IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO;

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

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

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President of the NCAA;

And

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

Defendants,

And

PENNSYLVANIA STATE UNIVERSITY,

Defendant.

Civil Division

Docket No. 2013-2082

MOTION TO MODIFY THE PROTECTIVE ORDER
Filed on Behalf of the Plaintiffs

Counsel of Record:
Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161
Email: tjw@goldbergkatzman.com

Wick Sollers (admitted *pro hac vice*)
L. Joseph Loveland (admitted *pro hac vice*)
Mark A. Jensen (admitted *pro hac vice*)
Patricia L. Maher (admitted *pro hac vice*)
Ashley C. Parrish (admitted *pro hac vice*)
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
Email: wsollers@kslaw.com
jloveland@kslaw.com
pmaher@kslaw.com
aparrish@kslaw.com

Paul V. Kelly (admitted *pro hac vice*)
John J. Commisso (admitted *pro hac vice*)
JACKSON LEWIS, P.C.
75 Park Plaza
Boston, MA 02116
Telephone: (617) 367-0025
Email: paul.kelly@jacksonlewis.com
john.commisso@jacksonlewis.com

MOTION TO MODIFY THE PROTECTIVE ORDER

AND NOW COMES the Plaintiffs, by and through their counsel, and moves This Honorable Court to modify the Protective Order entered in the matter, and in support thereof, avers the following:

1. This Court, pursuant to its September 11, 2014 Opinion and Order, determined that the Protective Order covering discovery in this matter would include paragraph 5, subsection (a), to which the Plaintiffs had objected.

2. Paragraph 5, subsection (a) of the Protective Order reads as follows:

> **5. Protection of Documents and Information**
>
> **(a) General Protections.** All pre-trial discovery materials in this litigation (including materials that are not designated as constituting Confidential Information of Highly Confidential – Attorneys' Eyes Only – Information) shall be used solely for the purpose of preparing and prosecuting the parties' respective cases, and shall not be used or disclosed for any other purpose. Nothing in this Order, however, limits; (i) the Parties' use of materials not designated as Confidential Information or Highly Confidential – Attorneys' Eyes Only – Information that the Parties, in good faith, have made part of the judicial record in this case; or (ii) the use of information a Party legitimately obtained through public sources.

3. In arguing for the inclusion of the aforementioned subparagraph, the Defendants requested the provision on the grounds that the public has no right to access pre-trial discovery materials.

4. The NCAA Defendants represented to the Court that the subsection would confirm the parties' obligations to handle all pre-trial discovery materials, whether designated as confidential or not, appropriately and not engage in abuses of the discovery process. *See* Statement by the NCAA, Dr. Mark Emmert and Dr. Edward Ray Regarding the Joint Motion for a Protective Order at 3.

5. The NCAA Defendants further argued that they had a concern that during the pre-trial discovery phase, Plaintiffs will inappropriately *selectively* provide private discovery materials to the media, post them on their website, or otherwise release these materials *en masse*. Id. at 7-8 (emphasis added).

6. As the Court is aware, there is additional litigation against the NCAA pending in this Commonwealth addressing the validity of the Consent Decree. *See Corman v. NCAA*, Commonwealth Court No. 1-MD-2013 ("*Corman*").

7. The Commonwealth Court in *Corman* declined to enter a protective order.

8. Discovery in the *Corman* matter is further advanced than in this case.

9. In that the underlying factual issues are similar between this case and *Corman*, it can be anticipated that much, if not all, the discovery materials will overlap between the two actions.

10. On Friday, November 14, 2014, the NCAA selectively released extensive discovery materials *en masse* created in the *Corman* matter.

11. The NCAA is now engaging in exactly the same conduct it successfully sought to preclude the Plaintiffs from engaging in.

12. In issuing the Protective Order, this Court recognized a potential for tainting the jury pool should discovery materials be disseminated in a public fashion. September 11, 2014 Opinion at 32-33.

13. As a result of the NCAA's actions of using the *Corman* suit to post selective discovery materials to sway public opinion, and the Plaintiffs being precluded from doing so

pursuant to subparagraph (a) of paragraph 5, the potential for tainting a jury pool would occur only to the detriment of the Plaintiffs.

14. Plaintiffs will be unfairly prejudiced if they are required to adhere to 5(a) of the Protective Order and the Defendants are allowed to circumvent it by claiming their dissemination of discovery materials is not occurring in conjunction with this case, but instead, *Corman*.

15. Counsel for Plaintiffs contacted counsel for the NCAA Defendants and Defendant Pennsylvania State University to seek their concurrence with this Motion. The Defendants do not concur.

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order rescinding the requirement that Section 5(a) be included in the Protective Order.

Respectfully submitted,

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 201
P.O. Box 6991
Harrisburg, PA 17112

Wick Sollers
L. Joseph Loveland
Patricia L. Maher
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006

Counsel for the Estate of Joseph Paterno

Paul V. Kelly
John J. Commisso
JACKSON LEWIS LLP
75 Park Plaza

Boston, MA 02116
Counsel for Plaintiffs Al Clemens, William Kenney and Joseph V. ("Jay") Paterno

MEMORANDUM IN SUPPORT OF MOTION TO MODIFY THE PROTECTIVE ORDER

The Plaintiffs, the Estate of Joseph Paterno, et al., respectfully request that the Court modify the protective order in this case to strike paragraph 5(a) and permit Plaintiffs to disclose materials obtained in discovery. In light of the NCAA's decision to publicly disclose materials covered by the protective order, the blanket restriction imposed by that provision is no longer necessary or appropriate.

When the Court entered the protective order, it included paragraph 5(a) — *at the NCAA Defendants' express request* — because they were purportedly concerned that pretrial discovery materials would be used "to attempt to create adverse publicity aimed at manipulating the public perception of this matter." Statement by the National Collegiate Athletic Association, Dr. Mark Emmert, and Dr. Ed Ray Regarding the Joint Motion for Protective Order, Ex. A at 8. The NCAA Defendants are now doing precisely that — they are selectively disclosing discovery materials to the media and waging a misleading public-relations campaign in an attempt to manipulate public perceptions. The result is a perversely unfair situation — the public is being deceived by the NCAA Defendants, the full truth about the NCAA Defendants' misconduct is being covered up, and Plaintiffs are unable to respond in kind to the NCAA Defendants' selective public disclosures. To remedy this situation, and for the reasons explained in more detail below, the Court should modify the protective order.

BACKGROUND

The Protective Order In This Case. The protective order applicable to discovery in this case was entered pursuant to the Court's September 11, 2014 Opinion and Order. As the Court will recall, when the parties failed to agree on a provision that would apply to all pretrial

discovery materials, they submitted a protective order to the Court with statements of their respective positions.

The disputed provision, paragraph 5(a), states:

5. Protection of Documents and Information.

> **(a) General Protections.** All pre-trial discovery materials in this litigation (including materials that are not designated as constituting Confidential Information of Highly Confidential – Attorneys' Eyes Only – Information) shall be used solely for the purpose of preparing and prosecuting the Parties' respective cases, and shall not be used or disclosed for any other purpose. Nothing in this Order, however, limits; (i) the Parties' use of materials not designated as Confidential Information or Highly Confidential – Attorneys' Eyes Only – Information that the Parties, in good faith, have made part of the judicial record in this case; or (ii) the use of information a Party legitimately obtained through public sources.

Plaintiffs objected to this provision because it did not meet the "good cause" standard of Pa. R.C.P. No. 4012 and constituted an unnecessary gag order contrary to public policy. In contrast, the NCAA Defendants urged the Court to include the disputed provision, arguing that even documents that do not qualify for protection under the terms of the protective order and Pennsylvania law should be protected from "public disclosure," citing their "concern that during the pretrial discovery phase, Plaintiffs [would] *inappropriately and selectively* provide private discovery materials to the media, post them on their website (www.paterno.com) or otherwise release these materials *en masse*." Ex. A at 7–8 (emphasis added).

The Court accepted the NCAA Defendants' position and entered a protective order that includes paragraph 5(a) and restricts the parties' use of pretrial discovery materials. *See* Protective Order ¶ 5(a). As a result, the protective order allows the parties to use materials "legitimately obtained through public sources" and to make documents obtained through discovery part of the "judicial record." *Id.* It does not, however, permit the parties to inform the

public of materials disclosed through discovery by (for example) posting those materials on websites or releasing them to the media.

***The* Corman *Litigation*.** In a separate action in Commonwealth Court against two of the same defendants as this case — the NCAA and Penn State — Pennsylvania Senator Jake Corman and Treasurer Robert McCord have challenged the Consent Decree imposed on Penn State by the NCAA. In that case, the Commonwealth Court declined to enter a protective order. *See Corman v. NCAA*, Commw. Ct. No. 1 MD 2013 (Oct. 15, 2014), Ex. B. As a result, the parties in *Corman v. NCAA*, are not restricted in their use of pretrial discovery materials.

Like the Estate in this action, the plaintiffs in *Corman* have made discovery requests for documents and information related to the investigation leading up to the entry of the Consent Decree imposed on Penn State by the NCAA. In addition, the Estate in this action has requested that the NCAA produce all documents that it has produced to the *Corman* plaintiffs, and the NCAA has agreed to do so. Ex. C, August 4, 2014 letter from P. Maher to B. Kowalski; Ex. D, November 6, 2014 email from B. Kowalski to S. Doran. Consistent with the terms of the protective order, however, the Estate has not shared with the *Corman* plaintiffs (or any other third party) any materials it has received through discovery in this case.

***The NCAA Defendants' Selective Public Disclosure*.** On November 14, 2014, the NCAA made precisely the type of public disclosure of information that it described as "unnecessary and improper." *See* Ex. A at 7. In particular, the NCAA has *posted on its website* more than 20 excerpts from documents produced in discovery and depositions taken in the *Corman* case. *See* http://www.ncaa.org/about/resources/media-center/news/documents-clarify-penn-state-consent-decree, Ex. E. The excerpts link to full copies of the documents, none of which is marked "Confidential," even though some of the documents were marked as

"Confidential" when the NCAA Defendants produced them to the Plaintiffs in this case. *See, e.g.*, Ex. F, [NCAA00006345] and Ex. G, [NCAA00011334].[1] The excerpts selectively include statements favorable to the NCAA's position with respect to the process that led to the Consent Decree at issue in both *Corman* and the instant case.

In other words, having asked this Court to impose a protective order that governs all discovery materials in this case, including discovery materials that no party contends are confidential, the NCAA Defendants are now selectively disclosing those materials to the media and general public because they believe it is to their advantage to do so. Confronted by the release of a number of damaging emails and other materials by the *Corman* plaintiffs, the NCAA states on the "Media Center" page of its website that it wants to provide "context" for those documents. According to the NCAA, the hand-selected emails and deposition excerpts it has posted "fully explain the appropriateness of the NCAA's decision in response to the Sandusky scandal and the advocacy of Penn State's counsel regarding NCAA actions." Ex. E.

In fact, the selective documents posted by the NCAA are prejudicial, incomplete, and misleading. For example, the NCAA's website includes disparaging references to parties, like the Plaintiffs, that oppose the NCAA's ongoing misconduct. The website suggests that the position of those parties is "proof of the problem with the culture in the first place," which according to the NCAA led to the criminal conduct by Jerry Sandusky. Ex. E. In support of that

[1] Plaintiffs have not attached as exhibits to this motion any documents designated as "Confidential" by the NCAA when they were produced in this case, even though they have been produced elsewhere without that designation. Where a reference is made to a document the NCAA designated "Confidential" in this case but the NCAA also produced the same document in *Corman* that is not subject to the restriction of a protective order, the *Corman* version with the NCAAJC Bates prefix is attached as the exhibit. The Bates number of the "Confidential" document produced in this case is also provided in brackets [NCAA0000xxxx]. In some instances, the NCAA marked documents produced in *Corman* "Confidential" even though there is no applicable protective order.

assertion, the website selectively discloses materials that it contends show that the NCAA Defendants acted within their authority when they imposed the Consent Decree on Penn State. In fact, documents produced in discovery show that that the NCAA staff realized at the time that the NCAA lacked jurisdiction to proceed as it did with Penn State and viewed their position with regard to Penn State as a "bluff." Ex. H, NCAAJC00019739 [NCAA00020323].

The first email listed on the NCAA's website is a July 23, 2012 email from Penn State's outside counsel, Gene Marsh, to the NCAA, purporting to show that Penn State believed that accepting the Consent Decree rather than proceeding through a traditional infractions process was the "right choice." Ex. I. But later emails from Mr. Marsh show that he expressed concern and then anger at the NCAA for misleading him and Penn State into believing that the alternative to acceptance of the Consent Decree would be a multi-year "death penalty" (*i.e.*, a total ban on football). Following reports that the Chair of the NCAA Executive Committee, Ed Ray, stated after the Consent Decree was finalized that imposition of the death penalty was never approved, Mr. Marsh sent a series of emails conveying anything but satisfaction with the process that had resulted in the Consent Decree. *See* Ex. J, NCAA00024276 ("Read Mark Emmet's [sic] comments in the sit down with Pat Forde — Yahoo — and the comments last night re the traditional infractions process. So which is it? Please get your act together."); Ex. K, NCAAJC00000658 [NCAA00006455] ("My folks are really upset . . . Ray should publicly fix his comments."); Ex. L, NCAA00027027 ("If this really is from Ed Ray, then what was told to me on the phone that week WAS overselling."); Ex. M, NCAA00010373 ("If you determine the comments I forwarded are in fact from Ed Ray, I am to the point of needing to have a conversation with him to get his story on what happened and where the votes were.").

As another example, the NCAA's website selectively quotes the deposition testimony of one of its vice presidents, Kevin Lennon, that "Penn State willingly entered into a consent decree with the NCAA." But other documents produced in discovery demonstrate that no negotiation occurred and that the terms of the Consent Decree were dictated by the NCAA and forced upon Penn State. Those documents show that NCAA officials believed that imposing the Consent Decree on Penn State was comparable to "shooting road kill." Ex. N, NCAAJC00015873 [NCAA00034671]. Indeed, when the NCAA's general counsel sent a draft of the Consent Decree to counsel for Penn State, he advised that "major substantive changes will likely not be acceptable." Ex. O, NCAAJC00026859 [NCAA00006303]. He stated that he would discuss "glaring inconsistencies or typos, nothing more." Ex. P, NCAAJC00000519 [NCAA00006312]. Similarly, another NCAA vice president assured the Division I Conference Commissioners that the action taken by the Executive Committee with respect to Penn State "was not a negotiation." Ex. Q, NCAA00008051.

