ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE
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.

2015 OCT 17 PM 3:13
DEBRA A. HAMEL
PROTHONOTARY
CENTRE COUNTY, PA

Docket No.: 2013-2082

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

Type of Pleading:
Defendant Dr. Edward J. Ray's Answer with New Matter to Plaintiffs' Second Amended Complaint

Filed on Behalf of:
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

ORIGINAL

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,	)	Civil Division Docket No. 2013-2082

2016 OCT 17 PM 3:4
PROTHONOTARY
CENTRE COUNTY, PA

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,

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

Michael N. Sheetz, Esquire
MA I.D. #548776
Timothy W. Cook, Esquire
MA I.D. #688688
COOLEY, LLP
500 Boylston Street, 14th Floor
Boston, MA 02116-3736
Telephone: (617) 937-2300
Email: msheetz@cooley.com
tcook@cooley.com
Counsel for Dr. Edward J. Ray

ORIGINAL

2016 OCT 17 PM 3:14
DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

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,	)	Civil Division
	)	Docket No. 2013-2082

DR. EDWARD J. RAY'S ANSWER WITH NEW MATTER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Dr. Edward J. Ray files the following 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

ORIGINAL

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. The contract claims in this case (and all relief requested therefrom) have been dismissed or withdrawn. 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 Dr. Ray published the disputed statements and those statements are demonstrably false *and* that Dr. Ray acted with actual malice (*i.e.*, he either "knew" the statements were false, or acted with reckless disregard for their falsity). These allegations otherwise constitute conclusions of law, to which no response is required.

To the extent a response is required, Dr. Ray 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." Dr. Ray 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.

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: **Dr. Ray admits that the NCAA is a voluntary association of member institutions of higher education. Dr. Ray further admits that the NCAA 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.**

Dr. Ray specifically denies that the only purpose of the NCAA's Constitution and Bylaws is to "regulate competition between members." Dr. Ray 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. Dr. Ray 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 constitutes 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

---

[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'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: Dr. Ray incorporates his 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. Dr. Ray 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."

Dr. Ray also denies the allegations in the second sentence of Paragraph 3 as stated. Dr. Ray incorporates by reference his 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.

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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray specifically denies that the NCAA "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. Dr. Ray 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." Dr. Ray also specifically denies that entering into the Consent Decree with Penn State was beyond the scope of the NCAA's authority. Additionally, Dr. Ray is 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 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," Dr. Ray 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, Dr. Ray 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, Dr. Ray 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, Dr. Ray demands proof at trial that he made the statements and he "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: **Dr. Ray incorporates his 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, Dr. Ray specifically denies that the NCAA's 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, Dr. Ray incorporates by reference his 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.**

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: **Dr. Ray incorporates his 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, Dr. Ray specifically denies that Penn State was "forced under extreme duress" to enter into the Consent Decree.

Dr. Ray further specifically denies that the NCAA 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. Dr. Ray further denies that he, in any capacity, made any statements through the Consent Decree or that the Consent Decree referenced Jay Paterno or William Kenney. Dr. Ray further denies that any statements made by the NCAA caused Plaintiffs "significant harm."

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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray 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: Dr. Ray 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, Dr. Ray 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: Dr. Ray states he is without knowledge or information sufficient to form a belief as to whether Messrs. Kenney and Jay Paterno were residents of Pennsylvania.

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: Dr. Ray admits that the NCAA is an unincorporated association headquartered in Indianapolis, Indiana with members in all fifty states, the District of Columbia, Puerto Rico, and Canada. Dr. Ray denies that 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: Dr. Ray admits that Mark Emmert is the current president of the NCAA.

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

RESPONSE: **Dr. Ray admits that he is the president of Oregon State University and the former chairman of the NCAA's Executive Committee. His term as Chairman ended on August 1, 2012.**

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: **Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray admits that Penn State is a state-related institution of higher learning based in Centre County, Pennsylvania, and one of the NCAA's member institutions. Dr. Ray 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."**

Dr. Ray also specifically denies that he made "threats" that "Penn State would be subject to the so-called 'death penalty' if the Consent Decree is revoked or voided." Though Dr. Ray denies Plaintiffs' characterizations of the NCAA-Penn State negotiations, Dr. Ray also states that he was not a party to those negotiations. 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. To the extent an answer is required, Dr. Ray denies this allegation and continues to assert and does not waive lack of personal jurisdiction as a defense.**

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: **Dr. Ray incorporates his 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: **Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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. Dr. Ray denies that such purpose is the NCAA's only purpose.**

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: **Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is**

required, Dr. Ray 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, Dr. Ray 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, Dr. Ray 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, Dr. Ray denies those allegations.

To the extent further response is required, Dr. Ray 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. Dr. Ray 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. Dr. Ray 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. Dr. Ray 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, Dr. Ray 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, Dr. Ray denies those allegations.

To the extent further response is required, Dr. Ray admits that certain rules governing NCAA sports are developed through a membership-led organization, but he denies that the rules reflected in the Manual are the exclusive source of rules governing NCAA sports. Dr. Ray 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: Dr. Ray incorporates his 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. 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process and incorporates by reference his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, Dr. Ray 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, Dr. Ray denies those allegations.

Further, the allegations in Paragraph 27 state Plaintiffs' conclusion of law, which requires no answer.

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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, Dr. Ray 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, Dr. Ray 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, Dr. Ray admits that "institutional control" is defined as "[a]dministrative control," "faculty control," or a combination of the two, but he denies the remaining allegations if Paragraph 28 as stated. Each member institution has the responsibility to

control its own institution in compliance with the rules and regulations of the NCAA. Dr. Ray 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, Dr. Ray 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, Dr. Ray 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.

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: Dr. Ray incorporates his 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. 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and

infractions process, and incorporates by reference his 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: Dr. Ray incorporates his 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to

Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference his 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: Dr. Ray incorporates his 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to

Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference his 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: Dr. Ray incorporates his 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference his 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: Dr. Ray incorporates his 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference his 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: Dr. Ray incorporates his 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to

enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference his response to Paragraphs 2 and 4. Dr. Ray further denies that any Plaintiff was an "involved individual."

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: Dr. Ray incorporates his 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference his response to Paragraphs 2 and 4. Dr. Ray further denies that any Plaintiff was an "involved individual."

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: Dr. Ray incorporates his 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference his 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: Dr. Ray incorporates his 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.

Dr. Ray admits that in entering into the Consent Decree the NCAA did not undertake a traditional enforcement and infractions process pursuant to Articles 19 and 32 of the Division I Manual. However, Dr. Ray denies that the Division I Manual precluded the NCAA 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: Dr. Ray incorporates his 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.

Dr. Ray denies that the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement, and infractions process and incorporates by reference his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, Dr. Ray 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, Dr. Ray 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. Dr. Ray 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. Dr. Ray denies that the Division I Manual precluded the

NCAA from agreeing with Penn State to enter into the Consent Decree, and incorporates by reference his responses to the allegations in Paragraphs 2 and 4. Dr. Ray 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, Dr. Ray 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, Dr. Ray 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, Dr. Ray admits that suspension of play is a sanction that may substantially impact a program, but Dr. Ray denies the remaining allegations in the first two sentences of Paragraph 41. Those allegations contain argument and opinion, not factual averments. Dr. Ray 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. Dr. Ray also denies the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree, and incorporates by reference his responses to the allegations in Paragraphs 2 and 4. Dr. Ray 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: Dr. Ray incorporates his 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.

Dr. Ray denies the Division I Manual precluded the NCAA from agreeing with Penn State to enter into the Consent Decree and forego the traditional enforcement and infractions process, and incorporates by reference his 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: Dr. Ray incorporates his 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.

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: **Dr. Ray incorporates his 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.**

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: Dr. Ray incorporates his 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.

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: Dr. Ray incorporates his 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.

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: Dr. Ray incorporates his 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.

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: **Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent a response is required, Dr. Ray 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, Dr. Ray 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, Dr. Ray denies the allegations in the first sentence of Paragraph 48 as stated. Dr. Ray denies that the Executive Committee could only take legislative action on a prospective basis when acting on matters of Association-wide import. Dr. Ray 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: Dr. Ray incorporates his 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. Dr. Ray 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. Finally, Dr. Ray incorporates by reference the 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: Dr. Ray incorporates his 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, Dr. Ray 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 in 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, Dr. Ray 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: Dr. Ray denies Paragraph 54 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. To the extent the allegations in Paragraph 54 vary therewith, Dr. Ray denies those allegations.

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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray admits that the incidents involving Sandusky were reprehensible. Dr. Ray 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, Dr. Ray incorporates by reference his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray 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, Dr. Ray specifically denies that the "NCAA accused certain Penn State personnel (including Plaintiffs) of being significantly involved in alleged violations of the NCAA's rules." Dr. Ray further answers that the NCAA's position was spelled out in the November 17, 2011 letter, which 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray states that no response is needed to the allegations in Paragraph 57 because Count I, breach of contract, has been dismissed. Dr. Ray further 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 Dr. Ray incorporates by reference his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray 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, Dr. Ray admits that the grand jury presentment referenced Joe Paterno. Dr. Ray 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.

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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray 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, Dr. Ray 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray 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 Dr. Ray

incorporates by reference his responses to the allegations in Paragraphs 56 through 58.

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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray 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, Dr. Ray 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 Dr. Ray incorporates by reference his 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, Dr. Ray denies that he had any contact with the Freeh Firm or Penn State during the pendency of the Freeh Investigation. Dr. Ray is without sufficient knowledge to respond to the remaining allegations in Paragraph 62.

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: Dr. Ray is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations that Dr. Emmert made public statements about the Freeh firm's investigation or Dr. Emmert's alleged belief that 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray 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, Dr. Ray admits that Joe Paterno died on January 22, 2012, and that the Freeh investigation was not complete at that time. Dr. Ray denies the remaining allegations in Paragraph 64 and states that he had no involvement or communication with the Freeh firm. Dr. Ray incorporates his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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. Dr. Ray specifically denies that the Sandusky scandal "fell far outside [the NCAA's] purview." Dr. Ray is without sufficient knowledge to respond to the allegation that the NCAA and the Big Ten "participate[d] in the investigation by the Freeh firm." Dr. Ray incorporates by reference his 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, Dr. Ray 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 Freeh Report is in writing and speaks for itself. Dr. Ray denies any suggestion that he had any interaction with the Freeh firm. Dr. Ray is without sufficient knowledge to respond to the allegation that the NCAA and the Big Ten "participated in the process." Answering further, Dr. Ray incorporates by reference his 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.

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: Dr. Ray lacks information sufficient to admit or deny the allegation that the Penn State 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."

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: Dr. Ray admits that Penn State Board of Trustees 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, Dr. Ray lacks information sufficient to admit or deny that allegation. Dr. Ray denies that Dr. Emmert made the statement alleged in the second sentence. Dr. Ray lacks information sufficient to admit or deny the allegation in the third sentence.

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: Dr. Ray is without knowledge as to Penn State's Board of Trustees decision-making process. Dr. Ray states that Penn State 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.

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. Dr. Ray admits that the NCAA stated it had no need to duplicate the "effort by the Freeh [firm]" which it characterized as "incredibly exhaustive." Dr. Ray 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.

Dr. Ray 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. Dr. Ray 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 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, Dr. Ray denies the allegations in the last sentence of Paragraph 71 as stated.

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: Dr. Ray 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." Dr. Ray is without knowledge as to

whether the Freeh Firm was able to interview all persons with potentially relevant information. By way of further answer, Dr. Ray incorporates by reference his 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: Dr. Ray denies the allegations in Paragraph 73. Dr. Ray specifically denies that the "Freeh Report was an improper and unreliable 'rush to justice,' and it has been thoroughly discredited." Dr. Ray further denies that so-called "[p]rominent experts" have "independently concluded that the Freeh Report is deeply flawed." Dr. Ray is aware of no information that has "discredited" the Freeh Report.

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: Dr. Ray 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.

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: Dr. Ray states that the article referenced or characterized in Paragraph 75 is a written document that speaks for itself.

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.

RESPONSE: On information and belief, Dr. Ray admits that the Freeh Firm did not interview Mr. Schultz, Mr. Curley, Mr. Paterno, and Mr. McQueary. Dr. Ray is without knowledge as to how many interviews the Freeh Firm conducted. Dr. Ray 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. Dr. Ray incorporates by reference his 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. Dr. Ray 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. Dr. Ray incorporates by reference his response to the allegations in Paragraph 71. Further, Dr. Ray 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 were "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: Dr. Ray specifically denies that the Freeh firm did not "undertake[] a proper investigation," and incorporates by reference his responses to Paragraphs 71. Dr. Ray 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 Dr. Ray 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: Dr. Ray 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." Dr. Ray incorporates by reference his 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.

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: Dr. Ray specifically denies the allegations in the first sentence of Paragraph 80. 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: Dr. Ray 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, Dr. Ray denies the allegations in Paragraph 81 as stated. Dr. Ray admits that the NCAA's enforcement program has been 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: Dr. Ray is without sufficient knowledge to respond to allegations regarding a report concerning certain issues related to an investigation of the University of Miami. It is a written document that speaks for itself.

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: Dr. Ray 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, Dr. Ray responds 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." Dr. Ray specifically denies that the NCAA has a flawed enforcement process and that its handling of the "case against Jerry Tarkanian" is "infamous." Dr. Ray incorporates by reference his responses to Paragraphs 81 and 82.

By way of further answer, the allegations of this Paragraph, which relate to one senator's political statement have nothing to do with Penn State, which renders this paragraph 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray admits that there are other instances of solely "criminal conduct by student athletes." Dr. Ray 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, Dr. Ray incorporates by reference his 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: Dr. Ray incorporates his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray admits that he was quoted as stating that the NCAA did not "have all the facts about individual culpability" in a response to a question from a member of the media about Graham Spanier's involvement. Dr. Ray further responds that the NCAA 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.

Dr. Ray denies that 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."

Dr. Ray denies that all of the allegations in the second sentence of Paragraph 86. To the contrary, Dr. Ray states that 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. Dr. Ray 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray responds that the allegations in Paragraph 87 constitute conclusions of law and argument that require no response. To the extent a response is required, Dr. Ray specifically denies that he or the NCAA 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, Dr. Ray incorporates by reference his 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. Dr. Ray further specifically denies that the Consent Decree includes any penalties for "coaches and administrators." The NCAA did not initiate a formal investigatory and disciplinary process with regard to individuals. In addition, Dr. Ray specifically denies that he or the NCAA "forced Penn State to accept the sanctions they dictated by threatening to seek the death penalty," and, to the contrary, incorporates by reference his response to Paragraphs 7, 95, and 107. Dr. Ray further notes that he did not negotiate with Penn State.

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: Dr. Ray incorporates his 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, Dr. Ray specifically denies all of the allegations, for the reasons set forth throughout this answer. ***See, e.g.*****, response to Paragraphs 1, 3-5, 62. Dr. Ray admits that the 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray is without sufficient knowledge to answer allegations regarding the NCAA's negotiations with President Erickson because he was not a party to those negotiations.

Dr. Ray 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. Dr. Ray also specifically denies that the Freeh Report's findings are "flawed," incorporates by reference his 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, Dr. Ray specifically denies that he or the NCAA "knew or should have known" that the Freeh Report was "unreliable" or that its conclusions were "unsupported." To the contrary, Dr. Ray incorporates by reference his responses to Paragraphs 5, 72, and 73.

Dr. Ray 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. Dr. Ray 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. Dr. Ray incorporates by reference his response to Paragraphs 5 and 90.

To the extent further response is required, Dr. Ray 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. Dr. Ray also specifically denies he "knew or should have known"

that the findings in the Freeh Report did not violate NCAA rules. Dr. Ray also specifically denies that the NCAA's actions were not authorized, or that it could not use the Freeh Report as the main factual predicate for the Consent Decree. Dr. Ray incorporates by reference his response to Paragraphs 71, 86, 87, and 90.

Dr. Ray 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: Dr. Ray incorporates his 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.

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: Dr. Ray denies the allegations in Paragraph 93 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray 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, Dr. Ray is without knowledge as to the negotiations between Mr. Marsh and the NCAA.

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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray responds that he is without knowledge as to the discussions between the NCAA and Mr. Marsh. Dr. Ray further states that 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: Dr. Ray incorporates his 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.

As to the allegations in the second sentence of Paragraph 96, Dr. Ray 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.

Dr. Ray further specifically denies that the NCAA's "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.

Dr. Ray 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." 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray is without knowledge as to President Erickson's interactions with the Executive Committee of the Penn State Board of Trustees. Dr. Ray otherwise denies Paragraph 97 as stated. Dr. Ray is without sufficient knowledge as to negotiations between the NCAA and Penn State.

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, Dr. Ray denies that the NCAA "frequently takes years" to conduct and complete an NCAA investigation; the length of investigations varies and depends on a number of facts and circumstances.

Dr. Ray denies as stated that the NCAA "moved to impose sanctions on Penn State almost immediately after the Freeh firm released its report." Dr. Ray also specifically denies the last sentence of Paragraph 98, including that the NCAA "had taken steps to influence the focus of [the Freeh] investigation and the nature of its findings." Dr. Ray incorporates by reference his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray is without knowledge as to the communications between the NCAA and Mr. Marsh. Because Dr. Ray was not involved in communications between the NCAA and Mr. Marsh, he is without knowledge as to the Consent Decree draft sent to Mr. Marsh.

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: Dr. Ray 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." Dr. Ray 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. Dr. Ray specifically denies that the Consent Decree was "coercive" in "nature," and incorporates by reference his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray responds that the allegations in Paragraph 101 contain Plaintiffs' conclusions of law, which require no response. To the extent further response is required, Dr. Ray is without sufficient knowledge as to President Erickson's conversations with his Board or his duties under the University's governing requirements. Dr. Ray is also without knowledge as to the NCAA's negotiations with President Erickson. Dr. Ray further answers by incorporating references his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray responds that the allegations in Paragraph 102 state Plaintiffs' conclusions of law, which require no response. To the extent further response is required, Dr. Ray denies that President Erickson did not have the authority to bind Penn State.

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: Dr. Ray 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, Dr. Ray specifically denies that the Consent Decree does not identify any conduct that constitutes a violation of the NCAA's rules. Dr. Ray 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. Dr. Ray also denies that the Division I Manual precluded the NCAA 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: Dr. Ray 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. Dr. Ray admits that the Consent Decree repeats verbatim the findings from the Freeh Report.

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

RESPONSE: Dr. Ray 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. Dr. Ray incorporates by reference his response to the allegations in Paragraph 71. Further, Dr. Ray 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: Dr. Ray incorporates his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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. Dr. Ray 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.

Dr. Ray 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. Dr. Ray specifically denies that the NCAA ever threatened Penn State with a suspension in play. Dr. Ray incorporates by reference his 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 Dr. Ray 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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.

Dr. Ray 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: Dr. Ray incorporates his 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.

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: Dr. Ray denies the allegations in this Paragraph as stated. Dr. Ray admits that a July 29, 2012 USA Today article quotes him 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." Dr. Ray 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. Dr. Ray incorporates by reference his response to Paragraphs 1, 2, 4, and 88. Dr. Ray 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 his responses to Paragraphs 1, 2, 4, and 88.

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: Dr. Ray denies Paragraph 111 as stated. In the Consent Decree, the NCAA and Penn State agreed that the findings in the Freeh Report established a factual basis to conclude that Penn State breached the standards articulated in the NCAA Constitution and Bylaws. Dr. Ray specifically denies that he or the NCAA "directed the Freeh firm to focus on issues related to institutional control."

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: Dr. Ray incorporates his 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. Dr. Ray 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. Dr. Ray 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: Dr. Ray incorporates his 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] not 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray is without sufficient knowledge to respond to Plaintiffs' allegations that they attempted to file appeals with the NCAA.

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: **Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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 further response is required, Dr. Ray is without sufficient knowledge to respond to Plaintiffs' allegations that they attempted to file appeals with the NCAA.**

The last sentence in Paragraph 115 constitutes Plaintiffs' conclusions of law and argument, which require no response. To the extent further response is necessary, Dr. Ray 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, Dr. Ray incorporates by reference his 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: **Dr. Ray 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, Dr. Ray 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. Dr. Ray is without sufficient knowledge to respond to Plaintiffs' allegations that they attempted to file appeals with the NCAA and the NCAA's internal appellate process. Dr. Ray 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, Dr. Ray incorporates by reference his 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.**

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: **Dr. Ray denies Paragraph 117 as stated. Dr. Ray admits that the Consent Decree was, and is, a public document and that it received significant national media attention. Dr. Ray specifically denies the allegations in the second sentence of Paragraph 117. Dr. Ray incorporates his 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: **Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray admits the allegations in the first sentence of Paragraph 118. Dr. Ray 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 returned 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: Dr. Ray incorporates his 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. To the extent a further response required, he admits that the NCAA lifted its post-season bowl ban and scholarship reduction.

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, Dr. Ray specifically denies that the NCAA made any "knowingly false statements" concerning

Plaintiffs in the Consent Decree, or that it caused "enormous harms" to Plaintiffs. Dr. Ray also denies that he, in any capacity, made any statements through the Consent Decree. Dr. Ray incorporates by reference his 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: Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is required, Dr. Ray 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, Dr. Ray specifically denies that he or the NCAA has "continued" any "unlawful conduct" or "abuse of authority."

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:

- Dr. Ray specifically denies that the NCAA ever commenced an investigation concerning the Sandusky matter, much less when Joe Paterno was alive. Dr. Ray 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, Dr. Ray incorporates by reference his responses to Paragraphs 56-58, 60, 71, and 91.
- Dr. Ray 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.
- Dr. Ray 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, Dr. Ray 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.

- **Al Clemens has withdrawn all of his claims in this case, and therefore no response is required to Paragraph 124(d).**
- **Dr. Ray specifically denies that the NCAA "wiped out" the "considerable achievements of Coach Joe Paterno and former student athletes."**

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 parties 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, Dr. Ray specifically denies that the Sandusky matter fell outside of the NCAA's "authority and purview," that it "undermined the search for truth" and "crystallized" any purported "errors" in the Freeh Report. Dr. Ray further specifically denies that the Freeh Report contained "errors."**

COUNT I: BREACH OF CONTRACT

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

RESPONSE: **Dr. Ray repeats and realleges his 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: **Dr. Ray incorporates his response to Paragraph 1 pertaining to relevance and burden of proof. To the extent further response is**

required, Dr. Ray 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: Dr. Ray incorporates his 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.

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: Dr. Ray incorporates his 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, Dr. Ray denies these allegations. Specifically, Dr. Ray admits that Joe Paterno was referenced in the Consent Decree and the grand jury presentment, but 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.

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: **Dr. Ray incorporates his 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: **Dr. Ray incorporates his 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, Dr. Ray 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 Dr. Ray incorporates his 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: **Dr. Ray incorporates his 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.**

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: Dr. Ray incorporates his 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 Dr. Ray incorporates his 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: Dr. Ray incorporates his 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: Dr. Ray repeats and realleges his 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: Dr. Ray 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. Dr. Ray denies that he 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, Dr. Ray denies that he 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, Dr. Ray is unaware of any fact to substantiate the allegation that he or 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. Dr. Ray denies that he is responsible for any damages allegedly suffered by Plaintiffs. In addition, Dr. Ray 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: **Dr. Ray is without sufficient knowledge as to the 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: Dr. Ray 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, Dr. Ray 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. Dr. Ray 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, Dr. Ray denies that he disparaged Coach Kenney, for the reasons described in Paragraphs 5, 70-74, 104-105, 139, 141, and 144, incorporated by reference herein. Dr. Ray 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, Dr. Ray 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 him. 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, Dr. Ray denies that he 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. Dr. Ray 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: **Dr. Ray is without sufficient knowledge as to the 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: **Dr. Ray denies that Jay Paterno was let go by Penn State following the 2012 football season. Specifically, upon information and belief, Dr. Ray believes that Jay Paterno was let go by Penn State following the 2011 football season. Dr. Ray 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: **Dr. Ray 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, Dr. Ray denies that he disparaged Plaintiff for the reasons described in Paragraphs 5, 70-74, 104-105, 139, and 141, and 166, incorporated by reference herein. Dr. Ray 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, Dr. Ray is without knowledge of any evidence to substantiate the allegation that the Consent Decree or allegedly disparaging statements by him were the proximate cause of Jay Paterno's 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, Dr. Ray 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. Dr. Ray 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, Dr. Ray is unaware of any evidence to substantiate the allegation that the Consent Decree was the proximate cause of Jay Paterno's 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, Dr. Ray specifically denies that statements by the NCAA caused Jay Paterno to not be employed. Dr. Ray 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, Dr. Ray is unaware of any evidence to substantiate the allegation that the Consent Decree was the proximate cause of Jay Paterno's 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: **Dr. Ray 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: **Dr. Ray repeats and realleges his 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: Dr. Ray admits that the Consent Decree was available on the NCAA website. The remaining allegations of Paragraph 159 are denied as stated. Dr. Ray otherwise objects that the phrase "widely disseminated" is vague and ambiguous. Dr. Ray 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, Dr. Ray denies that he is responsible for any damages allegedly suffered by the Estate of Joseph Paterno. Dr. Ray 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: **Dr. Ray repeats and realleges his 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: Dr. Ray 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: Dr. Ray 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." Dr. Ray denies that 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, and because neither the statement nor the Freeh Report 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, Dr. Ray 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: Dr. Ray 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. Dr. Ray admits that the NCAA held a press conference and made the Consent Decree publicly available, but he denies that the NCAA made each challenged statement in the Consent Decree in front of large audiences or disseminated them through national news media. Dr. Ray denies that the remaining allegations and incorporates his 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, Dr. Ray denies that he is responsible for any damages allegedly suffered by Plaintiffs. In addition, Dr. Ray 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: Dr. Ray repeats and realleges his 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 1, 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 176 repeats allegations stated earlier in the Complaint, for which Dr. Ray incorporates his 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. 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, Dr. Ray denies that he is responsible for any damages allegedly suffered by Plaintiffs. In addition, Dr. Ray 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.

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, Dr. Ray 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. Dr. Ray 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. Dr. Ray 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. Dr. Ray 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]

Collateral Estoppel (Plaintiffs Jay Paterno and William Kenney – Counts II, IV, and V)

196. Dr. Ray incorporates by reference paragraphs 1 through 195 as if fully set forth herein.

---

[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, Dr. Ray includes "truth or substantial truth" as an affirmative defense in his Answer. Nothing in Dr. Ray's Answer should be deemed as an assumption by Dr. Ray of the burden to demonstrate the truth of the challenged statements.

197. On July 21, 2014, Plaintiffs Paterno and Kenney sued Penn State in the U.S. District Court for the Eastern District of Pennsylvania. *See generally* Complaint, *Paterno v. Pa. State Univ.*, No. 2:14-cv-04365-LS (E.D. Pa. July 21, 2014).

198. Paterno and Kenney's Amended Complaint in that case asserted that Penn State made an "actionable statement" about them in the Consent Decree, which Penn State knew "was erroneous and based on unreliable and unsubstantiated conclusions made in the Freeh Report." Am. Compl. ¶¶ 169-174, *Paterno*, No. 2:14-cv-04365-LS (Nov. 24, 2014), ECF No. 11. The alleged "actionable statement" was 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 "Some Coaches Statement"). *Id.* Although the Some Coaches Statement did not identify them by name, Paterno and Kenney alleged that they were "readily identifiable" by the public as members of the referenced group. *Id.* ¶ 314.

199. Paterno and Kenney alleged that the Some Coaches Statement injured their reputations and caused them "financial harm in the nature of lost wages and future lost employment opportunities." *Id.* ¶ 309. Based in part on that allegation, they asserted claims against Penn State under 42 U.S.C. § 1983.

200. On February 25, 2016, the federal court dismissed Paterno's and Kenney's Section 1983 claims with prejudice. *See* Memorandum at 14-23, *Paterno*, No. 2:14-cv-04365-LS (Feb. 25, 2016), ECF No. 27. The court held that the Some Coaches Statement could not reasonably be understood to refer to Paterno or Kenney. That holding was essential to the court's decision on the Section 1983 claims, which constituted a final judgment on the merits.

201. In this action, each and every one of Plaintiffs Paterno's and Kenney's claims flow from the same Some Coaches Statement in the Consent Decree. That statement forms the basis for their claims in Counts II, IV, and V. Paterno and Kenney have alleged that the Some Coaches Statement "concerned" them because they were "assistant coaches of the Penn State football program during the relevant times." Second Am. Compl. ¶ 166.

202. Based on the federal court's decision, Plaintiffs Paterno and Kenney are **collaterally estopped** from asserting that the Some Coaches statement referred to them. Accordingly, their claims in Counts II, IV, and V fail as a matter of law.

203. Dr. Ray hereby incorporates by reference the proceedings in *Paterno v. Pa. State Univ.*, No. 2:14-cv-04365-LS (E.D. Pa.), in their entirety.

204. Relevant filings from that action are attached as **Exhibit A**, which is also incorporated herein.

ORIGINAL

Lack of Personal Jurisdiction (All Applicable Counts)

205. Dr. Ray incorporates by reference paragraphs 1 through 204 as if fully set forth herein.

206. Plaintiffs' remaining claims against Dr. Ray should be dismissed because this Court lacks general personal jurisdiction and/or specific personal jurisdiction over Dr. Ray.

* * *

207. To the extent Pennsylvania Rule of Civil Procedure 1032 mandates that any and all affirmative defenses not set forth are waived, Dr. Ray 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, Dr. Ray demands that judgment be entered in his favor and against Plaintiffs at Plaintiffs' cost.

Respectfully submitted,

Date: October 17, 2016

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

Michael N. Sheetz, Esquire
MA I.D. #548776
Timothy W. Cook, Esquire
MA I.D. #688688
COOLEY, LLP
500 Boylston Street, 14th Floor
Boston, MA 02116-3736
Telephone: (617) 937-2300
Email: msheetz@cooley.com
tcook@cooley.com

Counsel for Dr. Edward J. Ray

VERIFICATION

I, Edward J. Ray, hereby verify that the statements in the foregoing 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. § 4904, relating to unsworn falsification to authorities.

Date: October 12, 2016

Edward J. Ray

Dr. Edward J. Ray

ORIGINAL

EXHIBIT A

CLOSED,APPEAL,STANDARD

United States District Court
Eastern District of Pennsylvania (Philadelphia)
CIVIL DOCKET FOR CASE #: 2:14-cv-04365-LS

PATERNO et al v. THE PENNSYLVANIA STATE UNIVERSITY
Assigned to: HONORABLE LAWRENCE F. STENGEL
Case in other court: USCA THIRD CIRCUIT, 16-01720
Cause: 42:1983 Civil Rights Act

Date Filed: 07/21/2014
Date Terminated: 02/25/2016
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutes: Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff

JOSEPH V. PATERNO
"JAY"

represented by **EDWARD S. MAZUREK**
THE MAZUREK LAW FIRM LLC
717 S. COLUMBUS BLVD STE 516
PHILADELPHIA, PA 19147
267-243-3393
Email: emazurek@mazureklawfirm.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

MAURICE R. MITTS
MITTS LAW, LLC
1822 Spruce Street
PHILADELPHIA, PA 19103
215-866-0112
Fax: 215-866-0113
Email: mmitts@mittslaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

GERARD M. MCCABE
Mitts Law, LLC
1822 Spruce Street
PHILADELPHIA, PA 19103
215-866-0120
Fax: 215-866-0121
Email: gmccabe@mittslaw.com
ATTORNEY TO BE NOTICED

Plaintiff

WILLIAM KENNEY

represented by **EDWARD S. MAZUREK**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

MAURICE R. MITTS
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

GERARD M. MCCABE
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

THE PENNSYLVANIA STATE UNIVERSITY

represented by **JOSEPH F. O'DEA , JR.**
SAUL EWING LLP
1500 MARKET ST.
38TH FL
PHILADELPHIA, PA 19102
215-972-7777
Fax: 215-972-1877
Email: jodea@saul.com
ATTORNEY TO BE NOTICED

NICHOLAS J. NASTASI , JR.
SAUL EWING, LLP
1500 MARKET STREET
38TH FLOOR
PHILADELPHIA, PA 19102-2100
215-972-8445
Email: nnastasi@saul.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/21/2014	1	COMPLAINT against THE PENNSYLVANIA STATE UNIVERSITY (Filing fee $ 400 receipt number 104687.), filed by JOSEPH V. PATERNO, WILLIAM KENNEY. (Attachments: # 1 Civil Cover Sheet, # 2 Exhibit, # 3 Exhibit)(jwl,) (Entered: 07/22/2014)
07/21/2014		Summons Issued as to THE PENNSYLVANIA STATE UNIVERSITY. One Forwarded To: Counsel on 7/22/14 (jwl,) (Entered: 07/22/2014)
07/21/2014		DEMAND for Trial by Jury by WILLIAM KENNEY, JOSEPH V. PATERNO. (jwl,) (Entered: 07/22/2014)
07/31/2014	2	WAIVER OF SERVICE Returned Executed by JOSEPH V. PATERNO. THE PENNSYLVANIA STATE UNIVERSITY waiver sent on 7/25/2014, answer due 9/23/2014. (MCCABE, GERARD) (Entered: 07/31/2014)
09/23/2014	3	NOTICE of Appearance by NICHOLAS J. NASTASI, JR on behalf of THE PENNSYLVANIA STATE UNIVERSITY with Certificate of Service(NASTASI, NICHOLAS) (Entered: 09/23/2014)

09/23/2014	4	NOTICE of Appearance by JOSEPH F. O'DEA, JR on behalf of THE PENNSYLVANIA STATE UNIVERSITY with Certificate of Service(O'DEA, JOSEPH) (Entered: 09/23/2014)
09/23/2014	5	MOTION to Dismiss *Plaintiffs' Complaint* filed by THE PENNSYLVANIA STATE UNIVERSITY.Memorandum, Certificate of Service, Exhibits.(O'DEA, JOSEPH) (Entered: 09/23/2014)
10/06/2014	6	STIPULATION for Extension of Time to File Response/Reply as to 5 MOTION to Dismiss *Plaintiffs' Complaint* filed by WILLIAM KENNEY, JOSEPH V. PATERNO..(MITTS, MAURICE) *FILED IN ERROR BY ATTORNEY; COPY FORWARDED TO JUDGE FOR APPROVAL* Modified on 10/7/2014 (lisad,). (Entered: 10/06/2014)
10/06/2014	7	ORDER THAT THE ABOVE-CAPTIONED CASE IS REASSIGNED FROM THE CALENDAR OF THE HONORABLE JOHN R. PADOVA TO THE CALENDAR OF THE HONORABLE LAWRENCE F. STENGEL. SIGNED BY CHIEF JUDGE PETRESE B. TUCKER ON 10/6/14. 10/7/14 ENTERED AND COPIES E-MAILED.(kw,) (Entered: 10/07/2014)
10/15/2014	8	STIPULATION AND ORDER THAT PLFFS SHALL PLEAD OVER OR RESPOND TO MOTION TO DISMISS ON OR BEFORE 11/24/2014. SIGNED BY HONORABLE LAWRENCE F. STENGEL ON 10/15/14. 10/15/14 ENTERED AND COPIES E-MAILED.(kw,) (Entered: 10/15/2014)
10/16/2014	9	NOTICE of Hearing:AN IN-PERSON RULE 16 CONFERENCE IS SCHEDULED FOR 12/15/2014 AT 9:30 AM BEFORE HONORABLE LAWRENCE F. STENGEL IN ROOM 3809, U.S. COURTHOUSE, 601 MARKET STREET, PHILADELPHIA, PA. COUNSEL SHALL COMPLY WITH THE INSTRUCTIONS IN THE ATTACHED NOTICE.(pac,) (Entered: 10/16/2014)
11/24/2014	10	NOTICE of Cancelling Rule 16 Conference scheduled for 12/15/2014 at 9:30 a.m. with the Honorable Lawrence F. Stengel.(kw,) (Entered: 11/24/2014)
11/24/2014	11	AMENDED COMPLAINT against THE PENNSYLVANIA STATE UNIVERSITY; jury demand, Certificate of Service, filed by PLFFS JOSEPH V. PATERNO, WILLIAM KENNEY.(kw,) (Entered: 11/25/2014)
12/03/2014	12	ORDER THAT DEFENDANT'S MOTION TO DISMISS IS DENIED AS MOOT. SIGNED BY HONORABLE LAWRENCE F. STENGEL ON 12/2/2014.12/3/2014 ENTERED AND COPIES E-MAILED.(kp,) (Entered: 12/03/2014)
12/03/2014	13	STIPULATION AND ORDER THAT THE TIME WITHIN WHICH DEFENDANT PENNSYLVANIA STATE UNIVERSITY MAY ANSWER OR OTHERWISE RESPOND TO PLAINTIFFS' AMENDED COMPLAINT IS HEREBY EXTENDED TO AND INCLUDING 1/7/15. SIGNED BY HONORABLE LAWRENCE F. STENGEL ON 12/2/14. 12/3/14 ENTERED & E-MAILED.(fdc) (Entered: 12/03/2014)
01/07/2015	14	MOTION for Leave to File Excess Pages *in Connection with Motion to Dismiss*, filed by THE PENNSYLVANIA STATE UNIVERSITY.Proposed Orders, Memorandums, Certification, Certificates of Service and Exhibits.(O'DEA,

		JOSEPH) Modified on 1/8/2015 (lisad,). Modified on 1/16/2015 (ke,). (Entered: 01/07/2015)
01/15/2015	15	ORDER THAT DEFT'S MOTION FOR LEAVE TO EXCEED PAGE LIMITS IS GRANTED. IT IS FURTHER ORDERED THAT DEFT MAY FILE A MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS NOT TO EXCEED THIRTY-FOUR PAGES, EXCLUSIVE OF TABLE OF CONTENTS, TABLE OF AUTHORITIES, & ATTACHMENTS. SIGNED BY HONORABLE LAWRENCE F. STENGEL ON 1/14/15.1/15/15 ENTERED AND COPIES E-MAILED.(kw,) (Entered: 01/15/2015)
01/16/2015	16	Memorandum of Law In Support of Motion Dismiss Plaintiffs' First Amended Complaint re 14 MOTION for Leave to File Excess Pages *in Connection with Motion to Dismiss* MOTION to Dismiss *Plaintiffs' First Amended Complaint with Exhs. and Certificate of Service* filed by THE PENNSYLVANIA STATE UNIVERSITY. (O'DEA, JOSEPH) (Entered: 01/16/2015)
01/16/2015	17	Stipulation for Extension of Time *to respond to Defendant's Motion to Dismiss* by WILLIAM KENNEY, JOSEPH V. PATERNO. (MITTS, MAURICE) *FILED IN ERROR BY ATTORNEY; COPY FORWARDED TO JUDGE FOR APPROVAL* Modified on 1/20/2015 (lisad,). (Entered: 01/16/2015)
01/21/2015	18	STIPULATION AND ORDER THAT PLFFS SHALL RESPOND TO MOTION TO DISMISS ON OR BEFORE 3/2/2015. PARTIES FURTHER STIPULATE THAT DEFT THE PENNSYLVANIA STATE UNIVERSITY SHALL BE ENTITLED TO FILE A REPLY TO PLFFS' RESPONSE ON OR BEFORE 4/16/2015. SIGNED BY HONORABLE LAWRENCE F. STENGEL ON 1/21/15. 1/22/15 ENTERED AND COPIES E-MAILED.(kw,) (Entered: 01/22/2015)
03/02/2015	19	MOTION for Leave to File Excess Pages filed by WILLIAM KENNEY, JOSEPH V. PATERNO.Memorandum, Certificate of Service. (Attachments: # 1 Exhibit 1) (MCCABE, GERARD) (Entered: 03/02/2015)
03/20/2015	20	ORDER THAT PLFFS' UNCONTESTED MOTION FOR LEAVE TO EXCEED PAGE LIMITATIONS IS GRANTED. THE CLERK OF COURT IS DIRECTED TO FILE THE PROPOSED RESPONSE IN OPPOSITION TO DEFT'S MOTION TO DISMISS ATTACHED TO THE MOTION AS EXHIBIT 1. SIGNED BY HONORABLE LAWRENCE F. STENGEL ON 3/20/15.3/23/15 ENTERED AND COPIES E-MAILED.(kw,) (Entered: 03/23/2015)
03/20/2015	21	RESPONSE in Opposition to deft's motion to dismiss plffs' first amended complaint, Memorandum, Certificate of Service, filed by PLFFS WILLIAM KENNEY, JOSEPH V. PATERNO. (kw,) (Entered: 03/23/2015)
04/16/2015	22	REPLY in Support of Motion to Dismiss Plaintiffs' First Amended Complaint re 14 MOTION for Leave to File Excess Pages In Connection with Motion to Dismiss Plaintiffs' First Amended Complaint, and Certificate of Service, filed by THE PENNSYLVANIA STATE UNIVERSITY. (O'DEA, JOSEPH) Modified on 4/16/2015 (md). (Entered: 04/16/2015)
04/22/2015	23	MOTION for Leave to File *a Sur-Reply* filed by WILLIAM KENNEY, JOSEPH V. PATERNO.Memorandum, Certificate of Service.(MCCABE, GERARD) (Entered: 04/22/2015)

05/05/2015	24	RESPONSE to Motion re 23 MOTION for Leave to File *a Sur-Reply and Certificate of Service* filed by THE PENNSYLVANIA STATE UNIVERSITY. (O'DEA, JOSEPH) (Entered: 05/05/2015)
05/06/2015	25	ORDER THAT PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR REPLY IS GRANTED; ETC.. SIGNED BY HONORABLE LAWRENCE F. STENGEL ON 5/6/15.5/7/15 ENTERED AND E-MAILED.(jl,) (Entered: 05/07/2015)
05/18/2015	26	SUR-REPLY in Opposition re 5 MOTION to Dismiss *Plaintiffs' First Amended Complaint* filed by WILLIAM KENNEY, JOSEPH V. PATERNO. (MCCABE, GERARD) Modified on 5/19/2015 (lisad,). (Entered: 05/18/2015)
02/25/2016	27	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE LAWRENCE F. STENGEL ON 2/25/16. 2/26/16 ENTERED AND COPIES E-MAILED.(kw,) (Entered: 02/26/2016)
02/25/2016	28	ORDER THAT DEFT'S MOTION TO DISMISS IS GRANTED. IT IS FURTHER ORDERED THAT COUNTS I & III ARE DISMISSED WITH PREJUDICE AND REMAINING STATE LAW CLAIMS ARE DISMISSED WITHOUT PREJUDICE. THE CLERK OF COURT IS DIRECTED TO MARK THIS CASE CLOSED FOR ALL PURPOSES. SIGNED BY HONORABLE LAWRENCE F. STENGEL ON 2/25/16. 2/26/16 ENTERED AND COPIES E-MAILED.(kw,) (Entered: 02/26/2016)
03/28/2016	29	NOTICE OF APPEAL as to 27 Memorandum and/or Opinion, 28 Order (Memorandum and/or Opinion), by WILLIAM KENNEY, JOSEPH V. PATERNO. Certificate of Service. Copies to Judge, Clerk USCA, Appeals Clerk. (MITTS, MAURICE) Modified on 3/29/2016 (lisad,). (Entered: 03/28/2016)
03/28/2016		USCA Appeal Fees received $ 505 receipt number 137657 re 29 Notice of Appeal, filed by WILLIAM KENNEY, JOSEPH V. PATERNO (kp,) (Entered: 03/29/2016)
03/29/2016	30	Clerk's Notice to USCA re 29 Notice of Appeal. (kp,) (Entered: 03/29/2016)
03/31/2016		NOTICE of Docketing Record on Appeal from USCA re 29 Notice of Appeal, filed by WILLIAM KENNEY, JOSEPH V. PATERNO. USCA Case Number 16-1720 (jl,) (Entered: 03/31/2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Joseph ("Jay") V. Paterno P.O. Box 762 Lemont, PA 16851, and William Kenney 636 Wynding Oaks Kalamazoo, MI 49006, Plaintiffs, v. The Pennsylvania State University, 201 Old Main University Park, PA 16802, Defendant.	CIVIL ACTION No. _____ **JURY TRIAL DEMANDED**

COMPLAINT

Plaintiffs Joseph "Jay" V. Paterno ("Paterno") and William Kenney ("Kenney") (Paterno and Kenney, collectively, "Plaintiffs"), by and through their attorneys, Mitts Law, LLC, and The Mazurek Law Firm, LLC, file this complaint against The Pennsylvania State University ("Penn State") and allege as follows:

PRELIMINARY STATEMENT

1. This lawsuit arises from the tragic events and publicity surrounding the discovery of the horrific conduct of Gerald A. Sandusky ("Sandusky"), a former assistant football coach, former assistant professor of physical education and former employee of Penn State, who was charged and convicted of various criminal offenses, including aggravated criminal assault, corruption of minors, unlawful contact with minors and endangering the welfare of minors.

2. A jury found Sandusky guilty of 45 of 48 child sexual abuse counts involving 10 victims over a period of 18 years, and the Court thereafter sentenced Sandusky to 30 to 60 years in prison.

3. As a result of the national and international bad publicity suffered by Penn State as a result of Sandusky's reprehensible crimes (the "Sandusky Scandal"), Penn State reacted in mid-January 2012 with rashness and without basis by prematurely releasing from Penn State's employment the majority of the Penn State football coaching staff, including the employment of Paterno and Kenney, all of whom had acted as assistant coaches for the Penn State football team for many previous years (the "Termination").

4. Prior to the Termination, Paterno and Kenney had exemplary reputations where they each had brought considerable distinction and acclaim to Penn State during their respective lengthy years of service.

5. Although none of the terminated assistant football coaches, including Plaintiffs, had been found at that time in January 2012 to have committed or been involved in any wrongdoing in connection with the Sandusky Scandal, Penn State terminated each of them at the height of the Sandusky Scandal's dark shroud and without any attempt whatsoever by Penn State to preserve the reputations of these guiltless individuals.

6. Penn State further re-injured and maligned anew Plaintiffs' hard earned reputations when Penn State executed the Consent Decree, titled the "*Binding Consent Decree imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University*," dated and issued to the public on July 23, 2012 (the "Consent Decree") (attached as **Exhibit A**).[1]

[1]All Exhibits referenced in this Complaint and attached hereto are incorporated herein in their entirety.

7. The National Collegiate Athletic Association (the "NCAA") prepared, and Penn State agreed to, the Consent Decree, resulting, *inter alia*, in over $60 million dollars in penalties against Penn State regarding the Sandusky Scandal.

8. By executing the Consent Decree and adopting the Freeh Report (as defined herein), Penn State destroyed any realistic prospect Plaintiffs had to obtain other comparable positions for which they were qualified and would have otherwise been competitive, either at the collegiate or professional level, or with positions with national media companies, had Penn State not terminated Plaintiffs at the height of the Sandusky Scandal and/or had Penn State not executed the Consent Decree soon thereafter.

9. In fact, upon information and belief, after the Termination and execution of the Consent Decree, a number of the terminated coaches, including each of Plaintiffs, applied for positions with other comparable professional and/or top tier Division I college football programs (including as well possible positions with national media companies), but such terminated coaches, including each of Plaintiffs, were met with both disdain and disinterest.

10. Plaintiffs had earned, through no fault of their own, a pariah status that was attributed to them as a result of the Termination and/or Consent Decree that was wholly undeserved.

11. Based upon Penn State's actions, notably the Termination and/or execution of the Consent Decree (and concomitant adoption of the Freeh Report), which both individually and collectively caused irreparable damage to Plaintiffs' personal and professional reputations, Plaintiffs assert a claim against Penn State as their former employer, and as a state actor, pursuant to 42 U.S.C. § 1983 and the 5th and 14th Amendments to the United States Constitution, for the deprivation of their liberty interests and reputations ***without*** due process of law and further assert additional state law claims for intentional interference with contractual relations,

civil conspiracy and violation of the Pennsylvania Wage Payment and Collection Law, 43 P.S. §§ 260.1 *et seq.* ("WPCL").

12. Plaintiffs seek damages in excess of One Million Dollars ($1,000,000.00), including, but not limited to, compensatory and punitive damages, and/or any other relief the Court deems appropriate, against Penn State for the harmful and injurious effects caused by the Termination and/or the execution of the Consent Decree.

THE PARTIES

13. Plaintiff Paterno is an adult individual with an address of P.O. Box 762, Lemont, PA 16851, who Penn State employed from 1995 until mid-January 2012.

14. Plaintiff Kenney is an adult individual residing at 636 Wynding Oaks, Kalamazoo, MI 49006, who Penn State employed from 1988 until mid-January 2012.

15. At all times relevant to this Complaint, Penn State employed each Plaintiff, and immediately prior to the Termination, they each held the title of an assistant football coach for Penn State's intercollegiate football team and each was a well-respected NCAA top tier Division I collegiate football coach.

16. Defendant Penn State is organized and existing under the law of the Commonwealth of Pennsylvania (the "Commonwealth"), was incorporated for educational purposes by the Act of February 22, 1855, PL 46, and has its principal administrative office located at 201 Old Main, University Park, Centre County, Pennsylvania 16802.

17. Penn State also has and maintains campuses for its matriculating students throughout the Commonwealth, including many within this District.

18. At all times relevant, Penn State has been the recipient of millions of dollars annually from the Commonwealth for use in funding its operations.

JURISDICTION AND VENUE

19. Jurisdiction is invoked pursuant to the provisions of 42 U.S.C. § 1983.

20. All actions complained of herein involve Penn State as a defendant that resides, in part, and conducts its business, in part, within this Court's jurisdictional limits.

21. Venue before this Court is therefore proper pursuant to the dictates of 28 U.S.C. §§ 1391(b)(1).

FACTUAL BACKGROUND

I. Brief History Of Plaintiffs' Employment With Penn State

A. Jay Paterno

22. Paterno, the son of Joe Paterno ("Joe Paterno"), the former head football coach of Penn State, was on Penn State's football coaching staff for 17 seasons, 12 of which Paterno served as Penn State's quarterbacks coach.

23. Previously, Paterno served for five (5) years as Penn State's tight ends coach and recruiting coordinator.

24. Prior to being on the Penn State football staff, Paterno served as a graduate assistant at the University of Virginia from 1991 to 1992, wide receivers and tight ends coach at the University of Connecticut in 1993, and as the quarterbacks coach at James Madison University in 1994.

B. Bill Kenney

25. Kenney attended Norwich University where Kenney was a three-year starter as a tight end and fullback, and was the co-captain of the football team in his senior year in 1981.

26. Prior to being on the Penn State football staff, Kenney served as an offensive backfield coach at Norwich University in 1982, Dennis-Yarmouth Regional High from 1983 to

1984, and Lincoln High School in 1985. Kenney then moved back to the college level where, from 1986 to 1988, he served as a graduate assistant at the University of Nebraska.

27. In 1988, Kenney moved to Penn State, where Kenney was originally a Graduate Assistant football coach and then became a full time coach with the Penn State football coaching staff in 1989.

28. Kenney worked the next 23 years with Penn State, serving in a variety of coaching positions including offensive line coach, recruiting coordinator, and offensive tackles/tight ends coach.

C. Fixed Term Employment Appointments

29. During the time that Plaintiffs each acted as an assistant football coach, Penn State's custom and practice was to treat each assistant football coach as a 12-month Fixed Term Appointee who was entitled to receive full wages and benefits from the start of the academic year in which they were coaching (*i.e.*, July 1st) through the end of the academic year (*i.e.*, June 30th of the following year) ***even if*** such assistant football coach was **released**[2] from his coaching duties by the head football coach without cause at any time during and prior to the end of the academic year.

30. In effect, Plaintiff's wages and benefits were spread throughout a 12-month period with the majority of football coaching responsibilities were front loaded and occurring during the fall football season beginning in July and lasting through December and possibly early January, that included early mornings, long nights, weekend games and practices and significant travel time.

[2]Penn State's head football coach had the discretionary authority to determine his coaching staff, and so could "release" an assistant coach from his "coaching duties," but the head football coach had no authority to actually terminate or fire any assistant head coach from his employment with Penn State.

31. In addition, it was Penn State's custom and practice, as a result of the specific wishes of Joe Paterno, that Penn State provided to each released (without cause) assistant football coach an 18-month severance package (the "Severance Pay Period") that included the continuation of the then-current level of wages and benefits for 18 months that would begin on the July 1st after their release and extend through to the end of the following year (at the conclusion of 18 months).

32. Joe Paterno had specifically implemented this custom and practice, and Penn State had agreed to and did in fact comply over the years with this custom and practice, by providing the Severance Pay Period for the specific purpose of ensuring that any assistant football coach, released of his coaching duties and terminated as of the end of the academic year, would have his then current level of wages and benefits paid to them through at least two (2) football seasons following any release and subsequent employment termination.

33. Consistent with this custom and practice, Erikka Runkle, Penn State's Human Resources Manager Intercollegiate Athletics, further told both Paterno and Kenney in mid-December 2011 that, if either of them were released and not retained by Penn State's yet-to-be-selected new football coach, they would each be paid their full wages and benefits, at their current level, through the end of the academic year (through to the end of June 30, 2012) and that thereafter their Severance Pay Period would commence as of July 1, 2012.

34. As a result, in mid-January 2012, when Penn State's new football coach did not select Paterno and Kenney to be on his staff of assistant football coaches, Plaintiffs expected that they would be treated in the manner as stated by Ms. Runkle and in the same manner regarding the continuation of wages and benefits, including the commencement of their Severance Pay Period as of July 1, 2012, as all other assistant football coaches who were in years past similarly released from their coaching duties prior to the end of the academic year.

35. However, instead of paying Plaintiffs their full wages and benefits through the end of the 2011-2012 academic year, and then commencing the Severance Pay Period as of July 1, 2012, Penn State purposefully accelerated the Severance Pay Period to commence as of mid-January 2012 that lasted through mid-July 2013.

36. As of mid-July 2013, without ever receiving from Penn State any formal notice of their termination from their employment positions with Penn State, Penn State ceased paying all wages and benefits to Plaintiffs (except as otherwise provided by and during the Severance Pay Period).

37. In this way, Penn State wrongfully avoided payment to Plaintiffs of those 6-months of wages and benefits from mid-January through July 2012.

D. The Termination, Freeh Investigation & Execution of Consent Decree

38. At the time of the Termination, the Sandusky Scandal was in full swing and consumed the nation and all forms of general and sports media outlets with stories of the horrible crimes Sandusky committed as well as the allegations of cover-up by Penn State officials, including allegations that Joe Paterno and other assistant football coaches participated in such alleged cover-ups.

39. In fact, as of November 9, 2011, under this ever-darkening cloud of suspicion and innuendo, the Board of Trustees of Penn State (the "Board of Trustees") voted to relieve Joe Paterno of his head football coaching responsibilities effective immediately, only two (2) months prior to the Termination.

40. The Board of Trustees said that Joe Paterno had demonstrated a "failure of leadership" by only fulfilling his legal obligation to inform another Penn State official, Penn State's Athletic Director Tim Curley, about a 2001 incident involving Sandusky and a minor, and by not going to the police himself.

41. Thereafter, only two (2) days later, on November 11, 2011, the Board of Trustees formed a Special Investigations Task Force which engaged the firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm"), to investigate the alleged failure of certain Penn State personnel, including the football coaching staff, to respond to and report certain allegations against Sandusky.

42. Penn State also asked the Freeh Firm 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.

43. Penn State had not engaged the Freeh Firm, and had not granted any authority to the Freeh Firm, to investigate or even consider whether any of the actions under its review constituted violations of the NCAA's rules. Penn State did **not** retain the Freeh Firm for these purposes.

44. On November 17, 2011, Mark A. Emmert ("Emmert"), president of the National Collegiate Athletic Association ("NCAA"), sent a letter (the "Emmert Letter") to Rodney A. Erickson ("Erickson"), Penn State's interim President, expressing concerns over the grand jury presentments that were ongoing with the criminal investigation into the Sandusky Scandal and asserting both that the NCAA had jurisdiction over the matter and that the NCAA might take an enforcement action against Penn State. (The Emmert Letter is attached as **Exhibit B**).

45. The Emmert Letter failed to identify any specific provision in the NCAA's Constitution or Bylaws that granted the NCAA authority to become involved in criminal matters regarding the Sandusky Scandal that resided outside of the NCAA's basic purpose and mission. *Id.*

46. Nor did the Emmert Letter identify any NCAA rule that Penn State had allegedly violated as a result of the Sandusky Scandal. *Id.*

47. Emmert nonetheless asserted in the Emmert Letter 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. *Id.*

48. Emmert advised Erickson that Penn State would need to "prepare for potential inquiry" by the NCAA and posed four (4) written substantive questions to which the NCAA sought responses. *Id.*

49. Instead of demanding that Penn State provide answers to these four (4) questions, and instead of commencing its own investigation, the NCAA waited for the Freeh Firm to complete its investigation.

50. On or about January 6, 2012, while the Freeh Firm was conducting its investigation, Penn State announced that Penn State had selected William J. O'Brien ("O'Brien") as Penn State's new head football coach.

51. Thereafter, O'Brien elected not to retain and otherwise released Plaintiffs as assistant football coaches with the Penn State football program.

52. As a result, and despite Penn State's above-described custom and practice of paying the then-current wages and benefits through the end of the academic year, and without any notice, Penn State terminated Plaintiffs' employment with Penn State and accelerated Plaintiffs' Severance Pay Period to commence in mid-January 2012, instead of July 1, 2012.

53. Throughout their entire respective tenures of employment with Penn State, each Plaintiff had an exemplary performance record and was never subjected to any disciplinary actions.

54. The Termination occurred in temporal proximity to the events surrounding the Sandusky Scandal and, as such, the Termination, in conjunction with Penn State's subsequent execution of the Consent Decree, had the effect of branding and stigmatizing Plaintiffs as participants in the Sandusky Scandal and, by so doing, maligned Plaintiffs' heretofore stellar reputations by portraying them by implication in false light.

55. On or about January 6, 2012, Penn State issued a press release (the "O'Brien Press Release") (attached as **Exhibit C**) upon O'Brien's hiring wherein Penn State affirmed the positive legacy of Penn State football:

> "The Penn State football program has a great legacy and has contributed enormously to our University community," said [Rodney A.] Erickson[, president of Penn State University]. "**A program of this caliber requires a special kind of leader - a leader who will embrace that legacy and maintain the University's commitment to excellence on the field and in the classroom**. We have that leader in Coach O'Brien, and I look forward to working with him in his new role."
>
> "**We have found the man to take Penn State football forward**," said Dave Joyner, Penn State acting director of athletics. "**Needless to say, we have been looking for someone with some very special qualities, beginning with a heart that beats to the values and vision of Penn State University and our Penn State football legacy and tradition. That was our starting point, and Coach O'Brien exemplifies those traits that Penn Staters hold so highly. In addition to his model characteristics as a man and a teacher**, he's all about producing winners, and doing so the right way. **He will embrace tradition, demand excellence and pursue Success with Honor in every phase of our program**."
>
> "I am thrilled to be the head coach of the Penn State football program," stated O'Brien. "I cannot tell you how excited I am to get started, meet the team, meet the football alumni and meet all of the people that make this University so special. **As head coach of this special football program, it is my responsibility to ensure that this program represents the highest level of character, respect and integrity in everything we do. That includes my coaching staff**, our players and everyone involved in the football program. There is tremendous pride in Penn State football and will never, ever take that for granted."

