IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
PENNSYLVANIA
CIVIL ACTION – LAW

GEORGE SCOTT PATERNO,
as duly appointed representative of the
ESTATE and FAMILY of JOSEPH PATERNO, et al.

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.

Defendants.

Docket No. 2013-2082

Type of Case: Commercial

Type of Pleading: Memorandum in Opposition to Defendants' Preliminary Objections to First Amended Complaint

Filed on Behalf of: Plaintiff George Scott Paterno as Duly Appointed Representative of the Estate and Family of Joseph Paterno

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO;

RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;

PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University;

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and

ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President of the NCAA; and

EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Civil Division

Docket No. 2013-2082

MEMORANDUM IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS TO FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT

The children harmed by Sandusky, the children's family members, the community, PSU and the Commonwealth were all seeking to uncover the truth behind these hideous crimes when although "ordinarily . . . not . . . actionable by the NCAA," the NCAA involved itself in one of the most disastrous events in . . . the history of the community, PSU and the Commonwealth . . . .

Student-athletes, trainers, coaches, administrators and support personnel who had excelled in their jobs through hard work, practice, commitment, team work, sportsmanship, excellence and perseverance were told none of that mattered.

— *Corman v. NCAA*, __ A.3d __, 2014 WL 1382675, at *15 (Pa. Commw. Ct. Apr. 9, 2014).

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The National Collegiate Athletic Association ("NCAA") has immense power and influence over its member institutions and their administrators, faculty, staff, and student-athletes. As this case shows, it has the ability to impose sanctions that can end careers, ruin reputations, and change public perceptions. It is for this reason that the rules that bind the NCAA and its member institutions contain careful limits on the scope and exercise of the NCAA's enforcement authority. When the NCAA, its President Mark Emmert, and the former chairman of its Executive Committee Dr. Edward Ray ("NCAA defendants") acted in the wake of the Sandusky scandal, however, they ignored their own rules and denied plaintiffs any of the rights and process to which plaintiffs were entitled. The NCAA defendants did this even though they knew that their unlawful actions and

irresponsible accusations would end plaintiffs' careers, ruin their reputations, and severely injure them. In violating their own rules, the NCAA defendants flouted basic requirements of law and in the process caused extraordinary harm to innocent parties, including plaintiffs in this action.

In this Court, the NCAA defendants' principal strategy has been to invent as many objections as possible in an attempt to prevent this litigation from going forward, avoid the merits, and ensure that the real facts never see the light of day. Instead of answering, or responding only to the *new* allegations in the amended complaint, the NCAA defendants are now seeking to re-litigate every single count; raise both old and new arguments in support of the same objections that have already been litigated; and challenge material that was present in the original complaint. That is impermissible under Pennsylvania rules and should not be countenanced.

Even on their own terms, the NCAA defendants' arguments are meritless. In their attempt to re-litigate matters this Court has already resolved, the NCAA defendants continue to ignore the crux of the complaint — that the NCAA defendants had no authority to interfere in a criminal investigation to address a matter that has nothing to do with athletic competition. *Cf. Corman*, 2014 WL 1382675, at *11, *13 (noting the NCAA's "questionable involvement"; its "dubious authority" to impose the Consent Decree; and "the many discrepancies

between the Consent Decree and the NCAA Constitution and Bylaws"). Not only does the criminal conduct that provided the asserted basis for the NCAA's sanctions fall far outside the scope of the NCAA's delegated authority, but the NCAA defendants did not conduct the type of investigation required under their own rules. Indeed, they conducted no investigation at all. They did not develop evidence to support their purported "findings." They did not interview the individuals who were the subject of and harmed by those findings. They did not follow *any* required procedures. And, in perhaps the most ironic twist, the NCAA defendants used — and continue to use — the very fact that they failed to follow their own procedures as a reason for denying involved individuals and other affected parties their rights, including the right to challenge the unsupported findings and conclusions that provide the basis for the unlawful Consent Decree.

The NCAA defendants' objections to the limited new material included in the amended complaint fare no better. The NCAA defendants' contention that plaintiffs have not adequately identified prospective contractual opportunities — that is, jobs they would have secured without the NCAA defendants' unjustified interference — is unsupportable. The amended complaint's new allegations cure the deficiencies previously identified by the Court and, as a result, plaintiffs have adequately stated a claim for tortious interference with contract. Litigation against the NCAA defendants should proceed.

For its part, Penn State objects to being sued as a nominal defendant. But the amended complaint is clear that no relief is sought against the University, and Penn State has no standing to press objections on the NCAA defendants' behalf. Penn State's decision to support the NCAA defendants is not surprising, however, for Penn State remains trapped under their thumb. Even before this Court, the NCAA defendants repeatedly threaten Penn State with the prospect of "harsh penalties" and a "protracted NCAA investigation," *see* NCAA Br. 3, 6, even though doing so exceeds their lawful authority. These improper tactics confirm the need for a full and fair hearing on the merits.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Do Pennsylvania rules of procedure prohibit the NCAA defendants from objecting, for a second time, to material and allegations in the amended complaint that are not new and were present in the original complaint. (Suggested answer: yes.)

2. Does the amended complaint sufficiently allege that the NCAA defendants tortiously interfered with prospective contractual relations, where plaintiffs had numerous career prospects with other universities or professional franchises that would have come to fruition absent the NCAA defendants' unjustified interference. (Suggested answer: yes.)

3. Are the alleged procedural deficiencies in the amended complaint identified by the defendants non-prejudicial and meritless. (Suggested answer: yes.)

4. Are plaintiffs third-party beneficiaries of the NCAA rules, which expressly confer rights and procedural protections on individuals allegedly involved in NCAA rules violations, and do plaintiffs have standing to seek to void a Consent Decree that directly and substantially harms their interests. (Suggested answer: yes.)

5. Does the amended complaint sufficiently allege a claim for commercial disparagement, where the NCAA defendants made statements that

materially harmed Joe Paterno's reputation, which is a marketable commercial interest, resulting in pecuniary loss to his estate. (Suggested answer: yes.)

6. Does the amended complaint sufficiently allege a claim for defamation, where the recipients of the NCAA defendants' statements clearly understood the statements as referring to plaintiffs, the statements were expressions and conclusions regarding factual matters, and defendants acted with actual malice. (Suggested answer: yes.)

7. Does the amended complaint sufficiently allege a conspiracy, where the NCAA defendants agreed to violate plaintiffs' rights and their concerted actions were wrongful, purposeful, and taken in order to harm plaintiffs and with reckless disregard for plaintiffs' rights. (Suggested answer: yes.)

8. Does the amended complaint sufficiently allege facts to establish personal jurisdiction over defendants Mark Emmert and Edward Ray. (Suggested answer: yes.)[1]

[1] The parties have agreed, pursuant to this Court's August 16, 2013 order, that the Court will address this issue after it has resolved defendants' other preliminary objections and the parties have completed merits discovery. The issue is therefore not addressed in this Memorandum.

STATEMENT OF FACTS

This lawsuit has been brought against the NCAA defendants to enforce the rules with which they are required to comply and to remedy their improper interference in a criminal matter that falls far outside the scope of their lawful authority. The relevant facts are alleged in the amended complaint and summarized in plaintiffs' response to the NCAA defendants' first round of preliminary objections. *See* Plfs.' Resp. to Prelim. Objections at 8–20 (Sept. 6, 2013). At this stage of proceedings, it is those alleged facts, and not the slanted recitation appearing in the NCAA defendants' brief, that should be considered by the Court. *See Sevin v. Kelshaw*, 417 Pa. Super. 1, 7, 611 A.2d 1232, 1235 (1992).

Plaintiffs are the representative of the Estate and Family of Joe Paterno, current members of the Board of Trustees of Penn State, former coaches of the Penn State football team, current members of the faculty of Penn State, and players on the Penn State football team who participated in the program between the years 1998 and 2011. Their initial complaint pled causes of action for breach of contract, tortious interference with contractual relations, commercial disparagement, defamation, and civil conspiracy. The NCAA defendants filed 19 pages of preliminary objections challenging every count in the complaint, along with a 91-page memorandum in support and a 56-page reply. In the Court's words, the parties filed a "very high volume of paperwork" with "more citations

than [the Court has] seen in any case . . . over the past 26 years or so." Hrg. Tr. at 183 (Oct. 29, 2013). The Court held a hearing on the NCAA defendants' objections, and permitted more than three hours of argument.

Earlier this year, the Court issued a thorough opinion overruling most of the NCAA defendants' objections but sustaining several of them. *See* Opinion & Order (Jan. 7, 2014) ("Order"). The Court rejected the NCAA defendants' challenges to the defamation, commercial disparagement, and conspiracy counts. It also ruled, however, that the defamation cause of action could go forward only as to plaintiffs Al Clemens, Jay Paterno, and Bill Kenney, *id.* at 18; that the tortious interference count was insufficiently plead as to the details of the plaintiffs' lost future opportunities, *id.* at 22; and that Penn State is an indispensable party, *id.* at 12–13. Because the Court dismissed the tortious interference and contract claims without prejudice, plaintiffs filed an amended complaint. Apart from the addition of Penn State as a nominal defendant and allegations setting forth further details on the tortious interference claim, the amended complaint contains no new substantive matter. *See* Am. Compl. ¶¶ 17, 131–42.

The NCAA defendants now want a do-over. Instead of filing an answer, or preliminary objections limited to the new allegations in the amended complaint, they have reasserted their preliminary objections to the entire complaint and each

count in it. Remarkably, they have added several new arguments attacking the unchanged allegations, effectively seeking reconsideration of the Court's rejection of many of their old arguments. In short, they want to re-litigate issues the Court has already adjudicated.

Penn State raises some of the same objections, but it is a *nominal* defendant brought into this lawsuit only because one form of relief sought by plaintiffs includes nullifying the unlawful Consent Decree imposed by the NCAA defendants. Plaintiffs do not seek any affirmative relief against Penn State, and the University lacks standing to object to claims against the NCAA defendants. But Penn State's position is easily explained. The NCAA defendants have taken every opportunity to emphasize that they are still pointing a gun directly in Penn State's direction, continuing their unlawful conduct by threatening to impose "harsher sanctions" and even the "death penalty" if Penn State does not cooperate, *see* NCAA Br. 3, 6 — even though the NCAA defendants have no authority to impose sanctions in this matter, and the "death penalty" is expressly limited to "repeat violators" and cannot apply to Penn State. *Cf. Corman*, 2014 WL 1382675, at *12–13.

ARGUMENT

Where, as here, defendants' preliminary objections are in the nature of a demurrer, the question is "whether, on the facts averred, the law says *with certainty* that *no recovery* is possible." *Sevin*, 417 Pa. Super. at 7, 611 A.2d at 1235 (emphasis added) (citing *Eckell v. Wilson*, 409 Pa. Super. 132, 135, 597 A.2d 696, 698 (1991)). A demurrer should be sustained only if "the plaintiff has clearly failed to state a claim on which relief may be granted." *Id.* "A demurrer should not be sustained if there is any doubt as to whether the complaint adequately states a claim for relief under any theory." *Id.*

Plaintiffs' amended complaint easily passes muster under this standard. The well-pleaded allegations are more than sufficient to allow the NCAA defendants to prepare a defense. The NCAA defendants have failed to show that no recovery is possible.

Moreover, most of the NCAA defendants' arguments are procedurally improper. Preliminary objections to an amended complaint are permitted only to address *new* allegations not present in the original complaint. The NCAA defendants raise just one substantive argument regarding the new allegations in the amended complaint, directed to the sufficiency of the prospective contractual opportunities for the former assistant coach plaintiffs. Joined by Penn State, they also raise several pettifogging objections to purported procedural errors in the

amended complaint, but these objections are non-prejudicial, moot, and meritless. All of defendants' objections, including those that have been recycled from the first round of objections, should be overruled.

I. The NCAA Defendants' Objections Improperly Attempt To Re-Litigate Issues The Court Has Already Decided.

The Pennsylvania Rules of Civil Procedure instruct that "[*a*]*ll* preliminary objections shall be raised *at one time*." Pa. R. Civ. P. 1028(b) (emphasis added). "[An] attack, by preliminary objection, against the amended complaint," therefore, "must be limited to matters [that] did not appear in the original complaint." *Mazur v. Damilowicz*, 84 Pa. D.&C. 78, 79 (Ct. C.P. 1952); *see also Castle Cheese v. Sadler*, 81 Pa. D.&C.4th 157, 161 (Ct. C.P. 2007) ("Defendant cannot raise preliminary objections to an amended complaint if the amended complaint does not raise new issues to be decided."); *McNally v. Allstate Ins. Co.*, 8 Pa. D.&C.3d 750 (Ct. C.P. 1979) (court would not reconsider previous order denying preliminary objections).

As the Pennsylvania courts have emphasized, this rule prevents a defendant from "attack[ing] the plaintiff's complaint in small bites." *Gen. State Auth. v. Lawrie & Green & John McShain, Inc.*, 29 Pa. Commw. 567, 571, 372 A.2d 45, 47 (1977). A defendant cannot "point out a particular defect by preliminary objection; have the court pass on it; compel the plaintiff to amend; and then attack the

amended complaint by pointing out another particular defect which was in the original complaint." *Id.*

The NCAA defendants' brief is largely an exercise in retreading old objections that have already been considered and rejected by the Court. The arguments addressing the new allegations in the amended complaint are set forth in paragraphs 35 through 38 and 71 through 75 of the NCAA defendants' preliminary objections. The remaining objections duplicate those that were previously raised and litigated in connection with plaintiffs' original complaint:

- Lack of standing and failure to state a breach of contract claim. *Compare* Defs.' 2d Prelim. Obj. ¶¶ 1–30 (Mar. 17, 2014), *with* Defs.' 1st Prelim. Obj. ¶¶ 10–23, 26–29 (July 23, 2013).
- Failure to state a defamation claim. *Compare* Defs.' 2d Prelim. Obj. ¶¶ 49–62, *with* Defs.'1st Prelim. Obj. ¶¶ 31–41.
- Failure to state a tortious interference claim. *Compare* Defs.' 2d Prelim. Obj. ¶¶ 32–34, 39–40, *with* Defs.'1st Prelim. Obj. ¶¶ 50–55.
- Failure to state a commercial disparagement claim. *Compare* Defs.' 2d Prelim. Obj. ¶¶ 64–70, *with* Defs.'1st Prelim. Obj. ¶¶ 43–48.
- Failure to state a civil conspiracy claim. *Compare* Defs.' 2d Prelim. Obj. ¶¶ 42–47, *with* Defs.'1st Prelim. Obj. ¶¶ 57–61.

