

IN THE COURT OF COMMON PLEAS  
OF CENTRE COUNTY, PENNSYLVANIA  
CIVIL DIVISION - LAW

GEORGE SCOTT PATERNO, as duly : 13-2082  
appointed representative of the :  
ESTATE and FAMILY of JOSEPH PATERNO; :

RYAN McCOMBIE, ANTHONY LUBRANO, AL :  
CLEMENS and ADAM TALIAFERRO, members :  
of the Board of Trustees of :  
Pennsylvania State University; :

PETER BORDI, TERRY ENGELDER, SPENCER :  
NILES, and JOHN O'DONNELL, members :  
of the faculty of Pennsylvania State :  
University; :

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

ANTHONY ADAMS, GERALD CADOGAN, :  
SHAMAR FINNEY, JUSTIN KURPEIKIS, :  
RICHARD GARDNER, JOSH GAINES, :  
PATRICK MAUTI, ANWAR PHILLIPS, and :  
MICHAEL ROBINSON, former football :  
players of Pennsylvania State :  
University; :

VS :

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 :

TRANSCRIPT OF PROCEEDINGS  
(Preliminary Objections)

1 BEFORE: John B. Leete, Senior Judge  
2 Specially Presiding

3 DATE: October 29, 2013

4 PLACE: Centre County Courthouse  
5 Courtroom No. 1  
6 102 South Allegheny Street  
7 Bellefonte, PA 16823

8 APPEARANCES:

9 FOR THE PLAINTIFFS:  
10 L. Joseph Loveland, Esq.  
11 Ashley C. Parrish, Esq.  
12 Paul V. Kelly, Esq.  
13 Thomas J. Weber, Esq.

14 FOR THE DEFENDANTS:[  
15 Everett C. Johnson, Esq.  
16 Sarah M. Gragert, Esq.  
17 Lori Alvino McGill, Esq.  
18 Thomas W. Scott, Esq.  
19 Brian E. Kowalksi, Esq.

20

21 NOTES BY: Thomas C. Bitsko, CVR-CM-M  
22 Official Court Reporter  
23 Room 208, Centre County Courthouse  
24 102 South Allegheny Street  
25 Bellefonte, PA 16823  
814-355-6734 or fax 814-548-1158

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

INDEX TO THE WITNESSES

DIRECT CROSS REDIRECT RECROSS

PLAINTIFFS:

(None)

DEFENDANTS:

(None)

INDEX TO THE EXHIBITS

ADMITTED:

PLAINTIFFS:

(None)

DEFENDANTS:

(None)

## 1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good  
3 morning, ladies and gentlemen. The matter  
4 before us is the *Paterno Estate and others*  
5 *versus the NCAA and others*, a civil matter  
6 filed at No. 2082 of 2013. The matter before  
7 us today -- perhaps more properly said the  
8 matters, plural, is argument on a variety of  
9 preliminary objections filed on behalf of the  
10 defendants. We will not be dealing with the  
11 question of personal jurisdiction over Dr. Ray  
12 and Dr. Emmert. We will see where we go with  
13 what we accomplish today and then we will deal  
14 with that issue at the appropriate time. So,  
15 if everyone is prepared, I would like to hear  
16 from the objecting parties, the NCAA. What I  
17 would like to do, ladies and gentlemen, is to  
18 deal with this objection-by-objection, so we  
19 will hear from the objecting party, then we  
20 will hear the response from the plaintiffs.

21 Good morning, sir.

22 MR. JOHNSON: Good morning, Your  
23 Honor. Everett Johnson from Latham and  
24 Watkins, and it is a pleasure to appear before  
25 Your Honor, and thank you for the privilege of

1 appearing in your court.

2           Your Honor, members of the Penn State  
3 community are understandably and justifiably  
4 proud of the long tradition of academic and  
5 athletic success of the Penn State football  
6 program under the leadership of former coach  
7 Joe Paterno, so it stands to reason that that  
8 same community is understandably frustrated and  
9 being angry about the tarnish brought to that  
10 program by the Sandusky affair. But the NCAA,  
11 just as it did not win any of the football  
12 games, is not responsible for the lack of  
13 institutional control and integrity that led to  
14 the sanctions.

15           THE COURT: As alleged by the Freeh  
16 report.

17           MR. JOHNSON: That's correct, Your  
18 Honor. That's exactly right. Now, Penn State  
19 University, for its part, has decided to move  
20 forward, to enter into a consent decree, accept  
21 responsibility --

22           THE COURT: Well, who exactly entered  
23 into that consent decree?

24           MR. JOHNSON: The consent decree as  
25 entered into by the university, Your Honor,

1 signed by President Erickson.

2 THE COURT: Was there any action by  
3 the board of trustees, to your knowledge?

4 MR. JOHNSON: To our knowledge, the  
5 board of trustees was fully informed about the  
6 timing of the Freeh report. It is our belief,  
7 although it is not in the record, that counsel  
8 for the board of trustees was consulted by  
9 President Erickson.

10 As I was saying, the university has  
11 decided to move forward, to institute strong  
12 corrective action, and to begin to restore the  
13 esteem of the program, as recently as yesterday  
14 resolving civil litigation with many of the  
15 victims of Sandusky itself.

16 THE COURT: I guess in the amount of  
17 around \$56 million, if news reports are  
18 correct.

19 MR. JOHNSON: If news reports are  
20 correct, Your Honor. But there are those who  
21 think that reverse is a better direction, who  
22 would like to undo the resolutions and start  
23 from the beginning, but this lawsuit and this  
24 Court is a poor forum for the venting of  
25 frustration, and the NCAA should not be made

1 the scapegoat for the errors and omissions of  
2 university officials, or even for the  
3 conclusions of the university's agent, Judge  
4 Freeh and the Freeh report. As I will explain,  
5 Your Honor, none of the causes of action states  
6 a claim against the NCAA, and we respectfully  
7 ask the Court to dismiss them all.

8           Now, Your Honor, the case is not  
9 uncomplicated. There are 21 plaintiffs in this  
10 lawsuit, six separate causes of action, which  
11 are the subject of our preliminary objections.  
12 For the Court's convenience, the claims fall, I  
13 think, reasonably into six categories. First,  
14 there is the estate of former Coach Paterno.  
15 Mr. Clemens is an individual trustee. The  
16 reason that we have identified Mr. Clemens  
17 separately on the graph is because he is the  
18 only trustee who was actually on the Board of  
19 directors in 1998 and 2001 who is also a  
20 plaintiff in this litigation. There are four  
21 other trustees, to state the inverse, who were  
22 not on the Board of directors at that time, and  
23 I think we will find that significant as we  
24 talk about our preliminary objections.

25           THE COURT: It is my understanding

1 that Peter Khoury is no longer a named  
2 plaintiff; is that correct?

3 MR. JOHNSON: That's correct, Your  
4 Honor.

5 THE COURT: And I think I did an order  
6 to that extent.

7 MR. JOHNSON: He entered a notice of  
8 withdrawal. I think, Your Honor, it is on that  
9 order. Thank you. There are nine former  
10 players who played for Penn State University  
11 between 1998 and 2011, and there are four  
12 faculty members at the university, all of whom  
13 are plaintiffs in the case. The easiest way to  
14 dispose of all those claims is to deal with the  
15 subject matter jurisdictional question first,  
16 because it conveys all of those claims. And,  
17 Your Honor, as we have argued, Penn State --

18 THE COURT: Well, does it pertain to  
19 all of the claims or only some of the claims?

20 MR. JOHNSON: It is our belief, Your  
21 Honor, that it actually pertains to all of the  
22 claims, and the reason for that is that the  
23 relief that is sought with respect to all of  
24 the claims is the invalidation of the consent  
25 decree, which, in our view, cannot be



1 accomplished without Penn State. In fact, that  
2 is exactly what we would want to talk about  
3 next.

4 One way to think about whether or not  
5 Penn State University is an indispensable party  
6 to this litigation is to ask yourself what have  
7 the plaintiffs said and what have they asked  
8 for, so here are just samples of the  
9 allegations from the complaint, which we  
10 believe illustrate the indispensability of Penn  
11 State University.

12 Now, they are candid in the complaint  
13 that this is really just about invalidating the  
14 consent decree. This lawsuit is purpose is to  
15 remedy the harms, and the plaintiffs --

16 THE COURT: Although many of the  
17 plaintiffs have asked for other relief as well.  
18 Would you agree?

19 MR. JOHNSON: I would, Your Honor.

20 THE COURT: Very well.

21 MR. JOHNSON: And there are claims for  
22 monetary damages and specific additional  
23 relief, but the uniform relief sought by all of  
24 the plaintiffs is the invalidation of the  
25 consent decree.

1           Your Honor, even a cursory reading of  
2 the complaint tells us that the primary  
3 grievance here is not with the NCAA. It is  
4 with the conclusions of the Freeh report. It  
5 is criticized throughout the complaint.

6           THE COURT: Which I believe the NCAA  
7 adopted a day or two after its issuance. Is  
8 that correct, Mr. Johnson?

9           MR. JOHNSON: Not precisely correct,  
10 Your Honor. What happened is Penn State  
11 University stated that it accepted the  
12 conclusions of the Freeh report, and it is --  
13 but Your Honor is also correct, because in the  
14 consent decree at issue here, the university  
15 said that it acknowledged and accepted the  
16 findings of the Freeh report for the purposes  
17 of the consent decree, and the NCAA agreed that  
18 it would therefore rely upon the findings of  
19 the Freeh report as accepted by Penn State, and  
20 that was, in fact, the point of the highlighted  
21 portion on this graphic, Your Honor, because,  
22 as I think will become important as we discuss  
23 this today, it is important to keep in mind  
24 that Judge Freeh and Freeh, Sporkin are not the  
25 agents of Penn State. They were, in fact,

1 ironically, engaged by the board of trustees of  
2 Penn State University. They are the agent of  
3 the university, not the NCAA.

4 Another allegation in the complaint is  
5 that President Erickson violated Penn State's  
6 governance; that he was not authorized to enter  
7 into the consent decree and that -- and this  
8 lawsuit specifically challenges the authority  
9 of President Erickson to have entered into the  
10 consent decree, and that is amplified in  
11 paragraph 88 of the complaint, in which it is  
12 specifically alleged and asks this Court to  
13 determine that Judge Erickson lacked -- I mean,  
14 that President Erickson, rather, lacked that  
15 authority.

16 So what have they asked for? They  
17 have asked for two pervasive forms of relief, a  
18 declaratory judgment that the consent decree is  
19 void *ab initio*, that it never was valid, and an  
20 issuance of an injunction preventing the NCAA  
21 from further enforcing the consent decree,  
22 presumably, against Penn State.

23 The relief that is requested in this  
24 case, Your Honor, dramatically impairs the  
25 rights and privileges of Penn State. You could

1 not consider the allegations that have been  
2 made or grant the relief that has been  
3 requested without specifically determining Penn  
4 State's rights under the consent decree, its  
5 rights under its governance, and specifically  
6 depriving it of the benefits of the consent  
7 decree.

8 THE COURT: Benefits?

9 MR. JOHNSON: Your Honor, indeed there  
10 are benefits, and I think this is one of the  
11 fallacies of the plaintiffs' argument, the  
12 notion, a sort of *ipse dixit* notion, that we  
13 say that this is all bad and not good. In some  
14 ways, that argument is not sufficiently  
15 respectful of the leadership of Penn State, who  
16 were advised by inside and outside counsel and  
17 who made a determination to enter into the  
18 consent decree, a determination that they  
19 believed was theirs to make, but Your Honor  
20 questions, what are the benefits of the consent  
21 decree? The benefits of the consent decree are  
22 set forth somewhat in the consent decree.

23 THE COURT: Which the Court has  
24 reviewed.

25 MR. JOHNSON: Right. One of them, of

1 course, specifically mentioned is that the  
2 potential penalty of suspension of competition,  
3 which the press from time to time refers to as  
4 the death penalty, was taken off the table. So  
5 one very clear benefit to Penn State is that,  
6 by entering into the consent decree -- is they  
7 avoided the risk, however large or small --  
8 that is their decision to make -- that the  
9 violation would result in a sanction resulting  
10 in the suspension of competition.

11 If the Court were to invalidate the  
12 consent decree *ab initio*, as they have asked,  
13 then, of course, that would restore that risk  
14 to the equation, but there are significant  
15 other benefits in the consent decree itself,  
16 for example, the period of the reduction in  
17 scholarship is four years. By agreeing to four  
18 years, Penn State University avoided the  
19 possibility that it could be longer than four  
20 years. The period of suspension from post-  
21 season play is four years. By entering into a  
22 consent decree, they avoided the possibility  
23 that it could be longer.

24 THE COURT: So you are indicating,  
25 obviously, the sanctions ultimately growing out

1 of the Sandusky criminal matter could have been  
2 far, far worse than those envisioned by the  
3 consent decree?

4 MR. JOHNSON: That is exactly right,  
5 Your Honor, and there is one enormous benefit  
6 of entering into the consent decree that Penn  
7 State would lose should the Court invalidate  
8 that, which is the avoidance of a protracted  
9 investigation and hearing, the possibility of  
10 greater sanctions, a period of time --

11 THE COURT: Well, from the NCAA point  
12 of view, though, there was no investigation.

13 MR. JOHNSON: Well, that is because  
14 there was a consent decree, Your Honor. If the  
15 Court were to void the consent decree, then, of  
16 course, there would likely be an investigation.  
17 We would be back at square one, and it is  
18 pretty clear that the decision that Penn State  
19 made was to seek to avoid that. In fact,  
20 philosophically, that is what they have been  
21 doing for the last year, as recently as  
22 yesterday. It is not for the plaintiffs to run  
23 the university or second-guess that decision or  
24 say, "We would have done it differently," or  
25 "You should just fight on." You know, it is

1 frequently the case, Your Honor, that those who  
2 want someone to fight, fight, fight, are not  
3 the ones who die in that fight. They just want  
4 to cheer from the sidelines. But Penn State  
5 made a rational, voluntary decision to enter  
6 into the consent decree, and one of the primary  
7 benefits was the benefit of putting this behind  
8 them, of moving forward, of not dragging this  
9 out for years and avoiding the risk of even  
10 harsher penalties.

11 One of the criticisms that pervades  
12 the complaint is the idea that entering into  
13 the consent decree was not a voluntary act by  
14 Penn State.

15 THE COURT: Yeah, that seems to be  
16 there in the first few dozen paragraphs. I  
17 agree.

18 MR. JOHNSON: Yes, precisely. It  
19 seems like Penn State ought to be the one  
20 making that argument, because if they felt  
21 coerced, then shouldn't they be present to say  
22 so? But let me also just speak to the  
23 argument, because I think it just  
24 misunderstands the world in a sense. Penn  
25 State did not have to think that its choices

1 were called good and better when it entered  
2 into the consent decree. It was a mess, a mess  
3 not of the NCAA's causing, but a mess,  
4 generally, and they were faced with difficult  
5 choices, but the fact that informed people,  
6 competent people, well-advised people, faced  
7 with difficult choices, elect one choice over  
8 another, says nothing at all about the  
9 voluntariness of their decision. It simply  
10 says they made a difficult decision.

11 A simple analogy, Your Honor, in this  
12 courtroom probably tomorrow and in courtrooms  
13 over the country today, lots of people will  
14 plead guilty to crimes. Now, the truth is, if  
15 they did not plead guilty to crimes, they are  
16 going to get charged with something, run the  
17 risk of being convicted of something, and  
18 perhaps face the possibility of a harsher  
19 sentence than they got by pleading guilty.

20 THE COURT: So you are analogizing to  
21 a criminal court plea bargain, basically?

22 MR. JOHNSON: I am analogizing to the  
23 colloquy that the Court takes when it  
24 determines the voluntariness of that plea, and  
25 the Court asks questions like, "Do you



1 understand you have a right to a trial? Do you  
2 understand you could present evidence? Do you  
3 understand you might win?" And plaintiffs --  
4 or defendants say, "I understand all of that,  
5 but this is a better choice for me," and the  
6 Court would not entertain for a second the  
7 argument that the guilty plea in my  
8 hypothetical was less than voluntary because  
9 the prosecutor was threatening to charge them  
10 if they did not plead guilty. That is true 100  
11 percent of the time. It does not speak to  
12 voluntariness.

13 THE COURT: And certainly in criminal  
14 court it is.

15 MR. JOHNSON: It does not speak to the  
16 voluntariness. Now, the plaintiffs in the  
17 case, I think, make essentially two arguments  
18 around the idea that Penn State is not an  
19 indispensable party in this case. The first  
20 argument they make is that they seek no  
21 specific redress from Penn State University.

22 THE COURT: I guess they are basically  
23 saying they are not asking Penn State to do  
24 anything.

25 MR. JOHNSON: Right. They are not

1 asking Penn State do anything, and they rely  
2 principally on an older decision of the  
3 Pennsylvania Supreme Court called *Sprague*  
4 *versus Casey*, which has the language upon which  
5 they principally rely. Let me say two things  
6 about that. They have misunderstood *Sprague*  
7 *versus Casey* and they are seeking specific  
8 redress from Penn State University. The  
9 specific redress they are seeking is to deprive  
10 them of every protection that they obtained in  
11 the consent decree -- it would all be gone --  
12 and to deprive them of their decision to put  
13 this behind them.

14           Here is the way in which they have  
15 misunderstood *Sprague versus Casey*. They cite  
16 to a specific sentence which says one way a  
17 party might not be indispensable is if, in the  
18 case, no specific redress is sought. They do  
19 not tell you about the next sentence in the  
20 opinion, though. The next sentence in the  
21 opinion says what this means is, if relief can  
22 be fashioned without affecting the rights of  
23 that party, then they might not be  
24 indispensable, but no reasonable person could  
25 say that you could invalidate the consent

1 decree without affecting Penn State's rights,  
2 because you will have invalidated a contract to  
3 which they are a party.

4 THE COURT: And I guess later on we  
5 will talk about who can invalidate a contract,  
6 particularly if you are not a party to it.

7 MR. JOHNSON: Well, when we get, Your  
8 Honor, to their third-party beneficiary  
9 argument, we are going to specifically talk  
10 about --

11 THE COURT: Good.

12 MR. JOHNSON: -- the absence of a  
13 right of a third party to invalidate the  
14 contract between the principals to that  
15 agreement.

16 The second argument they make, I  
17 believe, is that the consent decree lacks  
18 consideration. Now, I think that this argument  
19 is a little bit of a head-scratcher for me. I  
20 think it might win an award for circular  
21 reasoning. What they say is, because the  
22 NCAA's enforcement authority would not have  
23 extended to this conduct, giving up what they  
24 did was not a valid consideration, but that is  
25 just a cat chasing its tail. The NCAA, if it

1 had wanted to argue that -- I mean, rather,  
2 Penn State, if it had wanted to argue that the  
3 NCAA's enforcement authority did not extend to  
4 this contract, it could have, and it could have  
5 taken the risk that it was right or wrong about  
6 that, just as any person in any case might say,  
7 "I am innocent, or, "I did not do what you  
8 said," or, "The jury is going to acquit me,"  
9 or, "The law does not apply to me," but they  
10 take the risk of being wrong about that, and  
11 that is the risk that Penn State sought to  
12 avoid and that is the consideration that they  
13 received. So the idea that there was no  
14 consideration in this case, I think, does not  
15 deserve serious consideration by this Court.

16           At the end of the day, Your Honor, it  
17 is impossible to think that this is about  
18 anything other than simply undoing what Penn  
19 State has done, and if that is a fair  
20 characterization, then the conclusion that Penn  
21 State is a party indispensable to that case  
22 seems to us to be inescapable.