Id. (emphasis supplied).

56. Within this backdrop of positive statements about both the legacy and character of Penn State football and about how the new assistant coaches being hired (and, by implication, not Plaintiffs who were being released) fit within and emulate that tradition, Penn State terminated Plaintiffs without even so much as (i) a public thank you for their years of service and dedication that was part of the positive legacy so identified in the O'Brien Press Release, or (ii) a statement of exoneration that Penn State had no evidence that Plaintiffs were involved in any way in the Sandusky Scandal so as to preserve Plaintiffs' good name, reputation, honor and integrity.

57. Instead, on January 20, 2012, David Joyner, Penn State's Acting Athletics Director, made a statement to the Board of Trustees that the severance package for all of the terminated assistant football coaches, including Plaintiffs, would cost Penn State $4.5M.

58. After the Termination, and upon the passing of Joe Paterno, Penn State issued a another press release, on or about January 23, 2012 (the "January 23, 2012 press release"), wherein Penn State stated: "**Regrettably, Coach Paterno did not finish his coaching career in the manner he or anyone else had expected**, but his coaching legacy in Happy Valley and around the nation will live on forever." (The January 23, 2012 press release is attached as **Exhibit D**) (emphasis supplied).

59. The January 23, 2012 press release reaffirmed the innuendo and negative implications that the Sandusky Scandal foisted upon the entire Penn State football coaching staff.

60. Subsequently, by mid-February 2012, O'Brien completed his hiring of his assistant football coaches.

61. In a Penn State press release, dated February 18, 2012 (attached as **Exhibit E**), Penn State quoted O'Brien as follows:

> "With the hiring of Charlie Fisher as quarterbacks coach, we have completed the Penn State football coaching staff," O'Brien stated. "**This is a staff made up of men who care about the mission of Penn State University and being successful on and off the field. It is also a staff of winners**, with five staff members that have been a part of national championship teams as assistant coaches. This is a staff that has won many games; some while being a part of the same staff, and is a staff comprised of former head coaches, coordinators and tremendous recruiting experience."

Id. (emphasis supplied).

62. At this point, Penn State had terminated Plaintiffs' employment and they were left to twist in the proverbial winds of innuendo and suspect as to whether they were involved in the Sandusky Scandal, only to be made worse by the execution of the Consent Decree.

63. At the time of or prior to the Termination, Penn State never afforded Plaintiffs an opportunity to be heard nor did Penn State issue a press release after the Termination exonerating Plaintiffs so as to preserve their good name, reputation, honor and integrity.

64. Instead, during the time after the Termination but before the issuance of the Consent Decree, the NCAA collaborated with the attorneys and investigators working for the Freeh Firm who frequently provided information and briefings to the NCAA.

65. During the course of its investigation, the Freeh Firm periodically contacted representatives of the NCAA to discuss areas of inquiry and other strategies.

66. The Freeh Firm's final report (the "Freeh Report") acknowledged that, as part of its investigative plan, the Freeh Firm cooperated with "athletic program governing bodies," *i.e.*, the NCAA.

67. Thereafter, on or about July 12, 2012, the Freeh Firm published the findings of its investigation (the "Freeh Report") (attached as **Exhibit F**). According to the Freeh Report, Penn State officials conspired to conceal critical facts relating to Sandusky's abuse from law

enforcement authorities, the Board of Trustees, the Penn State community and the public at large.

68. In lieu of following its own mandated enforcement procedures, as set forth below, both the NCAA and Penn State accepted the conclusions of the Freeh Report as compelling evidence sufficient to justify the execution of the Consent Decree and subsequent imposition of the Consent Decree's sanctions against Penn State.

69. Specifically, soon after the issuance of the Freeh Report, Penn State and the NCAA agreed upon and executed the Consent Decree (**Exhibit A**) that resulted in (i) the imposition of over $60 million dollars in penalties against Penn State, (ii) a 4-year post-season play ban, (iii) loss of athletic scholarships and (iv) a vacating of football wins since 1998.

70. The Consent Decree explicitly states that, for purposes of the resolution with the NCAA, Penn State accepted the Freeh Report. *Id.*

71. Specifically, the Consent Decree makes certain that "Penn State has communicated to the NCAA **that it accepts the findings of the Freeh Report for purposes of this resolution and acknowledges that those facts constitute violations of the Constitutional and Bylaw principles described in the [Emmert Letter]**." *Id.* (emphasis supplied).

72. Penn State even went further and agreed "not 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 the Consent Decree**." *Id.* (emphasis supplied).

73. By way of background, the NCAA is an unincorporated voluntary association of member institutions of higher education, including Penn State, which operates pursuant to a

constitution and an extensive set of rules that define both the scope of the NCAA's authority and the obligations of the NCAA's member institutions.

74. The basic 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.

75. The NCAA is governed by a lengthy set of rules that define both the scope of the NCAA's authority and the obligation of the NCAA's member institutions, such as Penn State.

76. The relevant set of rules for purposes of this lawsuit is the 2011-2012 NCAA Division I Manual (the "NCAA Manual"), which is available at http://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx. (A copy of the relevant portions of the NCAA's Manual is attached to this Complaint as **Exhibit G**).

77. Specifically, Article 1 through 6 of the NCAA Manual comprise the NCAA's Constitution which set forth information relevant to the NCAA's purposes, its structure, its membership, the legislative purpose and the more important principles governing the conduct of intercollegiate athletics.

78. Articles 10 through 23 of the NCAA Manual are the Operating Bylaws (the "NCAA Bylaws") which consist of legislation adopted by member institutions, such as Penn State, to promote principles enunciated in the NCAA Constitution and to achieve the NCAA's stated purposes.

79. Article 31 through 33 are the Administrative Bylaws, adopted and modified by the NCAA subject to amendment by the membership through the regular legislative process (the "Administrative Bylaws"). The Administrative Bylaws implement the NCAA's general

legislative actions, setting forth policies and procedures for NCAA championships, the NCAA's business, its enforcement program and its athletics certification program.

80. The NCAA 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.

81. The NCAA Bylaws further authorize the NCAA to prohibit and sanction conduct that is intended to provide any member institution with a recruiting or competitive advantage in athletics.

82. 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.

83. The NCAA rules recognize that fair and proper procedures are important because the NCAA's action can have serious repercussions on their lives and careers.

84. When there is an alleged violation of the NCAA's rules, the NCAA Bylaws require the NCAA to provide interested parties with certain, well-defined procedural protections, including rights of appeal, all of which are delineated in the NCAA Manual and are set forth below (collectively, the "NCAA Rights").

85. Specifically, in accordance with Articles 19 and 32 of the NCAA Manual, if the NCAA enforcement staff conducts an investigation into allegations of misconduct and rules violations, and thereafter, as a result, deems that there is sufficient information to support a finding of a rules violation, the NCAA enforcement staff must then send "notice of allegations" to the institution that must list the NCAA rule alleged to have been violated and the details of the violation.

86. 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.

87. 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.

88. After the notice of allegations is issued, the matter is referred to the NCAA's Committee on Infractions (the "Infraction Committee").

89. A member institution, such Penn State, 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.

90. At the conclusion of the hearing, the Infractions Committee is required to issue a formal Infractions Report detailing all of the Infraction Committee's findings and the penalties imposed. The Infraction Committee must submit the infraction report to the institution and all involved individuals.

91. The infractions 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 infractions report is released to the public or forwarded to the Infractions Appeals Committee. The infractions report must also describe the opportunities for further administrative appeal.

92. The NCAA's rules provide a member institution, such as Penn State, 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 Infraction Committee's report finding violations of the NCAA's rules.

93. There is also a summary disposition process that is available to the NCAA's enforcement staff that requires, *inter alia*, consent of all of the parties, a thorough and complete investigation and a joint written report that includes the parties' proposed penalties.

94. If the Infraction Committee accepts the findings that a violation occurred with a summary disposition joint report, but does not accept the parties' proposed penalties, the Infraction Committee must hold an expedited hearing limited to considering the possibility of imposing additional penalties. After that expedited hearing, the Infraction 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.

95. These enforcement and investigative mechanisms and procedures are subject to amendment only in accordance with the legislative process set forth in Article 5 of the NCAA Manual.

96. No other NCAA body, including the Executive Committee and the Board of Trustees of Directors, has authority to bypass or amend these procedures and impose discipline or sanctions on any member institution, such as Penn State.

97. The Executive Committee and the Board of Trustees of Directors are authorized only to take actions that are legislative in character and are to be implemented association-wide on a prospective basis.

98. These procedural protections are a significant and vital part of the bargain involved in each member institution's decision to participate in the NCAA.

99. 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."

100. Penn State, as a member institution of the NCAA, knew or should have known of these NCAA Rights offered by the NCAA and to which Penn State was entitled.

101. In this way, the NCAA Bylaws are expressly intended to benefit not only the member institutions, such as Penn State, but also their staff (including the athletic coaching staffs such as Plaintiffs), students and other individuals affected by conduct subject to potential NCAA oversight and sanctions.

102. For this reason, Plaintiffs were intended third party beneficiaries of the agreement between the NCAA and Penn State that afforded Plaintiffs their NCAA Rights and thus may enforce those NCAA Rights against Penn State where Penn State has violated and otherwise abrogated Plaintiffs' rights by Penn State's capitulation to the execution of the Consent Decree.

103. Specifically, as noted, Erickson and Emmert executed and issued the Consent Decree to the public on July 23, 2012.

104. Erickson signed the Consent Decree without following the procedural requirements embodied by the NCAA Rights and as further set forth in Penn State's Bylaws, Charter and Standing Orders (that governed Penn State's relationship with NCAA and with Plaintiffs) (the "Penn State Rights").

105. Penn State's execution of the Consent Decree compounded and ignited afresh Plaintiffs' injuries caused by the Termination and only further compelled the implication and innuendo that Plaintiffs were complicit in some manner in the Sandusky Scandal, all to the detriment and stigmatization of Plaintiffs' good name, reputation, honor and integrity.

106. Penn State knew or should have known that the Freeh Report, as the basis of the Consent Decree, was an unreliable rush to judgment without a proper investigation and the conclusions reached in the Freeh Report were not substantiated.

107. Penn State knew or should have known that the Freeh Firm did not purport to conduct an investigation into alleged NCAA rules violations.

108. Penn State knew or should have known that the Freeh Firm did not record or summarize witness interviews as specified by the NCAA's rules governing its relationship with Penn State.

109. Penn State knew or should have known that the Freeh Firm failed to include in the Freeh Report any findings concerning alleged NCAA rules violations.

110. Penn State knew or should have known 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," as the NCAA Bylaws and other rules require.

111. Penn State knew or should have known that the individuals named in the Freeh Report were not given any opportunity to challenge its conclusions.

112. Penn State knew or should have known that the Freeh Report was not approved by the Board of Trustees which never took any official action based on the Freeh Report.

113. Penn State knew or should have known that the Board of Trustees had never accepted the Consent Decree's findings or reach any conclusions about its accuracy.

114. Penn State knew or should have known that the Freeh Report was an improper and unreliable "rush to justice" that has been thoroughly discredited.

115. Penn State knew or should have known that the Freeh Report also failed to interview key witnesses (including Gary Schulz, Timothy Curly, Michael McQuery and Joe

Paterno), and instead of supporting its conclusions with evidence, relied heavily on speculation and innuendo.

116. Penn State knew or should have known that the Freeh Report relied on unidentified, "confidential" sources and on questionable sources lacking any direct or personal knowledge of the facts or support for the opinions they provided.

117. Penn State knew or should have known that many of the Freeh Report's primary conclusions are either unsupported by evidence or supported only by anonymous, hearsay information of the type specifically prohibited by the NCAA rules.

118. Penn State knew or should have known that, contrary to suggestions made in the Freeh Report, as adopted by Penn State upon execution of the Consent Decree, there is no evidence that Joe Paterno, or any other Penn State assistant football coach, covered up known incidents of child molestation by Sandusky to protect Penn State football, to avoid bad publicity or for any other reason.

119. Penn State knew or should have known that there was no evidence that Joe Paterno or any other members of the football athletic staff, including Plaintiffs, conspired with Penn State officials to suppress information because of publicity concerns or a desire to protect the football program.

120. In short, Penn State knew or should have known that the Freeh Report provided no evidence of a cover-up by Joe Paterno or any other Penn State assistant football coach and no evidence that Penn State's football program caused or contributed to the underlying facts of the Sandusky Scandal.

121. Penn State also knew or should have known that, by accepting the Freeh Report upon execution of the Consent Decree, the Freeh Report would dramatically increase the publicity given to its unreliable conclusions, effectively terminate the search for the truth and

enable the NCAA, in violation of Plaintiffs' Penn State Rights and NCAA Rights, to force Penn State to accept the imposition of unprecedented sanctions.

122. Penn State knew or should have known that the conduct described in the Freeh Report, as adopted by Penn State by execution of the Consent Decree, was not a violation of the NCAA's rules and could not substitute for the procedures required under the NCAA's rules, including without limitation Plaintiffs' NCAA Rights.

123. Among other things, Penn State knew or should have known that the NCAA staff had not completed a thorough investigation, as required under the NCAA's rules, and had not identified any major or secondary violations committed by Penn State in connection with the criminal matters involving the Sandusky Scandal.

124. No general legislation adopted by the NCAA's member institutions authorized the actions taken by Penn State regarding the execution of the Consent Decree.

125. Penn State knew or should have known that neither Penn State nor any involved individual authorized the NCAA to use a summary disposition process and, in any event, that the NCAA did not comply with any such summary disposition process.

126. Finally, at no time did Penn State self-report any rules violations to the NCAA.

127. Before executing the NCAA-imposed Consent Decree, as noted, Erickson did not comply with the governing requirements required by Penn States governing rules, including the Penn State Rights.

128. Erickson failed to present the NCAA-imposed Consent Decree to the Board of Trustees for its approval, even though the Board of Trustees is the final repository of all legal responsibility and authority that governs Penn State.

129. Nor did Erickson call for a meeting of the Board of Trustees or the NCAA's Executive Committee (the "Executive Committee").

130. Although Erickson was subject to the threats and coercive tactics of Emmert and the NCAA, Erickson failed to inform the Board of Trustees about these issues in advance of executing the Consent Decree.

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

132. Penn State knew or should have known that the Consent Decree did not identify any conduct that, under the NCAA's rules, would qualify as either a secondary or a major violation of the NCAA rules.

133. A timely appeal of the Consent Decree was made with the NCAA Infractions Appeals Committee but the NCAA refused to accept those appeals.

134. As a result, Penn State knew or should have known that individuals who were involved and directly harmed by the Consent Decree were given no opportunity to challenge the NCAA's abuse of discretion.

135. Nonetheless, the NCAA stipulated that Penn State had violated the principles of "institutional control" and "ethical conduct" contained in the NCAA's Constitution, and that Penn State's employees had not conducted themselves as the "positive moral models" expected by Article 19 of the NCAA Bylaws.

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

137. Specifically, as regards Plaintiffs' liberty interests, the Consent Decree found 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." *See* **Exhibit A**, at 3 (emphasis supplied) (the "Actionable Statement").

138. Penn State knew or should have known that the Actionable Statement was erroneous and based on unreliable and unsubstantiated conclusions made in the Freeh Report.

139. Emmert magnified the negative impact of the Actionable Statement during a press conference on July 23, 2012, wherein Emmert confirmed that the investigation into possible additional sanctions against individual assistant coaches was continuing.

140. Specifically, Rosemary Connors, with NBC 10 in Philadelphia, questioned Emmert during Emmert's press conference announcing the Consent Decree: "**Are you considering the possibility of any future sanctions, for coaches who were at Penn State during the years that this abuse occurred and may be looking to coach again**?" *See* NCAA Announces PSU Sanctions, http://www.youtube.com/watch?v=7La97HPn7X0, at 4:20 (emphasis supplied).

141. In response to Ms. Connors' question, Emmert replied: "As I said in my opening statement, **we are reserving the right, after the conclusion of all of the criminal charges and proceedings that will go forward to look into any potential investigations or penalties that may need to be imposed on individuals, but for the time being, we're not doing anything with individuals**." *Id.* (emphasis supplied).

142. Emmert in his opening statement had earlier confirmed that the investigations were continuing and other "individuals" might be disciplined for their alleged participation in the cover-up of the Sandusky Scandal: "And finally, **the NCAA is reserving the right to initiate a formal investigation and disciplinary processes, to impose sanctions as needed on individuals involved in this case**, after the conclusion of any criminal proceedings. Beyond these sanctions, the NCAA is imposing other corrective actions to ensure that the intended cultural changes actually occur. The NCAA is requiring the university to adopt the formal reforms delineated in Chapter 10 of the Freeh Report, specifically 5.0." *See* NCAA Announces

PSU Sanctions: The Opening Statement, https://www.youtube.com/watch?v=VxlzH65ywtg, at 3:37 (emphasis supplied).

143. Even though Plaintiffs were not implicated in any wrongdoing regarding the Sandusky Scandal, and even though Plaintiffs were not involved in or implicated by any of the ongoing criminal proceedings, Emmert refused to clear the good name and reputation of Plaintiffs and the other assistant football coaches.

144. Instead, to the contrary, at the conclusion of his press conference, Emmert further reiterated the NCAA's position, thus Penn State's position as well (given that Penn State had abdicated its and Plaintiffs' rights to due process as it regarded the NCAA's potential future sanctions against individuals, including Plaintiffs), that there existed continuing investigations into the possible involvement of other individuals, including Plaintiffs as assistant football coaches, in the cover-up of some aspect of the Sandusky Scandal.

145. Specifically, Emmert stated at the end of his press conference: "Well again, **we expressly have, in these sanctions and findings, withheld judgment on individuals, and will continue to do so until all of the criminal investigations have concluded, and until then we won't have any comment on individuals**." *See* NCAA Announces PSU Sanctions, http://www.youtube.com/watch?v=7La97HPn7X0, at 27:36 (emphasis supplied). (Collectively, Emmert's statements at the July 23, 2012 press conference are referred to hereafter as the "Press Conference Statements").

146. Penn State issued its own press release on July 23, 2012 (the "PSU Press Release") (attached as **Exhibit H**), which adopted not only the Consent Decree but also, by implication, Emmert's Press Conference Statements.

147. Specifically, the PSU Press Release stated that "Penn State accepts the penalties and corrective actions **announced today by the NCAA**" and that "[t]oday [Penn State] accept[s] the terms of the consent decree imposed by the NCAA." *Id.* (emphasis supplied).

148. The PSU Press Release continued that "[a]s Penn State embarks upon change and progress, the announcement helps to further define our course. **It is with this compass that we will strive for a better tomorrow. Penn State will move forward with a renewed sense of commitment to excellence and integrity in all aspects of our University**." *Id.* (emphasis supplied).

149. It is apparent that the PSU Press Release is announcing the acceptance of not only the terms of the Consent Decree, but as well the NCAA's position, as stated by Emmert in the Press Conference Statements, that the "future" "compass" for Penn State, and its "renewed sense of commitment to excellence and integrity," will necessarily entail additional "**potential investigations or penalties that may need to be imposed on**" individuals, including potentially assistant football coaches who include Plaintiffs, for their role in the Sandusky Scandal.

150. The imposed Consent Decree, and its various statements as to the "ingrained" "reverence for Penn State football" that "permeated every level of the University community," as well as the Press Conference Statements and PSU Press Release, are an indictment of the entire Penn State football coaching staff, including Plaintiffs, as well as Penn State's individual institutional leaders, Board members, those responsible for and participants in athletic programs, the faculty and the student body.

151. The Consent Decree charges that every level of the Penn State community, and specifically the Athletic Staff (that includes Plaintiffs), created and maintained a culture of reverence for, fear of and deference to the Penn State football program, in disregard of the values of human decency and the safety and well-being of vulnerable children.

152. The unwarranted and unprecedented sanctions on Penn State, as agreed to and as allowed by Penn State, breached the contract between the NCAA and Penn State, which included those substantive and procedural safeguards and rights owed to Plaintiffs, including without limitation Plaintiffs' rights to notice and an opportunity to be heard before the imposition of such sanctions and execution of the Consent Decree, as embodied by the Penn State Rights, the NCAA Rights, and all other applicable Penn State and NCAA rules.

153. Penn State and the NCAA breached Plaintiffs' Penn State Rights, NCAA Rights and the obligations that both Penn State and the NCAA owed to uninvolved student-athletes, coaches, administrators and competitors, including the duty to ensure that those individuals, including Plaintiffs, are treated fairly by both Penn State and the NCAA in any NCAA enforcement action.

154. As a result of and due to the negativity created by implication and false innuendo as a result of the Termination and/or the execution of the Consent Decree, including the Actionable Statement, the Press Conference Statements and PSU Press Release, at the height of the Sandusky Scandal, Plaintiffs were deprived on their liberty and property interest in their good name, reputation, honor and integrity, as well as their liberty and property interest Penn State Rights and NCAA Rights.

155. The execution of the Consent Decree, the Press Conference Statements and the PSU Press Release, standing alone and coupled with the Termination, created a false and fabricated implication about each Plaintiff and their likely involvement in the Sandusky Scandal, despite that Penn State knew or should have known that it had **no** evidence, and it had not been suggested by any source, that Plaintiffs were involved in any way whatsoever in the Sandusky Scandal.

156. This false and fabricated impression, caused as a result of Penn State's abrogation of Plaintiffs' Penn State Rights and NCAA Rights, diminished Plaintiffs' future employment income and opportunities.

157. Accordingly, Penn State's execution of the Consent Decree and the issuance of the Press Conference Statements along with the PSU Press Release, that were predicated upon the abrogation of Plaintiffs' Penn State Rights and NCAA Rights, and coupled with the Termination that occurred in close temporal proximity, caused irreparable damage to Plaintiffs' liberty and property interest in their good name, reputation, honor and integrity, as well as an abrogation of Plaintiffs' liberty and property interest in their Penn State Rights and NCAA Rights.

158. Plaintiffs, through their attorneys, have made several requests both in writing and orally that they be afforded simple due process in order to clear and otherwise preserve their respective good name, reputation, honor and integrity, by securing and reaffirming Plaintiffs' Penn State Rights and NCAA Rights.

159. Penn State has denied Plaintiffs' requests for a vindication of their due process right as embodied by Plaintiffs' Penn State Rights and NCAA Rights, as well as other Penn State and NCAA rules, procedures and regulations governing Penn State's and the NCAA's relationship to Plaintiffs.

E. Lost Employment Opportunities

160. As a result of the Termination and upon execution of the Consent Decree and issuance of the Press Conference Statements and PSU Press Release, by and through Penn State's employees and officers, Penn State has not only deprived Plaintiffs of their Penn State Rights and NCAA Rights, but Penn State has further damaged Plaintiffs' professional livelihoods where Plaintiffs have been denied lucrative employment opportunities based upon

the false light and association by innuendo and negative implication that the Termination and Consent Decree (along with the Press Conference Statements and PSU Press Release) have suggested to the world.

161. Upon information and belief, but for Penn State's conduct set forth herein, Plaintiffs would have been hired to a comparable position with a comparable professional and/or top tier Division I football program (including as well possible positions with national media companies), including without limitation, to anyone of those positions that Kenney and Paterno applied to, interviewed for and/or for which they were respectively considered.

a. Coach Bill Kenney

162. As of the date of the Consent Decree imposed by the NCAA, Kenney had served as a Division I collegiate football coach for 27 years.

163. Kenney 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.

164. After Penn State terminated Kenney, Kenney made a determined effort to secure other employment as a football coach.

165. Kenney 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.

166. Kenney also applied for open coaching positions in the NFL, with franchises such as the New York Giants, Indianapolis Colts, and Cleveland Browns. Kenney was experienced and well-qualified for these positions.

167. 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, rather than on Kenney's credentials and approach as a football coach.

168. Despite interviews or discussions with schools such as the University of Massachusetts and NFL teams such as the New York Giants and Indianapolis Colts, Kenney was not offered a position. In most instances, the positions he applied for went to less experienced and less qualified candidates.

169. During the course of his pursuit for new employment, 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 any decision to hire him.

170. 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.

171. Kenney was exceptionally well-qualified for the positions for which he applied and was interviewed, and, upon information and belief, Kenney would have received job offers from these programs had it not been for the disparaging accusations leveled against Kenney by Penn State.

172. After over a year of frustration and disappointment, Kenney eventually secured employment as an offensive line coach at Western Michigan University ("Western Michigan").

173. While Kenney enjoys his new role at Western Michigan and greatly appreciates the opportunity, Kenney 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.

174. Kenney's professional career has suffered an extraordinary set-back and his future opportunities and earning potential have been harmed by Penn State's conduct.

b. Coach Jay Paterno

175. As of the date of the Consent Decree, Paterno had served as a Division I collegiate football coach for 21 years.

176. Before the execution of the Consent Decree, Paterno was a top candidate for open head coaching positions at other comparable institutions.

177. Paterno had received awards and accolades for his coaching efforts at Penn State, and Paterno had been approached during his time there by other universities and search firms exploring his potential interest in head coaching vacancies.

178. After Penn State terminated Paterno, Paterno sought other employment either as a head football coach or a media commentator.

179. Transitioning from his position to a head coaching role was a logical and customary progression for someone with Paterno's experience and reputation.

180. Paterno was well-qualified to receive such an offer.

181. Accordingly, Paterno applied for the open head coaching positions at the University of Connecticut and James Madison University, where he had worked earlier in his career.

182. Based on his qualifications and experience, Paterno was a strong candidate for each position; however, Paterno was not even interviewed by either school, and the open positions went to candidates with less coaching experience.

183. Paterno also applied for head coaching vacancies at the University of Colorado and Boston College.

184. Paterno was not granted an interview at either school.

185. Paterno 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. As a result, the program in question did not grant interviews to any candidates from Penn State.

186. 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 in the Consent Decree.

187. Paterno also engaged in discussions with various media companies, including ESPN, CBS Sports and Fox Sports, about serving as a college football commentator.

188. Paterno had had prior dealings with officials at each company, and they were aware of his experience as a columnist for StateCollege.com for nearly three (3) years.

189. Before the execution of the Consent Decree, ESPN advised 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.

190. The ESPN plan was to have Paterno start working as a commentator during the 2012 football season. These discussions were later discontinued.

191. Upon information and belief, officials at the ESPN network were nervous about the Sandusky Scandal and the NCAA's unsupported finding that Paterno and other coaches had ignored "the red flags of Sandusky's behaviors" at Penn State.

192. 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.

193. Despite these discussions, that position with ESPN never came to fruition and no offer was forthcoming.

194. During the spring 2013, Paterno had similar discussions with representatives of CBS Sports and Fox Sports, who had earlier expressed some interest in Paterno's services. Again, nothing materialized.

195. Paterno's hiring was considered too controversial, because if they placed Paterno in an "on-the-air" position, the networks would have no choice but to have Paterno publicly address past events at Penn State and developments arising from the Sandusky Scandal, given the baseless findings as set forth in the Consent Decree and Freeh Report.

196. Paterno is not currently employed other than as a freelance sports columnist, consultant and a soon-to-be author.

COUNT I

VIOLATION OF CIVIL RIGHTS BY TERMINATION AND/OR EXECUTION OF CONSENT DECREE

42 U.S.C. § 1983

(Deprivation of Constitutional Liberty And Property Interest Without Due Process)

197. Plaintiffs incorporate the foregoing and remaining paragraphs in this Complaint as though fully set forth at length herein.

198. Penn State acted under color of state law with respect to all acts referenced herein as regarding the execution of the Consent Decree and/or the Termination.

199. As provided in the Constitution of the United States, Plaintiffs have a liberty and property interest in their good name, reputation, honor and integrity, as well as a liberty and property interest in their NCAA Rights and Penn State Rights.

200. The aforementioned conduct of Penn State in terminating the employment of Plaintiffs so close in temporality to the Sandusky Scandal and/or then by executing the Consent Decree, coupled with the Press Conference Statements and the PSU Press Release, predicated

upon and adopting the Freeh Report without affording either of Plaintiffs an offer of explanation or exoneration deprived Plaintiffs of their liberty and property interest in their respective good name, reputation, honor and integrity, and their liberty and property interest in their Penn State Rights and NCAA Rights without due process of law.

201. In short, Penn State intentionally rushed to judgment without a proper investigation, violated Plaintiffs' procedural rights that afforded Plaintiff due process protections and knew or should have known that innocent parties, such Plaintiffs, would suffer substantial harm and be branded as an alleged participant in the Sandusky Scandal.

202. Penn State's actions and treatment of Plaintiffs under the circumstances of the Sandusky Scandal, as demonstrated by the Termination and/or the execution of the Consent Decree, coupled with the Press Conference Statements and PSU Press Release, stigmatized each of Plaintiffs and called into question their good names, reputations, honor and integrity, and further denigrated their competence as professional and/or top tier Division I collegiate football coaches.

203. The conduct of Penn State in effectuating the Termination and/or then by executing the Consent Decree, coupled with the Press Conference Statements and PSU Press Release, impugned Plaintiffs' professional good name, reputation, honor and integrity, and further abrogated Plaintiffs' Penn State Rights and NCAA Rights without due process.

204. Penn State, as a state actor, is liable for these violations of Plaintiffs' federal constitutional rights pursuant to 42 U.S.C. § 1983.

205. As a result of Penn State's conduct regarding the Termination and/or the Consent Decree, coupled with the Press Conference Statements and PSU Press Release, whereupon Plaintiffs were denied their Penn State Rights and NCAA Rights, without due process, Plaintiffs have suffered harm to their good name, reputation, honor and integrity, and further suffered

additional humiliation and severe emotional distress and financial harm in the nature of lost wages and future lost employment opportunities with comparable professional and/or top tier Division I football programs (including as well possible positions with national media companies).

206. Penn State's conduct was motivated by an evil motive, malice and/or intent and/or showed a reckless and/or callous indifference to Plaintiffs' constitutionally protected rights.

COUNT II

INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

207. Plaintiffs incorporate the foregoing and remaining paragraphs in this Complaint as though fully set forth at length herein.

208. As set forth above in detail, each Plaintiff had prospective and existing employment, business and economic opportunities with many prestigious comparable professional and/or top tier Division I university football programs, including at Penn State (including as well positions with national media companies), as a result of the favorable reputations that each of them had earned during their service as assistant coaches of the Penn State football program which was or should have been known to Penn State.

209. With knowledge of Plaintiffs' future prospective employment, business and economic opportunities, Penn State took the purposeful actions described above regarding the Termination and/or execution of the Consent Decree, coupled with the Press Conference Statements and PSU Press Release, in order to negligently, recklessly, intentionally and maliciously harm Plaintiffs and interfere with their prospective contractual relations.

210. Where Penn State effectively accused Plaintiffs of ignoring child sexual abuse and participating by implication in the cover-up of the Sandusky Scandal, Plaintiffs were

substantially certain to be less attractive job candidates to any prospective comparable employer that were considering employing them.

211. Penn State lacked justification for their intentional interference with Plaintiffs' prospective contractual relationships, or alternatively, Penn State abused any privilege it had to take the actions outlined above where Penn State violated Plaintiff's Penn State Rights and NCAA Rights, as well as Penn State's other rules and contractual obligations for an improper purpose.

212. As a direct and proximate result of the wrongful, arbitrary, capricious, malicious and unreasonable actions of Penn State, as described above, Plaintiffs have been unable to secure comparable employment opportunities with comparable professional and/or top tier Division I university football programs (including as well positions with national media companies).

213. Penn State's conduct in tortiously interfering with Plaintiffs' prospective contractual relations was malicious and outrageous and demonstrated a reckless disregard for Plaintiffs' rights to a good name, reputation, honor and integrity, as well as, without limitation, Plaintiffs' NCAA Rights and Penn State Rights.

214. As a direct and proximate result of these actions by Penn State, Plaintiffs have suffered economic loss, opportunity loss, reputational damage, emotional distress and other damage.

COUNT III

CIVIL CONSPIRACY

215. Plaintiffs incorporate the foregoing and remaining paragraphs in this Complaint as though fully set forth at length herein.

216. As set forth above, Penn State, Emmert, the NCAA, other unknown NCAA employees, along with the Freeh Firm (collectively, the "Conspirators"), conspired to work

together and did work together, and held briefings and meetings with and for each other, contacted each other to discuss areas of inquiry and strategies and otherwise worked and cooperated with each other, all in order to create a false report in the nature of the Freeh Report and, as a result, for the NCAA to threaten to impose the "death penalty" upon Penn State and thereby,[3] by extortion, compel Penn State to accept, and NCAA to impose, unwarranted and unprecedented sanctions on Penn State, thereby causing and compelling Penn State (i) to breach the contract between the NCAA and Penn State and (ii) to deprive Plaintiffs' of their Penn State Rights and NCAA Rights, to which they were entitled as an intended third party beneficiaries.

217. The Conspirators' concerted actions were unlawful or taken for an unlawful purpose in order to deprive Plaintiffs of their procedural and due process rights, and, by false accusation that Plaintiffs enabled and caused child sex abuse to occur and remain unreported, were malicious and intended to injure, or were at least in reckless disregard of substantially certain injury to Plaintiffs' property interest in their good name, reputation, honor and integrity, as well as Plaintiffs' Penn State Rights and NCAA Rights.

218. The Conspirators had no valid justification for their actions.

219. Among other things, the Conspirators agreed to:

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

b. deprive Plaintiffs of their Penn State Rights and NCAA Rights before imposing unprecedented sanctions; and

[3]The "death penalty" sanction refers to the sanction of cessation of an institution's participation in a sport, such as football, for a set period of time which can have enormous consequences for a program's future ability to recruit players, retain staff and attract/maintain fans and boosters. It is well known that imposing the "death penalty" on an institution can ruin the livelihood of those associated with an institution's athletic program and harm involved individuals well beyond the death penalty's immediate economic impact.

c. impose sanctions on Penn State based on an investigation that was improper, lacked investigation and failed to consider whether Penn State had violated any of the NCAA's rules.

220. The Conspirators performed a series of overt acts in furtherance of this conspiracy, including, without limitation, the following:

a. The Executive Committee and Dr. Edward Ray, the former Chairman of the Executive Committee ("Dr. Ray"), purported to grant Emmert authority to investigate Penn State and impose sanctions, despite knowing they did not have the power to do so and further knowing that such imposition of such sanctions violated Plaintiffs' Penn State Rights and NCAA Rights;

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

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

d. Unknown NCAA employees communicated to and implicitly threatened Penn State's counsel that the "death penalty" was on the table for Penn State, despite knowing that no such "death penalty" could have lawfully been imposed on Penn State under the NCAA rules;

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

f. Emmert imposed the Consent Decree on Penn State, and Penn State accepted the Consent Decree, based on the allegations in the Freeh Report, although doing so was impermissible under the NCAA's own rules, its contract with Penn State and would further violate Plaintiffs' Penn State Rights and NCAA Rights.

221. Penn State's conduct in engaging in this civil conspiracy with the other Conspirators was malicious and outrageous and showed a reckless disregard for Plaintiffs' rights to a good name, reputation, honor and integrity, as well as Plaintiffs' Penn State Rights and NCAA Rights.

222. As a result of this conspiracy, Plaintiffs suffered economic loss, opportunity loss, reputational damage, emotional distress and other damage.

COUNT IV

PENNSYLVANIA WPCL

223. Plaintiffs incorporate the foregoing and remaining paragraphs in this Complaint as though fully set forth at length herein.

224. Both Paterno and Kenney, based upon Penn State's custom and practice, where each was an assistant football coach who was terminated before the end of the academic year, as a fixed term appointee, were entitled (i) to receive full wages and benefits through the end of the 2012 academic year (*i.e.*, through the end of June 2012) and (ii) further entitled to have the Severance Pay Period, to which each were similarly promised, commence as of July 1, 2012.

225. Penn State failed to pay each Plaintiff the amounts that were due to them between the date of their Termination and through the end of June 2012.

226. Instead, Penn State accelerated the Severance Pay Period to commence as of mid-January 2012, and ceased making wage and benefits payments to Plaintiffs sometime in mid-July 2013 (*i.e.*, 18 months after Plaintiffs' termination).

227. For this reason, Penn State wrongfully terminated Plaintiffs and denied Plaintiffs their due wages and benefits as of mid-January 2012 through June 30, 2012.

228. Penn State's failure to pay Plaintiffs all owed wages and benefits through the end of June 2012 violated the WPCL.

229. As a result of Penn State' unlawful conduct, Plaintiffs suffered damages in the form of unpaid wages and benefits from January 12, 2012 through June 30, 2012, as set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(a) Enter a declaratory judgment that the actions of Penn State violated the rights of Plaintiffs as secured to them by the applicable state and federal laws and the United States Constitution;

(b) Compel Penn State to issue a public statement confirming that neither of Plaintiffs committed any wrongdoing or impropriety of any kind in connection with the crimes and misconduct of Sandusky, and/or Penn State's handling of Sandusky's crimes and misconduct in any way, shape or form;

(c) Award Plaintiffs past and future damages for loss of income, employment opportunities and all other wages and benefits denied to them due to the improper and unlawful actions of Penn State regarding the Termination and/or execution of the Consent Decree (coupled with the Press Conference Statements and PSU Press Release);

(d) Award Plaintiffs damages in compensation for their emotional distress, humiliation, loss of reputation and status in the community of their respective peers, and the loss of their ability to provide for themselves with the rewards of their years of excellence in their chosen profession;

(e) Award Plaintiffs punitive damages;

(f) Grant Plaintiffs costs, disbursements and reasonable attorneys' fees; and

(g) Grant Plaintiffs such additional relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

MITTS LAW, LLC

By: _____

Maurice R. Mitts, Esquire
Gerard M. McCabe, Esquire
1822 Spruce Street
Philadelphia, PA 19103
(215) 866-0110 (office)
mmitts@mittslaw.com
gmccabe@mittslaw.com

THE MAZUREK LAW FIRM, LLC

By: /s/ Edward R. Mazurek

Edward R. Mazurek, Esquire
717 South Columbus Boulevard
Philadelphia, PA 19147
(215) 988-9090
emazurek@mazureklawfirm.com

ATTORNEYS FOR PLAINTIFFS JOSEPH "JAY" V. PATERNO AND WILLIAM KENNEY

Dated: July 21, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Joseph ("Jay") V. Paterno P.O. Box 762 Lemont, PA 16851, and William Kenney 636 Wynding Oaks Kalamazoo, MI 49006, Plaintiffs, v. The Pennsylvania State University, 201 Old Main University Park, PA 16802, Defendant.	CIVIL ACTION No. 14-4365-LS **JURY TRIAL DEMANDED**

FIRST AMENDED COMPLAINT

Plaintiffs Joseph "Jay" V. Paterno ("Paterno") and William Kenney ("Kenney") (Paterno and Kenney, collectively, "Plaintiffs"), by and through their attorneys, Mitts Law, LLC, and The Mazurek Law Firm, LLC, file this First Amended Complaint ("FAC") against The Pennsylvania State University ("Penn State") and allege as follows:

PRELIMINARY STATEMENT

1. This lawsuit arises from the tragic events and publicity surrounding the discovery of the horrific conduct of Gerald A. Sandusky ("Sandusky"), a former assistant football coach, former assistant professor of physical education and former employee of Penn State, who was charged and convicted of various criminal offenses, including aggravated criminal assault, corruption of minors, unlawful contact with minors and endangering the welfare of minors.

2. A jury found Sandusky guilty of 45 of 48 child sexual abuse counts involving 10 victims over a period of 18 years, and the Court thereafter sentenced Sandusky to 30 to 60 years in prison.

3. As a result of the national and international bad publicity suffered by Penn State as a result of Sandusky's reprehensible crimes (the "Sandusky Scandal"), Penn State reacted in mid-January 2012 with rashness and without basis by prematurely releasing from Penn State's employment the majority of the Penn State football coaching staff, including the employment of Paterno and Kenney, all of whom had acted as assistant coaches for the Penn State football team for many previous years (the "Termination").

4. Prior to the Termination, Paterno and Kenney had exemplary reputations where they each had brought considerable distinction and acclaim to Penn State during their respective lengthy years of service.

5. Although none of the terminated assistant football coaches, including Plaintiffs, had been found at that time in January 2012 to have committed or been involved in any wrongdoing in connection with the Sandusky Scandal, Penn State terminated each of them at the height of the Sandusky Scandal's dark shroud and without any attempt whatsoever by Penn State to preserve the reputations of these guiltless individuals.

6. Penn State also injured and maligned Plaintiffs' when it deprived Plaintiffs' of their procedural due process rights that in turn damaged their hard earned reputations when Penn State executed the Consent Decree, titled the "*Binding Consent Decree imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University*," dated and issued to the public on July 23, 2012 (the "Consent Decree") (attached as **Exhibit A**).[1]

[1]All Exhibits referenced in this FAC and attached hereto are incorporated herein in their entirety.

7. The National Collegiate Athletic Association (the "NCAA") prepared, and Penn State agreed to, the Consent Decree, resulting, *inter alia*, in over $60 million dollars in penalties against Penn State related to the Sandusky Scandal.

8. Penn State acquiesced to and agreed with the NCAA on the imposition of the Consent Decree that is unlawful, imposes sanctions that are unauthorized and makes statements concerning Plaintiffs that sanctioned them and caused significant harm, all of which was done without effectuating and in abrogation of those due process rights afforded to Plaintiffs by Penn State's agreement with the NCAA and by Penn State's own bylaws and standing orders.

9. The NCAA's Bylaws constitute the contract between the NCAA and Penn State and are subject to the rules governing a written contract signed by all the parties, and thus it follows the contracting parties, such as Penn State, cannot ignore their own contractual covenants with impunity.

10. As set forth herein in greater detail, the NCAA Constitution and the Bylaws Enforcement Program mandate that the NCAA in situations of alleged noncompliance "afford ... fair procedures" and "provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions." NCAA Constitution and Bylaws, Article 2.8.2, Article 19.01.1 (emphasis supplied).

11. By executing the Consent Decree and adopting the Freeh Report (as defined herein), Penn State destroyed any realistic prospect Plaintiffs had to obtain other comparable positions for which they were qualified and would have otherwise been competitive, either at the collegiate or professional level, or with positions with national media companies, had Penn State not terminated Plaintiffs at the height of the Sandusky Scandal and/or had Penn State not executed the Consent Decree soon thereafter given the damaging statements contained therein that linked Plaintiffs to the Sandusky affair.

12. In fact, upon information and belief, after the Termination and execution of the Consent Decree, a number of the terminated coaches, including each of Plaintiffs, applied for positions with other comparable professional and/or top tier Division I college football programs (including as well possible positions with national media companies), but such terminated coaches, including each of Plaintiffs, were met with both disdain and disinterest.

13. Plaintiffs had earned, through no fault of their own, a pariah status that was attributed to them as a result of the Termination and/or Consent Decree that was wholly undeserved.

14. Based upon Penn State's actions, notably the Termination and/or execution of the Consent Decree (and concomitant adoption of the Freeh Report), which both individually and collectively caused irreparable damage to Plaintiffs' personal and professional reputations, Plaintiffs assert a claim against Penn State as their former employer, and as a state actor, pursuant to 42 U.S.C. § 1983 and the 5th and 14th Amendments to the United States Constitution, for the deprivation of their liberty interests and reputations ***without*** due process of law and further assert additional state law claims for intentional interference with contractual relations, civil conspiracy, violation of the Pennsylvania Wage Payment and Collection Law, 43 P.S. §§ 260.1 *et seq.* ("WPCL") and breach of contract.

15. Plaintiffs seek damages in excess of One Million Dollars ($1,000,000.00), including, but not limited to, compensatory and punitive damages, and/or any other relief the Court deems appropriate, against Penn State for the harmful and injurious effects caused by the Termination and/or the execution of the Consent Decree.

THE PARTIES

16. Plaintiff Paterno is an adult individual with an address of P.O. Box 762, Lemont, PA 16851, who Penn State employed from 1995 until mid-January 2012.

17. Plaintiff Kenney is an adult individual residing at 636 Wynding Oaks, Kalamazoo, MI 49006, who Penn State employed from 1988 until mid-January 2012.

18. At all times relevant to this FAC, Penn State employed each Plaintiff, and immediately prior to the Termination, they each held the title of an assistant football coach for Penn State's intercollegiate football team and each was a well-respected NCAA top tier Division I collegiate football coach.

19. In addition, prior to the Termination, there was a widely-shared belief among professional and collegiate football organizations that based upon each Plaintiffs' reputation and successes as assistant football coaches, they would have been well-sought after and desired prospective coaches, either as head coaches or assistant coaches, had they decided to leave their positions with Penn State.

20. Defendant Penn State is organized and existing under the law of the Commonwealth of Pennsylvania (the "Commonwealth"), was incorporated for educational purposes by the Act of February 22, 1855, PL 46, and has its principal administrative office located at 201 Old Main, University Park, Centre County, Pennsylvania 16802.

21. Penn State also has and maintains campuses for its matriculating students throughout the Commonwealth, including many within this District.

22. At all times relevant, Penn State has been the recipient of millions of dollars annually from the Commonwealth for use in funding its operations.

JURISDICTION AND VENUE

23. Jurisdiction is invoked pursuant to the provisions of 42 U.S.C. § 1983.

24. All actions complained of herein involve Penn State as a defendant that resides, in part, and conducts its business, in part, within this Court's jurisdictional limits.

25. Venue before this Court is therefore proper pursuant to the dictates of 28 U.S.C. §§ 1391(b)(1).

FACTUAL BACKGROUND

I. Brief History Of Plaintiffs' Employment With Penn State

A. Jay Paterno

26. Paterno, the son of Joe Paterno ("Joe Paterno"), the former head football coach of Penn State, was on Penn State's football coaching staff for 17 seasons, 12 of which Paterno served as Penn State's quarterbacks coach.

27. Previously, Paterno served for five years as Penn State's tight ends coach and recruiting coordinator.

28. Prior to being on the Penn State football staff, Paterno served as a graduate assistant at the University of Virginia from 1991 to 1992, wide receivers and tight ends coach at the University of Connecticut in 1993, and as the quarterbacks coach at James Madison University in 1994.

29. During each of Paterno's previous employments, he developed a reputation of being a successful football coach, as well as a person of high character.

B. Bill Kenney

30. Kenney attended Norwich University where Kenney was a three-year starter as a tight end and fullback, and was the co-captain of the football team in his senior year in 1981.

31. Prior to being on the Penn State football staff, Kenney served as an offensive backfield coach at Norwich University in 1982, Dennis-Yarmouth Regional High from 1983 to 1984, and Lincoln High School in 1985. Kenney then moved back to the college level where, from 1986 to 1988, he served as a graduate assistant at the University of Nebraska.

32. Kenney left each of his coaching positions with those organizations in good standing and with a strong reputation of being a successful football coach.

33. In 1988, Kenney moved to Penn State, where Kenney was originally a Graduate Assistant football coach and then became a full time coach with the Penn State football coaching staff in 1989.

34. Kenney worked the next 23 years with Penn State, serving in a variety of coaching positions including offensive line coach, recruiting coordinator, and offensive tackles/tight ends coach.

C. Fixed Term Employment Appointments

35. During the time that Plaintiffs each acted as an assistant football coach, Penn State's custom and practice was to treat each assistant football coach as a 12-month Fixed Term Appointee who was entitled to receive full wages and benefits from the start of the academic year in which they were coaching (*i.e.*, July 1st) through the end of the academic year (*i.e.*, June 30th of the following year) ***even if*** such assistant football coach was **released**[2] from his coaching duties by the head football coach without cause at any time during and prior to the end of the academic year.

36. In effect, Plaintiffs' wages and benefits were spread throughout a 12-month period with the majority of football coaching responsibilities being front loaded and occurring during the summer and fall football season beginning in July and lasting through December and possibly early January, that included early mornings, long nights, weekend games and practices and significant travel time.

[2]Penn State's head football coach had the discretionary authority to determine his coaching staff, and so could "release" an assistant coach from his "coaching duties" (which we do not dispute); however, the head football coach had no authority to actually terminate or fire any assistant head coach from his employment with Penn State.

37. In addition, it was Penn State's custom and practice, as a result of the specific wishes of Joe Paterno, that Penn State provided to each released (without cause) assistant football coach an 18-month severance package (the "Severance Pay Period") that included the continuation of the then-current level of wages and benefits for 18 months and would begin on the July 1st after their release and extend through to the end of the following year (at the conclusion of 18 months).

38. Joe Paterno had specifically implemented this custom and practice, and Penn State had agreed to and did in fact comply over the years with this custom and practice, by providing the Severance Pay Period for the specific purpose of ensuring that any assistant football coach, released of his coaching duties and terminated as of the end of the academic year, would have his then current level of wages and benefits paid to them through at least two football seasons following any release and subsequent employment termination.

39. Consistent with this custom and practice, Erikka Runkle, Penn State's Human Resources Manager Intercollegiate Athletics, orally agreed with and told both Paterno and Kenney in mid-December 2011 that, if either of them were released and not retained by Penn State's yet-to-be-selected new football coach, they would each be paid their full wages and benefits, at their current level, through the end of the academic year (**through to the end of June 30, 2012**) and that thereafter their Severance Pay Period would commence as of July 1, 2012.

40. As a result, in mid-January 2012, when Penn State's new football coach did not select Paterno and Kenney to be on his staff of assistant football coaches, Plaintiffs expected that they would be treated in the manner as stated and agreed to by Ms. Runkle one month earlier and in the same manner regarding the continuation of wages and benefits, including the commencement of their Severance Pay Period as of July 1, 2012, as all other assistant football

coaches who were in years past similarly released from their coaching duties prior to the end of the academic year, as per the terms, customs and practices that Penn State had agreed to.

41. However, instead of paying Plaintiffs their full wages and benefits through the end of the 2011-2012 academic year, and then commencing the Severance Pay Period as of July 1, 2012, Penn State purposefully accelerated the Severance Pay Period to commence as of mid-January 2012 that lasted through mid-July 2013.

42. As of mid-July 2013, without ever receiving from Penn State any formal notice of their termination from their employment positions with Penn State, Penn State ceased paying all wages and benefits to Plaintiffs (except as otherwise provided by and during the Severance Pay Period).

43. In this way, Penn State wrongfully avoided payment to Plaintiffs of those 6-months of wages and benefits from mid-January through July 2012.

D. The Termination and Freeh Investigation & Execution of Consent Decree

44. At the time of the Termination, the Sandusky Scandal was in full swing and consumed the nation and all forms of general and sports media outlets with stories of the horrible crimes Sandusky committed as well as the allegations of cover-up by Penn State officials, including allegations that Joe Paterno and other assistant football coaches participated in such alleged cover-ups.

45. In fact, as of November 9, 2011, under this ever-darkening cloud of suspicion and innuendo, the Board of Trustees of Penn State (the "Board of Trustees") voted to relieve Joe Paterno of his head football coaching responsibilities effective immediately, only two (2) months prior to the Termination.

46. The Board of Trustees said that Joe Paterno had demonstrated a "failure of leadership" by only fulfilling his legal obligation to inform another Penn State official, Penn

State's Athletic Director Tim Curley, about a 2001 incident involving Sandusky and a minor, and by not going to the police himself.

47. Thereafter, only two (2) days later, on November 11, 2011, the Board of Trustees formed a Special Investigations Task Force which engaged the firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm"), to investigate the alleged failure of certain Penn State personnel, including the football coaching staff, to respond to and report certain allegations against Sandusky.

48. Penn State also asked the Freeh Firm 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.

49. Penn State had not engaged the Freeh Firm, and had not granted any authority to the Freeh Firm, to investigate or even consider whether any of the actions under its review constituted violations of the NCAA's rules. Penn State did **not** retain the Freeh Firm for these purposes.

50. On November 17, 2011, Mark A. Emmert ("Emmert"), president of the National Collegiate Athletic Association ("NCAA"), sent a letter (the "Emmert Letter") to Rodney A. Erickson ("Erickson"), Penn State's interim President, expressing concerns over the grand jury presentments that were ongoing with the criminal investigation into the Sandusky Scandal and asserting both that the NCAA had jurisdiction over the matter and that the NCAA might take an enforcement action against Penn State. (The Emmert Letter is attached as **Exhibit B**).

51. The Emmert Letter stated that the "individuals with present or former administrative or coaching responsibilities may have been aware of this behavior" and that such

"individuals 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." *Id.*

52. The Emmert Letter also stated that "the NCAA will examine Penn State's exercise of institutional control over its intercollegiate athletic programs, as well as the actions, and inactions, of relevant responsible personnel."

53. The Emmert Letter set the stage for the accusations against Plaintiffs set forth in the Consent Decree.

54. The Emmert Letter failed to identify any specific provision in the NCAA's Constitution or Bylaws that granted the NCAA authority to become involved in criminal matters regarding the Sandusky Scandal that resided outside of the NCAA's basic purpose and mission. *Id.*

55. Nor did the Emmert Letter identify any NCAA rule that Penn State or any of the individuals being investigated, including Plaintiffs and other coaches and administrators, had allegedly violated as a result of the Sandusky Scandal. *Id.*

56. Emmert nonetheless asserted in the Emmert Letter 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. *Id.*

57. Emmert advised Erickson in the Emmert Letter that Penn State would need to "prepare for potential inquiry" by the NCAA and posed four (4) written substantive questions to which the NCAA sought responses. *Id.*

58. Those four (4) 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?"

59. Instead of insisting that Penn State provide timely answers to these four (4) questions, and without offering Plaintiffs or other individuals the right to participate in the investigative and review process or commencing its own investigation, the NCAA waited for the Freeh Firm to complete its investigation (though, as set forth herein, the NCAA had close and repeated strategic conversations and other communications with the Freeh Firm in fashioning the method and manner of the investigation and ultimately its conclusions).

60. In addition, the NCAA's inquiry prompted an investigation by another college football governing body, the Big Ten Conference ("Big Ten"), which sent a letter to Erickson requesting that the Big Ten be given the same treatment as the NCAA in the investigative process.

61. Penn State inappropriately allowed both the NCAA and the Big Ten to participate in the Freeh Firm's investigation, despite being aware that this was a criminal matter falling far outside their respective purviews.

62. On or about January 6, 2012, while the Freeh Firm was conducting its investigation, Penn State announced that Penn State had selected William J. O'Brien ("O'Brien") as Penn State's new head football coach.

63. Thereafter, O'Brien elected not to retain and otherwise released Plaintiffs as assistant football coaches with the Penn State football program.

64. As a result, and despite Penn State's above-described custom and practice of paying the then-current, and in Plaintiffs' case already-earned wages and benefits through the end of the academic year, and without any notice, Penn State terminated Plaintiffs' employment with Penn State and accelerated Plaintiffs' Severance Pay Period to commence in mid-January 2012, instead of on July 1, 2012.

65. To be certain, Plaintiffs do not complain that O'Brien released them from their coaching responsibilities and do not deny that O'Brien had the right to release them from such responsibilities.

66. Rather, Penn State's decision to prematurely cease wage payments to Plaintiffs, which had already been earned, and accelerate Plaintiffs' Severance Pay Period was both rash and without basis.

67. In doing so, Penn State purposely decided to breach its agreements, customs and practices by refusing to continue to pay Plaintiffs until the end of the academic year (*i.e.*, June 30, 2012) because Penn State had decided that it wanted to cut all ties with those assistant coaches that Penn State believed represented a reminder of the Sandusky Scandal.

68. Throughout their entire respective tenures of employment with Penn State, each Plaintiff had an exemplary performance record and was never subjected to any disciplinary actions.

69. The Termination occurred in temporal proximity to the events surrounding the Sandusky Scandal and, as such, the Termination, in conjunction with Penn State's subsequent execution of the Consent Decree, had the effect of branding and stigmatizing Plaintiffs as participants in the Sandusky Scandal and, by so doing, maligned Plaintiffs' heretofore stellar reputations by portraying them by implication in false light.

70. On or about January 6, 2012, Penn State issued a press release (the "O'Brien Press Release") (attached as **Exhibit C**) upon O'Brien's hiring wherein Penn State affirmed the positive legacy of Penn State football:

> "The Penn State football program has a great legacy and has contributed enormously to our University community," said [Rodney A.] Erickson[, president of Penn State University]. "**A program of this caliber requires a special kind of leader - a leader who will embrace that legacy and maintain the University's commitment to excellence on the field and**

> **in the classroom**. We have that leader in Coach O'Brien, and I look forward to working with him in his new role."
>
> "**We have found the man to take Penn State football forward**," said Dave Joyner, Penn State acting director of athletics. "**Needless to say, we have been looking for someone with some very special qualities, beginning with a heart that beats to the values and vision of Penn State University and our Penn State football legacy and tradition. That was our starting point, and Coach O'Brien exemplifies those traits that Penn Staters hold so highly. In addition to his model characteristics as a man and a teacher**, he's all about producing winners, and doing so the right way. **He will embrace tradition, demand excellence and pursue Success with Honor in every phase of our program**."
>
> "I am thrilled to be the head coach of the Penn State football program," stated O'Brien. "I cannot tell you how excited I am to get started, meet the team, meet the football alumni and meet all of the people that make this University so special. **As head coach of this special football program, it is my responsibility to ensure that this program represents the highest level of character, respect and integrity in everything we do. That includes my coaching staff**, our players and everyone involved in the football program. There is tremendous pride in Penn State football and will never, ever take that for granted."

Id. (emphasis supplied).

71. Within this backdrop of positive statements about both the legacy and character of Penn State football and about how the new assistant coaches being hired (and, by implication, not Plaintiffs who were being released) fit within and emulate that tradition, Penn State terminated Plaintiffs without even so much as (i) a public thank you for their years of service and dedication that was part of the positive legacy so identified in the O'Brien Press Release, or (ii) a statement of exoneration that Penn State had no evidence that Plaintiffs were involved in any way in the Sandusky Scandal so as to preserve Plaintiffs' good name, reputation, honor and integrity.

72. Instead, on January 20, 2012, David Joyner, Penn State's Acting Athletics Director, made a statement to the Board of Trustees that the severance package for all of the terminated assistant football coaches, including Plaintiffs, would cost Penn State $4.5M.

73. After the Termination, and upon the passing of Joe Paterno, Penn State issued a another press release, on or about January 23, 2012 (the "January 23, 2012 press release"), wherein Penn State stated: "**Regrettably, Coach Paterno did not finish his coaching career in the manner he or anyone else had expected**, but his coaching legacy in Happy Valley and around the nation will live on forever." (The January 23, 2012 press release is attached as **Exhibit D**) (emphasis supplied).

74. The January 23, 2012 press release reaffirmed the innuendo and negative implications that the Sandusky Scandal foisted upon the entire Penn State football coaching staff.

