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

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO;	Docket No.: 2013-2082
RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, PETER KHOURY, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;	Type of Case: Declaratory Judgment Injunction Breach of Contract Tortious Interference with contract Defamation Commercial Disparagement Conspiracy
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	Type of Pleading: Memorandum in Support of Preliminary Objections
ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GRDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University, Plaintiffs,	Filed on Behalf of: National Collegiate Athletic Association, Mark Emmert, Edward Ray, Defendants
v.	Counsel of Record for this Party:
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),	Thomas W. Scott, Esquire Killian & Gephart, LLP 218 Pine Street P.O. Box 886 Harrisburg, PA 17108-0886 TEL: (717) 232-1851 FAX: (717) 238-0592 tscott@killiangephart.com
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.	PA I.D. Number: 15681

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; 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.	Civil Division Docket No. 2013-2082

MEMORANDUM IN SUPPORT OF DEFENDANTS' PRELIMINARY OBJECTIONS

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PRELIMINARY STATEMENT

NCAA sanctions against major sports programs inevitably ignite strong passions among devoted supporters of the sanctioned institution—as the Penn State case vividly illustrates. But strong feelings do not create legal causes of action, and no court has ever recognized the type of actions Plaintiffs seek to bring here in the context of NCAA sanctions.

That the sanctions here resulted from a consent decree between The Pennsylvania State University ("Penn State" or "the University") and the NCAA, as opposed to the traditional investigative process, does not change the analysis. In the face of a truly unprecedented situation, Penn State and the NCAA decided to resolve this matter on the basis of the factual record from the Jerry Sandusky criminal proceedings and a report prepared by former FBI Director Louis Freeh, which was commissioned by the Penn State Board of Trustees and adopted by Penn State. Plaintiffs' strenuous objections to the Freeh Report and to *Penn State's* decision to settle do not give them any legal recourse against the NCAA or Dr. Edward Ray and Dr. Mark Emmert.

This case might best be viewed as a smorgasbord of complainants and complaints. For example:

- The estate of the late Coach Joseph V. Paterno ("Coach Paterno") asks the Court to revoke a sanction imposed on the University and declare

that Coach Paterno had a right to participate in an investigation after his death;

- Minority members of the Penn State Board ask the Court to act as a super-trustee and give them powers the actual Board of Trustees did not give them;
- And former players and assistant coaches, joined by current trustees and faculty members, ask the Court to give them truly unprecedented rights to challenge sanctions imposed on the University, and along the way declare them owners of athletic achievements of the University for which they played.

Despite the catalog of apparently disparate grievances and legal theories, this lawsuit has two unifying themes. First, Plaintiffs complain principally about the actual or perceived collateral consequences of the investigative report conducted by the firm *hired by Penn State's Board of Trustees*—The Freeh Report—and *the University's acceptance of that report*; for which they have bizarrely sued *not* the University or its agent, but the NCAA. Second, a lawsuit against the NCAA is not the proper forum for resolution of any of these grievances, which at bottom reflect Plaintiffs' deep disagreement and dissatisfaction with the Penn State Board majority's decision to accept the findings of the report that the Board itself commissioned.

As set forth below, Defendants' Preliminary Objections should be sustained and the case dismissed on multiple, independently sufficient grounds. The Court lacks subject matter jurisdiction over the case because Penn State is an indispensable party and lacks personal jurisdiction over Dr. Ray and Dr. Emmert because they have no connection whatsoever to Pennsylvania. Each count of the Complaint also must be dismissed because Plaintiffs either lack standing to assert them or have failed to state a cause of action.

PROCEDURAL HISTORY

On May 30, 2013, Plaintiffs initiated this lawsuit. The Complaint asserts claims for breach of contract (Counts I and II), intentional interference with contractual relations (Count III), commercial disparagement (Count IV), defamation (Count V), and civil conspiracy (Count VI). Plaintiffs request relief in the form of, *inter alia*, a declaratory judgment that the actions of Defendants were unlawful and that the Consent Decree was unauthorized, unlawful, and void ab initio; a permanent injunction preventing the NCAA from further enforcing the Consent Decree or the sanctions against Penn State; and compensatory and punitive damages. On June 26, 2013, the Supreme Court of Pennsylvania assigned the Honorable John B. Leete to preside over the matter. In accordance with a June 11, 2013 agreement among the Parties, Defendants hereby submit this memorandum in support of their preliminary objections.

STATEMENT OF FACTS

A. The NCAA

The NCAA is a voluntary association of more than 1,000 colleges and universities. Compl. ¶ 2.[1] Its purpose is to oversee college sports and to preserve the ideals of character, integrity, amateurism, and fair play. Compl. ¶¶ 2, 20; NCAA Academic and Membership Affairs Staff, *2011-12 NCAA Division I Manual* arts. 1.2-1.3, 2.4 (2011) ("Manual"), attached as Ex. A to the Complaint. The NCAA's ideals are embodied in its Constitution and extensive Bylaws, which emphasize that "[t]hese values should be manifest not only in athletics participation, but also in the broad spectrum of activities affecting the athletics program." Manual art. 2.4; *see* Compl. ¶¶ 2, 22. To that end, the NCAA's Bylaws require coaches to demonstrate "[e]xemplary [c]onduct" and "honesty and sportsmanship at all times" as a coach's "own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example." Manual arts. 10.01.1, 19.01.2.

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[1] This memorandum draws from the Complaint, the documents attached thereto or incorporated by reference, and other materials that are proper subjects of judicial notice. If this Court believes that Defendants have asserted facts outside the Complaint that would necessitate converting these preliminary objections into a motion for summary judgment, we ask that those facts be disregarded and that Defendants' preliminary objections stand or fall under Pennsylvania Rule of Civil Procedure No. 1028. Defendants do not here concede any of the allegations in the Complaint.

Member schools are ultimately responsible for upholding these ideals and standards. Compl. ¶ 23. The Constitution and Bylaws state that "[i]t is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes." Manual art. 2.2.3; *see* Compl. ¶ 24. Participating member schools are required to apply and enforce the rules, "including the principles of 'institutional control' and 'ethical conduct.'" Compl. ¶¶ 23-27, 53; Manual arts. 1.2(b), 10. The member schools' "responsibility for the conduct of its intercollegiate athletics program includes responsibility for the actions of its staff members." Manual art. 2.1.2.

B. Following Jerry Sandusky's Criminal Indictment, Penn State's Board Of Trustees Commissioned An Independent Investigation Into The Sandusky Matter And Its Handling By Penn State Officials

In 2011, the nation was shocked by revelations that longtime Penn State Assistant Football Coach Jerry Sandusky had used his position of authority to brutally abuse young children. Compl. ¶ 48. The Pennsylvania Attorney General formally charged Sandusky on November 4, 2011 with various criminal counts, including corruption of minors, unlawful contact with minors, and endangering the welfare of minors; he ultimately was convicted and sentenced to 30-60 years in prison. *Id.* Penn State's former President, its Athletic Director, and another senior official currently face felony charges for child endangerment arising from their failure to properly report allegations of Sandusky's crimes. *See* Compl. ¶¶ 63, 79.

On November 9, 2011, five days after the charges were filed against Sandusky, Penn State's Board of Trustees removed Coach Joesph V. Paterno ("Coach Paterno") from his position as head football coach and Graham Spanier from his position as University President. *Id.* ¶ 49. At the same time, the Board named Rodney Erickson President of the University. *Id.* Also in November 2011, the Board ordered an investigation into the alleged failure of Penn State personnel to respond to and report Sandusky's criminal acts, commissioning former FBI Director and federal judge Louis Freeh to conduct an extensive independent investigation. *Id.* ¶ 50; Freeh Sporkin & Sullivan, LLP, *Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky* 9 (2012) ("Freeh Report"), *available at* http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf.[2] The Board asked Freeh Sporkin & Sullivan, LLP ("FSS"), Freeh's law firm, "to provide recommendations regarding University governance, oversight, and administrative policies and procedures to help Penn State adopt policies and procedures to more effectively prevent or respond to incidents of

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[2] The Complaint's extensive references to the Freeh Report serve as the backbone of many of Plaintiffs' claims. This Court may therefore take judicial notice of the contents of that Report for purposes of evaluating the NCAA's preliminary objections. *Detweiler v. Hatfield Borough Sch. Dist.*, 376 Pa. 555, 558-59, 104 A.2d 110, 113 (1954).

sexual abuse of minors in the future." Compl. ¶ 50. The NCAA decided to wait for the results of the FSS investigation before deciding how to proceed with respect to Penn State. Compl. ¶ 54. For more than seven months, FSS conducted over 430 interviews and reviewed 3.5 million pieces of data and documents. *Id.* ¶¶ 56, 63, 64; Freeh Report at 9.

On July 12, 2012, FSS released its report, a 144-page document including approximately 120 pages of footnotes and exhibits. Compl. ¶ 56. The report was highly critical of Penn State and some of its senior officials, concluding that top University officials and Coach Paterno had known about Sandusky's conduct but failed to take action. *Id.* According to the Report, Penn State officials conspired to conceal critical facts relating to Sandusky's abuse from authorities, the Board of Trustees, the Penn State community, and the public at large. *Id.*

Almost immediately upon the Report's public release, Penn State officials announced that the Board of Trustees accepted full responsibility for the purported failures outlined in the Freeh Report. *Id.* ¶ 57. The University faced a formal NCAA inquiry and potential penalties, which could have included a multi-year ban on participation in football competition. *See Id.* ¶¶ 80-81.

C. The NCAA And Penn State Entered Into A Consent Decree To Resolve Penn State's Violations Of NCAA Rules

In July 2012, Penn State and the NCAA agreed upon a Consent Decree imposing sanctions on Penn State. Penn State and the NCAA agreed that in light

of FSS' exhaustive investigation and report and the Sandusky criminal proceedings, "traditional investigative and administrative proceedings would be duplicative and unnecessary." Consent Decree between Penn State and NCAA at 1 (July 23, 2012) ("Consent Decree"), Ex. B to Compl.. In other words, rather than subject itself to a prolonged NCAA investigation with potentially dire consequences, Penn State "accept[ed] the findings of the Freeh Report for purpose of this resolution" and "acknowledge[d] that those facts constitute violations of the Constitutional and Bylaw principles described in the [President Emmert's November 17, 2011] letter." *Id.* at 2 (citing Manual arts. 2.1, 2.4, 6.01.1, 6.4, 10.01.1, 10.1, 11.1.1, 19.01.2).

The Consent Decree provides that the findings of the Criminal Jury and the Freeh Report establish a factual basis "from which the NCAA concludes that Penn State breached the standards expected by and articulated in the NCAA Constitution and Bylaws," including a "failure to value and uphold institutional integrity, ... a failure to maintain minimal standards of appropriate and responsible conduct," and "a lack of adherence to fundamental notions of individual integrity." *Id.* (citing Manual arts. 2.1, 2.4, 6.01.1, 6.4, 10.01.1, 10.1, 11.1.1, 19.01.2). The Consent Decree also spelled out specific "key factual findings" of the Freeh Report that the NCAA relied on in concluding that Penn State violated the NCAA Constitution

and Bylaws. These factual findings—each of which quotes the Freeh Report verbatim—included the following:

- [University] President Graham B. Spanier, Senior Vice President-Finance and Business Gary C. Shultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno [] failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky's activities from the Board of Trustees, the University community and authorities ....

- These individuals, unchecked by the Board of Trustees that did not perform its oversight duties, empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program. Indeed, that continued access provided Sandusky with the very currency that enabled him to attract his victims. Some coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him.

- By not promptly and fully advising the Board of Trustees about the 1998 and 2001 child sexual abuse allegations against Sandusky and the subsequent Grand Jury investigation of him, Spanier failed in his duties as President. The Board also 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.

...

- [I]n order to avoid the consequences of bad publicity, the most powerful leaders at the University—Spanier, Schultz, Paterno and Curley—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.[3]

The Consent Decree further provided that although the Freeh Report concluded that avoiding the consequences of bad publicity was the most significant cause for the University's failure to protect child victims and report to authorities, the report cited other causes, including the following:

- the President "discouraged discussion and dissent";
- Spanier, Schultz, Paterno, and Curley allowed Sandusky to retire as a valued member of the University's football legacy, with "ways 'to continue to work with young people through Penn State,' essentially granting him license to bring boys to campus facilities for 'grooming' as targets for his assaults";
- the football program "did not fully participate in, or opted out, of some University programs, including Clery Act compliance ... "; and
- the University maintained a "culture of reverence for the football program that is ingrained at all levels of the campus community."[4]

The Consent Decree outlined sanctions that were directed at and agreed to by Penn State alone. Compl. ¶¶ 96-97; Consent Decree at 5-8. The sanctions against Penn State included a $60 million fine, a four-year ban on participation in postseason play, a reduction in football scholarships, vacation of wins since 1998, implementation of an Athletic Integrity Agreement aimed at reestablishing institutional control over the football program, and adoption of all of the policy

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3 Consent Decree at 3 (quoting Freeh Report at 14-16).

4 *Id.* at 4 (quoting Freeh Report at 16-17).

recommendations set forth in the Freeh Report. Compl. ¶¶ 96-97; Consent Decree at 5-8.

The NCAA expressly avoided imposing any sanctions on Plaintiffs or any other individuals. Consent Decree at 4. The Consent Decree stated that "[t]he NCAA reserves the right to initiate a formal investigatory and disciplinary process and impose sanctions on individuals after the conclusion of any criminal proceeding related to any individual involved." *Id.* at 6. No Plaintiff is individually mentioned in the Consent Decree, other than Coach Paterno, about whom the Consent Decree sets forth various findings taken directly from the Freeh Report. The Consent Decree further noted that the career record of Coach Paterno will reflect the vacated wins, as frequently occurs when such sanctions are levied against an athletic program, regardless of whether the coach(es) are implicated in the matter that gives rise to the sanctions. *Id.* at 5.[5]

The NCAA and Penn State intended the Consent Decree to bring closure to proceedings involving the University, and Penn State explicitly "waive[d] any claim to further process, including, without limitation, any right to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA

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[5] As discussed below, *infra* at Part II.A.1., the impact on a coach's win record results inevitably from the vacation of the school's wins and does not constitute a sanction on the individual coach.

rules, and any judicial process related to the subject matter of this Consent Decree." *Id.* at 4.

D. The Present Action

Plaintiffs filed the present action on May 30, 2013. Plaintiffs are the Estate and Family of Coach Paterno (collectively "the Estate"), certain former Penn State football players and assistant coaches, and certain current faculty and members of the Board of Trustees, in their individual capacities. Compl.¶¶ 8-12. Although the Complaint largely is directed at criticizing the findings of the Freeh Report, as well as Penn State's public acceptance of those findings, Penn State strangely has not been named as a Defendant.

Instead, Plaintiffs named the NCAA, Dr. Mark Emmert, and Dr. Edward Ray as Defendants (collectively, "the NCAA"). The NCAA is an unincorporated association of member colleges and universities with its headquarters in Indianapolis, Indiana. Compl. ¶ 13. Dr. Mark Emmert is the President of the NCAA. Compl. ¶ 14. Dr. Emmert is a resident of Indiana. Defs.' Prelim. Objs. ("Prelim. Objs.") ¶ 65. He has never resided in Pennsylvania, maintained a bank account in Pennsylvania, owned real estate in Pennsylvania, or transacted business in a personal capacity in Pennsylvania. *Id.* ¶ 67. At no time during the events described in the Complaint did Dr. Emmert set foot in Pennsylvania. *Id.* ¶ 68. As President of the NCAA, Dr. Emmert communicated with Penn State President

Rodney Erickson, following Sandusky's indictment. *Id.* ¶¶ 53, 75, 83. He also negotiated and signed the Consent Decree with Penn State. *Id.* ¶ 86.

Dr. Edward Ray is the President of Oregon State University and the former Chairman of the NCAA's Executive Committee. *Id.* ¶ 15. Dr. Ray is a resident of Oregon. *Id.* ¶ 66. He has never resided in Pennsylvania, maintained a bank account in Pennsylvania, owned real estate in Pennsylvania, or transacted business in Pennsylvania. *Id.* ¶ 67. At no time during the events described in the Complaint did Dr. Ray set foot in Pennsylvania. *Id.* ¶ 68. Dr. Ray did not make phone calls, send letters, faxes, or emails to anyone at Penn State during that time regarding the Consent Decree, the Sandusky incident, or the Freeh Report. *Id.* ¶ 69.

