IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; 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 OF LAW IN SUPPORT OF MOTION TO QUASH THIRD-PARTY DEPOSITION SUBPOENA DIRECTED TOWARD ERIC J. BARRON AND FOR PROTECTIVE ORDER** Filed on Behalf of: Non-Party The Pennsylvania State University and its President, Eric J. Barron Counsel of record for The Pennsylvania State University and Eric J. Barron: Daniel I. Booker, Esquire PA I.D. No. 10319 Jack B. Cobetto, Esquire PA I.D. No. 53444 Donna M. Doblick, Esquire PA I.D. No. 75394 William J. Sheridan, Esquire PA I.D. No. 206718 REED SMITH LLP Firm #234 225 Fifth Avenue Pittsburgh, PA 15222 (412) 288-3131 (412) 288-3063 (fax) Michael T. Scott, Esquire PA I.D. No. 23882 REED SMITH LLP Three Logan Square Suite 3100 1717 Arch Street Philadelphia, PA 19103 (215) 851-8100 (215) 851-1420 (fax)

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OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,	)	CIVIL DIVISION
Plaintiffs,	)	Docket No. 2013-2082
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.	)	

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH THIRD-PARTY DEPOSITION SUBPOENA DIRECTED TO ERIC J. BARRON AND FOR PROTECTIVE ORDER

The Pennsylvania State University ("Penn State" or "the University") and its President, Eric J. Barron, respectfully submit this memorandum of law in support of their request that this Court quash a subpoena for the third-party deposition of President Barron and issue a commensurate protective order, pursuant to Rules 234.4 and 4012 of the Pennsylvania Rules of Civil Procedure.

SUMMARY OF ARGUMENT

The subpoena directed toward President Barron is one of four that Plaintiffs recently issued to University representatives, and is the only one the University seeks to quash. President Barron was not affiliated with the University in any way at the time the Sandusky scandal erupted or when University hired the Freeh, Sporkin, & Sullivan law firm to conduct its

investigation (November 2011), when the Freeh firm rendered its report (July 2012), or when the defendant in this case, the National Collegiate Athletic Association ("NCAA"), imposed the Consent Decree on the University (July 2012). Indeed, Dr. Barron did not become the University's President until May 12, 2014 – two years after the events at issue in this litigation. The Plaintiffs have deposed and will depose other University representatives in this litigation, and they also have access to the testimony given by other University representatives (including President Barron's predecessor, several trustees, and several of the University's lawyers) in other litigation over the NCAA Consent Decree.

Counsel for the Plaintiffs have advised the undersigned that they want to depose President Barron in order to inquire into statements he made in 2014 and 2015 regarding his personal views of the Freeh Report, as well as his expressed intent in 2015 to conduct an independent review of the Freeh Report. These topics are simply too far afield of the issues in this litigation – claims against *the NCAA* for defamation, commercial disparagement, and tortious interference with two of the plaintiffs' job prospects based on statements the NCAA made in 2012 – to warrant requiring the extremely busy President of a large University to sit for a deposition in a case in which the University is not even a party, and about which he has no first-hand, personal knowledge.

This Court has the power to issue any order that justice requires to protect any person from "unreasonable annoyance, embarrassment, oppression, burden or expense." Pa. R. Civ P. 234.4(b), 4012(a). Penn State respectfully requests that the Court exercise that power to quash the deposition subpoena to President Barron and issue a commensurate protective order.

PROCEDURAL AND FACTUAL BACKGROUND

A. Pertinent Procedural Background

As this Court is aware, the University is no longer even a nominal defendant in this litigation, having been voluntarily dismissed from the case in July 2015 by the last plaintiff who had claims against it. The following claims remain against the NCAA and the individual NCAA defendants, (Mark Emmert (President of the NCAA) and Edward Ray (Chair of the NCAA's Committee on Infractions in July 2012, when the Consent Decree was issued)):

- the Estate of Joseph Paterno asserts a claim for commercial disparagement, in which it alleges that language in the July 2012 Consent Decree impugned Joseph Paterno's name, thereby adversely affecting the Estate's ability to profit from Paterno-related marketing efforts;
- Jay Paterno and William Kenney, former assistant football coaches, allege that the references in the July 2012 Consent Decree to unnamed members of the University's football coaching staff defamed them, and that those statements also constituted tortious interference with their prospective contractual relations, by, *e.g.,* making it difficult for them to obtain coaching jobs elsewhere; and
- all three Plaintiffs allege that the NCAA conspired with the law firm of Freeh, Sporkin & Sullivan (the "Freeh Firm") to commit those torts in July 2012.

