



IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO;

AL CLEMENS, member of
the Board of Trustees of Pennsylvania State
University;

and

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

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION ("NCAA");

MARK EMMERT, individually and as
President of the NCAA;

and

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

Defendants,

and

PENNSYLVANIA STATE UNIVERSITY,

Defendant.

)

) Civil Division

)

) Docket No. 2013-2082

)

) **MEMORANDUM IN OPPOSITION**
) **TO THE NCAA DEFENDANTS'**
) **PRELIMINARY OBJECTIONS**

) Filed on Behalf of the Plaintiffs

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2014 DEC -1 AM 9:55
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Civil Division

Docket No.
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2014 DEC -1 AM 9:53
DEBRA C. HARTZ
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CENTRE COUNTY, PA

**MEMORANDUM IN OPPOSITION
TO THE NCAA DEFENDANTS' PRELIMINARY
OBJECTION TO THE SECOND AMENDED COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	3
ARGUMENT	4
I. Plaintiffs Properly Amended Their Complaint Consistent With This Court’s Order And Pennsylvania’s Liberal Pleading Rules.	5
II. The Amended Complaint Properly Alleges Facts Establishing That Coach Joseph Paterno Was An “Involved Individual” Before His Death.....	8
A. The Court Should Decline The NCAA Defendants’ Invitation To Resolve Disputed Questions Of Fact.....	9
B. Plaintiffs Have Made No “Judicial Admissions” That Preclude The Second Amended Complaint’s Well- Pleaded Allegations.	11
C. The NCAA’s Constitution And Bylaws Are Not A Personal Services Contract.	16
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>Acumix, Inc. v. Bulk Conveyor Specialists, Inc.</i> , No. 2003-CV-424, 2007 Pa. Dist. & Cnty. Dec. LEXIS 62 (C.P. Ct. Mar. 23, 2007)	7
<i>Appenzeller v. Philadelphia Protestant Home</i> , No. 3592, 2007 Phila. Ct. Com. Pl. LEXIS 263 (C.P. Ct. Mar. 12, 2007)	7
<i>B.N. Excavating, Inc. v. PBC Hollow-A, L.P.</i> , 2013 Pa. Super. 120, 71 A.3d 274 (2013)	4
<i>Blakely v. Sousa</i> , 197 Pa. 305, 41 A. 286 (1900).....	19
<i>Bland's Administrator v. Umstead</i> , 23 Pa. 316 (1854).....	19
<i>Bond v. United States</i> , 131 S. Ct. 2355 (2011).....	18
<i>Celley v. Mut. Benefit Health & Accident Ass'n</i> , 229 Pa. Super. 475, 324 A.2d 430 (1974)	15
<i>DeArmitt v. N.Y. Life Ins. Co.</i> , 2013 PA Super 161, 73 A.3d 578 (2013)	12
<i>Deyarmin v. Consol. Rail Corp.</i> , 2007 PA Super 18, 931 A.2d 1 (2007)	11, 16
<i>Duke v. Hershey Medical Center</i> , No. 119-CV-2000, 2006 Pa. Dist. & Cnty. Dec. LEXIS 148 (C.P. Ct. Sept. 7, 2006).....	7
<i>Eckell v. Wilson</i> , 409 Pa. Super. 132, 597 A.2d 696 (1991)	4
<i>Foflygen v. R. Zemel, M.D. (PC)</i> , 420 Pa. Super. 18, 615 A.2d 1345 (1992)	4

<i>In re Billings's Appeal</i> , 106 Pa. 558 (1884).....	19
<i>In re Pierce's Estate</i> , 123 Pa. Super. 171, 187 A. 58 (1936)	17, 19
<i>In re Wartanian's Estate</i> , 305 Pa. 333, 157 A. 688 (1931).....	17
<i>John B. Conomos, Inc. v. Sun Co.</i> , 2003 PA Super 310, 831 A.2d 696 (2003).....	12
<i>McLane v. STORExpress, Inc.</i> , No. GD08-17605, 2009 Pa. Dist. & Cnty. Dec. LEXIS 228 (C.P. Ct. Sept. 2, 1009).....	7
<i>Meyer–Chatfield v. Century Bus. Servicing, Inc.</i> , 732 F. Supp. 2d 514 (E.D. Pa. 2010).....	15
<i>Pearsoll v. Chapin</i> , 44 Pa. 9 (1862).....	5
<i>Piehl v. City of Phila.</i> , 604 Pa. 658, 987 A.2d 146 (2009).....	7
<i>Posternack v. Am. Cas. Co.</i> , 421 Pa. 21, 218 A.2d 350 (1966).....	7
<i>Ress v. Barent</i> , 378 Pa. Super. 397, 548 A.2d 1259 (1988)	17
<i>Sevin v. Kelshaw</i> , 417 Pa. Super. 1, 611 A.2d 1232 (1992)	4, 9
<i>St. Clair v. Beggs</i> , 41 Pa. D & C.3d 513 (Pa. Com. Pl. 1985).....	15
<i>Travelers Indem. Co. v. Bailey</i> , 557 U.S. 137 (2009)	15
<i>Young v. Gongaware</i> , 275 Pa. 285, 119 A. 271 (1922).....	18

Rules

Pa. R.C.P. 1028.....	11, 16
Pa. R.C.P. 1033.....	7

PRELIMINARY STATEMENT

The truth about the NCAA Defendants' egregious misconduct is slowly coming to light. As discovery moves forward despite the NCAA's objections, and as relevant materials are made public in other litigation involving the NCAA, the support for Plaintiffs' allegations continues to build. Documents establish that, as alleged in the Second Amended Complaint, the NCAA knew that it lacked authority to become involved in a criminal matter far outside its jurisdiction. *See* Ex. A. They show that, at least as early as November 2011 — months before Coach Paterno's death — the NCAA was working closely with the Freeh firm in an investigation targeted at Coach Paterno and other University personnel, while knowing that it was not following proper investigative procedures as required under the NCAA's rules. The documents show that the Consent Decree process was one large, unseemly "bluff" that was pursued largely to enhance the NCAA Defendants' public image. *Id.* at 1; *see also* Ex. I (Emmert: "we cannot miss the opportunity to leverage the moment"). The NCAA imposed the Consent Decree on Penn State through fraud, illegality, and duress, threatening the University with the "death penalty" and other sanctions that the NCAA knew it lacked authority to impose. And the documents show that the NCAA "bank[ed] on the fact" that Penn State was so "embarrassed" that it would "do anything," *id.* at 2, including allowing the NCAA to impose enormous sanctions premised on "findings" in a

report that is increasingly being recognized for what it is — an irresponsible and deeply flawed product filled with rampant speculation masquerading as fact.

And yet: the NCAA Defendants continue to dig in. They have resisted meaningful discovery; they have threatened Penn State with sanctions if it does not remain at heel; and they insist that they have done nothing wrong. Their latest “bluff” is another round of preliminary objections seeking to prevent the Estate of Joseph Paterno from challenging the Consent Decree and holding the NCAA accountable. In particular, the NCAA Defendants contend that certain factual allegations in the Second Amended Complaint — allegations that Coach Paterno was the target of the NCAA’s investigation before he died — are improper. According to the NCAA Defendants, the Court should strike those allegations because it purportedly dismissed the Estate from Count I, found that Coach Paterno died before the NCAA’s investigation began, and granted the Estate only limited leave to amend. In addition, the NCAA Defendants argue that Plaintiffs purportedly made “judicial admissions” in earlier pleadings that the NCAA did not initiate an investigation until after Coach Paterno died.

None of these arguments has merit. The Court did not dismiss the Estate from Count I; instead, it held that the Estate had standing to bring Count I challenging the Consent Decree. The Court expressly granted Plaintiffs leave to amend and, consistent with Pennsylvania law, did not restrict their ability to add

new allegations. Although the Court did previously conclude that Coach Paterno was not an “involved individual” under the NCAA’s rules based on the NCAA’s contention that Coach Paterno died before any investigation occurred, Plaintiffs were well within their rights to include allegations in the Second Amended Complaint putting the NCAA’s factual contention in dispute. Plaintiffs have never conceded that the NCAA failed to initiate an investigation until after Coach Paterno died; they have merely alleged that no *proper* NCAA investigation ever occurred. The statements made in earlier pleadings are mischaracterized by the NCAA Defendants and fall far short of being the clear and unequivocal statements required to constitute binding judicial admissions. The NCAA Defendants’ preliminary objections should be overruled.¹

QUESTIONS PRESENTED

1. Did Plaintiffs appropriately amend their complaint consistent with Pennsylvania law and the instructions included in the Court’s September 11, 2014 Opinion and Order? (Suggested answer: yes.)
2. Did the Court’s September 11, 2014 Opinion and Order hold that the Estate of Joseph Paterno has standing to bring Count I challenging the Consent

¹ Penn State has not filed any preliminary objections and, instead, has filed an Answer to the Second Amended Complaint.