23           Unless the Court has further questions  
24 on the issue of the indispensability of Penn  
25 State, my intention is now to move to the

1 specific causes of action and specific --

2 THE COURT: All right. What I am  
3 going to do, Mr. Johnson, is allow plaintiffs'  
4 counsel to respond to that argument, and then  
5 we will move on to the next --

6 MR. JOHNSON: Thank you, Your Honor.

7 THE COURT: -- objection. Thank you,  
8 sir.

9 THE COURT: Mr. Loveland, is that  
10 correct?

11 MR. LOVELAND: Yes, Your Honor. Good  
12 morning.

13 Your Honor, with the Court's  
14 indulgence, on the plaintiffs' side, we are  
15 actually going to break the argument down  
16 depending on which objection the Court is going  
17 to hear. I will be speaking on the  
18 indispensable party --

19 THE COURT: And that is what we are  
20 addressing at this time.

21 MR. LOVELAND: So at this time I would  
22 like to address that. Your Honor, to put this  
23 into context, I'd like to go back to what Mr.  
24 Johnson started with and perhaps give a  
25 slightly different perspective from our point

1 of view. We are not seeking to reverse or  
2 start over in any way. What we are saying is  
3 it really comes down to three basic points.  
4 First, and there is really no dispute about  
5 this, the NCAA in this matter elected to go  
6 into totally uncharted waters. It elected to  
7 go into an area --

8 THE COURT: I believe you alleged that  
9 in the complaint and pretty much in that  
10 language.

11 MR. LOVELAND: And I do not believe it  
12 is disputed that there has never been by the  
13 NCAA an effort to jump into a criminal matter,  
14 assert jurisdiction over the conduct that was  
15 essentially criminal conduct, try and tie that  
16 to a university and its officials, and then,  
17 with no investigation of its own, rely on a  
18 report that has nothing to do with the NCAA  
19 rules or regulations and does not purport to  
20 make a single finding of any violation of any  
21 NCAA rule or regulation. Having done that,  
22 they then go to step two, which is to have  
23 absolutely none of the procedures that are  
24 inherent in the constitution and bylaws of the  
25 NCAA, which is the contract at issue between

1 the plaintiffs here and the -- as third-party  
2 beneficiaries.

3 THE COURT: In essence, was it a sort  
4 of a summary disposition? I believe we have  
5 seen that term referred to, bypassing,  
6 obviously, pages of NCAA requirements.

7 MR. LOVELAND: And not only that, Your  
8 Honor, but, in fact, summary disposition is  
9 itself a part of the provisions and it requires  
10 certain steps before you can even have a  
11 summary disposition, and one of those is notice  
12 to involved individuals such as Coach Paterno  
13 and others as we assert, so they do not even  
14 follow the summary disposition procedures.  
15 They invented this out of whole cloth. It had  
16 never been done before. It has never been done  
17 again. It is *sui generis* of the highest order.  
18 So they decided to have no procedures. Now,  
19 this is critical, because the procedures the  
20 NCAA has expressly require that they be fair,  
21 not only to the institution, but to any  
22 involved individuals, to the faculty -- excuse  
23 me -- to the student athletes and others, and  
24 then there are literally dozens of references  
25 within those to the rights of involved

1 individuals, which we will talk about  
2 specifically on the contract claim.

3 THE COURT: But, inherent in this, is  
4 it not, are the rights of the university? Is  
5 that not inherent in this entire discussion?

6 MR. LOVELAND: Your Honor, this  
7 certainly is inherent in the discussion and it  
8 is a critical part of the consent decree, and  
9 let me address it in this way -- I want to get  
10 to that in just a moment, if I may.

11 THE COURT: Okay. Go ahead.

12 MR. LOVELAND: So the second step,  
13 they say, is we are not going to follow any of  
14 the rules, any of the procedures we've  
15 established that are an inherent part of the  
16 contract between the institution and the NCAA  
17 and thus an inherent part of the contract that  
18 our clients are the beneficiaries of. Now,  
19 having done those two things, they then take  
20 the third step, which is to enter into the  
21 consent decree.

22 Now, it is important -- you know, I  
23 think it is really interesting to look at the  
24 heading of the consent decree, Your Honor. The  
25 heading of the consent decree is, "Consent



1 Decree Imposed by the NCAA and Accepted by Penn  
2 State." Does it sound like coercion? We  
3 outlined in the complaint the fact that, within  
4 hours of the time the consent decree comes down  
5 -- the Freeh report comes down -- the NCAA is  
6 communicating with threats of the death penalty  
7 and others in a matter over which they had no  
8 jurisdiction whatsoever, so they are holding  
9 this illusory threat and illusory benefit, you  
10 can avoid the death penalty, which presumes  
11 they have --

12 THE COURT: Well, it was not illusory.

13 MR. LOVELAND: Well, it is illusory if  
14 they had no jurisdiction over the matter and no  
15 ability to impose that to begin with, and there  
16 is no basis for that, but, having done that,  
17 they realize they cannot simply say, "Penn  
18 State, we want you to do these things or we are  
19 going to threaten you with the death penalty,"  
20 so what they do is they wrap it in a series of  
21 statements that are expressly attacking,  
22 blaming, and placing responsibility for these  
23 actions on the plaintiffs in this case,  
24 including Coach Paterno.

25 The consent decree adopts expressly

1 and republishes numerous statements suggesting  
2 that Coach Paterno and others at the university  
3 facilitated the conduct of Mr. Sandusky. Not  
4 only that, the consent decree says that Coach  
5 Paterno and others at the university created an  
6 atmosphere that allowed Mr. Sandusky to seduce  
7 his victims, and then the consent decree says  
8 that these individuals, Coach Paterno and  
9 others, unbelievably concealed and covered up  
10 this conduct for years.

11 THE COURT: And if this is -- if these  
12 allegations are correct, doesn't Penn State --  
13 do not they have to, in some manner, step  
14 forward or be involved in a determination of  
15 the validity of that?

16 MR. LOVELAND: And that, of course, is  
17 their position, Your Honor, and I find the  
18 NCAA's arguments, both in their reply brief, in  
19 particular, and today, to be interesting most  
20 importantly in their omission, and the omission  
21 is this: The Commonwealth Court of  
22 Pennsylvania, on September 4, 2013, in a six-  
23 to-one decision in the --

24 THE COURT: That's the *Corman* case.

25 MR. LOVELAND: -- *Corman* case

1 addressed specifically whether Penn State was  
2 an indispensable party to an action that sought  
3 to revise aspects of the consent decree.

4 THE COURT: Well, let's talk more  
5 specifically about what did *Corman* say.

6 MR. LOVELAND: Correct.

7 THE COURT: I mean, what -- didn't it  
8 have to do with dispositions of monies that are  
9 involved in that consent decree?

10 MR. LOVELAND: Absolutely.

11 THE COURT: Okay.

12 MR. LOVELAND: The NCAA made precisely  
13 the same arguments they have made here, which  
14 is that you cannot change any aspect of the  
15 consent decree, you cannot alter it without  
16 bringing Penn State in. Now, there are two  
17 things the Court did. First, it said that is  
18 not right. Penn State is not an indispensable  
19 party to the nature of the relief that is  
20 sought here, refocusing the --

21 THE COURT: But was not -- in *Corman*,  
22 weren't they talking, though, about, not the  
23 propriety of the penalties, but what to be done  
24 with the economic aspects of the penalty? So  
25 isn't that different from where we are today?

1 MR. LOVELAND: Your Honor, I do  
2 believe it is different. I am not suggesting  
3 that *Corman* is on all four corners with where  
4 we are today in its entirety. It is dealing  
5 with a particular aspect of the consent decree,  
6 but it certainly stands for the proposition  
7 that Penn State is not an indispensable party  
8 just because the consent decree or relief under  
9 the consent decree is involved, but there's a  
10 second aspect of *Corman*, Your Honor, and it  
11 goes further and it is this, and it deals  
12 inherently with this: The Court notes and  
13 points out that, in the consent decree --  
14 again, this is the beauty of what the NCAA did  
15 here. They imposed the consent decree and then  
16 they went, I think, a step too far, and that is  
17 what the Commonwealth Court noted, which is  
18 they then required that Penn State waive any  
19 right to seek any judicial process or review  
20 with regard to the consent decree, and the  
21 Commonwealth Court notes that that waiver, even  
22 if Penn State had been an indispensable party,  
23 they have waived the right to participate in  
24 the proceedings, and that applies on all four  
25 corners with where we are today.

1           Now, why is that important in this  
2 case? It is important in this case because the  
3 NCAA, perhaps understandably, wants to put the  
4 cart before the horse. They do not want anyone  
5 to pull back the covers and look at what  
6 happened in this situation, and therefore they  
7 say this case is only about rescinding the  
8 consent decree. That is not even the first  
9 aspect of the prayer for relief in this case.  
10 The first aspect of the prayer for relief is a  
11 declaratory judgment that the actions of the  
12 defendants were unlawful and constitute a  
13 violation of the plaintiffs' contractual and  
14 legal rights, and it is the NCAA that did that,  
15 not Penn State. It is the NCAA that foisted  
16 that conduct, went beyond its jurisdiction, and  
17 chose to step on the toes of the plaintiffs  
18 here without giving them any of the process  
19 that the NCAA rules allow.

20           THE COURT: And I guess we will talk  
21 about that separately, too, as to who is and is  
22 not an involved party under NCAA rules.

23           MR. LOVELAND: Yes, Your Honor, we  
24 will. Your Honor, may I hand the Court a very  
25 brief --

1 THE COURT: Of course.

2 MR. LOVELAND: -- summary? Your  
3 Honor, for purposes of this first argument,  
4 there is only one thing that I want to call the  
5 Court's attention to, really, and it is the  
6 slide that is number four in this presentation,  
7 which is called the contracted issue, because I  
8 do believe it is important logically, when we  
9 look at this -- and we have come back to this  
10 on the contract claim -- but it is important  
11 here as well just look at the indispensable  
12 party issue and to put that into context. The  
13 contract that is at issue is the agreement  
14 between the NCAA and the member institutions  
15 embodied in the constitution, bylaws, and rules  
16 of the NCAA.

17 THE COURT: And I suspect no one  
18 debates that.

19 MR. LOVELAND: I hope not, but the  
20 plaintiffs are third-party beneficiaries of  
21 that contract.

22 THE COURT: And I guess that is a  
23 question we have to talk about separately.

24 MR. LOVELAND: Certainly. That is a  
25 question we will talk about separately. The

1 consent decree is not the contract at issue.  
2 The consent decree is the manifestation of the  
3 breach of the contract. It is what was done in  
4 violation of the rights of the plaintiffs. The  
5 plaintiffs have, we believe, standing to sue  
6 for that breach of their third-party contract  
7 rights, and Penn State, if it was in any sense  
8 indispensable, has waived its right to  
9 participate in the consent decree that the NCAA  
10 imposed on Penn State.

11 THE COURT: By their waiver of  
12 judicial or administrative remedies?

13 MR. LOVELAND: Correct.

14 THE COURT: That is what you are --

15 MR. LOVELAND: That is our argument,  
16 Your Honor, and that is what we believe the  
17 *Corman* case has held. And voiding the consent  
18 decree is one possible remedy for the rights,  
19 but it is not the only remedy we seek --

20 THE COURT: And that is one of the  
21 remedies you seek?

22 MR. LOVELAND: It is one of the  
23 remedies we seek, and we believe we are  
24 entitled to it, but what the Court has to  
25 decide on the indispensable party issue is, is

1 it possible? Is it even possible -- this is a  
2 preliminary objection --

3 THE COURT: Sure.

4 MR. LOVELAND: -- is it even possible  
5 to fashion relief in the case without Penn  
6 State being here? That is the only issue that  
7 is necessary for indispensable party, and it is  
8 clearly possible to do that.

9 Now, if you void the consent decree,  
10 that would be more of an implication of Penn  
11 State, but for the waiver, but there are many  
12 other --

13 THE COURT: Because we have heard from  
14 the NCAA today that, if the consent decree is  
15 voided, there may be worse sanctions out there  
16 in the distance, so is there some value to this  
17 to Penn State?

18 MR. LOVELAND: And that, Your Honor,  
19 again begs the question of whether there was  
20 ever any jurisdiction to begin with. I mean,  
21 that is the threshold issue in this case, did  
22 the NCAA have any business in this matter?

23 THE COURT: Right, and that is a good  
24 question, but the question is how do we get to  
25 that in terms of the complaint and the rights,



1 if any, of the plaintiffs?

2 MR. LOVELAND: Correct, and the way we  
3 do it, Your Honor, I believe, is to allow there  
4 to be a meaningful inquiry into that issue, and  
5 that is why it is critical. There has to be a  
6 review, discovery, et cetera, on that point, to  
7 tee that up, because if we are right that the  
8 NCAA had no jurisdiction, then the consent  
9 decree, quote, "imposed by the NCAA on Penn  
10 State," has no basis. The threat of other  
11 violations or other remedies is an empty  
12 threat. The notion that there would be another  
13 investigation from the beginning is hollow if  
14 there is no jurisdiction to begin with.

15 THE COURT: But isn't that kind of  
16 getting the cart before the horse? You are  
17 arguing NCAA had no jurisdiction?

18 MR. LOVELAND: Yes, Your Honor.

19 THE COURT: But doesn't Penn State  
20 need to be heard on that issue?

21 MR. LOVELAND: We do not believe so,  
22 Your Honor, because that goes to the contract  
23 that we are the third-party beneficiary of, not  
24 the consent decree. That does not go to the  
25 consent decree. That goes to the rules and

1 constitution of the NCAA. That is what bounds  
2 their jurisdiction.

3 THE COURT: And, again, I do not think  
4 anyone argues that the NCAA followed any of its  
5 procedures, because, again, accepting the well-  
6 pled allegations of the complaint, it is true  
7 it certainly did not, so I do not think anyone  
8 is arguing that.

9 MR. LOVELAND: But what they are  
10 apparently arguing, although they avoided doing  
11 so expressly, is that somehow, over and above  
12 the constitution of the NCAA, over and above  
13 its bylaws, over and above the enforcement  
14 rules and regulations which were carefully  
15 crafted and negotiated with its member  
16 institutions, over and above the procedures  
17 that protect involved individuals and other  
18 members, over and above that, there is some  
19 overriding, supervening authority of the NCAA  
20 to do anything it wants to in a matter that  
21 involves a member institution, and that simply  
22 is not based anywhere that we are aware of.

23 THE COURT: But, in order to determine  
24 that Penn State is not an indispensable party,  
25 are you saying I preliminarily have to

1 determine that the NCAA had no jurisdiction to  
2 begin with?

3 MR. LOVELAND: I am saying that is  
4 actually the proper focal point, not the  
5 consent decree, not the remedy at the end of  
6 the day. The proper focal point of  
7 jurisdiction is the contract that we are  
8 seeking to enforce, which is the NCAA's  
9 contract with its member institutions that we  
10 are a third-party beneficiary of, and if that  
11 is the contract, Penn State is no more an  
12 indispensable party to that contract than is  
13 anyone when an action by a third-party  
14 beneficiary is brought for breach of the  
15 contract by one party.

16 THE COURT: But what I am saying is,  
17 aren't you suggesting I have to make a  
18 preliminary decision that the NCAA had  
19 absolutely no jurisdiction in order to  
20 determine the indispensable party issue?

21 MR. LOVELAND: No, Your Honor.

22 THE COURT: Okay. Please clarify that  
23 for me.

24 MR. LOVELAND: What I am saying is  
25 that issue of jurisdiction is the threshold

1 issue that must be addressed and resolved. If  
2 we are right on that, then the consent decree  
3 falls because of a lack of jurisdiction. If we  
4 are wrong on that, then we have a whole  
5 different issue, which is maybe they had  
6 jurisdiction. Did they violate their rules?  
7 Did they violate their regulations? Did they  
8 step on rights? Maybe at the end of the day,  
9 at that point, voiding the consent decree might  
10 fall off the table as an option. It is not  
11 because Penn State is indispensable, because  
12 Penn State has waived its rights, and that is  
13 the *Corman* determination. That always comes  
14 across on that, but that may impact what the  
15 remedy is, but it does not go to the issue of  
16 whether Penn State is indispensable to the  
17 cause of action. To the claim, it is not. To  
18 the relief, we do not believe it is. All that  
19 will tell you is, at the end of the day, there  
20 might be a remedy that the Court would have to  
21 assess on that basis, but there are many  
22 remedies that we seek in this action.

23 Fundamentally, this action is about  
24 the fact that the NCAA's decision to abandon  
25 totally its rules, regulations, and procedures,

1 and to do so in a way that was going to then  
2 not only not recognize the rights of the  
3 plaintiffs, but then violate those rights with  
4 a series of factual findings that expressly  
5 blamed the plaintiffs for facilitating this  
6 conduct and creating this atmosphere.

7 THE COURT: Well, I think, again, that  
8 I am having a little trouble separating your  
9 argument on indispensable party from third-  
10 party beneficiaries.

11 MR. LOVELAND: And I do believe, Your  
12 Honor, there is this question of what we are  
13 the third-party beneficiary of. We are the  
14 third-party beneficiary -- not of the consent  
15 decree -- we are the third-party beneficiary of  
16 the contract between the NCAA and member  
17 institutions.

18 THE COURT: And I believe that is what  
19 you pled.

20 MR. LOVELAND: Right, but that is --  
21 and that is what we pled. That is what we  
22 allege, and it is because of that and that  
23 claim, there is no argument that Penn State is  
24 an indispensable party. The waiver issue in  
25 *Corman*, Your Honor, we believe is dispositive

1 of the point before the Court. There is  
2 nothing about that, that is limited to the  
3 nature of the relief that was sought in *Corman*,  
4 and we believe that that answers the question  
5 of whether they are an indispensable party in a  
6 matter that the NCAA itself is involved.

7 Thank you, Your Honor.

8 THE COURT: Thank you.

9 Mr. Johnson, I presume you would like  
10 a moment to reply.

11 MR. JOHNSON: I would, Your Honor.  
12 Thank you. Let me make just five very brief  
13 points in response to Mr. Loveland's  
14 presentation. Your Honor asked during the  
15 course of the argument whether the rights of  
16 Penn State University were intertwined in the  
17 consent decree, and Mr. Loveland agreed that  
18 they are. That is completely dispositive of  
19 the indispensable party issue, because if you  
20 grant the relief, you would be resolving the  
21 rights of one of the parties to this agreement.  
22 They are indispensable.

23 Mr. Loveland also mentioned the idea  
24 that Penn State was coerced into this  
25 agreement. I will not repeat what I said

1 earlier, Your Honor, about voluntariness having  
2 nothing to do with the attractiveness of your  
3 alternatives. What I will emphasize, however,  
4 is that if Penn State was coerced into this  
5 agreement, that ought to be coming from their  
6 mouth.

7 THE COURT: That ought to be what?

8 MR. JOHNSON: Coming from their mouth,  
9 not from someone else's mouth. The NCAA's  
10 jurisdiction -- this is the cart before the  
11 horse. This is the caboose in front of the  
12 train. They argue, I believe, that -- as I  
13 understand their argument, it is as follows:  
14 Penn State is not an indispensable party to  
15 this case because the NCAA never had any  
16 jurisdiction over Penn State, and if the Court  
17 would simply find that, then they are not  
18 indispensable, because they would have been  
19 innocent. They would have been acquitted. You  
20 never could have reached it. That is the risk.  
21 That is the balancing that Penn State decided  
22 to give up. Parties can challenge  
23 jurisdiction. They can consent to it. For  
24 example, it may well be the case that -- let me  
25 take the example of this case, Your Honor. We

1 have alleged that this Court lacks personal  
2 jurisdiction over Drs. Emmert and Dr. Ray.  
3 They might well prevail on that argument. They  
4 could also surrender it. You can consent to  
5 jurisdiction, and if jurisdiction is disputed,  
6 you can decide not to take the risk.  
7 Jurisdiction here, however, is not juridical.  
8 It is not about personal or subject matter  
9 jurisdiction. It is about whether or not the  
10 rules breached this contract, and the NCAA does  
11 not have any doubt but that they do, but that  
12 is not really a jurisdictional question. It is  
13 a question of whether or not their conduct  
14 violated the rules.

