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

ESTATE of JOSEPH PATERNO;

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

and

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

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
("NCAA"),

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

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

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
Memorandum in Support of The NCAA Defendants' Preliminary Objections to Plaintiffs' Second Amended Complaint

Filed on Behalf of:
National Collegiate Athletic Association, Mark Emmert, Edward Ray

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and PENNSYLVANIA STATE UNIVERSITY, Nominal Defendant.	Civil Division Docket No. 2013-2082

MEMORANDUM IN SUPPORT OF THE NCAA DEFENDANTS' PRELIMINARY OBJECTIONS TO SECOND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

On September 11, 2014, this Court dismissed the Family and Estate of Joseph V. Paterno's ("Paterno Estate" or "Estate") breach of contract claim, expressly concluding that "[a]s Coach Joe Paterno was not an involved individual prior to his death, and he cannot, as a matter of law, be an 'involved individual' after his death, he had no rights as an 'involved individual' at any time, and as a result, his estate has no rights as an 'involved individual' now." Op. & Order 8 (Sept. 11, 2014). On that basis, the Court unequivocally ruled that "NCAA's Preliminary Objection based on Incapacity to Bring Count I and Demurrer to Count I is SUSTAINED with respect to the incapacity of the Estate of Joseph Paterno to bring suit." *Id.* at 34. Notwithstanding that definitive holding, and without any leave from this Court, Plaintiffs' Second Amended Complaint ("SAC") attempts to reassert the identical breach of contract claim that this Court already unambiguously has rejected. That effort should be rejected on both procedural and substantive grounds.

First, the Court's September 11, 2014 order provided Plaintiffs with the opportunity to file a Second Amended Complaint to cure a specific, narrow deficiency concerning the specificity of which claims were asserted against—and which relief was sought from—The Pennsylvania State University ("Penn State"). *See* SAC 35. The order did not authorize Plaintiffs to amend further their

complaint in any other respect. Nonetheless, without leave of court or the consent of the other parties, *see* Pa. R.C.P. 1033, Plaintiffs filed an amended complaint that re-asserts the Paterno Estate's dismissed contract claim and purports to add a number of allegations apparently intended to support this claim. That is procedurally improper. *See infra* at 5-7. And even if they had sought leave, there would have been no reason to give the Paterno Estate yet another bite at the apple: they have had two opportunities to present that contract claim to this Court over the last eighteen months. The Court already has carefully considered and dismissed that claim.

Second, the SAC provides no basis to disturb this Court's prior conclusion. Most of Plaintiffs' assertedly "new" allegations are not new at all—they simply rehash arguments Plaintiffs already asserted during the lengthy briefing and argument to this Court regarding the First Amended Complaint ("FAC"). And where Plaintiffs do attempt to change course, their new allegations flatly (and improperly) contradict their own prior binding admissions in previous complaints and other filings to this Court. In short, Plaintiffs cannot overcome this Court's conclusions that Coach Paterno was not an "involved individual" at the time of his death and that the personal procedural protections afforded "involved individuals" do not survive death in any event. Even leaving its procedural

impropriety aside, therefore, the Estate's restated breach of contract claim should again be dismissed on the merits.[1]

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Because the Court is now intimately familiar with the facts underlying this litigation, the National Collegiate Athletic Association ("NCAA") will not belabor them here. As relevant, on May 30, 2013, Plaintiffs filed their initial complaint, asserting various theories of contractual and tort liability against the NCAA, Dr. Mark Emmert, and Dr. Edward Ray (collectively "NCAA Defendants"). On January 7, 2014, this Court sustained in part and overruled in part the NCAA Defendants' preliminary injunctions. Order 24-25. Among other things, this Court sustained the NCAA Defendants' objections with respect to

