



IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO;)	
	)	Civil Division
and)	
	)	Docket No. 2013-2082
WILLIAM KENNEY and JOSEPH V. ("JAY"))	
PATERNO,)	
former football coaches at Pennsylvania State	)	Counsel of Record:
University,	)	Thomas J. Weber
	)	GOLDBERG KATZMAN, P.C.
Plaintiffs,	)	4250 Crums Mill Road, Suite 301
	)	P.O. Box 6991
v.	)	Harrisburg, PA 17112
NATIONAL COLLEGIATE ATHLETIC	)	Telephone: (717) 234-4161
ASSOCIATION ("NCAA");	)	Email: tjw@goldbergkatzman.com
)	
MARK EMMERT, individually and as	)	Wick Sollers (admitted <i>pro hac vice</i>)
President of the NCAA;	)	L. Joseph Loveland (admitted <i>pro hac vice</i>)
	)	Patricia L. Maher (admitted <i>pro hac vice</i>)
And	)	Ashley C. Parrish (admitted <i>pro hac vice</i>)
	)	KING & SPALDING LLP
EDWARD RAY, individually and as former)	1700 Pennsylvania Avenue, NW
Chairman of the)	Washington, DC 20006
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Defendants,)	jloveland@kslaw.com
)	pmaher@kslaw.com
And)	aparrish@kslaw.com
)	
PENNSYLVANIA STATE UNIVERSITY,)	
)	
Defendant.)	
)	
)	
)	

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 CLERK OF COURT
 CENTRE COUNTY, PA

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL PLAINTIFFS TO PRODUCE PRIVILEGE LOGS

This pleading responds to the NCAA Defendants' motion to compel Plaintiffs to produce privilege logs for Plaintiffs William Kenney and the Estate of Joseph Paterno, and to supplement the privilege log that Plaintiffs previously produced for Jay Paterno.

The NCAA's motion should be denied because it is both moot and procedurally defective. The privilege logs the NCAA seeks to compel have already been produced (or simply do not exist because no documents were withheld for privilege). Moreover, Plaintiffs stand ready to address with the NCAA any alleged "deficiencies" in the privilege log for Jay Paterno, but the NCAA has not asked to confer on the matter as required.

ARGUMENT

1. Plaintiffs appreciate the obligation to provide privilege logs. That is why they have provided the NCAA with privilege, for Jay Paterno, as well as for Scott Paterno individually, and for Mary Kay Paterno, from whom the NCAA subpoenaed documents. The privilege log for the Estate proved to be substantially larger than any of the others and took longer to prepare than anticipated. The NCAA notes that it produced its own privilege log for the NCAA over nine months ago. *See* NCAA Br. at 3-4. But the NCAA privilege log is basically the same one it prepared for the *Corman v. NCAA* litigation, which ended in early 2015. The Estate did not have the benefit of a privilege log all ready to go.

2. In any event, the NCAA's request for a privilege log for the Estate is now moot. On March 1, 2016, Plaintiffs produced an extensive and detailed privilege log of documents that the Estate has withheld from production to the NCAA on privilege grounds. The Estate's privilege log is 148 pages long and contains 1152 entries. Ex. 1, March 1, 2016 letter from P. Maher to B. Kowalski, et. al.

3. The NCAA also complains that it has not received a privilege log for William Kenney. But that is because Mr. Kenney has not withheld any documents on grounds of privilege. As Mr. Kenney testified in his deposition in October 2015 when asked about his search for and production of documents:

Upon the request that my attorney had sent to me, I pursued as many documents as I could, in terms of what you had asked for. Everything you had asked for I did not necessarily have. I didn't have emails and text messages, and all of that, as it related to the case at hand in terms of the whole, whether it was a consent decree or the Freeh Report or Jerry Sandusky's matter. I just didn't have any of that.

And I produced all of the documents to the very best of my ability through email[.]

So I gave you, you know, all my tax documents you had requested. I have produced, you know, just about everything that was pertinent to your request that I had access to, and I wasn't able to produce any more, you know. I know it's not a fairly large folder, but you have my personnel file, you have all of those, that information from Penn State, and –but I don't have, I just didn't have the bevy of material that you had requested. I just don't have that.

Ex. 2, Kenney Tr. at 191-192.

4. The NCAA's reference to Mr. Kenney's assertion of privilege apparently refers to objections in his written responses to the NCAA's document requests before any documents were produced. Mr. Kenney's counsel has never represented that he has withheld any responsive documents on privilege grounds or that he would need to produce a privilege log. Nor does the NCAA contend that such a representation was ever made. As indicated in Mr. Kenney's own testimony above, he produced everything he had that was responsive to the NCAA's requests. Lest there be any doubt, Plaintiffs confirmed in their transmittal of the Estate privilege log that Mr. Kenney has not withheld any documents on grounds of privilege. Ex. 1.

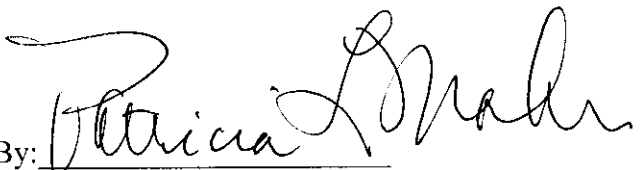
5. Although the NCAA's motion complains that the privilege log for Jay Paterno "appears incomplete on its face," this is the first time the NCAA raised a concern about any of the privilege logs that Plaintiffs have produced. The Centre County Civil Local Rules require that a party filing a discovery motion must include certification that the movant has in good faith conferred with opposing counsel in an effort to resolve the issue raised by the motion without intervention by the court. Local Rule 208.2(e). No such conference has taken place with respect to any issue related to Jay Paterno's privilege log.

