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, PETER KHOURY, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;	)	Civil Division Docket No. 2013-2082
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.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS

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PRELIMINARY STATEMENT

The contract between the National Collegiate Athletic Association ("NCAA") and its member institutions grants the NCAA extraordinary power. Sanctions imposed by the NCAA can end careers, ruin reputations, and change public perceptions. It is precisely 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. Most importantly, the agreed-upon rules provide that any individual alleged to be involved in an infraction of the NCAA rules must be afforded procedural rights and other protections, and that uninvolved coaches, student-athletes, and administrators are entitled to be treated fairly. Indeed, the NCAA and its member institutions have agreed that providing fair procedures is "essential" to the "conduct of a viable and effective enforcement program." Compl., Ex. A, R. 19.01.1.

In this case, the NCAA imposed some of the most severe and sweeping sanctions ever imposed during its 100-year history, and did so in total disregard of its own rules and procedures. In its rush to level massive penalties on The Pennsylvania State University ("Penn State") and its football program, the NCAA made "findings" publicly announced in a consent decree that certain Penn State coaches and board members, including plaintiffs, were guilty of heinous misconduct — concealing, facilitating, and allowing over a decade of horrific child

abuse. The NCAA's "findings" in the consent decree went even further, indicting the entire university community for creating a "culture" that facilitated and allowed that abuse. The NCAA then relied on those "findings" to impose unprecedented sanctions.

Yet when the NCAA imposed sanctions it did not comply with *any* of the rules intended to ensure procedural fairness. The criminal child abuse that provided the asserted basis for its sanctions falls far outside the scope of the NCAA's delegated authority, which is limited to the sphere of athletic competition. The NCAA did not conduct the type of investigation required under the rules; indeed, it conducted no investigation at all. It did not develop evidence to support its findings. It did not interview the individuals who were the subject of its findings. It did not follow required procedures. And, in perhaps the most ironic twist, the NCAA used the very fact that it had not followed its procedures to deny involved individuals and other affected parties any right to appeal its findings and conclusions. In short, the NCAA deprived involved individuals and other affected parties of the essential protections and other rights to which they are entitled under the NCAA's agreement with its members.

Instead of being based on a thorough investigation according to the NCAA's contract with its members, the NCAA's consent decree and public findings were based on a rushed reaction to the release of a "report" prepared by Freeh Sporkin &

Sullivan, LLP (the "Freeh firm"). The report's conclusions regarding plaintiffs in this action have been thoroughly discredited, and the NCAA knew they were not worth the paper they were written on. The report neither investigated potential NCAA rules violations nor complied with the investigative procedures required under the rules. Instead, the report was based on the type of speculation, innuendo, and hearsay that the rules flatly prohibit. The report's authors relied heavily on anonymous sources and failed to interview crucial individuals with knowledge of the relevant facts. Nor did they support the report's conclusions with reliable evidence. As the NCAA knew or should have known, the report's key conclusions regarding plaintiffs are wrong, unsubstantiated, and unfair. It is, even for the most charitably undiscerning, a shoddy and deeply flawed piece of work.

The NCAA's decision to adopt the report's unfounded "findings" as the NCAA's own was a clear violation of the NCAA rules. The decision also had the intended effect of terminating the search for truth, stamping the NCAA's imprimatur on the report as a supposedly authoritative account of the facts, dramatically increasing the publicity given to the report's unreliable conclusions, and forcing Penn State to accept the imposition of unprecedented sanctions. The NCAA and its officials did not merely "ignite strong passions among devoted supporters," as the NCAA dismissively suggests. Mem. 1. To the contrary, the

harms caused by the NCAA's unlawful actions are obvious and significant. The NCAA has:

- falsely labeled one of the Nation's most revered coaches as being complicit in child abuse;
- charged members of its Board of Trustees with allowing that abuse to occur;
- tainted the careers of other respected coaches; and
- painted a community of faculty members, student-athletes, and administrators as promoting a culture that purportedly lost sight of basic "values of human decency."

Compl., Ex. B, at p. 4.

In this context, the relief plaintiffs seek is plainly warranted. Contrary to the NCAA's assertions, plaintiffs are not seeking *any* relief from or against Penn State. Nor are they seeking to prevent Penn State from taking actions it might deem appropriate in response to Jerry Sandusky's crimes. What they do seek is redress and compensation for the harms caused by the NCAA's irresponsible and unlawful conduct. The NCAA-imposed consent decree should be declared unauthorized, unlawful, and void ab initio. The NCAA's egregious rule violations should be stopped. And the NCAA should not be allowed to continue to exceed its lawful authority.

In their preliminary objections, the NCAA, its President, and the former Chairman of its Executive Committee (the "NCAA defendants") do not dispute that they imposed sanctions without complying with the NCAA rules. Nor do they

identify any rule authorizing the NCAA to become involved in a criminal matter that has nothing to do with obtaining a competitive athletic advantage in college sports. Nonetheless, they argue that plaintiffs should not be allowed to prove their allegations, and urge this Court to extinguish the light that plaintiffs are seeking to shine on the truth about the NCAA's misconduct.

The NCAA defendants have filed a 91-page memorandum attempting to explain why plaintiffs' complaint does not state a claim for relief. But almost all of their arguments depend on ignoring the complaint's well-pleaded allegations and recasting the complaint into the suit the NCAA *wishes* plaintiffs had filed, not the action plaintiffs *in fact* filed. But the NCAA defendants cannot reasonably dispute that the complaint adequately summarizes the essential facts and apprises them of the nature of plaintiffs' claims. *See Sevin v. Kelshaw*, 417 Pa. Super. 1, 7, 611 A.2d 1232, 1235 (1992). Nor have they come close to showing that "the law says with certainty that no recovery is possible." *Id.* When the material facts set forth in the complaint and "all inferences reasonably deducible therefrom" are accepted as true, as they must be at this early stage of proceedings, *Foflygen v. R. Zemel, M.D. (P.C.)*, 420 Pa. Super. 18, 32, 615 A.2d 1345, 1352 (1992), only one conclusion remains: the complaint adequately states claims for relief. The NCAA defendants' preliminary objections should be overruled and this important case should be heard on its merits.

QUESTIONS INVOLVED

1. Does the Court have jurisdiction to adjudicate this lawsuit against the NCAA defendants without joining Penn State as an indispensable party, where plaintiffs seek no relief against Penn State and are not asking the Court to compel any action by Penn State. (Suggested answer: yes.)

2. 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 on other affected individuals; and do plaintiffs have standing to seek to void a consent decree that substantially harms their interests. (Suggested answer: yes.)

3. Does plaintiffs' complaint state a claim for breach of contract on the basis that the NCAA violated its own rules. (Suggested answer: yes.)

4. Does plaintiffs' complaint sufficiently allege that the NCAA defendants intentionally interfered with prospective contractual relations, where defendants deliberately caused harm to plaintiffs' prospects or deliberately blinded themselves to the harm their actions were substantially certain to cause. (Suggested answer: yes.)

5. Does plaintiffs' 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, and defendants knew the statements were not true or recklessly disregarded the obvious falsity of those statements. (Suggested answer: yes.)

6. Does plaintiffs' 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 plaintiffs' 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 of plaintiffs' rights. (Suggested answer: yes.)

8. Does plaintiffs' 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. *See* Compl. ¶ 1. The relevant facts are alleged in the complaint and summarized below.

A. The NCAA Rules

In 1906, a group of institutions of higher education formed an association for the purpose of regulating intercollegiate athletics. *Id.* ¶ 19. The result was the NCAA — an extraordinarily powerful and lucrative body with far-reaching control over the popular world of college sports. *Id.* ¶¶ 13, 21. No university that wishes to compete in college sports can defy or ignore the NCAA. *Id.* ¶ 13.

The NCAA is governed according to its constitution and bylaws, a lengthy document known as the "NCAA rules." *Id.* ¶ 22; *see id.*, Ex. A. The rules set forth the quid pro quo between the members and their association — regulated competition on a fair playing field in exchange for obedience to the rules. *Id.* ¶ 22–23. As an athletic association, the NCAA's authority is limited to regulating competitive athletics issues, such as admissions, financial aid, eligibility, and recruiting. *Id.* ¶ 25. It has never been granted authority to investigate criminal matters, to punish criminal conduct, or to regulate the "culture" of member

institutions. *Id.* ¶¶ 3, 25, 51, 71. Accordingly, although the NCAA rules exhort members' staff and students to act "ethically," that principle is defined with reference to examples that are related to securing a competitive advantage, and is thus given content through the rules' extensive provisions relating to competitive athletics. *Id.* ¶ 27. Likewise, the principle of "institutional control" means that each member institution is responsible for ensuring that staff and students comply with the rules. *Id.* ¶ 26. Neither principle has any application outside the NCAA's sphere of competitive athletics. *Id.* ¶¶ 26–27.

When an institution, student, or staff member violates one of the NCAA rules, the NCAA is authorized to take enforcement action in accordance with a carefully defined process set forth in the rules. *Id.* ¶¶ 23, 28, 37, 45. *Without exception*, the enforcement process is required to begin with an investigation by enforcement staff. *Id.* ¶ 28; *see also id.* ¶ 42 (even when an institution self-reports a rule violation, the enforcement staff must conduct an investigation). If the enforcement staff learns of "reasonably reliable information" that a rules violation may have occurred, it must issue a notice of inquiry that discloses the nature and details of its investigation. *Id.* ¶ 32. Then, if the staff determines after an initial inquiry that there is sufficient information to proceed, the staff is required to issue a "notice of allegations" that lists the alleged violations and the relevant provisions of the rules. *Id.* ¶ 33. If the notice names any individual as being significantly

involved in alleged violations, he or she is designated an "involved individual" and must be sent a copy of the notice and afforded an opportunity to respond. *Id.*

The case is then handed over to the Committee on Infractions. *Id.* ¶ 34. All involved individuals have the right to pre-hearing notice, a right to be represented by counsel, and a right to be heard and to produce evidence. *Id.* ¶¶ 34–35. The Committee must base its decision on evidence that is "credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs," *id.* ¶ 35, and may not rely on information provided anonymously. *Id.* ¶ 36. After a hearing, the Committee (and only the Committee) is authorized to impose sanctions designed to erase the competitive advantage that the violations were intended to achieve. *Id.* ¶ 37. The most severe sanction, which can be imposed only on "repeat violators," is the aptly named "death penalty." That sanction bans an institution from participating in a sport for a certain period of time and has devastating consequences for a program's ability to recruit players, retain staff, and attract fans and boosters. *Id.* ¶ 38.

At the end of its hearing, the Committee is required to issue a formal report detailing its proposed factual findings and proposed sanctions. *Id.* ¶ 39. Because of the harm the report could otherwise cause, the rules state that it may not be made public until after the institution and all involved individuals have been given an opportunity to review it, and the names of individuals named in the report are

redacted. *Id.* Moreover, once the Committee issues its report, individuals have the right to appeal to the Infractions Appeals Committee. The Appeals Committee must overturn the factual findings and proposed sanctions if they are clearly contrary to the evidence, if the facts found do not constitute a violation of the rules, or if procedural errors occurred in the investigative process. *Id.* ¶¶ 40–41.

The rules contemplate that in limited circumstances the NCAA may employ a more streamlined summary disposition and expedited hearing process. *Id.* ¶ 42. But that streamlined process may be used only with the unanimous consent of not only the NCAA's enforcement staff and the participating institution, but also all involved individuals. *Id.* ¶¶ 42–43. If all parties agree to use the streamlined process, the Committee on Infractions must still determine that a complete and thorough investigation of possible violations has occurred, and the parties (including involved individuals) are required to submit a joint written report. *Id.* ¶ 43. The Committee must then prepare its own formal written report, and all involved parties have the right to appeal. *Id.*

These and the many other procedural protections described in the complaint are a vital part of the bargain involved in each member's decision to participate in the NCAA. In particular, the NCAA rules reflect an intent to bestow important rights and protections on individuals who are accused of being significantly involved in alleged rules violations. *See id.* ¶¶ 24, 33. Moreover, because of the

serious consequences NCAA sanctions can have for institutions and their administrators, faculty, and students, the rules impose for their benefit an express obligation on the NCAA to ensure that any sanctions are fair and imposed consistent with established procedures. *Id.* ¶ 46. The rules recognize that it is the NCAA's responsibility to "afford the institution, its staff and student-athletes fair procedures in the consideration of an identified or alleged failure in compliance." *Id.* ¶ 47. The rules also provide that "an important consideration in imposing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions." *Id.* In fact, the NCAA and its members have agreed that ensuring fair procedures is "essential" to the "conduct of a viable and effective enforcement program." *Id.*, Ex. A, R. 19.01.1.

In this case, the NCAA defendants did not follow any of the rules and procedures described above. Instead, they exceeded the scope of their lawful authority, bypassed the enforcement process, ignored the appeals process, and imposed penalties not authorized under the rules. *Id.* ¶¶ 110, 119. Their unlawful conduct caused significant harm to involved individuals, as well as affected coaches, student-athletes, and administrators, who were deprived of essential procedural protections and denied even the most basic considerations of fairness.

B. The NCAA's Misconduct.

On November 4, 2011, the Attorney General of Pennsylvania charged Jerry Sandusky, a former assistant football coach, with criminal offenses including aggravated criminal assault, corruption of minors, unlawful contact with minors, and endangering the welfare of minors. *Id.* ¶ 48. Sandusky was convicted and, on October 9, 2012, sentenced to 30 to 60 years in prison. *Id.* The reprehensible incidents involving Sandusky were criminal matters that had nothing to do with securing a recruiting or competitive advantage. *Id.* ¶ 51. As defendant Mark Emmert, President of the NCAA, would later acknowledge, "[a]s a criminal investigation, it was none of [the NCAA's] business." *Id.* Nonetheless, on November 17, 2011, Emmert sent a letter to Penn State asserting that the NCAA had jurisdiction and might take action. *Id.* ¶ 53.

