IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, **As duly appointed representative of the** **ESTATE and FAMILY of JOSEPH PATERNO;** **RYAN McCOMBIE, ANTHONY LUBRANO,** **AL CLEMENS, and ADAM TALIAFERRO, members of the** **Board of Trustees of Pennsylvania State University;** **PETER BORDI, TERRY ENGELDER,** **SPENCER NILES, and JOHN O'DONNELL,** **members of the faculty of Pennsylvania State University;** **WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO,** **former football coaches at Pennsylvania State University; and** **ANTHONY ADAMS, GERALD CADOGAN,** **SHAMAR FINNEY, JUSTIN KURPEIKIS,** **RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI,** **ANWAR PHILLIPS, and MICHAEL ROBINSON,** **former football players of Pennsylvania State University,** **Plaintiffs,** **v.** **NATIONAL COLLEGIATE ATHLETIC ASSOCIATION** **("NCAA"),** **MARK EMMERT, individually** **and as President of the NCAA, and** **EDWARD RAY, individually and as former** **Chairman of the Executive Committee of the NCAA,** **Defendants.**	:	**Civil Division** **No. 2013-2082**

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CENTRE COUNTY, PA

OPINION & ORDER

LEETE, Senior J.

Before the Court are Preliminary Objections filed by Defendants National Collegiate Athletic Association ("NCAA"), Mark Emmert, and Edward Ray to the Complaint of Plaintiffs

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George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno ("Paterno's Estate"); Ryan McCombie, Anthony Lubrano, Al Clemens, and Adam Taliaferro, members of the Board of Trustees of Pennsylvania State University ("Trustees"); Peter Bordi, Terry Engelder, Spencer Niles, and John O'Donnell, members of the faculty of Pennsylvania State University ("Faculty"); William Kenney and Joseph V. ("Jay") Paterno, former football coaches at Pennsylvania State University ("Former Coaches"); and Anthony Adams, Gerald Cadogan, Shamar Finney, Justin Kurpeikis, Richard Gardner, Josh Gaines, Patrick Mauti, Anwar Phillips, and Michael Robinson, former football players at Pennsylvania State University ("Former Players").

For the reasons discussed below, Defendants' Preliminary Objections are SUSTAINED in part and OVERRULED in part.

BACKGROUND

This case arises from sanctions the NCAA imposed on the Pennsylvania State University ("Penn State") following the conviction of former Assistant Football Coach Jerry Sandusky related to child sex abuse. The sanctions were premised on Sandusky's use of Penn State facilities and his affiliation with Penn State's football program during the period when the abuse occurred. The pertinent facts alleged in the Complaint, highly summarized, are as follows.

The NCAA is a voluntary association of higher education institutions whose purpose is to promote academic and athletic excellence. Compl. ¶¶ 2, 19. The NCAA operates pursuant to a Constitution and Bylaws, which are incorporated into its contracts with member institutions and are designed promote the goals of fair competition and amateurism. Id. at ¶¶ 2, 20, 22. Articles 19 and 32 of the Bylaws contain detailed policies and provisions governing enforcement of NCAA rules, including imposition of sanctions on member institutions for rules violations. Id. at

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¶¶ 2, 28. These provisions grant numerous procedural protections to member institutions and other parties interested in investigations of NCAA rules violations, including provisions for notice and an opportunity to respond to allegations. Compl. ¶¶ 3, 24, 28-46. The Constitution also requires that institutions and their staff and student-athletes be provided fair procedures in enforcement matters. Id. at ¶¶ 24, 47.

On November 17, 2011, the NCAA notified Penn State that it was concerned about criminal charges filed against Jerry Sandusky for allegedly sexually abusing young boys at Penn State and through his connections to Penn State's football program. Id. at ¶ 53. The NCAA indicated that Penn State should prepare for a possible NCAA inquiry and involvement. Id. At that point, the Penn State Board of Trustees had already taken action in response to the scandal, including removing Penn State's President Graham Spanier from his position and replacing him with Rodney Erickson and removing head football coach Joe Paterno from his position. Compl. ¶ 49. Penn State's Board of Trustees had also commissioned the firm of Freeh, Sporkin & Sullivan, LLP to investigate any failures by Penn State officials and employees in regard to Sandusky's actions and to make recommendations regarding Penn State's policies, procedures and governance. Id. at ¶ 50. Instead of commencing its own investigation, as mandated by its own rules and procedures, the NCAA collaborated with the Freeh firm and waited for the results of the firm's investigation. Id. at ¶ 54.

On July 12, 2012, the Freeh firm released its report (the "Freeh Report") concluding, among other things, that certain Penn State officials and personnel including Joe Paterno had been aware of Sandusky's actions but failed to take action and concealed evidence from investigators. Id. at ¶ 56. Within hours after the Freeh Report was released, certain Penn State officials announced in a press release that the Board of Trustees had accepted full responsibility

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for the failures outlined in the Report. Compl. ¶ 57, 58. However, the Board of Trustees never approved or took any official action with respect to the Freeh Report. Id. at ¶ 59.