The NCAA defendants' attempt to re-argue objections to matter included in the original complaint is improper under Rule 1028(b).

Instead of addressing that rule, however, the NCAA defendants merely note in passing that "a 'trial judge may always revisit his own prior pre-trial rulings in a case without running afoul of the law of the case doctrine.'" NCAA Br. 46 (citing

Clearwater Concrete & Masonry, Inc. v. W. Phila. Fin. Servs. Inst., 2011 PA Super 64, 18 A.3d 1213, 1216, *abrogated on other grounds*, *Bricklayers of W. Pa. Combined Funds, Inc. v. Scott's Dev. Co.*, 2012 PA Super 4, 41 A.3d 16).

Of course, there is no question that this Court has discretion to revisit its earlier ruling if it sees fit. But the point is that the NCAA defendants have offered no reason for the Court to spend more time addressing objections that have already been litigated. And the case they cite — *Clearwater* — does not help them. That case held only that a trial court was not precluded from granting summary judgment on a theory it rejected during the preliminary objections stage. 18 A.3d at 1217–18. It emphasized that "a trial court exercises different types of review for preliminary objections and motions for summary judgment," and recognized that the court had new facts before it when considering the motion for summary judgment as compared to the preliminary objections. *Id.* *Clearwater* says nothing about a defendant's right to object to the same matters in a complaint over the course of multiple rounds of preliminary objections.

The NCAA defendants are essentially taking advantage of a second round of preliminary objections to seek reconsideration of the Court's January 6 Opinion and Order. But they have not explained why their old arguments should be given different treatment now, or why their new arguments could not have been raised in the original round of briefing. *Cf. Kelly v. Siuma*, 2011 PA Super 234, 34 A.3d 86,

94 n.8 (refusal to consider new arguments raised for first time on motion for reconsideration is proper); *Cortese v. West Jefferson Hills Sch. Dist.*, No. 53 C.D.2008, 2008 WL 9404638, at *9 n.2 (Pa. Commw. Ct. Dec. 9, 2008) (refusing to reconsider when "neither the motion nor the brief explained why any new arguments contained therein could not have been made in plaintiffs' original brief"). Accordingly, the Court need not and should not reach the merits of any of the NCAA defendants' objections to matter included in the original complaint.

II. The NCAA Defendants' Arguments Directed To Matter First Raised In The Amended Complaint Lack Merit.

The NCAA defendants raise only two sets of objections directed at new allegations in the amended complaint: the prospective contractual opportunities that form one element of the tortious interference claim, *see* NCAA Br. 40–42; and several minute, and ultimately irrelevant, procedural objections, *see id.* at 62–63; *see also* PSU Br. 19–20 (Mar. 17, 2014). Neither has merit and both should be overruled.

A. The Amended Complaint Adequately States A Claim For Tortious Interference With Prospective Contractual Relations.

Although, as discussed above, the NCAA defendants reassert several old objections to Count IV, they do, in part, challenge new allegations. In particular, the NCAA defendants argue that plaintiffs have failed to describe with sufficient

specificity the prospective contracts that plaintiffs lost because of the NCAA defendants' interference. *See* NCAA Br. 40–41. This argument is simply wrong.

In the amended complaint, plaintiffs identified 21 different employers to whom Bill Kenny and Jay Paterno submitted formal job applications or with whom they interviewed with for open positions or engaged in substantive conversations regarding employment opportunities. Am. Compl. ¶¶ 132–33, 138–41. In citing these prospective contracts with specificity, plaintiffs have cured the *only* deficiency the Court identified in the original complaint: failing to "allege they were applying for jobs, interviewing, or even job searching." Order 22. Plaintiffs have thus properly responded to the Court's order and sufficiently demonstrated that their prospective contractual relations amounted to more than a "mere hope." Order 22; *see also Rittenhouse Entmt., Inc. v. City of Wilkes-Barre*, 861 F. Supp. 2d 470, 490 (M.D. Pa. 2012) (list of lost prospective customers satisfied first element of the tort); *Perma-Liner Indus. v. U.S. Sewer & Drain, Inc.*, 630 F. Supp. 2d 516, 524 (E.D. Pa. 2008) (same); *cf. Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc.*, No. 90-7952, 1992 WL 97826, at *11 (E.D. Pa. Apr. 28, 1992) (complaint failed to state a claim for tortious interference because it cited no specific opportunities).

It bears emphasis that, at this stage of proceedings, all inferences should be drawn in plaintiffs' favor. *See* Order 5 (citing *Foflygen v. R. Zemel, M.D. (P.C.)*,

420 Pa. Super. 18, 32, 615 A.2d 1345, 1352 (1992)). The NCAA defendants' request — that the Court accept their word that they did not cause the loss of opportunities cited in the complaint — violates that rule. The complaint alleges that plaintiffs had highly successful careers before the NCAA defendants' interference, and that they were well qualified for the jobs to which they applied. Am. Compl. ¶¶ 131–32, 136–37. In many cases, the employers expressed concerns about the NCAA's involvement in the Sandusky scandal, and the prospective jobs went to less-qualified candidates. *Id.* ¶¶ 134, 138.

In *Peatross v. Southwark Minit-Man Corp.*, the Pennsylvania Supreme Court explained the now long-standing rule that contractual "expectancies" protected under the law are "those of future contractual relations, such as the prospect of obtaining employment or employees, or the opportunity of obtaining customers." 415 Pa. 129, 134–35, 202 A.2d 102, 104–05 (1964). As the Court emphasized, such prospects are protected because "there is a background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered." *Id.* Here, plaintiffs have demonstrated that their experience and backgrounds were impressive enough to merit consideration for the positions they applied to, absent the NCAA defendants' interference. That establishes at least a "reasonable probability" that plaintiffs

would have signed contracts absent the NCAA defendants' improper conduct. *Cf.* Order 21 (citing *Brunson Commc'ns, Inc. v. Arbitration, Inc.*, 239 F. Supp. 2d. 550, 578 (E.D. Pa. 2002)); Am. Compl. ¶¶ 131–32, 136–39. Nothing more should be required.

The NCAA defendants protest that it was not the Consent Decree, but the Freeh Report or other media coverage that prompted prospective employers to question plaintiffs about the allegations included in the Consent Decree. *See* NCAA Br. 42. That is a factual issue that cannot be resolved at this stage of proceedings. Plaintiffs have alleged that the NCAA is in charge of the big business of college sports, not Louis Freeh. Am. Compl. ¶¶ 14, 54. And there is a distinct difference between the nature of the Freeh Report or related media coverage, and the Consent Decree imposed by the NCAA defendants. While the Freeh Report reflected the conclusions of a private party, the Consent Decree constituted the NCAA's official pronouncement that the scandal was linked to Penn State football and covered up by its coaches, who should therefore be punished. *Id.* ¶¶ 61, 110. Precisely because the NCAA is not authorized to act without undertaking an extensive investigation and obeying procedural requirements designed to ensure that its findings are supported by evidence, the NCAA defendants' decision to impose a Consent Decree caused plaintiffs to suffer extensive, substantial harm.

The power wielded by the NCAA is undeniable. *Id.* ¶¶ 24, 25, 110. The collegiate football programs that considered hiring a coach in particular would have placed great — perhaps paramount — weight on the NCAA defendants' conclusions. After all, the NCAA defendants have demonstrated no compunction about interfering in anything tangentially related to football, whether justified or not. *Cf. Corman*, 2014 WL 1382675, at *11. The amended complaint sufficiently alleges that the NCAA defendants caused prospective employers to consider plaintiffs to be "tainted" by the scandal, and none of those employers wanted to be tarred with the same brush that the NCAA took to plaintiffs.

B. Dismissal Is Not The Proper Sanction For Any Asserted Procedural Deficiencies In The Amended Complaint.

The NCAA defendants also argue that the amended complaint should be dismissed for failure to include a verification. Penn State raises the same objection and also objects that the amended complaint does not include a Notice to Defend or a Notice to Plead. These objections are also meritless.

Notice to Defend/Plead Requirements. Penn State argues that the amended complaint should be dismissed because it lacked a Notice to Defend and a Notice to Plead. PSU Br. 20. But because Penn State has responded to the amended complaint, the issue is moot. "The only result where a complaint does not include the notice to defend in compliance with Pa. R.C.P. No. 1018.1 is that no responsive pleading need be filed." *North Penn Water Auth. v. A Certain Parcel of Land*, 168

Pa. Commw. 477, 485 n.10, 650 A.2d 1197, 1201 n.10 (1994); *Lautek Corp. v. Unemployment Comp. Bd.*, 136 Pa. Commw. 79, 84, 583 A.2d 7, 9 (1990). As a result, no default judgment can be entered on a complaint without those notices. *Mother's Rest. Inc. v. Krystkiewicz*, 2004 PA Super 411, ¶ 28, 861 A.2d 327, 338. But that is the only consequence.

Penn State has cited no authority supporting its contention that dismissal of the amended complaint is an appropriate sanction. PSU Br. 20. Its only authorities are the cases cited above, not one of which dismisses a complaint as a sanction for failing to include the notices. That is not surprising. Because the NCAA defendants and Penn State have both filed preliminary objections, plaintiffs cannot seek a default judgment and the issue is moot. *In re Lands of Patterson*, 722 A.2d 1176 (Pa. Commw. Ct. 1999) ("although the notice in this case did not specifically inform [defendant] that she must file preliminary objections, [defendant] was not prejudiced by this omission as she did in fact file preliminary objections in response").

Verification Requirements. The NCAA defendants, joined by Penn State, also assert that the amended complaint should be dismissed because plaintiffs did not verify it. NCAA Br. 62–63; PSU Br. 19–20. But the original complaint was verified, and only a few new allegations were added to the amended complaint. In any event, to the extent the amended complaint also should have been verified, any

verification error is "amendable." *Columbia Gas of Pa., Inc. v. Pa. Pub. Util. Comm'n*, 104 Pa. Commw. 142, 107 n.8, 521 A.2d 105, 146 n.8 (1987). Plaintiffs have addressed any possible defect by filing amended verifications. *See Commonwealth ex rel. Pappert v. TAP Pharm. Prods., Inc.*, 885 A.2d 1127, 1147 (Pa. Commw. Ct. 2005) (overruling preliminary objections where "[t]he Court's docket reveals that the [plaintiff] has corrected the verification defect"); *Koch v. First Union Corp.*, No. Control 100727, 2002 WL 372939, at *3 (Pa. Ct. C.P. Jan. 10, 2002) (directing plaintiffs to file verifications but refusing to dismiss complaint); *Pickar v. Fino*, 49 Pa. D.&C.3d 630, 639 (Ct. C.P. 1988) (same).

Contrary to the NCAA defendants' contentions, the "failure to verify does not support striking [the] complaint." *Hoover v. Cummings*, 289 Pa. Super. 181, 184, 432 A.2d 1112, 113 (1981). The NCAA defendants' authority is not to the contrary. *See* NCAA Br. 62–63. *Gracey v. Cumru Township* acknowledges that "amendment should be liberally allowed to cure technical defects in a verification." No. 2604 C.D. 2010, 2011 WL 10878246, at *3 (Pa. Commw. Ct. Dec. 27, 2011) (per curiam) (quoting *Atlantic Credit & Finance, Inc. v. Giuliana*, 2003 PA Super 259, ¶ 10, 829 A.2d 340, 344). Similarly, *Atlantic Credit & Finance* makes clear that this rule originated because a procedurally deficient complaint cannot support a default judgment, and the absence of verification, or notices to defend or plead, is grounds for reopening that default judgment. 2003

PA Super 259, ¶ 7, 829 A.2d at 342–43. As explained above, that is not the situation here; rules governing default judgments are irrelevant.

III. The Court Should Reaffirm Its Dismissal Of The NCAA Defendants' Reasserted Objections.

The Court need not read any further. Because the NCAA defendants' objections to the new allegations in the amended complaint fail, and because they should not be heard to raise new objections to matter contained in the original complaint, the Court need not be burdened with considering their recycled objections. If the Court chooses to consider the merits of the renewed challenges, however, there is no reason to alter the conclusions it already reached. The preliminary objections should be overruled.

A. Plaintiffs Have Standing To Litigate Their Breach-Of-Contract Claim.

In their first round of preliminary objections, the NCAA defendants argued that plaintiffs lacked standing to seek a declaratory judgment that the Consent Decree was void, and that plaintiffs were not third-party beneficiaries of the NCAA rules. NCAA Mem. Prelim. Obj. 19–35 (July 23, 2013) ("2013 NCAA Br."); NCAA Reply Prelim. Obj. 8–23 (Sept. 26, 2013) ("2013 NCAA Reply Br."). In this, their second round of objections, the NCAA defendants have raised the same arguments. NCAA Br. 14–39. But Count I of the amended complaint — breach of contract — is identical to Count I in the original complaint. And as the

Court has already concluded, "[m]any *fact* questions remain" as to whether the plaintiffs are third-party beneficiaries with standing to raise a breach of contract claim. Order 9 (emphasis added). The demurrer is thus improper.

