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, 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,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

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 the NCAA Defendants' Preliminary Objections to Amended Complaint

Filed on Behalf of:
National Collegiate Athletic Association, Mark Emmert, Edward Ray

Counsel of Record for this Party:
Thomas W. Scott, Esquire
Killian & Gephart, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
TEL: (717) 232-1851
FAX: (717) 238-0592
tscott@killiangephart.com
PA I.D. Number: 15681

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; RYAN MCCOMBIE, ANTHONY LUBRANO, AL CLEMENS, 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 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.	Civil Division Docket No. 2013-2082

REPLY IN SUPPORT OF THE NCAA DEFENDANTS' PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT

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PRELIMINARY STATEMENT[1]

Plaintiffs ask this Court to rewrite history. As their Opposition demonstrates, their case comes down to arguing that the National Collegiate Athletic Association ("NCAA" or the "Association") and the Pennsylvania State University ("Penn State" or the "University") could not *possibly* have believed that (1) the grave failures of senior Penn State leaders and athletics personnel in connection with the crimes committed by high-profile former coach Jerry Sandusky—which occurred, among other places, in team facilities—justified any sanction on the University, or (2) that the Freeh Report—commissioned by Penn State's own Board of Trustees and prepared by a former federal judge and Director of the Federal Bureau of Investigation ("FBI")—could *possibly* have had any credibility. Thus, they contend that the NCAA extorted an unwilling Penn State into the Consent Decree or, as they now suggest, perhaps the NCAA and Penn State for some reason conspired together to defame the memory of a beloved coach and commit various torts. Plaintiffs' case ignores reality, including a series of undisputed facts that they cannot try to seriously deny.

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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.

In particular, by the time the NCAA and Penn State entered into the Consent Decree, the following events had taken place without any involvement of the NCAA:

- Coach Paterno testified to a Grand Jury that he "knew some kind of inappropriate action was being taken by Jerry Sandusky with a youngster," the action took place "[i]n the shower... right on campus," and it was of a "sexual nature." Sandusky continued to have access to Penn State athletic facilities as recently as 2011.[2]

- Penn State fired Coach Paterno and removed his statue from outside Beaver Stadium. Am. Compl. ¶ 53.[3]

- Penn State fired University President Graham Spanier. *Id.*

- The Penn State Board of Trustees commissioned a report by the former Director of the FBI, which concluded that senior officials at Penn State concealed Sandusky's abuse of children in order to avoid bad publicity and as a result of a culture of reverence for the football program engrained at all levels of the campus community.[4] *Id.* ¶¶ 54, 61.

- Penn State publicly embraced the Freeh Report and took responsibility for the conduct it described.[5] *Id.* ¶¶ 62-63.

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[2] Transcript of Proceedings, Preliminary Hearing at 175-76, *Commonwealth v. Curley*, No. CP-22-MD-1374-2011 (Com. Pl. Ct. Dec. 16, 2011).

[3] *Joe Paterno Statute Taken Down*, ESPN.com (July 23, 2012), http://espn.go.com/college-football/story/_/id/8188530/joe-paterno-statue-removed-penn-state-university-beaver-stadium.

[4] Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky (July 12, 2012) ("Freeh Report") http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf.

[5] *Penn State Issues Statement on Freeh Report*,http://progress.psu.edu/resource-library/story/penn-state-issues-statement-on-freehreport; *Excerpts of comments by Penn State, board trustees*, CNN.com

- The Pennsylvania Governor declared: "There are monsters among us; people who will hurt children for their own sexual gratification. Every university, school, business and individual has an obligation to follow up and report such cases. This case is of such significance that I hope people will learn from it, and we will see that the failure to protect children does not happen again. I'll work to ensure that Penn State's administration and board of trustees implement the Freeh report's recommendations."[6]

- The Paterno family itself released a statement providing that "the underlying facts as summarized in the [Freeh] report are almost entirely consistent with what we understood them to be," and acknowledged that "Joe Paterno wasn't perfect," "[h]e made mistakes and he regretted them," and "[i]t can be argued that Joe Paterno should have gone further" than he did.[7]

- A Pennsylvania Grand Jury indicted two senior Penn State athletic officials, including the former Athletic Director, on felony charges of perjury and failure to report allegations of child abuse. *Id.* ¶ 86

Since the Consent Decree was executed, the record has not improved for Plaintiffs. Penn State has paid over $60 million to settle claims brought by the victims of Jerry Sandusky. And the Grand Jury indicted Penn State's former President and brought additional charges against the other officials. At the time, the Commonwealth Attorney General said, "This was a conspiracy of silence by

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(July 12, 2012), http://www.cnn.com/2012/07/12/us/pennsylvania-penn-state-excerpts/.

[6] Mike Bertha, *Governor Tom Corbett Responds to the Freeh Report*, Phila. Magazine (July 12, 2012), http://www.phillymag.com/news/2012/07/12/governor-tom-corbett-responds-free-report/.

[7] Brian Bennett, *Paterno Family Statement on Freeh Report*, ESPN.com Blog (July 12, 2012), http://espn.go.com/blog/bigten/post/_/id/52992/paterno-family-statement-on-freeh-report.

top officials at Penn State, working to actively conceal the truth, with total disregard to the suffering of children." To date, absolutely nothing has come out in the public domain to shake any confidence in Judge Freeh's report—let alone show it was unreasonable for the NCAA and Penn State to rely on it in 2012—other than the purported findings of paid consultants working at the direction of the Paterno Estate.

The NCAA did not create this situation or seek it out. Yet, in the summer of 2012, the NCAA found itself confronting a horrendous set of circumstances that were truly unprecedented in the annals of collegiate sports. At the same time, Penn State, by then under the leadership of a new president, had to decide how to move past this horrible affair and restore its reputation as a bastion of learning and decency. The result was the Consent Decree and its Athletic Integrity Agreement – a unique solution to be sure, but one that the parties legitimately and reasonably believed was supported by the facts, was true to the letter and the spirit of the NCAA Bylaws, and placed Penn State and its football program on a path to restore their integrity. And this resolution has been a resounding success. Penn State athletics, including football, continue to thrive. Under supervision of former Senator George Mitchell, Penn State has done an admirable job of implementing the Athletic Integrity Agreement, and the NCAA has responded with relief from some of the agreed sanctions under the Consent Decree.

Plaintiffs do not like this success story because it relies on the history that actually happened, as opposed to the history that they wish happened. As a result, Plaintiffs ask this Court to do something truly extraordinary: entirely void a contract to which they are neither a party nor a beneficiary, when both parties to the contract want to enforce it, and when voiding the contract is not necessary to remedy *any* of Plaintiffs' claims.

Even if Plaintiffs' claims were, through clever pleading, to survive this preliminary stage of the litigation, none have any merit and Plaintiffs will not be able to prove them at the end of this litigation. But this case should not proceed that far. As demonstrated in the NCAA's opening Memorandum, Plaintiffs' claims for breach of contract—and their request that the court declare the Consent Decree void *ab initio*—are doomed by Plaintiffs' lack of standing and other substantive legal deficiencies. In addition, they have not cured the shortcomings that led this Court to previously dismiss their tortious interference claim, and simply ignore the fatal flaws in their amended civil conspiracy claim. Further, even claims that survived this Court's January 7, 2014 Order—*i.e.*, defamation and commercial disparagement—deserve a fresh look, as legal holdings in the Order—as well as arguments not explicitly addressed by the court—suggest these claims should be dismissed too. Plaintiffs' Opposition has offered no persuasive response to the NCAA's objections to each count, instead hoping that this Court will bypass

consideration of these objections on the basis of Plaintiffs' misguided procedural arguments. But the NCAA's preliminary objections are properly before this Court, and they compel dismissal of the Amended Complaint.

ARGUMENT

I. EACH OF THE NCAA'S PRELIMINARY OBJECTIONS IS PROCEDURALLY PROPER.

Plaintiffs attempt to avoid engaging on the merits of the NCAA's preliminary objections by arguing that those objections are procedurally improper. Plaintiffs suggest that because the NCAA either already raised or could have raised these objections to the original complaint, the Court should not entertain them now. But that argument ignores the actual procedural history and posture of this case and misconstrues the applicable legal principles. Each of the NCAA's preliminary objections are properly before the Court.

First, the NCAA previously asserted a number of preliminary objections to Plaintiffs' contract claims, and asked the Court to strike as impertinent Plaintiffs' request to declare the Consent Decree void *ab initio*. Am. Mem. in Supp. of Defs.' Prelim. Objs. to Am. Compl. 14-39 (April 11, 2014) ("NCAA Mem."). The Court determined, however, that it lacked jurisdiction altogether over Plaintiffs' contract claims, because of their failure to join an indispensable party, Penn State. Opinion & Order (Jan. 7, 2014) ("Order") 12-13. The Court thus dismissed the contract claims—and struck the request to declare the Consent Decree void—on jurisdictional grounds and without reaching the merits of the NCAA's other objections. *Id.* The Court noted, in dicta, that there appeared to be many "fact questions" concerning the proper construction of the term "involved individual."

Order 9. But the Court's opinion understandably did not engage in a full analysis of the numerous challenges to Plaintiffs' contract claims because it lacked jurisdiction to address claims those claims in the first place. *Id.* at 13; *see also Day v. Civil Serv. Comm'n*, 593 Pa. 448, 459 (2007) (holding that if a court does not have jurisdiction over a claim it may not review the merits of that claim).

Plaintiffs have now added Penn State as a defendant and reasserted their contract claims. Under Pennsylvania law (and Plaintiffs' own authority), it is entirely proper for the NCAA to re-assert its standing objections and demurrer to these claims, now that the Court has jurisdiction to consider them. *See Dudurich v. Irwin*, 63 Pa. D. & C. 696, 699-70, 931 A.2d 646, 653 (C.P. Ct. 1948) (where the court granted the defendant's motion for a more specific complaint without resolving defendant's preliminary objection in the nature of a demurrer, the defendant was free to re-assert the demurrer to the amended complaint); *see also* Opp. 11, 13-14 (citing cases that merely suggest a party may not raise objections to an amended pleading that it could have—but did not—previously raise).

Similarly, Plaintiffs ignore that the Court actually dismissed the tortious interference claims because of Plaintiffs' failure to plead particular opportunities with which the NCAA allegedly interfered. As such, the Court's discussion of the other elements of Plaintiffs' tortious interference claims would appear to be nonbinding dicta. *See Lewis v. Erie Ins. Exchange*, 2000 Pa. Super. 160, ¶ 29, 753

A.2d 839, 849 (2000) (providing that a statement that was unnecessary to the disposition of a case constitutes *dicta*), *aff'd*, 568 Pa. 105, 793 A.2d 143 (2002); *Hunsberger v. Bender*, 407 Pa. 185, 188, 180 A.2d 4 (1962) (finding that a statement in prior opinion, which clearly was not decisional but merely dicta, "is not binding upon us"). Thus, it is appropriate for the NCAA to renew its challenges to the amended tortious interference claims, though, as Plaintiffs themselves recognize, the NCAA has focused its objections on Plaintiffs' failure to remedy the previous shortcomings identified by the Court.

