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

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

and

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

Plaintiffs,

v.

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

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Docket No.: 2013-2082

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

Type of Pleading:
NCAA's Opposition to Plaintiffs' Motion for Judgment on the Pleadings

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

ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

ESTATE of JOSEPH PATERNO, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	)	Civil Division Docket No. 2013-2082

NCAA'S OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITY

The National Collegiate Athletic Association ("NCAA") respectfully submits this Memorandum of Law in Opposition to Plaintiffs' Motion for Judgment on the Pleadings, accompanied by a Motion for Leave to Amend its Answer with New Matter.[1]

INTRODUCTION

The three remaining Plaintiffs in this case face major hurdles in prevailing on the merits. Their commercial disparagement and defamation claims require them to prove that the challenged statements in the Consent Decree—which were taken verbatim from the investigative report of former FBI director and federal judge Louis Freeh, at the culmination of an extensive investigation—are false; not just subject to debate or questioning, but "*demonstrably* false."[2] *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986). Plaintiffs must then establish by clear and convincing evidence that the NCAA somehow *knew* the statements were false, or recklessly disregarded their falsity, *id.* at 775, notwithstanding the credentials of the author, the depth of the supporting investigation, and their broad acceptance at the time in question by Pennsylvania State University ("Penn State"), the media, and numerous other objective

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1 The Amended Answer with New Matter is attached hereto as Exhibit A.

2 Plaintiffs' tortious interference and civil conspiracy claims are functionally derivative of the commercial disparagement and defamation claims, and their inability to prevail on the latter claims will necessarily doom the former.

observers. And Plaintiffs must then establish that the statements in the Consent Decree harmed them in some manner independent from the wide publication of the same exact statements in the Freeh Report itself, the torrent of negative publicity about Penn State's football program that began over seven months earlier with the shocking presentment of the Sandusky grand jury, the indictment of senior Penn State personnel on criminal charges, the termination of Coach Joseph Paterno by Penn State, the removal of his statue, and a host of other factors.

Facing such long odds, Plaintiffs seek to escape their burden and extricate themselves from the case by seizing on purported technicalities. In doing so, Plaintiffs have entirely repudiated their public contention that this litigation was a search for the "full truth, wherever it leads,"[3] and that "[t]his matter will never be resolved until the full facts are reviewed in a lawful and transparent manner."

Their own motion asks the Court to (1) dispense with any consideration of the actual merits of their claims (before Plaintiffs have been deposed or complied fully with their other discovery obligations), (2) declare them victorious based on

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[3] Mike Dawson, *Paterno lawyers to subpoena Big Ten for NCAA records about sanctions*, Centre Daily Times, Mar. 14, 2014, *available at* http://www.centredaily.com/2014/03/14/4084615_paterno-lawyers-to-subpoena-big.html?rh=1; Press Release, Paterno.com, *Paterno Family and several trustees, faculty, former players and coaches sue NCAA* (May 29, 2013), http://www.paterno.com/family-statements/post/Paterno-Family-and-several-Penn-State-trustees-faculty-former-players-and-coaches-sue-NCAA-.aspx.

the fiction that the NCAA does not vigorously deny their allegations, and (3) proceed straight to determining "the scope of appropriate injunctive and declaratory relief, and the amount of damages to which Plaintiffs are entitled." *See* Mot. ¶ 19.

Plaintiffs' Motion thus eviscerates their professed purpose for bringing this action, and the relief it seeks lacks any basis in Pennsylvania law. Indeed, it would be "contrary to the policy of the law of this Commonwealth," and an abuse of discretion, to enter judgment on the pleadings on the basis of the purported technical faults here. *Pilotti v. Mobil Oil Corp.*, 388 Pa. Super. 514, 519, 565 A.2d 1227, 1230 (1989). In the face of this standard, Plaintiffs contend that they are prejudiced because the NCAA's existing Answer leaves them with "*no understanding*" of the NCAA's positions in this litigation. Mot. ¶ 15 (emphasis added). That argument strains credulity, and is irreconcilable with the long history of this case, the numerous preliminary objections the NCAA has filed, the interrogatory responses and over 50,000 pages of discovery that it has produced, and its many public statements in and outside this Court setting out its position in great detail. Indeed, Plaintiffs' Motion does not mention that they have access to—and undoubtedly have studied—the full record of the *Corman* litigation, which includes, *inter alia*, thousands of documents, several depositions of NCAA personnel (including the senior leaders of the NCAA), and the NCAA's lengthy

statement of disputed material facts—all of which relate directly to the same underlying events at issue here.

Plaintiffs' approach to filing this motion further illustrates their gamesmanship. The NCAA filed its Answer on April 29, 2015. Despite abundant opportunity, Plaintiffs never raised the Answer's purported lack of specificity with the NCAA or requested an amendment to provide more detail, but instead simply sprung a motion asking for final judgment. Plaintiffs know the NCAA's position on the issues in this case. They do not want more detail or to search for the "truth." They want this Court to relieve them of the burden of trying to prove their claims—which they know they cannot do.

Under such circumstances, Pennsylvania law is crystal clear that even if the NCAA's Answer were defective (and it is not), the only proper remedy is leave to amend. Thus, while maintaining that its existing Answer complies with Rule 1029, the NCAA has offered an Amended Answer that would plainly address Plaintiffs' unfounded criticisms, moot the instant motion, relieve the Court of an unnecessary burden, and allow the parties to resolve the merits without further delay. Despite having twice amended their own complaint to seek to address manifest pleading deficiencies recognized by this Court, Plaintiffs have refused to consent to this single amendment for the NCAA, belying any genuine interest in addressing the

merits. The NCAA therefore requests that the Court grant leave to amend, which Pennsylvania courts must do with liberality, and deny Plaintiffs' Motion as moot.

If this Court reaches the merits, there is still no basis for granting Plaintiffs' Motion. The NCAA's Answer satisfied Rule 1029(b), which provides that averments should be "*denied specifically or by necessary implication*," for several reasons. Pa.R.C.P. No. 1029(b) (emphasis added). First, Plaintiffs ignore that the NCAA's Answer and New Matter itself, in fact, specifically and forcefully denied all of the allegations that are potentially material to Plaintiffs' remaining claims, including that the statements in the Consent Decree were false and that the NCAA made them with actual malice.

Second, a review of the "pleadings as a whole," which the Court must consider when assessing whether a particular averment has been sufficiently denied, *Commonwealth by Preate v. Rainbow Assocs., Inc.*, 138 Pa. Commw. 56, 61 & n.4, 587 A.2d 357, 360 & n.4 (1991), leaves no doubt that the NCAA's denials in its Answer and New Matter constitute *bona fide* denials. Over the course of over two years of litigation, the NCAA has repeatedly detailed its disputes with Plaintiffs' core allegations not only in the Answer and New Matter, but several other pleadings—including several rounds of preliminary objections.

Third, in any event, Rule 1029 itself makes clear that the NCAA was not required to respond to—much less specifically deny—the large majority of

allegations in Plaintiffs' Second Amended Complaint ("SAC"). Most of Plaintiffs' core allegations either state conclusions of law or constitute statements as to which the NCAA is without knowledge or information sufficient to admit or deny the truth of the averments at issue. Other allegations are no longer relevant, because they relate solely to the contract claims that are no longer part of this case. Still other allegations pertain to causes of action for which Rule 1029(b) is inapplicable.

For all these reasons, the Court should either deny Plaintiffs' Motion as moot, and grant the NCAA's motion for leave to amend its answer, or alternatively deny Plaintiffs' Motion on its merits because the NCAA's Answer plainly manifests its denial of the remaining material allegations.

STANDARD

A motion for judgment on the pleadings should be granted only when no issues of material fact exist in the case, and the law is so clear that a trial would be fruitless. *Rainbow Assocs.*, 138 Pa. Commw. at 59, 587 A.2d at 359; *Commonwealth v. Seymour*, 120 Pa. Commw. 423, 425, 549 A.2d 246, 247-48 (1988). In cases of purported technical fault, courts must grant leave to amend, rather than judgment on the pleadings, unless highly exceptional circumstances are present. *Pilotti*, 388 Pa. Super. at 519, 565 A.2d at 1230.