1. The Estate And Family Of Joe Paterno Is A Proper Party.

Unwilling to abide by this Court's earlier ruling, the NCAA defendants argue that the "family" of Coach Paterno cannot bring claims on his behalf because it is not a legal entity. NCAA Br. 25 n.10; *see also* PSU Br. 7–8. There is no reason this objection could not have been raised in response to plaintiffs' original complaint. It is also frivolous and underscores that the NCAA defendants will raise any argument, no matter how weak, in an attempt to avoid answering for their actions. The plaintiff is the "estate and family" of Coach Paterno; it is not two plaintiffs, one being the estate and the other the family. The NCAA defendants admit that an estate *is* a legal entity with capacity to sue, and that should end the matter. NCAA Br. 25 n.10; *see also* PSU Br. 7.

2. Plaintiffs Are Entitled To Seek Declaratory Relief.

The NCAA defendants next contend that plaintiffs lack standing to seek to void the Consent Decree. *See* NCAA Br. 15–18. This renewed argument appeared for the first time in the NCAA defendants' reply in the original round of objections. *See* 2013 NCAA Reply Br. 10–12. It is meritless.

The Consent Decree was imposed by the NCAA defendants, as the amended complaint alleges, through an unlawful and unauthorized exercise of the NCAA's enforcement authority. *See* Am. Compl. ¶¶ 96, 102–04, 109. Contrary to the NCAA defendants' assertions, *see* NCAA Br. 20, plaintiffs have thus alleged precisely the type of "illegality" that the NCAA defendants concede is a proper basic for voiding the Consent Decree. Moreover, plaintiffs have standing to challenge the Consent Decree because it is the manifestation of the violation of the membership agreement between the NCAA and its member institutions, and plaintiffs are third-party beneficiaries of that agreement. *See id.* ¶ 118. The NCAA defendants cannot hide behind the Consent Decree to escape judicial review and deny plaintiffs their rights. *Cf., e.g., Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529–30 (1986) (a consent decree may not "impose[] obligations on a party that did not consent to the decree"); *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 116–17 (3d Cir. 2013) (consent decree may not authorize or require conduct in violation of law).

Ignoring the complaint's allegations, the NCAA defendants characterize the Consent Decree they imposed as merely a "contract" and emphasize that because plaintiffs did not sign the Consent Decree, they are not parties to it. The NCAA defendants then cite a line of cases, mostly from outside of Pennsylvania, for the proposition that only the contracting parties can seek to void a contract. *See*

NCAA Br. 15. But that is not the law, at least not in Pennsylvania. The NCAA defendants tell only half the story; the traditional common law rule is that contracts that are *void* (and not just void*able*) can be challenged by anyone. *See Pearsoll v. Chapin*, 44 Pa. 9, 15 (1862) (contracts that "are absolutely void, because they have no legal sanction, . . . establish no legitimate bond or relation between the parties, and even a stranger may raise the objection"). The NCAA defendants' Pennsylvania cases are not to the contrary. *Schuster v. Pennsylvania Turnpike Commission* is about the statute of frauds, which "does not absolutely invalidate an oral contract relating to land but is intended merely to guard against perjury on the part of one claiming under the alleged agreement." 395 Pa. 441, 450–51, 149 A.2d 447, 452 (1959). The contract in question there was thus merely voidable, not absolutely void. *Id.* at 451, 149 A.2d at 452.

In modern jurisprudence, this traditional rule has more or less given way to the familiar standing inquiry, which asks whether the plaintiff has a direct, immediate, and substantial interest in the dispute before the Court. *See, e.g., Szoko v. Twp. of Wilkins*, 974 A.2d 1216, 1220 (Pa. Commw. Ct. 2009) (plaintiff did not have standing to void a contract to which he was not a party, because he "has not explained how he is harmed by the" contract); *Allstate Ins. Co. v. Stinger*, 400 Pa. 533, 536, 163 A.2d 74, 76 (1960) (parties whose "rights" are "affected" by an insurance contract have standing under the Declaratory Judgments Act, 42 Pa. C.S.

§ 7533); *see also Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 353 (3d Cir. 1986) (same result under federal standing law).[2] The only recent Pennsylvania case cited by the NCAA defendants confirms this point. *See* NCAA Br. 15. Although the decision gives a passing nod to the NCAA defendants' theory, it ultimately relies on the federal three-part standing test and finds that plaintiff did not suffer an "injury in fact." *Souders v. Bank of Am.*, No. 12-cv-1074, 2012 WL 7009007, at *10 (M.D. Pa. Dec. 6, 2012). Here, plaintiffs have alleged, and have plainly suffered, a direct, immediate, and substantial injury flowing from the breach of their rights under the membership agreement between the NCAA and Penn State. Nothing more is required.

The NCAA defendants' out-of-state cases establish nothing more than the potential existence of a split in authority. While some courts have opined that third parties cannot challenge the validity of a contract, others disagree. *See* 17A CJS Contracts § 373 (third parties may challenge contract where "the interests of the person asserting the invalidity are affected" (footnote omitted)) (citing *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986 (1972); and *Ockey v. Lehmer*, 2008 UT 37, 189 P.3d 51). As illustrated by the examples above,

[2] The NCAA defendants rely on *Avrich v. General Accident Insurance Co.*, 367 Pa. Super. 248, 532 A.2d 882 (1987), an intermediate appellate court decision that comes to the opposite conclusion without citing *Stinger*. NCAA Br. 16 n.4. It, and the unpublished trial court decision also cited by the NCAA defendants, are not persuasive in light of *Stinger* and *Rauscher*.

Pennsylvania law is more similar to Utah and California's than to the Seventh Circuit cases cited by the NCAA defendants.

The NCAA defendants' approach is especially inappropriate where, as here, the Consent Decree purports to reflect the results of an official investigation by the NCAA acting in a regulatory capacity, and is designed to affect not only the rights of a member institution but also the rights of involved and other affected individuals. Indeed, in the context of other consent decrees (settlements between a private party and an administrative agency approved by a court), courts have widely recognized the importance of protecting the rights of third parties. In *Martin v. Wilks*, for example, the Supreme Court explained that non-parties can collaterally attack a consent decree when it affects their legal rights. 490 U.S. 755, 762–63 (1989).[3]

Just as parties have standing to challenge administrative action when it causes them concrete injury (even if the action may be directed at others), plaintiffs have the right to challenge the NCAA defendants' illegal abuse of authority that gave rise to the Consent Decree, even though they are not signatories to that document. Involved individuals are squarely within the zone of interest that the

[3] *Wilks* was modified by statute to preclude collateral challenges by those who had the opportunity to participate in the earlier proceedings. *See Briscoe v. City of New Haven*, 654 F.3d 200, 204 (2d Cir. 2011). Of course, that only underscores the infirmity of the administrative proceedings here, where plaintiffs attempted to participate and the NCAA defendants told them they could not.

NCAA's Bylaws and Constitution are designed to protect. And the NCAA defendants cannot deprive plaintiffs of their rights by imposing the Consent Decree while blocking plaintiffs, as involved individuals, from participating in the underlying administrative proceedings. *See Wilks*, 490 U.S. 755, 762–63.

Contrary to the NCAA defendants' mischaracterizations, plaintiffs have never claimed to be third-party beneficiaries of the Consent Decree itself. *See* NCAA Br. 16 &17 n.5 (accusing plaintiffs of "muddy[ing] the waters"). Plaintiffs were *harmed* by the Consent Decree, not benefitted by it. But that enhances, rather than detracts from, their interest in voiding the Consent Decree as a violation of their rights under the NCAA rules. Suppose, for example, a hypothetical contract in which a regulated entity agrees with its regulator to take action to harm a third party. It would be hard to imagine a court telling the third party that it has no right to challenge the illegality of that agreement, even though it is not a third-party beneficiary. *See, e.g.*, *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052 (9th Cir. 2007) (lawsuit by neighbors of synagogue challenging consent decree between synagogue and city as void because it exceeded city's lawful authority); *Cleveland Cnty. Ass'n for Gov't by People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468 (D.C. Cir. 1998) (voters association had standing to challenge consent decree between county and minority group). So

too here. The Consent Decree imposed by the NCAA defendants injures plaintiffs' reputations and economic prospects in direct contravention of their rights.

In a last-ditch effort to convince the Court that plaintiffs are not injured by, and therefore have no interest in, the Consent Decree, the NCAA defendants point to provisions of the Consent Decree that supposedly do not affect plaintiffs. NCAA Br. 21 n.7 (discussing the $60 million fine, the four-year post-season playing ban, the reduction in grants-in-aid, probation, and the implementation of an Athletics Integrity Agreement). But all of these sanctions were purportedly justified on the basis of plaintiffs' alleged concealment of horrific child abuse. Am. Compl., Ex. B, at p. 3; *cf. Jacobs v. CNG Transmission Corp.*, 565 Pa. 228, 239, 772 A.2d 445, 452 (2001) ("a court may look to the contract as a whole . . . to determine the intent of the parties as to severability"). In any event, plaintiffs' interest, or lack thereof, in certain provisions of the contract is irrelevant at this stage. If plaintiffs have standing, the case will proceed and the Court will decide whether the Consent Decree is so fundamentally flawed that it should be stricken in its entirety, whether some portions should be severed and stricken, or whether another form of relief is appropriate.

3. The Facts In The Amended Complaint Are Sufficient To State A Claim That The Consent Decree Is Void.

The NCAA defendants next argue — again focusing on matter that appeared in the original complaint — that the amended complaint provides no grounds for

voiding the Consent Decree. *See* NCAA Br. 18–21. But that is demonstrably untrue. As the NCAA defendants admit, a contract can be void because it was unauthorized or it was the result of coercion and duress. *Id.* at 19 n.6, 20–21. Both conditions are present here.

First, the NCAA defendants were not authorized under their own rules to impose the Consent Decree. The amended complaint alleges that there is no provision of the NCAA rules granting the NCAA defendants authority to investigate criminal matters that have nothing to do with athletic competition, and that the NCAA defendants lacked authority to impose the Consent Decree. *See* Am. Compl. ¶¶ 2–6, 26–51, 56–59, 63, 65–66, 73, 84–86, 96, 103. Pointing to the Executive Committee's power to address "association-wide matters," the NCAA defendants brush aside these allegations with the breezy assurance that their authority to impose the Consent Decree is undisputed. NCAA Br. 21. But nothing could be further from the truth. This case is about the NCAA defendants' utter lack of any such power. *Cf. Corman*, 2014 WL 1382675, at *13.

The NCAA defendants' argument cannot be reconciled with the amended complaint's well-pleaded allegations and does not withstand scrutiny. The full provision delimiting the Executive Committee's authority states that the committee may "[a]ct on behalf of the Association by adopting and implementing policies to resolve core issues and other Association-wide matters." Am. Compl. ¶¶ 49, 103;

id. Ex. A, R. 4.1.2(e). There are thus two glaring problems with using this provision as a justification for the Consent Decree: (1) the sanctions imposed are not a "policy," and in fact violated the policies and procedures already in place; and (2) the "matter[]" is not applicable on an "Association-wide" basis.

A "policy" is a "general principle[] by which a government is guided in its management of public affairs." Black's Law Dictionary at 1276 (9th ed. 2009). The word "connotes a definite course or method of action selected in light of given conditions to guide and determine both present and future decisions." *Hearn v. Myers*, 699 A.2d 1265, 1266–67 (Pa. Super. Ct. 1997). Imposing sanctions, in contrast, is akin to an adjudication: the process involves applying existing rules of law to a single, particular circumstance. *Cf. Gregory v. Ashcroft*, 501 U.S. 452 (1991) (judges are not "policymak[ers]"). The Consent Decree is manifestly *not* a policy-setting act that applies to the entire Association going forward. Indeed, the NCAA defendants have admitted as much, contending that the Penn State situation was unprecedented and unique, and should not serve as a guide for future sanctions. Am. Compl. ¶ 104; *see* Dennis Dodd, CBSSports.com, *Emmert Says NCAA Would Have Started Investigation Into Penn State Without Freeh Report* (Sept. 24, 2012), http://www.cbssports.com/collegefootball/writer/dennis-dodd/20351738/emmert-says-ncaa-would-have-started-investigation-into-penn-state-without-freeh-report.

Moreover, as pleaded in the amended complaint, other provisions of the rules contradict the NCAA defendants' strained interpretation. For example, the rules mandate that sanctions for violation of the principles of "ethical conduct" must proceed according to Rule 19, which sets forth the traditional sanctions process. Am. Compl. ¶ 31; *id.*, Ex. A, R. 10.4; *see Corman*, 2014 WL 1382675 at *11. Rule 10.4 squarely applies because it was an alleged violation of the principles of "ethical conduct" that formed the basis of the Consent Decree. *See* Am. Compl., Ex. B, at p. 2. But the NCAA defendants ignored Rule 10, along with the cross-referenced Rule 19, when imposing sanctions on plaintiffs and Penn State. *See* Am. Compl. ¶¶ 81–86, 121.

Similarly, as alleged in the amended complaint, the rules provide that information pertaining to rules violations *must* be channeled to the enforcement staff if received by the NCAA president or by the NCAA's Committee on Infractions. Am. Compl. ¶ 33; *id.*, Ex. A, R. 32.2.1. At a minimum, therefore, Emmert had no authority to proceed unilaterally on the information regarding the Sandusky scandal; he was required by his institution's own rules to turn it over to the enforcement staff.

The rules likewise make clear that the NCAA has authority only over matters involving athletics: behavior intended to confer a recruiting or competitive advantage on a member institution. Am. Compl. ¶¶ 3, 29, 34; *see also id.*, Ex. A,

R. 1.3.2 (NCAA rules "apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting"). 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. Am. Compl. ¶ 56. There is no way to conclude, based on the amended complaint's allegations, that the NCAA defendants had any authority to impose the Consent Decree. *Cf. Corman*, 2014 WL 1382675, at *11–13. Under the provisions of its own rules, its actions were *ultra vires* and manifestly unsupported.