In lieu of following its own mandated enforcement procedures, the NCAA accepted the conclusions of the Freeh Report as compelling evidence sufficient to justify imposition of sanctions against Penn State. Id. at ¶ 58, 60. The NCAA did so despite serious flaws in the investigation and despite knowing that all the relevant facts were not even available. Id. at ¶¶ 60-88. About ten days after the Freeh report was released, and under threat of the "death penalty" (a complete ban from participation in college football for a period of time), the Consent Decree was executed by the NCAA and President Erickson. Compl. ¶¶ 83-86. The Consent Decree accepts the findings of Freeh Report and the jury findings in Sandusky's criminal trial as bases for sanctions, which included a $60 million fine, a 4-year post-season play ban, loss of athletic scholarships, and vacation of wins since 1998. Id. at ¶ 96. President Erickson signed the Decree without following the procedural requirements set forth in Penn State's Bylaws, Charter, and Standing Orders. Id. at ¶¶ 87, 88.

Some of the Plaintiffs filed appeals from the Consent Decree with the NCAA Infractions Appeals Committee, but the NCAA refused to accept the appeals on the ground that it was not proceeding pursuant to its traditional enforcement process. Id. at ¶¶ 98, 99.

Based on these allegations, Plaintiffs filed the Complaint on May 30, 2013. Count I of the Complaint alleges breach of Penn State's membership contract with the NCAA on behalf of Paterno and Trustee Clemens as third party beneficiaries. Count II asserts breach of the membership contract on behalf of the remaining Trustees and the Former Coaches and Former Players as third party beneficiaries. Count III asserts a claim for intentional interference with contractual relations on behalf of the Former Coaches. Count IV asserts a claim for injurious

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falsehood/commercial disparagement by Paterno's Estate on behalf of Paterno. Count V asserts a claim for defamation on behalf of the Plaintiffs other than Paterno's Estate. Count VI asserts a claim for civil conspiracy by all Plaintiffs. Plaintiffs seek declaratory and injunctive relief and recovery of compensatory and punitive damages and costs of the action.

Defendants filed the instant Preliminary Objections on July 23, 2013, asserting several challenges to the Complaint under Pa. R. Civ. P. 1028, including: (1) Lack of Jurisdiction Due to Failure to Join Indispensable Party; (2) Incapacity to Bring Contract Counts; (3) Impertinent Material; (4) Demurrers to Counts III through VI; and (5) Lack of Personal Jurisdiction. Pursuant to an agreement of the parties, the personal jurisdiction issues are reserved until the other preliminary objections are resolved. The remaining objections were fully briefed, and oral argument was held on October 29, 2013.

DISCUSSION

For purposes of deciding the preliminary objections, the Court must assume the well-pleaded factual allegations in the Complaint are true and must draw all inferences reasonably deducible from those allegations in favor of Plaintiffs. Foflygen v. R. Zemel, M.D. (P.C.), 420 Pa. Super. 18, 32, 615 A.2d 1345, 1352 (1992).

Failure to Join Indispensable Party (Rule 1028(a)(1))

Parties' Arguments

Defendants argue that Penn State is an indispensable party to this action because no judgment can be rendered on Plaintiffs' claims without dramatically affecting Penn State's rights. Specifically, Plaintiffs seek to materially impair Penn State's rights by voiding its contract with the NCAA, and they directly challenge the authority of Penn State and its senior leadership to execute the Consent Decree.

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Plaintiffs respond that Penn State is not indispensable because they do not seek any redress from Penn State. Moreover, Penn State signed a waiver in the Consent Decree which prohibits it from participating in any litigation related to the Consent Decree. Based on that waiver, the Pennsylvania Commonwealth Court recently held that Penn State was not an indispensable party in another suit involving different issues in the Consent Decree, Corman v. National Collegiate Athletic Ass'n, 74 A.3d 1149 (Pa. Cmmw. Ct. 2013).

Legal Standards

A party is indispensable to a suit when its rights are so connected with the claims asserted that no decree can be made without impairing those rights. Polydyne, Inc. v. City of Phila., 795 A.2d 495, 496-97 (Pa. Commw. Ct. 2002). If an indispensable party is not joined, the court lacks subject matter jurisdiction and may not address the merits of the case. See id.; see also Erie Ins. Group v. Cavalier, 380 Pa. Super. 601, 606, 552 A.2d 705, 707 (1989) (applying Pennsylvania's Declaratory Judgments Act).

In determining whether a party is indispensable, courts consider the following factors:

(1) Do absent parties have a right or interest related to the claim?

(2) If so, what is the nature of that right or interest?

(3) Is that right or interest essential to the merits of the issue?

(4) Can justice be afforded without violating the due process rights of absent parties?

See, e.g., Polydyne, 795 A.2d at 496; E-Z Parks, Inc. v. Philadelphia Parking Auth., 103 Pa. Commw. 627, 632, 521 A.2d 71, 73 (1987).

Applying these standards, Pennsylvania courts consistently have found that in breach of contract actions, all parties to the contract are indispensable. See, e.g., Polydyne, 795 A.2d at 496

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(in suit to enjoin contract between city and competing bidder, competing bidder was indispensable); Borough of Wilkinsburg v. Horner, 88 Pa. Commw. 594, 597-98, 490 A.2d 964, 965 (1985) (in taxpayers' suit to enjoin performance of refuse contract between borough and sanitation company, sanitation company was indispensable party); Gavigan v. Bookbinders, Mach. Operators and Auxiliary Workers Local Union No. 97, 394 Pa. 400, 401, 147 A.2d 147, 147 (1959) (in suit by union members seeking interpretation of contract between employer and union, employer was indispensable party and failure to join it was "fatal to the action").

