ORIGINAL

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

GEORGE SCOTT PATERNO,
as duly appointed representative of the
ESTATE and FAMILY of JOSEPH PATERNO;

RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, PETER KHOURY, 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 KENNEY and JOSEPH V. ("JAY") PATERNO,
former football coaches at Pennsylvania State University; and

ANTHONY ADAMS, GERALD CADOGAN,
SHAMAR FINNEY, JUSTIN KURPEIKIS,
RICHARD GRDNER, 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.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
REPLY IN SUPPORT OF DEFENDANTS' PRELIMINARY OBJECTIONS

Filed on Behalf of:

National Collegiate Athletic Association, Mark Emmert, Edward Ray

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Civil Division

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REPLY IN SUPPORT OF DEFENDANTS' PRELIMINARY OBJECTIONS

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PRELIMINARY STATEMENT[1]

Plaintiffs resort to tortured interpretations of the NCAA Bylaws and the case law in an effort to obscure two inescapable facts: they are the wrong plaintiffs and they have sued the wrong defendant. At bottom, Plaintiffs complain about perceived flaws in the investigation conducted by Freeh Sporkin & Sullivan, LLP ("FSS")—an investigation commissioned and accepted by the Board of Trustees ("the Board") of The Pennsylvania State University ("Penn State" or "the University"). But Plaintiffs inexplicably have sued not Penn State or its agent, but the NCAA. Both the nature of Plaintiffs' grievances and the extraordinary relief sought—a declaration voiding the Consent Decree—demonstrate that Penn State is an indispensable party to this suit, and this Court therefore lacks jurisdiction to proceed.

But Plaintiffs' Complaint is defective for a number of other, independent reasons. Plaintiffs have expressed their deep dissatisfaction with the summary resolution process that the NCAA and Penn State agreed to undertake, but they do not plausibly have any standing to challenge that process. Indeed, if Plaintiffs'

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[1] All preliminary objections are asserted on behalf of the NCAA, Dr. Mark Emmert, and Dr. Ray (collectively, "the NCAA"). This memorandum, however, does not address the preliminary objection that Dr. Mark Emmert and Dr. Edward Ray should be dismissed for a lack of personal jurisdiction. Per the Court's August 21, 2013 Order, a schedule for further briefing on personal jurisdiction will be set, if necessary, after this Court's resolution of Defendants' other preliminary objections.

theory of standing were accepted, the NCAA would never be able to reach a negotiated resolution of rules infractions with any member institution. In any event, for the reasons explained in the NCAA's opening Memorandum and below, Plaintiffs fail to state a viable cause of action.

Plaintiffs are obviously deeply disappointed with the Consent Decree and its effect on the legendary football program that they love. But Plaintiffs cannot cobble together a sustainable lawsuit from their sundry misdirected complaints, however sincere their disagreement with the agreed resolution of the Jerry Sandusky matter. The NCAA's Preliminary Objections should be sustained, and the case should be dismissed in its entirety.

ARGUMENT

I. THE COURT LACKS JURISDICTION DUE TO THE ABSENCE OF PENN STATE, AN INDISPENSABLE PARTY

Plaintiffs' action seeks to void a contract to which The Pennsylvania State University ("Penn State") is a party, yet Penn State is conspicuously absent from this action. *See* Mem. in Supp. of Defs.' Prelim. Objs. ("NCAA Mem.") 15-19 (July 23, 2013). The absence of Penn State deprives this Court of jurisdiction. Plaintiffs have two principal responses: (i) they do not seek redress from Penn State, (ii) and Penn State did not receive valid consideration under the Consent Decree. Neither argument is persuasive.

First, Plaintiffs contend that Penn State is not indispensable because Plaintiffs do not seek redress or action from the University. Mem. in Opp'n to Defs.' Prelim. Objs. ("Opp'n") 23-24 (Sept. 6, 2013). Although seeking redress against Penn State would likely be sufficient to render it an indispensable party, it is not *necessary*—particularly in view of Plaintiffs' request for declaratory relief, which manifestly affects Penn State's interests. *See, e.g.*, 42 Pa. Cons. Stat. § 7540(a) ("[A]ll persons shall be made parties who have or claim *any interest* which would be affected by the declaration ...." (emphasis added)); *Mechanicsburg Area Sch. Dist. v. Kline*, 494 Pa. 476, 431 A.2d 953 (1981) (identifying factors for determining whether a party is indispensable, without consideration of redress or action requested of the absent party).

None of the cases on which Plaintiffs rely purports to establish a general rule that a party is never an indispensable if redress is not sought from it. And, significantly, none of those cases involved a claim for declaratory relief under Pennsylvania law that sought to nullify a contract to which the absent litigant is a party. The rule in Pennsylvania is clear: a party to a contract is indispensable to an action seeking to void or enjoin a contract or to define a party's contractual interests. *See, e.g., Bracken v. Duquesne Elec. & Mfg. Co.* 419 Pa. 493, 495, 215 A.2d 623, 624 (1966) (parties to a contract were indispensable to an action defining their contractual rights); *Polydyne, Inc. v. City of Phila.*, 795 A.2d 495,

496 (Pa. Commw. Ct. 2002) (party to a contract was indispensable to an action seeking to enjoin performance of that contract); *E-Z Parks, Inc. v. Phila. Parking Auth.*, 103 Pa. Commw. 627, 521 A.2d 71 (1987) (party to a contract was indispensable to an action seeking to void that contract); *Borough of Wilkinsburg v. Horner*, 88 Pa. Commw. 594, 597, 490 A.2d 964, 965 (1985) (party to a contract was indispensable to an action seeking to enjoin performance of that contract); *Posel v. Redevelopment Auth. of City of Phila.*, 72 Pa. Commw. 115, 121, 456 A.2d 243, 246 (1983) (same); *ESP Enters., LLC v. Garagozzo*, No. 4218 JAN.TERM 2005, 2005 WL 1580049, at *4-5 (Pa. Ct. Com. Pl. June 27, 2005) (parties to a contract were indispensable to an action seeking a declaration that the contract was void); *Lutz v. Vill. 2 at New Hope, Inc.*, 71 Pa. D. & C.2d 595, 621 (Ct. Com. Pl. 1973) (party to a contract was indispensable because it would be "directly and seriously affected" by an action seeking a "declaration of the invalidity" of the contract); *Coxe v. Commonwealth*, No. 386, 1964 WL 1403, at *5 (Pa. Ct. Com. Pl. Mar. 24, 1964) ("[S]ince performance [of the contract] is sought to be enjoined, it is *necessary* that all parties to said contract be made parties to this action." (emphasis added)).[2]

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[2] Plaintiffs attempt to distinguish *E-Z Parks* and *Bracken* by arguing that the courts in those cases identified additional interests the absent parties had beyond being party to a challenged contract. *See* Opp'n 28-29. But each case is clear that

Americus Centre, Inc. v. City of Allentown and *Sprague v. Casey* are not to the contrary. *See* Opp'n 26-27. In *Americus*, the court held that the absent party did not have a contractual right because no contract had ever been executed. 112 Pa. Commw. 308, 313-14, 535 A.2d 1200, 1202-03 (1988) (noting absent party would have been indispensable if it had had an "actual contractual ... interest"). And in *Sprague*, unlike this case, it was indisputable that the absent party stood only to benefit from the plaintiff's requested relief. 520 Pa. 38, 48-49, 550 A.2d 184, 189 (1988).

As the Pennsylvania Supreme Court has explained, "[i]t cannot be the law that a party may be deemed essential only if the plaintiff specifically alleges that the party engaged in wrongdoing or seeks relief directly involving such party." *City of Phila. v. Phila. Parking Auth.*, 568 Pa. 430, 437-38, 798 A.2d 161, 166 (2002) (Castille, J., concurring) (per curiam). "Under such a rule, a plaintiff could, through intentionally incomplete or tactical pleading, effectively preclude the joinder of a party whose rights are directly at issue and could be prejudiced by the litigation." *Id.* Plaintiffs' artful pleading, therefore, does not change the analysis.

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the absent parties were indispensable simply because they had a right in the contract in question. The other interests were additional and independent reasons the absent parties were indispensable. *See Bracken*, 419 Pa. at 495, 215 A.2d at 624; *E-Z Parks*, 103 Pa. Commw. at 632-33, 521 A.2d at 73.

Second, Plaintiffs argue that their requested relief would not impinge any of Penn State's interests because Penn State did not receive consideration in exchange for its obligations under the Consent Decree. Opp'n 25-29. That argument is specious. By entering into the Consent Decree, Penn State was able to avoid potentially harsher sanctions and a protracted investigation and hearings, with all of the attendant negative publicity, renewed discussion of the Sandusky scandal, and harm to recruiting and alumni support that comes from the long process and uncertain outcome. *See* NCAA Mem. 17-18; Consent Decree between Penn State and NCAA at 1-9 (July 23, 2013) ("Consent Decree"), Ex. B to Compl.

Plaintiffs' argument hinges on the false premise that the NCAA was not actually authorized to impose *any* penalty on Penn State. Opp'n 25-26 (noting "any consideration supposedly received by Penn State was illusory," and "the relief sought ... can inure only to Penn State's benefit"). But it is Penn State—not Plaintiffs—that would have to challenge the NCAA's authority in this regard. *See* Part *infra* at Part II. The argument, in short, simply demonstrates the indispensability of Penn State.[3]

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[3] Whether Penn State's conduct constitutes a violation of NCAA's rules is a matter on which the NCAA's judgment receives substantial deference. *See infra* at Part II.A. If Plaintiffs were to prevail in their attempt to void the Consent Decree, the NCAA could choose to resort to its traditional enforcement procedures to

In addition, this also does not address the NCAA's two additional and independent bases to determine the University is indispensable: Plaintiffs' challenge to the University's authority and challenge to the role and responsibilities of the office of the University President. *See* NCAA Mem. 18-19. Plaintiffs argue that they do not challenge Penn State's ability to waive its own rights. Opp'n 29. But Plaintiffs' arguments denying the authority of the NCAA and Penn State officials to accept the Freeh Report findings and to enter into a summary resolution of Penn State's infractions demonstrate the falsity of this argument. *See e.g.*, Opp'n 4, 20, 24, 26, 40-41, 43, 48-49; Compl. ¶¶ 105-28, 109, 119, 147-53. Plaintiffs also have no response to the fact that they are separately challenging President Erickson's authority and, indeed, they concede as much by characterizing his conduct as "ultra vires." Opp'n 29.