Nor does Penn State's nominal "acceptance" of the sanctions expand the NCAA defendants' authority. Courts have recognized that consent decrees are particularly suspect "when parties seek to achieve by consent decree what they cannot achieve by their own authority." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993). "Consent is not enough" when an agency "seek[s] to grant [itself] powers [it] do[es] not hold outside of" the proceedings. *Id.* These concerns are particularly apt here. The NCAA rules prescribe procedures for the benefit of the entire membership, as well as involved individuals — not just for one member institution and the association itself. *See* Am. Compl. ¶¶ 27–28, 118–20. The facts of this case vividly illustrate why that is so.

Second, the amended complaint alleges that the NCAA defendants imposed the Consent Decree through "impermissible coercion," which provides additional and independent grounds for declaring it void. Am. Compl. ¶¶ 5, 42, 80–83, 87–90, 96, 121; *see Germantown Mfg. Co. v. Rawlinson*, 341 Pa. Super. 42, 54, 491 A.2d 138, 145 (1985); *Sheppard v. Frank & Seder*, 307 Pa. 372, 376, 161 A. 304, 305 (1932) (contract is "void ab initio" if secured through duress of "an extreme nature"). If a contract is induced "by an improper threat" that leaves the victim with no "reasonable alternative," the contract can be voided either by the victim, Restatement (Second) of Contracts § 175(1), or by third parties who have "rights based on" or "interests . . . affected" by the contract, 17A CJS Contracts § 373. "A threat is improper if" it is a "breach of the duty of good faith and fair dealing," or if "the resulting exchange is not on fair terms" and "what is threatened is otherwise a use of power for illegitimate ends." Restatement (Second) of Contracts § 176(1)(d), (2)(c); *see also Germantown*, 341 Pa. Super. at 51–52, 491 A.2d at 142–43 (adopting section 176).

These principles apply with special force where, as here, the contract is secured through "unlawful threats" that extend far beyond "economic duress." *See Degenhardt v. Dillon Co.*, 543 Pa. 146, 154–57, 669 A.2d 946, 950–52 (1996) (despite opportunity to consult with legal counsel, duress is actionable where "physical force or unlawful threats" were used). As alleged in the amended

complaint, the Consent Decree was secured through unlawful threats — specifically, the threat of imposing the "death penalty" that would not only ruin the livelihood of many of the plaintiffs but would also affect the entire community well beyond its economic impact. *See* Am. Compl. ¶¶ 42, 79. As Penn State's outside counsel would later put it, "[t]he idea [that] you'd be driving by an empty stadium with 108,000 seats every Saturday in the fall for four years and no football team playing there . . . it was just unthinkable." Don Van Natta Jr., *On Death's Door*, ESPN Mag. (Aug. 2, 2012), http://espn.go.com/espn/print?id=8228641. "I thought about the wind blowing through the portals and all the economic and social and spiritual ramifications of that empty stadium." *Id.*

Anyone familiar with the celebrated traditions of Penn State football would understand that an empty stadium would cause far more than mere economic harm. *See* Am. Compl. ¶¶ 42, 79. It would deeply impact the lives of plaintiffs and many student-athletes, coaches, employees, and others in the University community. *Corman*, 2014 WL 1382675, at *15. The fact that the NCAA defendants even threatened the "death penalty" here — given that the penalty was unlawful under their own rules, *see id.* at *12 — shows the extent to which the NCAA defendants were willing to ignore the rules to hold a gun to Penn State's head. And the fact that the NCAA defendants continue to assert that this threat was not only real, but could *still* be on the table, shows that they have learned nothing.

B. Plaintiffs Are Third-Party Beneficiaries Of The NCAA Rules.

Under Pennsylvania law, a party has standing to sue as a third-party beneficiary to a contract if either (1) the contract expresses an intent to benefit the third party; or (2) the recognition of the beneficiary's rights is appropriate to effectuate the intention of the contracting parties. *See Scarpitti v. Weborg*, 530 Pa. 366, 371–72, 609 A.2d 147, 149–50 (1992). Both tests are satisfied here. The agreement between the NCAA and Penn State — as reflected in the NCAA rules and as alleged in the amended complaint — makes clear that the NCAA and its member institutions intended to give the benefit of the agreement to third parties involved in or directly affected by alleged rule violations. *See* Am. Compl. ¶ 118.

1. The NCAA Defendants Have No Authority To Act Outside Their Constitution And Bylaws.

The NCAA defendants suggest that plaintiffs are not entitled to rights under the NCAA bylaws and constitution because the Consent Decree was "not the product of the traditional enforcement process." NCAA Br. 22. But as the amended complaint alleges, the NCAA defendants have no authority to act outside the traditional enforcement process proscribed by the rules. Am. Compl. ¶¶ 32, 49; *see also Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc.*, 395 Pa. 257, 263–64, 149 A.2d 456, 459 (Pa. 1959) ("[t]he specification of a particular procedure" in an association's bylaws, "including procedural safeguards, is ordinarily the exclusive remedy" and "the remedies extended by the internal regulations of a

voluntary association . . . must be given strict compliance," particularly where "individual rights may be adversely affected"). Nor can the NCAA defendants reasonably dispute that the Consent Decree and the "findings" and "conclusions" it embraces has severely harmed plaintiffs. *See* Am. Compl. ¶¶ 112–14.

Contrary to the NCAA defendants' assertions, the Consent Decree is not some anodyne agreement between the NCAA and Penn State; it is a malicious and scathing attack on plaintiffs. The notion that the NCAA defendants can impose unprecedented sanctions on the entire Penn State community on the premise that Coach Paterno and Al Clemens were complicit in horrific child abuse, and then argue that plaintiffs are not "involved individuals," is senseless. *Cf. Corman*, 2014 WL 1382675, at *11–13.

The NCAA defendants attempt to bootstrap their flagrant disregard for their own rules and procedures into an argument that plaintiffs are not "involved individuals" because plaintiffs did not receive formal "notice" of any alleged rule violations. Of course they did not; the NCAA defendants ignored their own rules, including the requirement that *before* undertaking an investigation — much less imposing sanctions — they must provide notice to individuals who are identified or suspected of being involved in alleged rules violations. *See id.*, Ex. A, R. 32.1.5, 32.6.2, 32.10.1.2. But the NCAA defendants cannot defeat *all* of the rules' procedural protections by bypassing the *first* procedural protection: notifying

an individual when the NCAA believes he may have been involved in an alleged violation. Doing so would interpret the contract inequitably and absurdly, and it would nullify the contract's terms. *See AK Steel Corp. v. Viacom, Inc.*, 2003 PA Super 411 ¶ 13, 835 A.2d 820, 823 (contract terms "should not be interpreted in a manner which nullifies" other provisions (internal quotation marks omitted)); *Clairton Slag, Inc. v. Dep't of Gen. Servs.*, 2 A.3d 765, 773 (Pa. Commw. Ct. 2010) (contracts should be interpreted to avoid absurdities).

The NCAA defendants previously acknowledged that the NCAA and its member institutions intended to "bestow" third-party rights on "involved individuals." 2013 NCAA Br. 21; *see* Am. Compl., Ex. A, R. 32.1.5. Indeed, every court to consider the question has held that "involved individuals" are entitled to enforce the rules against the NCAA. *See Bloom v. NCAA*, 93 P.3d 621, 623–24 (Colo. Ct. App. 2004) (which the NCAA has asserted is "materially indistinguishable" from the present case, *see* 2013 NCAA Br. 18); *Oliver v. NCAA*, 155 Ohio Misc. 2d 17, 920 N.E.2d 203 (Ct. C.P. 2009) (opinion vacated after settlement).

As the amended complaint alleges, the NCAA rules recognize that "involved individuals" are entitled (among other things) to notice of any alleged rules violation, an opportunity to participate in proceedings, an opportunity to defend themselves, a right to be represented by legal counsel, an opportunity to review any

infractions report, a right to withhold consent to the use of the summary disposition process, a right to prepare a written joint report following any investigation by NCAA enforcement staff, and a right to appeal any sanctions decision. *See* Am. Compl. ¶¶ 37–51; *see also id.*, Ex. A, R. 32.5.1(e), 32.6.2, 32.7.1, 32.7.1.2, 32.8.5, 32.8.7.3, 32.9.1, 32.10.1.2. The NCAA defendants unilaterally stripped plaintiffs of all these rights in this case.

2. The Estate Has Standing To Challenge The NCAA Defendants' Rule Violations.

The NCAA defendants contend that Paterno was not an "involved individual" within the meaning of the NCAA rules and, therefore, not a third-party beneficiary because he passed away before the NCAA defendants imposed sanctions. *See* NCAA Br. 25–34; PSU Br. 13–15. This new argument — which has nothing to do with the amended complaint — is wrong under both the NCAA rules and ordinary principles of contract law.

It is irrelevant that Paterno passed away before the NCAA defendants concluded that his conduct provided a basis for imposing sanctions. The NCAA defendants insist that an involved individual must be a living person because the rules contemplate the involved individual's participation in the sanctions process. NCAA Br. 27–31. To be sure, the rules may have been fashioned with a living, participating individual in mind; but that is not a *requirement*. It has nothing to do with the definition of an "involved individual" in Rule 32.1.5. Nothing in the

NCAA rules excludes from that definition individuals who are the target of an investigation and whose conduct becomes the purported basis for sanctions, whether or not they pass away before the investigation is completed.

Underscoring the weakness of defendants' position, the NCAA has never in the past contended that someone is not an "involved individual" merely because they are unavailable to participate in the sanctions process. It has always treated individuals as involved in a case and deserving of all the rules' procedural protections if their conduct forms the basis for an investigation, *see* Am. Compl. ¶¶ 37, 118–19, even if the individual is unavailable and does not avail himself or herself of those procedures. Uncooperative targets of NCAA investigations, for instance, are still treated as involved individuals when they refuse to be interviewed by the enforcement staff, or drop out of the investigation process before it is concluded. For example, the NCAA sanctioned the University of Kentucky in 2002 based on the conduct of a recruiting coordinator. Even though "[t]he recruiting coordinator refused to be interviewed by the enforcement staff," Ex. 1 at 4,[4] he was allowed to appeal, *see* Ex. 2 — because his conduct formed the basis for the sanctions and he was therefore an "involved individual." Similarly, in connection with the NCAA's decision to sanction the University of California at

[4] Exhibits 1, 2, and 3 are from the NCAA's public infractions database at https://web1.ncaa.org/LSDBi/exec/miSearch.

San Diego in 2013, although the former head women's rowing coach did not file responses to the notices of allegations and declined to attend the hearing, she participated in the process through her attorney. Ex. 3 at 2–3. Indeed, the NCAA routinely accepts attorney letters during the course of its investigations, and there is no reason it could not have done so for Coach Paterno.

Nor can the NCAA justify its rule violations under Pennsylvania contract law. Except in the case of contracts for personal services, contract duties survive death. *See, e.g.*, *In re Wartanian's Estate*, 305 Pa. 333, 335–36, 157 A. 688, 689 (1931); *In re Pierce's Estate*, 123 Pa. Super. 171, 178, 187 A. 58, 61 (1936); *see also Unit Vending Corp. v. Lacas*, 26 Pa. D.&C.2d 697, 699 (1962). As explained above, the procedural protections of the rules are not personal to Paterno. The NCAA defendants argue otherwise by focusing on whether *Paterno*'s services were personal, NCAA Br. 32–33; not on whether the *NCAA*'s contractual duties are personal. They are clearly not.

Nothing prevented the NCAA defendants from fulfilling their duties under the rules by notifying Paterno's estate and permitting an estate representative to participate in the enforcement process. Indeed, the Estate attempted to participate in the process, but the NCAA refused its request. The reason given was not that Paterno was deceased, but that no investigation had taken place — in other words, that the NCAA was throwing its rulebook out the window and there was no

process in which to participate. Moreover, had the NCAA defendants initiated a proper investigation in November 2011, instead of improperly conspiring with the Freeh firm, Paterno could have been available for the enforcement staff to interview (he passed away in January 2012). The contention that Paterno would have refused to speak to the NCAA because he died before an interview with Freeh could be scheduled is sheer speculation. *See* NCAA Br. 30 n.13. We do not know what Paterno would have done, because the NCAA defendants never initiated a proper investigation. The NCAA defendants should not be allowed to raise their failure to investigate as an after-the-fact justification for breaking their own rules.

3. Clemens Has Standing To Challenge The NCAA Defendants' Rule Violations.

The NCAA defendants contend that Clemens was not an "involved individual" because he was not referred to by name in the Consent Decree. NCAA Br. 34–37. Yet this Court held that Clemens has stated a claim of defamation based on the Consent Decree. Order 16, 18. And the NCAA defendants recognize that the definition of an "involved individual" is related to whether the Consent Decree sufficiently identifies plaintiffs for purposes of their defamation claim. NCAA Br. 37. It therefore follows — under the NCAA defendants' own logic — that Clemens is named in the Consent Decree and there is at least a question of fact as to whether he is an "involved individual."

Moreover, the NCAA defendants do not deny that the Consent Decree names the Board of Trustees and accuses its members of specific wrongdoing, including failing to perform their "oversight duties" and not "creating an environment where senior University officials felt accountable," which "empowered Sandusky" and allowed him to commit child abuse. Am. Compl., Ex. B, at p. 3. The Consent Decree specifically identified the conduct of the Board of Trustees in 1998 and 2001, of which Clemens was a well-known member, as a basis for imposing sanctions. Indeed, the Consent Decree found that the "actions and inactions of members of the leadership and board of Penn State . . . allowed Sandusky's serial child sexual abuse." *Id.* at p. 1.