In the face of mounting pressure, the Penn State Board of Trustees formed a Special Investigations Task Force, which engaged the Freeh firm to investigate the alleged failure of certain Penn State personnel to respond to and report allegations against Sandusky. *Id.* ¶ 50. The Freeh firm was not engaged, and had no authority, to investigate or even consider whether any of the actions under its review constituted violations of the NCAA rules. *Id.* ¶ 52. Nonetheless, the NCAA defendants viewed the Freeh firm's investigation as an opportunity to short-circuit their own procedures and to single out Penn State's football program

for harsh penalties, regardless of the facts, and with full knowledge that their actions would cause plaintiffs substantial harm. *Id.* ¶ 73. In pursuit of this goal, they coordinated and worked closely with the Freeh firm, which provided them with information and frequent briefings. *Id.* ¶ 54.

On July 12, 2012, the Freeh firm released a report (the "Freeh Report") asserting, among other things, that top university officials and Coach Paterno had known about Sandusky's conduct before Sandusky retired as an assistant coach in 1999 but failed to take action. *Id.* ¶ 56. According to the report, Penn State officials, including certain plaintiffs, concealed critical facts relating to Sandusky's abuse from authorities, the Board of Trustees, the Penn State community, and the public at large. *Id.*

The Freeh Report did not comply with the NCAA rules and procedures. In preparing its report, the Freeh firm did not purport to conduct an investigation into alleged NCAA rule violations. *Id.* ¶ 52. It did not record or summarize witness interviews as required under the NCAA rules. *Id.* ¶ 60. The report's authors did not interview Coach Paterno or other crucial individuals with knowledge of the relevant facts. *Id.* ¶ 63. Nor did the report include any findings concerning alleged NCAA rule violations. *Id.* ¶ 60. The report's conclusions were not based on evidence that is "credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs," as the NCAA rules require. *Id.* And

individuals named in the report, who were accused of being significantly involved in alleged misconduct, were not given any opportunity to be heard or to challenge its conclusions. *Id.*

The Freeh Report was an improper "rush to injustice," and it has been thoroughly discredited. *Id.* ¶ 61. The Freeh firm did not complete a proper investigation, failed to interview key witnesses, and instead of supporting its conclusions with evidence, relied heavily on speculation and innuendo. *Id.* ¶¶ 61–65. The report relies on unidentified, "confidential" sources and on questionable sources lacking any direct or personal knowledge of the facts or support for the opinions they provided. *Id.* And its main conclusions are either unsupported by evidence or supported only by anonymous, hearsay information of the type specifically prohibited by the NCAA rules. *Id.* ¶¶ 61–67. Prominent experts have independently concluded that the report is deeply flawed and that many of its key conclusions are wrong, unsubstantiated, and unfair. *Id.* ¶ 61; *see also* Armen Keteyian, *Sandusky Prosecutors: Penn State Put School's Prestige Above Abuse*, CBS News, Sept. 3, 2013, http://www.cbsnews.com/8301-18563_162-57601201 (no evidence supported conclusion that Coach Paterno concealed Sandusky's crimes, according to the chief prosecutor in the case against Sandusky).

The NCAA defendants knew or should have known that the Freeh Report was unreliable and grossly unfair. *Id.* ¶¶ 76–77. They also knew the report had not

been prepared in accordance with the NCAA's investigative procedures, and that putting the NCAA's imprimatur on the report would dramatically increase the publicity and credibility accorded to its unreliable conclusions, effectively terminate the search for truth, and enable the NCAA to force Penn State to accept the imposition of unprecedented sanctions. *Id.* ¶ 76. The NCAA defendants thus recognized that they did not "have all the facts about individual culpability" and that imposing sanctions could cause "collateral damage" to many innocent parties. *Id.* ¶ 72. They also knew that, before this matter, the NCAA had never interpreted its rules to permit intervention in criminal matters unrelated to athletic competition. *Id.* ¶ 71.

Nonetheless, the NCAA defendants viewed the Sandusky scandal as an opportunity: a chance to deflect attention from mounting criticisms of the NCAA, to shore up the NCAA's faltering reputation, to broaden the NCAA's authority far beyond its defined limits, and to impose enormous monetary sanctions for their own benefit. *Id.* ¶ 72. They also knew that, if they did not act quickly, the Freeh Report's many flaws would be uncovered and their ability to use it for their own advantage would soon dissipate. *Id.* ¶¶ 76–77.

Accordingly, the day of the report, Emmert announced (incorrectly) that there had been an "acceptance of the report" by the Penn State Board of Trustees. *Id.* ¶ 58. He also announced that the NCAA "and the University both found the

Freeh Report information incredibly compelling" and that the NCAA found "that body of information to be more than sufficient to impose" penalties. *Id.*

Although the NCAA ordinarily takes years to conduct and complete an investigation, the NCAA defendants moved to impose sanctions almost immediately after the Freeh firm released its report. *Id.* ¶ 84. On Friday or Saturday, July 20 or 21, Penn State's counsel received an email in the form of a nine page document, entitled "Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University." *Id.* ¶¶ 85–86. The parties named and described in the decree (including plaintiffs) were unfairly and improperly held guilty of covering up decades of horrendous child abuse. *Id.* ¶ 60. But they were given no opportunity to challenge the decree's conclusions. *Id.* ¶ 99. Nor were they afforded any of the other protections afforded by the NCAA rules. *Id.* ¶ 100. The agreement "imposed" by the NCAA was signed and released to the public on July 23, 2012. *Id.* ¶ 86.

C. The Consent Decree

The consent decree did not identify any conduct that, under the NCAA rules, would qualify as a violation subject to the NCAA's oversight. *Id.* ¶ 89. The NCAA nonetheless found that Penn State's employees, including plaintiffs, had not conducted themselves as "positive moral models," and that Penn State had

violated the principles of "institutional control" and "ethical conduct." *Id.* The consent decree's purported "factual findings" level extraordinary charges of wrongdoing against Coach Paterno and the Board of Trustees members in 1998 and 2001, as well as other Penn State staff and administrators. *Id.* ¶ 90. The decree states:

- Coach Paterno "failed to protect against a child sexual predator harming children for over a decade" and "concealed Sandusky's activities" from authorities.
- Coach Paterno "allow[ed] [Sandusky] to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program," which "provided Sandusky with the very currency that enabled him to attract his victims."
- Coach Paterno "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."
- Coach Paterno "essentially grant[ed]" Sandusky "license to bring boys to campus facilities for 'grooming' as targets for his assaults."
- The "actions and inactions of members" of the Board of Trustees and other university leaders "allowed Sandusky's serious child sexual abuse."
- The Board of Trustees "did not perform its oversight duties" and "failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable."
- "Some coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him."

Id., Ex. B, at pp. 1, 3–4; *see also id.* ¶ 90.

As sanctions, the NCAA's consent decree imposed a $60 million fine, a four-year post-season ban, a four-year reduction of grants-in-aid, five years of probation, and waiver of transfer rules and grant-in-aid retention (to allow entering or returning student-athletes to transfer to other institutions and play immediately). *Id.* ¶ 96. The decree made clear that all football wins from 1998 to 2011 would be vacated and specifically stated that, as part of the imposed sanctions, Coach Paterno's career record wins would "reflect the vacated records." *Id.*, Ex. B, at p. 5. The decree also reserved the NCAA's rights to initiate a formal investigatory and disciplinary process and to impose sanctions on any involved individuals in the future. *Id.* ¶ 96.

Invoking their rights under the NCAA rules, plaintiffs appealed the consent decree. *Id.* ¶ 98. The NCAA refused to accept those appeals. *Id.* ¶ 99. Instead, it took the astonishing position that, because it had not imposed the sanctions through its traditional enforcement process, the procedural protections provided by the rules were unavailable, even for individuals named or referenced in the consent decree. *Id.* As a result, notwithstanding the grave nature of the decree's factual findings, and notwithstanding the NCAA's failure to conduct its own investigation, individuals who were involved and directly harmed by the NCAA defendants' actions were given no opportunity to be heard and defend themselves. *Id.* ¶ 100.

D. This Lawsuit

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. *Id.* ¶¶ 8–12. They have suffered substantial harm as a direct result of the NCAA's unauthorized and unjustified actions described above. *Id.* ¶ 101. They are intended beneficiaries of the NCAA's agreement with its member institutions, *id.* ¶ 24, and, having been denied access to the procedural protections that are supposed to be guaranteed under the rules, they seek to vindicate their rights in a judicial forum.

The complaint pleads causes of action for breach of contract, intentional interference with contractual relations, commercial disparagement, defamation, and civil conspiracy. *Id.* ¶ 105–53. It seeks declaratory and injunctive relief, compensatory and punitive damages, and costs. *Id.* ¶ 154. The main purpose of this lawsuit is to require the NCAA defendants to comply with their own rules and prevent them from continuing to interfere in a criminal matter that falls far outside their lawful authority. In short, plaintiffs seek to stop the continuing injuries that are being caused by the NCAA defendants' unlawful, irresponsible, and outrageous conduct.

ARGUMENT

When considering preliminary objections to a complaint, "[a]ll material facts set forth in the pleadings as well as all inferences reasonably deducible therefrom are admitted as true." *Foflygen*, 420 Pa. Super. at 32, 615 A.2d at 1352. A complaint must apprise the party of the nature of the claims and formulate the issues by summarizing essential facts. *Sevin*, 417 Pa. Super. at 7, 611 A.2d at 1235. The allegations need not be detailed, but they should be sufficient to establish "that the averments are not merely subterfuge" and allow defendants to prepare their defense. *In re Estate of Schofield*, 505 Pa. 95, 103, 477 A.2d 473, 477 (1984) (applying heightened pleading standard for fraud).

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.*; *see also B.N. Excavating, Inc. v. PBC Hollow-A, L.P.*, __ A.3d __, 2013 Pa. Super. 120, 2013 WL 2145663, at *2 (2013)

("Any doubt should be resolved by a refusal to sustain the objections.") (citations omitted).

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

I. There Is No Jurisdictional Or Other Bar To Plaintiffs' Complaint.

The NCAA defendants raise two jurisdictional objections. They contend, *first*, that plaintiffs have failed to join an indispensable party and, *second*, that plaintiffs lack standing to pursue their breach-of-contract causes of action. Both objections are meritless and should be rejected.

A. Penn State Is Not An Indispensable Party.

The NCAA defendants argue that Penn State is an indispensable party and, unless it is joined, the Court lacks subject matter jurisdiction. *See* Mem. 15–19. To support this argument, the NCAA defendants ignore the complaint's well-pleaded allegations and seek to erect a false jurisdictional barrier by recasting the complaint into something it is not. In their view, this case is not about their wrongful conduct, but about "alleged collateral consequences of the Freeh Report . . . and the University's acceptance of that report." Mem. 15–16. That is wrong. Penn State is not an indispensable party.

Penn State Is Not Indispensable Because No Redress Is Sought Against It.

Under Pennsylvania law, courts apply a four-step inquiry to determine whether parties are indispensable:

> (1) Do absent parties have a right or interest related to the claim?
>
> (2) If so, what is the nature of the right or interest?
>
> (3) Is that right or interest essential to the merits of the issue?
>
> (4) Can justice be afforded without violating the due process rights of absent parties?

Hubert v. Greenwald, 743 A.2d 977, 980 (Pa. Super. Ct. 1999) (citing *CRY, Inc. v. Mill Serv., Inc.*, 536 Pa. 462, 468, 640 A.2d 372, 375 (1994)). In general, a party is indispensable only if "no relief" can be granted "without infringing on that party's rights." *Ballroom, LLC v. Commonwealth*, 984 A.2d 582, 588 (Pa. Commw. Ct. 2009). Accordingly, to determine whether a party is indispensable, a court should "refer to the nature of the claim and the relief sought." *Hubert*, 743 A.2d at 980. A party "against whom no redress is sought need not be joined." *Sprague v. Casey*, 520 Pa. 38, 48–49, 550 A.2d 184, 189 (1988).

Penn State is not an indispensable party because no claim is made against it, no redress is sought against it, and no action is requested of it. *See County of Berks v. Allied Waste Indus. Inc.*, 66 Pa. D. & C.4th 429, 434 (2004) (where plaintiff makes no claim that a party "acted improperly in any manner" and does not "seek relief or any action" against it, that party is not indispensable); *see also Comerford v. Factoryville Borough Council*, 16 Pa. Commw. 261, 263–64, 328 A.2d 221,

221–23 (1974) (government agency not indispensable because claims required no action on its behalf). Indeed, this principle was recently reaffirmed in other litigation challenging the $60 million fine imposed on Penn State by the NCAA. The court held that Penn State is not an indispensable party to that lawsuit because "Plaintiffs do not seek redress from [Penn State], but rather, from the NCAA." *Corman v. NCAA*, No. 1 M.D. 2013, slip op. at 19–20 (Pa. Commw. Ct. Sept. 4, 2013).

The complaint's well-pleaded allegations here are likewise directed not against Penn State but against the NCAA defendants in connection with *their* improper interference in" and improper response to a "criminal matter that falls far outside the scope of their authority." Compl. ¶ 1 (emphasis added). Plaintiffs do not seek to enjoin *Penn State* from implementing any of the terms of the consent decree pertinent to it; should Penn State deem it appropriate, for example, to continue recommended training and educational programs, it would be free to do so even if plaintiffs prevail. In fact, confirming that it lacks any interest in this litigation, Penn State previously waived its rights to bring any claims based on the consent decree. Compl., Ex. B, at p. 2; *see Corman*, slip op. at 21–22. Penn State's interests are therefore not "essential" to the merits of plaintiffs' claims, and granting relief against the NCAA will not violate Penn State's due process rights.

It Makes No Difference That Penn State Is A Party To The Consent Decree. The NCAA defendants contend that Penn State is indispensable because it is a party to the consent decree and voiding the decree would "materially impair Penn State's rights." Mem. 16. In their view, Penn State "entered into [that] contract for valuable consideration" because it was "able to avoid potential imposition of the 'death penalty,'" achieved "an expedited resolution," and "avoided a protracted investigation and enforcement process." *Id.* at 17–18. This argument is wrong both as a matter of law and as a matter of fact based on the allegations of the complaint.