In a similar vein, the NCAA has properly re-asserted certain arguments concerning claims that survived the NCAA's prior objections, which the Court did not explicitly address in its January 7 Order. In particular, in overruling the NCAA's preliminary objections to Plaintiffs' civil conspiracy, defamation, and commercial disparagement claims, the Court's Order did not explicitly address: (1) the failure of certain Plaintiffs to plead a valid underlying cause of action for civil conspiracy, NCAA Mem. 45-46, (2) the statements at the heart of Plaintiffs' defamation or commercial disparagement claims are not actionable because they are statements of opinion, NCAA Mem. 56-60, and (3) the Estate's commercial disparagement claim fails because it accrued (if at all) *after* Joe Paterno's death, NCAA Mem. 60-61. If the Court's opinion did not explicitly address these particular arguments because it found them unpersuasive, then it is of course free

to either reconsider them or overrule them once more. But there is certainly nothing procedurally improper with the NCAA's re-assertion of these unaddressed arguments in response to an amended complaint.

Indeed, Plaintiffs' authority does not even establish that the NCAA is precluded from re-asserting objections that this Court previously expressly overruled. In very limited instances, the NCAA has re-asserted such objections, either because the Court's own reasoning suggests these arguments should have led to a different result, *see* NCAA Mem. 48-56 (re-asserting failure to state a claim for defamation because the relevant groups contain more than 25 individuals), or to preserve them.[8] The NCAA has also asked the Court to reconsider its interpretation of *Menefee v. Columbia Broadcasting System, Inc.*, 458 Pa. 46, 329 A.2d 216 (1974), and accordingly dismiss the commercial disparagement claim.

Under Pennsylvania law, a trial court has inherent authority to re-visit and reverse its previous rulings during the pendency of litigation. *Clearwater Concrete & Masonry, Inc. v. W. Phila. Fin. Servs. Inst.*, 2011 PA Super. 64, 18 A.3d 1213, 1216 (2011) ("A trial judge may always revisit his own prior pre-trial rulings in a case without running afoul of the law of the case doctrine."). Plaintiffs point to no

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[8] The NCAA has set forth certain of its previously overruled preliminary objections in order to ensure they are preserved. *See, e.g.*, NCAA Mem. 43-44 (preserving objections to tortious interference claim); *id.* at 45 n.16 (preserving objections to civil conspiracy claim); *id.* at 58 n.22 (preserving objections to commercial disparagement claim).

authority suggesting that a Court may not exercise such discretion in considering preliminary objections to an amended complaint. Nor does Pennsylvania law preclude the NCAA from re-asserting such objections in the current posture. Instead, Pennsylvania courts specifically recommend that a defendant raise "*all possible* preliminary objections to the amended complaint." *Commonwealth v. Events Int'l, Inc.*, 137 Pa. Commw. 271, 277, 585 A.2d 1146, 1149 (1991) (emphasis added); *see also* Pa. R. Civ. P. 1028(f) ("Objections to any amended pleading shall be made by filing new preliminary objections."); 5 Standard Pa. Practice 2d § 25:13 ("a party wishing to object to an amended pleading must file a new preliminary objection").

In only one limited instance could the NCAA even *arguably* run afoul of Plaintiffs' proffered view that a party may not raise new objections that it could have, but did not, previously raise. *See* NCAA Mem. 25 n.10 (arguing that the "family" of Joe Paterno lacks legal capacity to maintain an action against the NCAA). Plaintiffs contend that such an objection cannot be raised to an amended complaint, under the rule that "'all preliminary objections shall be raised at one time.'" Opp. 11 (quoting Pa. R. Civ. P. 1028(b)). But the Commonwealth Court has held that "[w]hile this rule clearly permits only one set of preliminary objections to any single complaint, it does not address the situation where a party has voluntarily elected to file an amended complaint." *Events Int'l*, 137 Pa.

Commw. at 277, 585 A.2d at 1149. As such, there is no prohibition on the NCAA raising this narrow objection now. In any event, to the extent the NCAA is precluded from raising this argument, the Court can and should consider it on the merits of Penn State's own briefing. *See* Penn State Mem. 7-8.

II. PLAINTIFFS HAVE NOT IDENTIFIED ANY VALID BASIS FOR THEIR REQUEST TO DECLARE THE CONSENT DECREE VOID *AB INITIO*.

A. Plaintiffs Lack Standing to Void a Contract to Which They Are Complete Strangers.

Plaintiffs' Opposition acknowledges that they are neither parties nor third-party beneficiaries of the Consent Decree. *See* Opp. 27. Therefore, the only remaining question is whether, as complete strangers and against the wishes of the actual parties, Plaintiffs have standing to obtain a declaration that the entire Consent Decree is void *ab initio*—from the reductions in grants-in-aid, to the ban on post-season play, to Penn State's commitment to implement the Athletic Integrity Agreement. Plaintiffs' Opposition fails to justify their extraordinary claim that they have standing to obtain such sweeping relief.

As demonstrated in the NCAA's opening Memorandum, courts across numerous jurisdictions, including Pennsylvania, have held that only parties or third-party beneficiaries have standing to invalidate a contract. *See, e.g.*, *Schuster 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); *Ira G. Steffy & Son, Inc. v. Citizens Bank of Pa.*, 2010 PA Super. 175, 7 A.3d 278, 287-88 (2010) (plaintiff does not have standing to challenge alleged misconduct if the plaintiff is not a party or third-party beneficiary to the contract that is the basis for the plaintiff's claims); *Souders v. Bank of Am.*, No. 1:CV-12-1074, 2012 WL 7009007, at *9-10 (M.D. Pa. Dec. 6, 2012) (borrower could not challenge lender's assignment of mortgage because the borrower was not a party or third-party beneficiary of the assignment); *see also Ope Shipping, LTD. v. Allstate Ins. Co.*, 687 F.2d 639, 643 (2d Cir. 1982) ("Where, as here, the parties to a conveyance are satisfied with their bargain, a third person who is not a defrauded creditor of the grantor may not challenge the contract's validity on the basis of alleged insufficient consideration."); *United States v. Wagner*, 453 F. Supp. 850, 851 (S.D.N.Y. 1978) ("[O]nly the parties to the contract can assert its illegality; 'one in possession of the fruits of an illegal transaction to which he was not a party cannot invoke the defense of illegality.'" (citation omitted)); *Rawat v. Navistar Int'l Corp.*, No. 08-cv-4305, 2011 U.S. Dist. LEXIS 6319, at *17-18 (N.D. Ill. Jan. 20, 2011) ("[T]he named [parties] do not have standing to challenge an agreement to which they were not a party. Settlement agreements are contracts. Ordinarily, only parties to a contract have standing to challenge its validity." (internal citation omitted)); *cf. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528-530 (1986) ("It has never been supposed that one

party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation.").

Plaintiffs' attempt to circumvent this authority is unpersuasive. The only Pennsylvania source Plaintiffs cite for the proposition that a stranger to a contract has the right to void it is dicta from an opinion issued during the Civil War. Opp. 24 (citing *Pearsoll v. Chapin*, 44 Pa. 9, 15 (1862)). They do not cite a single analogous Pennsylvania case decided in the following 152 years in which that supposed rule was applied. They certainly identify no case holding that strangers can invalidate a contract simply because they were allegedly harmed by it.

Instead, Plaintiffs rely on cases which have no applicability to this matter. Plaintiffs put great weight on *Allstate Insurance Co. v. Stinger*, which concludes that "parties whose 'rights' are 'affected' by *an insurance contract* have standing under the Declaratory Judgments Act." 400 Pa. 533, 536, 163 A.2d 74, 76 (1960) (emphasis added). But this rule is peculiar to insurance cases, where the contract at issue (between the insured and insurer) is made, at least in part, for the benefit of an injured third party, and indeed, the real party in interest is often the third party seeking compensation from the insurance company. *See Fed. Kemper Ins. Co. v. Rauscher*, 807 F.2d 345 (3d Cir. 1986) ("[I]t is quite true that in many of the liability insurance cases, the most real dispute is between the injured third party

and the insurance company ...."); *see also Klopp v. Keystone Ins. Co.*, 528 Pa. 1, 9-11, 595 A.2d 1, 5-6 (1991) (Cappy, J., concurring). It has no application outside the insurance context.[9]

Plaintiffs' efforts to minimize and distinguish the wealth of authority identified in the NCAA's opening Memorandum is similarly unsuccessful. Plaintiffs contend that *Souders v. Bank of America*, No. 12-cv-1074, 2012 WL 7009007 (M.D. Pa. Dec. 6, 2012) supports their argument that the appropriate standing analysis is whether a party has suffered an "injury in fact." Opp. 25. But they completely mischaracterize the court's analysis, which, in fact, *did not* "rel[y] on" the injury-in-fact analysis to conclude that the plaintiff lacked standing. Instead, the Court explicitly held that the plaintiff "lacks standing to raise these claims because the contract underlying her claims is the assignment of the mortgage, to which she is neither a party nor third-party beneficiary." *Souders*, 2012 WL 7009007, at *11.

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[9] Plaintiffs also cite *Szoko v. Township of Wilkins*, 974 A.2d 1216, 1220 (Pa. Commw. Ct. 2009), to no avail. The case holds that harm is necessary to standing, but says nothing about whether harm alone is sufficient in the context of a stranger to a contract attempting to invalidate it. The issue is never addressed by the court. Plaintiffs' reliance on *League of Residential Neighborhood Advocates* and *Cleveland City Association* is similarly misplaced. Those cases merely allowed non-parties to challenge government action that had been taken pursuant to a consent decree. They certainly do not stand for the proposition that strangers can invalidate a private contract.

Further, despite Plaintiffs' attempt to create some split in authority, none exists. Even courts in California and Utah—which Plaintiffs contend are "more similar to" Pennsylvania, Opp. 26—have held that those who are neither parties nor third-party beneficiaries to a contract cannot seek to invalidate it. *Baum v. Am.'s Servicing Co.*, No. 12-CV-00310-H BLM, 2012 WL 1154479, at *4 (S.D. Cal. Apr. 5, 2012) ("Under California law, a plaintiff lacks standing to challenge a contract if he is not a party to the contract or if the principal contract 'was not made expressly for the benefit of plaintiff.'" (citation omitted)); *City of Grantsville v. Redevelopment Agency*, 2010 UT 38, ¶ 14, 233 P.3d 461, 466-67 (2010) ("[W]ith the exception of those who are third-party beneficiaries or assignees, only those who are a party to a contract have a legally protectable interest in that contract."). Even if a split of authority existed, Plaintiffs have no basis for asserting that *Pennsylvania law* would allow strangers to a contract to void it. Opp. 25-26. Pennsylvania law extends rights to non-parties to a contract in only limited circumstances. *See Scarpitti v. Weborg*, 530 Pa. 366, 370, 609 A.2d 147, 149 (1992). "In the absence of some statutory, common law, or equitable duty, the parties to an agreement simply have no obligation to a nonparty, regardless of the extent to which that nonparty is interested in enforcement or abrogation of the contract." *Halstead v. Motorcycle Safety Found., Inc.*, 71 F. Supp. 2d 455, 460

(E.D. Pa. 1999) (citing *Rottmund v. Continental Assurance Co.*, 761 F. Supp. 1203, 1208 (E.D. Pa. 1990)).

Finally, even if Plaintiffs were correct that non-parties have standing to void a contract so long as they have a "direct, immediate, and substantial interest" in the contractual bargain, and suffered an "injury in fact" resulting from that bargain, Opp. 24, 25, Plaintiffs *still* would not have standing to invalidate the Consent Decree here. The Consent Decree is a contract in which the NCAA agreed to refrain from conducting an enforcement investigation (which would have caused Penn State years of uncertainty, negative publicity, and potentially resulted in more serious penalties) in exchange for Penn State's agreement to a series of sanctions and other remedial measures. That contractual bargain has nothing to do with Plaintiffs. It does not injure them, and they have no "direct, immediate, and substantial interest" in it.

