THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The 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.	Civil Division Docket No. 2013-2082 Counsel of Record: Thomas J. Weber GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301 P.O. Box 6991 Harrisburg, PA 17112 Telephone: (717) 234-4161 Email: tjw@goldbergkatzman.com Wick Sollers (admitted *pro hac vice*) L. Joseph Loveland (admitted *pro hac vice*) Patricia L. Maher (admitted *pro hac vice*) 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

PLAINTIFFS' RESPONSE TO THIRD PARTY MOTIONS TO QUASH THE NCAA'S SUBPOENA AND FOR PROTECTIVE ORDER

Pursuant to this Court's June 14 Order, plaintiffs submit this response to motions filed by Penn State University and other third parties with respect to a document subpoena served by the NCAA on June 5, 2016. Plaintiffs agree that the Court should quash the subpoena because it seeks information that is only tangential to this case and does not justify the burdens on the Court

and parties and the delay that would necessarily result. In the alternative, if the Court does not quash the subpoena, it should ensure that plaintiffs have an opportunity to fully explore the basis for any third-party allegations that are allowed into the record in this case.

BACKGROUND

The parties in this case have had more than two-and-a-half years to conduct discovery. During that time, the NCAA pursued far-reaching discovery, including against third parties, but did not pursue any discovery into settlements reached between Penn State and individuals in connection with Jerry Sandusky's sexual abuse (the "John Does"). It did not propound that discovery, even though it had plenty of opportunities to do so, and even though the settlements were publicly disclosed years ago, well before discovery started in this case. *See* Penn State News, *Settlements announced for Sandusky victims* (Oct. 28, 2013), *available at* http://news.psu.edu/story/293049/2013/10/28/administration/settlements-announced-sandusky-victims.

In May 2016, after the close of discovery, the NCAA sought an extension of the discovery deadlines, claiming that it needed additional time to investigate information concerning the John Does and their settlements with Penn State. Because plaintiffs have consistently favored full disclosure of all information in search of the truth, plaintiffs did not oppose the NCAA's request for a limited extension. Nonetheless, they agreed with Penn State's objection that the evidence was not relevant to any of the claims or defenses in this case. It is undisputed that the John Does' allegations were not investigated by the Freeh Firm, were not mentioned in the Freeh Report, were not addressed in the Consent Decree, and were not a purported basis for the NCAA's sanctions decision.

The Court extended discovery for 45 days, but made clear that discovery would be very limited. It also made clear that it would not allow the NCAA to turn this case into a trial over the merits of the John Does' allegations and their settlements with Penn State. In the wake of the

Court's decision, plaintiffs and Penn State both cooperated with the NCAA's efforts to arrange informal discovery from the John Does. It soon became clear, however, that the NCAA would not be able to obtain information from the John Does voluntarily. The NCAA then served a document subpoena on Penn State. The subpoena calls for production of testimony and statements by the John Does regarding alleged assaults by Sandusky in the 1970s, the settlement agreements with Penn State, and documents to identify the John Does and their counsel.

Penn State has moved to quash the subpoena on grounds that producing the requested information would violate its obligations to ensure that the John Does' identities remain confidential. One of the John Does, "John Doe 150," has moved for a protective order, seeking a ruling that he need not appear for a deposition, or in the alternative, limiting the scope of any deposition to protect his privacy and confidentiality interests. The other John Doe, "John Doe 71," has filed a motion for leave to file a motion for protective order under seal (but appears not to have filed the underlying motion).

ARGUMENT

Plaintiffs remain committed to pursuing the truth on all matters relevant to this case, including the truth about the damage caused by the NCAA's egregious misconduct and abuse of authority. As a matter of principle, plaintiffs have no objection to reasonable discovery as long as the discovery process is fair to all sides. Plaintiffs have two overarching concerns with the NCAA's subpoena.

