ORIGINAL

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

ESTATE of JOSEPH PATERNO;

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.

Docket No.: 2013-2082

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

Type of Pleading:
The NCAA's Brief in Opposition to Plaintiffs' Motion to Compel Production of Documents Related to Repeal of Consent Decree

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

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PA I.D. Number: 15681

ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

ESTATE of JOSEPH PATERNO, et al., Plaintiffs,	)	Civil Division
v.	)	Docket No. 2013-2082
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	)	

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS RELATED TO REPEAL OF CONSENT DECREE

The last-minute request from Plaintiff the Estate of Joseph Paterno (the "Estate") for discovery regarding the NCAA's settlement of the *Corman* action, which included as a term the repeal of the Consent Decree, seeks information that is irrelevant, inadmissible, and privileged, and collecting and producing such materials sought would impose an unnecessary burden on the NCAA. The Estate's Request is an unabashed abuse of the discovery process. It seeks the NCAA's internal communications and deliberations regarding its decision to *settle litigation*—inherently confidential and privileged materials created in a lawyer-driven process. And notwithstanding the obvious heightened protection such materials should receive, the Estate struggles to conjure a reason they could be relevant.

The Estate's brief demonstrates that these documents would be worthless. Its motion to compel does not (1) evaluate the effect of Pennsylvania Rule 408, (2) provide any meaningful analysis of the relevance of the requested documents (other than falsely claiming that the Court already deemed materials related to the repeal relevant), or (3) seriously address the burden on the NCAA, especially in light of the fact that the vast majority of any responsive documents would be privileged. These shortcomings likely explain why the Estate did not request the settlement negotiation materials a year and a half ago, when the settlement occurred, rather than in the last two days parties could serve discovery requests in the instant matter.

The questionable relevance, likely inadmissibility, and overarching privilege and work product protection of the documents reveals what this request is: a long-shot fishing expedition to see if the Estate can locate a document that can be twisted to support its claim while at the same time driving up the NCAA's costs.

Having found no proof of actual malice to date, Plaintiffs' continually expanded their scope of discovery in search of anything to support such a claim. This request comes more than a year and a half after it could have been issued, revealing that it is a last-ditch, desperate attempt by the Estate. The motion to compel should be denied.

BACKGROUND

On March 28, 2016, a month after fact discovery was originally scheduled to close and only two days shy of the deadline to serve timely discovery, the Estate served three document requests on the NCAA. Ex. A, Estate's Third Request for Prod. of Docs. to NCAA (Mar. 28, 2016).[1] Two of those requests were reasonably tailored, and the NCAA provided the responsive materials it could locate. The focus of this dispute is the third document request.

Request No. 3 states: "For the period from January 1, 2013 through February 27, 2015, please produce all documents that evidence, reflect or refer to consideration of, evaluation of, or the bases for, the repeal, dissolution, modification of, or superseding treatment of, the Consent Decree" (the "Request"). The "repeal" of the Consent Decree was an element of the settlement agreement into which the NCAA, Senator Corman, and Treasurer McCord entered to resolve *Corman v. NCAA*, No. 1 MD 2013 (Pa. Commw. Ct.). *See* Ex. D to Pls.' Mot., Settlement Agreement ¶ 2 ("Plaintiffs, the NCAA, and Penn State agree that the July 23, 2012 Consent Decree is repealed."). As such, the Estate is seeking

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[1] Fact discovery was scheduled to end in this matter on February 29, 2016. Scheduling Order (Oct. 12, 2015). At Plaintiffs' request the Court extended fact discovery to April 29, 2016. Mot. to Extend Discovery Cutoff and for Entry of Revised Scheduling Order (Dec. 31, 2015); Revised Scheduling Order (Mar. 11, 2016).

settlement communications and the NCAA's internal settlement deliberations related to the *Corman* litigation.

For more than two years of discovery, the Estate agreed that no documents created after 2013 in the NCAA's possession were relevant to their claims. This is clear because the Parties agreed to limit their document productions to material generated prior to the initiation of the present litigation (May 31, 2013),[2] subject to isolated exceptions for specific categories of documents that the NCAA undisputedly required to defend this litigation.[3] In comparison, the information the NCAA sought during re-opened discovery—which is related to recently revealed allegations from the 1970s—was requested immediately upon learning new information and those requests are directly relevant to the issues in this case. Prior to the March 28th requests, the Estate had sought no discovery from the NCAA for the period after May 31, 2013, seemingly acknowledging the obvious: such materials could not be used in determining whether the NCAA acted with actual malice in issuing the Consent Decree, or any other matter relevant to this litigation.