The NCAA defendants' argument is directed to a complaint they wish plaintiffs had filed and not the complaint that was actually filed. As the complaint's well-pleaded allegations establish, the NCAA defendants had no authority to impose the death penalty, conduct an investigation, or undertake an enforcement process for criminal matters unrelated to athletic infractions. *See* Compl. ¶¶ 3–4, 51, 71–88, 104. As third-party beneficiaries of the contract between the NCAA and Penn State, plaintiffs have a right to challenge the NCAA's *ultra vires* conduct and to have the unlawful decree that violated plaintiffs' contractual rights declared void. *See generally Bedell v. Oliver H. Bair Co.*, 104 Pa. Super. 146, 153, 158 A. 651, 653 (1932) ("[c]ontracts ultra vires of the corporation making them are . . . 'wholly void and of no effect'"); *Baltimore &*

Ohio R.R. Co. v. Smith, 56 F.2d 799, 802 (3d Cir. 1932) ("[a]ll contracts" made by a corporation that exceed "the scope of [its] powers" enumerated in its charter "are unlawful and void"). The unauthorized, one-sided consent decree was forced upon Penn State to plaintiffs' detriment. *See* Compl. ¶ 82 (the "discussion was not a negotiation, but an unlawful and non-negotiable 'cram down' of a list of predetermined sanctions and penalties"). And the only parties to receive any consideration were the NCAA defendants, who used the decree to further their own improper objectives. *See id.* ¶¶ 68–72.

In the absence of any contractual or other authority for the NCAA to impose sanctions, any consideration supposedly received by Penn State was illusory and hardly makes Penn State an indispensable party. *See Americus Ctr., Inc. v. City of Allentown*, 112 Pa. Commw. 308, 313–14, 535 A.2d 1200, 1202–03 (1988) (company was not indispensable party in suit to enforce competitive bidding process for parking spaces against local government entity, despite having leased the spaces, because the executive director of the entity lacked authority to enter into that lease). In fact, the relief sought against the NCAA defendants in this lawsuit — enjoining them from continuing their bullying tactics and requiring them to comply with their own rules — can inure only to Penn State's benefit. *Cf. Sprague*, 520 Pa. at 49, 550 A.2d at 189–90 (absent officials not indispensable even if their rights might be affected, because relief sought could only benefit

them). If plaintiffs are correct on the merits, Penn State will not face any NCAA enforcement action or threatened death penalty, and will be free to conduct its affairs as it sees fit without the NCAA's unlawful interference.

Contrary to the NCAA defendants' assertions, the Court's inquiry does not stop with whether an absent party signed a contract that is challenged in the litigation. As courts have recognized, the crucial question is whether a plaintiff seeks relief against an absent party or whether a judgment would require the absent party to take action to afford the relief sought. *See, e.g.*, *Montgomery Cnty. Child Welfare Servs. v. Hull*, 51 Pa. Commw. 1, 4, 413 A.2d 757, 759 (1980) (party is indispensable if party must take certain action to afford the relief sought). In *Companaro v. Pennsylvania Electric Co.*, for example, a union was not an indispensable party to a lawsuit brought by workers against an electric utility company, even though the workers challenged the legality of a contract between the union and the company. 440 Pa. Super. 519, 522, 656 A.2d 491, 493 (1995). Applying long-standing principles, the court explained that, although the union had "an interest in the contract," it was "not an indispensable party because [the workers sought] no relief" from the union, and relief could be fashioned between the parties before the court. *Id.*; *see also Corman*, slip op. at 19–22 (despite being party to the consent decree, Penn State was not indispensable in suit seeking to enjoin the NCAA from collecting a $60 million fine); *French v. Shoemaker*, 81

U.S. (14 Wall.) 314, 314–15, 335 (1871) (a contract dispute between two parties did not require joinder of other parties to the contract, because suit sought no relief from other parties).

None of the cases cited by the NCAA defendants overthrow these basic principles. They are also readily distinguished. In *E-Z Parks, Inc. v. Philadelphia Parking Authority*, 103 Pa. Commw. 627, 521 A.2d 71 (1987), for example, a parking lot operator brought an action against both the Pennsylvania Department of Transportation and the Philadelphia Parking Authority, arguing that the Department had improperly terminated the operator's lease after entering a joint-use agreement requiring the Authority to construct a parking garage on the leased land. After losing its first suit, the parking lot operator filed a second action against only the Authority, seeking to void the joint-use agreement. Not surprisingly, the court held that the Department was an indispensable party to the second lawsuit not merely because it signed the joint-use agreement but also because granting the parking operator relief would directly impair the Department's rights, including its right to use the property over which it held fee simple ownership. *Id.* at 633, 521 A.2d at 73. Similarly, in *Bracken v. Duquesne Electric Manufacturing Co.*, the court did not rely solely on the fact that absent parties were co-signatories to a shareholders agreement but focused on the fact that their voting rights would be adversely affected by any judgment. 419 Pa. 493, 495,

215 A.2d 623, 624 (1966). Neither case establishes any basis for declaring Penn State indispensable to this litigation.

The Complaint Does Not Challenge Penn State's Authority. The NCAA defendants also assert that Penn State is indispensable because the complaint purportedly "challenges the University's authority" and the authority of its "senior leadership." Mem. 18–19. To support this argument, the NCAA defendants place heavy emphasis on the complaint's allegations that Penn State did not waive plaintiffs' rights under the consent decree, and that President Erickson acted outside his lawful authority. *Id.* But these allegations do not seek relief against Penn State. Nor do they challenge Penn State's authority to waive *its own* rights. The complaint merely alleges that Penn State was neither explicitly nor implicitly waiving plaintiffs' rights — *i.e.*, the rights of third-party beneficiaries. *See* Compl. ¶ 111. Similarly, President Erickson's *ultra vires* action cannot bind plaintiffs. *Id.* ¶ 87; *cf. Bedell*, 104 Pa. Super. at 153, 158 A. at 653.

The one out-of-state case cited by the NCAA defendants, *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004), is not persuasive on this point. In *Bloom*, which involved a lawsuit brought by a student-athlete against the NCAA, the appellate court mentioned in passing that the trial court had ordered joinder of the university as an indispensable party. The Colorado appellate court's decision does not describe, much less defend, the trial court's reasoning on this issue. As the barest

of dicta, the passing statement on which the NCAA defendants rely has no persuasive force. *See, e.g.*, *Cinram Mfg., Inc. v. Workers' Compensation Appeal Bd. (Hill)*, 601 Pa. 524, 532, 975 A.2d 577, 581 (2009); *see also Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 520 (2013) ("we resist reading a single sentence unnecessary to the decision as having done so much work").

In any event, it cannot be the case that a third party becomes indispensable under Pennsylvania law merely because a plaintiff alleges that its own rights were not waived or forfeited as a result of actions taken by the third party. Such a rule would greatly complicate litigation and undermine the basic purpose of joining indispensable parties. *See Allentown Hosp. Ass'n v. Bd. of Trs.*, 73 Pa. D. & C.2d 447, 450 (1975) ("[t]he right to join additional parties must be exercised with caution, . . . so that the proceedings will not be unnecessarily complicated or delayed"). Instead, as noted above, the proper test examines whether the lawsuit seeks redress against an absent party or whether any judgment could be effective without the absent party's involvement. *See Sprague*, 520 Pa. at 48, 550 A.2d at 189. Because this lawsuit does not seek redress against Penn State or President Erickson, because a judgment would not require Penn State to take any action, and because the Court can grant relief without prejudicing Penn State's rights, Penn State is not indispensable.

The NCAA Defendants Have Made No Showing That Penn State Cannot Be Joined. In the event the Court determines that Penn State is indispensable, the Court should still deny the NCAA defendants' dismissal request. Under Pennsylvania Rules of Civil Procedure, "the court shall order that . . . the indispensable party be joined," and "it shall dismiss the action" only if that is not possible. Pa. R. Civ. P. 1032(b); *see Resource Props. XLIV, Inc. v. Philadelphia Auth. for Indus. Dev.*, No. 1265 Nov. Term 1999, 2000 WL 33711060, at *5 n.19, 2000 Phila. Ct. Com. Pl. LEXIS 87, at *19 n.19 (Pa. Ct. C.P. Nov. 7, 2000); *Corman*, slip op. at 22 n.18. Although the NCAA defendants are wrong in seeking to force Penn State to join this lawsuit, they have made no showing that it would be impossible to join the University. Accordingly, if the Court determines that Penn State is indispensable, the proper course would be to order its joinder. There is no reason to dismiss the complaint.

B. Plaintiffs Have Standing To Litigate Their Breach-Of-Contract Claims.

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) (applying Restatement (Second) of Contracts § 302 (1979)). Both tests are satisfied here. The agreement between the

NCAA and Penn State — as reflected in the NCAA rules — 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* Compl. ¶¶ 107, 116.

1. Count I: Paterno And Clemens Have Standing As Third-Party Beneficiaries.

The NCAA defendants concede that the NCAA and its member institutions intended to "bestow" third-party rights on "involved individuals." Mem. 21; *see also* Compl., Ex. A, R. 32.1.5. Indeed, as the 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* Compl. ¶¶ 33–47; *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.

Paterno Was An "Involved Individual" Under The NCAA Rules. 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 (1) the consent decree did not sanction Paterno personally, and (2) Paterno

did not receive notice of any alleged NCAA rules violations before he died. *See* Mem. 25–26. These arguments are wrong and contrary to the NCAA rules. They also underscore how far the NCAA defendants will go to avoid being held accountable for their actions.

No one could read the consent decree and reasonably conclude that Paterno was not an "involved individual." He was a target of the decree and is named directly in it. And his alleged conduct formed part of the factual basis for the sanctions imposed.

There is no requirement in the NCAA rules that an individual be personally sanctioned to qualify as an "involved individual," and the NCAA defendants cite no such provision. Under the rules, an "involved individual" is anyone who has "significant involvement in alleged violations." Compl., Ex. A, R. 32.1.5. The rules plainly extend protections to individuals who are named in an investigation or otherwise accused of being involved in alleged violations. *See id.* R. 32.6.2. Indeed, the rules provide a litany of procedural rights and protections to "involved individuals" at the outset of an investigation, long before any sanctions are imposed. *See id.* R. 32.3.9.1.3, 32.3.10.2, 32.5.1(e), 32.6.2, 32.6.4, 32.6.6,32.6.7, 32.7.1. These provisions would be meaningless if, as the NCAA defendants contend, the rules protect only individuals who are ultimately sanctioned. *See, e.g., Gaffer Ins. Co. v. Discover Reinsurance Co.*, 2007 PA Super 339 ¶ 18, 936

A.2d 1109, 1115 (noting "basic principle of contract interpretation" that contract must be considered "as a whole" and every provision "give[n] effect").

In any event, there is no doubt that Paterno meets the definition of an "involved individual" under the rules. The decree's focus on Paterno was not a "mere reference," as the NCAA defendants assert. Mem. 29. To the contrary, the consent decree singled out Paterno and falsely accused him of horrific conduct, including "fail[ing] to protect against a child sexual predator harming children for over a decade," "repeatedly conceal[ing] critical facts relating to Sandusky's child abuse," and "essentially granting [Sandusky] license to bring boys to campus facilities for 'grooming' as targets for his assaults." Compl., Ex. B, at pp. 3–4. In addition, the consent decree stated that as a sanction, the NCAA would "vacate[] all of the wins of the Penn State football team from 1998 to 2011" and specifically noted that Paterno's "career record" would "reflect the vacated records." *Id.* at 5.

Under these facts, the NCAA's suggestion that the consent decree "did not impose any sanctions on Coach Paterno," Mem. 25, is deliberately obtuse. In the context of this lawsuit, it is irrelevant that the NCAA may not consider the penalties to be individual sanctions on the former head coach. The sanctions demonstrate that Paterno was sufficiently harmed by the NCAA's actions to confer standing on him to object. *See Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 204, 888 A.2d 655, 660 (2005); *cf.* Mem. 33. Vacating Paterno's

career record may well be the consequence of a broader institutional sanction, but it still carries individual consequences for the coach and his players.

More fundamentally, it is hard to fathom any sanction that could be more severe or personal than announcing to the world in a formal consent decree that a respected coach who dedicated his life to serving the community is guilty of the conduct described in the decree. *See generally Norton v. Glenn*, 580 Pa. 212, 229, 860 A.2d 48, 58 (2004) (noting that under Pennsylvania law "a person's interest in his or her reputation has been placed in the same category with life, liberty and property" (internal quotation marks omitted)). If Paterno does not have standing to object to the NCAA's violations of its own rules, then the NCAA rules and their professed commitment to fairness and proper procedures are a sham.

The NCAA defendants try to bootstrap their flagrant disregard for their own rules and procedures into an argument that Paterno is not an "involved individual" because he did not receive formal "notice" of any alleged rule violations. Of course he did not; the NCAA ignored its own rules, including the requirement that before undertaking an investigation — much less imposing sanctions — it must provide notice to individuals who are identified or suspected of being involved in alleged rules violations. *See* Compl., Ex. A, R. 32.1.5, 32.6.2, 32.10.1.2. The NCAA defendants cannot defeat *all* of the procedural protections the rules afford to involved individuals 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); *Clairton Slag, Inc. v. Dep't of Gen. Servs.*, 2 A.3d 765, 773 (Pa. Commw. 2010) (contracts should be interpreted to avoid absurdities).

It is likewise irrelevant that Paterno passed away before the NCAA imposed sanctions. 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). The NCAA had a duty to avoid inserting itself into a criminal matter and that duty was in no way affected by Paterno's death. 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. Moreover, had the NCAA initiated a proper investigation in November 2011, instead of improperly working with the Freeh firm, Paterno could have been available for the enforcement staff to interview (he passed away in January 2012).