QUESTIONS INVOLVED

1. Whether Penn State is an indispensable party, requiring dismissal, where Plaintiffs seek to materially impair Penn State's rights by voiding a contract to which Penn State is a party, and the Complaint directly challenges Penn State's authority and the authority and responsibilities of Penn State's senior leadership? (Suggested answer: yes.)
2. Whether dismissal is required because Plaintiffs, who are not subject to sanctions under the Consent Decree, lack standing to bring their asserted claims for breach of contract because they are not third-party beneficiaries of

Penn State's membership agreement with the NCAA? (Suggested answer: yes.)

3. Whether Plaintiffs' defamation claim should be dismissed for failure to state a claim where:

   a. Plaintiffs cannot reasonably be identified from the allegedly defamatory statements;

   b. The alleged defamatory communications are merely expressions of the NCAA's opinion; and

   c. Most Plaintiffs are public figures, but Plaintiffs fail to adequately plead that the NCAA acted with a knowing or reckless disregard for the truth? (Suggested answer: yes.)

4. Whether commercial disparagement claim brought by the Estate of Coach Paterno should be dismissed for failure to state a claim where:

   a. The Estate fails to allege an actionable commercial interest;

   b. The Estate fails to plead pecuniary loss resulting from the Consent Decree; and

   c. The Estate fails to adequately plead that the NCAA acted with a knowing or reckless disregard for the truth? (Suggested answer: yes.)

5. Whether Plaintiffs' claim for intentional interference with contractual relations should be dismissed for failure to state a claim where:

   a. Plaintiffs fail to plead the existence of any specific contract;

   b. Plaintiffs fail to plead that the NCAA acted with specific intent to interfere with these contracts; and

   c. Plaintiffs fail to plead why this asserted interference was not privileged? (Suggested answer: yes.)

6. Whether Plaintiffs' claim for civil conspiracy should be dismissed for failure to state a claim where Plaintiffs fail to aver material facts which establish a combination for an unlawful purpose? (Suggested answer: yes.)

7. Whether the Court lacks personal jurisdiction over Defendants Dr. Emmert and Dr. Ray, who are non-residents of Pennsylvania, have never been residents of Pennsylvania, never maintained a bank account in Pennsylvania, never owned real estate in Pennsylvania, never transacted business in a personal capacity in Pennsylvania, and not once set foot in Pennsylvania during the events described in the Complaint? (Suggested answer: yes.)

ARGUMENT

I. THE COURT LACKS JURISDICTION DUE TO THE ABSENCE OF PENN STATE, AN INDISPENSABLE PARTY

Plaintiffs' claims are based principally on the alleged collateral consequences of the Freeh Report (commissioned by Penn State's Board of

Trustees) and the University's acceptance of that report. But rather than sue the University or its agent, they seek to hold the NCAA responsible. Under Pennsylvania law, Penn State is an indispensable party to this action, and Plaintiffs' failure to join the University deprives this court of subject matter jurisdiction. *See Pilchesky v. Doherty*, 941 A.2d 95, 101 (Pa. Commw. Ct. 2008).

A party is indispensable when "'his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.'" *Polydyne, Inc. v. City of Phila.*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002) (quoting *Vernon Twp. Water Auth. v. Vernon Twp.*, 734 A.2d 935, 938 n.6 (Pa. Commw. Ct. 1999)). Penn State—as the counterparty to the NCAA of the Consent Decree, which is the very source of Plaintiffs' grievances and the subject of their request for relief—plainly is an indispensable party under that standard, for at least three reasons.

First, and most obviously, Plaintiffs seek to materially impair Penn State's rights by voiding a contract to which Penn State is a party. *See* Compl. ¶ 154(2)-(3) (seeking a declaratory judgment that the Consent Decree was "unauthorized, unlawful, and void *ab initio*," and a "permanent injunction preventing the NCAA from further enforcing the Consent Decree"). Pennsylvania courts have dismissed for lack of jurisdiction in similar circumstances, where a plaintiff seeking to void a contract fails to join a party to that contract. *See, e.g.,*

E-Z Parks, Inc. v. Phila. Parking Auth., 103 Pa. Commw. 627, 631-33, 521 A.2d 71, 73 (1987) (dismissing a case seeking to void a contract where only one of two parties to the contract was present); *Bracken v. Duquesne Elec. & Mfg. Co.*, 419 Pa. 493, 495, 215 A.2d 623, 624 (1966) ("The record discloses that two individuals, who were shareholders in 1958, and continue to be such today, and who were also parties to the agreement involved, are not parties to, or represented in, this proceeding. This in itself is *fatal to the action.*" (emphasis added)); *see also* 42 Pa. Cons. Stat. § 7540(a) (providing that when declaratory relief is sought, "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding").

As in *E-Z Parks*, Plaintiffs seek to void a contract to which an absent party (Penn State) is a party. The relief sought would plainly impair Penn State's rights. Penn State entered into the contract for valuable consideration. In exchange for consenting to the NCAA's sanctions, Penn State was able to avoid potential imposition of the "death penalty," Consent Decree at 4, *i.e.*, a prohibition on participation in intercollegiate football for a specified period of time, which could have had devastating long-term consequences to the football program and would have terminated a vital source of University revenue. *See id.* at 5 (indicating that the football program generates approximately $60 million per year). In addition,

Penn State achieved an expedited resolution and avoided a protracted investigation and enforcement process, *id.* at 1, and the attendant harm that prolonged uncertainty would have inflicted on the University's football program.[6] The failure to join Penn State—in a lawsuit that amounts to a disagreement with and attempt to void the bargain Penn State struck—requires dismissal.

Second, Penn State is indispensable because the Complaint directly challenges the University's authority. Plaintiffs' breach of contract (Counts I and II), interference with contractual relations (Count III), and civil conspiracy (Count VI) claims challenge Penn State's authority to contractually waive traditional NCAA enforcement procedures. Compl. ¶¶ 105-28, 147-53. The Complaint alleges that the University "could not, and lacked any authority to, waive Plaintiffs' rights and entitlement to the [enforcement and appeal] procedures [in the NCAA's bylaws] by signing the Consent Decree ...." *Id.* ¶ 111. This challenge to Penn State's autonomy is a non sequitur in a suit that fails to name Penn State as a party. Indeed, a Colorado court reached this very conclusion on materially indistinguishable facts, holding that the University of Colorado was an

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[6] Plaintiffs' allegations that the NCAA "imposed" the Consent Decree on Penn State or lacked authority to impose the death penalty, *see, e.g.*, Compl. ¶¶ 82-83, 87-88, do not create a material factual dispute because these allegations are not relevant to any of their claims. Plaintiffs do not even contend that they can assert any cause of action on behalf of Penn State.

indispensable party to a suit brought by a student-athlete claiming third-party beneficiary standing to challenge a contract between the NCAA and the University (the NCAA Bylaws). *See Bloom v. NCAA*, 93 P.3d 621, 622 (Colo. App. 2004).

Third, the Complaint strikes at the authority of the University's senior leadership. Plaintiffs challenge President Erickson for taking allegedly unlawful and *ultra vires* actions. *See* Compl. ¶ 87 ("Erickson did not comply with the governing requirements of the Charter, Bylaws, and Standing Orders of Penn State."); *id.* ¶ 88 ("Erickson did not have the legal or delegated authority to bind the Penn State Board of Trustees to the Consent Decree ...."); *id.* ¶ 111 (asserting that Erickson lacked authority to waive the NCAA's traditional enforcement procedures). Plaintiffs also charge that senior University officials lacked the authority to accept responsibility for the failings addressed in the Freeh Report, *id.* ¶¶ 57-59, absent ratification by the Board of Trustees. *See id.*

For all of these reasons, Penn State is an indispensable party to this lawsuit and its absence requires dismissal.

II. PLAINTIFFS' BREACH OF CONTRACT CLAIMS MUST BE DISMISSED FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM

A. Plaintiffs Lack Standing To Assert Breach Of Contract Claims

Because Plaintiffs are neither parties to the contract that they allege was breached, nor third-party beneficiaries of that contract, they lack standing to assert

their breach of contract claims against the NCAA.[7] *See Mack v. AAA Mid-Atl., Inc.*, 511 F. Supp. 2d 539 (E.D. Pa. 2007) ("The question of whether the parties' intent should be understood to create a third party intended beneficiary is one of standing ...." (citing *Scarpitti v. Weborg*, 530 Pa. 366, 371-72, 609 A.2d 147, 150 (1992))). Accordingly, Counts I and II of Plaintiffs' Complaint must be dismissed. *See Jeffcoat v. Hawes*, 42 Pa. D. & C.4th 141, 142 (Ct. Com. Pl. 1999) (sustaining defendants' preliminary objections under Pa. R.C.P. No. 1028(a)(5) because plaintiffs were not third-party beneficiaries to the contract at issue), *aff'd*, 758 A.2d 299 (Pa. Commw. Ct. 2000).

There is no dispute that Plaintiffs are not parties to Penn State's membership agreement with the NCAA. Plaintiffs may therefore bring claims for the purported breach of that agreement only if they are third-party beneficiaries of that agreement. Under Pennsylvania law, a third-party typically has standing to recover on a contract as a third-party beneficiary only when the actual parties to the contract expressly so intend: "both contracting parties must have expressed an

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[7] Given that Counts I and II only refer to actions by the "NCAA," it is Defendants' understanding that Counts I and II are only being asserted against the NCAA and not Dr. Emmert or Dr. Ray. *See* Compl. ¶ 112 ("As a direct and proximate result of this breach by the NCAA ...."); *id.* ¶ 110 ("Defendant NCAA materially breached its contractual obligations ...."); *id.* ¶ 119 ("The NCAA materially breached ...."); *id.* ¶ 121 ("As a direct and proximate result of this breach by the NCAA ....").

intention that the third party be a beneficiary, and that intention must have affirmatively appeared in the contract itself." *Scarpitti*, 530 Pa. at 370, 372-73, 609 A.2d at 149, 150-51.[8]

The NCAA Constitution and Bylaws do not manifest an intent to bestow procedural rights to appeal a member university's sanctions on an unbounded set of former players, former head or assistant coaches, trustees, or faculty members from that university. To the contrary, the NCAA Bylaws expressly provide that the NCAA and its members intended to bestow procedural rights related to the NCAA sanctions process only on "involved individual[s]" within the meaning of the Constitution and Bylaws. *See* Manual arts. 32.10.1.1.-32.10.1.2, 19.1.2.3. Involved individuals are "former or current student-athletes and former or current institutional staff members who have received notice of significant involvement in alleged violations through the notice of allegations or summary disposition

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[8] The Pennsylvania Supreme Court has articulated a narrow exception to that rule where "the circumstances are so compelling that recognition of the beneficiary's right is appropriate *to effectuate the intention of the parties*, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Scarpitti*, 530 Pa. 366 at 370, 372-73, 609 A.2d at 149, 150-51 (emphasis added). That exception, however, does "not alter the requirement that in order for one to achieve third party beneficiary status, that party must show that *both* parties to the contract so intended, and that such intent was within the parties' contemplation at the time the contract was formed." *Burks v. Fed. Ins. Co.*, 2005 PA Super 297, ¶ 8, 883 A.2d 1086, 1088 (2005).

process." *Id.* at 32.1.5. As that makes clear, the NCAA and its members intended to extend procedural rights only to those individuals that are alleged to have been "significant[ly] involve[d]" in violations of NCAA rules and who therefore may be subject to NCAA sanctions themselves. *See id.* at 19.1.2.3, 32.1.5, 32.10.1.1-32.10.1.2; *see also id.* at 32.10.1.2 ("An involved individual may appeal ... violations of NCAA legislation in which he or she *is named*." (emphasis added)).

When a contract expressly identifies and limits the third parties intended to be beneficiaries of particular contractual provisions, it necessarily establishes that the contracting parties did not intend to extend the benefits of those provisions to other unnamed third parties. *See Empire Sanitary Landfill, Inc. v. Riverside Sch. Dist.*, 739 A.2d 651, 655 (Pa. Commw. Ct. 1999) ("[F]or the purposes of determining the intent of parties to a contract, the maxim *expressio unius est exclusio alterius* is applicable and ... it 'translates into the proposition that the mention of particular items implies the purposeful exclusion of other items of the same general character.'" (citation omitted)). That common sense conclusion also accords with longstanding NCAA practice. The NCAA Constitution and Bylaws have never been interpreted to create any procedural rights related to the sanctions process for a former player, former head or assistant coaches, university trustee, or faculty member who was not implicated as significantly involved in violations of NCAA rules, and against whom no individual sanctions had been imposed or were

under consideration. Prelim. Objs. ¶ 14. Nor has the NCAA ever treated any such individual as an "involved individual." *Id.*[9]

If individuals such as Plaintiffs—none of whom was the subject of an investigation or sanction here—had standing as third-party beneficiaries under the Bylaws, the result would be that virtually any person ever associated with a university who is dissatisfied with the NCAA's sanctions against that university could challenge those sanctions in court. Not only would such a regime be unworkable for the NCAA, it would be unworkable for the NCAA's members. Universities like Penn State would be paralyzed, unable to act to resolve disputes concerning violations of NCAA rules without the unanimous consent of every past and present coach, student, administrator, and faculty member—an impossible task. The suggestion that either the NCAA or Penn State expressly intended to allow such parties to hold hostage its enforcement process is plainly absurd. Indeed, Plaintiffs fail to point to any court in any jurisdiction holding that a coach, trustee, faculty member, or former player not allegedly implicated in an NCAA rule violation is a third-party beneficiary of the procedural protections for "involved individuals" in the NCAA Bylaws and Constitution.

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[9] Evidence outside of the complaint can be introduced when making preliminary objections under Pa. R.C.P. No. 1028(a)(5). *See* Pa. R.C.P. No. 1028(c)(2) note.

As explained below, none of the individual Plaintiffs named in Counts I or II is an "involved individual" within the meaning of the NCAA Bylaws. Accordingly, both claims must be dismissed for lack of standing.

1. Count I Must Be Dismissed For Lack Of Standing.

Under the express terms of the NCAA Constitution and Bylaws, neither Coach Paterno nor Al Clemens is an "involved individual" entitled to maintain a breach of contract claim. As explained, *supra*, the NCAA Constitution and Bylaws expressly provide that involved individuals are limited to "former or current student-athletes and former or current institutional staff members *who have received notice of significant involvement in alleged violations through the notice of allegations or summary disposition process*." Manual art. 32.1.5 (emphasis added). Coach Paterno, however, passed away on January 22, 2012,[10] months before the Freeh Report was released, Penn State publicly announced its acceptance of its findings, and the NCAA imposed sanctions on the basis of those findings. Compl. ¶¶ 56-58, 75. By definition, therefore, he did not receive notice of any alleged violations, nor, obviously, was he then at risk of individual sanctions. Accordingly, he cannot qualify as an "involved individual."

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[10] *See* Richard Goldstein, *Joe Paterno, Longtime Penn State Coach, Dies at 85*, N.Y. Times (Jan. 22, 2012), *available at* http://www.nytimes.com/2012/01/23/sports/ncaafootball/joe-paterno-longtime-penn-state-coach-dies-at-85.html?pagewanted=all (noting the passing of Coach Paterno).

Moreover, the Consent Decree did not impose any sanctions on Coach Paterno. Although the sanctions to which Penn State agreed included the vacation of Penn State football team wins between 1998 and 2011, which would be reflected in Paterno's career record, the NCAA Bylaws make clear that such sanctions are *institutional* sanctions—not sanctions against Coach Paterno, or any other individual coaches or members of those teams. *See* Manual art. 19.5.2(h)(2) (noting that penalties for "a finding of ... [a] lack of institutional control" include the "[v]acation of team records and performances, including wins from the career record of the head coach in the involved sport ...."). Indeed, such sanctions are routinely imposed, with identical consequences for coaches' or players' individual career win-loss records, in cases where there is no culpability finding against an individual coach or player.[11]

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[11] To illustrate, the NCAA imposed sanctions on the University of North Carolina related to violations by the institution's football program. Although the introduction to the infractions report is clear that there was no charge of unethical conduct against the program's head coach, and he did not appear before the NCAA Infractions Committee, the sanctions included a vacation of the team's wins and expressly affected the head coach's record. *See* NCAA, *University of North Carolina, Chapel Hill Public Infractions Report* 22 (2012), *available at* http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2012/university+of+north+carolina,+chapel+hill+public+infractions+report+march+12,+2012 ("Further, the institution's records regarding football, as well as the record of the former head coach will reflect the vacated records and will be recorded in all publications in which football records are reported ....").