Finally, Plaintiffs misstate the law when they suggest that the NCAA must demonstrate that Penn State cannot be joined. *Plaintiffs* bear the "burden of proving that all interested persons have been made parties to the action." *Moraine Valley Farms, Inc. v. Connoquenessing Woodlands Club, Inc.*, 296 Pa. Super. 277, 281, 442 A.2d 767, 769 (1982). And when plaintiffs fail to join indispensable parties, as here, courts routinely dismiss actions. *See, e.g., Consol Pa. Coal Co. v.*

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evaluate Penn State's conduct anew—an outcome Penn State obviously sought to avoid (and did avoid) by agreeing to the Consent Decree. *See* Consent Decree at 1.

Farmers Nat'l Bank of Claysville, 600 Pa. 620, 969 A.2d 565 (2009) (remanding quiet title action with direction to dismiss for failure to join an indispensable party); *Pilchesky v. Doherty*, 941 A.2d 95, 101 (Pa. Commw. Ct. 2008) ("Failure to join or serve parties as required by the statute is a jurisdictional defect" and requires "dismissal."); *E-Z Parks,* 103 Pa. Commw. 627, 632, 521 A.2d 71, 73 (1987).

Penn State is an indispensable party, and this Court therefore lacks jurisdiction.[4]

II. PLAINTIFFS ARE NOT ENTITLED TO A DECLARATORY JUDGMENT VOIDING THE CONSENT DECREE

Even if Plaintiffs have third-party rights under the *NCAA Bylaws* (they do not, *see infra* Part III), they cannot claim to be third-party beneficiaries to the *Consent Decree* and, therefore, cannot challenge the validity of the Consent

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[4] Penn State is indispensable to all claims asserted because each claim is tied to the ultimate relief Plaintiffs seek—voiding the Consent Decree. In their breach of contract (Counts I and II) and civil conspiracy (Count VI) claims, they claim that the Consent Decree is void because it is allegedly an improper extension of the NCAA's authority under the Bylaws. And in Plaintiffs' tortious interference (III), defamation (V), and commercial disparagement (IV) claims, the allegedly defamatory and disparaging statements in the Consent Decree are the basis for Plaintiffs' argument that they have standing to void the Consent Decree. To the extent the Court believes that Penn State is an indispensable party to some claims but not others, it should dismiss those claims to which it finds Penn State is indispensable. *See Pa. Sch. Bds. Ass'n v. Commonweath Ass'n of Sch. Adm'rs, Teamsters Local 502*, 696 A.2d 859, 868 (Pa. Commw. Ct. 1997) (holding the governor was an indispensable party to some counts, but not as to other counts).

Decree. Plaintiffs argue that they can void the Consent Decree because: (i) they have suffered direct, immediate injury resulting from the Consent Decree; (ii) the NCAA lacked authority to enter into the Consent Decree; and (iii) the Consent Decree was imposed through impermissible coercion and unlawful threats. None of these arguments has merit.

Plaintiffs argue that they have standing to seek to void the entire Consent Decree because statements made in the Consent Decree—not the sanctions imposed by the Consent Decree—"target[ed]" them and caused them direct, immediate, and substantial injury. Opp'n 47-48. But Plaintiffs have not identified any individualized harm. *See* NCAA Mem. 33-34 (citing *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 204, 888 A.2d 655, 660 (2005). Their injury is indistinguishable from that of any member of the Penn State community referenced in the Consent Decree. In any event, Plaintiffs' arguments for voiding the Consent Decree have nothing to do with the statements about which they complain; the basis for their requested relief is the manner in which the agreement was made. Opp'n 45-51. Plaintiffs, therefore, do not have "a substantial, direct, and immediate interest in the outcome of the litigation."[5] *Pittsburgh Palisades*

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[5] The statements at issue came directly from the Freeh Report, and Plaintiffs have failed to establish that striking down the Consent Decree would remedy their

Park, 585 Pa. at 204, 888 A.2d at 660.

Regarding the Board of Trustees members, Plaintiffs argue that they are responsible for overseeing the University's administration, and therefore Messrs. McCombie, Lubrano, Clemens, and Taliaferro have an interest in the Consent Decree's postseason ban, $60 million fine, and the other sanctions imposed. Even if the Board had an interest in declaring the Consent Decree void, the Board is not a plaintiff here. These Plaintiffs are four individual Board members. They do not represent the Board,[6] and they do not personally have an interest sufficient to confer standing.

Additionally, Plaintiffs do not have standing to void the entire Consent Decree because they were not parties to the agreement. Plaintiffs argue, again, that the NCAA lacked authority to enter into the Consent Decree and employed

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alleged injury. Any order striking down the Consent Decree would not impact the factual findings of which Plaintiffs complain.

[6] *See* Peter Jackson, *Penn State: Student Trustee Withdrawing from Paterno Family Lawsuit against NCAA Had a Choice*, Associated Press (Aug. 20, 2013), *available at* http://collegefootball.ap.org/article/penn-state-board-student-trustee-had-choice (board leadership asked the trustee Plaintiffs to withdraw from this litigation because his position was in conflict with the interests of Penn State). Consideration of this article is appropriate because evidence outside the record is permissible for a preliminary objection brought for a lack of standing under Pennsylvania Rule of Civil Procedure 1028(a)(5). *See* Pa. R.C.P. 1028(b)(2) official note ("Preliminary objections raising an issue under subdivision (a)(1), (5), (6), (7), or (8) cannot be determined from facts of record."); Pa. R.C.P. 1028(b)(2) ("If an issue of fact is raised, the court shall consider evidence by deposition or otherwise.").

coercion and unlawful threats against Penn State to do so. Opp'n 48-49. However, only Penn State has standing to challenge the NCAA's authority and contest the means by which the contract was entered into. *Souders v. Bank of Am.*, No. 1:CV-12-1074, 2012 WL 7009007, at *9-10 (M.D. Pa. Dec. 6, 2012) (recommending that the court dismiss with prejudice plaintiff's claim for improper assignment because she was not a party or third-party beneficiary of the contract); *Shuster v. Pa. Tpk. Comm'n*, 395 Pa. 441, 451, 149 A.2d 447, 452 (1959) (stating that one who is not a party to a contract should not be allowed to challenge the validity of the contract); *Amica Mut. Ins. Co. v. Fassarella Pro Painting & Design, LLC*, No. FSTCV106003636S, 2011 WL 3338236, at *14 (Conn. Super. Ct. July 8, 2011) (""The general rule is that only a party (actual or alleged) to a contract can challenge its validity .... Obviously, the fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract.'" (quoting *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 138, 655 N.W.2d 390, 397 (2003)) (alteration in original)). None of the cases Plaintiffs cite allows an outside party to void a contract. *See* Opp'n 49-50.

In addition to the standing deficiency, Plaintiffs' request to void the Consent Decree finds no support in the law of contracts. The remedies for a breach of contract claim are damages, restitution, and specific performance. Restatement (Second) of Contracts § 345; *HEM Research, Inc. v. E.I. Dupont De Nemours &*

Co., No. 89-4572, 1990 WL 7429, at *3 (E.D. Pa. Jan. 30, 1990). Thus, even if Plaintiffs have stated a claim for breach of contract (which they have not), the proper remedy would be money damages, not nullification of the Consent Decree (an entirely *different* contract). Therefore, their request for a declaratory judgment should be struck. *See Diess v. Pa. Dep't of Transp.*, 935 A.2d 895, 909 (Pa. Commw. Ct. 2007) (striking part of the prayer for relief because plaintiffs were not entitled to such relief); *Danlin Mgmt. Grp., Inc. v. Sch. Dist. of Phila.*, No. 4527JAN.TERM2005, 2005 WL 2140314, at *3 (Pa. Ct. Com. Pl. Aug. 29, 2005) (striking all references to equitable relief from complaint because plaintiffs were not entitled to such relief).

III. PLAINTIFFS DO NOT HAVE STANDING TO ASSERT A CLAIM FOR BREACH OF CONTRACT

Plaintiffs' breach of contract claims are based on a novel legal theory that anyone who is affected by NCAA sanctions, no matter how tangentially, is a third-party beneficiary to the NCAA Constitution and Bylaws ("NCAA Bylaws" or "Bylaws") with standing to challenge the sanctions, and with additional rights vested in any person who is named as having some involvement in the conduct underlying the sanctions. Opp'n 33, 42. Plaintiffs' theory finds no support in legal precedent or NCAA practice and acceptance of their view would mean that the NCAA would never be able to enter into a consensual, summary resolution of infractions matters, even upon the consent of the university and the NCAA.

Plaintiffs are not third-party beneficiaries to the Bylaws, and in any event have no standing to seek relief in the form of voiding the Consent Decree.

A. Plaintiffs Fail To Establish That Paterno And Clemens Are Third-Party Beneficiaries To The NCAA Bylaws

Coach Paterno and Al Clemens—who were not sanctioned or facing sanctions in connection with the Consent Decree—argue they are "involved individuals" under the NCAA Bylaws because they were directly or indirectly referenced in the Consent Decree and that, therefore, they are entitled to enforce *all* NCAA Bylaws. Plaintiffs' arguments are without merit. Plaintiffs cannot simply invent their own self-serving interpretation of the Bylaws—a contract to which they are not even a party—and then unilaterally assert the NCAA breached it.

First, Plaintiffs incorrectly assert that the Bylaws' procedural protections extend to individuals named in investigations, and not only those under the threat of sanction. Neither Bylaw 32.6.2 nor anything else in the Bylaws suggests that persons who are merely named somewhere in a document announcing sanctions are "involved individuals." Bylaw 32.6.2 simply imposes a procedural requirement that involved individuals should be notified of the "allegations in which they are named." NCAA Academic and Membership Affairs Staff, *2011-12 NCAA Division I Manual* art. 32.6.2 (2011) ("Manual"), Ex. A to Compl. Involved individuals are given notice and other procedural rights so that they may challenge, dispute, and possibly avoid sanctions. Those protections are not warranted for

individuals—such as Coach Paterno and Mr. Clemens—who are not under the threat of sanction or at risk of an official NCAA finding that they violated an NCAA rule. *See* Decl. of Mark Emmert in Supp. of Defs.' Prelim. Objs. ("Emmert Decl.") ¶ 8 (July 22, 2013), Ex. 1 to Defs.' Prelim. Objs. (July 23, 2013); Manual art. 32.10.1.2. Nothing in the Bylaws requires the NCAA to provide procedural protections to persons who are not subject to sanctions; rather, they "merely provide[] that in the event [the NCAA] decides to impose discipline ..., it must follow certain procedures in doing so." *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 711-12 (D. Vt. 2012). To interpret it otherwise would be to read terms into a contract that are not otherwise provided. *Id.* at 712.