Plaintiffs have not cited any persuasive authority to the contrary. Several of the cases they rely on do not involve contract-based claims or are otherwise distinguishable. Campanaro v. Pennsylvania Elec. Co., 440 Pa. Super. 519, 656 A.2d 491 (1995) (employment discrimination); Sprague v. Casey, 520 Pa. 38, 550 A.2d 184 (1988) (election challenge); County of Berks v. Allied Waste Indus. Inc., 66 Pa. D. &. C.4th 429 (2004) (nuisance and other property claims); see also Comerford v. Factoryville Borough Council, 16 Pa. Commw. 261, 328 A.2d 221 (1974) (state agency not indispensable in action to enjoin contract between borough and engineering firm); Americus Ctr., Inc. v. City of Allentown, 112 Pa. Commw. 308, 535 A.2d 1200 (1988)(potential lessee not indispensable where contract had not yet been executed). French v. Shoemaker, 81 U.S. 314 (1871) involved a contract claim but because it is from 1871 and originated in Virginia, it is not compelling authority in this case.

Analysis

Indispensable Party Test

In this case, all of the factors in the indispensable party test apply with respect to Plaintiffs' contract claims. The contract at issue is the membership contract between Penn State and the NCAA in the form of the NCAA's Bylaws and Constitution. Compl. ¶¶ 105-121.

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Plaintiffs allege that Defendants breached the enforcement provision in the Bylaws as well as the covenant of good faith and fair dealing implied in the membership contract. Penn State has an interest and stake in the resolution of these issues as a party to the contract. See Bloom v. National Collegiate Athletic Ass'n, 93 P.3d 621, 622 (Colo. App. 2004) (noting, in another case involving claims under a NCAA membership contract, that the trial court had ordered the member institution joined as an indispensable party). In addition, Penn State has an interest in resolution of Plaintiffs claims that its senior leadership acted ultra vires in accepting the Freeh Report and entering the Consent Decree without ratification by Penn State's Board of Trustees. Likewise, Penn State has an interest in litigating Plaintiffs' claims that it lacked authority to waive the enforcement provisions set forth in the Bylaws.

Penn State's participation is also essential to resolving the threshold issue of standing. Plaintiffs contend that they have standing as third party beneficiaries to the membership contract because the Bylaws bestow various procedural rights upon "involved individuals," defined as student athletes and staff who have received notice of "significant involvement in alleged violations." See Compl. Exh. A, R. 32.1.5. They contend that Paterno and Clemens meet this definition because they were accused of wrongdoing and Paterno was sanctioned by the vacation of his record of wins. The absence of formal notice to Paterno and Clemens does not remove them from the definition of "involved individuals," they argue, because Defendants concede they were not utilizing any of the traditional enforcement procedures. Plaintiffs allege the other Plaintiffs have standing by virtue of the NCAA rule stating that providing fairness to uninvolved individuals is essential to a viable and effective enforcement program. See id. R. 19.01.1. Defendants argue that the NCAA has never interpreted its rules broadly enough to include persons who were not personally sanctioned or under threat of an official finding that they

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violated a rule. They argue that Paterno and Clemens did not receive notice of involvement in alleged violations and were not personally sanctioned. According to Defendants, the fairness provisions are too vague to support a third party beneficiary contract claim.

Whether a person has third party beneficiary status depends on the intent of the primary contract parties. Scarpitti v. Weborg, 530 Pa. 366 (1992). Where contract language is clear and unambiguous, it is conclusive as to the parties' intent. See, e.g., Keystone Dedicated Logistics, LLC v. JGB Enters. Inc., 77 A.3d 1, 6-7 (Pa. Super. Ct. 2013). However, when the contract language is susceptible of different reasonable interpretations extrinsic evidence may be needed to resolve the ambiguity. Id.

Here, the contract language is ambiguous. Based on the contract language and the context of this case, Defendants' argument that "involved individuals" means persons who are sanctioned or under threat of an official finding of rules violations is reasonable. Plaintiffs' argument that the phrase may cover a person who is named in the sanctioning document or whose conduct underlies sanctions is also reasonable. Many fact questions remain concerning the meaning and application of the phrase "involved individuals" in this case, including whether Paterno was personally sanctioned. Regarding the fairness provisions, it is not clear whether they were intended to create contract rights in third parties, and neither party has cited a controlling case on point in hundreds of pages of briefing. Cf. Knelman v. Middlebury Coll., 898 F. Supp. 2d 697, 713 (D. Vt. 2012) (applying Vermont law, even if college athlete had standing based on NCAA fairness provisions, he could not establish a concrete and specific promise to support a contract claim); Bloom, 93 P. 3d at 623-24 (in disciplinary matter, college athlete had standing to challenge NCAA eligibility rules); see also Oliver v. National Collegiate Athletic Ass'n, 155 Ohio Misc. 2d 8, 13-14 (2008). Given that Penn State's intentions as a primary contract party are

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directly at issue, it would be inappropriate to resolve these ambiguities and determine standing in Penn State's absence.