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[1] In the NCAA, Mark Emmert ("Dr. Emmert"), and Edward Ray's ("Dr. Ray") preliminary objections to the original complaint, Defendants Dr. Emmert and Dr. Ray asserted their position that they should be dismissed from this action because the Court lacked personal jurisdiction over them. *See* Mem. in Supp. of Defs.' Prelim. Objs. 74-90 (July 23, 2013). On August 21, 2013, the Court entered an order stating that after deciding on all other preliminary objections, it "will set a separate schedule for the objections relating to personal jurisdiction as necessary." Scheduling Order 1 (Aug. 16, 2013). The Second Amended Complaint does not allege any new grounds for the Court to exercise personal jurisdiction over Dr. Emmert and Dr. Ray. Accordingly, Dr. Emmert and Dr. Ray do not here repeat at length their previously asserted objections on this issue. However, for the avoidance of any doubt, Dr. Emmert and Dr. Ray have objected to the Second Amended Complaint on the grounds that the Court lacks personal jurisdiction over them, *see* NCAA Prelim. Objs. to FAC ¶¶ 76-87 (Mar. 17, 2014), and incorporate by reference the arguments previously set forth in support of their position. *See* Mem. in Supp. of Prelim. Objs. 74-90 (July 23, 2013).

Plaintiffs' breach of contract claims for failure to join an indispensable party, Penn State.

Plaintiffs filed an amended complaint on February 5, 2014, this time naming Penn State as a "nominal" defendant. FAC 2. The NCAA Defendants and Penn State filed preliminary objections. On September 11, 2014, this Court sustained in part and overruled in part Defendants' various objections. In particular, this Court agreed with the NCAA Defendants that the Paterno Estate lacked the capacity to bring a breach of contract claim premised on the NCAA's purported breach of its membership agreement with Penn State. *See* Op. & Order 7-8 (Sept. 11, 2014). This Court also agreed with Penn State that Plaintiffs had pleaded their claims with insufficient specificity to make clear which claims were directed at Penn State, what actions (or inactions) Penn State is alleged to have committed to support each count, and what relief is being sought in connection with those counts. *See id.* at 15-16. This Court granted Plaintiffs limited leave to amend their complaint only to resolve the insufficient specificity with which they had pleaded their claims against Penn State. *See id.* at 16-18, 35 ¶ 10. In no other respect did this Court grant Plaintiffs leave to amend their complaint.

On October 13, 2014, Plaintiffs filed a Second Amended Complaint, purporting not only to resolve the insufficient specificity of their pleadings with respect to Penn State, but also to resuscitate other claims that this Court had

dismissed when evaluating the NCAA Defendants' preliminary objections to the First Amended Complaint.

QUESTIONS PRESENTED

1. Whether the Paterno Estate should be permitted to re-assert a twice-dismissed breach of contract claim, and to add additional allegations in support, without permission from the Court or the consent of the parties? (Suggested answer: no.)

2. Whether the SAC requires this Court to reverse its prior holding that Coach Paterno's death precludes his Estate from asserting any rights as an "involved individual?" (Suggested answer: no.)

ARGUMENT

I. PLAINTIFFS HAVE IMPROPERLY AMENDED THEIR COMPLAINT WITHOUT LEAVE OF COURT OR THE CONSENT OF THE DEFENDANTS

The Paterno Estate's attempt to reassert a breach of contract claim that this Court already has dismissed, and to add additional allegations intended to bolster that claim, is procedurally improper and should be stricken.[2] The Court's September 11, 2014 order provided Plaintiffs with limited leave to amend their

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[2] It is not the case that the Estate's contract claim and related allegations are simply vestiges of the prior complaint that Plaintiffs do not intend to pursue. Plaintiffs have explicitly communicated to the NCAA that they have re-asserted the contract claim on behalf of the Estate and intend to continue pursuing it, including in discovery, where they are seeking information relevant, if at all, only to this claim.

claim to address a particular deficiency—not to make a second attempt to persuade this Court to change its mind about claims it already had dismissed. This Court issued a 31-paragraph order, expressly setting out which preliminary objections were sustained and overruled, and granting Plaintiffs leave to file a second amended complaint only in one limited respect. *See generally* Op. & Order 34-39 (Sept. 11, 2014). Per paragraph 10, this Court sustained "Penn State's Preliminary Objection based on Insufficient Specificity With Respect To Counts, Plaintiffs, Relief Sought for All Counts and Plaintiffs," and provided Plaintiffs with "30 days from the date of this Opinion and Order to file a Second Amended Complaint *to cure this deficiency*." *Id.* at 35 (emphasis added). This Court did not authorize the Plaintiffs to amend further their complaint in any other respect. Plaintiffs' decision to do so nonetheless without leave of this Court or consent of any other party is improper.

