

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

FILED FOR RECORD
2011 MAR 17 PM 3:43
DEBRA C. NIMEL
PROthonDARY
CENTRE COUNTY, PA

PRELIMINARY OBJECTIONS

The Pennsylvania State University ("Penn State"), by and through its undersigned
counsel, hereby files these Preliminary Objections to the First Amended Complaint.

**FIRST PRELIMINARY OBJECTION – INSUFFICIENT SPECIFICITY WITH
RESPECT TO COUNTS, PLAINTIFFS, RELIEF SOUGHT
(Pa. R. Civ. P. 1028(a)(3)) (ALL COUNTS - ALL PLAINTIFFS)**

1. The First Amended Complaint (the “Amended Complaint”) contains five Counts, each of which is asserted by different plaintiffs, namely: Breach of Contract (brought by the Estate of Joe Paterno and the “family” of Joe Paterno) (Count I); Intentional Interference with Contractual Relations (brought by William Kenney and Jay Paterno) (Count II); Injurious Falsehood/Commercial Disparagement (brought by the Estate of Joe Paterno and the “family” of Joe Paterno) (Count III); Defamation (brought by William Kenney, Jay Paterno, and Al Clemens) (Count IV); and Civil Conspiracy (brought by all plaintiffs) (Count V).

2. The Amended Complaint contains two paragraphs (¶¶ 168 and 169) that describe the relief plaintiffs are seeking in this litigation generally. Although ¶ 168 purports to request relief only against “the NCAA Defendants,” one of the categories of relief requested in ¶ 168 is the issuance of a permanent injunction preventing the NCAA from further enforcing the Consent Decree to which Penn State is a party. Accordingly, that relief, if granted, would adversely affect Penn State.

3. Paragraph 169 of the Amended Complaint seeks the following relief against the NCAA Defendants and Penn State:

- “(1) A declaratory judgment that
- a. Joe Paterno was an ‘involved individual’ within the meaning of the NCAA Rules;
 - b. Penn State did not have the authority to waive any rights that Joe Paterno had as an ‘involved individual’ under the NCAA Rules;
- and

c. The NCAA-imposed Consent Decree was unauthorized, unlawful, and void *ab initio*.

(2) Such other and further equitable relief as may be necessary to remedy the harm caused by the imposition of the Consent Decree.”

4. None of the relief sought in ¶¶ 168 and 169 of the Amended Complaint is tied to any specific Count of the Amended Complaint. Similarly, although different plaintiffs bring each of the five Counts (as described *supra*, ¶ 1), the Relief Requested in the Amended Complaint does not describe which plaintiff seeks which type of relief, nor does it identify the legal theory or Count he/it believes warrants the award of that relief.

5. Not every category of relief requested in ¶¶ 168 and 169 is a proper remedy for every Count of the Amended Complaint. For example, in Count I, certain plaintiffs assert a breach of the NCAA’s Constitution and/or the NCAA’s Bylaws. However, neither a declaration that Penn State “did not have the authority to waive any rights that Joe Paterno had as an ‘involved individual’ under the NCAA Rules” nor a declaration that the Consent Decree was “unauthorized, unlawful and void *ab initio*” would be proper remedies for any breach of that contract(s) by Penn State.

6. Moreover, Count V (Civil Conspiracy), is brought by all plaintiffs, and the relief requested is sought by all plaintiffs. This nomenclature seemingly would include plaintiffs (and Penn State Trustees) Ryan McCombie, Anthony Lubrano, and Adam Taliaferro, which would be directly inconsistent with the statement plaintiffs’ counsel made in his February 14, 2014, letter to Penn State’s General Counsel, *to wit*: “Trustees Ryan McCombie, Anthony Lubrano and Adam Taliaferro have not sued the University, have not brought any claims against the University and are not seeking any relief from the University.” *See* Exhibit A hereto (Feb. 14, 2014 letter from Paul V. Kelly to Stephen S. Dunham).

7. Counsel for Penn State sought informally to have the plaintiffs further amend the complaint to provide the requisite specificity. Specifically, counsel for Penn State: (a) advised counsel for the plaintiffs that the latter's statements that plaintiffs are "not seek[ing] any monetary damages from Penn State," and are not "ask[ing] that the court order Penn State to take any action" (*see* Exhibit B hereto, "*Paternos name Penn State a 'nominal defendant' in amended complaint against NCAA,*" CentreDaily.com, Feb. 5, 2014), and that McCombie, Lubrano, and Taliaferro "have not brought any claims against the University" (*see* Exhibit A hereto), cannot be reconciled with the Amended Complaint itself; (b) advised that "Penn State is unable to determine which counts of the First Amended Complaint are being directed against it and what relief is being sought in connection with those counts;" and (c) requested that plaintiffs file a second amended complaint. *See* Exhibit C hereto (Feb. 21, 2014 letter from Daniel I. Booker to Paul V. Kelly). Plaintiffs' counsel responded that, in his view, the Amended Complaint "is clear," and refused voluntarily to amend it. *See* Exhibit D hereto (Feb. 24, 2014 letter from Paul V. Kelly to Daniel I. Booker).