Clemens Was An "Involved Individual" Under The NCAA Rules. The NCAA defendants also contend that Clemens was not an "involved individual" because he was not "referred to by name" in the consent decree and, therefore, was not subject to sanctions. Mem. 26–27. This argument fails because it also depends on the erroneous assertion that the NCAA rules protect only individuals who are actually sanctioned. As explained above, the rules are designed to protect anyone accused of being significantly involved in alleged rules violations.

The NCAA defendants do not deny that the consent decree names the Board of Trustees and accuses the Trustees 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. 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.

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 the "star running back of 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."). Nor does it matter that the consent decree does not "suggest that [Clemens] personally violated any NCAA rules," Mem. 26 — that only exposes the weakness of the NCAA defendants' position. If Clemens's conduct in 1998 and 2001 did not violate the NCAA rules, then nothing done in 1998 and 2001 by any member of the Board of Trustees violated the NCAA rules. And if that is so, there is no legal basis or factual support for the consent decree's "findings" of supposed rule violations, at least with respect to the Board of Trustees, which is one of the very things this lawsuit seeks to prove. *See* Compl. ¶¶ 90(b), 100.

Paterno and Clemens Are Entitled To Enforce The NCAA Rules. The NCAA defendants assert that Paterno and Clemens lack standing because they purportedly seek to enforce contractual provisions that were not created for their benefit. *See* Mem. 27. In particular, the NCAA defendants contend the complaint is insufficient because (1) it does not identify "any actual provision of the Constitution and Bylaws that" plaintiffs "seek to enforce"; (2) plaintiffs are complaining "about alleged incursions of Penn State's interest" and not their own; and (3) plaintiffs were not harmed by the NCAA's failure to identify them as

"involved individuals." *Id.* at 28–29. These arguments are insubstantial and collapse on inspection.

First, the complaint alleges at length which provisions of the NCAA rules were violated that plaintiffs seek to enforce. The specific contractual violations committed by the NCAA defendants are identified in paragraph 110 of the complaint and described in detail in paragraphs 19 through 47 and paragraphs 71 through 88. In short, plaintiffs allege that the NCAA defendants acted outside their lawful authority, failed to follow required procedures, and failed to afford plaintiffs the procedural protections to which they were entitled under the rules. *See generally* Compl. ¶ 110 (describing violations of, among others, Rules 1.3.2, 2.1.1, 2.8.2, 4.1.2(d)-(e), 10.1, 19.01.1, 19.02.2.2, 19.5.2, 19.5.2.1, 19.6, 32.10, 32.2.1.2., 32.2.2.1.2, 32.7.1.1, 32.7.1.4.1, 32.8.7.4.1, 32.8.8.3, 32.10.1.2, and 32.10.4.2).

To be sure, the complaint does not specifically cite the many rule provisions that were violated. But the NCAA defendants should be familiar with their own rules, which are attached to the complaint, and the complaint's allegations are more than sufficient to allow them to prepare a defense. *See Schofield,* 505 Pa. at 103, 477 A.2d at 477. The allegations are also more than sufficient to establish plaintiffs' right to seek redress for the NCAA defendants' contractual violations. *See Foflygen,* 420 Pa. Super. at 32, 615 A.2d at 1352 ("[a]ll material facts" and all

"reasonably deducible" inferences are "admitted as true" at the preliminary objection stage). Nothing more is required.

Second, under Pennsylvania law, "a third-party beneficiary's rights and limitations in a contract are the same as those of the original contracting parties." *Miller v. Allstate Ins.*, 2000 PA Super. 350 ¶ 14, 763 A.2d 401, 404 n.1. It is therefore not surprising that, in discussing the NCAA defendants' unlawful conduct, the complaint refers to Penn State. But that is a necessary consequence of how the NCAA defendants framed their consent decree. The decree imposed sanctions on the entire Penn State community based on the alleged conduct of Paterno and Clemens (as a member of the Board of Trustees). That does not mean, however, that plaintiffs are seeking redress for violations of *Penn State's* rights. To the contrary, each and every one of the breaches identified in paragraph 110 of the complaint infringed *plaintiffs'* rights. For example, if the NCAA could bypass the enforcement process by using the policy-making power of the Executive Committee and rely entirely on reports prepared by third parties, it would infringe involved individuals' rights to, among other things, receive a notice of allegations, have counsel present at all stages of the proceedings, and appeal any adverse findings. The right to have enforcement staff conduct a thorough investigation is as much the right of involved individuals as it is the institution's. As individuals who were named in the decree and falsely accused of serious misconduct, plaintiffs

are entitled to a hearing on the merits to show that the NCAA exceeded its proper authority, failed to follow required procedures, failed to afford plaintiffs fair procedures, and engaged in other misconduct.

Third, the notion that plaintiffs benefitted from not being identified as "involved individuals" is nonsense. *See* Mem. 28–29. As explained above, there can be no doubt that the consent decree accuses Paterno and Clemens of horrific conduct, and relies on those (false) accusations as a basis for imposing sanctions. In these circumstances, the NCAA defendants denied Paterno and Clemens the process they were due under the NCAA rules by pretending that they were not "involved individuals." As a result, plaintiffs were seriously harmed. Compl. ¶ 103(a), (c).

2. Count II: Coaches, Student-Athletes, And Administrators Have Standing As Third-Party Beneficiaries.

The NCAA defendants contend that the plaintiffs in Count II — coaches, student-athletes, and administrators — lack standing because only "involved individuals" have third-party rights under the contract. *See* Mem. 21–23, 30–32. But the rules make clear that both the NCAA and its member institutions recognized that "provid[ing] fairness to *uninvolved* student-athletes, coaches, administrators" is "*essential* to the conduct of a viable and effective enforcement program." Compl., Ex. A, R. 19.01.1 (emphasis added); *see also id.* ¶¶ 24, 115. This provision would be mere surplusage if it were as empty as the NCAA

defendants now suggest. *See Boyd v. Rockwood Area Sch. Dist.*, 907 A.2d 1157, 1167 n.17 (Pa. Commw. Ct. 2006) ("no word in a contract is to be treated as surplusage or redundant if any reasonable meaning consistent with the other parts can be given to it") (quoting *Morris v. American Liab. & Surety Co.*, 322 Pa. 91, 94, 185 A. 201, 203 (1936)). Contracts should be interpreted to give effect to every provision. *See Bethlehem Steel Corp. v. MATX, Inc.*, 703 A.2d 39, 42 (Pa. Super. Ct. 1997). The rules' provisions make clear that, when the NCAA and its member institutions agreed to the rules, they intended to provide a direct (and not merely incidental) benefit to these enumerated types of "uninvolved" but directly affected individuals.

Significantly, the plaintiffs in Count II are not asking for all of the same procedural protections afforded to "involved individuals." Compl. ¶ 119; *cf.* Mem. 32. Instead, they seek to have the Court recognize that by interfering with a criminal matter outside its proper jurisdiction and by flagrantly disregarding its own rules, the NCAA has violated its obligation to "provide fairness" to "uninvolved student-athletes, coaches," and "administrators." Compl. ¶ 47; *id.*, Ex. A, R. 19.01.1. Dr. Ray's declaration that he "did not . . . even consider [p]laintiffs during the sanctioning process" is a candid admission that the fair procedures the NCAA and its members promised to provide these parties were ignored. *Compare* Ray Decl. ¶ 8, *with* Compl., Ex. A, R. 19.01.1 (providing

fairness to "uninvolved student-athletes, coaches, [and] administrators" is "an important consideration in imposing penalties").

The NCAA defendants argue that recognizing a cause of action would open the courthouse doors to every person who wishes to "challenge the severity of NCAA sanctions." Mem. 31. Not so. The NCAA itself stated in the consent decree that "the circumstances involved in the Penn State matter are, in many respects, unlike any matter encountered by the NCAA in the past" and that it is doubtful "that a similar circumstance would arise on any other campus in the future." Compl., Ex. B, at p. 1. Moreover, plaintiffs are not challenging the "severity" of the sanctions; instead, they are challenging the NCAA defendants' authority to impose *any* sanction in violation of the NCAA rules and in a matter entirely outside the NCAA's sphere of authority.

The plaintiffs' standing in this unprecedented case is a result of the NCAA's decision to stray far outside the scope of its lawful authority and to issue a consent decree that indicts "the entire Penn State community," including plaintiffs. Compl. ¶ 94; *id.*, Ex. B, at p. 4. The NCAA not only sought to penalize Penn State for alleged rules violations, but also imposed sanctions that directly affected plaintiffs and were expressly designed to "change the culture" of the entire Penn State community. *Id.* In doing so, the NCAA painted with a broad brush, claiming that "it was the fear of or deference to the omnipotent football program that enabled a

sexual predator to attract and abuse his victims" and that "the reverence for Penn State football permeated every level of the University community." *Id.*, Ex. B, at p. 4. In short, plaintiffs are not in the position of just any member of the public. They are parties who were specifically intended to receive rights under the NCAA rules. They were directly affected by the consent decree, which the NCAA imposed in an effort to alter their alleged conduct.

The NCAA defendants assert that no court has ever recognized a right to enforce the rules' "fairness" provision. Mem. 31–32. If that is true, however, it is only because the NCAA has never before acted so egregiously in contravention of its own rules, or sought to condemn so large a group. Compl. ¶¶ 1, 51, 71–72, 92, 95. The NCAA defendants are, in any event, wrong to suggest that "prior courts have held" that "the NCAA and its member institutions did not intend the 'fairness' provision to confer third-party beneficiary status on individuals like Plaintiffs." Mem. 32. The one case they cite — *Knelman v. Middlebury College* — stated only that no court had ever decided the issue. 898 F. Supp. 2d 697, 715 (D. Vt. 2012). Its subsequent discussion was not a holding, but dicta: The court recognized that it "need not decide the [standing] issue," because it held that, under Vermont law, the provisions the plaintiff sought to enforce were insufficient to show a breach of "specific and concrete" promises. *Id.* at 715–16. Here, in

contrast, the rules plaintiffs seek to enforce are both specific and concrete. *Cf.* Compl. ¶¶ 25–47.

More than one court has recognized third-party beneficiary status under the NCAA rules. In *Bloom v. NCAA*, for example, which the NCAA asserts is "materially indistinguishable" from this case, Mem. 18, the court provided a thorough analysis of third-party beneficiary standing to sue under the NCAA rules. 93 P.3d at 623–24. As *Bloom* explained, "the NCAA's constitution, bylaws, and regulations evidence a clear intent to benefit student-athletes." *Id.*

Other courts have likewise recognized that private individuals have standing to enforce an association's bylaws. *See Oliver v. NCAA*, 155 Ohio Misc. 2d 17, 920 N.E.2d 203 (Ct. C.P. 2009) (opinion vacated after settlement) (student was third-party beneficiary of NCAA rules); *Tiffany ex rel. Tiffany v. Arizona Interscholastic Ass'n, Inc.*, 151 Ariz. 134, 726 P.2d 231 (Ct. App. 1986) (administrative writ of mandamus proper to enforce association's rules); *Rose v. Giamatti*, No. A8905178, 1989 WL 111447 (Ohio Ct. C.P. June 26, 1989) (baseball player had substantial likelihood of success on the merits of claim that commissioner violated the league's rules). As the NCAA itself has previously acknowledged, courts are entitled to intervene when "the action by the association is in violation of its own bylaws and constitution." *California State Univ. v. NCAA*, 47 Cal. App. 3d 533, 542 (1975). Pennsylvania law is in accord. *See Boyle*

ex rel. Boyle v. Pa. Interscholastic Athletic Ass'n, Inc., 676 A.2d 695, 700–02 (Pa. Commw. Ct. 1996) (recognizing court's power to review athletic association's decisions when the association "seemingly ignored" its own bylaws), *abrogated on other grounds by Buffalo Twp. v. Jones*, 571 Pa. 637, 813 A.2d 659 (2002); *Pa. Interscholastic Athletic Ass'n, Inc. v. Geisinger*, 81 Pa. Commw. 421, 427, 474 A.2d 62, 65 (1984) (justiciable and "substantial" legal question existed as to whether athletic association had conducted a "thorough investigation" as required by its bylaws).

3. Plaintiffs Are Entitled To Seek Declaratory Relief.

The NCAA defendants also contend that plaintiffs lack "standing" to seek a declaration that the consent decree is void ab initio. Mem. 32–35. But this is not really an argument about plaintiffs' standing — *i.e.*, whether plaintiffs have pled an actual case or controversy, *see Pittsburgh Palisades Park*, 585 Pa. at 204, 888 A.2d at 660 — but rather an argument about whether plaintiffs are entitled to seek one of the remedies they have requested in their complaint. Because the NCAA defendants have not demonstrated that "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, their request to strike this portion of the complaint should be denied.

The NCAA defendants first assert that plaintiffs have not identified any direct, immediate, or substantial injury resulting from the consent decree. *See*

Mem. 33. But that bald assertion cannot be squared with either the complaint's well-pleaded allegations or the consent decree's plain terms. Plaintiffs have suffered obvious injuries from being falsely accused of "fail[ing] to protect" children "against a child sexual predator," "repeatedly conceal[ing] critical facts relating to Sandusky's child abuse," and taking "actions and inactions . . . that allowed Sandusky's serial child sexual abuse" to happen. Compl., Ex. B, at pp. 1–3. Moreover, as members of the Board of Trustees responsible for overseeing the University's administration, Messrs. McCombie, Lubrano, Clemens, and Taliaferro have an interest in the decree's post-season ban, $60 million fine, and the other harsh sanctions imposed. *See id.* ¶ 103(c); Pennsylvania State University, Standing Order V(1)(d)(iii) (members of board of trustees are required to fulfill all financial obligations of the University), V(e) (board of trustees "is the final repository of all legal responsibility and authority to govern the University"), *available at* http://www.psu.edu/trustees/pdf/standingorders.pdf. And all plaintiffs are directly and substantially injured by the consent decree's accusation that they created a "culture" that held the football program "in higher esteem" than "the values of human decency." Compl., Ex. B, at p. 4; *see also id.* ¶ 94. Plaintiffs have a real, immediate, and concrete individualized interest in having this baseless document declared void and lacking in any legal effect.