ARGUMENT

I. PLAINTIFFS' MOTION SHOULD BE DENIED AS MOOT IN LIGHT OF THE NCAA'S MOTION TO AMEND ITS ANSWER.

This Court need not reach the question of whether the NCAA's Answer and New Matter sufficiently denies Plaintiffs' allegations. Because any purported deficiency in the NCAA's Answer and New Matter is resolved by the NCAA's contemporaneously-filed Motion to Amend its Answer, and there is no conceivable prejudice to Plaintiffs resulting from such an amendment, the NCAA's Motion should be granted and Plaintiffs' Motion for Judgment on the Pleadings denied as moot.

Under Pennsylvania Rule of Civil Procedure No. 1033, a party may amend a pleading by leave of court "at any time," including "while a motion for judgment on the pleadings is pending." *Biglan v. Biglan*, 330 Pa. Super. 512, 520-21, 479 A.2d 1021, 1025-26 (1984). Pennsylvania courts have long recognized "the general and longstanding principle that pleading amendments under Pennsylvania Rule of Civil Procedure No. 1033 should be allowed with great liberality in order to advance the policy that cases be disposed of on their merits and not on technicalities." *Piehl v. City of Phila.*, 930 A.2d 607, 617 (Pa. Commw. Ct. 2007), *aff'd*, 604 Pa. 658, 987 A.2d 146 (2009).

In keeping with these principles, Pennsylvania courts hold that granting leave to amend—rather than entering judgment on the pleadings, as Plaintiffs

request—is the appropriate next step when an answer purportedly lacks specificity. As a leading Pennsylvania treatise summarizes the rule, "whenever a defect in party's pleading can be cured by amendment"— including "*to correct general denials that would otherwise have the effect of admissions*"—"a motion for judgment on the pleadings should not be granted without affording that party an opportunity to amend." 3 Goodrich Amram 2d § 1034(b):14 (emphasis added), attached as Ex. B. "'The policy of this Commonwealth is to grant judgment on the pleadings *only in cases where the moving party's right to relief is certain*'"; "'[w]here there is any uncertainty or doubt, *it should not be assumed that a party cannot plead with more specificity.*'" *Pilotti*, 388 Pa. Super. at 519, 565 A.2d at 1229 (quoting *Del Quadro v. City of Phila.*, 293 Pa. Super. 173, 177, 437 A.2d 1262, 1263 (1981)) (alteration in original) (emphasis added).

Indeed, under Pennsylvania law, it is an "*abuse of discretion*" *not* to permit leave to amend pleadings in such circumstances unless the opposing party is subject to "unfair surprise or some comparable prejudice." *Pilotti*, 388 Pa. Super. at 518, 565 A.2d at 1229 (emphasis added). Prejudice "must amount to something more than the removal of the procedural defect that the amendment is intended to cure," *id.*, and "more than a detriment to the other party," *Tanner v. Allstate Ins. Co.*, 321 Pa. Super. 132, 138, 467 A.2d 1164, 1167 (1983). "To make an advantage operate as a bar to amendment," after all, would effectively "'destroy

the right to amend.'" *Tanner*, 321 Pa. Super. at 138, 467 A.2d at 1167 (quoting *Sands v. Forrest*, 290 Pa. Super. 48, 53, 434 A.2d 122, 125 (1981)).

Pennsylvania courts repeatedly have applied those principles to permit a defendant to amend its answer to ensure that its pleadings are sufficiently specific to comply with Rule 1029(b). In *Pilotti*, for instance, the Superior Court reversed the trial court's decision to enter judgment on the pleadings, holding that it was "contrary to the policy of the law of this Commonwealth" to enter judgment on the pleadings where the defendant had moved to amend its answer in response to the motion, and plaintiffs were not subject to "unfair surprise." *Pilotti*, 388 Pa. Super. at 518-19, 565 A.2d at 1229. The court explained that judgment on the pleadings is not an available remedy if the "answer, though inartfully pled, is relevant and the court cannot assume from the pleadings that the defendant cannot plead a good defense to the plaintiff's claim." *Id.* at 519, 565 A.2d at 1229. Similarly, in *Keller v. R.C. Keller Motor Co.*, the Pennsylvania Supreme Court likewise affirmed a trial court's decision to grant a party leave to amend under similar circumstances, explaining that "[i]t has long been the law that technical defects in pleadings can be amended at the discretion of the court." 386 Pa. 56, 58, 124 A.2d 105, 106 (1956). "In order to prevent the case from turning on purely technical objections," the Court agreed that "the amendment was properly allowed." *Id.*

Numerous other cases are in accord. *See, e.g., Mellon Bank, N.A. v. Joseph*, 267 Pa. Super. 307, 312, 406 A.2d 1055, 1057 (1979) (even assuming answer "was not sufficiently pleaded, the remedy was *not* to strike the entire answer without leave to amend" (emphasis added)); *Medusa Portland Cement Co. v. Marion Coal & Supply Co.*, 204 Pa. Super. 5, 9, 201 A.2d 285, 287 (1964) (Defendant should be "given an opportunity to file an amended answer" to correct averments that were "insufficient" under Rule 1029); *Holland v. Lantz*, No. C-0048-CV-2008-11555, 2009 WL 6969700 (Pa. C.P. June 18, 2009) (Although defendant's answer, which "appear[ed] to consist of nothing more than general denials," was "inartfully pled and suffer[ed] technical insufficiencies, it would be contrary to the public policies of this Commonwealth to enter judgment on the pleadings on the basis of such insufficiencies."), attached as Ex. C; *Baird v. Congello*, 39 Pa. D. & C.4th 7, 14-15 (C.P. 1998) (permitting defendant leave to amend an answer that was deficient under Rule 1029 where the plaintiff could not "demonstrate any surprise or prejudice resulting from the court permitting the amendment or in refusing to deem [the relevant paragraph] admitted"), *aff'd*, 742 A.2d 1137 (Pa. Super. Ct. 1999); *Lewis v. Spitler*, 69 Pa. D. & C.2d 259, 263 (C.P. 1975) (holding that striking an answer "for failing to comply with the rules" and "treat[ing] plaintiffs' allegations as admitted" would "not be the just thing to do. ... Consequently, we will allow defendants to amend their answer."); *Peters v. Welsh*, 36 Pa. D. & C.2d 55, 58

(C.P. 1964) ("'[I]n order to prevent the case from turning upon purely technical defects, the answer may be amended, even at trial, to make specific denials instead of general ones.'").

Plaintiffs' Motion suggests that entry of judgment on the pleadings is the proper outcome, but Pennsylvania law permits judgment due to a party's purported technical faults only in exceptional circumstances. In *Swift v. Milner*, for instance, the Superior Court recognized that "leave to amend pleadings has been liberally granted," but denied such leave only because the defendant made "absolutely no effort" to amend the defective answer, despite receiving "notice by the trial court" and "the opportunity to cure the flaw." *See* 371 Pa. Super. 302, 309-10, 538 A.2d 28, 31 (1988). Similarly, in *James J. Gory Mechanical Contracting v. Philadelphia Housing Authority*, the court held that general denials in the defendant's answer could not be amended *after trial had commenced,* due in part to the "substantial prejudice" that would result from the defendant's "*ongoing* failure to file motions in a timely manner."[4] No. 453, 2001 WL 1807905, at *12 (Pa. C.P. July 11, 2001) (emphasis added), attached as Ex. D.