15           This is a common question in the law.  
16 Did what I do actually violate the law? People  
17 compromise that all the time. People decide  
18 all the time --

19           THE COURT: Yeah, we've talked -- we  
20 talked about that.

21           MR. JOHNSON: Right. Let me speak  
22 about the *Corman* decision, because that is --

23           THE COURT: Thank you. I wanted you  
24 to address that.

25           MR. JOHNSON: Could not be less



1 relevant to what Your Honor has to decide. The  
2 issue in the -- so, by way of background, after  
3 the consent decree was entered between Penn  
4 State and the NCAA, the Pennsylvania  
5 Legislature enacted new legislation, which  
6 required that the \$60 million penalty, which  
7 was to go to the benefit of victims of child  
8 abuse, be paid instead -- of the trust --  
9 independent trust that the NCAA was intending  
10 to set up be paid instead to the State  
11 Treasury. And Senator Corman and Treasurer  
12 McCord then sued the NCAA to enforce the  
13 endowment. We argue in that case that Penn  
14 State was a party indispensable to that  
15 proceeding, because it had to do with where  
16 they would pay the money.

17 THE COURT: Well, where they would pay  
18 the money as opposed to their obligation to pay  
19 the money.

20 MR. JOHNSON: Correct, and that is the  
21 distinction, and that is what the Court held.  
22 The Court held that the consent decree is  
23 silent about -- we fundamentally disagree.  
24 That part is probably obvious. But the Court  
25 held that the consent decree was silent as to

1 where the money would be paid and therefore the  
2 endowment act and the lawsuit to enforce the  
3 endowment act did not alter the consent decree  
4 because there was no term of the consent decree  
5 that was being altered, and for that reason  
6 Penn State was an indispensable party.

7 Mr. Loveland also focused on the  
8 waiver language, and it might be important for  
9 the Court to actually hear the language in the  
10 consent decree.

11 THE COURT: As I recall, it is  
12 extremely broad.

13 MR. JOHNSON: Well, it is, Your Honor,  
14 and let me just read it out loud, if I may. It  
15 says, "Penn State expressly agrees not to  
16 challenge the consent decree and waives any  
17 claim to further process, including, without  
18 limitation, any right to a determination of  
19 violations by the NCAA Committee on  
20 Infractions."

21 THE COURT: I am going to have you go  
22 a little slower, please, for the benefit our  
23 reporter.

24 MR. JOHNSON: I apologize. May I just  
25 start over?

1 THE COURT: Go ahead.

2 MR. JOHNSON: "Penn State expressly  
3 agrees not to challenge the consent decree and  
4 waives any claim to further process, including,  
5 without limitation, any right to a  
6 determination of violations by the NCAA  
7 Committee on Infractions, any appeal under NCAA  
8 rules, and any judicial process related to the  
9 subject matter of this consent decree.

10 THE COURT: That's extremely broad. I  
11 would agree.

12 MR. JOHNSON: And what that means,  
13 Your Honor, and it is actually extremely broad,  
14 but it is actually extremely common, because a  
15 party cannot enter into an agreement with you  
16 and then challenge the agreement. By way of  
17 analogy, just look to what happens in the  
18 courtroom every day by way of guilty pleas and  
19 settlement agreements. You enter into those,  
20 and then, when you enter into those, you are  
21 going to say, "I am not with the next step  
22 going to walk in and say, 'Hey, that doesn't  
23 count because of the following reasons that I  
24 just gave up,'" so while it is broad language,  
25 it is very typical language and commonly

1 protective language. Nothing in this language  
2 says that Penn State waives the rights it would  
3 have in this proceeding to come in and uphold  
4 the validity of the consent decree and say,  
5 "Judge, do not take all the rights away from  
6 us. These are important to us. We did have  
7 authority to enter into this. We do not want  
8 to go back to the beginning. We did want to  
9 end this investigation." So the waiver is just  
10 completely in opposite to the issue that you  
11 will have to resolve, which is whether you can  
12 take Penn State's rights away from it under the  
13 consent decree and not find that they are  
14 indispensable.

15 THE COURT: Assuming that Penn State  
16 has rights.

17 MR. JOHNSON: Well, they clearly do,  
18 Your Honor.

19 THE COURT: And we talked about that.

20 MR. JOHNSON: I do not think there is  
21 any question but that this consent decree could  
22 be enforced against the NCAA. For example, if  
23 the NCAA today said, "You know, on the basis of  
24 the same conduct, we have decided that four  
25 years' prohibition on post-season play is

1 insufficient. We have rethought it, and it is  
2 now five years," no question that Penn State  
3 would seek to enforce that, and I have little  
4 doubt, Your Honor, that you would think they  
5 would have a right to.

6 If I may, unless the Court has further  
7 questions --

8 THE COURT: I do not.

9 MR. JOHNSON: -- I will move along to  
10 the --

11 THE COURT: Just one moment.

12 Mr. Loveland, do you want a brief  
13 final comment on this issue before we move on?

14 MR. LOVELAND: Yes, Your Honor, I  
15 would like one very briefly on two points, Your  
16 Honor. First, on the issue of waiver of  
17 objection to jurisdiction, our point is that  
18 the NCAA constitution and rules do not convey  
19 jurisdiction and counsel does not, again,  
20 suggest how they do, but he says that is  
21 waived. There is no way Penn State could waive  
22 that for our clients. Our client's rights  
23 cannot be waived by Penn State, and it is those  
24 rights that form the basis for that breach of  
25 contract, third-party beneficiary claim.

1           Secondly, counsel read -- Mr. Johnson  
2 read the language from the consent decree with  
3 regard -- in *Corman* -- that was discussed in  
4 *Corman*. It is important to read how the *Corman*  
5 court interpreted that. Here, Penn State --  
6 this is what the Court said -- here, Penn State  
7 clearly waived its right to participate in any  
8 judicial process contemplated to arise from the  
9 consent decree. Absent fraud, accident, or  
10 mistake, this Court may not modify or vary the  
11 parties' express contractual language. Thus,  
12 we hold that Penn State is not an indispensable  
13 party and we overrule the NCAA's second  
14 preliminary objection.

15           The waiver language applies here as  
16 fully as it applies in any other context.

17           Thank you, Your Honor.

18           THE COURT: All right. Thank you very  
19 much, gentlemen, for your presentations on our  
20 first preliminary objection. I guess we are  
21 going to move on to the question of capacity to  
22 sue.

23           Again, Mr. Johnson.

24           MR. JOHNSON: Thank you, Your Honor.

25 I thought what I may do -- and, Your Honor, I

1 am happy to do this in any order.

2 THE COURT: Oh, you choose the order,  
3 sir. I just want to do it point-by-point.

4 MR. JOHNSON: Thank you, Judge. I  
5 hope this is more helpful and less confusing  
6 than I fear it might be, but here is what we  
7 have tried to do. There are -- as I mentioned  
8 at the outset, there are 21 plaintiffs in the  
9 case, six different claims, but not all  
10 plaintiffs are party to all of the claims. So  
11 what we tried to do, Your Honor, with this  
12 illustration is demonstrate which claims are  
13 being brought by which parties. The X  
14 indicates that the party on the left is not  
15 joined in that claim. So, for example, just as  
16 a way to read the chart, Coach Paterno's estate  
17 brings three claims, a civil conspiracy claim,  
18 the breach-of-contract claim, and a commercial  
19 disparagement claim, and we tried to do that  
20 similarly with respect to all of the  
21 individuals.

22 What I thought I would do quickly is  
23 clip through these in a way that, at least in  
24 our view, they are easiest to resolve, starting  
25 with those that we think present the most

1 simple areas of resolution, which is the  
2 tortious interference with respect to the  
3 economic advantage claims brought by the two  
4 former assistant coaches, and then we will  
5 proceed to the one that I know the Court may  
6 have the greatest interest in and the  
7 plaintiffs place the greatest emphasis on,  
8 which is the third-party beneficiary contracts,  
9 which are named more specifically under Mr.  
10 Clemens and Coach Paterno.

11           There are two former assistant  
12 coaches, Coach Kenney and Coach Jay Paterno,  
13 who allege that the language of the consent  
14 decree tortiously interfered with their  
15 prospective economic advantages. The  
16 background facts, I think, Your Honor, are not  
17 in dispute. Both Coach Kenney and Coach Jay  
18 Paterno were no longer employed as coaches at  
19 Penn State University at the time of the  
20 consent decree, which was on July 23, 2012,  
21 and, in fact, both had already been unemployed  
22 for some six or seven months prior to the entry  
23 of the consent decree. It is also not disputed  
24 that the consent decree simply repeats language  
25 that is in the Freeh report, which had been



1 issued previously.

2 THE COURT: No, not disputed.

3 MR. JOHNSON: Not disputed. It is  
4 also relevant, Your Honor -- I will preview  
5 this a little bit, although I think it has  
6 greater relevance to their defamation claim  
7 than it does to their tortious interference  
8 claim. It is important to note -- again, I  
9 believe not in dispute -- that the Freeh report  
10 nowhere mentions Coach Kenney or Coach Jay  
11 Paterno.

12 THE COURT: But it does make reference  
13 to coaches, as I recall.

14 MR. JOHNSON: It makes reference to a  
15 group called coaches, university  
16 administrators, and officials, which is a group  
17 of hundreds of people, again, coming back to  
18 that later in the defamation claim. In order  
19 to prove tortious interference with prospective  
20 opportunity, they have to tell the Court  
21 something about what that opportunity is. Now,  
22 the law here is pretty fact-specific. The law  
23 is clear on the one hand that, since you are  
24 talking about a prospective opportunity, you do  
25 not have to have exact precision. On the other

1 side --

2 THE COURT: I think is an accurate --  
3 that is certainly accurate.

4 MR. JOHNSON: Yeah. Right. And, on  
5 the other side of that, however, you have to  
6 say something. It cannot just be a vague hope.  
7 It cannot just be, "I am a pretty good coach  
8 and therefore I am pretty sure I could have  
9 gotten employed." There has to be some reason  
10 for the Court to believe that the alleged  
11 interference actually interfered with something  
12 that can be --

13 THE COURT: So you are indicating  
14 there is a lack of specificity, basically.

15 MR. JOHNSON: There is a void where  
16 the specificity ought to be. The only  
17 allegation is that they were successful coaches  
18 before, omitting the idea that they were  
19 already long-term unemployed at the time of the  
20 consent decree and that therefore it must be  
21 the consent decree that impaired their future  
22 employment. Your Honor, this is not in the  
23 record, but just for the Court's benefit, I  
24 actually think Coach Kenney is now employed as  
25 a football coach. So they have to say

1 something. Here's what a hedge factor about  
2 why they say nothing, because they actually  
3 know -- they must know what opportunities were  
4 out there, what head or assistant coaching  
5 vacancies became available, which ones did they  
6 apply for, where were they geographically. The  
7 silence here is deafening, not because the law  
8 says you have to know everything that might  
9 happen in the future, but, by the time they  
10 brought this claim, they had to have known.  
11 There is no way not to have known what  
12 vacancies they were and what jobs they applied  
13 for, and the silence around that, I think, is  
14 reason enough to dismiss this claim. The Court  
15 ought to know more specifics about what the  
16 alleged opportunities were.

17           There is a second and completely  
18 independent reason, Your Honor, why it is  
19 relatively easy to dismiss the tortious  
20 interference claim, and that is the law of  
21 tortious interference requires intent of the  
22 alleged interfering party to do so. It had to  
23 have been on purpose to interfere. As I say,  
24 Coach Kenney and Coach Jay Paterno are nowhere  
25 mentioned in any of the reports, so obviously

1 could not have --

2 THE COURT: Although would you agree  
3 they were perhaps some of the more well-known  
4 members of the coaching staff?

5 MR. JOHNSON: Well, I certainly could  
6 agree as a matter of intuition that Coach Jay  
7 Paterno would have been more well-known because  
8 of his last name. I mean no respect to Coach  
9 Kenney. I just do not know how well-known he  
10 was. Having said that, though, there is no  
11 rational basis that a person can conclude that  
12 the purpose of the NCAA's statement in the  
13 consent decree was to interfere with  
14 prospective economic advantages of two coaches  
15 who had nowhere been mentioned. As we know,  
16 and I think it is undisputed, the consent  
17 decree simply repeats the conclusions of the  
18 Freeh report, so the purpose in the consent  
19 decree was to set forth the factual basis for  
20 the sanctions that have been accepted by Penn  
21 State University. So it is a completely  
22 legitimate purpose in the consent decree, and I  
23 just do not think there is any rational way to  
24 construe the NCAA's intent with respect to the  
25 inclusion of that language as having the

1 purpose or intended effect or even the  
2 foreseeable effect concluded in the petition of  
3 causing any injury to Coach Kenney and Coach  
4 Jay Paterno.

5           Having said that, Your Honor, the  
6 easier of these two to resolve is the first;  
7 that, because they know the answer, they know  
8 what their opportunities were and whether or  
9 not they could pursue them. Now, that may  
10 simply be a re-pleading effort if the Court  
11 decides that any part of this case can survive.  
12 This could be a part of the case that -- with  
13 respect to which Penn State is not an  
14 indispensable party if they withdraw the claim  
15 for relief.

16           THE COURT: It appears it is  
17 completely separate.

18           MR. JOHNSON: I do believe that it  
19 could be. As I read their prayer for relief,  
20 it does not -- this claim seeks the same relief  
21 as all other claims, but if they were to re-  
22 plead and if they were to withdraw the prayer  
23 for relief to invalidate the consent decree,  
24 this could be a standalone tort. What I am  
25 suggesting --

1 THE COURT: And could it stand alone  
2 if more specifics were pled?

3 MR. JOHNSON: That is my question,  
4 Your Honor, is it would not be wrong for the  
5 Court to give them an opportunity to plead more  
6 specifics, and we would have to -- Your Honor  
7 would have to evaluate that at that time -- but  
8 there is simply nothing in the law that would  
9 prohibit a more specific claim from carrying  
10 forward. This is what we intended to say on  
11 this claim, Your Honor. I am just assuming  
12 that you would like to deal with this  
13 individually.

14 Thank you.

15 THE COURT: Mr. Kelly, am I correct?

16 MR. KELLY: You are, Your Honor. Good  
17 morning.

18 THE COURT: Good morning.

19 MR. KELLY: And I am Paul Kelly on  
20 behalf of plaintiffs from the law firm of  
21 Jackson, Lewis. Your Honor, in response first  
22 to the Court's specific questions on this point  
23 -- excuse me -- as the Court is well aware, the  
24 consent decree does specifically reference  
25 coaches --

1 THE COURT: It does.

2 MR. KELLY: -- ignored the red flags  
3 of Sandusky's behaviors and failed to warn the  
4 public about him. I mean, the allegation is  
5 that football coaches were aware that Mr.  
6 Sandusky was kind of running amok in the locker  
7 room, the showers at Penn State University, and  
8 failed personally to take actions to stop him  
9 or warn others about him, and one is a finite  
10 group of individuals, and the Court is correct  
11 that Coach Jay Paterno and Coach William "Bill"  
12 Kenney were two of the most well-known coaches,  
13 Mr. Kenney having coached at Penn State  
14 University for nearly three decades and Coach  
15 Paterno having coached the quarterbacks for  
16 many, many years. I believe around 15 years.

17 THE COURT: Is that pled, however?

18 MR. KELLY: It is.

19 THE COURT: Is it pled that they were  
20 especially well-known or especially recognized?

21 MR. KELLY: I do not know that we used  
22 the phrase "well-known," Your Honor. I think  
23 we have alleged properly and within  
24 Pennsylvania law requirements that they are  
25 part of a finite group. Again, some of the

1 details here can be fleshed out through  
2 discovery. With respect to, I think, a key  
3 point that Mr. Johnson is attempting to make,  
4 that there has been no prospective opportunity  
5 identified in the complaint or lack of a  
6 specificity, I would say two things, Your  
7 Honor. Number one, I do not believe such is  
8 required under Pennsylvania law. As the courts  
9 of Pennsylvania have made clear, when you are  
10 talking about prospective contractual business  
11 relations, it is not always susceptible of  
12 definite identification as of an existing  
13 contract as long as you have pled a reasonable  
14 probability of a contract, something less than  
15 a contractual right and more than mere hope. I  
16 think in this case, Your Honor, two things,  
17 one, it must be viewed in light of the monopoly  
18 which the NCAA has over the business of college  
19 sports. The NCAA certainly understands fully  
20 that, when you have individuals who commit  
21 their professional careers to the business of  
22 college coaching, that, when you make a  
23 gratuitous, unfounded, slanderous statement  
24 about those coaches in an NCAA-issued consent  
25 decree, that you are going to directly,



1 irreparably harm the future career tracks of  
2 those particular coaches.

3 THE COURT: Of how many -- of how many  
4 particular coaches?

5 MR. KELLY: Well, here you are talking  
6 about the coaches involved in the conduct of  
7 Mr. Sandusky in a finite period of time. This  
8 is a small coaching staff and you have two of  
9 the more --

10 THE COURT: You mentioned a finite  
11 number, if I recall earlier, just a few moments  
12 ago.

13 MR. KELLY: Yeah, and I do not know  
14 the precise number of coaches. I think it is  
15 less than 20 individuals that are actually on  
16 the coaching staff.

17 THE COURT: But that is not pled,  
18 right?

19 MR. KELLY: I do not believe we pled  
20 the specific number, nor do I think that the  
21 law requires that, but you are talking about  
22 individuals in Division I college football  
23 among the esteemed programs. That, in itself,  
24 is a finite group. I mean, if you look, Your  
25 Honor, as we have cited in our papers, in more

1 traditional times, it is a usual career track  
2 for veteran coaches from the Penn State  
3 football program to go on to become head  
4 coaches and coordinators, not only at prominent  
5 Division I institutions, but also for NFL  
6 teams. Here, Your Honor --

7 THE COURT: And, again, is that pled  
8 as such?

9 MR. KELLY: Well, no. What is pled,  
10 Your Honor, is, and I think consistent with  
11 what is required by Pennsylvania law, that  
12 these coaches suffered damages to their  
13 reputation as a result of this unfounded,  
14 unsupported language in the consent decree, and  
15 that it has impacted their standing as football  
16 coaches and they have been unable to secure  
17 comparable employment, despite impeccable  
18 qualifications and the existence of employers  
19 who would otherwise be willing to hire them.

20 Now, with respect to identifying a  
21 particular job on a particular day or a  
22 particular interview, number one, that is not  
23 required. Number two, it certainly could be  
24 available --

25 THE COURT: But you agree with Mr.

1 Johnson's assertion that -- I am sorry. I  
2 guess it was your assertion -- that we are  
3 talking about -- you have got to talk about a  
4 reasonable probability?

5 MR. KELLY: It is more than a -- yes,  
6 according to the language of the cases, Your  
7 Honor, it is something less than a contractual  
8 right, but more than a mere hope. I mean, here  
9 again you are talking about a specific, unique  
10 field that requires a certain skill set. You  
11 are talking about the defendant, NCAA, which  
12 has control over that field of occupation, and  
13 anyone involved in the business of college  
14 sports knows that, if you are the subject of a  
15 disparaging consent decree by the NCAA, that  
16 you are radioactive in the coaching world and  
17 most other programs are not going to want to  
18 touch you, and that is the experience that has  
19 been held by Mr. Kenney and Mr. Paterno, which  
20 we think has been satisfactorily alleged in the  
21 complaint.

