



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,

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:**

) The NCAA’s Response to

) Plaintiffs’ Motion to Extend

) Discovery Cutoff and for Entry

) of a Revised Scheduling Order

) **Filed on Behalf of:**

) National Collegiate Athletic

) Association, Mark Emmert, Edward

) Ray

) **Counsel of Record for this Party:**

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FILED FOR RECORD
2016 JAN 20 PM 4: 03
CENTRE COUNTY, PA

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA**

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

**THE NCAA’S RESPONSE TO PLAINTIFFS’ MOTION
TO EXTEND DISCOVERY CUTOFF AND FOR ENTRY
OF A REVISED SCHEDULING ORDER**

FILED FOR RECORD
2016 JAN 20 PM 4:03
CENTRE COUNTY, PA

The decision to extend the fact discovery deadline, as requested by Plaintiffs, is “left to the sound discretion of the trial court.” *Jefferson Bank v. Newton Assocs.*, 454 Pa. Super. 654, 664, 686 A.2d 834, 839 (1996); *see also Kerns v. Methodist Hosp.*, 393 Pa. Super. 533, 543-47, 574 A.2d 1068, 1073-74 (1990) (“In supervising discovery, the trial court has broad discretion to take such action as it deems appropriate to insure prompt and adequate discovery.”). The NCAA makes the following observations:

First, Plaintiffs’ position that their efforts to pursue discovery have been “stymied ... for months” is unsupported. Pls.’ Mem. in Supp. of Mot. to Extend Disc. Cutoff at 2 (Dec. 31, 2015). Plaintiffs blame their delay solely on non-party Pepper Hamilton’s purported “refusal to allow Plaintiffs’ access to” documents related to the Freeh investigation and Report, as well as Pepper Hamilton’s

designation of such documents as “Highly Confidential ... Attorneys’ Eyes Only” once it produced them. “Attorneys’ Eyes Only” designations are common in civil litigation, and it is not at all clear why Plaintiffs contend they have created some unusual or unique obstacle here. Nevertheless, Pepper Hamilton began producing those documents in July 2015—nearly six months ago—following this Court’s May 5, 2015 order. Since that time, all counsel of record, including Plaintiffs’ counsel, have been free to review and analyze all of the Pepper Hamilton documents. Further, the parties have been free to use those documents in depositions. The Protective Order (“Order”) specifically provides that “Highly Confidential” documents can be shown to deposition witnesses so long as the witness agrees to be bound by the terms of the Order. Order ¶ 5(b)(vii) (Sept. 10, 2014). And Pepper Hamilton’s designation of its own documents as “Highly Confidential” certainly had no impact on Plaintiffs’ ability to depose the current and former personnel of Pepper Hamilton itself, whose depositions Plaintiffs are only now attempting to schedule.

Plaintiffs agreed to the current schedule on the sole condition that the Court enter an order by November 30, 2015 granting Plaintiffs themselves (and not just their counsel) access to documents designated “Highly Confidential” by Pepper Hamilton or Penn State. Joint Mot. for Entry of Scheduling Order (Oct. 9, 2015). The Court did precisely that in an order dated November 25, 2015. Plaintiffs do

not explain why the schedule for resolving the issue of Pepper Hamilton's confidentiality designations, which Plaintiffs themselves proposed in October 2015, is no longer sufficient.

Second, as Plaintiffs note, this case has been pending for more than two and a half years. Throughout this time, the parties have operated under the same constraints concerning discovery. The NCAA has diligently complied with its discovery obligations and pursued discovery (including depositions) to defend against Plaintiffs' claims. By contrast, Plaintiffs have inexplicably drug their heels throughout the discovery process. Plaintiffs have canceled or postponed four depositions; indeed, Plaintiffs have not taken any depositions since August 2015. Beyond that, Plaintiffs have failed to produce responsive documents in their possession in a timely manner,¹ attempted to block *all* discovery from certain third-

¹ For example, on October 7, 2015, the Court granted the NCAA's Motion to Compel and ordered Jay Paterno to produce within 30 days documents regarding, *inter alia*, his employment search, or certify that he had none. Mr. Paterno certified he had none in his possession, and Plaintiffs' counsel had previously represented to the Court (on multiple occasions) that any such documents had been produced. Yet, on December 30, 2015, Mr. Paterno made a substantial production of these very documents—documents that the NCAA requested in *May 2014*. When the NCAA asked for an explanation, Plaintiffs' counsel said it was an "inadvertent delay." *See, e.g.*, Ex. 1, Letter from B. Kowalski to P. Maher (Jan. 7, 2016); Ex. 2, Letter from P. Maher to B. Kowalski (Jan. 11, 2016).