Plaintiffs complain that findings about their conduct inspired or motivated the contract between the NCAA and Penn State, and that they were allegedly harmed by statements made in what amounts to the preamble to the contractual agreement. *See, e.g.*, Am. Compl. ¶ 110 ("The NCAA's decision to embrace the Freeh Report was widely viewed as extremely damaging to the Penn State football program and the reputation of those associated with it, including Plaintiffs."); *id.* ¶¶ 97-98 (identifying allegedly "erroneous" statements in the Consent Decree

that purportedly harmed Plaintiffs"); *id.* ¶ 101 ("The imposed Consent Decree is an indictment of the entire Penn State community .... [It] charges that every level of the Penn State community created and maintained a culture of reverence for, fear of, and deference to the football program, in disregard of the values of human decency ....").

But even under their own theory, Plaintiffs' standing to void a contract would depend on their interest in the contractual bargain itself. *See* Opp. 27 (offering a "hypothetical contract in which a regulated entity *agrees* with its regulator *to take action to harm a third party*" (emphasis added)). It would not depend on what may have motivated the contracting parties. And certainly recitations in a preamble or "whereas" clause do not confer Plaintiffs with standing to invalidate the actual contract. Plaintiffs can allege tort claims based on the statements made in the Consent Decree (which they have), or attempt to allege claims for breach of contract rights allegedly owed them under the Bylaws (which they have). They have no standing, however, to unwind a contractual agreement between the NCAA and Penn State that by its actual terms does not affect them in any way. *See, e.g.*, Consent Decree at 6, Ex. B to Am. Compl. ("Individual penalties to be determined. The 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 certainly offer no legitimate basis for concluding they have standing to void the *entire* Consent Decree. There can be no credible argument that Coach Paterno and Trustee Clemens had a "direct, immediate, and substantial interest"—and suffered an "injury in fact" from—Penn State's agreement, for example, to not participate in bowl games, to reduce its number of athletic grant-in-aids, or to commit to an Athletics Integrity Agreement. Plaintiffs contend that they nonetheless have standing to invalidate all of these commitments because their conduct allegedly supplied the motivation for the agreement. *See* Opp. 28. As demonstrated above, that is insufficient. And in any event, Plaintiffs ignore that the "findings and conclusions" about Spanier, Schultz, and Curley (each of whom is being criminally prosecuted for his role in the Sandusky scandal)—as well as Penn State, as an institution—provide an ample independent basis for the Consent Decree, even if the Consent Decree had been entirely silent on Coach Paterno and the Penn State Board of Trustees.

In the end, Plaintiffs ask the Court to allow this case to proceed (perhaps for years) before ultimately deciding "whether the Consent Decree is so fundamentally flawed it should be stricken in its entirety, whether some portions should be severed and stricken, or whether another form of relief is appropriate." Opp. 28. Plaintiffs ignore, however, that during that entire time, the cloud of uncertainty will continue to hang over Penn State, and prevent it from finally and conclusively

moving past the Sandusky affair. That would be fundamentally unfair, and sacrifice the entire Penn State community's interests to the potential benefit of no one but these few Plaintiffs. The law is clear that, as strangers to the Consent Decree, Plaintiffs have no authority to seek its invalidation. Their request for such relief should therefore be stricken now.

B. Plaintiffs Still Have Not Identified a Proper Legal Basis For Declaring the Consent Decree Void *Ab Initio* In Its Entirety.

Lack of standing aside, Plaintiffs contend that the Consent Decree is void *ab initio* in its entirety because it was allegedly unauthorized under the NCAA's Bylaws, and because the Consent Decree is the product of duress. These allegations have no basis in fact, and, even if true, would not supply valid legal grounds for invalidating the Consent Decree.

Plaintiffs' Opposition offers no authority for the proposition that a contract would be void *ab initio* if a private organization violated other contractual commitments when entering into it, or even if the private organization acted beyond the scope of its own bylaws. *See* Opp. 29-32. Plaintiffs' previous opposition in this case generally referenced two eighty-year old cases in support of this argument. Opp. to Defs.' Prelim. Objs. 25-26 (Sept. 6, 2013) (citing *Bedell* and *Baltimore & O.R.*). Plaintiffs, however, did not even bother to cite them again, as they are completely inapplicable here. *Baltimore & O.R. Co. v. Smith*, held that a national bank could not act beyond the scope of its authority—which was

specifically delineated by the federal government. 56 F.2d 799, 802 (3d Cir. 1932). Similarly, *Bedell* held that where a corporation's "powers" are "conferred upon it by the legislature," it may not act beyond the scope of those powers. *Bedell v. Oliver H. Bair Co.*, 104 Pa. Super. 146, 153-54, 158 A. 651, 653-54 (1932) (holding that funeral home had no authority to issue an insurance contract, as such contract was "'beyond the powers conferred upon it by the legislature'" and because it was not an insurance company subject to "supervision of the Insurance Department" (citation omitted)).

Where modern cases have voided contracts as ultra vires, they have done so in the context of *government entities* exceeding their *statutory* or *regulatory* authority.[10] Thus, these cases simply involve a variation of the rule that a contract that violates federal or state law is invalid. But that is not the issue presented here. Even if the NCAA (a private voluntary association with no state law delineating its powers or authority) acted beyond its authority under the Bylaws (and it did not), that would at most violate separate alleged contractual obligations under the Bylaws, and not any statute or other state law.

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[10] *See, e.g.*, *Wilson v. Cnty. of Montgomery*, No. 2463 C.D.2010, 2011 WL 10876908, at *3 (Pa. Commw. Ct. Nov. 17, 2011) (holding a county "acted beyond its powers"); *Clairton Slag, Inc. v. Dep't of Gen. Servs.*, 2 A.3d 765, 782 (Pa. Commw. Ct. 2010) ("When a government entity enters into a contract beyond its authority, the contract is void and unenforceable."); *Bolduc v. Bd. of Supervisors*, 152 Pa. Commw. 248, 253-54, 618 A.2d 1188, 1191 (1992) (holding that a "[t]ownship acted beyond its power").

Plaintiffs argue at length that the NCAA does not have authority under its Bylaws to sanction Penn State outside of the traditional enforcement process. *See* Opp. 35-38. Plaintiffs are wrong about that. The NCAA's Constitution and Bylaws give the Executive Committee broad authority to respond to "core issues and other Association-wide matters," and the Executive Committee's judgment about the meaning of the Association's own Bylaws would be entitled to substantial deference here.[11] But for present purposes the more important point is that Plaintiffs' arguments assume wrongly that the NCAA imposed sanctions *unilaterally*. *See, e.g., id.* at 38. It did not. Facing an unprecedented crisis, the NCAA and Penn State *agreed* on an appropriate set of remedial measures, in order to avoid the need for a formal enforcement process. The NCAA's Bylaws govern enforcement actions when such actions are initiated. They certainly do not *require*

[11] The Executive Committee is the highest authority within the NCAA's administrative structure and is comprised of the NCAA President (whom the Committee selects) and the chairs of the Division I Leadership Council, and members of the Division I Board of Directors, among others. The Executive Committee's authority to act on behalf of the Association is extensive, and includes, *inter alia*, the authority to "[p]rovide strategic planning for the Association as a whole," "[i]dentify core issues that affect the Association as a whole," "[a]ct on behalf of the Association by adopting and implementing policies to resolve core issues and other Association-wide matters," and "[i]nitiate and settle litigation." NCAA Academic and Membership Affairs Staff, *2011-12 NCAA Division I Manual* art. 4.1.2 (2011) ("Manual"), attached as Ex. A to Am. Compl. The Executive Committee concluded that the unprecedented and unique crisis at Penn State posed "core," "Association-wide" issues that it is empowered to address. A private voluntary association's reasonable construction of its own bylaws is entitled to substantial deference. *See Musicians' Protective Union Local No. 274 v. Am. Fed'n of Musicians*, 329 F. Supp. 1226, 1236 (E.D. Pa. 1971).

the Association to initiate enforcement proceedings in response to every suspected violation, even when the member institution has voluntarily accepted or initiated appropriate remedial measures. And against that backdrop, the Executive Committee's conclusion that it had the authority to enter into a Consent Decree with Penn State was plainly reasonable (and, again, entitled to substantial deference—not second-guessing, *see supra* 21 n.6).

Plaintiffs' actual "ultra vires" argument boils down, therefore, to the contention that the NCAA lacks authority to *unilaterally impose* an *involuntary* resolution of a potential enforcement action without the various procedural safeguards promised in the Bylaws. The argument collapses, in other words, into Plaintiffs' contention that the NCAA "impermissibl[y] coerc[ed]" Penn State into accepting these sanctions, *see* Opp. 33—and fails as a matter of law for the same reasons.

Needless to say, Penn State is a top-notch research university led and advised by extraordinarily knowledgeable people who are not easily intimidated, and who agree to bargains if, and only if, that bargain is in the University's long-term best interests. It is a bedrock legal principle that a settlement of a potential dispute under conditions of uncertainty is not legally coerced merely because the

outcome of that dispute might have been extremely unpleasant.[12] If criminal defendants facing the *actual* death penalty can agree to enforceable plea bargains, Penn State, and its lawyers, could agree to a consensual resolution of this crisis even if the prospect of a temporary suspension of college football competition is one possibility in the background.

The allegations in the Amended Complaint (if true) at most amount to ordinary duress, which would only render the Consent Decree voidable at the

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[12] *See, e.g.*, *Hamlin v. Dep't of Army*, No. 95-3140, 60 F.3d 839, 1995 U.S. App. LEXIS 40305, at *3 (Fed. Cir. Apr. 13, 1995) ("No basis exists for [plaintiff's] allegation that her execution of the settlement agreement was involuntary. ... Her allegation that the Army's ability to pursue a complaint against her with the state nursing board constituted coercion is without merit. It is not coercive for an agency to insist upon a legally permissive course of action and to remind an employee of the consequences thereof."); *see also Commonwealth v. Chumley*, 482 Pa. 626, 647, 394 A.2d 497, 508 (1978) ("A well-reasoned decision to plead guilty to avoid an unconstitutional death penalty does not in and of itself render the guilty plea invalid."); *Casillas v. Grace*, No. CIV.A. 04-2642, 2005 WL 195588, at *9 (E.D. Pa. Jan. 28, 2005) ("It is well established that when a defendant's decision to plead guilty is motivated by a desire to avoid the death penalty, that fact does not make the plea involuntary or otherwise invalid."); *Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Commc'ns Corp.*, 337 B.R. 475, 478 (S.D.N.Y. 2006), *aff'd sub nom. In re Adelphia Commc'ns Corp.*, 224 F. App'x 14 (2d Cir. 2006) ("The government encouraged Adelphia to enter into the settlements by offering substantial benefits ... in exchange for its agreement to the settlements. While the alternatives presented all were unpleasant, that does not render the situation coercive in any legally relevant sense."); *Restucci v. Spencer*, 249 F. Supp. 2d 33, 43-44 (D. Mass. 2003) ("Restucci simply misunderstands the notion of coercion. There are no threats of physical harm in the record and any suggestion that Restucci's will was overborne is overblown. A plea is not involuntary when simply motivated by the desire to 'accept the certainty or probability of a lesser penalty rather than face a wider range of [sentencing] possibilities.'" (alteration in original) (citation omitted)).

election of Penn State. *See Germantown Mfg. Co. v. Rawlinson*, 341 Pa. Super. 42, 54, 491 A.2d 138, 144 (1985) (improper threats of criminal prosecution constitute duress rendering a contract *voidable*); *see also* Restatement (Second) of Contracts § 175(1) (1981) ("If a party's manifestation of assent is procured by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is *voidable* by the victim." (emphasis added)). Plaintiffs would have no authority to control Penn State's decision whether to ratify the Consent Decree under those circumstances, and, in fact, the University has made clear that it will stand by and fulfill its commitments under the Consent Decree. Plaintiffs cannot plausibly contend that Penn State remains subject to legal coercion *now*, standing before this Court with the ability to assert and obtain a resolution of any legal argument that it might wish to advance. Thus, even if Plaintiffs' allegations of ordinary duress were true, they have no ability to void the Consent Decree.