Decree and grant Plaintiffs leave to amend to plead their claims with greater specificity? (Suggested answer: yes.)

3. Because the Second Amended Complaint alleges facts establishing that Coach Paterno was alive when the NCAA initiated its investigation and, therefore, was an “involved individual” before his death, should the Court decline the NCAA Defendants’ invitation to resolve disputed questions of fact at the preliminary objection stage of litigation? (Suggested answer: yes.)

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 v. R. Zemel, M.D. (PC)*, 420 Pa. Super. 18, 32, 615 A.2d 1345, 1352 (1992). 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 v. Kelshaw*, 417 Pa. Super. 1, 7, 611 A.2d 1232, 1235 (1992) (emphasis added) (citing *Eckell v. Wilson*, 409 Pa. Super. 132, 135, 597 A.2d 696, 698 (1991)). “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.*; *B.N. Excavating, Inc. v. PBC Hollow-A, L.P.*, 2013 Pa. Super. 120, 71 A.3d 274, 278 (2013) (“Any doubt should be resolved by a refusal to sustain the objections.”).

I. Plaintiffs Properly Amended Their Complaint Consistent With This Court's Order And Pennsylvania's Liberal Pleading Rules.

The NCAA Defendants contend that Plaintiffs improperly amended their complaint because, in their view, the Court dismissed the Estate's contract claim in Count I and did not authorize the Estate to include new allegations supporting that claim. NCAA Br. 1, 6. This argument is wrong and does not accurately describe the Court's earlier ruling.

First, the Court did not dismiss the Estate's contract claim in Count I. To the contrary, the Court *overruled* the NCAA's objections to the Estate's capacity to bring Count I, *see* Op. 5, holding that under *Pearsoll v. Chapin*, 44 Pa. 9 (1862), both the Estate and Al Clemens "have standing to challenge the Consent Decree" based on allegations that the Consent Decree "was imposed through an unlawful and unauthorized exercise of the NCAA's enforcement authority." *Id.*; *see also id.* at 34 (¶ 1) (overruling the NCAA's preliminary objection "based on an Incapacity to Bring Count I"). The Court also recognized the legal principle that a contract, like the Consent Decree, may be voided if it is the result of fraud, duress, or illegality, and that determining whether the Consent Decree should be voided in this case depends on disputed facts that cannot be resolved at a preliminary stage of litigation. *See id.* at 6.

The NCAA Defendants do not challenge this portion of the Court's Opinion and Order; they simply ignore it. And that is fatal to their position. Because the

Court held that the Estate has standing to bring Count I under *Pearsoll* — regardless of whether Coach Paterno was targeted by the NCAA’s investigation before his death — the Estate is a party to Count I and is entitled to challenge the Consent Decree. Op. 5.

Second, the Court did not hand-cuff Plaintiffs by narrowly limiting their ability to amend the complaint. To the contrary, the Court instructed that “Plaintiffs will need to file a Second Amended Complaint alleging the actions of *each defendant* giving rise to *each count* along with the corresponding relief requested.” Op. 16 (emphasis added). Significantly, in discussing Penn State’s objection that the complaint lacked adequate specificity, the Court focused on paragraph 169 of the First Amended Complaint, which among other things sought declaratory relief from Penn State (as well as the NCAA) that Joe Paterno was an “involved individual” within the meaning of the NCAA’s rules. Op. 15. The Court also addressed Penn State’s objection that Plaintiffs had not identified “what particular rights” they had “purportedly acquired” under the NCAA’s Constitution and Bylaws, and described that objection as a “‘subset’ of the overall objection to lack of specificity for all counts.” Op. 17; *see also* PSU Br. 16 (May 17, 2014).

Nothing in the Court’s Opinion and Order states that it intended to limit Plaintiffs’ right to amend. To the contrary, the Court made clear that it was granting Plaintiffs leave to amend their complaint and to add allegations supporting

their claims so as to ensure that Penn State has sufficient notice of the claims against it, including the “particular rights” that Plaintiffs acquired under the NCAA’s Constitution and Bylaws. *See* Op. 17; *see also* Pa. R.C.P. 1033. It was certainly not unreasonable for Plaintiffs to interpret the Court’s instructions in that manner. Under Pennsylvania law, amendments “should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party.” *Piehl v. City of Phila.*, 604 Pa. 658, 671–72, 987 A.2d 146, 154 (2009). The NCAA Defendants have not — and cannot — argue that they are prejudiced by the allegations included in the Second Amended Complaint. *See Posternack v. Am. Cas. Co.*, 421 Pa. 21, 24, 218 A.2d 350, 351 (1966) (amendments should be “liberally” permitted unless “surprise or prejudice” will result).²

² The cases cited by the NCAA Defendants’ are plainly inapposite. In *Acumix, Inc. v. Bulk Conveyor Specialists, Inc.*, No. 2003-CV-424, 2007 Pa. Dist. & Cnty. Dec. LEXIS 62 (C.P. Ct. Mar. 23, 2007), the amended pleading was not rejected, but accepted, because the original pleading was improperly filed. In *Appenzeller v. Philadelphia Protestant Home*, No. 3592, 2007 Phila. Ct. Com. Pl. LEXIS 263 (C.P. Ct. Mar. 12, 2007), the plaintiff attempted to add a party after the statute of limitations had expired. In *McLane v. STORExpress, Inc.*, No. GD08-17605, 2009 Pa. Dist. & Cnty. Dec. LEXIS 228 (C.P. Ct. Sept. 2, 1009), the court dismissed because the *pro se* plaintiff, after multiple attempts, was unable to draft a “procedurally or substantively proper complaint” but instead continued to level allegations about the implanting of “human genes in pigs and pig genes in humans.” In *Duke v. Hershey Medical Center*, No. 119-CV-2000, 2006 Pa. Dist. & Cnty. Dec. LEXIS 148 (C.P. Ct. Sept. 7, 2006), the court struck portions of a

It is correct, as the NCAA Defendants' emphasize, that a portion of the Court's Opinion and Order sustained their preliminary objection that Coach Paterno "was not an 'involved individual'" before or at the time of his death in January 2012. *See* Op. 8, 34 (¶ 3). But that portion of the Court's order was premised on a factual conclusion, pushed by the NCAA, that documents produced through discovery have proven false. As explained below, the documents show that the NCAA initiated its investigation *before* Coach Paterno died and that the NCAA considered him a target of investigation while he was still alive. Because the Court granted Plaintiffs' leave to amend, there is nothing wrong with Plaintiffs pleading allegations that bring the NCAA's factual assertions into dispute by showing that Coach Paterno was an involved individual at the time of his death.

II. The Second Amended Complaint Properly Alleges Facts Establishing That Coach Paterno Was An "Involved Individual" Before His Death.

In the last round of preliminary objections, the Court accepted the NCAA Defendants' factual contention that Coach Paterno died before the NCAA initiated an investigation. The Court's Opinion and Order thus concluded, at the NCAA Defendants' urging, that "Coach Joe Paterno was not an involved individual prior to his death" and, therefore, "had no rights as an 'involved individual' at any time, and as a result, his estate has no rights as an 'involved individual' now." Op. 8.

complaint that alleged misconduct on behalf of a defendant who had been entirely dismissed from the action.

The Second Amended Complaint addresses that issue head on by including specific allegations showing that *as a matter of fact* Coach Paterno was an involved individual months before his death. Those factual allegations are appropriate and, because “on the facts averred” the law does not say “with certainty” that “no recovery is possible,” the NCAA Defendants’ preliminary objections should be overruled. *Sevin*, 417 Pa. Super. at 7, 611 A.2d at 1235.