Under Pennsylvania Rule of Civil Procedure 1033, a party may amend a pleading "either by filed consent of the adverse party or by leave of court." Here, Plaintiffs obtained neither the NCAA's consent, nor leave of the Court to file an amended complaint attempting to reassert a claim as to which this Court already had sustained the NCAA's preliminary objection. *See Acumix, Inc. v. Bulk Conveyor Specialists, Inc.*, No. 2003 CV 424, 2007 Pa. Dist. & Cnty. Dec. LEXIS 62 (C.P. Ct. Mar. 23, 2007) (rejecting amended pleading because "Pa.R.C.P. 1033

clearly states that a party can only file an amended pleading with the consent of the other party or by leave of Court [and t]he Defendant has obtained neither"); *Appenzeller v. Phila. Protestant Home*, No. 3592, 2007 Phila. Ct. Com. Pl. LEXIS 263, at *5-6 (C.P. Ct. Mar. 12, 2007), *aff'd*, 945 A.2d 753 (Pa. Super. Ct. 2007). When, as here, a court grants only limited leave to amend, parties cannot ignore the court's limitations. *See, e.g.*, *McLane v. STORExpress, Inc.*, No. GD08-17605, 2009 Pa. Dist. & Cnty. Dec. LEXIS 228, at *11-12 (C.P. Ct. Sept. 2, 2009) (dismissing complaint because Plaintiff's amended complaint exceeded scope permitted by the court's order and "Plaintiff never asked this Court for leave to amend her complaint" further); *Duke v. Hershey Med. Ctr.*, No. 95 CV 2000, 2006 Pa. Dist. & Cnty. Dec. LEXIS 148, at *9-10 (C.P. Ct. Sept. 7, 2006) (striking portions of amended complaint as containing impertinent matter to the extent they included allegations of misconduct on the part of a defendant who was previously dismissed from the case). Because Plaintiffs here are seeking to amend their complaint in a manner not permitted by this Court, Plaintiffs' attempt to revive the Estate's breach of contract claim violates Pennsylvania Rule of Civil Procedure 1033 and should be stricken.

II. NONE OF THE AMENDED PORTIONS OF THE COMPLAINT CAN RESCUE THE ESTATE'S DEFECTIVE CONTRACT CLAIM

In any event, the Paterno Estate's attempt to revive its dismissed breach of contract claim fails on the merits. It invites this Court to overlook the Estate's

own prior admissions to this Court and to reach a different result on identical facts. This Court already has considered and decided that the Paterno Estate's claim cannot go forward. Even leaving aside its procedural impropriety, therefore, it should be dismissed again on substantive grounds, and the related allegations should be stricken from the SAC.

As the Court knows, the issue of whether Coach Paterno's death in January 2012 precludes him from qualifying as an "involved individual" under the NCAA Bylaws has been addressed at significant length in this case.[3] The NCAA first raised this argument in July 2013, in its preliminary objections to the original complaint, and the issue was briefed by both parties. The Court's January 2014 order dismissed the contract claims due to Plaintiffs' failure to join an indispensable party—and therefore did not reach the issue. Plaintiffs filed an amended complaint in February 2014, and the parties again briefed—at length—the legal impact of Coach Paterno's death on the Estate's contract claim. And the issue was discussed extensively during oral argument on May 19, 2014.

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[3] The NCAA believes that Coach Paterno could not be considered an "involved individual" even if the dispositive impact of his death was disregarded, and has set forth its position fully in its prior briefs. The Court concluded that these other arguments present factual questions, and so the NCAA continues to focus on the impact of Coach Paterno's death, which presents a pure question of law that the Court can and has resolved on preliminary objections.

With the benefit of this extensive briefing and argument dating back to July 2013, the Court dismissed the Paterno Estate's contract claim in its September 11, 2014 order. The Court's reasoning was compelling and made clear that Coach Paterno "had no rights as an 'involved individual' at any time, and as a result, his estate has no rights as an 'involved individual' now." Op. & Order 8 (Sept. 11, 2014). Nothing in the SAC provides any basis for this Court to reverse its prior holding.