22 And, of course, Your Honor, at the end  
23 of the day, if the Court is concerned that  
24 there is not requisite specificity or  
25 particularity at this early stage of the

1 proceedings, the proper course would be to  
2 allow for an amendment of the complaint where  
3 we would certainly be able to specify precisely  
4 the opportunities which have been deprived, the  
5 doors which have been slammed in the face of  
6 these two veteran college coaches as a result  
7 of the conduct of the NCAA.

8           Your Honor, while Mr. Johnson did not  
9 dwell on it, I would like to make one other  
10 point, and that is, in their moving papers,  
11 they make the claim that this cause of action  
12 should fall because the NCAA had a privilege to  
13 take the actions that it took. Your Honor,  
14 we --

15           THE COURT: I believe that was on the  
16 basis of limited public figure, if I recall  
17 correctly.

18           MR. KELLY: Well, we -- I think under  
19 the law of intentional interference in  
20 Pennsylvania, the plaintiff claiming  
21 interference must allege, as we have properly  
22 done, lack of privilege on the part of a  
23 defendant, and what is privileged conduct is  
24 not susceptible, or a precise definition, but  
25 under Pennsylvania law it has been defined by

1 the rules of the game, quote, "the rules of the  
2 game or whether the party engaged in socially-  
3 acceptable conduct which the law requires as  
4 privileged." Your Honor, I would just say, in  
5 response to that, under the facts of this case,  
6 as we fully alleged in the complaint, the NCAA  
7 flagrantly violated its own rules of the game  
8 and utterly failed to follow the required  
9 bylaws and procedures before publishing,  
10 without any investigation or fair process,  
11 totally baseless allegations of misconduct by  
12 the Penn State coaching staff, including Mr.  
13 Paterno and Mr. Kenney. It did so having full  
14 knowledge that, by including such language in  
15 the consent decree, it would be causing  
16 significant harm to the prospective contractual  
17 and business relations of these individuals,  
18 whose chosen careers are in an area over which  
19 the NCAA has complete control.

20 Thank you, Your Honor.

21 THE COURT: Thank you.

22 Anything further on this particular  
23 issue?

24 MR. JOHNSON: No, Your Honor, I'll  
25 just make one observation that goes to my

1 colleague's point about -- our primary  
2 challenge here is to the sufficiency of the  
3 pleadings.

4 THE COURT: I am sorry?

5 MR. JOHNSON: Our primary challenge on  
6 the tortious interference claims are the  
7 sufficiency of the pleadings. Obviously, they  
8 all fall with the indispensable party, but I do  
9 not intend to keep repeating that every time I  
10 stand up, Your Honor, and I want to make one  
11 factual observation. This complaint was filed  
12 in May of 2013. By that time, Coaches Kenney  
13 and Coach Jay Paterno had eventually been  
14 unemployed for approximately 18 months. It  
15 would not be too great a burden for them to say  
16 what they did during that 18-month period of  
17 time. They know.

18 Your Honor, we thought we would move  
19 again up the ladder of difficulty, if that is  
20 an appropriate way of saying it, to the civil  
21 conspiracy claim. Now, this is a claim -- it  
22 is the last count of the complaint,  
23 appropriately so. This is sort of a tagalong  
24 claim, if you will, because it requires as a  
25 predicate that they be right about something in

1 their other claims, and the easiest way to get  
2 rid of the civil conspiracy claim as it relates  
3 to all of the plaintiffs is by the well-settled  
4 gist-of-the-action doctrine.

5           Now, as Your Honor notes, civil  
6 conspiracy is not just a free-floating idea  
7 that I can sue you if you talked to somebody  
8 and I am mad about what they did. It is a  
9 civil conspiracy to breach a contract, and, as  
10 we will address later on, all the plaintiffs in  
11 this case are alleging breach of contract.  
12 They are all alleging with greater or lesser  
13 proximity to the contract that they are third-  
14 party beneficiaries of the contract and that,  
15 therefore, the communications that they allege  
16 between Judge Freeh and his team and the NCAA  
17 constitute a conspiracy to breach that  
18 contract. That allegation adds nothing at all  
19 to their breach-of-contract claim. It could  
20 have evidentiary significance if the claim  
21 survives. They could use it as argumentation.  
22 But it does not expand or contract the contract  
23 claim, and this is important, because civil  
24 conspiracy is a tort claim that carries with it  
25 a different array of damages, and that's why

1 the Pennsylvania courts have been so clear,  
2 that if all you are really doing is alleging  
3 that your contract was breached, then the  
4 courts ought to be --

5 THE COURT: Yeah. It is not a  
6 substitute --

7 MR. JOHNSON: It --

8 THE COURT: -- for breach of contract.

9 MR. JOHNSON: It is not --

10 THE COURT: I think we all know that.

11 MR. JOHNSON: And the question is does  
12 it add anything to the breach-of-contract  
13 claim? And our argument, Your Honor, is that  
14 it does not. It does require not just  
15 conversation and communication, but an unlawful  
16 combination, a combination whose purpose was to  
17 do a wrong. The complaint simply alleges that  
18 representatives of Freeh, Sporkin communicated  
19 with the NCAA from time to time as they were  
20 preparing their report. It was completely  
21 legitimate communication under the  
22 circumstances, given what had happened, and no  
23 allegation that there was anything unlawful  
24 about that.

25 I would point out here, though, that



1 it is important with respect to some of these  
2 plaintiffs that Freeh, Sporkin is the agent of  
3 Penn State University, so the trustees, for  
4 example -- and -- were employees of the  
5 university at that time, so it is kind of an  
6 allegation that we conspired with their agent.  
7 It is difficult to sustain. As I said, the  
8 gist-of-the-action doctrine is dispositive.  
9 Again, this is a somewhat redundant argument,  
10 Your Honor. Civil conspiracy requires there to  
11 have been an underlying wrong different from  
12 the breach of contract allegation here, and the  
13 communications between Judge Freeh and his team  
14 and the NCAA, even in the complaint, have a  
15 completely legitimate purpose. This cause of  
16 action, I think, as I said at the beginning and  
17 I will conclude by saying it, adds nothing. It  
18 is a little bit of a throwaway. The plaintiffs  
19 are no worse off in their potential recoveries  
20 and their claims if this cause of action were  
21 to be dismissed, and that is why the gist-of-  
22 the-action doctrine bars this civil conspiracy  
23 claim.

24 THE COURT: So basically you are  
25 saying, if there is a claim, it is a breach-of-

1 contract claim. It does not take the next step  
2 as a conspiracy

3 MR. JOHNSON: I wish I could say it  
4 that succinctly, but that is exactly what I am  
5 saying.

6 THE COURT: All right.

7 MR. JOHNSON: Thank you, Your Honor.

8 THE COURT: Yes, sir. Let's see, that  
9 would be Mr. Parrish.

10 MR. PARRISH: Yes, Your Honor.

11 THE COURT: Thank you.

12 MR. PARRISH: Thank you. Let me just  
13 say a few things, Your Honor, in response, but  
14 let me begin by mentioning that opposing  
15 counsel seems to forget that, at this stage, of  
16 course, all inferences have to be resolved in  
17 our favor, and I do think that that is a quite  
18 popular comeback.

19 THE COURT: Any well-pled allegation  
20 has to be accepted by the Court as true for  
21 purposes of preliminary objections, absolutely.

22 MR. PARRISH: Absolutely, Your Honor.

23 THE COURT: A freshman law school  
24 principle.

25 MR. PARRISH: But, Your Honor, the

1 reason I mention that is because that goes  
2 directly to the way the courts have dealt with  
3 the gist-of-the-action doctrine, and what comes  
4 up in these cases is a couple of things. One  
5 is that usually it comes up in the fraud  
6 context, but in the cases that are relevant  
7 here, they talk about as to whether it is just  
8 merely a violation of a contract or whether it  
9 goes to the broader issues of social duties and  
10 social policy.

11           What the courts have said repeatedly  
12 in this area, and the two cases they rely on in  
13 their brief, is the *eToll* case and the *CBG*  
14 case, which I'll explain to you in a little  
15 more detail, but both of those cases are  
16 notably summary judgment cases, because it is  
17 very difficult at this preliminary stage to  
18 make a precise determination.

19           THE COURT: In fact, most of those  
20 cases that were cited were summary judgment  
21 cases, were they not?

22           MR. PARRISH: They were. Yes, sir.  
23 And, Your Honor, we did not cite these cases,  
24 but, for your convenience, I will just give you  
25 two recent cites of cases that talk about this

1 in some detail. There is the *Cave versus Saxon*  
2 case, which is 2012 Westlaw 1957588. That is  
3 in the Eastern District of Pennsylvania, May  
4 30, 2012, and then the *Kimberton* case,  
5 *Healthcare Consulting versus Primary*  
6 *Physiciancare*, 2011 Westlaw 6046923. That is  
7 an Eastern District of Pennsylvania case from  
8 December 2011. Those cases go into some detail  
9 of the Pennsylvania law authority to make the  
10 point that gist of the action is really a  
11 summary judgment determination and very rarely,  
12 if ever, a preliminary objection. The reason  
13 why that is, Your Honor, is again, is if you  
14 take a look here, it is no doubt that many of  
15 our clients are driven by the fact that there  
16 has been a breach of a contract, but as my co-  
17 counsel mentioned, this goes way beyond any  
18 simple contract between the parties. In fact,  
19 as it is labeled, it is a consent decree that  
20 is imposed on Penn State and it goes beyond  
21 simply the requirements of what the parties  
22 would agree to, but, instead, bigger and much  
23 more significant issues about the role of the  
24 NCAA and its obligations to the plaintiffs  
25 here. Those are the types of social relief

1 that it has completely fallen down on in this  
2 case, and although opposing counsel would like  
3 to say that our pleadings bear on this, it  
4 really is not, Your Honor. There are  
5 allegations after allegations explaining why  
6 the NCAA has a specific responsibility here,  
7 why the rules are set up to protect the  
8 plaintiffs, and why they have violated them.  
9 So, Your Honor, for purposes of specifically at  
10 this stage, they are wrong, but even if they  
11 might be right about the idea of contracts and  
12 conspiracy, Your Honor might have noted that  
13 they are do something that is a little bit  
14 clever, which is that the Pennsylvania Supreme  
15 Court has never addressed this case under the  
16 gist-of-the-action doctrine. There are some  
17 recent cases in the summary judgment context  
18 that predict how the Court might act, but we  
19 have cited the older cases, Your Honor. This  
20 is the *Fife* case from 1947 and the *Commonwealth*  
21 *versus Milford* case from 1958, which are  
22 summarized in the *Haymond* case. Now, this is  
23 on page 85 of our brief. Your Honor, I am not  
24 saying that you will read those cases and say  
25 dispositively that the Court has addressed this

1 for all time or rejected their arguments, but  
2 if you are interpreting about what the Supreme  
3 Court will do, unlike the cases they rely on,  
4 which are generally an expectation in the area  
5 of, say, fraud, where the Court has not said  
6 anything yet, for now, until the Court says  
7 that you cannot have a conspiracy for contract,  
8 those older cases are still good law, and we  
9 would suggest are certainly persuasive, if not  
10 binding, on this Court.

11 Your Honor, opposing counsel also  
12 mentioned the concerted action argument, where  
13 they say that there was clearly a legitimate  
14 purpose here and we haven't pled that. Again,  
15 Your Honor, if you take the allegations in our  
16 complaint as given and the inferences in our  
17 favor, there is no legitimate purpose here at  
18 all. We have no idea, and we plead this very  
19 clearly, as to why possibly the NCAA would be  
20 authorized to get involved in a criminal matter  
21 that is far outside their jurisdiction. And  
22 so, for that reason, the fact that they are  
23 working with the Freeh firm and dealing with  
24 the Freeh firm on something that does not  
25 concern them at all shows that we have alleged

1 that there is concerted action here that is  
2 sufficient.

3 THE COURT: Well, communications are  
4 alleged; is that correct?

5 MR. PARRISH: Absolutely, Your Honor,  
6 but they say that those communications are  
7 legitimate, but it is only based on their  
8 inferences of the complaint, that they want to  
9 ignore the fact that we have alleged that they  
10 have no business in talking to them at all  
11 because there is nothing here that concerns the  
12 NCAA. Now, I realize that they dispute that,  
13 but certainly, for the purposes of a  
14 preliminary objection, the inferences go in our  
15 favor.

16 And then lastly, Your Honor, this also  
17 goes to their arguments about motive, the idea  
18 that we have not adequately pled that. Of  
19 course, we do allege that they acted with  
20 actual malice and reckless intent, and in their  
21 reply brief -- this is on page 54 of the  
22 consent -- they point out the question, was  
23 there anything in here that would have given  
24 them some idea, some indication perhaps, that  
25 the Freeh report was not something they should

1 rely on and that this was inappropriate to  
2 working with them. And, of course, there are  
3 lots of things that show that they had an  
4 improper motive here, based on our allegations  
5 of what the Freeh report said and why they  
6 should have realized, based on their own  
7 rules --

8 THE COURT: But if the university  
9 accepted it, was not the NCAA free to accept  
10 it?

11 MR. PARRISH: Well, Your Honor, in  
12 what way? And this goes to a point about  
13 defamation and otherwise that we will get to  
14 later, but the NCAA put it in a consent decree  
15 that was using their full force as the  
16 governing institution to impose sanctions. It  
17 was not just a question of whether or not they  
18 might, as a matter of opinion or not, thought  
19 that they agreed with Freeh or not. They were  
20 using their full force to impose sanctions and  
21 sanctions that were directly targeted at my  
22 clients, and they made specific statements  
23 about my clients that suggested they were  
24 embracing the Freeh report. I do not think  
25 there --



1 THE COURT: Referring to the coaches  
2 language?

3 MR. PARRISH: The coaches language,  
4 the references to Coach Paterno throughout the  
5 complaint.

6 THE COURT: Right.

7 MR. PARRISH: The suggesting that --  
8 we obviously will get to that with the other  
9 plaintiffs, but, Your Honor, in terms of  
10 motive, again, if the inferences are construed  
11 in our favor, as they should be, there is more  
12 than enough in the complaint at this point to  
13 establish a conspiracy. So, Your Honor, to sum  
14 up, and -- but, in short, because the law is on  
15 our side, because the inferences are sufficient  
16 there, and because it is true that there is an  
17 open question that should be resolved, we make  
18 it past this preliminary stage and we should be  
19 allowed to go to the next stage.

20 Thank you, Your Honor.

21 THE COURT: Okay. Thank you, sir.

22 MR. JOHNSON: Your Honor, I do not  
23 intend to retread much ground on the civil  
24 conspiracy issue, but let me just say two  
25 things. Your Honor asked whether the

1 university -- Penn State University's  
2 acceptance of the Freeh report could be, in the  
3 eyes of the NCAA, some indicia of its  
4 reliability here of any other indicia -- and we  
5 will talk about this more around the defamation  
6 claim -- but the answer to Your Honor's  
7 question is of course.

8 THE COURT: I would ask you to keep  
9 your voice up very slightly.

10 MR. JOHNSON: Yes. I said the answer  
11 to Your Honor's question is of course Penn  
12 State University's acceptance of that report is  
13 indicia of its reliability.

14 With respect to the gist-of-the-action  
15 doctrine, there is really a simple question:  
16 What does this add that is not already there?  
17 And I think with respect --

18 THE COURT: Yeah, is it something  
19 more --

20 MR. JOHNSON: Is it something --

21 THE COURT: -- than a contract --

22 MR. JOHNSON: Is it something more  
23 than a contract issue? And I do not think  
24 there is any fair reading of the complaint that  
25 suggests that this is simply an aggressive

1 recitation using declaratory words like  
2 "conspiracy" of their breach-of-contract claim.

3 Now, Your Honor, for this next segment  
4 -- and if the Court would like to do this  
5 differently, I would be happy to do it --

6 THE COURT: No, you are fine.

7 MR. JOHNSON: All of the plaintiffs in  
8 this case have a breach of contract action, but  
9 they are not all the same, and so we have  
10 actually, for purposes of our thinking about  
11 them, divided them into two categories; that  
12 is, the breach of contract, third-party  
13 beneficiary actions brought by the trustees  
14 other than Mr. Clemens, Coach Kenney, and Coach  
15 Jay Paterno, the former players, and the  
16 faculty members, and the reason we have  
17 separated that out is, as we understand the  
18 plaintiffs' allegations, none of those groups  
19 contends that they are involved individuals  
20 within the meaning of the NCAA rules. They are  
21 relying on more traditional third-party  
22 beneficiary analysis. And, in particular, what  
23 they are relying upon is prefatory language in  
24 the NCAA's constitution and bylaws that says  
25 aspirationally one of the goals is to provide

1 fairness to student-athletes, members of the  
2 community, et cetera. The gist of their third-  
3 party beneficiary argument here is we have  
4 something to do with Penn State, or used to,  
5 and we object. We think this was not fair.  
6 You said fair in your bylaws. That must be  
7 intended to benefit us, and that therefore we  
8 are going to sue you. We are connected in some  
9 way to Penn State, and we just do not like what  
10 happened. That ought to give rise to standing  
11 to sue. That is a literally limitless  
12 principle. There is not anyone who could  
13 not --

14 THE COURT: It could cover a lot of  
15 ground, couldn't it?

16 MR. JOHNSON: -- who could not bring  
17 that lawsuit, and there is no reason to think  
18 that that lawsuit would be confined to Penn  
19 State people, by the way, because the fairness  
20 language provides fairness for all members.  
21 So, under their third-party beneficiary theory,  
22 conceivably any Michigan faculty member could  
23 say, "I do not think this was fair, either. I  
24 think it is way too lenient. You have breached  
25 my rights to fairness. I do not want to have

1 to play against these guys." So the principle  
2 here articulated consumes itself. It just does  
3 not end anywhere, and that is why the Court, in  
4 the *Knelman* case, said that no court has ever  
5 found third-party beneficiary status arising  
6 from the general fairness principle, and you  
7 can parse that in various legal ways. You can  
8 say the statement is too vague to constitute a  
9 promise or you could say, even if it were not  
10 too vague to constitute a promise, if there is  
11 no reason to believe that the members of the  
12 NCAA intended that promise to extend to groups  
13 such as these, as remote from these events as  
14 they are. And the second point, Your Honor, is  
15 actually the one that I started with, is with  
16 respect to these individuals, I do not think  
17 that the Court needs to consider at all the  
18 involved individual language in the NCAA  
19 constitution, bylaws, and regulations.

20 THE COURT: And we are talking there  
21 about the professors.

22 MR. JOHNSON: Correct. We are  
23 talking, I believe, about everyone except Mr.  
24 Clemens and Coach Paterno's estate. I do  
25 believe that Mr. Clemens and Coach Paterno's

1 estate contends that they are involved  
2 individuals within the meaning of the bylaws,  
3 and we will talk about that actually as the  
4 last argument, but, with respect to the other,  
5 more remotely-connected individuals, I do not  
6 understand them to be even making that  
7 allegation.

8 Thank you.

9 THE COURT: Okay. Mr. Kelly, you are  
10 going to address that for plaintiffs?

11 MR. KELLY: Yes. Thank you, Your  
12 Honor. And, just to be clear, what we are  
13 talking about here are three categories of  
14 plaintiffs, three groups of plaintiffs, Your  
15 Honor. We are talking about the current  
16 trustees other than Mr. Clemens and we are  
17 talking about the assistant football coaches,  
18 Coach Paterno and Coach Kenney, and we are  
19 talking about the former players. We are not  
20 talking about the faculty members, who have not  
21 alleged a breach-of-contract claim, so I am  
22 going to focus my comments with respect to  
23 those three plaintiff groups and start with the  
24 precise language of the rule that we are  
25 talking about from NCAA manual and the

1 applicable NCAA manual.

