IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

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

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

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

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

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

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Civil Division

Docket No. 2013-2082

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

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PRELIMINARY STATEMENT

In this action, the Family and Estate of Joseph V. Paterno (the "Estate" or the "Paterno Estate") and a small group of other dissidents (collectively, "Plaintiffs") seek to veto the decision of The Pennsylvania State University ("Penn State" or the "University") to resolve its institutional role in the Jerry Sandusky disaster by freely entering into a Consent Decree and Athletic Integrity Agreement ("AIA") with the NCAA. Plaintiffs seek to achieve this result both directly, by requesting that the Consent Decree be declared void *ab initio*, and indirectly, on the basis of meritless claims predicated on alleged ancillary and derivative harms they have suffered. This Court's January 7, 2014 Order properly recognized that this action amounts to an assault on Penn State's interests. *See* Opinion & Order 10-11 ("Order" or "January 7 Order"). The Court held that such an action could not proceed in Penn State's absence and dismissed a substantial portion of Plaintiffs' case (including their request to declare the Consent Decree void *ab initio*) on that basis. Plaintiffs have attempted to resuscitate their case by adding Penn State as a "nominal" defendant, but there is nothing "nominal" about Penn State's role or interests in this case, and this action nonetheless remains fundamentally flawed.[1]

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[1] In the NCAA Defendants' preliminary objections to the original complaint, Defendants Mark Emmert ("Dr. Emmert") and Edward Ray ("Dr. Ray") asserted their position that they should be dismissed from this action because the Court lacked personal jurisdiction over them. *See* Memorandum in Support of Defendants' Preliminary Objections (Jul. 23, 2013) ("Mem. in Supp. of Prelim. Objs.") 74-90.

First, even with the addition of Penn State as a defendant, Plaintiffs are not entitled—as a matter of law—to void the Consent Decree or otherwise permanently enjoin its signatories from enforcing it. Plaintiffs allege that by entering into the Consent Decree, the National Collegiate Athletic Association (the "NCAA"), Dr. Emmert, and Dr. Ray (collectively, the "NCAA Defendants") breached contractual obligations owed to Coach Joseph Paterno ("Coach Paterno") and Trustee Al Clemens ("Trustee Clemens") under the NCAA Constitution and Bylaws. But even if that were true (and it is not), Pennsylvania law does not support the position that a contract between two private parties is void simply because one of them may have breached obligations to a complete stranger under another, independent contract. A contract is void *ab initio* only under extremely limited circumstances—such as illegality, fraud, and mutual mistake—that are plainly not present here. And in any event, Plaintiffs lack standing to assert such challenges to the validity of the Consent Decree: they are not signatories to this separate contract or even third-party

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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 (Aug. 21, 2013) 1. The 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 Amended Complaint on the grounds that the Court lacks personal jurisdiction over them, *see* Preliminary Objections to Am. Compl., ¶¶ 75-84, and incorporate by reference the arguments previously set forth in support of their position. *See* Mem. in Supp. of Prelim. Objs. 74-90.

beneficiaries thereunder. Therefore, they cannot void the Consent Decree to which they are strangers.

Second, the breach of contract claims asserted by the Estate and Trustee Clemens must be dismissed for several reasons. The claims depend on the faulty predicate that Plaintiffs are third-party beneficiaries to the NCAA Constitution and Bylaws (which they are not). They also invoke alleged rights (available for so-called "involved individuals") that are inapplicable here—both because the Consent Decree was not the product of the NCAA's enforcement process (but rather provided Penn State with the ability to avoid that process and the harsh penalties that could result), and because the plain and unambiguous definition of "involved individual" does not cover Coach Paterno or Trustee Clemens. The Court's January 7 Order did not squarely address this question because it lacked jurisdiction over the contract claims in Penn State's absence, but noted in dicta that there may be some ambiguity concerning the "meaning and application of the phrase 'involved individuals'" that presents "fact questions." Order 9.

Nonetheless, there are bases for dismissing the breach of contract claims that do not require the resolution of any such ambiguities, and that the court did not previously address. In particular, the Estate cannot assert any "involved individual" rights here because Coach Paterno died months before even Plaintiffs suggest he would have become an "involved individual." As a matter of law, the sort of

personal procedural mechanisms allegedly afforded "involved individuals" under the NCAA Constitution and Bylaws (even if they were otherwise applicable) do not survive death and certainly do not accrue to the estate of a deceased person. As to Trustee Clemens, he erroneously asserts "involved individual" status solely on the grounds that he is a member of a governing body—the Board of Trustees—referenced in the Consent Decree. But whatever ambiguities may exist, no reasonable construction of the term "involved individual" encompasses entities that are not actual persons. Certainly, such rights could be invoked by an individual member that constitutes a mere 1/32 of an overall body.

Third, the tortious interference claim that has been re-pled by Coaches William Kenney and Jay Paterno (the "Former Coaches") still fails to state a claim under Pennsylvania law. This claim is completely derivative of these Plaintiffs' defamation claim, and it simply attempts to fashion a tortious interference claim out of the effect of the defamation they allege. This is insufficient to state a claim, and therefore dismissal of the tortious interference claim is appropriate. In addition, the Former Coaches still do not provide sufficient "factual allegations supporting their claims of lost opportunities or contracts." *See* Order 22. They now provide a laundry list of universities, professional teams, and media companies that they claim presented viable "opportunities" that did not materialize. *See* First Amended Complaint ("Am. Compl." or "Amended Complaint") ¶¶ 131-42. But they provide

no plausible factual allegation that it was the Consent Decree itself that interfered with these alleged opportunities—as opposed to the host of independent events, such as the grand jury presentment in the Sandusky matter, the firing of Coach Paterno and removal of his statue, the release of the Freeh Report by Penn State (containing the exact statements of which they claim), and the hurricane of negative publicity that accompanied these events, all of which had nothing to do with the Consent Decree. In this context, it is simply implausible to suggest that the Consent Decree was the "but for" cause of these lost opportunities—and Plaintiffs provide no factual allegation to the contrary.

Fourth, in light of the January 7 Order and the Amended Complaint, at most only the Estate, Trustee Clemens, and the Former Coaches can assert a civil conspiracy claim. Any other Plaintiffs purporting to assert a civil conspiracy claim must be dismissed as a matter of law because they indisputably do not assert any underlying tort (or even contract) claim in this action. As to the remaining Plaintiffs, to the extent they do not assert this claim against Penn State, their civil conspiracy claim should be dismissed for failure to join an indispensable party, because Plaintiffs seek voidance of the Consent Decree as relief for that claim.

Fifth, Plaintiffs' reasserted defamation claim (now on behalf of only Trustee Clemens and the Former Coaches) and commercial disparagement claim should similarly be dismissed. The January 7 Order properly held that "a group consisting

of 25 or more members is too large to support a defamation claim." Order 15. Here, it is indisputable—and a matter of public record—that the number of individuals who sat on the Penn State Board of Trustees from 1998 to 2001 exceeds twenty-five, as does the number of "coaches, administrators and football staff" that supported the Penn State football team "over a decade" in which Sandusky was harming children. As such, the January 7 Order itself compels the dismissal of the defamation claim. As to both the defamation and commercial disparagement claims, the statements at issue are opinions based on disclosed facts, which are not actionable.

Sixth, as a procedural matter, Plaintiffs have failed to verify the Amended Complaint as required by Pennsylvania Rule of Civil Procedure 1024(a). That alone is grounds for dismissing the Amended Complaint.

These various infirmities compel dismissal of the Amended Complaint in its entirety. Ultimately, Plaintiffs lack any legal authority to substitute their own judgment for the University's in this manner. Penn State knowingly and willingly chose to enter into the Consent Decree, presumably because it believed that was in the best interests of the University and wanted to avoid a protracted NCAA investigation and possible harsher penalties, among other things. The University has never wavered in is commitments under the Consent Decree and AIA, which have provided the University with an opportunity to move forward positively, past a dark chapter in the University's otherwise storied history. The wisdom of the

University's decision to move forward in this manner is self-evident. And its commitment to the Consent Decree contradicts Plaintiffs' cynical suggestion that they proceed here "in the best interests of the entire University community." *See, e.g.*, Am. Compl. ¶ 10. Plaintiffs' meritless lawsuit should be dismissed in its entirety.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The NCAA Defendants have previously recited the facts of this action and will not fully repeat them herein. *See* Mem. in Supp. Prelim. Objs. 4-13. As the Court knows, this case concerns the actions that Penn State and the NCAA took following revelations of child sexual abuse by longtime Penn State Assistant Football Coach Jerry Sandusky. Shortly after Sandusky was convicted and sentenced to 30 to 60 years in prison, the Penn State Board of Trustees removed President Graham Spanier and Coach Paterno and hired the law firm Freeh Sporkin & Sullivan ("FSS") to conduct an extensive investigation into the alleged failure of certain Penn State personnel to respond to and report Sandusky's criminal acts. Am. Compl. ¶¶ 52-54. The investigation resulted in a 144-page report (the "Freeh Report") that 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.* ¶ 61. In light of FSS' exhaustive investigation and report, Penn State and the NCAA agreed to a Consent Decree imposing sanctions on Penn State, rather than a prolonged NCAA investigation that could result in dire consequences for Penn State. Consent Decree between Penn State and the NCAA at 1 (July 23, 2012) ("Consent Decree"), Ex. B to Am. Compl. The Consent Decree quoted various factual findings in the Freeh Report. *Id.* at 3.

Plaintiffs initiated this lawsuit on May 30, 2013, criticizing the findings of the

Freeh Report, Penn State's acceptance of those findings, and the Consent Decree between Penn State and the NCAA. Plaintiffs asserted claims for breach of contract, intentional interference with contractual relations, commercial disparagement, defamation, and civil conspiracy. Plaintiffs requested relief in the form of, *inter alia*, a declaratory judgment that the NCAA Defendants' actions were unlawful and the Consent Decree was void *ab initio*, a permanent injunction preventing the NCAA from further enforcing the Consent Decree, and compensatory and punitive damages.

The NCAA Defendants promptly filed Preliminary Objections under Pennsylvania Rule of Civil Procedure 1028. On January 7, 2014, the Court issued an Order, sustaining in part and overruling in part the Preliminary Objections. Order 24-25. The Court sustained the NCAA Defendants' Preliminary Objections with respect to the breach of contract claims due to Plaintiffs' failure to join Penn State, an indispensable party, and struck Plaintiffs' request to void the Consent Decree. *Id.* at 12-13. The Court did not decide whether Plaintiffs had standing to assert their contract claims. *Id.* at 13. The Court next sustained the NCAA Defendants' demurrer to the defamation claim, except for the claim asserted by Trustee Clemens and the Former Coaches. *Id.* at 25. The Court also sustained the demurrer to the intentional interference with prospective contractual relations claim, without prejudice, because Plaintiffs failed to plead facts supporting an inference that actual

contracts were probably forthcoming. *Id.* at 22. Finally, the Court overruled demurrers to the commercial disparagement and civil conspiracy claims. *Id.* at 25.

