IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The 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.

Civil Division

Docket No. 2013-2082

Memorandum in Support of Motion to Compel Responses to Discovery and for an Order Overruling Objections to Third Party Discovery

Filed on Behalf of Plaintiffs

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MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY RESPONSES AND FOR AN ORDER OVERRULING OBJECTIONS TO THIRD PARTY DISCOVERY

Plaintiffs the Estate of Joseph Paterno, William Kenney and Joseph V. ("Jay") Paterno ("Plaintiffs"), have issued discovery requests seeking information that bears on whether the

NCAA Defendants acted with malice in connection with the actions set forth in Plaintiffs' complaint. That discovery is appropriate because malice is an element of the Estate's commercial disparagement claim and the individual Plaintiffs' defamation claims. The NCAA has nonetheless objected to the discovery claiming that the information purportedly has no relevance to any legal or factual claim remaining in the case.[1]

The NCAA has objected to Plaintiffs' requests for admission and interrogatories and also to Plaintiffs' notice of intent to depose Britton Banowsky, the former Chair of the NCAA's Committee on Infractions (the "Committee"), and to subpoena documents from individual members on the Committee at the time of the events at issue in this case. The Committee is an independent body composed of representatives from member institutions, athletic conferences and the private sector. Ex. 7 at 2. Its members are not employees of the NCAA. *Id.* For example, at the time of the events underlying the claims in this case, Mr. Banowsky was affiliated with Conference USA, an athletic conference of Southern and Midwestern schools. Ex. 12, NCAA's Response to First Set of Interrogatories by George Scott Paterno, at 7-8. The other members were in private legal practice, affiliated with other athletic conferences, or with a college or university. *Id.* The NCAA has objected that Mr. Banowsky and the Committee members would not have any information relevant to the NCAA's narrow delineation of the issues and that responding to the document subpoenas would be burdensome and oppressive.

In an effort to avoid this motion, Plaintiffs have made clear that they seek information and documents from Mr. Banowsky and other Committee members because these third parties may have had communications with NCAA staff, other members of the Committee, or other

[1] The NCAA also objected that the information requested through the interrogatories is highly confidential. Even if the information requested could properly be characterized as highly confidential—which it cannot—the protective order in this case provides for designation of documents or information produced in discovery as Confidential or Highly Confidential, and all parties (including the NCAA) have availed themselves of those designations.

third parties regarding the NCAA's extraordinary departure from its standard enforcement process in the Penn State case, which divested the Committee on Infractions of its responsibility in this exceptional case. The reasons for the procedural deviations, and the COI members' reactions to them, if any, may bear directly on the issue of malice. Undoubtedly, the NCAA's failure to follow its own rules in one of the most challenging cases it ever confronted – and the possible response to that decision by those vested with responsibility for the investigation and fact-finding under the NCAA's rules – relates to the issue of whether the NCAA acted with malice. Here, where the NCAA does not deny the uniqueness of its approach to imposition of sanctions in the Penn State case, its challenge to the relevance of discovery from the Committee or its former Chair regarding the NCAA's handling of the Penn State/Sandusky matter rings hollow.

For the reasons set forth in this Memorandum, Plaintiffs respectfully request that this Court overrule the NCAA's objections to these discovery requests to the NCAA and order the NCAA to respond to Plaintiffs' interrogatories and requests for admission. Plaintiffs also request that the Court overrule the NCAA's objections to their service of deposition and document subpoenas to third parties, Banowsky and the members of the NCAA Committee on Infractions.

I. Plaintiffs' Discovery Requests Are Relevant To A Showing of Malice.

The discovery requests at issue in this motion include interrogatories seeking information about whether the NCAA has previously relied entirely on an investigation conducted by a third party as the purported basis for imposing sanctions without conducting its own investigation. Ex. 3 at 5. The interrogatories do not ask the NCAA to provide names of institutions or athletes, or the specifics of any enforcement action. Rather, they merely ask how often, if ever, the NCAA followed the approach that it employed with respect to Penn State of relying exclusively

on the report of an investigation that was not conducted by the NCAA or its staff and was not prepared in compliance with the NCAA's Bylaws and rules. If it has done so, one follow-up interrogatory asks whether that enforcement matter was considered by the NCAA's Committee on Infractions. *Id.* at 6. This information is directly relevant to establishing that when the NCAA imposed sanctions on Penn State, and announced that those sanctions were justified because of Plaintiffs' conduct, the NCAA was acting with malice and in reckless disregard for the truth or falsity of the statements included in its Consent Decree.