8. For all of the reasons set forth above, and the views of plaintiffs' counsel notwithstanding, the Amended Complaint does *not* inform Penn State with accuracy or completeness of the specific basis on which the plaintiffs are seeking recovery against it, and is *not* sufficiently clear or specific to enable Penn State to prepare its defense. Penn State is entitled to know, but does not know, which Counts are asserted against it and is entitled to know, but does not know, the precise nature of the relief, if any, those plaintiffs are seeking against it with respect to any such Count.

WHEREFORE, The Pennsylvania State University respectfully requests that the Court dismiss the Amended Complaint with prejudice pursuant to Rule 1028(a)(3) or, in the alternative, direct the filing of a more specific statement as to which Counts, asserted by which

plaintiffs, are directed against Penn State, and the precise nature of the relief sought with respect to that Count or Counts.

**SECOND PRELIMINARY OBJECTION – DEMURRER FOR LACK OF STANDING
(Pa. R. Civ. P. 1028(a)(4)) (COUNT I - PLAINTIFF AL CLEMENS)**

9. Plaintiff Al Clemens is described in ¶ 10 of the Amended Complaint as “a current member of the Board of Trustees of Penn State,” who “was also a member of the Board of Trustees in 1998 and 2001.”

10. The Amended Complaint further alleges that Clemens is an “involved individual,” as that term is used in the NCAA Bylaws, and, as such, Clemens is an intended third-party beneficiary of the NCAA’s “Constitution, Operating Bylaws, and Administrative Bylaws.” Am. Compl., ¶¶ 117, 118, 119.

11. The term “involved individuals” is defined in § 32.1.5 of the NCAA’s Operating Bylaws as “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.”

12. The NCAA’s Operating Bylaws distinguish between members of the institution’s “staff” and members of the institution’s “governing board.” *See, e.g.*, NCAA’s Operating Bylaws § 13.1.2.3 (“The following are additional [recruiting] restrictions that apply to an institution’s staff members and governing board”); *id.*, § 13.4.1.1.9)(a)[6] (“All institutional staff members (e.g., faculty members, athletics, department staff members and administrators) may prepare general correspondence.”); *id.*, § 4.02.3 (“‘On the staff,’ as it applies to individuals from member institutions or conferences who are eligible to serve on committees or as officers or representatives of the Association, is defined as those individuals who receive a regular salary from a member institution or organization for the performance of a regular staff function

representing at least 50 percent of the normal workload for a staff member at that institution or conference.”).

13. Clemens does not allege that he was or is a former or current student-athlete or a former or current staff member of Penn State.

14. Because Clemens’ status as a current (and former) member of Penn State’s Board of Trustees does not render him an “involved individual,” and because Clemens’ claimed status as intended third-party beneficiary of the NCAA’s Constitution and Bylaws is predicated on him being an “involved individual,” Clemens lacks standing to sue for any claimed breaches of that alleged contract.

WHEREFORE, The Pennsylvania State University respectfully requests that Count I of the Amended Complaint be dismissed with prejudice pursuant to Rule 1028(a)(4) to the extent Al Clemens asserts a claim for breach of contract against Penn State.

THIRD PRELIMINARY OBJECTION – LACK OF CAPACITY TO SUE (Pa. R. Civ. P. 1028(a)(5)) (ALL COUNTS - PLAINTIFF GEORGE SCOTT PATERNO AS REPRESENTATIVE OF “THE FAMILY OF JOSEPH PATERNO”)

15. Plaintiff George Scott Paterno, the son of former head football coach Joseph “Joe” Paterno, purportedly brings this action “as the duly authorized representative of and on behalf of the . . . Family of Joe Paterno.” Am. Compl., ¶ 8.

16. Unlike a decedent’s estate, the “family” of a deceased individual is not a legal entity with any recognized juridical presence.

17. Further, any rights that survived the death of Joe Paterno are properly asserted only by a duly appointed representative of his decedent’s estate.

18. Moreover, the Amended Complaint is devoid of factual allegations describing: which individuals comprise the “family” of Joe Paterno; how plaintiff George Paterno allegedly

became the “duly appointed representative” of those family members; or how those unspecified members of Joe Paterno’s family allegedly acquired rights he may have had prior to his death.

19. Further, the term “involved individuals” is defined in § 32.1.5 of the NCAA Bylaws to include “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.” That definition does not make reference to the family or family members of former or current institutional staff members.

20. Nor does the Amended Complaint allege that Penn State and the NCAA expressly intended to confer third-party beneficiary status on unspecified family members of former or current institutional staff members, including the “family” of Joe Paterno that purports to bring this action.

21. For all of these reasons, the “family of Joseph Paterno” lacks both capacity to sue and standing to sue Penn State for any claimed breach of the NCAA’s Constitution or Bylaws.

WHEREFORE, The Pennsylvania State University respectfully requests that all claims brought against it by George Scott Paterno on behalf of “the family of Joseph Paterno” be dismissed with prejudice pursuant to Rule 1028(a)(5).