Plaintiffs filed a First Amended Complaint on February 5, 2014, naming Penn State as a "nominal" defendant. Am. Compl. at 2. The Amended Complaint asserts claims for breach of contract (Count I, brought by the Estate and Trustee Clemens), intentional interference with contractual relations (Count II, brought by the Former Coaches), commercial disparagement (Count III, brought by the Estate), defamation (Count IV, brought by the Former Coaches and Trustee Clemens), and civil conspiracy (Count V, brought by all Plaintiffs). *Id.* ¶¶ 116-67. Plaintiffs again seek relief in the form of, *inter alia*, a declaratory judgment that the NCAA Defendants' actions were unlawful and the Consent Decree was void *ab initio*; a permanent injunction preventing the NCAA from further enforcing the Consent Decree; and compensatory and punitive damages, as well as a declaratory judgment that Coach Paterno was an "involved individual" and that Penn State did not have the authority to waive any rights Coach Paterno may have had. The NCAA Defendants hereby summit this memorandum in support of their preliminary objections to the Amended Complaint.

QUESTIONS PRESENTED

1. Whether Plaintiffs should be permitted to seek a declaration that the Consent Decree is void *ab initio* where:

   a. Plaintiffs are neither parties nor third-party beneficiaries to the Consent Decree; and

   b. The Amended Complaint does not plead any facts that permit a finding that the Consent Decree is void *ab initio*? (Suggested answer: no.)

2. Whether dismissal of Plaintiffs' breach of contract claim is required where:

   a. Plaintiffs are not third-party beneficiaries of Penn State's membership agreement with the NCAA, nor qualify as "involved individuals" under the NCAA Constitution and Bylaws;

   b. Coach Paterno's death precludes him from asserting any rights as an "involved individual," even assuming they otherwise applied (they did not); and

   c. Whatever ambiguities may exist, the term "involved individual" cannot possibly be construed to cover an entity like a "Board of Trustees" as opposed to an actual person? (Suggested answer: yes.)

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

   a. Plaintiffs' claim is entirely derivative of their defamation claim;

b. Plaintiffs fail to sufficiently plead the existence of any specific contract that *but for* the NCAA Defendants' conduct had a reasonable probability of coming to fruition;

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

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

4. Whether Plaintiffs' claim for civil conspiracy should be dismissed for failure to plead an underlying cause of action and failure to join an indispensable party? (Suggested answer: yes.)

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

a. Plaintiffs cannot reasonably be identified as the target of the allegedly defamatory statements;

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

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

6. Whether commercial disparagement claim brought by the Estate should be dismissed for failure to state a claim where:

a. The allegedly disparaging statements were statements of opinion;

b. The cause of action does not survive Coach Paterno's death; and

c. The Estate fails to allege an actionable commercial interest? (Suggested answer: yes.)

7. Whether dismissal is required because Plaintiffs failed to verify the Amended Complaint? (Suggested answer: yes.)

ARGUMENT

I. AS A MATTER OF LAW, PLAINTIFFS ARE NOT ENTITLED TO A DECLARATION THAT THE CONSENT DECREE IS VOID.

The Court's January 7 Order struck as impertinent Plaintiffs' request for voidance of the Consent Decree because of their failure to join an indispensable party—Penn State. Order 12. In their Amended Complaint, Plaintiffs have added Penn State as a so-called "nominal" defendant, but their request for a declaratory judgment finding the Consent Decree void *ab initio* remains fatally flawed even with Penn State's participation in this case. Whatever their rights in relation to the NCAA Constitution and Bylaws, the Estate and Trustee Clemens (*i.e.*, the only Plaintiffs asserting the underlying breach of contract claims) lack standing to challenge the validity of the Consent Decree[2], and in any event they do not plead any facts that (even if true) would permit a finding that the Consent Decree is void *ab initio*.[3]

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[2] To the extent any other Plaintiffs seek to declare the Consent Decree void *ab initio*, they certainly lack standing to do so, as they do not even assert standing under the NCAA Constitution and Bylaws.

[3] For the same reason, Plaintiffs' request that the Court permanently enjoin the parties to the Consent Decree from enforcing any aspect of it should also be dismissed. That relief itself is just a thinly veiled request to declare the Consent Decree void. In addition, that request for relief should be struck as improper for failure to join an indispensable party, as it is sought exclusively as to the NCAA as relief for tort claims, *see* Am Compl. ¶ 168, but would "deprive Penn State of its rights under the Consent Decree," Order 10, in the same manner as a declaration that the Consent Decree is void.

A. Plaintiffs Lack Standing To Obtain A Declaration That The Consent Decree Is Void *Ab Initio.*

As a matter of law, strangers to a contract have no standing to challenge the contract's validity and obtain a finding that it is void *ab initio*. *See Schuster v. Pa. Tpk. Comm'n*, 395 Pa. 441, 451, 149 A.2d 447, 452 (1959) (stating that one who is not a party to a contract should not be allowed to challenge the validity of the contract); *Souders v. Bank of Am.*, No. 1:CV-12-1074, 2012 WL 7009007, at *9-10 (M.D. Pa. Dec. 6, 2012) (borrower could not challenge lender's assignment of mortgage because the borrower was not a party or third-party beneficiary of the assignment); *Stolz-Wicks, Inc. v. Commercial Television Serv. Co.*, 271 F.2d 586, 589 (7th Cir. 1959) ("'[T]he rule that the law will not enforce an illegal contract has application only between the immediate parties to the contract' ...." (citation omitted)); *see also DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*, 384 F.3d 338, 350-51 (7th Cir. 2004) (a non-party has no standing to challenge a contract as void due to illegality); *Tasini v. N.Y. Times Co.*, 184 F. Supp. 2d 350, 356 (S.D.N.Y. 2002) ("[T]ypically only the actual or alleged party to the contract is in a position to challenge its validity."); *Amica Mut. Ins. Co. v. Fassarella Pro Painting & Design, LLC*, No. FSTCV106003636S, 2011 WL 3338236, at *15 (Conn. Super. Ct. July 8, 2011) ("'The general rule is that only a party (actual or alleged) to a contract can challenge its validity ... Obviously, the fact that a third party would be better off if a contract were unenforceable does not give him standing

to sue to void the contract.'" (alteration in original) (quoting *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 655 N.W.2d 390, 397 (Neb. 2003))).[4]

Here, whatever their rights under the NCAA Constitution and Bylaws may be, there can be no dispute that the Estate and Trustee Clemens are neither parties to the Consent Decree nor third-party beneficiaries of the Consent Decree. They therefore cannot challenge the validity of the Consent Decree or obtain a declaration that it is void.

Despite their efforts to muddy the waters, Plaintiffs allege two separate and independent contracts. The first is the NCAA Constitution and Bylaws, which Plaintiffs allege constitutes a multilateral contract between the NCAA and its numerous member institutions. *See* Am. Compl. ¶ 117 ("At all relevant times ... the NCAA had a valid and enforceable agreement with Penn State, in the form of its Constitution, Operating Bylaws, and Administrative Bylaws"). That is the purported

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[4] The rule is no different where, as here, a party seeks declaratory relief concerning a contract to which they are a stranger. *See Avrich by Avrich v. Gen. Accident Ins. Co.*, 367 Pa. Super. 248, 252, 532 A.2d 882, 884 (1987) (denying request for declaratory relief under insurance contract under 42 Pa. Cons. Stat. § 7533 because although plaintiffs had been injured in an auto accident, "they [we]re not parties to the insurance contract and they ha[d] no rights under the contracts."); *see also Rettew & Assocs., Inc. v. Lower*, No. CI-01-05949, 2004 WL 5904862 (Pa. Ct. Com. Pl. Jan. 14, 2004) (sustaining preliminary objections because "[t]he Plaintiff does not constitute a person 'interested under a written contract' or 'whose rights, status, or other legal relationships are affected by a contract' because ... the Plaintiff was not a party to the relevant contract and was not a third party beneficiary of that contract").

contract that sets forth the procedural mechanisms used in a traditional enforcement matter, to which the Estate and Trustee Clemens claim third-party beneficiary status here. *See id.* ¶ 118 ("The NCAA and Penn State both intended, upon entering into this contract, to give the benefit of the agreement to any third parties that would be involved in findings of rule violations against a member institution.").

The second contract at issue is the Consent Decree, a bilateral agreement between the NCAA and Penn State. The Estate and Trustee Clemens are strangers to the Consent Decree. They are not signatories and do not assert third-party beneficiary rights thereunder. Nor could they: the Consent Decree plainly does not "explicitly state [an] intent to name [either Plaintiff] a third party beneficiary," as would be required. *See Souders*, 2012 WL 7009007, at *9-10 (citing *Ira G. Steffy & Son, Inc. v. Citizens Bank of Pa.*, 2010 PA Super 175, 7 A.3d 278 (2010)). To the contrary, it offers no protection or benefits to *any* individual, and instead explicitly provides that the NCAA reserves the "right to ... impose sanctions on individuals" at a later date notwithstanding its agreement with the institution.[5] Consent Decree

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[5] Plaintiffs would face another challenge in asserting third-party beneficiary status under the Consent Decree: they allege it is void and has no legal effect, and therefore cannot claim any rights thereunder. Restatement (Second) of Contracts, § 309(1) & illus. 1 (1981) (stating that a void contract creates no third-party beneficiary rights); *see also* Order on Affiliated Defendants' Motion to Dismiss Count XII and Plaintiffs' Motion to Amend Complaint at 5-6, *Richman v. Possibilities Counseling Servs., Inc.*, No. BCD-WB-CV-10-53 (Me. Super. Ct. May 2, 2011). That is one reason why doctrines like illegality and other grounds for

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The Estate and Trustee Clemens claim that the NCAA breached the contractual obligations it owes them as "involved individuals" under the *NCAA Constitution and Bylaws* by not providing them with certain procedures, such as notice of allegations and opportunity to respond. *See, e.g.*, Am. Compl. ¶¶ 37, 121. But the relief they seek is a declaration that the *Consent Decree*—the separate contract between the NCAA and Penn State—is void. *Id.* ¶ 169. The Estate and Trustee Clemens cannot use their alleged rights under the first contract to manufacture standing as to the second. They are free to pursue ordinary contract remedies for an alleged breach of their rights under the NCAA Constitution and Bylaws (which are without merit here). And they can (as they have) assert tort claims arising from the NCAA's and Penn State's entrance into the Consent Decree (which also lack merit). But as a matter of law, strangers to the Consent Decree—i.e., the Estate and Trustee Clemens (and certainly any of the other Plaintiffs)—have no standing to obtain a declaration that it is void *ab initio* or otherwise challenge its validity.