Plaintiffs cannot provide a single instance in which the NCAA has interpreted "involved individual" in such broad fashion, *see* Emmert Decl. ¶ 8, and the NCAA's historical interpretation of "involved individual" is due considerable deference. *See Musicians' Protective Union Local No. 274 v. Am. Fed'n of Musicians*, 329 F. Supp. 1226, 1236 (E.D. Pa. 1971) ("The practical and reasonable construction of the Constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." (internal quotation marks and citation omitted)); *see also Harrisburg Sch. Dist. v. Pa. Interscholastic Athletic Ass'n,* 453 Pa. 495, 502, 309 A. 2d 353, 357 (1973) ("[J]udicial interference in the affairs of private

associations is the rule rather than the exception."); *Baker-Bey v. Delta Sigma Theta Sorority, Inc.*, No. 12-1364, 2013 WL 1742449 (E.D. Pa. Apr. 23, 2013) (observing that "courts will ordinarily not interfere with the management and internal affairs" of a voluntary membership organization" (internal citation and quotation marks omitted)). Courts have historically afforded the NCAA significant leeway in enforcing its rules and regulations given that those rules reflect "society's general interests in promoting fairness, honesty and morality." *See, e.g.*, *Bassett v. NCAA*, No. 5:04-425-JMH, 2006 WL 1312471, at *6-7 (E.D. Ky May 11, 2006).

Second, Plaintiffs argue that Coach Paterno was "sanctioned" under the Consent Decree because the Consent Decree allegedly falsely accused him of horrific conduct and stated that his record would reflect the vacated wins. As an initial matter, Coach Paterno was not alive to have undergone an investigation and been sanctioned. Further, statements contained in the "Findings and Conclusions" section of the Consent Decree are just that—statements, not sanctions (which are contained in a distinct section of the Consent Decree). *See* Merriam-Webster Dictionary (2013), *available at* http://www.merriam-webster.com/dictionary/sanction (defining "sanction" as "the detriment, loss of reward, or coercive intervention annexed to a violation of a law as a means of enforcing the law"). The NCAA Bylaws expressly enumerate what penalties

constitute NCAA sanctions—*i.e.*, disciplinary actions taken against student athletes or institutional members. *See* Manual art. 19.5 (listing, *e.g.*, reduction in scholarships, suspension, institutional fine, etc.). Simply because an individual may be impacted by a sanction imposed on another entity does not render him or her an involved individual. The NCAA was also expressly clear in the Consent Decree that it was *not* imposing sanctions on any individual. Consent Decree at 6 ("NCAA reserves the right to initiate a formal investigatory and disciplinary process and impose sanctions on individuals after the conclusion of any criminal proceedings related to any individual involved.").

Plaintiffs assert that the vacation of wins was a sanction against Coach Paterno personally, regardless of what the NCAA intended. Opp'n 34. This is factually incorrect. The NCAA's rules and historical practice are clear: the vacation of wins—even when a head coach is referenced—is an *institutional* sanction. *See* NCAA Mem. 25-26 & n.11 (citing Manual art. 19.5.2 and specific examples of instances in which a head coach's record reflected the vacation of wins even when the coach was not charged with improper conduct). Indeed, it was a vacation of *team* wins—*i.e.*, wins belonging to the program—they are not Coach Paterno's personal wins. The fact that Coach Paterno's win record was affected by the sanction does not render it an individual sanction. Irrespective of whether a coach was in any way involved with the wrongdoing, a vacation of wins for

institutional misconduct affects the coach's record. Additionally, the NCAA's understanding that the vacation of wins is a sanction on the institution, not the coach, is anything but irrelevant. Not only is the NCAA's interpretation of its Bylaws given deference, *see supra*, but the intent of the contracting parties is the *controlling determination* in identifying a third-party beneficiary. *Scarpitti v. Weborg*, 530 Pa. 366, 370-73, 609 A.2d 147, 149-51 (1992). As past practice indicates, the NCAA never intended to confer third-party beneficiary status on individuals who are not under investigation or under a threat of potential individual sanctions. Plaintiffs have offered nothing to the contrary.

Plaintiffs attempt to demonstrate a deprivation of Coach Paterno's rights because the NCAA failed to interview him in the two months between the indictment of Sandusky and Coach Paterno's death. Opp'n 36. The NCAA had not yet begun any investigation, however, before Coach Paterno unexpectedly passed because the NCAA was waiting for the release of the Freeh Report before doing so. *See* Compl. ¶ 54. Plaintiffs cannot explain how the NCAA could have afforded Coach Paterno procedural protections in a formal investigation after his death.

Plaintiffs' contrary argument rests on cases that are factually far afield from the present situation in which the purported rights are intrinsic to the decedent himself. *E.g.*, *In re Wartanian's Estate*, 305 Pa. 333, 335-36, 157 A. 688, 688-89

(1931) (discussing whether a contract for tenancy survives one's death); *In re Pierce's Estate*, 123 Pa. Super. 171, 178, 187 A. 58, 61 (1936) (discussing the survivability of a contract for financial support). Indeed, *Pierce's Estate* makes clear that any rights Coach Paterno may have had under the NCAA rules should not survive his death. The court stated that a contract of a decedent can survive only when (1) it is not personal to the decedent, (2) it imposes a general duty that anyone can do, such as the payment of money, or (3) when it is the clear intention of the contracting parties that it survive. *Pierce's Estate*, 123 Pa. Super. at 178, 187 A. at 61. Here, the rights at issue—procedural rights provided to involved individuals—are entirely personal.

Third, Plaintiffs argue that Mr. Clemens is an involved individual because he was a "well-known" member of the Board of Trustees mentioned in the Consent Decree. Opp'n 37-38. As discussed above, a mere statement in the "Findings and Conclusions" section is not a sanction and does not vest a person with procedural rights. Moreover, Mr. Clemens was one of more than two dozen trustees from a three-year period more than fifteen years ago—not readily identifiable, personally, as the object of any particular statement. *See infra* at Part II.A. The idea that Mr. Clemens is an involved individual vested with procedural rights under the Consent Decree is ridiculous.

Fourth, Plaintiffs argue that, if they are third-party beneficiaries, they have

standing to enforce the entirety of the Bylaws because "a third-party beneficiary's rights and limitations in a contract are the same as those of the original contracting parties." Opp'n 40 (internal quotation marks and citation omitted). Plaintiffs tell only half of the story. Although a third-party beneficiary may have standing to enforce a contract on par with those of the contracting parties, that principle holds true only for those provisions made expressly for the third-party beneficiary's benefit. *See* NCAA Mem. 27-28. As the sanctioned party, only Penn State has standing to assert that (1) the NCAA did not have the authority to initiate an enforcement action because the conduct did not violate the Bylaws; (2) the Consent Decree was forced on Penn State; or (3) Penn State's procedural rights were violated. *See* Compl. ¶¶ 73, 77, 82, 89. Even if Plaintiffs were involved individuals, then at most they could enforce only the rights afforded such individuals (*e.g.*, an opportunity to participate in proceedings, defend themselves, and appeal).

Plaintiffs also argue that all rights afforded to Penn State affect their rights too. Specifically, they state:

> For example, if the NCAA could bypass the enforcement process by using the policy-making power of the Executive Committee and rely entirely on reports prepared by third parties, it would infringe involved individuals' rights to, among other things, receive a notice of allegations, have counsel present at all stages of the proceedings, and appeal any adverse findings. The right to have enforcement staff conduct a thorough investigation is as much the right of involved individuals as it is the institution's.

Opp'n 40. These sentences are damning. They make clear that Plaintiffs believe the NCAA and a member institution could never enter into a negotiated, consensual resolution—because to do so would be to deprive named or connected individuals of supposed process rights. The university would always have to endure a lengthy investigation and hearings, with the attendant discussion of unflattering facts and a hit to its recruiting and alumni support due to the negative publicity and uncertainty of the infractions process.[7]

Finally, Plaintiffs argue that they were harmed by *not* being identified as "involved individuals" because the Consent Decree contained negative statements about them. *Id.* at 41. Plaintiffs complain, in effect, that they were *not* labeled as suspects under investigation and potentially subject to personal sanctions. The argument is absurd on its face. In any event, even if the NCAA had pursued a traditional enforcement process, and even if it then reached a different conclusion, the statements in the Freeh Report (which finds the underlying facts) would stand.

B. Plaintiffs Fail To Establish That The Remaining Plaintiffs Are Third-Party Beneficiaries To The NCAA Bylaws

Plaintiffs have presented no case law supporting their novel their theory that uninvolved and unnamed individuals aggrieved by NCAA sanctions have rights as

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[7] This point is also premised on an overbroad definition of "involved individual," as discussed, *supra* at Part II.A. Further, it demonstrates, once again, that Penn State is an indispensable party because Plaintiffs are challenging Penn State's very ability to enter into the Consent Decree. *Supra* at Part I.

third-party beneficiaries to the NCAA Bylaws. They also cannot explain how their strained theory does not open the door for any individual having a connection to a sanctioned institution to initiate litigation against the NCAA merely because the sanctions have affected him or her in some way.

Plaintiffs assert that their interpretation of the Bylaws would not open the floodgates to challenges to the severity of NCAA sanctions because this is a unique situation. Opp'n 43-44. But Plaintiffs' challenge to the severity of sanctions is a challenge to their fairness. *Id.* at 41. There is nothing unique about these Plaintiffs even if the horrific nature of the wrongdoing that occurred is unique. Plaintiffs are simply a few people out of hundreds, or thousands, of former players, coaches, and Board members who feel aggrieved by the NCAA sanctions. Indeed, Plaintiffs' argument that the Consent Decree "indicts 'the entire Penn State community,'" *id.* at 43 (citation omitted), only reinforces the point—in Plaintiffs' view, any member of the community, including any student, alumnus, faculty member, or even a die-hard fan would have standing.[8]

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[8] Plaintiffs make too much of Dr. Ray's statement that he "did not ... even consider Plaintiffs during the sanctioning process" in attempting to characterize this as an admission that the NCAA had not followed its own procedures. *See* Opp'n 42; Decl. of Dr. Edward Ray in Supp. of Defs.' Prelim. Objs. ¶ 8 (Jul. 19, 2013). Dr. Ray's statement merely demonstrates that he did not specifically consider these specific individual Plaintiffs during the sanctioning process, which

Plaintiffs assert that courts have recognized third-party beneficiary status under the NCAA rules. *Id.* at 44-46. The cases on which they rely are readily distinguishable, as each involved student-athletes who had been personally sanctioned or who were individually facing disciplinary proceedings by the NCAA.[9] Plaintiffs can point to no authority (and the NCAA is aware of none) in which a court deemed an uninvolved individual a third-party beneficiary to an athletic association's bylaws.