A. The Court Should Decline The NCAA Defendants’ Invitation To Resolve Disputed Questions Of Fact.

Coach Paterno was alive when the NCAA initiated its investigation and, therefore, was an “involved individual” before his death. *See, e.g.*, SAC ¶ 124(a) (“Joe Paterno was alive when the NCAA began its investigation and alleged to be significantly involved in the incidents that were the focus of the NCAA’s investigations.”). As the Second Amended Complaint alleges, “as early as November 2011” — several months before Coach Paterno’s death — “the NCAA accused certain Penn State personnel (including Plaintiffs) of being significantly involved in alleged violations of the NCAA’s rules.” SAC ¶ 56; *see also id.* ¶ 64 (Coach Joe Paterno died on January 22, 2012). In fact, in a November 17, 2011 letter to Penn State’s President Erickson, the NCAA’s Emmert expressed concern over a grand jury presentation that expressly referenced Coach Paterno and made clear that he “was one of the individuals that Emmert and the NCAA had decided to investigate.” SAC ¶¶ 57–58. This letter is referenced in the first sentence of the

Consent Decree's "Findings and Conclusions," making clear that it was part of the NCAA's investigation process.

The Second Amended Complaint's allegations are supported by highly relevant information that has come to light in discovery. Documents show that in late 2011, while Coach Paterno was still alive, the NCAA worked closely with the Freeh firm to investigate Coach Paterno and other Penn State officials. *See* Ex. B; *see also* SAC ¶¶ 62, 173–76 (alleging that the NCAA and the Freeh firm collaborated and conspired to work together). For example, documents show that as early as December 7, 2011, a meeting was held to discuss the ongoing investigation, which was attended by the NCAA's personnel, members of the Freeh firm, and representatives of the Big Ten. *See* Ex. B; *see also* Ex. C, Ltr. to M. Emmert from Members of Congress (Nov. 19, 2014) ("recent reports indicate that the NCAA regularly coordinated with" the Freeh firm and that "[t]he coordination appears to have started almost immediately"). Moreover, starting before Coach Paterno's death, weekly telephone conferences addressing the ongoing investigation were joined by representatives of the NCAA, the Big Ten, and the Freeh firm. *See* Ex. D. In addition, in December 2011, the NCAA arranged to provide 15 to 17 members of the Freeh firm a 2 hour tutorial on the NCAA's "institutional control" requirements (the meeting occurred on January 6, 2012). *See* Ex. E. The NCAA also sent the Freeh firm a list of questions to be

asked as part of the coordinated investigation. *See* Ex. F. It is these and other meetings between the NCAA and the Freeh firm that culminated in what the NCAA's Emmert agreed was a "bluff" — the NCAA's decision to impose sanctions on Penn State, knowing that even though the NCAA lacked authority under its rules, Penn State was "so embarrassed [it] w[ould] do anything." Ex. A.

In short, the evidence supports the Second Amended Complaint's allegations that before Coach Paterno died, the NCAA initiated its investigation (albeit an improper one in a matter outside its jurisdiction) and accused Coach Paterno of being significantly involved in an alleged rules violation. The alleged facts therefore establish that Coach Paterno was an "involved individual" who under the NCAA's rules was entitled to certain rights and protections. The NCAA Defendants may well dispute those facts, but disputed facts should not be resolved at the preliminary objection stage of litigation. *See* Pa. R.C.P. 1028(c)(2) (where preliminary objections raise issues of fact, "the court shall consider evidence by depositions or otherwise"); *Deyarmin v. Consol. Rail Corp.*, 2007 PA Super 18 ¶ 28, 931 A.2d 1, 14 (2007) (trial court may not resolve disputed issues of fact at preliminary objection stage).

B. Plaintiffs Have Made No "Judicial Admissions" That Preclude The Second Amended Complaint's Well-Pleaded Allegations.

The NCAA Defendants conspicuously fail to say when the NCAA's investigation began. Nor do they deny that Coach Paterno was alive when the

NCAA initiated its investigation. Instead, they attempt to escape those facts by arguing that Plaintiffs purportedly “admitted and complained that the NCAA did not begin an investigation prior to Coach Paterno’s death.” NCAA Br. 9. According to the NCAA Defendants, Plaintiffs have made “judicial admissions” that should prevent them from amending their complaint. *Id.* at 12.

This argument is meritless and distorts the record. A judicial admission is binding only if it is a “clear and unequivocal admission of fact” — “an express waiver made . . . by a party to gain an advantage, conceding for the purposes of trial the truth of the admission.” *DeArmitt v. N.Y. Life Ins. Co.*, 2013 PA Super 161, 73 A.3d 578, 590 (2013). To qualify, the fact must be “unequivocally admitted and not be merely one interpretation of the statement that is purported to be a judicial admission.” *Id.* (quoting *John B. Conomos, Inc. v. Sun Co.*, 2003 PA Super 310 ¶ 33, 831 A.2d 696, 712–13 (2003)). The NCAA Defendants have not come close to identifying any unequivocal admission that could preclude the Court from considering the Second Amended Complaint’s well-pleaded factual allegations.

Contrary to the NCAA Defendants’ assertions, Plaintiffs have never contended that the NCAA did not start an investigation until after Coach Paterno’s death. As even the materials cited by the NCAA Defendants confirm, Plaintiffs have consistently made a more nuanced argument — the NCAA failed to

commence a *proper* investigation and, instead, having sent its November letter indicating that it was interested in information about Coach Paterno and others, waited for the results of the Freeh firm's investigation, which it participated in (but which did not find any alleged violations of the NCAA rules), before imposing the Consent Decree. *See* NCAA Br. 10 (citing Plfs' Mem. in Opp. to Defs' Prelim. Objs. 36 (Sept. 6, 2013) ("had the NCAA initiated a *proper* investigation . . .") (emphasis added)); Plfs' Mem. in Opp. to Defs' Prelim. Objs. (Apr. 16, 2014) ("the NCAA defendants never initiated a *proper* investigation" (emphasis added)).

It is thus true that rather than following proper procedures, as required by its own rules, the NCAA worked behind the scenes with the Freeh firm, purportedly "waiting to see" what would happen with the Freeh firm's investigation. *See* NCAA Br. 11 (quoting hearing transcript). But that does not mean that the NCAA failed to commence an investigation or that Coach Paterno was not an involved individual. The NCAA's argument that it did not begin an investigation because it did not follow its own rules for opening an investigation is just more "circuitous logic." Op. 7. It is also flatly inconsistent with materials produced in discovery showing that, after writing its letter in November, the NCAA worked closely with the Freeh Firm, well before Coach Paterno's death, to investigate Coach Paterno and other individuals at Penn State.

The NCAA Defendants’ “judicial admission” argument is ultimately grounded on a legally flawed premise that only “living individuals” can be “involved individuals” under the NCAA’s rules. In the last round of preliminary objections briefing, the NCAA Defendants argued that Plaintiffs conceded that the NCAA rules protect only the rights of living individuals because Plaintiffs recognized that “the rules may have been fashioned with a living, participating individual in mind.” Ex. G, 2014-05-19 Hrg. Tr. 85:3–6. In fact, Plaintiffs’ recognition of what “may” have been the NCAA’s subjective intent falls far short of a concession that this “was” its intent, much less a concession that the NCAA’s intent is controlling in interpreting the rules. *See* Ex. H, 2014-05-19 Hrg Tr. 89:21–90:1 (explaining that the NCAA was misreading Plaintiffs’ response, Plaintiffs did not concede the point, and whether Coach Paterno is an “involved individual” is a “summary judgment issue” or “a trial issue”).³ In noting that “the rules *may* have been fashioned with a living, participating individual in mind,” Plaintiffs merely emphasized that the NCAA’s speculation as to the drafters’

³ Plaintiffs could not concede anything about the NCAA’s intent because Plaintiffs still do not have that information — despite persistent efforts to obtain reasonable discovery. Shortly after the Court denied the NCAA’s first round of preliminary objections, Plaintiffs served discovery requests to the NCAA, seeking information about the NCAA’s interpretation of the term “involved individual.” The NCAA refused to provide responses to those requests until after the Court ruled on their second round of preliminary objections and entered a protective order. The Court did both of those things in its September 11 Order, but the NCAA continues to refuse to provide illustrative examples of the NCAA’s application of its own rules.

subjective intent was irrelevant because the plain text of the rules themselves contain no such requirement. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150 (2009) (“It is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties’ subjective intent”); *Meyer–Chatfield v. Century Bus. Servicing, Inc.*, 732 F. Supp. 2d 514, 520 (E.D. Pa. 2010) (“[e]xtrinsic evidence to show ambiguity in a contract can only be evidence that addresses the meaning of a specific term in the contract, and not the subjective intent of the parties”). The rules afford protections to *any* individual accused of significant rules violations without caveat or exception. Nothing in the NCAA rules excludes from the definition of “involved individuals” those individuals who are the target of an investigation and whose conduct is the purported basis for sanctions, regardless of whether those individuals are living or recently deceased.