ARGUMENT

Plaintiffs do not seek in this motion to prevent the NCAA Defendants from selectively disclosing documents and materials on their website. But the simple fact of the matter is that, contrary to the representations the NCAA Defendants previously made to the Court to support their request for a protective order, the NCAA is now using pretrial discovery materials "to attempt to create adverse publicity aimed at manipulating the public perception of this matter." *See* Ex. A at 8. Moreover, because the NCAA is trying to manipulate public perceptions, the playing field in this case is no longer level. In its continued effort to prevent the full truth from coming to light, the NCAA is publicly saying whatever it chooses and selectively publishing whatever pretrial discovery materials suits its needs. Yet Plaintiffs cannot fully respond publicly

because their hands are tied by a protective order that the NCAA Defendants contended was necessary to prevent this case from being litigated in the court of public opinion.

There is a simple and fair solution to this perverse situation: The Court should modify the protective order to strike paragraph 5(a) and eliminate any restrictions that prevent Plaintiffs from disclosing materials produced in discovery that were not marked "Confidential" or "Highly Confidential." There is no conceivable basis for tying the hands of one party to litigation while allowing another party to use selective portions of the same documents to wage a misleading public-relations campaign.

To the contrary, when the Court entered the protective order, it noted its concern that public disclosures could risk tainting the jury pool. *See* Op. at 32–33. With the NCAA's disclosures of pretrial discovery materials published on their website and available to the public on its Media Center webpage, that influence on potential jurors is unavoidable. Requiring the Plaintiffs to continue to comply with the restrictions of paragraph 5(a) means that potential jurors will be exposed to only the NCAA's selective disclosures favorable to its position. Accordingly, now that the NCAA Defendants have deliberately undermined the restriction this Court put in place *at the NCAA's own urging*, Plaintiffs respectfully request that the Court modify the protective order. Modifying the protective order's restrictions on pretrial discovery is necessary to restore a level playing field and to ensure that the public has fair access to the full range of information concerning the NCAA Defendants' egregious and ongoing misconduct in this matter.

CONCLUSION

Plaintiffs respectfully requests that the Court modify the protective order applicable to pretrial discovery in this case by striking paragraph 5(a).

Date: November 20, 2014

Respectfully submitted,

By: _____

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 201
P.O. Box 6991
Harrisburg, PA 17112

Wick Sollers
L. Joseph Loveland
Ashley C. Parrish
Patricia L. Maher
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006

Counsel for Plaintiff Estate of Joseph Paterno

Paul V. Kelly
John J. Commisso
Jackson Lewis, P.C.
75 Park Plaza
Boston, MA 02116

Counsel for Plaintiffs Al Clemens, William Kenney, and Joseph V. ("Jay") Paterno

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MOTION TO MODIFY THE PROTECTIVE ORDER AND SUPPORTING MEMORANDUM** were served this 20th day of November, 2014 by email and first class mail to the following:

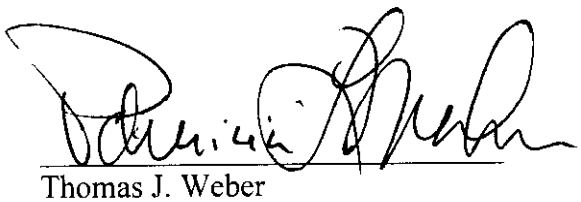
Thomas W. Scott
Killian & Gephart
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Email: tscott@killiangephart.com

Everett C. Johnson, Jr.
Sarah Gragert
Brian E. Kowalski
Latham & Watkins LLP
555-11th Street, N.W.
Suite 1000
Washington, D.C. 20004-1304
Email: Everett.Johnson@lw.com
sarah.gragert@lw.com
brian.kowalski@lw.com

Paul V. Kelly
John J. Commisso
Jackson Lewis LLP
75 Park Plaza
Boston, MA 02116
Email: Paul.kelly@Jacksonlewis.com
John.commisso@Jacksonlewis.com

Daniel I. Booker
Jack B. Cobetto
Donna M. Doblick
Reed Smith LLP
225 Fifth Avenue
Suite 1200
Pittsburgh, PA 15222
dbooker@reedsmith.com
jcobetto@reedsmith.com
ddoblick@reedsmith.com

Joseph P. Green
Lee Green & Reiter Inc.
115 East High Street
Lock Drawer 179
Bellefonte, PA 10823-0179
jgreen@lmgrlaw.com



Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112

Wick Sollers
L. Joseph Loveland
Patricia Maher
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500

Counsel for Plaintiff Estate of Joseph Paterno

EXHIBIT A

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

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

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 GRDNER, 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.

Docket No.: 2013-2082

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

Type of Pleading:
Statement by the National Collegiate Athletic Association, Dr. Mark Emmert, and Dr. Edward Ray Regarding the Joint Motion for a Protective Order

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

Counsel of Record for this Party:

Thomas W. Scott, Esquire
Killian & Gephart, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
TEL: (717) 232-1851
FAX: (717) 238-0592
tscott@killiangephart.com
PA I.D. Number: 15681

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, et al., Plaintiffs, v. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION et al. Defendants, And THE PENNSYLVANIA STATE UNIVERSITY, Nominal Defendant.	)	Civil Division Docket No. 2013-2082

STATEMENT BY THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, DR. MARK EMMERT, AND DR. EDWARD RAY REGARDING THE JOINT MOTION FOR A PROTECTIVE ORDER

The National Collegiate Athletic Association ("NCAA"), Dr. Mark Emmert, and Dr. Edward Ray (collectively, the "NCAA Defendants") hereby request that the Court enter the Protective Order that is attached as Exhibit A to the parties' Joint Motion for Entry of a Protective Order ("Joint Motion"), and file this Statement in support of that request.

INTRODUCTION

Following the May 19, 2014 hearing, the parties have made great strides in reaching agreement on the provisions of the proposed protective order in this

matter—including the manner in which "Confidential" and "Highly Confidential" materials will be treated by the parties and their counsel.[1] However, there remains a single disputed provision because Plaintiffs refuse to agree that the use of pre-trial discovery materials produced in this case, including those that are not designated as "Confidential" or "Highly Confidential," should be limited to the purpose of preparing and prosecuting the parties' respective cases in court.

The U.S. Supreme Court has made clear that "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes," and that litigants do *not* have an "unrestrained right to disseminate information that has been obtained through pretrial discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31, 34-35 (1984). The NCAA Defendants contend that this basic and uncontroversial principle of law should be memorialized in the Protective Order governing discovery in this case. Accordingly, the NCAA Defendants and the Pennsylvania State University have proposed that the Protective Order contain the following provision at Paragraph 5(a):

---

[1] In particular, the Parties have agreed that "Confidential Documents" will be protected from disclosure to any third party other than the parties to the litigation, their counsel, and the Court, with certain limited exceptions (to include, for example, certain identified consultants, experts and contractors and deposition witnesses who have agreed to be bound by the Protective Order). "Highly Confidential Documents" will be subject to these same restrictions, and in addition will be protected from disclosure to the parties themselves.

> "**General Protections.** All pre-trial discovery materials in this litigation (including materials that are not designated as constituting Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information) shall be used solely for the purpose of preparing and prosecuting the Parties' respective cases, and shall not be used or disclosed for any other purpose. Nothing in this Order, however, limits: (i) the Parties' use of materials not designated as Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information that the Parties, in good faith, have made part of the judicial record in this case; or (ii) the use of information a Party legitimately obtained through public sources."

See Appendix A to Joint Motion. This provision would confirm the Parties' obligations to handle all pre-trial discovery materials, whether designated as confidential or not, appropriately and not engage in abuses of the discovery process. This provision is narrowly tailored such that it does not restrict the Parties' use of non-confidential materials outside the litigation once they have been made, in good faith, part of the judicial record, nor does it restrict the use of information obtained from public sources.

Ordinarily, it may not be necessary for a protective order to address the appropriate treatment of documents that are *not* designated as "Confidential." But here, Plaintiffs have made unmistakably clear their intent to use discovery in this litigation as a means to obtain private documents that are not public and that they would not otherwise have access to merely so that they can subsequently disclose them freely outside the litigation, without regard to any prejudice or harm to the Defendants or third parties. The full record in this case will demonstrate that

Plaintiffs' claims are fundamentally meritless, and that the NCAA and Penn State responded to an unprecedented tragedy with a unique, but valid approach (*i.e.*, the Consent Decree and Athletics Integrity Agreement), consistent with their respective authority. But pending resolution of this judicial proceeding, this Court should not condone Plaintiffs' apparent plans to selectively and prejudicially disclose private materials obtained solely through pre-trial discovery.

ARGUMENT

Paragraph 5(a) of the Protective Order supported by the NCAA Defendants and Penn State is consistent with well settled law and ensures that the pre-trial discovery process is smooth and free from the substantial risk of abuse. There can be no dispute that pre-trial discovery materials may be used for "the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes...." *Seattle Times Co. v. Rhinehart*, 467 U.S. at 34-35. Indeed, while liberal discovery is allowed for the purpose of preparing a litigant's case, "*a litigant has no right to disseminate private documents gained through the discovery process.*" *See MarkWest Liberty Midstream & Res., LLC v. Clean Air Council*, 71 A.3d 337, 345 n.15 (Pa. Commw. Ct. 2013) (emphasis added) (citing *Seattle Times*, 467 U.S. at 32-34).

Moreover, both federal and Pennsylvania law recognize that this pretrial discovery process is "essentially a private process" among the parties. *Stenger v.*

Lehigh Valley Hosp. Ctr., 382 Pa. Super. 75, 89, 554 A.2d 954, 961 (1989) (citing *Seattle Times*, 467 U.S. at 33 ("pretrial depositions and interrogatories are not public components of a civil trial"); *Gannett Company v. DePasquale*, 443 U.S. 368, 396 (1979) ("it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants")).

To be sure, litigants have a right to enter discovery materials into the judicial record, and the public has a right to access non-confidential materials once they are part of the record. But in other than materials legitimately appended to pleadings or otherwise made part of the record, "private documents collected during discovery are not judicial records" and there is no right of or need for public access to such materials. *Stenger*, 382 Pa. Super. at 89 (citing *In re Alexander Grant and Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986)); *see also Hutchison v. Luddy*, 398 Pa. Super. 505, 515-16, 581 A.2d 578, 583 (1990) *rev'd on other grounds*, 527 Pa. 525, 594 A.2d 307 (1991) (per curiam) ("In the aftermath of *Stenger*, it appears that this Commonwealth does not view discovered information produced in the preparation of civil litigation as material to which the public has a common law, presumptive right of access."); *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) ("Generally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access

to unfiled discovery.").

This is for good reason. As the Pennsylvania Superior Court has recognized, if "discovery information were to be readily available to the public, the detrimental consequences to the discovery process would be grievous," and, "[a]s a result, the entire litigation process would suffer." *Stenger*, 382 Pa. Super. at 89. Indeed, Pennsylvania has even recognized that "nonparty access [to discovery materials] in controversial cases threatens the right of the litigants to a fair trial. *It is essential that the court ensure this right by preventing an unfair presentation, prior to trial, of the facts and issues underlying a controversy.*" *Id.* at 90 (emphasis added). The court has explicitly recognized its authority and responsibility to exclude nonparties from access to judicial records "to minimize the danger of an unfair trial by adverse publicity." *Katz v. Katz*, 356 Pa. Super. 461, 468, 514 A.2d 1374, 1377 (1986) (citing *In re National Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981)). It makes no difference whether nonparties seek access to unfiled discovery, or the parties themselves inappropriately disclose it outside the judicial process. The result is the same, and protecting unfiled, pre-trial discovery information from inappropriate public disclosure preserves the functioning of the discovery process and is critical to ensuring that controversial, high-visibility cases are decided equitably.

Here, many of the documents that Plaintiffs have requested are confidential

and qualify for protection from public disclosure under the agreed upon provisions of the Protective Order. Other documents may not qualify for such protection under the Protective Order and Pennsylvania law—but these documents should nonetheless be protected from unnecessary and improper public disclosure, particularly during the pre-trial phase. In this case, Plaintiffs have requested a very substantial set of documents and information from the NCAA Defendants and Penn State—many of which, while responsive to the discovery requests, are only tangentially (at best) related to the issues in this litigation, and may well contain private information about matters far afield of this litigation. Defendants should not face the possibility that Plaintiffs, for purposes unrelated to the preparation and trial of this case, will turn over to the public realm a significant set of documents that have not been designated as "Confidential" by the Defendants. But Plaintiffs' own public statements make clear there is a significant risk of just that:

- Paterno family spokesman, Dan McGinn, recently stated: "For everyone who wants to know the truth about the Sandusky tragedy ..., we must do what is necessary to bring the full record to light."[2]
- Following this Court's January 2014 order, Mr. Sollers declared: "With this ruling the bright light of legal discovery will finally shine on the facts and records of all parties involved."[3]

---

2 *Penn State Objects to Paterno Family's Subpoena Request in NCAA Lawsuit*, Onward State, http://onwardstate.com/2014/03/17/penn-state-objects-to-paterno-familys-subponea-request-in-ncaa-lawsuit/ (last visited July 3, 2014).

3 Kevin Horne, *Judge Rules Parts of Paterno-NCAA Lawsuit Have Standing*, Onward State, https://onwardstate.com/2014/01/07/judge-rules-parts-of-paterno-

- Scott Paterno has also issued the following statements via Twitter: "Ladies and Gentlemen - the Court just gave us Discovery in Paterno vs. NCAA. Here we go";[4] "Freeh report is garbage, and that will be more clear as we move through discovery ....";[5] "That is why discovery is so critical; that transparency is so necessary. Freeh present[ed] an unchallenged one-sided biased view."[6]

Defendants thus have a well-founded concern that during the pretrial trial discovery phase, Plaintiffs will inappropriately and selectively provide private discovery materials to the media, post them on their website (www.paterno.com), or otherwise release these materials *en masse*.

