

The claims in this case pertain to the Consent Decree between the NCAA and the Pennsylvania State University (“Penn State”). Plaintiffs contend that statements in the Consent Decree defamed and disparaged them and that Defendants acted with malice. After this litigation began, the NCAA reached an agreement with Penn State to repeal the Consent Decree in connection with the resolution of a separate lawsuit brought by Pennsylvania Senator Jake Corman, *Corman v. NCAA, et. al.*, Case No. 1 M.D. 2013 (Commonwealth Court). The NCAA provided a copy of the settlement agreement dated January 21, 2015 and accompanying documents to this Court by letter dated February 27, 2015. Ex. D.

The repeal of the Consent Decree as part of the *Corman* settlement raises obvious questions concerning whether the NCAA ever had any lawful basis for imposing the Consent Decree and whether the NCAA knew (or should have known) that the statements made in the Consent Decree were false. Plaintiffs are entitled to explore the reasons for its repeal, especially because the NCAA continues to defend the truth of the statements in the Consent Decree that are the subject of the Plaintiffs’ claims.

Accordingly, because the repeal of the Consent Decree is relevant to this litigation, Plaintiffs sought appropriate discovery. As this Court is aware, Plaintiffs sought documents from members of the NCAA Committee on Infractions, which the Court approved over the NCAA’s objection. *See* Ex. E. The Court also authorized Plaintiffs to depose the current president of Penn State, Eric Barron, over Penn State’s objection, allowing Plaintiffs to inquire about the repeal of the Consent Decree. Ex. F.

Although these rulings recognized the relevance of discovery related to the repeal of the Consent Decree, the NCAA is unwilling to abide by this Court’s earlier rulings. Instead, seeking to re-litigate issues this Court has already resolved, the NCAA has objected on multiple grounds

to Plaintiffs' request for "documents that evidence, reflect, or refer to consideration of, evaluation of, or the bases for the repeal, dissolution, modification of, or superseding treatment of the Consent Decree." Ex. E. The NCAA contends that Plaintiffs' document Request No. 3 came too late, that the documents requested are irrelevant, and that all responsive documents would be privileged, even though the NCAA has not conducted a search for or reviewed the documents, and objects to logging them because they are "litigation documents."

Plaintiffs have conferred with the NCAA regarding each of these objections but have been unable to resolve their differences. *See* Statement of Conference. At the May 16, 2016 discovery conference, the NCAA requested leave to submit a brief on its objections to Plaintiffs' request for documents related to dissolution of the Consent Decree. For the Court's convenience, Plaintiffs submit this short Memorandum in support of their Motion to Compel.

A. The Document Request Was Timely

The NCAA has objected that Plaintiffs' request for documents related to the repeal of the Consent Decree came too late in the discovery process to require the NCAA to search for responsive documents, even though the NCAA's objections and responses were due and served before the April 29 discovery cutoff. Ex. B. Moreover, now that the Court has granted the NCAA's request to extend discovery, this objection is moot. There is no reason the NCAA should not comply with discovery requests served before the April 29 discovery cutoff.

B. The Requested Documents Are Discoverable

The NCAA has also objected that the requests for documents related to the repeal of the Consent Decree are not discoverable because they are not likely to lead to admissible evidence. This objection is also meritless, including because the Court has already determined that discovery on the same subject from third parties could proceed, over the objections of Penn State

and the NCAA. *See* Exs. E¹ and F. Consistent with the Court's rulings, Plaintiffs have already served subpoenas with requests for documents related to repeal of the Consent Decree on members of the NCAA Committee on Infractions, and deposed Penn State President Barron on the subject of the repeal of the Consent Decree. Treating discovery as a one-way street, as if the NCAA is exempt from the rules that apply to everyone else, the NCAA now contends that discovery from it should be more narrowly circumscribed than discovery from these third parties. But that is directly contrary to representations it has previously made to the Court. Indeed, the NCAA objected to issuing subpoenas to the members of the Committee on Infractions as too burdensome on the ground that unlike the NCAA, they are third parties. Ex. H, March 11, 2016 Transcript of Proceedings at 54.