The NCAA defendants' argument is based on its unsupported contention that plaintiffs' interests "are no different than the 'common interest' of all supporters of Penn State football." Mem. 34. But that is not true. Not all supporters of Penn State football were the target of the decree or part of the "culture" the decree seeks to change. In any event, the relevant inquiry is whether plaintiffs have a common interest that surpasses that of "all citizens" — not just a sub-group of citizens such as "supporters of Penn State football." *See Pittsburgh Palisades Park*, 585 Pa. at 204, 888 A.2d at 660; Mem. 33. As members of the Penn State community, plaintiffs are similarly situated to other sub-groups of citizens Pennsylvania courts have found to have standing. *See, e.g., S. Whitehall Twp. Police Serv. v. S. Whitehall Twp.*, 521 Pa. 82, 88, 555 A.2d 793, 796 (1989) (representative of group of "uniformed [police] officers" had standing); *Oliviero v. Diven*, 908 A.2d 933, 936-37 & n.2 (Pa. Commw. Ct. 2006) (plaintiffs had standing as "registered, Republican electors in the 22nd Legislative District").

The NCAA defendants further contend that the complaint provides no grounds for voiding the consent decree. *See* Mem. 34. But that too is false. The complaint states that there is no provision of the NCAA rules granting the NCAA defendants authority to investigate criminal matters, and the complaint's allegations explain, at length, why they lacked authority to impose the consent

decree. *See* Compl. ¶¶ 2–6, 22–47, 51–55, 58, 60–61, 66, 71–100. The NCAA defendants do not point to any provision that grants them such authority.

It is well settled that a contract is void if it is executed by "parties lacking authority to contract." *Colarossi v. Faber*, 359 Pa. Super. 259, 268, 518 A.2d 1224, 1228–29 (1986); *Clairton Slag*, 2 A.3d at 782 (citing cases); *cf. Bedell*, 104 Pa. Super. at 153 ("Contracts ultra vires of the corporation making them are . . . 'wholly void and of no effect'"); *Baltimore & Ohio R.R. Co.*, 56 F.2d at 802 ("[a]ll contracts" made by a corporation that exceed "the scope of [its] powers" enumerated in its charter "are unlawful and void"). In *Philadelphia Workingmen's Savings Loan & Building Ass'n v. Wurzel*, for example, the Pennsylvania Supreme Court voided a contract between an association and its debtor where the association "lacked authority to release" the debtor because, among other things, the association had not followed its own bylaws as to the required number of directors at the relevant meeting. 355 Pa. 86, 90–91, 49 A.2d 55, 57 (1946); *see also Gordon v. Tomei*, 144 Pa. Super. 449, 460, 19 A.2d 588, 593 (1941) (recognizing that authority of the "officers of the association, as agents of the entire membership," is restricted by the association's bylaws).

The law is also settled that the by-laws and rules of an association are "essentially legislative in character," *Gordon*, 144 Pa. Super. at 457, 19 A.2d at 592, and "constitute the compact which binds its members and *the law* by which

they are to be governed." *Linaka v. Fireman's Pension Fund*, 149 Pa. Super. 458, 462, 27 A.2d 501, 503 (1942) (emphasis added). As the NCAA defendants admit, a contract that violates that law is void. Mem. 34.

Moreover, the complaint alleges that the NCAA imposed the consent decree through "impermissible coercion," which provides independent grounds for declaring it void. *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.2d 304, 305 (1932) (contract is "void ab initio" if secured through duress of "an extreme nature"); *see* Compl. ¶¶ 5, 38, 73–76, 80–83, 89, 110. 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 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* Compl. ¶¶ 38, 89, 110. 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 . . . well, to me it was just unthinkable." Don Van Natta Jr., *On Death's Door*, ESPN Magazine, Aug. 2, 2012, *available at* 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.

II. Plaintiffs Have Adequately Stated Claims For Relief.

The NCAA defendants challenge each of plaintiffs' claims. But they have not demonstrated that "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. Because

plaintiffs have not clearly failed to state a claim — quite the opposite — the defendants' objections should be overruled. *Id.*

A. The Complaint Adequately States Claims For Breach Of Contract And Breach Of The Duty Of Good Faith And Fair Dealing.

Apart from challenging plaintiffs' standing, the NCAA defendants do not advance any meaningful challenge to the sufficiency of plaintiffs' allegations supporting their breach-of-contract claims in Counts I and II. Their only argument appears in a single, conclusory assertion that plaintiffs have not pointed to "any actual provision of the Constitution or Bylaws that they seek to enforce." Mem. 28. As described above, this assertion cannot be reconciled with the complaint's well-pleaded allegations describing the NCAA rules and identifying how they were violated by the NCAA defendants. Those allegations are more than sufficient to state a claim for breach of contract. *See Foflygen*, 420 Pa. Super. at 32, 615 A.2d at 1352.

B. The Complaint Adequately States A Claim For Intentional Interference With Prospective Contractual And Business Relations.

Plaintiffs William ("Bill") Kenney and Joseph V. ("Jay") Paterno are former assistant football coaches at Penn State University. Kenney coached at Penn State for 23 years, primarily as an offensive line coach, and Jay Paterno coached at Penn State for 16 years, mentoring quarterbacks. Until the NCAA's consent decree, both coaches were in the prime of their careers and were sought after by other

colleges, universities, and professional football programs. *See* Compl. ¶¶ 103(b), 123, 128.

The complaint alleges that, as a result of statements purposefully included in the consent decree, Kenney and Jay Paterno "suffered damage to their reputation and standing as football coaches, and have been unable to secure comparable employment despite their qualifications and the existence of employers who would otherwise be willing to hire them." Compl. ¶ 103(b). The NCAA defendants made these factually unsupported statements "[w]ith knowledge of Plaintiffs' future prospective employment, business and economic opportunities" and "in order to harm Plaintiffs and interfere with their contractual relations." *Id.* ¶ 124. Moreover, the NCAA defendants lacked any justification for their actions or, alternatively, they abused any privilege they may have had to take those actions. *Id.* ¶ 125. This conduct was "malicious and outrageous and showed a reckless disregard for Plaintiffs' rights." *Id.* ¶ 127.

These allegations are more than sufficient to state a claim for relief and to apprise the NCAA defendants of the essential factual basis for the claim. *See Sevin*, 417 Pa. Super. at 7, 611 A.2d at 1235. The NCAA defendants nonetheless contend the complaint's allegations are inadequate for three reasons.

First, the NCAA defendants argue that plaintiffs are required to identify a specific contract with which they have interfered. *See* Mem. 64. But the case on

which the NCAA defendants largely rely addresses a claim for interference with *current* contractual relations. *See Al Hamilton Contracting Co. v. Cowder*, 434 Pa. Super. 491, 497, 644 A.2d 188, 191 (1994). In contrast, "prospective contractual relations are, by definition, not as susceptible of definite, exacting identification as is the case with an existing contract with a specific person." *Kelly-Springfield Tire Co. v. D'Ambro*, 408 Pa. Super. 301, 308, 596 A.2d 867, 871 (1991). A prospective contractual relation is a reasonable probability of a contract, *i.e.* "something less than a contractual right" but "something more than a mere hope." *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994) (quoting *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 209, 412 A.2d 466, 471 (1979)). "Neither case law nor Section 766B of the Restatement (Second) of Torts, which purports to define the tort of interference with a prospective contractual relation, requires an averment that the tortfeasor have knowledge of a specific third person whom its conduct prevented from entering a business relation with the plaintiff." *Kelly-Springfield Tire*, 408 Pa. Super. at 309, 596 A.2d 867, 871 (citing *Breslin v. Vornado*, 559 F. Supp. 187 (E.D. Pa. 1983)).

Courts have thus held that as long as each element of the intentional tort claim appears in the complaint, and despite the fact that the alleged prospective contractual relation or business expectancy is "relatively vague," the claim should not be dismissed. *See Dunlap v. Peco Energy Co.*, No. 96-4326, 1996 WL 617777,

at *5, 1996 U.S. Dist. LEXIS 15922, at *17 (E.D. Pa. Oct. 23, 1996), *aff'd* 159 F.3d 1350 (3d Cir. 1998) (unpublished table decision); *see also PT Group Acquisition, LLC v. Schmac*, No. 5044 of 2008, 2008 Pa. Dist. & Cnty. Dec. LEXIS 221, at *10–11 (Nov. 12, 2008); *Hydrair Inc. v. National Envtl. Balancing Bureau*, 52 Pa. D. & C.4th 57, 2001 WL 1855055, at *6 (2001); *Kelly-Springfield Tire*, 408 Pa. Super. at 309, 596 A.2d at 871 (nothing "requires an averment that the tortfeasor have knowledge of a specific third person whom its conduct prevented from entering a business relation with the plaintiff"). That is especially true in the context of this case. The NCAA defendants run the big business of college sports and have a full understanding of the career tracks of and employment opportunities for experienced football coaches from respected programs. They knew or should have known that their actions were substantially certain to result in plaintiffs' contractual opportunities and business relations being negatively and dramatically affected.[2]

[2] For example, in more typical times without the looming omnipresence of the consent decree, many coaches accepted other prestigious positions after coaching at Penn State: Quarterbacks Coach Jim Caldwell left to become the Head Coach at Wake Forest University (January 1993) (Caldwell ultimately became the Head Coach of the Indianapolis Colts and won a Super Bowl victory as Offensive Coordinator of the Baltimore Ravens); Offensive Coordinator Fran Ganter was offered the position of Head Coach at Michigan State University (but turned it down) (December 1994); Assistant Coach Craig Cirbus left to become Head Coach at the University of Buffalo (January 1995); Defensive Backs Coach Greg Schiano left to become an Assistant Coach with the Chicago Bears (December 1995); Receivers Coach Ken Jackson left to become an Assistant Coach with the Pittsburgh Steelers (February 2001); Linebackers Coach Al Golden left to become the Defensive Coordinator at the University of Virginia (February 2001); and

Second, the NCAA defendants assert that the complaint fails to plead "that the NCAA *intended* to interfere with any contract or prospective contract" and does "not allege[] *any action at all* by the NCAA." Mem. 66 (emphasis in original). The Court need not — and should not — linger long on this empty assertion. The complaint describes in detail the specific actions taken by the NCAA that were unlawful and contrary to its own rules. *See* Compl. ¶¶ 72–88, 90–100, 103; *see also id.* at ¶ 122 (incorporating paragraphs 1 through 104 as if fully set forth herein). It also alleges that the NCAA defendants' actions were "purposeful" and "malicious," and taken "in order to harm Plaintiffs and interfere with their contractual relations." *Id.* ¶¶ 124–27.

Under Pennsylvania law, "intent extends both to the desired consequences and the consequences substantially certain to follow from the act." *Field v. Phila. Elec. Co.*, 388 Pa. Super. 400, 417, 565 A.2d 1170, 1178 (1989); *see also Robbins v. Cumberland Cnty. Children & Youth Servs.*, 802 A.2d 1239, 1253 (Pa. Commw. Ct. 2002) ("To prove willful misconduct, a plaintiff must establish that the actor desired to bring about the result that followed, or at least it was substantially certain to follow, *i.e.*, specific intent."); Restatement (Second) of Torts § 8A (intent means "that the actor desires to cause [the] consequences of his act, or that he

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Defensive Backs Coach Brian Norwood left to become Defensive Coordinator at Baylor University (January 2008). Similar opportunities have not been available to plaintiffs.

believes that the consequences are substantially certain to result from it"). When the NCAA defendants purposefully, and without any reasonable indication that the assertions were true, condemned certain football coaches for purportedly "ignor[ing] red flags" regarding Sandusky and enabling horrific child abuse, it was "substantially certain" that their actions would significantly impact the coaches' ability to secure comparable positions in their chosen profession. Compl. ¶¶ 123–24.

In suggesting that the facts are not sufficient to infer specific intent, the NCAA defendants minimize the seriousness of accusing all Penn State football coaches of being part of a culture that supposedly allowed child abuse, and ignore the obvious repercussions of stitching a scarlet letter on coaches they labeled complicit in jettisoning the "values of human decency." Compl., Ex. B, at p. 4; *see* Mem. 69 (conceding that society "universally condemns" child abuse). It is more than reasonable to infer that, given the NCAA's monopoly over the world of college football, the NCAA defendants understood the impact this would have on plaintiffs. *See* Compl. ¶ 13. Indeed, unlike in the cases cited by the NCAA defendants, the NCAA here undertook an express obligation — indeed, "mission" — under its rules to treat fairly and to consider the impact of its actions on uninvolved coaches, like Kenney and Jay Paterno. *See id.* ¶ 24; *see also id.*, Ex. A, R. 19.01.

Third, the NCAA defendants argue that their actions were "privileged" and thus not actionable. Mem. 68. But "[w]hat is or is not privileged conduct in a given situation is not susceptible of precise definition." *Glenn v. Point Park Coll.*, 441 Pa. 474, 482, 272 A.2d 895, 899 (1971). Whether a defendant is privileged or justified in a particular course of conduct is defined by "'the rules of the game,' or the 'area of socially acceptable conduct which the law regards as privileged.'" *KBT Corp., Inc. v. Ceridian Corp.*, 966 F. Supp. 369, 376 (E.D. Pa 1997).

While the NCAA defendants can assert until they are blue in the face that they played by the "rules of the game," the complaint's allegations tell a very different story and negate any inference in defendants' favor. *Cf. Martin v. Dep't of Transp.*, 124 Pa. Commw. 625, 629, 556 A.2d 969, 971 (1989) ("a demurrer cannot aver the existence of facts not apparent from the face of the challenged pleading"). As the 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, having full knowledge that in doing so they would be causing 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* Compl. ¶¶ 13, 123–24. As the complaint alleges, these actions were taken not for any proper purpose, but because the NCAA defendants wanted to "deflect attention

from mounting criticisms," "shore up the NCAA's faltering reputation," "broaden the NCAA's authority beyond its defined limits," and "impose enormous monetary sanctions" for the NCAA's own benefit. *See id.* ¶ 72; *see also id.* ¶ 68 (NCAA's decision driven by improper monetary and political considerations). Accepting these allegations as true, the NCAA defendants are not entitled to any privilege or immunity for their actions under Pennsylvania law.