FOURTH PRELIMINARY OBJECTION – DEMURRER – ALLEGED INTENDED THIRD-PARTY BENEFICIARY STATUS (Pa. R. Civ. P. 1028(a)(4)) (COUNT I – 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”)

22. Paragraphs 118 and 119 of the Amended Complaint allege that Joe Paterno and Al Clemens “are intended third party beneficiaries of the agreement between the NCAA and Penn State.” The “agreement” is alleged to be the NCAA’s Constitution, the NCAA’s Operating Bylaws, and the NCAA’s Administrative Bylaws. Am. Compl., ¶ 117.

23. The assertion that these individuals are intended third-party beneficiaries of this alleged contract is a legal conclusion, devoid of the requisite factual allegations necessary to support it.

24. When ruling on preliminary objections, the Court is not required to, and may not, accept as true asserted conclusions of law, and may not draw unwarranted inferences from the alleged facts.

25. Generally, a person is an intended third-party beneficiary of a contract only if the parties to the contract express an intention to benefit the third party *in the contract itself*. If the contract itself expresses no such intention, then the party claiming intended third-party beneficiary status must establish that both that the circumstances indicate that the promisor intends to give him the benefit of the promised performance and that the circumstances are so compelling that recognizing the alleged beneficiary's right is appropriate to effectuate the intention of both contracting parties.

26. Count I of the Amended Complaint fails to plead facts sufficient to establish that the NCAA and Penn State intended that Al Clemens be a third-party beneficiary of the NCAA Constitution and/or the NCAA Bylaws. Even assuming *arguendo* that the NCAA's Constitution and Bylaws are considered to be a contract, Al Clemens is not expressly named in that contract as an intended third-party beneficiary thereof. Nor does the Amended Complaint allege facts sufficient to show either that the circumstances are so compelling that recognizing Clemens' claimed rights under that contract would be appropriate to effectuate the intent of Penn State and the NCAA or that either of the contracting parties intended to give Clemens the benefit of its performance under the contract. And, further, in any event, the Amended Complaint is devoid of facts sufficient to show that the NCAA and Penn State intended to confer on Clemens the right to sue *Penn State* for claimed breaches of the NCAA's Constitution and/or Bylaws.

27. Accordingly, because the Amended Complaint fails to plead facts sufficient to show that Al Clemens is an intended third-party beneficiary of the NCAA Constitution and Bylaws, he lacks standing to sue Penn State for any claimed breaches of that contract.

28. As with Clemens, the Amended Complaint is devoid of facts sufficient to show that the NCAA and Penn State intended to confer on Joe Paterno the right to sue *Penn State* for claimed breaches of the NCAA's Constitution and/or Bylaws.

29. Count I also fails to plead facts sufficient to establish either that: (a) Joe Paterno, who died before the Consent Decree was issued, was an "involved individual" with respect to any statements made or adopted in or in conjunction with the Consent Decree; or (b) the NCAA and Penn State intended that the rights or remedies – if any – the NCAA Constitution and Bylaws may have conferred on Joe Paterno during his lifetime in, e.g., his capacity as a "former or current institutional staff member," would survive his death.

30. To the contrary, to the extent the NCAA Constitution and Bylaws conferred any "rights" on "involved individuals," much less rights enforceable in a court of law, which Penn State disputes, those purported "rights" are purely procedural in nature. *See, e.g.*, Operating Bylaws § 32.6.2 (requiring the NCAA enforcement staff to "notify involved individuals . . . of the allegations in a notice of allegations in which they are named"); *id.*, § 32.6.4 ("[t]he institution and involved individuals shall have reasonable access to all pertinent evidentiary materials"); *id.*, § 32.7.1 ("[i]n major infractions cases, institutions, involved individuals and the enforcement staff may elect to process the case through the summary disposition procedures"); *id.*, § 32.10.1.2 ("An involved individual may appeal the Committee of Infractions' findings and/or show cause order imposed for violations of NCAA legislation in which he or she is named."). Indeed, the plaintiffs themselves complain that they were "unlawfully deprived of the

required procedures due to them under the NCAA's rules." Am. Compl., ¶ 113 (emphasis added).

31. The Consent Decree, which the Amended Complaint contends constitutes a breach of Joe Paterno's rights as an alleged intended third-party beneficiary of the NCAA Constitution and the NCAA Bylaws, was executed on July 23, 2012. Am. Compl., Ex. B.

32. Joe Paterno died six months before the Consent Decree was executed — on January 22, 2012. As such, he could not have been an "involved individual" with respect to any conduct or statement made in conjunction with that Consent Decree.

33. Furthermore, to the extent Joe Paterno had any procedural rights or remedies under the NCAA Bylaws (to, e.g., a "right" to receive notice of allegations and a "right" to have reasonable access to pertinent evidentiary materials), those "rights" abated upon his death. Other procedural "rights" or remedies Joe Paterno may have had if he had been alive when the Consent Decree was issued (e.g., a "right" to appeal) never inured to Joe Paterno in the first instance, given that he died before the Consent Decree was executed. In any event, any such "rights" would have been personal to Joe Paterno, and, as such did not pass to his Estate upon his death. Moreover, the Amended Complaint is devoid of any allegations that the Estate itself was an intended third-party beneficiary of the NCAA's Constitution or Bylaws.