B. The Amended Complaint Does Not Plead Any Facts That Permit A Finding That The Consent Decree Is Void *Ab Initio.*

Plaintiffs' dispositive lack of standing aside, the Amended Complaint fails to

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finding a contract void *ab initio* are limited to contract defenses that only the parties can assert to relieve themselves of any obligations under the purported contract.

plead any facts that (even if true) are sufficient to support a finding that the Consent Decree is void *ab initio*. Holding that a contract is void *ab initio* means that, despite the parties' intention, the contract is "'[o]ne which never had any legal existence or effect ..., [that] creates no legal rights and either party thereto may ignore it at his pleasure, in so far as it is executory.'" *Vartan v. Commonwealth*, 151 Pa. Commw. 86, 92-93, 616 A.2d 160, 164 (1992) (quoting *Black's Law Dictionary* (5th ed. 1979)). Under Pennsylvania law, such extraordinary judicial relief is authorized in only limited and extreme circumstances, such as "fraud, mistake, or illegality." *Snow v. Corsica Constr. Co.*, 459 Pa. 528, 531, 329 A.2d 887, 889 (1974) (explaining that "'[i]nadequacy of price, improvidence, surprise, and mere hardship, none of these, nor all combined, furnish an adequate reason for a judicial rescission of a contract. For such action something more is demanded—such as fraud, mistake, or illegality'" (citation omitted)).[6]

The Amended Complaint does not allege any facts that would permit such

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[6] *See also Davis v. Pittsburgh Nat'l Bank*, 120 Pa. Commw. 453, 458, 548 A.2d 1326, 1329 (1988) ("A contract that violates public policy as declared by the legislature is unenforceable and void *ab initio*."), *aff'd*, 521 Pa. 537, 557 A.2d 1064 (1989); *Klopp v. Keystone Ins. Cos.*, 528 Pa. 1, 9, 595 A.2d 1, 5 (1991) (insurance policy void *ab initio* due to fraud); *Dep't of Auditor Gen. v. Council 13, AFSCME*, 136 Pa. Commw. 87, 94, 582 A.2d 98, 101 (1990) (noting that an illegal contract would be void *ab initio*); *Watrel v. Commonwealth Dep't of Educ.*, 88 Pa. Commw. 1, 5, 488 A.2d 378, 381 (1985) (contract void if it "violates a statutory provision"), *aff'd*, 515 Pa. 61, 518 A.2d 1158 (1986); *Sheppard v. Frank & Seder*, 307 Pa. 372, 376, 161 A. 304, 305 (1932) (a contract procured under "extreme" duress is void *ab initio*).

relief here. Plaintiffs certainly do no allege "fraud, mistake, or illegality." They suggest generally that the Consent Decree was the product of some sort of duress, but that plainly would be *Penn State's* argument to make (not Plaintiffs'). And in any event, the allegations at most suggest that the University was facing some unpalatable choices in the midst of the Sandusky tragedy, but certainly not the form of "extreme" duress that is necessary to find a contract void. *Sheppard v. Frank & Seder, Inc.*, 307 Pa. 372, 376, 161 A. 304, 306 (1932) (holding that a contract can be void *ab initio* for duress only if such duress is "extreme" and of a "*forcible* or *terrorizing* character;" even duress of a "less degree," including that which would "'overcome the mind and will of a person of ordinary firmness,'" is insufficient (emphasis added) (citation omitted)).

Ultimately, the Estate and Trustee Clemens rest their request for this relief entirely on their contention that by entering into the Consent Decree with Penn State, the NCAA violated rights that it allegedly owes to them under a separate contract—the NCAA Constitution and Bylaws. Pennsylvania law does not support the proposition, however, that breach of one contract can serve as the basis for finding that a separate contract is void *ab initio*. Perhaps recognizing this, Plaintiffs attempt to cast the NCAA's conduct as "unauthorized" or "ultra vires," as opposed to a simple breach of the Estate's and Trustee Clemens' alleged rights as third-party beneficiaries of the NCAA Constitution and Bylaws. But, of course, Plaintiffs

cannot contest the NCAA's authority to enter into contracts with its member institutions, nor the authority of its Executive Committee to act, as it did here, on behalf of the NCAA in association-wide matters pursuant to Article 4.1.2(e) of the NCAA Constitution. *See* NCAA Academic and Membership Affairs Staff, *2011-12 NCAA Division I Manual* art. 4.1.2(e) (2011) ("Manual"), attached as Ex. A to Am. Compl. Thus, there can be no real dispute that the NCAA has *authority* to enter into the Consent Decree with Penn State. The allegation that the NCAA's conduct was "unauthorized" or "ultra vires" merely constitutes rhetorical gloss applied to the question whether the NCAA separately violated Plaintiffs' alleged contractual rights under the NCAA Constitution and Bylaws. Even if it did, that would be insufficient as a matter of law to render the Consent Decree void.[7]

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[7] Even if the Court were to find that the Estate and Trustee Clemens have sufficiently alleged standing and a basis for challenging the validity of the Consent Decree, they are not entitled to invalidate the Consent Decree *in its entirety*. *See Bowen v. Mount Joy Twp.*, 165 Pa. Commw. 101, 108, 644 A.2d 818, 821 (1994); *see also Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. 288, 307 (1904) (citing *Or. Steam Navigation Co. v. Winsor*, 87 U.S. 64 (1874)) (explaining that one part of a contract "may be void while the other is not"). As an illustration, neither the Estate nor Trustee Clemens can possibly claim any direct, immediate, or substantial injury—that is, the *bare minimum* they would need to show, *see Bowen*, 644 A.2d at 821, 165 Pa. Commw. at 108—resulting from Penn State's agreement in the Consent Decree to accept a $60 million fine, four-year post-season ban, four-year reduction in grants-in-aid, five year probation, or its implementation of an AIA. Nor can they claim any injury at all resulting from statements in the Consent Decree about Graham Spanier, Gary Schultz, and Timothy Curley. Indeed, the "findings and conclusions" about these three individuals (each of whom is being criminally prosecuted for his role in the Sandusky scandal) provide an ample independent basis for the Consent Decree, even if the Consent Decree had

II. THE BREACH OF CONTRACT CLAIMS SHOULD BE DISMISSED AS A MATTER OF LAW.

A. The Estate And Trustee Clemens Are Not Third Party Beneficiaries Of The NCAA Constitution And Bylaws.

As the NCAA has previously argued, the breach of contract claims asserted by the Estate and Trustee Clemens should be dismissed because neither Plaintiff is a third party beneficiary of the NCAA Constitution and Bylaws.[8] Mem. in Supp. of Prelim. Objs. 20-23. Under Pennsylvania law, a person is an intended third-party beneficiary of a contract only if the contracting parties express in the contract itself an intent to benefit the third party. *Scarpitti v. Weborg*, 530 Pa. 366, 371, 609 A.2d 147, 150 (1992). No such express statement can be found in the NCAA Constitution and Bylaws. As such, Plaintiffs would need to demonstrate that they are mere "incidental beneficiaries." But they cannot meet that standard either, *see id.* at 371, 609 A.2d at 150, and even if they did, an incidental beneficiary acquires no rights against the parties to the contract, *see* Restatement (Second) of Contracts § 315

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been entirely silent on Coach Paterno and the Penn State Board of Trustees. The Estate and Trustee Clemens thus cannot possibly seek the invalidation of the entire Consent Decree, and their request that this Court do so should be struck.

[8] *See, e.g. Knelman v. Middlebury College*, 898 F. Supp. 2d 697, 714-15 (D. Vt. 2012) (holding that plaintiff student was not a third party beneficiary of college's contract with the NCAA (the NCAA manual)); *Hall v. NCAA*, 985 F. Supp. 782, 796-97 (N.D. Ill. 1997) (expressing skepticism that student was third party beneficiary of NCAA bylaws, constitution, and regulations); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1320 (9th Cir. 1996) (holding that student was not third party beneficiary of Pac-10's constitution, bylaws, and articles).

(1981). In any event, Plaintiffs' claim to third-party beneficiary status must be rejected because the Amended Complaint simply states the legal conclusion that Plaintiffs are entitled to such rights, Am. Compl. ¶ 119, without any averment of fact that would support that position. *See Strutz v. State Farm Mut. Ins. Co.*, 415 Pa. Super. 371, 374-75, 609 A.2d 569, 571 (1992).

Further, Plaintiffs' alleged status as third party beneficiaries rests entirely on the faulty premise that the Estate and Trustee Clemens are "involved individuals" under NCAA Bylaws article 32.1.5, and therefore were entitled to certain procedural mechanisms in connection with the NCAA's and Penn State's entrance into the Consent Decree.[9] The fundamental problem with this argument is that the Consent Decree was not the product of the traditional enforcement process. *See* Mem. in Supp. of Prelim. Objs. 26-32. Instead, it is a bilateral agreement between the NCAA and Penn State, which the NCAA entered into pursuant to the Executive Committee's authority to act on matters of association-wide import. *See* Manual art. 4.1.2(e). Indeed, the purpose behind the Consent Decree, at least in part, was to permit Penn State to resolve the Sandusky matter *without* enduring a full NCAA investigation and enforcement process. As such, whether Plaintiffs would have been treated as "involved individuals" in the traditional enforcement process is beside the

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[9] Even if Plaintiffs are covered by the term "involved individual" (they are not), that still does not mean Plaintiffs are third-party beneficiaries of the NCAA Constitution and Bylaws. *See infra.*

point. *See* Mem. in Supp. of Prelim. Objs. 26-32.

Further, the NCAA Bylaws themselves clearly define the term "involved individual" to mean "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. Plaintiffs concede that they never received such notice from the NCAA. Accordingly, a straightforward reading of the NCAA Constitution and Bylaws belies the entire premise for Plaintiffs' breach of contract claims. Mem. in Supp. of Prelim. Objs. 19-24. In addition, even if the procedural safeguards afforded to "involved individuals" were somehow applicable here, Plaintiffs cannot complain that they were harmed in any way by their absence. The Consent Decree contains only sanctions against *Penn State* as an institution, and *no individual sanctions* against Plaintiffs themselves. *See* Mem. in Supp. of Prelim. Objs. 24-27; *see* Reply in Support of Defendants' Preliminary Objections (Sept. 26, 2013) ("Reply") 13-20. For all of these reasons, Plaintiffs breach of contract claims should be dismissed.