2 THE COURT: And which sections are you  
3 specifically referring to? That is a lot of --

4 MR. KELLY: It is Bylaw Article 19.  
5 It is Article 19.01.1, and it is captioned "The  
6 Mission of the NCAA Enforcement Program," which  
7 is notable, and it reads, "It shall be the  
8 mission of the NCAA enforcement program to  
9 eliminate violations of NCAA rules and impose  
10 appropriate penalties should violations occur.  
11 The program is committed to fairness of  
12 procedures and timely and equitable resolution  
13 of infractions cases. The achievement of these  
14 objectives is essential to the conduct of a  
15 viable and effective enforcement program.  
16 Further, an important consideration in imposing  
17 penalties is to provide fairness to uninvolved  
18 student-athletes, coaches, administrators,  
19 competitors, and other institutions."

20 Your Honor, as for the argument made  
21 by Mr. Johnson that no court has ever  
22 recognized --

23 THE COURT: That's exactly what I  
24 wanted you to address. Do you agree with that  
25 argument?

1           MR. KELLY: Well, it may well be that  
2 no court has ever recognized that the fairness  
3 provision itself, standing alone --

4           THE COURT: Let me ask it another way.  
5 Has any court failed when -- has the question  
6 been presented to any court and has a court  
7 ruled on it?

8           MR. KELLY: To my knowledge, no,  
9 because I would respectfully suggest, given the  
10 various, numerous skilled lawyers to my right,  
11 that they would have prominently put that in  
12 their papers. Your Honor, the reason that it  
13 has not been addressed either negatively or  
14 positively is that this case is without  
15 precedent. I mean, there has never been a  
16 situation where the NCAA has acted so  
17 egregiously in violation of its own rules or  
18 sought to condemn so large a group as they have  
19 in this Penn State case. In fact, Your Honor,  
20 it is true that never before in the history of  
21 the NCAA -- and they go back a long time.

22           THE COURT: 1906, as I recall.

23           MR. KELLY: That's correct, Your  
24 Honor. They have never used this made-up  
25 procedure that they used here. I mean, this



1 was not an enforcement -- infractions  
2 investigation case. It was not a summary  
3 disposition case.

4 THE COURT: And I do not think that is  
5 even disputed. They cut a new path with this  
6 case, no question about it.

7 MR. KELLY: But the language of that  
8 provision is that it is essential -- it uses  
9 the word "essential" -- to the conduct of a  
10 viable and effective enforcement program, that  
11 fairness be provided, and it specifically  
12 references student-athletes, coaches, and  
13 administrators, which encompasses members of  
14 the board of trustees, which are the three  
15 groups that we are talking about here. And,  
16 Your Honor, the essence of the claim here --  
17 and unlike the involved individuals, and  
18 involved individuals are those that have  
19 some -- and I know that my colleague is going  
20 to address this question -- but who have some  
21 involvement in an ongoing investigation. With  
22 respect to the uninvolved individuals, who --

23 THE COURT: And all these past  
24 players, for example.

25 MR. KELLY: Yeah. I mean, plaintiffs

1 -- excuse me -- the NCAA would like to lump  
2 these groups together with just unhappy Penn  
3 State supporters and claim that these parties  
4 are no different, but that is not, in fact, the  
5 case. These three categories of plaintiffs are  
6 specifically referenced in the very rule that  
7 we submit requires fairness to be involved with  
8 these uninvolved student-athletes, coaches, and  
9 administrators, and if I could bring them down  
10 one at a time, Your Honor, it is important to  
11 note that -- what does the consent decree say?  
12 And what it says is that -- and, again, we  
13 suggest that it is unsupported by any evidence,  
14 unsubstantiated, and, quite frankly --

15 THE COURT: Well, that is what has  
16 been alleged.

17 MR. KELLY: It has been alleged, and  
18 that is, of course, critical in this stage in  
19 dealing with a motion to dismiss, but what is  
20 alleged and what is stated in the consent  
21 decree is that Penn State University  
22 "maintained a culture in which the football  
23 program was held in higher esteem than the  
24 values of the institution, the values of the  
25 NCAA, the values of higher education, and, most

1 assuredly, the values of human decency,"  
2 unquote, and it continues to say that this  
3 culture, this poisonous culture at Penn State,  
4 quote, "permeated every level of the university  
5 community and constituted an extraordinary  
6 affront to the values of all members of the  
7 association," meaning every other college and  
8 university across the United States.

9           Your Honor, these allegations, these  
10 statements, have tarnished in a substantial and  
11 significant way each of the plaintiff groups  
12 that I am about to talk about briefly. Let me  
13 start with the coaches who I spoke about  
14 previously, Your Honor, and you read the  
15 language in the consent decree about these  
16 coaches ignoring the red flags of Mr.  
17 Sandusky's behavior in failing to warn the  
18 public about him. I mean, this language, as it  
19 applies to Coach Kenney and Coach Paterno, is  
20 effectively that they had knowledge that Mr.  
21 Sandusky was a pedophile and that they failed  
22 to take some personal action to stop him or  
23 warn him, and while the plaintiffs strongly  
24 deny this suggestion, the public at large now  
25 has this unfair and inaccurate image etched in

1 its mind that these coaches simply turned a  
2 blind eye to this person roaming free with  
3 young boys in the Penn State shower room. They  
4 have been labeled in this consent decree and  
5 they have been caused significant harm as a  
6 result, harm which, under this provision of the  
7 NCAA rules, should be cognizable as a third-  
8 party -- as third-party beneficiaries.

9 THE COURT: Did Penn State have a  
10 right to sign off on their behalf?

11 MR. KELLY: That decision has come up  
12 repeatedly this morning, Your Honor, and  
13 obviously it is a legitimate concern. Now --

14 THE COURT: Because we know President  
15 Erickson signed the decree.

16 MR. KELLY: We know, and there is an  
17 allegation in --

18 THE COURT: Whatever it said, he  
19 signed it.

20 MR. KELLY: He signed it. And there  
21 are public comments by outside general counsel,  
22 Mr. Marsh, the former chair of the NCAA  
23 Enforcement Committee, that this was a coercive  
24 act on the part of the NCAA. He described --

25 THE COURT: I know that was alleged

1 in, I believe --

2 MR. KELLY: Right, that this consent  
3 decree was crammed down -- in other words, that  
4 Penn State was given no choice to either accept  
5 this --

6 THE COURT: But the president, wisely  
7 or unwisely, signed off on it, so where does  
8 that put us in terms of the plaintiffs?

9 MR. KELLY: Well, the rights of these  
10 plaintiffs are separate and apart. I mean, as  
11 third-party beneficiaries of a contract, once  
12 these plaintiffs are recognized as third-party  
13 beneficiaries of a particular agreement, and we  
14 are talking about the membership agreement  
15 between the NCAA and the member institutions,  
16 those rights are separate, distinct, and  
17 whether or not President Erickson, we believe  
18 improperly, unlawfully, signed off on that  
19 decree or not, does not extinguish the rights  
20 of these third-party beneficiaries.

21 With respect to the second plaintiff  
22 group, which is the current trustees, who were  
23 not in place at the time of the acts, and we  
24 are talking about alleged unlawful acts by Mr.  
25 Sandusky back in 1998 and 2001, the current

1 trustees are nonetheless responsible, but,  
2 first of all, I would say they are not bringing  
3 this action on behalf of the board of trustees,  
4 nor are they bringing the action simply because  
5 they are private citizens of the Commonwealth  
6 of Pennsylvania. They are bringing this action  
7 as members of the board of trustees who have  
8 legal and fiduciary duties and responsibilities  
9 to protect the good name, reputation, and  
10 fiscal health of the university.

11 THE COURT: But if these members  
12 chose, could they not have, within the confines  
13 of the board of trustees, taken action to  
14 repudiate President Erickson's signature, to  
15 say, "We do not accept this. Erickson had no  
16 authority"? I mean, couldn't they have done  
17 that as members of the board of trustees?

18 MR. KELLY: I think the answer to that  
19 is yes, Your Honor. I mean, they could have  
20 done both, but having not done that does not  
21 foreclose their ability to pursue the legal  
22 remedies which are being decided here.

23 THE COURT: If they are, in fact,  
24 third-party beneficiaries.

25 MR. KELLY: That is it. If they are

1 third-party beneficiaries by virtue of the  
2 language from the bylaws that I started with,  
3 then it makes no difference whether the  
4 petitioned internally or took certain actions  
5 administratively to challenge the actions by  
6 President Erickson. I think the record will  
7 establish that they have done both, Your Honor,  
8 but the point is that one does not necessarily  
9 foreclose the other. Not only did this consent  
10 decree --

11 THE COURT: But would you agree one is  
12 a little clearer than the other? If the board  
13 -- if members of the board of trustees say,  
14 "Hey, wait a minute. We disagree with this.  
15 We think the president overstepped his bounds,"  
16 that is a much clearer argument, is it not,  
17 than where we are here today?

18 MR. KELLY: It is clearer, but, again,  
19 in this case, Your Honor, we are really talking  
20 about something that has never before come  
21 before a court of law. I mean, it is  
22 interesting to me that here is an institution  
23 that has, at every turn, tried to deprive  
24 various parties of all their rights and the due  
25 process which they are owed, and now, at the

1 same time, they do not wish to have a court or  
2 you take a look at their actions.

3 THE COURT: No, they do not.

4 MR. KELLY: It is very easy for them  
5 to deprive people of rights, but now they do  
6 not want you taking a look and peeking under  
7 that tent. The reality is, with respect to the  
8 current trustees, they not only have had their  
9 responsibilities and fiduciary obligations  
10 impacted very prominently and directly by this  
11 consent decree, but this consent decree places  
12 affirmative obligations on the trustees moving  
13 forward. There are various monitoring -- there  
14 is a fiscal impact and there are affirmative  
15 duties. There are things, frankly, that each  
16 of the individual trustees have to sign on a  
17 periodic basis under this consent decree, so  
18 there is harm. There is impact on the current  
19 trustees as well.

20 And lastly, Your Honor, let me talk  
21 about the players, and I just want to make one  
22 point about that, because what we are talking  
23 about here is these are players that played for  
24 the Penn State football program from --

25 THE COURT: And there were some



1 numbers of hundreds of players that played for  
2 Penn State between 1998 and the time of this  
3 decree. Would you agree?

4 MR. KELLY: That is true.

5 THE COURT: At least a few hundred.

6 MR. KELLY: And I suspect that we  
7 could have considered it. We did not do it,  
8 because we did not want to unduly complicate  
9 the matter. I mean, you could potentially  
10 bring this as a class action --

11 THE COURT: So could any -- if you are  
12 the third-string quarterback and you played  
13 quarterback in 1999 and went on from there, do  
14 you have rights today under the theory you are  
15 setting forth?

16 MR. KELLY: If you were on the roster  
17 of the Penn State football program between 1998  
18 and 2011, you have rights as third-party  
19 beneficiaries in this particular matter.

20 THE COURT: Any player?

21 MR. KELLY: Any player, even if you  
22 never went on the field.

23 THE COURT: So we have a very large  
24 group, potentially, above and beyond the -- I  
25 think the 10 or 11 players listed in the

1 complaint?

2 MR. KELLY: That is true, Your Honor.

3 THE COURT: So any or all of them  
4 could take action under your theory?

5 MR. KELLY: And a finite group has  
6 stepped forward to do that. We have not and do  
7 not plan to bring it is a class action, so we  
8 are talking about the rights of a distinct  
9 group of players who fell within this larger  
10 group, having pled for Penn State between 1998  
11 and 2011. Frankly, some of these players, Your  
12 Honor, like Plaintiff Adam Taliaferro, suffered  
13 permanent physical injuries during their time  
14 and during wins and contests which have now  
15 been vacated by the NCAA, and on that point,  
16 Your Honor --

17 THE COURT: Is that an individual  
18 sanction or is that a university sanction?

19 MR. KELLY: They would like to say  
20 that it is a university sanction, but I would  
21 like to just quickly share one --

22 THE COURT: Go ahead.

23 MR. KELLY: -- one quick story, Your  
24 Honor. I received a call a couple weeks ago  
25 from a client, one of my clients named herein,

1 Your Honor, a former player who had returned to  
2 State College a few weeks ago to attend a game,  
3 and he brought his family and his young son  
4 with him, and he bought the boy the program,  
5 and the young son looked up the statistics in  
6 the program for the years that his dad had  
7 played, and it showed that they had no wins and  
8 all losses. And the point is, Your Honor, that  
9 to claim that there has been no harm or no  
10 personal consequence to these plaintiffs from  
11 the actions of the NCAA is to greatly ignore  
12 reality. And with respect to the vacation of  
13 wins, Your Honor, we would like to make one  
14 other point, the applicable NCAA rule we are  
15 talking about here, which is 19.5.2(h)  
16 specifies that the penalty of vacation of  
17 records may only be appropriate in, quote,  
18 "cases in which a student-athlete has competed  
19 while ineligible." There is absolutely no  
20 evidence whatsoever that that occurred in this  
21 case. There is no claim that ineligible  
22 players --

23 THE COURT: Well, there is no claim  
24 that any athlete did anything wrong.

25 MR. KELLY: That is correct. But

1 there has been real harm to these individuals.  
2 I mean, it has effectively let their careers,  
3 the blood, sweat, and tears that they put out,  
4 not only in four years, but for all the years  
5 leading up to that, never happened. It is  
6 direct harm to these players, and it --

7 THE COURT: And allegedly because of  
8 an institutional issue as opposed to a player  
9 issue; is that correct?

10 MR. KELLY: That is correct, because  
11 they have been deprived any fairness, any  
12 process of any kind. And, in fact, after this  
13 consent decree was issued, we, in a timely  
14 manner, filed a notice of appeal in the proper  
15 manner to the NCAA, and what did we get back?  
16 A letter saying, "We made up this procedure,  
17 and under the procedure that we made up, there  
18 is no right to appeal, so basically take your  
19 football and go home." That is what happened  
20 here, Your Honor, so at every turn they were  
21 deprived of fairness. And, respectfully, Your  
22 Honor, we believe that they have rights as  
23 third-party beneficiaries under that provision.

24 Thank you.

25 THE COURT: Okay. Mr. Johnson.

1 MR. JOHNSON: Thank you, Your Honor.  
2 With the Court's permission, I will address  
3 whether or not the vacation of wins was a team  
4 rather than an individual sanction. In  
5 connection with the breach-of-contract claims  
6 of Trustee Clemens and for Coach Paterno, but  
7 where I think it might be even more salient --  
8 but I will make this observation about Mr.  
9 Kelly's argument. The players are outraged  
10 that these games in which they played no longer  
11 are reflected as wins on their --

12 THE COURT: Well, I am sure that is  
13 true.

14 MR. JOHNSON: They are outraged. If  
15 they played with an ineligible player, exactly  
16 the same thing would be true. They would be in  
17 exactly the same position.

18 THE COURT: Well, let's talk about  
19 vacating wins. Do you agree with counsel's  
20 assertion that that can only be done under  
21 certain circumstances involving players?

22 MR. JOHNSON: Not at all.

23 THE COURT: Okay. Let's talk about  
24 that.

25 MR. JOHNSON: So, if you look at the

1 provision that deals with available  
2 sanctions --

3 THE COURT: Thank you.

4 MR. JOHNSON: -- the first thing you  
5 look to is the language at the beginning that  
6 says this is, under no circumstances, a  
7 comprehensive list; that sanctions are  
8 individually determined. It then gives a list  
9 of sanctions that might be appropriate under  
10 certain circumstances, but none of that  
11 language -- none of that language is limited.  
12 In fact, it specifically says including, but  
13 not limited to, the following.

14 I believe what Coach Paterno's estate  
15 may be arguing, at least with greater force  
16 than perhaps some of the participating  
17 athletes, is that the vacation of wins was an  
18 individual sanction as to him, not so much  
19 whether or not it is limited to just  
20 circumstances where player eligibility is the  
21 question. I think what he is intending to  
22 argue is, because you have sanctioned me, I  
23 must be an involved individual, and that is the  
24 -- I am happy to address that now, Your Honor,  
25 but that is also what I intended to address in

1 a few minutes when we get to that portion of  
2 the preliminary objections.

3           Let me say two things about the group  
4 of -- three groups here who are asserting  
5 themselves as third-party beneficiaries under  
6 the fairness provision of the agreement. When  
7 I stood, I said the principle was --  
8 essentially was that their argument here is  
9 that anybody who feels that it was unfair can  
10 bring a lawsuit, and Mr. Kelly, in candor, I  
11 think agrees with that, but when you espouse  
12 and then allege conspiracy and cannot say what  
13 the limit is, chances are the principle is  
14 wrong in the law, and so, for example, in the  
15 very rule that he quotes as giving rise to the  
16 third-party beneficiary rights, contractual  
17 rights to third-party beneficiaries, it  
18 mentions competitors. So, under their theory,  
19 a student-athlete at a competitor institution  
20 of Penn State University could bring a claim  
21 challenging the leniency of the consent decree.  
22 Now, he may or may not prevail on that, but  
23 their theory would have to extend to it,  
24 because it arises from the exact same language,  
25 and that is why the language is properly seen

1 as mission-oriented, as prefatory language.  
2 This is our goal, not specific enough to confer  
3 any contractual rights on any third party.  
4 Now, Your Honor asks --

5 THE COURT: So you are saying there  
6 are no third-party beneficiaries?

7 MR. JOHNSON: There are no third-party  
8 beneficiaries.

9 THE COURT: This is purely between  
10 Penn State and the NCAA?

11 MR. JOHNSON: There are no third-party  
12 beneficiaries of that language, which is the  
13 only language that these groups --

14 THE COURT: The fairness language?

15 MR. JOHNSON: The fairness language.  
16 The courts have held that players whose  
17 eligibility has been determined negatively  
18 might have -- and putting aside for a moment  
19 whether the NCAA agrees or disagrees with that  
20 -- there are courts that have held that  
21 specific players whose eligibility is in  
22 question might have third-party beneficiary  
23 rights with respect to the eligibility  
24 requirements, but no court has ever held such a  
25 sweeping statement with respect to the



1 fairness.

2 Now, Your Honor specifically asked  
3 about courts.

4 THE COURT: I did.

5 MR. JOHNSON: And the technical answer  
6 is no, no court has specifically addressed the  
7 provision that the plaintiffs in this case rely  
8 upon, and that is because no plaintiff has ever  
9 argued, to my knowledge, that that provision  
10 could give rise to contractual rights. The  
11 *Knelman* court did, however, specifically  
12 address --

13 THE COURT: That is the *Knelman versus*  
14 *Middlebury* case?

15 MR. JOHNSON: That is correct, Your  
16 Honor. And the facts in that case were a  
17 hockey student at Middlebury College was thrown  
18 off by his coach and thought that that was not  
19 fair and decided to -- went to Middlebury and  
20 said, "You are bound by the NCAA rules,  
21 including other fairness provisions, but  
22 fairness provisions nonetheless," and the  
23 federal court in Vermont in that case said that  
24 language is not specific enough to confer -- in  
25 fact, no court has ever --

1           THE COURT: Well, but that was also --  
2 they interpreted that, did they not, under  
3 Vermont law? The whole premise of the case was  
4 that he does not have this right under Vermont  
5 law.

6           MR. JOHNSON: Your Honor is right that  
7 Vermont contract law would apply to that.

8           THE COURT: Right.

9           MR. JOHNSON: At the same time, I am  
10 aware of no distinction between Vermont and  
11 Pennsylvania law in that regard. Both  
12 require --

13          THE COURT: Nor am I, sir.

14          MR. JOHNSON: So -- thank you, Judge.  
15 With the Court's permission, we will move on to  
16 the next objection.