In light of these statements, it makes no difference that Clemens was not personally named in the decree. That is equivalent to suggesting that an individual would not be entitled to the protections provided under the rules if the NCAA, for example, merely referred to him as the "head coach of Ohio State" or a "star running back at USC." *Cf. Employers' Liab. Assur. Corp. v. Fischer & Porter Co.*, 167 Pa. Super. 448, 455, 75 A.2d 8, 12 (1950) ("The law cannot thus be circumvented by doing indirectly what could not be done directly.").

Moreover, the focus of the NCAA defendants' arguments is misplaced. The Board itself is not an "involved individual," true, but the Board as a "corporate body" is not capable of engaging in sanctionable conduct under the NCAA rules,

either. If the alleged failures of the individual members of the Board provide the NCAA defendants with justification for the Consent Decree, then they are involved individuals. If it does not, the NCAA defendants must concede that the Consent Decree lacks support for its conclusions. The NCAA defendants cannot have it both ways.

Similarly, it does not matter that some Board members may have accepted the sanctions, or that Clemens is the only Board member bringing this claim. *Cf.* NCAA Br. 35. That additional Board members may have compromised their claim does not mean that Clemens's claim must fail. The NCAA defendants offer no authority for their position, which defies logic.

Finally, Penn State argues that Clemens is not an "involved individual" because Rule 32.1.5 defines involved individuals as "former or current student-athletes and former or current institutional staff members" who have received formal notice of rules violations, and Clemens is not a "staff" member. PSU Br. 6. But as shown above, this provision cannot be the beginning and the end of the definition of "involved individuals." Other parts of the rules clearly indicate that "a person who is named in the sanctioning document or whose conduct underlies sanctions" is an involved individual. Am. Compl., Ex. A, R. 32.1.5 (an "involved individual" is anyone who has "significant involvement in alleged violations"); *id.* R. 32.6.2 (extending protections to individuals who are named in an investigation

or otherwise accused of being involved in alleged violations). The Court explicitly found this to be a "reasonable" interpretation of the bylaws. Order 9. The challenge to Clemens' standing should be overruled.

4. The NCAA's Interpretation Of Its Rules Does Not Defeat Plaintiffs' Standing.

The NCAA defendants assert that they should prevail on their contract arguments because the Court previously concluded that "Defendants' argument that 'involved individuals' means persons who are sanctioned or under threat of an official finding of rules violations is reasonable." Order 9; NCAA Br. 37–39. Because courts ordinarily defer to an association's "reasonable" interpretation of its own bylaws, the argument goes, the NCAA defendants are entitled to declare by fiat that plaintiffs are not involved individuals. According to the NCAA defendants, that ends the matter of plaintiffs' standing. *See* NCAA Br. 39.

This argument is wrong for several reasons. Most importantly, at this preliminary stage of proceedings, the issue is whether the law "says with certainty that no recovery is possible." *Sevin*, 417 Pa. Super. at 7, 611 A.2d at 1235. The NCAA defendants' ipse dixit as to what its rules purportedly require cannot overcome the well-pleaded allegations in the amended complaint.

Moreover, the NCAA defendants' position is based on a selective reading of the Court's decision. Although the Court described the NCAA defendants' interpretation as "reasonable," it also held that the Estate's interpretation was

equally "reasonable" and that "fact questions remain concerning the meaning and application of the phrase 'involved individuals' in this case, including whether Paterno was personally sanctioned." Order 9. The NCAA defendants' contention that Paterno was not personally sanctioned is a factual dispute that cannot be settled as a matter of law; it certainly cannot be determined at this stage that Paterno was not "under threat of an official finding of rules violations." And under the NCAA defendants' construction of the term "involved individual," whether Paterno was personally sanctioned or under such a threat is highly relevant, if not dispositive. *Id.*

In any event, even if the NCAA defendants' proposed interpretation is "reasonable," deference is nonetheless "unwarranted when there is reason to suspect that the [association]'s interpretation 'does not reflect the [association]'s fair and considered judgment on the matter in question.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012). "This might occur . . . when it appears that the interpretation is nothing more than a 'convenient litigating position,' or a '"post hoc rationalization" advanced by an [association] seeking to defend past agency action against attack.'" *Id.* (citation omitted).

That is what happened here. The NCAA defendants do not assert that their restriction of the term "involved individuals" to those who are sanctioned or threatened with sanctions has ever before been articulated or adopted. And once

again, the NCAA's own bylaws expose the flaws in its position. As the NCAA defendants recognize, "Bylaw 5.4 establishes comprehensive procedures by which NCAA Committees and Staff may, at the request of member institutions, 'make *binding* interpretations of NCAA legislation.'" NCAA Br. 38. Precisely. The problem is that none of those "comprehensive procedures" were followed here. The Executive Committee and NCAA President — let alone the NCAA's legal counsel — are not among those specifically authorized to issue "binding interpretations" of the rules. Am. Compl., Ex. A, R. 5.4.1.1. Furthermore, the rules allow an institution, conference, or other institutional representative to appeal the staff's interpretation. *Id.* R. 5.4.1.2.1.1. Those interpretations must be officially published on the NCAA's website or legislative services database. *Id.* R. 5.4.1.2.1.3. Nothing like that has happened with "involved individual," or any other provision of the rules at issue here.[5] The NCAA has ignored, and continues to ignore, its own rules from start to finish.

[5] The NCAA defendants have refused to respond to properly served discovery regarding their interpretation of the term "involved individual" until after the Court rules on its second round of preliminary objections. *See* Mot. to Compel Prod. of Documents by Defs. Emmert, Ray, and the NCAA (Apr. 14, 2014).

C. The Amended Complaint Adequately States A Tortious Interference Claim.

The NCAA defendants raise three objections to plaintiffs' tortious interference claim that the Court has already overruled. *See* NCAA Br. 42–43. These arguments are all meritless.

First, the NCAA defendants argue that plaintiffs' tortious interference claims arise from the same statement in the Consent Decree that forms the basis of plaintiffs' defamation claims, and the tortious interference claim is therefore derivative and cannot stand on its own. *See* NCAA Br. 40. In support of this argument, the NCAA defendants cite a single case: *Ashoff v. Gobel*, 23 Pa. D.&C. 4th 300 (Ct. C.P.) (the "effect" of a defamatory statement is insufficient to state a separate claim for tortious interference), *aff'd*, 450 Pa. Super. 706, 676 A.2d 276 (1995). NCAA Br. 40. *Ashoff* is inapplicable. It merely held that the plaintiff's claim to emotional distress was not a separate tort but "another item of claimed damage from the alleged defamation." *Ashoff*, 23 Pa. D.&C.4th at 306. In contrast, the "effect" at issue here *is* a separate tort. Am. Compl. ¶¶ 124–42. Pennsylvania courts have recognized that defamatory statements can provide the basis for a tortious interference claim. *Empire Trucking Co. v. Reading Anthracite Coal Co.*, 71 A.3d 923, 935–36 (Pa. Super. Ct. 2013); *see also, e.g.*, *Kiely v. Univ. of Pittsburgh Med. Ctr.*, No. 98-1536, 2000 WL 262580, at *3–5, *11 (W.D. Pa. Jan. 20, 2000) ("unfounded and unsubstantiated" accusations made by the

defendants formed the basis for both defamation and tortious interference claims); *Geyer v. Steinbronn*, 351 Pa. Super. 536, 550–54, 506 A.2d 901, 908–10 (1986) (defamatory statements made to prospective employer gave rise to both defamation and tortious interference claims).

Second, the NCAA defendants reargue that they did not act with the "requisite intent." NCAA Br. 43. But the Court has already held that plaintiffs have sufficiently pled intent. Order 22. As the Court recognized, "intent to cause a result may be inferred from circumstances indicating the result is substantially certain to occur." *Id.* (citing *BTZ, Inc. v. Grove*, 803 F. Supp. 1019, 1023–24 (M.D. Pa. 1992)). The NCAA defendants dismiss this finding as "dicta," but that makes no sense. The question was squarely presented to the Court, and the Court approved all the elements of this claim save one. Dismissing the claim on one ground does not give the NCAA defendants an excuse to re-brief all the other grounds.

Third, the NCAA defendants repeat their argument that their actions were "privileged" and not actionable. NCAA Br. 43–44. But as the Court has already held, the "absence of privilege is also sufficiently pled by the allegations that the NCAA violated its own rules for an improper purpose." Order 22. Contrary to the NCAA defendants' unfounded assumptions, plaintiffs *do* dispute whether "the Consent Decree served the societal good." NCAA Br. 44. As the amended

complaint alleges, the NCAA defendants flagrantly violated their own "rules of the game" and, without any investigation, published grave (and baseless) allegations of misconduct by the Penn State coaching staff. The NCAA defendants did so with full knowledge that they would cause significant harm to the prospective contractual and business relations of individuals who have pursued their chosen careers in an area over which the NCAA has absolute control. *See* Am. Compl. ¶¶ 14, 124–27; *see also Corman*, 2014 WL 1382675, at *15 ("coaches . . . who had excelled . . . through hard work . . . , excellence and perseverance were told none of that mattered."). The NCAA defendants offer no new support for their original argument and provide no basis for the Court to reconsider its earlier ruling.

D. The Amended Complaint Adequately States A Claim For Commercial Disparagement.

The NCAA defendants offer yet another frontal attack on the commercial disparagement claim, contending that it is entitled to re-brief arguments this Court did not specifically address in its Order. NCAA Br. 57–62. But the Court unambiguously held that the complaint stated a claim for commercial disparagement. Order 18–20. If the Court did not expressly address all the NCAA defendants' arguments, that was because they lack merit.

The Consent Decree Is Not An "Opinion." The NCAA defendants reiterate their view that the Consent Decree contains statements of "opinion" rather than actionable fact. NCAA Br. 58–59. According to the NCAA defendants, the only

"facts" in the Consent Decree are drawn "verbatim" from the Freeh report — facts which the Paterno family supposedly accepted. NCAA Br. 58 & n.23 (citing Paterno Family Statement, ESPN.com (July 12, 2012), http://espn.go.com/blog/bigten/post/_/id/52992/paterno-family-statement-on-freeh-report). That is untrue. The family stated only that the narrative of events surrounding the 1998 and 2001 incidents was roughly accurate, in that "[t]he 1998 incident was reported to law enforcement and investigated. Joe Paterno reported what he was told about the 2001 incident to Penn State authorities and he believed it would be fully investigated." Paterno Family Statement, *supra*.

The real facts bear no resemblance to the baseless statements included in the Consent Decree. Those statements include, among other things, that Coach Paterno "failed to protect against a child sexual predator harming children for over a decade" and "concealed Sandusky's activities" from authorities; "allow[ed] [Sandusky] to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program"; "provided Sandusky with the very currency that enabled him to attract his victims"; and "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." Am. Compl., Ex. B, at pp. 1, 3–4.

The fact that the Free Report published similar disparaging statements does not excuse the NCAA defendants' unlawful conduct — putting their imprimatur on those statements and imposing significant penalties on the basis of those statements. The amended complaint alleges that the NCAA defendants have a substantial influence on college football as a result of the NCAA's status as a monopolist. Am. Compl. ¶ 14. Louis Freeh, by contrast, is a private party with no formal control over college football. *Id.* ¶ 54. Moreover, the Court found that plaintiffs have stated a claim that the NCAA defendants conspired with the Freeh firm to violate plaintiffs' rights. *See* Order 22. It would be passing strange if one conspirator could avoid even having to respond to a complaint by asserting that any damage was caused by its co-conspirator. *See Cahalin v. Rebert*, 10 Pa. D.&.C.3d 142, 147 (1979) (every defendant is "liable for all acts committed pursuant to the conspiracy").

Paterno's Death Is Irrelevant To Commercial Disparagement. The NCAA defendants next argue that because Paterno is deceased, his commercial property cannot be subject to disparagement. NCAA Br. 59–60. But *Menefee v. Columbia Broadcasting System* explains why they are mistaken. *Menefee* held that "[s]ince [disparagement] involves redress for actual pecuniary losses rather than simply violations of interest in character or reputation without measurable loss of economic advantage, redress cannot be considered a 'windfall,'" and it is therefore

suitable to award this type of damages even after a plaintiff has passed away. 458 Pa. 46, 52, 329 A.2d 216, 219 (1974).

There is nothing to indicate that *Menefee*'s holding was limited to situations in which a plaintiff is alive when the disparagement occurred, but died before a final resolution of his claim. The NCAA defendants rely on a string of cases about survival actions — actions that accrued while the victim was alive and survive to be pressed by his or her estate. NCAA Br. 59. These cases have no applicability here, because the Estate does not contend that it is pressing Joe Paterno's claim. Instead, it is pressing its own claim, as the owner of the commercial interest in Paterno's property after he passed away. There is thus no reason to analyze whether the disparagement action "survived" Paterno's death. No case cited by the NCAA defendants establishes that all tort claims are personal and must be either pressed by the victim or converted into survival actions.

Menefee *Is Binding Precedent And Squarely Governs This Case.* The NCAA defendants close with a plea for this Court to reconsider its Order faithfully applying *Menefee*, and to disregard the case altogether. NCAA Br. 60. Of course, as a Supreme Court opinion, it is not so easily discarded.

In *Menefee*, "a successful radio personality" was allowed to bring a claim for commercial disparagement on the basis of "a statement that his program could no longer attract satisfactory ratings." 458 Pa. at 54, 329 A.2d at 220. The court

reasoned that "he had an intangible property interest in his broadcasting personality," and the statement at issue "would tend to disparage that property interest." *Id.* Common sense, applied to the present case, explains why this must be true. Paterno had a successful coaching career and was a hugely popular figure in the world of college football and beyond. His reputation was a commercialized property interest. The estate, which now owns that property interest, has suffered pecuniary loss because of the NCAA defendants' statements disparaging that career. Am. Compl. ¶¶ 114(a), 145–50.