Al Clemens, a member of the Board of Trustees, is likewise not an "involved individual" within the meaning of the NCAA Bylaws. The Consent Decree does not individually identify Mr. Clemens, and it imposes absolutely no sanction on him personally. Although the Consent Decree refers to shortcomings of the Board of Trustees ("the Board") identified in the Freeh Report, the Consent Decree does not single out Mr. Clemens for criticism, nor suggest that he personally violated any NCAA rules. And the Board itself is a group body politic—not an individual student-athlete or staff member that falls within the meaning of an "involved *individual*." That Mr. Clemens was a member of an entity referenced in the Consent Decree does not make him an "involved *individual*" any more than student-athletes at Penn State are "involved individuals" simply because they are

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Likewise, the official notation in the NCAA record book for Bobby Bowden, the former football coach at Florida State University, expressly notes that his coaching record was "adjusted by [the] NCAA Committee on Infractions." *2013 Coaching Records* at 2, NCAA (2013), http://fs.ncaa.org/Docs/stats/football_records/2013/coaching.pdf. Those wins were stripped, however, for institutional violations in which Bowden played no personal role. *See, e.g.*, NCAA, *Florida State University Public Infractions Report* 16 (2009), *available at* http://www.tallahassee.com/assets/pdf/CD12991436.PDF (noting that "records of the head coaches of [various] sports will reflect the [wins] vacated" under the sanctions, while not identifying any wrongdoing of that head coach); Mark Schlabach, *Bowden Hopes to Win Appeal*, ESPN.com (July 14, 2009), *available at* http://sports.espn.go.com/ncf/news/story?id=4327253 (explaining that Coach Bobby Bowden hoped that Florida State would win its appeal lest he have wins vacated "for something [he] had no part of"). Thus, under longstanding NCAA precedent, reducing Coach Paterno's career coaching record for institutional violations does not amount to a personal sanction against him.

members of the Penn State community. Moreover, the Consent Decree does not subject Mr. Clemens to any sanction; it does not purport to bar him from contact with Penn State or its sports program, fine him, or subject him to any personal adverse consequence whatsoever.[12] He is no more "sanctioned" than any other Penn State supporter who may feel aggrieved by the sanctions.

Even if Coach Paterno and Mr. Clemens could be considered third-party beneficiaries, they would *still* lack standing to assert the claims brought in Count I. Even third-party beneficiaries are restricted to enforcing only the specific provisions within a contract that were created for their benefit. *See, e.g., Archer W. Contractors, Ltd. v. Estate of Pitts*, 735 S.E. 2d 772, 778 (Ga. 2012) ("'Status as a third-party beneficiary does not imply standing to enforce every promise

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[12] The penalties contained in the Consent Decree are readily distinguishable from NCAA actions taken against an individual coach or athlete. For instance, in 2011, the NCAA found "that the former head coach [of The Ohio State University] violated NCAA ethical conduct standards" and "falsely attested that he reported to the institution any knowledge of NCAA violations ...." NCAA, *The Ohio State University Public Infractions Report* 20 (2011), *available at* http://www.ncaa.org/wps/wcm/connect/89166400497e7e46a353aff414ac0d18/20111220+Ohio+State+COI+public+report.pdf?MOD=AJPERES&CACHEID=89166400497e7e46a353aff414ac0d18. As a result of "his involvement in violations of NCAA legislation," the NCAA imposed a "five-year show-cause period ... [until] December 19, 2016" during which time, *inter alia*, the former head coach would be "suspended from all coaching duties for the first five games during the initial year he is employed as well as any postseason contest(s) during that year," if any other school were to hire him. *Id.* at 20-21. No coach (or anyone other individual) has been sanctioned by NCAA in connection with the Sandusky matter.

within a contract, including those not made for that party's benefit.'" (citation omitted)); *Clark v. Cal. Ins. Guarantee Ass'n.*, 133 Cal. Rptr. 3d 1, 5 (Ct. App. 2011) ("[A] third party beneficiary ... can only enforce those promises made directly for his benefit.").

In that regard, Plaintiffs' Complaint is insufficient for several reasons. *First*, Plaintiffs' Complaint fails to point to any actual provision of the Constitution and Bylaws that they seek to enforce. *Second*, Plaintiffs largely complain about alleged incursions of *Penn State's* interests—not their own. Plaintiffs have standing to assert violations only of their own rights, however, not those of Penn State. But of the twelve "breaches" Plaintiffs purport to allege in Paragraph 110 of their Complaint, only *two* pertain to Plaintiffs—(k) and (l), which respectively assert that the NCAA "(k) fail[ed] to recognize that Plaintiffs, who are named or referred to in the Consent Decree, are 'involved individuals' under the NCAA's own rules; and (l) fail[ed] to afford Plaintiffs 'fair procedures' during the NCAA's determinations and deliberations." The others purported "breaches" should be struck as impertinent under Pa. R.C.P. No. 1028(a)(2).

Third, even the two allegations concerning Plaintiffs fail to rest on provisions that in fact vest actionable rights in Plaintiffs. Paragraph 110(k) complains that the NCAA failed to name them as "involved individuals," but that is to Plaintiffs' *benefit*. It makes no sense why Plaintiffs would want to be

identified as parties who are significantly involved in the violation of NCAA rules and who may be subject to sanctions. But in any event, Plaintiffs surely do not have a contractual right to compel the NCAA to identify them as such parties. Nor would the vindication of that purported right entitle Plaintiffs to any of the relief they seek. Plaintiffs seem to assert that the mere reference to them in the Consent Decree—or in the case of Mr. Clemens, mention only of a body on which he sat—makes them "involved individuals" entitled to procedural rights. There is simply no authority for that proposition, particularly given that the Consent Decree imposed no personal sanction on either Coach Paterno or Mr. Clemens and, in fact, explicitly provided that any "individual penalties" would be determined at a later point in time, after the conclusion of criminal proceedings related to the Sandusky matter. Consent Decree at 6.

Paragraph 110(l) of the Complaint, meanwhile, appears to claim that the NCAA failed to afford Plaintiffs "fair[ness]" in their proceedings. As discussed above, however, because Plaintiffs were not "involved individuals" or sanctioned by the NCAA with respect to sanctions imposed against Penn State, they had no contractual right to contest the Consent Decree. The general "fairness" provisions in the NCAA manual do not create an enforceable contractual right that the NCAA will provide procedural protections any time an uninvolved third-party may be collaterally affected by sanctions. *See, e.g.*, *Knelman v. Middlebury Coll.*,

898 F. Supp. 2d 697, 714 (D. Vt. 2012) ("Mr. Knelman fails to identify a single case in which a court has held that a student-athlete is an intended third-party beneficiary of the NCAA manual's 'fairness' provisions and is entitled to recover for breach of contract ...." (citation omitted)); *see also infra* at Part II.A.2 (describing the absurd consequences that would follow if Plaintiffs were understood to possess freestanding right to challenge "fairness" of NCAA sanctions in situations when they were not involved individuals).

For all these reasons, Coach Paterno and Mr. Clemens lack standing to assert a breach of contract, and Count I must be dismissed.

2. Count II Must Be Dismissed For Lack Of Standing.

Because the Plaintiffs bringing Count II lack any basis to assert standing as third-party beneficiaries, Count II should likewise be dismissed. The Count II Plaintiffs—former assistant coaches, trustees who did not serve on the Board during the period in question, and former players—do not even allege that they are "involved individuals," the only individuals who have procedural rights under the Constitution and Bylaws.[13] *See* Manual arts. 19.1.2.3, 32.10.1.1-32.10.1.2. None of these individuals was named in the Consent Decree, let alone accused of being significantly involved in violations of NCAA rules, and none was sanctioned. The

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[13] Although Count I alleges that Coach Paterno and Mr. Clemens are third-party beneficiaries because they are "involved individuals," the Complaint tellingly omits any such assertion as to the Plaintiffs bringing Count II.

Complaint provides no more basis for these Plaintiffs' standing than any member of the University community who feels aggrieved by the sanctions—*e.g.*, students, current and former players, current and former coaches, alumni—and no court has ever recognized such an expansive right.

Because Plaintiffs cannot show that they are "involved individuals," they attempt to rely on a broad statement in the Bylaws that an "important consideration" in managing the NCAA Enforcement Program is to "provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions." Manual art. 19.01.1. This statement is plainly insufficient to show that the contracting parties intended to confer third-party beneficiary status on all "uninvolved student-athletes, coaches, administrators, competitors and other institutions." The NCAA is unaware of any case in which a court recognized that this provision creates a right to challenge the severity of NCAA sanctions. Moreover, because the provision references "competitors and other institutions," Plaintiffs' construction of it would mean not only that every Penn State student-athlete would have license to challenge the sanctions imposed as too harsh, but every "other institution[]" with whom Penn State competes, whether the University of Pittsburgh, Ohio State University, or Michigan State University, would have license to appeal Penn State's sanctions as too lenient. That assuredly would subvert the intent of the parties, and such appeals have never been permitted in the

history of NCAA enforcement practice. Plaintiffs' interpretation also would render ineffectual the express language in the NCAA Constitution and Bylaws limiting such procedural protections to "involved individuals." Such a reading is inconsistent with the well-established maxim that "'[t]erms in one section of the contract should not be interpreted in a manner which nullifies other terms.'" *AK Steel Corp. v. Viacom, Inc.*, 2003 PA Super 411, ¶ 13, 835 A.2d 820, 824 (2003) (citation omitted).

For those reasons, as prior courts have held, the NCAA and its member institutions did not intend the "fairness" provision to confer third-party beneficiary status on individuals like Plaintiffs. *See, e.g.*, *Knelman*, 898 F. Supp. 2d at 715 (plaintiff "fails to identify a single case in which a court has held that a student-athlete is an intended third-party beneficiary of the NCAA manual's 'fairness' provisions ....").

B. In Any Event, Plaintiffs' Claims Cannot Possibly Support The Sweeping Relief They Seek

Whatever the merits of Plaintiffs' breach of contract claims, Plaintiffs' request that this Court void the Consent Decree between Penn State and the NCAA, Compl. ¶ 154(2)-(3), is baseless. To obtain declaratory relief rendering the Consent Decree a nullity, Plaintiffs would have to plead facts which "establish a direct, immediate and substantial injury" by virtue of the entire Consent Decree—a contract to which they are complete strangers and imposes no contractual

obligations on them. *See Bowen v. Mount Joy Twp.*, 165 Pa. Commw. 101, 108, 644 A.2d 818, 821 (1994). Plaintiffs' contractual claims fail to establish any basis under which this relief would be appropriate.

As an initial matter, Plaintiffs lack standing to request a declaration voiding the Consent Decree in its entirety—even assuming they have standing to assert the breach of contract claims as pled. Plaintiffs may assert only "direct" and "immediate" interests and injuries, and only if there is a "causal connection" between harm to Plaintiffs and a violation of law that is not remote or speculative. *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 204, 888 A.2d 655, 660 (2005). Plaintiffs' injury or interest must also be individualized, *i.e.*, it must "'surpass[] the common interest of all citizens in procuring obedience to the law.'" *Id.* at 204, 888 A.2d at 660 (citation omitted). Here, however, Plaintiffs' requested relief does not relate to any direct, immediate, or substantial injury they have allegedly suffered. Plaintiffs' breach of contract claims fail to articulate any individualized interest, for instance, in Penn State's acceptance of a postseason ban or its commitment to pay a $60 million fine to the NCAA to establish an endowment to prevent child sexual abuse. Plaintiffs' tort claims, meanwhile, largely complain about language in the Freeh Report and prefatory language in the Consent Decree; they do not themselves assert an individualized interest in the Consent Decree's contractual provisions. Plaintiffs'

interests are no different than the "common interest" of all supporters of Penn State football.

Additionally, Plaintiffs have not presented any basis for which a declaration declaring the Consent Decree void ab initio is appropriate relief. A contract that is void ab initio is an agreement that has no legal operation whatsoever. *See FDA Packaging Inc. v. Advance Pers. Staffing Inc.*, 73 Pa. D. & C.4th 420, 430 (Ct. Com. Pl. 2005) ("[A] void contract lacks legal existence from inception."). Courts typically endorse such relief only in rare instances, such as where a contract violates the law. *See, e.g.*, *Davis v. Pittsburgh Nat'l Bank*, 120 Pa. Commw. 453, 458, 548 A.2d 1326, 1329 (1988) (declaring a contract void ab initio because it violated the Commonwealth Attorneys Act), *aff'd*, 521 Pa. 537, 557 A.2d 1064 (1989); *Lurie v. Lurie*, 246 Pa. Super. 307, 320, 370 A.2d 739, 745 (1976) ("'That the plaintiff and defendant stipulate for a falsehood to the court and contract that one of them shall commit perjury to bolster up the falsehood, clearly renders the contract void ab initio, if based on such iniquity.'" (citation omitted)). Plaintiffs have alleged nothing like that here. As such, this Court should, at minimum, strike the portion of the Complaint requesting equitable relief in the form of a "declaratory judgment that the NCAA-imposed Consent Decree was unauthorized, unlawful, and void *ab initio*." Compl. ¶ 154(2); *see Diess v. Pa. Dep't of Transp.*, 935 A.2d 895, 909 (Pa. Commw. Ct. 2007) (striking

"Paragraph 249, sub-paragraph (h)" of the prayer for relief because the plaintiffs were not entitled to such relief).

III. THE COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION

Plaintiffs (excepting the Estate of Coach Paterno) allege that the following statements critical of the Penn State community and the Board of Trustees, contained in the Consent Decree and made contemporaneously by the NCAA, defamed them:[14]

- "The decree stated that 'the Board of Trustees ... did not perform its oversight duties,' and that it '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.'" Compl. ¶ 90(b) (alterations in original) ("*Statement 1*"); *see also id.* ¶ 140;
- "The decree found that '[s]ome 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) ("*Statement 2*");
- "[T]he NCAA asserted that ... 'it was the fear of or deference to the omnipotent football program that enabled a sexual predator to attract and abuse his victims.' According to the NCAA, 'reverence for Penn State football permeated every level of the University community'" and was "'an extraordinary affront to the values of all members'" of the NCAA. *Id.* ¶ 92 ("*Statement 3*");

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[14] Although the Estate of Coach Paterno does *not* assert a defamation claim, Compl. at p. 36, the defamation allegations in the Complaint include alleged "false statements" about Coach Paterno. *See e.g.*, *id.* ¶ 140 ("The NCAA adopted the false statements ... that Joe Paterno deliberately covered up information of child abuse ...."). The Estate brings instead a claim for "commercial disparagement," which likewise fails. *See infra* Part IV.

- "The Consent Decree charges that every level of the Penn State community created and maintained a culture of reverence for, fear of, and deference to the football program, in disregard of the value of human decency and the safety and well-being of vulnerable children." *Id.* ¶ 94 ("*Statement 4*"); *see also id.* ¶ 140; and

- The NCAA and its officials stated that the issues addressed "in the Consent Decree were 'about the whole institution,'" and that "'the Freeh Report ... revealed [matters] that suggest really inappropriate behavior at every level of the university.'" *Id.* ¶ 141("*Statement 5*").[15]

Plaintiffs' defamation claim fails as a matter of law. *First*, Plaintiffs have not alleged that the NCAA, Dr. Ray, or Dr. Emmert was even *aware* of these particular Plaintiffs, let alone intended to direct the alleged defamatory statements at them, or that anyone hearing or reading these statements would reasonably think that the statements were about Plaintiffs. *Second*, the statements represent the NCAA's opinion based on the disclosed Freeh Report and are therefore not actionable. *Third*, most of these Plaintiffs are public figures, but they failed to allege actual malice. *See Alston v. PW-Phila. Weekly*, 980 A.2d 215, 220-22 (Pa. Commw. Ct. 2009) (sustaining demurrer where, *inter alia*, the challenged

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[15] The Complaint states that "these *and other statements*" were defamatory. Compl. ¶ 142 (emphasis added). To the extent Plaintiffs seek to rely on additional statements not clearly set forth in the Complaint, they obviously have not satisfied their duty to state each allegedly defamatory statement with specificity, as required by *Gross v. United Eng'rs & Constructors*, 224 Pa. Super. 233, 235, 302 A.2d 370, 371-72 (1973), and the Complaint's attempted catch-all defamation allegation should be struck. *See, e.g.*, *Lilac Meadows, Inc. v. Rivello*, 25 Pa. D. & C.5th 250, 264-69 (Ct. Com. Pl. 2012) (striking allegation that defamatory statements "'as well as diverse others'" had been made).

statements were not defamatory and the plaintiff had not adequately pled actual malice). Each of these defects independently dooms Plaintiffs' defamation claim.