On March 7, 2016, Plaintiffs' counsel served a subpoena, noticing President Barron's deposition to take place on April 13, 2016. As discussed *infra,* the parties held the requisite "meet and confer" before Penn State filed this motion.

B. Dr. Barron Did Not Become President Of Penn State Until May 2014.

Dr. Barron assumed the position as Penn State's President on May 12, 2014. Motion, Exhibit B, Declaration of Eric J. Barron ("Barron Dec."), ¶ 1. Between February 2010 and April

2014, he was the president of Florida State University, which is located in Tallahassee, Florida. *Id.*, ¶ 2.

President Barron's professional expertise is in the areas of climate, environmental change, and oceanography, among other earth science topics. He is a fellow in the American Association for the Advancement of Science, the American Geophysical Union, the American Meteorological Society and the Geological Society of America. *Id.*, ¶ 3. From 2008 to 2010, Dr. Barron served as director of the National Center for Atmospheric Research, a prominent federally-funded research and development laboratory in Boulder, Colorado. From 2006 to 2008, he was the dean of the Jackson School of Geosciences at the University of Texas-Austin. *Id.*, ¶ 4. From 1986 to 2006, Dr. Barron served in various positions at Penn State, including professor of geosciences, director of the Earth System Science Center, director of the EMS Environmental Institute, and dean of the College of Earth and Mineral Sciences (the "College"). *Id.*, ¶ 5.

Naturally, in view of the fact that he was the president of a University over 1,000 miles away from State College at the time, President Barron: had no involvement in Penn State's decision to retain the Freeh Firm in November 2011; was not interviewed by the Freeh Firm in connection with its investigation into matters relating to Jerry Sandusky's sexual abuse; and played no role whatsoever in Penn State's July 2012 decisions regarding the consent decree the NCAA imposed on it. *Id.*, ¶ 6.

C. Plaintiffs' Stated Reasons For Subjecting President Barron To A Deposition

On March 21, 2016, after several efforts to schedule a "meet and confer" in accordance with this Court's Local Rules, the undersigned counsel had a telephonic conversation with

Patricia Maher, one of the attorneys for the Plaintiffs.[1] When asked why Plaintiffs believed President Barron had any information that is properly discoverable, given the fact that he had no affiliation with the University at the time of the events at issue in this litigation, Attorney Maher referred generally to certain statements President Barron made in 2014 and 2015 about his personal views of the Freeh Report and his expressed intention at that time to undertake an independent review of that Report.

D. Dr. Barron Has Numerous Professional Obligations And Travel Commitments Over The Next Six Weeks That Cannot Be Rescheduled.

Dr. Barron has an extremely full schedule between now and the end of April, when discovery in this case closes. As set forth more fully in Exhibit 1 to his Declaration, Dr. Barron has numerous professional obligations -- including several out-of-town trips and weekend obligations -- during this period, the vast majority of which cannot be rescheduled.[2]

ARGUMENT

What President Barron thinks or says or did about the Freeh Report years after the NCAA allegedly made defamatory statements in the Consent Decree in July 2012 is far too slender a reed on which to compel the president of a large, non-party university to devote time to preparing for and participating in a deposition in this case. This Court should exercise its

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[1] Plaintiffs' counsel asked counsel for the University on January 27, 2016, if they would accept service of a deposition subpoena for the University's President, Eric J. Barron. The University's counsel responded that they would be willing to accept service of the subpoena, but without prejudice to the right to assert any and all objections to it. The University heard nothing further from the Plaintiffs until five weeks later, when, on March 21, 2016, Plaintiffs served the subpoena that is attached as Exhibit A to the Motion.

[2] On March 29, 2016, the University and President Barron filed an unopposed motion for leave to file Exhibit 1 to President Barron's Declaration under seal. The undersigned will file that exhibit under seal promptly upon receipt of an order granting that motion.

considerable discretion under Rules 234.4(b) and 4012(a) to quash the subpoena and issue a protective order.