75. Subsequently, by mid-February 2012, O'Brien completed his hiring of his assistant football coaches.

76. In a Penn State press release, dated February 18, 2012 (attached as **Exhibit E**), Penn State quoted O'Brien as follows:

> "With the hiring of Charlie Fisher as quarterbacks coach, we have completed the Penn State football coaching staff," O'Brien stated. "**This is a staff made up of men who care about the mission of Penn State University and being successful on and off the field. It is also a staff of winners**, with five staff members that have been a part of national championship teams as assistant coaches. This is a staff that has won many games; some while being a part of the same staff, and is a staff comprised of former head coaches, coordinators and tremendous recruiting experience."

Id. (emphasis supplied).

77. At this point, Penn State had terminated Plaintiffs' employment and thus, Plaintiffs were now left to twist in the proverbial winds of innuendo and suspect as to whether they were involved in the Sandusky Scandal, only to be made worse by the execution of the Consent Decree.

78. At the time of or prior to the Termination, Penn State never afforded Plaintiffs an opportunity to be heard nor did Penn State issue a press release after the Termination exonerating Plaintiffs so as to preserve their good name, reputation, honor and integrity.

79. Instead, during the time after the Termination but before the issuance of the Consent Decree, the NCAA collaborated with the attorneys and investigators working for the Freeh Firm, who frequently provided information and briefings to the NCAA, as further detailed below.

80. During the course of its investigation, the Freeh Firm periodically contacted representatives of the NCAA to discuss areas of inquiry and other strategies.

81. Specifically, the Freeh Firm provided frequent briefings to the NCAA, contacted the NCAA's representatives to discuss areas of inquiry and strategies, and further cooperated with the NCAA, all with the purpose of injuring Plaintiffs to deprive them of their procedural rights, or at least acting in reckless disregard of substantially certain injury to Plaintiffs with no legitimate purpose.

82. Despite all of that, the Freeh Firm's final report (the "Freeh Report") (attached as **Exhibit F**), which was published on or about July 12, 2012, failed to disclose, and otherwise hid from the public's view, that representatives of the NCAA and the Big Ten participated in the process with the Freeh Firm from the outset of the investigation.

83. The Freeh Report was the result of the investigation by the Freeh Firm that lasted through late Winter 2011 and into the Spring 2012, and finally up to the publication of the Freeh Report, which Penn State knew would keep the Sandusky Affair in the public limelight during this entire time period, including the time period from the date of the Termination through the execution of the Consent Decree.

84. The Freeh Report was not voted on or approved by the full Board of Trustees, nor were the conclusions of the Freeh Report were agreed to by the Board of Trustees, and further, the Board of Trustees did not even reach conclusions regarding the accuracy of all of the findings in the Freeh Report.

85. In fact, the NCAA and ultimately Penn State was willing to rely upon the Freeh Report as the underlying basis for the sanctions because both Penn State and the NCAA had been privy to the work of the Freeh Firm since late 2011 and indeed, the NCAA had taken steps to influence the focus of the investigation and the nature of its findings, including the directing of the Freeh Firm to specifically focus on issues related to institutional control.

86. According to the Freeh Report, Penn State officials conspired to conceal critical facts relating to Sandusky's abuse from law enforcement authorities, the Board of Trustees, the Penn State community and the public at large.

87. Within hours of the release of the Freeh Report and before all members of the Board of Trustees even 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.

88. Furthermore, both the NCAA and Penn State acted in lieu of following the NCAA's own mandated enforcement procedures, as set forth below, by accepting the conclusions of the Freeh Report as compelling evidence sufficient to justify the execution of the Consent Decree and subsequent imposition of the Consent Decree's sanctions against Penn State.

89. Specifically, soon after the issuance of the Freeh Report, Penn State and the NCAA agreed upon and executed the Consent Decree (**Exhibit A**) that resulted in (i) the

imposition of over $60 million dollars in penalties against Penn State, (ii) a 4-year post-season play ban, (iii) loss of athletic scholarships and (iv) a vacating of football wins since 1998.

90. Both the NCAA and Penn State approved the Consent Decree on or about July 22, 2012, the day prior to the public announcement of the execution of the Consent Decree, and after many days of meetings and discussions between Penn State and the NCAA that occurred between the public release of the Freeh Report and July 23, 2012.

91. In effect, Penn State collaborated with the NCAA and the Freeh Firm, recklessly disregarding Plaintiffs' procedural due process safeguards by imposing sanctions against Penn State and issuing the Consent Decree in a criminal matter unrelated to recruiting and athletic competition (and thus outside of the NCAA's jurisdiction), and falsely accusing Plaintiffs with malice of enabling and acting with complicity with child sexual abuse.

92. The Consent Decree expressly recognized the NCAA's questionable involvement in and its dubious authority pertaining to a criminal action against a non-university official which involved children who were non-university student-athletes.

93. Specifically, the Consent Decree recites that "[t]he sexual abuse of children on a university campus by a former university official ... while despicable, **ordinarily would not be actionable by the NCAA.**" Consent Decree at 4 (emphasis supplied).

94. The Consent Decree also explicitly states that, for purposes of the resolution with the NCAA, Penn State accepted the Freeh Report. *Id.*

95. Penn State's execution of the Consent Decree was done in order to avoid the **alleged** threat of risk of further sanctions (being asserted by the NCAA), including the ungrounded threat (and now known to be an outrageous bluff because of now-made public emails exchanged by internal NCAA staff) by the NCAA that it would seek the "death penalty," and in spite of the fact that, by doing so, Penn State was a part of the agreement and

acquiescence to directly violate the procedural due process rights of Plaintiffs, as guaranteed by Penn State's agreement with the NCAA and by Penn State's own bylaws and standing orders.

96. Specifically, the Consent Decree makes certain that "Penn State has communicated to the NCAA **that it accepts the findings of the Freeh Report for purposes of this resolution and acknowledges that those facts constitute violations of the Constitutional and Bylaw principles described in the [Emmert Letter]**." *Id.* (emphasis supplied).

97. Penn State even went further and agreed "not 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 the Consent Decree**." *Id.* (emphasis supplied).

E. NCAA Infractions Process & Procedural Safeguards

98. By way of background, the NCAA is an unincorporated voluntary association of member institutions of higher education, including Penn State, which operates pursuant to a constitution and an extensive set of rules that define both the scope of the NCAA's authority and the obligations of the NCAA's member institutions.

99. The basic 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.

100. The NCAA is governed by a lengthy set of rules that define both the scope of the NCAA's authority and the obligation of the NCAA's member institutions, such as Penn State.

101. The relevant set of rules for purposes of this lawsuit is the 2011-2012 NCAA Division I Manual (the "NCAA Manual"), which is available at

http://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx. (A copy of the relevant portions of the NCAA's Manual is attached to this FAC as **Exhibit G**).

102. The NCAA Constitution and Bylaws further provide that where a member institution, such as Penn State, has been found to be in noncompliance with the NCAA's rules and regulations "**[t]he Association shall ... afford the institution, its staff and student-athletes fair procedures** in the consideration of an identified or alleged failure in compliance." NCAA Constitution and Bylaws, Article 2.8.2 (emphasis supplied).

103. In such circumstances where a member institution fails to fulfill its obligations, Article 1.3.2 and Article 19 of the NCAA Constitution and Bylaws, state that its enforcement procedures shall govern.

104. The mission of the NCAA Enforcement Program reads, in pertinent part:

> The program is committed to fairness of procedures and the timely and equitable resolution of infractions cases. The achievement of these objectives is essential to the conduct of a viable and effective enforcement program. Further, **an important consideration in imposing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions**.

NCAA Constitution and Bylaws, Article 19.01.1 (emphasis supplied).

105. More specifically, Article 1 through 6 of the NCAA Manual comprise the NCAA's Constitution which set forth information relevant to the NCAA's purposes, its structure, its membership, the legislative purpose and the more important principles governing the conduct of intercollegiate athletics.

106. Articles 10 through 23 of the NCAA Manual are the Operating Bylaws (the "NCAA Bylaws") which consist of legislation adopted by member institutions, such as Penn State, to promote principles enunciated in the NCAA Constitution and to achieve the NCAA's stated purposes.

107. Article 31 through 33 are the Administrative Bylaws, adopted and modified by the NCAA subject to amendment by the membership through the regular legislative process (the "Administrative Bylaws"). The Administrative Bylaws implement the NCAA's general legislative actions, setting forth policies and procedures for NCAA championships, the NCAA's business, its enforcement program and its athletics certification program.

108. The NCAA 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.

109. The NCAA Bylaws further authorize the NCAA to prohibit and sanction conduct that is intended to provide any member institution with a recruiting or competitive advantage in athletics.

110. 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.

111. The NCAA rules recognize that fair and proper procedures are important because the NCAA's action can have serious repercussions on their lives and careers.

112. When there is an alleged violation of the NCAA's rules, the NCAA Bylaws require the NCAA to provide interested parties with certain, well-defined procedural protections, including rights of appeal, all of which are delineated in the NCAA Manual and are set forth below (collectively, the "NCAA Rights").

113. Specifically, in accordance with Articles 19 and 32 of the NCAA Manual, if the NCAA enforcement staff conducts an investigation into allegations of misconduct and rules violations, and thereafter, as a result, deems that there is sufficient information to support a finding of a rules violation, the NCAA enforcement staff must then send "notice of allegations"

to the institution that must list the NCAA rule alleged to have been violated and the details of the violation.

114. 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.

115. 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.

116. The rules protect any involved 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.

117. 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.

118. When an individual is not personally available to participate in the process, the NCAA has allowed the involved individuals to participate through counsel or an appropriate representative.

119. After the notice of allegations is issued, the matter is referred to the NCAA's Committee on Infractions (the "Infraction Committee").

120. A member institution, such Penn State, 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 (which, in this case, Penn State elected not to access to the deprivation of Plaintiffs' due process rights). The institution and all involved individuals have the right to be represented by legal counsel at all stages of the proceedings.

121. At the conclusion of the hearing, the Infractions Committee is required to issue a formal Infractions Report detailing all of the Infraction Committee's findings and the penalties imposed. The Infraction Committee must submit the infraction report to the institution and all involved individuals.

122. The infractions 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 infractions report is released to the public or forwarded to the Infractions Appeals Committee. The infractions report must also describe the opportunities for further administrative appeal.

123. The NCAA's rules provide a member institution, such as Penn State, 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 Infraction Committee's report finding violations of the NCAA's rules.

124. There is also a summary disposition process that is available to the NCAA's enforcement staff that requires, *inter alia*, consent of all of the parties, a thorough and complete investigation and a joint written report that includes the parties' proposed penalties.

125. If the Infraction Committee accepts the findings that a violation occurred with a summary disposition joint report, but does not accept the parties' proposed penalties, the Infraction Committee must hold an expedited hearing limited to considering the possibility of imposing additional penalties. After that expedited hearing, the Infraction 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.

126. These enforcement and investigative mechanisms and procedures are subject to amendment only in accordance with the legislative process set forth in Article 5 of the NCAA Manual.

127. No other NCAA body, including the Executive Committee and the Board of Trustees of Directors, has authority to bypass or amend these procedures and impose discipline or sanctions on any member institution, such as Penn State.

128. The Executive Committee and the Board of Trustees of Directors are authorized only to take actions that are legislative in character and are to be implemented association-wide on a prospective basis.

129. These procedural protections are a significant and vital part of the bargain involved in Penn State's decision to participate in the NCAA.

130. 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."

131. Penn State, as a member institution of the NCAA, knew or should have known of these NCAA Rights offered by the NCAA and to which Penn State was entitled.

132. In this way, the NCAA Bylaws are expressly intended to benefit not only the member institutions, such as Penn State, but also their staff (including the athletic coaching staffs such as Plaintiffs), students and other individuals affected by conduct subject to potential NCAA oversight and sanctions.

133. For this reason, Plaintiffs were intended third party beneficiaries of the agreement between the NCAA and Penn State that afforded Plaintiffs their NCAA Rights and thus may enforce those NCAA Rights against Penn State where Penn State has violated and otherwise abrogated Plaintiffs' rights by Penn State's capitulation to the execution of the Consent Decree.

F. Impact And Effect Of Consent Decree

134. Specifically, as noted, Erickson and Emmert executed and issued the Consent Decree to the public on July 23, 2012.

135. Erickson signed the Consent Decree without following the procedural requirements embodied by the NCAA Rights and as further set forth in Penn State's Bylaws, Charter and Standing Orders (that governed Penn State's relationship with NCAA and with Plaintiffs) (the "Penn State Rights").

136. Penn State's execution of the Consent Decree compounded and ignited afresh Plaintiffs' injuries caused by the Termination and only further compelled, as a result of the deprivation of Plaintiffs' due process rights, the implication and innuendo that Plaintiffs were complicit in some manner in the Sandusky Scandal, all to the detriment and stigmatization of Plaintiffs' good name, reputation, honor and integrity.

137. Penn State knew or should have known that the Freeh Report, as the basis of the Consent Decree, was an unreliable rush to judgment without a proper investigation and the conclusions reached in the Freeh Report were not substantiated.

138. Penn State knew or should have known that the Freeh Firm did not purport to conduct an investigation into alleged NCAA rules violations.

139. Penn State knew or should have known that the Freeh Firm did not record or summarize witness interviews as specified by the NCAA's rules governing its relationship with Penn State.

140. Penn State knew or should have known that the Freeh Firm failed to include in the Freeh Report any findings concerning alleged NCAA rules violations.

141. Penn State knew or should have known 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," as the NCAA Bylaws and other rules require.

142. Penn State knew or should have known that the individuals named in the Freeh Report were not given any opportunity to challenge its conclusions.

143. Penn State knew or should have known that the Freeh Report was not approved by the Board of Trustees which never took any official action based on the Freeh Report.

144. Penn State knew or should have known that the Board of Trustees had never accepted the Consent Decree's findings or reach any conclusions about its accuracy.

145. In fact, the Consent Decree was never presented to the full Board of Trustees prior to being signed by Erickson.

146. Penn State knew or should have known that the Freeh Report was an improper and unreliable "rush to justice" that has been thoroughly discredited.

147. Penn State knew or should have known that the Freeh Report also failed to interview key witnesses (including Gary Schulz, Timothy Curly, Michael McQuery and Joe Paterno), and instead of supporting its conclusions with evidence, relied heavily on speculation and innuendo.

148. Penn State knew or should have known that the Freeh Report relied on unidentified, "confidential" sources and on questionable sources lacking any direct or personal knowledge of the facts or support for the opinions they provided.

149. Penn State knew or should have known that many of the Freeh Report's primary conclusions are either unsupported by evidence or supported only by anonymous, hearsay information of the type specifically prohibited by the NCAA rules.

150. Penn State knew or should have known that, contrary to suggestions made in the Freeh Report, as adopted by Penn State upon execution of the Consent Decree, there is no evidence that Joe Paterno, or any other Penn State assistant football coach, covered up known incidents of child molestation by Sandusky to protect Penn State football, to avoid bad publicity or for any other reason.

151. Penn State knew or should have known that there was no evidence that Joe Paterno or any other members of the football athletic staff, including Plaintiffs, conspired with Penn State officials to suppress information because of publicity concerns or a desire to protect the football program.

152. In short, Penn State knew or should have known that the Freeh Report provided no evidence of a cover-up by Joe Paterno or any other Penn State assistant football coach and no evidence that Penn State's football program caused or contributed to the underlying facts of the Sandusky Scandal.

153. Penn State also knew or should have known that, by accepting the Freeh Report upon execution of the Consent Decree, as a basis for imposing sanctions instead of following the NCAA's own rules and due process procedures, including the rules and procedures that were designed to protect the due process rights of Plaintiffs, the Freeh Report would dramatically increase the publicity given to its unreliable conclusions, effectively terminate the search for the truth and enable the NCAA, in violation of Plaintiffs' NCAA Rights and Penn State Rights, to force Penn State to accept the imposition of unprecedented sanctions.

154. Penn State knew or should have known that the conduct described in the Freeh Report, as adopted by Penn State by execution of the Consent Decree, was not a violation of the NCAA's rules and could not substitute for the procedures required under the NCAA's rules, including without limitation Plaintiffs' NCAA Rights.

155. Among other things, Penn State knew or should have known that the NCAA staff had not completed a thorough investigation, as required under the NCAA's rules, and had not identified any major or secondary violations committed by Penn State in connection with the criminal matters involving the Sandusky Scandal.

156. No general legislation adopted by the NCAA's member institutions authorized the actions taken by Penn State regarding the execution of the Consent Decree.

157. Penn State knew or should have known that neither Penn State nor any involved individual authorized the NCAA to use a summary disposition process and, in any event, that the NCAA did not comply with any such summary disposition process.

158. Finally, at no time did Penn State self-report any rules violations to the NCAA.

159. Before executing the Consent Decree, as noted, Erickson did not comply with the governing requirements required by Penn States governing rules, including the Penn State Rights.

160. Erickson failed to present the Consent Decree to the Board of Trustees for its approval, even though the Board of Trustees is the final repository of all legal responsibility and authority that governs Penn State.

161. Nor did Erickson call for a meeting of the Board of Trustees or the NCAA's Executive Committee (the "Executive Committee").

162. Although Erickson was subject to the threats and coercive tactics of Emmert and the NCAA, Erickson failed to inform the Board of Trustees about these issues in advance of executing the Consent Decree.

163. Erickson did not have the legal or delegated authority to bind the Board of Trustees to the Consent Decree agreed to with the NCAA.

164. Penn State knew or should have known that the Consent Decree did not identify any conduct that, under the NCAA's rules, would qualify as either a secondary or a major violation of the NCAA rules.

165. A timely appeal of the Consent Decree was made with the NCAA Infractions Appeals Committee but the NCAA refused to accept those appeals, and thus due process was denied again.

166. As a result, Penn State knew or should have known that individuals who were involved and directly harmed by the Consent Decree were given no opportunity to challenge the NCAA's abuse of discretion.

167. Nonetheless, the NCAA stipulated that Penn State had violated the principles of "institutional control" and "ethical conduct" contained in the NCAA's Constitution, and that Penn State's employees had not conducted themselves as the "positive moral models" expected by Article 19 of the NCAA Bylaws.

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

169. Specifically, as regards Plaintiffs' liberty interests, the Consent Decree found 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." *See* **Exhibit A**, at 3 (emphasis supplied) (the "Actionable Statement").

170. The Actionable Statement asserts that some coaches were basically complicit in child sexual abuse which represents a factual conclusion based on the findings of the Freeh Report.

171. At no point does the Consent Decree state that this Actionable Statement was an "opinion" of the NCAA or Penn State.

172. On the contrary, key language of the Findings and Conclusions introductory paragraph of the Consent Decree states as follows: "Penn State has communicated to the NCAA that it accepts the findings of the Freeh Report ..." and more definitively, " ... the findings of the Criminal Jury and the Freeh Report establish a factual basis from which the NCAA concludes that Penn State breached the standards ... ." **Exhibit A** (Consent Decree), at 2.

173. Thus, the Actionable Statement is a factual statement that the Consent Decree offers to the public as a "truthful" statement.

174. However, Penn State knew that the Actionable Statement was erroneous and based on unreliable and unsubstantiated conclusions made in the Freeh Report, which itself Penn State knew was unreliable and seriously flawed and where Penn State intentionally rushed to judgment without a proper investigation, violating Plaintiffs' procedural due process rights, as safeguarded by the NCAA Rights and Penn State Rights.

175. In this way, Penn State and the other Conspirators (as such term is defined below) acted intentionally to abrogate and deny Plaintiffs their liberty interests and did so with malice toward Plaintiffs by executing the Consent Decree and issuing the Actionable Statement.

176. The effect of the Actionable Statement was that, now, following the lengthy investigation by the Freeh Firm, both Penn State and the NCAA (as well as the Freeh Firm) had come to the conclusion that Plaintiffs, as coaches with the Penn State football program, were involved in child sexual abuse conduct and therefore it is this Actionable Statement that has caused Plaintiffs their injury.

177. And this Actionable Statement **only** occurred because Penn State violated and deprived Plaintiffs of their constitutional liberty interests as set forth herein.

178. Moreover, although the Actionable Statement did not name either of Plaintiffs, the Actionable Statement is directed to "some coaches," which is a limited group of individuals that includes Plaintiffs, is discrete in size and consists of people who are well-known in the community or whose identity could easily be discovered upon inquiry.

179. Given the discrete size of this group of "some coaches," and where the Actionable Statement was made in the course of a public scandal, recipients of the Actionable Statement are more likely to make inquiry to determine the specific group members, and in this way, Plaintiffs are identified as targets of this Actionable Statement.

180. Accepting as true that Plaintiffs, as included in the phrase "some coaches" of the Actionable Statement, were accused of ignoring child sexual abuse, Plaintiffs were substantially certain to be less attractive job candidates were an employer to contemplate hiring them.

181. Emmert further magnified the negative impact of the Actionable Statement during his press conference on July 23, 2012, wherein Emmert confirmed that the investigation into possible additional sanctions against individual assistant coaches was continuing, despite the fact that Penn State had already told Emmert that there was no one still with Penn State who had been involved in the Sandusky Affair.

182. Specifically, Rosemary Connors, with NBC 10 in Philadelphia, questioned Emmert during Emmert's press conference announcing the Consent Decree: "**Are you considering the possibility of any future sanctions, for coaches who were at Penn State during the years that this abuse occurred and may be looking to coach again**?" *See* NCAA Announces PSU Sanctions, http://www.youtube.com/watch?v=7La97HPn7X0, at 4:20 (emphasis supplied).

183. In response to Ms. Connors' question, Emmert replied: "As I said in my opening statement, **we are reserving the right, after the conclusion of all of the criminal charges and**

proceedings that will go forward to look into any potential investigations or penalties that may need to be imposed on individuals, but for the time being, we're not doing anything with individuals." *Id.* (emphasis supplied).

184. Emmert in his opening statement had earlier confirmed that the investigations were continuing and other "individuals" might be disciplined for their alleged participation in the cover-up of the Sandusky Scandal: "And finally, **the NCAA is reserving the right to initiate a formal investigation and disciplinary processes, to impose sanctions as needed on individuals involved in this case**, after the conclusion of any criminal proceedings. Beyond these sanctions, the NCAA is imposing other corrective actions to ensure that the intended cultural changes actually occur. The NCAA is requiring the university to adopt the formal reforms delineated in Chapter 10 of the Freeh Report, specifically 5.0." *See* NCAA Announces PSU Sanctions: The Opening Statement, https://www.youtube.com/watch?v=VxlzH65ywtg, at 3:37 (emphasis supplied).

185. The NCAA and Emmert had already said that the Freeh Firm had conducted an investigation well beyond anything that the NCAA had done in the past,[3] and there is nothing to suggest that Emmert's statement regarding a future investigative process is anything more than a statement of future reliance upon the Freeh Report that, according to the Consent Decree, came to the factual conclusion that "some coaches" were complicit in fostering child sexual abuse.

186. That is, any person who read or heard Emmert's press conference statements could have reasonably understood it to mean that certain individuals (meaning "some coaches") would be individually sanctioned once all of the criminal proceedings were concluded.

[3]Emmert stated during his press conference: "The Freeh report, as well as the data that came out of the criminal trial provided extensive information in this case. The report has been accepted by the university itself. It was the result of more than 450 individual interviews, an examination of more than 3 million e-mails and other documents. **It is vastly more involved and thorough than any investigation we've ever conducted**." (emphasis supplied)

187. In this way, Emmert's statements that the NCAA may "impose sanctions as needed on individuals involved in this case" further malign that small, limited group of assistant coaches, including Plaintiffs, that were identified as "some coaches" in the Consent Decree.

188. The cast of the shadow of suspicion and innuendo is beyond merely those who might be directly involved in the ongoing criminal proceedings, but covers those "individuals involved in this case," which, according to the Actionable Statement, would necessarily include Plaintiffs as part of that small, discrete and limited group of assistant coaches.

189. The imposition of sanctions would merely occur "after the conclusion of any criminal proceedings."

190. Emmert's statements, and those coupled with the Consent Decree, were reckless and known to be false because, among other things, Penn State, through their negotiator, Gene A, Marsh, Esquire ("Marsh"), Penn State's outside negotiator of the Consent Decree with the NCAA, had already told the NCAA, by email dated July 19, 2012, that "[t]he individuals at the center of this problem are **no longer at PSU**." (emphasis supplied).

191. Moreover, upon information and belief, Emmert's statements were the result of a collaboratively designed effort by Penn State and the NCAA to have a unified message going forward to the press and public.

192. Both Penn State and the NCAA, through the Consent Decree and Emmert's statements, sent the message to the public that assistant coaches were involved in the Sandusky Affair even though neither Penn State nor the NCAA had any credible evidence to make such a damaging statement.

193. In this way, Emmert's statements were overt acts by the NCAA in furtherance of the conspiracy between the NCAA and Penn State, and Emmert was merely acting as a voice for Penn State, thus making his press conference statements attributable to Penn State.

194. Specifically, Donald Remy, as the Chief Legal Officer with the NCAA ("Remy"), stated in an email, dated September 7, 2012, to Marsh that "the statements made by President Emmert **were designed to assist Penn State with the story it was publicly communicating at the time**." (emphasis supplied).

195. Remy's now publicly-available comments made in his email represent evidence of collusive behavior between the NCAA and Penn State to ensure that a unified message is delivered to the public, a message that denigrated without due process the rights of Plaintiffs.

196. Further evidence of potential collusive behavior and collaborative public messaging by Penn State and the NCAA is represented by an email, dated July 19, 2012, from Marsh to Remy that was then forwarded by Remy to Emmert wherein Marsh wrote: "I hope that when this thing gets to a public announcement, Mark Emmert will clearly describe the strength of feeling on the board regarding the possible application of the death penalty etc., and point out that the actions of Penn State in hiring Freeh and on the corrective side were fully considered … **along with some of the other factors we discussed**." (emphasis supplied).

197. It is evident that Marsh, on behalf of Penn State, and Remy, on behalf of NCAA, at various times leading up to July 23, 2012, including, upon information and belief, on July 21, 2012, and July 22, 2012, were influencing and designing Emmert's public press conference statements that served to damage Plaintiffs and reinforce the accusation made against Plaintiffs in the Consent Decree.

198. After Emmert's public statements, on the day of the execution of the Consent Decree, Marsh wrote approvingly to Remy and David Berst, an NCAA Vice President ("Berst"), in an email, dated July 23, 2012, about Emmert's public comments and Emmert's Q&A session with reporters: "I think the comments in the press conference were fair **and supportive of the new leadership at Penn State** – which was appropriate." (emphasis supplied).

199. In response, by email, dated July 23, 2012, Berst thanked Marsh for his email: "Very much appreciated and your work has been exemplary in a very difficult time. I was worried that it was not clear enough early, **but I think [Emmert] hit on it well in the Q's and A's**." (emphasis supplied).

200. In an email back to Remy and Berst, Marsh complimented Emmert's public statements: "Mark's statements regarding Erickson were good. The most helpful part was saying that were the death penalty to be imposed, there also would have been additional penalties. I believed that to be the case from the start. The comments re Erickson were also terrific."

201. Marsh further reflected in that same email that he (Marsh) had presented to Penn State's legal team the option of a traditional infractions process and that Penn State decided to forego that opportunity, **knowing full well that there would be critics that challenged the apparent lack of due process**.

202. Specifically, Marsh stated in his July 23, 2012 email, to Berst and Remy:

> The hardest part of this has been talking on behalf of several lawyers ... But both Frank Guadagnino at Reed Smith and their new general counsel, Steve Dunham, have just been superb in this process – raising all the issues that come naturally to them as great lawyers – and they are great lawyers who have served their client [*i.e.*, Penn State] well – but also recognizing that in the end it must **be a decision made by the new leadership that weighs many, many factors. I had to weigh accepting this outcome versus what might come with a traditional infractions process in an opinion**. I laid it all out and gave my opinion, but the call was not mine. I think they made the right choice. **There will be caustic critics and experts on "due process" etc.** I'll get tagged I am sure, but I could truly care less. Truly. Folks who comment from the outside are all hat and no cattle.

(emphasis supplied).

203. By earlier email, dated July 19, 2012, Marsh wondered to Remy whether "at some point an institution may be better off under a traditional infractions process."

204. Penn State knew that it had a choice to follow those traditional infractions methods that would have ensured due process for Plaintiffs and declined, in an agreement with the NCAA, to elect that path out of expediency and fear.

205. In this way, Penn State acted with the specific intent of foregoing the traditional NCAA infractions process in an effort to expedite the process and to cut all ties with those employees and coaching staff with whom Penn State and/or the public associated or might associate with the Sandusky Affair.

206. Penn State made the conscious decision to forego the longer more involved protected process that included procedural safeguards in favor of a faster, cheaper less involved process that in the final analysis injured Plaintiffs.

207. In fact, Remy in his September 7, 2012 email to Marsh stated as much:

> At all times prior to the execution of the consent decree, PSU was free to repudiate the Freeh Report, withdraw its consent, and/or reject the direction of the NCAA Executive Committee and either litigate against an imposition of penalties by the Executive Committee or "roll the dice" with the enforcement and infractions process. **The decision not to do so was Penn State's decision, not the NCAA**.

(emphasis supplied).

208. Even though Plaintiffs were not implicated in any wrongdoing regarding the Sandusky Scandal, and even though Plaintiffs were not involved in or implicated by any of the ongoing criminal proceedings, both Erickson and Emmert refused to provide Plaintiffs their procedural due process rights that would have allowed them to clear the good name and reputation of Plaintiffs and the other assistant football coaches.

209. Instead, to the contrary, at the conclusion of his press conference, Emmert further reiterated the NCAA's position, thus Penn State's position as well (given that Penn State had abdicated its and Plaintiffs' rights to due process as it regarded the NCAA's potential future

sanctions against individuals, including Plaintiffs), that there existed anticipated investigations into the involvement of other individuals, including Plaintiffs as assistant football coaches, in the cover-up of some aspect of the Sandusky Scandal.

210. Specifically, Emmert stated at the end of his press conference: "Well again, **we expressly have, in these sanctions and findings, withheld judgment on individuals, and will continue to do so until all of the criminal investigations have concluded, and until then we won't have any comment on individuals**." *See* NCAA Announces PSU Sanctions, http://www.youtube.com/watch?v=7La97HPn7X0, at 27:36 (emphasis supplied). (Collectively, Emmert's statements at the July 23, 2012 press conference are referred to hereafter as the "Press Conference Statements").

211. Penn State issued its own press release on July 23, 2012 (the "PSU Press Release") (attached as **Exhibit H**), which adopted not only the Consent Decree but also, by implication, Emmert's Press Conference Statements, which we now know had collaboratively been "**designed**" to support and assist Penn State's public message.

212. Specifically, the PSU Press Release stated that "Penn State accepts the penalties and corrective actions **announced today by the NCAA**" and that "[t]oday [Penn State] accept[s] the terms of the consent decree imposed by the NCAA." *Id.* (emphasis supplied).

213. The PSU Press Release continued that "[a]s Penn State embarks upon change and progress, the announcement helps to further define our course. **It is with this compass that we will strive for a better tomorrow. Penn State will move forward with a renewed sense of commitment to excellence and integrity in all aspects of our University**." *Id.* (emphasis supplied).

214. The PSU Press Release announcing the acceptance of not only the terms of the Consent Decree, but as well the NCAA's position, as stated by Emmert in the Press Conference

Statements, that the "future" "compass" for Penn State, and its "renewed sense of commitment to excellence and integrity," will necessarily entail additional "**potential investigations or penalties that may need to be imposed on**" individuals, including potentially assistant football coaches who include Plaintiffs, for their role in the Sandusky Scandal.

215. Viewing Emmert's statements and Penn State's comments in their totality and from a combined auditory lens of the recipient, if tomorrow for Penn State will be "better" with a "renewed" sense of "integrity," then certainly the Consent Decree's Actionable Statement confirms to the public that the Penn State "coaches" of yesterday were **worse** and **without** integrity than the better of tomorrow, which is a reasonable conclusion for any recipient to make that was magnified where such "coaches" may yet be sanctioned by the NCAA for their complicity in child sexual abuse.

216. As Remy told Marsh, Emmert's statements were designed to support Penn State's public position, and it is evident that such designs failed to take into account Plaintiffs' reputations that were tarnished with the concomitant public scorn and ridicule that comes from being effectively accused of being complicit with child sexual abuse, all of which occurred because of the deprivation of Plaintiffs' procedural due process rights as embodied by the NCAA Rights and Penn State Rights.

217. The Consent Decree, and its various statements as to the "ingrained" "reverence for Penn State football" that "permeated every level of the University community," as well as the Press Conference Statements and PSU Press Release, are an indictment of the entire Penn State football coaching staff, including Plaintiffs, as well as Penn State's individual institutional leaders, Board members, those responsible for and participants in athletic programs, the faculty and the student body.

218. The Consent Decree charges that every level of the Penn State community, and specifically the Athletic Staff (that includes Plaintiffs), created and maintained a culture of reverence for, fear of and deference to the Penn State football program, in disregard of the values of human decency and the safety and well-being of vulnerable children.

219. The unwarranted and unprecedented sanctions on Penn State, as agreed to by Penn State, breached the contract between the NCAA and Penn State, which included those substantive and procedural due process safeguards and rights owed to Plaintiffs, including without limitation Plaintiffs' rights to notice and an opportunity to be heard before the imposition of such sanctions and execution of the Consent Decree, as embodied by the Penn State Rights, the NCAA Rights, and all other applicable Penn State and NCAA rules.

220. Penn State and the NCAA breached Plaintiffs' Penn State Rights, NCAA Rights and the obligations that both Penn State and the NCAA owed to uninvolved student-athletes, coaches, administrators and competitors, including the duty to ensure that those individuals, including Plaintiffs, are treated fairly by both Penn State and the NCAA in any NCAA enforcement action.

221. As a result of and due to the negativity created by implication and false innuendo as a result of the Termination and/or the execution of the Consent Decree, including the Actionable Statement, the Press Conference Statements and the PSU Press Release, at the height of the Sandusky Scandal, Plaintiffs were deprived of their liberty and property interest NCAA Rights and Penn State Rights and their liberty and property interest in their good name, reputation, honor and integrity.

222. The execution of the Consent Decree, the Press Conference Statements and the PSU Press Release, standing alone and coupled with the Termination, created a false and fabricated implication about each Plaintiff and their likely involvement in the Sandusky Scandal,

despite that Penn State knew or should have known that it had **no** evidence, and it had not been suggested by any source, that Plaintiffs were involved in any way whatsoever in the Sandusky Scandal.

223. This false and fabricated impression, caused as a result of Penn State's abrogation of Plaintiffs' NCAA Rights and Penn State Rights, diminished Plaintiffs' future employment income and opportunities.

224. Accordingly, Penn State's execution of the Consent Decree and the issuance of the Press Conference Statements along with the PSU Press Release, that were predicated upon the abrogation of Plaintiffs' NCAA Rights and Penn State Rights, and coupled with the Termination that occurred in close temporal proximity, caused (i) irreparable damage to Plaintiffs' liberty and property interest in their good name, reputation, honor and integrity, as well as (ii) an abrogation of Plaintiffs' liberty and property interest in their NCAA Rights and Penn State Rights.

G. Certain Sanctions Lifted

225. 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.

226. 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.

227. 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.

228. Although the NCAA has lifted these sanctions against Penn State, it has done nothing to correct the failure to provide Plaintiffs their due process taken away by the execution of the Consent Decree or to remedy the enormous harms caused to Plaintiffs.

229. As a result, many of the most significant sanctions pursuant to the Consent Decree that remain in place, including notably the vacating of the Penn State football wins, are those sanctions that have been imposed on Plaintiffs and further damage their ability to become employed in comparable positions within their chosen profession.

230. Despite lifting many of the sanctions against Penn State, the NCAA has continued its unlawful conduct and continued to abuse its 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.

231. And yet, the NCAA Enforcement Program details the types of violations and applicable penalties therefor and denotes that the "death penalty" applies only to repeat violators. *See* NCAA Constitution and Bylaws, Article 19.5.2.1.2.

232. However, the Consent Decree acknowledged that Penn State was not a "repeat offender" and thus the death penalty was inapplicable then and now:

> While these circumstances certainly are severe, the suspension of competition is most warranted when the institution is a violator and has failed to cooperate or take corrective action. [PSU] has never before had NCAA major violations... .

Exhibit A (Consent Decree), at 4.

233. Moreover, not only has the public now learned that the NCAA was bluffing Penn State when Penn State signed the Consent Decree with the threat of the death penalty, the NCAA has further admitted that, without Penn State agreeing to the Consent Decree, the NCAA didn't have jurisdiction to act.

234. "I know we are banking on the fact the school is so embarrassed they will do anything, but I am not sure about that, and no confidence conference or other members will agree to that," wrote Kevin Lennon ("Lennon"), NCAA's Vice President of Academic and Membership Affairs, on the same day.

235. Lennon continued: "**This will force the jurisdictional issue that we really don't have a great answer to that one** ... ." (emphasis supplied).

236. In response to these emails, Penn State released a statement, signed by President Eric Barron and Board of Trustees Chair Keith Masser, that reads in part as follows:

> We find it deeply disturbing that NCAA officials in leadership positions would consider bluffing one of their member institutions, Penn State, **to accept sanctions outside of their normal investigative and enforcement process**. We are considering our options. It is important to understand, however, that Penn State is in the midst of a number of legal and civil cases associated with these matters.

(emphasis supplied).

H. Lost Employment Opportunities

237. As a result of the Termination and upon execution of the Consent Decree and issuance of the Press Conference Statements and PSU Press Release, by and through Penn State's employees and officers and those other Conspirators (as such term is defined below), Penn State has not only deprived Plaintiffs of their NCAA Rights and Penn State Rights, but Penn State has further damaged Plaintiffs' professional livelihoods where Plaintiffs have been denied lucrative employment opportunities based upon the false light and association by innuendo and negative implication that the Termination and Consent Decree (along with the Press Conference Statements and PSU Press Release) have suggested to the world.

238. The improper acceptance of the Consent Decree and the penalty of the vacating of wins has had a negative impact on the Plaintiffs' ability to find comparable employment because

they no longer can receive credit for those wins, which bolstered their reputations as effective football coaches.

239. Upon information and belief, but for Penn State's conduct set forth herein, Plaintiffs would have been hired to a comparable position with a comparable professional and/or top tier Division I football program (including as well possible positions with national media companies), including without limitation, to anyone of those positions that Kenney and Paterno applied to, interviewed for and/or for which they were respectively considered.

240. Plaintiffs, through their attorneys, have made several requests both in writing and orally that they be afforded simple due process in order to clear and otherwise preserve their respective good name, reputation, honor and integrity, by securing and reaffirming Plaintiffs' NCAA Rights and Penn State Rights.

241. Penn State has denied Plaintiffs' requests for a vindication of their due process right as embodied by Plaintiffs' NCAA Rights and Penn State Rights, as well as other Penn State and NCAA rules, procedures and regulations governing Penn State's and the NCAA's relationship to Plaintiffs.

242. Plaintiffs attempted to resolve these issues with Penn State prior to the commencement of this litigation without success.

243. Initially, when the Sandusky Affair became public in early November 2011 and Penn State had hired the Freeh Firm, Plaintiffs requested assistance from Penn State during the investigation after multiple media outlets and commentators made comments that the assistant coaches at Penn State were aware of Sandusky's activities.

244. Plaintiffs, along with other coaches, sought a meeting (as had been requested by interim head coach Tom Bradley) with the administration and Ketchum, the public relations firm Penn State had hired.

245. Plaintiffs and others met with them on November 14, 2012, in Penn State's Lasch Building.

246. At this meeting, Plaintiffs requested that Penn State make a statement supporting the assistant coaching staff or, in the least, point out that we were not being investigated.

247. Penn State refused and declined and in fact never made a statement in support of Plaintiffs.

248. Instead, at that meeting, Penn State told Plaintiffs that they were Penn State's "guardrails" and Plaintiffs could not comment or even defend themselves in the press or public because they had to stay within the University's interests.

249. Penn State advised Plaintiffs that it would circle back to Plaintiffs with a plan of action but that never occurred.

250. As a result, Plaintiffs were not permitted to make any public comment until an interview was arranged with ESPN's Tom Rinaldi on November 18, 2011, a full two weeks after the Sandusky news story had broken on November 4, 2011, and long after many people had already made up their minds as to the complicity of the assistant coaches.

251. Plaintiffs followed Penn State's request but Penn State never defended Plaintiffs nor issued a statement in support of what we stated in the interview with ESPN.

252. After the execution of the Consent Decree, Plaintiffs have sought on numerous occasions and in writing, both by letters and follow-up emails, through their attorneys, to resolve their claims with Penn State without success.

253. Plaintiffs, through their counsel, advised Penn State that "[n]one of these coaches was afforded any kind of hearing in connection with their terminations and the University did nothing to protect their reputations in light of its gross mishandling of the Sandusky matter."

254. Although Penn State has taken the demands and other requests under advisement, Penn State has ultimately rejected them out of hand without equivocation.

255. All efforts to secure a commitment from Penn State to defend Plaintiffs and clear them from any involvement in the Sandusky Affair were futile and any additional efforts would have been futile as well.

256. In fact, Dick Anderson ("Anderson"), a Penn State assistant football coach, by email, dated August 29, 2012, that was sent to Erickson and Penn State's Board of Trustees, specifically requested that Penn State vindicate the names and reputations of the assistant coaches, including Plaintiffs:

> I would also like to bring to your attention that the Assistant Coaches who served under Coach Joe Paterno have never been vindicated by the University to the public. None of the coaches or staff knew anything about the 1998 incident, and none of us knew anything about Mike McQueary's encounter. None of us ever had any inkling that Jerry Sandusky could be a pedophile. The secrecy involved in this disease is well-documented. Unfortunately, we assistant coaches have been wrongly incriminated on numerous occasions by the media, and Penn State has done nothing to defend our reputations after our many years of devoted service.
>
> There are two assistant coaches from the previous staff who are still on Coach O'Brien's staff. Two of us have retired. The others, who were previously recognized as top college assistant coaches, have not been able to find new positions, largely because all of our reputations have been tainted by the media. **It would be very helpful if the University could make a statement exonerating our former Assistant Football Coaches**. The University obviously is confident that the former staff knew nothing of Jerry Sandusky's activities or they would not have retained two coaches from the former staff. **A statement from the University would be so helpful to those coaches seeking to continue their careers and would also be so meaningful to the retired coaches to erase these scars from our reputations**.

(emphasis supplied).

257. Despite Anderson's request for a "name-clearing" statement, made on behalf of all of the assistant football coaches, Penn State never issued one and all subsequent efforts by

Plaintiffs and others similarly proved fruitless and futile because Penn State has demonstrated no desire to clear the name of Plaintiffs.

a. Coach Bill Kenney

258. As of the date of the Consent Decree, Kenney had served as a Division I collegiate football coach for 27 years.

259. Kenney 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.

260. After Penn State terminated Kenney, Kenney made a determined effort to secure other employment as a football coach.

261. Kenney 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.

262. Kenney also applied for open coaching positions in the NFL, with franchises such as the New York Giants, Indianapolis Colts, and Cleveland Browns. Kenney was experienced and well-qualified for these positions.

263. 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, rather than on Kenney's credentials and approach as a football coach.

264. Despite interviews or discussions with schools such as the University of Massachusetts and NFL teams such as the New York Giants and Indianapolis Colts, Kenney was not offered a position. In most instances, the positions he applied for went to less experienced and less qualified candidates.

265. During the course of his pursuit for new employment, 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 any decision to hire him.

266. 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.

267. Kenney was exceptionally well-qualified for the positions for which he applied and was interviewed, and, upon information and belief, Kenney would have received job offers from these programs had it not been for the disparaging accusations leveled against Kenney by Penn State.

268. After over a year of frustration and disappointment, Kenney eventually secured employment as an offensive line coach at Western Michigan University ("Western Michigan").

269. While Kenney enjoys his new role at Western Michigan and greatly appreciates the opportunity, Kenney 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, either as an assistant coach or head coach.

270. Kenney's professional career has suffered an extraordinary set-back and his future opportunities and earning potential have been harmed by Penn State's conduct.

b. Coach Jay Paterno

271. As of the date of the Consent Decree, Paterno had served as a Division I collegiate football coach for 21 years.

272. Before the execution of the Consent Decree, Paterno was a top candidate for open head coaching positions at other comparable institutions.

273. Paterno had received awards and accolades for his coaching efforts at Penn State, and Paterno had been approached during his time there by other universities and search firms exploring his potential interest in head coaching vacancies.

274. After Penn State terminated Paterno, Paterno sought other employment either as a head football coach or a media commentator, and further attempted to locate an assistant coaching position through his backchannel relationships to no avail.

275. Transitioning from his position to a head coaching role was a logical and customary progression for someone with Paterno's experience and reputation.

276. Paterno was well-qualified to receive such an offer.

277. Accordingly, Paterno applied for the open head coaching positions at the University of Connecticut and James Madison University, where he had worked earlier in his career.

278. Based on his qualifications and experience, Paterno was a strong candidate for each position; however, Paterno was not even interviewed by either school, and the open positions went to candidates with less coaching experience.

279. Paterno also applied for head coaching vacancies at the University of Colorado and Boston College.

280. Paterno was not granted an interview at either school.

281. Paterno 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. As a result, the program in question did not grant interviews to any candidates from Penn State.

282. 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 in the Consent Decree.

283. Paterno also engaged in discussions with various media companies, including ESPN, CBS Sports and Fox Sports, about serving as a college football commentator.

284. Paterno had had prior dealings with officials at each company, and they were aware of his experience as a columnist for StateCollege.com for nearly three (3) years.

285. Before the execution of the Consent Decree, ESPN advised 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.

286. The ESPN plan was to have Paterno start working as a commentator during the 2012 football season. These discussions were later discontinued.

287. Upon information and belief, officials at the ESPN network were nervous about the Sandusky Scandal and the NCAA's unsupported finding that Paterno and other coaches had ignored "the red flags of Sandusky's behaviors" at Penn State.

288. 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.

289. Despite these discussions, that position with ESPN never came to fruition and no offer was forthcoming.

290. During the spring 2013, Paterno had similar discussions with representatives of CBS Sports and Fox Sports, who had earlier expressed some interest in Paterno's services. Again, nothing materialized.

291. Paterno's hiring was considered too controversial, because if they placed Paterno in an "on-the-air" position, the networks would have no choice but to have Paterno publicly address past events at Penn State and developments arising from the Sandusky Scandal, given the baseless findings as set forth in the Consent Decree and Freeh Report, and those public statements concerning such documents.

292. Paterno is not currently employed other than as a freelance sports columnist, consultant and a soon-to-be author.

COUNT I

VIOLATION OF CIVIL RIGHTS BY TERMINATION AND/OR EXECUTION OF CONSENT DECREE

42 U.S.C. § 1983

(Deprivation of Constitutional Liberty And Property Interest Without Due Process)

293. Plaintiffs incorporate the foregoing and remaining paragraphs in this FAC as though fully set forth at length herein.

294. Penn State acted under color of state law with respect to all acts referenced herein as regarding the execution of the Consent Decree and/or the Termination.

295. As provided in the Constitution of the United States, Plaintiffs have a liberty and property interest in the due process protections afforded to them by their NCAA Rights and Penn State Rights as well as a liberty and property interest in their good name, reputation, honor and integrity.

296. In addition, Plaintiffs' held a state-law created property interest in their employment as assistant coaches for Penn State. In the alternative, Plaintiffs' loss of employment is sufficient to satisfy their claims, regardless of whether Plaintiffs held such an interest in their employment.

297. The aforementioned conduct of Penn State in terminating the employment of Plaintiffs so close in temporality to the Sandusky Scandal and/or then by executing the Consent Decree, coupled with the Press Conference Statements and the PSU Press Release, predicated upon and adopting the Freeh Report without affording either of Plaintiffs an offer of explanation or exoneration deprived Plaintiffs of their liberty and property interest in their NCAA Rights and Penn State Rights without due process of law and, as a result, their liberty and property interest in their respective good name, reputation, honor and integrity.

298. As such, in order to avoid the risk of further sanctions and to hastily move on and away from those employees and coaches, including Plaintiffs, that Penn State believed were associated with the Sandusky Scandal, Penn State intentionally rushed to judgment without a proper investigation, violated Plaintiffs' procedural rights that afforded Plaintiffs due process protections and knew or should have known that innocent parties, such Plaintiffs, would suffer substantial harm and be branded as alleged participants in the Sandusky Scandal.

299. Penn State's actions and treatment of Plaintiffs under the circumstances of the Sandusky Scandal, as demonstrated by the Termination and/or the execution of the Consent Decree, coupled with the Press Conference Statements and PSU Press Release, stigmatized each of Plaintiffs and called into question their good names, reputations, honor and integrity, and further denigrated their competence as professional and/or top tier Division I collegiate football coaches.

300. Penn State knowingly terminated Plaintiffs from their employment and accelerated their Severance Period during a period of constant media coverage related to the negative news stories that were a part of the Sandusky Scandal.

301. Shortly after, in the days, weeks and months that followed the Termination, Plaintiffs were stigmatized again by (i) the O'Brien Press Release, which implicated Plaintiffs as

neither fitting within nor emulating the legacy and character of the Penn State tradition, (ii) the January 23, 2012 press release and (iii) the February 18, 2010 Penn State press release.

302. The timing of Plaintiffs' terminations was such that, to any reasonable observer, it would appear that all of those stigmatizing events were proximately connected and related.

303. In addition to the reasonable appearance of a connection between Plaintiffs' terminations and the Sandusky Scandal, Penn State further adopted those statements that connected Plaintiffs' terminations to the Sandusky Scandal, both explicitly in Penn State's own statements and implicitly by failing to even attempt to exonerate Plaintiffs.

304. The conduct of Penn State in effectuating the Termination and/or then by executing the Consent Decree, coupled with the Press Conference Statements and PSU Press Release, abrogated Plaintiffs' NCAA Rights and Penn State Rights without due process and, as a result, further impugned Plaintiffs' professional good name, reputation, honor and integrity.

305. Penn State's conduct occurred in close collaboration and proximate causal nexus with Emmert, the NCAA, those other "unnamed" NCAA employees and the Freeh Firm, each of whom separately and together acted as if a state actor in concert with one another and with Penn State to deprive Plaintiffs of their constitutionally protected interests as set forth herein.

306. Without such collaborative conduct of Emmert, the NCAA, those other "unnamed" NCAA employees and/or the Freeh Firm, the deprivation of Plaintiffs' liberty interests would not have occurred.

307. By executing the Consent Decree, Penn State knowingly and intentionally breached its contractual obligations and thereby stripped Plaintiffs of their procedural due process rights, as defined by the NCAA Rights and Penn State Rights, by, among other things:

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

b. failing to require that the NCAA conduct a traditional enforcement and infractions process that would have protected Plaintiffs' due process rights as involved persons;

c. 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 the NCAA's threat was an outrageous bluff; and

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

308. Penn State, as a state actor, is liable for these violations of Plaintiffs' federal constitutional rights pursuant to 42 U.S.C. § 1983.

309. As a result of Penn State's conduct regarding the Termination and/or the Consent Decree, coupled with the Press Conference Statements and PSU Press Release, whereupon Plaintiffs were denied their NCAA Rights and Penn State Rights, without due process, Plaintiffs have suffered harm to their good name, reputation, honor and integrity, and further suffered additional humiliation and severe emotional distress and financial harm in the nature of lost wages and future lost employment opportunities with comparable professional and/or top tier Division I football programs (including as well possible positions with national media companies).

310. Specifically, as a result of Penn State's denial of Plaintiffs' NCAA Rights and Penn State Rights, without due process, and the O'Brien Press Release, the January 23, 2012 press release, the February 18, 2012 Penn State press release, the inappropriate execution of the Consent Decree, the Press Conference Statements and the PSU Press Release, all of which created the appearance of a connection between Plaintiffs and the Sandusky Scandal, Plaintiffs

were each denied of employment opportunities and the liberty to pursue coaching positions in their chosen field of college football.

311. Penn State, and in conjunction with the NCAA and Emmert's statements, intentionally made each of those stigmatizing statements in public by doing so in the form of press releases and statements that were widely disseminated throughout the local and national media.

312. Both the substance and the material of those statements were false, as Plaintiffs were in no way aware or a part of the criminal actions committed by Sandusky, nor were Plaintiffs ever engaged in conduct that was unfitting of the Penn State tradition, dishonest or unethical; rather, each Plaintiff had an exemplary performance record and was never subjected to any disciplinary actions.

313. Penn State's statements, and those statements of Penn State's Conspirators (as such term is defined below) caused irreparable harm to Plaintiffs' professional good name, reputation, honor and integrity by connecting them to and falsely implicating them as participants in the unethical and criminal actions related to the Sandusky Scandal, which tarnished their reputations and made them less attractive job candidates to any prospective employers.

314. Within their statements, Penn State effectively pointed to Plaintiffs by referring to them as "assistant coaches," "some coaches," the "coaching staff," the "football athletic staff" and the "Penn State football program," all of which are related to a small, readily identifiable group of individuals, of which Plaintiffs were members.

315. In addition, despite their full awareness that the NCAA had made false and stigmatizing statements related to the character of and actions taken by Plaintiffs throughout the Sandusky scandal, Penn State failed to correct or respond to such statements, and therefore

accepted and adopted those statements resulting in the dissemination of false impressions of each Plaintiff.

316. Penn State further failed to uphold Plaintiffs' rights by denying their requests to be afforded simple due process in order to clear and otherwise preserve their respective good name, reputation, honor and integrity, which had been made by Dick Anderson and through their attorneys both in writing and orally.

317. Penn State's conduct was motivated by an evil motive, malice and/or intent and/or showed a reckless and/or callous indifference to Plaintiffs' constitutionally protected rights.

COUNT II

INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

318. Plaintiffs incorporate the foregoing and remaining paragraphs in this FAC as though fully set forth at length herein.

319. As set forth above in detail, each Plaintiff had prospective and existing employment, business and economic opportunities with many prestigious comparable professional and/or top tier Division I university football programs, including at Penn State (including as well positions with national media companies), as a result of the favorable reputations that each of them had earned during their service as assistant coaches of the Penn State football program which was or should have been known to Penn State.

320. With knowledge of Plaintiffs' future prospective employment, business and economic opportunities, and by effectively accusing Plaintiffs as being complicit with child sexual abuse, Penn State took the purposeful and malicious actions described above regarding the Termination and/or execution of the Consent Decree, coupled with the Press Conference Statements and PSU Press Release, and all other conduct set forth herein, in order to negligently,

recklessly, intentionally and maliciously harm Plaintiffs and interfere with their prospective contractual relations.

321. When Penn State violated Plaintiffs' liberty interests, as set forth in this FAC and Count I above, wherein Penn State effectively accused Plaintiffs of ignoring child sexual abuse and participating by implication in the cover-up of the Sandusky Scandal, Plaintiffs were substantially certain to be less attractive job candidates to any prospective comparable employer that were considering employing them.

322. If Penn State and the Conspirators (as defined below) had provided to Plaintiffs those procedural safeguards as defined in those NCAA Rights and the Penn State Rights, then Penn State would not have interfered with Plaintiffs' prospective contractual relationships.

323. Penn State lacked justification for their intentional interference with Plaintiffs' prospective contractual relationships, or alternatively, Penn State abused any privilege it had to take the actions outlined above where Penn State violated Plaintiffs' NCAA Rights and Penn State Rights, as well as Penn State's other rules and contractual obligations for an improper purpose.

324. As a direct and proximate result of the wrongful, arbitrary, capricious, malicious and unreasonable actions of Penn State, as described above, Plaintiffs have been unable to secure comparable employment opportunities with comparable professional and/or top tier Division I university football programs (including as well positions with national media companies).

325. Penn State's conduct in tortiously interfering with Plaintiffs' prospective contractual relations was malicious and outrageous and demonstrated a reckless disregard for Plaintiffs' rights to a good name, reputation, honor and integrity, as well as, without limitation, Plaintiffs' NCAA Rights and Penn State Rights.

326. As a direct and proximate result of these actions by Penn State, Plaintiffs have suffered economic loss, opportunity loss, reputational damage, emotional distress and other damage.

COUNT III

CIVIL CONSPIRACY

327. Plaintiffs incorporate the foregoing and remaining paragraphs in this FAC as though fully set forth at length herein.

328. As set forth above, there was an understanding between Penn State and the Freeh Firm that, among other things, Penn State would ignore Plaintiffs' rights by acting in lieu of its mandated enforcement procedures and allow the Freeh Firm to collaborate with the NCAA and the Big Ten, and others, from the inception of its investigation in November 2011, until its conclusion in July 2012.

329. Penn State allowed the Freeh Firm and encouraged the Freeh Firm to work closely with the NCAA and the Big Ten during the investigation that led up to the publication of the Freeh Report.

330. The Freeh Firm did work closely with the NCAA and Big Ten personnel in completing its investigation and designing the strategies that predicated the investigation and influenced the Freeh Report and the Consent Decree.

331. Attorneys and investigators working for the Freeh Firm collaborated with the NCAA and frequently provided information and briefings to the NCAA and Big Ten.

332. Penn State, in consultation with the Freeh Firm, made decisions as to who was and was not allowed to be a part of the Freeh Firm's investigation, sharing information that the Freeh Firm had asserted was privileged with third parties such as the NCAA and Big Ten.

333. In addition, there was an understanding and/or agreement between Penn State and the NCAA that Penn State would bypass the due process procedures which Plaintiffs were entitled to; facilitate the cooperation between the Freeh Firm and the NCAA and the Big Ten; accept and/or otherwise not object to any statements made or conclusions reached by the NCAA; and remain acquiescent throughout the entirety of the NCAA's process.

334. More specifically, Penn State, Emmert, the NCAA, other unknown NCAA employees, along with the Freeh Firm, and others (collectively, the "Conspirators"), conspired to work together and did work together, and exchanged emails and held briefings and meetings with and for each other, contacted each other to discuss areas of inquiry and strategies and otherwise worked and cooperated with each other, all in order to create a false report in the nature of the Freeh Report and, as a result, for the NCAA to threaten to impose the "death penalty" upon Penn State and thereby[4] have Penn State agree and accept the unwarranted and unprecedented sanctions on Penn State, thereby causing and compelling Penn State (i) to breach the contract between the NCAA and Penn State and (ii) to deprive Plaintiffs' of their NCAA Rights and Penn State Rights, to which they were entitled as an intended third party beneficiaries.

335. The extremely close nexus and connection between the actions of the Conspirators effectively demonstrated that the alleged private behaviors of the Freeh Firm and the NCAA were instead state actions and therefore should be fairly treated as that of Penn State itself.

[4]The "death penalty" sanction refers to the sanction of cessation of an institution's participation in a sport, such as football, for a set period of time which can have enormous consequences for a program's future ability to recruit players, retain staff and attract/maintain fans and boosters. It is well known that imposing the "death penalty" on an institution can ruin the livelihood of those associated with an institution's athletic program and harm involved individuals well beyond the death penalty's immediate economic impact.

336. The Conspirators' concerted actions were unlawful or taken for an unlawful purpose in order to deprive Plaintiffs of their procedural and due process rights, and, by false accusation that Plaintiffs enabled and caused child sexual abuse to occur and remain unreported, were malicious and intended to injure, or were at least in reckless disregard of substantially certain injury to Plaintiffs' property interest in their good name, reputation, honor and integrity, as well as Plaintiffs' NCAA Rights and Penn State Rights.