That is significant because, under Pennsylvania law, contracts are governed by their plain terms — not by speculation as to what one of the contracting parties may (or may not) have subjectively intended. *See St. Clair v. Beggs*, 41 Pa. D & C.3d 513, 519 (Pa. Com. Pl. 1985) (“fact that plaintiffs privately or subjectively gave a special meaning to the words of the contract, without objective manifestation therein or in other competent evidence, is immaterial”); *Celley v. Mut. Benefit Health & Accident Ass’n*, 229 Pa. Super. 475, 483, 324 A.2d 430, 435 (1974) (uncommunicated subjective understanding of one party to a contract is

irrelevant and inadmissible when interpreting the contract). Indeed, the NCAA has never before contended that someone is not an “involved individual” merely because they become unavailable to participate personally in the investigation process. *See* SAC ¶ 36.

As Plaintiffs made clear at the argument on the last round of preliminary objections, the issue of whether the NCAA Defendants’ “living person” gloss on the definition of who qualifies as an “involved individual,” which was made up for this litigation, is a fact issue on which discovery is required. *See* Ex. H, 2014-05-19 Hrg. Tr. 75:12–16 (“this is an ad hoc rationalization that very clever lawyers have come up with to try and take a right away that the NCAA didn’t think about at the time”); *see also id.* at 89:22–23 (“It is a summary judgment issue or it’s a trial issue”). In short, there is no credible argument that Plaintiffs conceded that only living persons are covered by the NCAA’s rules. And because the parties dispute the meaning of the NCAA’s rules, that issue should not be resolved at the preliminary objection stage of litigation. *See* Pa. R.C.P. 1028(c)(2); *Deyarmin*, 2007 PA Super at ¶ 28, 931 A.2d at 14 (fact disputes should not be resolved at the preliminary objection stage of litigation).

C. The NCAA’s Constitution And Bylaws Are Not A Personal Services Contract.

Under Pennsylvania law, except in the case of contracts for purely 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). “[C]ontracts made during a decedent’s lifetime are not dissolved by death unless they involve peculiar skills or are based on distinctly personal considerations.” *Ress v. Barent*, 378 Pa. Super. 397, 402–03, 548 A.2d 1259, 1262 (1988). Accordingly, under Pennsylvania law contractual obligations survive the death of either contracting party unless the contract otherwise specifically so provides or is for purely personal services that can only be performed by the contracting party. The fact that the NCAA’s rules unambiguously lack any carve-out for deceased individuals thus establishes that any individual accused of significant NCAA rules violations is an “involved individual” entitled to protections provided by the rules, regardless of whether the individual is living or recently deceased.

The NCAA Defendants argue that the NCAA’s Constitution and Bylaws provide nothing more than “personal” rights that do not survive an “involved individuals” death. NCAA Br. 14–15. That makes no sense. A “Constitution” grants rights to individuals not only to protect their personal interests but also to serve a larger institutional function. The Constitution and Bylaws, and the rights and obligations they impose, exist not for the narrow benefit of the NCAA and its member institutions *as institutions* but for the overall benefit of the students, coaches, faculty, and the larger community that participates in college athletic

sports. *Cf. Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (individual citizen has standing to challenge federal statute on grounds that it violates a State’s rights; the Constitution grants States rights not only to protect their interests but to “protect the liberty of all persons” within the States).

Not surprisingly, the protections afforded to “involved individuals” are not merely personal in nature; they serve a broad institutional purpose by ensuring that the organization’s rules are enforceable by individuals affected by an NCAA investigation — even when a member institution itself is under intense pressure to cave in to the NCAA’s demands. Among other things, the rules require the NCAA’s Committee on Infractions to prepare a formal report detailing all of its findings, and to submit the report to all involved individuals. *See* SAC ¶ 42. Similarly, no expedited hearing procedure may be used without the consent of involved individuals, *see id.* ¶ 46, and all involved individuals have a right to appeal any penalties that may be imposed, *see id.* ¶ 47. The Estate, acting in Joe Paterno’s interest, is in just as good a position to exercise these rights as Joe Paterno would be if he were still alive. *See Young v. Gongaware*, 275 Pa. 285, 287, 119 A. 271, 272 (1922) (“where [a] contract may be performed by the personal representatives, or where it embodies a property right, . . . death does not terminate such contract”). Indeed, as the Second Amended Complaint alleges,

involved individuals are often allowed to participate in NCAA investigations through counsel or an appropriate representative. *Id.* ¶ 36.

The NCAA Defendants dispute this fact and urge the Court to conclude that the rules are purely personal in nature. But even the cases cited by the NCAA undermine its position. Not surprisingly, none of them involve a contract that is even remotely analogous to an institution's Constitution and Bylaws. Two of the cases — *In re Pierce's Estate*, 123 Pa. Super. 171, 187 A. 58 (1936), and *In re Billings's Appeal*, 106 Pa. 558 (1884) — involved circumstances where the contract did *not* depend on personal skill or ability of one of the parties to perform and, therefore, the Court concluded that the contract survived the contracting party's death. The cases cited by the NCAA that reach a different conclusion were personal services contracts. In *Blakely v. Sousa*, 197 Pa. 305, 41 A. 286 (1900), for example, the Court held that a contract with John Philip Sousa to form a musical organization ("Sousa's Band") depended at its foundation on the "personal qualities" and "peculiar skill and expertise" of the contracting parties. Similarly, in *Bland's Administrator v. Umstead*, 23 Pa. 316, 317 (1854), the Court held that an agreement between two adjoining owners of land for "the maintenance of a partition fence" did not survive the death of one of the parties and could not bind the executor or administrator.

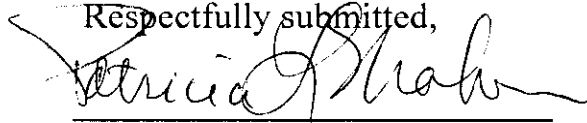
* * * *

Since this case began, the NCAA Defendants have refused to produce basic discovery concerning the application of their rules in other cases, their investigation into Coach Paterno, and their decision to sanction him in the Consent Decree they imposed on Penn State. They have filed multiple rounds of preliminary objections and, at every step, have tried to prevent this case from being litigated. But it is past time for the truth to come out, for their obstructionist tactics to end, and for this litigation to move forward. The Court has already held that the Estate has standing to bring Count I, and Plaintiffs appropriately included allegations in their Second Amended Complaint to bring into dispute the NCAA Defendants' factual contentions concerning the timing of Coach Paterno's death. Instead of countenancing any further delay, the Court should overrule the NCAA Defendants' preliminary objections and allow this case to proceed on its merits.

CONCLUSION

The NCAA Defendants' preliminary objections should be overruled.

Respectfully submitted,



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john.commisso@jacksonlewis.com

Dated: November 28, 2014

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

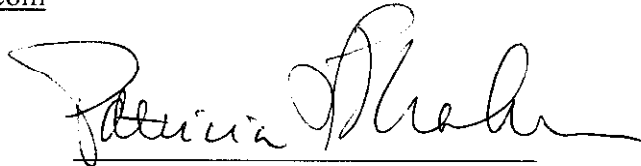
I HEREBY CERTIFY that a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO THE NCAA DEFENDANTS' PRELIMINARY OBJECTION TO THE SECOND AMENDED COMPLAINT** was served this 28th day of November, 2014 by first class mail and email to the following:

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Harrisburg, PA 17108-0886
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Counsel for Plaintiff Estate of Joseph Paterno

Exhibit A

Message

From: Lennon, Kevin [/O=NCAA/OU=NCAA/CN=RECIPIENTS/CN=KLENNON]
Sent: 7/15/2012 1:00:06 PM
To: Roe, Julie [jroe@ncaa.org]
Subject: RE: Confidential- checking in on PSU

Very helpful Julie. If there is a good time this afternoon, let me know. I'll try after 3pm but no worries if it isn't till tomorrow.

Thanks,

Kevin

From: Roe, Julie
Sent: Saturday, July 14, 2012 11:15 PM
To: Lennon, Kevin
Subject: Re: Confidential- checking in on PSU

Kevin,
All of your points are sound to me.

Redacted

I keep going back to the three questions I raised Friday before the call to try to frame the issue.