A. Plaintiffs Cannot Reasonably Be Identified As The Subjects Of Any Alleged Defamatory Statement

None of the alleged defamatory statements even mentions any of the Plaintiffs or could reasonably be interpreted as referring to them. "It is a well-established rule of law ... that defamatory words cannot be actionable unless they *apply to plaintiff* ...." *Klauder v. Phila. Newspapers, Inc.*, 66 Pa. D. & C.2d 271, 274 (Ct. Com. Pl. 1973) (emphasis added); *see also* 42 Pa. Con. Stat. § 8343(a); *Schonek v. W.J.A.C., Inc.*, 436 Pa. 78, 83-84, 258 A.2d 504, 507 (1969); *Viola v. A&E Television Networks,* 433 F. Supp. 2d 613, 617 (W.D. Pa. 2006) (applying Pennsylvania law and granting motion to dismiss because alleged defamatory statements about Catholicism were not specific to plaintiff). It is not enough for a plaintiff to feel subjectively attacked by a particular communication; "the test is whether the defamatory communication *may reasonably be understood* as referring to the plaintiff." *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 (E.D. Pa. 1983) (emphasis added) (construing Pennsylvania law). Here, there is nothing in any of the identified statements that "tend[s] to identify" these Plaintiffs. *Id.* at 412; *see also id.* at 413-14 (dismissing defamation claim because a reasonable reader would not have interpreted that advertisements parodying "zero technology

engineering" referred to plaintiff "Zerpol," even though plaintiff's name stood for "zero pollution" and they marketed a "zero discharge system").

When, as here, "defamatory words are directed at a group or class of persons," a plaintiff "must establish some reasonable personal application of the words to himself." *Klauder*, 66 Pa. D. & C.2d at 271. But where, as here, the statements are "directed towards a class or group whose membership is so numerous that no one individual member can reasonably be deemed an intended object" of the statement, a defamation claim does not lie. *Farrell v. Triangle Publ'ns, Inc.*, 399 Pa. 102, 109, 159 A.2d 734,738-39 (1960) (holding that group of thirteen township commissioners was a "relatively small and officially designated group" sufficient to support a claim for libel, especially given that plaintiff was known as a commissioner).

Applying this familiar common law principle, courts of the Commonwealth have instructed that statements directed at a class of twenty-five or more likely cannot support a claim that any particular persons were defamed. *Klauder*, 66 Pa. D. & C.2d at 271 ("'The rule has been applied quite uniformly to comparatively large groups or classes of a definite number, exceeding, say twenty-five persons.'" (quoting William L. Prosser, *Handbook of the Law of Torts*, ch. 19 § 111, at 749-51 (4th ed. 1971))); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015-16 (3d Cir. 1994) (holding that a reader would not likely ascribe

statements about a group of 20-25 companies to plaintiffs); *see also Schonek*, 436 Pa. at 84, 258 A.2d at 507 (because the allegedly defamed group "consisted of a large number of people, enough to more than fill the Westmont Fire Hall—possibly several hundred," plaintiffs could not state a claim for defamation).

These fundamental principles plainly bar the defamation claims of the former athletes, the faculty members, and the trustees not serving during 1998-2001, as the Complaint alleges no statements about these groups at all—other than the most general statements about the entire University community, which are far too general to support a defamation claim under well-established law. And, the claims of the former coaches (Messrs. Kenney and Jay Paterno) and the trustee who did serve during the period in question (Mr. Clemens) fail as well.

Klauder is instructive. There, the court dismissed a defamation action grounded on statements regarding systemic and pervasive corruption among "most" members of a particular police department. *Klauder*, 66 Pa. D. & C.2d at 271-72. Recognizing that "individual identification is the *sine qua non*" of a libel action, the court held that "the connection between named plaintiffs and the [statements] is simply too tenuous to support a cause of action." *Id.* at 281. The court reached this conclusion even though certain statements specifically referred to "high ranking officers," and the plaintiffs were "all highly decorated" officers. *Id.* at 272-73. In short, there can be no recovery unless the alleged defamatory

statements are "reasonably susceptible of a definite application to a particular individual." *Id.* at 275.

Dismissal of this claim follows a fortiori from *Klauder* and other cases in which courts have recognized that "statements which disparage it may not serve as a basis for an individual defamation claim unless a reader could reasonably connect them to the complaining individual." *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1016 (3d Cir. 1994); *see also Schonek,* 436 Pa. at 84, 258 A.2d at 507; *Viola,* 433 F. Supp. 2d at 617. Plaintiffs have not identified any alleged defamatory statements that "tend to identify" these Plaintiffs, or in which any Plaintiff reasonably could be seen as the object of the statement. *Zerpol,* 561 F. Supp. at 410, 412. Instead, they merely assert in conclusory fashion that "[e]very recipient of the statements ... understood that the Plaintiffs, individual members of the Penn State community between 1998 and 2011, were the objects of the communication." Compl. ¶ 144. That Plaintiffs themselves characterize these statements as directed generally towards all "members of the Penn State community between 1998 and 2011"—a class of *hundreds of thousands* of students, faculty, staff, and area residents—speaks for itself. At least three of the five statements (*Statements 3-5*) involve a far broader and more indefinite group than the statements directed toward a group of 8,200 police officers in *Klauder*,

66 Pa. D. & C.2d at 279-80, or the statements at issue in *Schonek,* 436 Pa. at 83-84, which were directed at a group of several hundred individuals.

The other two statements are similarly generalized, lacking any reasonably perceptible nexus to Plaintiffs. *Statement 2* asserts generally that "*[s]ome* coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors ...." Compl. ¶ 90(c) (emphasis added). Only Plaintiffs Kenney and Jay Paterno even arguably fit within those general categories, *see id.* ¶¶ 9-12, and there is nothing in this statement that reasonably could be viewed as identifying either of them, particularly because the statement is not an indictment of all or even most "coaches, administrators and football program staff members." In context, a reasonable person would assume that this statement refers to the coaches, administrators, and football staff *specifically identified* in the Consent Decree or the Freeh report—*i.e.*, former President Graham B. Spanier, Senior Vice-President-Finance and Business Gary C. Shultz, Athletic Director Timothy M. Curley, and Head Coach Joseph V. Paterno—and whom, with the exception of Coach Paterno, have been *criminally indicted* for conduct related to these matters.[16] *See* Consent Decree at 3; Freeh Report at 14.[17]

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[16] *See* Compl. ¶ 79 (referring to criminal trials of Gary Schultz and Timothy Curley); *see also* Press Release, Pennsylvania Attorney General, *Former Penn State President Graham Spanier Charged in "Conspiracy of Silence;"*

Finally, *Statement 1* refers to members of the Board of Trustees from 1998 to 2001. Compl. ¶ 90(b); *see also id.* ¶ 140. This statement, too, lacks anything that would lead a reasonable person to identify the Plaintiffs "as intended objects of the defamation." *Farrell*, 399 Pa. at 105, 159 A.2d at 736-37. Only *one* Plaintiff—Mr. Clemens—was even a member of the Board of Trustees between 1998 and 2001. Compl. ¶ 9. Again, there is nothing in this statement that would tend to identify Mr. Clemens as its object. The Board is comprised of 32 members, and its membership changes every year;[18] thus, more than 32 likely served from 1998 to 2001, and a far larger number between 1998 and 2011. Regardless of how one calculates the total, it is too many to permit reasonable identification of any

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Gary Schultz & Tim Curley Face Additional Charges (Nov. 1, 2012), *available at* http://www.attorneygeneral.gov/press.aspx?id=6699. Because the fact that Messrs. Spanier, Schultz, and Curley face criminal charges is not in dispute, this Court may take judicial notice of the existence of the criminal proceedings. *See Gulentz v. Schanno Transp., Inc.*, 355 Pa. Super. 302, 307, 513 A.2d 440, 443 (1986).

[17] Moreover, as Plaintiffs recognize, the conclusions of the Consent Decree are drawn from the Freeh Report. *See, e.g.*, Compl. ¶¶ 58, 91; *see also* Consent Decree at 3 (quoting the Freeh Report extensively and remarking that "[t]he entirety of the factual findings in the Freeh Report support these conclusions"), but nowhere in the Freeh Report are Messrs. Kenney or Jay Paterno even mentioned. *See generally* Freeh Report.

[18] Board of Trustees, Penn State, *Membership Selection*, http://www.psu.edu/trustees/selection.html (last visited July 1019, 2013). Plaintiffs should have included this fact in their Complaint, but regardless, it is a publicly-disclosed fact permissible for judicial notice in evaluating a preliminary objection in the nature of a demurrer. *See In re Interest of F.B.*, 555 Pa. 661, 670 n.8, 726 A.2d 361, 366 n.8 (1999) (allowing judicial notice of publicly disclosed Philadelphia School Code Policy and Procedural Manual).

particular individual. *See Klauder*, 66 Pa. D. & C.2d at 276-77. Moreover, Plaintiffs have not alleged any facts demonstrating that a reasonable recipient of the communication would identify Mr. Clemens as its object.

Put simply, these statements—most of which are directed toward innumerable members of the Penn State community at large, and none of which could reasonably be viewed as identifying any of the Plaintiffs—cannot support a claim for defamation.

B. Plaintiffs' Defamation Claim Fails Because The Identified Statements Are Expressions Of Opinion And Not Actionable

Plaintiffs' defamation claim fails for the additional and independent reason that the identified communications are expressions of opinion and would reasonably be viewed as such. The statements are therefore not actionable as a matter of law.

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). In view of that bedrock principle, an expression of opinion is actionable as defamatory only if it "'may reasonably be understood to imply the existence of *undisclosed* defamatory facts justifying the opinion.'" *Veno v. Meredith*, 357 Pa. Super. 85, 93, 515 A.2d 571, 575 (1986) (citation omitted) (emphasis added in original). An expression of

opinion that discloses the facts on which the opinion is based is not actionable because it permits the reader to evaluate the facts and draw his or her own conclusion. *Id.*

In *Veno*, a newspaper published an editorial stating that an article suggesting improper behavior of a judge was not supported by the facts. *Id.* at 93, 515 A.2d at 575. The author of the article about the judge brought a defamation claim, but the Superior Court affirmed the lower court's grant of a demurrer, reasoning that the editorial merely stated an opinion based entirely on the article at issue which had been "published for public consumption in the same newspaper, just days before the editorial." *Id.* The court found it significant that "[n]owhere in his editorial did [the defendant] imply that he was privy to some additional facts, beyond [plaintiffs'] article, which supported his opinion." *Id.*

The Court of Common Pleas reached the same result on similar facts. *Greene v. Street*, 24 Pa. D. & C.5th 546 (Ct. Com. Pl. 2011), *aff'd*, 60 A.3d 855 (Pa. Super. Ct. 2012). In *Greene*, the plaintiff had been removed from a high-profile position for gross misconduct. *Id.* at 547. There had been substantial public coverage of the plaintiff's misconduct in the media, and an investigative report about his misconduct had been publicly disclosed. *Id.* at 547, 562. The plaintiff brought a defamation action against his employer for making a public statement that the plaintiff had lied. *Id.* at 549. The court sustained the

defendant's demurrer. *Id.* at 563. The court held that the statement was only the defendant's opinion and was "based on facts already in the public purview" because of the newspaper articles and investigative report about the plaintiff's conduct. *Id.* at 562.

Similarly, the allegedly defamatory statements identified by Plaintiffs are expressions of NCAA's opinion, based on the Freeh Report.[19] The Consent Decree expressly states that its "conclusions" (*i.e.*, opinions) are based on the "findings" of the Freeh Report: "The *entirety of the factual findings in the Freeh Report* supports these *conclusions*. A detailed recitation of the Freeh Report is not necessary, but *these conclusions rely on the following key factual findings* ...." Consent Decree at 3 (emphases added); *see also id.* at 2 ("[t]he findings of the Criminal Jury and *the Freeh Report establish a factual basis* from which the NCAA *concludes* that Penn State breached the standards expected by and articulated in the NCAA Constitution and Bylaws." (emphases added)); *id.* at 4 ("The NCAA *concludes* that *this evidence* presents an unprecedented failure of institutional integrity ...." (emphases added)). Even *Plaintiffs* recognize that the statements contained in the Consent Decree and those made subsequent to its release were only opinions "based on ... conclusions in the Freeh Report."

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[19] The conclusions of the Consent Decree are also drawn from the findings of the Criminal Jury, *see* Consent Decree at 2, but these were also publicly available.

Compl. ¶ 91; *see also id.* ¶ 141 ("'[T]he Freeh Report ... revealed ....'"); *id.* ¶¶ 92-93 (NCAA's alleged statements regarding "'the reverence for'" and "'fear of or deference to'" the football program represented a "'*conclusion*'" by the NCAA (emphasis added)).

Like the article in *Veno* and the investigative report in *Greene*, the Freeh Report was publicly available and widely disseminated prior to the execution of the Consent Decree, and resulted in statements in the media about its findings "within hours" of its public release by the University. *See id.* ¶¶ 56-58; *see also id.* ¶ 76 (referring to publicity given to the Freeh Report). And like in *Greene,* there had been substantial public discussion of the conduct discussed in the Freeh Report. Indeed, not only did the NCAA make clear it was relying on a publicly available document, but it also quoted verbatim the key statements from that document that served the backbone of the NCAA's opinions. Consent Decree at 3-4. The NCAA never implied that it was privy to additional, undisclosed facts. *See Veno*, 357 Pa. Super. at 93, 515 A.2d at 575. Therefore, the public was free to review the Freeh Report and determine for themselves whether they agreed with the NCAA's opinion.

Because each of the alleged defamatory statements is nothing more than NCAA's expression of opinion, based explicitly on a publicly disclosed source, Plaintiffs' defamation claim fails as a matter of law.

C. The Public-Figure Plaintiffs Fail To Plead Actual Malice

If a plaintiff is a public figure, she must establish that that the defendant acted with actual malice in publishing the alleged defamatory communications. *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa.*, 592 Pa. 66, 84, 923 A.2d 389, 400 (2007). Here, Plaintiffs (except the Penn State faculty members) are, as a matter of law, at least "limited-purpose" public figures.[20] *Id.* at 84-85, 923 A.2d at 400. A limited-purpose public figure is an individual that "'voluntarily injects himself or is drawn into a particular public controversy'" and thereby becomes a public figure for purposes of that controversy. *Id.* at 86, 923 A.2d at 401 (quoting *Gertz*, 418 U.S. at 351). As public figures, Plaintiffs were required to plead actual malice with specificity but, at most, the Complaint alleges only that the NCAA acted with negligence. That deficiency is fatal to the defamation count brought by the former assistant coaches, former players, and Board of Trustee members.

1. Plaintiffs Are Public Figures.

To determine if Plaintiffs are limited-purpose public figures, the court first determines if a public controversy exists and then evaluates the "nature and extent" of Plaintiffs' participation in that controversy. *See Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1082 (3d Cir. 1985) (internal quotation marks

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[20] Plaintiff faculty members (Messrs. Bordi, Engelder, Niles, and O'Donnell) may also be public figures, but for the purposes of this demurrer, they are excluded.

omitted). It is undeniable that this action involves a public controversy; *i.e.*, the NCAA's imposition of sanctions on Penn State for violating NCAA rules. Courts have recognized a public controversy in similar cases. *See, e.g.*, *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1116 (N.D. Cal. 1984) (quoted approvingly by *Sarandrea v. Sharon Herald Co.*, 30 Pa. D. & C.4th 199, 211 (Ct. Com. Pl. 1996)) (NCAA investigation was a public controversy because the university's reputation was at stake, and it generated public debate as to how to address rules violations); *Cottrell v. NCAA*, 975 So. 2d 306, 335 (Ala. 2007) (NCAA sanctions were a public controversy because, *inter alia*, they generated public debate about the fairness of the NCAA's treatment of the university, and the football program was "source of pride" for many citizens). In addition, the "NCAA's focus [on] ... the football-centric 'culture' at Penn State," Compl. ¶ 82, is rooted in a "larger public debate over the proper role of athletic programs at institutions of higher learning," *Barry*, 584 F. Supp. at 1116-17; *id.* at 1117 (noting the sanctions were a part of a public controversy related to "the incongruity of a 'win at all costs' attitude, and the concomitant infractions of NCAA rules such an attitude engenders").