The standard for finding a contract void *ab initio* due to duress (as opposed to finding it merely voidable) is extraordinarily high in Pennsylvania. A contract can be void *ab initio* for duress only if such duress is "extreme" and of a "forcible or terrorizing character." *Sheppard v. Frank & Seder, Inc.*, 307 Pa. 372, 376, 161 A. 304, 305-06 (1932) (explaining that duress of a "less[er] degree," including that which would "'overcome the mind and will of a person of ordinary firmness,'" is insufficient (emphasis added) (citation omitted)). Plaintiffs do not allege any facts

that would rise to the level of "forcible" or "terrorizing" threats. With respect, the prospect that a college football team might have to take a temporary break from competition, in the wake of revelations that persons associated with the program and the university chose to protect the football program rather than report sexual assaults against children that occurred in, among other places, team facilities, should not seem a "terrorizing" prospect. *See* Opp. 34

III. PLAINTIFFS' OPPOSITION FAILS TO SALVAGE THEIR FLAWED CONTRACT CLAIMS.

A. The NCAA's Reasonable Construction of An Unambiguous Bylaw Should Dispose of Plaintiffs' Contract Claims Altogether.

Plaintiffs' Opposition acknowledges that the breach of contract claims brought by the Family and Estate of Joe Paterno (the "Estate") and Al Clemens ("Trustee Clemens") depend on their ability to establish third-party beneficiary status under the NCAA Bylaws, which (as they have framed it) is entirely dependent on their argument that they are "involved individuals" under the Bylaws.[13] Even on their second try, Plaintiffs remain unable to establish these two foundational predicates, and their contract claims thus fail on their own terms.

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[13] As demonstrated in the NCAA's opening Memorandum, even if Coach Paterno and Trustee Clemens were somehow "involved individuals" under Bylaw 32.1.5, they still cannot establish they are intended, third-party beneficiaries of the NCAA's Membership Agreement. Under Pennsylvania law, a person is an intended third-party beneficiary of a contract only if it can be reasonably determined that the contracting parties intended to benefit the third party. *Scarpitti v. Weborg*, 530 Pa. 366, 371, 609 A.2d 147, 150 (1992). No such express

The meaning of the term "involved individual" in the NCAA Bylaws is not a difficult question to resolve. NCAA Bylaw 32.1.5 is titled "*Definition of Involved Individual*," and explicitly provides that "[i]nvolved individuals are 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*." Manual art. 32.1.5 (emphasis added). Plaintiffs acknowledge they were never provided such notice, Opp. 36 ("[P]laintiffs did not receive formal 'notice' of any alleged rule violations."), and therefore they clearly and unambiguously were not "involved individuals" under the Bylaws. That is the end of the matter.

Plaintiffs suggest that this straightforward reading of the Bylaw would "interpret the contract inequitably and absurdly, and it would nullify the contract's terms." *Id.* at 37. But there is nothing "absurd[]" about construing a contract according to its plain language and nothing in any way unreasonable about how this Bylaw functions. As noted above, colleges and universities retain the power to discipline or fire employees without any NCAA involvement—just as Penn State made an independent decision here to fire Coach Paterno. So it makes sense that the procedural safeguards associated with an NCAA enforcement proceeding

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statement can be found in the NCAA Constitution and Bylaws, and the NCAA and Penn State have denied any such intent. As such, they have no rights against the parties to the contract. *See* Restatement (Second) of Contracts § 315 (1981).

would not be extended to anyone outside the context of such proceedings. Otherwise any fired or disciplined university employee could demand a hearing before the NCAA as an "involved individual" on the ground that, in that individual's opinion, the NCAA *should have been* pursuing enforcement proceedings even though it was not.

The Bylaw recognizes that where the NCAA engages its enforcement authority unilaterally and coercively to investigate and sanction member institutions, certain procedural mechanisms apply. And when the Enforcement Staff, in its discretion, decides to include individuals in an enforcement process, it provides them with notice and various procedures. But, as Plaintiffs acknowledge, none of that happened here. This is *not* a case where the NCAA enforcement staff conducted a traditional investigation without affording procedural mechanisms to "involved individuals." Instead, this case involves an express agreement by the NCAA and a member institution *not to engage its traditional enforcement process at all.*[14] The truly absurd construction would be to ignore the plain language of the rule, and require the NCAA to follow enforcement procedures even when, in exchange for a member's significant undertakings, it has expressly committed to refrain from doing so.

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[14] *See* Consent Decree at 1 ("In light of this record and the University's willingness, for purposes of this resolution, to accept the Freeh Report, which the University itself commissioned, *traditional investigative and administrative proceedings would be duplicative and unnecessary.*" (emphasis added)).

The Court should not entertain policy arguments from Plaintiffs about the wisdom or fairness of the NCAA's Bylaws, nor textual arguments concerning other proffered interpretations of the term "involved individual." *See* Opp. 36. The law does not afford Plaintiffs' views on the Bylaws equal weight to the Association's. Instead, the NCAA's "reasonable" interpretation is entitled to substantial deference, and should govern this case. *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.'" (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.*, 941 F. Supp. 2d 659, 665 (E.D. Pa. 2013) (observing that "'courts ordinarily will not interfere with the management and internal affairs'" of a "'voluntary membership organization'" (internal citations omitted)). Indeed, Plaintiffs' own authority makes clear that even if the Bylaw were ambiguous (it is not), the NCAA's interpretation is entitled to deference, "*even when that interpretation is advanced in a legal brief.*"[15] *Christopher v. SmithKline Beecham Corp.*, 132 S.

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[15] As Plaintiffs note, *Christopher* goes on to explain that there may be

Ct. 2156, 2166 (2012) (emphasis added). Here, the Court has already recognized that the NCAA's interpretation of "involved individual" is "reasonable." Order 9. And rightly so: it accords with the plain language of Bylaw 32.1.5 and is necessary to preserve the right of member institutions to independently govern their own employees. Where a voluntary association's "reasonable" interpretation of a bylaw so clearly aligns with the plain language and evident purposes of the provision, there is no room to permit third parties to inject their own preferred views. The NCAA's interpretation is binding, and the contract claims must be dismissed.

B. Plaintiffs' Own Brief Demonstrates the Dispositive Effect of Coach Paterno's Death on the Estate's Contract Claim.

Even if the Court believed the application of the term "involved individual" were somehow unclear, that term cannot—as a matter of law—apply to the Estate here for the additional reason that Coach Paterno indisputably passed away before he could have possibly become an "involved individual." The procedural mechanisms afforded involved individuals under the NCAA Rules envision only a

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circumstances when such deference is unwarranted, such as when the "interpretation is plainly erroneous or inconsistent with the regulation," "when the agency's interpretation conflicts with a prior interpretation," or "when it appears that the interpretation is nothing more than a convenient litigating position, or a post hoc rationalization advanced by an agency seeking to defend past agency action against attack." 132 S. Ct. at 2165 (internal quotation marks and citation omitted). These exceptions have no application here. The NCAA's interpretation of "involved individual" is entirely consistent with the plain language of the explicit definition provided for that term in the Bylaws themselves, as well as the purposes of that provision.

"living, participating" individual, *see* Opp. 38, and do not extend to the deceased. In their Opposition, Plaintiffs admit all of the predicate facts to establish that the Estate lacks standing on these grounds to assert a breach of contract claim. The Estate's contractual claim must therefore be dismissed.

Plaintiffs allege (incorrectly) that when (1) "the [NCAA] determines after conducting its initial inquiry that there is sufficient information to support a finding of a rules violation [by a member institution]"; and (2) the "allegations suggest the significant involvement of any individual staff member or student," the individual alleged to be significantly involved in the purported violation becomes an "involved individual."[16] Am. Compl. ¶ 37. Plaintiffs concede, however—as they must—that Coach Paterno died before any of that took place. Crucially, Plaintiffs expressly admit that Coach "Paterno passed away *before the NCAA defendants concluded that his conduct provided a basis for imposing sanctions.*" Opp. 38 (emphasis added). Indeed, the Estate alleges that Coach Paterno became an involved individual because he "was specifically named in the Consent Decree," several months after his death. Am. Compl. ¶ 119.

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[16] As explained in Section III.A., *supra*, Plaintiffs completely ignore that under the NCAA's Bylaws, a person becomes an "involved individual" only after they receive "*notice* of significant involvement in alleged violations through the *notice of allegations or summary disposition process.*" Their proposed definition thus reads out this critical language from the Bylaw's explicit definition of "involved individual." However, even putting the notice requirement aside, neither Coach Paterno nor the Paterno Estate could have been an "involved individual" for the reasons set forth above.

Although Plaintiffs deem that fact "irrelevant," Opp. 38, it could not be *more* relevant. Plaintiffs do not dispute (and, in fact, allege) that at the time of Coach Paterno's death, the NCAA had not determined either that (1) sufficient information existed to support a finding of a rules violation by Penn State; or (2) that Coach Paterno was significantly involved in any such alleged violations. *See* NCAA Mem. 27-29 (citing relevant portions of Plaintiffs' Amended Complaint). Plaintiffs instead specifically allege that the NCAA was awaiting the release of the Freeh Report before making any determination regarding whether sufficient information existed to support the finding that Penn State violated NCAA rules and whether any individuals were significantly involved in those violations. Am. Compl. ¶ 58. Accordingly, there is no real dispute that—even under Plaintiffs' construction of the term—Coach Paterno was not an "involved individual" on the day he died.

The only question remaining, therefore, is whether the NCAA and Penn State intended to extend the procedural rights afforded to involved individuals to "participate in the enforcement process" to persons who are deceased. To ask that question is to answer it. As Plaintiffs allege, involved individuals are entitled to things such as "notice of any alleged rules violation, an opportunity to participate in proceedings, an opportunity to defend themselves, a right to be represented by legal counsel, an opportunity to review any infractions report," and "a right to

prepare a written joint report following any investigation by NCAA enforcement staff." Opp. 38. In short, as Plaintiffs themselves acknowledge, the procedural mechanisms afforded to involved individuals allow the individuals to "*participate* in the enforcement process." Opp. 40 (emphasis added).