337. The Conspirators had no valid justification for their actions.

338. Among other things, the Conspirators agreed to:

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

b. continue the investigation despite knowing and acknowledging internally that it lacked merit;

c. deprive Plaintiffs of their NCAA Rights and Penn State Rights before imposing unprecedented sanctions; and

d. impose sanctions on Penn State based on an investigation that was improper, lacked investigation and failed to consider whether Penn State had violated any of the NCAA's rules.

339. The Conspirators performed a series of overt acts in furtherance of this conspiracy, including, without limitation, the following:

a. The Executive Committee and Dr. Edward Ray, the former Chairman of the Executive Committee ("Dr. Ray"), purported to grant Emmert authority to investigate Penn State and impose sanctions, despite knowing they did not have the power to do so and further knowing that such imposition of such sanctions violated Plaintiffs' NCAA Rights and Penn State Rights;

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

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

d. Unknown NCAA employees communicated to and implicitly threatened Penn State's counsel that the "death penalty" was on the table for Penn State, despite knowing that no such "death penalty" could have lawfully been imposed on Penn State under the NCAA rules;

e. Emmert threatened, and Penn State accepted, that, if Penn State went to the media, the "death penalty" sanction would be certain, thus compelling and receiving silence from Erickson and Penn State;

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

g. Emmert prepared and negotiated the Consent Decree with Penn State, and Penn State accepted the Consent Decree, based on the allegations in the Freeh Report, although doing so was impermissible under the NCAA's own rules, its contract with Penn State and would further violate Plaintiffs' NCAA Rights and Penn State Rights.

340. Penn State's conduct in engaging in this civil conspiracy with the other Conspirators was malicious and outrageous and showed a reckless disregard for Plaintiffs' rights

to a good name, reputation, honor and integrity, as well as Plaintiffs' NCAA Rights and Penn State Rights.

341. As a result of this conspiracy, Plaintiffs suffered economic loss, opportunity loss, reputational damage, emotional distress and other damage.

COUNT IV

PENNSYLVANIA WPCL

342. Plaintiffs incorporate the foregoing and remaining paragraphs in this FAC as though fully set forth at length herein.

343. Both Paterno and Kenney, based upon Penn State's custom and practice, where each was an assistant football coach who was terminated before the end of the academic year, as a fixed term appointee, were entitled (i) to receive full wages and benefits through the end of the 2012 academic year, which should have been until June 30, 2012, and (ii) further entitled to have the Severance Pay Period, to which each were similarly promised, commence as of July 1, 2012, which represented the period immediately following the end of Plaintiffs' fixed, paid terms.

344. Penn State failed to pay each Plaintiff the amounts that were due to them between the date of their Termination and through the end of June 2012.

345. Instead, Penn State accelerated the Severance Pay Period to commence as of mid-January 2012, and ceased making wage and benefits payments to Plaintiffs sometime in mid-July 2013 (*i.e.*, 18 months after Plaintiffs' termination).

346. For this reason, Penn State wrongfully terminated Plaintiffs and denied Plaintiffs their due wages and benefits as of mid-January 2012 through June 30, 2012.

347. Plaintiffs had already earned these wages by front-loading their hours upon hours of football efforts and working tirelessly through the summer and fall football season on behalf of Penn State.

348. Despite having received an accelerated severance pay, Plaintiffs were still improperly denied their due and already earned wages and benefits for those six (6) months.

349. It was Penn State's failure to pay Plaintiffs all owed and already earned wages and benefits through the end of June 2012 that directly caused Plaintiffs' injury.

350. Accordingly, Penn State's failure to pay Plaintiffs those owed and already earned wages and benefits through the end of June 2012 was a violation of the WPCL.

351. As a result of Penn State's unlawful conduct, Plaintiffs suffered damages in the form of unpaid wages and benefits from January 12, 2012, through June 30, 2012, as set forth herein.

COUNT V

BREACH OF CONTRACT

352. Plaintiffs incorporate the foregoing and remaining paragraphs in this FAC as though fully set forth at length herein.

353. Erikka Runkle, Penn State's Human Resources Manager Intercollegiate Athletics, had orally agreed in mid-December 2011 that each Plaintiff would be paid their full salary through the end of the academic year (*i.e.,* through to the end of June 30, 2012).

354. Despite Runkle's oral agreement, Penn State failed to pay each Plaintiff the amounts that were due to them between the date of their Termination and through the end of June 2012.

355. Instead, Penn State accelerated the Severance Pay Period to commence as of mid-January 2012, and ceased making wage and benefits payments to Plaintiffs sometime in mid-July 2013 (*i.e.*, 18 months after Plaintiffs' termination).

356. For this reason, Penn State wrongfully breached Runkle's agreement with Plaintiffs and denied Plaintiffs their due wages and benefits as of mid-January 2012 through June 30, 2012.

357. Penn State's failure to pay Plaintiffs all owed wages and benefits through the end of June 2012 was a breach of Runkle's oral agreement.

358. As a result of Penn State's unlawful conduct, Plaintiffs suffered damages in the form of unpaid wages and benefits from January 12, 2012, through June 30, 2012, as set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(a) Enter a declaratory judgment that the actions of Penn State violated the rights of Plaintiffs as secured to them by the applicable state and federal laws and the United States Constitution;

(b) Compel Penn State to issue a public statement confirming that neither of Plaintiffs committed any wrongdoing or impropriety of any kind in connection with the crimes and misconduct of Sandusky, and/or Penn State's handling of Sandusky's crimes and misconduct in any way, shape or form;

(c) Award Plaintiffs past and future damages for loss of income, employment opportunities and all other wages and benefits denied to them due to the improper and unlawful actions of Penn State regarding the Termination and/or execution of the Consent Decree (coupled with the Press Conference Statements and PSU Press Release);

(d) Award Plaintiffs damages in compensation for their emotional distress, humiliation, loss of reputation and status in the community of their respective peers, and the loss of their ability to provide for themselves with the rewards of their years of excellence in their chosen profession;

(e) Award Plaintiffs punitive damages;

(f) Grant Plaintiffs costs, disbursements and reasonable attorneys' fees; and

(g) Grant Plaintiffs such additional relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

MITTS LAW, LLC

By: */s/ Maurice R. Mitts*

Maurice R. Mitts, Esquire
Gerard M. McCabe, Esquire
1822 Spruce Street
Philadelphia, PA 19103
(215) 866-0110 (office)
mmitts@mittslaw.com
gmccabe@mittslaw.com

THE MAZUREK LAW FIRM, LLC

By: */s/ Edward R. Mazurek*

Edward R. Mazurek, Esquire
717 South Columbus Boulevard
Philadelphia, PA 19147
(215) 988-9090
emazurek@mazureklawfirm.com

ATTORNEYS FOR PLAINTIFFS JOSEPH "JAY" V. PATERNO AND WILLIAM KENNEY

Dated: November 24, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ("JAY") V. PATERNO AND WILLIAM KENNEY, Plaintiffs, v. PENNSYLVANIA STATE UNIVERSITY, Defendant.	:	CIVIL ACTION NO. 2:14-cv-04365-LS

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant Pennsylvania State University ("Penn State") submits this Memorandum of Law in support of its Motion to Dismiss the First Amended Complaint of Plaintiffs Joseph "Jay" V. Paterno and William Kenney in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT 1

II. STATEMENT OF ALLEGED FACTS 2
- A. Plaintiffs' Employment at Penn State. 3
- B. Plaintiffs' Termination. 3
- C. Statements Regarding the Penn State Football Program. 4
- D. Execution of Consent Decree 4

III. ARGUMENT 6

- A. Count I of the First Amended Complaint (Violation of Civil Rights by Termination and/or Execution of the Consent Decree) Should be Dismissed for Failure to State a Claim. 7
  - 1. Plaintiffs fail to plead a cognizable recognized right that satisfies the "plus" prong of the "stigma-plus" test. 8
    - a. Termination of employment is not a sufficient "plus" because it was not contemporaneous to statements issued at the time of Consent Decree. 9
    - b. Loss of other specific employment opportunities is not sufficient for the "plus" requirement. 10
  - 2. None of the purportedly injurious statements is sufficient to meet the "stigma" prong of the "stigma-plus" test. 12
    - a. The Purported "Actionable Statement". 13
    - b. The Press Conference Statements by Emmert. 15
    - c. PSU Press Release. 16
    - d. "Various Statements" in the Consent Decree. 17
  - 3. Silence by defendant could not constitute a negative inference creating a stigma. 17
  - 4. Plaintiffs' Section 1983 claim is waived because they failed to request a timely name-clearing hearing. 18
  - 5. Plaintiffs' purported "Penn State Rights" and "NCAA Rights" do not give rise to a claim as a matter of law 19

- B. All Potential Federal Statutory Conspiracy Claims are Without Merit, Time Barred, and Should Be Dismissed. 22
  - 1. Plaintiffs' due process rights were not violated, so there can be no conspiracy under Section 1983. 22
  - 2. Plaintiffs have not pleaded a plausible basis for conspiracy under Section 1983 under the facts averred. 23
    - a. Plaintiffs have failed to allege that Penn State acted with specific intent to cause injury to Plaintiffs 24

b. Plaintiffs' own factual averments undermine any plausible "meeting of the minds". 25
3. Plaintiffs' Federal Conspiracy claims are time-barred as to acts before July 21, 2012. 26

C. The Supplemental State Law Claims Should be Dismissed. 26

D. Count II (Intentional Interference with Prospective Contractual Relations) Should be Dismissed as it is Time-barred and Fails to State a Claim. 27
1. Plaintiffs' state-law claims sound in defamation, and therefore the one-year statute of limitations for defamation should apply. 27
2. Plaintiffs' claim for intentional interference with prospective contractual relations is insufficient as Plaintiffs have failed to sufficiently plead that Penn State acted purposefully with the specific intent to harm the plaintiffs. 28

E. Count III of the Amended Complaint (Conspiracy) Should be Dismissed as Plaintiffs' Claim is Time-barred, and Plaintiffs have Failed to State a Claim for State-law Civil Conspiracy Associated with their Contractual Interference Claim. 30
1. The "overt act" was a defamatory publication, and therefore the one-year statute of limitations for defamation applies to the conspiracy claim. 30
2. Plaintiffs failed to state facts sufficient to demonstrate unlawful means or purpose, actual legal damage, or malicious intent. 30

F. Count IV of the Amended Complaint (Pennsylvania WPCL) Should be Dismissed for Failure to State a Claim. 31
1. The WPCL does not cover claims for post-termination wages. 31
2. The plaintiffs were paid their full severance amount, and therefore cannot claim severance as the basis for a WPCL claim. 32

G. Count V of the First Amended Complaint (Breach of Contract) Should be Dismissed for Failure to State a Claim, or, in the Alternative, the Court should Require a More Definite Statement. 32

IV. CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Allende v. Winter Fruit Distribs., Inc.,
709 F. Supp. 597 (E.D. Pa. 1989) 31

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 6, 22

Barmasters Bartending Sch., Inc. v. Authentic Bartending Sch., Inc.,
931 F. Supp. 377 (E.D. Pa. 1996) 29

Barsky v. Beasley Mezzanine Holdings, L.L.C.,
No. 04-1303, 2004 WL 1921156 (E.D. Pa. Aug. 30, 2004) 31, 32

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 6

Bey v. Keen,
No. 1:CV-12-00732, 2012 WL 5051924 (M.D. Pa. Oct. 18, 2012) 23

Bloom v. Nat'l Collegiate Athletic Ass'n,
93 P.3d 621 (Colo. App. 2004) 20

Bosold v. Warden, SCI-Somerset,
No. 11-4292, 2013 WL 315714 (E.D. Pa. Jan. 28, 2013) 13

Braun v. Kelsey-Hayes Co.,
635 F. Supp. 75 (E.D. Pa. 1986) 33

Britton v. Whittmanhart, Inc.,
No. 09-cv-1593, 2009 WL 2487410 (E.D. Pa. Aug. 13, 2009) 31

Cash v. Wetzel,
No. 12-cv-05268, 2014 WL 1244048 (E.D. Pa. Mar. 26, 2014) 22

Chinoy v. Pa. State Univ.,
No. 11-cv-01263, 2012 WL 727965 (M.D. Pa. Mar. 6, 2012) 8

Cindrich v. Fisher,
341 F. App'x 780 (3d Cir. 2009) 26

City of Chicago v. Int'l Coll. of Surgeons,
522 U.S. 156 (1997) 26

Corrs. U.S.A. v. McNany,
892 F. Supp. 2d 626 (M.D. Pa. 2012) 28, 29

Crane v. Yurick,
287 F. Supp. 2d 553 (D.N.J. 2003) 10

D & D Associates, Inc. v. Bd. of Educ. of N. Plainfield,
No. CIV.A. 03-1026 MLC, 2012 WL 1079583 (D.N.J. Mar. 30, 2012 20

Dennis v. DeJong,
867 F. Supp. 2d 588 (E.D. Pa. 2011) 23, 30

Dist. Counsel 33, Am. Fed'n of State Cnty. & Mun. Employees, AFL-CIO v. City of Philadelphia,
944 F. Supp. 392 (E.D. Pa. 1995) 21

Dobson v. Northumberland Cnty.,
151 F. App'x 166 (3d Cir. 2005) 8

Erb v. Borough of Catawissa,
No. 3:07-CV-1961, 2010 WL 4318886 (M.D. Pa. July 21, 2010) 17

Estate of Joseph Paterno, et al., v. National Collegiate Athletic Association, ("NCAA") et al.
No. 2013-2082 (C.P. Centre Cnty. 2014) 15, 19

Evans v. Philadelphia Newspapers, Inc.,
No. 1992, 1991 WL 1011010 (Pa. Com. Pl. Feb. 11, 1991) 27, 30

Fowler v. UPMC Shadyside,
578 F.3d 203 (3d Cir. 2009) 6

Freeman v. City of Chester,
No. 10-2830, 2010 WL 4025918 (E.D. Pa. Oct. 14, 2010) 11

Gagliardi v. Lee,
154 F. App'x 317 (3d Cir. 2005) 23

Gardella v. Prodex Int'l, Inc.,
No. CIVA 06-1821, 2006 WL 2261352 (E.D. Pa. Aug. 4, 2006) 33

Glenn v. Point Park Coll.,
272 A.2d 895 (Pa. 1971) 28

Great W. Mining & Mineral Co. v. Fox Rothschild LLP,
615 F.3d 159 (3d Cir. 2010) 24

Greene v. Street,
No. 10-4529, 2011 WL 2517144 (E.D. Pa. June 22, 2011) 18, 19

Heimenz v. Pa. Power & Light Co.,
75 Pa. D. & C.2d 405 (C.P. Lycoming Cnty. 1976) 32

Henry v. Philadelphia Adult Prob. & Parole Dep't,
CIV.A. 05-4809, 2007 WL 2670140 (E.D. Pa. Sept. 6, 2007) 19

Hill v. Borough of Kutztown,
455 F.3d 225 (3d Cir. 2006) 7, 8, 12

IDT Corp. v. Unlimited Recharge, Inc.,
No. CIV.A. 11-4992 ES, 2012 WL 4050298 (D.N.J. Sept. 13, 2012) 23

Kafando v. Erie Ceramic Arts Co.,
764 A.2d 59 (Pa. Super. Ct. 2000) 31

Kaidanov v. Pennsylvania State Univ.,
No. CIV.A. 14-3191, 2014 WL 7330462 (E.D. Pa. Dec. 23, 2014) 12, 13

Kelly v. Borough of Sayreville,
107 F.3d 1073 (3d Cir. 1997) 11

Knelman v. Middlebury Coll.,
898 F. Supp. 2d 697 (D. Vt. 2012) 20

Kost v. Kozakiewicz,
1 F.3d 176 (3d Cir. 1993) 25

Latessa v. N. J. Racing Comm'n,
113 F.3d 1313 (3d Cir. 1997) 12

Lockett v. Pa. Dep't of Corrs.,
529 F. App'x 294 (3d Cir. 2013) 12, 13

Lokuta v. Sallemi,
No. 3:CV-13-0288, 2013 WL 5570227 (M.D. Pa. Oct. 9, 2013) 10

Machesky v. Hawfield,
No. 07-9, 2008 WL 614819 (W.D. Pa. Mar. 4, 2008) 10

McCool v. City of Philadelphia,
494 F. Supp. 2d 307 (E.D. Pa. 2007) 10

Mun. Revenue Servs., Inc. v. McBlain,
No. 06-4749, 2007 WL 879004 (E.D. Pa. Mar. 19, 2007) 11

Oliver v. Nat'l Collegiate Athletic Ass'n,
155 Ohio Misc. 2d 8, 920 N.E. 2d 196 (2008) 20

Orelski v. Bowers,
303 F. App'x 93 (3d Cir. 2008) 9

Paul v. Davis,
424 U.S. 693 (1976) 8, 11

Perano v. Twp. of Tilden,
423 F. App'x 234 (3d Cir. 2011) 22

Permenter v. Crown Cork & Seal Co., Inc.,
38 F. Supp. 2d 372 (E.D. Pa. 1999) 8

Phillips ex rel. Phillips v. Northwest Reg'l Commc'ns,
391 F. App'x 160 (3d Cir. 2010) 7

Phillips v. Selig,
959 A.2d 420 (Pa. Super. Ct. 2008) 28

Rankin v. Smithburger,
No. 2:12-CV-01373, 2013 WL 3550894 (W.D. Pa. July 11, 2013) 26

Reed v. Chambersburg Area Sch. Dist. Found.,
No. 1:13-CV-00644, 2014 WL 1028405 (M.D. Pa. Mar. 17, 2014) 9

Regis Ins. Co. v. A.M. Best Co.,
No. 10-3171, 2013 WL 775521 (E.D. Pa. Mar. 1, 2013) 28, 29

Rosembert v. Borough of E. Lansdowne,
No. 13-2826, 2014 WL 1395032 (E.D. Pa. Apr. 9, 2014) 23, 25

Sampson v. Sch. Dist. of Lancaster,
No. 05–6414, 2009 WL 1675083 (E.D. Pa. June 12, 2009) 9

Snyder v. Kraus,
No. 08-5217, 2010 WL 3419890 (E.D. Pa. Aug. 27, 2010) 22

Spencer v. Steinman,
968 F. Supp. 1011 (E.D. Pa. 1997) 25

Strain v. Borough of Sharpsburg,
No. 04-1581, 2007 WL 1630363 (W.D. Pa. June 4, 2007) 27

Strickland v. Univ. of Scranton,
700 A.2d 979 (Pa. Super. Ct. 1997) 28, 30

Sturm v. Clark,
835 F.2d 1009 (3d Cir. 1987) 11

Thomas Merton Ctr. v. Rockwell Int'l Corp.,
442 A.2d 213 (Pa. 1981) 14

Veggian v. Camden Board of Education,
600 F. Supp. 2d 615 (D.N.J. 2009) 10

Young v. Kann,
926 F.2d 1396 (3d Cir. 1991) 22

STATUTES

42 U.S.C. § 1983 ..... passim

42 U.S.C. § 1985 25

42 U.S.C. § 1986 25

WPCL 26, 31, 32

OTHER AUTHORITIES

Fourteenth Amendment 8

Federal Rule of Civil Procedure 12(b)(6) 1, 2, 6

Restatement (Second) of Torts 14

I. PRELIMINARY STATEMENT

After Penn State filed its Motion to Dismiss Plaintiffs' Complaint, Plaintiffs amended their Complaint in an attempt to circumvent the dismissal of their baseless claims against Penn State.[1] While Plaintiffs have added new allegations in an attempt to defeat the legal arguments raised in the Motion to Dismiss, their efforts fall short. The First Amended Complaint, together with its exhibits, fails to contain a single factual assertion to support their claim that Penn State, the NCAA, and/or the Freeh Firm specifically targeted Mr. Jay Paterno or Mr. Kenney intending to harm them in any way, shape or form.

While the First Amended Complaint raises many issues relating to the events that unfolded following the November 2011 arrest of Jerry Sandusky, Plaintiffs were terminated because the new head coach of Penn State football hired his own staff which did not include Plaintiffs.

In January 2012, Penn State hired William J. "Bill" O'Brien as Head Coach to Penn State's NCAA football program. Like most college football coaches, Coach O'Brien was permitted to choose his own coaching staff. As is typical in situations like this, Coach O'Brien chose to replace nearly the entire assistant football coaching staff. As a result, several assistant coaches were released from their coaching positions, and their employment at Penn State was ultimately terminated. (First Amended Complaint ("FAC") ¶¶ 3, 5). Among the coaches released and terminated as a result of Coach O'Brien's coaching decisions were Plaintiffs Joseph

---

1 By filing the First Amended Complaint, Plaintiffs avoided a legal decision on the merits of Penn State's motion because their amended pleading rendered the Motion to Dismiss moot. *See Paterno et al. v. Pennsylvania State University,* Order that Defendant's Motion to Dismiss is Denied as Moot, Docket No. 12 (Dec. 3, 2014).

"Jay" V. Paterno and William Kenney. *Id.* Penn State honored its contractual obligations and compensated Plaintiffs with 18 months of full salary severance[2] as well as other benefits.

Plaintiffs' terminations were the typical result of a head coaching change at a Division I NCAA football program. Plaintiffs were not singled out in any way and were treated in the exact same manner as the other similarly situated assistant coaches who were terminated. Indeed, most would agree that Plaintiffs were treated extremely fairly having received the 18-month severance and other benefits.

Nevertheless and in an attempt to secure even more compensation from Penn State, Plaintiffs have concocted a facially implausible set of allegations that tell a false and preposterous tale of an alleged conspiracy directed at them between the NCAA, the Freeh Firm and Penn State completely devoid of any specific factual allegations to support such a claim. Plaintiffs allege that those entities agreed to embark on a course of conduct with the specific intent to cause harm to the reputations of Messrs. Paterno and Kenney. Ultimately, Messrs. Paterno and Kenney contend that it was the alleged conspiracy that caused them to be unable to secure comparable employment at other football programs. Each of Plaintiffs' allegations lack any factual foundation and fail to set forth a cognizable legal theory on which Plaintiffs could possibly recover. Accordingly, Plaintiffs' First Amended Complaint must be dismissed as a matter of law.

II. STATEMENT OF ALLEGED FACTS

Penn State disagrees with many of the facts asserted by Messrs. Paterno and Kenney and with the characterization of some of the events described in the First Amended Complaint. Nevertheless, this Court is compelled to accept Plaintiffs' well-pleaded allegations as true for

---

[2] William Kenney obtained a coaching position at another university. Accordingly, his severance was reduced by the value of the salary earned in his new position during the 18-month severance period.

purposes of Penn State's Motion to Dismiss. In that context, and for the purposes of this motion only, the following allegations from the First Amended Complaint should be considered by the Court. After reviewing these allegations and the legal argument that follows, we respectfully request this Court dismiss all of Plaintiffs' claims as a matter of law.

A. Plaintiffs' Employment at Penn State.

Plaintiff Jay Paterno, the son of former head coach Joe Paterno, was on Penn State's football coaching staff for 17 seasons, for 12 of which he served as the quarterbacks coach. (FAC ¶ 26). Plaintiff William Kenney began as a full time coach at Penn State in 1989 and held positions as offensive line coach, recruiting coordinator and offensive tackles/tight ends coach. (FAC ¶¶ 33, 34). At the time of their termination, both coaches held the title of assistant football coach. (FAC ¶ 3).

B. Plaintiffs' Termination.

In January 2012, Penn State hired a new head football coach, William J. "Bill" O'Brien. (FAC ¶ 62). Coach O'Brien did not offer Kenney or Paterno a position on his coaching staff. (FAC ¶ 63). As a result, Penn State terminated their employment at the University. (FAC ¶ 64). Penn State agreed to pay Kenney and Paterno eighteen months of Severance Pay commencing as of the date of their termination in mid-January 2012. (FAC ¶ 41).

Kenney is currently employed as an offensive line coach at Western Michigan University – an assistant coaching position. (FAC ¶ 268). Paterno alleges that he applied for a handful of head coaching positions and was not granted any interviews. (FAC ¶¶ 277-281). He also claims that he made inquiries with the national media and has been unable to secure employment there as well. (FAC ¶¶ 283-290). Significantly, Paterno does not allege that he applied for any assistant coaching positions or any other positions potentially comparable to the one he lost when Coach O'Brien decided not to retain Paterno.

C. Statements Regarding the Penn State Football Program.

Following the decision to hire Coach O'Brien, Penn State issued press releases, which are cited in Plaintiffs' First Amended Complaint. None of the press releases mention either Plaintiff by name nor do the press releases imply anything negative about the assistant coaching staff at Penn State.

More specifically, on or about January 6, 2012, Penn State issued a press release (the "O'Brien Press Release") (Plaintiffs' Exhibit C) wherein Penn State "affirmed the positive legacy of Penn State football." (FAC ¶ 70).

Upon the passing of former head football coach Joe Paterno, Penn State issued another press release (the "January 23, 2012 Press Release", Plaintiffs' Exhibit D), wherein Penn State stated: "Regrettably, Coach Paterno did not finish his coaching career in the manner he or anyone else had expected, but his coaching legacy in Happy Valley and around the nation will live on forever." (FAC ¶ 73). Bill O'Brien then issued a press release on February 18, 2012 (Plaintiffs' Exhibit E), announcing the completion of his hiring process. (FAC ¶¶ 75-76).

Penn State did not mention Kenney or Paterno in any of these statements, or any other statements identified during this period. The plain language of these press releases makes clear they had nothing whatsoever to do with Jay Paterno or William Kenney.

D. Execution of Consent Decree

Plaintiffs allege that, in November 2011, Penn State's Board of Trustees formed a Special Investigations Task Force which engaged the law firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm") to, among other goals, 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. (FAC ¶¶ 47-48). Plaintiffs also allege that the NCAA announced an investigation into

the Sandusky events, citing a letter sent by NCAA president Mark A. Emmert to Rodney A. Erickson, president of Penn State. (FAC ¶¶ 50-58, Plaintiffs' Exhibit B). On or about July 12, 2012, the Freeh Firm published its findings, opinions and conclusions of its investigation (the "Freeh Report", Plaintiffs' Exhibit F).

Soon after the issuance of the Freeh Report, the NCAA imposed a Consent Decree upon Penn State, and Penn State agreed not to challenge the Consent Decree. (Plaintiffs' Exhibit A at 2). The Consent Decree stated that for purposes of the resolution with the NCAA, Penn State accepted the Freeh Report. (FAC ¶ 94). The Consent Decree also noted that Penn State undertook "a commendable process by commissioning the independent [Freeh Firm] Investigation. [The Freeh Firm] has established an exhaustive factual record. . . . [T]he existing record permits fashioning an appropriate remedy for the violations on an expedited timetable, which benefits current and future University students, faculty and staff." (Consent Decree at 1, Plaintiffs' Exhibit A). Penn State issued a press release about the Consent Decree on July 23, 2012 ("PSU Press Release"). (Plaintiffs' Exhibit H) (FAC ¶¶ 211-212). That same day, NCAA President Mark Emmert appeared at a press conference to discuss the Consent Decree ("Press Conference Statements"). (FAC ¶¶ 181-184). At that press conference, the NCAA was asked about its future plans with respect to "individuals" at Penn State. Regarding individual PSU employees, the NCAA stated only that it had withheld judgment of individuals at least until the criminal investigations were completed. (FAC ¶ 183). The Consent Decree, the Press Conference Statements, and the July 23, 2012 Penn State Press Release made no reference whatsoever to Plaintiffs or any assistant coaches individually, or even as a group. A reading of the allegations in the First Amended Complaint and the exhibits thereto reveal that no mention of either Paterno or Kenney was made at that time.

Notwithstanding the fact that Plaintiffs were released in the normal course of a head football coaching change, and that the First Amended Complaint does not allege that Penn State ever directly or indirectly said a negative word about Kenney or Paterno, Plaintiffs claim that Penn State (i) violated Plaintiffs' civil rights because it did not affirmatively clear their names; (ii) conspired with the NCAA and the Freeh Firm with the specific intent to harm Plaintiffs; (iii) tortiously interfered with their prospective contractual relations with respect to other employment opportunities; and (iv) failed to pay Plaintiffs the equivalent of two years of salary and benefits following their termination. For the reasons set forth below, all of Plaintiffs' claims fail as a matter of law.

III. ARGUMENT

Plaintiffs have included additional averments in the First Amended Complaint; nevertheless, like the Complaint, their arguments contain nothing more than conclusory allegations without sufficient factual support to withstand this Motion to Dismiss. Indeed, each of Plaintiffs' claims fails as a matter of law – even if the allegations in the First Amended Complaint were true (which they are largely not).

Where a plaintiff does not plead sufficient facts to support the claims he asserts in his complaint, a Court should dismiss the claims pursuant to Federal Rule of Civil Procedure 12(b)(6). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to defeat a Rule 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While a district court must accept all of the complaint's well-pleaded facts as true, a complaint must do more than allege a plaintiff's entitlement to relief – it must "show" such an entitlement with its facts. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). As illustrated below, Plaintiffs' Complaint fails to meet this standard, and therefore must be dismissed with prejudice.

A. Count I of the First Amended Complaint (Violation of Civil Rights by Termination and/or Execution of the Consent Decree) Should be Dismissed for Failure to State a Claim.

In Count I and pursuant to 42 U.S.C. § 1983, Plaintiffs allege that Penn State, while acting under color of state law, deprived Plaintiffs of their liberty and property interest in their respective good name, reputation, honor and integrity, and their liberty and property interest in their Penn State Rights and NCAA Rights without due process of law. (FAC ¶ 297). Plaintiffs allege further that their civil rights were violated because Penn State terminated their employment so temporally close to the Sandusky investigation and/or by then executing the Consent Decree coupled with the NCAA's Press Conference Statements and the PSU Press Release. *Id.* Essentially, Plaintiffs allege that the failure by Penn State to affirmatively clear their names caused them to be stigmatized and unable to find future employment opportunities.

In order to state a claim under Section 1983 for deprivation of procedural due process rights, a plaintiff must allege that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of "life, liberty, or property," and (2) the procedures available to him did not provide "due process of law." *Hill v. Borough of Kutztown*, 455 F.3d 225, 233-34 (3d Cir. 2006). "Section 1983 is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred." *Phillips ex rel. Phillips v. Northwest Reg'l Commc'ns*, 391 F. App'x 160, 165 (3d Cir. 2010) (citation and internal quotation omitted).

In spite of the fact that Plaintiffs summarily allege that Penn State violated both their liberty and property interests, the only cognizable constitutional interest that Plaintiffs plead in an identifiable manner concerns an alleged interest in their reputation.[3] However, the United

[3] To the extent Plaintiffs argue a property interest in their continued employment (FAC ¶ 50), such a claim is not supported by the facts as alleged or the law. "Pennsylvania law presumes that all employment is at-will

States Supreme Court has held that "reputation *alone* is not an interest protected by the Due Process Clause" of the Fourteenth Amendment. *Hill*, 455 F.3d at 236 (citing, *inter alia*, *Paul v. Davis*, 424 U.S. 693, 701-712 (1976)). The Supreme Court explained that in order to be entitled to relief under Section 1983, a Plaintiff must establish that he has suffered harm beyond a state common law claim. *Paul*, 424 U.S. at 711-12. The allegations must involve the additional deprivation of a protected interest; accordingly, the Due Process Clause only protects a liberty interest in reputation when the plaintiff can prove both a "stigma" to his reputation "*plus* deprivation of some additional right or interest." *Hill*, 455 F.3d at 236 (emphasis in original). Here, Plaintiffs have failed to satisfy both requirements on the face of the Complaint.

1. Plaintiffs fail to plead a cognizable recognized right that satisfies the "plus" prong of the "stigma-plus" test.

Plaintiffs have failed to sufficiently plead the "plus" element of their Section 1983 claim. To satisfy the "plus" requirement, a plaintiff must demonstrate that he or she has been deprived of "a right or status previously recognized by state law." *Hill*, 455 F.3d at 237 (quoting *Paul*, 424 U.S. at 711). Plaintiffs make reference to (i) the loss of their employment at Penn State and (ii) their inability to secure specified future employment opportunities. As described below, neither of the harms alleged by Plaintiffs in this regard rise to the level of a cognizable Section 1983 claim.

---

unless the employee is able to prove otherwise by showing with 'clarity and specificity that the parties contracted for a definite period.'" *Permenter v. Crown Cork & Seal Co., Inc.*, 38 F. Supp. 2d 372, 377 (E.D. Pa. 1999). Here, both Plaintiffs were at-will employees. *See, e.g., Chinoy v. Pa. State Univ.*, No. 11-cv-01263, 2012 WL 727965, at *4 (M.D. Pa. Mar. 6, 2012) (holding that a non-tenured Penn State employee, without an employment contract allowing termination only for cause, was an at-will employee). Plaintiffs acknowledge that Coach O'Brien elected not to retain Plaintiffs as assistant football coaches. (FAC ¶ 40). An at-will employee, i.e. a party that can be fired at any time, for any reason, necessarily has no entitlement to a particular type of notice or opportunity to be heard. *See Dobson v. Northumberland Cnty.*, 151 F. App'x 166, 168-69 (3d Cir. 2005) (public employee with no protected property interest in his job has no substantive or procedural due process claims). To the extent Plaintiffs allege to have been "Fixed Term" employees, they are not alleging they could only have been released for cause. Rather, Plaintiffs are disputing what compensation they were owed for having been terminated. (FAC ¶¶ 342-351).

a. Termination of employment is not a sufficient "plus" because it was not contemporaneous to statements issued at the time of Consent Decree.

Plaintiffs' termination from Penn State does not satisfy the "plus" requirement of their Section 1983 claim because Plaintiffs have not alleged a sufficient nexus between the statements given at the time of the Consent Decree and Plaintiffs' termination of employment – events which occurred 5 months apart. In order for termination of employment to satisfy the "plus" requirement, Plaintiffs must allege a sufficiently close, contemporaneous nexus for the Court to conclude that Plaintiff was stigmatized in the course of his termination. *See, e.g.*, *Orelski v. Bowers*, 303 F. App'x 93, 94 (3d Cir. 2008) (citing *Brennan v. Hendrigan*, 888 F.2d 189, 196 (1st Cir. 1989)) (holding that delay of less than three months precluded due process claim); *see also Reed v. Chambersburg Area Sch. Dist. Found.*, No. 1:13-CV-00644, 2014 WL 1028405, at *6 (M.D. Pa. Mar. 17, 2014) (citing *Ewers v. Bd. of Cnty. Comm'rs of Curry Cnty.*, 802 F.2d 1242, 1248 (10th Cir. 1986) (holding that three-week delay between stigma and termination precluded due process claim)); *Sampson v. Sch. Dist. of Lancaster*, No. 05–6414, 2009 WL 1675083, at *9 (E.D. Pa. June 12, 2009) ("[The defamatory article] was published over a month *after* Plaintiff's termination of employment. Plaintiff's termination and the allegedly false and defamatory newspaper article are not 'roughly contemporaneous.'"). The delay of approximately five months between Plaintiffs' terminations and the execution of the Consent Decree is too long to qualify as "contemporaneous" as a matter of law. Moreover, their termination was the result of a change in the head coach position at the Penn State football program. (FAC ¶ 63). There is nothing in the First Amended Complaint which would suggest that the termination was related to the Consent Decree or the statements contained therein. As a result, Plaintiffs cannot rest their Section 1983 claim on their termination from Penn State.

b. Loss of other specific employment opportunities is not sufficient for the "plus" requirement.

Additionally, the alleged failure of Plaintiffs to secure the specific employment opportunities identified in the First Amended Complaint does not create a sufficient "plus" for a stigma-plus claim under Section 1983. While the "plus" prong can be satisfied where a plaintiff has been deprived of "his freedom to take advantage of other employment opportunities," *Veggian v. Camden Board of Education*, 600 F. Supp. 2d 615, 624 (D.N.J. 2009) (citations omitted), this is not true here, where Kenney admits that he secured employment as an assistant football coach and where Paterno admits he only sought head coaching positions. Plaintiffs do not, and cannot, allege that they have been deprived of the freedom to pursue employment in the college football field.

The stigma-plus line of cases looks to protect the liberty interest to "pursue a calling or occupation, and not the right to a specific job." *Machesky v. Hawfield*, No. 07-9, 2008 WL 614819, at *6 (W.D. Pa. Mar. 4, 2008) (quoting *Piecknick v. Commw. of Pa.*, 36 F.3d 1250, 1259 (3d Cir. 1994)). Successful claims "all deal with a complete prohibition of the right to engage in a calling. . . ." *McCool v. City of Philadelphia*, 494 F. Supp. 2d 307, 325-26 (E.D. Pa. 2007) (citing *Conn v. Gabbert*, 526 U.S. 286, 286 (1999).

Kenney is currently employed as an assistant coach at Western Michigan. (FAC ¶ 268). As such, he cannot demonstrate that he was deprived of his liberty interest in a chosen occupation merely because he may not have the specific job that he would like. *See, e.g., Lokuta v. Sallemi*, No. 3:CV-13-0288, 2013 WL 5570227, at *12 (M.D. Pa. Oct. 9, 2013) (dismissing due process claims where former judge alleged "only that she is prevented from holding judicial office, as opposed to being deprived of her ability to purse a calling in the legal field generally"); *see also Crane v. Yurick*, 287 F. Supp. 2d 553, 559 (D.N.J. 2003) ("[a]ny argument, therefore,

that Plaintiff has been foreclosed from practicing an occupation is belied by his resumption of employment approximately one year and three months from his termination . . ."). Kenney alleges that he would have liked to have been hired as an assistant coach in the NFL or at other football programs. (FAC ¶¶ 260-266). However, the law under Section 1983 simply does not protect Kenney's desire to obtain such specific employment opportunities.

To the extent Kenney may be alleging that he has a protected interest in earning a salary similar to that which he earned at Penn State, such a claim fails as a matter of law. Economic harm accompanying the alleged defamation is insufficient to satisfy this "plus" requirement. *See, e.g.*, *Kelly v. Borough of Sayreville*, 107 F.3d 1073, 1078 (3d Cir. 1997) ("[E]ven financial injury due solely to government defamation does not constitute a claim for deprivation of a constitutional liberty interest"); *Sturm v. Clark*, 835 F.2d 1009, 1013 (3d Cir. 1987) ("[F]inancial harm resulting from government defamation alone is insufficient to transform a reputation interest into a liberty interest"); *Mun. Revenue Servs., Inc. v. McBlain*, No. 06-4749, 2007 WL 879004, at *4 (E.D. Pa. Mar. 19, 2007), *aff'd*, 347 F. App'x 817 (3d Cir. 2009) ("Mere economic harm accompanying the defamation is insufficient to satisfy this 'plus' requirement"); *Freeman v. City of Chester*, No. 10-2830, 2010 WL 4025918, at *4 (E.D. Pa. Oct. 14, 2010) (citing *Boyanowski v. Capital Area Intermediate Unit.*, 215 F.3d 396, 400 (3d Cir. 2000) (plaintiff's claims of lost future clients and profits, without more, do not rise to the level of "stigma-plus" contemplated by *Paul v. Davis*)).

Paterno's Section 1983 claim also fails because he does not allege that he lost the ability to pursue employment in the field of college football. Accepting his allegations as true for the purposes of this motion, Paterno has only applied for <u>head</u> coaching jobs and careers in national sports media. (FAC ¶ 274). He has never held any such position. Paterno does not allege that

he applied for any assistant coaching positions similar to the one he held at Penn State for many years. Indeed, Paterno only applied for four head coaching jobs, and inquired about one other. (FAC ¶¶ 277, 279, 281).

Paterno's aspirations to become a head coach or a sports media star do not translate into a cognizable civil rights claim under Section 1983. As one concurring Court of Appeals judge stated: "[a] plaintiff cannot assert a liberty interest where none exists merely by limiting his chosen occupation to the point where 'occupation' becomes synonymous with 'job.'" *Latessa v. N. J. Racing Comm'n*, 113 F.3d 1313, 1324 (3d Cir. 1997). Because Paterno has failed to seek assistant football coaching positions[4], he is unable to allege that he has been excluded from the field of football coaching, and his claim fails as a matter of law.

2. None of the purportedly injurious statements is sufficient to meet the "stigma" prong of the "stigma-plus" test.

In addition to failing to allege a cognizable "plus" to their Section 1983 claim, Plaintiffs have also failed to allege that Penn State made any statements in connection with the Consent Decree, or otherwise, that could possibly satisfy the three-part "stigma" requirement of the "stigma-plus" test. *Lockett v. Pa. Dep't of Corrs.*, 529 F. App'x 294, 296 (3d Cir. 2013). In order to properly plead such a claim, Plaintiffs must allege: (1) the stigmatizing statement was made publicly; (2) the statement was substantially and materially false; and (3) the reputational harm was caused by the falsity of the statement. *Id.*[5] Statements which could only be considered

---

[4] In the First Amended Complaint, Paterno alleges that he "further attempted to locate an assistant coaching position through his backchannel relationships. . . ." (FAC ¶ 274). Not only was this alleged attempt omitted from the first pleading, the vague unsupported allegation of an "attempt to locate" a position should not be enough to overcome this motion to dismiss. Further, he fails to allege that his inability to locate such a position was in any way connected to the purported reputational harm; the only averments claiming such a connection relate to head coaching positions and jobs in the media.

[5] The Third Circuit has previously articulated a two-part test of publicity and falsity; however, the causation prong was implicit in these cases. *See, e.g., Hill,* 455 F.3d at 236. The third prong is sometimes articulated

stigmatizing through speculation cannot provide the basis of a stigma-plus claim; in a recent Eastern District decision, Judge Pratter articulated this requirement in light of the events at Penn State:

> The only publication [former fencing coach and plaintiff] Mr. Kaidanov points to is a statement made by the University that Mr. Kaidanov's termination was a "personnel matter." He claims that in the wake of the Sandusky scandal such a statement invited "rampant and unfounded speculation" by the public. However, **even in the post-Sandusky world of Penn State's Athletic Department, an innocuous and generalized statement such as the one alleged here could not be interpreted as materially false or infringing upon "reputation, honor, or integrity," without an enormous and unwarranted lunge into the realm of speculation.** Thus, the Court will dismiss Mr. Kaidanov's "stigma-plus" claim.

Kaidanov v. Pa. State Univ., No. CIV.A. 14-3191, 2014 WL 7330462, at *7 (E.D. Pa. Dec. 23, 2014) (emphasis added). As in *Kaidanov*, and as set forth below, Plaintiffs have failed to sufficiently plead an actionable "stigma" that could possibly be attributable to Messrs. Paterno and Kenney specifically:[6]

a. The Purported "Actionable Statement".

Plaintiffs cite to a specific statement in the Consent Decree, which they label the "Actionable Statement" in alleged support of the "stigma" element of the claim -- "[s]ome coaches, administrators, and football staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him." (FAC ¶ 169) (Plaintiffs' Exhibit A at 3).

---

as a requirement that the statement infringe on the plaintiff's "reputation, honor, or integrity." *See Kaidanov v. Pa. State Univ.*, No. CIV.A. 14-3191, 2014 WL 7330462, at *7 (E.D. Pa. Dec. 23, 2014).

[6] To the extent Plaintiffs may argue that other, earlier statements constitute actionable "stigma" (FAC ¶ 301), each such claim is time-barred. A cause of action accrues, and the statute of limitations begins to run, "when the plaintiff knew or should have known of the injury upon which its action is based." *See, e.g., Bosold v. Warden, SCI-Somerset*, No. 11-4292, 2013 WL 315714, at *3 (E.D. Pa. Jan. 28, 2013) (citation omitted). Plaintiffs were aware of the statements made at the time of termination by February 2012. As the present lawsuit was filed over two years and five months after that time, these claims are barred. Further, Plaintiffs fail to aver that any of these statements were false, and therefore they do not meet the second prong of the "stigma" test. *See Lockett*, 529 F. App'x at 296.

For the reasons set forth below, this purported "Actionable Statement" is not actionable at all with respect to Plaintiffs and their Section 1983 claim.

First, purely as a matter of pleading, even in this second version of their Complaint Plaintiffs fail to set forth the required specific facts that would demonstrate that this statement is substantially and materially false. *See Lockett*, 529 F. App'x at 296. Furthermore, Plaintiffs have not alleged that their purported reputational harm was caused by this statement as opposed to the overwhelming publicity surrounding the crimes committed by Mr. Sandusky and the criminal investigation and trial that preceded the Consent Decree. The First Amended Complaint does not allege that, absent this purported Actionable Statement, Plaintiffs would have suffered no reputational harm from the wide-spread publicity surrounding the events that unfolded at Penn State after November 2011. For these two reasons alone, Plaintiffs' Section 1983 claims must be dismissed.

Even more fundamentally, the purported "Actionable Statement" never mentions Plaintiffs at all. It refers to "some coaches" and "football staff members." Plaintiffs' names are not mentioned anywhere in the Consent Decree or in the Freeh Report (the document on which the Consent Decree relies).

On the other hand, when put in context, both the Consent Decree and the Freeh Report specifically identify other "coaches, administrators, and football staff members" and make very specific allegations with respect to those identified individuals. By design, Plaintiffs chose to leave this information out of the face of their pleading even though they rely on both the Consent Decree and the Freeh Report in bringing their claims. A careful and fair review of the entire Consent Decree (not just a sound bite chosen by Plaintiffs) reveals that the purported "Actionable Statement" is not related in any way to Plaintiffs, and therefore, cannot form the

basis of the "stigma" required for their Section 1983 claim. *See, e.g., Thomas Merton Ctr. v. Rockwell Int'l Corp.*, 442 A.2d 213, 216 (Pa. 1981) ("'[W]ords which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable.' Restatement (Second) of Torts, supra, s 563 Comment d. Thus, we must consider the full context of the [statement] to determine the effect the [statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.") (internal quotation and citation omitted). Plaintiffs' claim that these statements refer or relate to Jay Paterno or William Kenney is not a reasonable reading of the Consent Decree, and therefore, cannot form the basis for their Section 1983 claim.[7]

b. The Press Conference Statements by Emmert.

Plaintiffs also dubiously argue that they were harmed by statements by NCAA President Emmert during his press conference on July 23, 2012. (FAC ¶¶ 181-184). First, Plaintiffs do not, and cannot, allege that these statements were made by Penn State – they were made by the NCAA.[8] Second, Plaintiffs cannot credibly allege that the NCAA's statements are false.

---

[7] These same Plaintiffs asserted a similar claim in *Estate of Joseph Paterno, et al., v. National Collegiate Athletic Association ("NCAA") et al.* against the NCAA, however, that claim was one sounding in common law defamation (a claim that would be time-barred here). Opinion and Order, No. 2013-2082, (C.P. Centre Cnty. Jan. 7, 2014) (denying preliminary objections as to defamation) (attached as Defendant's Exhibit 1); Opinion and Order, No. 2013-2082, (C.P. Centre Cnty. Sept. 11, 2014) (reaffirming denial) (Defendant's Exhibit 2). In that case, Judge Leete overruled preliminary objections to the defamation claim with respect to the same purported "Actionable Statement". *Id.* Nevertheless, it appears that Judge Leete may not have considered some of the arguments raised in this motion and this motion concerns a Section 1983 claim – not a time-barred defamation claim. Moreover, Penn State was not even a party to that action at the time of Judge Leete's initial decision (and remains only a "nominal defendant"). Accordingly, Penn State respectfully requests this Court evaluate the purported "Actionable Statement" in the context of Plaintiffs' Section 1983 claim against Penn State and after considering the entire statement set forth in the Consent Decree – not only the self-selected sentence cited by Plaintiffs.

[8] Plaintiffs allege that Penn State "adopted" the statements of the NCAA at the Emmert press conference, but this claim is not supported by any facts. The PSU Press Release merely states that Penn State "accepts the penalties and corrective actions announced today by the NCAA." (Plaintiffs' Exhibit H) (emphasis added). Penn State did not state that it was adopting the statements by President Emmert or the NCAA at the Press Conference. Furthermore, Plaintiffs do not allege that the PSU Press Release came after the Emmert Press

Instead, the statements cited in the First Amended Complaint are forward looking statements regarding the intent of the NCAA to investigate individuals or not. For example, President Emmert stated: "we are reserving the right, after the conclusion of all of the criminal charges and proceedings that will go forward to look into any potential investigations or penalties that may need to be imposed on individuals, but for the time being, we're not doing anything with individuals." (FAC ¶ 183). This statement, and the others identified in the First Amended Complaint, express the intent of the NCAA and do not make a factual statement by Penn State that can be considered false.

c. PSU Press Release.

Finally, Plaintiffs claim that they were harmed by the PSU Press Release issued on July 23, 2012 (FAC ¶ 211) (Plaintiffs' Exhibit H). A plain reading of the sections Plaintiffs themselves identify and rely on reveals that the statements contained therein are not false (FAC ¶¶ 212-213):

- "Penn State accepts the penalties and corrective actions announced today by the NCAA"
- "Today [Penn State] accept[s] the terms of the consent decree imposed by the NCAA."
- "As Penn State embarks upon change and progress, the announcement helps to further define our course. It is with this compass that we will strive for a better tomorrow. Penn State will move forward with a renewed sense of commitment to excellence and integrity in all aspects of our University."

Here again, Plaintiffs do not, and could not, allege that the Press Release contained any false statements. These statements cannot possibly be characterized as statements of fact that are false in any way, and so the claim must fail under the falsity requirement of the "stigma" test.

Conference. It is impossible to adopt something that came later-in-time in response to a press inquiry. Finally, Plaintiffs now attempt to point to emails between and among Penn State and the NCAA which variously describe the approach to the press conference. (FAC ¶¶ 194-199). Penn State does not agree with Plaintiffs' characterization of these statements. Nevertheless, there is no allegation that the e-mails referenced by Plaintiffs were published to the public or to any prospective employer of Plaintiffs. Plaintiffs allegations, taken together, do not support an allegation that such prospective employers believed Penn State was adopting the NCAA's statements at the press conference or otherwise.

Moreover, the PSU Press Release cannot be reasonably read to refer to Plaintiffs at all. As such, the PSU Press Release cannot form the basis of Plaintiffs' Section 1983 Claim.

d. "Various Statements" in the Consent Decree.

Plaintiffs also allege that the Consent Decree contains "various statements" as to the "ingrained" "reverence for Penn State Football" that "permeated every level of the University." (FAC ¶ 217). Plaintiffs aver that these statements are an "indictment of the entire Penn State football coaching staff, including Plaintiffs, as well as Penn State's individual institutional leaders, Board members, those responsible for and participants in athletic programs, the faculty, and the student body." *Id.* The statements in Consent Decree, allegedly "implicating" the entire Penn State community, cannot rise to the level of stigmatizing the individual plaintiffs. As explained above, the Consent Decree and the Freeh Report specifically identify certain individuals – Jay Paterno and William Kenney are unequivocally not among those identified in either document. Plaintiffs' assertion that those documents stigmatized them is belied by the plain reading of those documents.

3. Silence by defendant could not constitute a negative inference creating a stigma.

Plaintiffs also allege that Penn State's lack of an affirmative statement "exonerating" them created a stigma surrounding their termination. (FAC ¶ 78). While some courts have held that silence upon termination may be sufficient to create a stigma, in each actionable instance, the employer failed to correct a specific false statement about the employee. *See, e.g., Erb v. Borough of Catawissa*, No. 3:07-CV-1961, 2010 WL 4318886, at *6 (M.D. Pa. July 21, 2010) ("In the face of accusations by the public and reports by the media that Plaintiff resigned her position without notice, whether Defendants [sic] silence constitutes their dissemination of a false impression of her is unsettled."). Unlike those cases, Plaintiffs do not allege that Penn State

made any specific statements about them. Consequently, no such exonerating statement is necessary or required under the law. Penn State's silence in response to statements that do not mention the Plaintiffs cannot constitute stigma in this case.

4. Plaintiffs' Section 1983 claim is waived because they failed to request a timely name-clearing hearing.

Assuming, arguendo, that Plaintiffs had adequately pled the requisite "stigma-plus" to sustain their due process claim (which they have not), Plaintiffs' claim also fails because they have not sufficiently pled that Plaintiffs made a timely request for a name-clearing hearing which is required by law in this context. "[I]n a deprivation of liberty interest in reputation claim, the cause of action 'arises not from the defamatory or stigmatization conduct *per se* but from the denial of a name-clearing hearing. . . . It follows that to sustain a § 1983 stigmatization claim, an aggrieved employee must plead and prove that he timely requested a name-clearing hearing and that the request was denied.'" *Greene v. Street*, No. 10-4529, 2011 WL 2517144, at *4 (E.D. Pa. June 22, 2011) (quoting *Schlichter v. Limerick Twp.*, No. 04-CV-4229, 2005 WL 984197, at *8 (E.D. Pa. Apr. 26, 2005) (emphasis added)). The requirement that a plaintiff adequately plead that he requested a name-clearing, and that his request was denied, "has long been the rule in this district." *Greene*, 2011 WL 2517144, at *4 & n.2 (citing application of the name-clearing hearing rule in nine Eastern District cases). For example, in *Greene*, the court allowed the due process claim to proceed only after the plaintiff amended his complaint to (1) provide facts about his counsel's offer to meet with defendants, and (2) plead that defendants ignored this communication. *Id.* at *5-6.

Here, Plaintiffs summarily allege that their attorneys made a request for "simple due process." (FAC ¶ 240).[9] Plaintiffs fail to plead sufficient facts to plausibly sustain this claim because they do not aver specifically (i) what "process" was requested, (ii) the date of the requests, or (iii) that the requests were at all temporally close to the alleged stigmatizing conduct. Plaintiffs must plead this element with the requisite specificity. Their failure to do so is a fatal flaw.

5. Plaintiffs' purported "Penn State Rights" and "NCAA Rights" do not give rise to a claim as a matter of law.

In their First Amended Complaint, Plaintiffs again refer to their purported "Penn State Rights" and "NCAA Rights." Any claims regarding these so-called rights are entirely unavailing.

Plaintiffs describe at length certain procedures that occur when an NCAA investigation relates to "involved individuals." (FAC ¶¶ 113-125). However, Plaintiffs never once allege that they are in the class of persons who are entitled to these procedures; i.e., the NCAA never named them as "involved individuals", and Plaintiffs have not claimed that they should have been deemed "involved individuals" in any hypothetical NCAA investigation.[10]

---

[9] Plaintiffs allege that this requirement was satisfied at "a November 14, 2012 meeting [sic]" with other coaches and the administration. (FAC ¶ 244-248). It appears that Plaintiff may have intended to allege a November 14, 2011 meeting. Nevertheless, Plaintiffs plead throughout the First Amended Complaint that it was their terminations and/or the Consent Decree which caused stigmatizing harm – neither event had taken place at the time of their November 2011 meeting with the administration. As such, it is not clear what relief Plaintiffs could have requested at the meeting which would be relevant for their present due process claim. Plaintiffs also note former coach Dick Anderson's purported request to "vindicate the names and reputations" of the Plaintiffs. (FAC ¶ 256-257). First, this was not a request for a name-clearing hearing, but merely a demand for a press release. Second, this request cannot be at all construed as timely, as it was allegedly made over seven months after the Plaintiffs' terminations.

[10] *Compare* the related state court action, in *Estate of Joseph Paterno, et al., v. National Collegiate Athletic Association ("NCAA") et al.* Opinion and Order, No. 2013-2082, (C.P. Centre Cnty. Sept. 11, 2014) (Defendant's Exhibit 2) at *7, in which the Estate of Joseph Paterno and former Penn State trustee Al Clemens actually claimed that they should have been "involved individuals." The state court held that Coach Joe Paterno was not an involved individual prior to his death, and he cannot, as a matter of law, be an "involved individual" after his death, and so his estate was not an "involved individual" as a matter of law. *Id.* at *7-*8. The court further held that the issue of whether Al Clemens was an "involved

Instead, Plaintiffs base their purported "third party beneficiary" theory on one sentence in the NCAA's mission statement describing uninvolved individuals; "an important consideration in imposing penalties is to provide fairness to uninvolved student athletes, coaches, administrators, competitors and other institutions." (FAC ¶¶ 130-133). Such a broad statement cannot confer third-party beneficiary rights, which are interpreted narrowly under Pennsylvania contract law. *See Henry v. Philadelphia Adult Prob. & Parole Dep't*, CIV.A. 05-4809, 2007 WL 2670140, at *10 - *11, (E.D. Pa. Sept. 6, 2007) *aff'd sub nom. Henry v. Philadelphia Adult Prob. And Parole*, 297 F. App'x 90 (3d Cir. 2008) ("Generally, a promisor who contracts with a government is not subject to contractual liability to a member of the public because individual members of the public are merely incidental beneficiaries. . . . **The only possible situation in which plaintiffs could recover as third-party beneficiaries under this contract would be if the contract between the defendants provided that [the promisor] would be liable to the public.**" (emphasis added)). As a matter of law, Plaintiffs were not intended third party beneficiaries to the relationship between the NCAA and Penn State.[11]

---

individual" was an issue for the jury. *Id.* at *8. Plaintiffs Jay Paterno and Kenney, who are also plaintiffs in the *Estate of Paterno* case, made no such claims.

[11] Faced with similar claims, other courts have been hesitant to find that an agreement between the NCAA and a member university creates a third-party beneficiary status, and all positive examples identified by the Defendant are confined to enforcement of NCAA's requirements enforced against those specific individuals asserting the claim. *See, e.g., Bloom v. Nat'l Collegiate Athletic Ass'n,* 93 P.3d 621, 623–24 (Colo. App. 2004); *Oliver v. Nat'l Collegiate Athletic Ass'n,* 155 Ohio Misc. 2d 8, 13–14, 920 N.E. 2d 196, 200 (2008); *see also Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 715 (D. Vt. 2012) *aff'd*, 13-2614-CV, 2014 WL 2808091 at *715 (2d Cir. June 23, 2014) (noting the low probability of establishing third-party beneficiary status under state law). Defendant has found no court which has held that all conceivably affected individuals are entitled to third-party beneficiary status as to agreements between member institutions and the NCAA.

Nevertheless, even if Plaintiffs did have third party beneficiary rights in this manner (which they do not), Plaintiffs fail to allege how these purported rights might give rise to a claim in this case. Plaintiffs do not allege a breach of contract with respect to these purported rights.[12]

Moreover, to the extent Plaintiffs rely on the purported Penn State and/or NCAA "rights" as the foundation of their 1983 due process claim, these third-party benefits are not the type of right that could constitute a sufficient basis for due process protection. *See D & D Associates, Inc. v. Bd. of Educ. of N. Plainfield*, No. CIV.A. 03-1026 MLC, 2012 WL 1079583 at *16 (D.N.J. Mar. 30, 2012) *aff'd*, 552 F. App'x 110 (3d Cir. 2014) ("A property interest warranting due process protection has been recognized as existing with respect to two types of contract rights: where (1) the contract confers a protected status, such as in the case of receipt of welfare benefits or continued tenure in the public school employment context, or (2) the contract itself includes a provision that the state entity can terminate the contract only for cause." (citing *Linan–Faye Constr. Co., Inc. v. Hous. Auth. of City of Camden,* 49 F.3d 915, 932 (3d Cir. 1995); *Unger v. Nat'l Residents Matching Program,* 928 F.2d 1392, 1399 (3d Cir. 1991)). The purported Penn State and NCAA "rights" do not relate to a protected status or to a termination for cause provision.