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[2] *See, e.g.*, Ex. B, Letter from S. Gragert to P. Maher (Apr. 21, 2015) ("We agreed that the same time period would apply to the non-Estate Plaintiffs' productions as the NCAA and the Estate have applied to their productions. Namely, the NCAA agreed that these Plaintiffs could limit their responsive materials to those generated between January 1, 2011 and May 30, 2013.")).

[3] For example, documents pertaining to Plaintiffs William Kenney's and Jay Paterno's subsequent employment searches.

ARGUMENT

The Court should not condone the Estate's eleventh-hour attempt to obtain the NCAA's internal communications and deliberations regarding its decision to *enter into a litigation settlement*. The Request is harassment cloaked as discovery: it seeks irrelevant, inadmissible, and privileged information that bears on the NCAA's strategic decision to settle the *Corman* matter and *not* the merits of the instant case, and would impose an unjustifiable and undue burden on the NCAA. As such, the balance of the need for the discovery against the burdens it would impose—which this Court must weigh—tips decisively *against* granting the Estate's motion to compel. *See* Pa. R.C.P. 4009.1, explanatory cmt.;[4] *Shedlock v. UPMC Presbyterian*, 69 Pa. D. & C.4th 1, 8 (C.P. 2004) ("[A] court shall balance the needs of the party seeking discovery against the burdens which the discovery would impose.").

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[4] "As with all other discovery, electronically stored information is governed by a proportionality standard in order that discovery obligations are consistent with the just, speedy and inexpensive determination and resolution of litigation disputes. The proportionality standard requires the court, within the framework of the purpose of discovery of giving each party the opportunity to prepare its case, to consider: (i) the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (ii) ***the relevance of electronically stored information and its importance to the court's adjudication in the given case***; (iii) the ***cost, burden*** and delay that may be imposed on the parties to deal with electronically stored information; (iv) the ease of producing electronically stored information and whether substantially similar information is available with less burden; and (v) any other factors relevant under the circumstances." Pa. R.C.P. 4009.1, explanatory cmt. (emphases added).

The extremely limited relevance of settlement communications and deliberations—which the Estate seeks here—is well-established. Pennsylvania Rule of Civil Procedure 408 provides that "[e]vidence of [compromise offers and settlement negotiations] is *not admissible*—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Pa. R.C.P. 408 (emphasis added). Federal courts have routinely construed Federal Rule of Civil Procedure 408—which is identical in all relevant respects to the Pennsylvania rule[5]—to apply equally to settlement agreements between a defendant and a third party in a different proceeding, particularly where, as here, the settled claims shares some factual nexus to the instant litigation. *See, e.g.*, *Portugues-Santana v. Rekmodiv Int'l*, 657 F.3d 56, 63 (1st Cir. 2011); *Banker v. Nighswander, Martin & Mitchell*, 37 F.3d 866, 872 (2d Cir. 1994); *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F. 3d 284, 297-298 (5th Cir. 2010).

This rule both recognizes the irrelevance of settlements and related communications to deciding the merits, and serves the important policy of encouraging amicable resolution of litigation. *See, e.g.*, *Portugues-Santana*,

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[5] The rules are the same with the exception that Pennsylvania's rule does not contain an exception related to criminal cases. Pa. R.E. 408, cmt. ("Pa.R.E. 408(a) differs from F.R.E. 408(a) in that the federal rule in paragraph (a)(2) contains language that seems to permit the use in criminal cases of statements made to government investigators, regulators, or enforcement authority in negotiations in civil cases.").

657 F.3d at 63 ("[T]he admission of such evidence would discourage settlements in either case." (citation omitted)); *Lyondell Chem. Co.*, 608 F. 3d at 294 ("[T]he relevancy of settlement communications is thought to be suspect because they may have been an attempt to purchase peace rather than an admission of liability."). Such considerations are so important that some courts have even declared that a "settlement privilege" exists, categorically preventing any discovery of litigation settlement materials. *See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980, 983 (6th Cir. 2003).

The U.S. District Court for the Eastern District of Pennsylvania recently confronted (and largely rejected) a broad request for settlement materials similar to the one at issue here. In *Steinmetz v. Houghton Mifflin Harcourt Publishing Co.*, No. 14-1937, 2014 U.S. Dist. LEXIS 171343 (Dec. 11, 2014), the plaintiff contended that the defendant's history of settling multiple copyright infringement cases demonstrated that its alleged continued infringement was willful, and, late in the discovery process, sought "broad discovery" concerning all such prior settlements, including confidential settlement agreements, "underlying correspondence and internal memoranda." *Id.* at *2, *8.