A. The SAC's Suggestion that Coach Paterno was an "Involved Individual" Prior to His Death Should be Rejected.

Most of the purportedly new allegations in the SAC merely restate points that Plaintiffs already made during briefing on the NCAA's preliminary objections to Plaintiffs' first amended complaint. What few "new" allegations Plaintiffs assert in support of the Estate's contract claim attempt a one hundred-eighty degree turn from Plaintiffs' prior pleadings and contend that the NCAA, in fact, *did* begin an investigation in November 2011, when President Mark Emmert ("Dr. Emmert") sent a letter to President Rodney Erickson inquiring about the Sandusky scandal. *See, e.g.*, SAC ¶ 58-59. Having already themselves admitted *and complained* that the NCAA *did not* begin an investigation prior to Coach Paterno's death, Plaintiffs' current allegations are improper. In any event, they conflict with other allegations made and documents referenced in their own pleadings.

Plaintiffs repeatedly have alleged that a party becomes an involved individual after an initial investigation leads the NCAA to conclude that "there is sufficient information to support a *finding* of a rules violation." SAC ¶ 35(emphasis added); FAC ¶ 37. For months, Plaintiffs have charged that the NCAA failed to commence such an investigation in November 2011, and attacked the NCAA for instead awaiting the results of the Freeh investigation before determining whether sanctions were appropriate. *See, e.g.*, Mem. in Opp. to Defs.' Prelim. Objs. to FAC 38 (Apr. 16, 2014) ("Paterno passed away *before the NCAA defendants concluded that his conduct provided a basis for imposing sanctions*" (emphasis added)); Mem. in Opp. to Defs.' Prelim. Objs. 36 (Sept. 6, 2013) ("Moreover, had the NCAA initiated a proper investigation in November 2011, instead of improperly working with the Freeh firm, Paterno could have been available for the enforcement staff to interview (he passed away in January 2012)."); Mem. in Opp. to Defs.' Prelim. Objs. to FAC 41 (Apr. 16, 2014) ("We do not know what Paterno would have done [if contacted by the NCAA] because the NCAA defendants never initiated a proper investigation [before Paterno's death].").

The Court's January 7, 2014 opinion summarized the "pertinent facts alleged in the Complaint" as making this very contention:

> "On November 17, 2011, the NCAA notified Penn State that it was concerned about criminal charges filed against

> Jerry Sandusky for allegedly sexually abusing young boys at Penn State and through his connections to Penn State's football program. The NCAA indicated that Penn State should prepare for a *possible NCAA inquiry* and involvement .... *Instead of commencing its own investigation*, as mandated by its own rules and procedures, the NCAA collaborated with the Freeh firm and *waited for the results of the firm's investigation*."

Op. & Order 3 (Jan. 6, 2014) (emphases added) (citations omitted). During oral argument in May 2014, counsel for the Estate specifically raised President Emmert's November 2011 letter and described it as communicating that the NCAA was "*waiting to see* what was happening" and that the NCAA "*may well have questions*." Prelim. Objs. Tr. 76:14-77:5 (May 19, 2014) (emphases added). Counsel described the letter as reflecting a "choice" by the NCAA "to sit back and *not act*" at that time. *Id.*

The Court recognized that Plaintiffs' allegations established that Coach Paterno died before he could have ever become an "involved individual." Op. & Order 8 (Sept. 11, 2014). In an attempt to disavow their own prior pleadings, Plaintiffs now allege that by sending this letter in November 2011, the NCAA "had decided to investigate" and "accused certain Penn State personnel (including Plaintiffs) of being significantly involved in alleged violations of the NCAA's rules." SAC ¶¶ 56, 58; *see also id.* ¶ 64 (alleging that by the time Coach Paterno died, the NCAA had already "initiat[ed] its investigation"). That is precisely the opposite of what Plaintiffs previously had argued.