Because the purported Penn State and NCAA "rights" relate to process alone, those rights do not give rise to a 1983 due process violation as a matter of law. *See, e.g., Dist. Counsel 33, Am. Fed'n of State Cnty. & Mun. Employees, AFL-CIO v. City of Philadelphia*, 944 F. Supp. 392, 395-96 (E.D. Pa. 1995) *aff'd sub nom. Dist. Council 33, Am. Fed'n of State, Cnty. & Mun. Employees v. City of Philadelphia*, 101 F.3d 690 (3d Cir. 1996) ("[P]rocedural interests under

---

12 Plaintiffs do request a declaratory judgment in their Prayer for Relief; however, the basis for requesting this judgment is vague; "that the actions of Penn State violated the rights of Plaintiffs as secured to them by the applicable state and federal laws and the United States Constitution."

state law are not themselves property interests that will be enforced in the name of the Constitution."). As such, Plaintiffs fail to allege any facts to sustain a due process claim with respect to the purported Penn State and NCAA "rights".

B. All Potential Federal Statutory Conspiracy Claims are Without Merit, Time Barred, and Should Be Dismissed.

While Plaintiffs again appear to have been purposefully vague as to the underlying legal basis for their conspiracy claim, it seems likely they are pleading a federal conspiracy claim pendant to their Section 1983 claims. Such a claim fails for at least three separate and independent reasons. First, there is no plausible underlying due process claim as described in detail above. Second, Plaintiffs have not pleaded a plausible basis for the claim that Penn State "conspired to" deprive them of their constitutional rights. Third, actions alleged to have occurred prior to July 21, 2012 are time-barred as to the conspiracy claim.

1. Plaintiffs' due process rights were not violated, so there can be no conspiracy under Section 1983.

To sustain a conspiracy claim under Section 1983, a plaintiff must allege: (1) the existence of a conspiracy involving state action; and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy. *Cash v. Wetzel*, No. 12-cv-05268, 2014 WL 1244048, at *11 (E.D. Pa. Mar. 26, 2014). A Section 1983 conspiracy claim only arises when there has been an actual deprivation of a federal right. *Perano v. Twp. of Tilden*, 423 F. App'x 234, 239 (3d Cir. 2011). Because Plaintiffs have not pleaded an actionable constitutional deprivation (*see* Section III.A, *supra*) they do not have a viable conspiracy claim under Section 1983. *See, e.g.*, *Snyder v. Kraus*, No. 08-5217, 2010 WL 3419890, at *4 (E.D. Pa. Aug. 27, 2010) (dismissing claim where Plaintiffs' factual allegations in support of their conspiracy claims were the same allegations the court held did not constitute constitutional violations).

2. Plaintiffs have not pleaded a plausible basis for conspiracy under Section 1983 under the facts averred.

Plaintiffs have failed to plead any set of actions by the so-called "Conspirators" which could possibly sustain their Section 1983 conspiracy claim. Conspiracy claims must be based on more than mere suspicion and speculation. *Young v. Kann*, 926 F.2d 1396, 1405 & n.16 (3d Cir. 1991). "Where the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal,* 556 U.S. at 678 (quoting Fed. R. Civ. P. 8(a)(2)).

In the case at bar, Plaintiffs baldly allege that Penn State's acceptance of the Consent Decree was "improper", (*see, e.g.*, FAC ¶ 238), and that the so-called Conspirators' actions were "unlawful." (*see, e.g.*, FAC ¶ 336). Such conclusions are insufficient to sustain a claim. "Plaintiffs alleging a conspiracy to deprive them of their constitutional rights must include in their complaint nonconclusory allegations containing evidence of unlawful intent or face dismissal prior to the taking of discovery." *Gagliardi v. Lee*, 154 F. App'x 317, 319 (3d Cir. 2005) (citation omitted). None of Plaintiffs' vaguely pled allegations nor their alleged "facts" can support their claims of impropriety; rather, Plaintiffs merely show their disagreement with the actions of the NCAA and Penn State.

Courts routinely grant motions to dismiss where plaintiffs plead only cursory facts to support vague claims of conspiracy. *See, e.g.*, *Bey v. Keen*, No. 1:CV-12-00732, 2012 WL 5051924, at *10 (M.D. Pa. Oct. 18, 2012) ("the court finds there are no allegations in the second amended complaint to support a plan or agreement of the Defendants to conspire or engage in a corrupt plot to violate Plaintiff's civil rights. The court therefore rejects any of Plaintiff's factual contentions as clearly baseless."); *IDT Corp. v. Unlimited Recharge, Inc.*, No. CIV.A. 11-4992 ES, 2012 WL 4050298, at *14 (D.N.J. Sept. 13, 2012) ("the allegations in Plaintiffs' complaint

are simply too vague to survive a motion to dismiss. While Plaintiffs do allege that these Defendants 'combined with a common purpose,' they [do] not make explicitly clear what the actual agreement consisted of, or how the agreement was made. Plaintiffs must allege an actual agreement among Defendants for their civil conspiracy claim to survive a motion to dismiss."). Because of their lack of foundation, Plaintiffs' conspiracy claims must fail.

a. Plaintiffs have failed to allege that Penn State acted with specific intent to cause injury to Plaintiffs.

To state a claim for conspiracy, "[i]t is not enough that the end result of the parties' independent conduct caused plaintiff harm or even that the alleged perpetrators of the harm acted in conscious parallelism." *Rosembert v. Borough of E. Lansdowne*, No. 13-2826, 2014 WL 1395032, at *9 (E.D. Pa. Apr. 9, 2014) (citation omitted). Rather, Plaintiffs must show "actions taken in concert by defendants with the specific intent to violate the right protected under section 1983." *Dennis v. DeJong*, 867 F. Supp. 2d 588, 650 (E.D. Pa. 2011) (emphasis added). Plaintiffs repeatedly aver that Penn State "knew or should have known" that Plaintiffs may be harmed. Then, with no factual support, Plaintiffs conclude that "Penn State's conduct was motivated by an evil motive, malice and/or intent and/or showed a reckless and/or callous indifference to Plaintiffs' constitutionally protected rights." (FAC ¶ 317). Likewise, Plaintiffs merely conclude that "[t]he Conspirators agreed to... deprive Plaintiffs of their Penn State Rights and NCAA rights before imposing unprecedented sanctions." (FAC ¶ 338). A claim that the Defendant "knew or should have known", or acted "recklessly", does not create an inference of specific intent as to the violation of the Plaintiffs' rights.

Further, Plaintiffs' argument that Penn State knew that it had a choice to follow "the traditional infractions method that would have ensured due process for Plaintiffs" is entirely baseless. (FAC ¶ 204). Again, Plaintiffs never once claim to be within the class of individuals

that would have been "owed" process under the NCAA's own rules. They do not claim that they should have been properly identified as "involved individuals." (See Section III.A, *supra*).

Instead, Plaintiffs' own averments lend support to the conclusion that Penn State's intent with respect to the Consent Decree was not related to Plaintiffs at all. Accordingly, the Section 1983 conspiracy claim fails as a matter of law.

b. Plaintiffs' own factual averments undermine any plausible "meeting of the minds".

Additionally, to sufficiently support a conspiracy claim, a plaintiff must allege "facts that plausibly suggest a meeting of the minds." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 179 (3d Cir. 2010). Such a meeting of the minds, moreover, must be "to violate [plaintiff's] constitutional rights." *Rosembert*, 2014 WL 1395032, at *9 (citing *Startzell v. City of Philadelphia*, 533 F.3d 183, 205 (3d Cir. 2008)).

Here, Plaintiffs allege that the Consent Decree was "imposed" on Penn State. Specifically, Plaintiffs state:

- "Unknown NCAA employees communicated to and **implicitly threatened** Penn State's counsel that the "death penalty" was on the table for Penn State, despite knowing that no such "death penalty" could have lawfully been imposed on Penn State under the NCAA rules";
- "Emmert **threatened**, and Penn State accepted, that, if Penn State went to the media, the "death penalty" sanction would be certain, thus compelling and receiving silence from Erickson and Penn State"

(FAC ¶ 339) (emphasis added). These allegations must be taken as true for the purposes of this motion, and they directly contradict Plaintiffs' conclusory allegations that Penn State "conspired" with the NCAA or agreed to the Consent Decree "in order to deprive Plaintiffs of their procedural and due process rights." (FAC ¶ 334). Plaintiffs cannot have it both ways. As

"[a]greement is the *sine qua non* of a conspiracy", Plaintiffs' own averments defeat their conspiracy claim. *Spencer v. Steinman*, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997).[13]

3. Plaintiffs' Federal Conspiracy claims are time-barred as to acts before July 21, 2012.

In this Circuit, as a matter of federal law, the statute of limitations for a conspiracy claim runs from "*each* overt act causing damage." *Kost v. Kozakiewicz*, 1 F.3d 176, 191 (3d Cir. 1993) (emphasis added). The Third Circuit has expressly rejected the "last overt act rule," which "would invite attempts to revive time-barred injuries by piggy-backing them onto actions occurring within the relevant period." *Id.* (quoting *Wells v. Rockefeller*, 728 F.2d 209, 217 (3d Cir. 1984)); *see also Rankin v. Smithburger*, No. 2:12-CV-01373, 2013 WL 3550894, at *5 - *6 (W.D. Pa. July 11, 2013) (holding that time-barred violations occurring before the final overt act may not be considered as "overt acts" that make up plaintiff's conspiracy claim)).

Accordingly, to the extent Plaintiffs rely on allegations that occurred prior to July 21, 2012 (two years prior to the filing of the original Complaint) to support their federal conspiracy claim, such a claim fails as a matter of law. *See Rankin*, 2013 WL 3550894, at *5-6 (dismissing Section 1983 conspiracy claims as to events occurring more than two years before complaint was filed).

C. The Supplemental State Law Claims Should be Dismissed.

Plaintiffs' claims for tortious interference with prospective contracts, the associated conspiracy claim, their claim under the WPCL, and claim for breach of contract are substantive state law claims. Because Plaintiffs' federal due process claim in Count I fails (along with its associated conspiracy claim), the Court should dismiss the remaining state law claims, as they

---

[13] Defendant acknowledges that federal conspiracy claims may also be brought under 42 U.S.C. § 1985(3) and 42 U.S.C. § 1986. However, such claims were not specifically pled by Plaintiffs, and are inapposite to the well-pleaded facts of the Complaint.

involve the same set of facts and the interests of efficiency, convenience, and fairness require dismissal of those claims on their merits.

A federal district court may exercise supplemental jurisdiction over state law claims that are (1) related to claims over which the court does have original jurisdiction, and (2) when the court has made a discretionary determination that the values of judicial economy, convenience, fairness, and comity make the exercise of jurisdiction appropriate. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 167, 172-73 (1997). When a federal court has supplemental jurisdiction over state law claims, "it has discretion to exercise or decline to exercise this jurisdiction." *Cindrich v. Fisher*, 341 F. App'x 780, 789 (3d Cir. 2009). The Court should exercise discretion to assume supplemental jurisdiction over state law claims when the interests of efficiency, judicial economy, convenience, fairness, and comity are served. *See Strain v. Borough of Sharpsburg*, No. 04-1581, 2007 WL 1630363, at *10 (W.D. Pa. June 4, 2007).

Here, as the facts that the Court needs to consider to decide the due process claim(s) are the same facts on which Plaintiffs rely for their state law claims, the interests of efficiency, convenience, and fairness require the Court to assume supplemental jurisdiction over Plaintiffs' state law claims and dismiss them as well.

D. Count II (Intentional Interference with Prospective Contractual Relations) Should be Dismissed as it is Time-barred and Fails to State a Claim.

1. Plaintiffs' state-law claims sound in defamation, and therefore the one-year statute of limitations for defamation should apply.

Where the gravamen of an action for interference with a contractual relationship is based on the commission of a tort, the statute of limitations for that tort must govern. *Evans v. Philadelphia Newspapers, Inc.*, No. 1992, 1991 WL 1011010, at *36 (Pa. Com. Pl. Feb. 11, 1991), *aff'd*, 411 Pa. Super. 244, 601 A.2d 330 (1991). In *Evans*, the court reasoned that "in creating a cause of action for tortious interference with a contract, there is nothing to suggest that

the courts intended that a claim which was basically one of defamation should be given a two year statute of limitations." *Id.* The court further held that the plaintiff's claim for tortious interference with a contractual relationship must be dismissed where it was not filed within one year of the alleged defamatory statement that formed the basis for the claim. *Id.*

As in *Evans*, here the Plaintiffs' tortious interference claim is premised on allegedly defamatory statements, the latest of which was made on July 23, 2012 (FAC ¶ 211) (Plaintiffs' Exhibit H, "PSU Press Release"). As such, the statute of limitations ran one year from that date, and Plaintiffs' claim is now time-barred.

2. Plaintiffs' claim for intentional interference with prospective contractual relations is insufficient as Plaintiffs have failed to sufficiently plead that Penn State acted purposefully with the specific intent to harm the Plaintiffs.

Plaintiffs have not pleaded the single most important element of an intentional interference claim: that there was "purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring." *Strickland v. Univ. of Scranton*, 700 A.2d 979, 985 (Pa. Super. Ct. 1997). Without facts to sustain this required element, Count II and any related state-law conspiracy claims should be dismissed.

The Plaintiffs have failed to plead any facts supporting their conclusion that Penn State acted with the specific intent to prevent Plaintiffs from obtaining comparable employment at other college football programs. Indeed, such a claim would be absolutely baseless – which is likely why it was omitted from both the original and the Amended Complaint.

The Pennsylvania Supreme Court held "[i]t must be emphasized that the tort we are considering is an intentional one: the actor is acting as he does [f]or the purpose of causing harm to the plaintiff. . . The defendant must not only have intended the interference, but must have

acted in part at least for the purpose of accomplishing it." *Glenn v. Point Park Coll.*, 272 A.2d 895, 899 (Pa. 1971) (citations omitted); *see also Phillips v. Selig*, 959 A.2d 420, 429 (Pa. Super. Ct. 2008) ("[t]he second element requires proof that the defendant acted for the specific purpose of causing harm to the plaintiff"); *Regis Ins. Co. v. A.M. Best Co.*, No. 10-3171, 2013 WL 775521, at *12 (E.D. Pa. Mar. 1, 2013) (granting summary judgment where nothing in the record supported plaintiff's contention that defendant specifically intended to harm his existing or prospective contractual relations); *Corrs. U.S.A. v. McNany*, 892 F. Supp. 2d 626, 644 (M.D. Pa. 2012) (same).[14] Because the First Amended Complaint is completely devoid of any fact supporting the inference that Penn State took action with the intent to prevent Paterno and Kenney from obtaining other coaching positions, the claim must be dismissed as a matter of law.

Plaintiffs allege a litany of events that Penn State "knew or should have known" would allegedly occur and cause harm to Plaintiffs. (FAC ¶¶ 131, 137-151, 155, 164, 166, 298, 339). However, in the context of tortious interference, knowledge of a mere possibility does not equal specific intent. *See, e.g., Regis Ins. Co.*, 2013 WL 775521, at *12 (holding that "nothing in the record supports the argument that [defendant] downgraded [plaintiff's company] for the express purpose of causing it to lose existing or prospective business. . . It is, of course, possible that if a rated entity is downgraded, this could cause harm to its business. But such harm is not the specific intent of the rating. It is merely an indirect effect."). Likewise, Plaintiffs' allegations that Penn State's actions were "malicious" (FAC ¶¶ 325-326) is a conclusion wholly unsupported by facts; as such, the claim must fail.

---

[14] An alternative formulation holds that "[a] defendant need not act with the specific intent of interfering with plaintiff's contracts. Rather, the second prong is satisfied if defendant acts improperly and with the knowledge that such interference is substantially certain to occur." *See, e.g., Barmasters Bartending Sch., Inc. v. Authentic Bartending Sch., Inc.*, 931 F. Supp. 377, 386 (E.D. Pa. 1996). Plaintiffs fail to allege any facts to meet this "substantially certain" standard.

E. Count III of the Amended Complaint (Conspiracy) Should be Dismissed as Plaintiffs' Claim is Time-barred, and Plaintiffs have Failed to State a Claim for State-law Civil Conspiracy Associated with their Contractual Interference Claim.

1. The "overt act" was a defamatory publication, and therefore the one-year statute of limitations for defamation applies to the conspiracy claim.

To the extent that Plaintiffs' vague conspiracy claim is one brought under Pennsylvania common law (as opposed to Federal law as discussed above), such a claim is time-barred pursuant to the statute of limitations applicable to defamation claims. The court in *Evans v. Philadelphia Daily News*, discussed above, also addressed a conspiracy claim similar to the Plaintiffs', which could be "characterized both as a conspiracy to defame and as a conspiracy to tortiously interfere with a contract." *Evans*, 1991 WL 1011010, at *37 (citations omitted). The court held that the "overt act in either instance was the defamatory publication [in the press]." *Id.* The statute of limitations is therefore one year, and the statute ran one year from the date of the last overt acts specifically alleged; July 23, 2012. (FAC ¶¶ 6, 90, 211).

2. Plaintiffs failed to state facts sufficient to demonstrate unlawful means or purpose, actual legal damage, or malicious intent.

Plaintiffs' purported common law conspiracy claim also fails because Plaintiffs have not properly pleaded the elements of such a claim. In Pennsylvania, to state a cause of action for civil conspiracy, the following elements are required: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. *Dennis*, 867 F. Supp. 2d at 657 (citing *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003); *Strickland*, 700 A.2d at 987-88). Crucially, proof of malice or an intent to injure is essential to the proof of a conspiracy. *Strickland*, 700 A.2d at 988.

Plaintiffs' claim for state-law conspiracy fails for reasons similar to the failure of their federal conspiracy claim; namely, that Plaintiffs' allegations of malice or intent to injure are bald assertions that must be ignored, and that there was no unlawful act or unlawful purpose by any so-called "conspirator." (discussion at section III.B, *supra*). As such, Plaintiffs' state-law conspiracy claim fails.

F. Count IV of the First Amended Complaint (Pennsylvania WPCL) Should be Dismissed for Failure to State a Claim.

Plaintiffs' penultimate claim is brought pursuant to the Pennsylvania Wage Payment and Collection Law ("WPCL"). The statute does not itself create a right to compensation; rather, a contract between the parties governs whether specific wages or commissions have been earned. *Kafando v. Erie Ceramic Arts Co.*, 764 A.2d 59, 61 (Pa. Super. Ct. 2000). Plaintiffs cannot sustain a claim under the WPCL because (1) they base their claim on post-termination wages, and (2) have already been paid their agreed-upon severance payment.

1. The WPCL does not cover claims for post-termination wages.

The WPCL applies only to "back wages already earned." *Allende v. Winter Fruit Distribs., Inc.*, 709 F. Supp. 597, 599 (E.D. Pa. 1989) (granting motion to dismiss plaintiff's claim for compensation post-dating termination, except for bonus payments). In the case of a terminated employee, the WPCL applies only to wages earned prior to termination. *Cf. Britton v. Whittmanhart, Inc.*, No. 09-cv-1593, 2009 WL 2487410, at *6 (E.D. Pa. Aug. 13, 2009) (denying motion to dismiss only where employee "incentive plan" and "commission agreement" created a potential contractual right to payment in addition to salary).

Lost future earnings are more appropriately categorized as expectation damages. These lost earnings arise when the employee is prevented from performing the required services by reason of the alleged improper termination and are not covered by the statutory remedy. *Barsky*

v. Beasley Mezzanine Holdings, L.L.C., No. 04-1303, 2004 WL 1921156, at *2-3 (E.D. Pa. Aug. 30, 2004) (holding that Plaintiff's claims were either for lost future wages and payments, or for separation pay that does not qualify for collection under the WPCL).

Paterno and Kenney claim that they were "entitled to receive full wages and benefits through the end of the 2012 academic year", six months past their termination date. (FAC ¶ 343). These wages are clearly "lost future earnings" not covered by the WPCL. *See Barsky*, 2004 WL 1921156, at *2. The Plaintiffs cannot state a claim for relief under this statute.

2. The plaintiffs were paid their full severance amount, and therefore cannot claim severance as the basis for a WPCL claim.

Plaintiffs also claim that they were entitled to eighteen months of severance pay, but do not claim that they are owed any severance payment. Rather, they merely claim that this 18-month severance pay period was "accelerated" to commence at the time of their termination. (FAC ¶ 345). Since the entire severance amount was paid to Plaintiffs, Plaintiffs cannot sustain a claim under the WPCL on the basis of this alleged obligation. *Cf. Heimenz v. Pa. Power & Light Co.*, 75 Pa. D. & C.2d 405, 406 (C.P. Lycoming Cnty. 1976) (denying preliminary objections to WPCL claim where severance was not paid to plaintiff).

G. Count V of the First Amended Complaint (Breach of Contract) Should be Dismissed for Failure to State a Claim, or, in the Alternative, the Court should Require a More Definite Statement

For the first time in their First Amended Complaint, Plaintiffs claim that Penn State has breached its contract by ceasing to make wage and benefit payments to Plaintiffs in mid-July, 2013 – eighteen months after Plaintiffs were terminated. Plaintiffs' argument regarding a breach of contract is undermined by their own averments, and therefore fails to state a claim upon which relief may be granted.

Plaintiffs claim that they were promised "their full salary through the end of the academic year." (FAC ¶ 353). However, Plaintiffs (perhaps tacitly acknowledging that they were at-will employees) do not claim that they were promised continued employment by virtue of their agreement with Penn State employee Erikka Runkle. Per Plaintiffs' own averments, Runkle did not promise (and could not have promised) that they would not be terminated. (FAC ¶ 353). Plaintiffs' view regarding the proposed employment arrangement is altogether unclear; if they believe that they were to be retained as employees, they have not so stated in their Amended Complaint.

Even if the Plaintiffs did argue that Runkle's statement constituted an offer of employment through the end of the academic year, such an argument would fail. First, the statement cannot overcome Pennsylvania's strong presumption of at-will employment. *See, e.g.*, *Braun v. Kelsey-Hayes Co.*, 635 F. Supp. 75, 77 (E.D. Pa. 1986) ("the plaintiff has the burden of overcoming the presumption under Pennsylvania law that employers may terminate employees at will for any reason, at any time, absent a contract or statute which provides otherwise."). Second, Plaintiffs have not pled, with specificity, an essential part of the alleged employment contract: "the details of the agreement including the duration of the employment position." *Gardella v. Prodex Int'l, Inc.*, No. CIVA 06-1821, 2006 WL 2261352, at *1 (E.D. Pa. Aug. 4, 2006) (noting requirements for pleading at Motion to Dismiss stage).

Rather, Plaintiffs' sole claim is that they were promised "their full salary through the end of the academic year." (FAC ¶ 353). Plaintiffs, in fact, received an equivalent of three times this amount; the equivalent of 18 months of salary and benefits from Penn State (reduced only in Kenney's case when he secured other employment). By Plaintiffs' own averments, Penn State exceeded the allegedly promised salary and benefits by its severance payment.

Under the facts as viewed in the most favorable light to the Plaintiff, there was no contract to retain Plaintiffs as employees, and their claim must fail. Defendant therefore respectfully requests that the Court dismiss this count, or, in the alternative, requests that Plaintiffs provide a more definite statement regarding the alleged contract.

IV. CONCLUSION

Because of the deficiencies in Plaintiffs' First Amended Complaint, Penn State respectfully requests that the Court grant its Motion to Dismiss and dismiss with prejudice Plaintiffs' First Amended Complaint in its entirety for failure to state a claim upon which relief may be granted.

Dated: January 7, 2015

Respectfully submitted,

/s/ Joseph F. O'Dea, Jr.

Joseph F. O'Dea, Jr., Esq.
PA Attorney ID No. 48370
Nicholas J. Nastasi, Esq.
PA Attorney ID No. 82102
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA, 19102-2186
T: (215) 972-7109

Attorneys for Defendant
Pennsylvania State University

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Joseph ("Jay") V. Paterno and William Kenney	:	CIVIL ACTION
	:	No. 14-4365-LS
v.	:	
The Pennsylvania State University	:	**JURY TRIAL DEMANDED**

ORDER

AND NOW, this _____ day of _____, 2015, upon consideration of the Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint (the "Motion") and Plaintiffs' Response In Opposition thereto and Memorandum of Law in Support thereof, **IT IS HEREBY ORDERED** that the Motion is **denied** in its entirety. Defendant The Pennsylvania State University is directed to file its Answer in accordance with the Federal Rules of Civil Procedure within the prescribed time period.

BY THE COURT:

_____
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Joseph ("Jay") V. Paterno and William Kenney	:	CIVIL ACTION
	:	
	:	No. 14-4365-LS
v.	:	
	:	
The Pennsylvania State University	:	**JURY TRIAL DEMANDED**

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Plaintiffs Joseph "Jay" V. Paterno ("Paterno") and William Kenney ("Kenney") (Paterno and Kenney, collectively, "Plaintiffs"), by and through their attorneys, Mitts Law, LLC, and The Mazurek Law Firm, LLC, hereby file this Response In Opposition (this "Response") to Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint (the "Motion"), and incorporate its attached Memorandum of Law in support of this Response, and related exhibits attached thereto, as though set forth at length herein. Plaintiffs respectfully request that this Court deny the Motion for the reasons set forth in the attached Memorandum of Law.

WHEREFORE, upon consideration of Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint, Plaintiffs' Response In Opposition thereto and the Memorandum of Law submitted in support thereof, Plaintiffs respectfully request that the Court deny the Motion in its entirety.

Respectfully submitted,

MITTS LAW, LLC

By: */s/ Gerard M. McCabe*

Maurice R. Mitts, Esquire
Gerard M. McCabe, Esquire
1822 Spruce Street
Philadelphia, PA 19103
(215) 866-0110
mmitts@mittslaw.com
gmccabe@mittslaw.com

THE MAZUREK LAW FIRM, LLC

By: */s/ Edward R. Mazurek*
Edward R. Mazurek, Esquire
717 South Columbus Boulevard
Philadelphia, PA 19147
(215) 988-9090
emazurek@mazureklawfirm.com

ATTORNEYS FOR PLAINTIFFS JOSEPH "JAY" V. PATERNO AND WILLIAM KENNEY

Dated: March 2, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Joseph ("Jay") V. Paterno and William Kenney	:	CIVIL ACTION
	:	No. 14-4365-LS
v.	:	
The Pennsylvania State University	:	**JURY TRIAL DEMANDED**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Plaintiffs Joseph "Jay" V. Paterno ("Paterno") and William Kenney ("Kenney") (Paterno and Kenney, collectively, "Plaintiffs"), by and through their attorneys, Mitts Law, LLC, and The Mazurek Law Firm, LLC, hereby submit for the Court's consideration this Memorandum of Law in Support of their Response In Opposition (this "Response") to Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint (the "Motion"). For the reasons set forth below, Plaintiffs respectfully request that this Court deny the Motion of Defendant The Pennsylvania State University ("Penn State"), thereby requiring Penn State to file its Answer to the First Amended Complaint (the "FAC")[1] consistent with the Federal Rules of Civil Procedure.

I. SUMMARY OF ARGUMENT

This lawsuit arises from the tragic events surrounding the horrific criminal conduct of Gerald A. Sandusky, a former Penn State assistant football coach. Following the national and international negative publicity suffered by Penn State as a result of the Sandusky Scandal, Penn State reacted by terminating Plaintiffs from Penn State's employment in mid-January 2012 (the "Termination") and thereafter executing the Consent Decree with the NCAA that deprived Plaintiffs of their liberty interests in their reputations. Prior to the Termination and Consent Decree, Paterno and Kenney had exemplary reputations and had brought considerable distinction and acclaim to Penn State during their lengthy years of service.

[1]Defined terms cited herein have the same definition as ascribed to them in the FAC.

Despite Penn State's effort to spin the facts and frame this case as being about Plaintiffs' alleged "sour grapes" over not being retained by Penn State's new head football coach, this case is **not** about anything so trivial. Indeed, Plaintiffs have explicitly stated that they are not complaining about not being retained. *See* FAC ¶¶35 n.2, 65. Rather, this case centers on Penn State's abrogation of Plaintiffs' federally protected liberty interests in their reputations when Penn State executed the Consent Decree that stigmatized Plaintiffs by alleging that "[s]ome coaches ... ignored the red flags of Sandusky's behaviors and no one warned the public about him." A state court judge, reviewing this same Actionable Statement, has already concluded that the Actionable Statement was potentially stigmatizing and could reasonably be understood to imply that Plaintiffs were complicit in a cover-up of child sexual abuse.

Penn State was well aware of the consequences of its actions. The Consent Decree explicitly stated that "Penn State expressly ... waive[d] any claim to further process, including ... any right to a determination of violations by the NCAA Committee on Infractions, any appeal ..., and any judicial process ... ." In this way, Penn State and the NCAA conspired to waive the traditional NCAA infractions process to which Plaintiffs were entitled once they were named in the Consent Decree, thereby denying them the opportunity to vindicate their reputation and demonstrate their lack of involvement in any alleged cover-up.

The Actionable Statement was a gratuitous pot-shot at the very visible and easily identifiable assistant coaching staff, including Plaintiffs, and had no purpose in effectuating the Consent Decree. Worse, the Actionable Statement was unsubstantiated and impugned Plaintiffs' hard-earned good names and reputation. Because Penn State's actions were taken in connection with Penn State's (i) waiver of Plaintiffs' rights as "involved individuals" under the NCAA Bylaws[2] and (ii) termination of Plaintiffs' public employment as coaches, and because Penn State took this reputational swipe at Plaintiffs without affording them the requisite name-clearing

[2]*See* FAC ¶307(b) (confirming that Plaintiffs are seeking relief in the FAC as "involved persons").

hearing that Plaintiffs repeatedly demanded to no avail, Plaintiffs have thus satisfied the stigma plus requirements.

Penn State's stigmatization of Plaintiffs' reputation denied Plaintiffs the ability to find comparable employment. After publication of the Actionable Statement, Plaintiffs applied for positions with **comparable** professional and/or top tier Division I college football programs, but were met with disdain and disinterest. Thus, Penn State's actions and decisions to act in concert with the NCAA to forego the traditional NCAA infractions process (the protections to which Plaintiffs were entitled as "involved persons" since they were effectively named in the Consent Decree), caused reputational harm to Plaintiffs.

Plaintiffs have thus sustained their burden at this pleading stage of setting forth a cognizable claim for the deprivation of their liberty interests in their reputations and related state law claims for civil conspiracy and intentional interference with prospective contractual relations, as well as for their wage and breach of contract claims.

II. PROCEDURAL HISTORY

Plaintiffs filed their original Complaint on July 21, 2014 (Doc. No. 1). Penn State thereafter filed a Motion to Dismiss (Doc. No. 5). Plaintiffs filed an Amended Complaint (Doc. No. 11). As a result, the Court ruled that Penn State's initial Motion to Dismiss was dismissed as moot. *See* Doc. No. 12. Penn State renewed its Motion to Dismiss (Doc. No. 14). Penn State's current Motion is solely predicated upon Federal Rule of Civil Procedure 12(b)(6).

III. STATEMENT OF FACTS

The brief rendition of the facts cited in the Motion is incomplete and this Response provides a fuller explication of those facts relevant to the issues raised by the Motion.

A. Plaintiffs

Immediately prior to the Termination, Penn State employed each Plaintiff as an assistant football coach for Penn State's intercollegiate football team and each was a well-respected NCAA top tier Division I collegiate football coach. *Id.* ¶18. Prior to the Termination, there was

a widely-shared belief among professional and collegiate football organizations that based upon each Plaintiffs' reputation and successes as assistant football coaches, they would have been well-sought after and desired prospective coaches, either as head coaches or assistant coaches, had they decided to leave their positions with Penn State. *Id.* ¶19.

1. Jay Paterno

Paterno, the son of Joe Paterno ("Joe Paterno"), the former head football coach of Penn State, was on Penn State's football coaching staff for 17 seasons, 12 of which Paterno served as Penn State's quarterbacks coach. *Id.* ¶26. As of the date of the Consent Decree, Paterno had served as a Division I collegiate football coach for 21 years. *Id.* ¶¶271, 26-29. Before the execution of the Consent Decree, Paterno was a top candidate for open head coaching positions at other comparable institutions. *Id.* ¶272. Paterno had been approached during his time at Penn State by other universities and search firms exploring his potential interest in head coaching vacancies. *Id.* ¶273.

After Penn State terminated Paterno and after the execution of the Consent Decree, Paterno sought other employment either as a head football coach or a media commentator, and further attempted to locate an assistant coaching position through his backchannel relationships to no avail. *Id.* ¶274. Transitioning from his position to a head coaching role was a logical and customary progression for someone with Paterno's experience and reputation. *Id.* ¶275. Paterno was well-qualified to receive such an offer. *Id.* ¶276. Accordingly, Paterno applied for the open head coaching positions at the University of Connecticut and James Madison University, where he had worked earlier in his career. *Id.* ¶277.

Based on his qualifications and experience, Paterno was a strong candidate for each position; however, Paterno was not even interviewed by either school, and the open positions went to candidates with less coaching experience. *Id.* ¶278. Paterno also applied for head coaching vacancies at the University of Colorado and Boston College. *Id.* ¶279. Paterno was not granted an interview at either school. *Id.* ¶280.

Paterno 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. As a result, the program in question did not grant interviews to any candidates from Penn State. *Id.* ¶281. 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 in the Consent Decree. *Id.* ¶282.

Paterno also engaged in discussions with various media companies, including ESPN, CBS Sports and Fox Sports, about serving as a college football commentator. *Id.* ¶283. Paterno had had prior dealings with officials at each company, and they were aware of his experience as a columnist for StateCollege.com for nearly three (3) years. *Id.* ¶284. Before the execution of the Consent Decree, ESPN advised 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. *Id.* ¶285. The ESPN plan was to have Paterno start working as a commentator during the 2012 football season. These discussions were later discontinued. *Id.* ¶286.

Upon information and belief, officials at the ESPN network were nervous about the Sandusky Scandal and the Consent Decree's unsupported finding that Paterno and other coaches had ignored "the red flags of Sandusky's behaviors" and failed to report Sandusky's crimes. *Id.* ¶287. 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. *Id.* ¶288. Despite these discussions, that position with ESPN never came to fruition and Paterno received no offer. *Id.* ¶289.

During the spring 2013, Paterno had similar discussions with representatives of CBS Sports and Fox Sports, who had earlier expressed some interest in Paterno's services. Again, nothing materialized. *Id.* ¶290. Paterno's hiring was considered too controversial, because if they placed Paterno in an "on-the-air" position, the networks would have no choice but to have

Paterno publicly address past events at Penn State and developments arising from the Sandusky Scandal, given the baseless findings as set forth in the Consent Decree and Freeh Report, and those public statements concerning such documents. *Id.* ¶291. Paterno is not currently employed other than as a freelance sports columnist, consultant and a soon-to-be author. *Id.* ¶292.

2. Bill Kenney

As of the date of the Consent Decree, Kenney had served as a Division I collegiate football coach for 27 years. *Id.* ¶¶258, 30-34. Kenney 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 NFL, including several first-round draft choices. *Id.* ¶259.

After Penn State terminated Kenney, Kenney made a determined effort to secure other employment as a football coach. *Id.* ¶260. Kenney 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. *Id.* ¶261. Kenney also applied for open coaching positions in the NFL, with franchises such as the New York Giants, Indianapolis Colts, and Cleveland Browns. Kenney was experienced and well-qualified for these positions. *Id.* ¶262.

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, rather than on Kenney's credentials and approach as a football coach. *Id.* ¶263. Despite interviews or discussions with schools such as the University of Massachusetts and NFL teams such as the New York Giants and Indianapolis Colts, Kenney was not offered a position. In most instances, the positions he applied for went to less experienced and less qualified candidates. *Id.* ¶264.

During the course of his pursuit for new employment, 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 any decision to hire him. *Id.* ¶265. 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. *Id.* ¶266.

Kenney was exceptionally well-qualified for the positions for which he applied and was interviewed, and, upon information and belief, Kenney would have received job offers from these programs had it not been for the disparaging accusations leveled against Kenney by Penn State. *Id.* ¶267. After over a year of frustration and disappointment, Kenney eventually secured employment as an offensive line coach at Western Michigan University ("Western Michigan"). *Id.* ¶268. While Kenney enjoys his new role at Western Michigan and greatly appreciates the opportunity, Kenney 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, either as an assistant coach or head coach. *Id.* ¶269. Kenney's professional career has suffered an extraordinary set-back and his future opportunities and earning potential have been harmed by Penn State's conduct. *Id.* ¶270.

B. Fixed Term Employment Appointments

During Plaintiffs' tenure with Penn State, Penn State's custom and practice was to treat each assistant football coach as a 12-month Fixed Term Appointee who was entitled to receive full wages and benefits from the start of the academic year in which they were coaching (*i.e.*, July 1st) through the end of the academic year (*i.e.*, June 30th). *Id.* ¶35. The assistant coaches were entitled to these benefits ***even if*** they were **released** from their coaching duties by the head football coach without cause at any time during and prior to the end of the academic year. *Id.*

Plaintiffs' wages and benefits were spread throughout a 12-month period with the majority of football coaching responsibilities being front loaded and occurring during the summer and fall football season beginning in July and lasting through December and possibly early January, which included early mornings, long nights, weekend games and practices and significant travel time. *Id.* ¶36.

In addition, it was Penn State's custom and practice that Penn State provided to each released assistant football coach an 18-month severance package (the "Severance Pay Period") that included the continuation of the then-current level of wages and benefits for 18 months and would begin on the July 1st after their release and extend through to the end of the following year (at the conclusion of 18 months). *Id.* ¶37.

Consistent with this custom and practice, Erikka Runkle, Penn State's Human Resources Manager for Intercollegiate Athletics, orally agreed with and told both Paterno and Kenney in mid-December 2011 that, if they were not retained by Penn State's yet-to-be-selected new football coach, they would each be paid their full wages and benefits, at their current level, through the end of the academic year with the Severance Pay Period to follow. *Id.* ¶39.

When Penn State's new football coach did not select Paterno and Kenney, Plaintiffs expected to be treated in the manner consistent with Penn State's custom and practice and as otherwise agreed to by Ms. Runkle one month earlier. *Id.* ¶40. Instead, Penn State purposefully accelerated the Severance Pay Period to commence as of mid-January 2012, and, without ever receiving from Penn State any formal notice of their termination, Penn State ceased paying all wages and benefits to Plaintiffs as of mid-July 2013. *Id.* ¶42. By so doing, Penn State wrongfully avoided payment to Plaintiffs of those 6-months of wages and benefits from mid-January through July 2012. *Id.* ¶43.

C. The Termination, Freeh Investigation & Execution of Consent Decree

On November 11, 2011, Penn State's Board of Trustees formed a Special Investigations Task Force which engaged the 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. *Id.* ¶47.

On November 17, 2011, Mark A. Emmert ("Emmert"), president of the NCAA, sent a letter (the "Emmert Letter") to Rodney A. Erickson ("Erickson"), Penn State's interim President, expressing concerns over the grand jury presentments that were ongoing with the criminal

investigation into the Sandusky Scandal and asserting both that the NCAA had jurisdiction over the matter and that the NCAA might take an enforcement action against Penn State. *Id.* ¶50. The Emmert Letter stated that the "individuals with present or former administrative or coaching responsibilities may have been aware of this behavior" and that such "individuals 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." *Id.* ¶51. The Emmert Letter set the stage for the Actionable Statement made against Plaintiffs in the Consent Decree. *Id.* ¶53.

On or about July 12, 2012, the Freeh Firm published the Freeh Report. *Id.* ¶82. The Freeh Report was not voted on or approved by the full Board of Trustees, and neither did the Board of Trustees agree to the conclusions of the Freeh Report, nor even reach conclusions regarding the accuracy of the findings in the Freeh Report. *Id.* ¶84. And yet, according to the Freeh Report, Penn State officials conspired to conceal critical facts relating to Sandusky's abuse from law enforcement authorities, the Board of Trustees, the Penn State community and the public at large. *Id.* ¶86.

Thereafter, on or about July 22, 2012, Penn State agreed to and executed the Consent Decree that adopted the findings of the Freeh Report and resulted in the imposition of drastic sanctions on Penn State and its football program. *Id.* ¶89. The FAC asserts that "[b]y executing the Consent Decree, Penn State collaborated with the NCAA and the Freeh Firm, recklessly disregarding Plaintiffs' procedural due process safeguards by accepting and agreeing to the imposition of sanctions in lieu of the traditional infractions process, and falsely accusing Plaintiffs, through the Actionable Statement, with malice of enabling and acting with complicity with child sexual abuse." *Id.* ¶91.

In the Consent Decree, Penn State agreed to "waive[] 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 the Consent Decree." *Id.* ¶97. These are the NCAA Rights to which Plaintiffs are entitled as third party beneficiaries (*see* FAC ¶133) and "involved persons" (*see* FAC ¶307(b)).

In connection with Penn State's waiver of the NCAA Rights, Penn State agreed to and executed the Consent Decree that included the Actionable Statement that stated "[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." *Id.* ¶169. The Actionable Statement effectively asserts that "some coaches" were complicit in child sexual abuse by ignoring the "red flags" of child abuse, which represents a factual conclusion based on the findings of the Freeh Report. *Id.* ¶170. Although the Actionable Statement did not name Plaintiffs, the Actionable Statement is directed to "some coaches," which is a limited group of individuals that includes Plaintiffs, is discrete in size and consists of people who are well-known in the community or whose identity could easily be discovered upon inquiry. *Id.* ¶178. Given the discrete size of this group of "some coaches," and where the Actionable Statement was made in the course of a public scandal, it is reasonable that recipients of the Actionable Statement are more likely to make inquiry to determine the specific group members. In this way, Plaintiffs are identified in the Consent Decree as targets of this Actionable Statement. *Id.* ¶179.

At no point does the Consent Decree state that this Actionable Statement was an "opinion" of Penn State. *Id.* ¶171. Rather, key language of the Findings and Conclusions introductory paragraph of the Consent Decree states as follows: "Penn State has communicated to the NCAA that it accepts the findings of the Freeh Report ..." and more definitively, "the findings of the Criminal Jury and the Freeh Report establish a factual basis from which the NCAA concludes that Penn State breached the standards ... ." *Id.* ¶172. For this reason, the Actionable Statement is a factual statement that the Consent Decree offered to the public as a "truthful" statement. *Id.* ¶173.

The effect of the Actionable Statement was that, now, following the lengthy investigation by the Freeh Firm, both Penn State and the NCAA had come to the asserted conclusion that

Plaintiffs, as coaches with the Penn State football program, were involved in child sexual abuse conduct, and therefore, it is this Actionable Statement that has caused Plaintiffs harm. *Id.* ¶176. Thus, accepting as true that Plaintiffs were accused of ignoring child sexual abuse, Plaintiffs were substantially certain to be less attractive job candidates. *Id.* ¶180.

However, Penn State knew that the Actionable Statement was based on the unreliable and unsubstantiated conclusions made in the Freeh Report, which itself Penn State knew was unreliable. *Id.* ¶174. Regarding the Consent Decree (and its unfounded and disproportionate reliance on the Freeh Report), the FAC asserts that Penn State knew or should have known that:

- the Freeh Report, as the basis of the Consent Decree, was an unreliable rush to judgment without a proper investigation and the conclusions reached in the Freeh Report were not substantiated. *Id.* ¶137;
- the Freeh Firm did not record or summarize witness interviews as specified by the NCAA's rules governing its relationship with Penn State. *Id.* ¶139;
- 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," as the NCAA Bylaws and other rules require. *Id.* ¶141;
- the individuals named in the Freeh Report were not given any opportunity to challenge its conclusions. *Id.* ¶142;
- the Freeh Report was not approved by the Board of Trustees. *Id.* ¶143;
- the Board of Trustees had never accepted the Consent Decree's findings. *Id.* ¶144;
- the Consent Decree was never presented to the full Board of Trustees. *Id.* ¶145;
- there is no evidence that any football coach covered up known incidents of child molestation by Sandusky to protect Penn State football, to avoid bad publicity or for any reason. *Id.* ¶150;
- there was no evidence that Joe Paterno or any other football staff conspired with Penn State officials to suppress information because of publicity concerns or a desire to protect the football program. *Id.* ¶151;
- the Freeh Report provided no evidence of a cover-up by any football coach and no evidence that Penn State's football program caused or contributed to the underlying facts of the Sandusky Scandal. *Id.* ¶152;

- the NCAA staff had not completed a thorough investigation, as required under the NCAA's rules, and had not identified any major or secondary violations committed by Penn State. *Id.* ¶155; and

- the individuals who were involved and directly harmed by the Consent Decree were given no opportunity to challenge the NCAA's abuse of discretion. *Id.* ¶166.

In this way, Penn State, along with the other Conspirators acted intentionally to abrogate and deny Plaintiffs their liberty interests and did so with knowledge, intent and malice toward Plaintiffs by executing the Consent Decree and issuing the Actionable Statement. *Id.* ¶175. The Actionable Statement **only** occurred because Penn State violated and deprived Plaintiffs of their constitutional liberty interests as set forth herein. *Id.* ¶177.

Emmert further magnified the negative impact of the Actionable Statement during his press conference on July 23, 2012, wherein, in response to a specific question as to whether the NCAA was still considering sanctions against assistant coaches, Emmert confirmed that the NCAA may yet "impose sanctions as needed on individuals involved in this case." *Id.* ¶181 (the "Emmert Statement").[3] Emmert stated at the end of his press conference: "Well again, we expressly have, in these sanctions and findings, withheld judgment on individuals, and will continue to do so until all of the criminal investigations have concluded, and until then we won't have any comment on individuals." *Id.* ¶210.

The FAC asserts that the Emmert Statement was the result of a collaboratively designed effort by Penn State and the NCAA to have a unified public message. *Id.* ¶191. Both Penn State and the NCAA, through the Consent Decree and Emmert's subsequent statements, delivered a public message with credible evidence that assistant coaches were involved in the Sandusky Scandal. *Id.* ¶192. In this way, Emmert Statement, and all discussions leading up to the Emmert Statement, were overt acts by the NCAA in furtherance of the conspiracy between the NCAA and Penn State. Emmert was merely acting as a voice for Penn State. *Id.* ¶¶193-198. Specifically, Donald Remy, as the Chief Legal Officer with the NCAA ("Remy"), stated to

[3]The Emmert Statement includes all of Emmert's comments at the press conference wherein he announced the execution of the Consent Decree. *See* FAC ¶¶183-184; 210.

Marsh that "the statements made by President Emmert were designed to assist Penn State with the story it was publicly communicating at the time." *Id.* ¶194.

Gene Marsh, Penn State's negotiator with the NCAA, reflected that he (Marsh) had presented to Penn State's legal team the option of a traditional infractions process and that Penn State decided to forego that opportunity, knowing full well that there would be critics that challenged the apparent lack of due process. *Id.* ¶201. Specifically, Marsh stated the following in his July 23, 2012 email that:

> ... in the end it must be a decision made by the new leadership that weighs many, many factors. I had to weigh accepting this outcome versus what might come with a traditional infractions process in an opinion. I laid it all out and gave my opinion, but the call was not mine. I think they made the right choice. There will be caustic critics and experts on "due process" etc. ... .

Id. ¶202. By earlier email, dated July 19, 2012, Marsh wondered to Remy whether "at some point an institution may be better off under a traditional infractions process." *Id.* ¶203. In fact, Remy in his September 7, 2012 email to Marsh stated as much:

> At all times prior to the execution of the consent decree, PSU was free to repudiate the Freeh Report, withdraw its consent, and/or reject the direction of the NCAA Executive Committee and either litigate against an imposition of penalties by the Executive Committee or "roll the dice" with the enforcement and infractions process. **The decision not to do so was Penn State's decision, not the NCAA**.

Id. ¶207.

D. Name Clearing Request

After the Termination and execution of the Consent Decree, Plaintiffs, through their attorneys, have made several requests both in writing and orally that they be afforded due process in order to clear and preserve their reputation. *Id.* ¶¶240-47, 252-253. Moreover, Dick Anderson ("Anderson"), a Penn State assistant football coach, by email, dated August 29, 2012, requested that Penn State vindicate the names and reputations of the assistant coaches, including Plaintiffs. *Id.* ¶256 ("It would be very helpful if the University could make a statement exonerating our former Assistant Football Coaches. ... A statement from the University would be so helpful to those coaches seeking to continue their careers and would also be so meaningful

to the retired coaches to erase these scars from our reputations."). Penn State ignored these requests. *Id.* ¶¶254, 257.

E. Centre County Rulings

There are parallel proceedings ongoing in Centre County before the Honorable Judge John B. Leete, involving some of the same parties and addressing similar factual and legal issues. Penn State attached to its Motion two (2) opinions entered by Judge Leete that bear relevance to these federal proceedings. *See* Motion at **Exhibit 1** (*Estate of Joseph Paterno et al., v. Nat'l Collegiate Athletic Ass'n et al.,* Opinion and Order, No. 2013-2082 (C.P. Centre County Jan. 6, 2014) (the "January 6 Opinion")); Motion at **Exhibit 2** (*Estate of Joseph Paterno et al., v. Nat'l Collegiate Athletic Ass'n et al.* Opinion and Order, No. 2013-2082 (C.P. Centre County Sept. 10, 2014) (the "September 10 Opinion")). These decisions provide succinct legal analysis that may prove helpful to this Court.[4]

1. January 6, 2014 Centre County Opinion

By the January 6 Opinion, Judge Leete ruled upon certain preliminary objections against the original complaint. At least three (3) of Judge Leete's rulings in the January 6 Opinion are relevant to denying the Motion.

a. Defamation Ruling

In the January 6 Opinion, Judge Leete ruled that Paterno and Kenney had adequately pled a defamation claim predicated upon the Actionable Statement. January 6 Opinion at 14-18. Judge Leete ruled that, because the Actionable Statement asserted "some coaches were basically complicit in child sexual abuse," the Actionable Statement could be considered to be

[4]In general, a federal court should give deference to a state court judgment, ruling or resolution of a state-law question. *See, e.g., Nat'l R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 342 F.3d 242, 254 (3d Cir. 2003) (stating that underlying legal principles "require[] federal courts to give preclusive effect to a state court determination of the state law issue [such as] the existence of a property interest."). At a minimum, federal courts should have "respect for the competence of state courts," such as where the state court has already spoken on an issue related to the one before the federal court. *Kovats v. Rutgers*, 749 F.2d 1041, 1048 (3d Cir. 1984).

defamatory for purposes of this pleading stage. *Id.* Additionally, Judge Leete found that statement was published as a "factual conclusion" in the Consent Decree. *Id.*[5]

Judge Leete further found that Plaintiffs sufficiently alleged that they could reasonably be viewed as targets of the Actionable Statement because "some coaches" was "a limited group of individuals including" Plaintiffs which was "certainly smaller" than groups it had previously determined to be too large. *Id.* Additionally, Judge Leete noted that "the Pennsylvania Supreme Court has recognized that when defamatory statements are made in the course of a public scandal, recipients may be more likely to make inquiry to determine the specific group members." *Id.* (citing *Farrell v. Triangle Publications, Inc.*, 159 A.2d 734, 738-39 (Pa. 1960)).

Next, Judge Leete considered the requisite element of malice, which the Court accepted as being demonstrated "when a defendant publishes statements with obvious reasons to doubt their veracity, such as when the defendant is aware of internal inconsistencies or apparently reliable contradictory information." *Id.* (citing *Mzamane v. Winfrey,* 693 F. Supp. 2d 442, 505-06 (E.D. Pa. 2010)). Judge Leete found that Plaintiffs had adequately pled malice by alleging that the Freeh Report was "unreliable and seriously flawed" and that Defendants "intentionally rushed to judgment, without a proper investigation, violating the procedural rights of affected individuals, and aware that innocent parties would suffer substantial harm." *Id.*[6]

Importantly, Judge Leete further ruled that the statement in the Consent Decree regarding the Board of Trustees' alleged failure to perform its oversight duties (the "BOT Statement") could similarly be considered defamatory and reasonably be understood to include the state court plaintiff Al Clemens ("Clemens"), a former Penn State Trustee. For the same reason that Judge Leete had concluded that the Actionable Statement, to a reasonable person, so identified Plaintiffs, Judge Leete ruled that this BOT Statement

[5] *See also* FAC ¶¶170-172.
[6] *See, e.g.,* FAC ¶174.

referred to those Trustee members serving in 1998 and 2001 and that the trustees during that time period were a "finite group" that included Clemens. *Id.* at 16.

b. Intentional Interference With Contractual Relations

In the January 6 Opinion, Judge Leete, although finding that Plaintiffs had failed to "[plead] facts supporting an inference that actual contracts were probably forthcoming," did conclude that "[a]ccepting as true that [Plaintiffs] were accused of ignoring child sexual abuse, they were substantially certain to be less attractive job candidates ... ." *Id.* at 22.

c. Civil Conspiracy

In the January 6 Opinion, Judge Leete further ruled that the plaintiffs' complaint had alleged that the NCAA had "collaborated with the Freeh firm to breach contractual obligations owed to Plaintiffs." *Id.* at 23. Judge Leete highlighted that the complaint had alleged that the Freeh Firm and NCAA had met and discussed "areas of inquiry and strategies," and had included many other overt acts of the NCAA and the Freeh Firm working together. *Id.* Judge Leete noted that the complaint had asserted that these actions were taken "to purposefully injure [the plaintiffs], to deprive them of their procedural rights, or at least in reckless disregard of substantially certain injury to [the plaintiffs], with no legitimate purpose." *Id.* Judge Leete accepted, as follows, that:

> Plaintiffs' allegations that Defendants and the Freeh firm recklessly disregarded Plaintiffs' procedural rights in imposing sanctions in a criminal matter unrelated to recruiting and athletic competition, accepted the flawed Freeh report knowing it was not the result of a reliable investigation, and falsely accused Plaintiffs of enabling and causing child sex abuse are sufficient to allege malice.

Id. Plaintiffs in this action have made similar allegations. *See, e.g.,* FAC ¶¶88, 91, 174, 175, 191-203, 220 and 328-340.

d. "Involved Individuals" As Third Party Beneficiaries

In the January 6 Opinion, Judge Leete could not determine whether the membership contract between Penn State and the NCAA (in the form of the NCAA's Bylaws conferred the status of third party beneficiary upon (i) "'Involved Individuals,' defined as [former or

current] student athletes and staff who received notice of 'significant involvement in alleged violations,'"[7] and/or (ii) "Uninvolved Individuals" where the Bylaws "afford ... fair procedures" and "provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions." *See* FAC, **Exhibit G**, NCAA Bylaws 19.01.1. Judge Leete concluded that, although the NCAA Bylaws were ambiguous, it was reasonable that:

> (a) "'[I]nvolved individuals' means persons who are sanctioned or under threat of an official finding of rules violations;"
>
> (b) Involved individuals also includes "**a person who is named in the sanctioning document or whose conduct underlies sanctions**;" and
>
> (c) It was not clear whether the "fairness provisions" for "Uninvolved Individuals" were intended to create contract rights in such uninvolved third parties.

Id. at 9 (emphasis supplied). Judge Leete did not want to resolve any ambiguities or definitively interpret the NCAA Bylaws in the absence of Penn State being involved in the case (which they were not at the time).

2. September 10, 2014 Centre County Opinion

By the September 10 Opinion, Judge Leete ruled upon certain preliminary objections filed by the defendants against the state court amended complaint. Several of Judge Leete's rulings in his September 10 Opinion are relevant for this Court in denying the Motion.

a. Intentional Interference With Contractual Relations

Judge Leete determined that the description and litany of Plaintiffs' lost economic opportunities, which is the same as those lost economic opportunities that are described in the FAC for each of Plaintiffs (*see* FAC ¶¶239, 261-64, 269-70 and 277-291), satisfied Plaintiffs' pleading requirements for their state law claim of intentional interference with contractual relations filed against the NCAA. September 10 Opinion at 11.

---

[7] *See* FAC, **Exhibit G**, NCAA Bylaws 32.1.5 ("Involved individuals are former or current student-athletes and former or current institutional staff members who have received notice of significant involvement in alleged violations through the notice of allegations or summary disposition process.")

b. Defamation Ruling

In the September 10 Opinion, Judge Leete reaffirmed his earlier ruling that the Actionable Statement was asserted as a "factual conclusion" and not an "opinion." Judge Leete reiterated that the Actionable Statement was included in the "Findings And Conclusions section[]" of the Consent Decree which never states that these statements are the opinion of NCAA or Penn State. *Id.* at 13. Judge Leete emphasized that:

> "Penn State has communicated to the NCAA that it accepts the findings of the Freeh Report…", and more definitively "the findings of the Criminal Jury and the Freeh Report establish a factual basis from which the NCAA concludes that Penn State breached the standards…"

Id. at 13-14.

c. "Involved Individuals" And "Uninvolved Individuals" As Third Party Beneficiaries

In his September 10 Opinion, Judge Leete again revisited[8] the issue of "involved individuals" and specifically whether Plaintiff Al Clemens ("Clemens"), as a member of the Board of Trustees, could be considered to be an "involved person" pursuant to the NCAA Bylaws (who, if so, would therefore be entitled to the contractually provided notice and other due process procedural safeguards as provided by the NCAA Bylaws) where the Consent Decree had included the BOT Statement that repeated a conclusion in the Freeh Report that "the Board of Trustees … did not perform its oversight duties." *Id.* Because Judge Leete had ruled that the BOT Statement could reasonably be understood to include Clemens, as a former trustee, and because Judge Leete had also ruled that an "involved individual," as defined by the NCAA Bylaws, included "a person who is named in the sanctioning document or whose conduct underlies sanctions," then therefore Judge Leete concluded that it was for a jury to determine whether the BOT Statement could be interpreted as

[8]Although Penn State was not a party to the state court litigation at the time of the January 6 Opinion, it had been joined and was a defendant by the time of the September 10 Opinion.

referring to Clemens, and importantly, if so, then Clemens would be an "involved person" who was entitled to the due process procedures provided by the NCAA Bylaws.

This same reasoning applies to Plaintiffs who may likewise be an "involved person" because, as Judge Leete had concluded, it was reasonable to conclude that the Actionable Statement could reasonably be interpreted to refer to Plaintiffs. Thus, if a jury determines that the Actionable Statement refers to Plaintiffs, then like Clemens, Plaintiffs would be entitled to those notice, due process and fair procedures provided by the NCAA Bylaws.

IV. LEGAL STANDARDS

A. Rule 12(b)(6) Standard

In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), all well-pleaded allegations in the FAC, along with all reasonable inferences that can be drawn therefrom, must be accepted as true and viewed in the light most favorable to the plaintiff. *Warren Gen. Hosp. v. Amgen, Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (citing *Pinker v. Roche Holding Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)); *Santiago v. Warminster Twp.*, 629 F.3d 121, 128 (3d Cir. 2010).