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[4] The other cases cited by Plaintiffs are similarly inapposite. In *Bank of America, N.A. v. Gibson*, (1) there is no indication that the defendant ever attempted to amend; (2) the court explicitly limited its holding to cases involving mortgage foreclosure actions; and (3) the defendant contended it did not have sufficient information about something it obviously would know. 2014 PA Super 217, 102 A.3d 462, 466-67 (2014). Nor was there any indication in *Safeguard v.*

No such exceptional circumstances are present here. Rather, the NCAA promptly acted to correct any purported deficiency in its Answer by offering to file an amended answer the same day Plaintiffs filed their Motion, and, when they declined that offer, requesting leave to amend shortly thereafter.[5] The NCAA's proposed Amended Answer overwhelmingly refutes Plaintiffs' contention that "[i]t has no viable response other than simply to claim generally that it has done nothing wrong and hope to buy as much time as possible." *See* Mot. ¶ 17. To the contrary, the NCAA welcomes the opportunity to present its case and to reveal Plaintiffs' claims and allegations as weak and unfounded.

Plaintiffs cannot credibly contend that the position set forth in the NCAA's Amended Answer comes as an "undue surprise." *See Pilotti*, 388 Pa. Super. at 520, 565 A.2d at 1230. As the Court is aware, the NCAA has repeatedly made clear its many disagreements with Plaintiffs' allegations—in its Answer and New

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Standard Machine & Equipment Co.—an unreported decision of the Court of Common Pleas—that any attempt to amend was made. No. 853, 1996 WL 943774, at *2 (Pa. C.P. Oct. 29, 1996), attached as Ex. E. Finally, in *Hydrair, Inc. v. National Environmental Balancing Bureau*, the court construed general denials as admissions *only* for the purpose of quashing improper service. No. 2846, 2001 WL 1855055, at *2 (Pa. C.P. Apr. 23, 2001), attached as Ex. F.

[5] In so offering, the NCAA explained to Plaintiffs that while it maintained that its existing Answer complied with Pennsylvania rules, it proposed amending its Answer to moot Plaintiffs' Motion, relieve the Court of the burden of considering an unnecessary motion, and proceed with the determination of the merits in this case. Plaintiffs refused to grant the NCAA's request. *See* Email from P. Maher to B. Kowalski, et al. (June 10, 2015), attached as Ex. G.

Matter, and across numerous preliminary objections, lengthy supporting memoranda, hearings, discovery responses, and public statements over more than two years.

Further, the same events featured in the Second Amended Complaint were at the center of the highly public *Corman v. NCAA* litigation. Thousands of documents, numerous deposition transcripts (including depositions of the NCAA's senior leaders about the same core events at issue in this case), substantial briefing, and even a joint pre-trial statement that includes the NCAA's extensive "statement of contested facts" from that litigation are publicly available. Indeed, Plaintiffs' own counsel in this case actually took the deposition of the former chair of the NCAA's Executive Committee that was noticed in the *Corman* litigation. And Plaintiffs' counsel, Patricia Maher, acknowledged to this Court in February that the NCAA's "position has been set forth" in extensive discovery materials and pleadings from the *Corman* case. Hr'g Tr. 75:20-76:9 (Feb. 6, 2015). Plaintiffs' recent about face is unconvincing. *See Pilotti*, 388 Pa. Super. at 520, 565 A.2d at 1230 ("Review of the record reveals that the factual averments necessary to the defenses, which Mobil Oil sought leave to amend in order to assert, were plainly known to Pilotti even before this litigation commenced. Thus, there would be no undue surprise or prejudice from allowance of the amendment.").

Even crediting the extremely unlikely assertion that Plaintiffs are uncertain about the NCAA's position in this litigation, that state of affairs has only existed for a mere few weeks: from the time the NCAA was required to file an answer (on April 29, 2015) to today, when the NCAA filed a proposed Amended Answer that directly addressed Plaintiffs' unfounded criticisms concerning its denials. During the interim period, not a single event has taken place in this litigation that would be impacted by the content of the denials in the NCAA's Answer. Plaintiffs cannot credibly identify any surprise or prejudice whatsoever (much less any that rises to the level of "undue" or "unfair").

In any event, as Plaintiffs' own motion makes clear, Plaintiffs will not be prejudiced if the NCAA's motion for leave to amend is granted. The only source of prejudice Plaintiffs identify—their supposed inability to "understand[] ... what issues are actually in dispute"—is one that amendment would *cure*, rather than cause. *See* Mot. ¶ 15. Moreover, "[p]rejudice must amount to something more than the removal of the procedural defect that the amendment is intended to cure." *Pilotti*, 338 Pa. Super. at 518, 565 A.2d at 1229. Here, granting the NCAA leave to amend will resolve any purported uncertainty regarding what issues are actually in dispute, thereby facilitating the "search for truth" Plaintiffs have long claimed to lie at the heart of this litigation. SAC ¶¶ 5, 90, 125 (Oct. 13, 2014); *see also*

Compl. ¶¶ 5, 76, 104 (May 30, 2013) (stating Plaintiffs are searching for the "truth"); First Am. Compl. ¶¶ 5, 83, 115 (Feb. 5, 2014) (same) ("FAC").

Granting the NCAA leave to amend its Answer is particularly warranted given that Plaintiffs have themselves amended their own pleadings on numerous occasions. Since filing their original Complaint on May 30, 2013, Plaintiffs' *own* pleading deficiencies have twice led this Court to grant them leave to amend. The Court allowed Plaintiffs to amend their initial Complaint to remedy the lack of jurisdiction over their two breach of contract claims, due to the failure to join an indispensable party. The Court also permitted Plaintiffs William Kenney and Jay Paterno to amend to plead "facts supporting an inference that actual contracts were probably forthcoming"—a critical component of their intentional interference claim. *See* Op. & Order at 13, 22 (Jan. 6, 2014).

Plaintiffs filed a First Amended Complaint on February 5, 2014, which the Court held did not sufficiently specify what relief was sought against Penn State, and was therefore "insufficient to put Penn State on notice of the claims upon which they will have to defend." Op. & Order at 15-16 (Sept. 11, 2014). However, the Court once again allowed Plaintiffs to amend their complaint. Plaintiffs filed their Second Amended Complaint on October 13, 2014, which included additional amendments beyond the scope of what the Court authorized and without consent from the adverse parties. Despite the fact Plaintiffs "didn't

follow the mandated process," the Court noted at oral argument that leave to amend "probably would have" been expeditiously granted, if Plaintiffs had requested it. Hr'g Tr. 40:22-41:4 (Feb. 6, 2015). In the face of this procedural history, denying the NCAA even *one* reciprocal opportunity to amend would be patently unjust. *See, e.g.*, *Martin v. Barfield*, 66 Pa. D. & C. 321, 324 (C.P. 1948) (permitting amendment to correct insufficiently specific denials based on "require[ments]" of "justice").

Accordingly, to cure any purported deficiency in the NCAA's original Answer, the NCAA respectfully requests that this Court grant it leave to file its proposed Amended Answer and dismiss this Motion for Judgment on the Pleadings as moot.

II. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE THE NCAA HAS SUFFICIENTLY DENIED ALL MATERIAL AVERMENTS IN THE SECOND AMENDED COMPLAINT.

If this Court reaches the merits, it still should deny Plaintiffs' Motion for Judgment on the Pleadings. Pennsylvania Rule of Civil Procedure No. 1029(b) provides that "averments in a pleading to which a responsive pleading is required are admitted when not *denied specifically or by necessary implication*." *Id.* (emphasis added). Plaintiffs ask the Court to construe Rule 1029(b) as if there were a bright-line rule that all single-word "denials" must necessarily be treated as "admissions." But that is not Pennsylvania law. *McDermott v. Commonwealth*,

103 Pa. Commw. 134, 137, 519 A.2d 1088, 1089 (1987) (holding that, based on context from the pleadings, the single-word answer 'DENIED' did not have the effect of an admission).