The NCAA defendants argue that *Menefee* stands alone. NCAA Br. 60–62. That is irrelevant, but also untrue. *Menefee* held that the plaintiff had successfully "ma[de] out a cause of action for untruthful disparagement" by alleging harm to his broadcasting personality. *Menefee*, 458 Pa. at 53–54, 329 A.2d at 220. A Pennsylvania federal court approvingly echoed this holding a few decades later. *Swift Bros. v. Swift & Sons, Inc.*, 921 F. Supp. 267, 276 (E.D. Pa. 1995) ("a claim of commercial disparagement emphasizes the direct harm to the plaintiff's reputation (and hence sales) caused by the alleged false statement"). So too Pennsylvania statutory law, which recognizes that a reputation can be a commercialized property interest. *See* 42 Pa. C.S. § 8316(e) (defining "commercial value" in a similar context to include "[v]aluable interest in a natural person's name or likeness that is developed through the investment of time, effort

and money"). In short, the line between defamation and commercial disparagement is not as clear cut as the NCAA defendants would have the Court assume. As other states have recognized, "[a] false statement that casts aspersion upon both an individual personally and upon that individual's tangible or intangible property interest may result in damages to either the individual's reputation or his or her pecuniary interests *or both*." *Kollenberg v. Ramirez*, 127 Mich. App. 345, 353, 339 N.W.2d 176, 179 (1983) (emphasis added).

The NCAA defendants have cited no case that applies where the plaintiff's reputation *is* his business. Rather, their authorities assume the existence of a plaintiff's business and a separate business reputation. Those authorities then explain that the business reputation is not actionable on a commercial disparagement claim. The treatise they cite, for instance, states that "[t]he purpose of a commercial disparagement action . . . is not to vindicate the plaintiff's *business reputation*." 31 P.L.E. Libel and Slander § 14 (emphasis added) (cited NCAA Br. 60). And in *Ashoff v. Gobel*, the plaintiff had a reputation, but no business. 23 Pa. D.&C.4th at 306 (local politicians did not allege that "any particular property of [theirs] has lost value"). Only *Menefee* explains how to handle a situation in which a plaintiff's reputation *is* his business. This Court properly followed *Menefee*, and the NCAA defendants' arguments provide no basis for the Court to reconsider that ruling.

E. The Amended Complaint Adequately States A Claim For Defamation.

The NCAA defendants repeat three well-worn arguments in an effort to persuade the Court that, despite its carefully reasoned decision to the contrary, plaintiffs' defamation claims should be dismissed. They argue that (1) plaintiffs Clemens, Kenney, and Jay Paterno cannot be reasonably identified as targets of the NCAA defendants' defamatory statements; (2) plaintiffs have not adequately pled malice; and (3) pure statements of opinion cannot be defamatory. NCAA Br. 46–57. Because the Court already addressed each of the NCAA defendants' arguments and found them wanting, the Court should deny the request for reconsideration. The NCAA defendants have presented no new facts or law to justify a different outcome.

1. Plaintiffs Clemens, Kenney, And Jay Paterno Can Be Reasonably Identified As Targets Of The NCAA Defendants' Defamatory Statements.

The NCAA defendants argue that plaintiffs have not adequately stated a claim for defamation because they cannot be reasonably identified as the targets of the defamatory statements. *See Klauder v. Phila. Newspapers, Inc.*, 66 Pa. D.&C.2d 271, 276 (Ct. C.P. 1973). In support of this argument, defendants do not cite any new law but, rather, *mis*cite the Court's Order for the proposition that "a group consisting of 25 or more members is too large to support a defamation claim." Order 15. In doing so, the NCAA defendants mischaracterize the Court's

actual conclusion that *"[a]s a general guideline*, a group consisting of 25 or more members is too large to support a defamation claim." *Id.* (emphasis added). The strategic omission of the qualifying exordial phrase, "as a general guideline," ignores the Court's determination that, notwithstanding membership in groups potentially made up of slightly more than 25 members, plaintiffs are members of "groups that are limited in size and consist of people who are well-known in the community or whose identity could easily be discovered upon inquiry." *Id.* at 16.

In particular, the Court specifically considered the *Klauder* decision that the NCAA defendants rely on, and determined that the groups plaintiffs belong to are "certainly smaller than the 8,200 member police force in *Klauder* and closer to the 13-member board of commissioners in *Farrell* and the school 'leadership' in *Mzamane*." *Id.* (citing *Klauder*, 66 Pa. D.&C.2d at 276, *Farrell v. Triangle Publ'ns, Inc.*, 399 Pa. 102, 106, 159 A.2d 734, 737 (1960); and *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010)). The NCAA defendants cite a non-binding Florida Court of Appeals decision that merely reiterates the 25-member benchmark — a benchmark already considered by the Court. NCAA Br. 48 (citing *Thomas v. Jacksonville Tele., Inc.*, 699 So. 2d 800, 805 (Fla. Dist. Ct. App. 1997)). That is hardly grounds for reconsidering the Court's decision, particularly when Pennsylvania has refused to foreclose defamation claims based on an arbitrary number. *See O'Neill v. Motor Transp. Labor Relations, Inc.*, 41 Pa. D.&C.2d 242,

246 (Ct. C.P. 1966) ("[G]roup libel is not a mere matter of numbers, but to the contrary, is a question of adequate identification.").

The NCAA defendants also attempt to inflate the size of the groups to which both sets of plaintiffs belong. With respect to plaintiff Clemens, they argue that the Court should consider not just the size of the Board of Trustees on any given year, but the total number of Trustees in years 1998 and 2001. Yet each group deserves its own consideration. The NCAA defendants defamed the Trustees who served in 1998 (of which there were likely 32), and defamed those who served in 2001 (of which there were likely 32). The relevant group size is therefore not 64, but two separate groups of 32 each. Similarly, the NCAA defendants focus on the number of "coaches, administrators and football program staff members" at Penn State in 1998 and 2001, but fail to recognize that plaintiffs Jay Paterno and Kenney belong only to the group of "coaches" in 1998 and the group of "coaches" in 2001. NCAA Br. 52. Those groups consist of nine members each. Am. Compl., Ex. A, R. 11.7.2 ("There shall be a limit of one head coach, nine assistant coaches and two graduate assistant coaches who may be employed by an institution in bowl subdivision football.").

Plaintiff Clemens Can Be Reasonably Identified. The Court has determined that the defamed Trustees "are a finite group and include Clemens." Order 16. Whether or not plaintiff Clemens was actually identified as a target of

these statements is an issue of fact to be assessed during the course of discovery and ultimately determined at a later stage in the proceedings. *See Farrell*, 399 Pa. at 106, 159 A.2d at 737 ("if the defamatory publication can reasonably be interpreted as referring to a particular complainant, whether recipients did so conclude is for a jury to determine").

Plaintiffs Kenney and Jay Paterno Can Be Reasonably Identified. The Court determined that the complaint adequately alleged that the NCAA defendants' statement referring to "some coaches" defamed "a limited group of individuals including Former Coaches Paterno and Kenney." Order 16. The NCAA defendants' new argument is that a reasonable person would have understood that "some coaches" did not apply to Paterno and Kenney because they were not actually members of the group the statements intended to target (*i.e.*, coaches who observed Sandusky showering with young boys). NCAA Br. 53–54. The NCAA defendants also argue that, because the Freeh Report specifically identifies certain coaches by name, a reasonable person should understand that the statement "some coaches" refers only to those named individuals. NCAA Br. 54–55.

These arguments are untenable. The Consent Decree was broad and sweeping in its accusations. It did not confine itself to certain coaches and not others. The NCAA defendants deliberately chose to cast a wide net, and they

benefitted from that conscious decision. They cannot now back out of the consequences of that choice. In any event, whether the publisher of the defamatory statement intended the communication to apply to a specific plaintiff is immaterial. *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 (E.D. Pa. 1983). These arguments are more appropriate for a jury, not the Court at the preliminary objection stage of the proceedings, when all inferences reasonably deducible from plaintiffs' allegations should be drawn in their favor. Order 5 (citing *Foflygen v. R. Zemel, M.D. (P.C.)*, 420 Pa. Super. 18, 32, 615 A.2d 1345, 1352 (1992)); *see also Farrell*, 399 Pa. at 106, 159 A.2d at 737.

2. Plaintiffs Have Adequately Alleged Malicious Intent.

The Court found that plaintiffs Clemens, Kenney, and Jay Paterno "sufficiently alleged the element of malice." Order 17. It determined that the complaint stated a claim of defamation based on plaintiffs' allegations that "Defendants accepted the Freeh Report even though they knew it 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.* In an effort to undermine the Court's conclusions, the NCAA defendants again make arguments that have no place at the preliminary objection stage of the proceedings and that, in any event, misconstrue plaintiffs' allegations.

Plaintiff Clemens Did Not Endorse the Freeh Report. In an effort to support its argument that the NCAA defendants did not act with malice, the NCAA defendants state that Clemens admitted the truth of the defamatory statement and cannot now claim that the NCAA defendants had reason to doubt its veracity. Specifically, the NCAA defendants assert that Clemens, as the target of its defamatory statement, "admitted its truth" when "the Board of Trustees accepted the statement of which Trustee Clemens complains as true." NCAA Br. 50 (citing Am. Compl. ¶ 62). But the suggestion that Clemens endorsed the Freeh Report is inaccurate.

As an initial matter, the first half of paragraph 62 and all of paragraph 64 of the amended complaint make clear that the relevant statement was issued without the Board's approval.[6] The NCAA defendants cannot attribute such statements to Trustee Clemens in light of his explicit disclaimer of their content. Moreover, to the extent the NCAA defendants argue that "Plaintiffs plead no facts to show that the NCAA possessed 'obvious reasons to doubt the veracity' of statements about

[6] Paragraphs 62 and 64 of the amended complaint state, respectively: "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"; and "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."

the Board of Trustees that Penn State and other Trustees indisputably accepted," that argument is belied by the detailed facts set forth in the amended complaint. *See* Am. Compl. ¶¶ 58, 80–82 (alleging *inter alia*, that the NCAA defendants colluded with the Freeh Firm during the course of its investigation; forced Penn State to accept the Consent Decree; and instructed Penn State to keep certain information from the Board of Trustees).

As the Court has recognized, the complaint sufficiently alleges that the NCAA defendants' "rush to judgment" on matters placing individuals' livelihoods and reputations at stake "violat[ed] the procedural rights of affected individuals." Order 17. Plaintiffs have alleged more than enough facts to plead malicious intent at this stage in the proceedings. Order 13 (citing *Bower v. Bower*, 531 Pa. 54, 57 611 A.2d 181, 182 (1992)).

The NCAA Defendants' Sweeping Language Enhances, Rather Than Negates, Their Liability. The NCAA defendants argue that the former coaches cannot establish that the NCAA defendants acted with actual malice because the defamatory statement in question referred only to "some coaches," and "some coaches" may indeed have ignored red flags of Sandusky's behavior. NCAA Br. 55. That argument once again turns the NCAA defendants' failings into their own justifications, and the Supreme Court has squarely rejected such tactics. *Farrell*, 399 Pa. at 109, 159 A.2d at 739 ("The fact that the [defamatory] article did not

state that all of the commissioners of the township were parties to the reported corrupt deal could not operate to exclude the plaintiff from being one of the relatively small and officially designated group to which the article indisputably made reference.").

The subsequent criminal investigations into the truth of the NCAA defendants' statements *as to other individuals* have no bearing on their falsity with respect to the former coaches. *See Zerpol Corp.*, 561 F. Supp. at 410 (quoting *Purcell v. Westinghouse Broad. Co.*, 411 Pa. 167, 180, 191 A.2d 662, 669 (1963)). In short, the NCAA defendants contend that they were aware that statements accusing a group of people of criminal conduct may have been true with respect to certain individuals, but that they failed to limit those statements accordingly and instead directed them more broadly towards a group of identifiable people. That very recklessness militates in favor of — not against — a finding of malice. *See* Order 17 ("Malice is shown 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."); *see also Purcell*, 411 Pa. at 180, 159 A.2d at 669.

3. The NCAA Defendants' Statements Were Not Mere Opinions.

The NCAA defendants complain that the Court failed to address the argument that the challenged statements were protected opinions. That argument misinterprets the Court's opinion and is unsupported by Pennsylvania law.

The Court determined that "[t]he first two elements of defamation, that the statements . . . are defamatory and are published, are easily met based on Plaintiffs' allegations." Order 16. Specifically, the Court found that the statements "*assert*[] that the Trustees serving in 1998 and 2001 failed in their oversight duties, and . . . that some coaches were basically complicit in child sexual abuse." *Id.* (emphasis added). The Court characterized the statements as "conclusions," *id.*, which are not, as the NCAA defendants previously argued — and argue again now — "protected as a pure expression of opinion." NCAA Br. 55; *Petula v. Mellody*, 138 Pa. Commw. 411, 421–22, 588 A.2d 103, 109 (1991) (communications that "profess to report" statements "as fact" "cannot be characterized as 'pure' opinion"). The Court's decision is supported both by the facts of this case and by Pennsylvania law. *See, e.g.*, *Petula*, 138 Pa. Commw. at 421–22, 588 A.2d at 109.