Not only has the NCAA reversed its stance on the scope of discovery from parties as compared to third parties, the documents requested fall squarely within the scope of discovery allowed under Pa. R. Civ. P. 4003.1. Despite agreeing to dissolve the Consent Decree, the NCAA continues to defend the truth of the Consent Decree's statements, Ex. I (The National Collegiate Athletic Association' Responses and Objections to Plaintiffs' Requests for Admissions), and the propriety of its actions in imposing the Consent Decree. Ex. J, January 16, 2016 Statement of NCAA Board of Governors member, Kirk Schulz, President of Kansas State University. Information related to the reasons for repeal of the Consent Decree, even while the NCAA has continued to affirm its validity, is thus reasonably calculated to lead to discovery of admissible evidence.

¹ The March 29, 2016 Opinion and Order overruling the NCAA's objection to Plaintiffs serving document subpoenas to members of the Committee on Infractions authorized Plaintiffs to serve third party subpoenas for "all documents . . . that evidence, reflect or relate in any way to the following . . . (b) The NCAA Consent Decree . . . including but not limited to drafts of the Consent Decree and *any documents that relate in any way to the repeal, dissolution, modification, and/or superseding of the Consent Decree, such as the NCAA's January 2015 repeal of the Consent Decree* and the superseding Athletics Integrity Agreement that the NCAA terminated in December 2015[.]" Ex. E at 13 (emphasis added).

Discovery is also relevant to the question of malice and damages. The Superseding Agreement that Penn State and the NCAA reached in connection with the *Corman* settlement includes a provision acknowledging “the NCAA’s legitimate and good faith interest and concern regarding the Jerry Sandusky matter.” Ex. D at 4. Moreover, President Barron, who acted as a mediator between the NCAA and Senator Corman in resolving that case, cited this provision as a key to reaching the settlement.² Communications with Penn State and or Senator Corman regarding the NCAA’s desire for recognition of its purportedly “legitimate interest and concern” in the Jerry Sandusky matter are potentially relevant to the issue of malice, and whether the NCAA imposed the Consent Decree on Penn State knowing it lacked authority to do so.

C. The Requested Documents Are Not All Privileged.

The NCAA has objected that documents related to the repeal of the Consent Decree are “settlement documents” and thus privileged. The requested documents plainly do not relate to settlement of the instant litigation, and are not immune from discovery on that basis. Moreover, the resolution of the *Corman* litigation was achieved by agreement among three parties. Although there may have been communications between the NCAA and its counsel regarding the repeal of the Consent Decree, there were also communications between and among the two other parties to the settlement as to which the NCAA could not assert attorney-client privilege or work product protection. There may also be internal NCAA documents that are not privileged, but that cannot be determined without a search and review by the NCAA. Any responsive documents the NCAA contends are protected as attorney-client communications or as attorney work product should be listed on a privilege log before any judgment is made as to which documents may or may not be privileged.

² Plaintiffs deposed President Barron on May 12, 2016. The transcript of his testimony is not yet available, but Plaintiffs will submit relevant excerpts at a later date if the Court so requests.

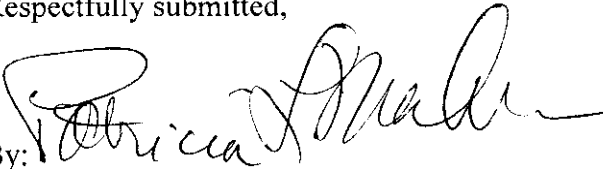
The NCAA has suggested that the requested documents are “litigation documents” which the parties to this case have agreed not to log. To the extent there is such a practice in this case, it pertains only to pleadings and other documents related to the litigation of this case. It does not extend to the repeal of the Consent Decree, the document that underlies Plaintiffs’ claims in a context unrelated to this case. Plaintiffs have no agreement that documents outside the context of the instant litigation would not be logged, if privileged.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion To Compel Production of Documents Related to Repeal of the Consent Decree by Defendant National Collegiate Athletic Association, responsive to Plaintiffs’ Third Request for Production of Documents, and provide a privilege log for any documents withheld by the NCAA on grounds of privilege.

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Respectfully submitted,

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