Instead, the well-established "purpose of this rule is to identify the issues in dispute between the parties." *Alwine v. Sugar Creek Rest, Inc.*, 2005 PA Super 291, ¶ 7, 883 A.2d 605, 609 (2005). Thus, "[t]o determine if an answer is a general denial under Rule 1029(b), the court must examine the pleadings as a whole" and remain mindful of the "fundamental principle that the plaintiff has the obligation of proving the defendant's liability, and that the defendant does not become liable by failing to deny in exculpating detail the plaintiff's incriminating allegations." *Rainbow Associates*, 138 Pa. Commw. at 61 n.4, 587 A.2d 357, 360 n.4 (1991); *see also Cercone v. Cercone*, 254 Pa. Super. 381, 391-92, 386 A.2d 1, 6 (1978) (Courts "should examine the pleadings as a whole in determining whether a defendant has admitted the material factual allegations of a complaint" or denied them "at any time."). Before treating a denial as an admission, courts must evaluate whether the effect of the "general" denial is a manifestation that the defendant, in fact, has *no valid basis to deny* the allegation and instead admits it. *See Bogley, Harting & Reese, Inc. v. Stuart*, 11 Pa. D. & C.3d 303, 311 (C.P. 1979) (holding defendants' denials were admissions because of defendants' "failure to

raise *any facts or issues* containing the *possibility* of a defense on the merits" (emphasis added)); *McDermott*, 103 Pa. Commw. at 137, 519 A.2d at 1089.

Under the applicable standard, the NCAA's existing Answer and New Matter satisfies Rule 1029(b) for several reasons. *First*, on its face, the NCAA's existing Answer and New Matter specifically and unequivocally denies the remaining material allegations of the Second Amended Complaint. *Second*, a review of the "pleadings as a whole"—which include multiple rounds of preliminary objections—reveals that the NCAA has been disputing the main elements of Plaintiffs' claims since the inception of this case. *Third*, the overwhelming majority of the NCAA's purported "general denials" were not inconsistent with Pennsylvania procedure, because the allegations they denied were conclusions of law to which no specific answer is required, concerned information solely within Plaintiffs' control, exclusively concerned Plaintiffs' dismissed or withdrawn contract claims, or concerned a claim for which no specific denial is required.

A. On Its Face, The NCAA's Answer And New Matter Sufficiently Denies All Material Allegations Left In This Case.

In their attempt to declare victory without addressing the merits, Plaintiffs grossly mischaracterize the NCAA's existing Answer and New Matter. Contrary to their assertions, the NCAA's existing Answer and New Matter specifically and

forcefully denied all of the allegations that are material to Plaintiffs' remaining claims. In particular:

- The NCAA's Answer and New Matter specifically averred that the challenged statements in the Consent Decree are "true or substantially true." NCAA Answer & New Matter ¶ 195 (Apr. 29, 2015) ("Plaintiffs' claims under Count II (tortious interference), Count III (commercial disparagement), Count IV (defamation), and Count V (civil conspiracy) should be dismissed because the statements that Plaintiffs allege were defamatory or disparaging were **true or substantially true**." (emphasis in original)). That statement necessarily establishes the NCAA's specific denial to allegations that constitute necessary elements of each of Plaintiffs' remaining claims, in particular Plaintiffs' various assertions that the findings in the Freeh Report and Consent Decree were untrue, unsupported, or erroneous. That alone is sufficient to deny Plaintiffs' Motion for Judgment on the Pleadings.[6]

- The NCAA's Answer and New Matter specifically denies that the NCAA made the challenged statements with actual malice, includes substantial factual averments in support of that position, and even includes express admissions that are inconsistent with actual malice. For example, the NCAA admits that before it even sent its November 2011 letter, the "Grand Jury

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[6] Plaintiffs' Motion suggests that the NCAA should be required to set forth in detail the "specific factual bases" supporting the Freeh Report conclusions. Mot. ¶¶ 15-16. That is simply an attempt to impermissibly shift the burden of proof in this case. The NCAA did not conduct the Freeh investigation and instead relied upon the Freeh investigation and Report in entering into the Consent Decree. The NCAA's Answer and New Matter avers facts that clearly support the NCAA's reliance and belief that the Freeh Report's findings are accurate. Nothing more can be required from the NCAA. Under the U.S. Constitution, *Plaintiffs* must carry the burden of establishing that the statements are actually false and that the NCAA made them with actual malice. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) (The First Amendment requires "that the plaintiff bear the burden of showing falsity, as well as fault."). Plaintiffs' suggestion that the NCAA must do more than effectively deny those allegations is inconsistent with decades of decisions by the U.S. and Pennsylvania Supreme Courts.

publicly alleged that Joe Paterno was involved in the issues identified in the Grand Jury Report." *Id.* ¶ 61. The NCAA admitted (and similarly averred in its New Matter) that "within hours of the release of the Freeh Report, certain Penn State representatives held a press conference and released a written statement asserting that the Board of Trustees accepted full responsibility for the failures outlined in the Freeh Report. *Id.* ¶ 68; *see also id.* ¶ 189. The NCAA averred that the findings in the Freeh Report "were based on a lengthy and comprehensive investigation—by a former director of the FBI, and commissioned by Penn State's own Board of Trustees." *Id.* ¶ 111. And Penn State was willing, in the Consent Decree itself, to accept the findings of the Freeh Report. *Id.* ¶ 190. To be sure, these are not the only facts that preclude a finding of actual malice, but each of them directly refute any suggestion that the NCAA "knew" the findings in the Freeh Report were false, or recklessly disregarded their falsity.

- The NCAA's Answer and New Matter also specifically denies that the NCAA was the cause of any harm that Plaintiffs claim to have suffered. *See Burnside v. Abbott Labs.*, 351 Pa. Super. 264, 274, 505 A.2d 973, 978-79 (1985) (Cause is an essential element of every tort.). The NCAA avers that as early as November 2011, Joseph Paterno had already been identified publicly as "involved in the issues identified in the [Sandusky] Grand Jury Report." *Id.* ¶ 61. The NCAA avers that before the Consent Decree was "executed or made public," the Freeh firm prepared and published an investigative report that included "the exact statements" that Plaintiffs now challenge. *Id.* ¶ 189. And the NCAA specifically denied that the Consent Decree included any findings concerning Plaintiffs William Kenney or Jay Paterno. *Id.* ¶¶ 144, 151. Again, these are not all the facts that could be relevant to causation, but they certainly are sufficient to demonstrate that the NCAA, in fact, denies that it caused any harm.

Plaintiffs' Motion focuses on a number of allegations regarding the NCAA's authority, the requirements and procedures set forth in its bylaws, the process by which the Consent Decree was achieved, and negotiations between the NCAA and Penn State leading to the Consent Decree. These allegations are now irrelevant. While they may have been relevant to the Plaintiffs' contract claims,

those claims have all been dismissed or withdrawn. Such allegations have no relevance to the core issues left in the case. They obviously have nothing to do with the truth or falsity of the challenged statements. And despite Plaintiffs' clear attempt to use these allegations to paint the NCAA as a bad actor, those allegations would (even if true) be fundamentally irrelevant to actual malice as well. *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 505 (E.D. Pa. 2010) ("The critical point of the actual malice inquiry under the First Amendment *focuses on the defendant's attitude toward the truth of the information itself*, unlike the common law malice inquiry which measures the defendant's attitude toward the plaintiff as an individual." (emphasis added)); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989) (explaining that "a public figure plaintiff must prove more than an extreme departure from professional standards").

In any event, the NCAA's existing Answer and New Matter is also replete with specific denials and averments concerning these very issues, including, among others:

- The NCAA specifically denied that the NCAA Division I Manual is the "exclusive source of the NCAA's authority." NCAA Answer and New Matter ¶ 24.

- The NCAA specifically denied that it imposes penalties "only in order to erase a competitive advantage." *Id.* ¶ 40.

- The NCAA specifically denied that the so-called "death penalty" is reserved solely for cases of repeat violators of major NCAA rules. *Id.* ¶ 94.

- The NCAA specifically denied the NCAA had initiated an enforcement inquiry in November 2011. *Id.* ¶ 65

- The NCAA admitted that Penn State's Board of Trustees engaged the Freeh firm in November 2011, *id.* ¶ 53, and that the NCAA waited for the Freeh firm to complete its investigation before requesting that Penn State provide answers to the November 2011 letter. *Id.* ¶ 62

- The NCAA averred that the NCAA advised Penn State's outside counsel, Mr. Gene Marsh, that Penn State could opt for the traditional enforcement process, and that if it did so, suspension of play would be available as a potential sanction. *See id.* ¶ 94.