Balancing the limited relevance and likely inadmissibility of the requested evidence against the burden the requests imposed on the defendant, the *Steinmetz* court permitted only limited discovery concerning prior settlements; namely, the

defendant was required to "identity" any previously-filed claims (so that plaintiffs could review the relevant dockets and pleadings) and the plaintiff was permitted to ask "reasonable questions" about the previously-filed claims at depositions. *Id.* at *9-10. The Court did *not* permit discovery of the settlement agreements themselves or any related correspondence or internal memoranda. *Id.* In so holding, the *Steinmetz* court explained the limited utility of settlement materials: "[T]he fact of a settlement only indicates that a claim was made, not necessarily that the claim had any merit. All parties in litigation frequently settle claims not because of any endorsement of merit or lack of merit of a particular claim, but for other factors including the risks and expenses of litigation, a party's policies towards settlement of litigation, and the confidentiality assured by a settlement as opposed to the public availability of evidence that attaches to any court proceeding." *Id.* at *4.

The NCAA respectfully asks that this Court follow the analysis of the *Steinmetz* decision and similarly deny the Estate's "broad" requests for settlement materials. Here, the Estate already has access to the information that the *Steinmetz* court allowed the plaintiff in that case to obtain. Specifically, the Estate (1) is in possession of the *Corman* settlement agreement, and, indeed, actually participated in discussions that lead to that settlement; and (2) has had the opportunity to ask "reasonable questions" at depositions about the Corman settlement—and, in fact,

did so during the deposition of Penn State President Eric Barron, which the Estate recognizes. Pls.' Mot. at 4. As such, the issue is simply whether the Estate should be permitted "broad" discovery—including settlement correspondence and internal memoranda—of the exact type that the *Steinmetz* court denied to the plaintiff in that case.

The Estate can offer no reason to deviate from the outcome in *Steinmetz*. *First*, just as the defendant argued in *Steinmetz*, the requested materials are irrelevant and very likely inadmissible. The requested materials reflect the NCAA's strategic decision to settle litigation, and by doing so ensure that $60 million could be directed to organizations dedicated to protecting children from sexual abuse. That is it. Yet the Estate seeks these materials for precisely the purpose Rule 408 prohibits: to try to demonstrate that the NCAA's compromise in litigation supposedly evidences a guilty mindset. And to the extent that the Estate harbors some suspicion that the request materials would reveal an admission by the NCAA that it lacked the authority to sanction Penn State—in communications with *opposing litigation counsel*—then the Estate is simply engaging in a fanciful fishing expedition. The NCAA then—and now—resolutely stands by its authority. The Estate all but admits as much. As the Estate recognized, President Barron indicated that a key to reaching settlement for the NCAA was a provision in the

settlement papers by which Penn State reaffirmed that the NCAA acted in good faith in executing the Consent Decree. Pls.' Mot. at 5.[6]

The Estate argues that the Court already held that the repeal of the Consent Decree is relevant. Pls.' Mot. at 3-4. Not so. The Estate contends that the Court recognized the relevance of the repeal of the Consent Decree by permitting Plaintiffs to serve subpoenas directed to current and former members of the NCAA Committee on Infractions and the Infractions Appeals Committee ("Committee Subpoenas"), which sought, among other things, materials related to the *Corman* settlement. *Id.* But the relevance of the *Corman* settlement materials was never before the Court. The NCAA objected to the Committee Subpoenas at a broader level.[7] NCAA Opp'n to Pls.' Mot. to Compel Discovery at 3 (March 10, 2016). The NCAA did not challenge any specific document request contained in the Committee Subpoenas.

The Estate also argues that it asked President Eric Barron at his deposition about the repeal of the Consent Decree. Pls.' Mot. at 3-4. But simply because Plaintiffs chose to ask about it does not make the issue relevant. Nor has the Court

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[6] The Estate suggests, without explanation, that the requested materials are relevant to damages. Pls.' Mot. at 5. It does not explain how that could be, nor can the NCAA fathom how, internal NCAA documents about the repeal of the Consent Decree could possibly be probative of the Estate's alleged damages.

[7] The Estate mischaracterizes the NCAA's objections to the Committee Subpoenas by representing that the NCAA simply objected on the grounds that the intended recipients were third parties. *See* Pls.' Mot. at 4.

so held. Penn State's motion to quash President Barron's deposition subpoena did not address whether the repeal of the Consent Decree was a proper subject for inquiry.

Second, nearly all—if not all—internal NCAA communication related to the *Corman* settlement are privileged and work product. The Estate seeks documents about *a litigation settlement*—a process driven entirely by lawyers in the course of an ongoing lawsuit. *See* Pa. R. Civ. P. 4003.3 (preventing discovery into counsel's conclusions and opinions). Aside from limited conversations between Penn State President Eric Barron and NCAA President Mark Emmert at the tail end of the settlement process, these settlement communications occurred between counsel. Other communications about why the NCAA repealed the Consent Decree are textbook privileged and work product materials. Accordingly, if its motion were granted, the Estate would receive little beyond a privilege log.