Penn State is also indispensable because the relief Plaintiffs seek would deprive Penn State of its rights under the Consent Decree. If the Consent Decree is declared void, as Plaintiffs request, Penn State would lose the benefits it bargained for, including avoiding harsher sanctions and limiting further loss that could result from a prolonged investigation. Even at oral argument, the NCAA indicated that the "death penalty" could conceivably result if the Consent Decree was invalidated. Where similar relief voiding a contract has been sought, Pennsylvania courts have held the parties to the contract must be joined. See, e.g., E-Z Parks, Inc. v. Philadelphia Parking Auth., 103 Pa. Commw. 627, 631-33, 521 A.2d 71, 73 (1987)(DOT indispensable party in parking lot operator's suit to void contract between DOT and parking authority as unauthorized); Frushon v. Pittston Twp. Sch. Dist., 8 Pa. D. & C. 2d 165, 167, 1957 WL 6299 at p.* 2 (1956) (in suit to cancel contract between school district and tax collector, tax collector was indispensable).

Nor can declaratory relief be granted without Penn State's presence as a party to this suit. Section 7540 of the Pennsylvania Declaratory Judgments Act, 42 Pa. C.S.A. §§ 7531-7541, provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." See also Erie Ins. Group v. Cavalier, 380 Pa. Super. 601, 606, 552 A.2d 705, 707 (Pa. Super. Ct. 1989) (in insurer's suit for declaration of coverage limits, insureds were indispensable parties); ESP Enters., LLC v. Garagozzo, 2005 WL 1580049 at p* 2 (Pa. Com. Pl. 2005) (parties to agreement of sale indispensable in suit to declare agreement void).

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Thus, Penn State has interests in the action arising from its contract rights, and those interests are essential to the merits of the claims. Penn State's interests are distinct from those of Plaintiffs and Defendants, and their interests are not adequately protected by the other parties. See, e.g., Polydyne, 795 A.2d at 496 (in suit to enjoin city's contract with competing bidder, competing bidder's rights were not adequately protected by city's interest in upholding contract). "Inquiry into whether a party is indispensable is viewed from the perspective of protecting rights of absent parties, not from perspective of whether joinder of a party to an action would make matters more difficult to litigate." E-Z Parks, 103 Pa. Cmmw. at 635, 521 A.2d at 72. In this case, it would be unjust to rule upon the meaning of the terms of Penn State's contract and whether its conduct was voluntary and authorized in its absence.

Waiver Issue

The waiver provision relied on in Corman v. National Collegiate Athletic Ass'n, does not compel a different conclusion. First, Corman is factually distinguishable. The issue in Corman was whether the fine money received by the NCAA under the Consent Decree was subject to the Institution of Higher Education Monetary Penalty Endowment Act. As "[n]othing in the Consent Decree permits [Penn State] to affect the disposition of the fine being paid," its rights were not essential to the merits of the case. Corman, 74 A.3d at 1163. In Corman, none of the relief requested impacted Penn State. Id. at 1165-66. By contrast, in this case Penn State's contract rights would be determined by the declaratory and other relief sought. Penn State has a direct and material interest in how its own contract is interpreted and enforced and whether its actions are determined to be authorized, voluntary, or appropriate.

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Moreover the waiver provision relied on in Corman court does not appear to apply here, based on its plain language. The waiver provides as follows:

> Penn State expressly agrees not to challenge the consent decree and waives any claim to further process, including, without limitation, any right to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, and any judicial process related to the subject matter of this Consent Decree.

Compl. Exh. B at p. 2.

Thus, the waiver applies to Penn State's "challenge to the consent decree." This suit is based on the membership contract, and the only challenge to the consent decree is asserted by Plaintiffs. It is not reasonable to construe the waiver to cover a suit for breach of a different contract based on a non-party's request for voidance of the Consent Decree.

It is also significant that in this case, unlike in Corman, Plaintiffs have alleged the Consent Decree was coerced and is void *ab initio*. In Corman, the court noted that the Consent Decree was a contract and had to be enforced absent fraud or other invalidating grounds, which were not alleged in that case Id. at 1165. Here, Plaintiffs themselves allege the Consent Decree is invalid because President Erickson was "forced to agree not to challenge the decree and to waive any right to a 'determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rule, and any judicial process related to the subject matter of the Consent Decree." Compl. ¶ 97. In deciding preliminary objections the Court must accept Plaintiffs' allegations as true. If the Consent Decree is void as alleged, the waiver also is void and has no effect.

Conclusion

The preliminary objection based on failure to join an indispensable party is therefore SUSTAINED. For the same reasons, the preliminary objection seeking to have the request for voidance of the Consent Decree stricken as impertinent is also SUSTAINED. In light of this

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disposition, the Court lacks jurisdiction over the contract claims. See Erie Ins. Group v. Cavalier, 380 Pa. Super. 601, 606, 552 A.2d 705, 707 (1989) (declining to address merits of appeal where jurisdiction lacking due to failure to join indispensable parties). Accordingly, the Court does not reach the objection to Plaintiffs' standing to assert the contract claims. See, e.g., Hollinger v. Dep't of Pub. Welfare, 469 Pa. 358, 364, 365 A.2d 1245, 1248 (1976) (declining to reach remaining preliminary objections where objection to jurisdiction was sustained); Barr v. Commonwealth, 110 Pa. Commw. 530, 533, 532 A.2d 1236, 1237 (1987) (same). However, the Court notes for purposes of judicial economy that it appears from the current record that the operative Bylaws language is ambiguous.