B. There Are Legal Grounds For Dismissing The Contract Claims That Do Not Require The Court To Resolve Any Perceived Ambiguities About The Term "Involved Individual"

In its January 7 Order, the Court did not address squarely whether Plaintiffs are third party beneficiaries or "involved individuals" because the contract claims were dismissed for lack of jurisdiction due to Plaintiffs' failure to join Penn State,

an indispensable party. In dicta, however, the Court suggested that the term "involved individuals" is ambiguous, that both parties' interpretations of the term are reasonable, *see* Order 13, and that "[m]any fact questions remain concerning the meaning and application of the phrase 'involved individual' in this case," including "whether Paterno was personally sanctioned." *Id.* at 9. For the reasons previously stated, the NCAA maintains that the term "involved individual" is plain and unambiguous and did not apply to Coach Paterno or Trustee Clemens here. But in any event, there are independent legal reasons why neither the Estate nor Trustee Clemens can assert breach of contract claims as "involved individuals," which were not addressed by the Court in its Order and which do *not* require the Court to address any "fact questions" about that term.[10]

1. As A Matter Of Law, Coach Paterno's Death Precludes The Estate From Asserting Rights As An "Involved Individual."

The Estate's breach of contract claim depends on the premise that Coach Paterno was an "involved individual" within the meaning of the NCAA's Rules, and that the Estate was entitled to assert the procedural rights that an "involved

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[10] The breach of contract claim—as well as the commercial disparagement and civil conspiracy claims—is asserted by "George Scott Paterno, as duly appointed representative of the estate *and family* of Joseph Paterno." Am. Compl. (caption) (emphasis added). The "family of Joseph Paterno," however, is not a juridical entity and has no capacity to assert any claims. Accordingly, the Court should dismiss any claims purportedly asserted by the "family of Joseph Paterno," and clarify that such claims are asserted by the Estate only.

individual" is due under the NCAA's Enforcement Process.[11] But Coach Paterno's death in January 2012 decisively undercuts this argument. As Plaintiffs' Amended Complaint makes clear, Coach Paterno was not an "involved individual" at the time of his death. And the procedural rights extended to "involved individuals"—such as notice, the opportunity to attend hearings, and the chance to submit written information to assist the NCAA in its investigation—unambiguously and self-evidently contemplate only living individuals. Because Coach Paterno never became an "involved individual" before passing away, no rights as an "involved individual" ever accrued to him. It was therefore impossible for the NCAA to breach Coach Paterno's right to receive notice, review documents, or attend hearings, because it could not possibly have afforded him those rights after he died. The Estate therefore cannot maintain its contract claim as a matter of law.

Even if this Court somehow believed that Coach Paterno could have been an involved individual prior to his death, the procedural protections afforded to involved individuals are unmistakably personal in nature and would not survive his death. For either or both reasons, the Estate's breach of contract claim must be

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[11] As this Court recognized in its January 7 Order, the Estate's breach of contract claim also requires the Estate to demonstrate that Coach Paterno would have been a third-party beneficiary of Penn State's membership agreement with the NCAA, and that such beneficiaries have standing to assert that the NCAA breached its agreement with Penn State. Order 9. However this Court would resolve those disputes, the Estate cannot maintain its contract claims for the independent reasons set out in this section.

stricken.

a. The Term "Involved Individuals" Contemplates Only Living Persons.

The Amended Complaint asserts that "involved individuals" within the meaning of the NCAA Bylaws are entitled to certain procedural mechanisms only after an initial investigation has generated "sufficient information to support a finding of a rules violation." Am. Compl. ¶ 37.[12] One's status as an involved individual is triggered by a notice of allegations from the NCAA following an initial NCAA investigation or institutional self-report which "must list the NCAA rule alleged to have been violated and the details of the violation" and suggests "the significant involvement of any individual staff member or student" in the violation. *Id.*; *see also id.* ¶ 46. A person thus cannot become an "involved individual"—and is not entitled to any procedural safeguards—*before* the NCAA has determined that the factual record supports a finding of a rules violation.

In this case, Plaintiffs' Amended Complaint (as well as the undisputed record) establishes that Coach Paterno died before he could have become an "involved

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[12] As Plaintiffs explain, the NCAA principally generates that information in one of two ways: (1) through an initial investigation to determine whether an institution may have violated NCAA rules, followed by a "notice of inquiry," which "presents the institution with an opportunity to address the issue and either convince the NCAA that no wrongdoing has occurred or, if there is wrongdoing, cooperate and play a role in the investigation," Am. Compl. ¶¶ 32-33, 36; or (2) through a summary disposition process when an institution self-reports violations to the organization, *id.* ¶ 46.

individual" within the meaning of the NCAA rules. As the Amended Complaint acknowledges, upon learning about allegations of sexual abuse at Penn State, the President of the NCAA, Dr. Emmert, sent a letter to President Erickson of Penn State "expressing concern over the grand jury presentments and asserting that the NCAA ... *might take action* against Penn State," *id.* ¶ 57 (emphasis added). Far from announcing that it had generated "sufficient information to support a finding of a rules violation," *id.* ¶ 37, Plaintiffs acknowledge that "the letter [did not] identify any NCAA rule that Penn State had allegedly violated" and instructed Penn State only to "prepare for *potential inquiry*." *Id.* ¶ 57 (emphasis added). Plaintiffs likewise repeatedly acknowledge that the NCAA did not proceed with its own investigation of Penn State or announce that Penn State had violated NCAA rules, but rather awaited the conclusions of Penn State's internal investigation, being conducted by FSS. *See id.* ¶ 58 ("Instead of demanding that Penn State provide answers to its questions, the NCAA waited for the Freeh firm to complete its investigation."); *id.* ¶ 59 ("[T]he NCAA waited for the results of the Freeh firm's investigation ....").

Coach Paterno died on January 22, 2012, well prior to the release of the Freeh Report on July 12, 2012 and before the NCAA had made any decision about how to address the Penn State matter. At the time of his death, therefore, Coach Paterno indisputably was not an "involved individual." FSS' investigation was ongoing and

the NCAA was awaiting its results. Plaintiffs themselves allege that Coach Paterno was an involved individual because of *later* statements from the Freeh Report repeated in the Consent Decree—a document signed over six months after Coach Paterno died. *See id.* ¶ 119 ("Joe Paterno was specifically named in the Consent Decree [and] ... was also alleged to have engaged in conduct that formed the basis for the Consent Decree (*and, therefore, [was] deemed significantly involved in violations of the NCAA Rules*)" (emphasis added)). *Compare id.*, *with* Manual art. 32.1.5 (defining "[i]nvolved individuals" as individuals "who have received notice of significant involvement in alleged violations through the notice of allegations or summary disposition process").

The procedural rights afforded to an involved individual do not accrue after death—the rights in the NCAA Bylaws plainly contemplate only a living individual. *See, e.g.*, Manual art. 19.4.3 ("[An] involved individual [may] appear before the committee to discuss a response to the notice of allegations ...."); *id.* at 32.3.10.2 ("[I]nvolved individuals may review such information in the national office or through a secure website ...."); *id.* at 32.6.1.1(e) ("[The] involved individual [may have] the opportunity to submit in writing any information the individual desires that is relevant to the allegation in question [on Infractions.]"); *id.* at 32.6.6 ("[T]he enforcement staff shall consult with ... involved individuals who will attend the hearing in order to clarify the issues to be discussed in the case during the hearing

...."). At bottom, those rights are designed to afford an individual the opportunity to tell his or her side of the story and to convey his or her first-hand knowledge of the circumstances under investigation by the NCAA. *See id.* at 32.8.7.3, 32.8.7.6. Such an opportunity was simply inapplicable to Coach Paterno after he passed away. It is impossible to provide such procedural rights to a person who is deceased, and the contract plainly does not contemplate that nonsensical result.[13] *See* Order 9 ("Where contract language is clear and unambiguous, it is conclusive as to the parties' intent.") (citing *Keystone Dedicated Logistics, LLC v. JGB Enters. Inc.*, 2013 PA Super 225, 77 A.3d 1, 6-7 (2013)). The NCAA therefore cannot be held in breach of contract for failing to provide Coach Paterno with procedural protections, such as notice or the opportunity to be heard, when Coach Paterno passed away before any such protections were due.

That conclusion is consistent with the bedrock principle that "'[d]eath or a disability, which renders performance impossible, discharges the contract.'" *Blakely v. Sousa*, 197 Pa. 305, 329, 47 A. 286, 286 (1900) (citation omitted); *see also Alvino*

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[13] Indeed, it is far from clear that Coach Paterno would have invoked such procedural mechanisms had they been afforded to him while he was still alive. *See* Louis J. Freeh, *Statement from Louis J. Freeh*, ESPN Outside The Lines (Feb. 10, 2013, 9:58 AM), http://www.espn.go.com/espn/otl/story/_/id/8933344/louis-j-freeh-statement-response-paterno-family-report ("During the investigation, we contacted Mr. Paterno's attorney in an attempt to interview Mr. Paterno. Although Mr. Paterno was willing to speak with a news reporter and his biographer at that time, he elected not to speak with us.").

v. Carraccio, 400 Pa. 477, 482, 162 A.2d 358, 361 (1960) ("'When people enter into a contract which is dependent for the possibility of its performance on the continual availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is prima facie regarded as dissolved.'" (citation omitted)); Restatement (Second) of Contracts § 261 cmt. b (1981) ("[T]he death of a person ... necessary for performance" is a "supervening event" which discharges any contractual duty contemplating the continued existence of that person."). Pennsylvania continues to follow these principles today. *See Step Plan Servs. v. Koresko*, 2010 PA Super 232, 12 A.3d 401, 411 (2010). That result mirrors the outcome in other similar cases when suit is brought asserting violations of one's rights after one's death. *See McCain v. Episcopal Hosp.*, 350 F. App'x 602, 604 (3d Cir. 2009) (Section 1983 "'does not provide a cause of action on behalf of a deceased based upon alleged violation of the deceased's civil rights which occurred after his death.'" (citation omitted)); *Waller v. Butkovich*, 584 F. Supp. 909, 940 n.10 (M.D.N.C. 1984) (claimed conspiracy to violate decedents' rights after their deaths non-actionable, because "rights died with them, and nothing done after their deaths could constitute a deprivation").[14]

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[14] Because Coach Paterno was not an involved individual at the time of his death, Plaintiffs also cannot style their claim as a "survival" action. *See Carroll v. Skloff*, 415 Pa. 47, 48, 202 A.2d 9, 10-11 (1964) (holding that a survival action "is grounded upon an existing personal cause of action which the deceased could have but did not

b. An Involved Individual's Procedural Rights Are Distinctly Personal And Do Not Survive Death.

Alternatively, even if this Court somehow concluded that it was ambiguous as to whether Coach Paterno became an involved individual prior to his death, any procedural rights intended for "involved individuals" are distinctly personal, and would not have survived Coach Paterno's death. *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*, 197 Pa. at 329, 47 A. at 329 ("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

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institute during his or her lifetime"), *overruled by Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085 (1985).