A. The Court may quash a subpoena and issue a protective order where, as here, the discovery sought would impose unreasonable annoyance, embarrassment, oppression, burden or expense.

Rule 4012 of the Pennsylvania Rules of Civil Procedure provides that "the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense . . . ." Pa. R. Civ P. 4012(a). Rule 234.4(b) contains the same language with respect to third-party subpoenas in particular. Furthermore, a party may obtain discovery only of matters that are "relevant to the subject matter involved in the pending action." Pa. R. Civ. P. 4003.1(a). Although one may not object to discovery on the grounds that the information would be inadmissible at trial, the information sought must "appear[ ] reasonably calculated to lead to the discovery of admissible evidence." Pa. R. Civ. P. 4003.1(b). Here, the information Plaintiffs seek to obtain by deposing President Barron plainly does not satisfy these requirements, especially where, as here, the deposition is being sought at the very end of an extended discovery period.

Although Pennsylvania does not have a well-established body of case law specifically regarding the depositions of high-ranking officials, Rules 234.4(b) and 4012(a) are very similar to Rule 26 of the Federal Rules of Civil Procedure, which likewise provides that a federal court may issue orders to protect a witness from annoyance, embarrassment, oppression, or undue burden or expense. Under the Federal Rules, a court may protect a high-level executive from the burdens of a deposition where the executive has no personal knowledge of the disputed issues and/or sitting for the deposition would be a substantial hardship in light of the executive's professional obligations. *Opposing 'Apex' Depositions of Top Corporate Executives,* available at http://us.practicallaw.com/1-602-9445. Here, given President Barron's declaration that he had

no involvement in and no first-hand, personal knowledge of the 2011-2012 events that underlie the Plaintiffs' claims against the NCAA, as contrasted with the unreasonable hardship, annoyance, and inconvenience that enforcing the subpoena would create, this Court should exercise its power to manage and control discovery to quash the subpoena and issue a protective order.

1. President Barron is highly unlikely to have unique, first-hand knowledge of matters relating to the Plaintiffs' remaining claims in this case.

Given the potential for abuse, many courts require a showing that a high-level executive has unique and personal knowledge of the claims at issue before subjecting him to a deposition – even where the executive is employed by a party to the litigation. *E.g., Baine v. Gen. Motors Corp.,* 141 F.R.D. 332, 334 (M.D. Ala. 1991) (it would be oppressive, inconvenient, and burdensome to depose manufacturer's vide-president, who wrote a memo describing the restraint system that allegedly failed, given no indication he had superior or unique knowledge of the system or the accident in which it failed); *Folwell v. Hernandez,* 210 F.R.D. 169, 175 (M.D.N.C. 2002) (the deposition of a high-level corporate executive should not be freely granted when the subject of the deposition would be only remotely relevant to the issues in the case); *Six W. Retail Acquisition v. Sony Theatre Mgmt. Corp.,* 203 F.R.D. 98, 102 (S.D.N.Y. 2001); *Community Federal Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.,* 96 F.R.D. 619, 621 (D.D.C. 1983) (absent a showing that members of a government board had "unique personal knowledge" of the decision at issue, appropriate to bar their depositions). The fact that a high-ranking official made general statements about topics potentially germane to the allegations in litigation generally *are not* sufficient to warrant subjecting that individual to a deposition. *Apple Inc. v. Samsung Elecs. Co.,* 282 F.R.D. 259, 266 (N.D. Cal. 2012) (general statements in which a high-ranking executive voiced the need "to remain competitive and plan [the company's] designs accordingly"

was not sufficient to compel his deposition); *Affinity Labs. Of Texas v. Apple, Inc.*, No. 09-cv-4436, 2011 WL 1753982, *16 (N.D. Cal. May 9, 2011) (a CEO's public statements, even on issues arguably relevant to the other side's claims, are insufficient to justify his deposition). These considerations are all the more compelling where, as here, the organization with which the official is affiliated *is not a party to the litigation.*

Here, three University trustees who were on the board in 2011-2012 (Ira Lubert, Keith Masser, and Paul Silvis) are being deposed by Plaintiffs in this case. Plaintiffs also have deposed the University's Associate General Counsel (Frank Guadagnino). In addition, Penn State's President in 2012 (Rodney Erickson), another trustee and head of the University's Special Investigative Task Force (Keith Frazier), and several of the University's lawyers (Gene Marsh and Steve Dunham) were deposed in *Corman v. NCAA, et al.* (Pa. Commw. No. 1 MD 2013), and the Plaintiffs and the NCAA have stipulated that the parties may use the *Corman* deposition transcripts as evidence in this case.