- The NCAA explicitly admitted that the Executive Committee had the authority to authorize President Mark Emmert to enter into the Consent Decree, and one source of that authority was Article 4 of the NCAA Constitution. *Id.* ¶¶ 88, 110.

- The NCAA averred that, following dialogue between the two parties, "[i]n the Consent Decree, the NCAA and Penn State agreed that the findings in the Freeh Report, which were based on a lengthy and comprehensive investigation—by a former director of the FBI, and commissioned by Penn State's own Board of Trustees—established a factual basis to conclude that Penn State breached the standards articulated in the NCAA Constitution and Bylaws." *Id.* ¶¶ 111, 181. And in so doing, Penn State waived any process, including a determination of violations by the NCAA Committee on Infractions. *Id.* ¶ 184.

The NCAA's Answer and New Matter thus, on its face, sufficiently denies the key allegations in this case, and even provides additional detail about the NCAA's position (including its authority and basis for entering into the Consent Decree) that was not necessary to include given the limited remaining claims. There is certainly no basis to conclude that any of the NCAA's express denials should be treated as *admissions*. *See, e.g., Dusman v. Bd. of Dirs. of*

Chambersburg Area Sch. Dist., 113 A.3d 362, 371 (Pa. Commw. Ct. 2015) (reversing lower court's finding that responses were admissions because, after looking at the answer "as a whole, it is apparent the responses were not intended to be admissions, and, given [defendants'] other denials and its asserted defenses in new matter, it would be inconsistent to conclude [defendants] made these admissions"). For this reason alone, the Motion should be denied on the merits.

B. The NCAA's Other Pleadings Confirm that it Has Sufficiently Denied All Material Allegations.

In addition to its New Matter, the NCAA's preliminary objections—which also constitute pleadings under Pennsylvania law[7]—make clear that the NCAA specifically denies the central allegations to each of the remaining claims in the Second Amended Complaint. Indeed, as *Plaintiffs themselves* acknowledge, "[t]he NCAA and its counsel have taken every opportunity to probe every potential weakness in the pleadings, including the Second Amended Complaint, filing multiple rounds of preliminary objections." Mot. ¶ 13. For this additional reason, the Motion for Judgment on the Pleadings should be denied.

Count II: Mr. Kenney and Mr. Paterno's Claim For Intentional Interference With Contractual Relations. Plaintiffs assert that the NCAA's pleadings should be understood to constitute the NCAA's admission of Plaintiffs'

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[7] *See* Pa.R.C.P. No. 1017(a)(4) (stating pleadings include preliminary objections and responses).

material allegations in support of Count II, including that (i) with knowledge of future and existing prospective business opportunities, the NCAA took purposeful, wrongful actions to interfere with the contractual relations of Mr. Kenney and Mr. Paterno; (ii) the NCAA lacked justification or abused any privilege; (iii) Mr. Kenney and Mr. Paterno have been unable to secure employment; (iv) the conduct was malicious and outrageous and showed a reckless disregard; and (v) Mr. Kenney and Mr. Paterno have suffered loss and damages. Mot. ¶ 21; SAC ¶¶ 137-41. In its preliminary objections, however, the NCAA already has specifically disputed each of these allegations and apprised Plaintiffs of potentially meritorious defenses. *See* NCAA Defs.' Prelim. Objs. ¶¶ 49-55 (July 23, 2013) ("PO to Compl."); NCAA Defs.' Prelim. Objs. to Am. Compl. ¶¶ 31-40 (Mar. 17, 2014) ("PO to FAC").

For instance, the NCAA specifically pleaded that its actions were "privileged and not improper," PO to Compl. ¶ 55 (July 23, 2013), and that "Plaintiffs fail to specify a prospective contract that, *but for* the NCAA Defendants' conduct, had a reasonable probability of coming to fruition," PO to FAC ¶ 37 (Mar. 17, 2014). The NCAA also disputed whether the *NCAA* caused any of the harm of which Mr. Kenney and Mr. Paterno complain, noting that "numerous media outlets also quoted the Freeh Report and disseminated the same statements that the NCAA quoted in its Consent Decree." *Id.* ¶ 38. The NCAA

likewise disputed that Mr. Kenney and Mr. Paterno were named by the Consent Decree, pleading that "[t]he Former Coaches do not fall into the category of 'some coaches' referenced in Consent Decree" and further pleading that "even if it is possible that someone would erroneously infer that the statement about 'some coaches' applies to the Former Coaches, that is not sufficient to show that the NCAA Defendants acted with intent and for the purpose of interfering with any potential job opportunities." *Id.* ¶ 39. Those pleadings, taken as a whole—not to mention numerous other statements in supporting memoranda[8]—are more than sufficient to constitute specific denials or denials by necessary implication of Plaintiffs' material allegations respecting Count II.

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[8] *See also* NCAA Defs.' Am. Mem. in Supp. of PO to FAC at 5 (Apr. 11, 2014) ("Am. Mem. in Supp. of PO to FAC") ("[I]t is simply implausible to suggest that the Consent Decree was the 'but for' cause of these lost opportunities—and Plaintiffs provide no factual allegation to the contrary."); NCAA Defs.' Reply in Supp. of PO to Compl. at 49-50 (Sept. 26, 2013) ("Reply in Supp. of PO to Compl.") (Mr. Kenney and Mr. Paterno "do not—and cannot—allege that either the Consent Decree or the Freeh Report mentions Plaintiffs Kenney or Jay Paterno at all or suggests in any way that this general statement references them specifically."); Am. Mem. in Supp. of PO to FAC at 5 (Apr. 11, 2014) (Plaintiffs "provide no plausible factual allegation that it was the Consent Decree itself that interfered with these alleged opportunities—as opposed to the host of independent events, such as the grand jury presentment in the Sandusky matter, the firing of Coach Paterno and removal of his statue, the release of the Freeh Report by Penn State (containing the exact statements of which they claim), and the hurricane of negative publicity that accompanied these events, all of which had nothing to do with the Consent Decree."); PO to FAC ¶ 36 (Mar. 17, 2014) ("Plaintiffs' allegations that they applied for open positions and had interviews with prospective employers do not create a reasonable probability that they would be hired.").

Count III: The Estate's Claim For Commercial Disparagement. Under Count III, the Estate of Joseph Paterno (the "Estate") materially alleges that (i) the Consent Decree relied on statements that disparaged Coach Paterno and the Estate, (ii) Paterno/the Estate possessed a property interest, (iii) the statements were false and defamatory and libel *per se*, (iv) the statements were widely disseminated, (v) the NCAA intended the statements to cause loss, (vi) the Estate suffered damages, (vii) the NCAA knew the statements were false or acted in reckless disregard, and (viii) the NCAA's conduct was malicious and outrageous. Mot. ¶ 25; SAC ¶¶ 155-63.

Once again, the NCAA's preliminary objections specifically denied each of these allegations. *See* PO to Compl. ¶¶ 42-48 (July 23, 2013); PO to FAC ¶¶ 63-70 (Mar. 17, 2014). The NCAA pleaded that "none of the statements that the Estate identifies disparage the quality of any goods or services." PO to Compl. ¶ 43 (July 23, 2013). The NCAA disputed causation, noting that "all of the underlying facts upon which the [NCAA's] opinions are premised were disclosed to the public" prior to the NCAA's statements, noting the "extensive negative media attention given to Coach Paterno in the midst of the Sandusky scandal and statements contained in the Freeh Report." *Id.* ¶ 45; PO to FAC ¶ 65 (Mar. 17, 2014). The NCAA also reiterated that "[t]he challenged statements are statements of opinion." PO to FAC ¶ 65 (Mar. 17, 2014). And as noted previously, it pleaded specifically

that the statements it made in the Consent Decree were "privileged and not improper," PO to Compl. ¶ 55 (July 23, 2013).