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." Manual arts. 32.8.7.3, 32.8.7.6 (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, any more than his Estate could give similar testimony in the pending criminal trials against Graham Spanier, Tim Curley and 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)).

Coach Paterno was not an involved individual at the time of his death and procedural rights afforded to individuals do not vest in a person who has died. And even if it was ambiguous whether he was an involved individual, any procedural rights to which he would have been entitled before the NCAA imposed sanctions would not have survived his death. For either reason, as a matter of law, the Estate cannot maintain a breach of contract claim founded the NCAA's purported failure to provide "fair procedures" to Coach Paterno. Am. Compl. ¶ 121(m).

2. As A Matter Of Law, Trustee Clemens Cannot Assert Any Rights As An "Involved Individual."

Similarly, Trustee Clemens cannot as a matter of law assert status as an involved individual. This is fatal to his breach of contract claim, which on its own terms is predicated on the erroneous position that he was an "involved individual" within the meaning of the NCAA Bylaws, and that the term applied in the context of the Consent Decree. As this Court has explained, Plaintiffs allege that the term "involved individuals" "may cover a person who is named in the sanctioning document or whose conduct underlies sanctions." Order 9. It is undisputed, however, that Trustee Clemens is named neither in the Freeh Report, nor the Consent Decree. Trustee Clemens nevertheless attempts to characterize himself as an "involved individual" by association by suggesting that the NCAA improperly repeated a conclusion in the Freeh Report that "the Board of Trustees ... did not perform its oversight duties." Consent Decree 3; *see also* Am. Compl. ¶ 119. That claim fails for several reasons closely related to those for which Trustee Clemens' separate defamation claim also fails. *See infra*, Section V.A.

By its plain meaning, an "involved individual" under the NCAA Rules refers only to an *individual* who is significantly involved in violations of NCAA rules, not a corporate body like the Board of Trustees. The Consent Decree makes no claim that any particular *individual* Board member was significantly involved in violations of NCAA rules, and no other Board member has interpreted the Consent Decree as

such. Even if a corporate body could assert rights as an involved individual on the basis of the Consent Decree, it would be the Board of Trustees—the entity named in the Consent Decree—not Trustee Clemens.

The Board of Trustees has not sought to challenge the conclusions in the Freeh Report that were repeated in the Consent Decree. Although Trustee Clemens complains that the Consent Decree included "baseless allegations that the Board of Trustees 'did not perform its oversight duties' and 'failed in its duties to ... creat[e] an environment where senior University officials felt accountable,'" Am. Compl. ¶ 154 (quoting Consent Decree 3), Plaintiffs acknowledge that Penn State released a statement shortly after the Freeh Report was released "asserting that the Board of Trustees accepted full responsibility for the purported failures outlined in the Freeh Report," *id.* ¶ 62. That statement expressly provided that "[t]he Board of Trustees acknowledges that it failed to create an environment of accountability and transparency and did not have optimal reporting procedures or committees structures" and that "[t]he Board of Trustees, as the group that has paramount accountability for overseeing and ensuring the proper functioning and governance of the University, accepts full responsibility for the failures that occurred." Penn State University, *Penn State Issues Statement on Freeh Report* (July 12, 2012), *available at* http://progress.psu.edu/resource-library/story/penn-state-issues-statement-on-freeh-report ("*Penn State Issues Statement on Freeh Report*").

Even Trustee Clemens himself has recently acknowledged the Board's "acceptance of [Louis Freeh's] conclusions."[15] *See* Jennifer Miller, *Penn State Board Trustee Al Clemens Resigns; Alumni Criticize Board for Freeh Report Response*, StateCollege.com (Mar. 7, 2014), http://www.statecollege.com/news/local-news/penn-state-board-trustee-al-clemens-resigns-alumni-criticize-board-for-freeh-report-response,1458230/. Trustee Clemens apparently now views that acceptance as a "mistake," *id.*, but to

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[15] Trustee Clemens' separate contention that no full, official vote of the Board of Trustees was taken regarding the Freeh Report is a red herring. *See* Am. Compl. ¶ 64. As noted above, Trustee Clemens himself (like Penn State and other Trustees, *see infra* at 35-36) have acknowledged that the Board accepted the Freeh Report's conclusions about the Board's failures after the Report was released. In any event, the NCAA cannot possibly be held accountable for acknowledged representations by Penn State about the Board of Trustees' acceptance that Trustee Clemens alleges well over a year later were in fact misrepresentations. *See* 15 Pa. Cons. Stat. § 5503(a) ("A limitation upon the business, purposes or powers of a nonprofit corporation, expressed or implied in its articles or bylaws or implied by law, shall not be asserted in order to defend any action at law or in equity between the corporation and a third person, or between a member and a third person, involving any contract to which the corporation is a party or any right of property or any alleged liability of whatever nature ...."); *cf. Downing v. Sch. Dist.*, 360 Pa. 29, 40, 61 A.2d 133, 138 (1948) ("[A] corporation which has received and retained the benefits and advantages of a contract should not be allowed to escape its obligations upon a plea of *ultra vires* ...."); *Strauss v. W.H. Strauss & Co.*, 330 Pa. 517, 520, 199 A. 195, 197 (1938) ("[T]he defense of ultra vires can no longer be asserted by a corporation in an action involving a contract such as this one, to which it is a party."); *Zitelli v. Dermatology Educ. & Research Found.*, 409 Pa. Super. 219, 241 n.4, 597 A.2d 1173, 1184 n.4 (1991) ("An intra vires problem arises ... if action is taken by officers without authorization of the board of directors. As to outsiders, such action could be held to be enforceable but as to benefits conferred on the interested board members may not be enforceable."), *aff'd in part and vacated in part on other grounds*, 534 Pa. 360, 633 A.2d 134 (1993).

the extent that a right to challenge conclusions regarding the Board of Trustees in the Consent Decree exists, that right begins and ends with the Board of Trustees—not a member comprising only 1/32 of the Board.

In any event, Trustee Clemens cannot possibly be an involved individual on account of statements in the Freeh Report, repeated in the Consent Decree, describing oversight failures of the Board of Trustees as a body politic. As noted, *infra*, the common law provides that allegedly defamatory statements made about groups of more than 25 individuals are not actionable because a plaintiff cannot show that a reasonable person would identify any particular individual in the group as a target of the statement. Certainly, Trustee Clemens cannot show, and he has included no factual allegations to support the claim, that the NCAA intended to afford even greater rights than would be afforded by the common law. And it is a particular stretch to interpret provisions affording procedural protections to involved *individuals*, who were singled out for their significant involvement in violations, as extending protections to an unbounded group, none of whom is singled out for any personal misconduct. Accordingly, any potential ambiguities regarding the term "involved individual" aside, it is clear as a matter of law that Trustee Clemens cannot claim that status, and his contract claim must therefore fail on its own terms.

3. The NCAA's "Reasonable" Interpretation Of The Term "Involved Individual" Should Prevail.

The January 7 Order explicitly and correctly stated that the NCAA's

construction of the term "involved individual," as set forth in its prior briefing and at argument, is "reasonable." Order 9. Under well-settled law, a voluntary association's "practical and reasonable" construction of its bylaws must be given effect, and courts will not interfere with it. *See Musicians' Protective Union Local No. 274 v. Am. Fed'n of Musicians*, 329 F. Supp. 1226, 1236 (E.D. Pa. 1971) ("'The practical and reasonable construction of the Constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts.'" (citation omitted)); *see also Harrisburg Sch. Dist. v. Pa. Interscholastic Athletic Ass'n,* 453 Pa. 495, 502, 309 A.2d 353, 357 (1973) ("[J]udicial interference in the affairs of private associations is the rule rather than the exception."); *Baker-Bey v. Delta Sigma Theta Sorority, Inc.*, 941 F. Supp. 2d 659, 665 (E.D. Pa. 2013) (observing that "'courts ordinarily will not interfere with the management and internal affairs'" of a "'voluntary membership organization'" (internal citations omitted)). Indeed, the NCAA's exclusive authority to construe its Bylaws has been explicitly acknowledged by its membership. In particular, Bylaw 5.4 establishes comprehensive procedures by which NCAA Committees and Staff may, at the request of member institutions, "make *binding* interpretations of NCAA legislation," including its bylaws. *See* Manual art. 5.4.1.1.1 (emphasis added). The NCAA's "reasonable" construction of the term "involved individual" is thus entitled to particular deference here.

Ultimately, this Court's recognition that the NCAA's construction is "reasonable" is therefore not the beginning—but the end—of the analysis. It does not matter whether Plaintiffs have also submitted a "reasonable" interpretation (they have not), because as a voluntary association, the NCAA's "reasonable" interpretation must govern. For this independent reason, the breach of contract claims should be dismissed.

III. PLAINTIFFS' TORTIOUS INTERFERENCE CLAIM MUST BE DISMISSED.

A. Plaintiffs' Tortious Interference Claims Must Be Dismissed Because They Are Entirely Derivative Of Their Defamation Claims.

In the Amended Complaint, the Former Coaches assert once again that the NCAA intentionally interfered with their "prospective and existing employment, business, and economic opportunities with many prestigious college and professional football programs, including at Penn State." Am. Compl. ¶ 125. The Court's prior Order dismissed these tortious interference claims due to Plaintiffs' failure to allege sufficient facts concerning such purportedly lost "economic opportunities." As such, the Court did not have occasion to address the NCAA Defendants' argument that the tortious interference claim must be dismissed because it is entirely derivative of Plaintiffs' defamation claim. Now that the tortious interference claim has been re-asserted, this provides an independent ground for dismissing it once again.

The law is clear: "attempt[ing] to establish a separate cause of action out of an alleged *effect* of ... alleged defamation" is insufficient to state a claim. *Ashoff v. Gobel*, 23 Pa. D. & C.4th 300, 306 (Ct. Com. Pl.), *aff'd*, 450 Pa. Super. 706, 676 A.2d 276 (1995). The entirety of the Former Coaches' allegations boil down to alleged harms arising from the statement in the Consent Decree that "[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors." Consent Decree 3. That is identical to their defamation claim. To the extent that the alleged defamatory statement limited their prospective coaching opportunities, that is simply an "effect of the alleged defamation" and "another item of claimed damage from the alleged defamation." *See* 23 Pa. D. & C.4th at 306. It is not a valid tortious interference claim. Plaintiffs are seeking double-recovery for the same allegedly tortious conduct, which the law does not permit. Accordingly, the tortious interference claim must be dismissed as a matter of law, irrespective of whether they now adequately plead lost "economic opportunities" in the Amended Complaint. Am. Compl. ¶ 125.