C. The Complaint Adequately States A Claim For Commercial Disparagement.

Contrary to the NCAA defendants' assertions, the complaint adequately states a claim for commercial disparagement. It is obvious that labeling a revered coach in a formal consent decree as someone who "repeatedly concealed" child abuse would cause concrete harms to the commercial interests of his estate. The NCAA defendants' attempts to avoid this commonsense conclusion are unavailing.

1. The Complaint Adequately Identifies A Concrete Commercial Interest.

The NCAA defendants argue that plaintiffs have not identified a "concrete commercial interest" necessary to state a claim for commercial disparagement. Mem. 57–58. In fact, the complaint alleges that "Joe Paterno or his estate possessed a property interest in his name and reputation, and there was a readily available, valuable commercial market concerning Joe Paterno's commercial property," and that the NCAA defendants published statements "regarding Joe

Paterno's character and conduct as Head Coach" that therefore "concern[ed] the business and property of his estate." Compl. ¶¶ 131–32.

The NCAA defendants acknowledge the complaint's allegations, but dismiss them as not "specific" enough. Mem. 58. According to the NCAA defendants, the claim is "nothing more than a failed defamation claim." *Id.* at 57. To be sure, a freestanding claim of injury to reputation is a defamation claim, not a commercial disparagement claim. *Id.* at 56. But if that reputation is commercialized such that it is a source of pecuniary gain to the plaintiff, a defamation claim will *become* a commercial disparagement claim. This principle is best illustrated by defendants' own case, *Menefee v. CBS*, 458 Pa. 46, 329 A.2d 216 (1974).

In *Menefee*, "a successful radio personality" was able to bring a claim for commercial disparagement on the basis of "a statement that his program could no longer attract satisfactory ratings." *Id.* 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.* The case here is no different: Paterno had a highly successful coaching career and was a hugely popular figure in the world of college football and beyond. The estate, which now owns that property interest, has suffered pecuniary loss because of the NCAA defendants' statements disparaging that career. Compl. ¶¶ 103(a), 131–36. The Supreme Court in *Menefee* did not state that a plaintiff must have taken

"steps" to "exploit that market," or anything else defendants argue is deficient about the complaint here. *Cf.* Mem. 58. It simply 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; *see also 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"); *see also* 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 contrast to *Menefee*, defendants' other cases do not involve remotely similar facts. Most of them are not even about whether the stated commercial interest is sufficiently specific to state a claim. *See Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 570 Pa. 242, 247, 809 A.2d 243, 246 (2002) (statute of limitations question); *Untracht v. Fry*, No. 1683, 2010 Phila. Ct. Com. Pl. LEXIS 77, at *13 (Apr. 7) (holding that statements of opinion were not actionable), *aff'd*, 22 A.3d 1076 (Pa. Super. Ct. 2010); *Ashoff v. Gobel*, 23 Pa. D. & C.4th 300, 306 (holding that plaintiff did not allege that any particular property lost value), *aff'd*, 450 Pa. Super. 706, 676 A.2d 276 (1995). The defendants' lone case that discusses a "commercial interest" does not identify the commercial interest at stake, much

less discuss why it was insufficient to support a claim of commercial disparagement. *See Abbadon Corp. v. Crozer-Keystone Health Sys.*, No. 4415, 2009 Phila. Ct. Com. Pl. LEXIS 233, at *13 (Nov. 13, 2009) (holding that statements implying plaintiff was involved in organized crime were not actionable). The case is neither controlling nor as persuasive as *Menefee*.

2. The Complaint Adequately Pleads Pecuniary Loss.

The NCAA defendants next argue that plaintiffs must plead pecuniary loss "with specificity" and have failed to satisfy that requirement because (1) the complaint does not list the names of lost customers, (2) the complaint does not provide a plausible basis for attributing financial damage to the consent decree, and (3) Coach Paterno died before the NCAA released its consent decree. Mem. 58–62. These arguments are all meritless.

Plaintiffs Are Not Required To List Specific Lost Customers. While some cases have required plaintiffs to list the names of lost customers and account for the exact amount of money lost, *see* Mem. 58, there are two important exceptions to this rule that apply here: *First*, a plaintiff need not prove "specific" loss if the statements were "widely disseminated" and, as a result, the circumstances render it infeasible to identify specific customers who were negatively affected. *Menefee*, 458 Pa. at 54–55, 329 A.2d at 220–21 (citing Restatement of Torts § 633 cmt. f); *see also* Restatement (Second) of Torts § 633(2)(b) & cmt. h. *Second*, as in the

defamation context, courts have recognized that the requirement to plead and prove special damages for a commercial disparagement claim should be relaxed when a plaintiff alleges the existence of statements that are libel per se. *See, e.g.*, *Bro-Tech Corp. v. Thermax, Inc.*, 651 F. Supp. 2d 378, 416 (E.D. Pa. 2009); *Testing Sys., Inc. v. Magnaflux Corp.*, 251 F. Supp. 286, 290–91 (E.D. Pa. 1966) (citing *Cosgrove Studio & Camera Shop v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962)). A statement is libel per se if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Cosgrove*, 408 Pa. at 318, 182 A.2d at 753 (quoting Restatement of Torts § 559); *see also Walker v. Grand Cent. Sanitation, Inc.*, 430 Pa. Super 236, 241–42, 634 A.2d 237, 245–46 (1993) (citing Restatement (Second) of Torts § 573).

Both exceptions apply with full force here. There is no dispute that the consent decree was widely disseminated, rendering it both unnecessary and infeasible for the estate to prove which specific customers were negatively affected. Compl. ¶ 134. Moreover, as the complaint recites, "[t]he statements in the Consent Decree regarding Joe Paterno's character and conduct were libel per se, because they imputed dishonest conduct to Joe Paterno." *Id.* ¶ 133. This allegation is amply supported by the facts alleged in the complaint and the statements in the consent decree. The NCAA stated that Paterno, in the course of

his professional duties, covered up evidence of a child predator because he was concerned about a negative effect on the football program. *See id.* ¶¶ 56, 58–60, 90(a), 93–94, 103(a), 104. These statements are libel per se. *Cf. Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 496 n.24 (E.D. Pa. 2010) (statements that individuals among the school leadership were complicit in child abuse at the school involved the individuals' "trade or profession" and constituted defamation per se). There is accordingly no need for plaintiffs to plead special damages.

Plaintiffs Have Adequately Pleaded Causation. The NCAA defendants next argue that plaintiffs cannot show that any damage was caused by the consent decree because the Freeh Report circulated the same or similar disparaging statements. Mem. 59–61. The NCAA defendants thus proceed on the assumption that plaintiffs must plead in their complaint not only that the NCAA defendants were a proximate cause of the loss, but also that their statements were the *only* cause. *Id.* at 60–61.

That is not required under Pennsylvania law. The *Menefee v. CBS* case explains why the complaint sufficiently alleges causation. *Menefee* held that a "plaintiff must show that he suffered a direct pecuniary loss as the result of this disparagement," and adopted the Restatement test for determining causation: "The [disparagement] causes financial loss resulting from the impairment of their vendibility if the [disparagement] is *a substantial factor* in determining a third

person not to buy or lease the thing disparaged." 458 Pa. at 54, 329 A.2d at 220 (quoting Restatement of Torts § 632) (emphasis added). As the Second Restatement explains, "[i]t is enough that the disparagement *is a factor* in determining [the putative customer's] decision, even though he is influenced by other factors without which he would not decide to act as he does." Restatement (Second) of Torts § 632 cmt. c (emphasis added).

Contrary to the NCAA defendants' assertions, courts have overruled preliminary objections and held that a simple allegation of "causation of pecuniary loss" is sufficient. *See, e.g.*, *Phillips v. Selig*, No. 1550, 2001 WL 1807951, at *7, 2001 Phila. Ct. Com. Pl. LEXIS 52, at *26 (Pa. Ct. C.P. Sept. 19, 2001) (finding allegation that "the defendants published the statements with the intent to damage the plaintiffs' pecuniary relationship with [their client] and that the publications did in fact cause the plaintiffs to lose the pecuniary value of their relationship with [their client]" sufficient to state a claim); *Watson v. Abington Twp.*, No. 01-cv-5501, 2002 WL 32351171, at *8, 2002 U.S. Dist. LEXIS 16300, at *23–25 (E.D. Pa. Aug. 15, 2002) (similar holding under federal pleading standards).

Here, the mere fact that the Freeh Report published similar defamatory 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. Indeed, the complaint alleges that the NCAA conspired

with the Freeh firm, *see* Compl. ¶¶ 74, 148–53, and 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"). Moreover, the complaint demonstrates that defendants have a substantial influence on college football as a result of the NCAA's status as a monopolist. Compl. ¶ 13. Louis Freeh, by contrast, is a private party with no control over college football. *Id.* ¶ 50.

Paterno's Death Is Irrelevant To Commercial Disparagement. The NCAA defendants attempt to construct an argument that because Paterno died his commercial property cannot be subject to disparagement. Mem. 61–62. Yet again, *Menefee* 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. at 52, 329 A.2d at 219.

There is nothing to indicate that this 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 point to a section in *Menefee*

quoting the Restatement to suggest that plaintiffs must show they "would 'have found a purchaser'" of their services but for the disparagement. Mem. 62 (quoting *Menefee*, 458 Pa. at 54–55)). But there is nothing in that phrase, or the context in which it is used, that requires a plaintiff to be living to show that potential customers would have bought certain goods but for the disparaging statements. The theory defies reality and common sense. That Paterno is deceased, for instance, does not mean that college football fans cannot still purchase footballs that were signed by him. But they are less likely to do so after the NCAA defendants' publication of the disparaging and baseless statements made in the consent decree. Compl. ¶¶ 130–38.

3. The Disparaging Statements Are Actionable.

The NCAA defendants contend that their disparaging statements are "opinions" and therefore not actionable for the same reasons they contend that the complaint does not adequately state a claim for defamation. For reasons explained below, these arguments are also meritless. The NCAA defendants have failed to demonstrate that, accepting the pleaded allegations as true, plaintiffs are not entitled to relief.

D. The Complaint Adequately States A Claim For Defamation.

The NCAA defendants argue that (1) the statements in the consent decree cannot reasonably be understood to refer to plaintiffs; (2) the statements are

protected expressions of opinion; and (3) a more exacting pleading standard of actual malice is required when the subject of defamatory statements is a public figure. *Cf. Smith v. Wagner*, 403 Pa. Super. 316, 321, 588 A.2d 1308, 1311 (1991) (listing elements of a defamation claim). None of these arguments has merit.

1. The Statements Made By The NCAA Defendants Are Reasonably Understood As Referring To Plaintiffs.

The NCAA defendants first contend that the defamatory statements in the consent decree do not mention plaintiffs by name and could not reasonably be interpreted as referring to them. Mem. 37–43. In support, the NCAA defendants ask the Court to assume that "the Board of Trustees," "coaches," members of the "football program," and "administrators" are such nebulous groups that no person could reasonably tie statements defaming them to individual plaintiffs. But that assertion is belied by defendants' own characterization of plaintiffs as public figures who were well-known and highly visible *precisely because of their membership in such groups.* The NCAA defendants cannot cast aspersions on defined groups of people — the members of which are well known and easily identifiable — and then contend that merely because they did not identify any individual by name they are shielded from liability.

To determine whether a defamatory statement applies to a plaintiff, a court must determine whether it "may reasonably be understood as referring to the plaintiff." *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 (E.D. Pa. 1983)

(citing *Farrell v. Triangle Publ'ns, Inc.*, 399 Pa. 102, 159 A.2d 734 (1960)). The law does not require that a plaintiff be specifically named in an allegedly defamatory statement if, by description or circumstances, it tends to identify the plaintiff as its object. *See Cosgrove*, 408 Pa. 314, 182 A.2d 751. Moreover, whether the publisher of the defamatory statement intended the communication to apply to a specific plaintiff is immaterial. *See Zerpol Corp.*, 561 F. Supp. at 410 (citing *Purcell v. Westinghouse Broad. Co.*, 411 Pa. 167, 180, 191 A.2d 662, 669 (1963) ("[I]f one hurls defamatory epithets in a manner to strike one to whom they seem, because of fortuitous circumstances, peculiarly to fit, he is liable as much as if he had aimed his remarks precisely at that person.")). Where individual plaintiffs are not specifically named, the question is whether "the circumstances surrounding their publication or the descriptions used therein must, in the first instance, tend to identify [the plaintiff]." *Id.* at 412. The initial determination for the court is only whether "the defamatory publication can reasonably be interpreted as referring to a particular complainant," while "whether recipients did so conclude is for a jury to determine." *Farrell*, 399 Pa. at 106, 159 A.2d at 737.

The NCAA defendants quote *Farrell* in an attempt to liken plaintiffs to members of "a class or group whose membership is so numerous that no one individual member can reasonably be deemed an intended object." Mem. 38 (quoting *Farrell*, 399 Pa. at 109, 159 A.2d at 738–39). But the "class or group" to

which the *Farrell* court referred was an entire profession. The court thus explained that a particular lawyer, doctor, or minister would not be able to maintain a cause of action for statements defaming all lawyers, doctors, or ministers. *Farrell*, 399 Pa. at 104–05, 159 A.2d at 736–37. The court contrasted the members of an entire profession to the commissioners of a town council, whose identity could reasonably be known. *See id.* at 109, 159 A.2d at 738.

Pennsylvania courts have recognized that the size of a particular group is not dispositive when it is clear that recipients of a defamatory statement knew the plaintiff was a member of the group. "[G]roup libel is not a mere matter of numbers, but to the contrary, is a question of adequate identification." *O'Neill v. Motor Transp. Labor Relations, Inc.*, 41 Pa. D. & C.2d 242, 246 (1966). "If a defendant were to defame 500 individuals, each of whom was specifically named and identified, each of the 500 would undoubtedly have a cause of action for libel, since there could be no question but that each had been defamed." *Id.*; *see also Mzamane*, 693 F. Supp. 2d at 484, 495 (statements about the school's "leadership" could reasonably be understood to be about the plaintiff, even though she was only one of many who could have made up the amorphous group of "leaders" of the school).