Plaintiffs' attempt to downplay the significance of *Knelman*, falls flat. Opp'n 44-45. The court refused to recognize that the plaintiff student-athlete was a third-party beneficiary to the NCAA Bylaws because "although a few courts have recognized intended third-party beneficiary status based upon the relationship between a member institution and the NCAA, these cases are confined to enforcement of NCAA's eligibility requirements." *Knelman*, 898 F. Supp. 2d at

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reinforces the point that Plaintiffs are not intended third-party beneficiaries of the NCAA Bylaws.

[9] *Bloom v. NCAA*, 93 P.3d 621 (Colo. Ct. App. 2004) (plaintiff was a student-athlete who filed a declaratory judgment regarding his eligibility); *Oliver v. NCAA*, 155 Ohio Misc. 2d 17, 920 N.E.2d 203 (Ct. Com. Pl. 2009) (plaintiff was a student-athlete who had been sanctioned by the NCAA); *Tiffany ex rel. Tiffany v. Ariz. Interscholastic Ass'n*, 151 Ariz. 134, 726 P.2d 231 (Ct. App. 1986) (plaintiffs brought action after Arizona Interscholastic Association refused to grant him a hardship waiver from its nineteen-year-old eligibility rule); *Rose v. Giamatti*, No. A8905178, 1989 WL 111447 (Ohio Ct. Com. Pl. June 26, 1989) (plaintiff brought motion for a temporary restraining order because he was being subjected to unfair disciplinary proceedings).

715; *see also Global Energy Consultants LLC v. Holtec Int'l, Inc.*, No. 08-5827, 2011 WL 3610418, at *3-4 (E.D. Pa. Aug. 17, 2011), *aff'd*, 479 F. App'x 432 (3d Cir. 2012). Plaintiffs also point to paragraphs in the Bylaws pertaining to procedures for enforcement proceedings, but these have nothing to do with the uninvolved Plaintiffs. Plaintiffs concede that they are not owed the same procedural protections as "involved individuals," and that their claim is based on the NCAA violating its obligation to "provide fairness." Opp'n 42. That provision is not sufficiently specific or concrete to serve as the basis for a breach of contract claim. *Natale v. Winthrop Res. Corp.*, No. 07-4686, 2008 WL 2758238, at *9 (E.D. Pa. July 9, 2008) (finding that a promise by employer to "do everything possible to assist" was too vague and indefinite because it provides no basis on which the court could determine whether the agreement has been kept or broken); *Morris v. Brandeis Univ.*, 60 Mass. App. Ct 1119, 804 N.E.2d 961 n.6 (2004) (finding that generalized representations to treat students with "fairness and beneficence" were "too vague and indefinite" to be enforceable).

IV. PLAINTIFFS HAVE NOT STATED A CLAIM FOR DEFAMATION

As explained in the NCAA's opening Memorandum (at 35-54), none of the allegedly defamatory statements was directed at Plaintiffs or could reasonably be understood as referring to particular Plaintiffs. Plaintiffs have no persuasive response to that point, and it is fatal to their defamation claim. Moreover, also as

explained in the NCAA's Memorandum, the identified statements are expressions of opinion that the NCAA and FSS drew from facts that were publicly disclosed, and are therefore not actionable. Finally, Plaintiffs (excepting the faculty members) are public figures, and Plaintiffs have not adequately alleged actual malice. Plaintiffs' various responses to these points are unavailing.

A. The Challenged Statements Are Not Reasonably Understood As Referring to Plaintiffs

As discussed in the NCAA's Memorandum, a defamation claim cannot stand if the communication cannot "'reasonably be understood as referring to the plaintiff.'" NCAA Mem. 37 (quoting *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 (E.D. Pa. 1983)). Plaintiffs' only connection to the challenged statements is that they are members of large groups to which the statements refer. *See* NCAA Mem. 39-43. If all Plaintiffs—including a few faculty members out of thousands, and a few football players out of hundreds, if not thousands—can sustain a defamation action in light of the broad objects of the challenged statements, then this requirement of Pennsylvania defamation law would be meaningless.

Plaintiffs' entire argument is that they are readily identifiable members of the defamed groups because they are public figures, the groups are highly visible, and recipients of the statements will conduct research and be able to identify them as members of the football program or Board of Trustees. *See generally* Opp'n 68-74. At the outset, these arguments ignore Plaintiff faculty members who are not

public figures; any nexus those Plaintiffs have to the statements is no different than any member of the broader Penn State community. *See* NCAA Mem. 47.

Moreover, Plaintiffs misunderstand the law. The legal standard does not inquire whether a plaintiff is a particularly "identifiable" (as in high-profile) member of a defamed *group*, but rather whether the plaintiff personally is reasonably identified as *the object of the statement* when it is directed towards a class or group. *See Schonek v. WJAC, Inc.*, 436 Pa. 78, 83, 258 A.2d 504, 507 (1969). A defamation claim cannot survive a preliminary objection unless "the defamatory publication can reasonably be interpreted as referring *to a particular complainant*." *Farrell v. Triangle Publ'ns, Inc.*, 399 Pa. 102, 106, 159 A.2d 734, 737 (1960) (emphasis added). Membership alone may be relevant if the group is so small that it is reasonable to infer that the speaker intended to attribute certain qualities, beliefs, or acts to every member. *Klauder v. Phila. Newspapers, Inc.*, 66 Pa. D. & C.2d 271, 277 (Ct. Com. Pl. 1973). But even with a small group, "statements which disparage [the group qua group] may not serve as a basis for an individual defamation claim unless a reader could reasonably connect them to the complaining individual." *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1016 (3d Cir. 1994); *cf. O'Neill v. Motor Transp. Labor Relations, Inc.*, 41 Pa. D & C.2d 242, 246 (Ct. Com. Pl. 1966) (dismissing preliminary objection because all 124 plaintiffs were specifically named in the defamatory publication and noting

that a very large group can sustain a cause of action when each "***was specifically named and identified***." (emphasis added)).

Plaintiffs argue that *Farrell* only excludes a cause of action for defamation of an entire profession, as opposed to a group with members who are either readily identified or, through investigation, could be identified.[10] Opp'n 69-72 (citing *Farrell*, 399 Pa. at 109, 159 A.2d at 738-39). *Farrell* is not so limited. *See Farrell*, 399 Pa. at 104-05, 159 A.2d at 736-37. In *Farrell*, the court reasoned that statements about a scandal within a township commission were actionable because they involved a small and discrete commission with only thirteen members, and the nature of the comments implicated every member by stating that they would each be questioned by authorities. *Id.* at 109, 159 A.2d at 739. Further, the Pennsylvania Supreme Court subsequently dismissed an action because the challenged statements targeted a "truth committee" (not a profession), which may have numbered in the several hundred. *Schonek*, 436 Pa. at 83-84, 258 A.2d at 507.

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[10] Plaintiffs also cite *Zelik v. Daily News Publishing Company*, 288 Pa. Super. 277, 431 A.2d. 1046 (1981). Opp'n 73-74. *Zelik* involved a defamatory statement about a specific (though unnamed) teacher, and the plaintiff was the only teacher who fit the identifying features in the statement. 288 Pa. Super. at 283-84, 431 A.2d at 1049.

Under Plaintiffs' view, a statement directed at a group generally will always be actionable with respect to any member of the group that is a public figure. Defamation of a highly visible group, like a sports team, also would necessarily create a cause of action in any of its individual members, regardless of the content of the statement. That is not the law, and Plaintiffs cite no case suggesting it is.

Nor do Plaintiffs posit any other theory of nexus between the challenged statements and themselves, relying instead on generalized assertions that fail to take on the statement-by-statement analysis offered in the NCAA's opening Memorandum. *See, e.g.*, Opp'n 71 ("*[T]he defamatory statements* here have a sufficient 'nexus' to *individual plaintiffs*." (emphases added) (citation omitted)).[11]

As discussed in the NCAA's Memorandum, *Statements 3, 4,* and *5* refer only to the general Penn State community. *See* NCAA Mem. 35-36, 40-41 (quoting the five challenged statements). The Complaint's lone allegation that recipients would

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[11] The NCAA respectfully requests that if the Court is not inclined to dismiss the defamation claim in its entirety, that in its order it clarify which allegedly defamatory statements survive and with respect to which Plaintiffs. Defamation claims rise and fall on the specific statements that were made and the harm suffered by individual Plaintiffs. Thus, the NCAA needs this information in order to have adequate notice of the claims against which it must defend itself. *See Baker v. Lafayette Coll.*, 516 Pa. 291, 532 A.2d 339 (1987) (considering each allegedly defamatory statement independently); *Moses v. McWilliams,* 379 Pa. Super. 150, 170, 549 A.2d 950, 960 (1988) ("A complaint for defamation must, on its face, identify specifically what allegedly defamatory statements were made, and to whom they were made.").

understand the statements as referring to Plaintiffs is premised on Plaintiffs' membership in the general Penn State community between 1998 and 2011—a class of hundreds of thousands. *Id.* at 40 (quoting Compl. ¶ 144). Plaintiffs attempt to recast this allegation, Opp'n 71, but their effort is to no avail. Paragraph 144 is clear that Plaintiffs believe they are objects of the statements simply because they are members of the broader Penn State community: "***These statements concerned the members of the Penn State community***. They were false, defamatory, and irreparably harmed Plaintiffs' reputations and lowered them in the estimation of the nation. Every recipient of the statements understood their defamatory meaning and understood that the ***Plaintiffs, individual members of the Penn State community between 1998 and 2011, were the objects of the communication***." Compl. ¶ 144 (emphases added).