The NCAA expanded on those denials of Plaintiffs' allegations in its memoranda in support of its preliminary objections. It explained that "Plaintiffs have not pled the requisite actual malice." NCAA Defs.' Reply in Supp. of PO to Compl. at 45-46 (Sept. 26, 2013) ("Reply in Supp. of PO to Compl."). And it reiterated that "the statements of which the Estate complains are expressions of the NCAA's opinion, based explicitly on the publicly disclosed Freeh Report" and therefore "cannot form the basis of a claim for defamation or disparagement." Mem. in Supp. of PO to Compl. at 62 (July 23, 2013). Again, such pleadings and supporting statements were sufficient to constitute specific denials or denials by necessary implication of several material allegations respecting Count III.

Count IV: The Former Coaches' Claim For Defamation. Under Count IV, Plaintiffs materially allege that the statements in the Consent Decree concerned Plaintiffs, were made intentionally or recklessly, were false, and harmed Plaintiffs. Mot. ¶ 26; SAC ¶¶ 165-70. As the Court is aware, this claim has been the subject of extensive briefing in preliminary objections. *See* PO to Compl. 30-41 (July 23, 2013); PO to FAC ¶¶ 48-62 (Mar. 17, 2014). In these objections, the NCAA has specifically denied each of Plaintiffs' allegations, stating, for example:

- "Neither of the alleged defamatory statements even mentions any of the Plaintiffs or could reasonably be interpreted as referring to them." PO to FAC ¶ 52 (Mar. 17, 2014).

- "[A] reasonable person would have understood that the statement about which the Former Coaches complain does not apply to the Former Coaches." *Id.* ¶ 56.

- "[T]he public would have realized that the Freeh Report explains that several staff members and football coaches observed Sandusky showering with young boys, including specifically identifying one coach who testified in open court that he observed this activity but did not find the practice to be improper. But it never names or references the Former Coaches." *Id.*

- "[T]he Former Coaches cannot establish that the NCAA acted with actual malice." *Id.* ¶ 60; *see also* Mem. in Supp. of PO to Compl. at 51-52 (July 23, 2013) ("Nor does it constitute actual malice for the NCAA to rely solely on the Freeh Report—a report the Board of Trustees *itself* commissioned and the findings of which the *University accepted*.").

- "[T]he statement in question is either true regarding *some* coaches, or at minimum, not obviously false." PO to FAC ¶ 61 (Mar. 17, 2014).

- "Plaintiffs' defamation claim fails for the additional and independent reason that the two statements are expressions of the NCAA's opinion, based on facts that were publicly disclosed, *i.e.*, the Freeh Report." *Id.* ¶ 62.

In light of the NCAA's pleadings, taken as a whole, there can be no doubt that the NCAA's denials in its Answer and New Matter constitute *bona fide denials*.

Count V: Plaintiffs' Claim For Civil Conspiracy. Finally, Plaintiffs allege that the NCAA unlawfully combined with the Freeh Group for an unlawful purpose. *See* Mot. ¶ 27; SAC ¶¶ 173-79. Once again, the NCAA's pleadings

taken as a whole sufficiently denied the material allegations of Plaintiffs' Complaint. *See* PO to Compl. ¶¶ 56-61 (July 23, 2013); PO to FAC ¶¶ 41-47 (Mar. 17, 2014). First, the NCAA's Preliminary Objections pleaded that "a conspiracy claim does not lie without a valid underlying civil claim" and that "Plaintiffs have not properly stated any other civil cause of action, and therefore no conspiracy claim can be asserted in this action." PO to FAC ¶¶ 42-43 (Mar. 17, 2014). The NCAA likewise pleaded that "Plaintiffs must first demonstrate a combination of persons with a common purpose to do an unlawful act or to do a lawful act by unlawful means or purpose" and disputed that Plaintiffs' facts demonstrated such a combination. PO to Compl. ¶¶ 57-58 (July 23, 2013); *see also* Reply in Supp. of PO to Compl. at 55 (Sept. 26, 2013) ("Plaintiffs have not—and cannot in good faith—allege that the NCAA acted without any legitimate motives (*e.g.*, to punish conduct that it believed to be reprehensible and a violation of the spirit, if not the letter, of the NCAA rules).").

C. The Vast Majority of Allegations in the SAC Require No Specific Denial or Admission.

Judgment on the pleadings is precluded for the additional reason that the vast majority of the allegations that Plaintiffs contend were admitted do not actually require any response. Pennsylvania Rule of Civil Procedure No. 1029(b) provides that only "averments in a pleading *to which a responsive pleading is required* are admitted when not denied specifically or by necessary implication."

Id. (emphasis added). Thus, regardless of whether the NCAA's responses to these allegations should otherwise be construed as "general denials," they cannot be deemed "admitted."

1. Plaintiffs Challenge Numerous Responses to Allegations That Are Not Relevant to Any Remaining Claims.

The majority of the allegations in the SAC are legacy allegations that relate solely to Count I, and are no longer relevant to any remaining claims in this action. Indeed, the Court already struck many of these allegations, *see* Op. & Order (Mar. 30, 2015), and now that Plaintiff Clemens has withdrawn the last contract claim from this case, the NCAA's response to these allegations is entirely irrelevant and certainly should not be deemed any sort of "admission."

First, the Court has already stricken numerous allegations in the Second Amended Complaint, which were introduced by Plaintiffs to support the Estate's twice-dismissed contract claim without leave of Court or consent of the Defendants. Plaintiffs contend that the March 30, 2015[9] Order "did not include any ruling striking allegations of the Complaint." Mot. at 8 n.1. But Plaintiffs are once again misstating the plain and unequivocal language of an order of this Court. *See* Hr'g Tr. 41:25-42:5 (Feb. 6, 2015) (The Court stated that the "clear" implication and intent of his ruling did *not* "grant[] plaintiffs the right to restructure Count 1."); *id.* at 40:18-21("It seems to me [Plaintiffs] have kind of a tortured view

[9] Plaintiffs incorrectly refer to this as a March 8 Order.

of what the Court allowed for amendment to speak frankly, Mr. Loveland."). The NCAA's Preliminary Objections to the Second Amended Complaint contended that "Plaintiffs' attempt to amend their complaint beyond the scope permitted by this Court's September 11, 2014 Order without the NCAA Defendants' consent or leave of this Court is improper and such amended allegations should be stricken." PO to SAC ¶ 5 (Nov. 10, 2014). The NCAA specifically objected pursuant to Pa.R.C.P. No. 1028(a)(2) and asked that the Court "strike the allegations in paragraphs 36, 56-62, 64, 66, 85, 90, 93-94, 96, 98, 111, 115, 119-121, 124(a), 124(b), 124(e), 129, 131(n), 131(o), and all portions of 134 that refer to, make allegations concerning, or seek relief on behalf of the Paterno Estate." PO to SAC ¶ 17. The Court's March 30, 2015 Order states—without any ambiguity—that "NCAA's Preliminary Objection based on Impertinent Material is SUSTAINED." *Id.* at 6. Those allegations were thus plainly stricken, and the NCAA has no obligation to respond to them at all.

Second, more generally, the SAC focuses largely on allegations about the NCAA's authority, the purported procedures and requirements of its Constitution and Bylaws (including alleged rights of certain individuals thereunder), and the interactions between the NCAA and Penn State leading to the Consent Decree, among other things. *See, e.g.*, SAC ¶¶ 1, 3-4, 6-8, 15, 21-50, 55-61, 64-65, 84-89, 92, 94-97, 99, 101-103, 106-109, 112-116, 118-119, 121, 126-134. For example,

the SAC alleges that (1) the conduct described in the Consent Decree "did not violate the NCAA's rules and was unrelated to any athletics issue the NCAA could permissibly regulate," SAC ¶ 1; *see also id.* ¶¶ 103, 116; (2) in November 2011, the "NCAA had decided to investigate" Joe Paterno, *id.* ¶ 58; (3) "Penn State was forced under extreme duress ... to agree to the imposition of an NCAA-imposed Consent Decree," *id.* ¶ 7; (4) Penn State President Erickson lacked "legal or delegated authority to bind the Penn State Board of Trustees to the Consent Decree," *id.* ¶ 102; and (5) that "Plaintiffs were unlawfully deprived of the required procedures due to them under the NCAA's rules," *id.* ¶ 123.

