



IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; and)

) Civil Division

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

PATERNO, former football coaches at)
Pennsylvania State University,)

) Docket No. 2013-2082

Plaintiffs,)

v.)

) Counsel of Record:

) Thomas J. Weber

NATIONAL COLLEGIATE ATHLETIC)
ASSOCIATION ("NCAA");)

) GOLDBERG KATZMAN, P.C.

) 4250 Crums Mill Road, Suite 301

) P.O. Box 6991

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

) Harrisburg, PA 17112

) Telephone: (717) 234-4161

) Email: tjw@goldbergekatzman.com

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

) Wick Sollers (admitted *pro hac vice*)

) L. Joseph Loveland (admitted *pro hac vice*)

) Patricia L. Maher (admitted *pro hac vice*)

Defendants.)

) Ashley C. Parrish (admitted *pro hac vice*)

) KING & SPALDING LLP

) 1700 Pennsylvania Avenue, NW

) Washington, DC 20006

) Telephone: (202) 737-0500

) Email: wsollers@kslaw.com

) jloveland@kslaw.com

) pmaher@kslaw.com

) aparrish@kslaw.com

FILED IN RECORD

2017 FEB 22 AM 10:13

DEBRA C. HUBEL
PROTHONOTARY
CENTRE COUNTY, PA

PLAINTIFFS' RESPONSE TO FEBRUARY 3, 2017 ORDER

Plaintiffs respectfully respond as follows to the Court's February 3 Order regarding Penn State's Motion for Reconsideration of the Court's January 27, 2017 Order. In addition to the grounds set forth in support of the their January 12, 2017 Motion to Compel, Plaintiffs submit the following brief points in response to Penn State's Motion for Reconsideration:

First, Penn State's suggestion that Plaintiffs are seeking to impose an unreasonable burden on a non-party by requesting an overdue privilege log is incorrect. The Estate of Joseph Paterno served a document request on Penn State on July 28, 2014, when Penn State was a party. Penn State's response was due within 30 days pursuant to Pa. R. C. P. 4009.12(b), which provides: "The answer shall be in the form of a paragraph-by-paragraph response which shall . . . (2) identify all documents or things not produced[.] . . . Documents or things not produced *shall be identified* with reasonable particularity together with the basis for non-production." (Emphasis added). Penn State served its written response on August 27, 2014 while it was a party, and its production of responsive documents began on October 14, 2014 with an assurance that "[a] privilege log also will be forthcoming." Ex. C to Motion to Compel. Penn State clearly recognized its obligation to provide a privilege log as part of its response to the Estate's document request. Penn State should not be allowed to use its dereliction in fulfilling that obligation while it was a party as the justification for why it should not have to produce a privilege log at all.

Second, Penn State's references to former Plaintiff Clemens' dismissal of his claims are a red herring. Mr. Clemens did not serve the document requests at issue in the motion to compel, and the suggestion that the Estate somehow waived its right to a privilege log from Penn State by not insisting on it when Mr. Clemens dismissed his claims makes no sense. Penn State continued producing documents responsive to the Estate's requests after Mr. Clemens dismissed his claims in May 2015, which Penn State now characterizes "as a professional courtesy" on its part. Motion for Reconsideration at 5, ¶8. But Penn State's document production was done pursuant to its August 27, 2014 response to the Estate and was completely unrelated to Mr. Clemens. Just

as Penn State's obligation to complete its document production was unaffected by Mr. Clemens' dismissal of his claims, so was its obligation to provide a privilege log.

Finally, Penn State's assertion that it has "strictly limited" its role in this case (Motion for Reconsideration at 5, ¶ 10), and therefore should not have to fulfill obligations undertaken when it was a party is disingenuous at best. Penn State has been actively fighting Plaintiffs' document subpoena to non-party Pepper Hamilton for three years, and it has continued to do so long after its dismissal as a party in 2015. Indeed, Penn State's efforts to overturn this Court's privilege rulings with respect to Pepper Hamilton are ongoing in two appeals pending in Superior Court. *See Estate of Paterno v. National Collegiate Athletic Association, and the Pennsylvania State University, Appellant*, No. 878 MDA 2015 (Superior Ct.), and *Estate of Paterno v. National Collegiate Athletic Association, and the Pennsylvania State University, Appeal of Pepper Hamilton LLP*, No. 877 MDA 2015 (Superior Ct.).

Plaintiffs' motion to compel is not an attempt to inject a new dispute into this case. Nor does the motion impose an undue burden on Penn State, which has not even indicated the volume of documents it has withheld. Plaintiffs seek a list of documents responsive to its timely document request that Penn State has withheld and the grounds for withholding them, as required by Pa. R. C. P. 4009.12(b).

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order directing Penn State to provide a log of all documents responsive to Plaintiffs' First Requests for Production of Documents that it has withheld on grounds of privilege as instructed in Plaintiffs' Requests, or in the alternative, produce the withheld documents to Plaintiffs. Plaintiffs do not request oral argument on their Motion to Compel.

Dated: February 21, 2017



Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 201
P.O. Box 6991
Harrisburg, PA 17112

Wick Sollers
L. Joseph Loveland
Ashley C. Parrish
Patricia L. Maher
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PLAINTIFFS' RESPONSE TO FEBRUARY 3, 2017 ORDER was served this 21st day of February, 2017 by first class mail and email to the following:

Thomas W. Scott
Killian & Gephart
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Email: tscott@killiangephart.com

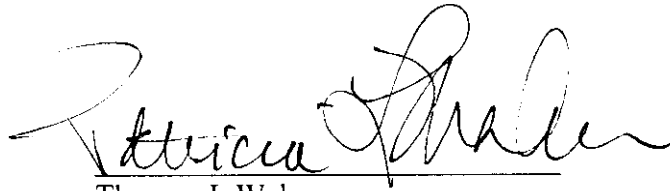
Everett C. Johnson, Jr.
Brian E. Kowalski
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
Email: everett.johnson@lw.com
brian.kowalski@lw.com
sarah.gragert@lw.com

Daniel I. Booker
Donna M. Dobblick
Reed Smith LLP
225 Fifth Avenue
Suite 1200
Pittsburgh, PA 15222
Email: dbooker@reedsmith.com
ddobblick@reedsmith.com

Joseph P. Green
Lee Green & Reiter Inc.
115 East High Street
Lock Drawer 179
Bellefonte, PA 10823-0179
Email: jgreen@lmgrlaw.com

Michael M. Sheetz
Timothy W. Cook
Cooley, LLP
500 Boylston Street, 14th Fl.
Boston, MA 02116-3736

Email: msheetz@cooley.com
tcook@cooley.com

A handwritten signature in black ink, appearing to read "Patricia L. Maher". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112

Wick Sollers
L. Joseph Loveland
Ashley C. Parrish
Patricia L. Maher
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500

Counsel for Plaintiffs