The "nature and extent" of Plaintiffs' involvement in this controversy renders them public figures. *Marcone*, 754 F.2d at 1082-83. As the Court of Common Pleas has noted, there is a "a long line of cases holding that athletes and coaches are either 'all-purpose' public figures or so-called 'limited-purpose' public

figures."[21] *Sarandrea*, 30 Pa. D. & C.4th at 210; *see also Barry*, 584 F. Supp. at 1119 ("This conclusion is consistent with a long line of cases ... which have found professional and collegiate athletes and coaches to be public figures."). Coaches and athletes become public figures by voluntarily choosing to assume the position of coach or athlete and the limelight associated with it. *See, e.g.*, *Curtis Publ'g. Co. v. Butts*, 388 U.S. 130, 154-55 (1967) (holding that a university athletic director was a public figure by his "position alone"); *Marcone*, 754 F.2d at 1083 ("[S]ports figures are generally considered public figures because of their position as athletes or coaches."); *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979) (holding football player was a public figure because "[p]rofessional athletes, at least as to their playing careers, generally assume a position of public prominence"); *Barry*, 584 F. Supp. at 1119 ("[O]ne's voluntary decision to pursue a career in sports, whether as an athlete or a coach, 'invites attention and comment' regarding his job performance and thus constitutes an assumption of the risk of negative publicity.").

At a minimum, a collegiate athlete's or coach's position renders her a limited-purpose public figure in the context of NCAA rules compliance.

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[21] Eleven Plaintiffs are former Penn State football coaches or athletes: William Kenney, Jay Paterno, Anthony Adams, Gerald Cadogan, Shamar Finney, Justin Kurpeikis, Richard Gardner, Josh Gaines, Patrick Mauti, Anwar Phillips, and Michael Robinson. Compl. ¶¶ 10, 12.

See Cottrell, 975 So. 2d at 340 (holding that the nature of assistant football coaches' positions and responsibilities "thrust them into the public controversy concerning [t]he University's compliance with NCAA rules"). This status is particularly pronounced when the athlete or coach is associated with a prominent athletic program, similar to Penn State's football program. *See id.* at 340 n.12. Thus, because they chose to become coaches and athletes, especially at an elite athletic program, these Plaintiffs assumed the role of public figures.

In addition, Plaintiffs who are members of the Board of Trustees[22] are also public figures because of the nature of their position as leaders of the University and because their responsibility for overseeing the implementation of the Consent Decree provisions places them at the center of this controversy. *See Lawrence v. Walker*, 9 Pa. D. & C.5th 225, 243 (Ct. Com. Ct. 2009) (holding that members of the board of directors of a 44,000-member private organization were "very much thrust into the center of the [controversy regarding election policy rules] by virtue of their role in setting the rules by which ethics and civility are to be governed ...."). Plaintiffs' allegations demonstrate that the Board is particularly entwined with this public controversy. The Board removed President Spanier and Joe Paterno from their positions in the aftermath of revelations about the Sandusky

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[22] These Plaintiffs include Ryan McCombie, Anthony Lubrano, Al Clemens, Peter Khoury, and Adam Taliaferro. Compl. ¶ 9.

scandal. Compl. ¶ 49. They also commissioned FSS "to investigate the alleged failure of certain Penn State personnel to respond to and report certain allegations against Sandusky." Compl. ¶ 50. Plaintiffs further aver that the Board was the rightful body to have received, considered, and voted on the contents of the Freeh Report. *See* Compl. ¶¶ 57, 59, 88. Because they voluntarily chose a prominent position as leaders of a large university, and the Board is directly involved in the outcome to the public controversy, the Plaintiffs who are members of the Board are public figures.

2. Plaintiffs' Defamation Claims Fail Because They Have Not Sufficiently Pled Actual Malice.

The Complaint is fatally deficient with regard to actual malice. Actual malice requires a demonstration of knowing or reckless disregard for the truth, which means "the defendant in fact ***entertained serious doubts*** as to the truth of his publication." *Tucker v. Phila. Daily News*, 577 Pa. 598, 634-35, 848 A.2d 113, 135-36 (2004) (emphasis added) (internal quotation marks and citation omitted) (affirming grant of demurrer for failure to allege sufficient facts to demonstrate actual malice (emphasis in original)). Plaintiffs aver in conclusory fashion that the NCAA made the alleged statements "with intentional, reckless, or negligent disregard for the truth," Compl. ¶ 142, but that is insufficient to satisfy Plaintiffs' burden to plead actual malice with particularity. *See Alston*, 980 A.2d at 222.

Plaintiffs' pleadings are replete with allegations that, at best, demonstrate only negligence. At the heart of Plaintiffs' scienter allegations are their criticisms of FSS' investigative methods, *see* Compl. ¶¶ 60-67, 77, but a long line of cases make clear that allegations of a failure to investigate are legally insufficient to demonstrate actual malice. *See, e.g., St. Amant v. Thompson*, 390 U.S. 727, 730, 732-33 (1968) (holding that "[b]y no proper test of reckless disregard" did defendant's sole reliance on one person's statement without verifying with others constitute actual malice); *Sarandrea*, 30 Pa. D. & C.4th at 215-16 ("The failure ... to check the accuracy of statements ... is constitutionally insufficient to show recklessness."); *Reiter v. Manna*, 436 Pa. Super. 192, 202, 647 A.2d 562, 567-68 (1994) ("[M]ere negligence or carelessness in failing to verify facts prior to publishing is not evidence of actual malice.").

Nor does it constitute actual malice for the NCAA to rely solely on the Freeh Report—a report the Board of Trustees *itself* commissioned and the findings of which the *University accepted.* Compl. ¶¶ 50, 57-58; Consent Decree at 1, 2. Reliance on a single source, "even though [it] reflect[s] only one side of the story," without availing oneself "of available means for ascertaining the falsity of allegedly defamatory statements," does not constitute actual malice. *Sarandrea*, 30 Pa. D. & C.4th at 215-16; *see also Tucker*, 577 Pa. at 629-30, 634-35, 848 A.2d at 132-33, 135-36 (sustaining demurrer because allegations that newspapers did not

conduct adequate research or interviews and relied solely on a biased source without checking the accuracy of the source did not, as a matter of law, rise to actual malice); *Curran v. Phila. Newspapers, Inc.*, 497 Pa. 163, 179, 439 A.2d 652, 660 (1982).[23] That surely is even more true when the primary subject discussed in that source validates its conclusions, as occurred here when Penn State accepted the findings of the Report.

Even Plaintiffs conclude that the NCAA and FSS acted only negligently. Plaintiffs' allegation that "Defendants knew or should have known" that the Freeh Report was unreliable and that its conclusions were unsubstantiated is only an allegation of negligence. Compl. ¶ 76; *accord id.* ¶ 5; *see Heimbecker v. Drudge*, 22 Pa. D. & C.5th 129, 178 (Ct. Com. Pl. 2011), *aff'd*, 64 A.3d 28 (Pa. Super. Ct. 2012) (holding that plaintiff's allegations, including that defendant "'knew or should have known'" that his statement was false, constituted only allegations of negligence (citation omitted)). Likewise, Plaintiffs aver that a "reasonably prudent" person would not rely on the Freeh Report, and a "reasonable, objective review" of the Freeh Report would have revealed a lack of evidence, Compl. ¶¶ 60, 66, but the law is clear that a showing of actual malice

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[23] Plaintiffs also point to reports criticizing the Freeh Report, but these reports could not have given the NCAA reason to seriously doubt the accuracy of the Freeh Report because they were published *after* the Consent Decree was executed and the alleged defamatory statements were made. *See* Compl. ¶¶ 61, 66-67.

"'requires more than a departure from *reasonably prudent* conduct.'" *Tucker*, 577 Pa. at 634, 848 A.2d at 135 (emphasis added) (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989)).[24]

In short, Plaintiffs were required—but failed—to plead facts sufficient to demonstrate that the NCAA acted with reckless disregard for the truth by relying on the Freeh Report in allegedly publishing defamatory statements.

IV. THE COMPLAINT FAILS TO STATE A CLAIM FOR COMMERCIAL DISPARAGEMENT

In lieu of joining the other Plaintiffs' defamation count, the Estate of Coach Paterno brings a cause of action for commercial disparagement.[25] That claim rests

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[24] Plaintiffs make two more allegations, but neither demonstrate actual malice. *First*, Plaintiffs assert that FSS "collaborated with the NCAA and frequently provided information and briefing to the NCAA. ... [T]he Freeh firm periodically contacted representatives of the NCAA to discuss areas of inquiry and other strategies." Compl. ¶ 54. Even if true, that allegation would demonstrate only that the NCAA and FSS "periodically" communicated, but it does not aver that they worked closely together or assert *any* fact to demonstrate that the NCAA was on notice that it should, allegedly, harbor serious doubts about the investigation's final conclusions. *Second*, Plaintiffs allege that the NCAA "knew or should have known that by accepting the Freeh Report they would ... effectively terminate the search for the truth ...." *Id.* ¶ 76; *see also id.* ¶ 5. The U.S. Supreme Court in *St. Amant v. Thompson* held that making a defamatory statement "heedless of the consequences" does not constitute reckless disregard for the truth. 390 U.S. at 730, 733.

[25] This count is styled "Injurious Falsehood/Commercial Disparagement." Compl. at 34. These are not alternative claims under Pennsylvania law, but rather different names for the same tort. *See Pro Golf Mfg. v. Tribune Review Newspaper Co.*, 570 Pa. 242, 246, 809 A.2d 243, 246 (2002) (injurious falsehood, commercial

upon the allegation that Coach Paterno's legacy generally was more marketable before the Consent Decree purportedly sullied his reputation. Compl. ¶¶ 103, 131, 136. Such an allegation, even if true, would not support a claim for defamation, much less commercial disparagement, which requires significantly more in the pleadings. At the threshold, the claim fails for the same reason that the other Plaintiffs' defamation claim fails: these are expressions of opinion based on previously disclosed factual findings, not actionable false statements, *see supra* at Part III.B, and the Estate has not alleged conduct to remotely indicate the NCAA acted with actual malice, *see supra* at Part III.C.2. But this claim suffers from other, independent (and incurable) defects. The Estate has entirely failed to allege that it ever took a single step to access the alleged "readily available, valuable commercial market concerning Joe Paterno's commercial property," much less averred any specific pecuniary harm to these unidentified commercial interests. These defects doom the claim.

A. Commercial Disparagement Under Pennsylvania Law

To state a claim for commercial disparagement in Pennsylvania, a plaintiff must prove that: "(1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication

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disparagement, trade libel, disparagement of goods, and slander of title are all synonymous).

will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity." *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 570 Pa. 242, 246, 809 A.2d 243, 246 (2002). "Pennsylvania law requires that a plaintiff claiming commercial disparagement plead damages with considerable specificity." *Swift Bros. v. Swift & Sons, Inc.*, 921 F. Supp. 267, 276 (E.D. Pa. 1995). In particular, in order to state a claim, "the plaintiff 'must in his complaint set out *the names of his lost customers and show by figures how much he has lost financially.*' *Id.* (emphasis added) (citation omitted). Given these strenuous pleading requirements, courts have appropriately characterized claims for commercial disparagement as "near impossible" to plead. *Id.* (quoting *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 409 (E.D. Pa. 1983)). Unlike defamation, "[t]he purpose of a commercial disparagement action is to compensate a vendor for pecuniary loss suffered because statements attacking the quality of his or her goods." 31 P.L.E. Libel and Slander § 14 (2013). Commercial disparagement claims are not the proper mechanism "to vindicate the plaintiff's business reputation and good name." *SNA, Inc. v. Array*, 51 F. Supp. 2d 554, 565 (E.D. Pa. 1999). The Estate cannot take a legally unviable defamation claim and masquerade it as a commercial disparagement claim.

The Estate does not, and cannot, come close to meeting this exceedingly high pleading bar. The claim appears to rest on the Estate's belief that the NCAA "imputed dishonest conduct to Joe Paterno." Compl. ¶ 133. As that allegation reveals, this count is at bottom nothing more than a failed defamation claim—uncomfortably packaged as a commercial disparagement claim, since Pennsylvania does not recognize a cause of action for defaming a deceased person.

B. The Estate Failed To Identify A Concrete Commercial Interest

The Complaint utterly fails to identify the commercial interest(s) allegedly disparaged. Commercial disparagement is "the false and malicious representation of the title or quality of another's interest in goods or property." *Pro Golf Mfg, Inc.*, 570 Pa. at 247, 809 A.2d at 246. The tort thus "protects economic interests" of an individual who "suffers pecuniary loss from slurs affecting the marketability of his or her goods." *Untracht v. Fry*, No. 1683, 2010 Phila. Ct. Com. Pl. LEXIS 77, at *13 (Apr. 7, 2010), *aff'd*, 22 A.3d 1076 (Pa. Super. Ct. 2010) (affirming grant of demurrer).[26] To state a claim, the challenged statement must be "directed to the quality of goods or services provided" by the plaintiff. *Abbadon Corp. v. Crozer-Keystone Health Sys.*, No. 4415, 2009 Phila. Ct. Com. Pl. LEXIS 233, at

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[26] Copies of unpublished opinions are provided in the Addendum of Unpublished Opinions accompanying this memorandum.

*13 (Nov. 13, 2009) (dismissing commercial disparagement claim because statements impugning plaintiff's reputation are not actionable).

The Complaint baldly asserts that "Joe Paterno or his estate possessed a property interest in his name and reputation" and that "there was a readily available, valuable commercial market concerning Joe Paterno's commercial property." Compl. ¶ 131. But it does not allege any specific commercial enterprise or property, let alone any enterprise or property which decreased in value as a direct result of the Consent Decree. Plaintiff does not allege what this (as-yet-untapped) "available, valuable commercial market" is or what if any steps the Estate has taken to exploit that market, much less does it identify an actual business interest that the NCAA's statements allegedly harmed. *See Ashoff v. Gobel*, 23 Pa. D. & C.4th 300, 306 (Ct. Com. Pl. 1995), *aff'd*, 450 Pa. Super. 706, 676 A.2d 276 (1995). They do not even allege that the Estate is *engaged* in any commercial conduct. This defect, too, dooms the claim.

C. The Estate Failed To Plead Pecuniary Loss With Specificity

Plaintiff also failed to plead the alleged pecuniary loss with specificity, as required by Pennsylvania law. It is well established that this element of the tort requires a plaintiff to "'set out the names of his lost customers and show by figures how much he has lost financially.'" *Testing Sys., Inc. v. Magnaflux Corp.*, 251 F. Supp. 286, 290 (E.D. Pa. 1966) (citation omitted) (granting motion to

dismiss); *Swift Bros.*, 921 F. Supp. at 276 (dismissing claim where the "complaint does not allege the customers it lost as a result of the [defendant's] advertisement"); *cf. Cosgrove Studio & Camera Shop v. Pane*, 21 Pa. D. & C.2d 89, 91 (Ct. Com. Pl. 1960) ("A mere statement that as a result of the alleged libel, many persons who previously dealt with [plaintiff] have since neglected and refused to do business with him is not sufficient. ... [Plaintiff] must in his complaint set out the names of his lost customers and show by figures how much he has lost financially."), *rev'd on other grounds*, 408 Pa. 314, 182 A.2d 751 (1962).