34. Accordingly, because the Amended Complaint fails to allege facts sufficient to show that: (a) Joe Paterno was an "involved individual;" (b) the NCAA and Penn State intended to confer on Joe Paterno the right to sue Penn State for breach of contract; (c) Joe Paterno's alleged procedural "rights" under the NCAA Constitution and Bylaws survived his death and passed to his Estate; or (d) the Estate was itself an intended third-party beneficiary of the NCAA Constitution and Bylaws, the Estate lacks standing to sue Penn State for any claimed breach of that alleged contract.

35. Furthermore, none of the plaintiffs with respect to Count I alleges that he/it is an intended third-party beneficiary of the Consent Decree itself.

WHEREFORE, The Pennsylvania State University respectfully requests that Count I of the Amended Complaint against it be dismissed with prejudice pursuant to Rule 1028(a)(4).

**FIFTH PRELIMINARY OBJECTION – DEMURRER FOR FAILURE TO ALLEGE A
BREACH OF CONTRACT (Pa. R. Civ. P. 1028(a)(4))
(COUNT I - THE ESTATE OF JOE PATERNO; THE “FAMILY” OF JOE PATERNO;
AL CLEMENS)**

36. Count I of the Amended Complaint is a claim for breach of contract.

37. The purported “contract” that is the subject of Count I is described in the Amended Complaint as the NCAA’s Constitution and Bylaws. *See, e.g.*, Am. Compl., ¶ 117 (alleging that “the NCAA had a valid and enforceable agreement with Penn State, in the form of its Constitution, Operating Bylaws, and Administrative Bylaws”); *id.*, ¶ 118 (alleging that the plaintiffs asserting Count I are third party beneficiaries of “this contract”).

38. 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.

39. Furthermore, to the extent Count I alleges a breach of an implied covenant of good faith and fair dealing, it is inconsistent with Pennsylvania law. In any event, even if such a duty existed, Count I is devoid of allegations that Penn State violated any such implied duty.

WHEREFORE, The Pennsylvania State University respectfully requests that Count I of the Amended Complaint against it be dismissed with prejudice pursuant to Rule 1028(a)(4) for failure to state a claim.

**SIXTH PRELIMINARY OBJECTION - INSUFFICIENT SPECIFICITY – ALLEGED
INTENDED THIRD-PARTY BENEFICIARY STATUS (Pa. R. Civ. P. 1028(a)(3))
(COUNT I - THE ESTATE OF JOE PATERNO; THE “FAMILY” OF JOE PATERNO;
AL CLEMENS)**

40. In Count I of the Amended Complaint, George Scott Paterno, on behalf of the Estate and unspecified members of the “family” of Joe Paterno, and Al Clemens, allege that they are intended third-party beneficiaries of the NCAA’s Constitution and Bylaws and, as such, they have the right to “enforce the provisions of” that contract.

41. The NCAA’s Constitution and Bylaws exceed 400 pages, and cover a wide range of subjects and conduct. The Amended Complaint fails to identify, however: (a) what particular rights any of these plaintiffs purportedly acquired under this alleged contract; (b) how Penn State allegedly violated those claimed contractual rights; or (c) how any of the plaintiffs claim to have been injured by Penn State’s alleged breach(es) of contract. Indeed, as explained *supra*, ¶¶ 36-39, Count I does not describe any way in which Penn State allegedly breached that contract.

42. For all of the reasons set forth above, the Amended Complaint does not inform Penn State with accuracy or completeness of the specific basis on which recovery is sought, and is not sufficiently clear or specific to enable Penn State to prepare its defense of Count I.

WHEREFORE, The Pennsylvania State University respectfully requests that the Court dismiss Count I of the Amended Complaint against it with prejudice pursuant to Rule 1028(a)(3) for insufficient specificity, or, in the alternative, direct the filing of a more specific statement that identifies: (a) what particular rights the Estate of Joe Paterno, the “family” of Joe Paterno, and Al Clemens claim to have acquired under the NCAA Constitution, the NCAA’s Bylaws, and/or the Consent Decree; (b) how Penn State allegedly breached those claimed contractual rights; and (c) how each of those plaintiffs was injured by Penn State’s alleged breach(es) of contract.

**SEVENTH PRELIMINARY OBJECTION – DEMURRER FOR FAILURE TO ALLEGE
ELEMENTS OF CIVIL CONSPIRACY AGAINST PENN STATE
(Pa. R. Civ. P. 1028(a)(4)) (COUNT V – ALL PLAINTIFFS)**

43. As set forth *supra*, ¶¶ 1-8, it is not clear which Counts of the Amended Complaint are directed against Penn State. To the extent Count V (Civil Conspiracy) is directed toward Penn State, it should be dismissed for legal insufficiency.

44. Count V alleges that Defendants Mark Emmert, Edward Ray, “other unknown NCAA employees,” and “the Freeh firm” engaged in a civil conspiracy to, *inter alia*, “bypass the NCAA’s rules and procedural requirements,” “deprive Plaintiffs of their rights,” and “impose sanctions on Penn State . . . based on an obviously flawed investigation” Am. Compl, ¶ 163.