Third, the Request would saddle the NCAA with a significant burden. The NCAA will be forced to undertake a time-consuming and expensive process of collecting, processing, and reviewing electronic data. The Parties had agreed to limit their document productions to materials created before May 31, 2013 (subject to certain exceptions not applicable here). This held true for more than two years of voluminous discovery. Based on the Parties' agreed discovery parameters, the NCAA's email and electronic data collection does not extend to January 2015,

when the NCAA settled *Corman* (and, accordingly, repealed the Consent Decree). Now, after nearly *2.5 years* of discovery, the Estate expects the NCAA to spend an enormous sum of money to undertake another round of electronic data collection, processing, review, logging, and production.[8] The burden is undeniable.

* * *

The Estate errs when it considers each issue (relevance, burden, privilege, timeliness) in a discrete vacuum. Rather, those issues (and inadmissibility) must be considered together as a part of a requisite balancing process in resolving discovery disputes. A complete analysis reveals that any benefit the Estate may receive is vastly outweighed by the burden placed on the NCAA. At the last possible minute—after years of considerable discovery—the Estate demands that the NCAA open an entirely new, large-scale, expensive front of discovery. For what? For highly sensitive litigation documents for which the Estate cannot explain their relevance, which the Estate will never receive due to privilege, and which even if the Estate *did* receive, the materials would not be admissible at trial.

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[8] The Estate offers that its timing "is moot" due to the Court's recent extension of discovery. Pls.' Mot. at 3. However, the brief discovery extension was intended to permit limited, targeted discovery (two depositions and discovery into the newly revealed 1970s allegations). Nothing the Court said at the May 16th conference invited broad, expensive, and burdensome discovery to rescue the Estate from its lack of diligence in pursuing discovery earlier that they have known about for over a year.

The Estate demands that the NCAA bear this significant burden, at the close of discovery, to obtain irrelevant, inadmissible, and privileged materials. Such a request should be evaluated for what it is: an attempt to burden a defendant for the sake of imposing burden. The Estate's motion should be denied.

CONCLUSION

For the foregoing reasons, the NCAA respectfully requests that the Estate's motion to compel be denied.

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Respectfully submitted,

Dated: June 9, 2016

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EXHIBIT A

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; 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.	Civil Division Docket No. 2013-2082 **Discovery** 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*) 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

THIRD REQUEST FOR PRODUCTION OF DOCUMENTS FROM PLAINTIFF ESTATE OF JOSEPH PATERNO TO DEFENDANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Plaintiff Estate of Joseph Paterno, by and through its undersigned counsel, requests, pursuant to Pa. R.C.P. No. 4009.11, that Defendant National Collegiate Athletic Association ("NCAA") respond to this Third Request for Production of Documents within thirty (30) days of service, in accordance with the Instructions and Definitions set forth herein, and produce the

following documents for inspection and copying at the offices of Goldberg Katzman, P.C., 4250 Crums Mill Road, Suite 301, P.O. Box 6991, Harrisburg, PA 17112.

INSTRUCTIONS

The following instructions are applicable throughout these Requests and are incorporated into each individual Request:

1. These instructions and definitions should be construed to require responses based upon the knowledge of, and information available to, the responding party, the Defendant NCAA, as well as its agents, representatives, and, unless privileged, attorneys and accountants, including but not limited to Latham & Watkins, LLP and Killian & Gephart, LLP.

2. These Requests are continuing in character, so as to require that supplemental responses be served promptly if additional or different information is obtained with respect to any Request.

3. No part of a Request should be left unanswered merely because an objection is interposed to another part of the Request. If a partial or incomplete response is provided, the responding party shall state that the response is partial or incomplete.

4. All objections shall be set forth with specificity and shall include a brief statement of the grounds for such objections.

5. Each Request shall be read to be inclusive rather than exclusive. Accordingly, the words "and" as well as "or" shall be construed disjunctively or conjunctively as necessary, in order to bring within the scope of each Request all information that might otherwise be construed to be outside its scope. "Including" shall be construed to mean "including, without any limitation." The word "all" includes "any" and vice versa. The past tense shall include the present tense so as to make the request inclusive rather than exclusive. The singular shall include the plural and vice versa. The masculine includes the feminine and vice versa.

6. Where a claim of privilege is asserted in objecting to any Request or part thereof, and documents or information is not provided on the basis of such assertion:

A. In asserting the privilege, the responding party shall, in the objection to the Request, or part thereof, identify with specificity the nature of the privilege (including work product) that is being claimed; and

B. The following information should be provided in the objection, if known or reasonably available, unless divulging such information would cause disclosure of the allegedly privileged information:

(1) For documents:

a. the type of document;

b. the general subject matter of the document;

c. the date of the document; and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

7. If, in responding to these Requests, you encounter any ambiguity when construing a Request, instruction, or definition, your response shall set forth the matter deemed ambiguous and the construction used in answering.