A plaintiff must also plausibly plead causation, *i.e.*, allege facts showing some "direct pecuniary loss" that would not have occurred *but for* the publication. *Menefee v. CBS, Inc.*, 458 Pa. 46, 54-55, 329 A.2d 216, 220-21 (1974).[27] To enumerate these requirements is to realize that the Estate falls irreparably short of satisfying them. The Complaint does not even attempt to identify, even in the most

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[27] As a leading Pennsylvania treatise explains, "[t]o successfully plead pecuniary loss associated with a cause of action for disparagement, a plaintiff must allege facts showing an established business, the amount of sales for a substantial period preceding publication, and amount of sales subsequent to the publication; facts showing that such loss in sale were the natural and probable result of such publication; and the facts showing the plaintiff could not allege the name of particular customers who withdrew or withheld their custom." 31 P.L.E. Libel and Slander § 14 (2013). The Estate does not allege facts to satisfy a single one of these requirements.

cursory fashion, any ascertainable financial loss flowing from the allegedly disparaging statements. The Estate vaguely asserts that the "value of the Estate and Family of Joe Paterno substantially and materially declined." Compl. ¶ 136. That is plainly insufficient.

Moreover, Plaintiff cannot cure this defect because there is no plausible basis for attributing any financial damage to a commercial interest of the Estate to the publication of the Consent Decree—even if the Estate were engaged in any commercial activity tied to Coach Paterno. Coach Paterno was the subject of massive media attention once the Sandusky scandal broke. He was removed from his position as head football coach on November 9, 2011. *Id.* ¶ 49. All of the NCAA's conclusions about Coach Paterno, which, again, flow directly from the Freeh Report findings, had already been widely reported in that Report on July 12, 2012. *Id.* ¶ 56. Media outlets subsequently quoted the Freeh Report and disseminated the same statements that the NCAA quoted in its Consent Decree and the Estate would characterize as disparaging.[28] Penn State even took the

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[28] *See, e.g.*, Dan Wetzel, *Freeh Report assigns blame to Joe Paterno, other Penn State officials for Jerry Sandusky's crimes*, Yahoo! Sports (July 12, 2012, 9:37 AM), http://sports.yahoo.com/news/ncaaf--freeh-report-penn-state-key-findings-joe-paterno-jerry-sandusky-.html; Kevin Johnson et al., *Freeh Report Blasts Culture of Penn State*, USA Today (July 13, 2012, 1:52 AM), http://usatoday30.usatoday.com/news/nation/story/2012-07-12/louis-freeh-report-penn-state-jerry-sandusky/56181956/1; *Penn State Freeh Report Speed Read: Most*

extraordinary and symbolic step of removing Coach Paterno's statue from its perch on July 22, 2012—the day *before* the Consent Decree was publicly announced.[29] Plaintiffs do not allege facts to suggest how the NCAA's publication of the Consent Decree, as distinct from any prior publications or Penn State's independent actions, caused any pecuniary loss to Coach Paterno's commercial interests.

Moreover, Coach Paterno passed away on January 22, 2012, well before the NCAA released the Consent Decree. The NCAA is not aware of a single

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Damaging Findings, Daily Beast (July 12, 2012, 11:04 AM), http://www.thedailybeast.com/articles/2012/07/12/penn-state-freeh-report-speed-read-most-damaging-findings.html. Indeed, the Freeh Report was republished in its entirety by countless media outlets. *See, e.g.*, *The Freeh Report*, N.Y. Times (July 12, 2012), *available at* http://www.nytimes.com/interactive/2012/07/12/sports/ncaafootball/13pennstate-document.html?_r=0; Dom Cosentino, *Here Is The Official Report of Louis Freeh's Investigation Into Penn State*, Deadspin (July 12, 2012, 9:05 AM), http://deadspin.com/5925386/here-is-the-official-report-of-louis-freehs-investigation-into-penn-state-discuss; Sarah Ganim, *Joe Paterno, Others Covered Up Jerry Sandusky Abuse of Children*, PSU-Freeh report says, Patriot-News (July 12, 2012, 9:31 AM), http://www.pennlive.com/midstate/index.ssf/2012/07/joe_paterno_others_covered_up.html. The Court may take judicial notice of the existence of newspaper articles at this stage of the case. *See Tilghman v. Commonwealth*, 27 Pa. Commw. 484, 487, 366 A.2d 966, 967 (1976) (considering preliminary objections and affirmative defenses, and concluding "that it is proper here to take judicial notice of the numerous newspaper articles and news broadcasts which have publicized" the subject matter underlying plaintiffs claim); *Public Op. v. Chambersburg Area Sch. Dist.*, 654 A.2d 284, 287 n.4 (Pa. Commw. Ct. 1995) (affirming propriety of judicial notice of newspaper article on demurrer).

[29] *See* Jennifer Preston, *Penn State Removes Paterno Statue*, N.Y. Times, (July 22, 2012, 8:31 AM), http://thelede.blogs.nytimes.com/2012/07/22/penn-state-will-remove-paterno-statue/.

commercial disparagement case alleging posthumous disparagement. Indeed, the Pennsylvania Supreme Court has suggested that such a claim will not lie. *See Menefee*, 458 Pa. at 48-49, 54-55, 329 A.2d 216, 217-18, 220-21 (requiring allegations that plaintiff would "have found a purchaser" of his services but for the disparagement). This defect, too, is fatal to the claim.

D. The Allegedly Disparaging Statements Are Not Actionable

The Estate asserts that the Consent Decree "maligned Joe Paterno's moral character and the fulfillment of his duties as Head Coach." Compl. ¶ 130; *see also id.* ¶ 90(a) (quoting Consent Decree at 3). As discussed, *supra* at Part III.B, the statements of which the Estate complains are expressions of the NCAA's opinion, based explicitly on the publicly disclosed Freeh Report. Such statements cannot form the basis of a claim for defamation or disparagement. *Untracht*, 2010 Phila. Ct. Com. Pl. LEXIS 77, at *6, *7, *12 (dismissing commercial disparagement claim because, like defamation, a claim cannot lie for statements of opinions premised on disclosed facts). The Estate also has not pled, remotely pled, that the NCAA acted with actual malice by relying on the Freeh Report, which the Board itself commissioned and the University accepted. *See supra* at Part III.C.2. That too dooms any claim for commercial disparagement concerning a public figure like Coach Paterno.

In sum, because the Estate has failed on every level to plead a viable claim for commercial disparagement, the NCAA's objection to that claim should be sustained.

V. THE COMPLAINT FAILS TO STATE A CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

Two Plaintiffs, former assistant football coaches Jay Paterno and William Kenney, assert that in imposing the penalties outlined in the Consent Decree against *Penn State*, the NCAA intentionally interfered with Plaintiffs' "prospective and existing employment, business, and economic opportunities with many prestigious college and professional football programs, including at Penn State." Compl. ¶ 123; *see also id.* ¶ 124. That claim fails on every level.

There are four elements to a claim of intentional interference with existing or prospective contractual relations: (1) a contractual, or prospective contractual, relationship between the complainant and a third-party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) actual legal damage as a result of the defendant's conduct. *Al Hamilton Contracting Co. v. Cowder*, 434 Pa. Super. 491, 497, 644 A.2d 188, 191 (1994).

The Complaint does no more than recite these elements in cursory fashion, without a single material factual allegation to buttress what amount to bare legal conclusions. *See generally* Compl. ¶¶ 122-28. This sort of claim, premised on "nothing more than conclusory[,] unsubstantiated suspicions and allegations," "simply do[es] not state a cause of action pursuant to any theory of tort recovery." *Feingold v. Hendrzak*, 15 A.3d 937, 942 (Pa. Super. Ct. 2011) (internal quotation marks omitted). More specifically, Plaintiffs fail to allege (i) the existence of any specific contract, (ii) that the NCAA acted with specific intent to interfere with these contracts, and (iii) why this asserted interference was not privileged.

First, Plaintiffs have failed to allege the existence of a contract. For the NCAA, Dr. Ray, or Dr. Emmert to *interfere* with a contract, there must *be* a contract. *Al Hamilton Contracting Co.*, 434 Pa. Super. at 497, 644 A.2d at 191 (noting that a current contractual relationship is "a critical element of the tort"). While Plaintiffs baldly allege interference with "prospective and existing employment, business, and economic opportunities," Compl. ¶ 123, they fail to identify a single specific contract or opportunity with which the NCAA has interfered. *See Al Hamilton Contracting Co.*, 434 Pa. Super. at 497, 644 A.2d at 191 (affirming lower court's sustaining of preliminary objection where appellant had not alleged there were "any third parties to which [appellant] was contractually related that have refused to perform, or were precluded from partially or

completely performing"); *Sylk v. Bernstein*, No. 1906, 2003 Phila. Ct. Com. Pl. LEXIS 75, at *9-14 (Feb. 4, 2003) (sustaining demurrer where plaintiff failed to describe any contract or business dealing besides stating that the relevant third party was a "business partner").

The Complaint's vague references to prospective "opportunities" cannot cure this defect. Plaintiffs must specify a prospective contract that, *but for* the NCAA's conduct, had a "reasonable probability" of coming to fruition. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 208-10, 412 A.2d 466, 471 (Apr. 27, 1979). Having failed to specify a single prospective contract, let alone one with a reasonable probability of being consummated, this claim again must be dismissed. *See Turk v. Salisbury Behavioral Health, Inc.*, No. 09-CV-6181, 2010 U.S. Dist. LEXIS 41640, at *13-14 (E.D. Pa. Apr. 27, 2010) (dismissing claim under Pennsylvania law where complaint "[did] not identify a single contract or job which [plaintiff] did not receive due to defendants' actions"); *Brunson Commc'ns, Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550, 578 (E.D. Pa. 2002) (dismissing plaintiff's tortious interference claim where it failed to identify the loss of any specific prospective contract or client).[30] "Shorn of the legal conclusions

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[30] The only specific employment opportunity referenced even indirectly was Plaintiffs' employment at Penn State, Compl. ¶ 123, but the Complaint is void of *any* allegations that their termination was related to the Consent Decree. Indeed,

that defendants intentionally interfered with prospective contracts, the ... Complaint only states that plaintiff[s have] been generally unable to obtain a job." *Turk*, 2010 U.S. Dist. LEXIS 41640, at *14.[31]

Second, Plaintiffs have not pled that the NCAA intended to interfere with any contract or prospective contract. Indeed, Plaintiffs have not alleged *any action at all* by the NCAA. *See* Compl. ¶¶ 123-24. Plaintiffs only vaguely, and in conclusory fashion, assert that the NCAA "took the purposeful actions *described above* in order to harm Plaintiffs and interfere with their contractual relations." *Id.* ¶ 124 (emphasis added). Plaintiffs never define the conduct "described above," but presumably this claim is premised on injury to Plaintiffs' reputations based on the same conduct that underpins either the defamation or breach of contract claims. As such, this claim is nothing more than an impermissible, thinly veiled attempt to seek double recovery for the same harm: pecuniary loss due to alleged reputational injury inflicted by the NCAA's sanctions on Penn State. *See Ashoff*, 23 Pa. D. &

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both coaches had left Penn State by mid-January 2012, more than *six months*, prior to publication of the Freeh Report or execution of the Consent Decree. Bob Flounders, *New Homes: Former PSU assistants Bill Kenney, Kermitt Buggs Land Jobs At Western Michigan, Connecticut*, Penn Live (Feb. 26, 2013), *available at* http://www.pennlive.com/pennstatefootball/index.ssf/2013/02/former_penn_state_assistant_co.html ("Flounders Article"); *Jay Paterno Leaves Penn State*, ESPN.com (Jan. 11, 2012), *available at* http://espn.go.com/college-football/story/_/id/7447930/assistant-jay-paterno-leaves-penn-state-nittany-lions.

[31] In fact, Mr. Kenney is currently employed as a football coach. *See* Flounders Article, *supra* note 30.

C.4th at 306 (dismissing tortious interference claim because it was simply an attempt to forge "a separate cause of action out of an alleged *effect* of the alleged defamation). And Plaintiffs certainly have not identified any action the NCAA took "*for the purpose* of causing harm to the plaintiff[s]." *Glenn v. Point Park Coll.*, 441 Pa. 474, 481, 272 A.2d 895, 899 (1971) (affirming grant of demurrer where plaintiffs failed to allege that defendant "acted for [the] specific purpose of causing harm to the plaintiffs") (emphasis added).

The Complaint merely asserts a legal conclusion that the NCAA acted purposefully to harm Plaintiffs. Compl. ¶ 124. This is insufficient as a matter of law. *See, e.g., B.T.Z., Inc. v. Grove*, 803 F. Supp. 1019 (M.D. Pa. 1992) (applying Pennsylvania law in sustaining motion to dismiss where complaint failed to sufficiently allege that defendant either intended to interfere with the contract or was substantially certain interference would occur). The paucity of facts in the Complaint from which to infer specific intent is particularly stark in contrast to the allegations in *Glenn*, where, despite averring that "'[b]y *negotiating directly* with [the third-party], the defendant intentionally, wrongfully, maliciously, fraudulently, deceitfully and without justification interfered with and precluded and prevented plaintiffs from entering into the relationship of brokers in the transaction with [the third-party],'" the court nevertheless held the complaint failed to charge an intent to harm plaintiffs. 441 Pa. at 481-82, 272 A.2d at 899 (emphasis added) (citation

omitted). Similarly, in *B.T.Z., Inc. v. Grove*, the court dismissed a tortious interference claim for failure to allege the requisite intent, even where the complaint had specific allegations regarding the defendants' intentional interactions vis-a-vis the plaintiff. 803 F. Supp. at 1023-24. In contrast, Plaintiffs here have not alleged that the NCAA was even aware of these Plaintiffs, let alone had some motive to intentionally interfere with their contracts and harm *them* in particular. Moreover, having failed to identify a single affected contract, Plaintiffs necessarily also fail to allege that the NCAA was even *aware* of any contracts with which they supposedly intended to interfere.[32]

Third, even if the NCAA intended to interfere with a contract, its actions are privileged and not improper. Pennsylvania recognizes that interferences that "'are sanctioned by the "rules of the game" which society has adopted'" are not improper and thus do not give rise to a tortious interference claim. *Glenn*, 441 Pa. at 482, 272 A.2d at 899 (citation omitted); *see also Small v. Juniata Coll.*, 452 Pa. Super. 410, 419, 682 A.2d at 354, 350 (1996). It is Plaintiffs' burden to allege facts sufficient to negate the existence of a privilege. *Glenn*, 441 Pa. at 482, 272 A.2d at 899-900 (affirming grant of a demurrer where, *inter alia*, plaintiff

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[32] The Complaint's failure to allege that the NCAA acted with actual malice in connection with allegedly defamatory statements, given that this claim is likely premised on the harm Plaintiffs purportedly endured to their reputations from the NCAA's alleged defamation.

failed to allege sufficient facts to overcome defendant's apparent privilege). They have failed to carry that burden.

Plaintiffs acknowledge that the NCAA's expressed motives for the Consent Decree were to punish a member institution for violations of its rules, Compl. ¶ 74, and to address "'the fear of or deference to the omnipotent football program," *id.* ¶ 92; *see also id.* ¶ 82 ("The NCAA's focus was on ... the football-centric 'culture' at Penn State ...."). Moreover, the rules violations arose from with a cover up of the sexual abuse of children, which society universally condemns. Any actions taken by Dr. Ray or Dr. Emmert in relation to the Consent Decree were done in their official corporate capacities on behalf of the NCAA. In light of the complete absence of *any* specific allegation regarding the NCAA's allegedly tortious conduct or motive, Plaintiffs have not satisfied their burden to negate the existence of a privilege.

VI. THE COMPLAINT FAILS TO STATE A CLAIM FOR CIVIL CONSPIRACY

All Plaintiffs assert a civil conspiracy claim, which is really nothing more than an attempt to create a "catch all" remedy that would allow any member of a university community that feels aggrieved by NCAA sanctions to sue. If such a broad cause of action existed, it could be used literally anytime the NCAA imposed sanctions by anyone associated with the affected university, *e.g.*, the faculty member Plaintiffs here, to allege that the NCAA conspired with some other

party to deny them rights under the Constitution and Bylaws. Of course, such a system would be totally unworkable and, for good reason, no such broad cause of action has ever been recognized. Plaintiffs' civil conspiracy claim fails on multiple levels.