The NCAA believes this litigation will establish the baseless nature of Plaintiffs' claims. However, the NCAA Defendants should not be subjected to selective and prejudicial disclosures of documents by Plaintiffs, as they use materials obtained through discovery to attempt to create adverse publicity aimed at manipulating the public perception of this matter. Information learned through discovery belongs in the courtroom, not on Twitter. Nor should the significant and legitimate privacy interests of the NCAA Defendants and Penn State be left unprotected and at the whim of the Plaintiffs.

---

ncaa-lawsuit-have-standing/ (last visited July 3, 2014).

[4] Scott Paterno, Twitter (Jan. 7, 2014 12:57 PM), https://twitter.com/ScottPaterno/status/420660599106707456.

[5] Scott Paterno, Twitter (Apr. 25, 2014 8:06 AM), https://twitter.com/ScottPaterno/status/459709996847362048.

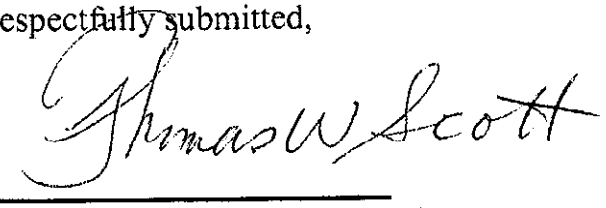
[6] Scott Paterno, Twitter (May 8, 2014 4:11 AM), https://twitter.com/ScottPaterno/status/464361870556536832

Paragraph 5(a) of the NCAA Proposed Order would protect the Defendants from such potential abuses. At the same time, Section 5(a) would not trammel on the appropriate use of discovery materials or constitute a *de facto* sealing of the entire case. First, documents that are made part of the judicial record in good faith are not covered by Paragraph 5(a). Thus, the public will have access to the materials that are actually relevant to the Court's decisions in this case, and Plaintiffs will not be precluded from publicly disclosing components of the official judicial record. Second, Paragraph 5(a) in no way limits Plaintiffs' access to any discovery information. Third, Paragraph 5(a) likewise does not limit in any manner Plaintiffs' use of documents or information that are obtained from public sources. In sum, Paragraph 5(a) carefully balances the parties' privacy interests and rights to fair trial, without prejudicing Plaintiffs in any way whatsoever, while ensuring public access to judicially filed materials—the materials that are actually pertinent to the litigation. Plaintiffs have not and cannot present any justifiable reason to oppose these protections.

CONCLUSION

For the foregoing reasons, the NCAA Defendants respectfully request that the Court enter the Protective Order attached as Exhibit A to the parties' Joint Motion for Entry of a Protective Order.

Respectfully submitted,



Date: July 3, 2014

Thomas W. Scott (No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Everett C. Johnson, Jr. (admitted *PHV*, DC No. 358446)
Brian E. Kowalski (*PHV pending*, DC No. 500064)
Sarah M Gragert (admitted *PHV*, DC No. 977097)
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Email: Everett.Johnson@lw.com
Brian.Kowalski@lw.com
Sarah.Gragert@lw.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing Statement by the NCAA, Dr. Mark Emmert and Dr. Edward Ray Regarding the Joint Motion for a Protective Order, by First Class Mail and email to:

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161
Email: tjw@goldbergkatzman.com

Wick Sollers
L. Joseph Loveland
Mark A. Jensen
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
Email: wsollers@kslaw.com
jloveland@kslaw.com
mjensen@kslaw.com
aparrish@kslaw.com

Paul V. Kelly
John J. Commisso
JACKSON LEWIS P.C.
75 Park Plaza
Boston, MA 02116
Telephone: (617) 367-0025
Email: Paul.Kelly@jacksonlewis.com
John.Commisso@jacksonlewis.com

Counsel for Plaintiffs

Daniel I. Booker
Jack B. Cobetto
Donna M. Doblick
William J. Sheridan
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: (412) 288-3131
Email: dbooker@reedsmith.com
jcobetto@reedsmith.com
ddoblick@reedsmith.com
wsheridan@reedsmith.com

Michael T. Scott
REED SMITH LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103
Telephone: (215) 851-8100
Email: mscott@reedsmith.com

Joseph P. Green
LEE, GREEN & REITER, INC.
115 East High Street
P.O. Box 179
Bellefonte, PA 16823-0179
Telephone: (814) 355-4769
Email: jgreen@lmgrlaw.com

Counsel for The Pennsylvania State University

Via FedEx Overnight Delivery
The Honorable John B. Leete
Senior Judge, Specially Presiding
Potter County Courthouse, Room 30
One East Second Street
Coudersport, PA 16915

Dated: July 3, 2014

Thomas W. Scott
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

EXHIBIT B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jake Corman, in his official capacity as Senator from the 34th Senatorial District of Pennsylvania and Chair of the Senate Committee on Appropriations; and Robert M. McCord, in his official capacity as Treasurer of the Commonwealth of Pennsylvania, Plaintiffs	:	
v.	:	
The National Collegiate Athletic Association, Defendant	:	
v.	:	
Pennsylvania State University, Defendant	:	No. 1 M.D. 2013

MEMORANDUM AND ORDER

AND NOW, this 15th day of October, 2014, upon consideration of Defendants Pennsylvania State University (PSU) and the National Collegiate Athletic Association's (NCAA) Motion for Entry of A Protective Order Regarding the Confidentiality of Certain Discovery Materials (Motion) and Plaintiff Senator Jake Corman's Answer in Opposition thereto, and wherefore:

Defendants PSU and NCAA seek a protective order from this Court identical to the protective order in the case of *Paterno, et al. v. National Collegiate Athletic Association, et al.*, No. 2013-2082, currently pending in the Centre County Court of Common Pleas.

Pennsylvania Rule of Civil Procedure No. 4012(a) provides that "[u]pon motion by a party or by the person from whom discovery or deposition is sought, **and for good cause shown**, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense . . . ." Pa. R.C.P. No. 4012(a) (emphasis added). In *Dougherty v. Heller*, 97 A.3d 1257 (Pa. Super. 2014), our Superior Court explained:

> No Pennsylvania appellate court has addressed what constitutes 'good cause' in this context. *But see Seattle Times*, 467 U.S. [20,] 26 [(1984)] (referencing the state court's requirement of a factual showing of good cause); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. (Pa.) 1994) ('**Good cause is established on a showing that disclosure will work a clearly[-]defined and serious injury to the party seeking closure. The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.**'); *Constand v. Cosby*, 229 F.R.D. 472, 479 (E.D.Pa. 2005) (applying the *Pansy* standard); *Ornsteen v. Bass*, 50 Pa. D. & C.3d 371, 374-75 (Phila. [Cnty.] 1988) ('The law is clear that the determination of whether good cause does or does not exist must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel.') (quotation omitted).
>
> . . . .
>
> We have previously observed that '[t]he questions of whether disclosure is to be allowed, if protection is to be afforded, and the form of such protection, are matters to be determined according to the discretion of the court.' *Crum [v. Bridgestone/Firestone North American Tire, LLC]*, 907 A.2d [578,] 586 [(Pa. Super. 2006)]. Further, the *Seattle Times* Court approved of the broad discretion afforded trial courts by the rules:
>
> > [S]uch discretion is necessary[.] . . . The trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery. The unique character of

> the discovery process requires that the trial court have substantial latitude to fashion protective orders.
>
> *Seattle Times*, 467 U.S. at 36.
>
> Though we need not impose a rigid standard of analysis, it is self-evident that **a party seeking a protective order must, at the very least, present some evidence of substance that supports a finding that protection is necessary. Such evidence must address the harm risked, and not merely an unsubstantiated risk of dissemination[.]**

Dougherty, 97 A.3d at 1267 (emphasis added).

Defendants assert in their Motion that "[t]he Plaintiffs . . . seek discovery of documents, information, and other materials that qualify for protection from public disclosure or are otherwise required to be maintained as confidential in the ordinary course of the University's business." Motion at 4. Defendants have demonstrated no specific injury that would occur in the absence of a protective order, and have presented no evidence that this Court's protection is necessary. They have done nothing other than make a general, sweeping, non-specific and unsupported statement that the information "qualif[ies] for protection from public disclosure" or is "required to be maintained as confidential in the ordinary course of [PSU's] business." *Id.* Their assertions fall far short of the required legal standard.

Defendants specifically request this Court to enter a protective order identical to the "Stipulated Confidentiality Agreement and Protective Order" (Paterno Protective Order) entered in the *Paterno* case[1] because "[d]iscovery in this action and *Paterno* involve overlapping documents and similar concerns regarding confidentiality and privilege[.]" Motion at 4. Contrary to Defendants' assertion, the action before this Court is distinctly different from the *Paterno* case. That case

[1] A copy of the Paterno Protective Order was attached to the Motion.

involves different parties seeking different relief. Further, in the *Paterno* case, the parties stipulated to the entry of the Paterno Protective Order, with the exception of one provision which was imposed by the trial court based upon concerns not present in the instant matter.[2] Thus, after review of the 15-page Paterno Protective Order, this Court declines to apply its terms to the instant action.

For all the foregoing reasons, Defendants' Motion is denied.

Anne E. Covey

ANNE E. COVEY, Judge

Certified from the Record

OCT 15 2014

and Order Exit

[2] The plaintiffs in the *Paterno* case claimed that because there was public interest in the case, the public had a right to non-confidential information. However, the trial court concluded that "dissemination of pre-trial documents would be an abuse of the discovery process" and "the risk to contaminate the potential jury pool is high[.]" *Paterno v. NCAA*, No. 2013-2082 (Centre County, Sept. 11, 2014) (opinion and order granting Paterno Protective Order provision). In the instant action, there is no allegation that the Plaintiffs seek to disseminate discovery information, nor is there a jury pool to contaminate.

EXHIBIT C

KING & SPALDING

King & Spalding LLP
1700 Pennsylvania Ave, NW
Suite 200
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737
www.kslaw.com

Patricia L. Maher
Direct Dial: +1 202 626 5504
Direct Fax: +1 202 626 3737
pmaher@kslaw.com

August 4, 2014

Via Email and First Class Mail

Brian E. Kowalski
Latham & Watkins LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004-1304

Re: Paterno v. NCAA et al.

Dear Brian,

Thank you for making the fifth production of documents responsive to the Estate's requests that was delivered last week. A number of the documents in that production were produced in MAC OS format, which is unreadable on standard Windows-operating computers. We would appreciate it if you would produce those documents to us in PDF.

Additionally, will you please confirm that we have or will receive in productions by the NCAA all of the documents that have been produced by the NCAA in response to requests from the plaintiffs in the *Corman v. NCAA* action?

Please let me know if you have questions about either of these requests.

Sincerely,

Patricia L. Maher

EXHIBIT D

Doran, Samuel

From: Brian.Kowalski@lw.com
Sent: Thursday, November 06, 2014 10:24 AM
To: Doran, Samuel; Daniel I. Booker; ddoblick@reedsmith.com; EVERETT.JOHNSON@LW.com; jcobetto@reedsmith.com; Jensen, Mark; john.commisso@jacksonlewis.com; Loveland, Joe; Maher, Trish; Parrish, Ashley; paul.kelly@jacksonlewis.com; Sarah.Gragert@lw.com; Sollers, Wick; tscott@killiangephart.com; tjw@goldbergkatzman.com
Subject: RE: Paterno v. NCAA - correspondence

Counsel –

We very much disagree with the assertions in your letter, particularly your characterization of the emails referenced therein. But for purposes of simplifying and coordinating discovery, we will provide you with the entirety of the document productions that we made in the *Corman* litigation today.

As we have discussed, the RFPs we received in *Corman* are not entirely co-extensive with the RFPs you served on us in this case. For example, as we have discussed, the Corman RFPs ask for more information about the Endowment Task Force and the fine proceeds than you sought, and you have repeatedly indicated that you do not want us to produce those documents to you. A smaller subset of documents—including at least one of the documents referenced in your letter—were very recently produced in the *Corman* litigation in connection with our refinement and finalization of our privilege determinations (i.e., they are documents that we ultimately determined are either *not* privileged, or at least *not* privileged in their entirety). We planned to produce them to you in the very near term, but, of course, were focused on producing them in the *Corman* matter first given the compressed schedule in that case (and given that we remain in the preliminary stages of our case). In any event, these documents will be included in the productions that we provide to you today.

Please let me know if you'd like to discuss.

Regards,

Brian

Brian E. Kowalski

LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, D.C. 20004-1304
Direct Dial: +1.202.637.1064
Fax: +1.202.637.2201
Email: brian.kowalski@lw.com
http://www.lw.com

From: Doran, Samuel [mailto:SDoran@KSLAW.com]
Sent: Wednesday, November 05, 2014 1:38 PM
To: Kowalski, Brian (DC); Daniel I. Booker; Donna Doblick; Johnson, Everett (DC); Jack Cobetto; Jensen, Mark; John Commisso; Loveland, Joe; Maher, Trish; Parrish, Ashley; Paul Kelly; Gragert, Sarah (DC); Sollers, Wick; Tom Scott; Tom Webber
Subject: Paterno v. NCAA - correspondence

Counsel,

Attached please find a letter from Wick Sollers which is also being sent by first class mail.

Samuel Doran
Associate

[redacted]
T: +1 202.626.5517 | F: +1 202.626.3737 | E: sdoran@kslaw.com
1700 Pennsylvania Ave., NW | Washington, DC 20006

EXHIBIT E

Documents clarify Penn State consent decree

NCAA sets record straight on agreement

November 14, 2014 9:42am

The NCAA released a set of documents Friday that provide important context in understanding the events that led to the consent decree between the Association and Penn State University.

This context is needed because the ongoing litigation has resulted in the release of various NCAA emails and other evidence including depositions and exhibits attached to various court papers filed by Senator Corman.