8. All documents that are responsive, in whole or in part, to any portion or clause of any paragraph of any Request shall be produced in their entirety.

9. Where any item contains marking(s) not appearing in the original, or drafts are altered from the original, then all such items must be considered as separate documents and

identified and produced as such.

10. Unless otherwise specified in a particular Request, the time period covered by these Requests is January 1, 2011 through the present.

DEFINITIONS

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under Pa. R.C.P. No. 4003.1. As used in these Requests, the following terms are to be interpreted in accordance with these definitions:

1. "You," "your," "yours," "Defendant," and "NCAA" shall refer to Defendant NCAA, to whom these Requests are directed, as well as any attorney, assignee, agent, representative, or any other person acting, authorized to act, or purporting to act on behalf of the NCAA.

2. "Plaintiff," "Joe Paterno," or "Paterno" shall refer to former Penn State head football coach Joseph ("Joe") V. Paterno or his Estate, or any other person authorized to act on behalf of Joe Paterno or his Estate.

3. "Communication" means the transmittal of information by any means, and shall mean and be deemed to refer to any writing or oral conversation, including, but not limited to, telephone conversations, conversations in meetings, letters, memoranda, notes, or electronic communications.

4. "Document" is defined as broadly as possible to include anything stored in any medium, including but not limited to, all written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, of every type and description that is in your possession, control, or custody, or of which you have knowledge, including but not limited to, correspondence; memoranda; transcriptions of any conversation or testimony; tapes; stenographic or hand-written notes; studies; publications; books; diaries; phone records; logs; instant messaging (public and private IM); electronic mail (email), including but not limited to, server-based email,

web-based email (i.e. gmail.com, yahoo.com, hotmail.com), dial up email, email attachments, deleted email, and email stored on hard drives or portable media; voicemail; information stored on social media and social networking sites; information created or received with the use of PDAs or smartphones; information stored in a cloud environment; text messages; information stored on removable hard drives, thumb drives, flash drives, CDs, DVDs, disks and other portable media; pamphlets; pictures (drawings and photographs); films; images; microfilms; recordings (including any analog, digital, electromagnetic, optical, phonographic, or other media of audio and/or visual recordings); maps; reports; recommendations; surveys; appraisals; charts; minutes; statistical computations; spreadsheets; telegrams; telex messages; listings of telephone calls; calendars; datebooks; books of account; ledgers; expense records; accounts payable; accounts receivable; presentations; analyses; computer records, data compilations and/or databases; every draft of each such document; every copy of each such document where the original is not in your possession, custody or control; and every copy of each such document where such copy is not an identical copy of an original, or other copy, or where such copy contains any commentary or notation whatsoever that does not appear on the original or other copy. "Document" includes any electronically stored information ("ESI").

5. "Evidence, reflect, or relate to" means in the broadest sense and includes documents and things alluding to, responding to, concerning, connected with, commenting on, in respect of, about, regarding, discussing, evidencing, contradicting, showing, describing, reflecting, analyzing and/or constituting the subject matter of the request.

6. "Person" means any natural person or any business, corporation, public corporation, municipal corporation, state government, local government, agency, partnership, group, association, or other organization, and also includes all of the person's representatives.

7. "Penn State" shall refer to employees, administrators, and personnel of The Pennsylvania State University, as well as any attorney, assignee, agent, representative, or any other person acting, authorized to act, or purporting to act on behalf of Penn State.

8. "Jerry Sandusky" or "Sandusky" shall refer to former Penn State assistant football coach Gerald A. Sandusky, as well as any attorney, assignee, agent, representative, or any other person acting, authorized to act, or purporting to act on behalf of Gerald A. Sandusky.

9. "Mark Emmert" or "Emmert" shall refer to the President of the NCAA, Mark Emmert, as well as any attorney, assignee, agent, representative, or any other person acting, authorized to act, or purporting to act on behalf of Mark Emmert.

10. "Edward Ray" or "Ray" shall refer to the former Chairman of the NCAA's Executive Committee, Edward Ray, as well as any attorney, assignee, agent, representative, or any other person acting, authorized to act, or purporting to act on behalf of Edward Ray.

11. The "Freeh Firm" refers to the law firm of Freeh, Sporkin & Sullivan, LLP (and any successor entity), as well as attorneys, investigators, or employees that aided or worked with the Freeh Firm on the Freeh investigation, as defined *infra*, including the Freeh Group International Solutions ("FGIS").