A. Insofar As Plaintiffs' Civil Conspiracy Claim Is Based On Breach Of Contract, It Is Barred By The Gist Of The Action Doctrine

In stating their civil conspiracy claim, Plaintiffs improperly allege that the NCAA conspired to "breach[] the contract between the NCAA and Penn State," thereby "depriving Plaintiffs of their rights." Compl. ¶ 148. Under the gist of the action doctrine, however, Plaintiffs are precluded from "re-casting ordinary breach of contract claims into tort claims." *eToll, Inc. v. Elias/Savion Adver., Inc.*, 2002 PA Super 347, ¶ 14, 811 A.2d 10, 14 (2002). Civil conspiracy claims alleging illicit concerted action to breach a contract are improper and must be dismissed. *See, e.g., CBG Occupational Therapy, Inc. v. Bala Nursing & Ret. Ctr.*, No. 1758, 2005 Phila. Ct. Com. Pl. LEXIS 19, at *11 (Jan. 27, 2005) (holding plaintiffs' civil conspiracy claim barred by the gist of the action doctrine where claim was rooted in contract). It would be particularly bizarre to allow these Plaintiffs to press such a claim, where none has any rights under the contract at issue, as described above.

B. Plaintiffs' Civil Conspiracy Claim Fails To Aver Material Facts Which Establish A Combination For An Unlawful Purpose

Plaintiffs' civil conspiracy claim also fails to aver "material facts which will either directly or inferentially establish elements of conspiracy" and, therefore, should be dismissed. *Brown v. Blaine*, 833 A.2d 1166, 1173 (Pa. Commw. Ct. 2003). To state a claim for civil conspiracy, Plaintiffs must first demonstrate a combination of persons with a common purpose to do an unlawful act or to do a lawful act by unlawful means or purpose. *Strickland v. Univ. of Scranton*, 700 A.2d 979, 987-88 (Pa. Super. Ct. 1997). Plaintiffs' bare-bones allegations fall far short of demonstrating this requisite unlawful combination for two main principal reasons.

First, the Complaint has not alleged facts demonstrating a combination between the NCAA and FSS.[33] Plaintiffs rely exclusively on the Freeh Report's statement that "as part of its investigative plan, the firm cooperated with 'athletic program governing bodies,'" to reach the conclusion that the NCAA and FSS

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[33] Any coordinated action by Dr. Emmert, Dr. Ray, and other NCAA employees cannot constitute a combination because, as a matter of law, agents of a single entity cannot conspire among themselves. *See Whaumbush v. City of Phila.*, 747 F. Supp. 2d 505, 520-21 (E.D. Pa. 2010) (construing Pennsylvania law and holding that, under the doctrine of intracorporate immunity, a corporation's employees, acting as agents of the corporation, are incapable of conspiring among themselves or with the corporation); *Rutherfoord v. Presbyterian-Univ. Hosp.*, 417 Pa. Super. 316, 333-34, 612 A.2d 500, 508 (1992) ("A single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves.").

"worked closely and coordinated" to prepare a false report. Compl. ¶¶ 54, 148.[34] The Complaint lacks *any* allegation regarding the manner in which they purportedly coordinated, how the NCAA was involved, which individuals with each entity worked together, or any other details such as any "meetings, conferences, telephone calls, joint filings, cooperation." *See Burnside v. Abbott Labs.*, 351 Pa. Super. 264, 280, 505 A.2d 973, 982 (1985). Having failed to demonstrate a combination, the claim must be dismissed. *See Slaybaugh v. Newman*, 330 Pa. Super. 216, 221, 479 A.2d 517, 519-20 (1984) (affirming demurrer on civil conspiracy claim where facts did not support inference that defendants "acted in concert with the common purpose of" committing the alleged underlying tort).

Second, Plaintiffs fail to allege that the NCAA and FSS combined for an unlawful purpose—specifically, to commit a tort. *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 789 (3d Cir. 1999) ("The established rule is that

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[34] Additionally, Plaintiffs allege an agreement between the NCAA and FSS to take various actions, Compl. ¶ 149, and that the NCAA "worked closely and coordinated with the Freeh firm to help it prepare a report that they knew or should have known included false conclusions that had not been reached by means of an adequate investigation," Compl. ¶ 151(b). The Complaint also avers the NCAA waited on the results of the report, Compl. ¶ 55, relied on the report, Compl. ¶ 58, treated the report, which was commissioned by the Penn State Board of Trustees, as a "self-report" of NCAA infractions, Compl. ¶ 79, and moved to impose sanctions based on the report soon after it was released, Compl. ¶ 84.

a cause of action for civil conspiracy requires a separate underlying tort as a predicate for liability."); *see also Grose v. Procter & Gamble Paper Prods.*, No. 2005 PA Super 8, ¶ 8, 866 A.2d 437, 441 (2005) (finding complaint insufficient to state civil conspiracy claim where it was "totally devoid of any averments specifying either an unlawful act or a lawful act carried out by unlawful means"). "Absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy" to commit that act. *Nix v. Temple Univ. of Com. Sys. of Higher Educ.*, 408 Pa. Super. 369, 380, 596 A.2d 1132, 1137 (1991) (quoting *Pelagatti v. Cohen*, 370 Pa. Super. 422, 432, 536 A.2d 1337, 1342 (1987)). Further, if Plaintiffs cannot recover for any alleged underlying torts, there can be no conspiracy as to them, and the claim must be dismissed. *McKeeman v. Corestates Bank, N.A.*, 2000 PA Super 117, ¶ 8, 751 A.2d 655, 658 (2000).

On its face, this claim alleges only that the NCAA and FSS conspired to breach the NCAA's contract with Penn State, which cannot itself suffice to state a civil conspiracy claim. *See Alpart v. Gen. Land Partners, Inc.*, 574 F. Supp. 2d 491, 506 n.18 (E.D. Pa. 2008) ("'[A] breach of contract, without more, is not a tort.'" (citation omitted)); *cf. Glazer v. Chandler*, 414 Pa. 304, 308, 200 A.2d 416, 418 (1964) ("Most courts have been cautious about permitting tort recovery for contractual breaches and we are in full accord with this policy."). Insofar as the other torts alleged in the Complaint are the basis of the conspiracy claim, Plaintiffs

must show that the *sole* and *express* purpose of the alleged combination between the NCAA and FSS was to commit those torts. *Bristol Twp. v. Independence Blue Cross*, No. 01-4323, 2001 U.S. Dist. LEXIS 16594, at *16 (E.D. Pa. Oct. 11, 2001) (citing *Thompson Coal Co.*, 488 Pa. at 211, 412 A.2d at 472); *Burnside v. Abbott Labs.*, 351 Pa. Super. at 278, 505 A.2d at 981 (discussing South Carolina law as "similar to the law in Pennsylvania"). Plaintiffs fail to allege that the sole purpose of the alleged combination was to commit these torts, rather than to conduct a legitimate and proper investigation as commissioned by *Penn State*.

Far from stating a claim for civil conspiracy, this claim—like the tortious interference claim—is nothing but "unsubstantiated suspicion" of a conspiracy theory, which does not satisfy Pennsylvania's pleading standards. *Feingold v. Hendrzak*, 15 A.3d 937, 942 (Pa. Super. Ct. 2011). Plaintiffs simply make the unreasonable leap in inference from "periodic[]" contacts between the NCAA and FSS to an unsubstantiated allegation of a conspiracy. *See* Compl. ¶ 54. This claim is nothing but a pure, speculative conspiracy theory that must be dismissed.

VII. DR. EMMERT AND DR. RAY SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION

To assert personal jurisdiction over a non-resident defendant like Dr. Emmert or Dr. Ray, "(1) the non-resident defendant must have sufficient minimum contacts with [Pennsylvania] and (2) the assertion of *in personam* jurisdiction must comport with fair play and substantial justice." *Fidelity Leasing, Inc. v. Limestone*

Cnty. Bd. of Educ., 2000 PA Super 244, ¶ 16, 758 A.2d 1207, 1211 (2000); 42 Pa. Cons. Stat. § 5322(b).

Jurisdiction may be based "either upon the specific acts of the defendant which gave rise to the cause of action or upon the defendant's general activity within the state." *Kubik v. Letteri*, 532 Pa. 10, 17, 614 A.2d 1110, 1114 (1992). In either case, however, "a defendant's contacts with the forum state must be such that the defendant could reasonably anticipate being called to defend itself in the forum." *Fidelity Leasing, Inc.*, 2000 PA Super 244, ¶ 13, 758 A.2d at 1210. Because Plaintiffs cannot meet their burden to show that this Court possesses personal jurisdiction over either defendant, *see Commonwealth v. KT&G Corp.*, 863 A.2d 1254 (Pa. Commw. Ct. 2004), Plaintiffs' claims against Dr. Emmert and Dr. Ray must be dismissed.

A. This Court Lacks General Jurisdiction Over Dr. Emmert And Dr. Ray

General jurisdiction "'exists regardless of whether the cause of action is related to the defendant's activities in this Commonwealth.'" *Derman v. Wilair Servs., Inc.*, 404 Pa. Super. 136, 141, 590 A.2d 317, 320 (1991) (citations omitted). General personal jurisdiction may be asserted over a non-resident defendant under Pennsylvania's long-arm statute only when that individual (i) is "[p]resen[t] in this Commonwealth at the time when process is served"; (ii) is "[d]omicile[d] in this Commonwealth at the time when process is served"; or (iii) "[c]onsent[s]" to

jurisdiction. 42 Pa. Cons. Stat. § 5301(a)(1)(i)-(iii). As discussed below, none of those prerequisites are met here. Additionally, Plaintiffs must plead "'material facts'" demonstrating "an out-of-state resident's contacts with Pennsylvania" are "'continuous and substantial.'" *Bork v. Mills*, 458 Pa. 228, 232, 329 A.2d 247, 249 (1974) (citation omitted); *see also Derman*, 404 Pa. Super. at 150, 590 A.2d at 324 (general jurisdiction requires "continuous and systematic" contacts). Plaintiffs likewise fail this test.

To begin with, Plaintiffs cannot assert general personal jurisdiction against Dr. Emmert or Dr. Ray under Pennsylvania's long-arm statute. Neither Dr. Emmert nor Dr. Ray was present or domiciled in the Commonwealth when process was served, *see* Prelim. Objs. ¶¶ 64, 67, and Plaintiffs do not contend otherwise, *see id.* ¶ 63. Neither Dr. Emmert nor Dr. Ray has consented to Pennsylvania's exercise of jurisdiction against them. General jurisdiction is therefore unavailable. *See* 42 Pa. Cons. Stat. § 5301(a)(1)(i)-(iii).

Plaintiffs also point to no material facts showing that the exercise of general jurisdiction is proper. Plaintiffs only assert, without explanation, that Defendants "carry on a continuous and systematic part of their general business in Pennsylvania." Compl. ¶ 17. In *Bork*, however, the Pennsylvania Supreme Court found such unsupported allegations to be insufficient to sustain the exercise of personal jurisdiction. *See* 458 Pa. at 230-232, 329 A.2d at 248-49 (complaint

asserting that defendant "prior to and subsequent to July 11, 1969, has acted ... within the Commonwealth of Pennsylvania in the business, *inter alia*, of hauling freight for hire" pleaded insufficient facts to establish that defendant's "business [was] 'so continuous and substantial as to make it reasonable' to exercise ... jurisdiction"). Plaintiffs' allegations here are equally unsubstantiated, and even *less* specific than the allegations that the Pennsylvania Supreme Court found inadequate in *Bork*. They fail to establish that general jurisdiction is proper.

Indeed, Plaintiffs fail to plead *any* facts suggesting that Dr. Emmert or Dr. Ray maintain continuous and systematic contacts with Pennsylvania. Dr. Emmert is a resident of Indiana and Dr. Ray is a resident of Oregon. Prelim. Objs. ¶¶ 65-66. Neither lives in Pennsylvania, works in Pennsylvania, owns property in Pennsylvania, or maintains a bank account in Pennsylvania. *Id.* ¶ 67. In fact, Plaintiffs offer no facts indicating that either Dr. Ray or Dr. Emmert has any type of continuous and systematic contacts with Pennsylvania. *Id.* ¶ 63. In such circumstances, general jurisdiction is unavailable. *See, e.g.*, *Lowe v. Tuff Jew Prods.*, No. 1112, 2006 Phila. Ct. Com. Pl. LEXIS 241, at *6 (Mar. 6, 2006) (general jurisdiction did not exist where defendants did "not do business, reside, have offices or own property in Pennsylvania").

B. This Court Lacks Specific Jurisdiction With Respect To Each Claim Brought Against Dr. Emmert And Dr. Ray

Specific jurisdiction is appropriate over a claim against a non-resident defendant only when "the defendant's contacts [with the forum state] are purposeful and voluntary and give rise to the cause of action." *Fidelity Leasing, Inc.*, 2000 PA Super 244, ¶ 17, 758 A.2d at 1211. "This determination is both claim-specific and defendant-specific," requiring individualized assessment of whether specific jurisdiction is available over each cause of action brought against Dr. Emmert and Dr. Ray. *Saudi v. Acomarit Maritimes Servs., S.A.*, 114 Fed. App'x 449, 453 (3d Cir. 2004) (citing, *inter alia*, *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)). Here, Plaintiffs fail to demonstrate that specific jurisdiction is proper over either Dr. Emmert or Dr. Ray in either their individual or corporate capacities for any of the claims asserted against them.[35]

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[35] Defendants do not understand Plaintiffs to claim that Dr. Emmert or Dr. Ray breached the NCAA's membership agreement with Penn State (Counts I and II), given that Dr. Emmert and Dr. Ray were not parties to that agreement and neither count raises any allegations against any Defendant other than the NCAA. *See supra* note 8. Even if Plaintiffs were understood to have brought such claims against Dr. Emmert and Dr. Ray, Pennsylvania law is clear that courts lack specific personal jurisdiction over a defendant in his/her individual capacity for an asserted breach of contract by an individual acting in their corporate capacity. *Luke v. Am. Home Prods. Corp.*, No. 1998-C-1977, 1998 Pa. Dist. & Cnty. Dec. LEXIS 201, at *11 (Ct. Com. Pl. Nov. 18, 1998); *Nat'l Precast Crypt Co. v. Dy-Core of Pa., Inc.*, 785 F. Supp. 1186, 1191 (W.D. Pa. 1992). Here, Plaintiffs' Complaint is directed at actions taken or allegedly taken by Dr. Emmert and Dr. Ray in their respective corporate capacities as President of the NCAA and Chairman of the Executive

1. This Court Lacks Specific Jurisdiction Over Plaintiffs' Claims Against Dr. Ray And Dr. Emmert In Their Individual Capacities.

"A defendant is generally not individually subject to personal jurisdiction under Pennsylvania's long-arm statute merely based on actions conducted in a corporate capacity." *Luke v. Am. Home Prods. Corp.*, No. 1998-C-1977, 1998 Pa. Dist. & Cnty. Dec. LEXIS 201, at *11-12 & n.2 (Ct. Com. Pl. Nov. 18, 1998). Jurisdiction over corporate officers in their personal capacities is appropriate only in exceptional circumstances, such as where the officer "personally engaged in egregious activity on behalf of the corporation." *Am. Int'l Airways, Inc. v. Am. Int'l Grp., Inc.*, No. 90-7135, 1991 U.S. Dist. LEXIS 6888, at *9-10 (E.D. Pa. May 21, 1991). Whether personal jurisdiction may be maintained over corporate officers in their personal capacities "based on acts performed in their corporate capacity" requires consideration of a "number of factors ... including the officer's role in the corporate structure, the nature and quality of the officer's forum contacts and the extent and nature of the officer's personal participation in the tortious conduct." *Id.*, at *10. Even then, however, "'when personal jurisdiction is based on an officer's corporate activities, only those actions taken *within the forum state* are to be considered in the jurisdictional

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Committee. *See, e.g.*, Compl. ¶¶ 1, 14, 15. Specific personal jurisdiction, therefore, does not exist against either Dr. Emmert or Dr. Ray for Plaintiffs' breach of contract claims.

analysis.'" *Hyndman v. Johnson*, No. 10-7131, 2011 U.S. Dist. LEXIS 14871, at *12 (E.D. Pa. Feb. 15, 2011) (emphasis added) (citation omitted); *Am. Int'l Airways, Inc.*, 1991 U.S. Dist. LEXIS 6888, at *9-10. "Otherwise, 'an individual's transaction of business solely as an officer or agent of a corporation does not create personal jurisdiction over that individual.'" *Hyndman*, 2011 U.S. Dist. LEXIS 14871, at *12. (quoting *Feld v. Tele-View, Inc.*, 422 F. Supp. 1100, 1104 (E.D. Pa. 1976)).[36]

Here, no personal jurisdiction can attach to Dr. Emmert or Dr. Ray in their personal capacities. Plaintiffs do not allege that Dr. Emmert or Dr. Ray ever set foot in Pennsylvania over the course of their allegedly tortious actions. In fact, Dr. Emmert and Dr. Ray announced and published the Consent Decree from a podium in Indianapolis, Indiana.[37] And Plaintiffs fail to allege that any of the other statements Plaintiffs ascribe to Dr. Emmert or Dr. Ray were made to Pennsylvania

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[36] Even if this Court were to conclude that Dr. Emmert's or Dr. Ray's actions *outside* the forum state could somehow be the basis for personal jurisdiction against them in their personal capacity for their corporate actions, personal jurisdiction would still be inappropriate for the reasons set out in Part VII.B.2, *infra*.