Regarding your third point, I think Mark believes based on conversations with some presidents that PSU did gain an advantage although Berst, Wally and I disagree with that point. The point some have made is that had PSU dealt with this in 2001, they might have suffered a recruiting disadvantage due to the bad publicity at that point. Given that they have a decent recruiting class now, not sure this holds up.

I characterized our approach to PSU as a bluff when talking to Mark yesterday afternoon after the call. He basically agreed b/c I think he understands that if we make this an enforcement issue, we may win the immediate battle but lose the war when the COI has to rule. I think he is okay with that risk.

I need to think about point no. 4 some more. I think we are waiting on PSU to respond- you are right, but I don't know that it precludes us from gathering info on our own to adequately assess the response.

Point no. 5 is a good one. Seems like the conferences and ADs are not part of the discussion, as well as the majority of the presidents. I think the presidents are feeling public pressure and allowing that to raise the viability question which is not one of my big three. I am hopeful the call with the larger group next week will give a broader perspective.

I would appreciate talking with you. Possibly tomorrow afternoon? or early tomorrow morning? (Halle gets up around 6:30).

Here's where I am. I still think there is credibility in saying: 1) we could try to assert jurisdiction on this issue and may be successful but it'd be a stretch. I have thought more about this- we could make the control argument based on ethical failures by senior leaders and I think it's reasonable and logical, just not sure the COI (and then IAC) would agree 2) in

— this case, we reached an agreement with PSU resulting in significant penalties being imposed along with corrective actions; 3) ideally (and going forward), we need to be able to be a force when a general lack of integrity exists and there should be no ambiguity on that point; 4) in terms of our future positioning, we are appointing a blue ribbon group to develop the right approach to helping our members establish standards/expectations so as to ensure they don't have a cultural failure and abandonment of integrity. We also need a means of accountability for the Association to assert, if God forbid, some similar situation ever arises again.

To your point, we want the agreement to be strong (my point no. 2) but are going to have to be flexible in negotiating that with PSU.

I don't think I've said anything new here but hopefully it helps us both think through this to get to the right answer.

Sent from my iPad

On Jul 14, 2012, at 10:02 PM, "Lennon, Kevin" <klennon@ncaa.org> wrote:

Julie,

— Sending this to you only to get a sense of how off I am on what I see transpiring with our internal group. I feel like it is a bit of a runaway train right now and am a bit concerned on a couple of fronts. I most certainly will share these thoughts with the group if some of it makes sense. I want to make sure I am providing the best counsel possible and know you do as well.

So I am taking a quick check with you. No need to respond quickly, just food for thought. In no particular order:

1. The more penalties and sanctions placed on school, conference, other members, the less likely they will agree. I know we are banking on the fact school is so embarrassed they will do anything, but I am not sure about that, and no confidence conference or other members will agree to any of that. This will force the jurisdictional issue that we really don't have a great answer to that one....
 2. Whatever action we take against PSU will require us to answer the immediate follow up questions as to what this means for the next case- scope and reach of ethical dilemmas that will take many forms. Don't we need to have an answer for this before we do something with PSU?
 3. Delicate issue, but how did PSU gain a competitive advantage by what happened? Even if discovered, reported, and actions taken immediately by the administration, not sure how this would have changed anything from a competitive advantage perspective.
 4. As for idea to bring in Judge Freeh, I thought the key response from our end is to wait to hear from PSU? I feel like to do otherwise with any action (like this) will invite what else the NCAA is doing now? Like are you sending enforcement representatives in now, and if not, why not?
-

5. I feel we have not spent enough time on membership input/ counsel/ reaction/direction and spending more time on media input. I understand not everyone in our membership will agree with any direction we take, but coming off our last round of problems, best to eliminate at least one complaint and that is that national office was not in touch with membership. I know Mark has call scheduled, but think we need more time on this part of our discussions.

Appreciate reactions and comments when you get a chance. Phone call is easier. And no reason for anything this weekend. And you can certainly take a pass on commenting all together.

I also know how important July is for you and your family. And this most certainly takes precedent. Please know I am praying for you , your sister, and family and sorry if this message is but another intrusion.

Keep the faith.

Your friend,

Kevin

Exhibit B

Appointment

From: Walls, Tommie [/O=NCAA/OU=NCAA/CN=RECIPIENTS/CN=TWALLS]
Sent: 12/1/2011 7:31:11 PM
Subject: meeting with Freeh Sporkin & Sullivan, LLP staff -- lunch will be provided
Location: Nittany Lion Inn, 200 West Park Avenue, State College, PA 16803 Boardroom 2 on the ground level
Start: 12/7/2011 5:00:00 PM
End: 12/7/2011 8:00:00 PM
Show Time As: Busy

- Judge Louis Freeh
- Judge Eugene Sullivan
- Omar Y. McNeill
- Barbara Mather (on behalf of the Special Investigative Counsel)
- Jon Barrett, external counsel on behalf of the Big 10
- Donald Remy and Julie Roe (NCAA Staff)

Exhibit C

Congress of the United States
Washington, DC 20515

November 19, 2014

Dr. Mark Emmert
President
National Collegiate Athletic Association
P.O. Box 6222
Indianapolis, IN 46206

Dear Dr. Emmert:

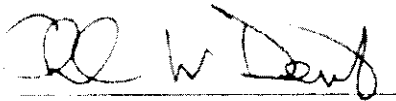
We are writing in regard to the National Collegiate Athletic Association's (NCAA) 14 November 2014 press release that claims to provide "clarity" and "set the record straight" regarding the events which led to the Consent Decree being imposed upon The Pennsylvania State University (Penn State). This release included selected descriptions of events by NCAA officials and provides little context to what actually happened. Instead of selectively releasing documents in an attempt to cast your organization in a favorable light, we urge you to immediately release all documents related to the Consent Decree.

Earlier this month, it also came to our attention that your association "bluffed" its way into forcing Penn State – a member institution that represented the gold standard of NCAA rules compliance for decades – to accept unduly punitive sanctions. From examining these emails, it is clear the NCAA lacked any credible basis to impose sanctions. Instead of enforcing the rules laid out in your bylaws, the NCAA sought to insert itself into a purely criminal matter that fell outside the scope of the NCAA's jurisdiction. In fact, internal emails go on to state that "we [the NCAA] could try to assert jurisdiction on this issue and may be successful *but it'd be a stretch.*" (emphasis added) Furthermore, your staff actively "bank[ed] on the fact the school is so embarrassed they will do anything." Given the tenuous nature of your egregious over-extension of power, you have at least had enough sense to remove some sanctions that should have never been imposed in the first place. We urge you to remove all remaining sanctions immediately.

Additionally, recent reports indicate that the NCAA regularly coordinated with Freeh Sporkin Sullivan, LLP (Freeh Group) during its review of Penn State. The coordination appears to have started almost immediately after Penn State retained the Freeh Group. As with the Consent Decree, the NCAA selectively released emails relating to its communications with the Freeh Group. Unless you release all documents related to your involvement with the Freeh Group, how can you objectively say that they conducted an independent review of Penn State? A full release would provide all possible clarity to the public, something that is sorely needed at this time.

We look forward to your immediate response to this request and seeing all documents related to the events involved with your imposition of the Consent Decree. We hope you are not "banking" on the fact that we will not pursue further action.


Sincerely,



Charles W. Dent
MEMBER OF CONGRESS



Glenn 'GT' Thompson
MEMBER OF CONGRESS



Jim Gerlach
MEMBER OF CONGRESS



Michael F. Doyle
MEMBER OF CONGRESS



Mike Kelly
MEMBER OF CONGRESS



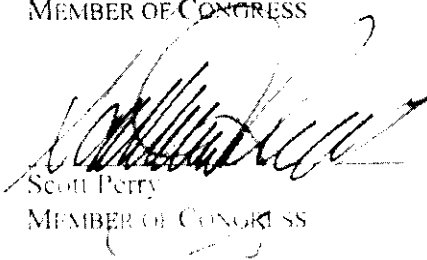
Bill Shuster
MEMBER OF CONGRESS



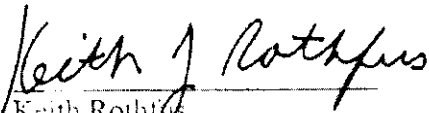
Lou Barletta
MEMBER OF CONGRESS



Tom Marino
MEMBER OF CONGRESS



Scott Perry
MEMBER OF CONGRESS



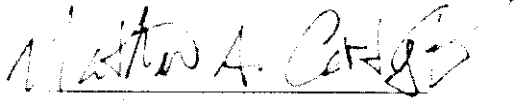
Keith Rothfus
MEMBER OF CONGRESS



Joseph R. Pitts
MEMBER OF CONGRESS



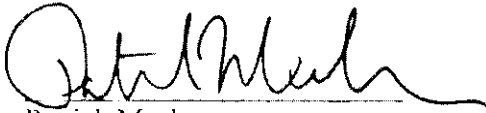
Robert A. Brady
MEMBER OF CONGRESS



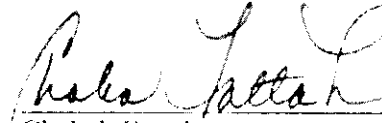
Matt Cartwright
MEMBER OF CONGRESS



Michael G. Fitzpatrick
MEMBER OF CONGRESS



Patrick Meehan
MEMBER OF CONGRESS



Chakah Fattah
MEMBER OF CONGRESS

CC: Hon. Jacob D. Corman, Majority Leader, Senate of Pennsylvania
Hon. Robert M. McCord, Treasurer of the Commonwealth of Pennsylvania