The alleged defamatory statements themselves reaffirm that Plaintiffs' sole nexus to the statements is Plaintiffs' membership in the broader University community: "[R]everence for Penn State football permeated *every level of the University community* and was an extraordinary affront to the values of *all members* ..." (*Statement 3*); "The Consent Decree charges that *every level of the Penn State community* created and maintained a culture of reverence ..." (*Statement 4*); and "[T]he issues addressed in the Consent Decree were *about the whole institution*, and ... the Freeh Report ... suggest[s] really inappropriate

behavior at *every level of the university.*" (*Statement 5*). NCAA Mem. 35-36 (emphases added) (internal quotation marks omitted) (quoting Compl. ¶¶ 92, 94, 141). The Complaint offers no other basis to connect these three statements to any Plaintiff other than their membership in the Penn State community. Plaintiffs' cause of action based on these three statements should be dismissed.

Statement 2 is a generalized statement that "[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors." *See* NCAA Mem. 41 (quoting Compl. ¶ 90(c)) (internal quotation marks omitted). This statement cannot reasonably be attributed to Plaintiffs William Kenney or Jay Paterno, two former assistant coaches. Indeed, given that the Consent Decree references certain individuals to which that statement would refer, such an interpretation is plainly unreasonable. *See* NCAA Mem. 41.

As for the remaining statement, *Statement 1*, Plaintiffs do not address the NCAA's arguments. Only Plaintiff Clemens could arguably maintain a defamation claim premised on this statement, but even he cannot demonstrate a sufficient nexus to himself given that thirty-two members served on the Board each year, and even more collectively over the course of 1998 through 2001. Even thirty-two is more than double the size of the thirteen-member township commission in *Farrell*, and more than the twenty-five people that the *Klauder* court indicated would be too many. *See* NCAA Mem. 38 (quoting *Klauder*, 66 Pa. D & C.2d at 271).

In short, the requirement that a recipient of an allegedly defamatory statement be able to reasonably identify the plaintiff as the object of the statement is fatal to Plaintiffs' defamation claim. Even if a recipient could identify all or some Plaintiffs as being members of the allegedly defamed groups, their membership alone in these large groups is inadequate for a recipient to reasonably attribute the statements about the groups to any specific Plaintiff.

B. The Challenged Statements Are Not Actionable Because They Are Expressions Of Opinion

The NCAA's Memorandum explains that the challenged statements are opinions based on facts fully disclosed in the Consent Decree, Freeh Report, and Grand Jury Presentment[12] and, therefore, are not actionable as a matter of law. NCAA Mem. 43-46. In response, Plaintiffs make three arguments: (i) the NCAA's alleged statements are not opinion because they contain verifiable facts in contrast to figurative, hyperbolic language; (ii) when taken in context, the statements would not be considered opinion; and (iii) the NCAA did not disclose all facts that support the opinions. As discussed below, these arguments are insufficient to save this claim.

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[12] Crim. Compl., *Commonwealth v. Sandusky*, Nos. CP-14-CR-2421-2011, CP-14-CR-2422-2011 (Pa. Ct. Com. Pl. Nov. 4, 2011), *available at* http://co.centre.pa.us/centreco/media/upload/SANDUSKY%20CRIMINAL%20COMPLAINT%202422%20OF%202011.pdf ("Grand Jury Presentment").

First, Plaintiffs argue that the NCAA's statements are verifiable and were not loose, figurative, hyperbolic language. Opp'n 75-76.[13] Plaintiffs cite to *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 21 (1990), but *Milkovich* does not purport to be a description of Pennsylvania law, nor does it hold that statements that are non-verifiable and loose, figurative, or hyperbolic can support a claim. *See id.* Under Pennsylvania law, which follows the Restatement, "[a] statement in the form of an opinion is actionable only if it may reasonably be understood to imply the existence of *undisclosed* defamatory facts justifying the opinion." *Veno v. Meredith*, 357 Pa. Super. 85, 93, 515 A.2d 571, 575 (1986) (emphasis in original) (internal quotation marks omitted) (affirming demurrer grant because allegedly defamatory articles drew their support solely from another article that had been previously published to the public); *see also Alston v. PW-Phila. Weekly*, 980 A.2d 215, 221 (Pa. Commw. Ct. 2009) (affirming grant of preliminary objection because facts supporting alleged defamatory statement were included in a published article); *Mathias v. Carpenter*, 402 Pa. Super. 358, 364, 87 A.2d 1, 11 (1991) (affirming grant of preliminary objection because all facts behind the allegedly

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[13] Inexplicably, Plaintiffs again argue that the alleged statement that Coach Paterno "'failed to protect against a child sexual predator harming children for over a decade'" is defamatory. Opp'n 75 (citing Consent Decree at 3). But the Estate of Coach Paterno is not a party to the defamation claim (Count V) in the Complaint. *See* Compl. at p. 36.

defamatory statement were laid out earlier in the article); *Greene v. Street*, 24 Pa. D & C.5th 546 (Ct. Com. Pl. 2011) (sustaining demurrer because statement was based on newspaper articles and an investigative report already in the public purview).

In any event, Plaintiffs only explain how *Statement 1* and *Statement 2* are susceptible of being proven true or false. *See* Opp'n 76. These two statements are taken verbatim from the Freeh Report. *See* Consent Decree at 3. When evaluated in context, the Consent Decree is clear that these statements are the *findings* FSS concluded at the close of its investigation; *i.e.*, FSS's opinions as to what the facts state. (*Statements 3* through *5* are the NCAA's conclusions drawn from the Freeh Report and the Grand Jury Presentment. *Id.* at 4.) Any reasonable reader of the Consent Decree, "having access to the facts on which the [findings were] based, could decide for himself or herself whether the facts supported [the Freeh Report findings]." *Mathias*, 402 Pa. Super. at 364-65, 587 A.2d at 11.

Second, Plaintiffs argue that inclusion in a Consent Decree gave the statements an imprimatur of truth. *See* Opp'n 77. But the Consent Decree is the paradigmatic document that the law intends to protect. Its conclusions are drawn exclusively from the Freeh Report and Grand Jury Presentment—two publicly available documents—and it even quotes many of their findings verbatim for a reader to independently evaluate. Consent Decree at 2-3. Indeed, the very

existence of the reports Plaintiffs point to that purportedly critique the Freeh Report demonstrate that the public was able to evaluate and debate the facts in the Freeh Report themselves.[14] *See* Compl. ¶¶ 66-67.

Third, Plaintiffs argue that the NCAA did not disclose that it allegedly had a hand in forming the Freeh Report findings, and it allegedly coerced Penn State into accepting the Freeh Report findings. Opp'n 78-79. This is a red herring. These alleged "facts" have nothing to do with the content of the conclusions stated in the Consent Decree. Plaintiffs fail to plead "undisclosed defamatory facts" on which the NCAA's opinion was based. *See Veno*, 357 Pa. Super. at 93, 515 A.2d at 575.

C. The Complaint Does Not Adequately Allege Actual Malice

The NCAA's Memorandum explains that Plaintiffs (except for the faculty members) are public figures and, therefore, Plaintiffs were required to, but did not, adequately plead actual malice. NCAA Mem. 47-54. Plaintiffs argue that, regardless of whether the evidence will ultimately support their allegations, they have plead enough to survive a demurrer. Opp'n 79. That assertion does not hold up under scrutiny. To be sure, Plaintiffs allege in conclusory fashion, parroting the

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[14] Plaintiffs also cite to two news articles to support some of their allegations. Opp'n 78. These sources are not permissible on a demurrer. In contrast, the NCAA cited news articles for permissible purposes, such as to permit the court to take judicial notice of the mere existence of the articles and their subject matter, but not to accept as fact disputed factual statements made within the articles. *See, e.g.*, NCAA Mem. 60-61 & n.28.

legal standard, that the NCAA acted "with intentional, reckless, or negligent disregard for th[e] truth." Compl. ¶ 142. But the Complaint is devoid of the requisite allegations to demonstrate that "the defendant in fact *entertained serious doubts* as to the truth of his publication." *Tucker v. Phila. Daily News*, 577 Pa. 598, 634-35, 848 A.2d 113, 135-36 (2004) (emphasis added). Contrary to Plaintiffs' suggestion (Opp'n 80), the failure to plead facts showing actual malice is fatal at the pleading stage. *See Tucker*, 577 Pa. at 625-26, 848 A.2d at 130 (affirming grant of demurrer with respect to defamation claim for failure to adequately plead actual malice).

Plaintiffs argue that the NCAA purposefully avoided the truth because it "ignored facts that would have alerted any reasonable, impartial observer to the blatant deficiencies of the Freeh Report." Opp'n 82-83. But none of Plaintiffs' allegations indicate that the NCAA allegedly had or should have had *serious doubts* about the veracity of the Freeh Report, such as by ignoring internal inconsistencies or then-available contradictory, reliable information. Plaintiffs emphasize perceived flaws in the FSS investigation procedures and argue that the NCAA rushed to judgment without conducting its own investigation into whether there were NCAA rules violations. *Id.* at 82-83. But the law is clear that FSS's and the NCAA's alleged failure to investigate or verify information does not, as a matter of law, constitute actual malice. *See* NCAA Mem. 52-53 (collecting

authorities). Plaintiffs also argue that FSS was not authorized to investigate NCAA rules violations, Opp'n 82, but they cannot say why FSS's factual findings could not form the basis for the NCAA's independent determination of rules violations.[15]

In short, Plaintiffs have not satisfied their burden to plead actual malice.

V. THE COMPLAINT FAILS TO STATE A CLAIM FOR COMMERCIAL DISPARAGEMENT

The family of Joe Paterno is undoubtedly hurting from the repercussions that the Jerry Sandusky scandal and its attendant notoriety has inflicted on the late coach's legacy. But that frustration simply does not translate into a cause of action for commercial disparagement against the NCAA. The Estate of Coach Paterno (the "Estate") labors mightily to shoehorn its allegations into the elements of a commercial disparagement claim, but try as it might, it cannot satisfy disparagement's demanding pleading standard. Instead, the Estate conflates

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[15] Plaintiffs make three additional points, none of which requires a lengthy response. First, they assert that the NCAA and FSS worked together to make Penn State an example regardless of the facts. Opp'n 82. But whether they acted "'regardless of the facts'" is the ultimate conclusion, not a factual allegation. *See id.* (quoting Compl. ¶ 73). Second, Plaintiffs contend that the NCAA recognized it lacked sufficient facts about individual culpability. Opp'n 82. Even if true, that would not mean that the NCAA did not have sufficient facts about *Penn State* to justify moving forward with sanctions. Third, Plaintiffs criticize the NCAA for moving too quickly to impose sanctions after the Freeh Report issued, *id.* at 82-83; but given the nature of the conduct at issue and fact that the factual investigation was complete, this cannot demonstrate that the NCAA harbored serious doubts about the truth of the statements.

commercial disparagement with defamation in an effort to confuse the issue and survive dismissal. Its strained effort only underscores that the relief the Estate seeks is not available under Pennsylvania law.

