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,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

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CENTRE COUNTY, PA

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 National Collegiate Athletic Association's Opposition to Plaintiffs' Motion to Compel Discovery Responses and For an Order Overruling Objections to Third Party Discovery

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

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

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

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY RESPONSES AND FOR AN ORDER OVERRULING OBJECTIONS TO THIRD PARTY DISCOVERY

All discovery that Plaintiffs' motion seeks shares a common theme: it relates to Plaintiffs' breach of contract claim (which the Court *dismissed in 2014*), including information about the NCAA's traditional enforcement process (which was *not used* in the Penn State matter). Recognizing the lack of utility of this extensive and intrusive discovery, Plaintiffs attempt to repackage arguments they first made in support of their now-dismissed contract claims as proof of "actual malice," a required element of the claims that remain. Needless to say, the NCAA vigorously disputes the suggestion that its decision not to use the traditional enforcement process in addressing the Penn State situation is relevant to or supports a finding of actual malice.[1] But the Court need not—and should not—

[1] It is well established that the actual malice inquiry "focus[es] upon the investigatory efforts *actually* undertaken ..., *not* upon the additional efforts that might hypothetically have been undertaken." *Fitzpatrick v. Phila. Newspapers, Inc.*, 389 Pa. Super. 438, 446-48, 567 A.2d 684, 688-89 (1989) (emphases added). Indeed, *Curran*, one of the cases on which Plaintiffs rely, makes exactly that point. *See Curran v. Philadelphia Newspapers*, 376 Pa. Super. 508, 525, 648, 546 A.2d 639, 648 (1988) ("[O]ur focus is upon what a defendant did, as compared to what it did not do, as the measuring rod against which its conduct is to be assessed."). Nor are the other cases Plaintiffs cite to the contrary. For instance, *Harte-Hanks* emphasizes that, absent "obvious reasons to doubt the veracity of the information," even "highly unreasonable conduct constituting an *extreme departure* from the standards of investigation and reporting ordinarily adhered to by responsible publishers" will not establish actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989) (emphasis added) (citation omitted). And in *Suzuki*, the Ninth Circuit focused on evidence that the defendant actively "rigged" tests to produce results directly contrary to those from tests it had conducted earlier. *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1135 (9th Cir. 2003).

construe the actual malice standard—a central, ultimate issue in this case—in the context of a discovery motion, without benefit of the full record or complete summary judgment briefing. Plaintiffs' motion should be denied for a host of other reasons.

First, Plaintiffs seek responses to requests for admission that the NCAA has not previously taken the position that a deceased individual could not be an "involved individual" under the NCAA's bylaws. But the Court **already ruled** on the "involved individual" issue as a matter of Pennsylvania law—and on that basis—dismissed Plaintiffs' breach of contract claim. *See* Op. & Order at 8 (Sept. 11, 2014) ("As Coach Joe Paterno was not an involved individual prior to his death, and he cannot, as a matter of law, be an 'involved individual' after his death, he had no rights as an 'involved individual' at any time ...."). The "involved individual" issue is simply no longer a part of the case. *See id.* Indeed, Plaintiffs' repeated attempts to relitigate the issue only further highlight their refusal to accept defeat and meaningfully engage with the issues that remain.

Second, Plaintiffs seek to depose Mr. Britton Banowsky – a former chair of the Committee on Infractions ("COI") – and to conduct document discovery from ***thirteen*** other current and former members of the COI and Infractions Appeals

Committee ("IAC").[2] As the NCAA explained in its objections to Plaintiffs' subpoenas, the COI is an independent administrative body that, among other things, finds facts related to alleged NCAA bylaw violations brought forth by the Enforcement staff, concludes whether such violations have occurred, and issues and monitors penalties related to those violations. *See* NCAA Objs. to Pls.' Proposed Subpoena Pursuant to Rule 4009.21, ¶ 2 (Feb. 18, 2016). COI and IAC members are not NCAA employees, but rather are volunteers drawn from NCAA member institutions and conferences, as well as from the general public. *Id.* As Plaintiffs have themselves alleged – and as the evidence makes clear – the COI and IAC had *no* part in developing, negotiating, or executing the Consent Decree – a document that was instead developed by the NCAA staff with authorization from the Executive Committee, and with the agreement of Penn State itself.