12. The "Freeh investigation" shall refer to the investigation conducted by the Freeh Firm into the alleged failure of certain Penn State personnel to respond to and report certain allegations against Sandusky.

13. The "Freeh Report" shall refer to the report issued by the Freeh Firm on July 12, 2012, including all footnotes, exhibits, drafts, or other notes related to that Report.

14. The "NCAA investigation" shall refer to any investigation or evaluation of Penn State undertaken by the NCAA following Defendant Emmert's assertion of NCAA jurisdiction over matters related to Sandusky and Penn State in November 2011.

15. The "Consent Decree" shall refer to the document titled the "Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University," released on July 23, 2012, as well as all footnotes, exhibits, drafts, and other notes related to the Consent Decree.

16. The "NCAA's Operating Bylaws and Administrative Bylaws," "Operating Bylaws," or "Administrative Bylaws," shall refer to the operating policies, procedures, guidelines, and rules set forth in the 2011-2012 NCAA Division I Manual, Second Am. Compl. Ex. A.

17. The "NCAA enforcement process" shall refer to the operating policies, procedures, and investigative guidelines with which the NCAA and the NCAA Committee on Infractions are required to comply in conducting an investigation, as set out in the NCAA's Operating Bylaws and Administrative Bylaws.

18. The "NCAA appeals process" shall refer to the operating policies, procedures, and investigative guidelines with which the NCAA and NCAA Infractions Appeals Committee are required to comply with respect to appeals from the Committee on Infractions as set out in the NCAA's Operating Bylaws and Administrative Bylaws.

19. "Involved individual" shall refer to any individual staff or student who is named in or alleged to be significantly involved in an alleged NCAA rules violation.

DOCUMENT REQUESTS

REQUEST NO. 1:

For the period from November 1, 2011 through August 31, 2012, please produce all agendas for the weekly meetings of the NCAA's Enforcement Directors that contain any reference to Penn State University, the Freeh investigation, the Freeh Report or the Consent Decree.

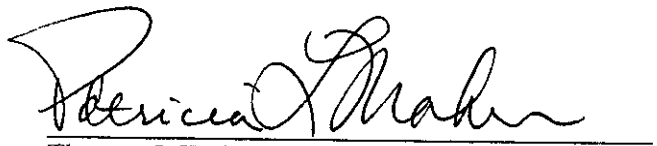
REQUEST NO. 2:

For the period from November 1, 2011 through August 31, 2012, please produce all notes of the weekly meetings of the NCAA's Enforcement Directors, prepared by the executive assistant to the NCAA Vice President for Enforcement, that contain any reference to Penn State University, the Freeh investigation, the Freeh Report or the Consent Decree.

REQUEST NO. 3:

For the period from January 1, 2013 through February 27, 2015, please produce all documents that evidence, reflect or refer to consideration of, evaluation of, or the bases for, the repeal, dissolution, modification of, or superseding treatment of, the Consent Decree.

Dated this 28th day of March, 2016.



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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **THIRD REQUEST FOR PRODUCTION OF DOCUMENT PLAINTIFF ESTATE OF JOSEPH PATERNO TO DEFENDANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION** was served this 28th day of March, 2016 by first class mail and email to the following:

Thomas W. Scott
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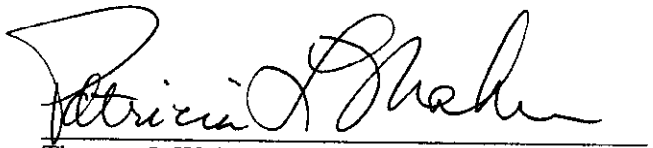

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LATHAM&WATKINS LLP

April 21, 2015

VIA EMAIL

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Washington, DC 20006

Re: *Paterno, et al. v. NCAA, et al.*, Civ. No. 2013-2082

Dear Trish:

I am writing to memorialize the matters discussed during our March 27, 2015 teleconference regarding Plaintiffs' responses to the NCAA's requests for the production of documents. During the call, we primarily discussed the written responses and objections to the NCAA's requests for production from William Kenney, Jay Paterno, and Al Clemens (the "non-Estate Plaintiffs"), which are addressed below.

However, we first note three other topics discussed. *First*, you noted that all four Plaintiffs anticipated making an imminent production, which we have now received and are in the process of reviewing. We appreciate Plaintiffs' efforts to produce responsive materials. Nonetheless, we would hope that more sizable productions are forthcoming. Nearly a year has passed since the NCAA served its discovery requests, but Plaintiffs have produced few materials in response. For example, Mr. Kenney has not produced any materials, and Jay Paterno[1] has produced only 21 documents.