Accordingly, even Plaintiffs concede that "the rules [pertaining to involved individuals] may have been fashioned with a *living, participating individual in mind*." Opp. 38 (emphasis added). That is dispositive. Plaintiffs have acknowledged that third-party beneficiary status is available only to "effectuate the intention of the contracting parties." Opp. 35. Here, where the contracting parties indisputably had "living, participating individuals in mind," there is no basis to conclude that the parties intended to afford rights to deceased individuals. And that is also common sense. Plaintiffs argue that the NCAA could have "fulfill[ed] their duties under the rules by notifying Paterno's estate and permitting an estate representative to participate in the enforcement process." Opp. 40. But neither George Paterno, nor his lawyer, could possibly stand in for Coach Paterno in an investigation into what *Coach Paterno* knew, said, and did or did not do during meetings with other Penn State officials to which neither George Paterno, nor his lawyer, was a part. That would not only be hearsay; it would be rank speculation. Plaintiffs have offered no evidence whatsoever to suggest that the parties to the NCAA's membership agreement envisioned such an incomprehensible state of

affairs, where a deceased individual's involvement in alleged rule violations would be evaluated based on the hearsay or speculation of his uninvolved next-of-kin.

The Estate's primary response is to argue that in some cases, an involved individual has declined to accept the procedural rights that the NCAA has offered them. Opp. 39-40. But that situation is obviously far flung from this one. The fact that living involved individuals sometimes *choose* to decline rights that they could exercise does not suggest that the NCAA intended to provide deceased individuals rights that they *cannot* exercise.[17]

Plaintiffs' only other argument is equally unpersuasive. Having repeatedly criticized the NCAA for its purported "rush to judgment" by relying on a nearly 150-page report, produced after a seven-and-a-half month investigation commissioned by Penn State itself (not the NCAA), and led by the former head of the FBI, Am. Compl. ¶¶ 61, 63, 83, Plaintiffs argue that Coach Paterno would have been an involved individual if only the NCAA had initiated its own investigation in November 2011 and presumably concluded within the two months before his death that Coach Paterno was significantly involved in violations of NCAA rules. Opp. 41. But the NCAA can hardly be faulted for awaiting the results of Penn

[17] The fact that the NCAA has proceeded to impose sanctions in cases where an involved individual declines to participate in the enforcement process is not objectionable. *See* Opp. 39-40. In such cases, the NCAA has fulfilled any obligation on its own part to extend procedural rights to the involved individual. It would be nonsensical if an involved individual could prevent sanctions against a member institution by declining to participate in an enforcement process.

State's internal investigation, and Plaintiffs point to no NCAA rule or other legal basis that required the NCAA to investigate Penn State or reach conclusions about Coach Paterno's conduct more quickly. No doubt that if it had, then Plaintiffs *certainly* would have criticized the NCAA for rushing to judgment.

In sum, Plaintiffs effectively have acknowledged: (1) Coach Paterno was not an involved individual on the day he died, and (2) the procedural mechanisms afforded involved individuals under the NCAA Rules envision a "living, participating" individual. Therefore, as a matter of law, neither Coach Paterno nor his Estate can be a third-party beneficiary to the NCAA's membership agreement with Penn State.[18]

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[18] Because there can be no dispute that Coach Paterno died before he became an involved individual, the question of whether such rights would have *survived* his death is not presented here. If it was, however, they would not survive, for the reasons set forth in the NCAA's opening Memorandum. NCAA Mem. 26-34. Plaintiffs' Opposition contends otherwise, on the grounds that the only category of contracts that do not survive death are contracts for the decedent's personal *services*. Opp. 40. But that is incorrect. Contracts that depend on the existence of a particular person do not survive death whether the decedent is the promisor or promisee. Restatement (Second) of Contracts § 262 & cmt. a (1981) ("If the existence of a particular person is necessary for the performance of a duty, his death ... discharges the obligor's duty to render the performance .... Usually, the person in question will be the obligor, *but he may also be the obligee* ...." (emphasis added)). The participatory rights afforded to an involved individual are inherently personal and the NCAA can fulfill its duty only by providing them to the involved individual himself. As a result, any such obligations would not survive the individual's death.

C. Plaintiffs Cannot Demonstrate That Statements About the Full Board of Trustees Are Sufficient To Render A Single Trustee an "Involved Individual."

Similarly, Plaintiffs have failed to demonstrate that *any* possible construction of the term "involved individual" would apply to Trustee Clemens here. To begin with, unlike Coach Paterno, Trustee Clemens is not specifically named in the Freeh Report or the Consent Decree, and his claims are predicated entirely on a statement about the full Board of Trustees. But Trustee Clemens lacks standing to challenge a statement made about the *Board* itself, repeating conclusions by the *Board's* agent, to which the *Board* gave—at minimum—its tacit acceptance. It is undisputed that before entering into the Consent Decree, Penn State issued a statement indicating that the Board of Trustees, as a corporate body, "accepted full responsibility for the purported failures outlined in the Freeh Report." Am. Compl. ¶ 62. Trustee Clemens does not dispute that Penn State continues to stand by that statement, that numerous other trustees have affirmed their agreement with that statement, or that he is the only member of the Board of Trustees in 1998 and 2001 challenging that statement in this case. Opp. 43. Indeed, Trustee Clemens himself has been outspoken in his criticism of the Board for "[h]iring Louis Freeh and *the tacit acceptance of his questionable conclusions*." *See* Jennifer Miller, *Penn State Board Trustee Al Clemens Resigns; Alumni Criticize Board for Freeh Report Response*, StateCollege.com (Mar. 7, 2014),

http://www.statecollege.com/news/local-news/penn-state-board-trustee-al-clemens-resigns-alumni-criticize-board-for-freeh-report-response,1458230/ (emphasis added). Because the statement of which Trustee Clemens complains is directed at the Board, the Board is the only body which could have standing to challenge it. The Board chose not to do so.

Trustee Clemens further argues that the NCAA's objection is misplaced because a "'corporate body' is not capable of engaging in sanctionable conduct under the NCAA Rules." Opp. 42. But just the opposite is true—the NCAA primarily imposes sanctions against member institutions, which are corporate bodies, not individuals. To be sure, individuals may commit the violations for which an institution is punished, but here, there is not even any allegation that any statement in the Consent Decree singles out Trustee Clemens for criticism or alleges his significant involvement in NCAA Rule violations.[19] Trustee Clemens may disagree with the statement about the Board generally, just as members of the Penn State community disagree about statements made concerning Penn State. But

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[19] For the reasons explained in Section IV.B, *infra*, the general rule is that a statement made about a group of over 25 members cannot even support a common law defamation claim by an individual group member. That is because such statements "are not reasonably understood to have any personal application to any individual unless there are circumstances that give them such an application." Restatement (Second) of Torts § 564A cmt. a (1977). Here, where it is doubtful that Trustee Clemens can even show that the statement even *applies to him*, he cannot reach the higher threshold of showing that the statements allege that Trustee Clemens was himself "*significantly* involved" in violations of NCAA Rules.

just because he is a member of that group does not mean that he is an "involved *individual*" within any meaning of the NCAA Rules.

Trustee Clemens argues that it makes no difference that he was not personally named in the Consent Decree, arguing that his case is analogous to one in which the NCAA referred to allegations against the "head coach at Ohio State" or a "star running back at USC." Opp. 42. But the difference between this case and those only underscores why Trustee Clemens is not an "involved individual." In those examples, the allegations would be directed against *one particular individual*. That is not the case here. The statement that Trustee Clemens challenges is directed at the Board as an entire body, not any one Board member. Much like statements directed against a member institution, they do not themselves render every member of those groups "involved individuals."

IV. PLAINTIFFS' AMENDED TORTIOUS INTERFERENCE CLAIM SHOULD BE DISMISSED.

A. Plaintiffs Have Not Cured The Previous Deficiencies Identified By This Court.

This Court dismissed Plaintiffs' tortious interference claim for failure to adequately plead that "any specific prospective contracts would have been consummated but for Defendants' conduct." Order 22. Plaintiffs were given the opportunity to amend their complaint and address this specific deficiency. Were Plaintiffs' claims merited, this would not be a difficult task because Plaintiffs

would have direct firsthand knowledge of any specific prospective contracts that were reasonably likely to have been entered into. But, as demonstrated in the NCAA's opening Memorandum, NCAA Mem. 41-43, Plaintiffs' amended allegations fail to plead anything more than applications, interviews and vague expressions of interest from schools, NFL teams, and media companies. This is insufficient as a matter of law. Because Plaintiffs' Amended Complaint has not cured the deficiency set forth by the Court in its January 7 Order, Plaintiffs' claim for tortious interference with prospective contractual relations should again be dismissed.

In their Opposition, Plaintiffs contend that they have shown a "reasonable likelihood or probability of a contractual relation." But their own authority shows that they have not. Indeed, in each of the two cases they cite, the plaintiffs had ongoing or recurring customer relationship that had been disrupted, and it was reasonable to conclude that such business would have continued but for defendants' improper interference. *See Rittenhouse Entm't, Inc. v. City of Wilkes-Barre*, 861 F. Supp. 2d 470, 490 (M.D. Pa. 2012) (nightclub with a steady business night after night had demonstrated a "'reasonable likelihood or probability [of a contractual relation]'" (alteration in original) (citation omitted)); *Perma-Liner Indus., Inc. v. U.S. Sewer & Drain, Inc.*, 630 F. Supp. 2d 516 (E.D. Pa. 2008)

("allegations could establish a reasonable expectation that but for the Defendants' actions, Plaintiff would have retained the business of this prominent customer").

Here, by contrast, Plaintiffs provide no similar "specific foundation" for their tortious interference claim.[20] They merely offer the hope that alleged preliminary interactions with potential employers would have blossomed but for the NCAA's conduct. In particular, Plaintiffs' contentions that Jay Paterno had previously "been approached" by universities and search firms "exploring his potential interest in head coaching vacancies" and that both William Kenney and Jay Paterno (the "Former Coaches") were "well-qualified" for the positions for which they applied do not create a reasonable probability that any specific prospective contracts would have been consummated but for the NCAA's conduct. Am. Compl. ¶¶ 132, 136-37. Plaintiffs do not allege that these contacts ever proceeded beyond the preliminary stage. *See Manning v. Flannery*, No. 2:10-cv-178, 2012 U.S. Dist. LEXIS 44831, at *80-84 (W.D. Pa. Mar. 31, 2012) (The

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[20] *See Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc.*, No. 90-7952, 1992 U.S. Dist. LEXIS 6479, at *35 (E.D. Pa. Apr. 30, 1992) (holding allegations of potential opportunities inadequate, and contrasting them with a scenario in which a plaintiff "alleged the existence of referral and consultation patterns ... that gave a specific foundation" for the tortious interference claim (citing *Posner v. Lankenau Hosp.*, 645 F. Supp. 1102 (E.D. Pa. 1986))); *see also Cloverleaf Dev., Inc. v. Horizon Fin. F.A.*, 347 Pa. Super. 75, 82, 500 A.2d 163, 167 (1985) (averments that a potential customer "had agreed to sell his stock" and that another potential customer "was prepared to sign an agreement to buy" were "sufficient to allege a reasonable likelihood or probability that an anticipated business arrangement would have been consummated").

plaintiff's tortious interference claim was defeated where plaintiff "had 15 or 16 initial interviews and only two second interviews, but neither led to discussions of terms and conditions of employment," and plaintiff failed to show that plaintiff "obtained an offer, oral agreement or had actual current dealings for employment beyond preliminary discussions and interviews for positions." (citing *Moore v. United Int'l Investigative Servs., Inc.*, 209 F. Supp. 2d 611, 619-20 (E.D. Va. 2002) (a prospective employer's inquiry as to the reasons for the plaintiff's termination from his prior employment did not establish an expectancy of a business relationship where there was no evidence to suggest that the prospective employer expected or intended to offer plaintiff a job))), *aff'd*, *Manning v. Flannery*, 528 F. App'x 141 (3d Cir. 2013). And the allegations they make about the role of the Consent Decree in particular in interfering with these alleged opportunities are suspiciously vague and, in any event, are entirely implausible given the broader firestorm surrounding the Sandusky scandal. Plaintiffs have not rescued their tortious interference claims, and they must be dismissed again.