A. Pennsylvania Law Provides No Support For Plaintiff's Novel Legal Theory

The Estate argues that Coach Paterno had a commercial interest in his name and reputation and that, therefore, the Estate's "defamation claim will *become* a commercial disparagement claim." Opp'n 59-60. Plaintiff cannot transmute a defamation claim into one for commercial disparagement. Defamation, not disparagement, is the sole tort that supports recovery for injury to an individual's reputation. *See Balletta v. Spadoni*, 47 A.3d 183, 201 (Pa. Commw. Ct. 2012) ("Pennsylvania does not recognize the existence of a cause of action for monetary damages ... based on injury to reputation separate and apart from a claim for defamation ...."). Commercial disparagement, in turn, protects against statements directed at the quality of a plaintiff's *goods or services*. *See Abbadon Corp. v. Crozer-Keystone Health Sys.*, No. 4415, 2009 Phila. Ct. Com. Pl. LEXIS 233, at *13 (Nov. 13, 2009) (statements about a plaintiff's business reputation are not actionable as commercial disparagement if they do not directly address the goods or services it provided); Restatement (Second) of Torts § 623A cmt. g (the two

torts "protect different interests"); NCAA Mem. 56.[16] Here, the Estate unabashedly seeks relief for losses that allegedly flow from harm to Coach Paterno's reputation.

Plaintiffs' claim rests entirely on a single case, *Menefee v. CBS, Inc.* 458 Pa. 46, 54-55, 329 A.2d 216, 220-21 (1974), which bears only a superficial resemblance to the Estate's novel claim.[17] *Menefee* involved statements broadcast

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[16] *See also Ashoff v. Gobel*, 23 Pa. D. & C.4th 300, 306 (Ct. Com. Pl. 1995) (losses associated with an alleged harm to the plaintiff's reputation are recoverable as defamation, not disparagement), *aff'd*, 450 Pa. Super. 706, 676 A.2d 276 (1995); *SNA, Inc. v. Array*, 51 F. Supp. 2d 554, 565 (E.D. Pa. 1999) (noting that the purpose of commercial disparagement is "not to vindicate the plaintiff's business reputation and good name"); *Brooks Power Sys., Inc. v. Ziff Commc'ns, Inc.*, No. CIV A 93-3954, 1994 WL 444725, at *2 (E.D. Pa. Aug. 17, 1994) (noting the distinction that "commercial disparagement protects economic interests related to the marketability of goods; defamation involves the reputation of persons"); *Centennial Sch. Dist. v. Independence Blue Cross*, 885 F. Supp. 683, 688 (E.D. Pa. 1994) (defamation, not disparagement, occurs if statements attack the plaintiff's honesty and fairness in marketing its services but not the *quality* of the services themselves); *Rain v. Rolls-Royce Corp.*, 626 F.3d 372, 380-81 (7th Cir. 2010) (collecting cases that reflect that disparagement deals with "business interests, not reputational ones").

[17] Plaintiff's additional authority is not related to the Estate's theory. *See Swift Bros. v. Swift & Sons, Inc.*, 921 F. Supp. 267 (E.D. Pa. 1995) (dismissing commercial disparagement claim because damages were not plead with specificity); 42 Pa. Con. Stat. § 8316(e) (defining "commercial value" for statutory purposes of claims for improper use of name or likeness, not disparagement). Ironically, Plaintiff criticizes the *NCAA* for relying on case law that is not factually analogous. Opp'n 61-62. Of course, that is because commercial disparagement is not intended to provide recovery for an individual's reputational harm; thus, the NCAA is unaware of any factually analogous case. Instead, the NCAA's authority explains why, even in a business context, a

throughout a city that the plaintiff, a radio personality, was unable to draw an audience or earn satisfactory ratings. *Id.* at 48, 329 A.2d at 217-18. When the plaintiff passed away on the eve of trial, his estate inherited the cause of action. *Id.*, 329 A.2d at 220. But *Menefee* lends no support to the Estate's attempt to recover for pecuniary losses based on statements about a deceased individual's reputation.

First, *Menefee* involved statements broadcast throughout a city that targeted the plaintiff's *business*. *Id.* at 48-49, 329 A.2d at 217-18; *id.* at 50, 329 A.2d at 218 ("Menefee has been caused to suffer a loss of his business and occupation as a radio personality ...." (internal quotation marks omitted)). Second, the statements were directed at the *goods or services* that the plaintiff sold to radio stations—the "broadcasting personality," *i.e.*, a character, he had created. *Id.* at 54, 329 A.2d at 220. The plaintiff's pecuniary loss was "the impairment of [his broadcasting personality's] value to radio stations in the area caused by the defendant's untrue statements." *Id.* at 54, 329 A.2d at 220. *Menefee* does not suggest that a defamation claim "will become" a commercial disparagement claim if the plaintiff's reputation is "commercialized." Opp'n 60. To the contrary, the court is clear that liability for the disparagement of *things* (commercial disparagement) is

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plaintiff must allege facts regarding the commercial interests in question and the damage to their value or marketability. *See* NCAA Mem. 56-58.

distinct from a cause of action for defamation to the *"personal reputation of another."* *Id.* at 52-53, 329 A.2d at 219-20 (emphasis added) (internal quotation marks and citation omitted). To be sure, the Plaintiff in *Menefee* sold a service—his "radio personality"—that was uniquely bound up with his personal reputation. *Id.* But no Pennsylvania court has ever interpreted *Menefee* to eviscerate the distinction between defamation and commercial disparagement, as Plaintiffs do.

Here, the Estate is unable to articulate how its commercial interest in Coach Paterno's personal reputation—an amorphous, intangible concept—did in fact, or even *could*, decrease in value or lose marketability. *See Ashoff v. Gobel*, 23 Pa. D. & C.4th 300, 306, (Ct. Com. Pl. 1995), *aff'd*, 450 Pa. Super. 706, 676 A.2d 276 (1995). Plaintiff agrees that any financial loss resulting from commercial disparagement is recoverable only if the statement causes "'a third person not to buy or lease the thing disparaged.'" Opp'n 64-65 (quoting *Menefee*, 458 Pa. at 54, 329 A.2d at 220). But Plaintiff has not articulated how the alleged disparagement affected the sale or lease of the "thing disparaged" (*i.e.*, Coach Paterno's reputation)—because it was not, and could not be, for sale. In short, neither the Complaint nor Plaintiffs' Opposition identifies the "available, valuable commercial market" the Estate proclaims exists or the commercial interests in that market that purportedly have been harmed. *See* Opp'n 59. Such supporting allegations are

necessary to put the NCAA on notice to permit it to fairly defend itself. A vague reference to the Estate's interest in an unidentified but supposedly available commercial market is insufficient to satisfy Plaintiff's burden. *See Ashoff*, 23 Pa. D. & C.4th at 306 (finding plaintiff's vague reference to "economic interest" insufficient to support disparagement claim); *see also* NCAA Mem. 57-58.

B. The Complaint Fails To Allege Direct Pecuniary Loss With Sufficient Specificity

The Estate does not contest that a plaintiff must ordinarily plead direct pecuniary loss with "considerable specificity." *See Swift Bros. v. Swift & Sons, Inc.*, 921 F. Supp. 267, 276 (E.D. Pa. 1995); NCAA Mem. 58-62. Instead, Plaintiff points to two "exceptions" and also contends that it need only demonstrate that the alleged statements were *a* cause of pecuniary harm, not the sole cause. Opp'n 62-63. These arguments are without merit.

First, Plaintiff argues that because the Consent Decree was "widely disseminated," it need not plead specifics regarding the alleged pecuniary loss. Plaintiff cites one case, again *Menefee*, to support that assertion. Opp'n 62. But *Menefee* does not absolve the Estate of its obligation to plead pecuniary loss with specificity, and we are aware of no decision relying on *Menefee* for such a proposition.

In *Menefee*, the plaintiff identified the goods (a radio character), the market (radio stations in the area), and the lost customers (radio stations). *Menefee*, 458

Pa. at 54, 329 A.2d at 220. The court relied on the Restatement to note that a disparaging statement, if widely disseminated, may cause pecuniary loss by depriving the plaintiff "'of a market in which, but for the disparagement, [his goods] might with reasonable certainty have found a purchaser.'" *Id.* at 54-55, 329 A.2d at 221 (quoting Restatement (Second) of Torts § 633 cmt. h (exception applies only when it "can be shown with reasonable certainty" that plaintiff was deprived "of a market that he would otherwise have found")). In other words, *Menefee*'s "widely disseminated" principle applies at most to "established businesses." Restatement (Second) of Torts § 633 cmt. h. And even then, wide dissemination alone will not suffice absent additional specificity as to the pecuniary losses. *See Swift Bros.*, 921 F. Supp. at 276 (dismissing disparagement claim for failure to plead the names of customers even though the statements in question were distributed via the town newspaper). As discussed above, Plaintiff has not identified how Coach Paterno's name could serve as a business, much less alleged facts to indicate his name is an *established* business, in an established market, with established customers.

Second, Plaintiff contends that the pleading standard is relaxed because the Consent Decree amounts to libel *per se*. Opp'n 63. The relaxed pleading standard for libel *per se* would apply to a cause of action for *defamation*—not to a commercial disparagement claim. *See Pro Golf Mfg., Inc. v. Tribune Review*

Newspaper Co., 570 Pa. 242, 246, 809 A.2d 243, 246 (2002) (comparing requirement for special damages on defamation and commercial disparagement claims and noting the *per se* exception only for defamation); *see also Eagle Traffic Control v. Addco*, 882 F. Supp. 417, 421 (E.D. Pa. 1995) (dismissing commercial disparagement claim and rejecting plaintiff's argument that comments were slanderous *per se* so it did not have to plead special damages on its disparagement claim); *SNA, Inc. v. Array*, 51 F. Supp. 2d 554, 565 (E.D. Pa. 1999) (applying relaxed pleading for slander *per se* to defamation claim but not to disparagement claim).