Precisely because neither the COI nor IAC played any role with respect to the Consent Decree, there is no reason whatsoever to think that testimony from the COI's former Chair – much less documents supposedly in the possession of COI

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[2] Plaintiffs' apparent belief that members of the IAC possess relevant documents is particularly fantastical, given that the IAC's only role is to review decisions rendered by the COI. Not only is it undisputed that the IAC did not actually conduct any such review with respect to the Penn State matter, because the enforcement process was never instituted, there was of course never even any COI decision that the IAC *could have* reviewed in the first place. Tellingly, Plaintiffs' motion fails to even mention that they have requested documents from IAC members – strongly suggesting that they are well aware that such discovery could not possibly have any relevance.

and IAC members – could have any relevance to whether the NCAA staff made the statements in the Consent Decree with actual malice. Indeed, the extensive discovery Plaintiffs have taken to date has not revealed one shred of evidence that any of these fourteen third-party witnesses ever discussed the substantive statements in the Consent Decree. Their ***fourteen proposed subpoenas are a burdensome fishing expedition***—with a huge net. Plaintiffs merely suggest that COI members "*may have had* communications with NCAA staff, other members of the Committee, or third parties" about the NCAA's "departure" from its ordinary procedures. Mem. in Supp. of Pls.' Mot. to Compel at 2-3 (Feb. 29, 2016) (emphasis added). And they apparently draw that conclusion from nothing more than their own supposition that COI members "*presumably*" would have had "some reaction to being bypassed by the NCAA executives."[3] *Id.* at 7 (emphasis added). Thus, at best, Plaintiffs speculate these witnesses may have evidence about an irrelevant collateral issue.

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[3] Although Plaintiffs claim to be in search of the COI and IAC members' "reactions" to the Consent Decree, their proposed document subpoenas are in reality much broader. For example, their subpoenas would require the COI and IAC members to produce all documents that relate "in any way" to "the Penn State football program and/or Penn state employees, football coaches ... Board of Trustees members, administrators, or agents," as well as documents that relate "in any way" to the Freeh Report, whether or not those documents have anything to do with the Consent Decree. *See, e.g.*, Ex. 8 to Mot., Pls.' Proposed Subpoena to Greg Sankey.

Of course, nearly everyone had "reactions" to the Consent Decree – including the media and the general public. And given that members of the COI (a) were not involved in developing the Consent Decree; (b) are not even NCAA employees; and (c) possessed no first-hand knowledge of the underlying events of the Sandusky scandal, their "reactions" are no more relevant to Plaintiffs' claims than are anyone else's.[4] Surely Plaintiffs are not entitled to take discovery from any third party they choose, simply because someone "*may* have had communications" or "reactions" bearing on what was a major national news story.

Third, Plaintiffs seek responses to interrogatories concerning the extent to which the NCAA has previously relied on third-party investigations when imposing sanctions against other member institutions. But NCAA witnesses have *already* testified about the NCAA's previous use of third-party investigations.[5]

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[4] Plaintiffs attempt to analogize this case to a recent California case in which a court cited communications among COI member as evidence that the NCAA acted with actual malice. *See McNair v. NCAA*, No. B245475, 2015 WL 8053286, at *11 (Cal. Ct. App. Dec. 7, 2015). But in that case, the relevant statements were contained in an infractions report, which was drafted and issued *by the COI itself*, in relation to an NCAA rules violation matter that had proceeded through the traditional enforcement process. It was thus very different from this case, where there is no dispute that the COI was *not involved* in developing and executing the Consent Decree.

[5] *See, e.g.*, Remy Dep. 45:16-22, *Corman v. NCAA*, No. 1 MD 2013 (Pa. Commw. Ct. Nov. 20, 2014) ("[I]n prior investigations at the NCAA, as I understand it from the experts on our staff, the NCAA has participated insofar as has even shadowed them at interviews and the like as investigations were undertaken by member institutions or even by third parties for member

Plaintiffs' requests on this topic are yet another fishing expedition into other NCAA enforcement actions that have no relation to Penn State. Their obvious desire is to dive deeply into investigations involving other, unrelated member institutions, coaches, and student-athletes, in an attempt to distinguish those enforcement actions from Penn State. However, to the extent there were investigations, those were in the context of the enforcement process, which all parties agree was never initiated here. Any relevance that Plaintiffs can conjure up for these issues would be marginal at best, and it therefore should not allow them to conduct a deep and intrusive dive into the sensitive details surrounding past (and unrelated) infractions matters.

CONCLUSION

Because there is no dispute in this case that the NCAA did not initiate the traditional enforcement process, the discovery Plaintiffs seek – all of which relates to that process and Plaintiffs' dismissed breach of contract claim – will do nothing to help them establish their claims. Yet, what that discovery *will* do is harass and burden over a dozen third-parties and make litigation fodder out of sensitive and confidential information involving totally unrelated matters. Plaintiffs' motion to compel should be denied.

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institutions."); Roe Dep. 22:1-4, *Corman*, No. 1 MD 2013 (Nov. 11, 2014) ("Q: Did the NCAA conduct its own investigations? A: Well, sometimes member institutions would conduct their own investigations.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving *The National Collegiate Athletic Association's Opposition to Plaintiffs' Motion to Compel Discovery Responses and for an Order Overruling Objections to Third Party Discovery* on the following by First Class Mail and email:

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