Exhibit D

Appointment

From: Omar Y. McNeill [McNeill@freehgroup.com]

Sent: 12/24/2011 1:16:52 PM

To: Remy, Donald [dremy@ncaa.org]; 'Barrett, Jonathan A.' [JBarrett@mayerbrown.com]

Subject: PSU Weekly Update

Location: Conference Call (Dial-In Info Below)

Start: 12/23/2011 2:00:00 PM

End: 12/23/2011 3:00:00 PM

Show Time As: Busy

Recurrence: Weekly

Occurs every Friday from 9:00 AM to 10:00 AM effective 12/23/2011 until 5/4/2012. There are 13 more occurrences.
Eastern Time (US & Canada)

Please use the new passcode listed below for calls going forward.

866-212-0875

Passcode – 937115#

Appointment

From: Omar Y. McNeill [McNeill@freehgroup.com]
To: 'Barrett, Jonathan A.' [JBarrett@mayerbrown.com]; Remy, Donald [dremy@ncaa.org]; Omar Y. McNeill [McNeill@freehgroup.com]
Subject: PSU Weekly Update
Location: Conference Call (Dial-In Info Below)
Start: 1/16/2012 2:00:00 PM
End: 1/16/2012 3:00:00 PM
Show Time As: Busy

Please use the new passcode listed below for calls going forward.

866-212-0875

Passcode - 937115#

Appointment

Subject: PSU Weekly Update 866-212-0875. Passcode – 937115#
Location: Conference Call (Dial-In Info Below)
Start: 1/20/2012 2:00:00 PM
End: 1/20/2012 3:00:00 PM
Show Time As: Busy

Please use the new passcode listed below for calls going forward.

866-212-0875
Passcode - 937115#

Appointment

From: Omar Y. McNeill [McNeill@freehgroup.com]
Sent: 1/25/2012 5:17:38 PM
To: 'Omar Y. McNeill' [McNeill@freehgroup.com]; Remy, Donald [remy, donald]; 'Barrett, Jonathan A.' [barrett, jonathan a.]; Remy, Donald [dremy@ncaa.org]; 'Barrett, Jonathan A.' [JBarrett@mayerbrown.com]
Subject: PSU Weekly Update
Location: Conference Call (Dial-In Info Below)
Start: 4/6/2012 6:00:00 PM
End: 4/6/2012 7:00:00 PM
Show Time As: Tentative

Please use the new passcode listed below for calls going forward.

866-212-0875

Passcode 937115#

Appointment

From: Omar Y. McNeill [McNeill@freehgroup.com]
Sent: 2/1/2012 2:29:38 PM
To: 'Omar Y. McNeill' [McNeill@freehgroup.com]; Remy, Donald [remy, donald]; 'Barrett, Jonathan A.' [barrett, jonathan a.]; Remy, Donald [dremy@ncaa.org]; 'Barrett, Jonathan A.' [JBarrett@mayerbrown.com]
Subject: PSU Weekly Update
Location: Conference Call (Dial-In Info Below)
Start: 2/20/2012 2:00:00 PM
End: 2/20/2012 3:00:00 PM
Show Time As: Tentative

Please use the new passcode listed below for calls going forward.

866-212-0875

Passcode 937115#

Appointment

Subject: PSU Weekly Update 866-212-0875 Passcode – 937115#

Location: Conference Call (Dial-In Info Below)

Start: 2/3/2012 2:00:00 PM

End: 2/3/2012 3:00:00 PM

Show Time As: Busy

Please use the new passcode listed below for calls going forward.

866-212-0875

Passcode - 937115#

Appointment

From: Omar Y. McNeill [McNeill@freehgroup.com]
Sent: 12/24/2011 1:16:52 PM
To: Remy, Donald [dremy@ncaa.org]; 'Barrett, Jonathan A.' [JBarrett@mayerbrown.com]
Subject: Copy: PSU Weekly Update 866-212-0875 Passcode – 937115#
Location: Conference Call (Dial-In Info Below)
Start: 2/6/2012 2:30:00 PM
End: 2/6/2012 3:30:00 PM
Show Time As: Busy

Please use the new passcode listed below for calls going forward.

866-212-0875
Passcode – 937115#

Exhibit E

Message

From: Remy, Donald [/O=NCAA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DREMY]
Sent: 1/5/2012 7:54:49 PM
To: Omar Y. McNeill [mcneill@freehgroup.com]
CC: Roe, Julie [jroe@ncaa.org]; Walker, Amy [ajwalker@ncaa.org]; Walls, Tommie [twalls@ncaa.org]
Subject: FW: Presentation documents
Importance: High

Confidential

Omar –

Happy New Year. I hope that all is well. Attached are advance materials for our call tomorrow morning. As discussed, this informational briefing is being provided to your team to illustrate how the NCAA enforcement staff historically has examined issues involving institutional control and ethical conduct. We hope that it will be helpful as you independently examine similar issues related to your charge. Of course, it goes without saying that at this time the NCAA does not have an open enforcement inquiry or investigation into the issues at Penn State and this presentation is not focused on that institution. We hope to get you the additional information we discussed in short order.

To structure our discussion, note that we will walk through the power point slowly and the only supplement that would be good to read in advance is Number 3, which you may already have. The others are background reference material. Look forward to talking to you.

Warmest Regards,

Donald

CC: Julie Roe Lach

Exhibit F

Message

From: Remy, Donald [/O=NCAA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DREMY]
Sent: 12/28/2011 10:27:04 PM
To: Omar Y. McNeill [mcneill@freehgroup.com]
Subject: ProposedNCAAQuestions

Omar –

Apologies, but it has been more difficult than I thought to get people engaged this week. In any event, I have attached a list of draft questions as discussed. These may be edited and supplemented as we move on. Also, we may be able to have Julie or someone from her shop come to State College late next week. Is there a day that works better than others?

Happy Holidays,

Donald M. Remy | General Counsel

NCAA | P O Box 6222 | Indianapolis, Indiana 46206-6222



Office

Mobile

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dremy@ncaa.org

Shipping Address

NCAA Distribution Center | 1802 Alonzo Watford Sr. Dr. | Indianapolis, Indiana 46202 | 317/917-6222 Main

"The pursuit of excellence in both academics and athletics"



Proposed questions associated with issues raised by the NCAA

Overall from Presidential letter related to Grand Jury Report

1. How has Penn State and/or its employees complied with Articles 2.1, 2.4, 6.01.1 and 6.4 of the NCAA Constitution and NCAA Bylaws 10.1, 11.1.1, 11.1.2.1 and 19.01.2?
2. How has Penn State University exercised institutional control over the issues identified in and related to the Grand Jury Report? Were there procedures in place that were or were not followed? What are the institution's expectations and policies to address the conduct that has been alleged in this matter upon discovery by anyone?
3. Have each of the alleged persons to have been involved or have notice of the issues identified in and related to the Grand Jury Report behaved consistent with principles and requirements governing ethical conduct and honesty? If so, how? If not, how?
4. What policies and procedures does Penn State University have in place to monitor, prevent and detect the issues identified in and related to the Grand Jury Report or to take disciplinary or take corrective action if such behaviors are found?

General

5. Describe the culture of the university as it relates to ethical behavior.
6. Describe the culture of the athletics department.
7. What is the difference between the university culture and the athletics department culture?
8. Describe the staffing and structure of compliance related professionals? University wide? In athletics?
9. Describe the integration of athletics compliance, if any, with overall university compliance.
10. Where do the athletics compliance functions report?