Second, you provided an update on the Estate's efforts to obtain Coach Paterno's materials located at Penn State. We understand that Coach Paterno's office has been sealed but that you will be permitted to conduct a supervised review. We ask that you please advise us if, in the course of that review, you identify materials that may be responsive to the NCAA's document requests.

Third, we reiterated the NCAA's concern regarding its lack of visibility into the custodians/sources of documents the Estate considers to be within its custody, control, or

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[1] In this letter, "Coach Paterno" refers to the late Joe Paterno, represented in this action by George Scott Paterno; "Mr. Paterno" refers to Jay Paterno.

possession. We appreciate your efforts during our call to explain generally your approach to collecting responsive materials on behalf of the Paterno Estate. However, to ensure that all responsive materials are provided to the NCAA, we plan to seek documents directly from certain relevant individuals connected to the Estate and anticipate inquiring into this subject in the course of future depositions. We hope this approach will help reduce any ambiguity about the scope of the Estate's response. We trust that, notwithstanding these efforts, the Estate will continue to discharge its obligations to produce materials on behalf of the Estate.

As to the non-Estate Plaintiffs' written responses and objections, we discussed the following on our call:

Time period. We agreed that the same time period would apply to the non-Estate Plaintiffs' productions as the NCAA and the Estate have applied to their productions. Namely, the NCAA agreed that these Plaintiffs could limit their responsive materials to those generated between January 1, 2011 and May 30, 2013, unless otherwise noted. The NCAA reserved the right, however, to request additional documents outside of this date range in the future.

Request Nos. 4–7.[2] You clarified that, notwithstanding the non-Estate Plaintiffs' objections to these requests on the grounds of attorney work product and/or attorney-client privilege, the non-Estate Plaintiffs were not withholding materials on such grounds and that, in fact, they had no responsive materials.

Request No. 10. You clarified that the non-Estate Plaintiffs were not withholding documents on the basis of their objection to the definition of "Plaintiff" as encompassing George Scott Paterno. You also clarified that, notwithstanding the non-Estate Plaintiffs' limitation of the scope of this Request to materials "that relate to the investigation of Jerry Sandusky, actions by the NCAA and Penn State following [his] indictment in November 2011, and the effects of those actions," these Plaintiffs were not, in fact, withholding materials based on that statement. Said another way, the non-Estate Plaintiffs will not withhold materials, if any, that would be responsive to the Request as drafted by the NCAA but not responsive and/or outside of the time period as re-stated by the non-Estate Plaintiffs.

Request No. 11. You stated that you are not currently aware of any communications with the Pennsylvania Attorney General's Office and, as such, were not withholding documents on the basis of the non-Estate Plaintiffs' objections. We agreed that if you later found communications with the Attorney General's Office that Plaintiffs chose to withhold, you would so advise the NCAA.

Request No. 12. You indicated that the non-Estate Plaintiffs will not produce materials in response to this Request due to uncertainty of its meaning. We reiterated our confusion over this objection given that the Request, in part, seeks materials concerning Plaintiffs' own

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[2] All Request numbers refer to those contained in the requests for the production of documents propounded on Mr. Clemens; however, our discussion included the responses and objections Jay Paterno and William Kenney provided to their corollary Requests.

allegations in Paragraphs 99-101 of the Amended Complaint. Nevertheless, we offered to attempt to clarify the Request.

Request No. 13. In response to the non-Estate Plaintiffs' objection that Request No. 13 is overly broad, we offered to narrow the Request by omitting publicly available media articles.

Request No. 14. We asked about the basis of the non-Estate Plaintiffs' objection that this Request calls for materials protected by the attorney work product doctrine and/or attorney-client privilege. In response, you stated that Messrs. Clemens and Kenney would not withhold materials on those grounds because they did not have responsive materials. As to Mr. Paterno, you noted that you did not yet know whether he intended to withhold responsive documents on those grounds, but that you would inform the NCAA should he choose to do so in order to permit a discussion of the grounds for the objection.

Request Nos. 15-17. Request Numbers 15-17 seek documents pertaining to the non-Estate Plaintiffs' financial position over time, including their sources of income, earnings, assets and financial wherewithal. We understand that Messrs. Kenney and Paterno will produce responsive documents, and are in the process of doings so. With regard to Mr. Clemens, however, you explained that information responsive to these requests would not reflect the type of damages he purportedly suffered and, as such, Mr. Clemens objects to producing the requested materials. We do not understand how that position is consistent with Mr. Clemens' claim for compensatory damages in this case. Indeed, Mr. Clemens voluntarily chose to assert claims for damages as a plaintiff here, and in doing so, put squarely at issue his financial condition and records. Thus, if we were to agree to exempt Mr. Clemens from producing materials responsive to Request Nos. 15-17, we would need in return a stipulation making sufficiently clear, *inter alia*, that Mr. Clemens is not asserting any claim for financial or pecuniary damages in this case, and that he will not claim to have suffered any such damages related to the statements made in the Freeh Report or repeated in the Consent Decree. Otherwise, we request that Mr. Clemens produce the requested materials within 21 days.