17               Your Honor, we thought we would  
18 address the defamation claims of the faculty  
19 members, the former players, and the trustees  
20 other than Mr. Clemens, and I just, by way of  
21 preview, although I think it is completely  
22 obvious, the way -- the reason that we have  
23 taken the former assistant coaches, rather, and  
24 Mr. Clemens out of this particular analysis is  
25 the plaintiffs argued that they belonged to

1 groups of people that are mentioned in the  
2 consent decree. The former players, the  
3 faculty members, and the trustees other than  
4 Mr. Clemens are not even mentioned. They are  
5 not even part of the group that is mentioned.  
6 So group disparagement is an interesting  
7 concept in the law, but the first thing to  
8 understand about it is there is no such thing  
9 as group disparagement. Disparagement relates  
10 to individuals, so when one is relying upon an  
11 allegedly-disparaging statement directed --

12 THE COURT: Or an identifiable group  
13 of individuals.

14 MR. JOHNSON: That is --

15 THE COURT: Would you agree?

16 MR. JOHNSON: That is precisely my  
17 point, Your Honor. They had -- well, an  
18 identifiable group of individuals in the sense  
19 that the complainant individually must say,  
20 "This statement is about me." Now, it can be  
21 about me because I say about the group,  
22 everyone in it has this characteristic, but you  
23 still have to track it to me, because your  
24 reputation is --

25 THE COURT: And is that in some manner

1 reflected by the size of the group?

2 MR. JOHNSON: Well, some Pennsylvania  
3 courts have said that size of the group is a  
4 consideration. They rely on the *Farrell* case,  
5 where the group was 13 commissioners, although  
6 there are some other distinguishing  
7 characteristics, and then the *Klauder* case,  
8 which we have cited in our papers. The courts  
9 have analyzed Pennsylvania law and said,  
10 generally speaking, if the group is larger than  
11 25 members, then it is not reasonable to  
12 conclude that any statement about the group is  
13 traceable to any individual in the group, and  
14 what I was flirting with was the idea that it  
15 has to be traced -- someone has to think we are  
16 talking about you, not a group that you are a  
17 part of, not a club that you have joined, you,  
18 specifically.

19 So, for example, if I said -- Your  
20 Honor, to your size points -- if I said the  
21 Three Stooges lacked talent, they might all  
22 have a claim, because they might say, "We are a  
23 small-enough group and everybody knows who we  
24 are. You are talking about each of us, every  
25 single one of us." If I say the Philadelphia

1 Eagles lacked talent, no player on that team  
2 would have a claim, because the group is too  
3 large and no reasonable hearer could say that  
4 is about me. It is about the team and,  
5 therefore, could not constitute defamation.  
6 And the reason that we have identified these  
7 three groups, the non-1998-2001 trustees and  
8 the former players and, the most attenuated of  
9 all, the faculty members, is that they are not  
10 mentioned anywhere. There is no mention of  
11 them. So it stands to reason, if they are not  
12 mentioned anywhere, then no group that they are  
13 a member of is mentioned anywhere, then the  
14 statement cannot be reasonably identified as  
15 relating to them individually.

16 I think that my colleagues would  
17 disagree with me on this, but a fair reading of  
18 their claim is, "You have said terrible things  
19 about things about me, things that happened at  
20 Penn State. You have said terrible things.  
21 The Freeh report says terrible things about  
22 certain officials at Penn State and the  
23 university's attitude. I was connected to Penn  
24 State. I feel disparaged by that." I think  
25 that is what they are saying, and what we are

1 saying is, with respect to their feelings, that  
2 does not state a claim for individual  
3 disparagement.

4 THE COURT: So, in essence, you are  
5 saying a student, an avid Penn State fan,  
6 obviously, could not claim under these  
7 provisions that -- based on what you are  
8 saying, and you are analogizing that to these  
9 particular groups?

10 MR. JOHNSON: That's right, Your  
11 Honor, although I want to be clear that I have  
12 moved away from the third-party beneficiary  
13 agreement now, so what we are talking about  
14 here is stand-alone tort law in defamation, but  
15 that is right, Your Honor. None of those  
16 groups of people and none of these three groups  
17 of people can claim to have been disparaged,  
18 and the reason -- I do not think there is any  
19 disagreement about, generally, the law here,  
20 which is the reason that courts have been very  
21 clear, in order to bring an individual  
22 defamation claim, you have to have some basis  
23 that a reasonable person could think that they  
24 were talking about you, not just the group, is  
25 that this butts right up against First

1 Amendment rights and people can say things  
2 about groups and the like, so laws that can  
3 restrict First Amendment rights, such as  
4 disparagement, have said it has got to be about  
5 you, it has to be just about you, not just some  
6 group that you are in. You cannot simply come  
7 to court and say, "I feel bad because you said  
8 something about a group that I am a member in,"  
9 so these individuals -- these three groups are  
10 just too far removed and no way to identify  
11 these statements to these individuals.

12           And then the last point here, Your  
13 Honor, I think it is reasonably self-evident,  
14 goes to the trustees. While it is true that  
15 the consent decree does repeat conclusions from  
16 the Freeh report about the board of trustees,  
17 it repeats them in a way that is specific to  
18 1998 and 2001. It says the board of trustees  
19 failed in their oversight duties in 1998 and  
20 2001. And so --

21           THE COURT: And you are talking now  
22 about the group that was not active on the  
23 board at that time?

24           MR. JOHNSON: I think I am deep into  
25 an observation of the obvious, Your Honor,

1 which is, if you were not on the board at that  
2 time, there is no way that that statement can  
3 be reasonably identified as talking about you.

4 Thank you, Your Honor.

5 THE COURT: Okay. Mr. Parrish,  
6 welcome back.

7 MR. PARRISH: Thank you, Your Honor.  
8 Your Honor, if I may, before I address that  
9 argument, one point that relates to this, and I  
10 trust, when you asked me, that I perhaps did  
11 not ask -- answer it as fully as I should,  
12 which is I just want to be clear that there has  
13 never been any official board vote on the Freeh  
14 report at all, and there has been no --

15 THE COURT: And I think that is  
16 alleged in the complaint.

17 MR. PARRISH: Good. I just want to  
18 make sure I did not misstate that --

19 THE COURT: Right.

20 MR. PARRISH: -- because it is true  
21 that that the -- the discussions about  
22 accepting the fine -- the recommendations are  
23 never defined anywhere, the conclusions or  
24 anything like that. I just want to make sure  
25 that, to the extent that the record reflected



1 something else, that that is cleared up.

2           Your Honor, one thing that is  
3 interesting about the defamation count here is  
4 that the NCAA has split them up. Perhaps that  
5 is acknowledgment that, when you get to the  
6 later part of this, they recognize that there  
7 is a claim here and so they tried to start off  
8 by pointing off what, I think, admittedly are  
9 the harder cases for us. What I would say,  
10 though, Your Honor, is that, again, they get  
11 the law wrong here and it is important at this  
12 early stage to look at the law correctly, and I  
13 think Your Honor's questions got to this, which  
14 is, if you take a look at the *O'Neill* case, the  
15 *O'Neill* case makes very clear that this is not  
16 a numbers game and it talks about the  
17 difference between 500 plaintiffs who have been  
18 defamed generally or who have been defamed  
19 specifically, and in order to look at that, you  
20 have to look at, as Your Honor knows, whether  
21 the particular parties can be identified and  
22 the context in which the comments are made, the  
23 nature of the defamatory statement, and then  
24 also the nature of how that will be perceived  
25 by a reasonable observer. So, just to use a

1 specific example, if someone was to say, "The  
2 lawyers of such-and-such a law firm are all  
3 crooks," that probably would not be, but if you  
4 would --

5 THE COURT: But a law firm of four  
6 versus a law firm of 400 --

7 MR. PARRISH: Well --

8 THE COURT: -- would that make a  
9 difference?

10 MR. PARRISH: But, Your Honor, that  
11 might, but it also -- let me say this. If  
12 there is a law firm of 400 and you were to say  
13 that the partners at that law firm  
14 systematically cheat their clients, even though  
15 it would be 400 people, at that point, if you  
16 said that they systematically cheat their  
17 clients and you can identify me as a partner at  
18 that law firm, then there is a defamation  
19 claim, and I think that is what *O'Neill* is  
20 getting at when it is talking about the  
21 difference between 500 or not, and so there is  
22 no doubt, Your Honor, that this would be  
23 unusual for these parties, an unusual case,  
24 because usually it would be a larger group, but  
25 the reason why it is unusual, Your Honor, is

1 because this is such an unusual action taken by  
2 the NCAA. This is not just a --

3 THE COURT: But that does not change  
4 the law, does it?

5 MR. PARRISH: Well, it does not change  
6 the law. It changes the objective  
7 reasonableness of who is looking at what the  
8 statements are and how those statements are  
9 interpreted, and again, Your Honor, as you  
10 know, it is not stated in the pleadings, but at  
11 this point inferences go in our favor, so, in  
12 order for them to win, they really have to show  
13 that no reasonable observer in the community  
14 would be incapable of construing these  
15 statements as being defamatory against my  
16 client, all of those clients. And, with  
17 respect to the board of trustees, for example,  
18 let's hold off --

19 THE COURT: Well, yeah, let's talk  
20 about that.

21 MR. PARRISH: Yeah. So this is a good  
22 example. So, obviously, we have got a very  
23 good argument on the members of the board of  
24 trustees who were there in 1998 and 2001.

25 THE COURT: Right. Let's talk about

1 those who were not there in '98 and 2001.

2 MR. PARRISH: Exactly. Now, Your  
3 Honor, if the consent decree had been very  
4 specific, if it had said very targetedly that  
5 there were certain actions that were taken at  
6 this specific time and we think that, as a  
7 result of these actions, we can identify some  
8 authority under our rules, we may be in a  
9 different situation. They do not do that.  
10 They paint it with very broad brushstrokes, and  
11 they did not paint with a broad brushstroke  
12 that is saying that lawyers are crooks, which  
13 seems to be somewhat acceptable, but they  
14 pointed at the most unacceptable behavior that  
15 you could imagine, which is that these -- that  
16 the board itself, in general, the board of  
17 trustees, has failed to oversee the actions of  
18 the university and this has led to a lack of  
19 oversight and it has led to ongoing  
20 complicitness in child abuse. Now, Your Honor,  
21 I --

22 THE COURT: So if I am on the board in  
23 2011, even though the incidents discussed were  
24 from a much earlier point in time, that somehow  
25 applies to me; is that right?

1 MR. PARRISH: Your Honor, I think  
2 that, because of the -- and my honest answer is  
3 that the breadth of the consent decree and the  
4 actions that the NCAA has taken, the way that  
5 they have brought -- painted with such a broad  
6 brush here -- has made this a very large group  
7 of individuals that would be identified and  
8 that people in the community reasonably could  
9 look at these statements and interpret them as  
10 not only being limited to failures of the board  
11 that occurred in 1998 and 2001, but more  
12 broadly, to the board in general. And, Your  
13 Honor, what I would say is that it may be that,  
14 with future discovery or with going on in the  
15 case, that this argument that we are making  
16 turns out not to be a fair interpretation of  
17 what a reasonable observer would do, but at  
18 this point in time the only reason that we are  
19 in this position is not because of any choices  
20 that my client made, but because of the choices  
21 that the NCAA has made in terms of how broadly  
22 and how aggressively it has acted, and our  
23 simple submission to these parties is that, if  
24 you do look at the statements that have been  
25 made, a reasonable observer could interpret

1    them as being interpretable more broadly and  
2    they could identify who those people are in the  
3    nature of the --

4           THE COURT:   Well, supposing I was on  
5    the board in 1990 and I decide to be a named  
6    plaintiff here, does that get me in?

7           MR. PARRISH:   Well, Your Honor, I  
8    think that would be a harder claim than what we  
9    have got right now, which is we have the  
10   members of the board who are currently in the  
11   -- on the board at the time --

12           THE COURT:   Currently on the board,  
13   but not on the board at the time of the alleged  
14   underlying incident?

15           MR. PARRISH:   They -- obviously with  
16   the one person put to the side, but that's  
17   exactly right.

18           THE COURT:   Right, Mr. Clemens.  
19   Right.

20           MR. PARRISH:   Yeah, and, Your Honor,  
21   also to take a look at this and answer your  
22   question, I would say Mr. Clemens, obviously,  
23   we think, clearly has a claim.  We believe that  
24   the current board members have a claim because  
25   of the way that the consent decree was framed

1 and because of the way the NCAA has chosen to  
2 paint them, and if there was somebody from 1990  
3 that had not served since, I think that would  
4 be a harder question. I think there is  
5 something about the fact that you are looking  
6 at the current board and they are being  
7 criticized for this.

8           Your Honor, this is the same point  
9 that we have for the other plaintiffs in these  
10 larger groups. Again, we do not think that all  
11 -- every plaintiff's claim should rise and fall  
12 on the same analysis, but --

13           THE COURT: Does it apply to some  
14 several thousand full professors, associate  
15 professors, adjunct professors, instructors,  
16 and whatever?

17           MR. PARRISH: Your Honor, let's take a  
18 look at that, because what they do --

19           THE COURT: Yeah, let's.

20           MR. PARRISH: -- is they say very  
21 specifically -- they say coaches,  
22 administrators, and then they say football  
23 staff. Now, what they mean by that is a  
24 reasonable observer failed to have observed red  
25 flags, and the way I would say that a

1 reasonable observer would look at that is that  
2 individuals in positions of authority or  
3 leaders of the university, those who are in a  
4 position to superintend the students that are  
5 there, have fallen down on their job, and they  
6 painted it with a very broad brush.

7 THE COURT: Thousands of faculty  
8 members --

9 MR. PARRISH: Well --

10 THE COURT: -- part-time, full-time,  
11 tenured, untenured?

12 MR. PARRISH: Well, Your Honor, I  
13 think that this statement -- I think it is a  
14 fair, reasonable inference that the way that  
15 they have painted the consent decree -- but I  
16 want to be honest, Your Honor. I am not going  
17 to die my sword on this argument, because I  
18 really do believe they cut it up in a way that  
19 helped them here by focusing on these, but I  
20 would say, Your Honor, that I think a fair  
21 result for the Court to reach would be to let  
22 the other claims go forward and talk about  
23 that, to take a look at these and realize that,  
24 at this stage, the NCAA's breadth of their  
25 decision as to how they wanted to frame the



1 decree is enough to allow us to go forward now.

2 I appreciate Your Honor's time.

3 THE COURT: Thank you.

4 MR. JOHNSON: Thank you, Your Honor.

5 Let me just parse through very briefly the  
6 separate categories. I am not even sure what  
7 the allegation is arising from the players and  
8 the faculty, but what I think I just heard my  
9 colleague argue is that coaches,  
10 administrators, and football staff could  
11 fairly, reasonably be interpreted to include  
12 groups that are none of those. Well, that is  
13 exactly the point. They are not -- those  
14 groups, none of these individuals is -- none of  
15 the former players or the faculty fall within  
16 the group of coaches, administrators, or  
17 football staff, so it would be sort of like  
18 saying take the group that is identified,  
19 expand it to include people that are not  
20 identified, and then reason that it is talking  
21 about me. That is too much work, just that  
22 they are not close enough to this.

23 With respect to the trustees who are  
24 -- other than Mr. Clemens, who is different,  
25 not because he has a better claim, but because

1 he was at least present at the time, I do think  
2 it is important to focus on what was said.  
3 Now, my colleague argued that there was not  
4 sufficient specificity; that the NCAA was  
5 painting with such a broad brush that even  
6 members of the board of trustees who were not  
7 present at the time might fear that the public  
8 would reasonably believe that, not just that  
9 the NCAA was talking about the board of  
10 trustees at a different time, but within that  
11 group they were talking about them, personally.  
12 That is what they would have to say. This  
13 statement should be interpreted to mean board  
14 of trustees at some time other than 1998 and  
15 2001, and then take the second leap of faith  
16 and please infer that they are also talking  
17 about me, personally, that this can be traced  
18 to me, and, with respect, Your Honor, that is  
19 too many bridges to cross.

20           Having said that, the statement upon  
21 which I believe they rely does not lack  
22 specificity or clarity at all, and with the  
23 Court's permission, I would read it. It says  
24 -- this is from the consent decree, which is  
25 again an acceptance of the conclusions made by

1 Judge Freeh. As an aside, Your Honor, let me  
2 point out with respect to the trustees, this  
3 conclusion comes from Judge Freeh, and Judge  
4 Freeh is their agent, so they are suing us on  
5 the basis of something their agent said. It  
6 says, "The board also failed in its duties to  
7 oversee the president and senior officials in  
8 1998 and 2001 by not inquiring about important  
9 university matters and by not creating an  
10 environment where senior university officials  
11 felt accountable." And my esteemed adversary  
12 suggests that should be read to apply to all  
13 boards of directors between 1998 and 2011, and,  
14 with respect, the language simply cannot bear  
15 that much weight.

16 One final point on this, Your Honor,  
17 and my colleague referred to the *O'Neill* case.  
18 I do not intend to say a lot about it, except  
19 that it is important for the Court to  
20 understand that -- which was a large group of  
21 individuals -- that they were all named by  
22 name. So you did not have to trace through and  
23 say, "Gosh, who is this talking about?" They  
24 appended a list with the name of every  
25 individual.

1           With the Court's permission, we will  
2 move on to --

3           THE COURT: Go right ahead.

4           MR. JOHNSON: -- the next set of  
5 issues.

6           Your Honor, there is one count in this  
7 complaint that is only brought by one party,  
8 and that is the commercial disparagement of  
9 Coach Joe Paterno, the commercial disparagement  
10 claim brought by Coach Paterno's estate. So we  
11 might begin by asking why does Coach Paterno  
12 sue for commercial disparagement and not for  
13 defamation? And I do not think there is going  
14 to be any dispute about this. The answer is  
15 Coach Paterno was deceased at the time of the  
16 consent decree, and, under Pennsylvania law, I  
17 do not believe there is any dispute, any claim  
18 that he might have had for defamation expired  
19 at the time of his death. They simply do not  
20 survive the decedent. So they have therefore  
21 tried to cram what is by any reasonable  
22 construction a pure defamation claim into the  
23 much narrower tunnel of commercial  
24 disparagement.

25           THE COURT: Relative to goods and

1 services?

2 MR. JOHNSON: Exactly right, because  
3 defamation -- the law of defamation protects a  
4 person's reputation, but the law of commercial  
5 disparagement protects only goods and services.  
6 It is therefore necessary for a commercial  
7 disparagement claim that there be goods and  
8 services. The complaint alleges no commerce of  
9 any kind. What they really try and do is  
10 describe Coach Paterno's reputation as if it  
11 were in commerce by saying it is a valuable  
12 asset and therefore a good or a service, but  
13 that is a tautology, because if a reputation is  
14 an asset and it is a good and service, then  
15 defamation survives death. It sort of -- it  
16 will eradicate the law. So you have to have  
17 actual goods and services, but more than that,  
18 Your Honor, they have to be engaged in  
19 commerce.

20 Now, here is what is a head-scratcher  
21 about this one to me: If Coach Paterno has  
22 goods and services that are engaged in  
23 commerce, why do not we know what they are?

24 THE COURT: They were not pled,  
25 obviously.

1 MR. JOHNSON: Pardon?

2 THE COURT: They were not pled,  
3 obviously.

4 MR. JOHNSON: They were not pled, and  
5 so, unless you allege a form of commerce, you  
6 cannot allege commercial disparagement.  
7 Similarly, even if you had alleged goods and  
8 services, you would have to allege with much  
9 greater specificity than a defamation claim the  
10 pecuniary loss, the injury to those goods and  
11 services, so, for that reason, I think this is  
12 relatively simple, Your Honor. Since there is  
13 no commerce and no alleged injury to commerce,  
14 the commercial disparagement claim cannot  
15 survive.