45. In order to plead an actionable claim for civil conspiracy, a plaintiff must plead: (a) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (b) an overt act done in pursuit of the common purpose; and (c) actual legal damage.

46. Count V does 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 does Count V 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.

WHEREFORE, The Pennsylvania State University respectfully requests that, to the extent Count V is directed toward Penn State, that it be dismissed with prejudice pursuant to Rule 1028(a)(4) for failure to state a claim.

**EIGHTH PRELIMINARY OBJECTION – FAILURE TO COMPLY WITH LAW OR
RULE OF COURT – NO VERIFICATION (Pa. R. Civ. P. 1028(a)(2))
(COUNTS I, II, III, IV, V - ALL PLAINTIFFS)**

47. Pennsylvania Rule of Civil Procedure 1024(a) provides that “[e]very pleading containing an averment of fact not appearing of record . . . shall state that the averment or denial is true upon the signer’s personal knowledge or information and belief and shall be verified.”

48. The First Amended Complaint, which is not verified, does not comply with Rule 1024(a).

WHEREFORE, The Pennsylvania State University respectfully requests that the First Amended Complaint be dismissed with prejudice pursuant to Rule 1028(a)(2).

**NINTH PRELIMINARY OBJECTION – FAILURE TO COMPLY WITH LAW OR
RULE OF COURT – NO NOTICE TO DEFEND OR PLEAD (Pa. R. Civ. P. 1028(a)(2))
(COUNTS I, II, III, IV, V — ALL PLAINTIFFS)**

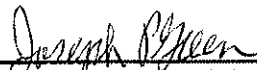
49. Pennsylvania Rule of Civil Procedure 1018.1(a) provides that “[e]very complaint filed by a plaintiff . . . shall begin with a notice to defend in substantially the form set forth in subdivision (b).

50. Pennsylvania Rule of Civil Procedure 1026(a) provides that “[e]very pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading, but no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead.”

51. The First Amended Complaint does not contain either a notice to defend or a notice to plead, and, as such, does not conform to Rule 1018.1(a) or Rule 1026(a).

WHEREFORE, The Pennsylvania State University respectfully requests that the First Amended Complaint be dismissed with prejudice pursuant to Rule 1028(a)(2).

Respectfully submitted,



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Dated: March 17, 2014

Exhibit A

Representing Management Exclusively in Workplace Law and Related Litigation

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February 14, 2014

VIA EMAIL AND FIRST CLASS MAIL

Stephen S. Dunham, Esq.
Vice President & General Counsel
The Pennsylvania State University
108 Old Main
University Park, PA 16802

Re: **Estate and Family of Joseph Paterno et al. v. N.C.A.A. et al., Docket No. 2013-2082**

Dear Mr. Dunham:

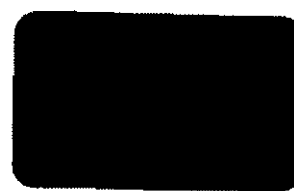
I am writing to follow up our telephone call on Wednesday afternoon. As I stated during the call, I respectfully disagree with most of your assertions concerning the reading and interpretation of the First Amended Complaint relative to Penn State, but it would not be constructive to continue that discussion. Nevertheless, in an effort to remove any continuing confusion, I want to address briefly some of the issues you raised.

As I stated during our call, Trustees Ryan McCombie, Anthony Lubrano, and Adam Taliaferro have not sued the University, have not brought any claims against the University, and are not seeking any relief from the University. The only parties that are pursuing claims which involve Penn State are the Estate and Family of Joe Paterno and Al Clemens.

Moreover, it is clear from the First Amended Complaint — especially in light of the history of this litigation and the Court's January 6, 2014 Opinion & Order — that the University has been named *only* as a nominal defendant. The University has been brought into this litigation at the insistence of the NCAA and over plaintiffs' objections that Penn State is not an indispensable party. To be clear, the Paterno Estate and Mr. Clemens do not seek any monetary damages from Penn State, nor are they asking that the Court order Penn State to take any action. They seek a declaration that they have rights under the NCAA rules that were violated, and that the Consent Decree imposed by the NCAA is null and void.

The First Amended Complaint, at paragraph 17, explains this simply and clearly:

Because the NCAA has successfully argued that Penn State is an indispensable party to certain of the claims set forth below, Plaintiffs have joined Penn State to this action as a nominal defendant. Although Plaintiffs seek modification or rescission of the Consent Decree imposed



by the NCAA Defendants, Plaintiffs seek no direct injunctive or monetary relief against Penn State. As alleged in more detail below, Penn State was at all relevant times and remains a victim of the NCAA Defendants' ongoing misconduct and abuse of power, including but not limited to threats by the NCAA Defendants that Penn State would be subject to the so-called "death penalty" if the Consent Decree were revoked. . . .