11. Do the compliance functions have access to the board of trustees?
12. Do the President/Chancellor/Athletics Director and other members of the senior leadership make clear that integrity takes precedence over winning?
 - a. Describe the institution's commitment to upholding integrity (doing the right thing).
 - b. Does the culture of the athletic department align with the institution's stated commitment to integrity? How?
13. Describe the affirmative steps taken to assure compliance with NCAA rules?
14. Describe the University's policies and procedures regarding access to athletic facilities by non athletics, non employee personnel.
15. Describe the University's policies and procedures regarding the monitoring and control of the organizations and individuals who are promoting the athletics interest of the institution (e.g. boosters).
16. Describe the University's policies and procedures regarding background checks for university employees generally? Athletic personnel? Employees that are involved with youth activities.

Response to Wrongdoing and Duty to Report

17. Do the President/Chancellor/Athletics Director and other members of the senior leadership make clear, by words and actions, that individuals who engage in wrongdoing will be appropriately disciplined, where applicable, and subject to penalty or discharge?
 - a. Does such language appear in the employment contracts of administrators and coaches?
 - b. How did they communicate the message?
 - c. How often? Who was present? Was there any ambiguity? Etc.
18. Do the President/Chancellor/Athletics Director and other members of the senior leadership make clear, by words and actions, that individuals who witness or otherwise learn of acts of wrongdoing are expected to report those activities to the appropriate institutional office or agency or the appropriate office or agency outside the institution under all circumstances, under penalty of adverse personnel action?

- a. How did they communicate the message?
 - b. How often? Who was present? Was there any ambiguity? Etc.
19. Do the President/Chancellor/Athletics Director and other members of the senior leadership clearly set forth the expectations of student-athletes, staff members, administrators and coaches to properly report and act on information regarding possible wrongdoing involving athletics department personnel?
- a. Are there clear procedures available to facilitate such reporting?
 - b. Are those procedures understood, frequently communicated (how) in a meaningful way conveying their importance?
20. Has the President/Chancellor/Athletics Director and other members of the senior leadership created and fostered an environment in which student-athletes, staff members, administrators and coaches feel free to report possible wrongdoing without fear of reprisal or retaliation and make those aforementioned individuals well aware of the mechanisms in place to make such reports?
- a. When interviewed, do staff members convey that they feel free to report possible wrongdoing without the negative backlash detailed in the question?

Additional Education and Auditing of Commitment to Foster Culture of Reporting

21. Has the President/Chancellor/Athletics Director and other members of the senior leadership established written criteria that specify the factors, including, but not limited to, the factors mentioned above that will be considered in evaluating the job performance of the director of athletics, staff members and coaches? In that regard, have the following criteria been included:
- a. Establishing and conducting educational programs to assist in detecting and reporting wrong or undesirable behavior including the penalties for failure to report such behavior and incentives for coming forward and reporting;
 - b. Effectively communicating to the athletics department the institution's position on inappropriate or undesirable behavior;
 - c. Effectively communicating to athletics department personnel their duty to report instances of inappropriate or undesirable behavior,
 - d. Instilling a department-wide notion that such oversight and monitoring is a shared responsibility, resulting in a culture of awareness and appropriate behavior.

22. Do the President/Chancellor/Athletics Director and other members of the senior leadership have clearly-written procedures for conducting exit interviews for student-athletes, staff members, administrators and coaches?
- a. Do those written procedures expect probing the interviewee about any knowledge of wrongdoing by any member of the athletics department?
 - b. How is it insured that those exit interviews occur and are conducted in conformance with the procedures?
23. Has the President/Chancellor established a procedure for a periodic, independent review of the culture of the athletics department?
- a. Do others in the athletics department and institution at large feel empowered to challenge a “power coach” or report the coach’s conduct if he/she has engaged in wrongdoing?
 - b. How is the “power coach” held accountable for upholding the rules and acting ethically?
24. Has the President/Chancellor/Athletics Director and other members of the senior leadership established a system of incentives to encourage student-athletes, staff members, administrators and coaches to report instances of suspected wrongdoing to the appropriate institutional or local office or agency?
- a. Is there a system in place to track such reports once they are made in order for the President/Chancellor to exercise appropriate control and monitoring?
 - b. How often are those reports and subsequent follow-up reviewed to ensure thorough follow up did in fact, occur?
 - i. Who conducts the initial follow-up and subsequent, review?
 - ii. Is this person independent?

Ethical Conduct

25. Describe how the President/Chancellor/Athletics Director/Coaches promote the character development of participants.
26. Describe how the President/Chancellor/Athletics Director/Coaches enhance the integrity of higher education.
27. Describe how the President/Chancellor/Athletics Director/Coaches promote civility, student-athletes, coaches, and all others associated with these athletics programs.

28. Describe how the President/Chancellor/Athletics Director/Coaches ensure that athletic participation, events, and all activities affecting the athletics program adhere to values such as respect, fairness, civility, honesty and responsibility.
29. Describe the steps taken by the /President/Chancellor/Athletics Director to require individuals impacting the athletics program to act with honesty and sportsmanship at all times.
30. Describe the steps taken by the President/Chancellor/Athletics Director to encourage the honor and dignity of fair play and the generally recognized high standards associated with wholesome competitive sports.
31. Describe the policies and procedures to hold head coaches responsible to promote an atmosphere for compliance within the program supervised by the coach and to monitor the activities regarding compliance of all assistant coaches and other administrators involved with the program who report directly or indirectly to the coach.
32. Do you think that the coaches and administrators effectively avoided improper conduct or questionable acts and exhibited positive and exemplary moral values when learning of allegations against the former assistant football coach.

Exhibit G

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA
CIVIL DIVISION - LAW

GEORGE SCOTT PATERNO, as duly : 13-2082
appointed representative of the :
ESTATE and FAMILY of JOSEPH PATERNO; :

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

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

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

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

VS :

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, and THE :
PENNSYLVANIA STATE UNIVERSITY :

1 the Court to adopt as a preliminary matter with
2 respect to Mr. Clemens is simply so broad as to
3 be limitless, and that's our contention here
4 today.

5 On the issue of whether or not the
6 Court -- the NCAA is grateful for the Court's
7 guidance. The Court found it lacked
8 jurisdiction over the contract claim, but so
9 almost by definition it didn't bind any of the
10 parties or itself to that dicta, but I do want
11 to speak to the question of whether or not we
12 are retreading old ground, because we are
13 intentionally not doing so, Your Honor

14 The ambiguity that the Court
15 identified -- we don't necessarily agree -- but
16 the ambiguity that the Court identified was
17 potential ambiguity concerning whether or not
18 involved individual has to mean an individual
19 who was sanctioned. The Court could not have
20 addressed the question of whether or not Coach
21 Paterno's death defeats his third-party
22 beneficiary status, because the concession upon
23 which we rely is actually in the briefing on
24 this round of preliminary objections, and Mr.
25 Loveland once said he's not sure whether it was

1 meant to apply to a living individual or a dead
2 individual, but in the parties' briefs at page
3 38, here is what they say: "To be sure, the
4 rules may have been fashioned with a living,
5 participating individual in mind, but that is
6 not a requirement." Our point about this is if
7 they concede, as they do, that the rules were
8 fashioned with a living individual in mind,
9 then that's where third-party beneficiary
10 status ends, because it requires express
11 intention.

12 The other thing that Mr. Loveland said
13 they had no idea about is whether anybody had
14 ever been named in the consent decree where
15 wins were taken away and they weren't named as
16 an involved individual. They do know the
17 answer to that, because we talked about it here
18 last time, Your Honor. That was the example of
19 Coach Bowden, whose wins were taken away with
20 respect to a violation that he had absolutely
21 nothing to do with and was not an involved
22 individual. He was mentioned. His wins were
23 taken away. So the idea that they have no idea
24 what the precedent is, I think, is
25 counterfactual.

1 And then finally, on the issue of
2 whether or not third-party beneficiary status
3 could survive death, it's not, Your Honor, a
4 question of intuition. It's a question of law.
5 The Court doesn't ask, "Is there some other way
6 that this could be done?" The question is, at
7 the time of the contractual agreement, were the
8 services personal enough in nature that the
9 parties contemplated that they would both have
10 to be alive in order to perform them? If the
11 answer is somebody else can do it with respect
12 to any personal service contract, somebody else
13 can always do it. I can contract with an
14 architect because he is famous and I like his
15 style and I want him to design my building. If
16 he passes away, it would be insufficient to
17 say, "You know, there are lots of architects.
18 Our firm has others who can do this. Anybody
19 can draw a building. There are other things we
20 can do." The question is he and I contemplated
21 that I would do that with him.