Contrary to defendants' assertions, no court has said otherwise. *Cf.* Mem. 38. *Klauder v. Philadelphia Newspapers, Inc.* merely echoed the holding in

Ferrell that slandering an entire profession is not adequate to support a claim by members of that profession. 66 Pa. D. & C.2d 271, 275 (1973) ("While the articles at issue contain numerous references to policemen in general, there is no allusion, however obscure, to any of the six named [policemen] plaintiffs."). To the extent *Klauder* quoted approvingly from a treatise opining that members of groups larger than twenty-five persons cannot bring a defamation claim, it is in direct conflict with *O'Neill*. *See id.* at 277–78.

In any event, it is clear that, even under *Klauder*, the defamatory statements here have a sufficient "nexus" to individual plaintiffs. *Cf. id.* at 275. The NCAA defendants distort the complaint's allegations to suggest that it is premised on the notion that "the [entire] Penn State community between 1998 and 2011" was the "object of the communication." *Cf.* Mem. 40. In fact, the complaint alleges that "[e]very recipient of the statements understood their defamatory meaning and understood that *the Plaintiffs*, individual members of the Penn State community between 1998 and 2011, *were the objects of the communication.*" Compl. ¶ 144 (emphasis added).

Moreover, where, as here, defamatory statements create or are tied to a public scandal, an understanding that they refer to an individual group member is even more reasonable. While some recipients of the statements may not initially identify a particular plaintiff as a member of the defamed group, the court in

Farrell found that it was reasonable to conclude that after publication of the statements, those who heard or read them could be "impelled by the scandalous nature of the charges to make inquiry and find out who the [group members] were — a process which would almost inevitably lead to connecting the plaintiff's name with the alleged [scandal]." *Farrell*, 399 Pa. at 109, 159 A.2d at 738–39. The court thus acknowledged that an individual, who may not in the normal course be readily identified as a group member, may subsequently become so after publication of defamatory statements cause recipients to scrutinize the group to discern the targets of the statements. *Id.*

In this case, the Board of Trustee members, coaching staff, former athletes, and faculty members, like the town council members in *Farrell*, may all be "readily identified and the recipients of the defamatory matter are likely to identify some, if not all, of them as intended objects of the defamation." *Id.* at 105, 159 A.2d at 736–37. The publication of defendants' defamatory statements was first made on national television and followed by widespread national media attention. It is reasonable to conclude that many who heard and read those statements were able to identify plaintiffs as members of the Board of Trustees, coaches, athletes, and faculty members of Penn State University, and for those people to believe the statements meant that plaintiffs enabled and turned a blind eye to child abuse.

For those individuals who may not have been familiar with the composition of the Board of Trustees or the football program staff, it is equally plausible that upon hearing defendants' defamatory statements they made an effort to identify members of the defamed groups. For example, Clemens was a member of the Board of Trustees at the time defendants published their defamatory remarks maligning the Board members for, among other things, abandoning their oversight duties and "fail[ing] in its duties to oversee the President and senior University officials in 1998 and 2001." Compl. ¶ 90(b); *see also id.* ¶¶ 9, 92, 94, 140–41. Similarly, the Penn State football program staff is an easily identifiable and high-profile group of individuals within the Penn State community and throughout the country.

It is likewise plausible that recipients of defendants' defamatory statements reasonably understood that statements referencing "some coaches, administrators, and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him," *id.* ¶ 90(c), targeted and included Plaintiffs Kenney and Jay Paterno. Likewise, plaintiffs Adams, Cadogan, Finney, Kurpeikis, Gardner, Gaines, Mauti, Phillips, and Robinson were all members of the "omnipotent football program," the fear of which, according to defendants, "enabled a sexual predator to attract and abuse his victims." *Id.* ¶ 92. Given the high-profile nature of those plaintiffs' membership within the group, it is

reasonable that many people who heard defendants' defamatory statements about the football program understood those statements as targeting them. *Cf. Zelik v. Daily News Publ'g Co.*, 288 Pa. Super. 277, 284, 431 A.2d 1046, 1049 (1981) ("Certainly it is possible, if not probable, that some readers of the article either knew that [the plaintiff was the object of the communication] or subsequently made inquiry to learn the name of the [plaintiff]. Whether the readers did have such knowledge is a question for the finder of fact at trial.").

Finally, defendants attempt to shield themselves from liability on the theory that their defamatory statements were prefaced with the qualifier that only "some" coaches, administrators, and football program staff were complicit in ignoring "red flags" of Sandusky's abuse. But the NCAA defendants' argument has been explicitly rejected by the Pennsylvania Supreme Court as "irrational" and "unconscionable":

> it would indeed be irrational, as well as unconscionable, to permit a publication to escape responsibility under the libel law simply by confining the objects of its defamation to "a number of," "some of", or even to "one of" a relatively small group of persons all of whom are readily identifiable by recipients of the defamatory matter.

Farrell, 399 Pa. at 105, 159 A.2d at 737. The argument should likewise be rejected by this Court.

2. The Defamatory Statements Are Not Protected Expressions Of Opinion.

The NCAA defendants assert that plaintiffs' defamation claims fail because their statements were mere opinions based on publicly disclosed facts. *See* Mem. 43. That is an untenable assertion. The NCAA defendants' published "conclusions" with a "factual basis," stating that the Board of Trustees did not perform its oversight duties, that the football program did not comply with university programs, and that the members of the Penn State community maintained a "culture of reverence for the football program that is ingrained at all levels of the campus community," which, the NCAA "concluded," allowed Sandusky to engage in his criminal behavior. Compl., Ex. B, at pp. 3–4. In the words of the consent decree, the NCAA defendants found, "without further investigation or response," that the "entirety of the factual findings in the Freeh Report support these conclusions." *Id.* at pp. 2–3. In short, the NCAA adopted the "facts" from the Freeh Report *as their own findings* as justification for imposing sanctions and harming plaintiffs. *Id.*

Having lain that predicate, the NCAA defendants went on to state, for example, in absolute terms that "Head Football Coach Joseph V. Paterno failed to protect against a child sexual predator harming children for over a decade." *Id.* at p. 3. This and other statements were "not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was

seriously maintaining" the veracity of the statements. *Cf. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Nor were they subjective opinions incapable of being proven true or false. *Cf. id.* ("We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false."). To the contrary, "[u]nlike a subjective assertion," there can be no doubt that the defendants' defamatory statements articulated "an objectively verifiable event." *Id.* at 22 (internal quotation marks omitted); *see also 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").

For instance, the duties of the Board of Trustees are spelled out in the University's charter, and whether they performed them or not is ascertainable based on a reading of those duties in light of the Board's documented actions during the relevant time period. *Cf.* Compl., Ex. B, at p. 3. Similarly, whether "coaches, administrators and football program staff members" were aware of Sandusky's illegal behavior and failed to warn the public about him is also susceptible of being proven true or false. *Cf. id.* Had the NCAA abided by its contractual obligations and performed a thorough investigation, interviews of plaintiffs and other involved individuals would have revealed exactly what information they were privy to — or not — and how they dealt with it.

When determining whether a statement is capable of defamatory meaning, a court must consider the context in which it was made. *See Baker v. Lafayette Coll.*, 516 Pa. 291, 296, 532 A.2d 399, 402 (1986); *Agency Servs., Inc. v. Reiter*, 513 F. Supp. 586, 587–88 (E.D. Pa. 1981). The focus of such a determination is how the statement would be interpreted by the average person to whom it was directed. *See Marier v. Lance, Inc.*, No. 07-4284, 2009 WL 297713, at *3, 2009 U.S. App. LEXIS 2713, at *7–10 (3d Cir. Feb. 9, 2009); *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. Ct. 1997).

Unlike the cases relied on by the NCAA defendants, the statements here were not published in a newspaper opinion article or made on a television program, both of which are forums in which the public expects to see or hear opinions. *See e.g.*, *Veno v. Meredith*, 357 Pa. Super. 85, 515 A.2d 571 (1986) (statements appeared in newspaper editorial); *Greene v. Street*, 24 Pa. D. & C.5th 546 (2011) (statement made by someone appearing on a news program). Instead, the statements were set forth in a formal consent decree and defendants relied on them as justification for imposing unprecedented and unjustified sanctions. The legal document in which these statements appeared gave them the imprimatur of truth not found in newspaper editorial articles or statements made by an individual on a news program and, viewed in that context, would not be understood by the average person as mere expressions of opinion. *Cf. Sarandrea v. Sharon Herald Co.*, 30

Pa. D. & C.4th 199, 206 (1996) ("it is sufficiently clear from the context that [the] column, which was subtitled 'Sportsview,' was an expression of opinion and would be understood by an ordinary reader as such"). In short, the NCAA defendants did not merely express a personal opinion based on facts set forth by a third party; rather, they adopted facts they had a hand in creating and held them out as their own contractually mandated investigative findings. Compl. ¶¶ 54–55, 60, 74, 77, 86, 90–91; *see also* ESPN.com News Services, *Penn State Sanctions: $60M, Bowl Ban*, July 24, 2013, http://espn.go.com/college-football/story/_/id/8191027; Pete Thamel, *Sanctions Decimate the Nittany Lions Now and for Years to Come*, July 23, 2012, http://www.nytimes.com/2012/07/24/sports/ncaafootball/penn-state-penalties-include-60-million-fine-and-bowl-ban.html.

Even assuming that statements in the consent decree could be construed as opinions, they would still form the basis for a cause of action as "mixed" expressions of opinion made on the basis of undisclosed facts. *See Sarandrea*, 30 Pa. D. & C.4th at 208. The NCAA defendants did not simply offer an opinion on "disclosed facts" they stumbled upon in a newspaper article. Instead, they actively participated in the process that led to the very "findings" they later embraced — without any mention of their own role in the process, Compl. ¶ 55, or the fact that the investigation failed to comply with the NCAA's own rules. In an effort to further bolster the "findings," they then forced the University to accept their

"findings" or else face far greater sanctions — a fact that also remained hidden from the public. *See id.* ¶ 83. The consent decree announces that it was accepted by Penn State, but fails to mention that it was accepted only after defendants threatened Penn State with the end of its football program for the foreseeable future. *See id.* ¶ 86.

This lack of disclosure stands in sharp contrast to the situations in *Greene* and *Veno*, in which the courts were not made aware of any undisclosed facts related to the allegedly defamatory statements. *See, e.g.*, *Veno*, 357 Pa. Super. at 94 (concluding a statement was an opinion because there were no indications of "undisclosed facts upon which the opinion was based").

3. The Complaint Sufficiently Alleges Actual Malice.

The NCAA defendants argue that some of the "the former assistant coaches, former players, and Board of Trustee members" are limited-purpose public figures and, therefore, must plead that defendants acted with actual malice to state a claim for defamation. Mem. 47; *see also id.* at 47 n.20 (specifically noting that not all plaintiffs are public figures for purposes of this argument). Even assuming that some plaintiffs are limited-purpose public figures, however, the complaint sufficiently pleads actual malice.

The only issue before the Court is whether plaintiffs have adequately alleged malice, not whether the evidence will ultimately support it. Actual malice may be

demonstrated by showing that the allegedly defamatory statements were false and that the publisher of the statement either knew they were false or recklessly disregarded their falsity. *Tucker v. Philadelphia Daily News*, 577 Pa. 598, 621, 848 A.2d 113, 127–28 (2001). There are two ways a plaintiff can show actual malice: "Under the first approach, a plaintiff presents evidence that the defendant knows or has information which casts doubt as to the truth of the allegedly defamatory communication." *Mzamane*, 693 F. Supp. 2d at 506. Under the second approach, the plaintiff shows "that the publisher purposefully avoided contradictory information due to the publisher's own doubts as to the truth of his own statements." *Id.* The latter theory is "akin to the proverbial 'burying one's own head in the sand' to avoid obtaining conflicting information." *Id.* While a failure to investigate facts underlying a defamatory statement alone is insufficient to show actual malice, "'the purposeful avoidance of the truth is in a different category' and may rise to the level of actual malice." *Id.* (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989)).

Actual malice is an intensely fact-based inquiry, evidence of which will likely be uncovered only in the course of discovery. Accordingly, although the Court will ultimately need to evaluate the issue, it cannot be meaningfully resolved at the pleading stage. In *Sarandrea*, by contrast, the court determined *at the summary judgment stage* that deposition testimony by a reporter indicating that he

had "some doubt" about the veracity of his statements "raise[d] an issue of material fact as to whether he entertained serious doubts about the material printed in his column," and that such issue was a matter for the jury to decide. 30 Pa. D. & C.4th at 216; *cf.* Mem. 52. Likewise, in *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, the issue of actual malice was appropriately submitted to the jury and the jury instructions were eventually affirmed by the Supreme Court. 592 Pa. 66, 923 A.2d 389 (2007).

Similarly, in *St. Amant v. Thompson*, the United States Supreme Court specifically warned that "[t]he finder of fact must determine whether the publication was indeed made in good faith." 390 U.S. 727, 732 (1968). That warning was heeded by the Pennsylvania Supreme Court, which declined to affirm summary judgment entered against a plaintiff in light of its agreement that "'[t]he proof of "actual malice" calls a defendant's state of mind into question' and does not readily lend itself to summary disposition." *Curran v. Phila. Newspapers, Inc.*, 497 Pa. 163, 184, 439 A.2d 652, 662 (1981) (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979)); *see also Mzamane*, 693 F. Supp. 2d 442 (allowing in part and denying in part defendants' motion for summary judgment with respect to defamation claims requiring actual malice); *Corabi v. Curtis Publ'g Co.*, 441 Pa. 432, 456, 273 A.2d 899, 911 (1971) (affirming lower court's denial of defendant's motion for judgment n.o.v. as to claim of libel requiring actual malice), *overruled*

on other grounds by Dunlap v. Philadelphia Newspapers, Inc., 301 Pa. Super. 475, 448 A.2d 6 (1982).