Plaintiffs cannot ask this Court to ignore their past assertions that the NCAA failed to commence and complete an investigation prior to Coach Paterno's death. "Admissions ... contained in pleadings, stipulations, and the like, are usually termed 'judicial admissions' and as such cannot later be contradicted by the party who has made them." *Rizzo v. Haines*, 520 Pa. 484, 506, 555 A.2d 58, 69 (1989); *see also Wills v. Kane*, 2 Grant 60, 63 (Pa. 1853) ("When a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice."). "Admissions in pleadings are binding on the party that makes them." *Osprey Portfolio, LLC v. Mar-Ron Caterers, Inc.*, No. 1388, 2013 Phila. Ct. Com. Pl. LEXIS 403, at *4-5 n.10 (Pa. C.P. Ct. Nov. 13, 2013) (citing *John B. Conomos, Inc. v. Sun Co., Inc. (R&M)*, 2003 PA Super 310, 831 A.2d 696, 712 (2003)). "A verified complaint is a party admission. An amendment does not abolish such admissions." *Osprey*, 2013 Phila. Ct. Com. Pl. LEXIS 403, at *4-5 n.10.

In any event, Plaintiffs' new allegations are in conflict with other legacy allegations that remain in the SAC and continue to affirm the Estate's consistent prior position that the NCAA failed to investigate or reach conclusions about Penn State before Coach Paterno's death. For example, paragraph 57 continues to describe the November 17, 2011 letter as asserting that the NCAA "*might take*

action against Penn State," SAC ¶ 57 (emphasis added), paragraph 60 describes the letter as asserting that the NCAA's Constitution contains principles regarding institutional control and ethical conduct that "*may* justify the NCAA's involvement," *id.* ¶ 60 (emphasis added), and paragraph 62 still alleges that rather than demand answers from Penn State, the "NCAA *waited for the Freeh firm to complete its investigation.*" *Id.* ¶ 62 (emphasis added). And certain new allegations are flatly contradicted by the older ones. For example, while the SAC contains a new allegation that the November 17, 2011 letter "accused certain Penn State personnel ... of being significantly involved in alleged violations of the NCAA's rules," *id.* ¶ 56, a legacy allegation still in the SAC contends that the letter did *not* "identify any NCAA rule" that had been "allegedly violated." *Id.* ¶ 60. Of course, both cannot be true.

The Court should not permit this sort of gamesmanship. But in the end, it does not matter: Plaintiffs' new approach is flatly contradicted by documents attached to Plaintiffs' pleadings. *See In re Found. for Anglican Christian Tradition*, No. 2164 C.D. 2013, 2014 Pa. Commw. LEXIS 525 (Nov. 5, 2014) ("[W]hen there is a contradiction between a pleading's averments and exhibits, the latter control, and the contradicted averments are not admitted for purposes of resolving preliminary objections.") (citing *Baravordeh v. Borough Council*, 699 A.2d 789, 791 (Pa. Commw. Ct. 1997)). The November 2011 letter—which

Plaintiffs attach to the SAC—is quite clear that, at that time, the NCAA was still considering whether to become involved in the Penn State/Sandusky matter at all. *See* Letter from M. Emmert to R. Erickson (Nov. 17, 2011), attached as Ex. B to SAC (advising Penn State "to prepare for *potential* inquiry" and referring to "any future action we *may* take" (emphases added)). Nor can there be any dispute that the NCAA ultimately waited for the conclusion of the Freeh investigation before taking any action with respect to Penn State—*seven months* after Coach Paterno died. There is a reason Plaintiffs themselves used to allege just that (and sometimes still do, *see, e.g.*, SAC ¶ 62). The Court was plainly correct to conclude that "Coach Paterno was not an involved individual prior to his death," and, of course, "he cannot, as a matter of law, be an 'involved individual' after his death." Op & Order 8 (Sept. 11, 2014). The Estate's attempt to re-wire its contract claim to circumvent that holding fails.

B. The SAC Does Not Refute that An Involved Individual's Procedural Rights are Distinctly Personal and Do Not Survive Death.