"When taken out of context, some of this material creates a misleading impression of the important issues related to the consent decree between the NCAA and Penn State," said NCAA spokesperson Erik Christianson. "The NCAA believes the full story will emerge at the trial scheduled for January 2015."

The NCAA on Thursday filed a motion in Pennsylvania state court for partial summary judgment in the Corman case, urging the judge to determine that the consent decree between the Association and Penn State University was not entered into under duress.

The NCAA carefully considered how to deal with the unprecedented situation reflected in the Freeh Report. Penn State commissioned and accepted the report prior to entering voluntarily into the consent decree, rather than risk an extended enforcement investigation and potentially more severe sanctions.

The materials released today do not include any documents received from other parties through the discovery process. Many other internal documents remain subject to attorney-client privilege.

The following list outlines several important items for context:

- Penn State was advised by a team of lawyers with expertise in every area relevant to Penn State's decision whether to execute the consent decree, including the former chair of the NCAA Committee on Infractions, who advised Penn State as it "weigh[ed] accepting [the sanctions in the consent decree] versus what might come with a traditional

infractions process in an opinion," and he believed it "made the right choice." Email from Gene Marsh to David Berst and Donald Remy (July 23, 2012).

- Interactions between the NCAA and Penn State were courteous and professional. Penn State understood its options and viewed the certainty and quick resolution provided by the consent decree as preferable to the "roll of the dice" and drawn-out timing associated with the traditional enforcement process. Email from Remy to Marsh and Berst (Sept. 7, 2012).

- Counsel for Penn State advocated on its behalf regarding the consent decree and recognized that Penn State could have opted for the traditional enforcement process. Email from Marsh to Remy and Berst (July 19, 2012); Email from Marsh to Remy and Berst (July 19, 2012).

- Penn State's outside counsel specifically requested that, at the conclusion of the process, the NCAA emphasize in its public statements the "strength of feeling on the [NCAA Executive Committee and Division I Board] regarding the possible application of the death penalty" to help in "bringing the 'community' along in buying in to this." Email from Marsh to Remy and Berst (July 19, 2012).

- The NCAA allowed Penn State's leadership to "frame" the events leading to the execution of the consent decree "for its own survival," and not to correct the public perception and record that Penn State's leadership created. Email from Berst to Wally Renfro, Remy, Bob Williams, Mark Emmert, and Jim Isch (July 29, 2012).

- The NCAA enforcement staff praised and supported the actions taken by the Executive Committee in responding to the scandal at Penn State, and Penn State's outside counsel praised the press conference announcing the consent decree. Email from Julie Roe Lach to Ed Ray, Berst, Emmert, Renfro, Remy, Kevin Lennon, Williams, Isch and Bernard Franklin (July 23, 2012).

- Despite internal dialogue about the NCAA's role in responding to the Sandusky scandal at Penn State, the NCAA senior staff concluded that the action taken by the Executive Committee was appropriate, valid, and consistent with its authority to address issues impacting the "core values" of the Association. Email from Berst to the Division I Conference Commissioners Association (July 23, 2012).

Depositions of NCAA witnesses also fully explain the appropriateness of the NCAA's decision in response to the Sandusky scandal and the advocacy of Penn State's counsel regarding NCAA actions.

- "Penn State willingly entered into a consent decree with the NCAA, which is totally appropriate as a member institution. They elected to take that course of action without availing themselves of any appeal opportunities which were available to them." Deposition testimony of Kevin Lennon, NCAA vice president of academic and membership affairs (Nov. 5, 2014).

- "As to whether this was successful, you know, I see the -- what I hope is a minority view from plaintiffs' attorneys and other very vocal individuals around Penn State who simply are defending the previous culture and saying, NCAA, you shouldn't have ever done anything. You should not attack our program which is supported unconditionally. I

think that's just wrong footed, and I believe -- I hope there's actually a majority of the people in the valley who are thinking this is the dumbest thing I've ever seen, and everybody ought to be moving forward, and what Erickson did was give everybody a chance to do that in moving forward. And there have been what I hope is a minority group that simply won't accept that which, in my mind, is proof of the problem with the culture in the first place ... But the failure is in the failure to act appropriately when the time came for that to occur. So that had to change in some fashion. I believe Mark Emmert did the right thing to try. Even though I disagreed with the process in the beginning, I would testify and am that it had full -- he had full authority to try to start enforcement process [and] the Executive Committee had full authority to act under matters that are fundamental to the association. And that brings us to here today, unfortunately." Deposition testimony of David Berst, NCAA vice president of Division I governance (Nov. 11, 2014)

- "I believe it is very possible at the time in July of 2012 that as the facts proceed and are agreed upon, that a case for lack of institution control could absolutely be made." Deposition testimony of Lennon (Nov. 5, 2014).

- "Q: What was your view on the possibility of a consent decree? A: Based on what I knew at that point, I thought it appeared to be a good option for Penn State. And at that point, the NCAA Executive Committee. Q: Can you explain why you thought it was a good option? A: Because both parties were agreeing to this path as a way to resolve an important issue and a way to resolve it in what appeared to be a reasonable way by both sides." Deposition testimony of Julie Roe Lach, former NCAA vice president of enforcement (Nov. 11, 2014).

- "Q: ... Would the enforcement group have had jurisdiction based on your review of the Freeh Report and anything you read after the Freeh Report? A: ... I think based on my reading of the Freeh Report at the time, I thought there was a genuine issue for the enforcement staff to consider issuing a letter of inquiry and initiating an investigation. Q: And that was not done because the Executive Committee took jurisdiction? A: That, I never got to that point. I didn't need to because the Executive Committee and Penn State said we're going to resolve this through this appropriate pathway. Q: And what would have been the basis of the enforcement group's jurisdiction? A: Again, it's been a while since I've read the Freeh Report. But at the time, there seemed to be real questions about administrator unethical conduct ... and then also some larger institutional control issues." Deposition testimony of Roe Lach (Nov. 11, 2014).

- "Any reasonable person in an organization would consider that, in light of the facts that came forward in the Freeh Report, ...the lack of control demonstrated by the institution that they ultimately agreed to, ... the possibility that sanctions could be applied in those instances if you're asking if that's a realistic thought in conversation that could have happened, and was going -- the answer is yes." Deposition testimony of Lennon (Nov. 5, 2014).

- "Q. Is the first time conceptually what became the consent decree was discussed among anyone, was when you discussed it as a possibility, regardless of what it was called ...? A. I believe that to be the case. It may not have been the first conversation where that would occur. But the idea certainly surfaced in that, in a call with Gene [Marsh]. And he became very interested in whether there was some possible process that could be quicker than going through what I call ... the hard slog of trying to go through infractions." Deposition testimony of Berst (Nov. 11, 2014).

- "Q. Do you recall a conversation with Gene Marsh in which the substance of the communication was Penn State can accept the punishments it will get through the Executive Committee and, you know, a stipulated result, a consent decree, whatever by that point it was being called or it can go the infractions route and it runs serious risk of the death penalty? A. I don't think it was ever phrased that way. I think it was - and I think it was understood by Gene that we might not ever get to the point where we could prove a case that would finally result in the death penalty. I believe there were people interested in heading in that direction. But I would guess he didn't consider that a realistic threat. I think he knew all the problems we would have in developing the case. Q. You don't believe that Gene Marsh thought that the imposition of the death penalty was a realistic threat, if he proceeded with -- A. That isn't what I said. Q. That's why I'm trying to be clear. A. That if you went the enforcement investigation route, that there were -- I think he was as well aware as I was of the various impediments in making it to the end of that process, that at which time the death penalty could be considered. I think he knew that it was relatively unlikely we could prove the case adequately to get there. Q. Was that ever said aloud or that is your understanding of what you believe Gene knew? Did you two discuss that openly? A. Yes, and I think he even said that. Q. Something like you're going to have problems proving your case? A. Yes." Deposition testimony of Berst (Nov. 11, 2014).

- "Q. Did you believe that Gene Marsh on behalf of Penn State had the right to reject a proposal that involved Executive Committee consideration and instead opt for the infractions process? A. At every step. And I believe -- I don't know that he could do that unilaterally - his obligation I would expect would be to go back to Erickson or whoever else he was reporting to at the institution and any or all of them could take that step at any juncture. Q. And had that step been taken, assuming appropriate authority from President Erickson, would NCAA to your knowledge have honored that request and instead used the traditional infractions process? ... A. I believe that it would have, yes." Deposition testimony of Berst (Nov. 11, 2014)

- "A. There was interest in whether there is a way, was a way to avoid what I called the hard slog of the enforcement program, which I said would, in fact, be imposed or would be implemented if this didn't work. Recognizing that there was no assurance on either side, whether that would be concluded in a manner that could -- would, I guess would result in the death penalty. ... And still, you had presidents and others who were basically saying this case is one in which the death penalty ought to be applied, the so-called death penalty. And to me, this looked like the most appropriate way to move forward. If you both want to put it behind you, you want to begin to build a new culture. And if the penalties that are ultimately imposed are acceptable to all parties. Q. You agreed as a matter of NCAA bylaws that the death penalty or suspension of play could have been applied to Penn State as a penalty had it gone through the enforcement process? A. Yes." Deposition testimony of Berst (Nov. 11, 2014).

- "Q. [D]id the words you used to express that sentiment express a sentiment that Gene [Marsh], you are likely to get the death penalty if you go the infractions route or, Gene, it's on the table if you go the infractions route? A. It was probably closer to the latter, that the so-called death penalty comes into play. And there would be those that would advocate for it." Deposition testimony of Berst (Nov. 11, 2014)

- "Q: Does the suspension of play penalty, is it provided anywhere else within the bylaws other than the repeat violators provision? A: The 'other penalties as appropriate' section that exists in the major violations section of the other bylaws, I think, could encompass a discontinuation of a program. Q: So your position is then the death penalty is not limited to repeat offenders? A: I think the reason the major violations lists 'other penalties as appropriate' is to

allow the Association a wide breadth of penalties when acts were so egregious that it warrants things that aren't specifically listed or included on the existing list." Deposition testimony of Lennon (Nov. 5, 2014).

- Lennon testified that Roe "shared with me that she wasn't sure exactly how the Committee on Infractions might react or rule," but that "quite frankly, that is just a standing concern that enforcement has any time they bring allegations on infractions...." Deposition testimony of Lennon (Nov. 5, 2014).

- "Q: The next paragraph reads, quote: I characterized our approach to PSU as a bluff when talking to Mark yesterday afternoon after the call. Do you remember talking to Mark Emmert about a bluff? A: I remember talking to Mark in this time frame about the issue of if this action -- if this issue becomes an enforcement action, I have a lot of questions as to how it will play out. ... [A]t the point, I was leaning towards this very well could be an issue warranting enforcement inquiry. At that point, I had concerns of how successful would we be as an investigative unit to actually get people to talk to us to the degree and scope and breadth that the Freeh Group did. How successful would we be in getting the documents, in order to unearth facts to then decide what violations occurred that would then bring charges? So I had a question just about the likelihood of an enforcement investigation, while potentially appropriate, actually yielding charges. And then even if charges were brought, because this was an unprecedented issue, how the committee on infractions, acting as an independent judge and jury, would react to those charges. And those were the -- and I shared those questions or concerns with Mark in the sense of I don't -- I didn't know what was being communicated to Penn State because I wasn't a party to those conversations. But I wanted him to know that to me, it wasn't an automatic that this would wind up before the Committee on Infractions." Deposition testimony of Roe Lach (Nov. 11, 2014).

- "Q: The next paragraph down, you state, quote: We could try to assert jurisdiction on this issue and may be successful, but it would be a stretch. Do you remember saying that? A: No, I don't remember it. But I wrote it here. Q: Did you believe that asserting jurisdiction would be a stretch? A: Well, I think you have to read the next sentence to put it in context. Because I remember initially in November of 2011, having questions about enforcement jurisdiction as I shared earlier this morning. And then once the Freeh Report came out, to me the next sentence is a more accurate statement as to where I was at that point. I thought more about this. We could make a control argument based on ethical failures by senior leaders. It's reasonable and logical. I just wasn't sure how the committee on infractions would react to those charges because this was, for the most part, a case of new impression and it was unprecedented. So it's -- I think you've got to put that stretch in context with the overall assessment here where I was saying it actually makes sense. It just would be new. So not a stretch in terms of this doesn't make any sense. A stretch in terms of we're stretching beyond where we've been in the past, but that's because this is unprecedented." Deposition testimony of Roe Lach (Nov. 11, 2014).

- "Q: Was President Emmert any more image-conscious than prior leadership? A: I only have experience with one other leader, and that is Myles Brand, and the answer is no. Q: And you believe that pursuing allegations against Penn State would not have enhanced the association's standing with the public? ... A: I agree -- my position is that I don't believe any action was taken simply to do that. Q: Then why was action taken? A: I believe action was taken because there was clear evidence that the institution did not exercise institutional control, and that lack of institutional control led to young boys being raped for over a period of 10 years. Q: Where would that evidence come from? A: The evidence came from both the – what had happened on the indictment, and what we would find later was

included in the Freeh Report, which the university accepted." Deposition testimony of Bob Williams, NCAA senior vice president of communications (Nov. 6, 2014).

Media Contact

Stacey Osburn
NCAA Director of Public and Media Relations
NCAA
317-917-6117

Tags: News | Division I | Penn State

Share:

Related resources

Motion for summary judgment

Motion for summary judgment exhibits

Statement of facts

Statement of facts exhibits

Related

Documents clarify Penn State consent decree

NCAA responds to release of emails in Corman case

Statement on Supreme Court of Pennsylvania filing

Executive Committee restores Penn State football postseason, scholarships

NCAA response to amended Paterno complaint

View more >




EXHIBIT F

Message

From: Remy, Donald [redacted]

Sent: 9/7/2012 3:44:04 PM

To: Gene Marsh [redacted]

CC: Berst, David [redacted]

Subject: Ed Ray E-mails

Importance: High

Gene --

As you know, I have been flying most of the last two days and so I am taking the time to write you this message that I can send when I land. I understand your frustration that this issue continues to arise, and as you know we have previously spoken with President Ray about communications regarding it. While I have not yet confirmed that these e-mails actually came from President Ray or when they were sent, I would like to make a few points in response to your e-mails. Indeed, I think that it is important for you and me to clear the air.