16 Your Honor, we will talk more about  
17 these issues with respect to the defamation  
18 claims and the actual malice with respect to  
19 the defamation claims of Mr. Clemens and the  
20 former assistant coaches, but the reason that  
21 we have identified Coach Paterno's estate's  
22 disparagement claim here now is, in the absence  
23 of a more specific pleading about what the  
24 goods and services are and how they have been  
25 injured by any statements made, I think the

1 claim is relatively easy to get rid of. It  
2 might be worth noting, though, the chronology  
3 here is important. Coach Paterno was dismissed  
4 by the board of trustees of Penn State  
5 University on November 9, 2011. By the time of  
6 the consent decree, on July 23, 2012, he had  
7 been fired, university officials had removed  
8 his statue from the university grounds, and the  
9 Freeh report authored by the university's agent  
10 had already been publicized, so, in order for  
11 the consent decree to have injured Coach  
12 Paterno's goods and services, you would have to  
13 prove that there was some injury different on  
14 July 23 than on July 22, when all of those  
15 things had occurred. I say that to Your Honor  
16 not so much as an amplification of our legal  
17 argument, but just as an illustration of the  
18 implausibility of that at that time. Coming  
19 back to my initial point, however, in the  
20 absence of commerce and any injury to commerce,  
21 there can be no disparagement.

22 Thank you.

23 THE COURT: Thank you. Okay. We will  
24 turn the floor over to Mr. Parrish.

25 MR. PARRISH: Thank you, Your Honor.

1 I think I can address this fairly easily, first  
2 starting with the question of law, which is  
3 that they have no response to the *Menefee* case,  
4 and I would urge you to read that case. In  
5 that case, they do not talk about commercial  
6 disparagement being limited  
7 to --

8 THE COURT: This was the radio  
9 broadcaster case?

10 MR. PARRISH: Yes, Your Honor. Yes,  
11 Your Honor, and this is a Pennsylvania Supreme  
12 Court decision, and what they say very clearly  
13 is that he has a claim because he is a radio  
14 personality.

15 THE COURT: Although do I recall that  
16 the matter was in litigation at the time the  
17 gentleman passed?

18 MR. PARRISH: Well, Your Honor, that  
19 is true. I do not think that takes away from  
20 the fact that --

21 THE COURT: That was my next question.  
22 How does that affect it?

23 MR. PARRISH: Well, so there are two  
24 ways that it could affect it, Your Honor. The  
25 one, does it say anything about -- how --



1 interpretation of when you can bring a  
2 commercial disparagement claim, and the answer  
3 to that, in the sense of a commercialized  
4 interest as opposed to a mere defamation claim  
5 -- the answer to that is clearly no. So, on my  
6 opposing counsel's first argument, *Menefee*  
7 disposes of that. Your Honor's question really  
8 goes to their third document, which is whether  
9 or not Coach Paterno's death changes anything,  
10 and why I would say that, Your Honor, is if it  
11 did, then the case would have been mooted by  
12 his death, and it is significant here that they  
13 do not cite any cases in the commercial  
14 disparagement context as opposed to the  
15 defamation context that say -- says that death  
16 basically extinguishes the action, and the  
17 reason is -- is because commercial  
18 disparagement is a different type of injury.

19 THE COURT: Well, it does not relate  
20 in origin -- at least the case law I looked at  
21 does not relate to really goods and services,  
22 we are talking about, as opposed to harm to  
23 reputation.

24 MR. PARRISH: Well, Your Honor, and,  
25 like Bob Menefee in the *Menefee* case, who was

1 providing his personality as a radio  
2 personality -- and, Your Honor, I will admit to  
3 you we could easily plead more on this case.  
4 Obviously, the parties have no problems about  
5 proliferating paper, but --

6 THE COURT: No, that is absolutely  
7 true.

8 (Laughter.)

9 MR. PARRISH: But, Your Honor, one  
10 would have thought that if there was one thing  
11 that this Court, and even for myself, who is  
12 not from this area, would know, is that if  
13 anybody's reputation has been commercialized,  
14 it was Coach Paterno's, and the fact that they  
15 would like to pretend that it was not really  
16 misses out on sort of a basic understanding,  
17 and if you wanted me to go --

18 THE COURT: Is that marketable in some  
19 way? I mean, your point that everyone in  
20 Pennsylvania and probably far beyond knows who  
21 Joe Paterno was, and probably prior to the  
22 events complained of in a generally very  
23 positive manner --

24 MR. PARRISH: Your Honor --

25 THE COURT: Unfortunately, Coach

1 Paterno died in early 2012, as I recall,  
2 January of 2012, so what commercial interest  
3 remains, I guess is my question?

4 MR. PARRISH: Your Honor, let me put  
5 it this way to you: It is not only what is  
6 commercialized as a matter of fact. It  
7 continues to be even after his death, so let me  
8 just give you some examples. I realize these  
9 are not in the complaint.

10 THE COURT: Go ahead.

11 MR. PARRISH: But 1979, it started off  
12 with Dino's Pizza, with ads on television based  
13 on his personality, 1986, AT&T, 1987, American  
14 Express, 1992 --

15 THE COURT: Slower.

16 MR. PARRISH: I am sorry. 1995,  
17 Burger King, 1998, Aqua Penn, 2000 and 2012,  
18 Bank of America, 1979 to 2011, Nike. Now, even  
19 after his death, Nike had approached the estate  
20 about putting together a Nike coaching shoe  
21 that would have been a way of raising funds.  
22 Now, the Paternos and the business that they  
23 set up, the official businesses, have always  
24 taken the money that they have earned from  
25 these things, which were all commercial

1 enterprises, and donated them to charity, but  
2 the point is --

3 THE COURT: Primarily Penn State; is  
4 that correct?

5 MR. PARRISH: Primarily to Penn State,  
6 estimated to be a billion. If you think about  
7 the library that they funded, that was  
8 something along the lines of 12 to 14 million.  
9 The point is, Your Honor -- is that Coach  
10 Paterno's personality, like the radio  
11 personality, has been very commercialized. I  
12 will give you just an example, again outside  
13 the record, Your Honor, but certainly no  
14 surprise. If you think about the Florida State  
15 University program, Bobby Bowden there just  
16 entered a two-year licensing agreement with the  
17 university for his personality, to use his name  
18 to promote goods and services and things like  
19 that. So, Your Honor, it would be -- if you  
20 think that we need to go through and plead  
21 those things, we can do it, but the point here  
22 is, Your Honor, that anybody who knows who  
23 Coach Paterno was recognizes that there was a  
24 personality here, and the idea that the law  
25 precludes this is wrong, and we are just

1 talking about reasonable inferences, and,  
2 again, we should win on that.

3           Your Honor, one thing that opposing  
4 counsel has also said, is that we have not  
5 pledged sufficiently the pecuniary loss, but,  
6 as Your Honor knows from our brief, there are  
7 exceptions to when you need to do that, and one  
8 of those exceptions is when the statements are  
9 widely disseminated, and that applies here.  
10 Now, in their brief, in their reply brief, they  
11 maybe try to smuggle in the restatement  
12 requirement that it also be an established  
13 business. I do not know if that has actually  
14 been accepted under Pennsylvania law, but it  
15 does not matter.

16           THE COURT: I am trying to remember  
17 the section, 632, maybe, in your statement?

18           MR. PARRISH: Your Honor, I am glad  
19 you remember.

20           (Laughter.)

21           THE COURT: Do not hold me to that,  
22 counsel.

23           MR. PARRISH: Well, it certainly -- it  
24 is the restatement section, and they make the  
25 argument that there needs to be an established

1 business, but, of course, Your Honor, it is not  
2 that Coach Paterno suddenly materializes as a  
3 coach in 2011 and then left us in 2012. I  
4 mean, he has been a well-respected, well-  
5 regarded coach for many, many years.

6           The other thing, Your Honor, is that  
7 statements are libel per se. This, as you know  
8 from -- and I am going to have trouble  
9 pronouncing this -- but it is *Mzamane* case, but  
10 you can think of it as the Oprah Winfrey case.  
11 As you know from there -- is that statements  
12 that are libel per se, and one of those things  
13 is statements that affect your business and  
14 particularly when it relates to things like  
15 being complicit in child abuse. So, if  
16 anything is libel, per se, I think the  
17 statements that were leveled against Coach  
18 Paterno here are.

19           Now, they do make the argument in  
20 their brief that there are a series of cases  
21 that they think suggests that libel per se does  
22 not apply in the commercial disparagement  
23 context, but only in the defamation context.  
24 Your Honor, I do not know why that would be the  
25 case, but if you take a look at their cases,

1 *Pro Golf, Eagle Traffic, SNA*, none of them  
2 specifically addresses this. You know, we have  
3 cases on our side, the *In re: Test* -- I am  
4 sorry -- the *Testing Systems* case from 1996 --  
5 that they characterize this as dicta, but  
6 actually it is not dicta. The Court  
7 specifically dismissed the commercial  
8 disparagement claim, but in the discussion  
9 found that the claimant had not pled libel per  
10 se and, therefore, had not alleged special  
11 damages. So, Your Honor, we think that the  
12 libel per se exception truly does apply, which  
13 is why we do not need to plead it with any sort  
14 of specificity. And, again, it is a little bit  
15 of the NCAA's own making here, which is that,  
16 before you level these extraordinary type of  
17 accusations, you should be careful about what  
18 you do, and the case law that recognizes that,  
19 in certain circumstances, these type of  
20 extraordinary circumstances, these sort of  
21 accusations, leads to a type of disparagement  
22 where you do not need to plead it with  
23 specificity.

24           And, Your Honor, all I would close  
25 with is to say on the side of the other claims

1 and the rights after death, I do not think they  
2 have any cases to support them. It is true, in  
3 the defamation context, but why it would be  
4 true in the commercial disparagement context  
5 makes no sense, because the estate here has the  
6 ability to continue to use Coach Paterno's  
7 reputation, which has been commercialized, as a  
8 way of licensing, engaging in continuing  
9 charitable fundraising that they do, continuing  
10 with the commercialized business that they do,  
11 continuing to accept offers by folks like Nike  
12 to produce shoes, continue to offer to help the  
13 university and others raise funds. None of  
14 that has gone away, and that is why we have the  
15 permission statute.

16 Thank you, Judge.

17 THE COURT: Thank you.

18 MR. JOHNSON: Your Honor, it is quite  
19 remarkable.

20 THE COURT: Go right ahead.

21 MR. JOHNSON: So the question is what  
22 goods and services are being entered into  
23 commerce by the estate of Coach Paterno after  
24 his death? And counsel's examples are the ways  
25 that Coach Paterno marketed his reputation



1 through advertisements and endorsements while  
2 he was alive. So the question remains, what  
3 goods and services, other than intuition -- the  
4 request here is please intuit that this must  
5 have been bad for him, but in the law of  
6 commercial disparagement, intuition is the one  
7 thing that is not permitted. That is why  
8 damages have to be pled.

9 THE COURT: Can they plead -- if they  
10 are permitted to amend, can they plead  
11 specifics here that will get around this?

12 MR. JOHNSON: If they have them, I  
13 believe they could. I think the right answer  
14 may be to say that this is not sufficient for  
15 the goods and services of that they do contend  
16 are in commerce at the time of the consent  
17 decree, which is the first relevant time in  
18 history, identify those with specificity and  
19 identify the pecuniary loss with specificity,  
20 and you are at least on the path to a  
21 commercial disparagement claim, but, in the  
22 absence of either of those, you are just  
23 talking about defamation, and that expired with  
24 Coach Paterno in January of 2012.

25 Your Honor, if we could, let's talk

1 now about the defamation claims of Mr. Clemens  
2 and the former assistant coaches, and let's  
3 begin with, I think, what is not contested  
4 here. I believe it is the case that the  
5 plaintiffs concede that Mr. Clemens and the  
6 former assistant coaches are at least limited-  
7 purpose public figures and that, therefore, in  
8 order to stake a claim for defamation, they  
9 must allege with some specificity actual  
10 malice; that is to say, that the statements  
11 made by the NCAA about them were made with  
12 actual malice. There are two problems. The  
13 NCAA did not make any statements about them and  
14 there is no reasonable basis to believe that  
15 any statement they made was made with actual  
16 malice. So I think it is -- we are back to  
17 something we talked about briefly when we were  
18 talking about the faculty members' claims and  
19 the former players' claims, and that is  
20 statements made about groups of people have to  
21 be reasonably identifiable to an individual  
22 before that individual can bring a claim, and  
23 with respect to the others, there were no  
24 statements about --

25 THE COURT: And, again, I do not think

1 anyone is disputing that point of law.

2 MR. JOHNSON: I do think here that the  
3 reason this can be analyzed a little more  
4 closely is a statement was made about the board  
5 of trustees at the time that Mr. Clemens was a  
6 member of the board of trustees. Mr. Clemens  
7 is nowhere mentioned, not in the consent  
8 decree, not in the Freeh report --

9 THE COURT: Not by name.

10 MR. JOHNSON: Not by name. In fact,  
11 the only person who has ever mentioned Mr.  
12 Clemens' name is Mr. Clemens, so the idea is  
13 the world still knows you are talking about me  
14 when you say that the board failed to do a  
15 specific thing in 2001 and in 1998. A  
16 reasonable listener of that would be saying  
17 what we said is Mr. Clemens failed in his duty.  
18 How would one reasonably reach that conclusion  
19 about a criticism of a 32-member board of  
20 directors as a whole? What is it that this  
21 says about Mr. Clemens? Because simple math  
22 tells us that the board can do or not do  
23 anything that 17 of those 32 members choose,  
24 and so there is simply no reason and no  
25 rational basis for a person hearing a criticism

1 about the board to say, "Oh, yeah, I know they  
2 are talking about Mr. Clemens. He must have  
3 failed in some way." That requires an enormous  
4 leap of faith, and it is important --

5 THE COURT: Well, does it require that  
6 people have a broad-based knowledge of the  
7 board or just that people say, "Wait a minute.  
8 This guy was on the board during those critical  
9 years"?

10 MR. JOHNSON: So I think there are two  
11 points here. One of them is, Your Honor, would  
12 anybody even know that it would be widely known  
13 that Mr. Clemens was on this 32-member board?  
14 And just get the map a little closer to the  
15 right, over this period of time, the total  
16 number of people who served on the board was  
17 much larger than 32, because it is 32 at any  
18 given time, but the board changes, so the total  
19 number of people who would have been involved  
20 would have been more than that. One question  
21 would be is there any reason to think that  
22 people know that he is on the board? Now, it  
23 is knowable, but no reason to think that people  
24 are walking around town talking about all 32  
25 members of the board of directors, but I do not

1 think you have to get to that, because I think,  
2 when the group is that large and that group is  
3 capable of acting by a majority over the  
4 objections of the minority, you are back closer  
5 to my Philadelphia Eagles analogy from earlier,  
6 when I say they do not have any talent, that no  
7 one person could say that that's about me,  
8 because I have described the characteristics of  
9 the group, which may or may not have talent,  
10 but it does not tell you about the talent of  
11 any individual player, so such is the case with  
12 respect to the description of the board of  
13 trustees. The consent decree, again echoing  
14 the Freeh report, describes what it believes to  
15 be the failures of the group, but it tells you  
16 nothing at all about the actions or inactions  
17 of any one individual, and, in the absence of  
18 being able to point to something that says a  
19 reasonable person would think you are talking  
20 about me, me, not the group that I am in, but  
21 about me, then a claim for disparagement must  
22 fail. This is just a repetition of something I  
23 said earlier. Now, if we could move to the  
24 players or to the --

25 THE COURT: Go ahead.

1 MR. JOHNSON: -- or to the former  
2 assistant coaches of Penn State, that word  
3 appears one time, "coaches," and it is part of  
4 a sentence that refers to a much larger group  
5 of people, coaches, administrators, and  
6 university officials, members of the coaching  
7 staff. That group, taken together, is a very  
8 large group, and neither Mr. Kenney nor Coach  
9 Jay Paterno is mentioned there at all.

10 THE COURT: Well, in the knowledge of  
11 the general public, when we are talking  
12 coaches, the coaches at Penn State, is that  
13 Paterno name going to be out there in the  
14 public eye so that, when someone says coaches,  
15 you then think Paterno or Kenney, as opposed to  
16 the other group?

17 MR. JOHNSON: Well, I do not really  
18 know whether the public at large could  
19 distinguish between Joe Paterno and Jay  
20 Paterno. My suspicion is that they can and do,  
21 but it is more intuition than anything else.  
22 But what I was going to say, Your Honor, is you  
23 are not left to guess about this, because  
24 remember that this is an adoption of findings  
25 of the Freeh report. The university's agent

1 said this. And so, if you want to know who it  
2 refers to, all you have to do is read the Freeh  
3 report, because in the Freeh report it  
4 identifies who the coaches and administrators  
5 and other involved officials were, and it does  
6 not mention Coach Jay Paterno or Coach Kenney,  
7 so the public would reasonably understand  
8 because the consent decree says so, that we are  
9 getting this information from the Freeh report,  
10 and if the question is who does it refer to,  
11 the Freeh report gives you the answer to that,  
12 and it gives you the answer to that with  
13 respect to these two individuals by not  
14 mentioning them. They are not who Judge Freeh  
15 was talking about.

16           With respect to Mr. Clemens, Your  
17 Honor, I do think -- and I have said it more  
18 than once, so I do not want to be too  
19 repetitive about it -- but it is important that  
20 this statement emanates from the agent of the  
21 board. So, for example, if I said about  
22 myself, under agency principles, the agent of  
23 the board is the board. I mean, that -- they  
24 might have a quarrel with Judge Freeh about  
25 that, but the law is clear. When Judge Freeh

1 spoke, the board spoke, because he was their  
2 agent. If I say about myself, "I am ugly," and  
3 my colleague here repeats it and says, "Kip  
4 says he's ugly," I cannot sue her. She just  
5 said what I said. It cannot possibly be  
6 defamatory. So, with respect to the trustees,  
7 that is the position the law puts them in.

8 Now, Your Honor, I began this piece of  
9 it by saying I think it is uncontested that the  
10 former coaches and Mr. Clemens are at least  
11 limited-purpose public figures. It makes no  
12 difference for this analysis whether they are  
13 generally public figures or just limited-  
14 purpose public figures, so that --

15 THE COURT: So they are public figures  
16 even though the public may not identify them as  
17 such?

18 MR. JOHNSON: Well, that is important  
19 to the plaintiffs, and, of course, I think that  
20 is, in fact, the law, however, with respect to  
21 the limited-purpose public figure. You do not  
22 have to be widely known. You just get  
23 associated with a particular event, and that is  
24 -- you were a public figure for the limited  
25 purpose of that event. Coming back to my



1 Philadelphia Eagles example, I think the law  
2 would be clear that every member of a  
3 professional sports team is probably a public  
4 figure. I certainly cannot name them all.  
5 There may be some who can, but it would not be  
6 me. I do not think whether or not everyone  
7 knows you is really the gravamen of this  
8 designation. Here, however, I think we find a  
9 sleight-of-hand in the complaint, because  
10 Pennsylvania is a fact-pleading state. You  
11 cannot simply allege legal conclusions and say  
12 I have met my pleading requirement, so they  
13 would have to allege facts sufficient to  
14 indicate that the NCAA either knew or acted  
15 with reckless disregard to the truth of the  
16 conclusions of the Freeh report, either knew  
17 they were wrong or acted with reckless  
18 disregard with respect to the truth of those  
19 conclusions.

20 Now, let's take the obvious. If they  
21 are right, then --

22 THE COURT: Again, I do not know that  
23 those counts are disputed, either.

24 MR. JOHNSON: Right. Exactly right.  
25 So what are the indications in the complaint

1 that would support a conclusion of actual  
2 malice? And here is where the sleight-of-hand  
3 is. They say, well, they knew that Judge Freeh  
4 was not conducting this investigation pursuant  
5 to the NCAA rules. You have got a whole  
6 different set of rules. You could conduct your  
7 own investigation. But, of course, the  
8 conclusions relied upon in the Freeh report are  
9 the factual conclusions, who did what. That is  
10 just fact investigation. Those can be  
11 investigated under NCAA rules or under the  
12 criminal rules or anybody else. Is there a  
13 reason to believe that this fact investigation  
14 -- did they know or recklessly disregard the  
15 idea that this fact investigation --

16 THE COURT: Did they -- did they know  
17 as alleged that the Freeh report was  
18 conclusory? Did they know that certain key  
19 people were allegedly not interviewed? I mean,  
20 aren't those factors that have to be considered  
21 in determining that issue?