F. The Amended Complaint Adequately States A Claim For Conspiracy.

The NCAA defendants assert that although the Estate, Clemens, Kenney, and Jay Paterno were found to have a valid defamation or commercial disparagement claim and thus have standing to raise a conspiracy claim, the Court

should have dismissed the conspiracy claim as to the other plaintiffs. NCAA Br. 44–45. This position merely reiterates the NCAA defendants' objections to the matter in the original complaint and is an improper attempt to seek reconsideration of the Court's order. The Court found that *all* plaintiffs state a claim of civil conspiracy. Order 22–24. It did not restrict that finding in any way, or ask for re-briefing in light of its rulings on the other counts. *Id.*

The recent decision of the Commonwealth Court in *Corman* explains why plaintiffs have properly stated a claim for conspiracy. The court explained that the Consent Decree strikes at the heart of the Penn State community, and that "[t]he children harmed by Sandusky, the children's family members, the community, PSU and the Commonwealth were all seeking to uncover the truth behind these hideous crimes." *Corman*, 2014 WL 1382675, at *15. "Student-athletes, trainers, coaches, administrators and support personnel who had excelled in their jobs through hard work, practice, commitment, team work, sportsmanship, excellence and perseverance were told none of that mattered." *Id.* The NCAA defendants' conspiracy reached out and harmed the student-athletes and faculty associated with the Penn State program. It should not now be heard to say that those members of the community have no recourse against it.

The NCAA defendants' other objection to the conspiracy count rests on a misapprehension of the amended complaint. They argue that the conspiracy count

should be dismissed for failure to join an indispensable party, because the conspiracy count is not currently asserted against Penn State yet plaintiffs seek to void the Consent Decree based on this count. NCAA Br. 45–46. The NCAA defendants are mistaken. The request for a declaratory judgment that the Consent Decree is void is attached to the contract count, not the conspiracy count. Am. Compl. ¶ 169(1); Order 13.

IV. Penn State Lacks Standing To Object To Claims Against The NCAA Defendants And To Litigate Objections On The NCAA Defendants' Behalf.

Penn State's objections fail because Penn State is only a *nominal* defendant, and Penn has no standing to object on the NCAA defendants' behalf. Its objections are also meritless.

A. The Amended Complaint Clearly Alleges That Penn State Is Only A Nominal Defendant.

Penn State objects that the amended complaint is improper because Penn State cannot tell which counts are asserted against it. PSU Br. 2–5. But the complaint is very clear as to what counts apply to Penn State. *See* Am. Compl. ¶ 17. As this Court instructed, Penn State has been named as a nominal defendant to the breach of contract claim against the NCAA defendants because it is a party to the contract and, depending on what relief the Court may ultimately decide is appropriate, may have an interest in that claim. Order 13.

Plaintiffs are not seeking any affirmative relief against Penn State, and because the Consent Decree states that it was "imposed" on Penn State, the amended complaint does not allege that Penn State took any action that harmed plaintiffs.[7] Although the substantive paragraphs under each count explain that the "NCAA Defendants" took certain actions which harmed plaintiffs and violated their legal rights, *see* Am. Compl. ¶¶ 121, 126–30, 149–52, 154–56, 162–65, there is no mention of Penn State in any of the counts of the complaint other than to report facts, such as the existence of a contract between Penn State and the NCAA, *e.g.*, *id.* ¶ 162. Contrary to Penn State's assertions, there is nothing remotely confusing about this.

In short, plaintiffs joined Penn State to afford it an opportunity to assert its interest in the Consent Decree when the litigation reaches a stage at which voiding the Consent Decree may be an appropriate remedy. At this juncture, there is no reason to dismiss Penn State as a *nominal* defendant, let alone the entire complaint, simply because no counts assert that it took any action that harmed plaintiffs. *Cf. Hess v. M. Aaron Co.*, 4 Pa. D.&C.3d 153, 161 (Ct. C.P. 1977) (corporation was not dismissed from suit as nominal defendant even where "plaintiff has failed to

[7] Plaintiffs continue to believe that Penn State is a victim of the NCAA defendants' unlawful conduct and that its objections reflect the continued pressure by the NCAA defendants, including their repeated references to the possibility of unlawfully imposing more severe sanctions, including the death penalty. But if discovery reveals that Penn State is complicit in the NCAA defendants' unlawful conduct against plaintiffs, rather than a victim, plaintiffs reserve their rights to amend their complaint further, if appropriate.

state any material facts upon which a cause of action can be based against" it). That is the point of identifying Penn State as only a *nominal* defendant. *See* Black's Law Dictionary at 1232 (a "nominal party" is "joined in the lawsuit to avoid procedural defects" but "has no control over it"); *Am. Soc'y for Testing & Materials v. Corrpro Cos., Inc.*, 292 F. Supp. 2d 713, 718 (E.D. Pa. 2003) ("nominal party" has no actual "control over the subject matter of the litigation"). The Amended Complaint should not be dismissed simply because it does not allege that Penn State engaged in behavior underlying each of the substantive counts. Accordingly, the Court should overrule Penn State's objections. PSU Br. 5–7, 9–19.

B. Penn State's Remaining Objections Are Meritless.

Penn State's remaining objections largely echo the objections re-pressed by the NCAA defendants. At first glance its adversarial position is hard to fathom. As noted above, plaintiffs are not seeking any affirmative relief against Penn State. Although plaintiffs ultimately will request that the Court declare the Consent Decree void ab initio, that has nothing to do with whether the claims should be allowed to be litigated on their merits. Moreover, even if the Court ultimately grants all of the relief sought by plaintiffs, that would not prevent Penn State from implementing any of the decree provisions it has authority to implement. Any action would simply have to occur through a proper decision by its Board and with

due regard for the interests of the Penn State community — not because it is forced to act by the NCAA defendants' improper and unlawful threats. *See* Am. Compl. ¶¶ 87–90.

What explains Penn State's surprising litigation position also underscores why this case deserves to be heard on its merits and why the NCAA's Constitution and Bylaws bestow rights on involved individuals and affected third parties. The threats from the NCAA defendants against Penn State continue to be serious. Even in this Court, they have unabashedly threatened that unless Penn State cooperates, the NCAA defendants will again exceed their authority and re-evaluate whether to punish Penn State by imposing the "death penalty." *See* Order 10; 2013 NCAA Br. 17; Hrg. Tr. at 12–14 (Oct. 29, 2013). In these menacing circumstances, it is no surprise that Penn State is unwilling to say anything except that which will appease the NCAA defendants.

In any event, Penn State's objections to the amended complaint are irrelevant because plaintiffs do not seek any affirmative relief from the University. Am. Compl. ¶ 17. Penn State is in this case because "it would be unjust to rule upon the meaning of the terms of Penn State's contract and whether its conduct was voluntary and authorized in its absence." Order 11. But that does not mean that, to secure relief against the NCAA defendants, plaintiffs must assert that Penn State *breached* the contract or engaged in wrongful conduct. In fact, the Consent

Decree itself says that it was "imposed" on Penn State. Penn State has been joined as a nominal defendant — a defendant which is not alleged to have done anything wrong.

Penn State's objections to the amended complaint on behalf of the NCAA defendants are thus entirely beside the point. And at this early stage, Penn State has made no showing that "the law says *with certainty* that *no recovery* is possible." *Sevin*, 417 Pa. Super. at 7, 611 A.2d at 1235 (emphasis added) (citing *Eckell*, 409 Pa. Super. at 135, 597 A.2d at 698). Nor can it show that any of the claims against the NCAA defendants clearly fail. Accordingly, Penn State's objections should be overruled for the same reasons the Court should overrule the NCAA defendants' objections.

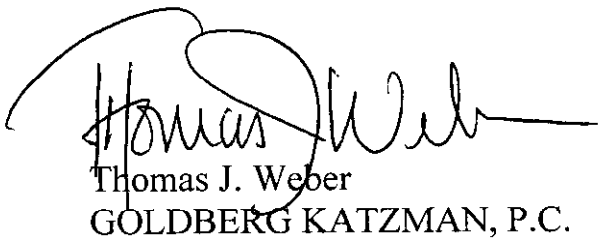
* * * *

The NCAA defendants have tried mightily to stop this litigation from going forward and to prevent plaintiffs from bringing to light the truth surrounding the NCAA defendants' unauthorized, unlawful, and indefensible actions in this case. As this Court has already once concluded, plaintiffs have properly stated claims for relief, and the allegations in the amended complaint address the few deficiencies previously identified by the Court. It is time for this litigation to proceed. The Court should once again overrule the NCAA defendants' preliminary objections and allow this important case to be heard on its merits.

CONCLUSION

The Court should limit the defendants' objections to the matters first raised in the amended complaint, and it should overrule those preliminary objections. In the alternative, if the Court reaches the merits of any of the preliminary objections directed to matter appearing in the original complaint, it should overrule them.

Respectfully submitted,



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April 16, 2014

VERIFICATION

I, William Kenney, hereby state that I am a plaintiff in this action, that I have read the First Amended Complaint filed on February 5, 2014 in *Paterno, et al. v. NCAA*, Docket No. 2013-2082, and that the facts stated therein – including in particular paragraphs 13, 114.b., 125-135, and 155-160 – are true and correct to the best of my knowledge, information, and belief.

I understand that any false statements herein are made subject to penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

William Kenney

Dated: 4/15/14

VERIFICATION

I, Joseph V. ("Jay") Paterno, hereby state that I am a plaintiff in this action, that I have read the First Amended Complaint filed on February 5, 2014 in *Paterno, et al. v. NCAA*, Docket No. 2013-2082, and that the facts stated therein – including in particular paragraphs 13, 114.b., 125-130, 136-142, and 155-160 – are true and correct to the best of my knowledge, information, and belief.

I understand that any false statements herein are made subject to penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

Joseph V. ("Jay") Paterno

Dated: 4/15/2014

VERIFICATION

I, George Scott Paterno, hereby acknowledge that I am an authorized representative of and on behalf of the Estate and Family of Joe Paterno and a plaintiff in this action, and that I have read the First Amended Complaint filed on February 5, 2014 in *Paterno, et al. v. NCAA*, Docket No. 2013-2082, and that the facts stated therein are true and correct to the best of my knowledge, information, and belief.

I understand that any false statements herein are made subject to penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification of authorities.

George Scott Paterno

Dated: 4/16/2014

EXHIBIT 1

Excerpts from Kentucky Sanctions Report

NCAA® News Release

FOR RELEASE:
January 31, 2002
11 a.m. Eastern time

CONTACT:
Thomas E. Yeager, chair
NCAA Division I
Committee on Infractions
Colonial Athletic Association

UNIVERSITY OF KENTUCKY
PUBLIC INFRACTIONS REPORT

I. INTRODUCTION.

This case involved the football program at the University of Kentucky and concerned violations of NCAA bylaws governing recruiting, extra benefits, falsification of recruiting records, failure to control salary of an employee, failure in fiscal control of an outside organization, unethical conduct (including academic fraud), failure to monitor and a lack of institutional control. The University of Kentucky is a Division I institution and a member of the Southeastern Conference. The university has an enrollment of approximately 22,000 students and sponsors 10 men's, 11 women's and one mixed-gender intercollegiate sports.

At the heart of this case were significant violations of NCAA legislation primarily committed by a former assistant football coach who also served as the director of football operations and recruiting coordinator (henceforth, "the recruiting coordinator"). In fact, this was one of the more serious cases heard by the committee in recent years in terms of the scope and breadth of the violations. In addition to the recruiting coordinator, at least two other assistant football coaches, a recruiting assistant, three student workers, a camp football camp director, members of the football equipment staff, eight football student-athletes, at least six prospective student-athletes, two high-school coaches and numerous representatives of the institution's athletics interests were all implicated in the violations either directly or indirectly. Additionally, in excess of $7,000 was spent by the institution (primarily through the recruiting coordinator) to pay for impermissible recruiting inducements and/or monetary gifts to high-school coaches and prospects.

Most of the information contained in this case was the result of the university's own self-discovery and subsequent investigation. The university's action was triggered by rumors about the recruiting coordinator's illicit activity, which led to his forced resignation on November 20, 2000. The information developed by the university and confirmed by the enforcement staff indicated that the recruiting coordinator had been subject to little, if any, oversight, resulting in an environment in which recruiting violations occurred. As alleged by the enforcement staff, the committee found that the former head football

coach (henceforth, "the head football coach") failed to monitor the activities of the recruiting coordinator. Although not alleged by the enforcement staff, the committee also found that the circumstances of this case warranted a finding of lack of institutional control against the university. The committee initially considered this finding based upon the information originally submitted by the university and enforcement staff, together with information provided at the hearing. Prior to the conclusion of the hearing, the committee informed the university specifically that the committee was considering such a finding and invited the university to respond. The university responded at the hearing and then subsequently in a written submission from the president. These responses were considered by the committee prior to making its finding.

The university had previous infractions cases in 1989 (men's basketball), 1976 (football and men's basketball), 1964 (football) and 1952 (men's basketball).

II. FINDINGS OF VIOLATIONS OF NCAA LEGISLATION.

A. RECRUITING INDUCEMENTS – PROSPECTIVE STUDENT-ATHLETES AND HIGH-SCHOOL COACHES. [NCAA Bylaws 13.2.1, 13.2.2-(b), 13.2.2-(g), 13.2.2-(h), 13.7.1.1, 13.8.2.1, 13.8.2.1.1, 13.8.2.1.2, 13.9.1 and 13.15.1]

During the 1998-99 through the 2000-01 academic years, the recruiting coordinator arranged or provided lodging, at no cost, as well as other inducements to prospective football student-athletes and their families while making unofficial visits to the institution's campus. Further, on one occasion, another assistant football coach purchased a meal for a prospective student-athlete at no cost to the young man. Finally, as a result of these inducements, each of these visits became a countable expense-paid visit to the university's campus. Specifically:

1. On January 25, 1999, the recruiting coordinator charged lodging expenses for a prospective football student-athlete (henceforth, "prospect A") in the amount of $218.14 to his personal American Express card. The prospect had previously made an official-paid visit to the institution, and as a result of the recruiting coordinator paying these expenses, the young man received two expense-paid visits to the institution's campus.