The SAC makes no meaningful attempt to address the other fundamental reason why the Estate's breach of contract claim is unviable in light of Coach Paterno's death. Even if Coach Paterno had been an "involved individual" while he was still alive (which this Court already rejected but is the apparent suggestion of the "new" allegations), the procedural protections afforded "involved

individuals" are distinctly personal and do not survive his death under Pennsylvania law. *See, e.g.*, *In re Pierce's Estate*, 123 Pa. Super. 171, 178, 187 A. 58, 61 (1936) ("[T]he contract of a decedent can survive only when it ... is not personal to himself ...."); *Blakely v. Sousa*, 197 Pa. 305, 329, 47 A. 286, 286 (1900) ("The effect of the death of a party to a contract whose distinctly personal services, involving peculiar skill and experience, are at the foundation of it, in the absence of any provision that the survivor must accept performance by the personal representative of the deceased, is not in doubt."); *In re Billings's Appeal*, 106 Pa. 558, 560 (1884) ("[W]here distinctly personal considerations are at the foundation of the contract, the relation of the parties is dissolved by ... death ...."); *Bland's Adm'r v. Umstead*, 23 Pa. 316, 317 (1854) ("[A]ll contracts must be construed with reference to their subject-matter, and a contract defining an existing relation can have no operation when that relation ceases, for its foundation is gone.").

By its terms, the procedural rights afforded to "involved individuals" are intended to afford individuals who are alleged to have been significantly involved in violations of NCAA rules with notice and an opportunity to "present their explanation of the alleged violations" and to answer questions "in order to determine the facts of the case." NCAA Academic and Membership Affairs Staff, *2011-12 NCAA Division I Manual* arts. 32.8.7.3, 32.8.7.6 (2011), attached as Ex. A

to SAC (emphasis added). Those rights cannot be sensibly exercised by an involved individual's estate. The Estate cannot testify at an NCAA hearing regarding what Coach Paterno saw or did (or failed to do), any more than his Estate could give similar testimony in the pending criminal trials against Graham Spanier, Tim Curley, or Gary Schultz. *Cf. Blakely*, 197 Pa. at 329, 47 A. at 286 (Where "the contract of a decedent [is] personal, and the performance of the deceased himself be the essence thereof ... [s]uch a contract could not devolve on the representatives of the deceased ...."); *White's Ex'rs v. Commonwealth*, 39 Pa. 167, 175-76 (1861) ("[I]f the contract of a decedent be personal ... 'we cannot suppose that the deceased was contracting for any kind of skill in his administrators.'" (citation omitted)).

On this point, Plaintiffs have only added to the SAC the "new" allegation that "[w]hen an individual is not personally available to participate in the process, involved individuals have been allowed to participate through counsel or an appropriate representative." *See* SAC ¶ 36. That is not a new argument. Plaintiffs already made exactly the same argument in their opposition to the NCAA's preliminary objections to the amended complaint. *See* Mem. in Opp. to Defs.' Prelim. Objs. to FAC 39-40 (Apr. 16, 2014). It evidently did not persuade the Court then, and it makes no difference now that it appears as an allegation in the complaint. As the NCAA demonstrated previously, "[t]he fact that living involved

individuals sometimes *choose* to decline rights that they could exercise does not suggest that the NCAA intended to provide deceased individuals" or their Estates, for that matter, rights the individuals "*cannot* exercise." *See* NCAA Reply Br. in Support of Prelim. Objs. to Am. Compl. 34 (May 6, 2014) (emphases in original).

Thus, without any rights as an "involved individual," the Estate's breach of contract claim should be dismissed from Count I of the SAC, and Plaintiffs' related allegations in support of that claim should be struck as impertinent.[4]

CONCLUSION

For the foregoing reasons, the Court should dismiss the Estate's re-asserted breach of contract claim and strike the newly added or revised allegations in paragraphs 36, 56-62, 64, 66, 85, 90, 93-94, 96, 98, 111, 115, 119-121, 124(a), 124(b), 124(e), 129, 131(n), 131(o), and 134 intended to support that claim.

Respectfully submitted,

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[4] To the extent that the Estate seeks relief that the Consent Decree be declared void *ab initio*, that is likewise foreclosed by this Court's previous order. The Estate's request that the Consent Decree be declared void *ab initio* is included in the SAC as relief sought only in relation to the breach of contract claim in Count I; it does not seek that relief in relation to its commercial disparagement claim. If the Estate lacks the capacity to bring a claim under Count I, as this Court has held, it cannot possibly be entitled to a declaration that the Consent Decree is void.

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