During our telephone call, you questioned whether certain parts of the First Amended Complaint could be read to suggest that plaintiffs are seeking direct injunctive or monetary relief against Penn State. That reading is contrary to the express allegations of paragraph 17. If there were any lack of clarity, the history of this litigation, the Court's Order, and the allegations in the First Amended Complaint resolve any confusion concerning plaintiffs' intentions.

Sincerely,

JACKSON LEWIS P.C.



Paul V. Kelly

cc: Alvin H. Clemens
Anthony P. Lubrano
Ryan J. McCombie
Adam J. Taliaferro
John J. Commisso, Esq.

Exhibit B

CentreDaily.com

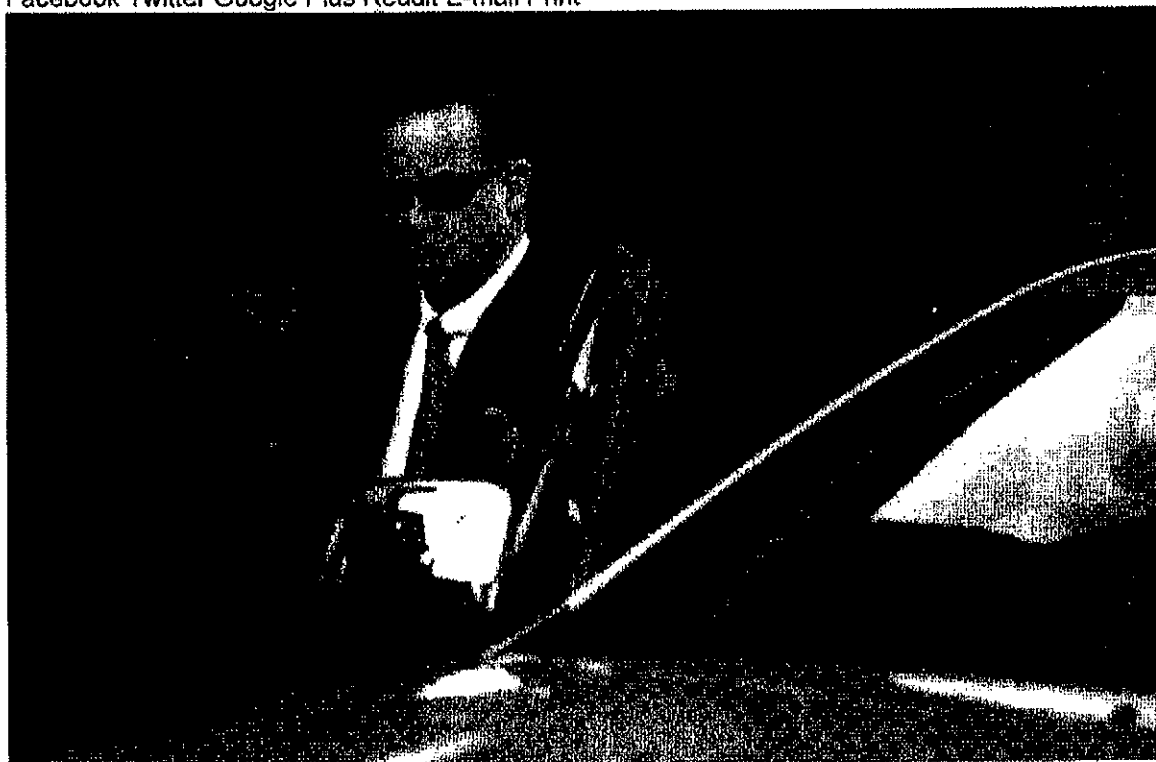
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Paternos name Penn State a 'nominal defendant' in amended complaint against NCAA

By Mike Dawson

mdawson@centredaily.com February 5, 2014

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Paterno family attorney Wick Sollers exits his vehicle before the hearing. Lawyers for the NCAA, Paterno family and Paterno supporters were in Bellefonte, Pa., at the Centre County Courthouse, Tuesday, October 29, 2013, for a court hearing. The lawsuit brought by the Paterno family aims to wipe out the NCAA sanctions against Penn State University. Centre Daily Times/Nabil K. Mark

NABIL K. MARK — CDT photo Buy Photo

Penn State was sued Wednesday by the family of Joe Paterno and their supporters that include four university trustees as they modified their lawsuit against the NCAA to reverse the sanctions for the Jerry Sandusky scandal.

The Paternos' attorney, Wick Sollers, referred to Penn State as a "nominal defendant" for only the claim of breach of contract in the lawsuit. The judge presiding over the case, John Leete, said in an order in October that the count could not be part of the lawsuit unless the university participated, so the plaintiffs decided to sue the university.



"We do not seek any monetary damages from Penn State, nor do we ask that the court order Penn State to take any action," Sollers said. "We ask only for a declaration that the plaintiffs have rights under the NCAA rules that were violated, and that the consent decree imposed by the NCAA is null and void."

The addition of Penn State was among two changes made in the amended complaint filed in Centre County Court. The other change expands on claims that two plaintiffs, former coaches Bill Kenney and Jay Paterno, could not find jobs in coaching because of the NCAA's decision to sanction Penn State.