First, it is my view that this ongoing dialogue would never have occurred had it not been for Penn State and its counsel discussing the process in a way designed to gain favor with its constituencies and the fact that current members of the Penn State Board of Trustees are encouraging (without any apparent restraint) that critical letters be written to the NCAA and President Ray. Second, the reporter who forwarded the e-mail to President Erickson -- like reporters before him -- appears to intentionally mischaracterize any interview given by President Ray, as well as the e-mail that purports to be from President Ray. Third, as I have discussed with you before, the statements made by President Emmert were designed to assist Penn State with the story it was publicly communicating at the time. In any event, they were consistent with comments made by President Ray and comments made by President Emmert previously, but the media and others chose to distort and misconstrue them. Fourth, whether or not the e-mail is from President Ray, based upon information with which I am familiar I do not find the e-mail to be inaccurate, although it may be incomplete in terms of details about the first Executive Committee meeting. I am not aware, however, of who (NCAA or Penn State) first introduced the notion of an alternative mechanism to resolve quickly issues raised by the Freeh Report, but I do know that it was an idea that all considered preferable. Fifth, in NO communication by David Berst or me did we ever threaten that the so-called death penalty would be imposed if Penn State did not agree to the consent decree. In fact, the voice-mail from David Berst specifically supports that fact. Nor did I ever communicate that a multiple year death penalty was planning to be imposed. Any assertion to the contrary is flat out false. We did tell you after the Executive Committee call on July 17, 2012 that a majority of the Board members favored stronger penalties, and that same majority favored the death penalty. That is not an overstatement or overselling. On that same call with you, me and David, we explained how the death penalty was not solely reserved for repeat offenders and how if we did not utilize this alternate process we believed that an enforcement and infractions process – while "a long hard slog" -- could likely result in the death penalty being imposed. In a subsequent call we informed you that it was Penn State's cooperation and transparency that encouraged members of the executive committee to forego the pursuit of a stop in play. You, me, and David spoke a couple of times thereafter and based upon your advocacy those discussions resulted in some changes to the penalties and the direction (i.e., change from 5 year post season ban to 4 year post season ban, change in the implementation timeframe of the grant in aid reduction). Further, as you know, there were several modifications to the draft consent decree made at your request before it was finalized. As the e-mail purportedly from President Ray explains, at the Executive Committee and Board of Directors call on July 21, 2012 those bodies voted to approve the actions that were ultimately taken – which did not include the so-

called death penalty. At that point, regardless of individual points of view held by anyone previously about any penalties, the NCAA spoke with one voice. At all times prior to the execution of the consent decree, PSU was free to repudiate the Freeh Report, withdraw its consent, and/or reject the direction of the NCAA Executive Committee and either litigate against an imposition of penalties by the Executive Committee or "roll the dice" with the enforcement and infractions process. The decision not to do so was Penn State's decision, not the NCAA.

To further set the record straight, I lay out for you below my chronology of events. I will not disclose attorney client privileged advice or work product, but suffice it to say that advice given throughout fully supports this characterization and timeline.

On November 17, 2011 President Mark Emmert sent a letter to President Rod Erickson regarding the grand jury report released on November 5, 2011 containing allegations of sexual abuse by Jerry Sandusky. On November 21, 2011, the Penn State Board of Trustees appointed the Freeh Group, led by former FBI director Louis Freeh to investigate. During the course of the Freeh investigation both the NCAA and the Big Ten were provided periodic updates on progress. Contrary to suggestions by Penn State and its counsel, we were not provided advance substantive information regarding the findings of the Freeh Group. We learned of those findings at the same time as the rest of the world. On July 10, 2012, the media disclosed that the Freeh Report would be issued and a press conference would be held on July 12, 2012. I contacted the Penn State University Office of General Counsel to inform them of the NCAA's position on this Report. Because Steve Dunham had not yet taken office, on July 11, 2012, I spoke with acting general counsel Mark Faulkner and others. I informed them that it would be the NCAA position when the Freeh Report was released that we expected Penn State to respond to the November 17 letter and then the NCAA would determine our course of action. That course of action could include anything from doing nothing to conducting a full blown enforcement investigation and going through the infractions process. On that same day, July 11, 2012, President Emmert delivered a similar message to President Erickson. On July 12, 2012 the Freeh Report was issued and the NCAA released the message we had communicated to PSU: we expected a response and then we would see what was next. On July 12, 2012, you contacted me for the first time and indicated that you would handle drafting the response for PSU, that you would be vacationing but would be available by mobile and we should try to connect the following week. We tried to connect over the weekend and on Monday, July 15, 2012, you and I spoke and recognized that our clients (NCAA and Penn State) were contemplating the possibility of resolving matters without a response to the letter and without an enforcement investigation and infractions hearing, but rather through some summary resolution wherein Penn State would agree to the findings of the Freeh Report and the NCAA would impose a set of penalties based upon those findings. On that same day, President Emmert appeared on a prescheduled interview with PBS where he discussed the Freeh Report and indicated that the NCAA was waiting for Penn State's response to his letter. In that interview he acknowledged that the traditional enforcement process was available and that all penalties, including the so-called death penalty were in play. On July 17, 2012 the NCAA Executive Committee met and discussed the approach of a summary resolution based upon Penn State's adoption of the Freeh Report that would include various penalties. On that same day, David Berst and I communicated to you the proposed penalties and the approach of a binding consent decree. You will recall that the proposed fine was originally discussed to be $30 million and subsequently raised to $60 million and we initially neglected to report on the vacation of wins, but immediately followed up the call with an e-mail to that effect. President Emmert had a similar conversation with President Erickson. Late night on July 20, 2012 you were sent a draft of the consent decree, pending NCAA Executive Committee approval. On July 21, 2012, the Executive Committee voted to approve the concepts of the penalties as they were spelled out in the final consent decree and that was communicated to you. On July 23, the consent decree was executed and announced.

Gene, as I have told you before I do not make a habit of discussing these types of exchanges publicly as I believe that is the only way that you can have a candid exchange of positions. Accordingly, I have remained silent thus far. Further, I agree that discussion around this issue needs to cease as we all are trying to move forward and hope that we can catch up with President Ray soon to reiterate that point. Nonetheless, while I don't intend to be combative or adversarial, I felt compelled to explain to you the position that I will take if ever required to speak about it.

If you want to talk further about this, I can be reached on my mobile over the weekend.

Regards,

Donald

From: Gene Marsh [mailto:[redacted]]
Sent: Friday, September 07, 2012 10:39 AM
To: Berst, David; Remy, Donald
Subject: Fwd: Ed Ray's Version of Events - No Wonder the Push to "MOVE ON"

See below - more of the same.

Sent from my iPhone

LIGHTFOOT
LIGHTFOOT FRANKLIN WHITE LLC
TRIAL & APPELLATE COUNSEL

Gene Marsh
[redacted]

Begin forwarded message:
From: David La Torre <[redacted]>
Date: September 7, 2012 9:14:24 AM CDT
To: Gene Marsh <[redacted]>, Frank Guadagnino <[redacted]>
Subject: Fwd: Ed Ray's Version of Events - No Wonder the Push to "MOVE ON"
FYI

Typos courtesy of my iPhine

Begin forwarded message:

From: mccahan[redacted] [mailto:mccahan[redacted]
Sent: Friday, September 07, 2012 8:44 AM
To: Adam Taliaferro; Adam Taliaferro; Anthony Lubrano; Ryan McCombie
Cc: Paul Silvis; Paul Suhey; Karen Peetz; John Surma; David Joyner; bot[redacted] Maribeth Schmidt; Rodney Erickson; Victoria Hargrave; Roger Williams
Subject: Ed Ray's Version of Events - No Wonder the Push to "MOVE ON"

Mr. Lubrano, Mr. McCombie, and Mr. Taliaferro (and Anyone Other BOT Members Who Have Enough Guts To Keep Fighting for the Truth):

Possibly you could get an explanation / clarification on the email responses below to a fellow alum from Mr. Ed Ray of the NCAA – his responses are highlighted in yellow. If you remember, he was the guy who looked like he was drooling the morning the sanctions were announced. Apparently, he has at least been professional enough to respond to alumni who have written him (a courtesy most of us haven't received from our own university – and that's not a "slam" on you 3). **Mr. Ray's responses reveal a very, VERY different story than Dr. Erickson's and Mr. Marsh's; the version they described in a recent BOT Teleconference Meeting.**

Someone is not being truthful here. **Mr. Ray certainly makes it sound like we requested the sanctions levied on us – not the NCAA – without the threat of the "death penalty". I mean how absurd is that!!!!** We would actually rush the NCAA to sanction us just so we could "MOVE ON" – I mean this isn't possible – is it? **And, by the way, every alumni I've spoken to is sick and tired of everyone telling us to** "MOVE ON" – everyone will "MOVE ON" when the truth is finally revealed and the ridiculous sanctions are lifted – IT'S JUST NOT RIGHT. **No wonder Dr. Erickson is in such a big hurry to "MOVE ON" – I would be too if Mr. Ray's story is true!!**

But, we're hoping that you guys can find out who's really telling the truth – if anyone is. It's very sad when you come to realize that your own university has played such a huge role in it's own destruction.

Keep fighting for the truth – you have a LOT of support,

For the Glory,

Matt and Carla McCahan

Class of '84 and '85 respectively

Lifetime Members of the Alumni Association.

For those of you who are curious - here is Dr. Ray's response to my letter (the letter I sent follows). It's not entirely responsive to the concerns I raise which makes me believe it's mostly a cut/paste job form response, and, as expected, it continues to tow his party line - but you can't say he's not responsive. More and more, though - he appears to be putting this on our Board pushing this agenda. **(Ray's responses clearly fly in the face of the version being told by Dr. Erickson and Gene Marsh – MM).**

My letter:

Dear Mr. Ray,

I understand that you have likely been inundated with letters from disgruntled Penn State alumni over the last few weeks concerning the sanctions imposed by the NCAA and I have seen your responses to several of those letters. Many of your responses, rightly, demonstrate that the NCAA's primary focus in deliberating how to handle this situation was on the children and insuring that this doesn't happen again and holding the institution that allegedly permitted this to happen accountable. I commend the NCAA for placing the focus where it rightfully needed to be.

With that said, as the governing body for athletics' programs of institutions of higher learning, and as an organization that promotes itself as insuring the prioritization of academics and education within the athletics'

framework, I hope you can see why the sanctions and the conclusions set forth in the consent decree are abhorrent to those very ideals and why many Penn Staters have vituperatively voiced their objection.

First, while the consent decree finds support in the Freeh report, as you should know, the Freeh report was neither designed for this purpose nor provides a proper foundation for the NCAA to determine culpability. Admittedly, although the report reasonably concludes that certain university administrators and leaders "repeatedly concealed critical facts" concerning Sandusky's behavior to avoid "bad publicity," this is only a "reasonable" conclusion (not a certain one), drawn by one person whose investigation did not take into account the testimony of most of the primary figures involved in the scandal, and seems to have been inferred from only a couple of ambiguous and potentially out-of-context e-mails allegedly written by the very people Mr. Freeh failed to interview.

While these "reasonable" conclusions may have been accepted by the Board in the context of moving forward, placing the focus on the children, or agreeing to the corrective measures suggested by Mr. Freeh, the report is grossly insufficient to be used by an outside organization, who was neither familiar with the investigative process used by Freeh nor has had an opportunity to review and properly weigh all the evidence and testimony culminated by that investigation, for the far more damaging purpose of levying the unprecedented sanctions that the NCAA has. The NCAA's actions amount to decimating a program, a university, and a community ? all of which played no role in this scandal ? based on a third parties' admittedly incomplete interpretation of a few ambiguous e-mails. The lack of due process afforded to the victims of those sanctions (the university, the current players, the Penn State community, etc.) is startling and contrary to the very principles this country was founded on and the inherent rights of the accused.

Fully reading the Freeh report and the alleged supporting documentation, I posit that it is equally (if not more) reasonable to conclude that there was no active concealment of facts to protect Mr. Sandusky in any way. The notion that any one person would actively and knowingly conceal pedophilia is so contrary to human nature that to suggest that it would be done by, not one person, but by Joe Paterno, Graham Spanier, Tim Curley and Gary Schultz ? four individuals whose reputation for acting appropriately and ethically was unimpeachable prior to this incident ? and also people outside the program who had no interest in bad publicity, such as Dr. Dranov, simply defies logic. And, to levy that indictment on these individuals and the university at large based on the scant "evidence" found in the Freeh report constitutes a grave rush to judgment and eviscerates the principles of "innocent until proven guilty" and due process. As Graham Spanier has shown by his retention of former federal prosecutor and federal judge Tim Lewis, I am sure that I can get several authorities equally or more credible to Mr. Freeh to reach that reasonable conclusion. And ? if two authorities of Mr. Freeh's and Mr. Lewis' stature can come to such divergent opinions ? should that not give the NCAA pause before adopting one of those conclusions and destroying reputations and a university based on it?

Putting aside the sanctions, the equally disturbing indictment by the NCAA that Penn State's culture was to blame for the alleged lapses that occurred and that it is that culture which needs to be changed, has only further acted to enrage Penn Staters. As President Erickson recently, and rightly, pointed out, Penn State doesn't have one identifying culture but is made up of several cultures revolving around academics,

philanthropy, research and athletics (to name a few) -- each of which has been a model for other institutions. Thus, when the NCAA says that this culture needs to change, it's not only an overbroad statement that fails to recognize this diversity, it's an insult to all of those people ? students, alumni, faculty, and administrators ? who worked tirelessly over generations to insure the growth, success and balance of those cultures. And, the only difference between Penn State's athletic culture and the athletic culture of other major Division I athletics' programs, is that ? as current and former players and coaches can attest, and as the graduation rates and academic All Americans demonstrate ? Penn State always championed education and success with honor above all else. If that is the culture the NCAA seeks to change, I fear for the future of college athletics.