6. Because the NCAA has already secured the relief requested in its motion regarding the privilege logs for the Estate and Mr. Kenney, and in light of Plaintiffs' readiness to address in good faith, any perceived deficiencies with Jay Paterno's privilege log (or any other privilege log that has been produced), the NCAA's motion to compel should be dismissed as moot. *See Com. v. Bucano*, No. 599 EDA 2013, 2014 WL 10936629, at *8 (Pa. Super. Ct. May 20, 2014) ("Defendant's Motion to Compel Discovery was dismissed as moot after Defendant advised the Court that she had received the requested discovery from the Commonwealth.").

CONCLUSION

For the foregoing reasons, the NCAA's Motion to Compel should be dismissed.

Date: March 3, 2016

By: 
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Exhibit 1

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VIA E Mail and FIRST CLASS MAIL

March 1, 2016

Brian E. Kowalski, Esq.
Sarah M. Gragert, Esq.
Latham & Watkins LLP
555 Eleventh Street, N.W.
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Washington, D.C. 20004-1304

Re: Estate of Paterno v. NCAA et al., Case No. 2013-2082 (Centre Cty. Common Pleas)

Dear Counsel,

We are forwarding to you with this letter a privilege log of documents that the Estate of Joseph Paterno has withheld from production to the NCAA on privilege grounds. We regret that it has taken this long to prepare this log but as you will see the log is lengthy and comprehensive.

We have previously provided privilege logs for Jay Paterno, Mary Kay Paterno and Scott Paterno. There will be no privilege log for William Kenney because he has not withheld any documents responsive to the NCAA's requests on grounds of privilege. Please let us know if there are items on any of the logs you want to discuss.

Sincerely,



Patricia L. Maher

Enclosure

cc: Thomas W. Scott, Esq.
Everett C. Johnson, Esq.
Drew Wisniewski, Esq.
Thomas J. Weber, Esq.

Exhibit 2

**HIGHLY CONFIDENTIAL MATERIAL
REDACTED**

1		04:27:24
2		04:27:26
3		04:27:28
4		04:27:29
5		04:27:37
6		04:27:44
7		04:27:49
8		04:27:51
9		04:27:58
10		04:27:59
11		04:28:00
12		04:28:07
13		04:28:11
14		04:28:16
15	Q. Okay. Give me just a second, Coach, I can skip over a	04:28:18
16	bunch of stuff here, I think.	04:28:33
17	Coach, the defendants in this case have	04:29:15
18	asked you to produce documents that might be in your	04:29:22
19	possession that are relevant to this litigation. Have	04:29:26
20	you, have you or someone else searched your documents?	04:29:30
21	A. I have.	04:29:34
22	Q. Okay. What did you search and when?	04:29:35
23	A. Upon the request that my attorney had sent to me, I	04:29:39
24	pursued as many of the documents as I could, in terms	04:29:49
25	of what you had asked for. Everything that you had	04:29:52

Highly Confidential Videotaped Deposition of William Kenney
Conducted on October 1, 2015

192

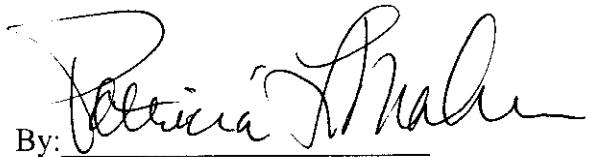
1	asked for I did not necessarily have. I didn't have	04:29:56
2	emails and text messages, and all of that, as it	04:30:01
3	related to the case at hand in terms of the whole,	04:30:06
4	whether it was a consent decree or the Freeh Report or	04:30:09
5	Jerry Sandusky's matter. I just didn't have any of	04:30:12
6	that.	04:30:15
7	And I produced all of the documents to the	04:30:17
8	very best of my ability through email, through -- and	04:30:20
9	I didn't have access to my Penn State email any	04:30:23
10	longer.	04:30:25
11	Q. Understood.	04:30:26
12	A. So I, I gave, you know, I produced all my tax	04:30:27
13	documents that you had requested. I have produced,	04:30:30
14	you know, just about everything that was pertinent to	04:30:33
15	your request that I had access to, and I wasn't able	04:30:35
16	to produce any more, you know. I know it's not a	04:30:41
17	fairly large folder, but you have my personnel file,	04:30:43
18	you have all of those, that information from Penn	04:30:46
19	State, and -- but I don't have, I just didn't have the	04:30:50
20	bevy of material that you had requested. I just don't	04:30:57
21	have that.	04:30:59
22	Q. Understood. You can't produce what you don't have.	04:31:00
23	A. Right.	04:31:02
24	Q. I just want to know where you looked.	04:31:02
25	MR. JOHNSON: Why don't we go ahead and	04:31:05

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL PLAINTIFFS TO PRODUCE PRIVILEGE LOGS** was served this 3rd day of March, 2016 by first class mail and email to the following:

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