IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

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

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President of the NCAA; and

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

Defendants.

CIVIL DIVISION

Docket No. 2013-2082

PENN STATE'S MOTION FOR RECONSIDERATION OF COURT'S JANUARY 27, 2017 ORDER

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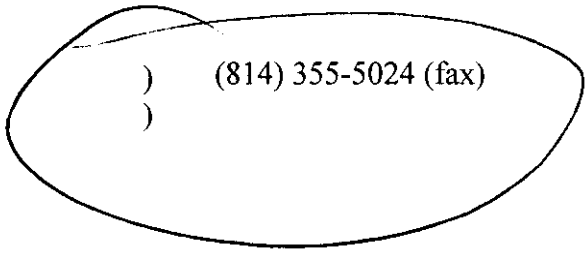
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Defendants.	)	

PENN STATE'S MOTION FOR RECONSIDERATION OF COURT'S JANUARY 27, 2017 ORDER

The Pennsylvania State University ("Penn State" or "the University") submits this Motion for Reconsideration of the aspect of the Court's January 27, 2017, Order that grants Plaintiffs' motion to compel Penn State, which has not been a party to this case since May 2015, to provide a privilege log in connection with document requests Plaintiffs served when Penn State *was* a party (the "Motion").

As a threshold matter, Penn State notes that the Court granted the Motion without establishing a briefing schedule or hearing from Penn State. Indeed, the undersigned counsel had been advised by counsel for the NCAA that, in the parties' January 17, 2017 telephonic conference, Plaintiffs' counsel had asked the Court to establish a briefing schedule, and that the Court signaled its intent to issue one. Penn State accordingly was preparing to respond to the

Motion in due course upon receipt of a briefing schedule when it received the Court's January 27 Order.

Because Plaintiffs' Motion painted a fundamentally incorrect picture of the operative timeline and the procedural posture germane to Penn State's position, Penn State respectfully submits that the Court granted the Motion based on a less than complete rendering of the facts by Plaintiffs. Accordingly, Penn State respectfully submits that the Court should reconsider the relief it granted as being both inappropriate as applied to a non-party and inconsistent with the Court's recognition (in the Court's Memorandum Opinion and Order also entered January 27, 2017) that fact discovery ended long ago. In support of this Motion for Reconsideration, Penn State avers as follows:

1. Plaintiffs served Penn State with a request for production of documents on July 28, 2014 (the "Document Requests"). Penn State duly served objections and responses to the Document Requests, including asserting that, in some respects, the Document Requests called for documents protected by the attorney-client privilege and/or the attorney work product doctrine.

2. Penn State began making rolling productions of non-privileged documents in response to the Document Requests in October 2014.

3. In an Opinion and Order dated September 11, 2014, this Court sustained in part the preliminary objections to the First Amended Complaint that were filed by Penn State and the NCAA. Specifically, the Court concluded that the Paterno Estate lacked standing to assert a breach of the NCAA Bylaws (Count I), because Coach Joe Paterno as not an "involved individual" (the operative phrase set forth in those Bylaws) prior to his death. *See* Exhibit 1 hereto (9/11/14 Order pp. 7-8). However, the Court reached a different conclusion with respect

to plaintiff Al Clemens, noting that whether or not Mr. Clemens is an "involved individual" for purposes of a breach of contract claim is "for a jury to decide." *Id.*, p. 9.

4. Plaintiffs then filed a Second Amended Complaint in which both the Paterno Estate and Mr. Clements nevertheless continued to assert a Breach of Contract claim – against both the NCAA and Penn State -- as Count I. When this prompted a preliminary objection from the NCAA, this Court agreed, in its March 30, 2015 Order, that it already had ruled that the Paterno Estate lacked standing to assert Count I. *See* Exhibit 2 (3/30/15 Order). The Court made no mention, however, of its earlier conclusion with respect to Mr. Clemens, *meaning that Penn State remained a nominal defendant with respect to Count I (vis-à-vis Mr. Clemens) even after the Court issued its March 30, 2015 Order.*[1]

5. Accordingly, Penn State – still a party to the litigation – continued honoring the discovery obligations the Pennsylvania Rules of Civil Procedure impose on parties, by, *inter alia,* continuing to make rolling productions in response to Plaintiffs' Document Requests.

6. However, Penn State's party status changed later in 2015, when Mr. Clemens filed a praecipe (on May 15, 2015) to discontinue all of his claims, including his claim (Count I) against Penn State. *See* Exhibit 3 hereto. In July 2015, the court amended the caption to reflect that neither Mr. Clemens nor Penn State were parties to the litigation. *See* Exhibit 4 hereto.

7. Mr. Clemens' dismissal of his claims was unconditional and unqualified: he did not in any way condition the withdrawal of his claims against Penn State on the University continuing to act as if it were a party in any respect, including with respect its discovery obligations under the Rules of Civil Procedure.

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[1] The representation in Plaintiffs' Motion (¶ 5) that all claims against Penn State had been dismissed as of March 30, 2015 is false.

8. Apart from finalizing, as a professional courtesy, document productions that had been in process at the time Mr. Clemens' claim against the University was still pending, at all times since May 2015, Penn State properly has acted as – and has been treated as – the non-party that it is.[2]

9. Indeed, in recognition of Penn State's non-party status, all depositions and requests for documents that Plaintiffs have sought from Penn State since the summer of 2015 have taken the form of third party subpoenas.

10. Penn State's continued participation in this case has been strictly limited to the roles of: (a) contesting, as a non-party, the Court's privilege rulings with respect to the subpoena *duces tecum* Plaintiffs issued to another non-party, Pepper Hamilton LLP (because that subpoena requests documents for which Penn State assert a privilege); and (b) contesting, as a non-party, subpoenas issued to it by Plaintiffs for (i) the deposition of President Eric Barron and (ii) documents relating to information provided by certain victims.

11. At no time since Penn State became a non-party to the litigation in the summer of 2015 did it ever volunteer to generate and produce the privilege log it would have been required to produce when it were still a party. Indeed, at no point since May 2015 did Plaintiffs even *broach* the subject of a privilege log with the undersigned counsel for Penn State. That request, from out of the blue, did not come until mid-December 2016.

12. Not only had Penn State been out of the case for over 18 months by that point, as this Court recently recognized (in the Memorandum Opinion and Order entered January 27, 2017), fact discovery *even as between the parties* had long since closed by December 2016. *See*

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[2] In fact, the vast majority of the documents Penn State produced in the summer of 2015 were produced inadvertently, a topic that was the subject of an earlier motion.

Exhibit 5 (1/27/17 Memorandum Opinion and Order) p. 1 ("with those exceptions [victim discovery], discovery was closed on April 29, 2016").

13. After conducting extensive research, the undersigned counsel for Penn State has been unable to locate even a single authority for the notion that a party that has been dismissed from a case nevertheless retains vestigial discovery obligations under the Rules of Civil Procedure. Tellingly, Plaintiffs do not cite any such authority in their Motion.

14. Moreover, if Plaintiffs had thought it important for Penn State to continue acting as if it were a party, Mr. Clemens conceivably could have negotiated such an outcome as a condition of dismissing Penn State from the litigation in the summer of 2015. He did not do so (indeed, he never even raised such a concept). It is utterly disingenuous for the remaining Plaintiffs to now surface –18 months later – and attempt to impose that burden on Penn State.

15. Requiring Penn State to prepare a privilege log under these circumstances not only is beyond the Court's power to order; it would be manifestly unjust. Between October 2014 and the summer of 2015, Penn State produced over 25,000 pages of documents in response to Plaintiffs' Document Requests.[3] The undersigned counsel estimates that upwards of 2,000 pages potentially were subject to a claim of privilege at the time the University made its document productions between October 2014 and the summer of 2015. It would be neither a ministerial task nor a small feat for Penn State to generate a privilege log so long after the fact. To the contrary, such an effort would entail considerable attorney time to review the designated entries and finalize and document Penn State's position with respect to each item on the log before producing the log.

[3] This is in addition to the more than 110,000 pages of documents Penn State produced from the Freeh Law Firm database in response to Plaintiffs' subpoena to Pepper Hamilton, which are *not* the subject of Plaintiffs' Motion.

