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

ESTATE of JOSEPH PATERNO;

AL CLEMENS, member of the Board of Trustees of  
Pennsylvania State University;

and

WILLIAM KENNEY and JOSEPH V. ("JAY")  
PATERNO,  
former football coaches at Pennsylvania State  
University

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION  
("NCAA"),

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

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

Defendants,

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:**

) National Collegiate Athletic  
Association's Reply

) Memorandum In Support Of The  
NCAA Defendants' Preliminary

) Objections To Second Amended  
Complaint

)

) **Filed on Behalf of:**

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Association, Mark Emmert,

) Edward Ray

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DEBORAH J. CONNEL  
PROthonary  
CENTRE COUNTY

ORIGINAL

DEBRA C. HART  
PROthonary  
CENTRE COUNTY

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AL CLEMENS, member of the  
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former football coaches at Pennsylvania State University,

Plaintiffs,

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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

PENNSYLVANIA STATE UNIVERSITY,

Defendant.

Civil Division

Docket No. 2013-  
2082

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

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ORIGINAL

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## INTRODUCTION

Plaintiffs' Memorandum in Opposition is little more than a plea for this Court to accept the same argument that it already has expressly rejected. Not only do Plaintiffs blatantly mischaracterize this Court's September 11, 2014 opinion, they also urge this Court to pretend that Plaintiffs' own prior pleadings and filings never happened. Regardless, Plaintiffs continue to admit the same dispositive facts that led this Court to conclude that "[a]s Coach Joe Paterno was not an involved individual prior to his death, and he cannot, as a matter of law, be an 'involved individual' after his death, he had no rights as an 'involved individual' at any time, and as a result, his estate has no rights as an 'involved individual' now." Op. & Order 8 (Sept. 11, 2014). Plaintiffs' attempted amendment is procedurally improper and the Estate of Joseph Paterno's (the "Estate") breach of contract claim fails for the same reasons that this Court already rejected it. This Court should affirm its prior ruling that the Estate lacks capacity to bring its breach of contract claim or obtain the relief it seeks under Count I.

Because Plaintiffs can present no compelling reason why this Court should disavow its prior holding, much of their memorandum is dedicated to proclaiming that the NCAA's "egregious misconduct" is purportedly coming to light in discovery—mostly in other litigation involving the NCAA in Commonwealth Court. Of course, none of Plaintiffs' contentions on this score

have any relevance to the legal conclusion that the Estate has no standing to pursue a breach of contract claim. But they also paint a deeply inaccurate picture of the powerful record being developed, which is thoroughly discrediting Plaintiffs' claims in this case.

Specifically, following extensive discovery, other plaintiffs engaged in litigation against the NCAA have abandoned claims that the Consent Decree was the product of duress,<sup>1</sup> instead “conceding that the [National Collegiate Athletic Association’s (the ‘NCAA’)] underlying legal conclusion is correct (i.e., *that the Consent Decree was not the product of duress*).” Corman & McCord Resp. to NCAA for Partial Summ. Judgment 19, *Corman v. NCAA*, No. 1 M.D. 2013 (Pa. Commw. Ct. Dec. 1, 2014) (emphasis added). Nor could they contend otherwise: Pennsylvania State University (“Penn State”) continuously weighed its alternatives before executing the Consent Decree; it consulted with no fewer than five lawyers

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<sup>1</sup> Treasurer McCord previously alleged that the Consent Decree was the product of duress on at least two occasions in other litigation involving the NCAA. See McCord’s Answer & Affirmative Defenses 20, *NCAA v. Corbett*, No. 13-cv-00457-YK (M.D. Pa. June 25, 2014), attached as Ex. A (“The Consent Decree between the NCAA and the Pennsylvania State University, imposing monetary fines, penalties and sanctions, is invalid, for the following reasons: .... The Consent Decree is a contract of adhesion, entered into under duress ....”); McCord’s Resps. & Objs. to NCAA’s First Set of Interrogs. No. 1, *NCAA v. Corman*, No. 1 M.D. 2013 (Pa. Commw. Ct. July 10, 2014), attached as Ex. B (“Treasurer McCord avers that the Consent Decree between the NCAA and the Pennsylvania State University is invalid for the following reasons: ... (5) the Consent Decree [was] entered into under duress....”).

in that process; and Penn State ultimately decided that resolving any potential NCAA Constitution or Bylaw violations quickly and with certainty was preferable to taking its chances in the lengthier and less predictable traditional infractions process, which could have identified additional violations and resulted in harsher sanctions. Meanwhile, Penn State issued a public statement accepting full responsibility for the failures identified in the Freeh Report *before* any substantive conversations with the NCAA occurred following the release of that report. The NCAA, meanwhile, had no reason to doubt Judge Freeh's substantial qualifications to conduct his investigation.

Plaintiffs' suggestion that the NCAA is seeking to delay this case, Opp'n 20, is exactly backwards. As discovery is making clear, the facts strongly support that Plaintiffs' claims are meritless and the NCAA is eager to answer the claims that have survived preliminary objections. It is Plaintiffs who are seeking to delay matters by attempting to resuscitate claims that this Court already has dismissed. This Court should sustain the NCAA's preliminary objections so that this case can finally move forward.<sup>2</sup>

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<sup>2</sup> During prior rounds of briefing on the NCAA's preliminary objections, this Court issued a scheduling order providing for the filing of reply briefs by particular dates, and the NCAA submitted reply briefs on both occasions. Because this Court did not issue a scheduling order during this round of briefing, the NCAA has attempted to file its reply brief as promptly as possible. To the extent this Court's leave is required to file this brief, the NCAA respectfully requests leave to file in light of

**I. PLAINTIFFS IMPROPERLY AMENDED THEIR COMPLAINT WITHOUT CONSENT OR LEAVE.**

Plaintiffs argue that they did not need to seek the “consent of the adverse party or ... leave of court,” Pa. R. Civ. P. 1033, in order to replead the Estate’s breach of contract claim for two reasons: Plaintiffs first contend that “the Court did not dismiss the Estate’s contract claim in Count I” such that there was no need to replead at all; second, Plaintiffs argue that this Court did give them leave to replead the Estate’s breach of contract claim. Opp’n 5-8. Both assertions are inaccurate.

Plaintiffs first assert—incredibly—that “[t]he Court did not dismiss the Estate from Count I.” *Id.* at 2; *see also id.* at 5 (“[T]he Court did not dismiss the Estate’s contract claim in Count I. To the contrary, the Court *overruled* the NCAA’s objections to the Estate’s capacity to bring Count I.”). That flatly misrepresents this Court’s opinion. In its September 11, 2014 Order, this Court expressly ruled that “NCAA’s Preliminary Objection based on Incapacity to Bring Count I and Demurrer to Count I is *SUSTAINED with respect to the incapacity of the Estate of Joseph Paterno to bring suit.*” Op. & Order 34 ¶ 3 (emphasis added). There can be no serious dispute that this Court dismissed the Estate’s breach of contract claim from Count I altogether, and as such the Estate cannot obtain the relief it seeks pursuant to Count I. Plaintiffs’ assertion to the contrary is frivolous.

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the consistent practice in this case to permit the filing of reply briefs in support of the NCAA’s preliminary objections.



Plaintiffs point out that this Court overruled a separate preliminary objection filed by the NCAA relating to the narrower question of the Estate's and Al Clemens's ability to obtain certain *relief* sought in Count I. Opp'n 5. But this Court inarguably sustained the NCAA's other preliminary objection on Count I, determining that the Estate lacked capacity to assert Count I altogether. Because the Estate lacks capacity to bring Count I at all, the narrower question of what relief would have been available if they *had* possessed capacity to bring Count I simply is not implicated.<sup>3</sup> Because this Court sustained the NCAA's preliminary objection to the Estate's capacity to bring Count I, the Estate's breach of contract claim and request for relief under Count I necessarily failed.

Plaintiffs next contend that this Court gave Plaintiffs *carte blanche* to revise their complaint, resuscitate any claim that previously had been dismissed, and add new allegations at will. *See* Opp'n 6-7. But as Plaintiffs ultimately acknowledge, the Court specifically permitted Plaintiffs to amend their complaint only in response to "*Penn State's* objection that the complaint lacked adequate specificity." Opp'n 6 (emphasis added). Accordingly, this Court explained that "[t]he Court finds that the pleadings are insufficient *to put Penn State on notice of*

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<sup>3</sup> It is hardly uncommon for a court to sustain preliminary objections on some grounds while overruling them on other grounds. *See* Pa. R. Civ. P. 1028(b) ("All preliminary objections shall be raised at one time .... Two or more preliminary objections may be raised in one pleading."); *see also* Op. & Order 5-9.

*the claims upon which they will have to defend.* Plaintiffs will need to file a Second Amended Complaint alleging the actions of each defendant giving rise to each count along with the corresponding relief requested.” Op. & Order 15-16 (emphasis added). In ordering Plaintiffs to amend their complaint to place *Penn State* on notice of the claims it will have to defend, this Court gave no indication that Plaintiffs were free to add additional claims against *the NCAA* or replead those claims against the NCAA that this Court already had dismissed.<sup>4</sup> Pennsylvania’s liberal pleading laws do not provide a basis for permitting Plaintiffs forever to delay this proceeding by indefinitely asserting claims identical to those that this Court already has dismissed. *See* Pa. R. Civ. P. 126 (the rules of procedure shall be “construed to secure the just, *speedy*, and *inexpensive* determination of every action or proceeding to which they are applicable” (emphases added)).

## **II. THE ESTATE’S CONTRACT CLAIM FAILS FOR THE SAME REASONS IT DID PREVIOUSLY.**

If this Court reaches the merits, it should reject the Estate’s argument for the same reasons that it previously did. As this Court recognized in its September 11, 2014 Order, Plaintiffs’ own allegations necessarily establish that “Coach Joe Paterno was not an involved individual prior to his death, and he cannot, as a

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<sup>4</sup> Plaintiffs’ attempt to read significance into this Court’s “focus[] on paragraph 169 of the First Amended Complaint,” Opp’n 6, is baffling. This Court pointed to paragraph 169—in which Plaintiffs expressly sought relief from both the NCAA and Penn State—only to make the point that “Plaintiffs’ claim that no relief is being sought against Penn State is incorrect.” Opp’n 15.

matter of law, be an ‘involved individual’ after his death, he had no rights as an ‘involved individual’ at any time, and as a result, his estate has no rights as an ‘involved individual’ now.” Op. & Order 8. Plaintiffs take pains to allege that they are making the same argument today that they always have. *See* Opp’n 12-13. But in so doing, Plaintiffs make clear that they are continuing to make an argument that this Court already has carefully considered and rejected. Indeed, Plaintiffs ultimately invite this Court to adopt the arguments that Plaintiffs made “on the last round of preliminary objections.” Opp’n 16. As that illustrates, Plaintiffs’ attempt to replead the Estate’s breach of contract claim is little more than a motion for reconsideration masquerading as an amended pleading, and should be rejected.

In any event, Plaintiffs do nothing to address the fact that the personal procedural rights afforded involved individuals—rights enabling an individual with unique knowledge to share his or her personal knowledge with investigators—cannot survive death. For all of these reasons, the Estate continues to lack capacity to bring its breach of contract or obtain the relief it seeks in Count I. Accordingly, the NCAA’s preliminary objections should be sustained.

**A. Plaintiffs’ Admissions Continue To Establish That Coach Paterno Was Not An Involved Individual Before His Death**

Plaintiffs claim that they “have consistently made [the same] argument – the NCAA failed to commence a *proper* investigation and, instead, having sent its November letter indicating that it was interested in information about Coach

Paterno and others, waited for the results of the Freeh firm's investigation, which it participated in (but which did not find any alleged violations of the NCAA rules), before imposing the Consent Decree.” Opp’n 12-13 (emphasis in original). As the NCAA explained in its opening brief, that argument is identical to the argument that this Court has always understood Plaintiffs to make. *See* NCAA Mem. in Supp. of Prelim. Objs. to Second Am. Compl. 10-11 (Nov. 10, 2014) (quoting Op. & Order 3 (Jan. 6, 2014)), summarizing Plaintiffs’ factual allegations as follows:

On November 17, 2011, the NCAA notified Penn State that it was concerned about criminal charges filed against Jerry Sandusky for allegedly sexually abusing young boys at Penn State and through his connections to Penn State’s football program. The NCAA indicated that Penn State should prepare for a possible NCAA inquiry and involvement .... Instead of commencing its own investigation, as mandated by its own rules and procedures, the NCAA collaborated with the Freeh firm and *waited* for the results of the firm’s investigation.

(emphasis added). Importantly, however, this Court already has recognized that Plaintiffs’ factual allegations establish that “Coach Paterno was not an involved individual prior to his death.” Op. & Order 8.

Indeed, Plaintiffs continue to admit the salient facts that led this Court to sustain the NCAA’s preliminary objection in its September 11, 2014 Opinion. Plaintiffs still allege that an individual becomes an involved individual when (1) following an investigation, (2) the NCAA determines there is “sufficient information to support a *finding* of a rules violation.” Second Am. Compl. ¶ 35

(Oct. 13, 2014) (“SAC”) (emphasis added). But Plaintiffs unequivocally have admitted in pleadings to this Court that “Paterno passed away *before the NCAA defendants concluded that his conduct provided a basis for imposing sanctions.*” Pls.’ Mem. in Opp’n to Defs.’ Prelim. Objs. to First Am. Compl. 38 (Apr. 16, 2014) (“Opp’n to Defs.’ Prelim. Obj. to FAC”) (emphasis added). That alone is fatal to their claim that Coach Paterno was an involved individual before his death, whatever Plaintiffs now allege about when the NCAA commenced its investigation.

Where Plaintiffs do attempt to change course by alleging that the NCAA had “initiat[ed] its investigation” by the time of Coach Paterno’s death, SAC ¶ 64, their new allegations are flatly incompatible with their past filings to this Court. *See* Opp’n to Defs.’ Prelim. Objs. to FAC 3 (“[T]he NCAA defendants did not conduct the type of investigation required under their own rules. *Indeed, they conducted no investigation at all.*”) (emphasis added). *See id.* at 41 (criticizing the NCAA for its “failure to investigate”); *see also id.* at 48-49 (“As the amended complaint alleges, the NCAA defendants flagrantly violated their own ‘rules of the game’ and, *without any investigation*, published grave (and baseless) allegations of misconduct by the Penn State coaching staff.”) (emphasis added). Indeed, Plaintiffs’ new allegations are incompatible with other allegations that remain in their present

complaint. *See* SAC ¶ 131 (alleging that the NCAA “fail[ed] to conduct its own investigation ... and rel[ied] instead on the flawed Freeh Report”).

In any event, not even Plaintiffs suggest that the Freeh Group’s investigation had concluded by the time of Coach Paterno’s death, let alone that the NCAA had made a finding that Coach Paterno’s conduct established a basis to impose sanctions. To the contrary, Plaintiffs repeatedly have alleged precisely the opposite—that the NCAA “waited for the Freeh firm to complete its investigation” before determining whether to take any action in response to the Sandusky scandal. *Id.* ¶ 62. And Plaintiffs themselves acknowledge that “during the time the NCAA Defendants were waiting for the Freeh firm to complete its investigation ... Joe Paterno died.” *id.* ¶ 64. Plaintiffs even assert that the Freeh firm “did not find any alleged violations of the NCAA rules.” Opp’n 13. Such assertions only affirm what this Court already has held—Coach Paterno was not an involved individual at the time of his death.

The balance of Plaintiffs’ response includes a hodgepodge of unpersuasive attempts intended to suggest that this Court’s former order was somehow improper or has been undermined by purported discovery revelations. Plaintiffs first disingenuously assert that this Court’s September 11, 2014 Order should be reversed because this Court improperly “accepted *the NCAA Defendants’* factual contention that Coach Paterno died before the NCAA initiated an investigation.”

Opp’n 8 (emphasis added). The assertion that this Court improperly credited the NCAA’s views over Plaintiffs’ pleadings is wholly inaccurate. *See, e.g.,* Op. & Order 4 (“All material facts set forth in the pleadings as well as all inferences reasonably deducible therefrom are admitted as true.”). As explained above, this Court concluded that Coach Paterno was not an involved individual on the basis of Plaintiffs’ own pleadings and admissions—which asserted both that the NCAA failed to initiate a proper investigation before Coach Paterno’s death and that Coach Paterno passed away before the NCAA defendants concluded that his conduct provided a basis for imposing sanctions. *See, e.g.,* Opp’n to Defs.’ Prelim. Objs. to FAC 38, 41, 48-49.

Plaintiffs next attempt to walk back their prior admission that “[t]o be sure, [the NCAA’s] rules [for an involved individual] may have been fashioned with a living, participating individual in mind.” *Id.* at 38. Plaintiffs unpersuasively now argue that their “recognition of what ‘may’ have been the NCAA’s subjective intent falls far short of a concession that this ‘was’ its intent.” Opp’n 14. Plainly, Plaintiffs seek to withdraw their statement because they now recognize its legal implications, not because there was any ambiguity to their statement at the time. Plaintiffs were not speculating about the NCAA’s intent, they were acknowledging the obvious: that when the NCAA and its members were shaping procedural rights

to *participate* in the enforcement process and share personal knowledge, they surely did not have in mind individuals who were *deceased*, let alone their estates.<sup>5</sup>

In any event, Plaintiffs concede that they already made the same attempt to walk back their admission during the last round of arguments over the NCAA's preliminary objections. *See id.* (quoting Hr'g Tr. 85:3-6 (May 19, 2014)); *see also* Hr'g Tr. 87:25-88:18 (May 19, 2014). Nonetheless, this Court sustained the NCAA's preliminary objection. Their present attempt is no more persuasive and offers no reason to reach a different result now. Regardless, Plaintiffs ignore that the procedural rights afforded involved individuals unambiguously and self-evidently contemplate living individuals—even leaving aside their fatal admissions. *See infra* at 14-17.

Finally, Plaintiffs argue that this Court's decision is undermined by purported revelations that the NCAA "collaborated" with the Freeh firm.

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<sup>5</sup> The point Plaintiffs were attempting to make at the time was substantially different than what they now claim—that although the rules “may have been fashioned with a living participating individual in mind; ... that is not a *requirement*.” Opp’n to Defs.’ Prelim. Objs. to FAC 38 (emphasis in original). But as even Plaintiffs have acknowledged, Pennsylvania law affords standing to sue as a third party beneficiary where doing so is necessary to “effectuate the intention of the contracting parties.” *Id.* at 35. Here, of course, not only Plaintiffs, but also both contracting parties (the NCAA and Penn State) have affirmed that they did not intend to afford rights on individuals who were deceased or their estates. *See, e.g.*, Penn State Br. in Supp. of Prelim. Objs. 14-15 (Mar. 17, 2014) (noting that the “personal” rights afforded “involved individuals ... plainly contemplate that the rights would be *exercised by a living person*” (emphasis in original)).



Opp’n 10.<sup>6</sup> Plaintiffs fail to explain why that would be legally relevant here. In any event, they have always alleged that. *See, e.g.*, Compl. ¶ 54 (May 30, 2013) (“Attorneys and investigators working for the Freeh firm collaborated with the NCAA and frequently provided information and briefings to the NCAA.”). As such, this Court always has assumed that fact for purposes of deciding preliminary objections. *See, e.g.*, Op. & Order 4 (“All material facts set forth in the pleadings as well as all inferences reasonably deducible therefrom are admitted as true.”). For the reasons already explained above, Plaintiffs’ factual assertions break no new ground and do nothing to establish that the NCAA had made a finding that Coach Paterno had violated NCAA rules before his death.

Try as they might, Plaintiffs cannot overcome their own allegations and the factual record. Because Coach Paterno died before he could have become an involved individual, this Court should uphold its prior determination and hold that the Estate lacks capacity to bring its breach of contract claim or obtain the relief it seeks in Count I.

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<sup>6</sup> While unnecessary to resolve the NCAA’s preliminary objection, we note for the sake of completeness that the nefarious implications that Plaintiffs attempt to draw from the NCAA’s purported “collabora[tion]” with the Freeh Group are wholly inaccurate. *Penn State* directed the Freeh Group to engage in communications with the NCAA and directed the Freeh Group to investigate facts that would *assist Penn State* in responding to the NCAA’s initial November 2011 letter. The Freeh Group declined, however, to provide the NCAA with updates prior to the publication of the Freeh Report regarding the substantive conclusions that the Freeh Group’s independent investigation was reaching.

## **B. An Involved Individual's Rights Do Not Survive Death**

Even if Coach Paterno had been an involved individual before his death, this Court correctly recognized in its September 11, 2014 opinion that “he cannot, as a matter of law, be an ‘involved individual’ after his death.” Op & Order 8. As this Court’s order reflected, the rights afforded involved individuals are uniquely personal rights that plainly contemplate only a living individual. *See, e.g.,* NCAA Academic and Membership Affairs Staff, *2011-12 NCAA Division I Manual* art. 19.4.3 (2011), attached as Ex. A to SAC (“[An] involved individual [may] appear before the committee to discuss a response to the notice of allegations ....”); *id.* at 32.6.1.1(e) (“[The] involved individual [may have] the opportunity to submit in writing any information the individual desires that is relevant to the allegation in question [on Infractions.]”); *id.* at 32.6.6 (“[T]he enforcement staff shall consult with ... involved individuals who will attend the hearing in order to clarify the issues to be discussed in the case during the hearing ....”). The self-evident purpose of these procedural rights are to afford an involved individual the opportunity to tell his or her side of the story and to convey his or her first-hand knowledge about circumstances under investigation as to which the individual in question has unique personal information and interest. Such procedural rights are inherently personal and do not survive death.

The Estate argues that it “is in just as good a position to exercise these rights as Joe Paterno would be if he were still alive.” Opp’n 18. But it is plain that the Estate could not testify to what Coach Paterno saw, heard, said, or thought when he first learned about allegations that Sandusky was sexually abusing young boys, when he discussed those learnings with senior Penn State officials, or when those officials declined to report those allegations to law enforcement. Not only has the Estate never alleged that it is privy to such information, but its second-hand explanation would be considered unreliable under basic legal principles. *Cf. Commonwealth v. Chmiel*, 585 Pa. 547, 600, 889 A.2d 501, 532 (2005) (“The rule against admitting hearsay evidence stems from its presumed unreliability.”). For this reason, any contractual rights that accrue to involved individuals do not devolve on that individual’s estate following death. *See, e.g., Blakely v. Sousa*, 197 Pa. 305, 329, 47 A. 286, 286 (1900) (Where “the contract of a decedent [is] personal, and the performance of the deceased himself be the essence thereof ... [s]uch a contract could not devolve on the representatives of the deceased.”).

Plaintiffs finally contend that the contractual provisions in the NCAA’s membership agreement cannot create rights that are merely personal because the NCAA’s “Constitution” serves a broader purpose to benefit the “larger community that participates in college athletic sports.” Opp’n 17-18. But there can be no serious dispute that any rights intended to benefit “involved *individuals*” are rights

that may not be asserted by the world at large. Rather, they are rights that may be asserted solely by those *individuals*—just as numerous rights within the United States Constitution are personal rights that may be asserted only by living individuals. *See, e.g.*, U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).<sup>7</sup>

Ultimately, what the Estate asks this Court to believe is that by creating an opportunity for those with personal knowledge of and involvement in the events in question to participate in the enforcement process, the NCAA and its member institutions intended that such rights could be exercised by an involved individual’s decedents, notwithstanding that they have no firsthand personal knowledge of the facts and events in question. That is wholly implausible.

To be clear, “Coach Joe Paterno was not an involved individual prior to his death.” Op. & Order 8 (Sept. 11, 2014). Even if he had been, however, the Estate would lack capacity to bring Count I. As common sense makes clear, and as both

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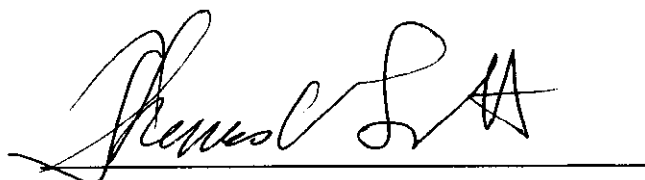
<sup>7</sup> Of course, just as in the case of the NCAA Constitution and Bylaws, such personal rights attach only after a determination following investigation that sufficient evidence supports a conclusion of wrongdoing. *See, e.g., Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 198 (2008) (affirming that right “to assistance of counsel ... ‘does not attach until a prosecution is commenced’” (citation omitted)).

the NCAA and Penn State have affirmed, the personal procedural rights afforded involved individuals do not survive death.

### CONCLUSION

This Court already has permitted numerous claims—including other claims brought by the Estate—to move forward. Indeed, this Court even has permitted former trustee Al Clemons to continue to pursue Count I. Plaintiffs' own allegations, however, continue to make clear that the Estate—unlike Trustee Clemons—lacks the capacity to pursue or obtain the relief it seeks in Count I. Because Plaintiffs' attempted amendment was unauthorized and improper, and because Plaintiffs offer no persuasive basis for this Court to overturn its September 11, 2014 opinion, the NCAA's preliminary objections should be sustained for the same reasons this Court already did so.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas W. Scott", is written over a horizontal line.

Date: December 19, 2014

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# EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION,**

**Plaintiff,**

**v.**

**THOMAS W. CORBETT, JR., in his  
capacity as Governor of the  
Commonwealth of Pennsylvania,  
ROB MCCORD, in his capacity as  
Treasurer of the Commonwealth of  
Pennsylvania, MARK R. ZIMMER,  
in his capacity as Chairman  
of the Pennsylvania Commission  
on Crime and Delinquency,  
and EUGENE DEPASQUALE,  
in his capacity as Auditor General of  
the Commonwealth of Pennsylvania,**

**Defendant.**

**Civil No. 1:13-CV-00457-YK**

**(Hon. Yvette Kane)**

**Filed Via Electronic Case  
Filing**

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**ANSWER AND AFFIRMATIVE DEFENSES OF STATE TREASURER  
ROBERT M. MCCORD TO THE NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION'S COMPLAINT**

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Pursuant to the Federal Rules of Civil Procedure 7(a)(2) and 8, Defendant Robert M. McCord, Treasurer of the Commonwealth of Pennsylvania, by and through his undersigned attorneys, answers the Complaint of Plaintiff National Collegiate Athletic Association ("NCAA"), as follows:



1. The NCAA's characterization of the Consent Decree and the complaint constitute Conclusions of Law to which no response is required. To the extent a response is required, the averment is Denied.

2. An averment to which no response is required.

3. It is Admitted only that this is an action for declaratory and injunctive relief. By way of further answer, the complaint speaks for itself.

4. It is Denied that the Institution of Higher Education Monetary Penalty Endowment Act ("Endowment Act") is unconstitutional pursuant to the Contracts Clause. *See Corman v. The National Collegiate Athletic Association*, 74 A.3d 1149 (Pa. Cmwlth. 2013); *see also Corman and McCord v. The National Collegiate Athletic Association*, 2014 Pa. Commw. LEXIS 214 (Pa. Cmwlth. 2014), *reargument denied*, 2014 Pa. Commw. LEXIS 238 (Pa. Cmwlth. 2014).

5. It is Denied the Endowment Act is unconstitutional pursuant to the Takings Clause. *See Corman v. The National Collegiate Athletic Association*, 74 A.3d 1149 (Pa. Cmwlth. 2013); *see also Corman and McCord v. The National Collegiate Athletic Association*, 2014 Pa. Commw. LEXIS 214 (Pa. Cmwlth. 2014), *reargument denied*, 2014 Pa. Commw. LEXIS 238 (Pa. Cmwlth. 2014).

6. It is Denied the Endowment Act is unconstitutional pursuant to the Commerce Clause. *See Corman v. The National Collegiate Athletic Association*, 74 A.3d 1149 (Pa. Cmwlth. 2013); *see also Corman and McCord v. The National*

*Collegiate Athletic Association*, 2014 Pa. Commw. LEXIS 214 (Pa. Cmwlth. 2014), *reargument denied*, 2014 Pa. Commw. LEXIS 238 (Pa. Cmwlth. 2014).

7. It is Admitted only that the Plaintiff seeks the relief requested. The remaining averments are Denied.

8. Conclusion of Law to which no response is required.

9. Conclusion of Law to which no response is required.

10. It is Admitted on information and belief only that the NCAA is a national association of higher education institutions. The remaining averments constitute Conclusions of Law to which no response is required. To the extent a further response is required, the averment is Denied.

11. It is Admitted only that Thomas W. Corbett, Jr. is the Governor of the Commonwealth of Pennsylvania. The remaining averments constitute Conclusions of Law to which no response is required.

12. It is Admitted only that Robert M. McCord is the Treasurer of the Commonwealth of Pennsylvania. The remaining averments constitute Conclusions of Law to which no response is required.

13. It is Admitted only that Mark Zimmer is Chairman of the Pennsylvania Commission on Crime and Delinquency. The remaining averments constitute Conclusions of Law to which no response is required.

14. It is Admitted only that Eugene DePasquale is the Auditor General of the Commonwealth of Pennsylvania. The remaining averments constitute Conclusions of Law to which no response is required.

15. Conclusion of Law to which no response is required.

16. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

17. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

18. Conclusion of Law to which no response is required.

19. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

20. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

21. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

22. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

23. It is Admitted only that the NCAA has quoted its 2012-2013 Division I Manual. To the extent a further response is required, the averment is Denied.

24. It is Admitted only that the NCAA has quoted its 2012-2013 Division I Manual. To the extent a further response is required, the averment is Denied.

25. It is Admitted only that the NCAA has quoted its 2012-2013 Division I Manual. To the extent a further response is required, the averment is Denied.

26. It is Admitted only that the NCAA has quoted its 2012-2013 Division I Manual. To the extent a further response is required, the averment is Denied.

27. It is Admitted only that the NCAA has quoted its 2012-2013 Division I Manual. To the extent a further response is required, the averment is Denied.

28. It is Admitted only that the NCAA has quoted its 2012-2013 Division I Manual. To the extent a further response is required, the averment is Denied.

29. Admitted on information and belief.

30. Admitted on information and belief.

31. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

32. Admitted on information and belief.

33. Admitted on information and belief.

34. Admitted on information and belief.

35. It is Admitted only that the Freeh report has been quoted. To the extent a further response is required, the Freeh report is in writing and speaks for itself.

36. Averment to which no response is required. To the extent a response is required, it is Denied that the NCAA has accurately quoted the Freeh Report, which actually stated: "The avoidance of the consequences of bad publicity is the most significant, but not the only, cause for this failure to protect child victims and report to authorities. The investigations also revealed...A culture of reverence for the football program that is ingrained at all levels of the campus community."

Freeh Report at 16 and 17.

37. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

38. Conclusion of law to which no response is required. To the extent a response is required, it is Admitted only that the NCAA and Penn State University entered into a consent decree.

39. It is Admitted only that the Consent Decree, Section I, Basis of the Consent Decree, is quoted in part. To the extent a further response is required, the averment is Denied.

40. It is Admitted only that the Consent Decree, Section I, Basis of the Consent Decree, is quoted in part. To the extent a further response is required, the averment is Denied.

41. It is Admitted only that the Consent Decree, Section II, Findings and Conclusions, is quoted in part. To the extent a further response is required, the averment is Denied.

42. It is Admitted only that a \$60 million fine was imposed. To the extent a further response is required, the averment is Denied.

43. It is Admitted only that President Erickson's Press Release is quoted. To the extent a further response is required, the averment is Denied.

44. It is Admitted only that the Penn State University Press Release is quoted. To the extent a further response is required, the averment is Denied.

45. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

46. It is Admitted only that the Penn State University Press Release was quoted. To the extent a further response is required, the averment is Denied. The Consent Decree does not require the creation of a task force.

47. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. It is Admitted only that the NCAA press release is quoted. To the extent a further response is required, the averment is Denied. The Consent Decree does not require the creation of a task force.

48. Upon information and belief, it is Admitted only that Penn State University has transferred \$12 million into a separate and segregated account for payment of the NCAA fine. The Defendant is without knowledge or information sufficient to determine who controls the account. To the extent a further response is required, the averment is Denied. By way of further answer, it is Denied that the Consent Decree provides for the structure and control of the endowment fund.

49. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

50. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied.

51. Upon information and belief, it is Admitted only that State Senator Jake Corman issued a Co-Sponsorship Memorandum to all members of the Senate of Pennsylvania. To the extent a further response is required, the averment is Denied.

52. It is Admitted only that State Senator Corman's Co-Sponsorship Memorandum is quoted. To the extent a further response is required, the averment is Denied.

53. Conclusion of law to which no response is required. To the extent a response is required, it is Admitted only that the Endowment Act has been quoted. The Endowment Act is in writing and speaks for itself.

54. Conclusion of law to which no response is required. To the extent a response is required, it is Admitted only that the Endowment Act has been quoted. The Endowment Act is in writing and speaks for itself.

55. Conclusion of law to which no response is required. To the extent a response is required, it is Admitted only that the Endowment Act has been quoted. The Endowment Act is in writing and speaks for itself.

56. Conclusion of law to which no response is required. To the extent a response is required, it is Admitted only that the Endowment Act has been quoted. The Endowment Act is in writing and speaks for itself.



57. Conclusion of law to which no response is required. To the extent a response is required, it is Admitted only that the Endowment Act has been quoted. The Endowment Act is in writing and speaks for itself.

58. Conclusion of law to which no response is required. To the extent a response is required, it is Admitted only that the Endowment Act has been quoted. The Endowment Act is in writing and speaks for itself.

59. It is Admitted only that Senator Corman's press release is quoted. To the extent a further response is required, the averment is Denied.

60. Conclusion of law to which no response is required. To the extent a response is required, it is Denied.

61. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied.

### **COUNT 1**

62. Treasurer McCord incorporates by reference each and every answer to the allegations in paragraphs 1 through 61 as though fully set forth at length herein.

63. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied.

64. Conclusion of law to which no response is required. To the extent a response is required, it is Admitted only that the Consent Decree states that a \$60 million fine is "to be paid over a five-year period beginning in 2012 into an

endowment.” By way of further answer, it is Denied that the Consent Decree provides for the structure and control of the endowment fund. Further, the Consent Decree is in writing and speaks for itself.

65. Conclusion of law to which no response is required. The Defendant is without knowledge sufficient to form a belief as to the intentions of the NCAA and Penn State University. To the extent a response is required, the averment is Denied. By way of further answer, it is Denied that the Consent Decree provides for the structure and control of the endowment fund. The Consent Decree simply states that the fine is “to be paid over a five-year period beginning in 2012 into an endowment.” Further, the Consent Decree is in writing and speaks for itself.

66. Conclusion of law to which no response is required. To the extent a response is required, the Endowment Act is in writing and speaks for itself.

67. Conclusion of law to which no response is required. To the extent a response is required, pursuant to the Endowment Act, Penn State University’s monetary penalty is to be paid into an endowment “established as a separate trust fund in the State Treasury.” 24 P.S. § 7503(b)(1). To the extent a response is required, the averment is Denied.

68. Conclusion of law to which no response is required. To the extent a response is required the averment is Denied. The NCAA does not have any ownership rights in the endowment fund. By way of further answer, it is Denied

that the Consent Decree provides for the structure and control of the endowment fund.

69. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied. By way of further answer, as a matter of state law, the money would not be appropriated to Treasury; rather, the money would be paid into a trust fund established in Treasury and for which the State Treasurer would act as custodian. 24 P.S. § 7503(b)(1). Pursuant to the Endowment Act, the “moneys of the separate trust fund are appropriated to the commission on a continuing basis to carry out the provisions of this act.” 24 P.S. § 7503(b)(1). Therefore, the proceeds of the trust are appropriated to the Pennsylvania Commission on Crime and Delinquency by the Pennsylvania legislature as a continuing appropriation.

70. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied.

## **COUNT II**

71. Treasurer McCord incorporates by reference each and every answer to the allegations in paragraphs 1 through 70 as though fully set forth at length herein.

72. Conclusion of law to which no response is required. To the extent a response is required, the Consent Decree is in writing and speaks for itself.

73. Conclusion of law to which no response is required. To the extent a response is required, the Consent Decree is in writing and speaks for itself. The Consent Decree is silent as to the structure, control, and distribution of funds in the endowment, including, who would make the determination as to how the funds would be spent; however, the Endowment Act states how the money in the fund would be dispersed.

74. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied. The Consent Decree is silent as to the structure, control, and distribution of funds in the endowment, including, who would make the determination as to how the funds would be spent; however, the Endowment Act states how the money in the fund would be dispersed.

75. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied. The Consent Decree is silent as to the structure, control, and distribution of funds in the endowment, including, who would make the determination as to how the funds would be spent; however, the Endowment Act states how the money in the fund would be dispersed.

76. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied. The Consent Decree is silent as to the structure, control, and distribution of funds in the endowment, including, who

would make the determination as to how the funds would be spent; however, the Endowment Act states how the money in the fund would be dispersed.

77. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied. The Consent Decree is silent as to the structure, control, and distribution of funds in the endowment, including, who would make the determination as to how the funds would be spent; however, the Endowment Act states how the money in the fund would be dispersed.

78. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied. The Consent Decree is silent as to the structure, control, and distribution of funds in the endowment, including, who would make the determination as to how the funds would be spent; however, the Endowment Act states how the money in the fund would be dispersed.

79. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied.

### **COUNT III**

80. Treasurer McCord incorporates by reference each and every answer to the allegations in paragraphs 1 through 79 as though fully set forth at length herein.

81. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied. The Consent Decree is in writing

and speaks for itself. Answering further, the Consent Decree does not direct the NCAA to create an endowment fund.

82. The Defendant is without knowledge sufficient to form a belief as to the truth of the averment. To the extent a response is required, the averment is Denied. The Consent Decree is in writing and speaks for itself. By way of further answer, it is Denied that the Consent Decree provides for the structure and control of the endowment fund.

83. Denied. The NCAA has not accurately quoted the Endowment Act, which states: “Unless otherwise expressly stated in the agreement, the funds may only be used within this Commonwealth for the benefit of the residents of this Commonwealth.” 24 P.S. § 7503(b)(4). There is no missing language requiring an ellipsis.

84. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied.

85. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied.

86. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied.

87. Conclusion of law to which no response is required. To the extent a response is required, the averment is Denied.

### **AFFIRMATIVE DEFENSES**

Treasurer McCord reserves the right to assert any and all applicable defenses to the NCAA's claims. Treasurer McCord has not yet obtained discovery from the NCAA in connection with this action; therefore, Treasurer McCord reserves the right to amend or otherwise supplement this pleading on that basis.

### **FIRST AFFIRMATIVE DEFENSE**

As the Commonwealth Court held in the parallel state action, *Corman v. The National Collegiate Athletic Association*, 74 A.3d 1149 (Pa. Cmwlth. 2013), the Endowment Act does not seek to confiscate funds from a private entity, the NCAA, without just compensation, in violation of the Takings Clauses of the United States or Pennsylvania Constitutions, in that, *inter alia*:

- A. The NCAA does not own or have control over the \$60 million fine paid or to be paid by Penn State University;
- B. The NCAA does not have a contractual right to direct how the funds paid or to be paid under the Consent Agreement are to be spent; and
- C. As a result, the NCAA has no cognizable or protected property interest that is affected by the Endowment Act.

**SECOND AFFIRMATIVE DEFENSE**

As the Commonwealth Court held in the parallel state action, the Endowment Act does not violate the Commerce Clause of the United States Constitution in that, *inter alia*:

- A. The Endowment Act requires that the monetary penalty be spent in Pennsylvania only if the agreement subject to the Endowment Act, here the Consent Agreement, does not specify that the funds are to be spent elsewhere, which the Consent Agreement does not do;
- B. Nothing in the Endowment Act prohibits out-of-state entities from applying for and receiving monies from the Fund, nor is the manner in which such entities may do so in any way different from the process required to be followed by an in-state entity;
- C. The creation of the endowment fund does not adversely impact out-of-state economic interests nor burden any out-of-state economic interests or entities;
- D. No provision in the Endowment Act expressly restricts where PSU's expenditures may be made, *i.e.*, that they must be made within Pennsylvania; and



- E. Any limitations on the expenditure of the funds are proper conditions accompanying the expenditure of state funds under the “Market Participant” doctrine.

### **THIRD AFFIRMATIVE DEFENSE**

As the Commonwealth Court held in the parallel state action, the Endowment Act does not impair any rights of the NCAA under the Consent Agreement, and therefore does not violate the Contracts Clauses of the United States or Pennsylvania Constitutions, in that, *inter alia*:

- A. Nothing in the Consent Decree provides for or evidences any obligation that the NCAA is to create the endowment or that the NCAA is to collect the fine monies;
- B. The Consent Decree does not specify any particular endowment that is to receive the fine proceeds or place any geographical restriction on the use of the funds;
- C. The Consent Decree is silent as to the establishment and control of the endowment to be created, and the Endowment Act does not interfere with PSU’s Consent Decree obligations, or with the use of the funds for the purposes stated therein.

#### **FOURTH AFFIRMATIVE DEFENSE**

As the Commonwealth Court held in the parallel state action, even if the Endowment Act impaired rights of the NCAA under the Consent Decree, that impairment is not substantial and therefore does not violate the Contracts Clauses of the United States or Pennsylvania Constitutions, in that, *inter alia*:

- A. The Consent Decree is silent as to who is to control or administer the endowment and on geographic limitations on the use of the funds, so the Endowment Act's provisions on those matters do not have a substantial impact on the provisions of the Consent Decree; and
- B. The Endowment Act has a legitimate and important public purpose and any adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in light of that purpose.

#### **FIFTH AFFIRMATIVE DEFENSE**

The Act to Accept Public Lands, by the United States, to the Several States, for the Endowment of Agricultural Colleges (Act 10A of 2012) was enacted and became effective on July 2, 2012, prior to the execution of the Consent Decree on July 23, 2012, and thus its enactment could not be “a change in the law that impaired [the Consent Decree].”

**SIXTH AFFIRMATIVE DEFENSE**

The Consent Decree between the NCAA and the Pennsylvania State University, imposing monetary fines, penalties and sanctions, is invalid, for the following reasons:

- A. The NCAA does not possess the authority to impose monetary fines, penalties and sanctions against a member University, its staff or its student-athletes based on the criminal conduct of a non-University employee. *Corman and McCord v. The National Collegiate Athletic Association*, 2014 Pa. Commw. LEXIS 214 (Pa. Cmwlt. 2014), *reargument denied*, 2014 Pa. Commw. LEXIS 238 (Pa. Cmwlt. 2014).
- B. In violation of its own bylaws and constitution, the NCAA failed to afford the Pennsylvania State University, its staff and its student-athletes adequate due process prior to the consideration and imposition of monetary fines, penalties and sanctions. *Id.*
- C. In violation of its own bylaws and constitution, the NCAA imposed monetary fines, penalties and sanctions against a member University, its staff or its student-athletes without conducting an inquiry, investigation or review.
- D. In violation of its own bylaws and constitution, the NCAA imposed monetary fines, penalties and sanctions against a member University, its

staff and its student-athletes in excess of its own guidelines and policy limitations.

E. The Consent Decree is a contract of adhesion, entered into under duress and without adequate consideration.

#### **SEVENTH AFFIRMATIVE DEFENSE**

The NCAA lacks standing to pursue this action in that, as the Commonwealth Court of Pennsylvania has already determined, the Consent Agreement creates no legally enforceable rights in the NCAA to the funds themselves or to control the fund. *Corman v. The National Collegiate Athletic Association*, 74 A.3d 1149 (Pa. Cmwlth. 2013).

#### **EIGHTH AFFIRMATIVE DEFENSE**

The NCAA's constitutional claims under the Commerce Clause of the United States Constitution and the Takings and Contract Clauses of the United States and Pennsylvania Constitutions fail to state a claim upon which relief can be granted, as determined by the Commonwealth Court of Pennsylvania in the parallel state proceedings, *Corman v. The National Collegiate Athletic Association*, 74 A.3d 1149 (Pa. Cmwlth. 2013).

**NINTH AFFIRMATIVE DEFENSE**

Commonwealth Court's determinations in the parallel state proceedings that the NCAA's constitutional claims fail to state a claim upon which relief can be granted are, or will be, entitled to preclusive effect.

**TENTH AFFIRMATIVE DEFENSE**

The Court should abstain from proceeding in this matter pursuant to the *Younger, Pullman, Burford*, and/or *Colorado River Basin* abstention doctrines.

**ELEVENTH AFFIRMATIVE DEFENSE**

The Court should, under principles of federal-state comity, defer to the state court and allow the Commonwealth Court to enter final judgments as to the constitutionality of the state Endowment Act in the parallel state proceedings.

Respectfully submitted,

/S/ Christopher B. Craig

**Christopher B. Craig, Chief Counsel**  
**Craig S. Schwartz, Deputy Chief Counsel**  
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DATED: June 25, 2014

*Counsel for Treasurer Robert M. McCord*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION,**

**Plaintiff,**

**v.**

**THOMAS W. CORBETT, JR., in his  
capacity as Governor of the  
Commonwealth of Pennsylvania,  
ROB MCCORD, in his capacity as  
Treasurer of the Commonwealth of  
Pennsylvania, MARK R. ZIMMER,  
in his capacity as Chairman  
of the Pennsylvania Commission  
on Crime and Delinquency,  
and EUGENE DEPASQUALE,  
in his capacity as Auditor General of  
the Commonwealth of Pennsylvania,**

**Defendant.**

**Civil No. 1:13-CV-00457-YK**

**(Hon. Yvette Kane)**

**Filed Via Electronic Case  
Filing**

**VERIFICATION**

I, Robert M. McCord, hereby depose and state that I am the State Treasurer of the Commonwealth of Pennsylvania and that the facts set forth in the foregoing

are true and correct to the best of my knowledge, information and belief. I understand that this Verification is made pursuant to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

/s/Robert M. McCord  
Robert M. McCord  
Pennsylvania State Treasurer

Date: June 25, 2014

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION,**

**Plaintiff,**

**v.**

**THOMAS W. CORBETT, JR., in his  
capacity as Governor of the  
Commonwealth of Pennsylvania,  
ROB MCCORD, in his capacity as  
Treasurer of the Commonwealth of  
Pennsylvania, MARK R. ZIMMER,  
in his capacity as Chairman  
of the Pennsylvania Commission  
on Crime and Delinquency,  
and EUGENE DEPASQUALE,  
in his capacity as Auditor General of  
the Commonwealth of Pennsylvania,**

**Defendant.**

**Civil No. 1:13-CV-00457-YK**

**(Hon. Yvette Kane)**

**Filed Via Electronic Case  
Filing**

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**CERTIFICATE OF SERVICE**

---

I, Christopher Craig, Chief Counsel, on behalf of Robert M. McCord, as  
Treasurer of the Commonwealth of Pennsylvania, and the Treasury Department of  
the Commonwealth of Pennsylvania, hereby certify that on June 25, 2014, I have



caused to be served a copy of the attached via the Electronic Filing System to the following individuals:

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Everett C. Johnson, Jr., Esquire  
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Jr. and Mark R. Zimmer, Chairman,  
PCCD*

Respectfully Submitted,

/s/ Christopher Craig  
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*Counsel for Treasurer Robert M.  
McCord*

Date: June 25, 2014

# EXHIBIT B

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**JAKE CORMAN, in his official capacity  
as Senator from the 34<sup>th</sup> Senatorial  
District of Pennsylvania and Chair of the  
Senate Committee on Appropriations;  
and ROBERT M. McCORD in his official  
capacity as Treasurer of the Commonwealth  
of Pennsylvania,**

**Plaintiffs,**

**v.**

**THE NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION, and THE PENNSYLVANIA  
STATE UNIVERSITY,**

**Defendants.**

**No. 1 M.D. 2013**

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**PENNSYLVANIA TREASURER ROBERT M. McCORD'S RESPONSES  
AND OBJECTIONS  
TO THE NCAA's FIRST SET OF INTERROGATORIES**

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Pursuant to Pennsylvania Rule of Civil Procedure 4006, Pennsylvania Treasurer Robert M. McCord (herein "Treasurer McCord"), by and through his undersigned counsel of record, hereby submits these answers and objections to the First Set of Interrogatories by the National Collegiate Athletic Association (herein "NCAA") as follows:

**I. General Objections**

1. Treasurer McCord objects to the "Definitions" and "Instructions" set forth in the Interrogatories set forth as overly broad, vague and/or ambiguous.
2. Treasurer McCord objects to the Interrogatories to the extent that they fail to describe with reasonable particularity each item or category of item sought or question posed.
3. Treasurer McCord objects to the Interrogatories to the extent they purport to make an inquiry into matters protected by the attorney-client privilege, the work product doctrine, the legislative Speech and Debate privilege, the deliberative process privilege, and any other applicable privileges or immunities.

**II. Objections to Definitions**

1. Treasurer McCord objects to the definition of "concerning" because it is overly broad and unduly burdensome. The definition lacks any form of

specificity to the extent it is not limited to the production of relevant information nor reasonably calculated to lead to the discovery of admissible evidence, or documents but encompasses such communication, documents, records, conversations or responses that may “without limitation” even tangentially relate to or allude to any person or association involved in any manner in this litigation. As defined, “concerning” is vague and ambiguous, and thus is too generalized to permit Treasurer McCord to apply any reasonable limitation upon its scope.

2. Treasurer McCord objects to the definition of “you” because it is overly broad and unduly burdensome. The definition lacks any specificity to the extent it is not limited to the production of relevant information or documents, but encompasses any person (in particular “others”) who may, directly or indirectly have provided information “for” Treasurer McCord. As the term “information” is undefined and thus accorded its ordinary meaning, there is no limitation concerning the scope of the term “you” or its use as to obtaining “information for” Treasurer McCord.

### **III. Objection to Instructions**

1. Treasurer McCord objects to the covered time period by the Interrogatories, commencing November 1, 2011, through the present, as overly broad and seeks to recover documents or information that are neither relevant to

the claims or defense of any party to this litigation nor reasonably calculated to lead to the discovery of admissible evidence. The Consent Decree was not executed until July 23, 2012, and the Endowment Act, formerly Senate Bill 187, was not introduced until January 16, 2013. No action involving Treasurer McCord occurred prior to July 2012.

#### **IV. Responses to Interrogatories**

##### **Interrogatory No. 1:**

State whether You contend that the Consent Decree is invalid and, if so, State with particularity all legal grounds on which You believe it is invalid and Identify all facts, witnesses, and Documents that support that contention.

##### **Response to Interrogatory No. 1:**

Treasurer McCord incorporates its General Objections, Objections to Definitions and Objection to Instructions as if fully set forth herein. To the extent that the NCAA relies upon and references the validity of the Consent Decree in support of its claims and defenses against the Endowment Act and asserts that the Endowment Act conflicts with the Consent Decree, it is the intention of Treasurer McCord to challenge the validity of the Consent Decree. Treasurer McCord avers that the Consent Decree between the NCAA and the Pennsylvania State University is invalid for the following reasons: (1) the NCAA does not possess the authority to impose monetary fines, penalties and sanctions against a member University, its staff or its student-athletes based on the criminal conduct of a non-University employee; (2) in violation of its own bylaws and constitution, the NCAA failed to afford the Pennsylvania University, its staff and its student-athletes adequate due process prior to the consideration and imposition of monetary fines, penalties and sanctions; (3) in violation of its own bylaws and constitution, the NCAA

imposed monetary fines, penalties and sanctions against a member University, its staff or its student-athletes without conducting an inquiry, investigation or review; (4) in violation of its own bylaws and constitution, the NCAA imposed monetary fines, penalties and sanctions against a member University, its staff and student-athletes in excess of its own guidelines and policy limitations; and, (5) the Consent Decree is a contract of adhesion, entered into under duress and without adequate consideration. *See, e.g., Corman and McCord v. The National Collegiate Athletic Association*, 2014 Pa.Cmwlt. LEXIS 214 (Pa. Cmwlt. 2014).

Treasurer McCord will identify such additional facts, witnesses and documents in support of these averments as each are made available at the conclusion of the Court scheduled discovery period.

Interrogatory No. 2:

Identify and Describe all oral communications and meetings involving (i) You or anyone on Your staff and (ii) the Pennsylvania Attorney General or any employee of the Office of the Pennsylvania Attorney General, Concerning the Act, the allegations in the Second Amended Complaint, the authority of the Pennsylvania Treasurer, this litigation, the Consent Decree or any of its sanctions, the NCAA, Sandusky, Coach Paterno, or the Paterno Litigation.

Response to Interrogatory No. 2:

Treasurer McCord incorporates its General Objections, Objections to Definitions and Objection to Instructions as if fully set forth herein. Treasurer McCord further objects because it is vague and ambiguous, burdensome and because it is not designed to seek the production of relevant information, but rather is intended to delve into the motivations, pre-decisional deliberations, litigation strategy and communications between governmental officers. Treasurer McCord also objects to the extent the NCAA seeks to divulge information and communications protected by the attorney-client privilege, the work product doctrine, the deliberative process



privilege or information and communicates otherwise protected from disclosure under applicable law. Treasury also objects to the extent the NCAA's inquiry implicates the legislative speech and debate privilege as it may involve communications with members, and staff, of the Pennsylvania General Assembly. Treasurer McCord intends to assert all applicable privileges or protections with respect to all such documents, communications or records.

Interrogatory No. 3:

Identify and Describe all oral communications and meetings involving (i) You or anyone on Your staff and (ii) Governor Tom Corbett or any employee of the Office of the Pennsylvania Governor, Concerning the Act, the allegations in the Second Amended Complaint, this litigation, the Consent Decree or any of its sanctions, the NCAA, Sandusky, Coach Paterno, or the Paterno Litigation.

Response to Interrogatory No. 3:

Treasurer McCord incorporates its General Objections, Objections to Definitions and Objection to Instructions as if fully set forth herein. Treasurer McCord further objects because it is vague and ambiguous, burdensome and because it is not designed to seek the production of relevant information, but rather is intended to delve into the motivations, pre-decisional deliberations, litigation strategy and communications between governmental officers. Treasurer McCord also objects to the extent the NCAA seeks to divulge information and communications protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege or information and communications otherwise protected from disclosure under applicable law. Treasury also objects to the extent the NCAA's inquiry implicates the legislative speech and debate privilege as it may involve communications with members, and staff, of the Pennsylvania General Assembly. Treasurer McCord intends to assert all applicable privileges or protections with respect to all such documents, communications or records.

Interrogatory No. 4:

Identify and Describe all oral communications and meetings involving (i) You or anyone on Your staff and (ii) Penn State or any of its officers, current or former Trustees, employees, or representatives, Concerning the Act, the allegations in the Second Amended Complaint, this litigation, the Consent Decree or any of its sanctions, the NCAA, Sandusky, Coach Paterno, or the Paterno Litigation.

Response to Interrogatory No. 4:

Treasurer McCord incorporates its General Objections, Objections to Definitions and Objection to Instructions as if fully set forth herein. Treasurer McCord further objects because it is vague and ambiguous, burdensome and because it is not designed to seek the production of relevant information, but rather is intended to delve into the motivations, pre-decisional deliberations, litigation strategy and communications between governmental officers. Treasurer McCord also objects to the extent the NCAA seeks to divulge information and communications protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege or information and communications otherwise protected from disclosure under applicable law. Treasury also objects to the extent the NCAA's inquiry implicates the legislative speech and debate privilege as it may involve communications with members, and staff, of the Pennsylvania General Assembly. Treasurer McCord intends to assert all applicable privileges or protections with respect to all such documents, communications or records.

Interrogatory No. 5:

Identify and Describe all oral communications and meetings occurring prior to March 23, 2013, between (i) You or anyone on Your staff and (ii) State Senator Jake Corman or any of Jake Corman's Senate staff, Concerning the Act, the allegations in the Second Amended Complaint, this litigation, the Consent Decree

or any of its sanctions, the NCAA, Sandusky, Coach Paterno, or the Paterno Litigation.

Response to Interrogatory No. 5:

Treasurer McCord incorporates its General Objections, Objections to Definitions and Objection to Instructions as if fully set forth herein. Treasurer McCord further objects because it is vague and ambiguous, burdensome and because it is not designed to seek the production of relevant information, but rather is intended to delve into the motivations, pre-decisional deliberations, litigation strategy and communications between governmental officers. Treasurer McCord also objects to the extent the NCAA seeks to divulge information and communications protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege or information and communications otherwise protected from disclosure under applicable law. Treasury also objects to the extent the NCAA's inquiry implicates the legislative speech and debate privilege as it may involve communications with members, and staff, of the Pennsylvania General Assembly. Treasurer McCord intends to assert all applicable privileges or protections with respect to all such documents, communications or records.

Interrogatory No. 6:

Identify and Describe all oral communications and meetings involving (i) You or anyone on Your staff and (ii) Auditor General Eugene DePasquale or any member of the staff of the Office of the Pennsylvania Auditor General, Concerning the Act, the allegations in the Second Amended Complaint, this litigation, the Consent Decree or any of its sanctions, the NCAA, Sandusky, Coach Paterno, or the Paterno Litigation.

Response to Interrogatory No. 6:

Treasurer McCord incorporates its General Objections, Objections to Definitions and Objection to Instructions as if fully set forth herein. Treasurer McCord further objects because it is vague and ambiguous, burdensome and because it is not designed to seek the production of relevant information, but rather is intended to delve into the motivations, pre-decisional deliberations, litigation strategy and communications between governmental officers. Treasurer McCord also objects to the extent the NCAA seeks to divulge information and communications protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege or information and communications otherwise protected from disclosure under applicable law. Treasury also objects to the extent the NCAA's inquiry implicates the legislative speech and debate privilege as it may involve communications with members, and staff, of the Pennsylvania General Assembly. Treasurer McCord intends to assert all applicable privileges or protections with respect to all such documents, communications or records.

Interrogatory No. 7:

Identify every public statement You made about the Consent Decree, the Freeh Report, or Penn State.

Response to Interrogatory No. 7:

Treasurer McCord incorporates its General Objections, Objections to Definitions and Objection to Instructions as if fully set forth herein. Treasurer McCord further objects because it is vague and ambiguous, burdensome and because it is not designed to seek the production of relevant information, but rather is intended to delve into the motivations, pre-decisional deliberations, litigation strategy and communications between governmental officers. Treasurer McCord also objects to the extent the NCAA seeks to divulge information and communications protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege or information and communications otherwise protected from disclosure under applicable law. Treasury also objects to the extent the NCAA's inquiry implicates the legislative speech and debate privilege as it may involve communications with members, and staff, of the Pennsylvania

General Assembly. Treasurer McCord intends to assert all applicable privileges or protections with respect to all such documents, communications or records.

Subject to and without waiving any of the foregoing see attached documents and records.

Public Statements (Press Releases)

Public Statements (News Clips)

Public Statements (Social Media)

Interrogatory No. 8:

Describe the subject matter for which You intend to present an expert witness, and Identify such expert if he or she has been selected.

Response to Interrogatory No. 8:

Treasurer McCord incorporates its General Objections, Objections to Definitions and Objection to Instructions as if fully set forth herein. Treasurer McCord further objects because it is vague and ambiguous, burdensome and because it is not designed to seek the production of relevant information, but rather is intended to delve into the motivations, pre-decisional deliberations, litigation strategy and communications between governmental officers. Treasurer McCord also objects to the extent the NCAA seeks to divulge information and communications protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege or information and communications otherwise protected from disclosure under applicable law. Treasury also objects to the extent the NCAA's inquiry implicates the legislative speech and debate privilege as it may involve communications with members, and staff, of the Pennsylvania General Assembly. Treasurer McCord intends to assert all applicable privileges or protections with respect to all such documents, communications or records.

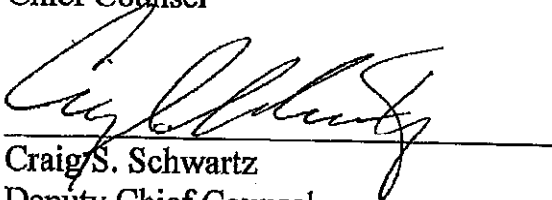
Subject to and without waiving any of the Treasurer McCord may present expert witness testimony pertaining to the customary historical and legal application of the NCAA's bylaws and constitution to investigations and

disciplinary proceedings involving member University, staff and student-athletes. Such expert witness has not yet been identified or retained.

At such time as Treasurer McCord has identified an expert witness, relevant information will be shared with the NCAA.

Respectfully submitted,

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Dated: July 10, 2014

## **CERTIFICATE OF SERVICE**

I, Thomas W. Scott, hereby certify that I am serving the foregoing document, by First Class Mail and email to:

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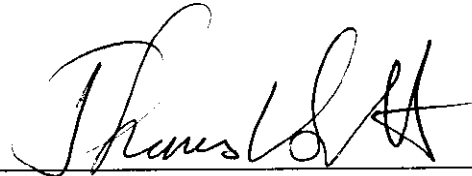
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*Counsel for The Pennsylvania State  
University*

*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: December 19, 2014

A handwritten signature in black ink, appearing to read 'Thomas W. Scott', written over a horizontal line.

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*Counsel for Defendants the NCAA,  
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