In conclusion, while I wholeheartedly agree that the focus should be on the children and insuring that this doesn't occur again, and that's what I believe the Board was attempting to do by commissioning and unwittingly accepting the Freeh report, the NCAA's actions do not accomplish that. In valuing expedience over truth, the NCAA simply and prematurely pointed its finger and placed the blame on those who have had no opportunity to defend themselves and penalized an institution for attempting to proceed down the right path. The NCAA's actions have only insured that no institution will ever engage in such transparency or self-investigation in the future and, in doing so, has only further endangered children.

I understand that Mr. Erickson signed the consent decree and, by doing so accepted the sanctions. Capitulation by him or the Board should not be a proper basis or excuse to trample over the rights of those the sanctions directly impact. And that is the precise reason you have and will continue to be inundated with letters.

xxx

Ed Ray's Response:

xxx:

I appreciate your assessment of matters and can only repeat the facts that are determinant for me. Following the Freeh Report and the sentencing of Jerry Sandusky, Mark Emmert asked Penn State to respond to questions raised last November. That led to a discussion about coming to a common agreement between the university and the NCAA about punitive and corrective actions to come to closure on institutional findings, although individual cases could be pursued if new evidence emerges over time. Rod Ericson signed a consent decree with the understanding that the board of trustees, presumably through the chair and the executive committee, approved the agreement.

The executive committee and the Division I board of the NCAA reviewed the proposed punitive and corrective actions in the package announced at the Monday press conference and about 30 college and university presidents and chancellors voted unanimously to accept the terms of the consent decree on behalf of the NCAA. I could not hope to explain the positions of the other 29 colleagues in endorsing the agreement. Absent the consent decree, I would expect the NCAA to go through the usual 1-2 year investigatory process and for the Committee on Infractions to announce findings after that. I assume the consent decree came up as an option because the president and board of trustees at Penn State wanted to close the institutional case and move forward.

Ed

More from Dr. Ed Ray and more fodder for the Rally for Resignations.... Reply

I followed up my letter from yesterday with a couple of questions (you'll have to scroll back a few pages to see the initial letter and Ray's response) - but here is my recent e-mail and his response if you're interested (from his iphone no less).

Dr. Ray,

Thank you for the time and thoughtfulness in your response. While I doubt it satisfies everyone's concerns regarding the rush to judgment and lack of due process that took place here, I think it provides some insight into the process the NCAA undertook.

You mention in your response that, absent the consent decree, you envisioned a 1-2 year investigative process. **Can I take that to mean that, had Dr. Erickson not signed the consent decree, the NCAA would have engaged in this process and that there was no pre-determined set of sanctions the NCAA was prepared to levy?** In other words, the possibility of the so-called "death penalty" would have been as possible an outcome as the NCAA not levying any sanctions and it would have all been dependent on the NCAA's independent investigation?

Again, I appreciate your response and hope you understand why the Penn State community has been outraged at this process and that you don't confuse that outrage for a lack of concern for the victims.

Ray's response:

xxx:

You are correct. We explicitly voted overwhelmingly not to include the death penalty. The COI (Committee on Infractions) would develop the case and make its own decision.

Ed

Sent from my iPhone

EXHIBIT G

Message

From: Gene Marsh [redacted]
Sent: 7/19/2012 1:30:04 AM
To: Remy, Donald [redacted]; Berst, David [redacted]
Subject: PSU Update

Donald and David-

My conference call today with Pres. Erickson and the other folks involved was very positive and encouraging. I think we will very quickly get to a point where PSU agrees with the ideas that have been put forward - perhaps with a little windage, but not much - so that Mark Emmert will be able to make a presentation to the NCAA Board that can be defended.

Later tonight or in the morning I will send out to you two an agenda for what I would like to talk through tomorrow. Pres. Erickson clearly understands Penn State's position and I gave them my take on what they should do.

Given the recent criticism regarding the Penn State board being too passive and not adequately informed, he will need to have a good plan to air these ideas while trying to maintain confidentiality - not an easy thing to do - but it must be done.

I look forward to getting your input and thoughts tomorrow.

Gene

LIGHTFOOT

LIGHTFOOT FRANKLIN WHITE LLC

Gene Marsh

[redacted]

EXHIBIT H

Message

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

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

Thanks,

Kevin

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

Kevin,
All of your points are sound to me.

Redacted

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

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

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

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

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

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

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

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

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

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

Sent from my iPad

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

Julie,

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

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

1. The more penalties and sanctions placed on school, conference, other members, the less likely they will agree. I know we are banking on the fact school is so embarrassed they will do anything, but I am not sure about that, and no confidence conference or other members will agree to any of that. This will force the jurisdictional issue that we really don't have a great answer to that one....

2. Whatever action we take against PSU will require us to answer the immediate follow up questions as to what this means for the next case- scope and reach of ethical dilemmas that will take many forms. Don't we need to have an answer for this before we do something with PSU?

3. Delicate issue, but how did PSU gain a competitive advantage by what happened? Even if discovered, reported, and actions taken immediately by the administration, not sure how this would have changed anything from a competitive advantage perspective.

4. As for idea to bring in Judge Freeh, I thought the key response from our end is to wait to hear from PSU? I feel like to do otherwise with any action (like this) will invite what else the NCAA is doing now? Like are you sending enforcement representatives in now, and if not, why not?

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

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

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

Keep the faith.

Your friend,

Kevin

EXHIBIT I

Message

From: Gene Marsh [redacted]
Sent: 7/23/2012 2:43:26 PM
To: Berst, David [redacted]
CC: Remy, Donald [redacted]
Subject: RE: NCAA PRESS CONFERENCE

David-

Mark's statements regarding Erickson were good. The most helpful part was saying that were the death penalty to be imposed, there also would have been additional penalties. I believed that to be the case from the start. The comments re Erickson were also terrific.

I appreciate your comments very much. I have not slept much in the past week, but hope to now ... but not right now.

The hardest part of this has been talking on behalf of several lawyers - including my partner and great friend, William - who come at things from an entirely different perspective. But both Frank Guadagnino at Reed Smith and their new general counsel, Steve Dunham, have been just superb in this process - raising all the issues that come naturally to them as great lawyers - and they are great lawyers who have served their client well - but also recognizing that in the end it must be a decision made by the new leadership that weighs many, many factors.

I had to weigh accepting this outcome versus what might come with a traditional infractions process in an opinion. I laid it all out and gave my opinion, but the call was not mine. I think they made the right choice.

There will be caustic critics and experts on "due process" etc. I'll get tagged I am sure, but I could truly care less. Truly. Folks who comment from the outside are all hat and no cattle.

Long ago - in the Alabama case - I learned to decide what is important to me ethically and stay right there intellectually. No matter what the noise.

That experience served me well this week, in talking this through with the people I dealt with.

I might fly to Indy on my own dime to talk about this - the big picture of this process - absolutely not specifics as to Penn State.

I hope Penn State will continue to involve me in this process as we move forward, but now is not the time to raise that. I think I can help them - truly.

At let me note that Donald Remy has been absolutely terrific this week. Most importantly, he understood what it was to be on the other side of this as a lawyer.

I remain so sorry for Penn State. So many folks paying a heavy price for the inaction of others. Having spent 28 years on a campus makes me even more sensitive to how this lands on people.

Best regards,

Gene

From: Berst, David [redacted]
Sent: Monday, July 23, 2012 9:17 AM
To: Gene Marsh
Subject: RE: NCAA PRESS CONFERENCE

Gene,

Very much appreciated and your work has been exemplary in a very difficult time. I was worried that it was not clear enough early, but I think Mark hit on it well in Q's and A's.

Best,

Dave

From: Gene Marsh [mailto:[redacted]
Sent: Monday, July 23, 2012 9:48 AM
To: Berst, David
Subject: NCAA PRESS CONFERENCE

David-

Just ME talking - I think the comments in the press conference are fair and supportive of the new leadership at Penn State - which was appropriate. I have been impressed with Dr. Erickson this week. He is in a hugely difficult position and has handled it as well as anyone could.

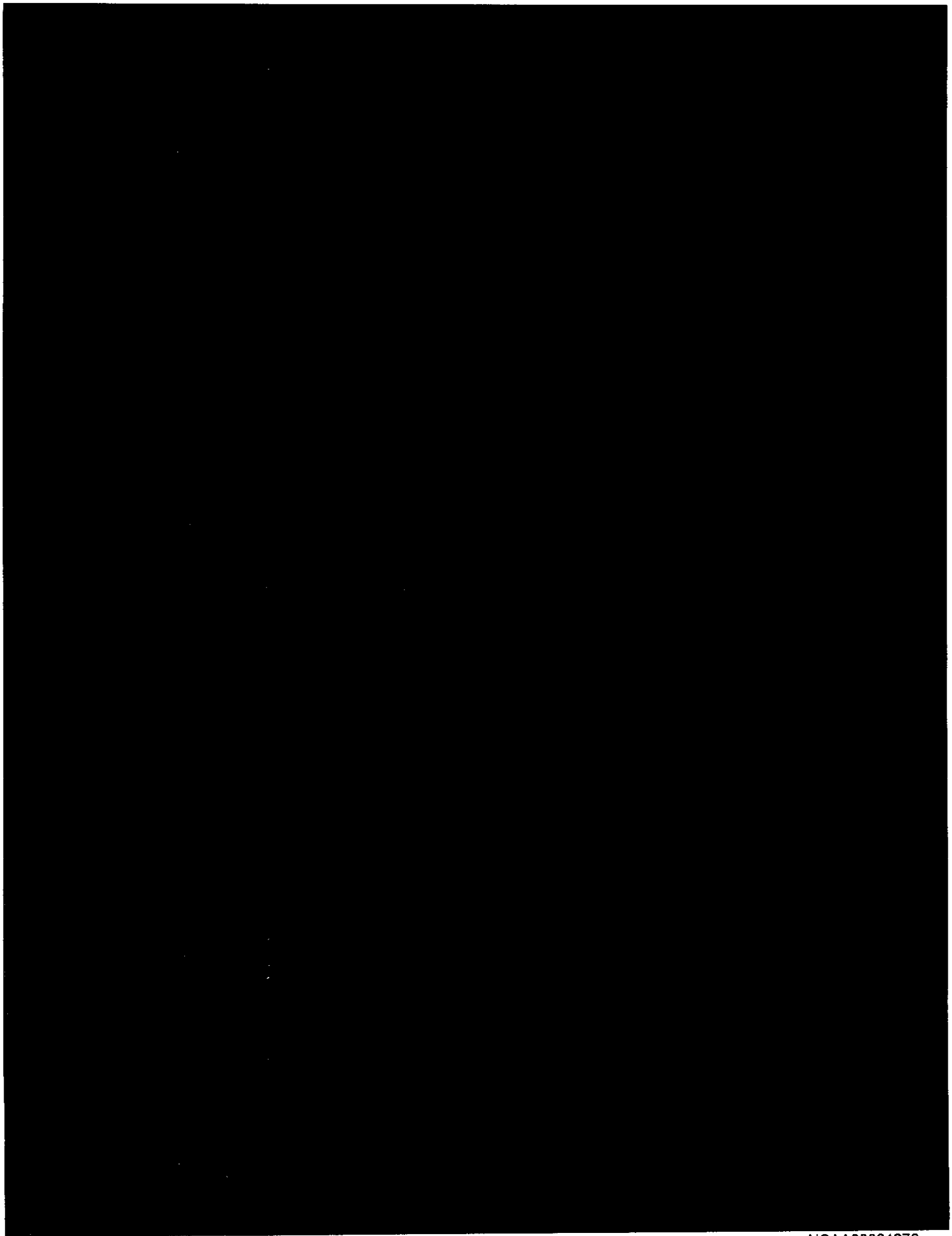
Gene M.

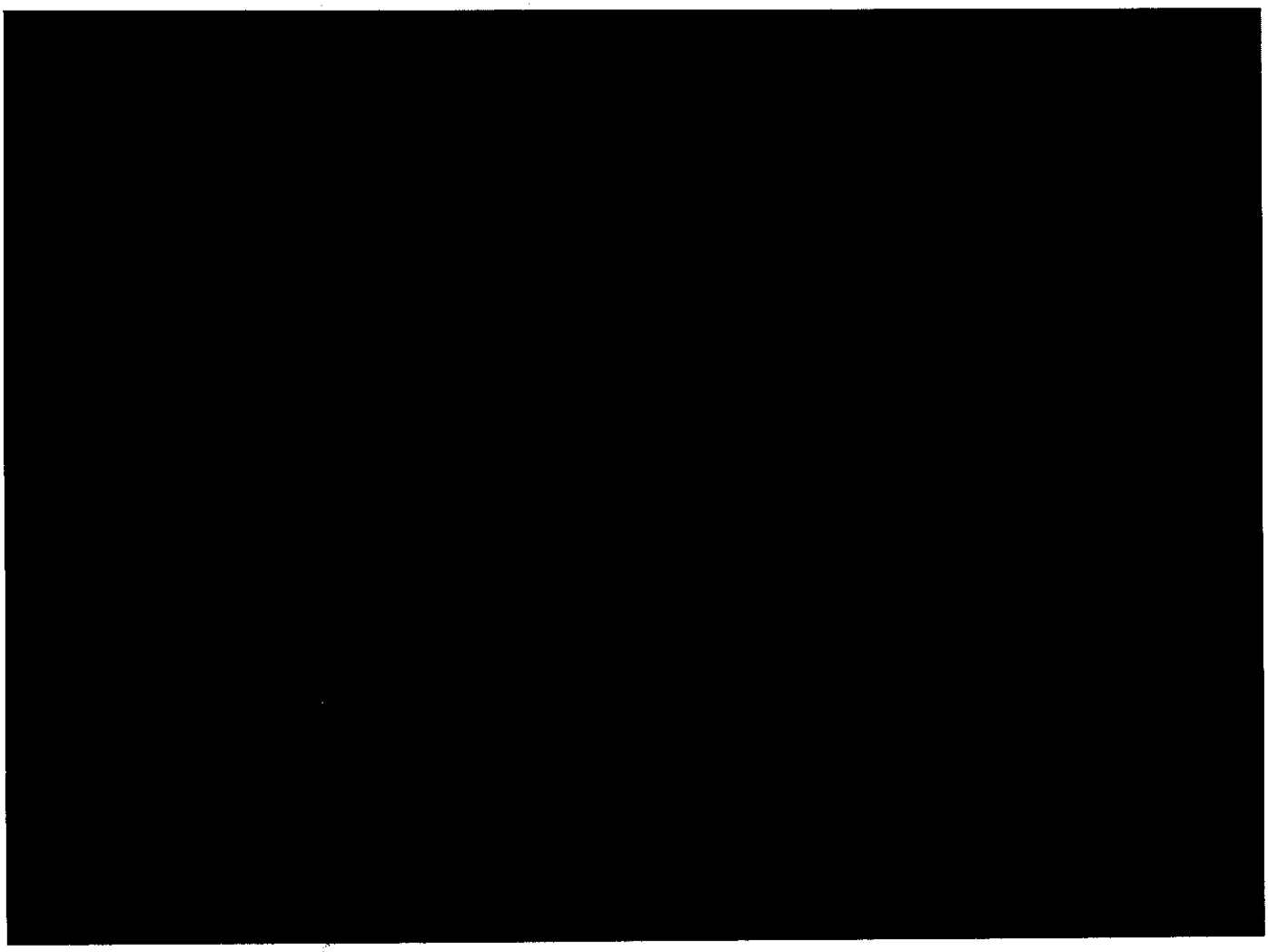
LIGHTFOOT

LIGHTFOOT, FRANKLIN, WHITE, LLC
TRIAL & APPELLATE COUNSEL

Gene Marsh
[redacted]

EXHIBIT J





From: Gene Marsh [mailto:gmarsh@lightfootlaw.com]
Sent: Wednesday, July 25, 2012 8:56 AM
To: Berst, David; Remy, Donald
Subject: Thought

Read Mark Emmet's comments in the sit down with Pat Forde - Yahoo - and the comments last night re the traditional infractions process. So which one is it?