B. Plaintiffs' Tortious Interference Claim Remains Defective For Several Other Reasons.

In addition to failing to cure the defect explicitly noted by the Court, Plaintiffs' tortious interference claim is also inadequately pled for several other reasons set forth in the NCAA's Memorandum. First, because the tortious interference claim is based upon the same facts as the defamation claim, it must be

dismissed for the same reasons the defamation claim fails, and, in any event, is impermissibly duplicative of that claim. *See Ashoff v. Gobel*, 23 Pa. D. & C.4th 300, 306 (Ct. Com. Pl.), *aff'd*, 450 Pa. Super. 706, 676 A.2d 276 (1995). Additionally, as set forth in the NCAA's Memorandum, Plaintiffs have failed to adequately plead the intent and privilege elements of their tortious interference claim or that the Former Coaches would not have faced the same difficulties securing coaching or commentator positions based solely on the Freeh Report and other negative publicity without any action by NCAA. *See* NCAA Mem. 43-44.

V. PLAINTIFFS' OPPOSITION IGNORES THE DISPOSITIVE LEGAL SHORTCOMING OF THE AMENDED CIVIL CONSPIRACY CLAIM.

In its opening Memorandum, the NCAA explained that "'absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act.'" NCAA Mem. 45 (quoting *McKeeman v. Corestates Bank, NA.*, 2000 PA Super 117, ¶ 14, 751 A.2d 655, 660 (2000) (citation omitted)). In the Amended Complaint, only four remaining Plaintiffs in this action—the Estate, Trustee Clemens, William Kenney, and Jay Paterno—have asserted any civil cause of action aside from this civil conspiracy claim. The other Plaintiffs' claims thus fail as a matter of law.

Plaintiffs do not even attempt to distinguish *McKeeman* or otherwise directly address this argument. Instead, they argue generally that all members of "the Penn

State community" were harmed by the Consent Decree. Opp. 64. But this Court expressly found that "that group would consist of hundreds of thousands of people, [and] it is far too large to support a finding that the statements [in the Consent Decree] targeted any of the [remaining] Plaintiffs personally," Order 18, and Plaintiffs have not challenged this holding. Indeed, Plaintiffs have actually *withdrawn* the contract claim they previously asserted on behalf of members of the Penn State faculty and Board of Trustees (other than Trustee Clemens), as well as the former players, as alleged "uninvolved individuals." It is thus beyond dispute that only the Estate, Trustee Clemens, William Kenney, and Jay Paterno have asserted any independent "civil cause of action," and therefore all other Plaintiffs must be dismissed from the civil conspiracy claim, and the case altogether.[21]

VI. PLAINTIFFS' OPPOSITION OFFERS NO LEGITIMATE BASIS FOR ALLOWING THE DEFAMATION CLAIMS TO PROCEED.

As demonstrated in the NCAA's opening Memorandum, the statements Plaintiffs assert are defamatory referring to "[s]ome coaches, administrators and

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[21] Plaintiffs have apparently disavowed any attempt to seek a declaration that the Consent Decree is void *ab initio* as relief for their civil conspiracy claim, and they suggest that renders it unnecessary to assert that claim against Penn State. *See* Opp. 64-65; *see also* NCAA Mem. 46-47 (arguing that to the extent that relief was sought in connection with the civil conspiracy claim, Penn State was indispensable and the claim must be dismissed for failure to join an indispensable party). Obviously, the claim still fundamentally implicates Penn State, as it alleges a conspiracy between the NCAA and Penn State's agent, Freeh Sporkin & Sullivan, LLP ("FSS"). Penn State thus remains indispensable to the civil conspiracy claim, and it must be dismissed due to Plaintiffs' continued refusal to join Penn State to it.

football program staff members" (the "Staff Statement"), and the failure of the 1998 and 2001 Board of Trustees to perform their oversight duties (the "Board Statement"), are not actionable because: (1) they are statements of opinion (an issue this Court's January 7 Order did not explicitly address); and (2) legal holdings in this Court's prior Order appear to lead to the conclusions that Plaintiffs are not reasonably identified as objects of either statement, and the NCAA's actions cannot, as a matter of law, constitute actual malice. Nothing in Plaintiffs' Opposition provides a basis for holding otherwise.

A. Plaintiffs Continue to Ignore That The Challenged Statements Are Opinions.

As explained in the NCAA's opening Memorandum, the challenged statements cannot be defamatory because they are statements of opinion based entirely on facts published in the Freeh Report, at Penn State's direction. *See* NCAA Mem. at 56-58. A statement "in the form" of an opinion is "absolutely privileged" when, as here, the defendant "states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character." *Alston v. PW-Phila. Weekly*, 980 A.2d 215, 220-21 (Pa. Commw. Ct. 2009) (affirming demurrer and explaining that it is "constitutionally significant" if a statement meets these criteria); *accord Mathias v. Carpenter*, 402 Pa. Super. 358, 363, 587 A.2d 1, 3 (1991) (affirming demurrer because all facts underlying challenged opinion were disclosed); *see also Veno v.*

Meredith, 357 Pa. Super. 85, 93, 515 A.2d 571, 575 (1986) (an expression of opinion is actionable as defamatory only if it "'may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion.'" (citation omitted)). "'Whether a particular statement constitutes fact or opinion is a question of law.'" *Veno*, 357 Pa. Super. at 575, 515 A.2d at 92 (citation omitted).

Plaintiffs' Opposition wholly misses the point. Plaintiffs assert that the "real facts bear no resemblance to the baseless statements," Opp. 50, and spill much ink attacking the underlying *factual* statements set forth in the Freeh Report.[22] But, under the law of defamation, the challenged statements in this case *are not facts*.[23] They are statements about Plaintiffs' "conduct, qualifications, or character," stated "in the form of an opinion," i.e., the ultimate conclusions that the NCAA (and Freeh Sporkin & Sullivan, LLP and Penn State) drew from facts disclosed in the Freeh Report. *See Black's Law Dictionary* 329 (9th ed. 2009) (defining "conclusion" as "[a] judgment arrived at by reasoning"). It appears the Court itself has recognized this: "Both Statements were published in the Consent Decree as

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[22] Notably, Plaintiffs address only statements in the Consent Decree about *Coach Paterno* (whose Estate has not joined this claim) in responding to this point; they never address the statements that Trustee Clemens, Jay Paterno, or William Kenney challenge as defamatory.

[23] The truth or falsity of a statement is relevant only in evaluating a *fact*. Opinions can be neither true nor false. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Plaintiffs also argue that FSS allegedly conspired with the NCAA, but this has no bearing on whether the challenged statements are opinions based on disclosed facts.

conclusions based on fact findings contained in the Freeh Report." Order 16 (emphasis added). By the Court's holding, these statements, therefore, cannot be defamatory under the law.

Prior courts have granted a demurrer on similar facts. For example, in *Greene v. Street*, 24 Pa. D. & C.5th 546 (Ct. Com. Pl. 2011), *aff'd*, 60 A.3d 855 (Pa. Super. Ct. 2012), the court dismissed plaintiff's defamation claim against his former employer for the statement that the plaintiff had "lied about everything," because that statement was based on substantial media coverage and the publication of an investigative report detailing the plaintiff's misconduct, which resulted in his termination from a high-profile position. *Id.* at 547, 549, 562. The employer's conclusion about the plaintiff's conduct, based on "based on facts already in the public purview," *id.* at 562, is effectively the same as the NCAA's statement based on a massive, nearly 150 page investigative report that the Board "failed in its oversight duties," and some staff "ignored red flags."

In the end, Plaintiffs may disagree with the contents of the Freeh Report or the NCAA's opinions, but the Board and Staff Statements are constitutionally protected statements "in the form of an opinion," and, therefore, not actionable.

B. Neither Trustee Clemens Nor the Former Coaches Can Be Reasonably Identified As the Object of the Challenged Statements.

In an odd twist that can probably best be explained by their desire to participate in a high-profile challenge to the Consent Decree, the Former Coaches and Trustee Clemens continue to insist that alleged defamatory statements in the Consent Decree identify *them* specifically. However, as a matter of law, when taken in context, the statements do not reasonably identify these particular Plaintiffs, and the defamation claims must therefore be dismissed.

In its opening Memorandum, the NCAA explained that a reasonable person would not identify the Former Coaches as objects of the Staff Statement because the Consent Decree and the Freeh Report expressly name individuals falling within that group, including several of whom "'regularly observed Sandusky showering with young boys in the Lasch Building.'" NCAA Mem. 52-54 (quoting the Freeh Report at 40). Plaintiffs countered that the Former Coaches are identifiable in the Staff Statement because there are only nine coaches a year, and the Statement cast an unnecessarily wide net by not specifically identifying certain coaches. Opp. 58-59, 61-62. These arguments do not address the fundamental deficiencies the NCAA outlined.

First, Plaintiffs assert that the Former Coaches are identifiable in the Staff Statement, even though the Freeh Report and the Consent Decree name other

individuals, because the Staff Statement itself "was broad and sweeping," and "did not confine itself to certain coaches and not others." Opp. 58. But it is well-established law that an allegedly defamatory statement must be viewed in context, rather than in a vacuum.[24] *See, e.g.*, *Tucker v. Phila. Daily News*, 577 Pa. 598, 615, 848 A.2d 113, 124 (2004) ("The court must view the statements in context ... to determine the effect the article is fairly calculated to produce ... in the minds of the average persons among whom it is intended to circulate." (internal quotation marks and citations omitted)). For example, in *Zerpol Corporation v. DMP Corporation*, 561 F. Supp. 404 (E.D. Pa. 1983), the court granted defendant's motion to dismiss. Allegedly defamatory advertisements did not name the plaintiff explicitly, so the court looked to "the circumstances surrounding their publication" to determine if they "tend[ed] to identify" the plaintiff. *Id.* at 412. The court held that the advertisements did not reasonably refer to the plaintiff, and it admonished that "the advertisements must be read in their entirety. To single out select phrases and draw the inference that [the plaintiff] is the intended target is *to totally mischaracterize* the communications." *Id.* at 414 (emphasis added).

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[24] Plaintiffs also contend that the NCAA's argument that a reasonable person would not believe the Staff Statement included the Former Coaches because they were not within the group to which the Staff Statement referred (*i.e.*, coaches who witnessed Sandusky's crimes) is new. Opp. 58. But the NCAA has repeatedly objected that a reasonable person would not identify the Former Coaches as the object of the Staff Statement because specific individuals are named in the Consent Decree and Freeh Report. Mem. in Supp. of Defs.' Prelim. Objs. 37-43 (July 23, 2013); Reply in Supp. of Defs.' Prelim. Objs. 24-30 (Sept. 26, 2013).