First, the NCAA's subpoena constitutes a significant departure from the actual issues in this case and has little likelihood of producing any probative evidence. That is especially a concern because the NCAA's request for additional discovery was made after discovery closed and there is no reason the NCAA could not have pursued in a timely fashion this discovery into settlements reached by Penn State or the basis for those settlements, including the underlying

allegations. The NCAA's belated effort to engage in such discovery on matters tangential, at best, to any claim or defense in this case is impossible to justify. As John Doe 150 explains:

> John Doe 150 is not a party to this action. His testimony is, for all practical purposes, collateral to the issues that appear to be before the Court. The dispute in question is between the Paterno Estate and the N.C.A.A. There is no claim that the N.C.A.A. sanctioned Penn State because of anything John Doe 150 said or did. In fact, Penn State and the N.C.A.A. entered into the Consent Decree approximately a year before John Doe 150 asserted any claim.

John Doe 150 Mot. for Prot. Order 6 (June 21, 2016). Also, it is now clear that there is no way to allow the NCAA to pursue its subpoena without further delaying the trial in this case. That delay is not justified given the tangential nature of the discovery the NCAA seeks.

The NCAA has argued that it should be given an opportunity to investigate whether the John Does' allegations are true. But the issue in this case is whether the NCAA had any truthful basis for announcing to the world that the Freeh Report's allegations concerning gross misconduct by plaintiffs were backed up by a sufficiently reliable investigation to justify the NCAA's imposition of unprecedented sanctions. *See* 2014-09-11 Opinion & Order at 12–14 (recognizing that statements in the Consent Decree were not pure opinion but conclusions that the Freeh Report established "a factual basis" for imposing sanctions). The discovery the NCAA seeks would uncover, at most, only *allegations* by individuals regarding events that happened more than 40 years ago that have nothing to do with the Freeh Report or the NCAA's blind reliance on that report. It would not establish the truth of those allegations. Nor would it change the fact that those allegations were never mentioned or relied on in the Freeh Report, the Consent Decree, or the NCAA's decision to impose sanctions. In short, the burdens that the NCAA's belated discovery requests will impose on the Court, plaintiffs, and the John Does are not justified.

Second, if the NCAA is allowed to conduct discovery into allegations about events that occurred more than 40 years ago, then plaintiffs also must have a sufficient opportunity to test the truth and validity of those allegations. Plaintiffs recognize the John Does' privacy concerns and their request that the Court take steps to protect their identities. Given the accusations they have apparently made about Coach Joe Paterno and other Penn State football coaches, however, it would be severely prejudicial to allow discovery to proceed on these allegations unless it is structured to be fair to all sides.

Plaintiffs struggle to see how the Court can protect the John Does' privacy concerns and also allow discovery to proceed without turning the NCAA's subpoena into a trial over the merits of the John Does' allegations. The restrictions that John Doe 150 has suggested should apply if the Court does not quash the NCAA's subpoena, for example, are not workable. In particular, John Doe 150 has proposed that the parties accept the transcript of the deposition given in the insurance litigation, with only very limited follow-up questions. But the insurance coverage litigation involves different parties and very different legal issues than the claims in this case. Although plaintiffs do not know what was covered in John Doe 150's deposition in the insurance case, absent full and fair cross-examination by the parties to this litigation, it would be fundamentally unfair to require the parties in this case to accept the discovery developed in that context.

In short, if the NCAA is allowed to bring the John Does' allegations into this case, plaintiffs also must be given an opportunity to explore those allegations fully on cross-examination. Unless a process can be devised to accommodate both the John Does' privacy interests and plaintiffs' interests in fully exploring these new allegations, the NCAA's pursuit of this belated discovery should end here.

CONCLUSION

Plaintiffs respectfully request that the Court quash the NCAA subpoena. If the Court does not quash the subpoena, any further discovery should be structured to protect plaintiffs' rights to explore fully the basis for any information from the John Does that is allowed into the record in this case.

Date: June 27, 2016

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PLAINTIFFS' RESPONSE TO THIRD PARTY MOTIONS TO QUASH THE NCAA SUBPOENA AND FOR PROTECTIVE ORDER was served this 27th day of June, 2016 by first class mail and email to the following:

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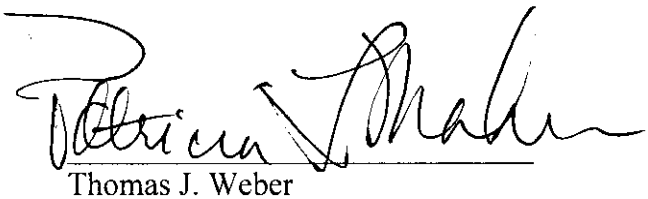

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