Indeed, in the same correspondence, Plaintiffs' counsel stated that "we have confirmed that we have no additional documents to produce for Jay Paterno." Ex. 2, Letter from P. Maher to B. Kowalski (Jan. 11, 2016). However, last week, a third party (Duquesne Brewing Company) produced dozens of email

party fact witnesses, and failed to produce privilege logs (which the NCAA has requested repeatedly since at least July).² In short, any difficulty in completing discovery is a challenge of Plaintiffs' own making.

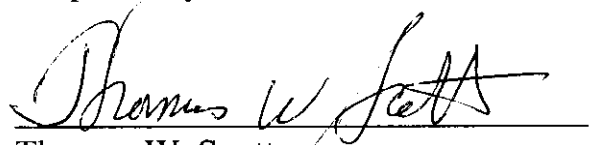
The NCAA questions whether the requested extension is necessary under such circumstances. Nevertheless, should the Court grant the extension Plaintiffs request, the NCAA agrees with Plaintiffs that all other deadlines in the scheduling order be adjusted accordingly. In particular, Plaintiffs' requested extension does not—and should not—limit or reduce the time for briefing and resolving motions for summary judgment, which serve a particularly “important function” in defamation and commercial disparagement cases that, like this one, involve the heightened scienter standard of “actual malice.” *First Lehigh Bank v. Cowen*, 700 A.2d 498, 502 (Pa. Super. Ct. 1997); *Lewis v. Phila. Newspapers, Inc.*, 2003 PA Super 350, ¶¶ 11-13, 833 A.2d 185, 191-92 (2003) (because the “actual malice” standard is designed to “protect the public discourse under the First Amendment,” whether the evidence is of “convincing clarity” “may not be left in the realm of the factfinder” (citation omitted)); *Curran v. Phila. Newspapers, Inc.*, 261 Pa. Super. 118, 127, 395 A.2d 1342, 1346 (1978) (summary judgment is the “preferred” approach in Pennsylvania when evaluating actual malice (emphasis

communications with Jay Paterno—emails that Mr. Paterno has never produced. These documents are undeniably responsive to the NCAA's requests.

² Jay Paterno has produced a privilege log, but the other Plaintiffs have not. It is unknown if Jay Paterno's log is complete.

added)), *aff'd in part, vacated in part*, 497 Pa. 163, 439 A.2d 652 (1981); *see also Mosley v. Observer Publ'g Co.*, 427 Pa. Super. 471, 475, 629 A.2d 965, 967 (1993) (noting that “summary procedures are even *more* essential” in defamation cases (emphasis added) (quoting *Wash. Post Co. v. Keogh*, 365 F.2d 965, 958 (D.C. Cir. 1966))). Thus, if the Court is inclined to extend fact discovery by 60 days, the NCAA joins Plaintiffs’ request that all other deadlines in the scheduling order be continued by 60 days.

Respectfully submitted,



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Dated: January 20, 2016

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

EXHIBIT 1

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LATHAM & WATKINS^{LLP}

January 7, 2016

VIA EMAIL

Patricia L. Maher
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London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.

Re: Paterno, et al. v. NCAA, et al., Civ. No. 2013-2082

Dear Trish:

I am writing in regard to Jay Paterno's production of 114 documents on December 30, 2015. We are troubled by the fact that the vast majority of these documents relate directly to Mr. Paterno's alleged employment opportunities and are responsive to document requests that the NCAA served on May 21, 2014.

As you are well aware, on October 7, 2015, the Court ordered Mr. Paterno to produce all documents related to various topics outlined in the NCAA's Motion to Compel within 30 days, including, *inter alia*, documents pertaining to Mr. Paterno's alleged employment opportunities. Alternatively, the Court ordered Mr. Paterno to certify, by November 6, 2015, that a good-faith, reasonable effort was made to locate additional materials and that none were located. On November 11, 2015, Mr. Paterno (belatedly) certified that, after a reasonable, good-faith search effort, he did "not locate[] any responsive documents beyond those that I have already provided to my counsel." Mr. Paterno's certification followed multiple representations to the Court that Mr. Paterno had produced all responsive documents regarding his employment opportunities. For example, Plaintiffs' July 20, 2015 brief in opposition to the NCAA's Motion to Compel stated that Mr. Paterno "has produced the responsive [employment] documents in his possession." In addition, on September 9, 2015, Plaintiffs' counsel again represented to the Court at oral argument that Messrs. Kenney and Paterno "have produced...information relating to...efforts they have made to obtain employment as football coaches since they were terminated by Penn State, and those things have been produced."

