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

ESTATE of JOSEPH PATERNO;

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.

) **Docket No.:** 2013-2082

) **Type of Case:**

) Declaratory Judgment

) Injunction Breach of Contract

) Tortious Interference with

) Contract

) Defamation

) Commercial Disparagement

) Conspiracy

) **Type of Pleading:**

) The NCAA’s Reply to

) Plaintiffs’ ‘Response’ to Third

) Party Motions to Quash the

) NCAA’s Subpoena and for

) Protective Order

) **Filed on Behalf of:**

) National Collegiate Athletic

) Association, Mark Emmert,

) Edward Ray

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FILED IN CASE NO. 2013-2082

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CENTRE COUNTY, PA

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA

ESTATE of JOSEPH PATERNO, et al.,)	
Plaintiffs,)	Civil Division
)	
v.)	Docket No. 2013-
NATIONAL COLLEGIATE ATHLETIC)	2082
ASSOCIATION, et al.,)	
Defendants.)	
)	
)	

DEBRA Q. HOFFMAN
 PROTHONOTARY
 CENTRE COUNTY, PA
 2016 JUL -1 PM 2:35
 FILED IN CASE NO. 2013-2082

**THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S REPLY TO
PLAINTIFFS' 'RESPONSE' TO THIRD PARTY MOTIONS TO QUASH
THE NCAA'S SUBPOENA AND FOR PROTECTIVE ORDER**

Plaintiffs ask this Court to bar from discovery potentially damning evidence indicating that Joe Paterno concealed Jerry Sandusky's sexual abuse of children and failed to protect the public from Mr. Sandusky when given the opportunity. Plaintiffs offer no valid reason why this critical evidence should not be explored in a defamation case in which Plaintiffs claim that statements about Joe Paterno concealing abuse and failing to protect the public are false. Nor do Plaintiffs offer any basis that this discovery would harm the parties or the case schedule, or any valid reason why this discovery may not be taken in a manner that is respectful of the victims' privacy concerns.

Contrary to their latest filing, the Paterno family has repeatedly declared its commitment to uncovering the "full truth" of Joe Paterno's involvement in the

Sandusky tragedy, including with respect to these recent 1970s allegations. Sue Paterno recently called for “the full record to be made public” because “everyone will be better served if the complete story is made available for all to review.”¹ She continued: “*In the spirit of our love for Penn State and our duty to the victims, let’s stop fighting about process and start fighting for the truth.*”² But with their feet to the fire, faced with actually undertaking discovery, Plaintiffs’ commitment to truth-seeking has evaporated. It was Plaintiffs who chose to pursue a defamation case against the NCAA. They cannot now choose to pursue only the convenient “truth” while avoiding inconvenient facts.

As a procedural matter, Plaintiffs are estopped from reversing course and quashing this discovery, and they have waived their right to do so. They have repeatedly declared, both publicly³ and before the Court, their mutual interest in

¹ Geoff Rushton, *Sue Paterno Releases Letter Asking for University Transparency Following Allegation*, StateCollege.com (May 6, 2016, 5:50 PM), <http://www.statecollege.com/news/local-news/sue-paterno-releases-letter-asking-for-university-transparency-following-allegation,1467795/>.

² *Id.* (emphasis added). When the recent allegations came to light, the Paterno family publically “demand[ed] a full public review of the facts” and a “total pursuit of the truth.” Charles Thompson, *Paterno family urges against a fresh rush to judgement*, PennLive.com (May 5, 2016, 6:56 AM), http://www.pennlive.com/news/2016/05/paterno_family_in_thursday_eve.html. The family claimed that “We do not fear the truth, we embrace it.” *Id.* Scott Paterno “agreed” with the NCAA’s request to “explore the evidence regarding these new allegations.” @ScottPaterno, Twitter (May 6, 2016, 3:03 PM), <https://twitter.com/ScottPaterno/status/728706675314728961>.

³ *See supra* note 2.

uncovering this information. At a hearing on May 16, 2016, Plaintiffs' counsel told the Court that they were not opposed to re-opening discovery for this purpose, and Plaintiffs' counsel proceeded to participate in the efforts to obtain discovery from counsel for the two victims. If Plaintiffs were going to object, the time to do so would have been in May, when Plaintiffs voluntarily waived the right to object to this subpoena and allowed the NCAA to serve Pennsylvania State University ("Penn State"). See Pa.R.C.P. No. 4009.22 (a party must object to a subpoena prior to its service). At minimum, per the parties' June 13, 2016 telephonic conference call with the Court, Plaintiffs should have raised their objections by June 20, 2016, the date by which objections to the NCAA's subpoena were anticipated. Although Plaintiffs term their filing a "Response," it does not respond to John Doe-150's motion for a protective order and is, in fact, a belated objection to the May 24, 2016 subpoena. See Order (June 14, 2016).

Plaintiffs' arguments substantively fail as well. *First*, Plaintiffs argue that these allegations, if corroborated, are not relevant. Plaintiffs ignore black letter law. As discussed in the NCAA's response to Penn State's motion to quash, Plaintiffs must prove that the statements in the Consent Decree are *demonstrably false* in order to prevail in this litigation. See NCAA's Resp. to Penn State's Mot. to Quash and to John Doe-150's Mot. for a Protective Order at 3 (June 27, 2016)

(“NCAA Resp. to Mot. to Quash”).⁴ Their own Complaint alleges—as it must—that the statement that Joe Paterno covered up child sexual abuse is “erroneous” and “false and defamatory.” Second Am. Compl. ¶¶ 105, 157. The recent revelations are a potentially independent basis for the failure of Plaintiffs’ claims, in addition to the events described in the Freeh report.⁵ Indeed, a jury could easily determine that the sworn account of these two victims—presumably that Joe Paterno knew about and concealed Sandusky’s abuse as early as 1971—is credible and that the statements in the Freeh Report are therefore true.