Here, there can be little doubt that the Consent Decree refers to the specifically identified individuals in the Consent Decree and Freeh Report, and not the Former Coaches. For example, the very bullet point in the Consent Decree that contains the Staff Statement begins with "*[t]hese individuals*," which were listed by name in the prior bullet point. Consent Decree at 3 (emphasis added); *see* NCAA Mem. 53-54 (providing additional analysis). To evaluate the Staff Statement in isolation would be to "totally mischaracterize" the communication.

Second, Plaintiffs argue that the group of coaches is small enough (nine coaches) that any one individual could be considered the object of the Staff Statement. Opp. 57. But the Statement is not limited to coaches; it pertains to coaches, administrators, and football program staff members over the course of a number of years—a group that indisputably exceeds 25 individuals. In any event, statements that disparage even a relatively small 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). When taken in context, a reasonable person would connect the Staff Statement to the named individuals, not the Former Coaches.

Nor would a reasonable person identify Trustee Clemens as the object of the Board Statement. *See Zerpol Corp.*, 561 F. Supp. at 410. As this Court expressly recognized in its January 7 Order, courts and leading secondary authorities have

established that a group consisting of more than 25 members is too large to support a defamation claim by any one of its members. *See* NCAA Mem. 48-49 (citing multiple authorities).[25] Plaintiffs admit that the 1998 and 2001 Boards likely each had 32 members—which indisputably exceeds the size for which the law permits an individual to sustain a defamation claim. *See* Opp. 57.

An exception to the rule is unwarranted here. Plaintiffs contend that 32 members is close to the 13 township commissioners in *Farrell v. Triangle Publications, Inc.*, 399 Pa. 102, 106, 159 A.2d 734, 737 (1960). Opp. 56. But it is not close enough. The size of the Board of Trustees is more than *double* the size of the *Farrell* township commission, which doubles the difficulty in reasonably

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[25] *See also, e.g.*, *Alexis v. Williams*, 77 F. Supp. 2d 35, 41 (D.D.C. 1999) (The "consistent rule of thumb" is that "unnamed group members generally are not permitted to sue for group defamation if the group has more than 25 members."); *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1185 (Cal. 1986) (en banc) ("[W]here the group is large—in general, any group numbering over twenty-five members—the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them.'" (citation omitted)); *Bujol v. Ward*, 778 So. 2d 1175, 1178 (La. Ct. App. 2001) ("[M]ost authorities agree that the group must consist of twenty-five or less members in order for the plaintiff to state a cause of action for group defamation." (citing *In re N.Y. Life Ins. Co. Agents' Class Claimants Solicitation Litig.*, 92 F. Supp. 2d 564, 569 (E.D. La. 1997))); Dan B. Dobbs, et al., *The Law of Torts* § 531 (2d ed. 2013) ("[T]he group may be small enough only if it is no more than 25 in number."); Restatement (Second) of Torts § 564A, cmt. b (1977) ("[T]he cases in which recovery has been allowed usually have involved numbers of 25 or fewer."); *Alvord-Polk,* 37 F.3d at 1016 (applying Pennsylvania law and affirming summary judgment/holding that 20 to 25 companies was too large a group); *O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 223 (E.D. Ky. 1990), *aff'd*, 931 F.2d 893 (6th Cir. 1991) (Twenty-nine high school teachers is too large of a group to maintain a defamation claim.).

identifying Trustee Clemens as the object of the statement. This difference is material. For example, the National Football League ("NFL") is comprised of the owners of 32 football teams—the same number as the trustees on the Board. If someone said that the NFL does not hold key players and coaches accountable for their actions, it does not follow that a person would reasonably identify Pittsburgh Steelers' owner Dan Rooney, in particular, as the object of that statement. Likewise, a person could not identify Trustee Clemens as the object of the Board Statement.

C. Plaintiffs' Allegations of Actual Malice Are Insufficient As a Matter of Law.

As this Court explained in its January 7 Order, to state a claim for which relief can be granted on a defamation theory, the plaintiffs in this case "must plead malice," by showing that "a defendant publishes statements with obvious reasons to doubt their veracity." Order 17. However, the essence of Plaintiffs' charge, as this Court recognized in its January 7 Order, is that the NCAA failed to conduct a proper investigation to determine the truth of the Freeh Report's statement. But the Pennsylvania Supreme Court has made clear that the failure to conduct a thorough investigation cannot establish malice as a matter of law. *See Tucker*, 577 Pa. at 634, 848 A.2d at 135 ("'[T]he question of whether a statement has been published with reckless disregard of falsity is not measured by whether a reasonably prudent man ... would have investigated before publishing.'" (citation

omitted)). And in any event, Plaintiffs' post hoc criticisms of the Freeh Report—based on the work of their paid consultants—are meaningless to demonstrate contemporaneous actual malice. For this independent reason, the defamation claims fail as a matter of law.

Plaintiffs do nothing to salvage the defamation claims. They cannot defend the proposition that the NCAA acted with knowing and reckless disregard for the truth in relying on (i) a seven-month investigation (ii) by the former director of the FBI, (iii) which Penn State itself publicly accepted, and (iv) which accorded with publicly disclosed facts about a criminal investigation into these matters.[26] Furthermore, *Penn State publicly stated that the Board of Trustees itself had accepted the Freeh Report.* Plaintiffs quibble that, in fact, the full Board had not accepted the Freeh Report, notwithstanding Penn State's public statements to the contrary. Regardless of the internal dynamics at Penn State, outside parties like the NCAA were legally permitted to rely on the statements of senior University officials. *See, e.g.*, *Ortiz v. Duff-Norton Co.*, 975 F. Supp. 713, 720 (E.D. Pa. 1997) (Under Pennsylvania law, a principal is bound to the acts of an agent that a third party "reasonably believes that the agent is authorized to do ...." (citation and quotation marks omitted)); *Ebasco Servs., Inc. v. Pa. Power & Light Co.*, 460 F. Supp. 163, 203 (E.D. Pa. 1978) (third party may rely on "reasonable expectations"

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[26] *See also* Preliminary Statement, *supra*, itemizing a plethora of public indicators of reliability.

of what an agent of a principle should have the inherent authority to do). The Pennsylvania Supreme Court has affirmed a demurrer for failure to plead malice in a situation in which the defendant acted upon far less indicia of veracity than that available to the NCAA. *See Tucker*, 577 Pa. at 634-35, 848 A.2d at 135-36.

Plaintiffs also argue that the NCAA should have seriously doubted the veracity of the Board Statement because the NCAA had "colluded with the Freeh Firm ….; forced Penn State to accept the Consent Decree; … instructed Penn State to keep certain information from the Board of Trustees"; and "rush[ed] to judgment" in establishing sanctions based on a report it "knew or should have known" contained conclusions that "were unsupported." Opp. 61, 59; Am. Compl. ¶ 83. Even if each of these allegations were true (which they are not), they allege nothing to support the notion that, *at the time of the Consent Decree*, the NCAA and Penn State had serious doubts about the accuracy of the *findings* in the Freeh Report, nor do they change the long list of reasons the NCAA was justified in believing the Board Statement was accurate.

Additionally, if this Court determines that the statements were not statements of opinion, then Plaintiffs effectively acknowledge that, as the NCAA has argued, the Staff Statement indisputably was true as to "some" coaches, if not the Former Coaches. They now simply argue that the NCAA acted recklessly because it potentially implicated innocent parties within the "[s]weeping

[l]anguage" of the Staff Statement. Opp. 61. A statement is not defamatory if it is true. *See, e.g.*, *Tucker*, 577 Pa. at 625, 848 A.2d at 130 ("The U.S. Supreme Court has ... set forth 'a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.'" (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (reversing the Pennsylvania Supreme Court))).

In any event, this nitpicking would at most show that the NCAA inadvertently suggested the Former Coaches were included in the group of "some coaches," when they were not. But that cannot establish *actual malice*. The U.S. Supreme Court has recognized that the law must balance defamation considerations with the fundamental constitutional protections of free speech. *See, e.g.*, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 146-47 (1967). Where, as here, Plaintiffs are public figures there is a heightened need for "overriding constitutional safeguards," which is the very reason Plaintiffs must plead and prove that the NCAA acted with actual malice. *See id.* at 155. Plaintiffs seek to upset that balance and impose a far greater duty on the NCAA than constitutionally permissible by requiring it exercise extreme precision in choosing its every word. *See Greene*, 24 Pa. D. & C.5th at 560 ("Furthermore, exaggerated and imprecise comments should not be viewed in a literal sense and are incapable of possessing

defamatory meaning."). This is not the law, and the defamation claims must be dismissed.

VII. PLAINTIFFS' OPPOSITION DOES NOT OVERCOME THE LEGAL FAILINGS OF THE COMMERCIAL DISPARAGEMENT CLAIM.

The NCAA's opening Memorandum demonstrated that two arguments not expressly addressed by the Court's January 7 Order warrant dismissal of the commercial disparagement asserted by the Estate: the challenged statements are opinions and the claim cannot accrue after Coach Paterno's death. NCAA Mem. 58-61. In response, the Estate argues that the statements are not true; the claim may proceed because it seeks specific (yet still unspecified) pecuniary relief; and the Estate asserts the claim on its own behalf and not Coach Paterno's. These arguments are addressed below.

The NCAA also asked the Court to reconsider its decision that *Menefee v. Columbia Broadcasting System, Inc.*, 458 Pa. 46, 329 A.2d 216 (1974), provided a legal foundation for the theory that Coach Paterno's reputation, as opposed to his goods and services, could be commercially disparaged. NCAA Mem. 61-63. In response, the Estate asks the Court to fundamentally rewrite Pennsylvania law. It wants to interpret the tort of commercial disparagement in a way that, until now, no Pennsylvania court ever has before—to permit an action where allegedly disparaging statements have nothing to do with a plaintiff's *commerce,* i.e., goods

and services. This theory has no precedential basis and would profoundly change the landscape between defamation and commercial disparagement.[27]

A. Plaintiffs Do Not Deny That The Challenged Statements Are Opinion And, Therefore, Not Actionable.

The commercial disparagement claim fails because the challenged statements are opinions whose factual premises are disclosed and, therefore, cannot be defamatory. *See supra*, Part IV.A. The Estate contends that the challenged statements about Coach Paterno are contrary to the facts and founded on a conspiracy, but as discussed above, this has no bearing on this issue. These arguments do not refute that the factual predicate for the "conclusions" (i.e., opinions) in the Consent Decree was the publicly disclosed Freeh Report (and the Grand Jury Presentment). Consent Decree at 2, 3, 4. In fact, the Estate repeatedly criticizes the NCAA *because* it relied solely on the factual findings in the Freeh Report. *See* NCAA Mem. 56-57.[28] Plaintiffs' Opposition never denies that the challenged statements are opinion. This warrants dismissal.

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[27] The arguments regarding actual malice discussed *supra,* Part VI.C, apply here as well.

[28] The Estate also tries to distance itself from public statements the Paterno family made upon the release of the Freeh Report, Opp. 50, but the point remains that prior to execution of the Consent Decree—based on the same information available to the NCAA in executing the Consent Decree—the Paterno family publicly accepted the *underlying facts* of the Freeh Report. It simply disagreed with the final opinions that FSS drew from the facts, but nonetheless characterized the opinions as "reasonable." NCAA Mem. 57, 59 n.23 (citing two news articles).