Although the court lacks jurisdiction over the contract claims, Penn State's absence does not require dismissal of the entire Complaint. Plaintiffs' tort claims stand on a different footing than the contract claims because they do not require rulings affecting Penn State's rights in any significant way. The Court next addresses Defendants' demurrers pursuant to Rule 1028(a)(4) to each of the four tort claims: Count V (defamation), Count IV (commercial disparagement), Count III (tortious interference with contract), and Count VI (civil conspiracy).

Demurrers (Rule 1028)(a)(4))

A complaint must allege enough facts to apprise the defendant of the nature of the claims and allow the defendant to prepare an answer and defense. Sevin v. Kelshaw, 417 Pa. Super. 1, 7, 611 A.2d 1232, 1235 (1992). A claim should only be dismissed on preliminary objections when it is clear and free from doubt that the pleader will not be able to prove facts legally sufficient to establish a right to relief. Bower v. Bower, 531 Pa. 54, 57, 611 A.2d 181, 182 (1992). When reviewing preliminary objections in the form of a demurrer, all well-pleaded material facts in the complaint, as well as inferences fairly deducible therefrom, are admitted as true. Strickland v.

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University of Scranton, 700 A.2d 979, 983 (Pa. Super. Ct. 1979). A demurrer should be sustained only where, on the facts averred, the law says with certainty that no recovery is possible. Id.

Demurrer to Defamation Claim

Defendants argue that the defamation claim, which is asserted by all of the Plaintiffs except Paterno's Estate, fails because the allegedly defamatory statements are directed to the Penn State community at large or to general groups at Penn State and do not reasonably identify any of the individual Plaintiffs. In addition, the alleged statements are expressions of opinion based on publicly disclosed facts and most Plaintiffs are public figures but have failed to allege malice.

Plaintiffs argue that the defamatory statements were directed at the individual Plaintiffs, and the size of the group defamed does not determine the viability of the claim. They further argue that the statements were factual conclusions and that malice is sufficiently alleged.

To state a claim for defamation, a plaintiff must allege (1) that the communication was defamatory; (2) that the defendant published the communication; (3) that it applied to the plaintiff; (4) that the recipient understood the defamatory meaning; (5) that the recipient understood that it was intended to be applied to the plaintiff; (6) that the plaintiff suffered special harm as a result of the publication; and (7) abuse of any conditional privilege. Alston v. PW-Philadelphia Weekly, 980 A.2d 215, 220 (Pa. Commw. Ct. 2009).

To constitute a defamatory statement, the plaintiff need not be named but may be referenced as part of a group. Klauder v. Philadelphia Newspapers, Inc., 66 Pa. D. & C.2d 271, 276 (1973). However, the plaintiff still must show a reasonable person would identify him as a target of the defamatory statement. Id. In making this determination, group size is an important

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factor. Id. at 276-78. As a general guideline, a group consisting of 25 or more members is too large to support a defamation claim. See id. at 280 (police force of 8,200 too large), Schonek v. WJAC, Inc., 436 Pa. 78, 84, 258 A.2d 504, 507 (1969) (committee of several hundred too large); Viola v. A & E Television Networks, 433 F. Supp. 2d 613, 617 (W.D. Pa. 2006) (applying Pennsylvania law)(Roman Catholic Church too large); cf. Farrell v. Triangle Publ'ns, Inc., 399 Pa. 102, 109, 159 A.2d 734, 738-39 (1960)(board of commissioners with 13 members not too large); Mzamane v. Winfrey, 693 F. Supp. 2d 442, 495 (E.D. Pa. 2010) (defamatory statements about school's "leadership" construed as concerning plaintiff); O'Neill v. Motor Transp. Labor Relations, Inc., 41 Pa. D & C.2d 242, 246 (1966) (group of 124 company employees not too large, but each was listed by name).

With these standards in mind, the Court will address the five allegedly defamatory statements alleged in the Complaint:

> Statement 1: The Consent Decree stated that "the Board of Trustees ... did not perform its oversight duties," and it "failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable." See Compl. ¶¶ 90(b), 140.

> Statement 2: The Consent Decree found that "[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him." Compl. ¶ 90(c).

> Statement 3: "[T]he NCAA asserted that ... 'it was the fear of or deference to the omnipotent football program that enabled a sexual predator to attract and abuse his victims.' According to the NCAA, 'the reverence for Penn State football permeated every level of the University community,'" and was "'an extraordinary affront to the values all members of the Association have pledged to uphold.'" Compl. ¶ 92.

> Statements 4: "[E]very level of the Penn State community created and maintained a culture of reverence for, fear of, and deference to the football program, in disregard of the

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> value of human decency and the safety and well-being of vulnerable children." Compl. ¶ 94, see also Compl. ¶ 140.

> Statement 5: The NCAA and its officials stated that the issues addressed "in the Consent Decree were 'about the whole institution'" and that "the Freeh Report ... revealed [matters] that suggest really inappropriate behavior at every level of the university.'" Compl. ¶ 141.

Accepting Plaintiffs' allegations as true for purposes of the demurrer, Plaintiffs have adequately pled a defamation claim on behalf of Clemens based on Statement 1 and on behalf of the Former Coaches based on Statements 2. The first two elements of defamation, that the statements are defamatory and are published, are easily met based on Plaintiffs' allegations. Statement 1 asserts that the Trustees serving in 1998 and 2001 failed in their oversight duties, and Statement 2 asserts that some coaches were basically complicit in child sexual abuse. Both Statements were published in the Consent Decree as conclusions based on fact findings contained in the Freeh Report. See Compl. Exh. B at pp. 2-3.