The relevance of the two Requests for Admissions is equally straightforward. They ask the NCAA to admit that the position it has asserted regarding the concept of an "involved individual" under its Bylaws was adopted for the first time with respect to Coach Joe Paterno and his Estate. Ex. 2 at 3. These requests pertain to the timing of the NCAA's interpretation of the term "involved individual" as something it came up with solely to defeat Coach Paterno's rights under the NCAA Bylaws. As with the interrogatories, the requests for admission seek information that could support a showing that the NCAA's interpretation of its Bylaws was arrived at in order to achieve a desired outcome with respect to the Plaintiffs in this case, and was not a pre-existing rule of general application.

The subpoenas Plaintiffs seek to serve on third parties also seek information that is relevant to showing that the NCAA acted with malice in the way it imposed sanctions on Penn State. The subpoenas are intended to elicit testimony and documents from the Committee members who ordinarily hear enforcement matters, but were excluded from consideration of the Penn State case. Documents or communications reflecting the Committee members' understanding that they were NOT going to be involved in consideration of the Sandusky/Penn

State matter, and their reactions to that development, could potentially show that the NCAA acted with malice in bypassing the Committee designated to hear such matters.

II. Plaintiffs Are Entitled to Discovery Relevant to Malice.

Each of the three Plaintiffs has asserted a claim against the NCAA that justifies the discovery related to the issue of malice. The Estate has asserted a claim of commercial disparagement, which requires a showing of malice when brought by a public figure such as the late Joe Paterno. *See, e.g., Brunson Communications, Inc. v. Arbitron, Inc.*, 266 F. Supp. 2d 377 (E.D. Pa. 2003) (applying Pennsylvania law); 4 Standard Pennsylvania Practice 2d § 23:146.

The individual plaintiffs, Jay Paterno and Bill Kenney, have asserted defamation claims against the NCAA. The NCAA has taken the position that both coaches are limited purpose public figures, and thus would be required to make a showing that the NCAA acted with malice in order to prevail on their defamation claims. *See* Defendants' Preliminary Objections at 8-10, ¶ ¶ 36-41; and The NCAA Defendants' Preliminary Objections to First Amended Complaint at 13, ¶ 57. Furthermore, the NCAA has served each of the Plaintiffs with interrogatories that ask them to state all facts that support their contentions that the NCAA acted with "actual malice" in defaming or disparaging them. Exs. 9, 10 and 11, Third Set of Interrogatories By the National Collegiate Athletic Association to Plaintiff Estate of Joseph Paterno; Third Set of Interrogatories By the National Collegiate Athletic Association to Plaintiff Joseph V. ("Jay") Paterno; Third Set of Interrogatories by the National Collegiate Athletic Association to Plaintiff William Kenney.

In addition, Plaintiffs have asserted claims for punitive damages. Second Amended Complaint at Counts II – V. A showing of malice is relevant to support those damage claims. *See, e.g., Paul v. Hearst Corp.*, 261 F. Supp. 2d 303, 306 (M.D. Pa. 2002); *DiSalle v. P.G. Publishing Co.*, 375 Pa. Super. 510, 544 A.2d 1345, 1365 (1988).