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,'" giving "the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quoting *Twombly*, 550 U.S. at 555). The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The plaintiff must allege facts that indicate "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "The Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: 'stating ... a claim requires a complaint with enough

factual matter (taken as true) to suggest' the required element.'" *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly,* 550 U.S. at 545). "A well-pleaded complaint may proceed even if it appears 'that a recovery is very remote or unlikely.'" *Twombly*, 550 U.S. at 555 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

In considering Rule 12(b)(6) motion, courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." *Myers v. Garfield & Johnson Enters., Inc.*, 679 F. Supp. 2d 598, 603 (E.D. Pa. 2010) (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004)). Plaintiff's burden in responding to a 12(b)(6) Motion is significantly lighter than required to avoid summary judgment. *See Gidley v. Allstate*, 2009 WL 4893567 at *5 (E.D. Pa. Dec. 17, 2009) (O'Neill, J.).

B. Deprivation of Plaintiffs' Liberty Interest & State Law Claims

The specific legal standards applicable to Plaintiffs' various liberty interest and state law claims are incorporated in the relevant subsections to the Argument section *infra*.

V. ARGUMENT

A. Plaintiffs Have Demonstrated That Penn State Has Deprived Plaintiffs Of Their Liberty Interest In Their Reputation By Executing The Consent Decree That Included The Actionable Statement That Stigmatized Plaintiffs And That Was In Conjunction With Both Penn State's (i) Abrogation Of Plaintiffs' Tangible Third Party Beneficiary Rights As An Involved Person Under The NCAA Bylaws And (ii) Termination Of Their Employment As Assistant Coaches.

1. Legal Standard for Stigma Plus Doctrine

Section 1983 of Title 42 provides that "every person who, under color of [state law] subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the [United States] Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. A person's interest in his or her good reputation alone, apart from a more tangible interest, is not a liberty or property interest sufficient to invoke the procedural protections of the Due Process Clause or create a cause of action under § 1983. *See Paul v. Davis*, 424 U.S. 693, 701 (1976). Instead, when dealing with loss of reputation alone, a state law

defamation action for damages is the appropriate means of vindicating that loss. *Id.* at 701-02. Loss of one's reputation can, however, invoke the protections of the Due Process Clause if that loss is **coupled** with the deprivation of another tangible interest, such as, without limitation, at-will government employment (where the terminated employee does not have a cognizable property interest in continued employment) or some other right or status created by the Constitution or state law. *Bd. of Regents v. Roth*, 408 U.S. 564, 572-73 (1972). Civil rights claims of this type under 42 U.S.C. § 1983 based on reputational harms are known as "stigma-plus" claims. *See Hill v. Borough of Kutztown*, 455 F.3d 225, 236 (3d Cir. 2006). The stigma is the attack on a person's liberty interest in their reputation and the "plus" is the alteration of a tangible interest possessed by that same person. *Id.* In order to satisfy the "stigma" prong of the "stigma-plus test," the plaintiff must establish: (1) publication of (2) a substantially and materially false statement (3) that infringed upon the reputation, honor, or integrity of the employee. *Brown v. Montgomery Cnty.*, 470 Fed. Appx. 87, 91 (3d Cir. 2012). A plaintiff generally is required only to allege the falsity of the stigmatizing statements as an issue, not prove that such statements are false. *Hill*, 455 F.3d at 236. *See also Codd v. Velger*, 429 U.S. 624, 627 (1977) (requiring only that plaintiff raise the issue of falsity regarding the stigmatizing charges — not prove it — in order to establish a right to a name-clearing hearing; *Ersek*, 102 F.3d at 83-84.[9] *See also Howard v. Pennsylvania Dept. of Pub. Welfare et al.*, 2011 U.S. Dist. LEXIS 127653 (E.D. Pa. November 3, 2011) (J. Stengel) (finding that plaintiff's allegation that alleged stigmatizing statement created a false and defamatory impression sufficient at the motion to dismiss stage).

[9] *See also McGhee v. Draper*, 639 F.2d 639 (10th Cir. 1981) ("The truth or falsity of any charges made or legitimized by the school board's action is not relevant to determining the existence of a procedural due process violation; it is relevant only in fashioning the appropriate remedy. The jury's determination whether plaintiff was deprived of a liberty interest because of the charges against her depends on the character of the charges, not on their truthfulness. The "truth or falsity ... [may] determine whether or not [the] decision to discharge [plaintiff] was prudent, but neither enhances nor diminishes [plaintiff's] claim that [her] constitutionally protected interest in liberty has been impaired." *Bishop v. Wood*, 426 U.S. 341, 349 (1976).").

2. Plaintiffs Have Demonstrated For The Purposes Of This Pleading Stage That The Actionable Statement And The Emmert Statement Were Published And Stigmatizing To Plaintiffs' Liberty Interest In Their Reputation.

a. The Actionable Statement And The Emmert Statement Were Published In The Consent Decree.

The Consent Decree published the Actionable Statement and Emmert published the Emmert Statement at a publicly held press conference. FAC ¶¶169, 181. Penn State has admitted that "the Consent Decree was widely disseminated and received significant national attention." *See* **Exhibit C** (Penn State's Answer to second amended complaint), at ¶117.

b. The Actionable Statement And The Emmert Statement Were Stigmatizing To Plaintiffs' Reputation.

In order to fulfill the requirements of a stigma-plus claim, a plaintiff must demonstrate that the government made stigmatizing statements about him — statements that call into question plaintiff's "good name, reputation, honor, or integrity." In this case, the FAC asserts that "Penn State's execution of the Consent Decree compounded and ignited afresh Plaintiffs' injuries caused by the Termination and only further compelled, as a result of the deprivation of Plaintiffs' due process rights, the implication and innuendo that Plaintiffs were complicit in some manner in the Sandusky Scandal, all to the detriment and stigmatization of Plaintiffs' good name, reputation, honor and integrity." FAC ¶136.

Charges which infringe upon the reputation, honor, or integrity of an individual include charges of immorality, dishonesty, alcoholism, disloyalty, communism, or subversive acts. *See Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 42 (2d Cir. 1987) (accusations that a teacher sexually abused autistic children); *Elliot v. Hinds*, 786 F.2d 298 (7th Cir. 1986); *Rodriguez de Quinonez et al. v. Perez*, 596 F.2d 486 (1st Cir. 1979) (removal on grounds of dishonesty, actual or suspected, affects liberty interest). *See also Organtini v. Methacton Sch. Dist.*, 2008 U.S. Dist. LEXIS 8523 (E.D. Pa. Feb. 6, 2008) (J. Stengel) ("In order for a communication to be defamatory, 'it must tend to harm the reputation of another so as to lower her in the estimation of

the community or to deter third persons from associating or dealing with her.'") (citing *Feldman v. Lafayette Green Condo. Assoc.*, 806 A.2d 497, 500 (Pa. Cmwlth. 2002)). Stigmatizing comments may include matters other than charges of illegality, dishonesty, or immorality. *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 446 n.4 (2d Cir. 1980).

"In constitutional jurisprudence, stigmatization is a term of art, *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 9 (1st Cir. 2011), and encompasses statements that falsely accuse a plaintiff of serious wrongdoing, *Jennings v. Owen*, 602 F.3d 652, 658 (5th Cir. 2010)." *Smith v. Borough of Dunmore*, 2011 WL 1541293, at *4 (M.D. Pa. Apr. 22, 2011), *aff'd*, 516 F. App'x 194 (3d Cir. 2013). Statements, however, which allege "merely improper or inadequate performance, incompetence, neglect of duty or malfeasance" are "not sufficiently stigmatizing to implicate a liberty interest." *Brown v. Montgomery Cnty.*, 470 Fed. Appx. 87, 91 (3d Cir. 2012) (quoting *Mercer v. Cedar Rapids*, 803 F.3d 840, 845-46 (8th Cir. 2002)).

In *McKnight v. Southeastern Pennsylvania Transportation Authority*, the Third Circuit found persuasive "McKnight's contention that the issue whether defendants' charge of intoxication is sufficiently stigmatizing to constitute an infringement of 'liberty' is significantly a question of fact that cannot be appropriately determined at this juncture." *McKnight*, 583 F.2d at 1237. As such, the Third Circuit held as follows:

> One basic element of the "liberty" interest ... is the protection against interference in the absence of due process with an individual's ". . . later opportunities for . . . employment". *Goss v. Lopez,* 419 U.S. 565, 575, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). In the complaint here, the "loss of opportunity for other employment" is specifically cited as a detriment flowing from the defendants' action. Thus, the question arises whether the defendants' charge of McKnight's intoxication in fact has been so stigmatizing as to hinder McKnight in seeking other opportunities of employment. Simply by reading the complaint, it cannot be said with certainty whether such effects did or did not flow from defendants' conduct. Because a motion to dismiss should not be granted unless it appears "beyond doubt" that there are no facts that would entitle plaintiff to relief, and since allegations of substantial stigma are clearly set forth in the complaint, it would appear incorrect to assume — in the absence of any evidence — that sufficient stigma cannot be shown.

Id. at 1236 (footnotes omitted). The *McKnight* court acknowledged that it would be "slippery at best" to try and draw a "bright line distinction" between statements that allege "inappropriate or

wrongful behavior in a discrete context on the job" and statements that impute to a person "a general social status that is opprobrious and that transcends a given job." *Id.* at 1237. The *McKnight* court acknowledged that, in the "absence of clear evidence," a court could not "know whether an employee has been so stigmatized by the employer's accusations against him as to have been precluded from other employment opportunities unless the court is exposed to pertinent evidence." *Id.* at 1238.

Plaintiffs have alleged not only the falsity of the Actionable Statement but also that the Actionable Statement, as enhanced and magnified by the Emmert Statement, stigmatized Plaintiffs. FAC ¶¶181, 190, 299 and 312. As found by Judge Leete, it cannot seriously be contended that the Actionable Statement did not gravely stigmatize Plaintiffs as having acted in complicity with child sexual abuse.[10]

Contrary to Penn State's suggestion, the full text of the Consent Decree, in the context in which it was published, demonstrates that the Actionable Statement is merely reinforced by the other statements in the Consent Decree which reconfirms the reprehensible existence of "active concealment" of child sexual abuse. *See* FAC, **Exhibit A** ("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.") (emphasis supplied). Moreover, the Actionable Statement not only alleges that "some coaches ... ignored red flags," it also asserts that "no one warned the public about him." The reference to the failure to "warn[] the public" presumes that those "some coaches" had knowledge and awareness of Sandusky's criminal conduct and yet failed to act (a reprehensible stain on a person's

[10]Penn State equates the non-stigmatizing statement in *Kaidanov v. Pennsylvania State Univ.*, 2014 WL 7330462 (E.D. Pa. Dec. 23, 2014) (Judge Gene E.K. Pratter), with the Actionable Statement. However, the *Kaidanov* statement was harmless because it merely asserted that the termination of Mr. Kaidanov was a "personnel matter." Mr. Kaidanov asserted that this "personnel" statement was akin to suggesting that Mr. Kaidanov was terminated for Sandusky-like reasons. Judge Pratter disagreed finding that a reference to "personnel matter" could never be understood to mean Sandusky-like conduct "without an enormous and unwarranted lunge into the realm of speculation." *Id.* Just the opposite can be said about the Actionable Statement, and, for this reason, *Kaidanov* actually proves Plaintiffs' assertion. The Actionable Statement in this matter could in fact be understood by a reasonable person, as Judge Leete has already ruled, as meaning that Plaintiffs were complicit in the cover-up of Sandusky crimes, and thus, it was stigmatizing.

reputation). The Actionable Statement is in reality a double whammy with the second half of the statement ensuring that the public understood that none of the coaches did anything to stop Sandusky despite their knowledge of his crimes.

The Emmert Statement, published simultaneously with the Actionable Statement, and suggesting potential additional investigations and sanctions against the assistant coaches (including Plaintiffs), "locked and sealed" the stigmatizing effect of the Actionable Statement.[11] Any person who read or heard the Emmert Statement could have reasonably understood such statements to mean that certain individuals (meaning "some coaches" as were identified in the Consent Decree) would be individually investigated once all of the criminal proceedings were concluded. Indeed, where Penn State had already been sanctioned and there was no indication that any student athletes were involved in any cover-up, Emmert's reference to "individuals" could only mean those assistant coaches who coached under Joe Paterno and were released when he lost his head coaching job and was replaced. *Id.* ¶186. Thus, a future investigation by the NCAA would refer to a future investigation of Plaintiffs and other assistant coaches for their alleged complicity in ignoring red flags and failing to warn the public. In this way, the Emmert Statement not only reinforced the stigmatizing effect of the Actionable Statement but further maligned that small, limited group of assistant coaches, including Plaintiffs. *Id.* ¶¶187, 211-214.

The Actionable Statement was simply a wholly unnecessary inclusion in the Consent Decree that took a reputational pot-shot at Plaintiffs and added nothing to underlying purposes of the effectuation of the Consent Decree. While it may have felt good to the NCAA and Penn State to impugn the integrity of the assistant coaches, which they did so with intention and malice (*id.* ¶¶175, 317), such "feel good" intentions had the intended effect of maligning Plaintiffs' reputation and harming their ability to acquire comparable positions. *Id.* ¶¶69, 237.

[11]The NCAA and Emmert had already said that the Freeh Firm had conducted an investigation well beyond anything that the NCAA had done in the past, and there is nothing to suggest that Emmert's statement regarding a future investigative process is anything more than a statement of future reliance upon the Freeh Report that, according to the Consent Decree, came to the factual conclusion that "some coaches" were complicit in fostering child sexual abuse. *Id.* ¶185.

c. It was Not Necessary That Plaintiffs Be Specifically Named In The Actionable Statement In Order For Such Actionable Statement To Be Stigmatizing.

As Judge Leete ruled, it is reasonable, given the size of the assistant coaching group, that a recipient could take the Actionable Statement to include Plaintiffs. January 6 Opinion at 17. The assistant coaching staff at Penn State included a total of 12 assistant coaches. Where the group is very small, a statement directed at only a few, or even at one of the members, may suffice to allow each member to sue. *See, e.g.,* Restatement (Second) of Torts § 564A, comment c (1976); Restatement (First) of Torts § 564, comment c, illustration 2 (1938) (statement that some member of B's household has committed murder defames each member of B's household). *See also Cushman v. Day*, 43 Or. App. 123, 602 P.2d 327, 331-32 (1979) ("When all or a significant portion of a small group are defamed, each individual in the group may be found to have been defamed.").

The fact that the names and identities of the assistant football coaches, who walked the sideline of each nationally televised Penn State football game, are immediately available through the internet makes them a limited group much more susceptible to reputational injury than those other groups named in the Actionable Statement, namely the more amorphous and unknown "administrators" and "football program staff members." *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010) (descriptive term of school's "leadership" related to a "readily identifiable group of individuals" of which plaintiff was a member). In addition, Jay Paterno, as the son of Joe Paterno, was even more especially notable and thus, more identifiable with the Actionable Statement. Finally, Sandusky, who himself was a Penn State assistant football coach, and Mike McQueary, also an assistant football coach, were at the epicenter of the Sandusky Scandal, which included McQueary's grand jury testimony that revealed the horrific nature of Sandusky's crimes. Thus, the public naturally perceived that the assistant football coaches, being the closest to Sandusky, were in the best position to not only become aware of Sandusky's crimes, but then also in the best position to cover them up, as suggested by the Actionable Statement.

The Third Circuit in *Alvord-Polk, Inc., et al. v. F. Schumacher & Co., et al.*, 37 F.3d 996, 1015-1016 (3d Cir. 1994), has cited with approval Section 564A of the Restatement (Second) of Torts, relying upon settled Pennsylvania Supreme Court precedent:

> Relying upon record evidence indicating that in 1990 there were only 20 to 25 800-number dealers in the industry (app. at 1123-24), plaintiffs argue that they may base their claim on statements directed at 800-number dealers in general. *Cf.* Restatement (Second) of Torts § 564A, comment c. As noted above, however, a group's size is not the sole consideration in determining whether individual members may assert defamation claims based upon statements about the group. A group may be relatively small, but statements which disparage it may not serve as a basis for an individual defamation claim unless a reader could reasonably connect them to the complaining individual.
>
> In [*Farrell v. Triangle Pubs., Inc.*, 159 A.2d 734, 736-37 (Pa. 1960)], for example, one of 13 township commissioners asserted a defamation claim against a newspaper which had published a story implicating "a number of township commissioners and others" in corrupt activity. *Farrell*, 159 A.2d at 736. The Pennsylvania Supreme Court held that the plaintiff had stated a claim for defamation. In so holding, however, the court concentrated not on the size of the group discussed but on whether readers "knew that the plaintiff was one of the thirteen commissioners." *Id.* at 738. We similarly do not end our inquiry upon being apprised that there were between 20 and 25 800-number dealers in 1990; we examine whether the plaintiffs were "sufficiently identified as [objects of NDPA's statements] to justifiably warrant a conclusion that [their] individual reputation[s have] been substantially injured." *Id.* at 736.

Alvord-Polk, 37 F.3d at 1015-16. The Third Circuit in *Alvord-Polk* analyzed the specific facts and concluded that they differed greatly from the facts in *Farrell* because the plaintiffs' group in *Alvord-Polk* appeared "amorphous and ill-defined when compared to the well-defined group of township commissioners at issue in *Farrell.*" *Id.* The *Alvord-Polk* plaintiffs failed to "produce evidence tending to prove that they belong[ed] to such an easily identifiable, cohesive group that a reader would ascribe statements referring to [general business entities] to any of them individually." *Id.*

The analysis in *Alvord-Polk* is compelling inasmuch as it not only confirms the applicability of Section 564A, but it also reiterates further that, at this stage in the proceedings, given the allegations as asserted in the FAC, Plaintiffs have satisfied their burden to demonstrate sufficient facts to warrant, in the least, additional fact gathering (just as Judge Leete has similarly

ruled). *See also Trantham v. Ford Motor Co., et al.*, 2001 WL 378874, at *1 (D.V.I. Apr. 12, 2001) (denying defendants' motion where the issue was whether a letter impugning the "management" of a company was understood by the recipient of the letter to mean plaintiff).

Moreover, if there was any doubt when the Actionable Statement was published (there was not) that the reputations of Plaintiffs as assistant coaches were at issue, the publication of the Emmert Statement with such simultaneous temporal proximity to the issuance of the Consent Decree made certain that any such doubt was extinguished. Emmert was specifically asked at his press conference about future investigations of assistant coaches. FAC ¶182. In response, and consistent with his published remarks as well (*id.* ¶183), Emmert advised the world that the NCAA was reserving the right to pursue additional sanctions on "individuals," which gave additional force and effect to the Actionable Statement. The cast of the shadow of suspicion and innuendo is beyond merely those who might be directly involved in the ongoing criminal proceedings, but now includes "individuals involved in this case," which, according to the Actionable Statement, would necessarily include Plaintiffs as part of that small, discrete and limited group of assistant coaches who allegedly ignored Sandusky's crimes.

3. Plaintiffs Have Demonstrated That The Stigmatizing Statement Was Published In Conjunction And/Or Combined With The Alteration Of Other Tangible Interests Held By Plaintiffs.

Plaintiffs satisfy the "plus" prong of the stigma plus requirements by demonstrating that two (2) different and distinct legal tangible interests and rights were altered by Penn State in conjunction with the publication of the Actionable Statement. **First**, by execution of the Consent Decree, Penn State abrogated Plaintiffs' contractual third party beneficiary rights to those NCAA Rights referenced in the FAC and further set forth in the NCAA Bylaws. **Second**, Penn State fired Joe Paterno from the head coaching position as a result of the Sandusky Scandal that in turn led to the terminations of Plaintiffs as assistant coaches, and in this way, Plaintiffs lost their tangible legal interest in their employment (even assuming, for the moment, that their

employment was an "at-will" arrangement which Plaintiffs dispute), which was in conjunction with and otherwise connected to the stigmatizing Actionable Statement.

a. Plaintiffs Were Owed Those NCAA Rights As "Involved Individuals" Which Were Tangible Third Party Beneficiary Contract Interests That Penn State Abrogated When Penn State Conspired To Waive The Traditional NCAA Infractions Process, Thereby Causing Plaintiffs To Suffer The Plus To the Actionable Statement's Stigma.

i. The NCAA Has Admitted That "Involved Individuals" Are Third Party Beneficiaries Of The NCAA Bylaws With Regard To The NCAA Rights Pertaining To Infraction Investigations.

Penn State, as an NCAA member, subscribed to the statement in the NCAA Bylaws that NCAA "enforcement procedures are an essential part of the intercollegiate athletic program of each member institution." NCAA Bylaws at 19.01.03.[12] The status of the protections afforded to an "involved person" is well known to the NCAA and Penn State. In fact, in the first set of preliminary objections to the plaintiffs' initial complaint in the Centre County action, the NCAA admitted that an "involved individual" was an explicit and intended third party beneficiary to the NCAA Bylaws. Specifically, the NCAA asserted as follows in their Preliminary Objections:

> 10. Plaintiffs lack standing to assert their breach of contract claims against the NCAA because they are neither parties to Penn State's membership agreement with the NCAA, nor third-party beneficiaries of that agreement.
>
> 11. The NCAA's Constitution and Bylaws do not manifest or express an intent to bestow procedural rights to appeal a member university's sanctions on an unbounded set of former players, former head or assist coaches, trustees, or faculty members from that university.
>
> 12. The NCAA Bylaws provide that the NCAA and its members intended to bestow procedural rights related to the NCAA sanctions process only on "[i]nvolved individuals" within the meaning of the Bylaws. *See* NCAA Academic and Membership Affairs Staff, *2011-12 NCAA Division I Manual* arts. 32.10.1.1-32.10.1.2, 19.1.2.3 (2011) ("Manual"), attached as Ex. A to the Complaint.
>
> 13. Involved individuals are "former or current student-athletes and former or current institutional staff members who have received notice of significant

[12]Penn State admitted in its answer to the Second Amended Complaint that "at all relevant times, Penn State has been an active member of the NCAA." *See* **Exhibit C**, at ¶117.

involvement in alleged violations through the notice of allegations or summary disposition process." Manual art. 32.1.5.

14. The NCAA has never treated former players, former head or assistant coaches, university trustees, or faculty members who were not under consideration for individual sanctions and against whom no individual sanctions were imposed as "involved individuals" as that term is defined in the NCAA Bylaws. Declaration of Dr. Mark Emmert ¶ 8 ("Emmert Decl.") (July 22, 2013), attached as Ex. 1 hereto.

***

20. Plaintiffs can only enforce promises within the Bylaws made for their benefit.

Exhibit A (NCAA Preliminary Objections) (emphasis supplied) (footnote omitted). Thus, there is no dispute that, if Plaintiffs could be "involved individuals," they would, *per force*, be third party beneficiaries entitled to the procedural contractual rights provided to "involved individuals" by the NCAA Bylaws, and as identified as the NCAA Rights in the FAC.

ii. "Involved Individuals" Are Entitled To NCAA Rights Pursuant To NCAA Infractions Process.

During an NCAA infraction investigation, involved individuals, such as Plaintiffs, are entitled to, in pertinent part, the following NCAA Rights (as a third party beneficiary):

1. To be represented by legal counsel at all stages of the proceedings **[§32.5.1(c)]**;
2. To have the opportunity to submit in writing any information relevant to the allegation(s) in question **[§32.6.1.1 (e)]**;
3. To be notified of the allegations, submit responses to Infractions Committee, and to be provided a copy of pertinent portions of the institution's response **[§32.6.2]**;
4. To have reasonable access to all pertinent evidentiary materials made available, and to be notified of the availability of additional information made to the secure website **[§§32.6.4-32.6.4.1]**;
5. To be consulted by the enforcement staff in cases involving an alleged major violation and provided portions of the Enforcement Staff Case Summary in which involved individual is identified as at risk **[§32.6.6]**;
6. To elect to process the case through the summary disposition procedures, request an expedited hearing and/or appeal any additional penalties **[§§32.7.1-32.7.1.4.3]**;
7. To submit a written report, proposed penalties and/or a statement regarding mitigating factors and to be forwarded the agreed-on findings and proposed penalties approved by the Committee on Infractions **[§32.7.1.2-.4]**;
8. To receive notification of hearing procedures **[§32.8.5]**;

9. To present any explanation of the alleged violations and any other arguments or information deemed appropriate in the Committee on Infractions' consideration of the case **[§32.8.7.3]**;

10. To be afforded an opportunity to respond where additional information has been requested by the Committee on Infractions from any source **[§32.8.8.1]**;

11. To receive an infractions report promptly submitted by the Committee on Infractions prior to public announcement and to be notified directly of the related appeal opportunities outlined in Bylaws 32.9 and 32.10 **[§§32.9.1-32.9.1(c)]**;

12. To request oral argument and/or representation in person upon appeal of the Committee on Infractions' findings, and to be permitted reasonable time to make such oral presentations **[§32.11.1(a)]**; and

13. To elect to be present in person and/or by counsel as a silent observer during the oral argument, where the right to appeal is waived **[§32.11.1(a)]**.

See **Exhibit B**. As the NCAA has admitted, both the NCAA and Penn State "intended to bestow [these] procedural rights related to the NCAA sanctions process only on "[i]nvolved individuals" within the meaning of the Bylaws." *See* **Exhibit A**. In this way, the NCAA Rights are in effect substantive contractual rights to which Plaintiffs were entitled to access and utilize.

iii. These NCAA Rights Were A Tangible Interest That Penn State Altered In Contemporaneous Conjunction With The Publication Of The Actionable Statement And Thus Such Abrogation Was A Sufficient Plus To The Stigmatization.

By agreeing to the Consent Decree, Penn State stigmatized Plaintiffs and, in connection therewith, altered Plaintiffs' tangible interests in the NCAA Rights. Specifically, by waiving "any claim to further process, including, without limitation, any right to a determination of violations by the NCAA Committee on Infractions," Penn State (and the NCAA) foreclosed any traditional infraction investigation and thus deprived Plaintiffs of their NCAA Rights as "involved individuals." In fact, when the Estate of Joe Paterno and others filed an appeal from the Consent Decree, the NCAA denied the appeal stating that there had been no investigation and therefore no one had a right to an appeal.[13] The logic of how Penn State and the NCAA denied

[13] Apparently, the NCAA vice president of communications responded to the appeal by stating that "[t]he Penn State sanctions are not subject to appeal" because Penn State is not being sanctioned through the traditional enforcement/infractions procedures [which Penn State had waived in the Consent Decree]. Dennis Dodd, NCAA: Paterno Family Cannot Appeal Penn State Sanctions, CBS SPORTS (Aug. 3, 2012),

Plaintiffs' their NCAA Rights without recourse should not be lost on this Court, as it was not lost on Judge Leete who chastised, as similarly circuitous, the NCAA's argument that a party cannot be an "involved individual" unless they received a notice from the NCAA (where the NCAA controlled the sending of such notices). September 10 Opinion at 7.

Thus, by agreeing to the Consent Decree, Penn State stigmatized Plaintiffs and simultaneously conspired with NCAA to waive the infractions process so as to deny Plaintiffs their NCAA Rights as an "involved person." Penn State has defamed Plaintiffs while simultaneously abrogating their state created rights that would have provided them the very opportunity to clear their name. Without Penn State's agreement to forego the Infractions Process (*see* FAC ¶201), thereby altering and abrogating Plaintiffs' tangible property interest as an "involved individual," then Penn State would never have been able to agree to the Consent Decree. In this way, the Actionable Statement and Penn State's alteration of Plaintiffs' third party beneficiary rights to the NCAA Rights are sufficiently connected to satisfy the stigma plus requirements. The operative question isn't whether Penn State had the right to waive the infractions process; rather the question is whether, if Penn State does abrogate Plaintiffs' tangible interests by waiving the infractions process, and then publishes a stigmatizing statement, then aren't Plaintiffs entitled to a name-clearing hearing, and the answer to this question is a resounding yes.

iv. The Tangible Interest That Constitutes The Plus Of The Stigma Plus Doctrine Need Only Be A State Created Right And Does Not Need To Be An Independently Protected Constitutional Right.

Reputational harm can constitute the deprivation of a protected liberty interest if the injury to the reputation is combined or occurs in connection with the deprivation of some other tangible interest (*i.e.*, the plus of the stigma plus doctrine), even if the tangible interest is not itself a protected property interest. *See Paul v. Davis*, 424 U.S. 693,708-712 (1976). *See also*

---

http://www.cbssports.com/collegefootball/blog/dennis-dodd/19721445/ncaa-paternofamily-cannot-appeal-sanctions (quoting the Twitter account of Bob Williams, NCAA vice president of communications).

Graham v. City of Philadelphia, 402 F.3d 139, 142 (3d Cir. 2005); *Kelly v. Borough of Sayreville, N.J.*, 107 F.3d 1073, 1077-78 (3d Cir. 1997).[14]

The earlier Third Circuit decisions queried as to the confusion as to whether this additional "tangible interest" must be "a protectible property interest," or whether "something less than a property interest, independently protected by the Due Process Clause, could be [] sufficient." *Ersek v. Twp. of Springfield*, 102 F.3d 79, 83 n.5 (3d Cir. 1996); *see Graham*, 402 F.3d at 142 n.2. The *Hill* court concluded that the tangible interest need not rise to the level of protectible interest in its own right. *Hill*, 455 F.3d at 236.

Moreover, the Third Circuit in *Dee v. Borough of Dunmore et al.*, 549 F.3d 225, 234 n.11 (3d Cir. 2008), acknowledged that there were effectively two (2) types of stigma plus cases, with the first being those that included the alteration by the state actor of the person's state-law created property interest not involving an employment termination (in this case, the abrogation of Plaintiffs' NCAA Rights), and the second involving a termination from public employment (also occurring in this case where Penn State terminated Plaintiffs from their assistant coaching positions). *Dee*, 549 F.3d at 234 n.11 (3d Cir. 2008). The Court in *Dee* further added as follows:

> We also note that we have held—consistent with the precedent of several of our sister circuits—**that when a public employee bases his "plus" on government conduct that does not implicate a state law-created property interest, the employee nonetheless satisfies the "stigma-plus" test if he can establish that he was "defamed in the course of being terminated or constructively discharged.**" *Hill*, 455 F.3d at 238; *accord Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1104-12 (D.C. Cir. 1985); *Dennis v. S & S Consol. Rural High Sch. Dist.*, 577 F.2d 338, 342-43 (5th Cir. 1978); *Colaizzi v. Walker*, 542 F.2d 969, 973 (7th Cir. 1976). As we have determined that a state law-created property *was* implicated in this case, termination or constructive discharge was not required.

Id. (emphasis supplied).[15]

---

[14]*See Owen v. City of Independence*, 445 U.S. 622 nn.10, 13 (1980) (finding that an employee without a protectible property interest in his job can state a claim for violation of a liberty interest in his reputation); *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977) (liberty interest implicated even if the failure to rehire or discharge deprives the plaintiff of no property interest within the meaning of the Fourteenth Amendment).

[15]*See Kelly v. Borough of Sayreville*, 107 F.3d 1073, 1077 (3d Cir. 1997) ("State law creates the property rights protected by the Fourteenth Amendment."); *Brown v. Trench*, 787 F.2d 167, 170 (3d Cir. 1986) ("State law determines whether . . . a property interest exists."). *See also Bundy v. Rudd*, 581 F.2d 1126, 1131 (5th Cir. 1978) ("To establish a liberty interest sufficient to implicate Fourteenth Amendment safeguards, the individual must

Thus, while stigma-plus analysis is more common in public employment cases, *see, e.g., Ersek v. Twp. of Springfield*, 102 F.3d 79 (3d Cir. 1996), dismissal from government employment positions does not exhaust the possibilities for stigma plus situations, and as they can occur in different contexts. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (finding that the offensive statute "significantly altered" plaintiff's status and right to purchase or obtain liquor in common with the rest of the citizenry); *Bishop v. Tice*, 622 F.2d 349, 353 (8th Cir. 1980) (finding that denial of administrative remedies was the "plus"); *Marrero v. City of Hialeah*, 25 F.2d 499, 519 (5th Cir. 1980) (finding that deprivation of fourth amendment rights was the "plus"). For these reasons, stigma plus is not dependent on a termination; rather, "it is the 'alteration of legal status,'" such as the governmental deprivation of a right securely held, "which, combined with the injury resulting from the defamation, [that] justifie[s] the invocation of procedural safeguards." *Paul*, 424 U.S. at 709.

For these reasons, Plaintiffs, in accordance with *Dee*, are permitted to rely upon solely the abrogation of their NCAA rights to satisfy the plus prong of the stigma plus doctrine. Of course, Plaintiffs rely upon both the abrogation of the NCAA Rights and the termination from their assistant coaching positions (*see infra*). Accordingly, the abrogation and deprivation of Plaintiffs' third party beneficiary contractual rights, as afforded to them by the NCAA Bylaws and as represented by the NCAA Rights, would constitute a tangible interest sufficient to qualify as the "plus" to the stigmatizing Actionable Statement. *See Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 623-24 (Colo. App. 2004) (affirming that third party beneficiary rights in the NCAA Bylaws are tangible state interests in the nature of contractual rights).

Penn State erroneously cites *District Counsel 33, Am. Fed'n of State Cnty. & Mun. Employees, AFL-CIO v. City of Philadelphia*, 944 F. Supp. 392, 393-94 (E.D. Pa. 1995), *aff'd without op.*, 101 F.3d 690 (3d Cir. 1996), as support for its assertion that the procedural

---

be not only stigmatized but **also stigmatized in connection with a denial of a right or status previously recognized under state law**.") (citation omitted) (emphasis supplied).

protections afforded by the NCAA Bylaws do not establish a constitutional deprivation upon which Plaintiffs can secure relief. Penn State is incorrect inasmuch as this case is inapplicable to the application of the stigma plus doctrine.

In *District Counsel 33*, a group of city employees as the plaintiffs brought a section 1983 claim against the City of Philadelphia, arguing that the City bypassed proper promotion procedures and that the failure to adhere to those procedures deprived plaintiffs "of a constitutionally protected property interest in 'merit selection' without due process of law." *Id. at* 393-94. The Court in *District Counsel 33*, which specifically noted that the plaintiffs made no claim of "an infringement of their life or liberty interests," determined that the actual "entitlement to which [plaintiffs] lay claim is a procedure through which the true substantive benefit, employment at a higher level, is conveyed." *Id.* at 395. The court found that no case law, to their knowledge, supports the existence of a constitutionally protected property interest in a procedure. *Id.* Further, the court quoted a separate case, stating, "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.* (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983)). In conclusion, the court held that the plaintiffs had possessed no property interest protected by the constitution in the City of Philadelphia's procedures for merit selection. *Dist. Counsel 33*, 944 F. Supp. at 396. Of note, the *District Counsel 33* Court made no reference to, and thus provided no analysis of the stigma-plus doctrine.

In this case, Plaintiffs have asserted a deprivation of their liberty interest in their reputation and rely upon the stigma plus doctrine to demonstrate that they were entitled to a name clearing hearing that Penn State failed to and refused to provide. The contractually provided safeguards, as defined as the NCAA Rights, relate to those processes afforded to "involved individuals" to which Plaintiffs were entitled to enjoy as third party beneficiaries.[16]

[16]Penn State cites to *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 716 (D. Vt. 2012) which concluded that plaintiff Knelman failed to demonstrate that he was an intended third party beneficiary to the "'fairness' provisions

Plaintiffs do not rely upon these NCAA Rights as constitutionally-protected processes themselves, but rather as contractual provisions which Penn State irreversibly altered and abrogated, thereby satisfying the plus prong, when Penn State agreed to the Consent Decree and waived the traditional infraction investigation.

v. It Is Not Necessary That The Alteration Of Plaintiffs' Tangible Interests As Defined By The NCAA Rights Be Caused By The Actionable Statement; Rather The Stigma Plus Requirement Is That The Stigmatizing Occurs In Conjunction With The Alteration Of The Tangible Interest.

There is no requirement or necessity of causation between the stigma and the plus; indeed, in many stigma plus termination cases, the stigmatizing statements occur after the employment termination. Instead, it is the mere alteration of a person's legal status, combined and occurring in connection with the stigmatizing statement, which justifies the invocation of procedural name-clearing safeguards. *Paul*, 424 U.S. at 708-09. The *Paul* Court noted that *Constantineau* had said that due process rights were triggered "[w]here a person's good name, reputation, honor, or integrity is at stake *because of what the government is doing to him.*" *Id.* at 708 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (italicized emphasis in original). The *Paul* Court said the italicized phrase "referred to the fact that the governmental action taken in that case ***deprived the individual of a right previously held under state law***" — the right to purchase or obtain liquor. *Id.* (bold and underline emphasis supplied).

It is evident that the Supreme Court focused on the conduct of the state actor in both stigmatizing the person and also altering their legally protected tangible interests. In other words, reputation damage is not actionable unless "it occurs **in the course of or is accompanied by a change or extinguishment** of a right or status guaranteed by state law or the Constitution." *Clark v. Twp. of Falls*, 890 F.2d 611, 619 (3d Cir. 1989) (emphasis supplied). *See also Strum v.*

---

on which [Knelman] relies in the NCAA manual, such that he would have an enforceable right to their performance." *Id.* Of course, the *Knelman* decision offers no respite to Penn State because the NCAA has already admitted in its pleadings in Centre County that "involved individuals," who Plaintiffs would be if a jury deems that they are included and understood to be referenced in and/or by the Actionable Statement, are intended by both the NCAA and its member institutions (*i.e.*, Penn State) to be third party beneficiaries.

Clark, 835 F.2d 1009, 1012 (3d Cir. 1987) ("[M]ere damage to reputation, **apart from the impairment of some additional interest previously recognized under state law**, is not cognizable under the due process clause.") (emphasis supplied). Thus, it is sufficient for Plaintiffs in this case to allege that they were stigmatized by the obviously offensive reference of the Actionable Statement in the Consent Decree while simultaneously having their NCAA Rights, to which they were entitled as "involved individuals" because they were effectively named in the Consent Decree by the inclusion of the Actionable Statement, abrogated by Penn State.

For example, in *Marrero v. City of Hialeah*, 625 F.2d 499, 519 (5th Cir. 1980), the Fifth Circuit concluded that there is no requirement of causation between the defamatory statement and the alteration of the person's legal status; rather *Paul* requires only that the defamatory statements be made in conjunction with the alteration of the legal status. *Marrero v. City of Hialeah*, 625 F.2d 499, 519 (5th Cir. 1980). In *Marrero*, the plaintiffs had alleged that the state actor had not only violated their fourth amendment rights by the unlawful arrest and unlawful search and seizure of the plaintiff's inventory in their store, but also further stigmatized them later by making defamatory statements about the plaintiffs. *Marrero,* 625 F.2d at 515. After the asserted deprivation of the plaintiff's fourth amendment rights, the state actors publicized stigmatizing statements about the plaintiffs having been in possession of stolen property. *Id.* at 502. The Fifth Circuit held:

> Our reading of *Paul* that the defamation need not cause the deprivation of another interest in order for a liberty interest to be implicated was recently confirmed by the Supreme Court in *Owen v. City of Independence,* ___ U.S. ___, 100 S. Ct. 1398, 63 L.Ed.2d 673 (1980). ... Hence, it is now apparent that **the defamatory communication need not *cause* the loss of the protected right, or more tangible interest, in order to satisfy the stigma-plus requirement of *Paul*.** Instead, **it is sufficient that the defamation occur in connection with, and be reasonably related to, the alteration of the right or interest**. Here we face a similar connection between the "stigma" and the "plus" but in the context of the state's deprivation of an individual's fourth amendment rights rather than the state's alteration of a state-created right or interest. In *Owen,* the defamation did not cause the employee's discharge; instead, the fact that the public perceived the defamatory charges to be connected to the discharge was sufficient to give rise to a liberty interest. Similarly,

> **here the defamation did not cause the violation of appellants' fourth amendment rights; however, the public surely perceived the defamatory statements made by the police and Rashkind to be connected to the arrests and search and seizure**. In *Dennis,* the defamation did not cause the refusal to rehire; rather, unpublicized reasons were the basis for the decision not to renew Dennis' contract and the defamation arose only when those reasons were subsequently made public. Similarly, here the defamation did not cause the unlawful arrests and search and seizure; rather, unpublicized reasons of Rashkind and the police led to the arrests and search and seizure, and the defamation occurred when those reasons were subsequently publicly aired.

Id. at 518 (emphasis supplied). *See also Velez v. Levy*, 401 F.3d 75 (2d Cir. 2005) (finding that stigma plus existed where stigma did not originate from the same party who inflicted the "plus") (citing decisions from other circuits that approved of "stigma-plus" claims in which the "plus" was imposed separately from any explicit stigmatizing statement); *Bishop v. Tice*, 622 F.2d 349, 353 (8th Cir. 1980) (holding that the stigmatizing statements of two defendants, made at the direction of a third defendant, in conjunction with the imposition of a "plus" — the denial of administrative remedies — by the third defendant, stated a valid claim for deprivation of plaintiff's liberty interest); *Ray v. Tennessee Valley Auth.,* 677 F.2d 818, 824 (11th Cir. 1982) ("Of course, situations may arise in which a defamatory statement by a person other than those responsible for the government deprivation of the "more tangible" right (here, the termination of Ray's employment) nevertheless is sufficiently connected to the action to meet *Paul's* requirements. The defamer, for example, may be operating under the authority or with the approval of those who deprived the plaintiff of the "plus" right.") (emphasis supplied).

In this case, Penn State stigmatized Plaintiffs by publishing the Actionable Statement while simultaneously waiving the traditional NCAA infraction investigation process, thereby altering, extinguishing and forever changing Plaintiffs' legally protected third party beneficiary contractual rights pursuant to the NCAA Bylaws in the form of the NCAA Rights. *See* **Exhibit B**. In this way, Plaintiffs have satisfied the plus prong of the stigma plus doctrine.

b. Penn State Published The Actionable Statement Which Was In Close Substantive Proximity And Connection To Plaintiffs' Terminations And Thus Such Terminations Qualify As The Requisite Plus To The Stigma Of The Actionable Statement.

In addition to the abrogation of Plaintiffs' NCAA Rights which acted as a "plus" to the stigma of the Actionable Statement, the terminations of Plaintiffs from Penn State's payroll in mid-January 2012 also satisfy as a separate and distinct "plus" because the stigmatizing statements included in the Consent Decree were so closely related in substance to Plaintiffs' terminations, and the period of time in between the termination and the Consent Decree was filled with continuous local, state, national and international press coverage, such that a reasonable observer could conclude that the stigmatization occurred "in connection with" the terminations.

Generally, in most termination cases, a plaintiff must demonstrate that the stigmatizing statements were made in temporal proximity to a plaintiff's dismissal from government employment. This is because, in most termination cases, the more time that passes between the "plus" of the termination and the stigma of the defamatory statements, the greater the likelihood that the defamatory nature of the stigmatizing statements will no longer be associated with the termination. So, in reality, the test for whether a termination is a plus to a particular stigma is not measured in time, but rather it is measured by the connectedness that would be understood to associate the plus with the stigma. *See Ulrich v. City and County of San Francisco*, 308 F.3d 968, 983 (9th Cir. 2002) (stating no requirement for a strict temporal link between stigmatizing statements and discharge; instead requirement is that stigmatizing statements be "**so closely related to discharge from employment that the discharge itself may become stigmatizing in the public eye**") (emphasis supplied). As the *McGhee* Court ruled:

> The requirement of *Paul v. Davis* that reputational harm be entangled with "some more tangible interests" is thus met when a terminated or non-renewed § 1983 plaintiff can show **that the termination at least aggravated his stigmatization**. We do not mean to imply that this is a heavy burden for a plaintiff. **Any termination occurring in an atmosphere where the plaintiff's reputation is at issue should be**

> **considered sufficient to meet *Paul*'s entanglement requirement**. It should be the *state's* burden to show that termination in such a context is so removed from the plaintiff's reputational concern that it in no way impacted upon it.

McGhee v. Draper, 639 F.2d 639, 643 (10th Cir. 1981) (emphasis supplied).

Penn State understandably argues that Plaintiffs cannot satisfy the "plus" prong because there is an insufficient nexus between the stigmatizing statements and the terminations due to the time gap. This argument is flawed, however, because it ignores the factual realities of this case that included a nearly continuous course of events regarding Penn State football, as detailed in the FAC at ¶¶44-49, 62-63, 82 and 89-96, beginning with the termination of Joe Paterno, the hiring of the Freeh Firm, the hiring of a new coach, the terminations of Plaintiffs, the publication of the Freeh Report and ending with the execution of the Consent Decree and inclusion of the Actionable Statement. Penn State's position further fails to consider relevant case law that rejects the temporal measuring stick in favor of a more substantive connectedness between the plus and stigma.

Specifically, Penn State attempts to persuade this Court that it should apply the typical legal standard to the extraordinary set of facts detailed in the FAC. Penn State asserts that Plaintiffs must allege "a sufficiently close, contemporaneous nexus for the Court to conclude that Plaintiff was stigmatized in the course of his termination." Motion, at 9. A better guiding measure can be found within the numerous circuit courts that have discussed this issue and rejected a specific temporal limitation. *See, e.g., Velez v. Levy*, 401 F.3d 75, 89 (2d Cir. 2005); *Ulrich v. City & Cnty. of San Francisco,* 308 F.3d 968, 983 (9th Cir. 2002). For example, in *Velez v. Levy*, the Court stated that "[t]here is **no rigid requirement**, therefore, that both the "stigma" and the "plus" must issue from the same government actor or **at the same time**." *Velez*, 401 F.3d at 89 (emphasis supplied). Similarly, in *Ulrich*, in regard to showing a "plus," the appellate court added, "[t]his element **does not require a strict temporal link** between the defamation and the nonrenewal or discharge." *Ulrich,* 308 F.3d at 983 (emphasis supplied). In fact, instead of setting a bright-line, time-based rule, courts have decided not to "set a temporal

limit on the relationship between the alleged defamation and the other deprivation action." *Campanelli v. Bockrath*, 100 F.3d 1476, 1482 (9th Cir. 1996) (citing *Ray v. Tennessee Valley Auth.*, 677 F.2d 818, 824 (11th Cir. 1982) (considering whether the "public would perceive the defamation as connected to the official termination")).

In *Ray*, the Eleventh Circuit "hesitate[d] to set a temporal limit on the relationship between the alleged defamation and the other deprivation action," but nevertheless found that six (6) years was too attenuated. *Ray*, 677 F.2d at 823. In the absence of requiring a stringent temporal parity, courts have turned to the application of more flexible standards, focusing more on the substantive connection between the stigmatizing conduct and the termination. *See, e.g., Ulrich*, 308 F.3d at 983 (holding that the separation of time between the "stigma" and "plus" does not bar the claim if the stigmatizing statements were substantively, "so closely related to discharge from employment that the discharge itself may become stigmatizing in the public eye."); *Velez*, 401 F.3d at 89; *Patterson v. City of Utica*, 370 F.3d 322, 335 (2d Cir. 2004). *See also Marrero*, 625 F.2d at 519-520 (concluding that where "public perceived the defamatory charges to be connected to the discharge was sufficient to give rise to a liberty interest").

Penn State's argument fails because it ignores the continuous course of factual events for over six (6) months leading up to the Consent Decree, which, in the eyes of the public, kept Plaintiffs' terminations intimately connected to the stigmatizing statements. The issue of the Sandusky Scandal was headline news beginning in November 2011 that led to the precipitous firing of Joe Paterno. The press coverage provided no let-up during the time period between Plaintiffs' loss of their positions and the publication of the stigmatizing statement. *See* FAC ¶83. It is in this way that there is a "connectedness" between the "stigma" of the Actionable Statement and the "plus" of their terminations.

A similar factual scenario to this case was presented in *Pasour v. Philadelphia Housing Auth*ority, 2013 WL 4014514, at *5 (E.D. Pa. Aug. 7, 2013) (Judge Buckwalter). In *Pasour*, Judge Buckwalter considered alleged stigmatizing statements regarding plaintiff employee that

were made in August and September 2010, followed by his replacement and suspension, and then his eventual termination in May 2011. *Id.* The defendant employer described the time period of those events as being seven (7) months which defendant argued "was not close enough . . . to connect" the alleged stigmatizing statements and plaintiff's termination. *Id.* Plaintiff argued in response that the stigmatizing statements, plaintiff's replacement and suspension, and plaintiff's eventual termination "demonstrate[d] a **continuing course of conduct connecting the termination to the damaging statements** made by [defendant]." *Id.* (emphasis supplied). The *Pasour* Court agreed with plaintiff's argument, adding that a "reasonable jury could infer" that there was a connection between the stigmatizing statements and the termination, and thus determined that the plaintiff had satisfied the "plus" element. *Id.*[17]

Similarly, the facts of Plaintiffs' case are like those in *Pasour*, because the period of six (6) months that followed Plaintiffs' terminations also included a continuous course of press coverage, including the replacement of the head coaching position at Penn State that was precipitated by the firing of Joe Paterno and that precipitated Plaintiffs' firing, and that culminated in the publication of the Freeh Report and execution of the Consent Decree. In fact, the public suspicion that the other assistant coaches were aware of Sandusky's criminal conduct permeated the media stories from the very beginning. *See* FAC ¶243 ("Initially, when the Sandusky Affair became public in **early November 2011** and Penn State had hired the Freeh Firm, Plaintiffs requested assistance from Penn State during the investigation after multiple media outlets and commentators made comments that the assistant coaches at Penn State were aware of Sandusky's activities.").

Additionally, similar to what was suggested in *Pasour*, if Plaintiffs are given the opportunity to present evidence, it is reasonable to conclude that a jury could infer that Plaintiffs'

[17]Although in *Pasour*, the stigmatizing statement is alleged to have precipitated the termination, the causality, as noted *supra*, is not a requirement of the stigma plus doctrine. *See Marrero v. City of Hialeah*, 625 F.2d 499, 519 (5th Cir. 1980). Indeed, in most stigma plus cases, the termination precedes the stigmatizing statement and the binding requirement is that the stigma and the plus are merely required to be connected, not caused by each other.

terminations were sufficiently connected to the Actionable Statement. At a minimum, Plaintiffs have alleged enough to support a finding that they are entitled to conduct discovery regarding the nexus between their terminations (the "plus") and the publication of the Actionable Statement in the Consent Decree (the "stigma").

Accordingly, in this case, the Court need only determine that Plaintiffs have substantively alleged a "close connection" between their termination and the stigmatizing statements made by Penn State. This Court should reject Penn State's focus on a rigid, temporal limitation.

c. It Is Unnecessary To Consider Whether Plaintiffs' Lost Economic Opportunities Constitute A Plus To The Stigma Of The Actionable Statement Where Plaintiffs Have Already Identified Two Other Pluses, But Nevertheless Such Lost Economic Opportunities Can Serve As A Plus In Their Own Right.

Penn State challenges the sufficiency of the litany of Plaintiffs' various lost economic opportunities as being insufficient to satisfy as the plus prong of the stigma plus doctrine. *See* Motion, at 10-12. *But see* FAC ¶¶239, 261-64, 269-70 and 277-291. However, where, as demonstrated above, Plaintiffs have already satisfied the "plus" prong **twice** by both showing the alteration of both (i) Plaintiffs' third party beneficiary rights to those NCAA Rights afforded to "involved individuals" and (ii) Plaintiffs' public employment, it is unnecessary to even consider Penn State's argument. Instead, where Plaintiffs have already satisfied the elements of "stigma plus," the issue of Plaintiffs' lost economic opportunities is an issue of damages, not liability.

Nevertheless, Plaintiffs assert that these lost economic opportunities further serve as an additional "plus" to the stigma caused by the Actionable Statement, especially at this stage in the proceedings and given the import of *McKnight*. *See McKnight v. Southeastern Pennsylvania Trans. Auth.*, 583 F.2d 1229, 1236 (holding that, at the motion to dismiss stage, harm to future employment possibilities may show sufficient stigma to allow a claim for a violation of a liberty interest); *Baraka*, 481 F.3d at 209 (accepting plaintiff's allegations of reputational harm, *as true,* on a Rule 12(b)(6) motion).

4. Plaintiffs Were Not Required To Have Requested A Name Clearing Opportunity, And, Even If There Was Such A Requirement, Plaintiffs Have Satisfied Any Burdens Imposed By Controlling Case Law Where They And Others On Their Behalf Requested Such A Hearing Which Penn State Ignored.

The remedy for a stigma-plus violation of a government employee's constitutional due process rights is a name-clearing hearing where the employee is given the opportunity to clear his name. The Supreme Court "consistently has held that 'some kind of hearing is required at some time before a person is finally deprived of his property interests.'" *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 16 (1978) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974)). "[A] hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal." *Craft*, 436 U.S. at 16 n.17. "The principal relief to which an individual is entitled should the government's stigmatizing comments rise to the level of a due process violation is a hearing to clear his name." *Ersek*, 102 F.3d at 84. When an employer "'creates and disseminates a false and defamatory impression about the employee in connection with his termination,' it deprives the employee of a protected liberty interest," the Third Circuit ruled in *Hill*, and an employee deprived of his protected liberty interest is entitled to a name-clearing hearing, even though he may have no protectible property interest in continued employment. *See Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006). *See also Patterson v. City of Utica*, 370 F.3d 322, 335 (2d Cir. 2004) (remedy for "stigma-plus claim premised on a plaintiff's termination from at-will government employment is a post-deprivation name-clearing hearing.").

A name clearing hearing provides the stigmatized plaintiff with an opportunity to hear and answer first-hand any charges being asserted against him/her, clearing his/her name of any false statements, and curing the injury to his/her reputation. A post-deprivation name-clearing hearing may defeat a plaintiff's stigma-plus claim, so long as the hearing is adequate for due process purposes. Where a hearing is not held, or is deemed to be insufficient, a plaintiff is entitled to damages if the court determines that the plaintiff was deprived of their reputational

liberty interest. *See Donato*, 96 F.3d at 633. *See also Ersek*, 102 F.3d at 84 n.6 ("[A] name-clearing hearing might be insufficient to cure all the harm caused by stigmatizing government comments. For instance, injury to a plaintiff's reputation might be irreversible.").

Penn State asserts that Plaintiffs had a requirement to plead and prove that they made a timely request for a name-clearing hearing, and that their failure to do so is fatal to their claim. Motion at 18. That is not the case, however, as the Third Circuit has not imposed as a requirement that a plaintiff must have requested such a hearing in order to avoid dismissal of their claim at this stage of the proceedings. *See Hill,* 455 F.3d at 239 n.19 ("It is not clear from the complaint whether Hill requested any sort of name-clearing hearing, **but we have not held that he was required to do so**.") (citing *Ersek*, 102 F.3d at 84 n.8) (emphasis supplied). For that reason, this Court should respectfully reject Penn State's argument.

Without analyzing or even referring to the controlling Third Circuit precedent, Penn State cites to two district court decisions that purport to require that a plaintiff must request a name-clearing hearing: (1) *Greene v. Street,* 2011 WL 2517144, at *4 (E.D. Pa. June 22, 2011); and (2) *Schlichter v. Limerick Twp.*, 2005 WL 984197, at *8 (E.D. Pa. Apr. 26, 2005). Penn State's argument flies in the face of not only the allegations in the FAC that detail Plaintiffs' efforts at securing a name-clearing opportunity, but further controlling precedent and other district court decisions as well. *See Hill*, 455 F.3d at 236; *Ersek*, 102 F.3d at 84 n.8; *Carroll v. Lackawanna Cnty.*, 2014 WL 325322, at *4 (M.D. Pa. Jan. 29, 2014); *Andrekovich v. Chenoga*, 2012 WL 3231022, at *9 n. 3 (W.D. Pa. Aug. 6, 2012); *Smith v. Borough of Dunmore*, 2011 WL 4458787, at *6 (M.D. Pa. Sept. 23, 2011) *aff'd*, 516 F. App'x 194 (3d Cir. 2013); *Erb v. Borough of Catawissa*, 749 F. Supp. 2d 244, 251 (M.D. Pa. 2010).

Plaintiffs are not required to have requested a name clearing opportunity with Penn State, and, even if there was such a requirement, as set forth below, Plaintiffs have satisfied the standard announced in *Green* (which Defendant cited), which required the *Green* plaintiff "(1) provide facts about his counsel's offer to meet with defendants, and (2) plead that defendants

ignored this communication." Motion at 18. *See also Carroll,* 749 F. Supp. 2d at 251 (stating "[g]iven the unsettled nature of this issue within the Third Circuit, [plaintiff] will be allowed to proceed on her stigma-plus claim.").[18]

Should this Court choose to distinguish the Third Circuit precedent cited above, and rely upon the *Green* standard, Plaintiffs' claims must still be sustained at this stage of the proceedings where the FAC adequately pleads multiple requests for a name-clearing hearing, each of which were (i) timely and (ii) pled with sufficient specificity. *See Greene,* 2011 WL 2517144, at *4 (an unspecific request for an opportunity for plaintiff to defend reputation was sufficient to adequately pled a request for a name-clearing hearing). Specifically, the FAC alleges the following:

- "Plaintiffs, through their attorneys, have made several requests both in writing and orally that they be afforded simple due process ... ." FAC ¶240;
- "Penn State has denied Plaintiffs' requests for a vindication of their due process rights . . ." *Id.* ¶241;
- "Plaintiffs attempted to resolve these issues with Penn State prior to the commencement of this litigation without success." *Id.* ¶242;
- "After the execution of the Consent Decree, Plaintiffs have sought on numerous occasions and in writing, both by letters and follow-up emails, through their attorneys, to resolve their claims with Penn State without success." *Id.* ¶252;
- "... Dick Anderson ... specifically requested that Penn State vindicate the names and reputations of the assistant coaches, including Plaintiffs ... ." *Id.* ¶256.

Anderson's email, dated August 29, 2012 (within 40 days of the stigmatizing), was on point with what was being requested and relatedly what was being ignored:

> It would be very helpful if the University could make a statement exonerating our former Assistant Football Coaches. ... A statement from the University would be so helpful to those coaches seeking to continue their careers and would also be so meaningful to the retired coaches to erase these scars from our reputations.

Id. There can be no legitimate argument that Anderson's email, being asserted on behalf of all of the assistant coaches, was not timely or substantively on point. Penn State's silence and

[18]In this instance, while Plaintiffs do refer to the law as "unsettled," it is only for the purpose of showing the bare minimum of why this Court should allow Plaintiffs' liberty interest claim to proceed.

intentional ignoring of the request demonstrates that no further efforts by Plaintiffs would have been successful and met with the same disdain and indifference.

Moreover, assuming arguendo that the law requires Plaintiffs to have pled their efforts, Plaintiffs have sufficiently alleged enough facts to satisfy any requirement. *See* FAC ¶¶240, 245-466, 253 and 256. Plaintiffs' repeated efforts in seeking redress from Penn State are consistent with what has been found to be acceptable by the Third Circuit:

> The Township claims that Ersek failed to request a name-clearing hearing and that such failure is fatal to his claim. Without holding that Ersek was required to do so, we note that Ersek's attorney, in a letter to the Township solicitor sometime after the statement but before the institution of suit, wrote that the Township never afforded Ersek an opportunity to respond to the fabricated statements. This is probably sufficient, notwithstanding Ersek's answer to an interrogatory after initiation of suit that he had not demanded a name-clearing hearing.