Because the primary goal of defamation law is to protect against harm to one's reputation, the relaxed pleading regarding damages is sensible when the defamation rises to a certain level of severity. In contrast, the very purpose of commercial disparagement law is to protect against pecuniary loss to a commercial interest caused by disparagement of goods and services. *Abbadon Corp.*, 2009 Phila. Ct. Com. Pl. LEXIS 233, at *13; *see also* Restatement (Second) of Torts § 623A (the two torts "protect different interests"). There is neither authority nor good reason to import a relaxed pleading standard in the disparagement context.[18]

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[18] Plaintiff does not cite a single case in which a court applied the libel per se exception to save a *commercial disparagement* claim from dismissal. *See Cosgrove Studio & Camera Shop, Inc. v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962)

Third, Plaintiff argues that the Estate need not plead that the Consent Decree is the *only* cause of pecuniary loss. Opp'n 64. That argument misses the point. Even assuming the Freeh Report and other statements contributed to the purported financial loss, Plaintiff failed to plead how the Consent Decree caused a *direct* pecuniary loss to the Estate. *See Menefee*, 458 Pa. at 54, 329 A.2d at 220 ("[P]laintiff must show that he suffered a ***direct*** pecuniary loss as the result of th[e] disparagement." (emphasis added)). Because the Estate did not identify a commercial interest in goods or services, as it should have done, the Estate cannot satisfy this requirement. Plaintiff resorts to the assertion (absent from the Complaint) that because the NCAA has "substantial influence on college football" as a "monopolist," it must have caused the alleged pecuniary loss (whatever loss that might be and in whatever market it might be in). Opp'n 66. Such a conclusory (and incomprehensible) allegation is not enough. Even Plaintiff's authority identifies the market, the disparaged services, and how the disparagement

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(involving defamation of a business); *Testing Sys., Inc. v. Magnaflux Corp.*, 251 F. Supp. 286, 290 (E.D. Pa. 1966) (granting motion to dismiss because plaintiff did not list out his customers); *Walker v. Grand Cent. Sanitation, Inc.*, 634 A.2d 237 (Pa. Super. Ct. 1993) (statements were the basis for defamation claim, not disparagement claim); *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010) (same). In *Bro-Tech Corp. v. Thermax, Inc.*, the court rejected the plaintiff's commercial disparagement claim for failure to support even general damages. 651 F. Supp. 2d 378, 416 (E.D. Pa. 2009). The court's reference to a libel *per se* exception is mere dicta, relies solely on a line of *defamation* cases, and is not binding on this court in any event. *Id.*

caused the alleged losses. *See Phillips v. Selig*, No. 1550, 2001 WL 1807951 (Pa. Ct. Com. Pl. Sept. 19, 2001) (disparaging comments made to law firm's former client caused client to leave and the firm to lose attorneys' fees it would have earned from an ongoing dispute); *Watson v. Abington Twp.*, No. Civ. A. 01-5501, 2002 WL 32351171 (E.D. Pa. Aug. 15, 2002) (defendant's statements deterred former patrons of plaintiffs' restaurant from returning, causing the restaurant to lose money and go out of business).

C. Any Commercial Disparagement Claim Is Foreclosed By Coach Paterno's Death

Coach Paterno's death deprives the Estate of a cause of action for commercial disparagement. The NCAA is aware of no authority that supports a cause of action arising *after* an individual died. Under Pennsylvania law, *accrued* causes of action may survive the death of a party. *See* 42 Pa. Con. Stat. § 8302 (permitting survival of "causes of action"); *Moyer v. Phillips*, 462 Pa. 395, 399-401, 341 A.2d 441, 443 (1975) (noting that "causes of action survive the death of either party" but recognizing that survival is confined to cases that "have an accrued cause of action"). Pennsylvania law stops short of permitting claims on behalf of the deceased when the claim arises posthumously.

Plaintiff's reliance on *Menefee* (again), Opp'n 66, does not help the Estate, because there the disparagement occurred—and the action was initiated—***before*** the plaintiff's death. 458 Pa. at 50, 329 A.2d at 218. In fact, the measure of

pecuniary loss in that case was premised on the fact that ***but for*** the disparagement, radio stations (*i.e.*, the customers) would have hired his services. *Id.* at 54, 329 A.2d at 220. In contrast, there was no market for Coach Paterno's services once he passed away.

Plaintiff suggests that a posthumous commercial disparagement claim must be viable to allow for the recovery of the decrease in marketability of footballs signed by Coach Paterno. Opp'n 67. As a threshold matter, no such allegation appears in the Complaint. Moreover, the NCAA is left to guess whether the Estate has some cache of autographed footballs that Coach Paterno signed before his death but, presumably, were not sold in the seven months between his death and the publication of the Consent Decree. (If such a cache existed, Plaintiff would have alleged that.) Regardless, the commercial interest identified by the Estate is Coach Paterno's good name and reputation, not a commercial interest in autographed footballs. Any pecuniary loss to that market would be only a tangential and consequential result of reputational harm, which, as discussed above, is not *directly* caused and is not actionable.

D. The Consent Decree Does Not Contain Actionable Disparagement

As discussed, *supra* at Part V.A-C, the statements regarding Coach Paterno in the Consent Decree do not constitute actionable disparagement. Plaintiffs have not pled the requisite actual malice, nor does the Consent Decree contain anything

more than the NCAA's opinion regarding Coach Paterno. For these independent reasons, Plaintiff's commercial disparagement claim fails.

VI. PLAINTIFFS FAIL TO STATE A CLAIM FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

As discussed in the NCAA's Memorandum, Plaintiffs William Kenney and Jay Paterno assert a claim for tortious interference with existing and prospective contractual relations premised on little more than a skeletal recitation of the elements of that cause of action. *See* NCAA Mem. 64; Compl. ¶¶ 122-28. Plaintiffs' Opposition does not cure three defects: Plaintiffs' allegations do not (i) identify existing or prospective employment that Plaintiffs were denied; (ii) allege facts to show intent by the NCAA to interfere specifically with these Plaintiffs' employment opportunities; or (iii) negate the existence of a privilege.

First, Plaintiffs have not identified any employment opportunity with which the NCAA interfered. Plaintiffs abandon any claim based on tortious interference with *existing* contractual relations. Opp'n 53-54. Instead, they argue that to demonstrate interference with *prospective* contractual relations, they need only allege a vague prospective contractual relation or business expectancy. *See id.* at 54-55. The law requires more. Plaintiffs must allege sufficient factual support to demonstrate "a *reasonable probability*" that, but for the NCAA's actions, they would have secured employment; a "mere hope" of employment will not suffice.

Foster v. UPMC S. Side Hosp., 2010 PA Super 143, 2 A.3d 655, 665-66 (2010) (emphasis added) (internal quotation marks and citation omitted) (affirming grant of demurrer where plaintiff alleged that defamatory statements about his performance interfered with prospective contractual relations with specifically named third parties but did not set forth facts "to support an inference that there was a reasonable probability that Appellant would enter a contract with any of the named entities").[19]

Plaintiffs' authority does not conclude otherwise. *Cf. Kelly-Springfield Tire Co. v. D'Ambro*, 408 Pa. Super. 301, 309, 596 A.2d 867, 871 (1991) (alleging defendant knew about, and interfered with, sale of property to a specifically-named prospective buyer); *Hydrair, Inc. v. Nat'l Envtl. Balancing Bureau*, 52 Pa. D & C.4th 57 (Ct. Com. Pl. 2001) (defendant licensing body revoked plaintiff's

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[19] *See also SSN Hotel Mgmt., LLC v. Susquehanna Bank*, No. 0296, 2012 Phila. Ct. Com. Pl. LEXIS 466, at *7-8 (Feb. 9, 2012) (sustaining demurrer because the complaint did not indicate a reasonable probability that a contract between plaintiff and a third party would have formed even where the contract already had been negotiated and *drafted*); *Turk v. Salisbury Behavioral Health, Inc.*, No. 09-CV-6181, 2010 WL 1718268, at *5 (E.D. Pa. Apr. 27, 2010) (dismissing claim for failure to identify specific lost prospective employment opportunity where plaintiff alleged that defamatory statements made to prospective employers prevented plaintiff from gaining other employment); *Brunson Commc'ns, Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550, 578 (E.D. Pa. 2002) (dismissing claim for failure to identify a lost prospective customer where plaintiff alleged that defendant's failure to reference plaintiff to potential customers interfered with prospective business with those customers).

certification, thereby definitively precluding plaintiff from performing work it had been doing). Plaintiffs' remaining authority is merely unpublished cases containing limited to no discussion of the pertinent allegations. *See PT Grp. Acquisition, LLC v. Schmac*, No. 5044 of 2008, 2008 Pa. Dist. & Cnty. Dec. LEXIS 221, at *10-11 (Nov. 12, 2008); *Dunalp v. PECO Energy Co.*, No. 96-4326, 1996 WL 617777, at *5 (E.D. Pa. Oct. 23, 1996).

Plaintiffs have not met their burden. "'Pennsylvania is a fact-pleading state; a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but the complaint must also formulate the issues by *summarizing those facts essential to support the claim.*'" *Foster*, 2 A.3d at 666 (quoting *Lerner v. Lerner*, 2008 PA Super 183, ¶ 12, 954 A.2d 1229, 1235 (2008) (emphasis added)). Plaintiffs have not provided any essential facts. The Opposition alleges that Plaintiffs were "sought after" by other programs, Opp'n 52-53, but this overstates the allegation in the Complaint, which is simply that Plaintiffs had "prospective ... opportunities" at other programs that "would otherwise be willing to hire them." Compl. ¶¶ 103(b), 123. In any event, the Complaint does not even allege that Plaintiffs were *looking* for employment, let alone identified any programs that were hiring, programs to which they applied or were being recruited, or any fact to infer a reasonable probability that Plaintiffs would have been hired. Plaintiffs would have alleged such facts if the events had,

in fact occurred. *See Brunson Commc'ns, Inc.*, 239 F. Supp. 2d at 578 (dismissing without leave to amend because Plaintiff would have alleged details about lost prospective customers if there had been any). In short, "[s]horn of the legal conclusions that defendants intentionally interfered with prospective contracts," Plaintiffs only state that they have "been generally unable to obtain a job." *Turk v. Salisbury Behavioral Health, Inc.*, No. 09-CV-6181, 2010 WL 1718268, at *5 (E.D. Pa. Apr. 27, 2010).