These allegations are baseless, but in any event, none of them are relevant to any of Plaintiffs' remaining claims. Plaintiffs plainly included them to support their contract claims in Count I (and Count II of the original Complaint) and the relief sought for those claims (*e.g.*, a declaration that the Consent Decree was void *ab initio*). Those claims have been dismissed by the Court or otherwise withdrawn. The case now centers on the challenged statements in the Consent Decree (taken verbatim from the Freeh Report)—in particular, whether the statements are "demonstrably false" and whether the NCAA knew they were false (or recklessly disregarded their falsity). As such, the NCAA has no obligation to respond to these numerous allegations that are relevant only to the dismissed and withdrawn contract claims. Indeed, whether the NCAA properly responded to

such allegations (and it did) should have no bearing on this case. Far from concluding that the NCAA "admitted" these allegations, the Court should strike or ignore them on the grounds that they are legacy allegations that are now entirely impertinent.

Plaintiffs' current case against the NCAA is substantially narrower than the case they originally asserted in May 2013. Only a small subset of the allegations in the SAC relate to the remaining claims, and, as set forth above, the NCAA adequately denied them. The Court should decline Plaintiffs' request to scrutinize the NCAA's responses to scores of irrelevant allegations that were included to support claims that have been dismissed and withdrawn. There is certainly no basis to deem any such impertinent allegations "admitted."

2. Most Of The Purported "General Denials" Are Directed At Allegations That Are Conclusions Of Law.

The vast majority of Plaintiffs' allegations constitute conclusions of law to which no responsive pleading is required. "[W]hile averments of fact require a denial, conclusions of law do not compel a response." *Rohrer v. Pope*, 2007 PA Super 43, ¶ 17, 918 A.2d 122, 129 (2007)) (citations omitted); *see also In re Estate of Roart*, 390 Pa. Super. 38, 45, 568 A.2d 182, 186 (1989) ("[A] responsive pleading is not required to an allegation which is not an averment of fact"); *id.* (allegations of "excessive and imprudent loans," "weakened financial condition," and "asset-quality problems" "are each conclusions of law" to which a responsive

pleading is not required); *Baird v. Congello*, 39 Pa. D. & C.4th 7, 11 (C.P. 1998) (explaining that "the allegations in paragraphs 50 through 59 of the complaint ... are mere conclusions of law to which a specific denial was not required"), *aff'd*, 742 A.2d 1137 (Pa. Super. Ct. 1999).

Here, most of the NCAA's challenged denials, including (but not limited to) those related to Paragraphs 1-8, 9, 12, 15-20, 26-49, 59, 64, 87-88, 90-91, 96, 101-102, 105, 107, 114-116, 120-125, 127-134, 137-141, 145-146, 150, 155-163, 165, 167-171, and 173-179 of the Answer, respond to allegations that constitute legal conclusions, and therefore do not require a responsive pleading under Rule 1029. Paragraph 122 of Plaintiffs' Second Amended Complaint is illustrative, alleging that "Plaintiffs have been substantially harmed, and will continue to incur future harm, as a direct and intentional result of the NCAA Defendants' unauthorized and unlawful conduct," and thereby calling for legal conclusions on the issues of damages and causation. SAC ¶ 122. Similarly, Paragraph 137 alleges that "*[w]ith knowledge* of Plaintiffs' future prospective employment, business, and economic opportunities, the NCAA Defendants took the *purposeful actions* described in this Complaint," thereby calling for a legal conclusion on the ultimate issue of intent. *Id.* ¶ 137 (emphases added). The other paragraphs identified by the NCAA likewise call for legal conclusions. *See, e.g., id.* ¶ 140 (alleging that the NCAA's conduct "*in tortiously interfering* with Plaintiffs' contractual relations *was*

malicious and outrageous and showed a reckless disregard for the rights of Coach Kenney and Coach Jay Paterno" (emphasis added)); *id.* ¶¶ 161-63 (calling for legal conclusions as to damages and intent). Because the NCAA was not required to specifically deny those allegations under Rule 1029, the NCAA's Answer to these allegations was not procedurally deficient even under Plaintiffs' view of the rules, and they cannot therefore be deemed "admitted."

3. The NCAA's Responses to Count II Do Not Constitute Admissions Because It Is Without Knowledge Or Information Sufficient To Form A Belief As To The Truth Of The Averments.

It was also unnecessary for the NCAA to specifically deny several allegations respecting Count II as to which the NCAA had insufficient knowledge or information sufficient to deny or admit Plaintiffs' allegations. Pennsylvania Rule of Civil Procedure No. 1029(c) provides that "[a] statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial." The objective of Rule 1029(c) "is to protect a party from making an admission in a situation where he was unable to ascertain competent information to support a specific denial." *Equibank v. Interstate Motels, Inc.*, 25 Pa. D. & C.3d 149, 152 (C.P. 1982). While the NCAA believes that the allegations in support of Count II are baseless, discovery will be needed to address them on a factual basis. Thus, the NCAA did not need to specifically deny them at this time.

Indeed, it is stunning that Plaintiffs could challenge the NCAA's response that it is "without knowledge" sufficient to respond to certain of the tortious interference allegations. The NCAA is currently pursuing the relevant information through discovery, including through document requests that it served on Plaintiffs William Kenney and Jay Paterno on May 21, 2014. Over a year has passed, and at the time Plaintiffs filed their Motion, Mr. Kenney and Mr. Paterno had produced a total of three (3) and forty-two (42)[10] documents, respectively. Plaintiffs cannot refuse to comply with their discovery obligations, and then use that same intransigence as grounds to seek judgment on the pleadings based on the form of the NCAA's Answer.

Plaintiffs' allegations in Count II are replete with factual assertions to which the NCAA cannot reasonably be expected to respond at this time. *See, e.g.*, SAC ¶ 142 (alleging that "[f]or most of his career, [William Kenney] coached offensive linemen and tight ends. He was well respected within the profession and was responsible for training and developing dozens of college football players who went on to play in the National Football League ("NFL"), including several first-round draft choices."); *id.* ¶ 143 ("After Coach Kenney was let go by Penn State following the 2012 football season, he made a determined effort to secure other

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[10] Mr. Paterno made an additional production on June 11, 2015, which the NCAA is currently reviewing.

employment as a football coach. He applied for open positions with various Division I college football programs ...."). The NCAA has no knowledge or information about whether Mr. Kenney's efforts to secure employment were "determined" or whether *he* was responsible for training and developing first-round draft choices. It was therefore entirely proper for the NCAA to deny those allegations on that basis. The same is true for the NCAA's response to the allegations in Paragraphs 147-52: the relevant information is in Plaintiffs' control.

"An averment of lack of knowledge is not a sufficient denial" only when, for instance, "the information is a matter of public record," or when "it is clear that defendant must know the truth or falsity of a particular allegation, the information necessary to formulate a specific denial is ascertainable after a reasonable investigation, and it affirmatively appears that defendant has sufficient knowledge on which to base an admission or a specific denial." *Equibank*, 25 Pa. D. & C.3d at 152-53. The cases on which Plaintiffs rely largely fall into that category.[11]

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[11] *See Equibank*, 25 Pa. D. & C.3d at 153 (finding it "untenable" that Plaintiffs could admit to executing and delivering a mortgage but then simultaneously lack knowledge as to its contents); *City of Phila. v. Kenny*, 28 Pa. Commw. 531, 544, 369 A.2d 1343, 1351 (1977) (finding that "each defendant had sufficient knowledge on which to base an admission or specific denial"); *Target Nat'l Bank v. Guida*, 11 Pa. D. & C.5th 363, 365-67 (C.P. 2010) (finding that the defendant failed to specifically deny the allegations because it was clear that she knew whether or not they were false (and accordingly could not rely on Rule 1029(c)). The remaining cases on which Plaintiffs rely are likewise inapposite. *See Beal Bank v. PIDC Fin. Corp.*, No. 02522, 2002 WL 31012320,

Those cases are not applicable, where, as here, the plaintiffs' allegations concern information beyond the defendants' knowledge or control. *See Commonwealth by Preate v. Rainbow Assocs., Inc.*, 138 Pa. Commw. 56, 62, 587 A.2d 357, 360 (1991) (denying motion for judgment on the pleadings because "it is not clear that Defendants knew whether the specific amounts alleged were accurate"); *see also Mellon Bank, N.A. v. Joseph*, 267 Pa. Super 307, 314, 406 A.2d 1055, 1058 (1979) (finding that certain information "*could well be ... beyond the mortgagor's knowledge*" (emphasis added)); *Dusman v. Bd. of Dirs. of Chambersburg Area Sch. Dist.*, 113 A.3d 362, 371(Pa. Commw. Ct. 2015) (explaining that "it is not so clear from what little record exists in this case that information at issue in these paragraphs must be in possession of CASD, such that

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at *5 (Pa. C.P. Sept. 9, 2002) ("SMF should have specific knowledge of its obligations [under a mortgage] and whether or not it satisfied those obligations."), attached as Ex. H.