Ersek, 102 F.3d at 84 n.8. Accordingly, this Court should not grant relief to Penn State on this basis.

B. Plaintiffs Sufficiently Allege Actionable Constitutional Deprivations Of Their Federal Rights, And Thus Have Adequately Alleged A Federal Conspiracy In Support Of Their Section 1983 Claims.

1. Plaintiffs Have Sufficiently Pled Their Deprivation Of Liberty Claims.

Penn State argues that, because Plaintiffs have failed to sustain their section 1983 liberty deprivation claim, then Plaintiffs cannot sustain their federal claim for conspiracy. However, as stated above, where Plaintiffs have demonstrated that the FAC provides two (2) independent bases to sustain Plaintiffs' section 1983 claim, then Defendant's argument must fail.

Specifically, Penn State cites to *Snyder v. Kraus*, 2010 WL 3419890 (E.D. Pa. Aug. 27, 2010), a case in which the Court granted a motion to dismiss the plaintiff's conspiracy claim. *Id.* at *4. The facts in *Snyder*, however, differ significantly from those in the present case, and therefore its findings are inapplicable.

In *Snyder*, the factual basis of the case was a township meeting where plaintiff Earl Kean, along with the son of plaintiff Roger Snyder, were singled out as the only attendees who were

told they could not speak or participate unless they signed an attendance log, which they subsequently refused to do. *Snyder*, 2010 WL 3419890, at *1. The *Snyder* court found that the plaintiff had failed to establish a constitutional deprivation where he did not even "identify any right which was allegedly infringed upon ... ." *Id.* at *4. Upon consideration of the defendants' motion to dismiss the plaintiffs' conspiracy claims, the *Snyder* court granted the motion because the plaintiffs had relied upon the same factual allegations that the *Snyder* court had just ruled were insufficient to support the plaintiffs' constitutional deprivation claims. *Id.* at *4.

In contrast, and as set forth above, Plaintiffs have demonstrated with detailed allegations (*see, e.g.*, FAC¶¶297-98, 304, 309) that Penn State not only deprived Plaintiffs' of their liberty interest in their reputation on the one hand, but further abrogated their NCAA Rights to which they were entitled as third party beneficiaries and terminated their public employment. In this way, Plaintiffs have satisfied the stigma plus requirement and are permitted at this stage to move forward with these reputational liberty claims.

2. Plaintiffs Sufficiently Pled A Plausible Basis For Conspiracy To Violate Plaintiffs' Liberty Interests In Their Reputations And Therefore Penn State's Argument Is Without Merit And Must Be Denied.

The factual allegations cited to by Penn State, as part of their claim that Plaintiffs have not pled a plausible basis for a section 1983 conspiracy claim, cannot support Penn State's position. Specifically, Penn State attempts to use two (2) short statements from separate allegations within the FAC's 358 paragraphs as support for its assertion that Plaintiffs' make bald allegations. *See* Motion at Section III.B.2.

Penn State's Motion ignores Plaintiffs' detailed allegations that Penn State and the NCAA conspired to deprive Plaintiffs of their liberty interests by their agreement to execute the Consent Decree despite both the NCAA and Penn State knowing that there was no credible evidence that any of the assistant coaches were involved in any cover-up of the Sandusky

Scandal. The primary conspiracy allegations are set forth in the Civil Conspiracy Count III at ¶¶328-340. They assert that Penn State and the Conspirators conspired to:

- bypass the NCAA's rules and procedural infractions' requirements in conducting the Penn State investigation;
- continue the investigation despite knowing and acknowledging internally that it lacked merit;
- deprive Plaintiffs of their NCAA Rights and Penn State Rights before imposing unprecedented sanctions; and
- impose sanctions on Penn State based on an investigation that was improper, lacked investigation and failed to consider whether Penn State had violated any of the NCAA's rules.

FAC ¶338. In support of those allegations in Count III, the FAC provided additional allegations in the body of the FAC. *See, e.g., id.* ¶88 ("both the NCAA and Penn State acted in lieu of following the NCAA's own mandated enforcement procedures, as set forth below, by accepting the conclusions of the Freeh Report as compelling evidence sufficient to justify the execution of the Consent Decree and subsequent imposition of the Consent Decree's sanctions against Penn State."); ¶91 ("In effect, Penn State collaborated with the NCAA and the Freeh Firm, recklessly disregarding Plaintiffs' procedural due process safeguards by imposing sanctions against Penn State and issuing the Consent Decree in a criminal matter unrelated to recruiting and athletic competition (and thus outside of the NCAA's jurisdiction), and falsely accusing Plaintiffs with malice of enabling and acting with complicity with child sexual abuse."); ¶174 ("However, Penn State knew that the Actionable Statement was erroneous and based on unreliable and unsubstantiated conclusions made in the Freeh Report, which itself Penn State knew was unreliable and seriously flawed and where Penn State intentionally rushed to judgment without a proper investigation, violating Plaintiffs' procedural due process rights, as safeguarded by the NCAA Rights and Penn State Rights."); ¶175 ("In this way, Penn State and the other Conspirators ... acted intentionally to abrogate and deny Plaintiffs their liberty interests and did so with malice toward Plaintiffs by executing the Consent Decree and issuing the Actionable

Statement."); ¶¶191-203 (including allegations that Penn State and NCAA collaboratively cooperated in the drafting and dissemination of the public statements surrounding the publication of the Consent Decree, including the Emmert Statement that magnified the stigma character of the Actionable Statement); ¶220 ("Penn State and the NCAA breached Plaintiffs' Penn State Rights, NCAA Rights and the obligations that both Penn State and the NCAA owed to uninvolved student-athletes, coaches, administrators and competitors, including the duty to ensure that those individuals, including Plaintiffs, are treated fairly by both Penn State and the NCAA in any NCAA enforcement action.").

Judge Leete relied upon these same and similar allegations to support his ruling in the January 6 Opinion that the state court plaintiffs had sufficiently pled their civil conspiracy claim against the NCAA. January 6 Opinion. Although Judge Leete was reviewing the allegations from the NCAA's viewpoint, the FAC in this case has alleged that Penn State similarly collaborated with the Freeh Firm and NCAA, that both the Freeh Firm and the NCAA were acting in a manner as a state actor (FAC ¶335), and that these conspirators had met and discussed "areas of inquiry and strategies," and had included many other overt acts of the NCAA and the Freeh Firm working together. *Id.* ¶¶305-06, 328-39. As Judge Leete likewise focused on, the FAC had asserted that these actions were taken "to purposefully injure [the plaintiffs] to deprive them of their procedural rights, or at least in reckless disregard of substantially certain injury to [the plaintiffs], with no legitimate purpose." *Id.* ¶81. The FAC has asserted that the conspirators knew that the Freeh Report was unreliable and yet agreed (conspired) to deprive Plaintiffs of their liberty interests by executing the Consent Decree and including the Actionable Statement while simultaneously abrogating Plaintiffs' rights to the NCAA Rights and Penn State Rights. *Id.* ¶¶137, 146, 153 and 174-75.

Plaintiffs' allegations in the FAC have provided more than enough information at this stage to detail their claims of unlawfulness by and amongst the conspirators. Although Penn

State does not enjoy the characterization of the collaborative environment between Penn State and the NCAA regarding the press release statements and public comments, as detailed in the FAC ¶¶191-214,[19] these are very specific discussions held between the NCAA and Penn State where there are explicit discussions of foregoing the traditional NCAA infractions process and waiving due process.[20] Penn State's decision to agree to the Consent Decree, waive the infractions procedures and include the Actionable Statement was in collaboration with the NCAA and this itself satisfies as an allegation of conspiracy. *See* FAC ¶204 ("Penn State knew that it had a choice to follow those traditional infractions methods that would have ensured due process for Plaintiffs and declined, in an agreement with the NCAA, to elect that path out of expediency and fear.").

Penn State's suggestion that Plaintiffs contradict their allegations that Penn State conspired with the NCAA is meritless and Penn State's characterization of FAC ¶339 is fanciful at best. At no point in all of the allegations of the FAC do Plaintiffs ever assert anything other than that Penn State "agreed" to execute the Consent Decree. In fact, Penn State has admitted that it "agreed to the Consent Decree to avoid harsher sanctions." *See* **Exhibit C**, at ¶70. *See also* FAC ¶339(f). What Penn State plainly ignores is that, although a conspirator may have any number of motivations to participate in a conspiracy, the fact that a party agrees in a conspiracy is sufficient to satisfy the *sine qua non* requirement of the existence of an agreement. If this court has any doubt, consider ¶334 of the FAC:

> More specifically, Penn State, Emmert, the NCAA, other unknown NCAA employees, along with the Freeh Firm, and others (collectively, the "Conspirators"), **conspired to work together and did work together, and exchanged emails and held briefings and meetings with and for each other, contacted each other to discuss areas of inquiry and strategies and otherwise worked and cooperated with each other, all in order to create a false report in the nature of the Freeh Report** and, as a result, for the NCAA to threaten to impose the "death penalty" upon

[19] *See, e.g.*, FAC ¶194 (Remy email admitting that Emmert's press conference statements were meant to assist Penn State in its public communications).

[20] FAC ¶191 ("Moreover, upon information and belief, Emmert's statements were the result of a collaboratively designed effort by Penn State and the NCAA to have a unified message going forward to the press and public.").

> Penn State and thereby have Penn State agree and accept the unwarranted and unprecedented sanctions on Penn State, thereby causing and compelling Penn State (i) to breach the contract between the NCAA and Penn State and (ii) **to deprive Plaintiffs' of their NCAA Rights and Penn State Rights, to which they were entitled as an intended third party beneficiaries**.

Id. (emphasis added). *See* FAC ¶¶193-203, 337 (alleging that Penn State and the NCAA (as well as the other Conspirators) conspired "to work together and did work together, and exchanged emails and held briefings and meetings with and for each other, contacted each other to discuss areas of inquiry and strategies and otherwise worked and cooperated with each other . . .", all in order to violate Plaintiffs' procedural and due process rights, as well as their liberty interests).

Penn State argues that Plaintiffs' claim regarding Penn State's knowledge and subsequent disregarding of traditional infractions methods is a baseless one. This argument, again, fails to acknowledge the multiple allegations, which precede the single allegation cited to by Penn State, which adequately and sufficiently allege facts that support Plaintiffs' argument. *See* FAC ¶¶ 201-204. Specifically, Plaintiffs allege that Gene A. Marsh ("Marsh"), a negotiator hired by Penn State, stated in an email to NCAA officials that he "had presented to Penn State's legal team the option of a traditional infractions process and that Penn State decided to forego that opportunity, **knowing full well that there would be critics that challenged the apparent lack of due process**." FAC ¶201. This is direct evidence of **specific intent** on the part of Penn State to agree to the expedited Consent Decree to the detriment of the procedural safeguards provided by the NCAA Rights. Similarly, in another email to the NCAA officials, Plaintiffs also allege "Marsh wondered . . . whether 'at some point an institution may be better off under a traditional infractions process.'" FAC ¶203. Obviously, the issue of whether to forego the traditional infractions process was something being considered and discussed and something that both Penn State and the NCAA conspired to abrogate to Plaintiffs' detriment in favor of the expedited Consent Decree. Accordingly, viewing these allegations in the light most favorable to Plaintiffs, Penn State's argument that Plaintiffs' allegations are "entirely baseless" must fail.

Finally, Penn State asserts that Plaintiffs "never once" assert that they are "within the class of individuals that would have been 'owed' process under the NCAA's own rules." Motion at, 24-25. Penn State apparently did not read ¶307(b) of Count I of the FAC:

> **307.** By executing the Consent Decree, Penn State knowingly and intentionally breached its contractual obligations and thereby stripped Plaintiffs of their procedural due process rights, as defined by the NCAA Rights and Penn State Rights, by, among other things: ... (b) failing to require that the NCAA conduct a traditional enforcement and infractions process **that would have protected Plaintiffs' due process rights as involved persons**; ....

FAC ¶307(b). For this reason, this Court can readily dismiss Penn State's argument has incorrect.

3. Plaintiffs Have Adequately Pled That Penn State Acted With Specific Intent To Violate Plaintiffs' Rights.

As Judge Leete recounted on facts nearly identical to those in the FAC, Plaintiffs have alleged that Penn State, along with the conspirators, acted together to commit overt acts in furtherance of their improper and unlawful purpose to harm Plaintiffs and deprive Plaintiffs of their liberty interests in their reputation by publishing an unsubstantiated fallacy in connection with Penn State's and the conspirators' alteration of Plaintiffs' NCAA Rights and public employment. Plaintiffs have asserted that Penn State and the conspirators relied upon the Freeh Report that they knew was unreliable and without support. *See, e.g.*, FAC ¶137 ("Penn State knew or should have known that the Freeh Report, as the basis of the Consent Decree, was an unreliable rush to judgment without a proper investigation and the conclusions reached in the Freeh Report were not substantiated."). As a result, both Penn State and the NCAA executed the Consent Decree (which adopted and relied entirely upon the "known-to-be" unreliable Freeh Report) and agreed to publish the Actionable Statement with specific knowledge or reckless disregard of its falsity. In effect, as Judge Leete has already ruled, the conspirators "falsely accused Plaintiffs of enabling and causing child sex abuse" which is "sufficient to allege malice." January 6 Opinion at 24 (citing *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 213 (Pa. Super., 2003) (malice can be shown by reckless disregard of plaintiff's rights)).

In this manner, Plaintiffs have sufficiently pled malice and specific intent at this stage in the proceedings. *See also* FAC ¶91 ("In effect, Penn State collaborated with the NCAA and the Freeh Firm, recklessly disregarding Plaintiffs' procedural due process safeguards by imposing sanctions against Penn State and issuing the Consent Decree in a criminal matter unrelated to recruiting and athletic competition (and thus outside of the NCAA's jurisdiction), and falsely accusing Plaintiffs with malice of enabling and acting with complicity with child sexual abuse."); ¶175 ("In this way, Penn State and the other Conspirators (as such term is defined below) acted intentionally to abrogate and deny Plaintiffs their liberty interests and did so with malice toward Plaintiffs by executing the Consent Decree and issuing the Actionable Statement.").

4. Overt Acts Of The Alleged Conspiracy That Occur Prior To Accrual Of Section 1983 Claim Can Nevertheless Be Used To Implicate And Demonstrate Conspiratorial Liability.

Penn State asserts wrongly that the overt acts underlying the conspiracy alleged in the FAC cannot be used to implicate Penn State's conspiratorial liability. Penn State is incorrect.

"Civil conspiracy is a combination of two or more persons to do an unlawful act or criminal act or to do a lawful act by unlawful means for an unlawful purpose." *Baker v. Rangos*, 324 A.2d 498, 506 (Pa. Super. 1974) (citations omitted). For conspiracies which have been alleged to have been "committed over an extensive period of time, where there are repetitive acts committed as part of the conspiracy, the applicable statute begins to run until after the commission of the last overt act in furtherance of the conspiracy." *Beasley v. Young*, 2012 Phila. Ct. Com. Pl. LEXIS 254 (Phila. C.P. 2012).

Independent overt acts which are committed prior to the statute of limitations are generally considered time barred. *See Parker v. Learn the Skills Corp.*, 2006 U.S. Dist. LEXIS 12468, 19-20 (E.D. Pa. Mar. 23, 2006) (finding "[a]ny allegations based on conduct prior to two years before the complaint was filed are untimely and cannot serve as a basis for recovery for either fraud or conspiracy"); *Wilson v. King*, 2010 U.S. Dist. LEXIS 27165, *13-14 (E.D. Pa.

2010) (holding "Plaintiff's conspiracy claim must be restricted to overt acts Defendants' allegedly committed on or after. . ." two years prior to filing of complaint).

The Third Circuit has ruled that the statute of limitations period for a section 1983 civil conspiracy begins to run from the commission of each overt act causing the injury. *See Wilson*, 2010 U.S. Dist. LEXIS 27165 at *12-13 (citing *Kost v. Kozakiewicz*, 1 F.3d 176, 191 (3d Cir. 1993)). In other words, the defendant must have "committed an overt act in furtherance of the conspiracy causing injury to Plaintiff during the two year period prior to the date Plaintiff filed the Complaint. *See Wilson*, 2010 U.S. Dist. LEXIS 27165 at *13 (citing *Bougher v. University of Pittsburgh*, 882 F.2d 74, 79 (3d Cir. 1985)). Moreover, Penn State is correct that "the Third Circuit has explicitly rejected the 'last overt act rule,' which 'would invite attempts to revive time-barred injuries by piggy-backing them onto actions occurring within the relevant period.'" *Rankin v. Smithburger*, 2013 U.S. Dist. LEXIS 96758, *17-18 (W.D. Pa. 2013) (quoting *Wells v. Rockefeller*, 728 F.2d 209, 217 (3d Cir. 1984)).

In assessing the statute of limitations period, the court must incorporate any relevant state tolling rules. *See Hardin v. Straub*, 490 U.S. 536, 543-44 (1989). Pennsylvania's discovery rule states that "the statute of limitations begins to run as soon as 'the plaintiff knows, or reasonably should know, (1) that he has been injured, and (2) that his injury has been caused by another party's conduct.'" *See Allison v. Chesapeake Energy Corp.*, 2013 U.S. Dist. LEXIS 28770, 25 (W.D. Pa. 2013). Moreover, "[t]he continuing violations doctrine is an equitable exception to the timely filing requirement. Thus, when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." *See Rankin*, 2013 U.S. Dist. LEXIS 96758 at *11 (citing *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001)).

In determining whether conduct constitutes a continuing violation, the Third Circuit requires a determination whether the alleged violations are discrete. Discrete acts are time-

barred and do not survive under the continuing violations doctrine. The difference between a discrete act and a non-discrete act "is that discrete acts . . . are 'easy to identify.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). The Supreme Court held in *Morgan* that non-discrete acts necessarily "occur [] over a series of days or perhaps years ... ." *Morgan*, 536 U.S. at 103. Furthermore, one district court in the Third Circuit interpreted "non-discrete acts" to mean "activity taking place 'behind the scenes,' such as internal memoranda, e-mails, or letters suggesting a pattern or unlawful conduct." *See Rankin*, 2013 U.S. Dist. LEXIS 96758 at *11 (citing *Hayes v. Del. State Univ.*, 726 F. Supp. 2d 441, 455 (D. Del. 2010); *Hankin Family P'ship v. Upper Merion Twp.*, 2012 U.S. Dist. LEXIS 1467 (E.D. Pa. 2012).

In *Rankin*, the court specifically held the acts occurring two years prior to the complaint being filed were discrete and thus, were not covered by the continuing violations doctrine. In that case, the time-barred acts consisted of the defendants unlawfully entering the plaintiff's residence and removing her personal property. Importantly, the *Rankin* court emphasized "[e]ach act would have constituted an independent tort, complete when the property had been unlawfully seized or when the home had been unlawfully searched." *See Rankin*, 2013 U.S. Dist. LEXIS 96758 at *17.

In this case, Plaintiffs' claim for the reputational injury did not exist and thus could not accrue **until** the Consent Decree was executed and Penn State published the Actionable Statement. Prior to that moment, Plaintiffs' reputational claim did not exist and Plaintiffs were incapable of filing a claim based upon the conspiracy of many acts about which Plaintiffs had absolutely no knowledge. Thus, the many overt acts leading up to the publication of the Actionable Statement are non-discrete acts that may be used to demonstrate conspiratorial liability. *See* FAC ¶334 (alleging that conspirators "conspired to work together and did work together, and exchanged emails and held briefings and meetings with and for each other, contacted each other to discuss areas of inquiry and strategies and otherwise worked and cooperated with each other"). In addition, the FAC cites to several overt acts occurring by and

between Penn State officials and NCAA officials that occurred between July 21, 2012, and July 23, 2012 (*see* FAC ¶¶197-202), that further demonstrate that Plaintiffs have sustained their claims for civil conspiracy by alleging overt acts within the statute of limitations period. For these reasons, this court should reject Penn State's arguments.

C. Plaintiffs Have Sufficiently Pled A Claim For Intentional Interference With Contractual Relations.

1. Plaintiffs' Liberty Claim Is A Two-Year Statute Of Limitations And Thus Plaintiffs' Contractual Interference Claim Is Timely.

Plaintiffs' intentional interference with prospective contractual relations claim ("contractual interference claim") requires the commission of an underlying state law tort which itself determines the applicable statute of limitations for the contractual interference claim. As demonstrated above, Plaintiffs have sufficiently pled their section 1983 claim regarding Penn State's deprivation of Plaintiffs' liberty interests in their reputation caused by the publication of the Actionable Statement, in connection with the alteration of Plaintiffs' tangible interests in both the NCAA Rights and their public employment. Accordingly, the applicable statute of limitations for the contractual interference claim is two (2) years from the date of the publication of the Actionable Statement and thus Plaintiffs' contractual interference claim is timely.

2. Plaintiffs' Contractual Interference Claim Is Sufficiently Pled Where Plaintiffs Have Alleged That Penn State Acted With Specific Intent.

Plaintiffs have sufficiently pled their intentional interference claim because the Plaintiffs' FAC includes several allegations which demonstrate that Penn State acted with specific intent. Specifically, with regard to the intentional and purposeful actions that Penn State took in harming Plaintiffs' prospective contractual relations, the FAC states that Penn State, knowing "that the Actionable Statement was erroneous and based on unreliable and unsubstantiated conclusions made in the Freeh Report," intentionally violated Plaintiffs' procedural due process rights by rushing "to judgment without a proper investigation," thus demonstrating Penn State's reckless disregard for Plaintiffs' rights. FAC ¶174. *See also* FAC ¶¶81, 91, 190, 317, 320, 325,

336, 339(c) and 340. Those actions, which Penn State took while knowing itself that the Actionable Statement was "unreliable and seriously flawed," were both malicious and reckless. *See id.* ¶¶320, 325. Further, Penn State also knew of "Plaintiffs' future prospective employment, business and economic opportunities," which are detailed in the FAC (*see* FAC ¶¶239, 261-64, 269-70 and 277-291) and also discussed *supra*, and still took the purposeful and malicious actions described in the FAC, including the intentional publication of the Actionable Statement which Penn State knew were "substantially certain" to make Plaintiffs less attractive job candidates. FAC ¶320.

Such reckless and malicious actions as those described above are sufficient to satisfy Plaintiffs' showing of specific intent. As referenced above, Judge Leete noted that malice or specific intent could be demonstrated by a reckless disregard for plaintiff's rights. January 6 Opinion at 17 (citing *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 213 (Pa. Super., 2003). *See also, e.g., Medure v. Vindicator Printing Co.*, 273 F. Supp. 2d 588, 609 (W.D. Pa. 2002) (stating "malice requires that a false statement be made 'with knowledge that it was false or with reckless disregard for whether it was false or not.'" (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). Accordingly, as such, Plaintiffs have alleged that Penn State acted intentionally and with reckless disregard for Plaintiffs' rights, which is sufficient to demonstrate specific intent as part of Plaintiffs' intentional interference claim. For those reasons, this Court should reject Penn State's argument on this issue.

D. In Count III, Plaintiffs Have Pled A Proper And Timely Civil Conspiracy Claim.

1. The Statute Of Limitations Applicable To Plaintiffs' Civil Conspiracy Claim Is Two Years Because It Is Predicated Upon Plaintiffs' Valid Section 1983 Claim, And Therefore The Claim Is Not Time-Barred.

Penn State argues that Plaintiffs' civil conspiracy claim is time-barred because Pennsylvania's one-year statute of limitations for defamation claims is applicable. The reason for this, according to Penn State, is that Plaintiffs assert a defamatory publication as the "overt

act" for their conspiracy claim. Penn State supports this position by citing to a Pennsylvania Court of Common Pleas case, in which the court based its decision to apply a one-year statute of limitations to the plaintiffs' claims for defamation and conspiracy, upon the determination that the overt act was a defamatory publication. *See Evans v. Philadelphia Newspapers, Inc.*, 1991 WL 1011010, at * 37 (Pa. Com. Pl. Feb. 11, 1991), *aff'd*, 601 A.2d 330 (Pa. Super. 1991). Penn State's argument, however, misinterprets and ignores Plaintiffs' claims, as well as the applicable law, and therefore, is not a basis upon which to dismiss Plaintiffs' civil conspiracy claim.

The law is clear in both the Eastern District of Pennsylvania and Pennsylvania state courts that "the statute of limitations for civil conspiracy is the same as the statute of limitations for the underlying tort" and courts will "apply the two-year statute of limitations for civil rights actions under 42 U.S.C. § 1983 and 42 U.S.C. § 1985." *Reynolds v. Fed. Bureau of Prisons*, 2010 WL 744127, at *8 (E.D. Pa. Mar. 2, 2010). *See also Kingston Coal Co. v. Felton Mining Co., Inc.*, 690 A.2d 284, 287 (Pa. Super. 1997); *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974).

Plaintiffs' section 1983 claim asserted in Count I is predicated upon Penn State's deprivation of Plaintiffs' liberty interests in their reputation when Penn State included the publication of the Actionable Statement in connection with the concomitant abrogation of Plaintiffs' NCAA Rights and their terminations. *See* FAC ¶309. Plaintiffs' liberty claim did not accrue until the Actionable Statement was published on July 23, 2012, and thus the filing of the FAC on July 21, 2014, ensured that not only was Plaintiffs' liberty claims timely (having been filed within two (2) years from the date of the publication of the stigmatizing statement), but that Plaintiffs' other state law claims, including civil conspiracy (that are themselves predicated upon the timely liberty claim), were also timely within the two-year statute of limitations. For this reason, Penn State fails to establish that Plaintiffs' civil conspiracy claim is time-barred, and this this Court should reject Penn State's argument.

2. Overt Acts Of The Alleged Conspiracy That Occur Prior To Accrual Of Section 1983 Claim Can Nevertheless Be Used To Implicate And Demonstrate Conspiratorial Liability.

As the above research and section provides, overt acts of the alleged conspiracy that occur prior to accrual of section 1983 claim can nevertheless be used to implicate and demonstrate Penn State's conspiratorial liability. For this reason, Penn State's argument again fails.

3. Plaintiffs Have Sufficiently Pled Malice At This Stage In the Pleadings.

As noted above, Plaintiffs have sufficiently pled that, by publishing the Actionable Statement with the specific knowledge that the Freeh Report was unreliable, Penn State and the conspirators acted with reckless indifference and specific intent to deprive Plaintiffs of their liberty interests by publishing the stigmatizing Actionable Statement while also altering Plaintiffs' other tangible interests, thereby satisfying at this stage Plaintiffs' requirement to plead malice. *See, e.g.*, FAC ¶¶91, 175.

E. Plaintiffs' Claims For Severance Pay Are Subject To The WPCL.

Penn State claims that Plaintiffs' claims under the Pennsylvania Wage Payment and Collection Law, 43 P.S. §§ 260.3 *et seq.* ("WPCL"), in Count IV of the FAC must be dismissed as a matter of law because, Penn State erroneously posits, the WPCL does not, as a matter of law, apply to post-termination severance payments due and employee. Penn State is wrong.

The WPCL was enacted to provide a vehicle for employees to enforce payment of their wages and compensation held by their employers. *Denny v. Primedica Argus Research Labs., Inc.*, 2001 WL 1807885, at *3 (Pa. Com. Pl. May 2, 2001). The underlying purpose of the WPCL is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy when an employer breaches its contractual obligation to pay wages. *Id.* The WPCL does not create an employee's substantive right to compensation; rather, it only establishes an employee's right to enforce payment of wages and compensation to which an

employee is otherwise entitled by the terms of an agreement. *Id. See also Kafando v. Erie Ceramic Arts Co.*, 764 A.2d 59, 61 (Pa. Super. 2000) (*citing Hartman v. Baker*, 766 A.2d 347, 352 (Pa. Super. 2000) (citations and internal quotation marks omitted).

Penn State argues that the post-termination payments that it was contractually bound to pay Plaintiffs are due are not subject to the WPCL as a matter of law. But, Penn State is wrong. The contractual guarantee of severance payments upon termination of an employment contract is indeed subject to the WPCL. *Sullivan v. Chartwell Inv. Partners*, LP, 873 A.2d 710 (Pa. Super. 2005); *Denton v. Silver Stream Nursing and Rehabilitation Cnt.*, 739 A.2d 571 (Pa. Super. 1999) (severance pay promised to plaintiff upon her separation was a "fringe benefit[□] or wage supplement [□] such as separation pay to be paid pursuant to an agreement to the employee" subject to WPCL); *Berger v. Safemasters Co., Inc.*, 1986 WL 15025 (E.D. Pa. Dec. 30, 1986).

Penn State cites the late Judge Newcomer's decision in *Allende v. Winter Fruit Distributors, Inc.*, 709 F. Supp. 597 (E.D. Pa. 1989), in claiming that the WPCL cannot be invoked to protect an employee's contractual entitlement to severance pay. Penn State's reliance on *Allende* is unavailing. In *Allende*, Judge Newcomer ruled that wages or compensation (including fringe benefits or wage supplements) not yet earned and/or relating to periods after his termination were not subject to the WPCL. *Allende*, 709 F. Supp. at 599. But, this case, like *Sullivan*, *Denton* and *Berger*, is distinguishable from *Allende.*

Here, the severance pay to which the Plaintiffs are entitled under the WPCL was part of their compensation package that they earned while they were employed by Penn State in exchange for their services that was to be paid after their employment ended. FAC ¶¶37-39. Thus, as was the case in *Sullivan*, *Denton* and *Berger*, the severance pay at issue here was promised to Plaintiffs during their employment as a "fringe benefit[□] or wage supplement [□] such as separation pay to be paid pursuant to an agreement to the employee" and is, therefore, subject to the WPCL.

F. Plaintiffs Have Stated A Claim For Breach Of Their Employment Contracts As A Matter Of Law.

Penn State claims that the Plaintiffs have failed to state a claim for breach of their employment contracts in connection with their WPCL claim. But, Penn State is wrong again.

To state a claim for breach of contract, the plaintiff must plead: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (citations omitted). "An enforceable contract exists where the parties reached mutual agreement, exchanged consideration, and set forth the terms of their bargain with sufficient clarity." *Gilmour v. Bohmueller*, 2005 U.S. Dist. LEXIS 1611, at *26 (E.D. Pa. Jan. 27, 2005). "An agreement is sufficiently definite if it indicates that the parties intended to make a contract and if there is an appropriate basis on which a court can fashion a remedy." *First Home Sav. Bank, FSB v. Nernberg*, 648 A.2d 9, 14 (Pa. Super. 1994).

Here, each of the foregoing elements is met. Plaintiffs have averred that each was employed by Penn State and was promised compensation and benefits in exchange for their services. FAC ¶¶35-40. One component of the compensation and benefits that Penn State promised to Plaintiffs in exchange for their services was severance pay. *Id.* Penn State breached its contract with Plaintiffs by failing to pay Plaintiffs their full wages and benefits through the end of the 2011-2012 academic year, and then commencing the Severance Pay Period as of July 1, 2012.

Penn State purposefully accelerated the Severance Pay Period to commence as of mid-January 2012 that lasted through mid-July 2013. FAC ¶41. As of mid-July 2013, without ever receiving from Penn State any formal notice of their termination from their employment positions, Penn State ceased paying all wages and benefits to Plaintiffs (except as otherwise provided by and during the Severance Pay Period) and in this way, Penn State wrongfully avoided payment to Plaintiffs of those 6-months of wages and benefits from mid-January

through July 2012 and in so doing, breached its agreements with Plaintiffs. *Id.* ¶¶42-43. In this way, Plaintiffs have easily met the notice pleading requirements of the Federal Rules with respect to establishing a breach of contract underlying their WPCL claim.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Penn State's Motion to Dismiss Plaintiffs' First Amended Complaint in its entirety.

Respectfully submitted,

MITTS LAW, LLC

By: */s/ Gerard M. McCabe*
Maurice R. Mitts, Esquire
Gerard M. McCabe, Esquire
1822 Spruce Street
Philadelphia, PA 19103
(215) 866-0110 (office)
mmitts@mittslaw.com
gmccabe@mittslaw.com

THE MAZUREK LAW FIRM, LLC

By: */s/ Edward R. Mazurek*
Edward R. Mazurek, Esquire
717 South Columbus Boulevard
Philadelphia, PA 19147
(215) 988-9090
emazurek@mazureklawfirm.com

ATTORNEYS FOR PLAINTIFFS JOSEPH "JAY" V. PATERNO AND WILLIAM KENNEY

Dated: March 2, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ("JAY") V. PATERNO AND WILLIAM KENNEY, Plaintiffs, v. PENNSYLVANIA STATE UNIVERSITY, Defendant.	:	CIVIL ACTION NO. 2:14-cv-04365-LS

DEFENDANT'S REPLY IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant Pennsylvania State University ("Penn State") submits this Reply in support of its Motion to Dismiss the First Amended Complaint of Plaintiffs Joseph "Jay" V. Paterno and William Kenney in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

TABLE OF CONTENTS

PAGE

I. PRELIMINARY STATEMENT 1

II. ARGUMENT 1

A. Plaintiffs Have Failed to State a Claim Under Section 1983. 1

1. Plaintiffs Have Not Sufficiently Pleaded a "Stigma" to Support a Section 1983 Claim. 2

2. Plaintiffs Have Not Articulated a Legal Basis for Any of their Proposed "Plus" Prongs. 5

a. Plaintiffs' Purported NCAA Rights are Procedural and Do Not Give Rise to a Property Interest as a Matter of Law. 5

b. Plaintiffs' Claims Also Fail Because the "Plus" Must Be a "More Tangible Interest"; Reputational Harm Alone is Insufficient. 6

c. Termination Was Not Sufficiently Connected to the Alleged Stigma to Qualify as a "Plus." 8

d. Economic Harm Cannot Stand as a Sufficient "Plus." 10

e. Failure to Request a Name Clearing Hearing Constitutes Waiver in this District, and Plaintiffs' Former Colleague was Not Their Representative. 10

B. Plaintiffs Have Not Sufficiently Pleaded a Plausible Basis for 1983 Conspiracy. 11

1. Plaintiffs Do Not Allege Sufficient Facts to Support a Conclusion That There Was a Specific Intent to Deprive Plaintiffs of Their Constitutional Rights. 12

2. Plaintiffs' Conspiracy Claims As to Acts Occurring Prior to July 21, 2012 are Time-Barred. 12

III. CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Arneault v. O'Toole,
864 F. Supp. 2d 361 (W.D. Pa. 2012) 7

Baraka v. McGreevey,
481 F.3d 187 (3d Cir. 2007) 7, 10

Burns v. Alexander,
776 F. Supp. 2d 57 (W.D. Pa. 2011) 7, 8

Dist. Counsel 33, Am. Fed'n of State Cnty. & Mun. Employees, AFL-CIO v. City of Philadelphia,
944 F. Supp. 392 (E.D. Pa. 1995) 6

Ersek v. Twp. of Springfield,
102 F.3d 79 (3d Cir. 1996) 11

Freeman v. City of Chester,
No. 10-2830, 2010 WL 4025918 (E.D. Pa. Oct. 14, 2010) 10

Gleason v. E. Norriton Twp.,
No. 11-CV-6273, 2012 WL 3024011 (E.D. Pa. July 24, 2012) 12

Greene v. Street,
No. 10-4529, 2011 WL 2517144 (E.D. Pa. June 22, 2011) 11

Hill v. Borough of Kutztown,
455 F.3d 225 (3d Cir. 2006) 2

Kelly v. Borough of Sayreville, N.J.,
107 F.3d 1073 (3d Cir. 1997) 7, 10

McKnight v. Se. Pennsylvania Transp. Auth.,
583 F.2d 1229, 1238 (3d Cir. 1978). 10

Mun. Revenue Servs., Inc. v. McBlain,
No. 06-4749, 2007 WL 879004 (E.D. Pa. Mar. 19, 2007) 10

Mzamane v. Winfrey,
693 F. Supp. 2d 442 (E.D. Pa. 2010) 3, 4

Pasour v. Philadelphia Housing Authority,
No. 13-2258, 2013 WL 4014514 (E.D. Pa. Aug. 7, 2013). 8

Paul v. Davis,
424 U.S. 693 (1976).....2, 3, 7, 10

Sampson v. Sch. Dist. of Lancaster,
No. 05–6414, 2009 WL 1675083 (E.D. Pa. June 12, 2009).....9, 10

Sturm v. Clark,
835 F.2d 1009 (1987).....7, 10

STATUTES

42 U.S.C. § 1983..... *passim*

42 Pa.C.S.A. § 5523.....3

I. PRELIMINARY STATEMENT

Plaintiffs Jay Paterno and William Kenney have failed to articulate a single plausible basis on which to rest the claims brought in their First Amended Complaint. Defendant Penn State will not retread its affirmative arguments from its Motion to Dismiss, but instead will focus only on the primary arguments raised in Plaintiffs' Response.

Plaintiffs are attempting to manufacture a constitutional claim from a routine termination. While the First Amended Complaint alleges events that unfolded following the November 2011 arrest of Jerry Sandusky, there seems to be no dispute that Plaintiffs were terminated because the new head coach of Penn State Football hired his own staff which did not include Plaintiffs. Penn State honored its contractual obligations and compensated Plaintiffs with 18 months of full salary severance[1] as well as other benefits. Nevertheless and in an attempt to secure even more compensation from Penn State, Plaintiffs have concocted a facially implausible set of allegations that tell a false and preposterous tale of an alleged conspiracy specifically directed at them between the NCAA, the Freeh Firm and Penn State completely devoid of any factual allegations to support such a claim. Each of Plaintiffs' allegations lack any factual foundation and fail to set forth a cognizable legal theory on which Plaintiffs could possibly recover.

II. ARGUMENT

A. Plaintiffs Have Failed to State a Claim Under Section 1983.

As set forth in Penn State's Memorandum of Law, the Supreme Court has held that in order to state a claim under Section 1983, a Plaintiff must allege that he has suffered harm beyond a state common law claim for defamation. *Paul v. Davis*, 424 U.S. 693, 711-12 (1976). The allegations must involve the additional deprivation of a protected interest; accordingly, the

---

[1] William Kenney obtained a coaching position at another university. Accordingly, his severance was reduced by the value of the salary earned in his new position during the 18-month severance period.

Due Process Clause only protects a liberty interest in reputation when the plaintiff can prove both a "stigma" to his reputation "plus deprivation of some additional right or interest." *Hill v. Borough of Kutztown*, 455 F.3d 225, 236 (3d Cir. 2006) (emphasis in original). Here, Plaintiffs have failed to satisfy both pleading requirements on the face of the First Amended Complaint.

1. Plaintiffs Have Not Sufficiently Pleaded a "Stigma" to Support a Section 1983 Claim.

Plaintiffs' Section 1983 claims first fail because they have not articulated a plausible basis on which a factfinder could conclude that Plaintiffs' reputations suffered a "stigma" as a result of anything that Penn State did or failed to do. In response to the arguments in the Motion to Dismiss, Plaintiffs appear to have significantly narrowed their purported claims of a Section 1983 "stigma" to the so-called "Actionable Statement" and the "Emmert Statement." Plaintiffs do not address Penn State's arguments regarding the statements at the time of the Plaintiffs' terminations or Penn State's purported "silence", and therefore, appear to have abandoned any claims related to such. Nevertheless, Plaintiffs' Section 1983 claims must be dismissed because the so-called "Actionable Statement" and the "Emmert Statement" cannot sustain their claims as a matter of law.

Plaintiffs rely heavily on Judge Leete's decision in the state-court litigation between Plaintiffs and the NCAA to argue that the "Actionable Statement" is sufficient to satisfy the "stigma" prong of the Section 1983 analysis on the Motion to Dismiss. *See Estate of Joseph Paterno, et al., v. National Collegiate Athletic Association ("NCAA"), et al.*, No. 2013-2082 (C.P. Centre Cnty. 2014). Plaintiffs' reliance in this regard is misplaced. First, Judge Leete's decision relates to a common law defamation claim. It does not relate to a Federal Section 1983 claim. Second, the state-court litigation is between Plaintiffs and the NCAA – Plaintiffs do not have any claims against Penn State in that case. Third, any such defamation

claim that Plaintiff may have had against Penn State is clearly time-barred, and as a result, is not a claim included in the First Amended Complaint. *See* 42 Pa. C.S.A. § 5523. Fourth, the Supreme Court in *Paul* held that a Plaintiff must allege that he has suffered harm beyond a state common law claim. As a result, this Court must separately decide whether the "Actionable Statement" is sufficient to sustain a Section 1983 claim. Judge Leete's decision has no impact on that analysis whatsoever.

More fundamentally, Plaintiffs fail to refute the fact that the purported "Actionable Statement" cannot be reasonably interpreted to be referring to Plaintiffs. The "Actionable Statement" reads "[s]ome coaches, administrators, and football staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him." (FAC ¶ 169). There is no mention of Messrs. Kenney and Paterno in the "Actionable Statement." Moreover, the Consent Decree and the Freeh Report specifically identify certain individuals, and Jay Paterno and William Kenney are not among those identified in either document. The fact that particular individuals were identified completely undermines any inference that the reference to "some coaches" could mean either Jay Paterno or William Kenney. The fact that specific individuals, other than Plaintiffs, are identified in the Consent Decree and the Freeh Report distinguishes this case from *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010) cited by Plaintiffs. In *Mzamane*, Defendant made reference to a school's "leadership", of which Plaintiff was a member as headmistress; this reference was held to be sufficiently "of and concerning" Plaintiff to allow the defamation claim to proceed. However, Judge Robreno in *Mzamane* noted that "no claim [would exist] if, for any other reason, a reader could not reasonably conclude that the statements at issue referred to the particular person or persons alleging defamation." *Mzamane*, 693 F. Supp. 2d at 484 (citing *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d

Cir. 1994)). In this case, a reasonable person reading the Consent Decree and the Freeh Report would not conclude that the reference to "[s]ome coaches, administrators, and football staff members" refers to Messrs. Paterno and Kenney, who are not even named in those reports. Plaintiffs' broader reading is unreasonable.

Similarly, Plaintiffs' characterization of the "Emmert Statement" continues to defy reasonable interpretations and, accordingly, does not satisfy the "stigma" prong of the Section 1983 analysis. Plaintiffs claim that Emmert, who was not speaking on behalf of Penn State, suggested "potential investigations and sanctions against the assistant coaches (including Plaintiffs)." Response Br. at 25. Plaintiffs appear to have concocted this "interpretation" out of thin air. Emmert stated that the NCAA was reserving the right to address issues concerning "individuals" at a later date. Without more, it is entirely unreasonable to conclude that the "individuals" to which Emmert was referring included, or could have included, Messrs. Paterno and Kenney. Indeed, several years have passed and Plaintiffs have failed to identify a single piece of evidence that would lead any reasonable person to conclude that Emmert was, or could have been, referring to Plaintiffs. Moreover, in their Response, Plaintiffs do not explain how Penn State was allegedly "adopting" these Press Conference statements by Emmert (who was speaking on behalf of the NCAA and not Penn State). For these reasons, the "Emmert Statement" too does not satisfy the "stigma" prong of the Section 1983 analysis.

Accordingly, Plaintiffs have failed to plead a plausible basis to satisfy the "stigma" prong of the Section 1983 analysis. As a result, Plaintiffs' Section 1983 claims fail as a matter of law and must be dismissed.

2. Plaintiffs Have Not Articulated a Legal Basis for Any of their Proposed "Plus" Prongs.

Plaintiffs argue that they have properly pleaded the deprivation of an additional right or interest to satisfy the "plus" element of their Section 1983 claims based on (i) alleged third-party beneficiary rights relating to the NCAA Bylaws and (ii) their terminations. Plaintiffs' arguments fail for at least five (5) reasons. First, the purported NCAA Rights are purely procedural in nature and do not give rise to a property interest. Second, the purported NCAA Rights do not represent harm separate and distinct from the "stigma" caused by the purported reputational harm suffered by Plaintiffs. Third, Plaintiffs' terminations occurred long before the alleged "Actionable Statement" and the "Emmert Statement." Fourth, the alleged economic harm suffered by Plaintiffs is insufficient to sustain their claims as a matter of law. Fifth, Plaintiffs failed to request a name-clearing hearing. For each of these reasons, Plaintiffs' Section 1983 claims must be dismissed.

a. Plaintiffs' Purported NCAA Rights are Procedural and Do Not Give Rise to a Property Interest as a Matter of Law.

Plaintiffs argue that Penn State deprived them of a property interest when it allegedly abrogated their "NCAA Rights." Plaintiffs' argument is unavailing because the alleged NCAA Rights are procedural and cannot satisfy the "plus" element of the Section 1983 analysis as a matter of law.

Plaintiffs acknowledge that there are "effectively two types of stigma-plus cases, with the first being those that included the alteration by the state actor of the person's state law created property interest. . . " Response Br. at 33 (citing *Dee v. Borough v. Dunmore et al.*, 549 F. 3d 225 (3d Cir. 2008)). Plaintiffs state that "the abrogation of Plaintiffs' NCAA Rights" constitutes this first type of case. *Id.* Plaintiffs also argue that they "do not rely upon [the] NCAA Rights as constitutionally-protected processes themselves, but rather as contractual provisions which Penn

State irreversibly altered and abrogated." Response Br. at 36. Plaintiffs admit that the state law created interest must be one in property – and not process alone. Response Br. at 33. At the same time, Plaintiffs admit that the purported NCAA Rights at issue constitute "procedural rights." Response Br. at 31; *see also* list of procedures at 30 – 31.

What Plaintiffs overlook is that, even if these "NCAA Rights" existed (which Penn State denies in this context), those contractual provisions do not provide the type of interest which has been held to be a sufficient "plus" for a stigma-plus Section 1983 claim. Defendant has found no case in which procedural interests, like the purported contract rights at issue here, gave rise to a property interest sufficient to satisfy the "plus" prong of the Section 1983 analysis. Plaintiffs misapply *Dist. Counsel 33, Am. Fed'n of State Cnty. & Mun. Employees, AFL-CIO v. City of Philadelphia*, 944 F. Supp. 392 (E.D. Pa. 1995), in which the Court noted that "research has revealed no case in which a property interest has been held to exist in a procedure, and Plaintiffs have failed to bring any such case to my attention." *Id.* at 395. Plaintiffs have failed to explain how they have a "property" interest in the NCAA Rights when, those rights, by definition, are procedural in nature. Plaintiffs fail to cite a single Third Circuit case in which a "plus" prong was satisfied by a mere claim to a purportedly agreed-upon process. Accordingly, Plaintiffs' claims fail as a matter of law.

b. Plaintiffs' Claims Also Fail Because the "Plus" Must Be a "More Tangible Interest"; Reputational Harm Alone is Insufficient.

Plaintiffs' reliance on the alleged deprivation of the NCAA Rights to satisfy the "plus" element of their Section 1983 claims is also misplaced because it represents nothing more than alleged harm to their reputations, and therefore, cannot be recognized as harm separate from the alleged "stigma" to sustain their claims. In order to properly plead a Section 1983 claim, Plaintiffs must allege the deprivation of an interest that is separate and distinct from the

reputational harm associated with the alleged "stigma." *See Paul*, 424 U.S. at 701. Plaintiffs have failed to do so here, and thus, their Section 1983 claims fail as a matter of law.

Not every conceivable claim rises to the level of a sufficient "plus"; rather, only claims that when "combined with the injury resulting from defamation, such an alteration of legal status. . . justifies the invocation of procedural safeguards." *Arneault v. O'Toole*, 864 F. Supp. 2d 361, 397 (W.D. Pa. 2012) *aff'd on other grounds,* 513 F. App'x 195 (3d Cir. 2013) (citations omitted). Such claims must amount to a "more tangible interest" than the alleged reputational harm. *Id.* at 395 (citing *Baraka v. McGreevey*, 481 F.3d 187, 208 (3d Cir. 2007)). In other words, the "plus" factor must be separate from, and in addition to, the injury resulting from the alleged defamation.

In this case, the so-called "abrogation" of Plaintiffs' NCAA Rights did not deprive Plaintiffs of a "more tangible interest" than their alleged reputational harm. *See Kelly v. Borough of Sayreville, N.J.*, 107 F.3d 1073, 1078 (3d Cir. 1997) (citing *Sturm v. Clark*, 835 F.2d 1009, 1012 (3d Cir. 1987)). Rather, Plaintiffs admit that the only substantive interest at issue is their general reputation; "Penn State has defamed Plaintiffs while simultaneously abrogating their state created rights that would have provided them the very opportunity to clear their name." Response Br. at 32. Essentially, Plaintiffs argue that their NCAA Rights would have provided them with an opportunity avoid the "stigma" allegedly caused by the "Actionable Statement" and the "Emmert Statement." Plaintiffs fail, however, to plead a separate deprivation of a property right as is required to sustain a Section 1983 claim. *Cf. Burns v. Alexander*, 776 F. Supp. 2d 57, 83 (W.D. Pa. 2011) (finding a sufficient "plus" where plaintiff relied "not simply on the negative implications that [the welfare official's] finding had on her employment prospects, but also on more tangible injuries such as her temporary removal from [the child care

center she ran], the decision not to renew her operating license, [the center's] suspension from the Keystone STARS program, and her loss of over $30,000.00 in grant money and tuition support.").

c. Termination Was Not Sufficiently Connected to the Alleged Stigma to Qualify as a "Plus."

Faced with the significant risk that the purported procedural NCAA Rights will not satisfy the "plus" prong of the Section 1983 analysis, Plaintiffs argue that this Court should rely primarily on authority from other Circuits to hold that the termination of their employment can be used as the "plus" factor here. Plaintiffs ignore the fact that the majority of courts addressing this issue in this Circuit would hold that the time between the termination and the stigma is too long to be sufficiently connected to the alleged stigma. Response Br. at 39 – 43.

Plaintiff's reliance on the only Third Circuit case cited in their Response is misplaced. In *Pasour v. Philadelphia Housing Authority*, the statements at issue were specifically made about the individual plaintiff and were made prior to his termination. No. 13-2258, 2013 WL 4014514, at *4 (E.D. Pa. Aug. 7, 2013). Further, the plaintiff alleged a specific chain of events leading from these defamatory statements to the "plus"; to wit, "his replacement as the Head of Human Resources, suspension from employment, and eventual termination demonstrate a continuing course of conduct connecting the termination to the damaging statements made by Chairman Street." *Id.* at *5. This course of conduct by the defendant then led the Court to hold that, if true, "a reasonable jury could infer" that the "eventual termination was the direct result of [the defaming] statements." *Id.*

In the case at bar, of course, the exact inverse of this situation occurred; according to Plaintiffs themselves, "Penn State fired Joe Paterno from the head coaching position as a result of the Sandusky Scandal that in turn led to the terminations of Plaintiffs as assistant coaches..."

Response Br. at 28. Plaintiffs were released months before the so-called "Actionable Statement", which did not mention or even allude to the Plaintiffs. As such, this case much more closely resembles the facts in *Sampson v. Sch. Dist. of Lancaster*, No. 05–6414, 2009 WL 1675083, at *9 (E.D. Pa. June 12, 2009) ("[The defamatory article] was published over a month *after* Plaintiff's termination of employment. Plaintiff's termination and the allegedly false and defamatory newspaper article are not 'roughly contemporaneous.'").

Moreover, Plaintiffs argue that the continuing "press coverage" surrounding the Sandusky investigation provided the requisite "connection" between their terminations and the allegedly stigmatizing statements. Response Br. at 41. However, the *Sampson* court addressed, and rejected, a very similar claim. In *Sampson*, the plaintiff school administrator argued that the School District of Lancaster deprived her liberty interest in reputation "sometimes through affirmative conduct, [and] sometimes through inaction and silence" during and after an audit looking into managerial mismanagement. *Id.* at *8. In granting the defendant's motion for summary judgment on the reputational due process claim, Judge Surrick noted that "[t]o the extent that Plaintiff argues that the [Defendant School District] 'disseminated' an impression about Plaintiff through. . . lack of public comment, we find the argument unpersuasive. The District's silence in the face of the independent media reports was particularly responsible under the circumstances." *Id.* at *10. Finally, Judge Surrick found that "the very purpose of retaining an independent auditor was to remove any connection with the District to ensure a fair and impartial audit. When the report was released, the District made no public statements regarding Plaintiff's termination. The fact that the news media connected Plaintiff's termination with the [auditor's] report—in the absence of any statement from the District—does not mean that the District violated Plaintiff's procedural due process rights. A school district is not obligated to

provide a name-clearing hearing to every terminated employee who finds his or her name in the news media." *Id.* at *10.

d. Economic Harm Cannot Stand as a Sufficient "Plus."

In an apparent attempt to salvage their claim that economic harm can constitute a sufficient "plus" factor, Plaintiffs rely upon *McKnight v. Se. Pennsylvania Transp. Auth.*, a Third Circuit case decided in 1978. 583 F.2d 1229, 1238 (3d Cir. 1978). However, in doing so, Plaintiffs entirely ignore the three more recent Third Circuit cases cited in Defendant's Motion to Dismiss, as well as two additional cases from the Eastern District of Pennsylvania.[2]

Moreover, it is unclear why Plaintiffs cite *Baraka v. McGreevey* at all, as the Third Circuit found therein that the plaintiff had not properly alleged a protected interest in his reputation. 481 F.3d 187, 209 (3d Cir. 2007). The court found that that there was no constitutional violation, and affirmed the dismissal of the 1983 claim. *Id.*

As such, it appears that Plaintiffs have effectively conceded that alleged economic harm is not a sufficient "plus" factor as a matter of law.

e. Failure to Request a Name Clearing Hearing Constitutes Waiver in this District, and Plaintiffs' Former Colleague was Not Their Representative.

As an initial matter, Plaintiffs do not allege sufficient facts to establish that there was any conduct of behalf of Penn State that would have entitled them to a name-clearing hearing at the time of their terminations or any reasonable time thereafter. Nevertheless, even if they were

---

[2] *See, e.g., Kelly v. Borough of Sayreville*, 107 F.3d 1073, 1078 (3d Cir. 1997) ("[E]ven financial injury due solely to government defamation does not constitute a claim for deprivation of a constitutional liberty interest"); *Sturm v. Clark*, 835 F.2d 1009, 1013 (3d Cir. 1987) ("[F]inancial harm resulting from government defamation alone is insufficient to transform a reputation interest into a liberty interest"); *Mun. Revenue Servs., Inc. v. McBlain*, No. 06-4749, 2007 WL 879004, at *4 (E.D. Pa. Mar. 19, 2007), *aff'd*, 347 F. App'x 817 (3d Cir. 2009) ("Mere economic harm accompanying the defamation is insufficient to satisfy this 'plus' requirement"); *Freeman v. City of Chester*, No. 10-2830, 2010 WL 4025918, at *4 (E.D. Pa. Oct. 14, 2010) (citing *Boyanowski v. Capital Area Intermediate Unit.*, 215 F.3d 396, 400 (3d Cir. 2000) (plaintiff's claims of lost future clients and profits, without more, do not rise to the level of "stigma-plus" contemplated by *Paul v. Davis*)).

entitled to such a hearing (which Penn State denies), Plaintiffs must actually request a name-clearing hearing in order to sustain a Section 1983 claim like the ones alleged in the First Amended Complaint. *See, e.g.*, *Greene v. Street*, No. 10-4529, 2011 WL 2517144, at *4 (E.D. Pa. June 22, 2011). Because Plaintiffs failed to request a name-clearing hearing, their Section 1983 claims fail as a matter of law.

Plaintiffs' allegations that they requested "due process" (FAC ¶¶ 240-41) or attempted to "resolve their claims" (FAC ¶¶ 242, 252) are insufficient to satisfy this clear requirement. Plaintiffs do not (and cannot) state that they requested a name-clearing hearing. Moreover, Plaintiffs' reliance on *Ersek v. Twp. of Springfield* is unavailing. 102 F.3d 79, 84 n.8 (3d Cir. 1996). In that case's dicta, the Court of Appeals noted that a more explicit statement than any alleged by Plaintiffs here was only "probably sufficient." The Court did not need to reach the issue of waiver, however, because it dismissed the plaintiff's claim on other grounds.

Finally, Plaintiffs argue that they satisfied this requirement because Dick Anderson "requested that Penn State vindicate the names and reputations of the assistant Coaches." (FAC ¶ 256). At best, this is a request for a press release, not a name-clearing hearing. Furthermore, Plaintiffs do not allege that Mr. Anderson was acting on behalf of Plaintiffs as their official representative.

B. Plaintiffs Have Not Sufficiently Pleaded a Plausible Basis for 1983 Conspiracy.

As articulated above, Plaintiffs' procedural due process claims in their reputations are insufficient. As such, Plaintiffs cannot sustain a 1983 conspiracy claim, as there has been no underlying due process deprivation. Nevertheless, Plaintiffs' conspiracy claim independently fails.

1. Plaintiffs Do Not Allege Sufficient Facts to Support a Conclusion That There Was a Specific Intent to Deprive Plaintiffs of Their Constitutional Rights.

"At the pleading stage, a plaintiff alleging conspiracy must make factual allegations—'not merely consistent with' an illegal agreement—but sufficient to infer the plausibility of such an agreement." *Gleason v. E. Norriton Twp.*, No. 11-CV-6273, 2012 WL 3024011, at *5 (E.D. Pa. July 24, 2012) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 557 (2007)). Plaintiffs must sufficiently allege, inter alia, that defendants "reached an agreement to deprive the plaintiff of a constitutional right." *Id.* (citing *Parkway Garage Inc.*, 5 F.3d 685, 700 (3d Cir. 1993)). Plaintiffs have pleaded no facts that would demonstrate that Penn State (or any other actor) reached any agreement with the intention of specifically depriving Messrs. Paterno and Kenney of a constitutional right.

2. Plaintiffs' Conspiracy Claims As to Acts Occurring Prior to July 21, 2012 are Time-Barred.

In response to the Motion to Dismiss, Plaintiffs now argue that "Plaintiffs' claim for reputational injury did not exist and thus could not accrue until the Consent Decree was executed and Penn State published the Actionable Statement." Response Br. at 56. This directly contradicts claims made in the First Amended Complaint, in which Plaintiffs claim that their purported injury to reputation began at the time of their terminations, and was "compounded" by the events at the time of the consent decree:

- "Penn State's execution of the Consent Decree compounded and ignited afresh Plaintiffs' injuries caused by the Termination and only further compelled, as a result of the deprivation of Plaintiffs' due process rights, the implication and innuendo that Plaintiffs were complicit in some manner in the Sandusky Scandal, all to the detriment and stigmatization of Plaintiffs' good name, reputation, honor and integrity." FAC ¶ 136.

- "As a result of and due to the negativity created by implication and false innuendo as a result of the Termination and/or the execution of the Consent Decree, including the Actionable Statement, the Press Conference Statements and the PSU Press Release, at the height of the Sandusky Scandal, Plaintiffs were deprived of their liberty and property

interest NCAA Rights and Penn State Rights and their liberty and property interest in their good name, reputation, honor and integrity." FAC ¶ 221.