Please get your act together.

Sent from my iPhone

<lfwlogo>

Gene Marsh
Direct Dial (205) 581-1507

The Clark Building
400 20th Street North
Birmingham, Alabama, 35203-3200
http://www.lightfootlaw.com

EXHIBIT K

Message

From: Gene Marsh [gmarsh@lightfootlaw.com]
Sent: 7/25/2012 1:41:35 AM
To: Remy, Donald [dremy@ncaa.org]; Berst, David [dberst@ncaa.org]
Subject: Re: ESPN

My folks are really upset. I will find the ESPN show when I get there.

I say again - Ray should publicly fix his comments.

Sent from my iPhone

On Jul 24, 2012, at 9:38 PM, "Remy, Donald" <dremy@ncaa.org> wrote:

> It think he made clear that the death penalty was in play and Penn State's cooperation helped avoid it.
>
> Sent from my iPhone
>
> On Jul 24, 2012, at 9:08 PM, "Gene Marsh" <gmarsh@lightfootlaw.com<mailto:gmarsh@lightfootlaw.com>> wrote:
>
> Did the comments go beyond praise for Erickson. Did they clearly state the death penalty was the majority view and then that was pulled back after looking at other the alternative penalties ?
>
> Sent from my iPhone
>
>
> <lfwlogo>
>
> Gene Marsh
> Direct Dial:(205) 581-1507
>
> The Clark Building
> 400 20th Street North
> Birmingham, Alabama, 35203-3200
> http://www.lightfootlaw.com<http://www.lightfootlaw.com/>
>
> NOTICE: This email may contain information that is privileged or otherwise confidential. It is intended solely for the holder of the email address to which it has been directed. It should not be disseminated, distributed, copied or forwarded to any other persons. It is not intended for transmission to, or receipt by, any other person. If you have received this email in error, please notify us of the error by reply email or by calling Gene Marsh at (205) 581-1507, and please delete this email without copying or forwarding it.
>
> This email and any attachments may contain NCAA confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return email, delete this message and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

LIGHTFOOT

LIGHTFOOT FRANKLIN WHITE LLC

Gene Marsh
Direct Dial (205) 581-1507

The Clark Building
400 20th Street North
Birmingham, Alabama, 35203-3200
http://www.lightfootlaw.com

EXHIBIT L

Message

From: Remy, Donald [/O=NCAA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DREMY]
Sent: 9/6/2012 4:25:34 PM
To: Williams, Bob [bwilliams@ncaa.org]
Subject: Fwd: Clarification on NCAA Process

Sent from my iPhone

Begin forwarded message:
From: "Berst, David" <dberst@ncaa.org>
Date: September 6, 2012 10:30:42 AM EDT
To: "Remy, Donald" <dremy@ncaa.org>
Subject: RE: Clarification on NCAA Process

Redacted

Begin forwarded message:
From: Gene Marsh <gmarsh@lightfootlaw.com>
Date: September 6, 2012 10:26:42 AM EDT
To: "Berst, David" <dberst@ncaa.org>
Cc: "Remy, Donald" <dremy@ncaa.org>
Subject: FW: Clarification on NCAA Process
David-

This is the exchange.

If this really is from Ed Ray, then what was told to me on the phone that week WAS overselling.

Then I was told that Ed Ray was the most hawkish.

Penn State is trying to move forward.

Gene Marsh

Dr. Erickson,

I am contacting you to get your side of this issue. We have received a number of emails that Dr. Ed Ray has sent out that are basically saying that you and Penn State asked for a consent decree over an investigation.

He is saying the blame for these sanctions lie with You and the Board of Trustees and not with the NCAA.

Which is different than the story that has previously come out.

Before we go to print with a story, we would like to get your side of the story. We want to get the truth out.

Since the NCAA had decided not to institute a suspension of play or death penalty and not only that, since the NCAA's own rules reserved that type of punishment for repeat offenders, which Penn State was not, why would you agree to the penalties in the consent decree?

Did Emmert tell you that the NCAA wanted to shut down Penn State for this season, even though they had no authority to do so?

Did Emmert threaten you when in fact he didn't have the authority from the NCAA to do so?

Dr. Ray is saying that they would have put Penn State through a 1-2 year investigation before making any decisions.

So again my question is since Penn State had never had any previous violations or punishments and the NCAA's punishments are spelled out via it's bylaws, why agree to something above and beyond what they could do to Penn State?

As a second question, why did you agree to fully accept all conclusions of the Freeh report as part of the consent decree?

We are working on a story for tomorrow, so if you could get back to me tomorrow by noon with any further clarifications that would be appreciated. If you can schedule us, we would be happy to schedule a 15 minute interview with you to discuss further.

Regards,
Dan

---------- Forwarded message ----------
From: **Ray, Ed** <Ed.Ray@oregonstate.edu>
Date: Fri, Aug 31, 2012 at 12:25 PM
Subject: RE: Clarification on NCAA Process
To: XXXXX
Dear XXXXX:

This is the only case in my now completed 5 1/3 years serving on the executive committee of the NCAA in which the executive committee and the Division I Board have been presented with and asked to determine a set of punitive and corrective measures that would resolve enforcement matters, except for any forthcoming disclosures regarding

individual culpability. I know of no other major case that was resolved by a consent decree, which as you know is signed on behalf of both parties.

The Freeh Report, the Sandusky investigation and the trial information and perhaps other information prompted the president and board of trustees of Penn State University to seek closure through a consent decree. I have no idea how fully the various parties involved relied on any given set of information to make that decision. The executive committee and the Division I Board voted unanimously for the package of actions announced at the press conference as adequate to reach closure without further institutional investigations. Those groups consist of about 30 presidents and chancellors from all three divisions of the NCAA.

To me, this case was unique because of the conspiracy of silence that was maintained over more than a decade, while the same and new victims were harmed. I was one of those 30 votes and others would have to speak for themselves. We did consider the suspension of play or death penalty and voted by a substantial majority in each group not to include it in the proposed consent decree package.

Also, I chaired those meetings and I know that there was no discussion of threats if the consent decree was not accepted. My presumption is that the usual enforcement process, which could take a year or two to reach a conclusion would have followed and in that process the possibility of the death penalty could have been considered by the Committee on Infractions which would have heard the case. Was there a real risk that the normal process would lead to a suspension of play for a year or more? Yes! So, there was a real risk of the death penalty if the consent decree was not signed but it was not in the package the two committees approved and we did not authorize any threats.

I hope this helps. I have no idea what interview you are referring to and I hope I have no more. My regret is that no one connected to Penn State has actually said "we made a lot of mistakes and innocent children suffered. We need to deal with the elements of the consent decree and ensure that nothing like this happens again." This case is not about what the NCAA did to Penn State. This case is about the actions and inactions of leaders at Penn State that led to horrible abuse of innocent children.
The acceptance of the consent decree and the appointment of a monitor for the changes to be implemented give me encouragement that the right things will be done.

You mention many other horrible cases and ask why the NCAA acted as it did in this case. Again, speaking only for myself, we were asked to consider acceptable elements for a consent decree to close this institutional case and we did that. One can only deal with the matters brought before him/her to the best of one's ability.

Ed
From: XXXXX
Sent: Friday, August 31, 2012 8:46 AM
To: Ray, Ed
Subject: Clarification on NCAA Process

Dr. Ray,

I just read an interview where you discussed the sanctions at Penn State. You mentioned that in all the emails you received, you never have any mention of the victims. I can't speak for others, but would assume that is because anyone with a heart is grieving, and is abhorred by the manipulation of the monster that is Jerry Sandusky, but doesn't feel that they have to mention that every time they talk about Penn State. To be clear, I grieve for those victims, as they did not receive the protection that society demands.

Where we disagree is who was responsible. I grieve the fact that the district attorney didn't prosecute, child protective services didn't list Jerry Sandusky as a potential offender, and the Second Mile didn't do anything with the information in 1998 when the State of Pennsylvania deemed there was not enough evidence. I grieve that the many people who didn't investigate charges to the fullest and the slow process of the Pennsylvania District Attorney, those who trusted their children to Sandusky, and the administrators that tried to hide it in the high schools and agencies of Pennsylvania. It seems that in the NCAA's mind, that means Penn State should vacate wins and be penalized. I think your cause and effect is a little warped, and your response actually trivializes the issue, especially when we look at other tragic occurrences.

I grieve for the rape victim at Montana, covered up to keep players eligible.

I grieve for the alleged rape victim by an Notre Dame football player who was distraught and committed suicide. The news account reported that the authorities couldn't get to interview the player in question due to the football program stonewalling.

I grieve for the Notre Dame student killed, when the football team forced him to ascend a lift in high wind to ensure practice was taped.

I grieve for the family and player at Baylor who was murdered by a teammate. This was covered up.

I grieve for the Syracuse basketball ball boys abused by deviate behavior of an assistant coach which was known and ignored for years.

I grieve for the rape victim at Washington, where football was placed ahead the victim's rights by pressuring her to accept mediation instead of legal charges.

These are all sad stories that 99% of citizens find deplorable and grieve for victims, and that our society allows this to happen. There are many others I am sure.

By you and the NCAA's actions of not acting, commenting or sanctioning culture in these situations as you did for PSU's criminal actions, I can only assume you do not. At a minimum, you place less concern or impact on these victims or crimes. Especially when it is obvious that the historical compliance, academic achievement and adherence to NCAA standards has been exemplary at Penn State, and at a higher level than these other institutions. This is especially confusing when you point out as stated below, the evidence is not 100% accurate.

Ed Ray responds: Well, you know, there's always this issue of, sort of, so, is it 100% accurate? You've seen it, their exhibits, their emails. And then they tell you how they think the emails fit within the narrative that they're sharing with you. Maybe you buy it, maybe you don't buy it. So, I think i think it's legitimate for people to say, "Is it 100 percent accurate? Is it 60 percent accurate?"

After thinking about the above, I was hoping you could clarify some questions I have on the NCAA process and procedure.

1. Why do you see Penn State situation is "breaking new ground" versus these other situations listed above. Is it the number of victims, the people involved. All are heinous, and facts seem to bear out more active behavior versus inactivity in the PSU situation.

2. What is the standard of accuracy of culpable information that the NCAA uses to decide sanctions, censure and even to act at all? It seems that by your own admission there is more culpability in other situation of egregious behavior the NCAA has not acted upon.

3. The NCAA has always weighed past history in any action it takes, what makes that no longer applicable as in the PSU situation?

4. How does the NCAA indict a whole culture on specific incidents and how is the decision made that culture is the reason for the issue rather than poor decisions, inaccurate information, or just incomplete understanding of the gravity of a situation? This is especially confusing in the context when you admit you do not even know how accurate the information is.

5. Does it not bother the NCAA that several news outlets published that Penn State was coerced into the decree, yet you deny. Mark Emmert has been quoted both ways on this issue, but more often states that the death penalty was a clear option. Isn't it important for your constituency to understand the process, and if Dr. Erickson and the Penn State BOT is lying, why as an educational body do you not want to clear that up?

6. If Dr. Erickson was not coerced to sign as you say, and that part of NCAA's explanation for severity of the sanctions is Dr. Erickson agreed, is it NCAA policy that any NCAA institution president can solicit sanctions without their boards approval, or significant facts to prove actions are warranted, and the NCAA will implement?

7. If this is truly a situation breaking new ground, and discussions that are not in the public view were made between the NCAA and any member at PSU, would you not want those public so member institutions know the facts and can adhere to new rules and adjust their process, versus vague innuendo on culture? Would you not want everything transparent that you are doing?

8. If you view this as a once in a lifetime situation and you not see sanctioning other people for criminal behavior or other " out of bounds" issues , how does that do anything more than just punish PSU.

As a long time fan of college athletics, this whole situation confuses me. Yes, I am a Penn State fan, but I have always loved all college sports because of their values, the concept of the student athlete, and the beauty of amateur competition. In that spirit, Penn State always made me proud by extolling " Success with Honor", a concept that was lauded by the NCAA in the past. By tying the issues to long term culture, the Freeh report and NCAA actions condemn that as not being true. I don't believe that and won't allow three vague emails to throw away that legacy.I am confused as to why the NCAA would to want to as well, as both Myles Brand and Mark Emmert commended Penn State for being a model for the NCAA in the last ten years. Do they not know what model behavior is?