2. On September 26, 1999, the recruiting coordinator or his assistant (henceforth, "the recruiting assistant"), at the recruiting coordinator's instructions, went to a Lexington hotel and paid lodging expenses of $89

in cash for two prospective student-athletes from Memphis, Tennessee, (henceforth, "prospects B and C," respectively). Both of these prospects later made a second expense-paid visit to the university's campus.

3. On April 23, 2000, the recruiting coordinator or the recruiting assistant, at the recruiting coordinator's instructions, went to a Lexington hotel and paid lodging expenses of $179.01 in cash for two other prospective student-athletes from Memphis, Tennessee, (henceforth, "prospects D and E," respectively) and one of their high-school assistant football coaches. The recruiting coordinator had reserved the rooms in the name of the head high-school football coach (henceforth, "head high-school coach 1"), for the two prospects. The hotel records listed head high-school coach 1's address as the University of Kentucky, Commonwealth Stadium.

   Also, on Saturday, April 22, the day the young men arrived on campus, an assistant football coach (henceforth, "assistant football coach 1") purchased a meal for prospects D and E, who were visiting the institution's campus to attend the spring football game.

4. On September 15 and again on October 8, 2000, the recruiting coordinator made cash payments at a Lexington hotel to cover the lodging expenses of a prospective student-athlete (henceforth, "prospect F"). In September, the recruiting coordinator made an advance payment of $100 for two night's lodging even though the young man only stayed one night. The hotel records showed an additional charge of $14.88 to cover the prospect's incidental expenses. In October, the recruiting coordinator paid $56.18 at the time the prospect checked out.

5. On the weekend of November 3-5, 2000, the recruiting coordinator provided inducements to three prospective student-athletes (henceforth, "prospects G, H and I," respectively), head high-school football coach 1, the coach's girlfriend and two of head high-school coach 1's assistant coaches Specifically:

   a. On Saturday evening, November 4, 2000, and after a meal at a restaurant, the recruiting coordinator instructed a football student-athlete to get three jackets from the recruiting coordinator's vehicle and give them to prospective student-athletes G, H and I. The football student-athlete complied with the recruiting coordinator's instructions. The three prospects were not required to return the jackets.

b. On Sunday, November 5, the recruiting coordinator met prospective student-athletes G, H and I; the three high-school coaches; and the head high-school coach's girlfriend at the local hotel in which the prospects and high-school coaches were staying; purchased their breakfast; and paid the group's lodging cost of $632 and incidental room expenses of $102.91 in cash.

Committee Rationale

The committee, the institution and the enforcement staff agreed with the facts of this finding and that violations of NCAA legislation occurred. The recruiting coordinator acknowledged his involvement in Findings II-A-1, II-A-2, II-A-4 and II-A-5-(a) but denied his involvement in Findings II-A-3 and II-A-5-(b). The recruiting coordinator, in his response to the letter of official inquiry, provided no specific reasons for his denial. The recruiting coordinator refused to be interviewed by the enforcement staff. With specific reference to Finding II-A-3, the committee found that the evidence clearly established the recruiting coordinator's culpability. Among other things, this finding is supported by information provided by the recruiting assistant in interviews conducted with the enforcement staff and the institution. The recruiting assistant remembered the recruiting coordinator instructing her to make the hotel reservation in the name of head high-school coach 1, who coached at a high school in Memphis, Tennessee. The recruiting assistant also reported that after the recruiting coordinator became the director of football operations in January 1999, he began openly committing recruiting violations, which included paying the lodging and/or expenses of prospects, their family members and their high-school coaches. The recruiting assistant stated that on many occasions, the recruiting coordinator gave her cash and instructed her to go to local motels to pay for expenses incurred by prospects, their families and their high-school coaches. She also remembered that student workers were sometimes sent to the hotels to pay lodging expenses in cash. The recruiting assistant stated that the recruiting coordinator favored prospects and coaches from a particular high school in Memphis at which head high-school coach 1 was employed. The recruiting assistant reported that she was given cash by the recruiting coordinator and instructed to go to a hotel in Lexington to pay the incidental expenses incurred by head high-school coach 1 (Finding II-A-3). During the investigation, the recruiting assistant reported her knowledge of the recruiting coordinator sending apparel items to head high-school coach 1 and a high-school coach at a different Memphis high school (henceforth, "head high-school coach 2" -- see Finding II-C-2). The recruiting assistant also reported that she saw head high-school coach 1 and some of his prospects sitting in the institution's section of seats at an away football game in Oxford, Mississippi (Finding II-C-6).

EXHIBIT 2

Kentucky Sanctions Page from NCAA Database

Major Infractions Case Display - 1 Case

Institution: University of Kentucky

Date: January 31, 2002

Violation Sumary: Recruiting inducements for prospective student-athletes and high-school coaches; impermissible tryout; unethical conduct; academic fraud; falsification of recruiting records; institutional control of recruiting funds; failure to control salary of employee; violation of supplemental pay provision; failure in fiscal control of outside agency; failure to monitor and a lack of institutional control. Also, numerous secondary violations.

Penalty Summary: Public reprimand and censure; three years of probation; postseason ban for 2002, reduction of initial grants in the sport of football for 2002-03 to 16, in 2003-04 to 18, and in 2004-05 to 22; reduction in the total number of football counters from 85 to 80; show-cause provision for the former recruiting coordinator for a period of eight years; signature control of all booster club accounts and annual reporting. [UPHELD ON APPEAL]

Reports

Public Report

Former Recruiting Coordinator's Appeal

University's Appeal

Involved Sports:
Football

Involved Penalties:

Television: 0 yrs
Postseason: 1 yrs
Probation: 3 yrs

Reduction in Financial Aid: Yes
Recruiting: Yes
Show Cause Action: Yes
Vacation of Record: No

References

Legislative References

Div.	Number	Title
I	10.1	Unethical Conduct.
I	11.3.1	

		Control of Employment and Salaries.
I	11.3.2.2	Supplemental Pay.
I	13.11.1	Prohibited Activities.
I	13.15.1	Prohibited Expenses.
I	13.2.1	General Regulation.
I	13.2.1.1	Specific Prohibitions.
I	13.2.3.4	Transportation to Summer Job.
I	13.6.2.1	One-Visit Limitation.
I	13.6.8	Entertainment on Official Visit for Spouse, Parent or Legal Guardian of Prospective Student-Athlete.
I	13.7.2.1	General Restrictions.
I	2.2.5	Fairness, Openness and Honesty.
I	2.5	The Principle of Sound Academic Standards.
I	2.8.1	Responsibility of Institution.
I	6.4.1	Independent Agencies or Organizations.
I	13.12.2	Employment at Camp or Clinic.
I	6.01	General Principle.
I	13.7	Unofficial (Nonpaid) Visit.
I	13.8.1	Entertainment Restrictions.
I	13.6.7.5.1	Multiple Hosts.

EXHIBIT 3

Excerpts from University of California-San Diego Sanctions Report

UNIVERSITY OF CALIFORNIA, SAN DIEGO
PUBLIC INFRACTIONS REPORT
AUGUST 6, 2013

I. INTRODUCTION

On Thursday, June 13, 2013, officials from The University of California, San Diego, appeared before the NCAA Division II Committee on Infractions to address allegations of major infractions in the women's rowing program.[1] The former head women's rowing coach ("head coach") and a former assistant women's rowing coach ("assistant coach") declined to attend the hearing and did not file responses to the notice of allegations.[2] At issue were allegations of student-athletes practicing, competing and receiving travel expenses while ineligible, and the at-risk coaches facilitating the violations and allowing them to occur. It was also alleged that the head coach provided a prescription anti-inflammatory drug to members of the women's rowing team. The final allegation was that the institution failed to monitor the women's rowing program.

The institution was in substantial agreement with the facts of the allegations and that the violations occurred. During their interviews, the head coach and assistant coach agreed with parts of the allegations and that certain violations occurred, but did not agree to other facts set forth in the allegations. The committee concludes that the head coach and assistant coach knowingly allowed ineligible student-athletes to participate, the head coach provided a prescription drug to student-athletes, and that both coaches engaged in unethical conduct. The committee also concludes that the institution failed to monitor the women's rowing program.

In light of the major infractions, and as set forth below, the committee concludes that the following principal penalties are appropriate: one year of probation, vacation of contests in which student-athletes competed while ineligible, a financial penalty, a three-year show-cause order for the head coach, a one-year show-cause order for the assistant coach, and other appropriate penalties as detailed in the penalty section of this report.

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[1] A member of the California Collegiate Conference and Western Intercollegiate Rowing Association, the institution has an enrollment of approximately 29,000 students. The institution sponsors 11 men's and 11 women's NCAA intercollegiate sports. This was the institution's first major infractions case.

[2] For the purposes of this report, the former head women's rowing coach will be referred to as the "head coach," because she was in that position when the violations occurred. In addition, the former assistant women's rowing coach will be referred to as the "assistant coach" as she was in that position when the violations occurred.

II. CASE HISTORY

On May 8, 2012, nine members of the institution's women's rowing team held a confidential meeting with the institutional administrator responsible for overseeing their sport ("associate director of athletics"). A team captain requested the meeting for the purpose of discussing the team's unhappiness with the behavior of the head coach. At the meeting, the student-athletes presented a four-page document listing their grievances. Among their complaints was an assertion that three student-athletes ("student-athletes 1, 2 and 3," respectively) had traveled, practiced and competed while ineligible. Also included in the document was an assertion that another student-athlete ("student-athlete 4") had traveled with the team to a competition while ineligible. The nine student-athletes also reported that the head coach dispensed Voltaren, a prescription anti-inflammatory drug, to members of the team.

Throughout the remainder of May, institutional personnel reviewed women's rowing travel documents and interviewed members of the women's rowing team. On May 21, institutional administrators, including the director of athletics ("director of athletics") and the associate director of athletics, interviewed the head coach and assistant coach. Following the interviews, the head coach and assistant coach were relieved of their duties, turned in their institutional keys and departed campus.

Over the next three days, institutional personnel conducted further interviews and continued to review institutional records. On May 25 and 29, the associate director of athletics and the compliance officer ("compliance officer") phoned the enforcement staff and left a voicemail stating that major violations had been discovered in the women's rowing program. On May 30, the director of athletics and associate director of athletics met with the members of the women's rowing team and informed them that the head coach had been relieved of her duties. The administrators also told the team that the potential for a full NCAA investigation existed and directed them to be open and honest once the investigation ensued. Also on May 30, the associate director of athletics spoke to NCAA enforcement personnel. During the conversation, the enforcement staff and associate director of athletics determined that the institution would complete its investigation and submit a self-report.

The associate director of athletics and compliance officer conducted further interviews on June 4. The institution completed and submitted the self-report on June 13, 2012.

The enforcement staff issued a notice of inquiry to the institution on July 20, 2012. From July into January 2013, the enforcement staff and institution engaged in a joint inquiry, conducting multiple interviews that led to the discovery of further possible violations.

The enforcement staff sent a document of proposed findings to the head coach and assistant coach on December 12, 2012. The head coach's attorney ("head coach's

attorney") responded the same day, stating that he and his client disagreed with the nature and seriousness of the violations. The enforcement staff received a letter from the head coach's attorney on December 27, requesting that the matter be disposed of through the secondary violation process.

On January 10, 2013, the enforcement staff issued a notice of allegations to the institution, head coach and assistant coach. After further violations were discovered, the enforcement staff issued revised notices of allegations on January 25, 2013, and March 26, 2013. The institution submitted a response to the notice of allegations on April 10, 2013, and participated in a prehearing conference with the enforcement staff on April 26. The enforcement staff and the assistant coach also held a prehearing conference on April 26. Following the December letter from the head coach's attorney, the enforcement staff had no further communication with her or her counsel.

III. FINDINGS OF FACT

Participation and receipt of travel expenses while ineligible

At various times during the 2010-11 and 2011-12 academic years, student-athletes 1, 2, 3, 4, and a fifth member of the team ("student-athlete 5"), were ineligible for practice, competition and/or team travel. During both academic years, the team was coached by the head coach and assistant coach. The assistant coach was in charge of the novice team, consisting of inexperienced rowers, while the head coach coached the varsity team and supervised both squads. The two teams practiced, traveled and competed together.

Student-athlete 1. A two-year college transfer, student-athlete 1 initially enrolled at the institution for the 2010-11 academic year. She had spent three years in the two-year college without earning her Associate of Arts degree, but was allowed to temporarily practice pursuant to the 45-day exception of Bylaw 14.5.4.4.6. The period she was allowed to practice ran from October 4, 2010, through November 17. During that time, the institution worked to determine her final status with the NCAA Eligibility Center.

On October 28, 2010, the head coach and assistant coach both signed an eligibility roster that listed student-athlete 1 as ineligible. On November 8 the compliance officer emailed the head coach, stating that the institution was waiting on certain documents from student-athlete 1's two-year college so as to get her "cleared as fast as possible." The head coach responded to the compliance officer the following day, stating an understanding that student-athlete 1 was ineligible. Three days later, on November 12, the compliance officer once again emailed the head coach with an updated eligibility roster; it confirmed that student-athlete 1 was one of only two student-athletes on the squad who remained ineligible to travel and compete. The assistant coach signed the roster the same day.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS TO FIRST AMENDED COMPLAINT** was served this 16th day of April, 2014 by first class mail and email to the following:

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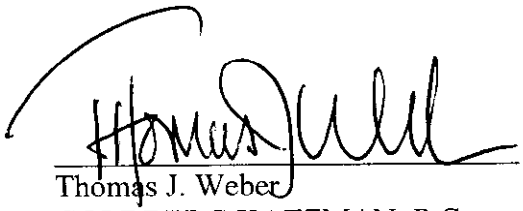

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