B. In Any Event, The Amended Complaint Fails To Cure The Prior Pleading Deficiencies.

As noted, the Court's January 7 Order dismissed Plaintiffs' tortious interference claim on the grounds that the Former Coaches had not adequately pled that "any specific prospective contracts would have been consummated but for Defendants' conduct." Order 22. The Former Coaches had attempted to revive this

claim with additional factual allegations in the Amended Complaint. But these additional allegations are insufficient as a matter of law, and the claim still fails.

In their Amended Complaint, Plaintiffs reference a number of schools, NFL teams, and media companies that had purportedly expressed interest in them at some point, but Plaintiffs plead no facts which would support a finding that there existed a "reasonable probability" that "a contract [would] arise." *Id.* at 21. Plaintiffs' allegations that they applied for open positions and had interviews with prospective employers do not suffice. The Former Coaches were applying to highly competitive jobs, and the fact that they were interviewed simply does not create a reasonable probability that they would be hired. The allegations are "speculative" and amount to nothing more than "a mere hope," which is insufficient to sustain a claim for tortious interference with contract under Pennsylvania law. *Id.* at 22.

Plaintiffs also fail to specify a prospective contract that, *but for* the NCAA Defendants' conduct, had a reasonable probability of coming to fruition. *See Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 209-10, 412 A.2d 466, 471-72 (1979). *Id.* Despite listing specific schools, professional teams, and TV networks by name where Plaintiffs apparently sought employment, they only vaguely allege that prospective employers asked questions about the Sandusky affair and Consent Decree. Indeed, Plaintiffs notably never attribute these questions to any particular prospective employer. The Amended Complaint only generally alleges that

"interviewers" at "college and professional teams" asked William Kenney about the language in the Consent Decree, and there are no allegations that anyone asked Jay Paterno about it. Additionally, the allegations are largely based only "upon information and belief"—an odd formulation given that Plaintiffs presumably would have personal knowledge of any such statements.

Plaintiffs also cannot reasonably allege that questions from prospective employers would not have been asked even if the NCAA had taken no action. Indeed, the massive media focus on the Sandusky scandal that preceded the Consent Decree makes it exceedingly likely that these alleged "questions" would have been asked absent any NCAA action. The particular statement about which they complain (concerning "some coaches") was publicly released—verbatim—in the Freeh Report, and subsequently quoted by media outlets around the world. As such, Plaintiffs have not sufficiently alleged any facts that plausibly suggest the Consent Decree was the reason they were not hired by these schools, NFL teams, or media companies. Accordingly, Plaintiffs have not cured the deficiencies in their tortious interference claim, and it must be dismissed.

C. The NCAA Maintains And Preserves Its Additional Objections To Plaintiffs' Tortious Interference Claims.

After dismissing the tortious interference claims in the January 7, 2014 Order, the Court noted in dicta that Plaintiffs' "allegations as to the remaining elements of the claim, although sparse on facts, are sufficient." Order 22. The NCAA

Defendants continue to maintain and preserve their objections to the "remaining elements of the claim," and incorporate by reference their additional prior objections to this count. *See* Mem. in Supp. of Prelim. Objs. 63-69; Reply at 46-51. In particular, Plaintiffs have failed to allege that the NCAA Defendants acted with the requisite intent. Specifically, the Court stated that Plaintiffs sufficiently pled intent because "[i]ntent to cause a result may be inferred from circumstances indicating the result is substantially certain to occur." Order 22. However, as discussed, *infra*, Section V.B., the NCAA has never asserted that the Former Coaches fall into the category of coaches who witnessed Sandusky showering with about young boys, and therefore, the statement about "some coaches" manifestly does not apply to them. It follows that it is not possible for the NCAA Defendants to have acted "for the purpose of" interfering with any potential job opportunities when the NCAA never made any statements about the Former Coaches. *See Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 430, 393 A.2d 1175, 1182 (1978). The fact that the NCAA Defendants' conduct had the unintended result of harming prospective relations is not sufficient under Pennsylvania law. *See Leopold Graphics, Inc. v. CIT Group/Equip. Fin., Inc.*, No. 01-cv-6028, 2002 WL 1397449, at *5 (E.D. Pa. June 26, 2002).

In addition, the NCAA maintains and preserves its argument that Plaintiffs have failed to negate the inference of privilege. *See* Mem. in Supp. of Prelim. Objs.

68-69; Reply at 50-51. Plaintiffs cannot dispute that the Consent Decree served the societal good of regulating intercollegiate sports, punishing rules violations, avoiding a protracted and unnecessary NCAA investigation, and addressing cultural issues to which Penn State admitted. These contested facts make the conduct privileged, even accepting the allegations in the Amended Complaint as true.

IV. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR CIVIL CONSPIRACY.

A. Plaintiffs' Civil Conspiracy Claim Must Be Dismissed Because They Have Failed To Plead An Underlying Cause Of Action.[16]

Under well-established Pennsylvania law, a conspiracy claim will not lie without a valid underlying civil claim. *See Goldstein v. Phillip Morris, Inc.*, 2004 PA Super 260, ¶ 20, 854 A.2d 585, 590 (2004). Indeed, "'absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act.'" *McKeeman v. Corestates Bank, N.A.*, 2000 PA Super 117, ¶ 14, 751 A.2d 655, 660 (2000) (citation omitted). Here, the NCAA Defendants maintain that Plaintiffs have not properly stated any other "civil cause of action." Indeed, the

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[16] The NCAA Defendants also continue to maintain and preserve the arguments set forth in their preliminary objections to Plaintiffs' original complaint regarding the claim of civil conspiracy. Specifically, the NCAA Defendants incorporate their argument that Plaintiffs' civil conspiracy claim is barred by the gist of the action doctrine. *See* Mem. in Supp. of Prelim. Objs. 70; Reply at 51-53. Plaintiffs also incorporate their argument that Plaintiffs failed to aver facts which establish elements of conspiracy, including that the NCAA and FSS combined for an unlawful purpose. *See* Mem. in Supp. of Prelim. Objs. 71-74.

defamation claim they previously asserted has been rejected by this Court, and they appear to have withdrawn their contract claims from the Amended Complaint. These purported Plaintiffs therefore cannot assert a conspiracy claim in this action. At minimum, only four of the Plaintiffs in this action—the Estate, and Messrs. Clemens, Kenney, and Jay Paterno—have even asserted any claim other than civil conspiracy. As such, only those four Plaintiffs are even theoretically eligible to assert a civil conspiracy claim. The additional Plaintiffs, including the former football players, trustees (other than Clemens), and faculty, are *only* parties to the civil conspiracy claim and therefore should be dismissed from this case as a matter of law. *Id.*

B. To The Extent The Civil Conspiracy Claim Is Not Asserted Against Penn State, That Claim Must Be Dismissed For Failure To Join An Indispensable Party.

To the extent Plaintiffs' civil conspiracy claim is not asserted against Penn State, it must be dismissed for failure to join an indispensable party.[17] In the Relief Requested portion of the Amended Complaint, Plaintiffs state that they seek a declaratory judgment declaring the Consent Decree void, which, as this Court has

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[17] As Penn State demonstrates in its Preliminary Objections, the Amended Complaint does not sufficiently apprise Penn State of which count (or counts) are leveled against it, by whom, and the relief being sought in connection with each count. That deficiency provides a basis for dismissing the Amended Complaint in its entirety pursuant to Pennsylvania. Rule of Civil Procedure 1028(a)(3). *See Rambo v. Greene*, 2006 PA Super 231, ¶ 11, 906 A.2d 1232, 1236 (2006); *Feingold v. Hendrzak*, 2011 PA Super 34, 15 A.3d 937, 942 (Pa. Super. Ct. 2011).

recognized, obviously "would deprive Penn State of its rights under the Consent Decree." Order 10. The Amended Complaint seeks this relief on behalf of *all* Plaintiffs, Am. Compl. ¶ 169, which appears to include the Plaintiffs who are former football players, trustees (other than Trustee Clemens), and faculty. But the only claim that *all* Plaintiffs assert is civil conspiracy. At the same time, there does not appear to be any allegation in that count of Penn State's involvement in the so-called "civil conspiracy." Thus, to the extent the civil conspiracy claim has not been asserted against Penn State, it must be dismissed for failure to join an indispensable party because Plaintiffs use this claim as a predicate for invalidating the Consent Decree. Order 10 (Court cannot grant "declaratory relief ... without Penn State's presence as a party to this suit.").

V. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR DEFAMATION.

In the Amended Complaint, Trustee Clemens and the Former Coaches assert that the NCAA defamed them by taking two statements from the Freeh Report and repeating them in the Consent Decree. The Court has previously overruled objections by the NCAA Defendants to this defamation claim. However, a "trial judge may always revisit his own prior pre-trial rulings in a case without running afoul of the law of the case doctrine." *Clearwater Concrete & Masonry, Inc. v. W. Phila. Fin. Servs. Inst.*, 2011 PA Super 64, 18 A.3d 1213, 1216 (2011) ("[B]y its terms, the doctrine only prevents a second judge from revisiting the decision of a

previous judge of coordinate jurisdiction or of an appellate court in the same case."), *abrogated on other grounds, Bricklayers of W. Pa. Combined Funds, Inc. v. Scott's Dev. Co.*, 2012 PA Super 4, 41 A.3d 16 (2012). Here, the NCAA Defendants respectfully reassert objections to Trustee Clemens' and the Former Coaches' defamation claim because (1) certain legal conclusions in this Court's January 7 Order, if applied to this case, appear to call for the dismissal of the defamation claim; and (2) at least one of the prior objections raised by the NCAA Defendants was not explicitly addressed in the January 7 Order.

In particular, as this Court explained in its January 7 Order, to state a claim for which relief can be granted on a defamation theory: (1) "a plaintiff must show a reasonable person would identify him as a target of the defamatory statement; and (2) the plaintiffs in this case "must plead malice," by showing that "a defendant publishes statements with obvious reasons to doubt their veracity." Moreover, Pennsylvania has adopted the rule that pure statements of opinion cannot be the basis for a defamation claim. *See Alston v. PW-Phila. Weekly*, 980 A.2d 215, 221 (Pa. Commw. Ct. 2009) (quoting Restatement (Second) of Torts § 566 cmt. c (1977)). Each of these three grounds provides an independent basis to hold that Plaintiffs' defamation claims are non-actionable.

A. Findings In This Court's January 7 Order Establish That Trustee Clemens Fails To State A Claim For Defamation.

Trustee Clemens, a member of the Penn State Board of Trustees in 1998 and

2001, argues that the NCAA defamed him in the Consent Decree by adopting statements in the Freeh Report that the Board of Trustees "'did not perform its oversight duties'" and "'failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable.'" Am. Compl. ¶ 154 (quoting Consent Decree 3). For reasons set out in this Court's January 7 Order and other controlling precedent, the record establishes that Trustee Clemens' defamation claim necessarily fails.