⁴ See also *Joseph v. Scranton Times, L.P.*, 2008 PA Super 217, ¶ 27, 959 A.2d 322, 335 (2008) (explaining that plaintiffs bear “the burden of proving, by a preponderance of the evidence, that the [alleged defamatory statements] [a]re, in fact, false” (citing *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986))); *Am. Fut. Sys., Inc. v. Better Bus. Bureau*, 592 Pa. 66, 84, 923 A.2d 389, 400 (2007) (“[T]he plaintiff must establish that the defendant made a false and defamatory statement ...”); *Tucker v. Phila. Daily News*, 577 Pa. 598, 621, 848 A.2d 113, 127-28 (2004) (“To prevail on their defamation claim, [the plaintiffs], as public figures, must prove, by clear and convincing evidence that the allegedly defamatory statements were false ...”); *Ertel v. Patriot-News Co.*, 544 Pa. 93, 99, 674 A.2d 1038, 1041 (1996) (“[I]t is the burden of a public figure plaintiff ... to show that the statements at issue are false.”); *Kurowski v. Burroughs*, 2010 PA Super 69, ¶ 21 n.5, 994 A.2d 611, 619 n.5 (2010) (“It is essential to a claim of defamation that the statements are false.”); *Bobb v. Kraybill*, 354 Pa. Super. 361, 364, 511 A.2d 1379, 1380 (1986) (“Truth is an absolute defense to defamation in Pennsylvania.”); Op. & Order at 18 (Jan. 6, 2014) (an element of commercial disparagement is proving that the “statement is false.”).

⁵ Plaintiffs similarly argue that all that could result from discovery are allegations, not the truth of those allegations. Resp. at 4. This argument is premature. We do not know what information the victims may have to corroborate their claims. Only once discovery is complete can the Court weigh the probative value and admissibility of the evidence obtained.

In addition, any notion that these allegations are irrelevant because they were not specifically part of the Freeh Report is meritless. That has no impact on whether or not the statements were, in fact, *true*. It is telling that Plaintiffs cite no case law for the fallacy that a true statement can still be defamatory if the speaker did not know the extent to which it was true. Quite simply: a true statement is a true statement, and the recent allegations confirm the veracity of the statements in the Freeh Report.

Second, Plaintiffs' argue that discovery would unduly delay the litigation. Resp. at 4. However, the Court has vacated the remaining dates on the schedule in order to resolve Plaintiffs' appeal of certain privilege issues, which will likely extend past this fall. The ongoing delay in this case is therefore of Plaintiffs' making, and has nothing to do with the NCAA. The NCAA seeks only narrow discovery that can be completed quickly and efficiently with little burden to the non-parties or parties while the more complicated and time-consuming issues concerning privilege are being worked out. *See* NCAA Resp. to Mot. to Quash. at 4-9.

Third, Plaintiffs' suggestion that the NCAA improperly waited until the close of discovery to seek these materials is without merit. *See* Resp. at 2. The NCAA notified the Court of its intent to seek discovery *the day after* learning of the allegations. *See* Letter from E. Johnson to Hon. J. Leete (May 6, 2016). For

the NCAA to have taken discovery of the various known Sandusky victims prior to that date, in hopes that a victim might say that Joe Paterno had contemporaneous knowledge, would have been a classic fishing expedition.

In contrast, it appears that Plaintiffs did know about these allegations last year.⁶ However, Plaintiffs never disclosed these allegations despite extensive discovery into what Joe Paterno may have known about Sandusky's crimes. The Court should not condone Plaintiffs' attempts to sandbag the NCAA.

Finally, Plaintiffs argue that if discovery should go forward, they should be permitted to "fully explore" these new allegations. Resp. at 2. This is an unusual request given that Plaintiffs have not served any discovery. Accordingly, the NCAA should be able to determine the methods and means of obtaining the discovery subject to its requests. Nonetheless, there is no reason the agreed-upon method of discovery could not adequately permit Plaintiffs' participation, while at

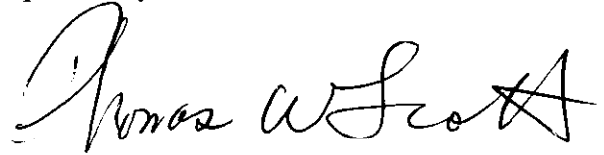
⁶ See, e.g., @ScottPaterno, Twitter (May 7, 2016, 7:24 AM), <https://twitter.com/ScottPaterno/status/728953546134163456> ("Well, I know a lot more than I can say until after the court rules."); Sarah Ganim, *Sandusky victim: Joe Paterno told me to drop abuse accusation*, CNN (May 8, 2016), <http://www.cnn.com/2016/05/06/us/jerry-sandusky-victims-paterno-penn-state/> (stating that "[L]ast year," the Paterno family lawyers denied that Paterno participated in the alleged telephone call with the 1971 victim) (emphasis added); @ScottPaterno, Twitter (May 10, 2016, 3:49 AM), <https://twitter.com/ScottPaterno/status/729986728128335873> ("The fact is @CNN had this story for 6 months at least and didn't deem it credible until the feeding frenzy started.").

the same time, the NCAA's proposed safeguards identified in its June 27, 2016 filing should alleviate John Doe-150's concerns.

CONCLUSION

For the foregoing reasons, the NCAA respectfully requests that the Court allow the NCAA to obtain the limited discovery it seeks.

Respectfully submitted,



Dated: July 1, 2016

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I, Thomas W. Scott, hereby certify that I am serving the NCAA's Reply to Plaintiffs' 'Response' to Third Party Motions to Quash the NCAA's Subpoena and for Protective Order on the following by First Class Mail and email:

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