Mr. Paterno's December 30, 2015 production violates the Court's October 7, 2015 Order and contradicts Mr. Paterno's sworn certification and counsel's representations. The accompanying cover letter lacked any explanation for the failure to provide these "additional documents responsive to the NCAA's document requests" in the time required for a response (over a year ago), let alone by the time mandated by the Court's Order. Therefore, the NCAA requests a detailed explanation for why this occurred and assurance that there are no additional

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non-privileged, responsive documents in Mr. Paterno's possession, custody, or control that were subject to the NCAA's Motion to Compel. In addition, we trust that Mr. Paterno (and counsel) will re-certify that he has no further documents to produce.

In light of Mr. Paterno's rapidly approaching deposition on January 28, 2016, it is imperative that we receive this information promptly, and at minimum, by no later than January 11, 2016.

Sincerely yours,



Brian E. Kowalski
for LATHAM & WATKINS LLP

cc: all counsel

EXHIBIT 2

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VIA E-MAIL AND FIRST CLASS MAIL

January 11, 2016

Brian E. Kowalski, Esq.
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Re: Estate of Paterno v. NCAA et al., Case No. 2013-2082 (Centre Cty. Common Pleas)

Dear Brian,

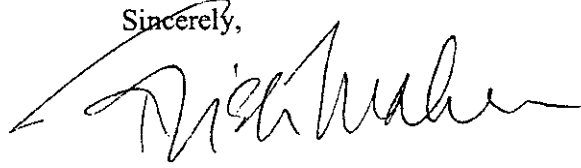
I am writing in response to your letter of January 7 regarding Jay Paterno's documents that we produced on December 30. First, your statement that the certification Jay Paterno provided to the Court on November 11 was provided "belatedly" is not accurate. The Court directed him to certify that he had made a reasonable good faith effort to locate additional materials responsive to the requests that were the subject of the NCAA's motion to compel within 30 days. Although the Court's order was signed on October 7, it was entered on the docket on October 12. As you know from the experience of the past two and a half years, the parties receive notice of orders in this case only when they are entered on the docket in Centre County, and there is a lag between the date Judge Leete signs an order and the date it is docketed. Jay Paterno's certification was served on November 11, which is 30 days from the date of entry of the Court's Order that he provide it.

Secondly, our production of 114 additional documents to you on December 30 was made following a determination that the documents had not been included in an earlier production of Jay Paterno's documents as intended. However, Jay Paterno had provided us with all of those documents well before the Court even heard argument on the NCAA's motion to compel in September. While we regret the inadvertent delay in producing them, we provided them once we determined they had not been included in the earlier production as intended. The only documents that Jay Paterno provided to us after his certification are the 64 documents that were produced on December 3, 2015, in response to the NCAA's Request No 25 (revised) for documents related to certain parts of his book, *Paterno Legacy*. Every statement in Mr. Paterno's certification remains true and correct.

Brian E. Kowalski, Esq.
January 11, 2016
Page 2

Finally, we have confirmed that we have no additional documents to produce for Jay Paterno.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia L. Maher". The signature is fluid and cursive, with a long horizontal stroke at the end.

Patricia L. Maher

cc: Thomas W. Scott, Esq.
Everett C. Johnson, Esq.
Sarah M. Gragert, Esq.
Drew Wisniewski, Esq.
Thomas J. Weber, Esq.

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving *The NCAA's Response to Plaintiffs' Motion to Extend* on the following by First Class Mail and email:

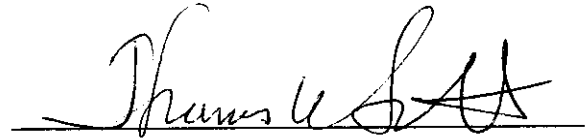
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Counsel for Plaintiffs

Via FedEx Overnight Delivery
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Senior Judge, Specially Presiding
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Dated: January 20, 2016

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

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