[37] *See* Jenna Johnson, *NCAA Sanctions on Penn State 'Unanimously' Backed by Boards of College Presidents*, Washington Post (July 23, 2012, 12:17 PM), http://www.washingtonpost.com/blogs/campus-overload/post/ncaa-sanctions-on-penn-state-unanimously-backed-by-boards-of-college-presidents/2012/07/23/gJQA0OsY4W_blog.html (photo caption identifying location of press conference).

media; to the contrary, the only source they actually identify as a location of Dr. Emmert's remarks is the Detroit Economic Club in Detroit, Michigan.[38] Dr. Ray's contacts with Pennsylvania and Penn State were particularly non-existent.[39] He did not even place phone calls or send email or letters to Penn State or anyone in Pennsylvania respecting the Consent Decree during the relevant time period. He had no power himself to impose or execute the Consent Decree; his role was limited only to being one of many members of the NCAA's Executive Committee to vote (outside Pennsylvania) to authorize the NCAA's execution of the Consent Decree. Indeed, the pleadings are limited to Dr. Emmert's and Dr. Ray's actions in their respective corporate capacities as President of the NCAA and former Chairman of the NCAA's Executive Committee. *See, e.g.*, Compl. ¶¶ 54-55, 58, 72, 74, 95.

Accordingly, this Court lacks personal jurisdiction over both Dr. Emmert and Dr. Ray in their individual capacities. *See, e.g.*, *Rychel v. Yates*, No. 09-1514, 2011 U.S. Dist. LEXIS 38824, at *51 (W.D. Pa. Apr. 11, 2011) (no jurisdiction over individuals for actions in corporate capacities where "neither Defendant ...

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38 *See* Compl. ¶ 55.

39 While this memorandum largely discusses Dr. Emmert and Dr. Ray together, this Court is, of course, required to assess on an individual basis whether personal jurisdiction against each individual defendant is appropriate. *See, e.g.*, *Saudi v. Acomarit Mars. Servs., S.A.*, 114 Fed. App'x 449, 453 (3d Cir. 2004).

had ever traveled to Pennsylvania"); *Am. Int'l Airways, Inc.*, 1991 U.S. Dist. LEXIS 6888, at *11 (no jurisdiction over defendant in individual capacity where defendant's "actions were taken solely in his capacity as an officer of a foreign corporation and were undertaken almost exclusively outside of the forum"); *Schiller-Pfeiffer, Inc. v. Country Home Prods., Inc.*, No. 04-CV-1444, 2004 U.S. Dist. Lexis 24180, at *19, *27 (E.D. Pa. Dec. 1, 2004) (holding that personal jurisdiction over two directors who played "major roles" in the corporation would be "problematic at best" when their only direct contact with the forum was their signature on an agreement sent to plaintiff's Pennsylvania office); *D&S Screen Fund II v. Ferrari*, 174 F. Supp. 2d 343, 348 (E.D. Pa. 2001) (finding there was no personal jurisdiction over corporate officer because, even though officers were charged as being the primary tortfeasors and had communications with the plaintiff in Pennsylvania, none of the tortious conduct occurred in Pennsylvania); *Capitol Ins. Co. v. Dvorak*, No. 10-CV-1195, 2010 U.S. Dist. LEXIS 115624, at *2, *11-12 (E.D. Pa. Oct. 29, 2010) (finding that corporate shield doctrine barred personal jurisdiction over corporate officers where there was no evidence as to how the claims arose from any business the officers transacted in Pennsylvania and plaintiffs "repeatedly conflate[d] the alleged actions of [the many defendants]" (e.g., "by using the ambiguous term 'Defendants'")).

2. This Court Lacks Specific Jurisdiction With Respect To Plaintiffs' Claims Against Dr. Ray And Dr. Emmert In Their Corporate Capacities.

Although Plaintiffs do not allege that Defendants set foot in Pennsylvania, they primarily appear to argue that jurisdiction is proper because Dr. Ray's and Dr. Emmert's out-of-state actions allegedly caused harm or injury inside the Commonwealth. *See* Compl. ¶ 17; 42 Pa. Cons. Stat. § 5322(a)(4).[40] "A court may exercise personal jurisdiction over a nonresident defendant who commits an intentional tort by certain acts outside the forum which have a particular type of effect upon the plaintiff within the forum," but only where the case satisfies the three-part test set out by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984). *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir. 1998). "[T]he *Calder* 'effects test' require[s] the plaintiff to show... : (1) the defendant committed an intentional tort; (2) the forum was the focal point of the harm suffered by the plaintiff as a result of the tort; (3) the forum was the focal point of the tortious activity in the sense that the tort was 'expressly aimed' at the forum." *Am. Bus. Fin. Servs., Inc. v. First Union Nat'l Bank*, No. 4955,

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[40] Plaintiffs also assert, without explanation, that Defendants "transacted business ... in Pennsylvania with respect to the causes of action asserted." Compl. ¶ 17. They fail, however, to allege any date or occasion related to this case on which Dr. Emmert or Dr. Ray entered Pennsylvania and conducted business there. And as explained, *supra* at Part VII.B.1., the actions about which Plaintiffs complain occurred outside Pennsylvania.

2002 Phila. Ct. Com. Pl. LEXIS 93, at *26 (Mar. 5, 2002). "[I]n order to make out the third prong of this test, the plaintiff must show that the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum." *IMO Indus.*, 155 F.3d at 266. Moreover, "the mere allegation that the plaintiff feels the effect of the defendant's tortious conduct in the forum because the plaintiff is located there is insufficient to satisfy *Calder*." *Id.* at 263. Because none of Plaintiffs' claims satisfy the *Calder* test, this Court lacks specific jurisdiction over Dr. Emmert and Dr. Ray.

Count III: Interference with Contractual Relations. Under Count III, Plaintiffs William Kenney and Jay Paterno—two former Penn State football coaches—allege that Defendants purposefully intended to interfere with their coaching and other business opportunities at "many prestigious college and professional football programs ... in order to harm Plaintiffs and interfere with their contractual relations." Compl. ¶ 123-24. Plaintiffs fail to plead any facts, however, indicating that Pennsylvania was the "focal point" of the harm suffered or tortious activity alleged.

Indeed, Plaintiffs' allegations make clear that Dr. Emmert or Dr. Ray could not have known that Plaintiffs would suffer the brunt of their asserted harm in Pennsylvania. To the contrary, the Complaint states "Defendants" interfered with Messrs. Kenney and Paterno's employment and business opportunities at "*many*

prestigious college and professional football programs ...." Compl. ¶ 123 (emphasis added). By describing Penn State as just one of "many" opportunities with which Defendants allegedly interfered, the Complaint highlights that Dr. Emmert and Dr. Ray cannot be understood to have directed their alleged tortious interference at contractual opportunities in Pennsylvania. Indeed, at the time Consent Decree and Freeh Report were published, Plaintiffs were no longer Penn State football coaches, having already lost their jobs months earlier when current Penn State football coach Bill O'Brien elected not to retain them on his staff.[41] Having recently been dismissed from coaching at Penn State, it would have been unreasonable to expect that the "many" prestigious college and professional opportunities with which Plaintiffs supposedly interfered necessarily would be centered in Pennsylvania.[42]

Plaintiffs also offer no facts to show that Dr. Ray or Dr. Emmert knew about Messrs. Kenney's or Paterno's potential business opportunities or that Dr. Emmert or Dr. Ray had *any* contacts with Pennsylvania regarding the coaches' contracts. Plaintiffs completely overlook the fact that Messrs. Kenney and Paterno were never mentioned in the Consent Decree or statements by Dr. Ray or Dr. Emmert

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41 *See supra*, note 35.

42 Indeed, only two of the 119 Division I Football Bowl Subdivision schools other than Penn State are located in Pennsylvania, and Plaintiff Kenney obtained his next job in Michigan.

about the Consent Decree. Dr. Emmert and Dr. Ray could not have reasonably foreseen being hauled into Pennsylvania court for interference with two assistant coaches' contracts they did not even know about. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Moran v. Metro. Dist. Council of Phila. & Vicinity*, 640 F. Supp. 430, 434 (E.D. Pa. 1986) (holding that, although Pennsylvania's "tort out/harm in long arm statute may comport with due process 'when the place of the harm was clearly and specifically foreseeable', the requirements of the due process clause are not satisfied" when harm is not foreseeable) (citation omitted); *Nationwide Contractor Audit Serv., Inc. v. Nat'l Compliance Mgmt. Serv., Inc.*, 622 F. Supp. 2d 276, 299 (W.D. Pa. 2008) (no specific personal jurisdiction for intentional interference claim over non-resident defendant because there was no evidence that the defendant knew that the plaintiff was a Pennsylvania resident when defendant made alleged tortious statements).

This Court therefore lacks personal jurisdiction over Dr. Emmert and Dr. Ray on Count III.

Counts IV and V: Injurious Falsehood / Commercial Disparagement, Defamation. Under Counts IV and V, Plaintiffs argue that they were harmed when Defendants published the Consent Decree and relied on statements in the Freeh Report in that publication. *See* Compl. ¶ 130, 132-35, 140, 144-45. As Plaintiffs' own allegations make clear, however, those statements were not

"expressly aimed" at causing harm in Pennsylvania. To the contrary, the Complaint itself acknowledges that the Consent Decree and Freeh Report were "widely disseminated" throughout the nation and "to the entire world." *Id.* ¶¶ 134, 143. In short, Plaintiffs complain of alleged harm to their *national* or *global* reputations—harms for which the focal point is necessarily not Pennsylvania.[43] Such geographically-diffuse alleged harm cannot be the basis for specific personal jurisdiction in Pennsylvania. *See, e.g.*, *D'Onofrio v. Il Mattino*, 430 F. Supp. 2d 431, 422-43 (E.D. Pa. 2006) (finding that "defendant cannot be said to have 'expressly aimed'" a defamatory statement at forum based merely on the fact that the defamatory statement is "published nationwide" (citation omitted)); *Westhead v. Fagel*, 416 Pa. Super. 561, 567-68, 611 A.2d 758, 761 (1992) (finding no personal jurisdiction over defendant for alleged defamatory statements he made in California about basketball coach, even though statements were published in Pennsylvania and statements injured the basketball coach's reputation in Pennsylvania). Accordingly, these claims against Dr. Emmert and Dr. Ray must be dismissed.

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[43] Indeed, as demonstrated by this lawsuit itself—uniting members of the Penn State Board of Trustees, along with former coaches, players, students, faculty members, and other Pennsylvania residents in opposition to the conclusions of the Freeh Report and Consent Decree—it is undoubtedly within Pennsylvania where the reputations of Coach Paterno and Penn State remained strongest in the aftermath of the Sandusky scandal.

Count VI: Civil Conspiracy. Finally, Count VI alleges a conspiracy among the NCAA and FSS to impose unwarranted sanctions on Penn State and deprive Plaintiffs of their rights. That allegation cannot establish specific personal jurisdiction over Dr. Emmert or Dr. Ray.

First, Plaintiffs' allegations are disguised contract claims that cannot serve as the basis for personal jurisdiction. Here, Plaintiffs allege that Defendants conspired to "breach[] the contract between the NCAA and Penn State," thereby "depriving Plaintiffs of their rights." Compl. ¶ 148. Where a claim is founded in breach of contract, however, "'individuals performing acts in a state in their corporate capacity are not subject to the personal jurisdiction of the courts of that state for those acts.'" *Nat'l Precast Crypt Co. v. Dy-Core of Pa., Inc.*, 785 F. Supp. 1186, 1191 (W.D. Pa. 1992) (citation omitted). Plaintiffs may not avoid that bar by recasting their breach of contract claim as one founded in conspiracy. To the contrary, as already explained, *supra* at Section VI.A, the gist-of-the-action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." *eToll, Inc.*, 2002 PA Super 347, ¶ 14, 811 A.2d at 14.

Second, Plaintiffs offer nothing but bare assertions of a conspiracy, which cannot form the basis of personal jurisdiction. *Commonwealth ex rel. Pappert v. TAP Pharm. Prods., Inc.*, 868 A.2d 624, 632 (Pa. Commw. Ct. 2005) ("Bare assertions of a conspiracy connection are insufficient to justify the exercise of

personal jurisdiction."). Plaintiffs simply allege that the NCAA and FSS agreed to bypass the NCAA's rules and deprive Plaintiffs of their rights. Such unsubstantiated allegations—including that the former Director of the FBI acted with malice to illicitly conspire to destroy the rights of every faculty member, coach, and student presently or formerly at Penn State—are preposterous on their face, but equally inadequate to serve as the basis for personal jurisdiction over Dr. Emmert and Dr. Ray.

Third, Plaintiffs point to no aspect of the supposed conspiracy that took place in Pennsylvania, such as would be necessary to maintain personal jurisdiction over Dr. Emmert or Dr. Ray. To the contrary, the Complaint fails to point to a single fact that any of the actions in furtherance of the alleged conspiracy occurred in Pennsylvania. That is fatal to their assertion of jurisdiction.[44] *See*,

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[44] In light of Dr. Emmert's and Dr. Ray's lack of ties to Pennsylvania, any assertion of jurisdiction over them also would offend traditional notions of fair play and substantial justice, and so would violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *see also, e.g.*, *Moran v. Metro. Dist. Council*, 640 F. Supp. 430, 435 (E.D. Pa. 1986) (no personal jurisdiction over individual defendants acting in their corporate capacity given their complete lack of contacts with Pennsylvania despite there being other factors that "clearly militate[d] strongly in favor of" jurisdiction, such as all activities occurred in Pennsylvania and bore on the lives of Pennsylvania citizens); *Kenny v. Alexson Equip. Co.*, 432 A.2d 974, 984 (Pa. 1981) ("The due process clause does not contemplate that a state may make binding a judgment in personam against an individual ...

e.g., *Santana Prods., Inc. v. Bobrick Washroom Equip.*, 14 F. Supp. 2d 710, 718 (M.D. Pa. 1998) ("Under Pennsylvania law, personal jurisdiction of a non-forum co-conspirator may be asserted only where a plaintiff demonstrates that substantial acts in furtherance of the conspiracy occurred in Pennsylvania and that the non-forum co-conspirator was aware or should have been aware of those acts."); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 855 F. Supp. 108, 111 (E.D. Pa. 1994) (even if jurisdiction existed against corporate defendants, it did not exist against corporate officer because plaintiffs failed to show "anything [officer] *himself did in Pennsylvania* that gave rise to [plaintiff's] cause of action and that would permit the exercise of personal jurisdiction over him" (emphasis added)).

For these reasons, this Court lacks personal jurisdiction over any claim asserted against Dr. Emmert and Dr. Ray, and they should be dismissed from the litigation.

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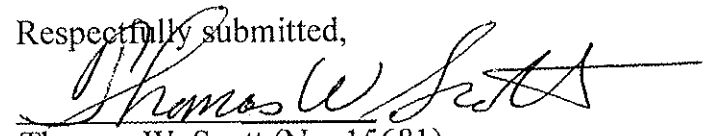
defendant with which the state has no contacts, ties or relations." (citations omitted)).

CONCLUSION

For the reasons stated above, Defendants' Preliminary Objections should be sustained and the case dismissed in its entirety with prejudice.

Respectfully submitted,



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