A closer question is whether the Statements reasonably identify those Plaintiffs. Both Statements refer to groups that are limited in size and consist of people who are well-known in the community or whose identity could easily be discovered upon inquiry. Statement 1 concerns the Board of Trustees serving in 1998 and 2001. Trustees meeting that description are a finite group and include Clemens, but not the other Trustee Plaintiffs. Id. at ¶ 9. Statement 2 is directed as "some coaches," a limited group of individuals including Former Coaches Paterno and Kinney. These groups are certainly smaller than the 8,200-member police force in Klauder and closer to 13-member board of commissioners in Farrell and the school "leadership" in Mzamane. In addition, the Pennsylvania Supreme Court has recognized that when defamatory statements are made in the course of a public scandal, recipients may be more likely to make

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inquiry to determine the specific group members. Farrell, 399 Pa. at 109, 159 A.2d at 738-39. Thus, Plaintiffs have sufficiently alleged that Clemens and the Former Coaches reasonably could be viewed as targets of Statements 1 and 2, respectively.

Plaintiffs have also sufficiently alleged the element of malice. By virtue of their positions with Penn State and involvement in a public scandal, Clemens and the Former Coaches are at least limited purpose public figures, and thus Plaintiffs must plead malice to establish their defamation claim. See Barry v. Time, Inc., 584 F. Supp. 1110 (N.D. Cal. 1984)(discussing cases finding college players and coaches to be public figures); Mzamane v. Winfrey, 693 F. Supp. 2d 442, 498-99 (E.D. Pa. 2010) (headmistress of school was limited purpose public figure). Malice is shown when a defendant publishes statements with obvious reasons to doubt their veracity, such as when the defendant is aware of internal inconsistencies or apparently reliable contradictory information. Mzamane, 693 F. Supp. 2d at 505-06.

In this case, the Complaint alleges that Defendants accepted the Freeh Report even though they knew it was unreliable and seriously flawed. Compl. ¶¶ 5, 6, 60-88. It also alleges that Defendants intentionally rushed to judgment without a proper investigation, violating the procedural rights of affected individuals, and aware that innocent parties would suffer substantial harm. Id. These allegations are sufficient to support the element of malice with respect to Statements 1 and 2.

However, Statements 3 through 5 are not actionable because nothing in those statements identifies any of the Plaintiffs as targets. Those statements refer to the "Penn State community," and Plaintiffs specifically allege that the statements were directed at all members of the Penn State Community between 1998 and 2011. Id. at ¶ 144. Because that group would consist of hundreds of thousands of people, it is far too large to support a finding that the statements

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targeted any of the Plaintiffs personally. See Klauder, 66 Pa. D. & C.2d at 280. The Former Players and Faculty and the Trustees who did not serve in 1998 and 2001 are not otherwise named, directly or indirectly, as individuals or as part of groups. Cf. O'Neill, 41 Pa. D & C.2d at 246 (124 group members were specifically named in defamatory statements). Thus recovery for defamation is not possible based on Statements 3 through 5.

The Demurrer to Count V is OVERRULED as to claims by Clemens and the Former Coaches based on Statements 1 and 2 and is otherwise SUSTAINED.

Demurrer to Commercial Disparagement Claim

Defendants argue that the commercial disparagement claim fails because Plaintiffs have not alleged any actionable commercial interest, pecuniary loss, or that the NCAA acted with knowing and reckless disregard for the truth. Plaintiffs respond that they have alleged a property interest in Paterno's name and reputation and need not allege specific pecuniary loss because the disparaging statements were widely disseminated and constituted libel per se.

To state a claim for commercial disparagement, a plaintiff must allege that publication of a disparaging statement about another's business where: (1) the statement is false, (2) the publisher intends that the statement will cause pecuniary loss or reasonably should recognize that it will cause pecuniary loss; (3) pecuniary loss in fact; and (3) the publisher knows the statement is false or acts in reckless disregard of its truth or falsity. Pro Golf. Mfg., Inc. v. Tribune Review Newspaper Co., 809 A.2d 243, 246, 570 Pa. 242, 246 (2002). Commercial disparagement is like defamation but protects commercial as opposed to reputational interests. Id. at 247, 570 Pa. at 246.

The Pennsylvania Supreme Court made clear in Menefee v. Columbia Broad. Sys., Inc., 458 Pa. 46, 54, 329 A.2d 216, 220 (1974), that the commercial interest need not be a product or

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service. The plaintiff in that case was a radio broadcaster and asserted a commercial disparagement claim based on statements indicating that he was unable to draw an audience and obtain good ratings. The Supreme Court recognized that he had "an intangible property interest in his broadcasting personality and that a statement that his program could no longer attract satisfactory ratings would tend to disparage that property interest." Id.

In this case the Complaint alleges that Joe Paterno or his estate "possessed a property interest in his name and reputation, and there was a readily available, valuable commercial market concerning Joe Paterno's commercial property." Compl. ¶ 131. It further alleges that the Consent Decree published various statements maligning Joe Paterno's moral character, including (1) "Head Football Coach Joseph V. Paterno failed to protect against a child sexual predator harming children for over a decade," (2) Paterno "concealed Sandusky's activities from the Board of Trustees, the University community and authorities," and (3) Paterno "allow[ed] [Sandusky] to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program." Id. at ¶ ¶ 90(a), 130. The Complaint alleges that Plaintiffs knew or should have known the statements were false and that the statements were published across the country, causing the Estate's "commercial interests and value" to "substantially and materially declined as a direct result of Defendant's conduct." Id. at ¶¶ 136, 137, see also id. at ¶ 103(a).

The Complaint sets forth sufficient factual allegations to support a plausible claim for commercial disparagement. Based on Menefee, Plaintiffs have at least a possibility of recovery based on a commercialized interest in Paterno's personality or reputation as a football coach. Plaintiffs identified disparaging statements accusing Joe Paterno of enabling and concealing child sexual abuse and knowledge or reckless disregard with respect to their falsity. Although

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Plaintiffs did not specifically plead pecuniary loss, as a plaintiff generally must in a commercial disparagement case (see Swift Bros. v. Swift & Sons, Inc., 921 F. Supp. 267, 276 (E.D. Pa. 1995)), such specificity is not required where the disparaging statements constitute libel per se. See Bro-Tech Corp. v. Thermax, Inc., 651 F. Supp. 2d 378, 415 (E.D. Pa. 2009) (applying Pennsylvania law); Testing Sys., Inc. v. Magnaflux Corp., 251 F. Supp. 286, 291 (D.C. Pa. 1966) (applying libel per se exception in context of trade libel/disparagement of property case but finding test was not met). The statements about Joe Paterno's response to child sexual abuse at Penn State impugn his moral character and conduct in his profession, constituting libel per se. See Testing Sys., Inc., 251 F. Supp. at 291. Alternatively, the pleading standards are relaxed where statements were widely disseminated due to the difficulty of proving particular customers were lost when the disparagement affects an entire market. Menefee, 458 Pa. at 54-55, 329 A.2d at 221 (citing Restatement of Torts § 633). Accordingly, Plaintiffs have stated a claim for commercial disparagement.

The Demurrer to Count IV is OVERRULED.

Demurrer to Intentional Interference with Prospective Contract Claim

Defendants argue that Plaintiffs have not stated a claim for tortious interference with prospective contractual relations because they failed to identify any contract or opportunity that had a reasonable likelihood of coming to fruition. They further argue that Plaintiffs have failed to allege any acts of intentional interference by Defendants. Finally, Defendants argue that Plaintiffs cannot allege lack of privilege because Defendants' actions were taken in course of official investigation of potential rules violations. Plaintiffs contend that their allegations are more than sufficient to apprise Defendants of the nature of their claim.

The elements of tortious interference with prospective contractual relations are: (1) the

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existence of a prospective contractual relationship between the plaintiff and a third party, (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship, (3) the absence of a privilege or justification for such interference, and (4) actual damages resulting from the defendant's conduct. Foster v. UPMC South Side Hosp., 2 A.3d 655, 665 (Pa. Super. 2010).

While Pennsylvania law does not require a plaintiff to identify a specific contract that was lost, a mere hope for employment is not enough. Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc., 1992 WL 97826 at p. *11 (E.D. Pa. 1992) ("The area of prospective relationships is necessarily a murky one."); Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1015 (3d Cir. 1994) (A prospective contract "is something less than a contractual right, something more than a mere hope"); Brunson Commc'ns, Inc. v. Arbitron Inc., 239 F. Supp. 2d 550, 578 (E.D. Pa. 2002) (same). There must be a reasonable probability, based on the parties' current dealings, that a contract will arise. Brunson, 239 F. Supp. 2d at 578 (allegations deficient where plaintiffs failed to identify a single prospective customer or plead facts suggesting that any customer was lost).

The Complaint alleges that the coaches had "prospective and existing employment, business, and economic opportunities with many prestigious college and professional football programs, including at Penn State." Compl. ¶ 123. The Complaint further alleges that Defendants knew or should have known of these opportunities and intentionally interfered with them without justification or privilege, causing harm. Id. at ¶ 124. Plaintiffs allegedly suffered damage to their reputations and standing as football coaches and have been unable to secure comparable employment despite qualifications and existence of employers who otherwise would hire them. Id. at ¶¶ 103(b), 128.

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Plaintiffs do not allege that any specific prospective contracts would have been consummated but for Defendants' conduct. They do not allege that they were applying for jobs, interviewing, or even job searching. They merely allege that based on their reputations they expected open doors with college and professional football programs. Such a general expectation is not equivalent to a specific contract being contemplated but is more akin to a "mere hope." The allegations here are general and speculative like those held deficient in Advanced Power Systems, Inc., where the plaintiff averred that because the defendant had plaintiff's trade secrets it would have the ability to undercut plaintiff's sales. There, as here, Plaintiffs have not pled facts supporting an inference that actual contracts were probably forthcoming.

The allegations as to the remaining elements of the claim, although sparse on facts, are sufficient. Intent to cause a result may be inferred from circumstances indicating the result is substantially certain to occur. See BTZ, Inc. v. Grove, 803 F. Supp. 1019, 1023-24 (M.D. Pa. 1992). Accepting as true that the Former Coaches were accused of ignoring child sexual abuse, they were substantially certain to be less attractive job candidates, were an employer to contemplate hiring them. Absence of privilege is also sufficiently pled by the allegations that the NCAA violated its own rules for an improper purpose.