Thank you for your time, and hopefully I can find it in my soul to remain a college sports fan. It's not about football to me, it is about a legacy.

I look forward to your response. Thank You.

XXXXXX

--

LIGHTFOOT

LIGHTFOOT, FRANKLIN, WHITE, LLC
TRIAL & APPELLATE COUNSEL

Gene Marsh
Direct Dial (205) 581-1507

The Clark Building
400 20th Street North
Birmingham, Alabama, 35203-3200
http://www.lightfootlaw.com

EXHIBIT M

Message

From: Gene Marsh [gmarsh@lightfootlaw.com]
Sent: 9/6/2012 2:55:02 PM
To: Berst, David [dberst@ncaa.org]; Remy, Donald [dremy@ncaa.org]
Subject: Ed Ray

If you determine the comments I forwarded are in fact from Ed Ray, I am to the point of needing to have a conversation with him to get his story on what happened and where the votes were.

Mark Emmert gave two interviews post-public announcement of the PSU penalties that contradict Ray - one with ESPN and one with Yahoo Sports. Does Ray know that?

I am speaking to the Penn State trustees again next week - Friday.

LIGHTFOOT
LIGHTFOOT FRANKLIN WHITE LLC

Gene Marsh
Direct Dial (205) 581-1507

The Clark Building
400 20th Street North
Birmingham, Alabama, 35203-3200
http://www.lightfootlaw.com

EXHIBIT N

Message

From: Gene Marsh [gmarsh@lightfootlaw.com]
Sent: 7/4/2012 7:40:16 PM
To: Cooper, Shep [scooper@ncaa.org]
Subject: Re: Expert: Penn State unlikely to face NCAA sanctions | Sports | CentreDaily.com

I know how they think there now, but they should leave this one alone.

Sent from my iPhone

On Jul 4, 2012, at 2:16 PM, "Cooper, Shep" <scooper@ncaa.org> wrote:

> FWIW, I agree. However, the new NCAA leadership is extremely image conscience and if they conclude that pursuing allegations against PSU would enhance the Association's standing with the public, then an infractions case could follow. I know that Mark Emmert has made statements to the press indicating that's he thinks it could fall into some sort of LOIC case. "Shooting road kill" is an apt analogy. --Shep
>
> Sent from my iPhone
>
> On Jul 4, 2012, at 2:33 PM, "Gene Marsh" <gmarsh@lightfootlaw.com<mailto:gmarsh@lightfootlaw.com>> wrote:
>
> Shep-
>
> FYI
>
> Gene
>
> <lfwlogo>
>
> Gene Marsh
> Direct Dial:(205) 581-1507
>
> The Clark Building
> 400 20th Street North
> Birmingham, Alabama, 35203-3200
> http://www.lightfootlaw.com<http://www.lightfootlaw.com/>
>
> NOTICE: This email may contain information that is privileged or otherwise confidential. It is intended solely for the holder of the email address to which it has been directed. It should not be disseminated, distributed, copied or forwarded to any other persons. It is not intended for transmission to, or receipt by, any other person. If you have received this email in error, please notify us of the error by reply email or by calling Gene Marsh at (205) 581-1507, and please delete this email without copying or forwarding it.
>
>
> _____
> From: David Price [granpaprice@gmail.com<mailto:granpaprice@gmail.com>]
> Sent: Wednesday, July 04, 2012 12:52 PM
> To: Gene Marsh
> Subject: Expert: Penn State unlikely to face NCAA sanctions | Sports | CentreDaily.com<http://CentreDaily.com>
>
> Gene -

>
> In case you haven't seen it. I couldn't agree with you more. - David
>
> http://www.centredaily.com/2012/07/04/3251112/expert-penn-state-unlikley-to.html
>
>
> David Price
> Sent from my iPhone
> This email and any attachments may contain NCAA confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return email, delete this message and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

LIGHTFOOT

LIGHTFOOT FRANKLIN WHITE LLC

Gene Marsh
Direct Dial (205) 581-1507

The Clark Building
400 20th Street North
Birmingham, Alabama, 35203-3200
http://www.lightfootlaw.com

EXHIBIT O

Message

From: Remy, Donald [/O=NCAA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DREMY]
Sent: 7/21/2012 4:37:32 AM
To: Gene Marsh [gmarsh@lightfootlaw.com]
CC: Berst, David [dberst@ncaa.org]
Subject: Re: Consent Decree -- Confidential -- For Discussion Purposes Only

I hope to be able to send you a version of the press release and perhaps a discussion draft of the integrity agreement on Sunday.

Sent from my iPhone

On Jul 21, 2012, at 12:34 AM, "Gene Marsh" <gmarsh@lightfootlaw.com> wrote:

Got it.

<lfwlogo>

Gene Marsh
Direct Dial:(205) 581-1507

The Clark Building
400 20th Street North
Birmingham, Alabama, 35203-3200
http://www.lightfootlaw.com

From: Remy, Donald [dremy@ncaa.org]
Sent: Friday, July 20, 2012 11:24 PM
To: Gene Marsh
Cc: Berst, David
Subject: Consent Decree -- Confidential -- For Discussion Purposes Only

Gene --

As discussed, attached you will find a final "draft" of the consent decree. This document remains in "draft" form for our discussions. Further, it will be discussed with the NCAA Board and will not be final until after they have been consulted. It will not be distributed to the NCAA Board or elsewhere by the NCAA until it is final. Similarly, I ask that you hold it confidentially and not distribute further than necessary to advise your client. While I am authorized to discuss with you possible changes, major substantive changes likely will not be acceptable. I look forward to speaking with you tomorrow.

Warmest Regards,

Donald M. Remy | Executive Vice President & General Counsel
NCAA | P O Box 6222 | Indianapolis, Indiana 46206-6222
317/917-6914 Office
317/966-0697 Mobile
317/917-6860 Fax
dremy@ncaa.org

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

"The pursuit of excellence in both academics and athletics"

EXHIBIT P

Message

From: Remy, Donald [/O=NCAA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DREMY]
Sent: 7/22/2012 1:47:39 PM
To: Gene Marsh [gmarsh@lightfootlaw.com]
CC: William H. King, III [wking@lightfootlaw.com]; Berst, David [dberst@ncaa.org]
Subject: Consent Decree
Importance: High

Gene –

Attached you will find the consent decree reflecting the changes we discussed last night. I am willing to discuss any typos or any glaring inconsistencies with our discussions, but nothing more. Indeed, if you will call me I will make myself available to discuss at any time. Please do not send a red-line. I will note for you a couple of edits that were not discussed on our last call:

Edit to this sentence:

To wit, after serious consideration and significant discussion, the NCAA has determined not to impose the so-called "death penalty."

This sentence has been deleted:

Yet, by concealing the conduct in question the University may have obtained a competitive advantage over an extended period of time.

This sentence has been modified based on our earlier discussion:

- Within ten days of the execution of this consent decree, the University will be required to enter into an "Athletics Integrity Agreement" ("AIA") with the NCAA and the Big Ten Conference, which obligates the University to adopt all of the recommendations in Section 5.0 of the Freeh Report and, at a minimum, the following additional actions:

With respect to the point below, we disagree that this does not come out of the Freeh Report. While I don't think it would be productive to go back and forth with cites to the report, I will note that Freeh specifically stated in his announcement that:

"Their failure to protect the February 9, 2001 child victim, or make attempts to identify him, created a dangerous situation for other unknown, unsuspecting young boys who were lured to the Penn State campus and football games by Sandusky and victimized repeatedly by him."

I think the language that we have used is more balanced.

This consent decree does not in any way affect and current or future unrelated enforcement actions.

Warmest Regards,

Donald

From: Gene Marsh [mailto:gmarsh@lightfootlaw.com]
Sent: Sunday, July 22, 2012 8:57 AM
To: Remy, Donald
Subject: FW: DRAFT_Confidential_and_For_Settlement_Discussions_Purposes_Only_July_21ncaaresp

Donald-

See below from another lawyer who offers an idea on the first point raised a few hours ago. Also a few typos. I assume secondaries will be handled in the usual way. Correct?

Gene

The Freeh Report provides as follows (at page 15):

"These individuals [referring to Spanier, Schultz, Curley and Paterno], unchecked by the Board of Trustees that did not perform its oversight duties, empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued ,unrestricted and unsupervised access to the University's facilities and afffiliation with the University's prominent football program. Indeed, that continued access provided Sandusky with the very currency that enabled him to attract his victims."

Perhaps the last sentence in the first paragraph of the Consent Decree could be modified as follows:

"The Freeh Report found that the leadership of Penn State, unchecked by the Board of Trustees that did not perform its oversight duties, empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program."

Gene: A couple of typos:

* In the paragraph about External Compliance Review, the word "Trustee" should be "Trustees".

* In the footnote relating to implementation of the Freeh recommendations, there are some words missing. I think the words "must be implemented" should follow the word "recommendations" in the third line.

* In the paragraph talking about remedies in the case of a breach of the AIA, the word "rest" in the last line should be "rests".

, I understand from Dave Joyner that Matt Stolberg made an oral report of a possible secondary violation to a Mr. Stroble (sp?) at the NCAA on July 10. We should make sure if we can that this potential violation is known to the folks that are working on this from the NCAA and doesn't trigger any additional penalties (other than what would otherwise have been the case with respect to this potential violation).

<lfwlogo>

Gene Marsh
Direct Dial:(205) 581-1507

The Clark Building
400 20th Street North
Birmingham, Alabama, 35203-3200
http://www.lightfootlaw.com

From: Remy, Donald [dremy@ncaa.org]
Sent: Saturday, July 21, 2012 6:42 PM
To: Gene Marsh; William H. King, III
Subject: FW: DRAFT_Confidential_and_For_Settlement_Discussions_Purposes_Only_July_21ncaaresp

Gene/William –

For discussion purposes in advance of our 8:00 call.

Donald

<DRAFT_Confidential_and_For_Settlement_Discussions_Purposes_Only_July_21ncaaresp.docx>

* * *

EXHIBIT Q

Message

From: Berst, David [/O=NCAA/OU=NCAA/CN=RECIPIENTS/CN=DBERST]
Sent: 7/23/2012 3:09:35 PM
To: Tom Douple [douple@thesummitleague.org]; John Swofford [jswofford@theacc.org]; Jamie Zaninovich [jzaninovich@westcoast.org]; Tom Burnett [tburnett@southland.org]; Carolyn Schlie Femovich [femovich@patriotleague.com]; Larry Scott [lscott@pac-12.org]; Jon Steinbrecher [jsteinbrecher@mac-sports.com]; John Iamarino [jiamarino@socon.org]; Craig Thompson [cthompson@TheMWC.com]; Doug Elgin [elgin@mvc.org]; Dennis Thomas [thomasd@themeac.com]; Richard Ensor [rich.ensor@maac.org]; Thomas Yeager [tyeager@caasports.com]; Dennis Farrell [dfarrell@bigwest.org]; James Delany [jdelany2@bigten.org]; Kyle Kallander [kylek@bigsouth.org]; Doug Fullerton [dfullerton@bigskyconference.org]; Ted Gumbart [tgumbart@atlanticsun.org]; Patty Viverito [pattyv@mvc.org]; Britton Banowsky [bbb@c-usa.org]; Bernadette McGlade [BMcGlade@atlantic10.org]; mlaslive@sec.org; Beth DeBauche [bdebauche@ovc.org]; Amy Huchthausen [huchthausen@americaeast.com]; Jon LeCrone [jlecrone@horizonleague.org]; Robin Harris [robinharris@ivyleaguesports.com]; Noreen Morris [nmorris@northeastconference.org]; Duer Sharp [d.sharp@swac.org]; Jeff Hurd [jhurd@wac.org]; Karl Benson [benson@sunbeltsports.org]; Bob Bowlsby [bob@big12sports.com]; Joseph Bailey [jbailey@bigeast.org]
CC: Greg Sankey [gsankey@sec.org]; Big Ten - Jennifer Heppel [jheppel@bigten.org]; Joseph D'Antonio [jdantonio@bigeast.org]; Kevin Weiberg [kweiberg@Pac-12.org]
Subject: PSU press conference--see web site link for full report

CCA members,
A few comments on how/why action has taken place. I have worked with our legal counsel and the university's to design the consent decree that Penn State eventually agreed to. Mark communicated with Jim Delany and Anna Lou Simon of MSU serves on the Board of Directors and Exec Com.

I want to comment to you on jurisdiction and where we go from here regarding future potential cases. We and the Exec Com believed the "athletic culture" of PSU over a 14 year period created the opportunity and maybe even the safe harbor for despicable criminal activities to take place. This cuts so deeply into the value structure of intercollegiate athletics that in the interests of taking action to resolve a "core issue of the Assn", the Exec Com exercised its jurisdiction and then permitted the staff to develop a set of conclusions based on the Freeh report and Sandusky trial as well as penalties, subject to Exec Com and a sign off by the President of Penn State. This was not a negotiation. The NCAA established the penalties and absent the signature of the President, the matter would have been referred to the more cumbersome enforcement process.

Many presidents favored the so-called death penalty, but it also was clear that none of the perpetrators remained and the new president and Board chair are clearly attempting to reestablish proper control. The intent on a set of penalties is to require the school to rebalance its athletics culture and to some degree provide the innocent athletes opportunities to compete or transfer.

The message going forward is that you should encourage schools to look carefully at "power" programs and whether the athletics culture could be overwhelming the proper educational, completive and recruiting values at our schools in addition to whether it could become a sanctuary for criminal activity as occurred at Penn State.

Our hope going forward is to develop clear legislation to place responsibility to call these matters into question through the usual enforcement program. I am sure you will hear more about empanelling a group to make legislative recommendations and I'll do my best to keep CCA involved in this process.

Having participated in both the SMU and Penn State cases, I am now comfortable with the process here (I was opposed early on) and I believe this case offers the most realistic opportunity going forward to address the unconditional broad support for or inattention to inconsistent conduct in some athletics programs with institutional, conference, Assn and even societal values systems.

Best to all and I'm glad to anser questions.
David Berst