Plaintiffs cannot have it both ways. The statute of limitations on Plaintiffs' claims relating to their terminations ran in mid-January 2014. Accordingly, to the extent Plaintiffs rely on allegations that occurred prior to July 21, 2012 (two years prior to the filing of the original Complaint) to support their federal conspiracy claim, such a claim fails as a matter of law.

III. CONCLUSION

For the reasons set forth above and in the Memorandum of Law in Support of the Motion to Dismiss, Penn State respectfully requests that the Court grant its Motion to Dismiss and dismiss with prejudice Plaintiffs' First Amended Complaint in its entirety for failure to state a claim upon which relief may be granted.

Dated: April 16, 2015

Respectfully submitted,

/s/ Joseph F. O'Dea, Jr.

Joseph F. O'Dea, Jr., Esq.
PA Attorney ID No. 48370
Nicholas J. Nastasi, Esq.
PA Attorney ID No. 82102
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA, 19102-2186
T: (215) 972-7109

Attorneys for Defendant
Pennsylvania State University

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of the foregoing *Reply in Support of Motion to Dismiss Plaintiffs' First Amended Complaint* to be served upon the following:

Via ECF
Maurice R. Mitts, Esq.
Gerard M. McCabe, Esq.
1822 Spruce Street
Philadelphia, PA 19103
(215) 866-0110

Via Electronic Mail
Edward R. Mazurek, Esq.
717 South Columbus Boulevard
Philadelphia, PA 19147
(215) 998-9090

/s/ Joseph F. O'Dea, Jr.
Joseph F. O'Dea, Jr.

Dated: April 16, 2015

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Joseph ("Jay") V. Paterno and William Kenney	:	CIVIL ACTION
	:	No. 14-4365-LS
v.	:	
	:	**JURY TRIAL DEMANDED**
The Pennsylvania State University	:	

PLAINTIFFS' SUR-REPLY
IN OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

I. INTRODUCTION

Plaintiffs Joseph "Jay" V. Paterno ("Paterno") and William Kenney ("Kenney") (Paterno and Kenney, together, "Plaintiffs"), by and through their attorneys, Mitts Law, LLC, and The Mazurek Law Firm, LLC, submit this Sur-Reply in Opposition to Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint (the "Motion to Dismiss").[1]

II. PLAINTIFFS HAVE SUFFICIENTLY STATED A CLAIM UNDER SECTION 1983.

Defendant erroneously asserts that Plaintiffs have failed to satisfy both the "stigma" and "plus" elements of the Stigma Plus doctrine. As demonstrated below, Defendant's interpretation of these elements is too restrictive and inconsistent with the case law interpreting these underlying elements.

A. Plaintiffs Have Satisfied The "Stigma" Element Of The "Stigma Plus" Doctrine.

Defendant wrongly asserts that Plaintiffs are not entitled to rely upon the sound analysis provided by Judge Leete in finding that the Actionable Statement could be understood by a reasonable person to refer to Plaintiffs. Specifically, Judge Leete found in the state court action

[1] All capitalized terms herein shall have the meanings ascribed to them in Plaintiffs' Response to the Motion to Dismiss (the "Response") if not otherwise defined.

that Plaintiffs sufficiently alleged that they could reasonably be viewed as targets of the Actionable Statement because the phrase "some coaches," as used in the Actionable Statement, could be understood to refer to "a limited group of individuals including" Plaintiffs. The reasons cited by Defendant to not rely upon Judge Leete's opinion are without merit.

First, Defendant is superficially correct in observing that Judge Leete's ruling came within the context of a state law claim of defamation, while Plaintiffs in this action have asserted a Section 1983 claim. However, Defendant's analysis stops there. Defendant's position is a "distinction without a difference." The same reasoning that the Actionable Statement could be attributable to Plaintiffs, as applied by Judge Leete in a defamation action, is equally applicable to Plaintiffs' Section 1983 claim where Plaintiffs are asserting, in both the state court action in defamation and this federal court action in a Section 1983 claim, that Defendant impugned and harmed Plaintiffs' reputation by executing the Consent Decree and publishing the same Actionable Statement that Judge Leete found was reasonably referring to Plaintiffs and was also potentially defamatory.

Second, Defendant asserts that Judge Leete's ruling is inapplicable because the claim for defamation in the state court action is only against the NCAA, **not** Defendant. While Defendant is again correct on the surface, Defendant's second point is once again a "distinction without a difference." More specifically, the substance of Defendant's argument is without logical relevance because the Consent Decree was issued and executed by both the NCAA and Penn State and thus, just as Plaintiffs were entitled to file a defamation claim against the NCAA in the state court action, Plaintiffs are similarly entitled to file a Section 1983 claim against Defendant, as the other author of the Actionable Statement, in this federal action. While Defendant is technically correct that Judge Leete's decision is not legally binding on this Court,[2] Defendant

[2]This is a classic straw man argument since Plaintiffs never asserted in their Response or otherwise that Judge Leete's ruling was controlling on this Court.

has nevertheless failed to offer any logical or legal reason why Judge Leete's conclusion, with respect to the application of state law to the underlying facts concerning whether the Actionable Statement could reasonably be considered to refer to Plaintiffs, should not be adopted by this Court.

Third, Defendant suggests that Plaintiffs' Section 1983 claim is in the nature of a defamation claim subject to a one-year statute of limitations and thus is time-barred. This is incorrect – even a cursory review of the FAC reveals that Plaintiffs assert a deprivation of their liberty and due process interests in their reputations pursuant to Section 1983, a claim that is subject to a two-year statute of limitations and one that is distinct from a state-law defamation claim. *See, e.g., Mazur v. Department of Revenue, Commonwealth of Pa.*, 516 F. Supp. 1328 (M.D. Pa. 1981) (holding that a 2-year statute of limitations is applicable), *aff'd*, 681 F.2d 807 (3d Cir. 1982). *See also Malcomb v. Dietz*, 487 F. App'x 683 (3d Cir. 2012) (stating "Pennsylvania's two-year statute of limitations for personal injury actions applied to federal civil rights claims. 42 U.S.C.A. §§ 1983, 1985."); *Elliott Reihner Siedzikowski & Egan, P.C. v. Pennsylvania Employees Benefit Trust Fund*, 161 F. Supp. 2d 413, 420 (E.D. Pa. 2001) (stating "Under Pennsylvania law, the two-year statute of limitations for personal injuries is applied to Section 1983 claims."); *Herbert v. Reinstein*, 976 F. Supp. 331, 336 (E.D. Pa. 1997) (stating "The statute of limitations for a § 1983 claim arising in Pennsylvania is two years.").

Fourth, Defendant makes another argument that is without substance when it asserts that the Supreme Court in *Paul* (without citation) held that a plaintiff must allege that he has suffered harm "beyond a state common law claim." Defendant's argument in that regard is irrelevant since Plaintiffs have alleged the deprivation of their liberty and due process interests in their reputation, including the denial of a name clearing hearing, by Defendant's intentional conduct. These liberty and due process allegations (with their related damages) are in stark contrast to a mere state law defamation action.

Fifth, Defendant attempts to suggest that, because certain individuals are named in the Consent Decree, it would be unreasonable to think that the reference to "some coaches" in the Actionable Statement could be understood to include Plaintiffs Paterno and Kenney. Defendant's reasoning is illogical. Defendant is suggesting that the reference to "some coaches" can only be understood to mean those coaches who were specifically named in the Consent Decree, and yet, if that were the case, then why would the Consent Decree not specifically refer to the coaches identified in the Consent Decree rather than use the less specific phrase "some coaches." Furthermore, Defendant is attempting to inject itself into the role of trier of fact by asserting that a "reasonable person" "would not conclude" this Actionable Statement to include Plaintiffs. This is neither the stage for such a determination to be made, nor is Defendant the one entrusted to make such a determination.

Rather, the more reasonable interpretation, as found by Judge Leete, is that Plaintiffs could reasonably be viewed as targets of the Actionable Statement because "some coaches" was "a limited group of individuals including" Plaintiffs, which was "certainly smaller" than groups it had previously determined to be too large. *See* Response at 15. Further, it is also more reasonable to interpret "some coaches" as including Plaintiffs because, as Judge Leete noted in his reference to a Pennsylvania Supreme Court opinion, when such statements are "made in the course of a public scandal," it is more likely that those who receive such statements "will make inquiry to determine the specific group members." *See Farrell v. Triangle Publ'ns, Inc.*, 159 A.2d 734, 738-39 (Pa. 1960). Judge Leete was correct in his reasoning and in his determination to at least allow the action to proceed to the discovery phase.

Finally, Defendant disputes the "stigma" effect of the Emmert Statement. Plaintiffs' reference to the Emmert Statement and the manner by which that Emmert Statement can be attributed to Defendant is set forth in the FAC at paragraphs 181-200. In these paragraphs, Plaintiffs set forth, based upon deposition testimony of various actors and agents acting on behalf

of Defendant and the NCAA, their belief that the Emmert Statement was the product of "collusive behavior and collaborative public messaging by Penn State and the NCAA." FAC at ¶ 196. Gene Marsh, the negotiating agent for Defendant, admitted that there were discussions by, between and among Defendant and the NCAA's agents and representatives regarding the public messaging, which such public messaging included the Emmert Statement. *Id.* at ¶ 197-198. In this way, the Emmert Statement, coupled with the Actionable Statement, each of which is alleged to be attributed to Defendant, constitutes the "stigma" element of the "Stigma Plus" doctrine.

B. Plaintiffs Have Satisfied The "Plus" Element Of The "Stigma Plus" Doctrine.

Defendant next asserts that Plaintiffs have failed to satisfy the "plus" element of the "Stigma Plus" doctrine because Plaintiffs' NCAA Rights (in the nature of their third-party beneficiary contractual rights to which each Plaintiff is entitled as an "involved person") do not rise to the level of a "property interest" because the contractual rights are "purely procedural" in nature. Defendant is again incorrect. **First**, as "involved persons," Plaintiffs have a legal entitlement and expectation to the NCAA Rights where they are cloaked within a contract. In this way, Defendant's assertion that the NCAA Rights are "purely procedural" is an inaccurate deflection. To the contrary, as set forth below, procedural processes which are provided by contract have been held by other courts to be "property rights." **Second**, even if the NCAA Rights are deemed to be something less than a "property right," the Supreme Court's pronouncements in both the *Roth* and *Paul* decisions demonstrate that the "altered state interest" does not necessarily have to be a "property interest," but is satisfied if the plaintiff's state right or status is altered. In this case, Defendant denied Plaintiffs their rights to enjoy the procedural processes afforded to them as involved persons and as third-party beneficiaries of the agreement

between the NCAA and Defendant. In this way, their rights and status, whether they were "property" rights or something less, were altered.

Specifically, the Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), enunciated the boundaries of the state interests that the *Paul* Court later relied upon in defining the "plus" element of the "Stigma Plus" doctrine:

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. **To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined**. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—**rules or understandings that secure certain benefits and that support claims of entitlement to those benefits**.

Roth, 408 U.S. at 577 (emphasis supplied). *See also Paul v. Davis*, 424 U.S. 693, 709 (1976). Without any analysis, Defendant ignores that the procedural processes granted to "involved persons" under the NCAA Rights are, in fact, contractually provided and therefore Plaintiffs have a "legitimate claim of entitlement" to those processes (thereby making them a property right).

The *Paul* Court further defined the boundaries of the "state" interest that constitute the "plus" element:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. **These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law**, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

424 U.S. at 711 (footnote omitted) (emphasis supplied). In this way, the *Paul* Court did not confine the "altered state interest" to being simply a "property interest," but rather acknowledged that there are a "variety of interests" that, although difficult to define, include any interest or status "recognized and protected by state law." Accordingly, even if this Court were to define the NCAA Rights as something lesser than a "property interest," such NCAA Rights would nevertheless still rise to the level of a legally protected status under state law inasmuch as such NCAA Rights are embodied within a contract between the NCAA and Defendant and the NCAA has already admitted that "involved persons" (such as Plaintiffs) are considered to be intended third-party beneficiaries of such contract. Indeed, Judge Leete, in his September 10, 2014 opinion, has already ruled that Plaintiff Al Clemens, as an "involved person," had the right to enforce his entitlement to the NCAA Rights granted to him as a third-party beneficiary. Judge Leete's September opinion is persuasive authority that these NCAA Rights are not "purely procedural," but rather enforceable rights that rise to the level, in the least, of those interests and status identified by the *Roth* and *Paul* decisions.

Defendant asserts that it could find no case that held such contractually provided "procedural processes" constituted a "property interest." However, there are, in fact, at least several such cases. *See Northern Penna. Legal Servs., Inc. v. Lackawanna County*, 513 F. Supp. 678 (M.D. Pa. 1981); *Pan Bldg., Inc. v. Philadelphia Hous. Auth.*, 1989 WL 8909, at *3 (E.D. Pa. Feb. 3, 1989) (citing *Northern Penna*).

In *Northern Penna. Legal Services, Inc. v. Lackawanna County*, 513 F. Supp. 678 (M.D. Pa. 1981), the court considered whether a non-profit legal aid organization had a right to appear on behalf of certain juvenile clients. Although the *Northern Penna.* court noted that a lawyer has no "automatic right to appear on behalf of a particular client," the plaintiffs asserted that they were entitled to appear on behalf of such clients pursuant to a valid enforceable contract:

> Many cases have held that valid contractual rights against government body, both explicit and implicit, create property interests within the scope of the Due Process Clause. [citations omitted]. ... **[N]o property interest exists in the event that the private party had no legal right to expect that the arrangement would in fact be binding**.

Id. at 682 (emphasis supplied). The court then went on to determine whether there was a binding legally enforceable agreement in place that would confirm a property interest. Of course, in this case, there is no question that there exists an agreement between the NCAA and Penn State and the NCAA has already admitted that "involved persons" are granted third-party beneficiary interests that are protectible under Pennsylvania state law.

Even more compelling, in *Pan Building, Inc. v. Philadelphia Housing Authority,* 1989 WL 8909 (E.D. Pa. Feb. 3, 1989), the district court confirmed that a specified procedural process, in the nature of a hearing, provided by contract, was a protectable "property interest":

> **The contract awards created property interests entitling Pan to a due process hearing**. *See: Northern Penna. Legal Services, Inc. v. County of Lackawana [sic]*, 513 F. Supp. 678, 682 (W.D. Pa.1981) (valid contractual rights against government body create property interests within the scope of the Due Process Clause).

Pan Bldg., 1989 WL 8909, at *8. Thus, procedural processes can rise to the level of a property interest. *See also J.O.M. Corp. v. Department of Health of the State of New York*, 697 F. Supp. 720 (S.D.N.Y. 1988) (finding that plaintiff held a property interest in the right to a hearing that was afforded by a contractual provision); *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975) (ruling that plaintiff was entitled to procedural safeguards provided by contract).

Defendant next wrongly associates Plaintiffs' deprivation of their NCAA Rights as being "nothing more than alleged harm to their reputations" and that therefore Plaintiffs have failed to plead the elements of a Section 1983 claim. Defendant's convenient characterization both misstates the law and ignores the contractual provisions that provided Plaintiffs the procedural processes that were denied to them. In order to properly plead a Section 1983 claim, Plaintiffs

need only demonstrate both a "stigma" and a "plus," which they have done in this matter. Defendant misunderstands and misapplies the standard. The "plus" element is defined as an "alteration of legal status" that equates to a "more tangible interest" than the alleged reputational harm, and the deprivation of Plaintiffs' NCAA Rights constitutes such an "alteration" that is indeed more than just the reputational harm. Simply because the deprivation of Plaintiffs' rights to the procedural processes afforded to them as "involved persons" could have permitted them to cure the stigmatizing effect of the Actionable Statement and the Emmert Statement does not remove such deprivation as constituting the "plus" element of the "Stigma Plus" doctrine. Defendant's attempt to equate the reputational harm with the deprivation of contractually guaranteed procedural processes fails in light of the standard announced by *Paul* and its progeny.

In addition to the deprivation of their NCAA Rights, Plaintiffs have further properly asserted that their termination from their employment, occurring in mid-January 2012, can constitute the "plus" element of the "Stigma Plus" doctrine, despite the temporal gap between the termination and the publication of the Actionable Statement in July 2012.

As with several of Defendant's earlier arguments, Defendant's attempt to distinguish the *Pasour* decision relies upon a "distinction without a difference." The import of the *Pasour* decision, and those other decisions cited in the Response, is that, where there is a substantive connection between the event of the termination and the stigmatizing statement, then a plaintiff has satisfied the elements of the "Stigma Plus" doctrine. While it may be true that the stigmatizing statements in *Pasour* preceded the termination, and may have even led to the termination itself, the import of the *Pasour* decision (and other decisions cited in the Response) was that the temporal gap can be bridged where there is a substantive perceptible connection between the two events.

In this case, the world watched the events unfold, from Joe Paterno's firing, to the new coach hiring, to the termination of Plaintiffs, to the ongoing Freeh Investigation, to the

publication of the Freeh Report and then finally the issuance of the Consent Decree. The substantive connection of all of these events, in the news nearly each day of the temporal period between the firing of Paterno and Plaintiffs' subsequent termination and Consent Decree, is sufficient to allow the termination to constitute the "plus" element to the stigmatizing effect of the Consent Decree.

Equally unavailing is Defendant's citation and reliance upon *Sampson v. School Dist. of Lancaster*, 2009 U.S. Dist. LEXIS 51579 (E.D. Pa. June 12, 2009), which was a decision on a motion for summary judgment (unlike the present posture of our matter). In *Sampson*, there were independent media reports regarding the underlying facts, which the court ultimately found were not defamatory because they did not mention the plaintiff. There was only one newspaper article that mentioned the *Sampson* plaintiff and that was published over one month after the plaintiff had been terminated, **and only after the plaintiff had issued a written statement disavowing certain allegations**. All of these facts are starkly different from those present in this case and undermine Defendant's attempt to rely upon *Sampson*.

In this case, Defendant had engaged the Freeh Firm to conduct a very public investigation that kept these issues of the Sandusky Affair in the news from the time period of Paterno's firing until the issuance of the Consent Decree. During the Freeh Firm's investigation, investigators were interviewing many witnesses, with leaked reports and news stories occurring nearly daily in the local, regional, national and international media. Indeed, as asserted in the FAC, the Freeh firm was in repeated contact with the NCAA, *see* FAC at ¶81, with the NCAA guiding it and assisting it at times during its investigation. Therefore, in this way, the temporal connection between these events and media reports is unlike any other case or decision decided and, in keeping with the reasoning of those cases cited in the Response, including *Pasour*, the focus of this Court should not be on how many specific days elapsed between the "stigma" and the

"plus," but rather on the substantive connection between the firing of Paterno, termination of Plaintiffs and issuance of the Consent Decree.

Finally, Defendant continues to assert that Plaintiffs have failed to request a name clearing hearing. **First**, Defendant has failed to distinguish the persuasive pronouncement by the Third Circuit that such a request is not even necessary. *See Hill,* 455 F.3d at 239 n.19 ("It is not clear from the complaint whether Hill requested any sort of name-clearing hearing, **but we have not held that he was required to do so**.") (citing *Ersek v. Twp. of Springfield,* 102 F.3d 79, 84 n.8 (3d Cir. 1996) (emphasis supplied). **Second**, the allegations of FAC state otherwise where Plaintiffs assert that "through their counsel, advised Penn State that '**[n]one of these coaches was afforded any kind of hearing in connection with their terminations** and the University did nothing to protect their reputations in light of its gross mishandling of the Sandusky matter.'" FAC at ¶ 257 (emphasis supplied). *See also* FAC at ¶¶ 252-257. Moreover, contrary to Defendant's assertion that the Anderson email was not made on behalf of Plaintiffs, the FAC states just the opposite: "Despite Anderson's request for a "name-clearing" statement, **made on behalf of all of the assistant football coaches**, ..." *Id.* ¶ 257. In this regard, taken together as a whole, Plaintiffs' allegations, at a minimum, assert that they requested the functional equivalent of a name clearing hearing from Defendant that would have allowed Plaintiffs to vindicate their names, all of which Defendant ignored. Indeed, what is glaringly and tellingly absent from Defendant's Reply is any statement or pronouncement that, had Plaintiffs merely requested a name clearing hearing in a manner and format satisfactory to Defendant at that time, then Defendant would have provided one. As this omission indicates, the reality is that any effort by Plaintiffs to seek an opportunity from Penn State to vindicate their names and reputations would have been similarly ignored or rebuffed.

III. PLAINTIFFS' ARGUMENTS IN THEIR RESPONSE ARE CONSISTENT WITH THE ALLEGATIONS OF THE FAC.

Plaintiffs' arguments that reputational injury did not occur until the publication of the Actionable Statement, as asserted in the Response, are entirely consistent with the allegations in the FAC. The FAC makes certain that Plaintiffs' claims emanate from the Termination **and/or** the execution of the Consent Decree with its concomitant publication of the Actionable Statement. *See, e.g.,* FAC at ¶ 11 ("had Penn State not terminated Plaintiffs at the height of the Sandusky Scandal and/or had Penn State not executed the Consent Decree soon thereafter given the damaging statements contained therein that linked Plaintiffs to the Sandusky affair."). *See also* FAC at ¶ 13, 14, 15, 221, 294, 297, 299, 304, 309 and 320. Plaintiffs are relying upon the Actionable Statement as the "stigma" of the "Stigma Plus" doctrine and thus it is axiomatic that Plaintiffs' 1983 claim against Defendant did not accrue until the publication of the Actionable Statement. Accordingly, Defendant is incorrect to assert that allegations of events occurring prior to July 21, 2012, cannot be considered because they are beyond the two-year statute of limitations. Defendant has conveniently ignored Plaintiffs' legal analysis regarding the "continuing violations doctrine." Defendant failed to distinguish Plaintiffs' assertion that "[t]he continuing violations doctrine is an equitable exception to the timely filing requirement. Thus, when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." *See Rankin*, 2013 U.S. Dist. LEXIS 96758 at *11 (citing *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001)). Defendant's position misreads the allegations in the FAC and further disregards the legal analysis in the Response.

Finally, the allegations in the FAC support Plaintiffs' position that Defendant and the NCAA came to a conspiratorial arrangement that had as its object the denial of the traditional

infractions process to Plaintiffs as involved persons. Neither Defendant nor the NCAA wanted to engage themselves upon a traditional infractions process that would have been lengthy in their viewpoint, and thus agreed to the execution of the Consent Decree, including an agreement, by their respective signatures, to include the Actionable Statement and then to collaborate on the messaging contained in the Emmert Statement. For this reason, Plaintiffs have alleged sufficient facts to support their conspiracy claims at this stage in the proceedings.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Penn State's Motion to Dismiss Plaintiffs' First Amended Complaint in its entirety.

Respectfully submitted,

MITTS LAW, LLC

By: */s/ Gerard M. McCabe*
Maurice R. Mitts, Esquire
Gerard M. McCabe, Esquire
1822 Spruce Street
Philadelphia, PA 19103
(215) 866-0110 (office)
mmitts@mittslaw.com
gmccabe@mittslaw.com

THE MAZUREK LAW FIRM, LLC

By: */s/ Edward R. Mazurek*
Edward R. Mazurek, Esquire
717 South Columbus Boulevard
Philadelphia, PA 19147
(215) 988-9090
emazurek@mazureklawfirm.com

ATTORNEYS FOR PLAINTIFFS JOSEPH "JAY" V. PATERNO AND WILLIAM KENNEY

Dated: May 18, 2015

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Joseph ("Jay") V. Paterno and William Kenney	:	CIVIL ACTION
	:	No. 14-4365-LS
v.	:	
	:	**JURY TRIAL DEMANDED**
The Pennsylvania State University	:	

CERTIFICATE OF SERVICE

I, Gerard M. McCabe, hereby certify that, on the date noted below, I caused a true and correct copy of Plaintiffs' Sur-Reply in Opposition to Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint, filed as of the date set forth below, to be served upon Defendant's counsel by the Court's e-filing system and email, upon the following:

Joseph F. O'Dea, Jr., Esquire
Nicholas J. Nastasi, Esquire
Saul Ewing LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102

By: */s/ Gerard M. McCabe*
Gerard M. McCabe

Dated: May 18, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ("JAY") V. PATERNO, et al.,	:	**CIVIL ACTION**
Plaintiffs	:	
	:	
vs.	:	**NO. 14-4365**
	:	
THE PENNSYLVANIA STATE UNIVERSITY,	:	
Defendant	:	

MEMORANDUM

STENGEL, J. **February 25, 2016**

Two former assistant football coaches bring this action against the Pennsylvania State University alleging federal and state law violations in the termination of their employment. Specifically, they claim: (1) a violation of their civil rights for the deprivation of their liberty and property interests without due process of law pursuant to 42 U.S.C. § 1983; (2) intentional interference with prospective contractual relations; (3) civil conspiracy; (4) a violation of the Pennsylvania Wage Payment and Collection Law, 43 P.S. §§ 260.1, *et seq.*; and (5) breach of contract. The defendant has filed a motion to dismiss to which the plaintiffs have responded. For the following reasons, I will grant the motion to dismiss.

I. BACKGROUND[1]

A. The Sandusky Scandal and Penn State's Response

Jay Paterno and William Kenney contend that in mid-January 2012, they were fired by the Pennsylvania State University ("Penn State") in response to the publicity surrounding the conduct of Gerald A. Sandusky, a former assistant football coach at Penn State. In November 2011, Sandusky was charged with various crimes, including aggravated criminal assault, corruption of minors, unlawful contact with minors, and endangering the welfare of minors. On June 22, 2012, a jury in Centre County, Pennsylvania found Mr. Sandusky guilty of forty-five of the forty-eight criminal charges filed against him. He was sentenced to thirty to sixty years in prison.

On November 4, 2011, the Attorney General of Pennsylvania also filed criminal charges against Penn State's Athletic Director and its Senior Vice President of Finance and Business for failing to report allegations of child abuse against Mr. Sandusky to law enforcement or child protection authorities in 2002 and for committing perjury before the grand jury in January 2011. See Am. Compl., Exhibit F at 13. Almost a year later, Penn State's former president was charged by a grand jury with obstructing justice, endangering the welfare of children, perjury, and conspiracy. These three former Penn State officials have yet to go to trial.

[1] The facts are gleaned from the amended complaint and the extrinsic documents upon which it is based. See GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004). For the purposes of this motion, they are presented in the light most favorable to the plaintiffs, as the non-moving parties, and are accepted as true with all reasonable inferences drawn in their favor.

On November 9, 2011, the Board of Trustees of Penn State voted to relieve Joe Paterno of his responsibilities as head football coach effective immediately. See Am. Compl. ¶ 45. The Board of Trustees stated that Joe Paterno had demonstrated a "failure of leadership" by only fulfilling his legal obligation to inform another Penn State official, Penn State's Athletic Director Tim Curley, about a 2001 incident involving Mr. Sandusky and a minor, and by not going to the police himself. Id. ¶ 46.

On November 11, 2011, two days after terminating Head Coach Joe Paterno, Penn State's Board of Trustees formed a Special Investigations Task Force, which engaged the firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm"), to investigate: (1) the alleged failure of Penn State personnel to respond to and report to the appropriate authorities the sexual abuse of children by Mr. Sandusky, a former football coach, see Am. Compl. ¶ 47; and (2) the circumstances under which such abuse could occur in Penn State facilities or under the auspices of Penn State programs for youth. See Am. Compl., Exhibit F. Further, Penn State asked the Freeh Firm 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. Id. ¶ 48. The plaintiffs note that Penn State, however, had not engaged the Freeh Firm, and had not granted any authority to the Freeh Firm, to investigate or even consider whether any of the actions under its review constituted violations of the NCAA's rules.

In announcing the investigation, Trustee Kenneth C. Frazier made the following public statement: "No one is above scrutiny. [The Freeh Firm] has complete rein to

follow any lead, to look into every corner of the University to get to the bottom of what happened and then to make recommendations that ensure that it never happens again." See Am.Compl., Exhibit F.

On November 17, 2011, Mark A. Emmert, President of the National Collegiate Athletic Association ("NCAA"), sent a letter to Rodney A. Erickson, Penn State's Interim President, expressing concerns over the grand jury presentments that were ongoing with the criminal investigation into the Sandusky scandal. Mr. Emmert asserted that the NCAA had jurisdiction over the matter and that the NCAA might take an enforcement action against Penn State. Id. ¶ 50. Mr. Emmert's letter stated that the "individuals with present or former administrative or coaching responsibilities may have been aware of this behavior;" and "if true, 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." See Am. Compl., Exhibit B.

The Emmert Letter also indicated that "the NCAA will examine Penn State's exercise of institutional control over its intercollegiate athletic programs, as well as the actions, and inactions, of relevant responsible personnel." See Am. Compl. ¶ 52. Mr. Emmert further asserted in his letter 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.[2] Id. ¶ 56. He advised Penn State that it would need to "prepare for potential inquiry" by the NCAA. Id. ¶ 57.

[2] The plaintiffs note that Mr. Emmert's letter failed to identify any specific provision in the NCAA's Constitution or Bylaws that granted the NCAA the authority to become involved in

B. The Hiring of a New Head Football Coach

On January 6, 2012, Penn State announced that it had selected William J. O'Brien as Penn State's new head football coach. Id. ¶ 62. The amended complaint states, "[t]hereafter, O'Brien elected not to retain and otherwise released Plaintiffs as assistant football coaches with the Penn State football program."[3] Id. ¶ 63. It further alleges that the plaintiffs both had exemplary reputations where they brought considerable distinction and acclaim to Penn State during their respective lengthy years of service. Id. ¶ 4. They even allege that there had been a widely-shared belief among professional and collegiate football organizations that, based upon the plaintiffs' reputations and successes as assistant football coaches, they would have been well-sought after and desired prospective coaches, either as head coaches or assistant coaches, had they decided to leave their positions with Penn State. Id. ¶ 19. The plaintiffs insist that because of the temporal proximity to the events surrounding the Sandusky scandal in conjunction with Penn State's subsequent execution of a Consent Decree, their termination had the effect of branding and stigmatizing the plaintiffs as participants in the Sandusky scandal and, by so doing, maligned the plaintiffs' stellar reputations by portraying them by implication in false light. Id. ¶ 69.

---

criminal matters regarding the Sandusky scandal that resided outside of the NCAA's basic purpose and mission. See Am.Compl. ¶ 55. They also note that the letter did not identify any NCAA rule that Penn State or any of the individuals being investigated, including the plaintiffs and other coaches and administrators, had allegedly violated as a result of the Sandusky scandal. See Am. Compl. ¶ 54.

[3] The plaintiffs do not dispute that every head football coach has the discretionary authority to determine his coaching staff, and could release an assistant coach from his coaching duties. See Am. Compl. ¶ 65.

In its press release on January 6, 2012 announcing Coach O'Brien's hiring, Penn State indicated that it had been looking "for someone with some very special qualities, beginning with a heart that beats to the values and vision of Penn State University and our Penn State football legacy and tradition," and that Coach O'Brien exemplified those traits. Coach O'Brien stated,

> "I am thrilled to be the head coach of the Penn State football program. I cannot tell you how excited I am to get started, meet the team, meet the football alumni and meet all of the people that make this University so special. As head coach of this special football program, it is my responsibility to ensure that this program represents the highest level of character, respect and integrity in everything we do. That includes my coaching staff, our players and everyone involved in the football program."

See Am. Compl., Exhibit C.

By mid-February 2012, Coach O'Brien completed the hiring of his assistant football coaches. Id. ¶ 75. On February 18, 2012, Penn State issued a press release, quoting the new head coach:

> "With the hiring of Charlie Fisher as quarterbacks coach, we have completed the Penn State football coaching staff," O'Brien stated. "This is a staff made up of men who care about the mission of Penn State University and being successful on and off the field. It is also a staff of winners, with five staff members that have been a part of national championship teams as assistant coaches. This is a staff that has won many games; some while being a part of the same staff, and is a staff comprised of former head coaches, coordinators and tremendous recruiting experience."

See Am. Compl. ¶ 76; see also Am. Compl., Exhibit E.

C. The Freeh Report and the NCAA Sanctions

On July 12, 2012, the Freeh Firm published its report. Id. ¶ 82. The report was not voted on or approved by Penn State's full Board of Trustees. Id. ¶ 84. According to the report, in order to avoid the consequences of bad publicity, the most powerful leaders at Penn State repeatedly concealed critical facts relating to Mr. Sandusky's abuse from law enforcement authorities, the University's Board of Trustees, the Penn State community, and the public at large. Id. ¶ 86. Within hours of the release of the Freeh Report and before all members of the Board of Trustees even 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.

On July 22, 2012, the NCAA prepared a Consent Decree, resulting in the imposition of drastic sanctions against Penn State and its football program, including the imposition of over $60 million in penalties, a four-year post-season play ban, a loss of athletic scholarships, and a vacating of football wins since 1998. Penn State agreed to and executed the Consent Decree, which adopted the findings of the Freeh Report. Id. ¶¶ 89, 90. The amended complaint asserts that

> Penn State collaborated with the NCAA and the Freeh Firm, recklessly disregarding the plaintiffs' procedural due process safeguards by imposing sanctions against Penn State and issuing the Consent Decree in a criminal matter unrelated to recruiting and athletic competition (and thus outside of the NCAA's jurisdiction), and falsely accusing Plaintiffs with malice of enabling and acting with complicity with child sexual abuse.

Id. ¶ 91.

In the Consent Decree, Penn State agreed to "waive[] 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 the Consent Decree." See Am.Compl., Exhibit A. The plaintiffs claim that these are the NCAA rights to which they were also entitled as third party beneficiaries and involved persons.

In connection with Penn State's waiver of the NCAA Rights, Penn State agreed to and executed the Consent Decree that included the following statement to which the plaintiffs refer to as the "Actionable Statement:" "[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." Id. ¶ 169. The plaintiffs interpret the Actionable Statement to assert that "some coaches" were complicit in child sexual abuse by ignoring the "red flags" of child abuse, representing a factual conclusion based on the findings of the Freeh Report. Id. ¶ 170.

The plaintiffs note that the Consent Decree does not state that the Actionable Statement was an "opinion" of Penn State. Id. ¶ 171. Instead, they characterize it as a seemingly factual and truthful statement offered to the public based on language in the introductory paragraph, which states: "the findings of the Criminal Jury and the Freeh Report establish a factual basis from which the NCAA concludes that Penn State breached the standards ..." Id. ¶¶ 172-73. Nevertheless, the plaintiffs insist that Penn

State knew that the Actionable Statement was based on the unreliable and unsubstantiated conclusions made in the Freeh Report, which Penn State knew was unreliable. Id. ¶ 174.

D. The Effect of the Scandal, the NCAA Sanctions, and the Coaching Change on Jay Paterno's Employment

Jay Paterno was on Penn State's football coaching staff for seventeen seasons, twelve as Penn State's quarterbacks coach and five as its tight ends coach and recruiting coordinator. Id. at ¶¶ 26-27. Before coaching at Penn State, Mr. Paterno served as a graduate assistant at the University of Virginia from 1991 to 1992, wide receivers and tight ends coach at the University of Connecticut in 1993, and as the quarterbacks coach at James Madison University in 1994. Id. at ¶ 26-27.

Mr. Paterno contends that before the execution of the Consent Decree, he was a top candidate for open head coaching positions at other comparable institutions. Id. at ¶ 272. Mr. Paterno had been approached during his time at Penn State by other universities and search firms exploring his potential interest in head coaching vacancies. Id. at ¶ 273.

After his termination by Penn State, however, those opportunities seemed to vanish. Being well-qualified, Mr. Paterno sought other employment either as a head football coach or a media commentator. Id. at ¶¶ 275-76. He further attempted to secure an assistant coaching position through his professional relationships, all to no avail. Id. at ¶ 274. Mr. Paterno was not granted an interview at any of the several football programs to which he applied, and the coaching positions were given to candidates with less coaching experience. Id. at ¶¶ 277-80.

Mr. Paterno also inquired about the head coaching position at another Division I school in the mid-Atlantic region, but that university's administration allegedly considered the coaches from Penn State to be "too toxic," given the findings of the Consent Decree. Id. at ¶ 281. As a result, that program did not interview any candidates from Penn State. Id. The amended complaint also alleges that because of his qualifications and experience, Mr. Paterno would have received job offers from these programs had it not been for the disparaging accusations leveled against him in the Consent Decree. Id. at ¶ 282.

Mr. Paterno also allegedly engaged in discussions with various media companies, including ESPN, CBS Sports, and Fox Sports, about serving as a college football commentator. Id. at ¶ 283. Mr. Paterno had prior dealings with officials at each network, and they were aware of his experience as a columnist for StateCollege.com for nearly three years. Id. at ¶ 284. Before the execution of the Consent Decree, ESPN advised Mr. Paterno that it was interested in his services and suggested that it wanted to have him involved in a Spring 2012 telecast and a couple of in-studio college football shows. Id. at ¶ 285. These discussions were later discontinued. Id. at ¶ 286.

The amended complaint alleges that officials at ESPN were uneasy about the Sandusky scandal and the Consent Decree's unsupported finding that Mr. Paterno and other coaches had ignored "the red flags of Sandusky's behaviors" and failed to report Sandusky's crimes. Id. at ¶ 287. Further discussions with ESPN about the possibility of Mr. Paterno being a commentator during lower profile college football games for the 2013 season were fruitless. Id. at ¶¶ 288-89.

During the Spring of 2013, Mr. Paterno had discussions with representatives of CBS Sports and Fox Sports which were also fruitless. Id. at ¶ 290. Mr. Paterno's hiring was allegedly considered too controversial, because the networks would have had no choice but to have Mr. Paterno publicly address past events at Penn State and developments arising from the Sandusky Scandal. Id. at ¶ 291. Mr. Paterno is not currently employed other than as a freelance sports columnist, consultant, and author. Id. at ¶ 292.

E. The Effect of the Scandal, the NCAA Sanctions, and the Coaching Change on William Kenney's Employment

William Kenney had served as a Division I collegiate football coach for twenty-seven years. He was well-respected within the profession and was responsible for training and developing many college football players who later played in the National Football League ("NFL"). See Am. Compl. ¶ 259. Prior to coaching for Penn State, Mr. Kenney served as an offensive backfield coach at Norwich University in 1982, at Dennis-Yarmouth Regional High School from 1983 to 1984, and at Lincoln High School in 1985. He then returned to the college level where, from 1986 to 1988, he served as a graduate assistant at the University of Nebraska. Mr. Kenney left each of his coaching positions in good standing and with a strong reputation as a successful football coach. In 1988, Mr. Kenney moved to Penn State, where he was first a graduate assistant football coach and then a year later became a full-time coach. Mr. Kenney worked the next twenty-three years with Penn State, serving in a variety of coaching positions including offensive line coach, recruiting coordinator, and offensive tackles/tight ends coach.

After his termination by Penn State, Mr. Kenney made a determined effort to secure other employment as a football coach. Id. at ¶ 260. He applied for open coaching positions with several Division I college football programs and in the NFL. Id. at ¶¶ 261-262. Mr. Kenney contends he was exceptionally well-qualified for these positions and would have possibly received job offers from these programs had it not been for the Sandusky scandal. Id. at ¶ 267. Mr. Kenney received a few interviews, but was allegedly questioned about the NCAA's unsupported finding that he and other coaches had ignored "the red flags of Sandusky's behaviors" at Penn State, rather than on his credentials as a football coach. Id. at ¶ 263. Despite interviews or discussions with these potential employers, Mr. Kenney was not offered a position. Mr. Kenney alleges that in most instances, the positions he applied for were given to less experienced and less qualified candidates. Id. at ¶ 264.

During the course of his pursuit for new employment, Mr. Kenney allegedly 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 any decision to hire him. Id. at ¶ 265. In fact, some head coaches were allegedly instructed by their colleges to forgo interviewing or hiring any former Penn State coaches. Id. at ¶ 266.

After over a year, Mr. Kenney secured employment as an offensive line coach at Western Michigan University. Id. ¶ 268. He earns significantly less in salary than he did at Penn State and less than he would have earned had he been hired by one of the top Division I programs or NFL teams. Id. ¶ 269. The amended complaint alleges that Mr.

Kenney's professional career suffered an extraordinary set-back and his future opportunities and earning potential have been harmed by Penn State's conduct. Id. ¶ 270.

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted examines the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Following the Supreme Court decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009), pleadings standards in federal actions have shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss under Fed. R. Civ. P.12(b)(6). Fowler v. UPMC Shadyside, 578 F.3d 203, 210-211 (3d Cir. 2009); see also Phillips v. County of Allegheny, 515 F. 3d 224, 230 (3d Cir. 2008).

Therefore, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The court must accept all of the complaint's well-pleaded facts as true but may disregard legal conclusions. Iqbal, 556 U.S. at 679. Second, a district court must determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." Id. In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. Id.; see also Phillips, 515 F.3d at 234-235. "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of

misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" Iqbal, 556 U.S. at 679.

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in Twombly, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." Id. at 557.

III. DISCUSSION

A. Plaintiffs' Section 1983 Civil Rights Claim

Mr. Paterno and Mr. Kenney claim that Penn State's actions caused irreparable damage to their personal and professional reputations. They assert a civil rights claim against Penn State under 42 U.S.C. § 1983, for violations of the 5th and 14th Amendments to the United States Constitution, as they contend they were deprived of their liberty interests and reputations without due process of law. They further claim that Penn State injured and maligned them when it executed the Consent Decree in violation of their procedural due process rights.

The timeline of events is very important. In the fall of 2011, Mr. Sandusky's criminal conduct was discovered, leading to the filing of criminal charges against him

and three Penn State officials. A Special Investigations Task Force was formed by the Board of Trustees to investigate how this criminal conduct had been able to continue at Penn State and how it was possible that personnel had failed to report it to the authorities. Shortly thereafter, the Board voted to relieve Head Coach Joe Paterno of his coaching responsibilities. In January 2012, Penn State announced the hiring of William J. O'Brien to replace Mr. Paterno as Head Coach. Thereafter, Coach O'Brien released the majority of the assistant football coaches, including the plaintiffs. By February 2012, the newly formed football coaching staff was complete.

A review of these events establishes that the plaintiffs were terminated as part of a new regime for Penn State football. The plaintiffs themselves understand that this process is typical with the hiring of a new head football coach: "[t]o be certain, Plaintiffs do not complain that O'Brien released them from their coaching responsibilities and do not deny that O'Brien had the right to release them from such responsibilities." See Am. Compl. ¶ 65. Thus, the termination of the plaintiffs was a foreseeable result of the hiring of a new head coach.

The plaintiffs were no longer employees of Penn State at the time the Freeh Report and the Consent Decree with its Actionable Statement were published. Rather, the Freeh Report was completed and the Consent Decree signed long after Paterno and Kenney were fired. Although their terminations occurred in the midst of a scandal, they were not a byproduct of the Freeh Report or the Consent Decree. Rather, Mr. Paterno and Mr. Kenney were let go as part of a series of coaching staff decisions by new Head Coach William O'Brien. These coaching staff personnel changes are normal, typical, and

accepted in the profession whenever a new head coach assumes control of a team. These reasonable and expected personnel decisions did not rise to the level of the deprivation of the plaintiffs' constitutional rights without due process of law by a state actor.

Plaintiffs' allegation that they had a "property interest" in their continued employment is not supported by the facts or by the law. Pennsylvania law presumes that all employment is at-will unless the employee is able to prove otherwise by showing with ***clarity*** and ***specificity*** that the parties contracted for a definite period. Permenter v. Crown Cork & Seal Co., Inc., 38 F.Supp.2d 372, 377 (E.D. Pa. 1999) (emphasis added). Here, there are no allegations that the employment of the plaintiffs was anything other than at-will. There was no special contract requiring that they could only be terminated for cause. In fact, the plaintiffs do not dispute that every head football coach has the discretionary authority to determine his coaching staff, and could release an assistant coach from his coaching duties for no reason. See Am.Compl. ¶ 65. I find that both of the plaintiffs were at-will employees. An at-will employee has no entitlement to a particular type of notice or opportunity to be heard. See Dobson v. Northumberland Cnty., 151 F.App'x 166, 168-69 (3d Cir. 2005) (public employee with no protected property interest in his job has no substantive or procedural due process claims). Accordingly, I will grant the defendant's motion to dismiss as to Count I.

In the alternative, even if it could be said that the plaintiffs' constitutional rights were involved, their Section 1983 claim would still fail. Under 42 U.S.C. § 1983, a private party may recover in an action against any person acting under the color of state

law who deprives the party of his constitutional rights. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Section 1983 does not by itself confer substantive rights, but instead provides a remedy for redress when a constitutionally protected right has been violated. Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). Therefore, in order to succeed on a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate: (1) the violation of a right secured by the Constitution, and (2) that the constitutional deprivation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

Here, there is no dispute that Penn State is a state actor. The defendant does dispute, however, whether a constitutional right was involved or violated during the plaintiffs' termination. I agree with the defendant that the only cognizable constitutional interest that the plaintiffs pleaded properly is an alleged interest in their reputation. An individual has a protectable interest in reputation. Wisconsin v. Constantineau, 400 U.S. 433 (1971). "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. at 437. Courts have clarified, however, that "reputation alone is not an

interest protected by the Due Process Clause." Versarge v. Township of Clinton, New Jersey, 984 F.2d 1359, 1371 (3d Cir. 1993) (citing Paul v. Davis, 424 U.S. 693, 701-712 (1976)). The Court announced that defamation is actionable under 42 U.S.C. § 1983 only if it occurs in the course of or is accompanied by a change or extinguishment of a right or status guaranteed by state law or the Constitution. Paul, 424 U.S. at 701-12.

Accordingly, to prevail on a claim for deprivation of a liberty interest in one's reputation, a plaintiff must show a stigma to his reputation plus deprivation of some additional right or interest. Hill v. Borough of Kutztown, 455 F.3d 225, 236 (3d Cir. 2006). "In the public employment context, the stigma-plus test has been applied to mean that when an employer creates and disseminates a false and defamatory impression about the employee ***in connection with*** his termination, it deprives the employee of a protected liberty interest." Id. (citing Codd v. Velger, 429 U.S. 624, 628 (1977)) (emphasis added). "The creation and dissemination of a false and defamatory impression is the 'stigma,' and the termination is the 'plus.'" Hill, 455 F.3d. at 236. In order to satisfy the stigma prong of the test, the plaintiff must allege that the stigmatizing statements "(1) were made publicly, and (2) were false." Id.

I am not convinced that there is any evidence that Penn State made stigmatizing statements specifically about the plaintiffs or any other statements about them that were sufficient to satisfy the stigma prong of the "stigma-plus" test. The "Actionable Statement" of the Consent Decree states, "***[s]ome*** coaches, administrators and football program staff members ignored the red flags of Sandusky's behavior and no one warned the public about him." See Am.Compl., Exhibit A at 3 (emphasis added). The plaintiffs

base much of this action on the Consent Decree's use of the term "some coaches." They argue that because of the limited number of football coaches involved in the program at the time, it would be easily determined that the plaintiffs were members of that group and thus, be tainted as complicit in the child sexual abuse scandal. In fact, the amended complaint makes the following huge leap from actual language of the Actionable Statement to the plaintiffs' own interpretation:

> The effect of the Actionable Statement was that, following the lengthy investigation by the Freeh Firm, both Penn State and the NCAA (as well as the Freeh Firm) had come to the conclusion that ***Plaintiffs, as coaches with the Penn State football program, were involved in child sexual abuse conduct*** and therefore, it is this Actionable Statement that has caused Plaintiffs their injury.

See Am.Compl. ¶ 176 (emphasis added). Thus, the plaintiffs insist, because of this statement, they were substantially certain to be less attractive job candidates. Id. ¶ 180. I disagree.

The difference between what the Actionable Statement actually says and the interpretation the plaintiffs urge the court to accept is more than unreasonable. The force of the term "some coaches" here is lessened because the Consent Decree specifically names other individuals at Penn State who were accused in the Freeh Report of wrongdoing. For example, the Consent Decree states,

> "University President Graham B. ***Spanier***, Senior Vice President – Finance and Business Gary C. ***Shultz***, Athletic Director Timothy M. ***Curley***, and Head Football Coach Joseph V. ***Paterno*** failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky's activities from the Board of Trustees, the University community and authorities…"

Id. at 4 (emphasis added). The Consent Decree also states,

> "By not promptly and fully advising the Board of Trustees about the 1998 and 2001 child sexual abuse allegations against Sandusky and the subsequent Grand Jury investigation of him, ***Spanier*** failed in his duties as President."

Id. (emphasis added). Later, the Consent Decree states,

> "[The Freeh Report] found that it was 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."

Id. (emphasis added). Finally, the Consent Decree states,

> "***Spanier, Schultz, Paterno, and Curley*** allowed Sandusky to retire as a valued member of the University's football legacy, with 'ways to continue to work with young people through Penn State,' essentially granting him license to bring boys to campus facilities for 'grooming' as targets for his assaults.'"

Id. (emphasis added). The Freeh Report and subsequent Consent Decree went to great lengths to specifically name four individuals who were accused of wrongdoing. It would be reasonable, then, to expect that the Consent Decree would also specifically name the plaintiffs if Penn State, as a state actor, determined that they were also involved in this scandal.

Nevertheless, even if I were convinced that Penn State had publically made false and stigmatizing statements against the plaintiffs sufficient to satisfy the stigma prong of the stigma-plus test, their claim would still fail because they also cannot satisfy the plus

prong. Over the years, the Supreme Court has discussed, without specifically deciding, what was required to satisfy the plus prong of the stigma-plus test. In Paul v. Davis, the Court stated that the "plus" had to be an alteration or extinguishment of "a right or status previously recognized by state law." 424 U.S. at 711. In Board of Regents v. Roth,[4] the Court suggested that under this standard, a person's loss of employment to which he did not hold a state law-created property interest is a sufficient "plus." 408 U.S. 564, 573 (1972). In Owen v. Independence, the Eighth Circuit had held that the police chief petitioner "possessed no property interest in continued employment," but that allegedly false accusations that the city made incident to his discharge "had blackened petitioner's name and reputation, thus depriving him of liberty without due process of law." 445 U.S. 622, 631 (1980). Citing Roth and Paul, the Supreme Court held that it had "no doubt that the Court of Appeals" was correct in this conclusion. Id. at 633 n.13. Similarly, in Codd v. Velger, the Court stated that "where a non-tenured employee has been stigmatized in the course of a decision to terminate his employment," he is entitled to a name-clearing hearing. 429 U.S. at 627.

The Third Circuit Court of Appeals has also discussed the requirements necessary to establish the plus prong of the stigma-plus test. See McKnight v. SEPTA, 583 F.2d 1229, 1235-1242 (3d Cir. 1978) (holding that a complaint stated a "stigma-plus" due

[4] In Roth, a non-tenured professor who had not been reappointed after his initial one-year term ended claimed that he had been deprived of a right to continued employment without due process. The Court denied his claim, finding that the professor, because he was not tenured, did not have a property right to continued employment. It noted, however, that had the University defamed the professor in the course of declining to rehire him, it would have deprived the professor of a liberty interest. Id. at 573.

process claim where the plaintiff was defamed in the course of being discharged, though it was not clear under state law whether he had a property interest in continued employment). In Hill, however, the court definitively decided,

> We therefore conclude today that a public employee who is defamed in the course of being terminated or constructively discharged satisfies the "stigma-plus" test even if, as a matter of state law, he lacks a property interest in the job he lost.

Hill, 455 F.3d at 238.

Here, whether or not the plaintiffs held a property interest in continued employment under state law, there was no deprivation following or connected to the purported stigmatizing statements of the defendant. Because the plaintiffs had already been terminated months before those statements, there can be no connection between the statements and the termination. In all of the cases discussing the stigma-plus test, a basic fact pattern exists. An employer creates and/or disseminates a false and defamatory impression about the plaintiff in connection with the plaintiff's termination. The employers' actions have come first and the employees' terminations have followed either immediately or shortly thereafter. Here, the plaintiffs were terminated during a change in the regime of a university's football program, and not in connection with or subsequent to any alleged stigmatizing statements by the defendant. The plaintiffs' reputations may have been negatively impacted by statements made by the defendant months after their terminations. Reputation alone, however, apart from some more tangible interests such as employment, does not implicate any "liberty" or "property" interests sufficient to invoke the procedural protection of the Due Process Clause. Paul, 424 U.S. at 701.

Thus, I find that the plaintiffs have failed to state a claim for the deprivation of their liberty interest in their reputations without the process due under the U.S. Constitution.

B. Civil Conspiracy

The amended complaint alleges that Penn State, along with other alleged conspirators, acted intentionally to abrogate and deny the plaintiffs their liberty interests and did so with knowledge, intent, and malice toward the plaintiffs by executing the Consent Decree and issuing the Actionable Statement. See Am. Compl. ¶¶ 175, 177. It further contends that Mr. Emmert, an alleged co-conspirator but not a state actor, magnified the negative impact of the Actionable Statement during his press conference on July 23, 2012, when he indicated that the NCAA may yet "impose sanctions as needed on individuals involved in this case." Id. ¶ 181. Mr. Emmert stated,

> Well again, we expressly have, in these sanctions and findings, withheld judgment on individuals, and will continue to do so until all of the criminal investigations have concluded, and until then we won't have any comment on individuals.

Id. ¶ 210. The plaintiffs characterize Mr. Emmert's statement as the result of a collaboratively designed effort by Penn State and the NCAA to have a unified public message. Id. ¶ 191. As further proof, the plaintiffs cite the following statement of Donald Remy, the NCAA's Chief Legal Officer, made to Gene Marsh, Penn State's negotiator with the NCAA:

> the statements made by President Emmert were designed to assist Penn State with the story it was publicly communicating at the time.

Id. ¶ 194.

In Count III, the amended complaint alleges that "there was an understanding and/or agreement between Penn State and the NCAA that Penn State would bypass the due process procedures which Plaintiffs were entitled to." See Am.Compl. ¶ 333. It also contends that,

> the Conspirators'[5] concerted actions were unlawful or taken for an unlawful purpose in order to deprive Plaintiffs of their procedural and due process rights, and, by false accusation that Plaintiffs enabled and caused child sexual abuse to occur and remain unreported, were malicious and intended to injure, or were at least in reckless disregard of substantially certain injury to Plaintiffs' property interest in their good name, reputation, honor and integrity, as well as Plaintiffs' NCAA Rights and Penn State Rights.

Id. at ¶ 336. Because the plaintiffs claim that the purpose of the alleged conspiracy was to deprive them of their procedural and due process rights, I will construe Count III as a claim for conspiracy under Section 1983, rather than a state law claim for civil conspiracy.[6]

[5] The plaintiffs refer to "Penn State, Emmert, the NCAA, other unknown NCAA employees, along with the Freeh Firm, and others" as the "Conspirators." See Am. Compl. ¶ 334.

[6] I note that "[t]he standard for civil conspiracy under Pennsylvania law" sets "a higher bar than under Section 1983" because in addition to proving the existence of an agreement, a plaintiff must also prove malice. Banks v. Gallagher, 686 F. Supp. 2d 499, 528 (M.D. Pa. 2009) (quoting Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 472 (Pa. 1979)). The elements of a state law claim for civil conspiracy in Pennsylvania are: (1) an agreement between two or more persons; (2) to do an illegal act or to do a legal act by unlawful means; and (3) malice. Skipworth by Williams v. Lead Indus. Ass'n, Inc., 690 A.2d 169, 174 (Pa. 1997). In order to proceed with a civil conspiracy action, however, the plaintiffs also must have a valid cause of action for a particular act which the defendants conspired to commit. See McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 660 (Pa. Super. 2000). Because that is not the case here, the plaintiffs' claim for civil conspiracy also would fail if it were construed as a state law claim.

"In order to prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law conspired to deprive him of a federal protected right." Ashton v. City of Uniontown, 459 F.App'x 185, 190 (3d Cir. 2012) (quoting Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 254 (3d Cir. 1999)); see also Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 700 (3d Cir. 1993) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)) (In order to demonstrate a Section 1983 conspiracy, a plaintiff must show that two or more conspirators reached an agreement to deprive him or her of a constitutional right under color of state law).

Here, because I have concluded that the object of the conspiracy claim must be dismissed, the alleged conspiracy claim itself must be dismissed. The amended complaint does not establish a claim for the deprivation of a liberty interest in reputation. Thus, one element of a conspiracy cause of action has not been satisfied, i.e., the deprivation of a federal protected right. See Ashton, 459 F.App'x at 190-191. I will grant the motion to dismiss Count III.

C. Remaining State Law Claims

The plaintiffs also have brought several state law claims against Penn State, including intentional interference with prospective contractual relations, a violation of Pennsylvania's Wage Payment and Collection Law, and breach of contract. Having dismissed the plaintiffs' federal claims, I decline to exercise supplemental jurisdiction over these remaining state law claims. See 28 U.S.C. § 1367(c)(3) (stating that a federal district court may decline to exercise supplemental jurisdiction over state law claims

when the district court has dismissed all claims over which it has original jurisdiction). Accordingly, I will dismiss those claims without prejudice.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ("JAY") V. PATERNO, et al.,	:	**CIVIL ACTION**
Plaintiffs	:	
	:	
vs.	:	**NO. 14-4365**
	:	
THE PENNSYLVANIA STATE UNIVERSITY,	:	
Defendant	:	

ORDER

AND NOW, this 25th day of February, 2016, upon consideration of the defendant's motion to dismiss (Documcnt #14), the plaintiffs' response thereto (Document #21), and the defendant's reply brief (Document #22), IT IS HEREBY ORDERED that the motion is GRANTED.

IT IS FURTHER ORDERED that:

1. Counts I and III are DISMISSED with prejudice.

2. Because I decline to exercise supplemental jurisdiction, the remaining state law claims are DISMISSED without prejudice.

3. The Clerk of Court is directed to mark this case CLOSED for all purposes.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving a copy *Dr. Edward J. Ray's Answer with New Matter to Plaintiffs' Second Amended Complaint* on the following by First Class Mail and email:

Thomas J. Weber, Esquire
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, Esquire
L. Joseph Loveland, Esquire
Mark A. Jensen, Esquire
Patricia L. Maher, Esquire
Ashley C. Parrish, Esquire
Alan R. Dial, Esquire
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

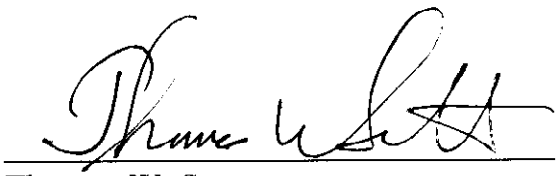
Counsel for Plaintiffs

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

Everett C. Johnson, Jr. (admitted *Pro Hac Vice,* DC No. 358446)
Brian E. Kowalski (admitted *Pro Hac Vice*, DC No. 500064)
Sarah M. Gragert (admitted *Pro Hac Vice,* 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 Defendants the NCAA, Dr. Emmert, and Dr. Ray

Dated: October 17, 2016



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 Dr. Ray