President Barron, who was not even in Pennsylvania, much less at Penn State, when all relevant events occurred, does not possess unique additional knowledge about matters relevant to the the Plaintiffs' remaining claims in this litigation. As explained *supra,* the legal issues remaining in the litigation essentially are claims that the NCAA lacked a good-faith factual basis for making certain statements in the July 2012 Consent Decree that referred to, *inter alia,* Coach Paterno and unnamed members of his coaching staff. President Barron, however, had no involvement whatsoever in negotiating the Consent Decree or agreeing to its imposition.[3] There simply is no good-faith basis for a conclusion that President Barron has information that is either

[3] That decision was made by then-President Rodney Erickson, who was deposed in *Corman.*

relevant or reasonably likely to lead to the discovery of evidence that would be admissible in this litigation.

Moreover, although it should come as no surprise that President Barron – like many people who have read the Freeh Report – has thoughts and opinions about it, his personal opinions in that regard have no bearing whatsoever on the Plaintiffs' claims that the NCAA defamed and disparaged them years earlier. In short, absent a showing from Plaintiffs that Dr. Barron is likely to possess unique, first-hand knowledge that is directly relevant to, or likely to lead to the discovery of evidence admissible about, Plaintiffs' claims, the deposition should not go forward.

2. Sitting for a deposition would be an unreasonable hardship in light of Dr. Barron's other professional commitments.

The subpoena should be quashed, and a protective order entered, for the equally compelling reason that it would impose an undue hardship on President Barron to require him to prepare for, and then participate in, a deposition given his lack of any first-hand knowledge of matters relevant to the litigation. *Guan Ming Lin,* No. 10 Civ.l 1335 VM JCF, 2010 WL 4007282, *2 (S.D.N.Y. Oct. 5, 2010); *Apple Inc.,* 282 F.R.D. at 266-270. As set forth *supra* and in more detail on Exhibit 1 to Dr. Barron's Declaration, his schedule between now and the end of April is packed with professional obligations. Indeed, one is hard-pressed to find a day in the next five weeks on which Dr. Barron does not have multiple obligations that cannot be rescheduled.

Courts are especially sensitive to the desire to avoid imposing an undue hardship on an individual where, as here, the deponent's organization is not a party to the litigation. *E.g., Watts v. S.E.C.,* 482 F.3d 501, 509 (D.C. Cir. 2007). Similarly, a hardship often is considered to be "undue" where, as here, there is a strong factual showing that the executive has no unique

personal knowledge that would justify the imposition on his time and the inconvenience. *In re Ski Train Fire of Nov. 11, 2000 Kaprun, Austria,* No. MDL 1428, 2006 WL 1328259, *10 (S.D.N.Y. May 16, 2006). As discussed *supra,* in view of the fact that President Barron was not even affiliated with Penn State at the time the Freeh Firm was retained or at the time the Consent Decree was imposed, requiring him to prepare for, and then sit for, a deposition, is the quintessential type of harassment and undue burden that Rules 234.4(b) and 2014(a) contemplate.

CONCLUSION

Plaintiffs simply do not have a bona fide reason for seeking to require President Barron to sit for a deposition in this case. Requiring him to do so nevertheless would be unduly burdensome, harassing, and completely unwarranted. For all of the foregoing reasons, Penn State and President Barron respectfully request that the Court exercise its discretion under Pa. R. Civ. P. 234.4(b) and 4012(a) to quash the subpoena and issue a commensurate protective order providing that his deposition shall not proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 30th day of March, 2016, a true and correct copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH THIRD-PARTY DEPOSITION SUBPOENA DIRECTED TO ERIC J. BARRON AND FOR PROTECTIVE ORDER was served upon the following counsel via United States mail, first class, postage prepaid:

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