As the parties on whom the burden of proof falls, the Plaintiffs are entitled to take discovery on malice as an element of their claims. It is a long-settled that malice is proven inferentially with circumstantial evidence. *See, e.g., Stinson v. Smith*, 329 Pa. 177, 182, 196 A. 843, 845 (1938) ("proof ... of malice may be founded on circumstantial evidence; in fact, such proof in these cases usually depends on inferences") (citations omitted). Moreover, malice can be demonstrated by evidence tending to show the defendant acted with a pre-conceived outcome, and was indifferent to what the actual facts demonstrated. *See Harte-Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 684-85 (1989) ("a deliberate effort to avoid the truth" could be inferred when a newspaper decided to publish unsubstantiated allegations against a political candidate to support the newspaper's attack on the candidate); *see also Suzuki Motor Corp. v. Consumers Union of United States, Inc.,* 330 F.3d 1110, 1135 (9th Cir. 2003) (evidence that defendant's test was designed to support its conclusion that plaintiff's vehicle rolled over too easily sufficient to prove actual malice). In addition, evidence that the defendant changed otherwise applicable rules or interpretations tends to show that the action was taken to achieve a pre-determined outcome, rather than allowing a truth-finding process to unfold. *See Curran v. Philadelphia Newspapers, Inc.*, 376 Pa. Super. 508, 513-514 (1988) (noting that "clear departures from acceptable journalistic procedures, including the lack of adequate prepublication investigation ... were sufficient to support finding of reckless disregard for the falsity of the information") (citing *Frisk v. News Company*, 361 Pa. Super. 536 (1986)).

Here, Plaintiffs seek to determine whether the NCAA relied for the first and only time on an investigative report by a third party as the sole basis to support the imposition of sanctions with regard to Penn State. Such information is relevant to showing that the NCAA and Mr. Emmert did this to justify a pre-determined decision to sanction Penn State and assign blame to

Coach Joe Paterno and other unnamed coaches at Penn State without regard to what the facts actually showed. Evidence of such an ad hoc and results-driven process would show that the NCAA acted knowingly or recklessly when it adopted the Freeh Report and issued the Consent Decree.

Similarly, Plaintiffs want to depose Mr. Banowsky regarding his interactions with members of the Committee on Infractions as well as the NCAA executives, including Defendants Emmert and Ray. It is undisputed that the NCAA's action in this case was unprecedented. Exs. 13 and 14, Ray deposition Ex. 11 (Statement from July 23, 2012) and Ex. 13 ("The Executive Committee has authority when it is of a big enough and significant enough nature that it should exercise its ability to expedite the process of reviewing cases."). Presumably the members of the Committee that would otherwise have handled the matter had some reaction to being bypassed by the NCAA executives, including Defendants Emmert and Ray, which it is reasonable to believe they would have shared among themselves at least. Plaintiffs want to serve deposition and document subpoenas to learn whether any of those communications related to the unique way NCAA handled the Penn State matter, and whether any concerns were relayed to the officials who imposed the sanctions on Penn State. In a recent opinion in an unrelated case involving defamation claims against the NCAA, the California Court of Appeals cited communications among members of the Committee on Infractions as evidence that the plaintiff, a former football coach at the University of Southern California, would be able to make a showing that the NCAA acted with malice in issuing an infractions report that contained allegedly false statements as to him. *McNair v. NCAA*, 2015 WL 8053286 at 11 (Cal. Ct. App. 2015).

Defendants' objections to these discovery requests are misplaced. Pennsylvania law directs courts to allow discovery liberally regarding any non-privileged matter relevant to the case. Pa. R.C.P. 4003.1; *see George v. Schirra,* 814 A.2d 202, 204 (Pa. Super. 2002). In the discovery context, the term "relevant" has a broader and more flexible meaning than it does in the context of admissibility at trial. *See id.* at 205-206. Rule 4003.1(b) of the Pennsylvania Rules of Civil Procedure specifically provides that relevance for discovery purposes is not restricted to admissibility at trial. *See also Winck v. Daley Mack Sales Inc.*, 21 Pa. D. & C.3d 399, 401 (Pa. Com. Pl. 1980). Rather, "[a]n inquiry is proper if it may reasonably lead to other information which may be admissible at trial." *Fitt v. Gen. Motors Corp.*, 13 Pa. D. & C.4th 336, 338 (Com. Pl. 1992). Tellingly, Pa. R.C.P. 4003.1 places the burden on the party opposing requested discovery to show that the discovery is *improper*. *See, e.g., Schirra,* 814 A.2d at 205-206. The NCAA cannot make that showing with respect to the discovery at issue.

The information Plaintiffs seek here fits comfortably under the broad umbrella of "relevance" that Pa. R.C.P. 4003.1 instructs this Court to apply during discovery. As suggested above, the discovery Plaintiffs seek goes to malice in a straightforward and uncontroversial way. The NCAA's ad hoc departures from its investigative and decision-making processes, as well as its apparent attempt to disregard processes that could have better informed its decision-making, are classic examples of evidence showing malice.

"The purpose of pre-trial discovery is to accumulate information and evidence, to determine the relevance to trial of information obtained in the discovery process and to plan trial strategy." *See supra, Schirra*, 814 A.2d at 206. That purpose cannot be fulfilled if Defendants can simply refuse to provide responsive information that bears directly on an element of the claims against them. Defendants are the best source of information regarding the investigative

process the NCAA used in sanctioning Plaintiffs and whether the NCAA had ever previously used that process. Similarly, only the NCAA can say when it developed the interpretation of the term "involved individual" it has advanced with respect to Joseph Paterno and his estate.

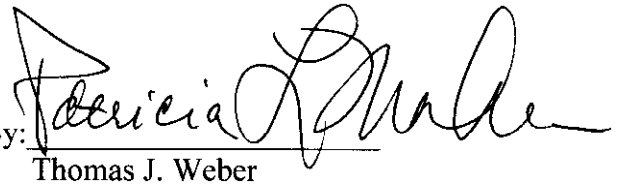
Responding to the discovery at issue will not "inject undue burden and expense into [the] litigation." *Cooper v. Schoffstall*, 588 Pa. 505, 523, 905 A.2d 482, 494 (2006). The discovery requests to the NCAA are focused in scope and limited in number: the interrogatories consist of only four questions, going to the NCAA's own practices regarding the extent of the NCAA's reliance on outside investigations and investigative reports. The requests for admission consist of only two questions about the timing of the NCAA's interpretation of its Bylaws to require that an "involved individual" must be a living person.

The subpoenas are limited to one deposition of the former Chair of the Committee on Infractions, whom it is reasonable to conclude would have engaged in communications about the decision to bypass the Committee's standard procedures. Contrary to the NCAA's position that subpoenas to Committee members would be "oppressive," the document subpoenas would hardly be burdensome to any individual member who has no responsive documents. For any member with responsive documents, the potential relevance of such documents justifies the burden where it could bear on an element of Plaintiffs' claims. *See, e.g., Berger v. Weinstein*, No. CIV.A. 08-4059, 2015 WL 3622934, at *2 (E.D. Pa. June 10, 2015) (denying motion to quash Judgment Creditors' third-party subpoena when "subpoena is not duplicative and does not subject [Judgment Debtor's wife] to harassment. While she denied personal knowledge of the relevant business entities in her deposition, the proper inquiry is whether she possesses documents or information which would aid in discovery.") (applying Pennsylvania law).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Court enter an order overruling the NCAA's objections to responding to Plaintiffs' discovery requests and directing the NCAA to provide substantive responses to the Interrogatories Plaintiffs served on January 8, 2016, and to Plaintiffs' Second Set of Requests for Admissions to the National Collegiate Athletic Association. In addition, Plaintiffs request that the Court overrule the NCAA's objections to Plaintiffs' proposed document and deposition subpoenas to third parties Britton Banowsky and the individual members of the NCAA Committee on Infractions.

Date: February 29, 2016

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY RESPONSES AND FOR AN ORDER OVERRULING OBJECTIONS TO THIRD PARTY DISCOVERY** was served this 29th day of February, 2016 by first class mail and email to the following:

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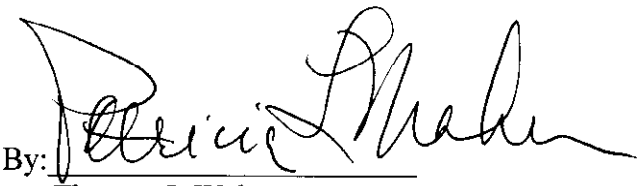
By: 

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