B. A Commercial Disparagement Claim Cannot Accrue After Coach Paterno Died.

In its opening Memorandum, the NCAA explained that a tort claim cannot accrue after the plaintiff has passed away. *See* NCAA Mem. 60-61 (citing, *inter alia*, *Moyer v. Phillips*, 462 Pa. 395, 398-401, 341 A.2d 441, 443 (1975). The Estate makes two arguments in response: (1) a claim for actual pecuniary losses rather than "violations of interest in character or reputation without measurable loss of economic advantage" can continue after Coach Paterno passed; and (2) it is not pressing a claim in Coach Paterno's name, but rather seeking redress for its own injury to alleged losses to Coach Paterno's property. The Estate labors mightily to shoehorn its allegations into the elements of a commercial disparagement claim, but try as it might, its efforts are not sufficient to invent a cause of action unrecognized in the law.

First, the Estate contends that because its claim seeks redress for specific pecuniary harm, rather than general losses to its reputational interests, Opp. 53, it can sustain a commercial disparagement claim. But that theory would eviscerate the distinction between defamation and commercial disparagement—pleading special damages would not bar a defamation claim, and it is, in fact, *required* in a defamation *per quod* claim. *See Burger v. Blair Med. Assocs.*, 600 Pa. 194, 964 A.2d 374 (2009) ("[J]ust as a plaintiff alleging commercial disparagement must prove special damages, a plaintiff claiming slander must demonstrate special

damages unless the statement in question constitutes slander *per se*." (citing *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 570 Pa. 242, 248, 809 A.2d 243, 247 (2002))). And many allegedly defamatory statements targeting an individual would discourage the public from engaging that individual's services, causing pecuniary loss—even if the comment had nothing to do with the individual's work. Despite its attempted spin work, the Estate's claim is, in fact, seeking redress for a general "violation[] of interest in character or reputation," *Menefee,* 458 Pa. at 52, 329 A.2d at 219, as opposed to pecuniary harm occurring when—according to ***Menefee***—one's "property *in goods or the quality of ... goods* has been attacked," *id.* at 53, 329 A.2d at 220 (emphasis added).[29]

As such, the Estate should be held to the defamation standard. *See Pro Golf Mfg.*, 570 Pa. at 247-48, 809 A.2d at 246-47 (holding that simply because the plaintiff labeled an action as "commercial disparagement" did not permit it to circumvent the statute of limitations for defamation actions); *see also Burger*, 600 Pa. at 202, 964 A.2d at 378 (citing *Pro Golf* and explaining that where a

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[29] No case expressly holds that a commercial disparagement claim cannot accrue after an individual has passed, but that is because no prior case has recognized that a commercial disparagement claim can be based on an *individual's* personal reputation. Defamation claims cannot accrue after the subject individual has passed. *See, e.g.*, Dan B. Dobbs, et al., *The Law of Torts* § 532 (2d ed. 2013) (citing multiple cases). The Estate should not be able to circumvent this bar simply by asserting that it has suffered specific damages—even though that same condition would apply in countless defamation cases. *See, e.g., Pro Golf Mfg.*, 570 Pa. at 246, 809 A.2d at 246.

commercial disparagement claim so closely resembled a defamation claim, the court would apply the defamation standard, regardless of the differences in the interests protected and burdens of proof). This count is at bottom nothing more than a failed defamation claim—uncomfortably packaged as a commercial disparagement claim. Therefore, it should be dismissed.

Second, the Estate asserts that it is pressing the disparagement claim on its own behalf, not as a survival action on behalf of Coach Paterno. But the caption of the commercial disparagement count indisputably states that it is brought "on behalf of Joe Paterno." Am. Compl. at p. 40. In any event, the Estate can cite to no commercial disparagement case in which a court recognized commercial disparagement towards a *living* individual's personal reputation, let alone alleged disparagement of a *deceased* person. The Estate's inability to point to a single case supporting its novel theory is notable; Coach Paterno is not the first public figure in history to receive posthumous negative publicity—but his Estate appears to be the only one to interpret *Menefee* in this manner.

C. *Menefee* Does Not Support A Disparagement Claim Premised On Statements That Do Not Target Goods Or Services.

The Estate contends that Coach Paterno's reputation *is* a business. Opp. 54. But a reputation cannot be bought or sold. Goods and services can be bought and sold—and one's reputation can *drive* those sales—but the reputation is not, itself, a business. For example, the Paterno name may drive the sales of Jay Paterno's

upcoming book release about his father, but Coach Paterno's reputation is not, itself, a commodity to be traded.

The Court recognized *Menefee* is the only case that could even plausibly support the Estate's theory. Order 19-20. But respectfully, neither *Menefee* nor any other Pennsylvania court has *ever* upheld a commercial disparagement claim on the basis that a reputation is a business. Every case the Estate cites involves disparagement to one's professional services. For example, in *Menefee*, the defendant attacked Mr. Menefee's work as a radio host, asserting that he could not attract ratings for his program. 458 Pa. at 48, 53-54, 329 A.2d at 217, 220; *see also id.* at 50, 329 A.2d at 218 ("Menefee has been caused to suffer a loss of his business and occupation as a radio broadcast personality ...." (internal quotation marks omitted)). In *Swift Brothers v. Swift & Sons, Inc.*, 921 F. Supp. 267 (E.D. Pa. 1995), the defendant allegedly disparaged the plaintiff's janitorial business—not the plaintiff's reputation[30]—and the court *dismissed* the commercial disparagement claim.[31]

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[30] The Estate selectively quotes a statement the *Swift Brothers* court made to contrast commercial disparagement from the separate action of misrepresentation of product origin—a tort that does not involve reputation at all—but the Estate omits the court's more precise description of commercial disparagement as "[t]he publication of a disparaging statement *concerning the product* of another." 921 F. Supp. at 276 (emphasis added).

[31] The *Swift Brothers* court dismissed the commercial disparagement action for failure to plead damages with specificity. 921 F. Supp. at 276. The NCAA

Plaintiff even reaches outside of Pennsylvania to the law of the fifty states, and yet still comes up empty-handed. The Estate relies (Opp. 54) on *Kollenberg v. Ramirez*, 339 N.W.2d 176, 179 (Mich. Ct. App. 1983), but the defendant in *Kollenberg* maligned plaintiff's work as a pharmacist, accusing him of incorrectly filling a prescription. The Estate also cites to an inapposite statute discussing commercial value in the specific and distinct context of the tort of improper use of one's name or likeness, which also has a distinct and specific means of identifying injury. Opp. 53 (citing 42 Pa. Cons. Stat. § 8316(e)). The Estate cites no case applying that statute in the commercial disparagement context.

In interpreting *Menefee*, the Third Circuit explained that disparagement targeted at goods and services, versus one's reputation, is the determinative distinction between defamation and commercial disparagement.[32] *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 924 (3d Cir. 1990) ("The distinction between actions for defamation and disparagement turns on the harm towards which each is directed. An action for commercial disparagement is meant

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continues to maintain that the Estate is likewise required to plead damages with specificity and incorporates its arguments on this point from its original Preliminary Objections.

[32] Courts have consistently interpreted Pennsylvania law in this manner. *See, e.g.*, NCAA Reply In Support of Defs.' Prelim. Objs. 36-37 & n.16 (Sept. 26, 2013) (citing multiple cases and secondary authority); *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 ....").

to compensate a vendor for pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability, while defamation is meant protect an entity's interest in character and reputation."); *accord* 31 P.L.E. Libel and Slander § 14; *Black's Law Dictionary* 304 (9th ed. 2009) (defining *commerce* as "[t]he exchange of goods and services"). Even *Menefee* distinguishes liability for the disparagement of *things* (commercial disparagement) from a cause of action for defamation to the *"personal reputation of another"* (defamation). 458 Pa. at 52-53, 329 A.2d at 219-20 (emphasis added) (quotation marks and citation omitted).

Coach Paterno's fame does not justify failing to adhere to historical and fundamental principles dividing defamation from commercial disparagement, or to permit a claim to proceed based on a statement of opinion targeting a deceased individual.

VIII. PLAINTIFFS' FAILURE TO VERIFY THE AMENDED COMPLAINT IS GROUNDS FOR DISMISSAL.

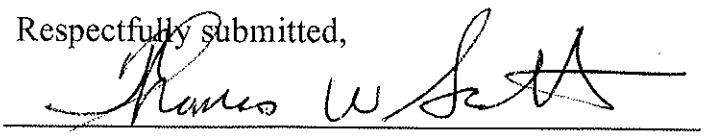
As explained in the NCAA's opening Memorandum, Pennsylvania law requires a complaint to be verified, and a complaint lacking verification should be dismissed. *See, e.g.*, Pa. R. Civ. P. 1024; *id.* 1028(a)(2); *Atl. Credit & Fin. Inc. v. Giuliana*, 2003 PA Super. 259, ¶ 10, 829 A.2d 340, 344 (2003); *Gracey v. Cumru Twp.*, No. 2604 C.D. 2010, 2011 WL 10878246, at *3 (Pa. Commw. Ct. Dec. 27, 2011). It is undisputed that Plaintiffs failed to verify their Amended Complaint at

the time of service. Plaintiffs' Opposition cites to cases noting that amendment is permitted to cure technical defects in a submitted verification, Opp.19-21, but here they had not submitted any verification to the Amended Complaint at all. This is an independent reason for dismissal of the Amended Complaint.

CONCLUSION

For the foregoing reasons, the NCAA respectfully requests that the Court dismiss Plaintiffs' Amended Complaint.

Respectfully submitted,



Date: May 6, 2014

Thomas W. Scott (No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Everett C. Johnson, Jr. (admitted *PHV,* DC No. 358446)
Brian E. Kowalski (*PHV pending,* DC No. 500064)
Sarah M Gragert (admitted *PHV,* DC No. 977097)
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Email: Everett.Johnson@lw.com
Brian.Kowalski@lw.com
Sarah.Gragert@lw.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing Reply in Support of the NCAA Defendants' Preliminary Objections to Plaintiffs' First Amended Complaint by First Class Mail and email to:

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161
Email: tjw@goldbergkatzman.com

Wick Sollers
L. Joseph Loveland
Mark A. Jensen
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
Email: wsollers@kslaw.com
jloveland@kslaw.com
mjensen@kslaw.com
aparrish@kslaw.com

Paul V. Kelly
John J. Commisso
JACKSON LEWIS P.C.
75 Park Plaza
Boston, MA 02116
Telephone: (617) 367-0025
Email: Paul.Kelly@jacksonlewis.com
John.Commisso@jacksonlewis.com

Counsel for Plaintiffs

Daniel I. Booker
Jack B. Cobetto
Donna M. Doblick
William J. Sheridan
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: (412) 288-3131
Email: dbooker@reedsmith.com
jcobetto@reedsmith.com
ddoblick@reedsmith.com
wsheridan@reedsmith.com

Michael T. Scott
REED SMITH LLP
Three Logan Square
Suite 3100
1717 Arch STreet
Philadelphia, PA 19103
Telephone: (215) 851-8100
Email: mscott@reedsmith.com

Joseph P. Green
LEE, GREEN & REITER, INC.
115 East High Street
P.O. Box 179
Bellefonte, PA 16823-0179
Telephone: (814) 355-4769
Email: jgreen@lmgrlaw.com

Counsel for The Pennsylvania State University

Via FedEx Overnight Delivery
The Honorable John B. Leete
Senior Judge, Specially Presiding
Potter County Courthouse, Room 30
One East Second Street
Coudersport, PA 16915

Dated: May 6, 2014

Thomas W. Scott
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray