

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

DEBORA J. SWEET
PROthonARY
CENTRE COUNTY, PA

2014 JUL -3 PM 2:18

FOR RECORDS

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:**
) Statement by the National
) Collegiate Athletic Association,
) Dr. Mark Emmert, and Dr.
) Edward Ray Regarding the Joint
) Motion for a Protective Order
) **Filed on Behalf of:**
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) Association, Mark Emmert,
) Edward Ray
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**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA**

GEORGE SCOTT PATERNO, et al.,

Plaintiffs,

v.

THE NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION et al.

Defendants,

And

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Civil Division

Docket No. 2013-2082

DEBRA C. HANEL
PROthonotary
CENTRE COUNTY, PA
2014 JUL -3 PM 2:18
FOR RECORD

**STATEMENT BY THE NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, DR. MARK EMMERT, AND DR. EDWARD RAY
REGARDING THE JOINT MOTION FOR A PROTECTIVE ORDER**

The National Collegiate Athletic Association (“NCAA”), Dr. Mark Emmert, and Dr. Edward Ray (collectively, the “NCAA Defendants”) hereby request that the Court enter the Protective Order that is attached as Exhibit A to the parties’ Joint Motion for Entry of a Protective Order (“Joint Motion”), and file this Statement in support of that request.

INTRODUCTION

Following the May 19, 2014 hearing, the parties have made great strides in reaching agreement on the provisions of the proposed protective order in this

matter—including the manner in which “Confidential” and “Highly Confidential” materials will be treated by the parties and their counsel.¹ However, there remains a single disputed provision because Plaintiffs refuse to agree that the use of pre-trial discovery materials produced in this case, including those that are not designated as “Confidential” or “Highly Confidential,” should be limited to the purpose of preparing and prosecuting the parties’ respective cases in court.

The U.S. Supreme Court has made clear that “[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes,” and that litigants do *not* have an “unrestrained right to disseminate information that has been obtained through pretrial discovery.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31, 34-35 (1984). The NCAA Defendants contend that this basic and uncontroversial principle of law should be memorialized in the Protective Order governing discovery in this case. Accordingly, the NCAA Defendants and the Pennsylvania State University have proposed that the Protective Order contain the following provision at Paragraph 5(a):

¹ In particular, the Parties have agreed that “Confidential Documents” will be protected from disclosure to any third party other than the parties to the litigation, their counsel, and the Court, with certain limited exceptions (to include, for example, certain identified consultants, experts and contractors and deposition witnesses who have agreed to be bound by the Protective Order). “Highly Confidential Documents” will be subject to these same restrictions, and in addition will be protected from disclosure to the parties themselves.

“General Protections. All pre-trial discovery materials in this litigation (including materials that are not designated as constituting Confidential Information or Highly Confidential - Attorneys’ Eyes Only - Information) shall be used solely for the purpose of preparing and prosecuting the Parties’ respective cases, and shall not be used or disclosed for any other purpose. Nothing in this Order, however, limits: (i) the Parties’ use of materials not designated as Confidential Information or Highly Confidential - Attorneys’ Eyes Only - Information that the Parties, in good faith, have made part of the judicial record in this case; or (ii) the use of information a Party legitimately obtained through public sources.”

See Appendix A to Joint Motion. This provision would confirm the Parties’ obligations to handle all pre-trial discovery materials, whether designated as confidential or not, appropriately and not engage in abuses of the discovery process. This provision is narrowly tailored such that it does not restrict the Parties’ use of non-confidential materials outside the litigation once they have been made, in good faith, part of the judicial record, nor does it restrict the use of information obtained from public sources.

Ordinarily, it may not be necessary for a protective order to address the appropriate treatment of documents that are *not* designated as “Confidential.” But here, Plaintiffs have made unmistakably clear their intent to use discovery in this litigation as a means to obtain private documents that are not public and that they would not otherwise have access to merely so that they can subsequently disclose them freely outside the litigation, without regard to any prejudice or harm to the Defendants or third parties. The full record in this case will demonstrate that

Plaintiffs' claims are fundamentally meritless, and that the NCAA and Penn State responded to an unprecedented tragedy with a unique, but valid approach (*i.e.*, the Consent Decree and Athletics Integrity Agreement), consistent with their respective authority. But pending resolution of this judicial proceeding, this Court should not condone Plaintiffs' apparent plans to selectively and prejudicially disclose private materials obtained solely through pre-trial discovery.

ARGUMENT

Paragraph 5(a) of the Protective Order supported by the NCAA Defendants and Penn State is consistent with well settled law and ensures that the pre-trial discovery process is smooth and free from the substantial risk of abuse. There can be no dispute that pre-trial discovery materials may be used for “the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes....” *Seattle Times Co. v. Rhinehart*, 467 U.S. at 34-35. Indeed, while liberal discovery is allowed for the purpose of preparing a litigant’s case, “*a litigant has no right to disseminate private documents gained through the discovery process.*” See *MarkWest Liberty Midstream & Res., LLC v. Clean Air Council*, 71 A.3d 337, 345 n.15 (Pa. Commw. Ct. 2013) (emphasis added) (citing *Seattle Times*, 467 U.S. at 32-34).

Moreover, both federal and Pennsylvania law recognize that this pretrial discovery process is “essentially a private process” among the parties. *Stenger v.*

Lehigh Valley Hosp. Ctr., 382 Pa. Super. 75, 89, 554 A.2d 954, 961 (1989) (citing *Seattle Times*, 467 U.S. at 33 (“pretrial depositions and interrogatories are not public components of a civil trial”); *Gannett Company v. DePasquale*, 443 U.S. 368, 396 (1979) (“it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants”)).

To be sure, litigants have a right to enter discovery materials into the judicial record, and the public has a right to access non-confidential materials once they are part of the record. But in other than materials legitimately appended to pleadings or otherwise made part of the record, “private documents collected during discovery are not judicial records” and there is no right of or need for public access to such materials. *Stenger*, 382 Pa. Super. at 89 (citing *In re Alexander Grant and Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986)); see also *Hutchison v. Luddy*, 398 Pa. Super. 505, 515-16, 581 A.2d 578, 583 (1990) *rev'd on other grounds*, 527 Pa. 525, 594 A.2d 307 (1991) (per curiam) (“In the aftermath of *Stenger*, it appears that this Commonwealth does not view discovered information produced in the preparation of civil litigation as material to which the public has a common law, presumptive right of access.”); *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) (“Generally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access

to unfiled discovery.”).

This is for good reason. As the Pennsylvania Superior Court has recognized, if “discovery information were to be readily available to the public, the detrimental consequences to the discovery process would be grievous,” and, “[a]s a result, the entire litigation process would suffer.” *Stenger*, 382 Pa. Super. at 89. Indeed, Pennsylvania has even recognized that “nonparty access [to discovery materials] in controversial cases threatens the right of the litigants to a fair trial. *It is essential that the court ensure this right by preventing an unfair presentation, prior to trial, of the facts and issues underlying a controversy.*” *Id.* at 90 (emphasis added). The court has explicitly recognized its authority and responsibility to exclude nonparties from access to judicial records “to minimize the danger of an unfair trial by adverse publicity.” *Katz v. Katz*, 356 Pa. Super. 461, 468, 514 A.2d 1374, 1377 (1986) (citing *In re National Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981)). It makes no difference whether nonparties seek access to unfiled discovery, or the parties themselves inappropriately disclose it outside the judicial process. The result is the same, and protecting unfiled, pre-trial discovery information from inappropriate public disclosure preserves the functioning of the discovery process and is critical to ensuring that controversial, high-visibility cases are decided equitably.

Here, many of the documents that Plaintiffs have requested are confidential

and qualify for protection from public disclosure under the agreed upon provisions of the Protective Order. Other documents may not qualify for such protection under the Protective Order and Pennsylvania law—but these documents should nonetheless be protected from unnecessary and improper public disclosure, particularly during the pre-trial phase. In this case, Plaintiffs have requested a very substantial set of documents and information from the NCAA Defendants and Penn State—many of which, while responsive to the discovery requests, are only tangentially (at best) related to the issues in this litigation, and may well contain private information about matters far afield of this litigation. Defendants should not face the possibility that Plaintiffs, for purposes unrelated to the preparation and trial of this case, will turn over to the public realm a significant set of documents that have not been designated as “Confidential” by the Defendants. But Plaintiffs’ own public statements make clear there is a significant risk of just that:

- Paterno family spokesman, Dan McGinn, recently stated: “For everyone who wants to know the truth about the Sandusky tragedy ..., we must do what is necessary to bring the full record to light.”²
- Following this Court’s January 2014 order, Mr. Sollers declared: “With this ruling the bright light of legal discovery will finally shine on the facts and records of all parties involved.”³

² *Penn State Objects to Paterno Family’s Subpoena Request in NCAA Lawsuit*, Onward State, <http://onwardstate.com/2014/03/17/penn-state-objects-to-paterno-familys-subponea-request-in-ncaa-lawsuit/> (last visited July 3, 2014).