22 The other piece of this is they talk
23 about this as being a process in which only
24 Coach Paterno would have rights. Of course,
25 the enforcement proceeding is mutual in nature,

Exhibit H

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA
CIVIL DIVISION - LAW

GEORGE SCOTT PATERNO, as duly : 13-2082
appointed representative of the :
ESTATE and FAMILY of JOSEPH PATERNO; :

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

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

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

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

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, and THE :
PENNSYLVANIA STATE UNIVERSITY :

1 those can be done by a representative. Those
2 are rights that can certainly be fulfilled,
3 just as any deceased --

4 THE COURT: Does the wording of the
5 NCAA on involved individual, does that
6 contemplate in any manner a deceased
7 individual?

8 MR. LOVELAND: I don't think it
9 contemplates or disregards the fact whether
10 someone who was living at the time this was
11 initiated somehow loses rights; that if they
12 were involved in the conduct, that that right
13 is lost because they pass away before the
14 investigation is completed. There is nothing
15 in the rules that suggests that they would lose
16 that right whatsoever.

17 Again, think about it in this context.
18 We, on behalf of the Paterno estate, sought the
19 right in this matter to participate in the
20 NCAA's investigation. We sought the right to
21 appeal. We were told you could not do that.
22 No one said you can't do that because Coach
23 Paterno is dead. No one made that
24 interpretation of their rules, and I'd be
25 interested in whether --

1 THE COURT: And basically because of
2 all the waiver of rights signed by the
3 university; is that correct?

4 MR. LOVELAND: They did it because
5 they said, "We didn't do this under our rules
6 and regulations or under our enforcement
7 procedures."

8 THE COURT: So you're out?

9 MR. LOVELAND: So therefore your
10 rights which you would have under our
11 enforcement procedures don't apply. No one
12 said because Coach Paterno is dead. So this is
13 an ad hoc rationalization that very clever
14 lawyers have come up with to try and take a
15 right away that the NCAA didn't think about at
16 the time. So if we want to look at their
17 interpretation of their own rules and
18 regulations, let's look at what they said at
19 the time.

20 But as I said, Your Honor, these are
21 rights that, had we been given the opportunity
22 to employ them, to call witnesses, to examine
23 documents, to do various things, to insist on
24 the process that the NCAA constitution and
25 rules applies because we are an involved

1 individual and we therefore can insist on that
2 process, those are things that the Paterno
3 estate was deprived the access to.

4 THE COURT: So, obviously, you are
5 arguing that the Paterno estate fully stands in
6 Joe Paterno's shoes. And where does that come
7 from in terms of the NCAA constitution and
8 bylaws? It's kind of a unique situation, isn't
9 it, where we have a decedent prior to the fact
10 that the Freeh report was issued and prior to
11 the fact that the NCAA then adopted the Freeh
12 report, which mentioned the coaches and
13 mentioned Coach Paterno by name?

14 MR. LOVELAND: But prior to Coach
15 Paterno's death, the NCAA interjected itself in
16 this process. Mr. Emmert wrote a letter to
17 President Erickson on November 17 --

18 THE COURT: Saying that the NCAA may
19 become involved.

20 MR. LOVELAND: The NCAA is looking
21 over the shoulder. The NCAA may well have
22 questions. The NCAA -- et cetera. So there's
23 no question the NCAA was there on the scene,
24 waiting to see what was happening. They made a
25 choice to sit back and not act. Then they made

1 clear for the record, Your Honor. Page 38 of
2 our brief on this round of preliminary
3 objections says as follows, "To be sure, the
4 rules may have been fashioned with a living
5 participating individual in mind, but that is
6 not a -- emphasized -- requirement. It has
7 nothing to do with the definition of an
8 involved individual in Rule 32.1.5." Far from
9 conceding that everyone -- only living
10 individuals can be involved individuals -- we
11 have said it has nothing to do with the
12 definition of involved individual. And again,
13 we have no idea whether the NCAA has ever taken
14 that position before. Have they allowed
15 estates to participate before? We do not know.
16 All we know is that's their argument on the
17 second round of preliminary objections in the
18 Paterno case, never made before.

19 Secondly, Mr. Johnson argues that the
20 ambiguity on the first part, which is has an
21 individual been sanctioned, that the Court
22 focused on, and it did? And the point was, if
23 you have been sanctioned, you are an involved
24 individual. Now, Mr. Johnson takes that and
25 turns it on its head, and he says, "Well, Coach

1 Bowden, we assert --" again, we haven't had the
2 opportunity to conduct discovery into the
3 records of this. And he says Coach Bowden's
4 wins were vacated, and he was not an involved
5 individual. I don't know if Coach Bowden
6 agreed to that. I don't know if Coach Bowden
7 sought to be an involved individual. I don't
8 know if the NCAA gave him notice. I know none
9 of those things, because we have had no
10 discovery. So it's not counterfactual. It's
11 simply that, while I respect Mr. Johnson
12 greatly, choose not to believe that that
13 constitutes the discovery record that we're
14 entitled to in this case on whether or not the
15 circumstance arises. More importantly,
16 however, on the issue of sanctions --

17 THE COURT: Basically, I guess you're
18 saying it's kind of a summary judgment matter
19 that comes later? Am I reading you correctly,
20 counsel?

21 MR. LOVELAND: Absolutely, Your Honor.
22 It is a summary judgment issue or it's a trial
23 issue. You know, it may be, at the end of the
24 day, that there is an issue of fact for trial
25 as to whether Coach Paterno was an involved

1 individual, but look at it this way. Was he
2 sanctioned? Well, it's in the punitive section
3 of their consent decree that they have the
4 vacation of wins by Coach Paterno. Punitive
5 equals sanction. I think it's a synonym.

6 THE COURT: And I guess the question
7 is was Coach Paterno being sanctioned or was
8 the university being sanctioned? Isn't that
9 the underlying issue there?

10 MR. LOVELAND: Correct. So then look
11 at the entire consent decree, because, as I
12 pointed out this morning -- and this is
13 actually something I don't think we discussed
14 the last time we were together. There is not
15 much that we didn't, but this is one.

16 THE COURT: Yes, we were getting on
17 toward four hours, as I recall.

18 MR. LOVELAND: Right. Which is that,
19 on page 2 of the consent decree, the NCAA does
20 expressly find that Coach Paterno violated the
21 rules and regulations of the NCAA and does
22 expressly find that he failed to maintain an
23 atmosphere of integrity in violation of those
24 rules. So they name him, they find he violated
25 the rules, they have a punitive section of the

Exhibit I

Message

From: skredmond@ncava.org [skredmond@ncava.org]
Sent: 11/29/2011 8:25:28 PM
To: Emmert, Mark [memmert@ncaa.org]
CC: Klecka, Cari [cklecka@ncaa.org]
Subject: RE: Penn State

Hi Mark-

Thank you for passing her name along and also for making this critical issue a priority. Thanks for your leadership.

Best-

Kathy

----- Original Message -----

Subject: RE: Penn State
From: "Emmert, Mark" <memmert@ncaa.org>
Date: Wed, November 23, 2011 10:35 am
To: "skredmond@ncava.org" <skredmond@ncava.org>
Cc: "Klecka, Cari" <cklecka@ncaa.org>
Kathy -

Thank you for your note and your ongoing commitment to this issue. It has risen to a higher level of attention for the most unfortunate of reasons. However, we cannot miss the opportunity to leverage the moment. To that end, by way of email, I am introducing you to Cari Klecka, a director on our staff who is developing relationships inside and outside of higher education to examine existing policies and procedures and to develop Association policies.

Enjoy the holiday season and best wishes for 2012.

All the best,
Mark

From: skredmond@ncava.org [mailto:skredmond@ncava.org]
Sent: Friday, November 18, 2011 5:43 PM
To: Emmert, Mark
Subject: Penn State

Hi Mark-

Hope you are well. Glad to see you are investigating Penn State. I think you'll find many universities display lack of institutional control and I would be happy to share that information with you. As you investigate Penn State, you will want to talk with your former colleague, Vicky Triponey. You'll find her testimony and documentation to be convincing. Should you need any info on Penn State or any other school, please know I am happy to provide it.

Thanks,

Kathy

This email and any attachments may contain NCAA confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return email, delete this message and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.