Second, in neither the Complaint nor their Opposition do Plaintiffs William Kenney and Jay Paterno identify any action the NCAA took towards them specifically, and certainly not "for the purpose of" interfering with their employment prospects. *See Glenn v. Point Park Coll.*, 441 Pa. 474, 481, 272 A.2d 895, 899 (1971). As Plaintiffs themselves concede, they must allege that either the NCAA desired to harm their prospective business opportunities or that such harm "'was substantially certain to follow'" from the NCAA actions. Opp'n 56 (citation omitted). Plaintiffs do not even allege that the NCAA was aware of these Plaintiffs or that they were searching for employment.

Plaintiffs rely exclusively on a solitary statement in the Consent Decree that "'[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors ....'" Compl. ¶ 90(c) (quoting Consent Decree at 3). They do not—and cannot—allege that either the Consent Decree or the

Freeh Report mentions Plaintiffs Kenney or Jay Paterno at all or suggests in any way that this general statement references them specifically. *See supra* at Part III.A. Nor could this statement reasonably be deemed as action taken for the purpose of interfering with these two Plaintiffs' prospective employment. As a result, Plaintiffs cannot satisfy their burden to plead specific intent. *See* NCAA Mem. 67-68 (citing two cases, *Glenn*, 441 Pa. at 481-82, 272 A.2d at 899, and *B.T.Z., Inc. v. Grove*, 803 F. Supp. 1019 (M.D. Pa. 1992), which dismissed claims for failure to adequately plead intent, despite containing more factual allegations than present here).[20]

Third, as discussed in the NCAA's Memorandum, Plaintiffs have the burden to negate the existence of a privilege. NCAA Mem. 68. Plaintiffs' conclusory allegations about the NCAA's alleged motivations and purported failure to follow its own rules fly in the face of the basic uncontested facts that (1) the NCAA reached an agreement with one of its member institutions; (2) the agreement was based on a report conducted on behalf of the institution by a former FBI Director and federal judge; (3) the conduct related directly to the football program; (4) the conduct resulted in the *criminal conviction* of the former assistant football coach

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[20] Plaintiffs assert that the NCAA undertook a "mission ... to treat fairly and to consider the impact of its actions on uninvolved coaches," like Messrs. Kenney and Paterno. Opp'n 57. That is a gross exaggeration of one clause in the NCAA Bylaws. *See supra* at Part II.B.

and the indictment of various senior Penn State officials, including the former athletic director. As a result, the agreement served the societal good of regulating intercollegiate sports, punishing rules violations, avoiding a protracted and unnecessary NCAA investigation, and addressing cultural issues to which Penn State admitted. These uncontested facts make the conduct privileged, even accepting the Complaint's allegations. *See Glenn*, 441 Pa. at 482, 272 A.2d at 899-900.

VII. PLAINTIFFS FAIL TO STATE A CLAIM FOR CIVIL CONSPIRACY

If Plaintiffs are able to proceed on their civil conspiracy claim, then any time a supporter of a university that the NCAA sanctions believes the severity of the sanctions are unfair or disagrees with the NCAA's procedures—arguing, for example, that the NCAA should have interviewed one additional person—he or she could bring an action for civil conspiracy. As discussed in the NCAA's Memorandum, this claim fails for three reasons: (i) it is barred by the gist of the action doctrine; (ii) Plaintiffs have not alleged a conspiratorial combination with FSS; and (iii) the allegations in the Complaint do not create the reasonable inference that the NCAA's *sole* purpose was to harm Plaintiffs. NCAA Mem. 69-74.

First, it is established law in Pennsylvania that a plaintiff cannot recast a breach of contract action into one of tort. *eToll v. Elias/Savion Adver., Inc.*,

2002 PA Super 347, ¶ 14, 811 A.2d 10, 14 (2002). In order to prevent duplicative relief, the gist of the action doctrine permits a tort action only when the parties' contractual relationship is so tangential to the tort as to render the tort the gist of the action. *See eToll*, 2002 PA Super 347, ¶¶ 27-28, 32, 811 A.2d at 19, 21.[21] Plaintiffs argue that the "essential wrong" is the NCAA's "conspiracy to exceed their lawful authority and impose substantial harms on plaintiffs." Opp'n 86. But the "lawful authority" to which Plaintiffs reference is the authority granted under the NCAA's *Constitution and Bylaws*; thus, Plaintiffs' argument is that the NCAA attempted to surpass the rights it had under the contract.

Plaintiffs recognize that "[t]ort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals."

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[21] Plaintiffs rely on two cases that predate development of the gist of the action doctrine, and a federal case that—in dicta—references only one of those old cases to hypothesize that such a claim may exist. Opp'n 85 (citing *Commonwealth v. Musser Forests, Inc.*, 394 Pa. 205 (1958); *Fife v. Great Atl. & Pac. Tea Co.*, 356 Pa. 265, 266, 52 A.2d 24, 32 (1947); *Haymond v. Haymond*, No. 99-5048, 2001 WL 74630 (E.D. Pa. Jan. 29, 2001)). In any event, *Musser Forests* is readily distinguishable because the contracts were collateral to the larger harm. Defendants defrauded the government and undermined its conservation efforts by purchasing trees at cost under the guise of conserving them, but instead sold them for a profit. The court determined that the defendants breached their social duty, as opposed to contractual duty, not to wrongfully convert trees and the government's injury far exceeded the value of the trees. *Musser Forests, Inc.*, 394 Pa. at 213, 215, 146 A.2d at 718, 719.

eToll, 2002 PA Super 347, ¶ 14, 811 A.2d at 14 (internal quotation marks and citation omitted); *accord* Opp'n 86. Plaintiffs attempt to argue that social policy undergirds their Complaint by asserting that "it is a matter of important social policy that associations be required to follow their own rules." Opp'n 86-87. This construction only makes clear that it is the contract (*i.e.*, the NCAA Bylaws), and performance thereof, that is at issue. Plaintiffs drive this point home by pondering, "if the NCAA had faithfully applied its own rules," *id.* at 87 (citing *Gordon v. Tomei*, 144 Pa. Super. 449, 19 A.2d 588 (1941)), *i.e.*, if the NCAA had not breached the contract. *Gordon* is over seventy years old, and it makes clear that an association's bylaws can create contractual duties arising from the mutual consensus of its members. 144 Pa. Super. at 460, 19 A.2d at 593. The first two "counts" of the Complaint regarding alleged breaches of contract, and twenty-one pages of argument in Plaintiffs' Opposition in support of those claims, lays bare that this is a breach of contract case.

Second, Plaintiffs have failed to allege concerted action with FSS. *See* NCAA Mem. 71-72. Plaintiffs assert they need only provide circumstantial facts and point to several Complaint paragraphs that purportedly identify collusion. Opp'n 87-88. Upon close review, however, it is apparent Plaintiffs have not even alleged circumstantial indications of collusion. Only *one* Complaint paragraph alleges interaction between the NCAA and FSS, and it avers only that FSS

frequently briefed the NCAA and that the NCAA "periodically contacted" the NCAA "to discuss areas of inquiry and other strategies." Compl. ¶ 54. This does not satisfy Plaintiffs' burden, particularly given the obviously legitimate reasons the NCAA had for contact with lawyers conducting an internal investigation on behalf of a member institution. *See, e.g., Burnside v. Abbott Labs.*, 351 Pa. Super. 264, 280, 505 A.2d 973, 982 (1985) (holding that plaintiffs failed to plead facts to indicate the manner in which a conspiracy was carried out). Even in Plaintiffs' authority, the complaint had alleged meetings, conferences, telephone calls, and other communications, and alleged the purpose of those meetings. *See Commonwealth v. TAP Pharm. Prods., Inc.*, 885 A.2d 1127, 1141 (Pa. Commw. Ct. 2005).

Plaintiffs argue that a conspiracy can exist between the NCAA and its employees provided that a third party is involved. Opp'n 88 (citing *Unger v. Allen*, 3 Pa. D. & C.5th 191, 202 (2006)). But the point is that Plaintiffs have not pled that a third party (*i.e.*, FSS) was involved with the NCAA. Further, *Unger* contains only brief dicta, 3 Pa. D. & C.5th at 202, and it cites to a federal case about a labor dispute—not a conspiracy, *see Jackson v. T & N Van Serv.*, 117 F. Supp. 2d 457 (E.D. Pa. 2000).

Third, the Complaint does not sufficiently allege that the NCAA's *sole* purpose was to commit a tort against Plaintiffs. Plaintiffs recognize they must

allege malice "and *an absence* of legitimate motives." Opp'n 89 (emphasis added). Plaintiffs again argue that because Penn State had not commissioned FSS to investigate NCAA rules violations, the purpose of the purported conspiracy could not have been to conduct the investigation commissioned by Penn State. *Id.* at 90. This is a red herring. The NCAA has never stated that FSS conducted an investigation on behalf of the NCAA, nor does it matter if FSS did; as discussed, *supra* at Part III.C, FSS's factual findings could—and did—inform an independent NCAA determination of a rules violation.

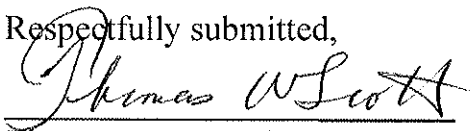
Plaintiffs have not—and cannot in good faith—allege that the NCAA acted without any legitimate motives (*e.g.*, to punish conduct that it believed to be reprehensible and a violation of the spirit, if not the letter, of the NCAA rules). The idea that the NCAA acted with the *sole* purpose of harming these Plaintiffs—only one of whom is even mentioned in the Consent Decree—as opposed to acting, at least in part, for the legitimate reason of concluding an agreement with a member institution to resolve a horrible situation on an expedited and mutually acceptable basis—is exactly the type of speculation and fancy that courts will not engage in resolving preliminary objections. It is nothing but a conspiracy theory of the type the court in *Feingold v. Hendrzak* held cannot survive a preliminary objection. 2011 PA Super 34, 15 A.3d 937, 942 (2011) (holding that "unsubstantiated suspicions and allegations that [Appellees] engaged in improper

and fraudulent conduct" did not satisfy Pennsylvania's fact-pleading requirements (internal quotation marks and citation omitted)).

CONCLUSION

For the foregoing reasons and those stated in the NCAA's opening Memorandum, the NCAA's Preliminary Objections should be sustained and the Complaint dismissed.

Respectfully submitted,



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