This Court has explained that to state a claim for defamation, a plaintiff "must show a reasonable person would identify him as a target of the defamatory statement." Order 14 (citing *Klauder v. Phila. Newspapers, Inc.*, 66 Pa. D. & C.2d 271, 276 (1973)). It likewise found that "[i]n making this determination, group size is an important factor." *Id.* at 14-15 (citing *Klauder*, 66 Pa. D & C.2d at 276-78). Importantly, this Court specifically noted that "a group consisting of 25 or more members is too large to support a defamation claim." *Id.* at 15. This Court's legal position has been echoed by countless other courts and leading secondary sources. *See, e.g.*, *Thomas v. Jacksonville TV*, 699 So. 2d 800, 805 (Fla. Dist. Ct. App. 1997) ("[W]hen a group is large, that is, composed of twenty-five or more members, courts consistently hold that plaintiffs cannot show the statements were 'of and concerning' them."); 1 Slade R. Metcalf et al., *Rights and Liabilities of Publishers, Broadcasters*

and Reporters § 1.16 (1982) (stating that "[a] reasonable guide has evolved that if members of the group exceed 25, then no one member can sue for libel"). It is undisputed, however, that the Board of Trustees of Penn State University is *larger than 25*—consisting of 32 members.[18] And, of course, that number is even higher when considering the members in more than one year. Under this Court's analysis, therefore, the Board of Trustees is too large of a group to support Trustee Clemens' defamation claim. A statement addressing the Board of Trustees cannot be the basis for a defamation claim brought by Trustee Clemens himself.

Even if Trustee Clemens could be understood to be a target of the Freeh Report's statement, he cannot establish that the NCAA acted with malice in repeating that statement in the Consent Decree. To prove malice, this Court has made clear that Trustee Clemens must show that the NCAA repeated the Freeh Report's statement regarding the Board of Trustees' failures "with obvious reasons to doubt their veracity." Order 17; *see also Tucker v. Phila. Daily News*, 577 Pa. 598, 629, 848 A.2d 113, 132 (2004) (malice requires showing of acting "recklessly or in knowing disregard of the truth"). Trustee Clemens cannot meet that standard as a matter of law because Plaintiffs concede that Penn State released a statement

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[18] It is a matter of public record, properly subject to judicial notice, that the Penn State Board of Trustees consists of 32 members. *See* Amended and Restated Bylaws of The Pennsylvania State University § 2.01(a) (Nov. 22, 2013), *available at* http://www.psu.edu/trustees/pdf/bylaws.pdf ("The number of Trustees which shall constitute the full Board of Trustees shall be thirty two ....").

affirming that *the Board of Trustees accepted the statement of which Trustee Clemens complains as true.* Am. Comp. ¶ 62. Penn State's official response to the Freeh Report expressly provided that "[t]he Board of Trustees acknowledges that it failed to create an environment of accountability and transparency and did not have optimal reporting procedures or committees structures" and that "[t]he Board of Trustees, as the group that has paramount accountability for overseeing and ensuring the proper functioning and governance of the University, accepts full responsibility for the failures that occurred." *Penn State Issues Statement on Freeh Report*, http://progress.psu.edu/resource-library/story/penn-state-issues-statement-on-freeh-report. The Chairwoman of the Board of Trustees echoed that statement in a public press conference that same day. *See Excerpts of comments by Penn State, board trustees*, CNN.com (July 12, 2012), *available at* http://www.cnn.com/2012/07/12/us/pennsylvania-penn-state-excerpts/ (Karen Peetz, chairwoman of the board of trustees: "The board of trustees .... accepts full responsibly for the failures that occurred."). Even today, almost two years later, Penn State stands by its official statement, continuing to display it on its website. *See Penn State Issues Statement on Freeh Report.*

We are unaware of any case in any jurisdiction providing that *malice* can be established by repeating a statement after the target of that statement admitted its truth. At a minimum, Plaintiffs plead no facts to show that the NCAA possessed

"obvious reasons to doubt the[] veracity" of statements about the Board of Trustees that Penn State and other Trustees indisputably accepted. Plaintiffs apparently believe that the NCAA engaged in a "rush to judgment," but Plaintiffs have not alleged facts to indicate that the NCAA should have seriously doubted the accuracy of the Freeh Report at the time it was published (or why a "rush to judgment" is otherwise improper in any way). Post hoc criticisms of the veracity of the Freeh Report are meaningless to demonstrate contemporaneous actual malice.

In any event, the essence of Plaintiffs' charge, as this Court recognized in its January 7 Order, is that the NCAA failed to conduct a proper investigation to determine the truth of the Freeh Report's statement. But the Pennsylvania Supreme Court has made clear that the failure to conduct a thorough investigation cannot establish malice as a matter of law. *See Tucker*, 577 Pa. at 634-35, 848 A.2d at 135 ("'[T]he question of whether a statement has been published with reckless disregard of falsity is not measured by whether a reasonably prudent man ... would have investigated before publishing.'" (citation omitted)). Whether or not such conduct could establish negligence in a given case—and here, given the published acceptance of those statements by the Board of Trustees it plainly would not—Plaintiffs cannot establish the recklessness required to prove actual malice. Trustee Clemens' claim therefore fails as a matter of law.

B. Findings In This Court's January 7 Order Establish That Jay Paterno And William Kenney Fail To State Claims For

Defamation.

The Former Coaches' claim fails for identical reasons. Both individuals, former Penn State football coaches, claim that the NCAA defamed them in the Consent Decree by adopting statements in the Freeh Report 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.'"[19] Am. Compl. ¶ 155 (emphasis added). But the number of "coaches, administrators and football program staff members" associated with the football team in any given year is greater than 25. Penn State's publicly-available Football Yearbooks from 1998 and 2001, respectively, list 31 and 38 football program coaches, administrators, and staff members.[20] And the total number of coaches, administrators, and staff members that supported the football team for "over a decade" in which Sandusky was harming children, Am. Compl. ¶ 97(a), necessarily exceeds those numbers. As detailed earlier, this Court already properly noted that "a group consisting of 25 or more members is too large to support a defamation claim." Order 15. The statements of which the Former Coaches complain address a large enough group that Plaintiffs

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[19] We are not aware of any dispute that "no one warned the public about [Sandusky]," and assume that Plaintiffs' complaint is directed to the "red flags" comment alone. Regardless, the entire statement is non-actionable for the reasons detailed in the text.

[20] *See Penn State Football: 1998 Yearbook* at 128, 143-53, 329; *Penn State Football: 2001 Yearbook* at 136-65.

cannot meet their burden to show that a "reasonable person would identify [them] as a target of the defamatory statement." *Id.* at 14.

In any event, this Court recognized that "when [allegedly] defamatory statements are made in the course of a public scandal, recipients may be more likely to make inquiry to determine the specific group members." Order 16-17 (citing *Farrell v. Triangle Publ'ns, Inc.*, 399 Pa. 102, 109, 159 A.2d 734, 738-39 (1960)). Here, a reasonable person would have understood that the statement about "some coaches, administrators and football program staff members" does not apply to the Former Coaches. Unlike certain other coaches, administrators, and staff members, the Former Coaches' names do not appear anywhere in the Freeh Report or the Consent Decree. Moreover, the statement in the executive summary about which Plaintiffs complain summarizes more comprehensive findings in the body of the Freeh Report explaining that "several staff members and football coaches regularly observed Sandusky showering with young boys in the Lasch Building," but failed to "notif[y] their superiors of this behavior." 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* 40 (2012) ("Freeh Report"), *available at*

http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf.[21] The Freeh Report specifically identifies another coach by name who falls into that category, but it does not name the Former Coaches. A person need only read the Freeh Report to know the identities of the individuals referenced in the Consent Decree.

Nor, obviously, have the Former Coaches alleged in this litigation that they "regularly observed Sandusky showering with young boys" at Penn State but failed to "notif[y] their superiors" of that behavior. They therefore do not fall within the scope of the group criticized in the Freeh Report's statement, and cannot assert a defamation claim on its basis. Indeed, neither the Freeh Report, nor the Consent Decree, names them or criticizes their conduct in any fashion.

In any event, Plaintiffs cannot establish that the NCAA acted with actual malice in repeating 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.'" Am. Compl. ¶ 155 (emphasis added). The Commonwealth of Pennsylvania has filed criminal charges against *some* University administrators and staff for "concealing information about suspected child abuse involving Jerry Sandusky." *See* Press Release, Pennsylvania Office of Attorney General, *Former*

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[21] The Amended 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 Defendants' preliminary objections. *Detweiler v. Hatfield Borough Sch. Dist.*, 376 Pa. 555, 558-59, 104 A.2d 110, 113 (1954).

Penn State President Graham Spanier charged in "conspiracy of silence;" Gary Schultz & Tim Curley face additional charges, http://www.attorneygeneral.gov/press.aspx?id=6699 (last visited Mar. 13, 2014). And, as the Freeh Report notes, another coach indisputably testified in open court that he saw Sandusky repeatedly showering with young children but "did not believe the practice to be improper." Freeh Report 40. Accordingly, the NCAA could not have acted recklessly in relying on a statement that is either true regarding "some" coaches, faculty members, and administrators, or at minimum, not obviously false, even if it does not apply to the Former Coaches themselves.

C. The Statements About Which Plaintiffs Complain Are Pure Opinions And Cannot Be Defamatory As A Matter Of Pennsylvania Law.

The Pennsylvania Commonwealth Court has explained that "'when the maker of [a] comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct,'" that statement is "protected as a pure expression of opinion." *Alston*, 980 A.2d at 220-21 (quoting Restatement (Second) of Torts § 566 cmt. b). In its January 7 Order, this Court did not address whether the statements on which Plaintiffs rely were protected opinions. Because the undisputed record establishes that they are, Plaintiffs' claims necessarily fail.

Pennsylvania has adopted the position of the Restatement (Second) of Torts § 566, which provides that "[a] defamatory communication may consist of a

statement in the form of an opinion, but a statement of this nature is actionable *only if it implies the allegation of undisclosed defamatory facts* as the basis for the opinion." *See Braig v. Field Commc'ns*, 310 Pa. Super. 569, 580, 456 A.2d 1366, 1372 (1983) (emphasis added); *see also Alston*, 980 A.2d at 220-21. The statements at issue here are unquestionably opinions, asserting that the Board of Trustees failed in its oversight duties, and that coaches, administrators, and other staff ignored the red flags of Sandusky's behavior. *See* Am. Compl. ¶¶ 154-55. Even Jay Paterno, one of the Plaintiffs himself, has expressly admitted that the Freeh Report's conclusions were "basically an opinion." *See* Jason Kirk, *Jay Paterno Interviewed, Says Freeh Report 'Basically an Opinion,'* SBNation.com (July 12, 2012), http://www.sbnation.com/ncaa-football/2012/7/12/3155504/jay-paterno-freeh-report-penn-state-scandal; *see id.* (finding that FSS came to "'reasonable conclusions'" in the absence of facts and used the "'same facts we've had'" to come to a "'different interpretation'").