Request Nos. 18-19. Subject to the stipulation described above, the NCAA is amenable to limiting Request Nos. 18 and 19 as to Mr. Clemens to those documents pertaining to contracts and agreements pertinent to his reputation/personality, such as media deals, endorsements, etc., if any. You indicated that you doubted any exist, but we reiterated our request for such documents to the extent they do. We clarified that we could not so narrowly limit these Requests as to Messrs. Paterno and Kenney, but you likewise doubted responsive materials exist.

Request No. 21. Similar to Request No. 10, you clarified that Mr. Paterno would not withhold documents based on his objection to including George Scott Paterno in the definition of "Plaintiffs." You indicated that Messrs. Clemens and Kenney did not have responsive materials.

Request No. 22. Consistent with the non-Estate Plaintiffs' position regarding Request No. 10, you clarified that these Plaintiffs were not withholding materials on the grounds of the temporal and subject matter scope limitations contained in their responses.

Request No. 24. We clarified that the word "and" in the date meant "between" so as to establish a date range.

Request No. 29. With regard to Mr. Clemens, we take the same position with respect to Request No. 29 as we do regarding Requests No. 15-17 above. We did, however, agree that as an initial matter, we would like to focus on documents created after January 1, 2011. Further, as noted above, the NCAA cannot accept Messrs. Kenney and Paterno's temporal limitation to 2011. The NCAA is willing to narrow the time period to January 1, 2007, but documents prior to 2011 are relevant to their damages claims and should be produced.

Finally, at the conclusion of our call, we had insufficient time to address several of Jay Paterno's and William Kenney's unique responses and objections, which Mr. Clemens had not asserted. We attempt to address these issues here such that a separate call may not be necessary. However, if you believe any of these topics would benefit from further discussion, we are happy to schedule a call to do so.

Request No. 13. Messrs. Kenney and Paterno each seek to temporally limit this Request to 2011. The NCAA cannot accept that limitation. Documents pertaining to their employment, or attempted employment, prior to 2011 are highly relevant to understanding their qualifications for, and likelihood of securing, employment after their termination from Penn State, among other things. If either Plaintiff intends to withhold responsive material based on that limitation, please advise use promptly.

Request Nos. 26-27 (Kenney); No. 31 (Paterno).[3] Messrs. Kenney and Paterno objected to these Requests on the ground that they "lack[] access to certain files that may contain responsive documents and information." The NCAA asks that Plaintiffs please identify who has custody, control, or possession of the files referenced in that objection so that it may determine if it needs to pursue discovery directly from such individuals or entities.

Request No. 25 (Paterno). Mr. Paterno objected to providing any responsive material pertaining to his book, *Paterno Legacy*, other than a copy of the final, published product on the grounds that the Request is overly broad and seeks irrelevant information. Mr. Paterno's objections are not well-taken. The Request is far broader than Mr. Paterno's narrow interpretation, and it is properly drafted to seek information that is reasonably likely to lead to admissible evidence, such as information, statements, and admissions regarding Coach Paterno's career and reputation, the Sandusky scandal, the NCAA, and this litigation. He also objected on the grounds that the Request seeks information subject to confidentiality agreements, attorney-client privilege, and/or the attorney work product doctrine. At most, these objections would apply to only a small subset of the responsive materials and are not a basis for withholding all responsive documents. In any event, it is questionable that much, if any, responsive information is properly subject to a privilege or work product claim given that the final book was made public and has been highly publicized, and the Request calls for, *inter alia*, public statements. Additionally, the existence of a confidentiality agreement does not immunize documents from

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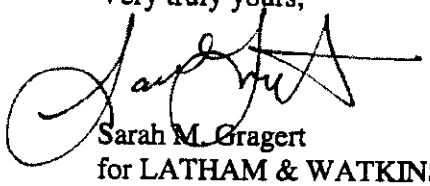
[3] Request No. 31 for Mr. Paterno was inadvertently mis-numbered as 26 in the original Requests.

production. Any documents properly designated as confidential will be protected by the operative protective order in this matter.

* * *

We appreciate the time you have provided to work through these issues. If we have misunderstood or misstated any of the Plaintiffs' positions, please let us know. We are optimistic that we can jointly resolve the remaining few issues.

Very truly yours,



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CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the NCAA's Brief in Opposition to Plaintiffs' Motion to Compel Production of Documents Related to Repeal of Consent Decree on the following by First Class Mail and email:

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