³ Kevin Horne, *Judge Rules Parts of Paterno-NCAA Lawsuit Have Standing*, Onward State, <https://onwardstate.com/2014/01/07/judge-rules-parts-of-paterno->

- Scott Paterno has also issued the following statements via Twitter: “Ladies and Gentlemen - the Court just gave us Discovery in Paterno vs. NCAA. Here we go”;⁴ “Freeh report is garbage, and that will be more clear as we move through discovery”;⁵ “That is why discovery is so critical; that transparency is so necessary. Freeh present[ed] an unchallenged one-sided biased view.”⁶

Defendants thus have a well-founded concern that during the pretrial trial discovery phase, Plaintiffs will inappropriately and selectively provide private discovery materials to the media, post them on their website (www.paterno.com), or otherwise release these materials *en masse*.

The NCAA believes this litigation will establish the baseless nature of Plaintiffs’ claims. However, the NCAA Defendants should not be subjected to selective and prejudicial disclosures of documents by Plaintiffs, as they use materials obtained through discovery to attempt to create adverse publicity aimed at manipulating the public perception of this matter. Information learned through discovery belongs in the courtroom, not on Twitter. Nor should the significant and legitimate privacy interests of the NCAA Defendants and Penn State be left unprotected and at the whim of the Plaintiffs.

[ncaa-lawsuit-have-standing/](#) (last visited July 3, 2014).

⁴ Scott Paterno, Twitter (Jan. 7, 2014 12:57 PM), <https://twitter.com/ScottPaterno/status/420660599106707456>.

⁵ Scott Paterno, Twitter (Apr. 25, 2014 8:06 AM), <https://twitter.com/ScottPaterno/status/459709996847362048>.

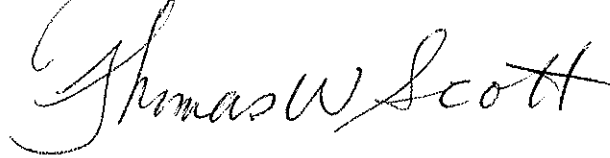
⁶ Scott Paterno, Twitter (May 8, 2014 4:11 AM), <https://twitter.com/ScottPaterno/status/464361870556536832>

Paragraph 5(a) of the NCAA Proposed Order would protect the Defendants from such potential abuses. At the same time, Section 5(a) would not trammel on the appropriate use of discovery materials or constitute a *de facto* sealing of the entire case. First, documents that are made part of the judicial record in good faith are not covered by Paragraph 5(a). Thus, the public will have access to the materials that are actually relevant to the Court's decisions in this case, and Plaintiffs will not be precluded from publicly disclosing components of the official judicial record. Second, Paragraph 5(a) in no way limits Plaintiffs' access to any discovery information. Third, Paragraph 5(a) likewise does not limit in any manner Plaintiffs' use of documents or information that are obtained from public sources. In sum, Paragraph 5(a) carefully balances the parties' privacy interests and rights to fair trial, without prejudicing Plaintiffs in any way whatsoever, while ensuring public access to judicially filed materials—the materials that are actually pertinent to the litigation. Plaintiffs have not and cannot present any justifiable reason to oppose these protections.

CONCLUSION

For the foregoing reasons, the NCAA Defendants respectfully request that the Court enter the Protective Order attached as Exhibit A to the parties' Joint Motion for Entry of a Protective Order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing Statement by the NCAA, Dr. Mark Emmert and Dr. Edward Ray Regarding the Joint Motion for a Protective Order, by First Class Mail and email to:

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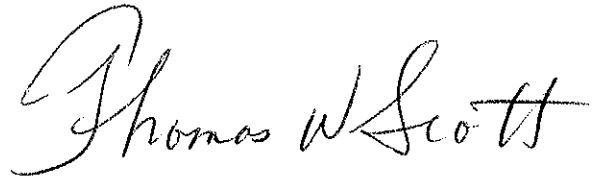
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