16. Moreover, Penn State sees the Plaintiffs' request for a privilege log for what it really is: an extraordinarily belated attempt to inject dozens (or more) of additional disputes over the privileged status of individual documents into the case at a time when: *(a) Penn State is no longer a party; and (b) fact discovery has long since closed.* Just as Plaintiffs' recent belated attempt to issue a subpoena *duces tecum* to Penn State "violate[d] the letter and spirit of the orders of this Court pertaining to discovery" (1/27/17 Mem. Op.), so, too, does their Motion to compel Penn State to produce a privilege log.

17. In summary, Plaintiffs make no effort to justify their effort to impose this burden on Penn State, nor do they cite a single authority for the proposition that a party that is dismissed from a case nevertheless is obligated to continue honoring the discovery obligations it had when it was a party. For all of these reasons, Penn State respectfully requests that the Court reconsider the final sentence of its January 27, 2017 Order, and deny Plaintiffs' Motion.

18. In the alternative, Penn State respectfully requests that the Court amend the January 27 Order to provide that: (a) Penn State has sixty (60) days to provide a privilege log; and (b) the fees and costs incurred in preparing such a log shall be borne by the Plaintiffs.

Respectfully submitted,

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Attorneys for The Pennsylvania State University

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 KENNY 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,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendants.

CIVIL DIVISION

Docket No. 2013-2082

EXHIBIT
1

OPINION AND ORDER

Presently before the Court are Preliminary Objections filed by Defendants National Collegiate Athletic Association (hereinafter "NCAA") and Nominal Defendants The Pennsylvania State University (hereinafter "Penn State") to Plaintiff's First Amended Complaint. Also before the Court are Discovery Objections filed by Penn State, including a disputed provision of an otherwise stipulated Joint Motion for a protective Order. A hearing on all relevant issues was conducted and all parties have submitted briefs. In response, the Court issues the following Opinion and Order.

Background

A detailed background of this case was discussed in this Court's Opinion & Order of January 6, 2014 (docketed on January 7, 2014, hereinafter "January 7 Order"). To briefly summarize, the genesis of this case was sanctions imposed on Penn State by the NCAA and the language of the publically released Consent Decree entered into between NCAA and Penn State that accompanied said sanctions.

Plaintiff's original Complaint, filed May 30, 2013, did not include Penn State as a Defendant, which was joined as a nominal Defendant subsequent to the January 7 Order. After joining Penn State as nominal a Defendant, Plaintiffs filed their Amended Complaint on February 5, 2014. Count I of the Amended Complaint alleged Breach of Contract for Plaintiffs The Estate and Family of Joe Paterno on Behalf of Joe Paterno and Al Clemens, based on their status as third part beneficiaries between the Membership Agreement between Penn State and NCAA.

Count II alleges Intentional Interference With Contractual Relations for Plaintiffs William Kenny and Jay Paterno. Count III asserts a claim for Injurious Falsehood/ Commercial Disparagement for Plaintiffs The Estate and Family of Joe Paterno on behalf of Joe Paterno. Count IV alleges Defamation for Plaintiffs William Kenney, Jay Paterno, and Al Clemens. Finally, Count V asserts a claim for Civil Conspiracy for All Plaintiffs.

On March 17, 2014, NCAA filed the instant Preliminary Objections to the Amended Complaint, pursuant to Pa.R.Civ.P. 1028, asserting: (1) Incapacity to Bring Count I; (2) Impertinent Material and Demurrer to Count I; (3) Incapacity to Bring Count I and Demurrer to Count I; (4) Demurrer to Count II; (5) Demurrer to Count V; (6) Demurrer to Count IV; (7) Demurrer to Count III; (8) Failure of a Pleading to Confirm to Law or Rule of Court; and (9) Lack of Personal Jurisdiction Over Dr. Emmert and Dr. Ray.

On March 17, 2014, Penn State also filed its Preliminary Objections to the Amended Complaint, pursuant to Pa.R.Civ.P. 1028, asserting: (1) Insufficient Specificity With Respect To Counts, Plaintiffs, Relief Sought for All Counts and All Plaintiffs; (2) Demurrer For Lack of Standing to Count I for Plaintiff Al Clemens; (3) Lack of Capacity to Sue for Count I for Plaintiff George Scott Paterno As Representative Of "The Family Of Joseph Paterno"; (4) Demurrer – Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs Al Clemens, George Scott Paterno As The Representative of the Estate of Joe Paterno, and George Scott Paterno as the Representative of the "Family of Joe Paterno"; (5) Demurrer For Failure to Allege A Breach Of Contract to Count I for Plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens; (6) Insufficient Specificity

Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens; (7) Demurrer For Failure To Allege Elements of Civil Conspiracy Against Penn State for Count V for All Plaintiffs; (8) Failure To Comply With Law Or Rule Of Court – No Verification to All Counts for All Plaintiffs; and (9) Failure To Comply With Law Or Rule Of Court – No Notice To Defend Or Plead to All Counts for All Plaintiffs.

The Discovery requests at issue originate from Plaintiff's Notice of Intent to Serve a Subpoena to Pepper Hamilton LLP To Produce Documents Pursuant to Rule 4009.21, filed on February 25, 2014. On March 14, 2014, Penn State filed Objections to the Discovery Request claiming: (1) Attorney-Client/Work Product/Self-Examination Privileges and Limited Waiver; (2) Relevance; (3) FERPA & CHRIA Protections; (4) Criminal Investigation; (5) Speculation as to an Opinion; (6) Vague, Overbroad, and Unduly Burdensome; (7) Costly, Time Consuming, and Excessively Burdensome; (8) Documents already in the Public Domain; (9) Invasive of Confidentiality Duties; Irrelevant in Time; (10) Overbroad and Irrelevant; (11) Standing with respect to "The Paterno Family"; (12) Entry of a Protective Order; and (13) A Missing Letter referenced in Request No. 3.

Preliminary Objections Discussion

For purposes of deciding the Preliminary Objections, "[a]ll material facts set forth in the pleadings as well as all inferences reasonably deducible therefrom are admitted as true". *Foflygen v. R. Zemel, M.D. (PC)*, 420 Pa. Super. 18, 32, 615 A.2d 1345, 1352 (1992).

NCAA: Incapacity to Bring Count I

NCAA alleges that neither the Estate of Joseph Paterno nor Al Clemens are parties to the Consent Decree, nor are they intended third-party beneficiaries, and as a result they do not have standing to seek to void the Consent Decree. It is true that neither of these Plaintiffs were parties to the Consent Decree, nor were they intended third party beneficiaries, and Plaintiffs state in their brief that they never claimed to be. Instead, Plaintiffs aver that the Consent Decree was imposed through an unlawful and unauthorized exercise of the NCAA's enforcement authority, therefore the Consent Decree is void, not simply voidable. Contracts that "are absolutely void, because they have no legal sanction,...establish no legitimate bond or relation between the parties, and even a stranger may raise the objection." *Pearsoll v. Chapin*, 44 Pa. 9, 15 (1862).

Under *Foflygen, supra*, the Court must accept that the Plaintiffs averment that the Consent Decree was imposed through an illegal and unauthorized exercise of the NCAA's authority is true for the instant Motion, making the Consent Decree void. As a result, under *Pearsoll*, Plaintiffs have standing to challenge the Consent Decree.

It is also worth noting that this case is unique. What distinguishes it from a typical third-party contract challenge is the basis of the alleged harm. The alleged harm does not come from an action, duty, or relationship resulting from the Consent Decree, but instead is derived from the language in the document itself.

The Court finds this distinguishing characteristic alone also warrants Plaintiffs' standing to challenge the Consent Decree.

Impertinent Material and Demurrer to Count I

NCAA correctly states that under Pennsylvania law, voiding a contract[1] is traditionally limited to instances "such as fraud, mistake, or illegality," *In re Frey's Estate*, 223 Pa. 61, 65, 72 A. 317, 318 (1909), or in cases in which a party enters into a contract under extreme duress. *See Sheppard v Frank & Seder Inc.,* 307 Pa. 372, 161 A. 304 (1932).

Plaintiffs allege that Penn State entered the Consent Decree under extreme duress, and as a result, the Consent Decree can be void *ab initio*. NCAA counter-argues, stating that although Penn State may have been under some form of duress, the degree of duress did not rise to the benchmark level of "'extreme' and of a 'forcible or terrorizing character'" required under *Sheppard* to support voiding the Consent Decree.

Whether or not Penn State was under ordinary duress, extreme duress, or any duress at all, is not a question for this Court; instead it falls to the factfinder.

> Whether [a] situation and all the attending circumstances were sufficient to establish duress to such extent as to induce [a person] to sign [a document] is a question which should be submitted to a jury.

Sheppard, supra at 376, citing *Fountain v. Bigham*, 235 Pa. 35, 48, 84 A. 131, Ann. Cas. 1913D, 1185; *Hogarth v. Grundy & Co.*, 256 Pa. 451, 461, 100 A. 1001.

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[1] or in this case, a Consent Decree.

NCAA: Incapacity to Bring Count I and Demurrer to Count I

NCAA alleges that neither the Estate of Joseph Paterno nor Al Clemens are parties to the NCAA Constitution or Bylaws, nor are they third-party beneficiaries of said documents; therefore, they are not parties to any alleged breach of contract based on them. The Estate of Joseph Paterno and Al Clemens claim they are third-party beneficiaries based on their status as "involved individuals" under NCAA Bylaws article 32.1.5, and as a result, they were entitled to certain procedural mechanisms in connection with the NCAA's and Penn State's entrance into the Consent Decree.

NCAA argues that Plaintiffs' claim is flawed for two reasons. First, any status Plaintiffs may have had under the Constitution and Bylaws is moot, as the purpose behind the Consent Decree, *inter alia*, was to permit Penn State to resolve the Sandusky matter without enduring a full NCAA investigation and enforcement process. Second, NCAA Bylaws define the term "involved individual" to mean,

> ...former or current student-athletes and former or current institutional staff members who have received notice of significant involvement in alleged violations through the notice of allegations or summary disposition process...

and Plaintiffs concede that they never received such notice from the NCAA.

To claim that Plaintiffs do not have standing to bring suit against NCAA for not following their own rules *because* NCAA did not follow their own rules is circuitous logic, which the Court finds to be contrary to the interest of justice.

Estate of Joseph Paterno

NCAA argues that Coach Joe Paterno was not an "involved individual" prior to or at the time of his death in January 2012, and the procedural rights extended to "involved individuals"—such as notice, the opportunity to attend hearings, and the chance to submit written information to assist the NCAA in its investigation—unambiguously and self-evidently contemplate only living individuals. It was therefore impossible for NCAA to deny these rights to Coach Paterno.

Plaintiffs recognize this fact by stating, "[t]o be sure, the rules may have been fashioned with a living, participating individual in mind; but that is not a requirement." Defendants argue that because that is how the rules were fashioned, that was everyone's understanding, and Plaintiff's shouldn't be allowed to argue otherwise now. The Court agrees.

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, and as a result, his estate has no rights as an "involved individual" now.

Al Clemens

NCAA goes on to claim that Clemens cannot be an "involved individual" as his basis for asserting said status is based on his being a member of the Penn State Board of Trustees. NCAA alleges that Clemens is claiming "involved individual" status by suggesting that the NCAA improperly repeated a conclusion in the Freeh Report that "the Board of Trustees ... did not perform its oversight duties." NCAA argues that NCAA Rules refers only to an individual who is significantly involved in

violations of NCAA rules, not a corporate body like the Board of Trustees, and the Consent Decree makes no claim that Clemens—or any particular individual from the Board of Trustees—was significantly involved in NCAA violations. NCAA further argues that even if a corporate body could assert rights as an "involved individual" on the basis of the Consent Decree, it could only be the Board of Trustees—the entity named in the Consent Decree—not Clemens, and the Board of Trustees, as a body, has not sought to challenge the conclusions in the Freeh report.

Plaintiffs counter-argue stating NCAA Defendants recognize that the definition of an "involved individual" is related to whether the Consent Decree sufficiently identifies plaintiffs. Therefore, whether or not Clemens is an "involved individual" hinges on whether or not he is identifiable by the NCAA statements. This issue has been addressed in the January 7 Order with respect to Count IV (Defamation). Specifically, this Court Overruled Objections that alleged NCAA statements could not be interpreted as referring to Clemens, and that it would be for a jury to decide that question.

NCAA: Demurrer to Count II

NCAA alleges that Plaintiffs Jay Paterno and William Kenney's tortious interference claim must be dismissed because it is entirely derivative of their defamation claim based on statements in the Consent Decree, and as a result, Plaintiffs are seeking double-recovery for the same allegedly tortious conduct, which the law does not permit.

NCAA also argues that Plaintiffs failed to cure the pleading deficiencies that led the Court to dismiss the tortious interference claim in its January 7 Order. Specifically, NCAA claims that Plaintiffs pleaded no facts which would support a finding that there existed a reasonable probability that a contract would arise with which Defendants interfered.

With respect to NCAA's argument that Plaintiffs are barred from "seeking double-recovery", Plaintiffs correctly counter-argue that Pennsylvania courts have recognized that defamatory statements can provide the basis for a tortious interference claim. *See Empire Trucking Co. v. Reading Anthracite Coal Co.*, 71 A.3d 923, 935-36 (Pa. Super. Ct. 2013); *see also*, e.g., *Kiely v. Univ. of Pittsburgh Med. Ctr.*, No. 98-1536, 2000 WL 262580, at *3-5, *11 (W.D. Pa. Jan. 20, 2000) ("unfounded and unsubstantiated" accusations made by the defendants formed the basis for both defamation and tortious interference claims); *Geyer v. Steinbronn*, 351 Pa. Super. 536, 550-54, 506 A.2d 901, 908-10 (1986) (defamatory statements made to prospective employer gave rise to both defamation and tortious interference claims).

Regarding the curing of deficiencies from their original Complaint, in their First Amended Complaint, Plaintiffs now allege: Kenney interviewed with such teams as the University of Massachusetts, the New York Giants, and the Indianapolis Colts, and those teams hired "less experienced and less qualified candidates." Jay Paterno alleged to have applied with University of Connecticut and James Madison where the position went to candidates with less coaching experience, and he also applied at University of Colorado and Boston College where he was not granted an interview. Jay Paterno also mentioned negotiations and

tentative arrangements with media companies, such as ESPN, CBS, and FOX Sports, serving as a football commentator. The Court finds that Plaintiffs have cured the Deficiencies of the original Complaint by pleading sufficient facts to proceed with this claim.

NCAA: Demurrer to Count V

In Pennsylvania, "absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act." *Goldstein v. Phillip Morris, Inc.*, 2004 PA Super 260, 854 A.2d 585, 590 (Pa. Super. Ct. 2004) (citing *McKeeman v. Corestates Bank, N.A.*, 2000 PA Super 117, 751 A.2d 655, 660 (Pa. Super. Ct. 2000)). Under *Goldstein*, civil conspiracy without an underlying cause of action is a legal impossibility.

In Plaintiffs' Amended Complaint, only the Estate of Joseph Paterno, Jay Paterno, Al Clemens, and William Kenney have alleged a cause of action in addition to Civil Conspiracy. Because the remaining plaintiffs have not alleged any cause of action (other than the civil conspiracy), there is no act upon which they could have conspired to commit. Therefore, these plaintiffs' Civil Conspiracy claim fails, as a matter of law. Further, since the remaining plaintiffs claim for Civil Conspiracy cannot succeed, and these plaintiffs have alleged no other claims, they have no standing in this case and shall be dismissed from this action.

NCAA: Demurrer to Count IV

NCAA alleges three reasons why this Count should be dismissed:

1. The alleged statements made by NCAA in the Consent Decree do not mention plaintiffs by name, nor could they be reasonably be interpreted as referring to them;
2. Plaintiffs have not pleaded that Defendant acted with malice or reckless disregard for the truth; and
3. the Statements about which Plaintiffs complain are pure opinions, premised upon disclosed facts. As such they are protected expressions, under *Alston v. PW-Philadelphia Weekly*, 980 A.2d 215, 220 (Pa. Commw. Ct. 2009), and cannot be defamatory as a matter of law.

This Objection was already ruled upon in the January 7th Opinion and Order, and NCAA has offered no new argument to justify the Court revisiting its decision with respect to reasons 1 and 2.

With respect to reason 3, the Pennsylvania Commonwealth Court has explained that "'when the maker of a comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiffs conduct,' that statement is 'protected as a pure expression of opinion.'" *Alston*, *supra* at 220-21. NCAA argues that the statements at issue are opinions based on published fact, and are thus protected. They bolster their argument with a statement made by Plaintiff Jay Paterno, to wit, he states in a media interview that the Freeh Report's conclusions were "basically an opinion."

The Court recognizes that Jay Paterno's statement was an attempt to mitigate a perceived damage to his reputation and that of his family name.[2] Consequently, any statements he may have made to the media have no legal effect in determining whether or not the statements were actually opinions.

Further, Plaintiffs argue that this Court, in its January 7 Order, characterized the statements as conclusions, not opinions; therefore *Alston* does not apply. The Court reasserts its characterization of the Consent Decree statements as conclusions, which by definition is "a judgment or decision reached by reasoning." http://www.oxforddictionaries.com/us/definition/american_english/conclusion. In making this determination, the Court looked at the language of the Consent Decree.

In their Amended Complaint, Plaintiffs allege the following statements form the basis of their Defamation Claim:

> [The Board of Trustees] did not perform its oversight duties...[and]...failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and my not creating an environment where senior University officials felt accountable;

and

> [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.

These statements are contained in the Consent Decree under the Findings And Conclusions sections of the document. At no point does the Consent Decree state that these statements are opinions of NCAA or Penn State. On the contrary, key

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[2] The Court makes no determination as to whether or not any damage actually occurred, as such a determination is for a jury to decide.

language of the Findings And Conclusions introductory paragraph state, "Penn State has communicated to the NCAA that it accepts the findings of the Freeh Report...", and more definitively "...the findings of the Criminal Jury and the Freeh Report establish a factual basis from which the NCAA concludes that Penn State breached the standards..."

Because the statements at issue are conclusions, as opposed to opinions, *Alston* does not apply; therefore, they are not protected.

NCAA: Demurrer to Count III

NCAA alleges two reasons why this Count should be dismissed:

1. the claim for disparagement is not actionable because all of the underlying facts upon which the opinions are premised were disclosed to the public through the Freeh Report; and
2. an estate cannot bring a survival action for tort liability that accrues after the decedent's death.

This Objection was already ruled upon in the January 7th Opinion and Order, and NCAA has offered no new argument to justify the Court revisiting its decision.

NCAA: Failure of a Pleading to Confirm to Law or Rule of Court

NCAA alleges that Plaintiffs' Amended Complaint has not been verified. This procedural defect has been cured, rendering this Objection moot.

NCAA Lack of Personal Jurisdiction Over Dr. Emmert and Dr. Ray.

As per the Court's, August 16, 2013 Order, this issue has been set aside from the remaining issues, and the Court will set a separate schedule for the objections relating to personal jurisdiction as necessary.

Penn State: Insufficient Specificity With Respect To Counts, Plaintiffs, Relief Sought for All Counts and All Plaintiffs

Penn State correctly alleges that Plaintiffs have not sought relief for each Count listed in the Amended Complaint, instead, Plaintiffs are seeking relief for the Complaint in its entirety. Penn State claims that it is unable to determine which counts of the First Amended Complaint are being directed against it, what actions (or inactions) Penn State is alleged to have committed to support each count, and what relief is being sought in connection with those counts. As a result, Penn State is unable to prepare for its defense. Plaintiffs respond that the Amended Complaint is clear that "no relief is sought against the University, and Penn State has no standing to press objections on the NCAA defendants' behalf."

Plaintiffs' claim that no relief is being sought against Penn State is incorrect. The Amended Complaint contains two paragraphs that describe the relief they are seeking. Paragraph 168 purports to seek relief solely from NCAA, and paragraph 169 seeks relief from NCAA *and* Penn State. Further, ¶ 168 requests the issuance of an injunction to prevent NCAA from further enforcing the Consent Decree to which Penn State is a party—a course of action which presumably Penn State does not wish to pursue.

"The purpose of the pleadings is to place a defendant on notice of the claims upon which he will have to defend." *City of New Castle v. Uzamere*, 829 A.2d 763,

767 (Pa. Commw. Ct. 2003). The Court finds that the pleadings are insufficient to put Penn State on notice of the claims upon which they will have to defend. Plaintiffs will need to file a Second Amended Complaint alleging the actions of each defendant giving rise to each count along with the corresponding relief requested.

Penn State: Demurrer For Lack of Standing to Count I for Plaintiff Al Clemens

This Objection is identical to NCAA's objection *Incapacity to Bring Count I and Demurrer to Count I, supra*.

Penn State: Lack of Capacity to Sue for Count I for Plaintiff George Scott Paterno As Representative Of "The Family Of Joseph Paterno"

This Objection was stipulated to at the hearing. It was agreed that "The Family of Joseph Paterno" does not have any legal standing in Pennsylvania. The phrase "George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno" will be replaced with "The Estate of Joseph Paterno" in the caption of this case.

Penn State: Demurrer – Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs Al Clemens, George Scott Paterno As The Representative of the Estate of Joe Paterno, and George Scott Paterno as the Representative of the "Family of Joe Paterno"

This Objection is identical to NCAA's objection *Incapacity to Bring Count I and Demurrer to Count I, supra.*

Penn State: Demurrer For Failure to Allege A Breach Of Contract to Count I for Plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens

PSU argues that the Amended Complaint is devoid of allegations that Penn State breached the NCAA's Constitution, the NCAA's Operating Bylaws, or the

NCAA's Administrative Bylaws. This objections can properly be categorized as a "subset" of the overall objection to lack of specificity for all counts. Plaintiffs will have the opportunity to cure this defect by submitting a Second Amended Complaint.

Penn State: Insufficient Specificity Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens

PSU alleges that although Plaintiff's claim they have the right to "enforce the provisions of" the NCAA's Constitution and Bylaws, they do not identify:

1. what particular rights any of these plaintiffs purportedly acquired under this alleged contract;
2. how Penn State allegedly violated those claimed contractual rights; or
3. how any of the plaintiffs claim to have been injured by Penn State's alleged breach(es) of said contract.

This objection can properly be categorized as a "subset" of the overall objection to lack of specificity for all counts. Plaintiffs will have the opportunity to cure this defect by submitting a Second Amended Complaint.

Penn State: Demurrer For Failure To Allege Elements of Civil Conspiracy Against Penn State for Count V for All Plaintiffs

PSU claims Plaintiffs do not allege that Penn State combined with any other defendant acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose. Nor do they allege either that Penn State took any overt act in pursuit of any alleged common purpose or that any of

the Plaintiffs suffered actual legal damage as the result of any conspiratorial conduct by Penn State.

This objection can properly be categorized as a "subset" of the overall objection to lack of specificity for all counts. Plaintiffs will have the opportunity to cure this defect by submitting a Second Amended Complaint.

Penn State: Failure To Comply With Law Or Rule Of Court – No Verification to All Counts for All Plaintiffs

This Objection is identical to NCAA's objection *NCAA: Failure of a Pleading to Confirm to Law or Rule of Court, supra.*

Penn State: Failure To Comply With Law Or Rule Of Court – No Notice To Defend Or Plead to All Counts for All Plaintiffs.

Penn State alleges that Plaintiffs' Amended Complaint failed to contain a notice to defend or a notice to plead, as required by rule 1018.1(a) or Rule 1026(a). Because Penn State has responded to Plaintiffs' Amended Complaint, this Objection is moot.

Discovery Discussion

The Court notes that originally Plaintiffs filed a Notice of Intent to Serve a Subpoena to Pepper Hamilton, LLP., as the keeper of the source documents[3];

[3] Source documents are the documents that the Freeh firm gathered from University servers and University custodians such as emails and other documents not created

however, during testimony, it was revealed that Pepper Hamilton no longer possess the database on which the source documents are stored, but rather, it is Defendants Penn State which now possesses the database at issue.

Attorney-Client / Work Product / Self-Examination Privileges and Limited Waiver

Penn State alleges that,

> [a]lthough Penn State directed that the Freeh Report be made public, beyond the public disclosure of that Report, Penn State did not waive, and hereby asserts, the attorney-client privilege, the work product doctrine, the self-examination privilege and all other privileges or immunities from discovery, relating to the Investigation and the Freeh Report.

In essence, Penn State is alleging "limited waiver" objection to the documents sought, claiming that only the publicly released findings contained in the publically released Freeh Report have been waived.

Plaintiffs counter argue that Penn State waived Attorney-Client in its entirety; Penn State cannot assert work-product on Pepper Hamilton's behalf and work-product does not apply, as the documents at issue were not prepared in anticipation of litigation; and Pennsylvania does not recognize a self-examination privilege.

Attorney-Client

> The generally recited requirements for assertion of the attorney-client privilege are: 1) The asserted holder of the privilege is or sought to become a client. 2) The person to whom the communication was made is a member of the bar of a court, or his subordinate. 3) The communication relates to a

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specifically for the investigation. Non-source documents are communications, interview notes, internal memoranda, etc. created for and during the course of the investigation.

> fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort. 4) The privilege has been claimed and is not waived by the client.

Com. v. Mrozek, 441 Pa. Super. 425, 428, 657 A.2d 997, 998 (1995).

Under *Mrozek,* an essential element of an attorney-client privileged document is that the document must relate to "securing either an opinion of law, legal services or assistance in a legal matter." The Engagement Letter between Penn State and the Freeh Firm states that the Scope of Engagement is as follows:

> FSS has been engaged to serve as independent, external legal counsel to the Task Force to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University ("PSU") personnel to report such sexual abuse to appropriate police and government authorities. The results of FSS's investigation will be provided in a written report to the Task Force and other parties as so directed by the Task Force. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS's report also will provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

At no point does the scope mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter. Further, section 5 (Retention of Third Parties), paragraph 2 of the engagement letter states,

> For the purpose of providing legal services to the Task Force, FSS will retain Freeh Group International Solutions, LLC ("FGIS") to assist in this engagement. It should be noted that Louis J. Freeh is a partner and member in FSS and FGIS, respectively, and has a controlling interest in both. FSS is a

> law firm and FGIS is a separate investigative and consulting group.

It therefore becomes clear that communications between Penn State and the Freeh Firm were not sought pursuant to seeking legal services; as such they are not subject to the attorney client privilege. As a result, any source documents Penn State turned over to the Freeh Firm for the purpose of conducting the investigation are not privileged. Likewise, any non-source documents created by either Penn State or the Freeh Firm is non privileged.

However, since Freeh Group International was providing legal services to Penn State, communications between Penn State and the Freeh Group International may be subject to attorney-client privilege. As such, any non-source documents created by the Freeh Group International may be privileged, and any non-source documents created by Penn State communicated to the Freeh Group International may also privileged, but that privilege may have been waived.

A client disclosing protected communications to a third party has long been considered inconsistent with an assertion of the privilege. *See Serrano v. Chesapeake Appalachia*, LLC, 298 F.R.D. 271 (W.D. Pa. 2014). Plaintiffs note that the Freeh Firm was communicating with third parties during the investigation—specifically, The Big Ten Athletic Conference and the NCAA. It is unquestioned that under *Serrano*, with respect to all documents—source and non-source—that were shared with the Big Ten or NCAA, the attorney-client privilege (if it ever existed) was waived.

Further, the scope of an attorney-client privilege waiver applies to the subject matter of the privileged documents disclosed. Therefore, voluntary

disclosure waives the privilege as to remaining documents of that same subject matter. *See Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) *citing Edwards v. Whitaker,* 868 F. Supp. 226, 229 (M.D. Tenn. 1994); *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.*, 132 F.R.D. 204, 207 (N.D. Ind. 1990). It then falls to the Court to decide how broadly subject matter classifications should be defined. The Court holds the divisions outlined in the Scope of Engagement are appropriate for categorizing subject matters:

i) failures that occurred in the reporting process;

ii) the cause for those failures;

iii) who had knowledge of the allegations of sexual abuse; and

iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff

As such, any documents shared with the Big Ten or NCAA regarding any of the aforementioned categories would constitute a subject-matter waiver.

Work Product

Unlike the attorney-client privilege, which belongs to the client to assert, the work product doctrine is asserted by the attorney. *Rhone-Poulenc Rorer, Inc. v. Home Inc/em. Co.*, 32 F.3d 851, 866 (3d Cir. 1994). Further, the purpose of work product is to allow an attorney to develop his/her mental impressions, conclusions, and opinions in preparation for trial. However, in Pennsylvania, the work product protection is not available unless the requests are made in connection with the litigation for which the material was prepared. *See Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C.5th 242, 249 (C.C.P. 2007).

Since Penn State does not have standing to object based on the privilege of work product, and the Scope of Engagement did not contemplate legal advice or legal services in conjunction with the case at bar, the Work Product doctrine does not apply.

Self-Examination

Pennsylvania Law does not recognize a Self-Examination Privilege. Penn State cites *Van Hine v. Dep't of State of Com.*, 856 A.2d 204, 212 (Pa. Commw. Ct. 2004) for the proposition that Pennsylvania may allow for such a Privilege, based on the Commonwealth Court's hypothetical existence of such a privilege in that opinion; however, this is misplaced. *Van Hine*'s use of the hypothetical existence of the privilege is for illustrative purposes only, and the Court goes on to emphasize that no such privilege actually exists.

Relevance

Penn State claims that the Freeh Firm collected over 3.5 million source documents, and only a small percentage of those documents would have any relevance. Further, it is not feasible for Penn State to review the vast number of documents to comply with the subpoena requests and or check for any privileges.

At the hearing, it was determined that search terms could be provided to narrow the 3.5 million documents down to a reasonable number. The question remained whether it would fall to Plaintiffs to provide the search terms to Penn State to perform the search, or whether Penn State should turn over the database to Plaintiffs to allow Plaintiffs to run their own search. The Court holds the former

is the correct procedure. This would allow Penn State to screen for and produce a privilege log prior to exposing privileged documents to plaintiffs.

FERPA & CHRIA Protections

Penn State claims that Freeh Firm may have gained access to documents and records protected from disclosure and dissemination pursuant to the Family Educational Rights and Privacy Act ("FERPA") and the Criminal History Record Information Act. ("CHRIA").

FERPA

There is no evidentiary privilege created by FERPA. *T.M. v. Elwyn, Inc.* 950 A.2d 1050, 1061 (Pa. Super. 2008).

CHRIA

> Investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic."

18 Pa.C.S.A. § 9106(c)(4) (part of CHRIA)

> CHRIA shall apply to "persons within this Commonwealth and to any agency of the Commonwealth or its political subdivisions which collects, maintains, disseminates or receives criminal history record information."

18 Pa.C.S.A. § 9103

> 'Criminal history record information.' Information collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of

> identifiable descriptions, dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom. The term does not include intelligence information, investigative information or treatment information...

18 Pa.C.S.A. § 9102

Penn State claims that it may have in its possession criminal history information on individuals, and it is prohibited from disseminating that information to persons other than criminal justice agencies under 18 Pa.C.S.A. § 9106(c)(4).

Penn State's reliance on § 9106 is misplaced. Under § 9103, any privilege that would be created under CHRIA does not apply to any source or non-source documents obtained or created by the Freeh Firm, as the Freeh Firm is not an agency of the Commonwealth or its political subdivision. Further, any source documents turned over to the Freeh Firm from Penn State likewise is not applicable, as Penn State does not collect, maintain, disseminate, or receive criminal history record information—with one possible exception: the Penn State University Police Department.

Of note, the only information that could conceivably be privileged, under § 9102, would be dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom that were collected by the Penn State University Police Department. All other investigative information including notes and other documents and confiscated evidence in pursuit of potential future criminal prosecution is expressly not subject to CHRIA.

Therefore, this privilege applies solely to notations of arrests, indictments, informations, or other formal criminal charges and any dispositions arising therefrom that were collected from Penn State University Police.

Criminal Investigation

Penn State claims some of the requested documents may relate to ongoing criminal investigations; therefore they object to the production of any such documents without prior notice to and approval from appropriate law enforcement officials.

The engagement letter instructed the Freeh Firm

> to communicate regarding its independent investigation performed hereunder with media, police agencies, governmental authorities and agencies, and any other parties, as directed by the Task Force.

According to the plain language of the engagement letter, any information the Freeh Firm shared with police agencies or governmental authorities is to be shared with the media and/or any other parties. Therefore, these documents are discoverable.

Speculate as to an Opinion

Penn State claims the subpoena requests documents that may "support" or "relate to" an opinion or conclusion expressed by the Freeh Firm, and Penn State is unable to speculate as to the basis of opinions held by others.

Although not expressly stated in their objection, it can be inferred that Penn State is referring to Plaintiff's requests for documents that support or relate to the Freeh Firm's following statements and/or conclusions:

- Joe Paterno failed to protect against a child sexual predator harming children for over a decade.
- The Board of Trustees did not perform oversight duties

- The Board of Trustees failed in its duties to oversee the President and senior University officials in 1998 ans 2001 by not inquiring about important University matters and by not creating an environment where senior officials felt accountable
- Joe Paterno, among others, concealed Jerry Sandusky's activities from the Penn State Board of Trustees
- Joe Paterno concealed critical facts regarding Jerry Sandusky from the authorities, the Penn State Board of Trustees, the Penn State community, and the public at large
- at the time of Jerry Sandusky's resignation from the coaching staff at Penn State, Joe Paterno suspected or believed that Sandusky was a sexual predator
- Some coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him
- Descriptions of Timothy Curley as "Joe Paterno's errand boy"
- Joe Paterno, among others, was kept informed of an investigation by Penn State Police and/or the Department of Public Welfare into a possible sexual assault by Jerry Sandusky in the Lasch Building in May 1998
- Joe Paterno knew everything that was going on at the Penn State football facilities, including but not limited to copies of interviews referenced at note 167 of the Freeh Report

The plain language of these requests warrants overruling this objection, as any reasonable person would be able to extrapolate the subject matter from a document and easily determine if it applies to one or several of the aforementioned statements.

However, Penn State's objection has merit with respect to one request. Plaintiffs have also requested "all documents that support any conclusions or recommendations for action reached by the NCAA, Emmert, or Ray as a result of the Freeh investigation, including all notes or records of telephone calls, memos, emails, letters, or other forms of communication." While any reasonable person could easily extrapolate the subject matter from a document relating to any "recommendations for action", asking Penn State to determine which documents "support any conclusions reached by the NCAA, Emmert, or Ray" is too speculative; therefore, this Objection shall be Sustained in Part and Overruled in part.

Vague, Overbroad, and Unduly Burdensome

Penn State claims that the language in the subpoena "evidence, reflect, or relate to" various subjects is vague, overbroad and unduly burdensome.

Because Penn State objects to turning over the 3.5 million document database over to Plaintiffs to allow them to run their own search terms, they should not be able to object to the burden they will endure by reviewing the documents in responding to the specific requests from the subpoena. In short, Penn State can't have it both ways. As previously discussed, Plaintiffs shall submit their search terms to Penn State to narrow the 3.5 million documents to a feasible number of documents, rendering this Objection moot.

Costly, Time Consuming, and Excessively Burdensome

Penn State claims that the broad nature of the language "evidence, reflect, or relate to", the various topics requested, and the efforts required to separate privileged and otherwise protected documents from non-protected documents would require substantial amounts of time and incur very substantial and unwarranted expenses in order to protect the privileges. The analysis and result of this Objection is identical to the Objection immediately preceding it.

Public Domain

Penn State claims many documents sought are already in the public domain. The Court holds that the effort required to produce said documents is de minimus.

Invasive of Confidentiality Duties

Penn State also objects as the requests may be invasive of confidentiality duties that Penn State may owe other third parties, such as employees. However, there is no privilege based on an individual's status as an employee in Pennsylvania.

Irrelevant in Time

Penn State objects to any documents created after July 23, 2012, as that was the creation of the Consent Decree, which is the subject of the litigation; any documents created after this date would be irrelevant.

Plaintiffs argue that an Amended Consent Decree was adopted after that date; therefore, defendants continued to document and evaluate the matters in the Consent Decree well after the July 23, 2012 date. Plaintiffs further argue, if the

work of the Freeh Firm stopped on July 23, 2012, there will not be responsive documents after that date; if there are responsive documents, they were the result of ongoing work and should be produced. The Court Agrees.

Overbroad and Irrelevant

Penn State claims many of the requests are so broad that they seek documents and information that are neither relevant to the subject matter, nor reasonably calculated to lead to the discovery of admissible evidence.

The only specific Overbroad and Irrelevant objection Penn State made was in response to request number 24—all invoices for services submitted to Penn State pursuant to the Engagement Letter.

The Court holds the invoices may be relevant. Under Attorney-Client Privilege, *supra*, the Court discussed the distinction between the Freeh Firm, responsible for the Investigation, and Freeh Group International Solutions, responsible for legal services—both of which would be invoiced pursuant to the engagement letter. Because documents produced and/or collected by the Freeh Firm are not subject to attorney-client privilege, and documents produced and/or collected by Freeh Group International Solutions may be privileged, albeit possibly waived, the invoices could reasonably be calculated to lead to the discovery of admissible evidence, specifically, the invoices could be used as evidence to distinguish between documents protected by attorney-client privilege and documents which are not privileged.

The Paterno Family

Penn State Objects to the issuance of the subpoena that purports to be on behalf of "the family of Joseph Paterno," as the "family" is not a recognized legal entity with standing to sue.

This issue was dealt with in the Preliminary Objections. All references to "The Family of Joe Paterno" are being replaced with "The Estate of Joeseph Paterno" by stipulation at the hearing.

Protective Order

Penn State objects to the production of any documents prior to the entry of an appropriate confidentiality stipulation and protective order in this case.

Recently[4], the parties have come close to reaching an agreement on the language of a Protective Order; there is only one provision remaining on which they cannot agree. The provision at issue is as follows:

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

Plaintiffs object to this provision claiming that there is a high public interest in this case and the public has a right to any non-confidential information. Plaintiffs

[4] As of July 3, 2014

also claim that this provision creates a blanket protective order, and blanket protective orders are disfavored in Pennsylvania.

While it is unquestionable that there is a high public interest in the instant case, Plaintiffs have cited no statutory or case law which stands for the proposition that such an interest creates an increased interest for a party to disseminate pre-trial discovery.

The fact that there is a high public interest in this case more strongly justifies the inclusion of the provision, as the dissemination of pre-trial discovery, which may ultimately not be admissible at trial, is more likely to taint a potential jury pool in a situation where public interest is higher than average, such as the case at bar.

> [T]he public may be "excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests...**and to minimize the danger of an unfair trial by adverse publicity**"

Katz v. Katz, 356 Pa. Super. 461, 468, 514 A.2d 1374, 1377 (1986)(**emphasis added**)

Further, Private documents collected during discovery are not "judicial records" to which public has presumptive right of access. *See Stenger v. Lehigh Valley Hosp. Ctr.,* 382 Pa. Super. 75, 89, 554 A.2d 954, 960 (1989). And,

> [P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33, 104 S. Ct. 2199, 2207-08, 81 L. Ed. 2d 17 (1984)(citations omitted).

Both Penn State and NCAA have cited *Seattle Times,* to support their claim that the public does not have a right to pre-trial discovery, and both parties are alleging that Plaintiffs' objection to the provision is Plaintiffs' desire to release said documents for public relations purposes. In their Statement in support of including the above provision, the NCAA has proffered evidence in support of this claim. The Court finds NCAA's argument convincing and holds that Plaintiffs using discovery for this purpose would be an abuse of the discovery process.

Because there is no right for the public to have access to pre-trial documents, the risk to contaminate the potential jury pool is high, and the dissemination of pre-trial documents would be an abuse of the discovery process, the provision at issue shall be included in the protective order.

Missing Letter in Request No. 3

Discovery Request number three states "Please produce all documents maintained as part of the Client File created by the Freeh Firm pursuant to the engagement letter attached hereto as Exhibit 1." Penn State objects that no "Exhibit 1" was attached to the Subpoena.

This is a procedural defect which was cured in subsequent filings; therefore this objection is moot.

Order

AND NOW, this 10 day of September, 2014, upon consideration of Defendants' Preliminary Objections and Defendant Penn State University's Objections to discovery requests, briefs submitted by all parties involved, and a hearing on the matters, the Objections are SUSTAINED in part and OVERRULED in part, as follows:

1. NCAA's Preliminary Objection based on an Incapacity to Bring Count I of the Amended Complaint is OVERRULED.
2. NCAA's Preliminary Objection based on Impertinent Material and Demurrer to Count I is OVERRULED.
3. NCAA's Preliminary Objection based on Incapacity to Bring Count I and Demurrer to Count I is SUSTAINED with respect to the incapacity of the Estate of Joseph Paterno to bring suit; it is OVERRULED in all other respects.
4. NCAA's Preliminary Objection based on Demurrer to Count II is OVERRULED.
5. NCAA's Preliminary Objection based on Demurrer to Count V is OVERRULED for the Estate of Joseph Paterno, Jay Paterno, Al Clemens, and William Kenney; it is SUSTAINED for all remaining Plaintiffs.

Ryan McComble, Anthony Lubrano, Adam Taliaferro, Peter Bordi, Terry Engelder, Spencer Niles, John O'Donnell, Anthony Adams, Gerald Cadogan, Shamar

Finney, Justin Kurpeikis, Richard Gardner, Josh Gaines, Patrick Mauti, Anwar Phillips, and Michael Robinson are dismissed from this action.

6. NCAA's Preliminary Objection based on Demurrer to Count IV is OVERRULED.
7. NCAA's Preliminary Objection based on Demurrer to Count III is OVERRULED.
8. NCAA's Preliminary Objection based on Failure of a Pleading to Confirm to Law or Rule of Court is OVERRULED on mootness.
9. No decision is made on the NCAA's Preliminary Objection based on Lack of Personal Jurisdiction Over Dr. Emmert and Dr. Ray.
10. Penn State's Preliminary Objection based on Insufficient Specificity With Repsect To Counts, Plaintiffs, Relief Sought for All Counts and Plaintiffs is SUSTAINED. Plaintiffs shall have 30 days from the date of this Opinion and Order to file a Second Amended Complaint to cure this deficiency.
11. Penn State's Preliminary Objection based on Lack of Capacity to Sue for Count I for Plaintiff George Scott Paterno As Representative Of "The Family Of Joseph Paterno" is SUSTAINED. Plaintiff "George Scott Paterno, As duly appointed representative of the Estate and Family of Joseph Paterno: shall be replaced with "The Estate of Joseph Paterno".

All filings from this point forward shall be as follows:

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.

12. Penn State's Preliminary Objection based on Demurrer – Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs Al Clemens, George Scott Paterno As The Representative of the Estate of Joe Paterno, and George Scott Paterno as the Representative of the "Family of Joe Paterno" is SUSTAINED in part and OVERRULED in part.

13. Penn State's Preliminary Objection based on Demurrer For Failure to Allege A Breach of Contract to Count I for plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens is SUSTAINED.

14. Penn State's Preliminary Objection based on Insufficient Specificity Intended Third-Party Beneficiary Status for Count I for Plaintiff The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens is SUSTAINED.

15. Penn State's Preliminary Objection based on Demurrer for Failure to Allege Elements of Civil Conspiracy Against Penn State for Count V for All Plaintiffs is SUSTAINED.

16. Penn State's Preliminary Objection based on Failure to Comply With Law or Rule of Court – No Verification to All Counts for All Plaintiffs is OVERRULED for mootness.

17. Penn State's Preliminary Objection based on Failure to Comply With Law or Rule of Court – No Notice To Defend or Plead to All Counts for All Plaintiffs is OVERRULED for mootness.

18. Penn State's Discovery Objection based on Attorney-Client / Work Product / Self-Examination Privileges and Limited Waiver is SUSTAINED for non-source documents between Penn State and Freeh Group International that are not of the same subject matter Penn State disclosed to third parties. The Objection is OVERRULED for all other documents.

19. Penn State's Discovery Objection based on Relevance is SUSTAINED in part and OVERRULED in part. Plaintiffs shall provide a search terms to Penn State to narrow the database of 3.5 million documents to a reasonable number.

20. Penn State's Discovery Objection based on FERPA and CHRIA Protections is SUSTAINED for dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom that were

collected by the Penn State University Police Department. The Objection is OVERRULED for all other documents.

21. Penn State's Discovery Objection based on a current Criminal Investigation is OVERRULED.

22. Penn State's Discovery Objection based on Speculation as to an Opinion is SUSTAINED for Plaintiff's request to provide "all documents that support any conclusion or recommendation for action reached by the NCAA, Emmert, or Ray as a result of the Freeh investigation, including all notes or record of telephone calls, memos, emails, letters, or other forms of communication." The Objection is OVERRULED for all other requests.

23. Penn State's Discovery Objection based on Vague, Overbroad, and Unduly Burdensome is OVERRULED. *See* ¶19.

24. Penn State's Discovery Objection based on Costly, Time Consuming, and Excessively Burdensome is OVERRULED. *See* ¶19.

25. Penn State's Discovery Objection based on information already in the Public Domain is OVERRULED.

26. Penn State's Discovery Objection based on Invasiveness of Confidentiality Duties is OVERRULED.

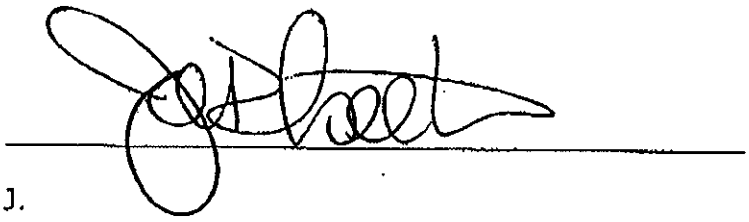
27. Penn State's Discovery Objection based on Irrelevant in Time is OVERRULED.

28. Penn State's Discovery Objection based on Overbroad and Irrelevant is OVERRULED.

29. Penn State's Discovery Objection based on The Paterno Family's standing is SUSTAINED. *See* ¶ 11.

30. Penn State's Discovery Objection based on the need for a Protective Order is SUSTAINED. The Protective Order shall be made with the provision at issue included.

31. Penn State's Discovery Objection based on a Missing Letter in Request Number 3 is OVERRULED for mootness.



J.

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

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

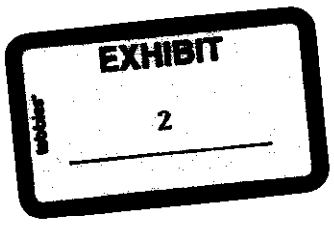
EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

And

THE PENNSYLVANIA STATE UNIVERSITY,
Nominal Defendant.

No. 2013-2082



Opinion and Order

Presently before the Court are Preliminary Objections to Plaintiff's Second Amended Complaint, filed on behalf of Defendant NCAA; a Motion to

modify the Protective Order, filed on behalf of Plaintiffs; and Objections to the issuance of Plaintiffs' Subpoenas.

NCAA cites four issues in the Preliminary Objections: 1) Failure of a Pleading to Conform to Law or Rule of Court; 2) Incapacity to bring Count I and Demurrer to Count I; 3) Impertinent Material; and 4) Lack of personal jurisdiction over Dr. Emmert and Dr. Ray.

The Court must note that in reaching a settlement in the Commonwealth Court Case of Jake Corman et. al. v. NCAA v. PSU, docketed at 1 MD 2013 (hereinafter "Corman Case"), the NCAA has repealed the Consent Decree at issue in the case *sub judice*.

Preliminary Objections

Failure of a Pleading to Conform to Law or Rule of Court, Incapacity to Bring Count I and Demurrer to Count I, and Impertinent Material

> A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Pa.R.C.P. No. 1033.

NCAA claims that in their Second Amended Complaint, Plaintiffs have "replead a breach of contract claim on behalf of the Paterno Estate that this Court has already dismissed." NCAA Defs.'s Prelim. Objections To Pls.'s

Second Am. Compl. ¶ 5. Further, as NCAA correctly states, although Plaintiffs were Ordered to file an Amended Complaint to cure specific deficiencies in their First Amended Complaint, this repleading was not included in that Order. While it is true that "the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party," *Werner v. Zazyczny*, 545 Pa. 570, 584, 681 A.2d 1331, 1338 (1996), in this case, Plaintiffs are not amending their Complaint to include a new cause of action or even a new theory of an existing cause of action; rather they are attempting to resurrect a claim on which this Court already dismissed. Therefore, the Court reasserts its position that

> [a]s Coach Joe Paterno was not involved 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, and as a result, his estate has no rights as an "involved individual" now.

Op. and Order, 9/11/14, p. 8.

Lack of Personal Jurisdiction

As per the Court's August 16, 2013 Order, this issue has been set aside from the remaining issues, and the Court will set a separate schedule for the objections relating to personal jurisdiction as necessary.

Motion to Modify the Protective Order

Plaintiffs wish to modify a Protective Order which was disputed when the Court issued its September 11, 2014 Order. The disputed provision of the Protective Order is as follows:

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

In its Order of September 11, the Court made the following ruling:

> Because there is no right for the public to have access to pre-trial documents, the risk to contaminate the potential jury pool is high, and the dissemination of pre-trial documents would be an abuse of the discovery process, the provision at issue shall be included in the protective order.

Op. and Order, 9/11/14, p. 33.

Plaintiffs are arguing that no such Order existed in the Corman Case and the NCAA is selectively releasing documents in an attempt to sway public opinion. While the Court has no reason to doubt this, it is insufficient to justify changing the Protective Order. Plaintiffs do not provide any authority to support the claim that disclosure in one case necessitates disclosure in another. Conversely, NCAA correctly argue that documents

which are public in one case may properly be subject to a protective order in another case. *See Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 534 (1st Cir. 1993). Therefore the Protective Order at issue shall remain in place undisturbed.

Objections to issuance of Plaintiff's Subpoenas

During oral argument, Defendants stated that they believed Plaintiffs should depose others before the subjects of the subpoenas. It was proffered that this claim is based upon the inconvenience and expense involved with deposing the subjects of the subpoenas; however, they offered no authority to support such a claim. Further, this Court is unaware of any legal maxim, case law, or statutory requirement that allows a Defendant to dictate in what order a Plaintiff may depose witnesses. Therefore, Plaintiff will be permitted to conduct depositions as they see fit—within the scope of Pennsylvania Discovery rules.

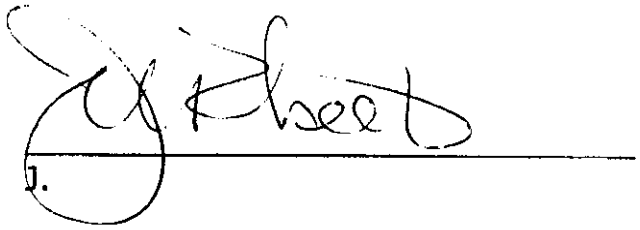
Order

AND NOW, this 24 day of March, 2015, it is hereby Ordered as follows:

1. NCAA's Preliminary Objection based on Failure of a Pleading to Conform to Law Or Rule of Court is SUSTAINED.
2. NCAA's Preliminary Objection based on the Estate of Joseph Paterno to Bring Count I and Demurrer to Count I is SUSTAINED.

3. NCAA's Preliminary Objection based on Impertinent Material is SUSTAINED.
4. No decision is made on NCAA's Preliminary Objection based on Lack of Personal Jurisdiction Over Dr. Emmert and Dr. Ray.
5. Plaintiff's Motion to Modify the Protective Order is DENIED.
6. NCAA's Objection to the Estate of Joseph Paterno's Proposed Subpoenas is OVERRULED.

BY THE COURT



J.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO;

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

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO,

former football coaches at Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President of the NCAA;

And

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

Defendants,

And

PENNSYLVANIA STATE UNIVERSITY,

Defendant.

Civil Division

Docket No. 2013-2082

PRAECIPE FOR PARTIAL DISCONTINUANCE

Filed on Behalf of Plaintiff Al Clemens

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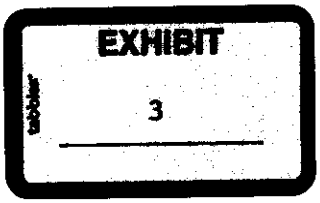

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO;	)	
	)	
AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and	)	Civil Division
	)	
WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,	)	Docket No. 2013-2082
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");	)	
	)	
MARK EMMERT, individually and as President of the NCAA;	)	
	)	
and	)	
	)	
EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
PENNSYLVANIA STATE UNIVERSITY,	)	
	)	
Defendant.	)	
	)	

PRAECIPE FOR PARTIAL DISCONTINUANCE

FILED BY PLAINTIFF AL CLEMENS

TO THE PROTHONOTARY OF SAID COURT:

Please enter Plaintiff Al Clemens's voluntary discontinuance without prejudice of all claims asserted by him against the Defendants in the above-captioned matter.

Respectfully submitted,

By: _____

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Date: May 15, 2015

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I am this date serving a copy of the foregoing document upon the following via First Class Mail, which service satisfies the requirements of the Pennsylvania Rules of Civil Procedure:

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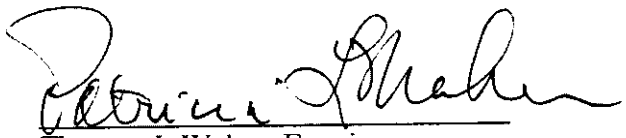
Date: May 15, 2015



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Counsel for Plaintiffs

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

ESTATE of JOSEPH PATERNO;

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

and

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Plaintiffs

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Defendants

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

No. 2013-2082

FILED FOR RECORD
2015 JUN 29 PM 4:16
DEBRA K. HAMEL
PROTHONOTARY
CENTRE COUNTY, PA

EXHIBIT
4

ORDER REMOVING AL CLEMENS FROM CAPTION

AND NOW, this 24 day of JUNE, 2015, having received a Praecipe for Partial Discontinuance, filed May 18, 2015, it is

hereby Ordered that Plaintiff Al Clements shall be removed from the caption in this matter. From this point forward, all filings should be captioned as follows:

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.

BY THE COURT

Senior Judge, John B. Leete,
specially presiding

ESTATE of JOSEPH PATERNO; WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football Coaches at Pennsylvania State University; and	: IN THE COURT OF COMMON PLEAS : OF CENTRE COUNTY, PENNSYLVANIA : : : :
v.	: :NO. 2082 OF 2013
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	:

MEMORANDUM OPINION AND ORDER

AND NOW, January 23, 2017, upon consideration of Plaintiff's request for a document subpoena to issue to the Pennsylvania State University and after review of the objections of the NCAA, and the briefs filed both in favor and in opposition to the objections, the objections are sustained and the motion for subpoena is denied.

All parties were aware of the discovery deadline of April 29, 2016, as originally established by Order of March 11, 2016. The Court by Order filed on August 16, 2016 permitted additional discovery, very limited in scope and time relative to certain alleged Sandusky victims identified as JD 71 and JD 150.

In the meantime, a motion to compel discovery relative to the repeal of the original consent decree was granted in part by Order filed on September 19, 2016. Essentially, with those limited exceptions, discovery was closed on April 29, 2016.

Apparently plaintiffs were dissatisfied with the NCAA response to the consent decree discovery, but took no final action. While plaintiffs were able to file discovery enforcement proceedings under the Rules of Civil Procedure, they failed to do so and instead choose to obtain this very same information from Penn State University by the above referenced request for a subpoena, filed on December 16, 2016. Plaintiffs mistakenly rely on the revised scheduling Order of December 14, 2016, which did make reference to a discovery cutoff date of January 31, 2017. That Order must be viewed, however, in the overall context of this case. To the Court's knowledge there were no pending discovery issues between the parties before the court as of December 14, 2016, with the exceptions of the separately ordered depositions by written interrogatories pertaining to JD 71 and JD 150. Thus, the interpretation of the December 14, Order by plaintiffs is inconsistent with the Court's thinking which was well known to both plaintiffs and defendants. Plaintiffs now complain that the NCAA did not comply with their requests concerning repeal, and try to use that argument to justify, much belated, further third party discovery.

This will not be permitted as it violates the letter and spirit of the orders of this Court pertaining to discovery.

BY THE COURT:

John B. Leete, Senior Judge
Specially Presiding

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 2nd day of February 2017, a true and correct copy of the foregoing PENN STATE'S MOTION FOR RECONSIDERATION OF COURT'S JANUARY 27, 2017 ORDER was served upon the following counsel via United States mail, first class, postage prepaid:

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