Plaintiffs' Amended Complaint likewise establishes that the opinions in the Consent Decree were premised on disclosed, not undisclosed, facts. Plaintiffs themselves repeatedly criticize the NCAA for relying on the factual findings made in the Freeh Report. *See* Am. Compl. ¶ 98 (alleging that the Consent Decree's statements "were based on unreliable and unsubstantiated conclusions in the Freeh Report"); Memorandum in Opposition to Defendants' First Preliminary Objections

75 ("In short, the NCAA *adopted the 'facts' from the Freeh Report* ... as justification for imposing sanctions" (emphasis added)); *see also* Consent Decree 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."). Because the record indisputably establishes that the statements of which Plaintiffs complain are opinions premised on disclosed facts, they are protected expressions of opinions which cannot be defamatory as a matter of law. For these independent reasons, Plaintiffs' defamation claim must be dismissed.

VI. THE NCAA DEFENDANTS MAINTAIN THAT THE ESTATE HAS FAILED TO STATE A CLAIM FOR COMMERCIAL DISPARAGEMENT.

The Court's January 7 Order held that the Estate had pled sufficient allegations to survive a demurrer on its commercial disparagement claim. The Court's decision focused primarily on (1) whether the Estate identified a sufficiently concrete commercial interest and (2) whether the Estate pleaded pecuniary loss with sufficient particularity. Plaintiffs' commercial disparagement claim fails, however, for two independent reasons not explicitly addressed in the January 7 Order: [22] (i)

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[22] The NCAA Defendants also continue to maintain and preserve the other arguments set forth in their preliminary objections to Plaintiffs' original complaint regarding the commercial disparagement claim. In particular, the NCAA Defendants argued that the Estate has failed to identify a concrete commercial interest because the complaint did not allege any specific commercial enterprise or

the underlying challenged statements were statements of opinion, and (ii) a tort claim cannot accrue *after* a decedent's death. Additionally, the NCAA Defendants respectfully request that the Court reconsider its prior holding regarding whether a commercial disparagement claim—rather than defamation—can be premised on harm to one's personal reputation. *See Clearwater Concrete & Masonry, Inc.*, 18 A.3d at 1216 (stating that "a trial judge may always revisit his own prior pre-trial rulings").

First, as discussed above in Part V.C., the challenged statements are statements of opinion. The specific references to Coach Paterno in the Consent Decree are quoted verbatim from the final opinions of the Freeh Report, which were premised on the facts disclosed in the Report.[23] *See* Consent Decree 3-4. Thus, a claim for disparagement is not actionable because all of the underlying facts upon

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property, let alone any enterprise or property which decreased in value as a direct result of the Consent Decree. *See* Mem. in Supp. of Prelim. Objs. 57-58. The NCAA Defendants further argued that the Estate failed to allege any facts showing some direct pecuniary loss that would not have occurred but for the publication of the allegedly disparaging statements. *See* Mem. in Supp. of Prelim. Objs. 58-62. The NCAA Defendants incorporate by reference these prior objections to the commercial disparagement claim.

[23] Even the Paterno family itself stated *before* the Consent Decree was executed that the Freeh Report's *facts* were accurate, affirming that "the underlying facts as summarized in the report are almost entirely consistent with what we understood them to be." Brian Bennett, *Paterno Family Statement on Freeh Report*, ESPN.com Blog (July 12, 2012, 12:30 PM), http://espn.go.com/blog/bigten/post/_/id/52992/paterno-family-statement-on-freeh-report.

which the opinions are premised were disclosed to the public such that the public could evaluate the underlying facts and reach their own conclusions. *Braig*, 310 Pa. Super. at 580, 456 A.2d at 1372; *Veno v. Meredith*, 357 Pa. Super. 85, 93, 515 A.2d 571, 575-76 (1986) (affirming demurrer because allegedly defamatory articles drew their support solely from a publicly available article); *see also, e.g.*, *Alston*, 980 A.2d at 221 (affirming demurrer because facts supporting alleged defamatory statement were included in a published article); *Mathias v. Carpenter*, 402 Pa. Super. 358, 364-65, 587 A.2d 1, 3-4 (1991) (affirming grant of preliminary objection because all facts behind the allegedly defamatory statement were laid out earlier in the article).

Second, the Estate cannot bring a survival action for tort liability that accrues after the decedent's death. As a matter of Pennsylvania law, tort claims that had not accrued at death do not survive to the Estate. *See Moyer v. Phillips*, 462 Pa. 395, 399-401, 341 A.2d 441, 443 (1975); *see also Carroll v. Skloff*, 415 Pa. 47, 48, 202 A.2d 9, 10-11 (1964) (holding that a survival action "is grounded upon an existing personal cause of action which *the deceased could have but did not institute during his or her lifetime*" (emphasis added)), *overruled by Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085 (1985); *Huddleston v. Infertility Ctr. of Am.*, 31 Pa. D. & C.4th 128, 151-52 (Pa. C.P. 1996) ("A survival action is brought by the personal representative of a decedent's estate in order to recover loss to the decedent's estate *resulting from a tort to the decedent while alive*." (emphasis added)), *aff'd in part, rev'd in part,*

700 A.2d 453 (Pa. Super. Ct. 1997). In *Menefee v. Columbia Broadcasting System, Inc.*, for example, the claims accrued *before* the decedent passed. 458 Pa. 46, 50, 329 A.2d 216, 218 (1974) ("[P]retrial preparation proceeded ... but Menefee died on November 9, 1971, one day before trial was to begin."). The NCAA is aware of no Pennsylvania authority supporting a claim brought on behalf of a decedent for allegedly disparaging remarks made after the decedent's death.

Third, we would respectfully request that the Court reconsider its statement that *Menefee* "made clear ... that the commercial interest need not be a product or service." Order 18. A claim for damage to one's reputation, rather than to one's commercialized business interest, is not actionable in a claim for commercial disparagement. *See, e.g.*, 31 P.L.E. Libel and Slander § 14 (2013) (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 ...."); *Ashoff*, 23 Pa. D. & C.4th at 306 (losses associated with an alleged harm to the plaintiff's reputation are recoverable as defamation, not disparagement). Indeed, the *Menefee* court took pains to distinguish an action for commercial disparagement from "the publication of matter which is defamatory to the personal reputation of another." 458 Pa. at 52-53, 329 A.2d at 219-20. Although the *Menefee* court held that the decedent had "an intangible property interest in his broadcasting personality," *id.* at 54, 329 A.2d at 220, the broadcasting personality

was the decedent's *career*—he was a *radio personality.* Indeed, the court finishes that very sentence by concluding: "a statement that *his program* could no longer attract satisfactory ratings would tend to disparage that property interest." *Id.* (emphasis added).

In contrast, the Estate's claim focuses on purported harm to Coach Paterno's "'property interest in *his name and reputation.*'" Order 19 (emphasis added) (quoting Compl. ¶ 131); *see also* Am. Compl. ¶¶ 145-46 (asserting harm to the "property interest in [Coach Paterno's] name and reputation"). The corollary of *Menefee* to the case *sub judice* would be if the NCAA Defendants had maligned Coach Paterno's skill as a football coach (while Coach Paterno was still alive). This they did not do. Nearly every allegedly defamatory statement affecting one's moral character would make that person's goods less marketable or make him or her less employable. The Estate is asserting a classic defamation argument masked as commercial disparagement, and it should necessarily fail.

Furthermore, neither party has identified *any other* authority aside from *Menefee*—a case that is over four decades old—that even comes remotely close to addressing commercial disparagement in the context of one's personal reputation. It is not surprising that *Menefee* stands alone. Although unclear, it appears that Mr. Menefee originally brought a *defamation* claim. The trial court subsequently dismissed the claim because defamation claims could not survive one's death. 458

Pa. at 50, 329 A.2d at 218. Due to the seeming inequity of dismissing a claim when the plaintiff died *one day* before trial, *id.*, the Pennsylvania Supreme Court appears to have attempted to salvage the claim by recasting it as one for commercial disparagement. *See id.* at 53-54, 329 A.2d at 220 ("The question ... is, do the appellant's complaints make out a cause of action for untruthful disparagement?"). This highly unique and specific scenario is absent here.

VII. PLAINTIFFS' AMENDED COMPLAINT FAILS TO CONFORM TO PA. R. CIV. P. 1024(A) AND THEREFORE MUST BE DISMISSED.

Rule 1024 of the Pennsylvania Rules of Civil Procedures requires verification of "[e]very pleading containing an averment of fact not appearing of record in the action." The rule requires verification of an amended complaint regardless of whether the original complaint was verified. *See, e.g., Johnston v. Shapp*, 57 Pa. D. & C.2d 753, 754 (Ct. Com. Pl. 1972) ("The failure of the amended complaint to contain a verification is properly raised by preliminary objection."). Here, Plaintiffs failed to verify their Amended Complaint, which pleads new facts not appearing in the record. This is a blatant violation of Rule 1024(a) and grounds for dismissal of the Amended Complaint. *See, e.g.*, Pa. R. Civ. P. 1028(a)(2) (providing for Preliminary Objections where a pleading fails to conform to law or rule of court); *Gracey v. Cumru Twp.*, No. 2604 C.D. 2010, 2011 WL 10878246, at *3 (Pa. Commw. Ct. Dec. 27, 2011) (affirming trial court's dismissal of complaint because the "complete absence of a verification falls so far short of the requirement imposed

by Rule 1024 that the instant complaint is patently insufficient"); *Atl. Credit & Fin., Inc. v. Giuliana*, 2003 PA Super 259, ¶ 10, 829 A.2d 340, 344 (2003) ("[T]here is no doubt but that the verification attached to the complaint in the instant case falls so far short of the statutory mandate that the verification is wholly defective and inadequate to support entry of a ... judgment against appellants.").

CONCLUSION

For the foregoing reasons, Plaintiffs' Amended Complaint should be dismissed.

Respectfully submitted,

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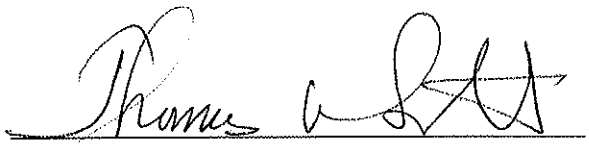
Dated: March 17, 2014



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