In addition, Plaintiffs are wrong to cite *Kenny* for the proposition that a party's failure to allege its lack of knowledge and information existed "after reasonable investigation," rendered that party's denials admissions. *See* Mot. ¶ 23. The court found that the denials in that case constituted admissions on two alternative grounds, including that it was clear that "each defendant had sufficient knowledge on which to base an admission or specific denial." *Kenny*, 28 Pa. Commw. at 544, 369 A.2d at 1351. Moreover, Rule 1029(c) has been amended since *Kenny*; following that amendment, a responding party is not required to state that a "reasonable investigation" was conducted. 3 Goodrich Amram 2d § 1029(c):3 & n.76 (citing Explanatory Comment to 1983 Amendment to Rule 1029), attached as Ex. I.

its responses constitute ineffectual denials").[12] This is particularly the case where the information is in the hands of an adverse party that simply will not comply with discovery demands.

4. A Denial that States that a "Writing Speaks for Itself" is Sufficient.

Plaintiffs are also wrong to suggest that "an answer stating merely that a document is a writing which speaks for itself is an unresponsive general denial that must be deemed an admission." Pls.' Mot. J. on the Pleadings ¶ 9. Plaintiffs rely entirely on a single *unpublished* Court of Common Pleas decision which does not stand for that proposition. Ex. H, *Beal Bank v. PIDC Financing Corp.*, No. 02522, 2002 WL 31012320, at *1 (Pa. C.P. Sept. 9, 2002). In *Beal Bank*, the defendant attempted to deny that it defaulted on a mortgage by pleading that the mortgage "Note is a writing which speaks for itself, and any characterization of the Note are specifically denied." *Id.* at *4. Because plaintiffs' allegation did not go to the note

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[12] Plaintiffs are also wrong to claim that the NCAA's failure to "assert that it made a reasonable, good faith investigation as to the truth of the averments" in those paragraphs of Count II render those responses admissions. *See* Mot. ¶¶ 22-23. "A statement of the nature of the 'reasonable investigation' undertaken by a party to ascertain the truth of an averment is not required and need not be set forth in a responsive pleading."); Ex. I, 3 Goodrich Amram 2d § 1029(c):3 & n.76 (citing Explanatory Comment to 1983 Amendment to Rule 1029); *see also id.* § 1029(c):2 ("A party need not state in a responsive pleading that the reason why he or she is without knowledge or information sufficient to form a belief as to the truth of an averment is that the means of proof as to the truth of that averment are within the exclusive control of an adverse party or a hostile person."), attached as Ex. J.

itself, but instead to facts within the defendants' knowledge—whether he had defaulted on his obligations—the court found that defendants were obligated to answer. Finally, the "admission" in that case arose in a dramatically different context—because the defendant had failed to put forth any evidence on summary judgment whatsoever to support his legal claims that he did not default on his mortgage. *Id.* at *8.

Here, by contrast, large portions of the SAC simply describe the contents of documents (often with Plaintiffs' own gloss added), including the NCAA's Constitution and Bylaws, media reports, the Freeh Report, and the Consent Decree. It is therefore appropriate (and common place) for the NCAA to respond that the document "speaks for itself," and deny any characterization that strays from the words of that document.

5. General Denials to the Commercial Disparagement Claim Are Sufficient Under Rule 1029(e).

Finally, Rule 1029(b) is simply inapplicable to Plaintiffs' allegations pertaining to commercial disparagement under Count III. Rule 1029(e) provides that averments in an action "seeking monetary relief for ... property damage," may be "denied generally." Pa.R.C.P. No. 1029(e). Consequently, even if the NCAA's answers are understood to constitute general denials, its responses with respect to Plaintiffs' allegations under Count III comport with the requirements of Rule 1029.

Under Pennsylvania law, the tort of commercial disparagement must involve direct damage to property value. *See Ashoff v. Gobel*, 23 Pa. D. & C.4th 300, 306 (C.P., Mar. 14, 1995) ("To recover for the tort of disparagement, a plaintiff must prove a direct pecuniary loss as a result of the disparagement."), *aff'd*, 450 Pa. Super. 706, 676 A.2d 276 (1995); *see also Menefee v. CBS*, 458 Pa. 46, 53-54, 329 A.2d 216, 220 (1974) (finding a cause of action for untruthful disparagement of plaintiff's property interest in his broadcasting personality). In line with that requirement, Plaintiffs' commercial disparagement claim seeks compensation and other monetary relief for property damage resulting from the NCAA's infliction of harm to Plaintiffs' property interest in Joseph Paterno's name, reputation, and business. *See* SAC ¶ 156-61. In Plaintiffs' view, not only did Joe Paterno or his Estate possess a property interest in his name and reputation, but there was a "readily available, valuable commercial market concerning Joe Paterno's commercial property." *Id.* ¶ 156. To that end, Plaintiffs allege that the NCAA's purported disparaging statements "concerned [Joseph Paterno's] business and *property*" and resulted in "substantial pecuniary harm to the current and long-term value of his estate ...." *Id.* ¶¶ 124, 155 (emphasis added).

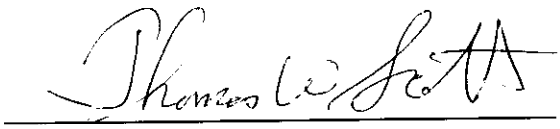
Pennsylvania courts have repeatedly affirmed that general denials are proper when responding to tort claims premised on claims of property damage. *Murphy v. City of Duquesne*, 898 A.2d 676, 678 (Pa. Commw. Ct. 2006) ("General denials in

an answer to a tort complaint satisfy the Pennsylvania Rules of Civil Procedure and will not be deemed admissions, except under certain exceptions not applicable here."); *see also Rohrer*, 2007 PA Super 43, ¶ 21, 918 A.2d at 130; *Parr v. Roman*, 2003 PA Super 146, ¶ 14, 822 A.2d 78, 81 (2003). Even if the NCAA's responses to Plaintiffs' commercial disparagement claim are understood to constitute general denials, such denials accord with the requirements of Pennsylvania Rule of Civil Procedure No. 1029(e) and cannot be construed as admissions.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' attempt to circumvent the merits based on a technicality, grant the NCAA leave to amend its Answer, and deny this Motion as moot. In the alternative, the Court should deny Plaintiffs' Motion on the merits.

Respectfully submitted,



Dated: June 16, 2015

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

Everett C. Johnson, Jr. (admitted *Pro Hac Vice*, DC No. 358446)
Brian E. Kowalski (admitted *Pro Hac Vice*, DC No. 500064)
Sarah M. Gragert (admitted *Pro Hac Vice*, 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 National Collegiate Athletic Association's Opposition to Plaintiffs' Motion for Judgment on the Pleadings* on the following by First Class Mail and email:

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

Counsel for Plaintiffs

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

Daniel I. Booker, Esquire
Jack B. Cobetto, Esquire
Donna M. Doblick, Esquire
William J. Sheridan, Esquire
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, Esquire
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, Esquire
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

Dated: June 16, 2015

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