The Demurrer to Count III is SUSTAINED without prejudice. Plaintiffs may file an Amended Complaint that provides factual allegations supporting their claims of lost opportunities or contracts.

Demurrer to Civil Conspiracy Claim

Defendants argue that the conspiracy claim fails because Plaintiffs do not allege that the NCAA and the Freeh firm "combined for an unlawful purpose." Specifically, Defendants argue that Plaintiffs do not plead facts, beyond generic allegations of coordination and communication,

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showing that the NCAA and the Freeh firm acted in concert. Defendants further argue that the only unlawful purpose Plaintiffs allege is breach of contract, which cannot form the basis for a civil conspiracy claim. Plaintiffs respond that their allegations that Defendants and the Freeh firm acted in concert and beyond their lawful authority to substantially harm others for their own benefit are sufficient to state a claim for conspiracy.

The elements of civil conspiracy are: (1) a combination of persons with purpose to do an unlawful act or a lawful act by unlawful means; (2) an overt act in furtherance of the purpose; and (3) actual legal damage. Strickland v. University of Scranton, 700 A.2d 979, 987-88 (Pa. Super. Ct. 1997). Although typically based on tort, civil conspiracy cases have been recognized in Pennsylvania based on breach of contract. See, e.g., Fife v. Great Atl. & Pac. Tea. Co., 356 Pa. 265, 266, 52 A.2d 24, 32 (1947); Commonwealth v. Musser Forests, Inc., 394 Pa. 205, 207, 146 A.2d 714, 715 (1958).

The Complaint alleges that the NCAA collaborated with the Freeh firm to breach contractual obligations owed to Plaintiffs. Compl. ¶¶ 54, 148. Specifically, over the course of the Freeh firm's investigation, the firm provided frequent briefings to the NCAA, contacted NCAA representatives to discuss areas of inquiry and strategies, and cooperated with the NCAA. Id. at ¶ 150. The Complaint alleges that Defendant took these actions to purposefully injure Plaintiffs to deprive them of their procedural rights, or at least acted in reckless disregard of substantially certain injury to Plaintiffs, with no legitimate purpose. Numerous overt acts are alleged in the Complaint, including working together to prepare a false report and threatening to impose the "death penalty" when the remedy was not authorized in order to extort silence from President Erickson. Id. at ¶ 151(a) through (f).

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Accepting the allegations of the Complaint as true, Plaintiffs have alleged that Defendants and the Freeh Firm acted together to commit overt acts in furtherance of their improper purpose to harm Plaintiffs, causing damage. Plaintiffs' general allegations of meetings between the alleged co-conspirators are sufficient, as Pennsylvania law does not require a plaintiff to plead dates, locations, or other specific details in order to state a civil conspiracy claim. Pappert v. TAP Pharmaceutical Prods., Inc., 885 A.2d 1127, 1141 (Pa. Commw. Ct. 2005). Plaintiffs' allegations that Defendants and the Freeh firm recklessly disregarded Plaintiffs' procedural rights in imposing sanctions in a criminal matter unrelated to recruiting and athletic competition, accepted the flawed Freeh report knowing it was not the result of a reliable investigation, and falsely accused Plaintiffs of enabling and causing child sex abuse are sufficient to allege malice. Reading Radio, Inc. v. Fink, 833 A.2d 199, 213 (Pa. Super. Ct. 2003) (malice can be shown by reckless disregard of plaintiff's rights). Thus, the Court cannot say that no recovery is possible on Plaintiffs' civil conspiracy claim.

The Demurrer to Count V is OVERRULED.

ORDER

AND NOW, this 6 day of ~~December~~ January 2014, upon consideration of Defendant's Preliminary Objections, the Objections are SUSTAINED in part and OVERRULED in part, as follows:

(1) The Preliminary Objections based on failure to join an indispensable party and impertinent material are SUSTAINED with respect to Counts I and II for Breach of Contract. Plaintiffs are granted leave to file an Amended Complaint that cures the

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jurisdictional defect by joining the Pennsylvania State University as a party to this action.

(2) No decision is made on the Preliminary Objection based on standing.

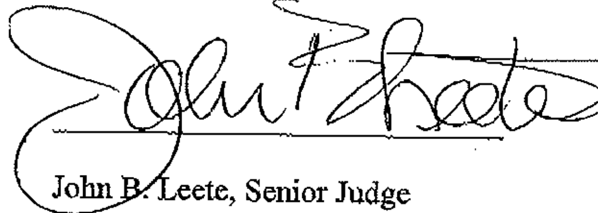
(3) The Demurrer to Count III for Intentional Interference with Prospective Contractual Relations is SUSTAINED without prejudice.

(4) The Demurrer to Count V for Defamation is SUSTAINED, except as to the defamation claims asserted by Trustee Clemens and the Former Coaches, as to which it is OVERRULED.

(5) The Demurrers to Count IV for Commercial Disparagement and Count VI for Civil Conspiracy are OVERRULED.

Plaintiffs shall have 30 days from the date of this Opinion and Order to file an Amended Complaint.

BY THE COURT:



John B. Leete, Senior Judge

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