There is no doubt that plaintiffs have alleged sufficient facts to support a claim for actual malice. The complaint shows that "Defendants recognized that, in this case, they did not 'have all the facts about individual culpability,' and that imposing sanctions could cause 'collateral damage' to many innocent parties." Compl. ¶ 72; *cf. Sarandrea*, 30 Pa. D. & C.4th at 216 (denying summary judgment where the defendant admitted he had "no proof" his statements were true). As alleged in the complaint, "[d]efendants agreed to work together to make Penn State an example and to single out its coaches and administrators for harsh penalties, regardless of the facts and with full knowledge that their actions would cause [p]laintiffs substantial harm." Compl. ¶ 73.

In furtherance of that agreement, defendants "conspired together and with the Freeh firm to circumvent NCAA rules, strip [p]laintiffs of their procedural protections under those rules, and level allegations against Penn State and certain of its officials in the absence of facts or evidence supporting those allegations." Compl. ¶ 74. Specifically, the NCAA defendants ignored facts that would have alerted any reasonable, impartial observer to the blatant deficiencies of the Freeh Report — deficiencies that violated defendants' own rules, with which they must be familiar. *Id.* ¶ 52 (Freeh was not hired to investigate NCAA rules violations);

id. ¶¶ 57–58 (report was "accepted" in too little time for anyone to actually have read all of it); *id.* ¶ 60 (explaining how Freeh Report violates the NCAA rules); *id.* ¶¶ 61–66 (thoroughly detailing manifest shortcomings of Freeh Report). Most damningly, "[a]lthough the NCAA frequently takes years to conduct and complete an investigation," the defendants "moved to impose sanctions on Penn State almost immediately after the Freeh firm released its report." *Id.* ¶ 84.

Viewed collectively, and in a light most favorable to plaintiffs, these facts state a plausible claim that the NCAA defendants published the defamatory statements with a reckless disregard for the truth, both because they harbored doubts as to the veracity of their statements and because they rushed to adopt the Freeh Report in violation of their obligation to conduct their own investigation and provide all required procedural protections. In so doing, the NCAA defendants chose to ignore the obvious signs of the falsity of their statements. *Id.* ¶¶ 90–95.

The few cases defendants cite in which courts have dismissed complaints at the preliminary objection stage for failure to plead actual malice involve the barest of conclusory allegations, in contrast to the extensive facts alleged here. In *Alston v. PW-Philadelphia Weekly*, for example, the complaint lacked specific factual averments and instead alleged only that the defendant's statements "amounted to actual malice," with nothing more. 980 A.2d 215, 222 (Pa. Commw. Ct. 2009). The court found that the only allegation in the complaint with respect to actual

malice "merely state[d] a conclusion of law" and granted the motion to dismiss. *Id.* In *Greene,* the court affirmed the lower court's dismissal of the plaintiff's defamation claim because the complaint was devoid of even the bare allegation of actual malice. 24 Pa. D. & C.5th at 4–5. Finally, in *Tucker*, the court upheld a dismissal at the preliminary objection stage because the pleading was "impermissibly vague," making it impossible to determine whether the defendants had notice of the falsity of a statement, which in turn would allow an inference that the statement was made despite having reasonable doubts as to its veracity. 577 Pa. at 633, 848 A.2d at 135.

E. The Complaint Adequately States A Claim For Conspiracy.

The NCAA defendants refer to plaintiffs' conspiracy claim as a "'catch all' remedy that would allow any member of a university community that feels aggrieved by NCAA actions to sue." Mem. 69. This is plainly wrong and inconsistent with the complaint's basic allegations. Plaintiffs do not merely "feel aggrieved by NCAA actions"; they are complaining about the NCAA defendants' extraordinary and unprecedented decision to ignore the NCAA rules and to take actions outside its lawful authority, as well as the concerted action taken by the NCAA defendants and the Freeh firm.

More concretely, the NCAA defendants argue that plaintiffs' civil conspiracy claim fails because: (1) under the "gist of the action" doctrine,

plaintiffs' claims are based on a breach of contract claim, and such a claim cannot be the basis for civil conspiracy, Mem. 70, 72–73; (2) plaintiffs have not alleged facts sufficient to show concerted action between the NCAA and the Freeh firm; and (3) plaintiffs have not alleged that the NCAA acted with the sole and express purpose of committing the alleged torts. Mem. 71–74. These contentions are mistaken.

First, contrary to the NCAA's assertions, "Pennsylvania law [does] suggest[] there may be a cause of action for a civil conspiracy to breach a contract." *Haymond v. Haymond*, No. 99-5048, 2001 WL 74630, at *4, 2001 U.S. Dist. LEXIS 630, at *13 (E.D. Pa. Jan. 29, 2001). In *Fife v. Great Atlantic & Pacific Tea Co.*, for example, the plaintiff claimed that the defendant was engaged "in a conspiracy to break the contract." 356 Pa. 265, 266, 52 A.2d 24, 32 (1947). The court treated the claim as valid but ultimately rejected it for lack of evidence. *Id.*; *see also Commonwealth v. Musser Forests, Inc.*, 394 Pa. 205, 207, 146 A.2d 714, 715 (1958) (rejecting a trespass action based on the statute of limitations but recognizing that "[t]he gravamen of the complaint is that the defendants conspired among themselves to defraud the Commonwealth by concertedly breaching series of contracts which the various defendants separately entered into").

The NCAA does not acknowledge these cases. It instead argues that the "gist of the action" doctrine precludes plaintiffs from "re-casting ordinary breach

of contract claims into tort claims." Mem. 70 (quoting *eToll, Inc. v. Elias/Savion Adver., Inc.*, 2002 PA Super 347 ¶ 14, 811 A.2d 10, 14). The doctrine is most commonly applied to fraud claims, where the "alleged acts of fraud arose in the course of the parties' contractual relationship" and the plaintiffs' claims are "created and grounded in the parties' contract." *eToll*, 2002 PA Super 347 ¶ 32, 811 A.2d at 20. The doctrine operates to bar other tort claims as well if the tort consists of nothing more than a non-performance of contractual duties. In *CBG Occupational Therapy, Inc. v. Bala Nursing & Retirement Center*, for instance, the court dismissed the conspiracy count because the plaintiffs alleged only that the defendants owed them money under a contract. No. 1758, 2005 WL 280838, at *4, 2005 Phila. Ct. Com. Pl. LEXIS 19, at *12 (Jan. 27, 2005). But at its heart, the "gist of the action" doctrine is a balancing test: "[D]uties imposed as a matter of social policy" give rise to tort actions, whereas "duties imposed by mutual consensus" underlie contract actions. *eToll*, 2002 PA Super 347 ¶ 15, 811 A.2d at 14 (internal quotation marks omitted). "[A]lthough mere non-performance of a contract does not constitute a fraud, it is possible that a breach of contract also gives rise to an actionable tort" if "the wrong ascribed to defendant [is] the gist of the action." *Id.* (internal quotation marks omitted).

Here, the essential wrong is the NCAA defendants' conspiracy to exceed their lawful authority and impose substantial harms on plaintiffs for their own

benefit. Moreover, it is a matter of important social policy that associations be required to follow their own rules. *See Gordon*, 144 Pa. Super. at 457, 460–62, 465, 19 A.2d at 592–95. If the NCAA had faithfully applied its own rules, it would not have defamed plaintiffs or interfered with their contractual opportunities. Defendants' actions were therefore wrongful, above and beyond a mere breach of contract.

Second, the NCAA defendants misunderstand the allegations necessary to sustain a conspiracy claim under Pennsylvania law. They argue that plaintiffs have "not alleged facts demonstrating a combination between the NCAA and [the Freeh firm]." Mem. 72. And they fault plaintiffs for not detailing "the manner in which [the NCAA and the Freeh firm] purportedly coordinated, how the NCAA was involved, which individuals with each entity worked together," or anything else. Mem. 71. But any such requirement goes beyond what plaintiffs would need to show to prove a conspiracy at trial, much less to survive a preliminary objection. *See Musser Forests, Inc.*, 394 Pa. at 210, 146 A.2d at 716 (a conspiracy may be proven by circumstantial evidence).

Although the full extent of the conspiracy between the NCAA defendants and the Freeh firm will not be known until discovery takes place, the complaint alleges sufficient facts to support the claim. Compl. ¶ 54 (the Freeh firm provided information to NCAA and received direction from NCAA on an ongoing basis

during its investigation); *id.* ¶ 55 (NCAA relied on the Freeh firm because it "had more power" than the NCAA); *id.* ¶ 58 (Emmert publicly adopted Freeh Report and assumed, without basis, that Penn State had also adopted it); *id.* ¶ 60 (NCAA ignored that the Freeh Report did not comply with NCAA rules for investigative procedures). Plaintiffs are permitted to rely on allegations of coordinated action among Emmert, Ray, and other NCAA employees because, although the actions of an entity and its own employees cannot usually give rise to a conspiracy, *see* Mem. 71 n.33, an important exception to that rule exists when "a third party participated in the conspiracy." *Unger v. Allen*, 3 Pa. D. & C.5th 191, 202 (2006). The Freeh firm is not a part of the NCAA and its participation is thus sufficient to invoke this exception. Compl. ¶ 50.

Unlike in *Burnside v. Abbott Laboratories*, plaintiffs *have* averred that there were meetings, conferences, or telephone calls. 351 Pa. Super. 264, 280, 505 A.2d 973, 982 (1985); *see* Compl. ¶ 54. To fault plaintiffs for not alleging the full extent and manner of these meetings makes no sense; after all, they were not invited to participate in the meetings or telephone calls. As the Commonwealth Court has stated, "[a]lthough these averments do not specify the dates and times of the alleged meetings . . . a plaintiff is not required to plead the specifics of such contact, only that such contact occurred." *Commonwealth ex rel. Pappert v. TAP Pharm. Prods., Inc.*, 885 A.2d 1127, 1141 (Pa. Commw. Ct. 2005); *see* Compl.

¶ 54. Courts "do not require minute detail in the pleading of such contact." *Pappert*, 885 A.2d at 1141. The NCAA must provide that information in discovery.

Finally, the NCAA argues that "Plaintiffs fail to allege that the sole purpose of the alleged combination was to commit . . . torts, rather than to conduct a legitimate and proper investigation as commissioned by Penn State." Mem. 74 (emphasis removed) (citing *Thompson Coal*, 488 Pa. at 211, 412 A.2d at 472). But to plead a claim for civil conspiracy under Pennsylvania law requires only an allegation of "actual malice" and an absence of legitimate motives. *Commonwealth v. TAP Pharm. Prods., Inc.*, 36 A.3d 1112, 1185 (Pa. Commw. Ct. 2011) (collecting cases). "'Common law malice' involves conduct that is outrageous (because of the defendant's evil motive or his reckless indifference to the rights of others), and is malicious, wanton, reckless, willful, or oppressive." *Sprague v. Walter*, 441 Pa. Super. 1, 66, 656 A.2d 890, 922 (1995). Pennsylvania courts have thus recognized that the pleading standard for civil conspiracy is satisfied by allegations of recklessness — *i.e.*, that the defendants acted in reckless disregard of consequences that were substantially certain to follow. *See Pappert*, 885 A.2d at 1141 (allegations that defendants conspired "with knowledge and intent to cause such injuries and/or with reckless disregard for the consequences" were sufficient to satisfy Pennsylvania's pleading requirements); *Reading Radio,*

Inc. v. Fink, 2003 PA Super 353 ¶ 40, 833 A.2d 199, 213 (finding conspiratorial intent, or "malice," where the defendants conspired "in reckless disregard" of the victims' rights).

Further, the complaint does in fact allege, at length, that there was no legitimate purpose to the NCAA's actions. Penn State did not commission an investigation into NCAA rules violations, so the purpose of the conspiracy could not possibly have been to conduct the investigation commissioned by Penn State. Compl. ¶ 52. To the contrary, the complaint alleges that the purpose of the conspiracy was to injure plaintiffs and deprive them of procedural and substantive rights or, alternatively, that defendants acted in reckless disregard of a substantial likelihood of injury to plaintiffs. *See* Compl. ¶¶ 73–73, 150. The NCAA defendants have never before taken such actions, *see id.* ¶ 20, and recognized that they did not know all the facts about the situation. *Id.* ¶ 72. They rushed to judgment anyway. *Id.* ¶¶ 76, 84. It was substantially certain that plaintiffs would be harmed by these actions. *Id.* ¶¶ 13, 24, 46, 72–74, 76, 94, 101–03, 150. The NCAA defendants' arguments do not withstand the well-pleaded allegations of the complaint and the reality of their actions.

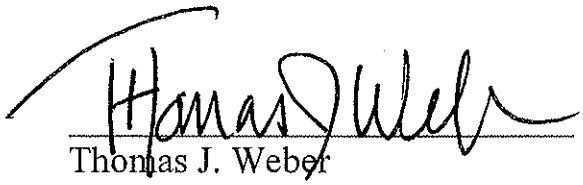
* * * *

This lawsuit's overarching purpose is to remedy and obtain appropriate compensation for the significant and continuing harms caused to plaintiffs by the NCAA defendants; to prevent the NCAA defendants from continuing to exceed the scope of their lawful authority; and, most importantly, to shed light on the truth. The NCAA defendants' extraordinary and unprecedented actions in this case caused direct, proximate, and immediate harm, and the NCAA defendants should not be allowed to escape the review of a fair and impartial tribunal. It is time for the NCAA defendants to be held accountable. The Court should overrule the preliminary objections and allow this important case to be heard on its merits.

CONCLUSION

The Court should overrule defendants' preliminary objections. In the alternative, if the Court sustains any of the preliminary objections, plaintiffs should be afforded the opportunity to file an amended complaint.

Respectfully submitted,



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September 6, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has on this date been forwarded to the individuals listed below as addressed, by first class mail:

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