The lawsuit seeks the reversal of the sanctions that include a \$60 million fine, scholarship reductions, a bowl ban and the erasing of Joe Paterno's 111 wins from 1998 to 2011.

The trustee plaintiffs in the suit are Alvin Clemens, Anthony Lubrano, Ryan McCombie and Adam Taliaferro. Clemens is the only trustee to have served on the board before the Sandusky scandal, and Lubrano has been among the most vocal pro-Paterno voices in the university community since the scandal and the beloved coach's firing in November 2011.

Penn State officials blasted the decision by the Paternos, the trustees and their supporters, saying the university was "deeply disappointed" to be forced into the dispute between them and the NCAA.

"The board (of trustees) has not authorized the individual trustee plaintiffs to sue as trustees or to bring claims on behalf of the university," the university said in a statement. "Due to concerns with serious conflicts of interest that already exist, board leadership urged the trustee plaintiffs to end their involvement in the lawsuit.

"Instead, these conflicts of interest and the harm to the university have been made worse by the actions of the four trustee plaintiffs and others in seeking to force the university to be a party in this litigation."

The statement said Penn State will remain committed to complying with the NCAA's consent decree and an athletics integrity agreement.

In a statement released by the NCAA, chief legal officer Donald Remy said the plaintiffs' decision to sue Penn State is "yet another step backwards" against the university, and he vowed to fight the lawsuit to uphold the consent decree.

"It should be clear what the plaintiffs have just done," he said. "They have sued the very school they say they want to protect, asking for relief that Penn State itself has not sought."

The Paternos and their supporters sued the NCAA to reverse the sanctions, claiming that the national sports organization's leaders bypassed their rulebook when they penalized Penn State for a criminal matter that was being prosecuted in court. That's the basis for the breach of contract claim.

The lawsuit also claims the NCAA's consent decree defamed Clemens, Kenney and Jay Paterno and hurt the Joe Paterno name and reputation.

Last month, the plaintiffs scored a victory when the judge on the case denied many of the NCAA's objections to the claims made in the lawsuit. The judge's ruling allowed the lawsuit to proceed to the discovery phase.

"This lawsuit is extremely important to everyone who wants to know the truth about the mishandling of the Sandusky matter by the NCAA and the university," said Sollers, the Paterno lawyer, on Wednesday. "In short order we expect to gain access to the documents and records in this case and begin deposing the key parties. We welcome the opportunity to explore the record in a full, fair and transparent manner."

Exhibit C

ReedSmith

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February 21, 2014

By U.S. Mail and Email (paul.kelly@jacksonlewis.com)

Paul V. Kelly, Esq.
Jackson Lewis, P.C.
75 Park Plaza
Boston, MA 02116

Re: Estate and Family of Joseph Paterno et al. v. N.C.A.A. et al., Docket No. 2013-2082

Dear Mr. Kelly:

We have been retained by The Pennsylvania State University ("Penn State") to represent it in the above-referenced lawsuit, to which Penn State has now been added as a defendant.

I am writing to respond to your letter to Penn State's General Counsel, Stephen Dunham, dated February 14, 2014. In that letter, you state that "Trustees Ryan McCombie, Anthony Lubrano and Adam Taliaferro have not sued the University, have not brought any claims against the University and are not seeking any relief from the University." You also state that "[t]he only parties that are pursuing claims which involve Penn State are the Estate of Joe Paterno and Al Clemens."

While we appreciate your assurances, as counsel for plaintiffs, as to your intent, I simply cannot square them with your amended pleading. In fact, the above statements are flatly inconsistent with the allegations in the First Amended Complaint. First, Trustees Ryan McCombie, Anthony Lubrano and Adam Taliaferro are, on the face of the First Amended Complaint, plaintiffs to the lawsuit to which Penn State has now been added as a defendant. Second, paragraph 169 of the First Amended Complaint expressly states: "*Plaintiffs* respectfully request the following equitable relief as against the NCAA Defendants *and Penn State*: . . ." (Emphasis added) Nothing in paragraph 169, or anywhere else in the First Amended Complaint, in any way implies or suggests that the term "plaintiffs" does not include Trustees Ryan McCombie, Anthony Lubrano and Adam Taliaferro. To the contrary, they are indisputably plaintiffs to the lawsuit.

Furthermore, the "equitable relief" that "plaintiffs" (not excluding Trustees Ryan McCombie, Anthony Lubrano and Adam Taliaferro) seek in paragraph 169 "as against the NCAA *and Penn State*" includes, but is not limited to, a declaratory judgment that the Consent Decree into which Penn State entered "was unauthorized, unlawful, and void *ab initio*" and includes other unspecified equitable relief against Penn State that "may be necessary to remedy the harm caused by the imposition of the Consent Decree." It is simply undeniable that a declaratory judgment that Penn State acted without authority and that the Consent Decree to which Penn State is a party was unlawful and void "involves" Penn State. Moreover, the equitable relief the First Amended Complaint seeks against Penn State on behalf of *all* plaintiffs is completely open-ended.

In short, your statements that Trustees Ryan McCombie, Anthony Lubrano and Adam Taliaferro "have not sued the University," "are not seeking any relief from the University" and that only the Estate of Joe Paterno and Al Clemens "are pursuing claims which involve Penn State" simply cannot be reconciled with

the very clear statements on the face of the First Amended Complaint. Assuming it to be the case, as you have represented, that Ryan McCombie, Anthony Lubrano and Adam Taliaferro do not intend to sue, bring claims against or seek relief from Penn State, it is manifest that the First Amended Complaint does not accurately reflect their intentions.

Furthermore, although the First Amended Complaint does, for each of the five "counts," identify which plaintiffs are asserting that count, it does not identify the defendants against which that count is being asserted and also does not identify what relief is being sought with respect to that count. Because of this, Penn State is unable to determine which counts of the First Amended Complaint are being directed against it and what relief is being sought in connection with those counts. Thus, an amended complaint should be filed that, for each count, clearly identifies: 1) the plaintiffs who are asserting that count; 2) the defendants that count is being asserted against; and 3) what remedy is being sought for the violations alleged in that count.

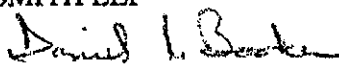
Finally, notwithstanding any amended pleading, it is difficult for us to see how it is possible for Trustees Ryan McCombie, Anthony Lubrano and Adam Taliaferro to remain as plaintiffs in this lawsuit, to which Penn State is now a defendant and which seeks to vacate the Consent Decree to which Penn State is a party, without "pursuing claims that involve Penn State." As you have been informed by Mr. Dunham, Trustees Ryan McCombie, Anthony Lubrano and Adam Taliaferro, and also Trustee Al Clemens, who you agree in your letter *is* asserting a claim against and seeking relief from Penn State, have a clear conflict of interest with Penn State in this lawsuit, and should withdraw as plaintiffs to the lawsuit.

For the sake of clarity, I feel compelled also to observe that the claims asserted and relief sought in the lawsuit are contrary to Penn State's positions. A principal example of this is that Penn State does not seek or support any declaration or finding that the Consent Decree was unauthorized or is unlawful or void. Penn State remains committed to full compliance with the Consent Decree and the Athletics Integrity Agreement. The claims in the lawsuit seek to interfere with the University's contract and other rights, and they are harmful to Penn State's interests.

I would appreciate it if, after reviewing this letter, you would contact me to let me know if plaintiffs will file an amended complaint. As it is unclear to me which plaintiffs are represented by which counsel, I have copied Wick Sollers of King & Spalding, LLP and Thomas Weber of Goldberg Katzman, P.C. on this letter.

Very truly yours,

REED SMITH LLP

By: 
Daniel I. Booker

DIB:cg

cc: Wick Sollers, King & Spalding, LLP (by U.S. Mail and Email)
Thomas J. Weber, Goldberg Katzman, P.C. (by U.S. Mail and Email)

Exhibit D

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DETROIT, MI	MINNEAPOLIS, MN	PROVIDENCE, RI	WHITE PLAINS, NY

February 24, 2014

VIA EMAIL AND FIRST CLASS MAIL

Daniel I. Booker, Esq.
Reed Smith LLP
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222

Re: **Estate and Family of Joseph Paterno et al. v. N.C.A.A. et al., Docket No. 2013-2082**

Dear Mr. Booker:

Thank you for your letter of February 21, 2014 on behalf of Penn State.

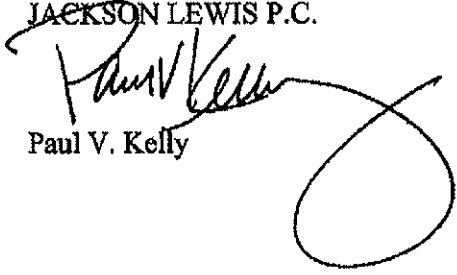
I have conferred with my colleagues at King & Spalding, counsel for the Estate and Family of Joseph Paterno, and we continue to believe that the First Amended Complaint - - read in light of the history of this litigation and the Court's January 6, 2014 Opinion & Order - - is clear. I stand by the statements made in my prior letter to Mr. Dunham (dated February 14, 2014) concerning the status and legal claims of Trustees Clemens, Lubrano, McCombie and Taliaferro.

In response to the final sentence of your letter, and as I have conveyed to Mr. Dunham, Attorney Sollers and Attorney Weber, and their respective firms, are counsel to the Estate and Family of Joseph Paterno. Jackson Lewis P.C. represents all remaining plaintiffs, which includes the Trustees.

While we are exchanging preliminary communications, is your office prepared to acknowledge service of process on behalf of Penn State? If so, please advise and we will call off the process servers.

Sincerely,

JACKSON LEWIS P.C.


Paul V. Kelly

cc: Wick Sollers, Esq.
Thomas J. Weber, Esq.



CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 17th day of March, 2014, a true and correct copy of the foregoing Preliminary Objections was served upon the following counsel via United States mail, first class, postage prepaid:

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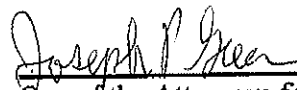
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One of the Attorneys for
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