22 MR. JOHNSON: Well, I actually think  
23 not in the way that the plaintiffs suggest,  
24 Your Honor. We are entitled to rely on the  
25 following facts -- remember, this is an

1 agreement with Penn State University. This is  
2 how this comes to us.

3 THE COURT: Right.

4 MR. JOHNSON: Penn State hired Judge  
5 Freeh. In hiring Judge Freeh, they endorsed  
6 his reliability, credibility, integrity, and  
7 experience.

8 THE COURT: But did they endorse his  
9 ultimate conclusion?

10 MR. JOHNSON: And they endorsed his  
11 ultimate conclusion, not just at the time, but  
12 in the consent decree. They say in the consent  
13 decree -- we do not have to speculate about  
14 what they were saying. In the document itself,  
15 it says, "We accept these conclusions." Now,  
16 Judge Freeh had also been the former Director  
17 of the United States Federal Bureau of  
18 Investigation --

19 THE COURT: Yes.

20 MR. JOHNSON: -- and had been a  
21 federal judge, other -- what people might think  
22 is some indicia of integrity and reliability.  
23 He conducted an extensive evaluation. I think  
24 the consent decree says -- there is probably  
25 more than this -- interviewed almost 450

1 people, looked at millions of documents.

2 THE COURT: 3.5 million e-mails.

3 MR. JOHNSON: Right. So the law does  
4 not impose on the NCAA a burden to cross-  
5 examine Judge Freeh. The burden is actually in  
6 the opposite direction. Based on the facts  
7 known to us, was it reckless, not just  
8 negligent, but reckless to assume that the  
9 allegations of the Freeh report were true? Did  
10 we know they were false and were we recklessly  
11 assuming they were true? The external indicia  
12 of reliability here are overwhelming.

13 Now, as is the case anytime somebody  
14 writes a report, it is always the case somebody  
15 commissions a different report and they say the  
16 first report was no good, and the plaintiffs  
17 would have you believe that that is significant  
18 somehow, that somebody else is willing to  
19 criticize Judge Freeh's report. Okay. Great.  
20 Awesome. That was not true on July 23, 2012.  
21 The only evidence out there was incredibly  
22 reliable. It was from Judge Freeh, and our  
23 counterparty commissioned it and accepted it,  
24 so no reasonable person, from the allegations  
25 of the complaint, can conclude that they have

1   pled actual malice with sufficient specificity.  
2   That's all I have on these.

3           THE COURT:   Okay.  I think Mr. Parrish  
4   wants the floor to talk about these issues as  
5   well.

6           MR. PARRISH:  Thank you, Your Honor.  
7   What I would like to do, because I think this  
8   will help the arguments, I would like to  
9   respond to three points that have been made,  
10  starting with this idea that Freeh was just an  
11  agent and this is therefore his opinion and not  
12  a fact, that we move to the malice point, and  
13  then lastly, Your Honor, I would like to move  
14  to the identification, if I might.  Let's start  
15  off with the opinion point, because, Your  
16  Honor, I really do not understand how they can  
17  make this argument.  It is no doubt that I have  
18  had people in my life call me ugly.  If Mr.  
19  Johnson --

20           THE COURT:  A little louder, please,  
21  sir.

22           MR. PARRISH:  If Mr. Johnson notes  
23  that I am ugly, fine.  He may have a point.  If  
24  he then notes I am ugly and sanctions me the  
25  way that the NCAA sanctioned Penn State, he has

1 done something else that goes beyond sanction  
2 based on opinion. He has made those facts his  
3 own facts, which is exactly what the NCAA did  
4 here. Nobody -- nobody can reasonably suggest  
5 that the sanctions that were imposed by this  
6 consent decree in a legally-binding document,  
7 whether Penn State itself waived its ability to  
8 further change these things, are just opinions,  
9 like an editorial. They are the factual  
10 findings that were the basis for the NCAA's  
11 action. That is not an opinion, and, Your  
12 Honor, more broadly, we are not here again  
13 complaining about what the Freeh report was  
14 saying. We are complaining about what the NCAA  
15 did, which was to adopt those findings and --

16 THE COURT: Well, you are indicating  
17 it was in some manner unreasonable for them to  
18 do so.

19 MR. PARRISH: It was unreasonable,  
20 unlawful, and whatever other adjectives you  
21 could add, but that is right, Your Honor. They  
22 are not permitted to do that, but that does not  
23 make it an editorial that is merely expressing  
24 opinions. It is their conclusions of fact.  
25 Now, again, Your Honor, I would ask you to look

1 at the *Oprah Winfrey* case, because what happens  
2 in there is exactly this issue that comes up,  
3 and the question there is whether Oprah  
4 Winfrey's statements were just mere opinions  
5 because she was expressing what others had  
6 said, and to the extent that you could even  
7 look at these opinions, what the court says in  
8 that case is well-known. She is in a position  
9 of authority; that there must be some  
10 reasonable implication here that there are  
11 undisclosed facts that allows her to be in a  
12 superior position of knowledge, which is  
13 exactly what you would think, which is that you  
14 have a report that is submitted to the  
15 university, that has lots of flaws in it, that  
16 are not --

17 THE COURT: But the university  
18 seemingly accepts that.

19 MR. PARRISH: Well, Your Honor, as I  
20 said before, they did not, although -- at least  
21 not the board. But let me say this more  
22 specifically, is that it does not matter,  
23 because the question for the NCAA, which gets  
24 to the second point about malice, is not  
25 whether somebody else accepted it one way or

1 the other. In fact, Your Honor, I would ask  
2 that you look to their reply brief, where they  
3 set this forth on page 34 and they set forth a  
4 test, which is was there serious doubts  
5 entertained because, for example, that they  
6 ignored internal inconsistencies or then-  
7 available, contradictory, reliable information.  
8 Now, Mr. Johnson said we did not plead anything  
9 in our complaint, but, Your Honor, as you know,  
10 if you look at our complaint, you can see there  
11 is a lot of contradictory information that is  
12 ignored, most fundamentally that this is the  
13 NCAA that is supposed to decide whether or not  
14 their rules were complied with as a basis for  
15 imposing sanctions as we set forth in the  
16 complaint. None of those procedures that are  
17 required to give due process and fairness to  
18 the plaintiffs are followed, and that --

19 THE COURT: And I -- and again, there  
20 is certainly no question that the seemingly-  
21 mandated procedures were not followed, and that  
22 has been pled and I would suggest, as a matter  
23 of fact, Mr. Johnson is not going to contest  
24 that.

25 MR. PARRISH: Well, Your Honor, he



1 also should not contest that the NCAA knew that  
2 when they imposed a consent decree and knew  
3 that they had not been complied with, so they  
4 knew that the Freeh report on its face could  
5 not comply with the indicia of reliability that  
6 is required under the rules before you take the  
7 steps of publicizing the statements and  
8 violations. Again, this gets -- I think the  
9 malice points into the opinion point, that they  
10 work together.

11 THE COURT: So you are indicating that  
12 the Freeh report comes out, the NCAA accepts  
13 it, that malice arose because they did not do  
14 an independent investigation or because they  
15 accepted a report that seemingly Penn State  
16 accepted?

17 MR. PARRISH: Well, Your Honor, what I  
18 would say is that the report came out, NCAA  
19 made a choice at that time to brand it with  
20 their imprimatur and say that this is valid and  
21 a basis for sanctions, and when they did that,  
22 they knew that it was not the basis for  
23 sanctions because it did not have any of the  
24 steps that are required under the rules to  
25 allow them to take that extraordinary measure,

1 and that is why they knew that the Freeh report  
2 itself could not be a basis for this extra  
3 "Ooomph" it puts in their opinion. It was not  
4 like an editorial. They were using it as a  
5 basis for their exercise of authority that they  
6 had been granted, which is why my point is --  
7 is the argument about whether this is a fact or  
8 opinion and whether this -- whether the alleged  
9 malice, show of malice, are really two sides of  
10 the same coin. And, Your Honor, even beyond  
11 the fact that there was no compliance with  
12 their actual rules, there were lots of other  
13 flags that put them on notice that they were  
14 ignoring internal inconsistencies and then-  
15 available contradictory evidence. What was  
16 that? Well, the Freeh report did not interview  
17 key witnesses. They did not interview Mr.  
18 Sandusky. They did not interview Coach  
19 Paterno. They did not interview a lot of  
20 people that were critical to the conclusion  
21 that the NCAA reached. There were confidential  
22 sources. Now, that is prohibited under the  
23 rules. You cannot rely on confidential sources  
24 in NCAA investigations, but that is what the  
25 Freeh report did throughout. It relied on

1 sources with personal knowledge based on  
2 hearsay. One of the key pieces of information  
3 that the Freeh report relies on is an e-mail  
4 that is completely hearsay, not the basis for  
5 imposing sanctions under the NCAA rules. They  
6 failed to address lots of contradictory  
7 evidence that showed that they are reaching  
8 conclusions, and their main conclusions that  
9 were the basis for the sanctions, those  
10 conclusions were all speculative and not really  
11 based on hard evidence. They were e-mail  
12 strings. And the point is not that you need to  
13 adjudicate that at this point. In fact, I  
14 think both me and my counsel have moved past  
15 the pleading stage into questions of proof, and  
16 my point, Your Honor, is, obviously, you do not  
17 need to get there, but you can let us get  
18 there.

19           Then -- so I think, Your Honor, that  
20 their first few objections really fall, and so  
21 now we are back to at least the question of  
22 identification. And, Your Honor, again, as  
23 with the *Menefee* cases on our side from the  
24 Pennsylvania Supreme Court on disparagement,  
25 the Pennsylvania Supreme Court is also on our

1 side when comes to defamation. And, Your  
2 Honor, I would ask that you look at the *Farrell*  
3 cases. It is 399 Pa. 102, and this is a 1980  
4 decision. Now, you were asking counsel whether  
5 they needed to actually be named. Obviously,  
6 they do not need to be named. They just need  
7 to be identified. I mean, the question is --  
8 is does there have to be some pre-existing  
9 knowledge, and I may be hearing them  
10 incorrectly, but I thought opposing counsel  
11 suggested that nobody knew who these people  
12 were. But, of course, Your Honor that is not  
13 the test. It is very clear that the test is,  
14 in this *Farrell* case here, they may not have  
15 known the identify of all of the commissioners,  
16 but were impelled by the scandalous nature of  
17 the charges to make inquiry and find out who  
18 they were, which would almost inevitably lead  
19 to connecting the plaintiffs' names with the  
20 alleged corruption in the office. And, Your  
21 Honor, that is our point here, precisely, which  
22 is that you cannot avoid a defamation claim by  
23 just being clever about how you word it.

24 Now, let's take a look at the two  
25 groups that we have left, and I promised Your

1 Honor before that these would be easy. I still  
2 think they are. So, first of all, we have the  
3 board of trustee members who were there in 1998  
4 and 2001. A couple of points, Your Honor --  
5 one is that all of those members are  
6 identifiable, and, second, there is a much  
7 smaller group than even, I believe, the 32  
8 members that have been thrown out who are there  
9 both times. It is only maybe six or seven.  
10 Mr. Clemens was one of those. It would be very  
11 easy indeed to find out who was on that board,  
12 and when you read the complaint and take  
13 inference in our favor, for a reasonably  
14 objective person to look at that and say this  
15 was one of the gentlemen who was on the board  
16 of trustees that failed on his oversight  
17 responsibilities as put forth in the decree and  
18 therefore allowed for corruption of -- was  
19 complicit in the child abuse that occurred.  
20 There is no other reasonable --

21 THE COURT: Indicating that the public  
22 is going to hear the general statement, which  
23 did not include Mr. Clemens' name, and is going  
24 to explore that a bit and say, "Well, Mr.  
25 Clemens was on during all these time periods?"

1           MR. PARRISH: Exactly, Your Honor, and  
2 I would submit respectfully to the Court that,  
3 given the seriousness of these accusations that  
4 occurred, given the seriousness of this to this  
5 community, there is no doubt that computers  
6 across Pennsylvania were looking up who were  
7 these people that were complicit in this abuse  
8 that the NCAA has alleged as a result of my  
9 clients' conduct. Your Honor, this same sort  
10 of analysis also works for the coaches,  
11 because, again, the consent decree very  
12 specifically says that the reason for imposing  
13 sanctions -- they say specifically that there  
14 were some coaches who ignored the red flags of  
15 child abuse. Now, it would not be difficult --  
16 the coaching staff, as co-counsel said, over a  
17 period of years, it is probably 20. I mean,  
18 each year it is limited to 12, although someone  
19 may correct me at some point, but it is an  
20 identifiable number. These are clearly coaches  
21 that were well-recognized, and it would not be  
22 unreasonable to assume that a reasonable person  
23 looking at the complaint, taking inferences in  
24 our favor, would construe that as if these were  
25 the people --

1 THE COURT: You are indicating if they  
2 were not known, they could easily be  
3 ascertained?

4 MR. PARRISH: Easily ascertained, and,  
5 Your Honor, again, like the *Menefee* case and  
6 the *Farrell* case also on this, and I really do  
7 not think they have an answer to that.

8 THE COURT: I think I understand your  
9 argument. Thank you.

10 MR. PARRISH: Your Honor, thank you  
11 for your time.

12 THE COURT: Thank you.

13 MR. JOHNSON: Just four, I promise,  
14 very brief observations. My colleague argued  
15 that Mr. Clemens is one of a very small number  
16 of people who was on the board in both 1998 and  
17 2001. I am scratching my head about the  
18 significance of that. There is no construction  
19 of the statement that says and we are proving  
20 that for the people who were here both times.  
21 The board --

22 THE COURT: Although wouldn't that be  
23 a reasonable reading?

24 MR. JOHNSON: No, not at all.

25 THE COURT: Not at all?

1           MR. JOHNSON: No. The board was 32  
2 people each time, and there will be some  
3 overlap, as there is naturally overlap. Why  
4 would anybody, hearing the statement that two  
5 boards of directors at two points in time  
6 failed to do something, and identify that  
7 statement as particularly relating to the  
8 people who happen to be there both times?

9           THE COURT: Would those statements put  
10 the public on notice where they may make  
11 inquiry about that?

12           MR. JOHNSON: I have no idea about  
13 whether that would or would not. I just do not  
14 think it has any legal relevance, and this  
15 actually goes to another of the points that I  
16 was trying to make.

17           THE COURT: Well, how about the  
18 *Farrell* case? Was there not some discussion of  
19 that type of thinking in the *Farrell* case?

20           MR. JOHNSON: So, yeah, three things  
21 were important in *Farrell*. *Farrell* is the --  
22 you may remember it -- applied to a town  
23 counsel comprising 13 members, and so one thing  
24 that was important is that it was a relatively  
25 small group, roughly a third of the group we



1 are talking about here. Another thing that was  
2 important in *Farrell* is, because it was a small  
3 town, the Court did say it is likely that every  
4 single one of these town councilmembers was  
5 known. I do not know whether or not that would  
6 be true with respect to a 32-member statewide  
7 elected board of trustees.

8 THE COURT: But if they allege that,  
9 doesn't that get them in the door, at least for  
10 this timeframe?

11 MR. JOHNSON: I do not think so, and  
12 because -- and this is my -- let me say one  
13 thing about *Farrell* and then I want to answer  
14 directly that question, Your Honor. Here is  
15 what is really important in *Farrell*: The  
16 defamatory statement alleged in *Farrell* called  
17 them all out. It said the police department  
18 intends to interview every single one of you,  
19 and therefore the statement was construed by  
20 the Court as casting aspersions not on the  
21 group as a whole, but on every single one,  
22 because the police had said they were going to  
23 talk to everyone. So how does one reasonably  
24 identify a particular town councilmember?  
25 Because the published statement said the police

1 are going to interview them about wrongdoing,  
2 hugely different from here.

3 Now, I do think there is an analytical  
4 error. Your Honor, I want to respond to the  
5 question that you have just asked me. A  
6 statement is not identified to someone -- if I  
7 make a statement about a group and it is  
8 somehow possible to look up and see who is on  
9 that group, that does not close the gap between  
10 those two things. I can say terrible things  
11 about a group, and all groups are comprised of  
12 people. It is almost always possible to find  
13 out who was on --

14 THE COURT: And the size of the group  
15 becomes relevant, does it not?

16 MR. JOHNSON: The size of the group  
17 can be relevant, but the analysis is the same,  
18 not did I say something bad about a group of  
19 which you are a member. I am permitted to do  
20 that. The First Amendment allows me to do  
21 that. It has to be that I said something bad  
22 about you and the statement has to be tracked  
23 to you, so the fact that I say something about  
24 a group and it is possible to ascertain who the  
25 members of the group are says nothing at all

1 about whether the statement was about any  
2 individual member of the group, and defamation  
3 is an individual claim, not a group claim.

4 With the Court's permission, Your  
5 Honor, we will move to --

6 THE COURT: Go right ahead.

7 MR. JOHNSON: -- our final series of  
8 claims here. Now, these are the breach-of-  
9 contract claims brought by Coach Paterno's  
10 estate and by Mr. Clemens, and they are  
11 different from the breach-of-contract claims  
12 that we discussed earlier with respect to the  
13 other plaintiffs, because, as I understand the  
14 complaint, both Coach Paterno's estate and Mr.  
15 Clemens allege that they are entitled to third-  
16 party beneficiary rights that are specifically  
17 recognized in the rules because they are  
18 involved individuals.

19 THE COURT: That is what they allege.

20 MR. JOHNSON: Right. Now, Mr.  
21 Clemens' allegation that he is an involved  
22 individual, I think, emanate from the idea that  
23 he is a member of a group that is named, so  
24 just almost as a matter of dictionary meaning,  
25 the fact that the board of trustees was named

1 does not make him an involved individual,  
2 because individual means individual.  
3 Nevertheless, and it may be best to look at  
4 this through the eyes of the Paterno estate's  
5 claims, Coach Paterno is mentioned in two  
6 places in the consent decree, as I recall. He  
7 is identified -- again repeating the  
8 conclusions of Judge Freeh -- he is identified  
9 as one of the individuals, along with others,  
10 who acted inappropriately in connection with  
11 the Sandusky affair, and he is also identified  
12 in the institutional sanction that his -- the  
13 vacation of the university's team wins would  
14 also be reflected in his head coaching record,  
15 and I think, from those two mentions, the  
16 plaintiffs would allege that he is an involved  
17 individual within the meaning of the rules and  
18 therefore entitled to some process under the  
19 rules.

20           Let me say two things. First of all,  
21 he is not an involved individual, and second,  
22 it would not make any difference, and I would  
23 like to address them in exactly that way. The  
24 reason he is not an involved individual goes to  
25 the meaning of an involved individual, and the

1 NCAA is entitled to some deference in its  
2 interpretations of its rules. Now, the  
3 plaintiffs would have you think that an  
4 involved individual means a mentioned  
5 individual or an angry individual or somebody  
6 who does not like what was said about me, and  
7 what I say about that is none of that falls  
8 within the definition of an involved  
9 individual. Now, they may have other rights,  
10 and they seek to assert them here, commercial  
11 disparagement, defamation. The law does  
12 not --

13 THE COURT: An involved individual  
14 under the NCAA agreement?

15 MR. JOHNSON: Under the NCAA, that is  
16 correct.

17 THE COURT: The constitution and  
18 bylaws?

19 MR. JOHNSON: That is correct. That  
20 is correct. So what is the most rational  
21 meaning of that phrase, involved individual?  
22 The most rational meaning is the NCAA's  
23 interpretation of that rule, which ought to be  
24 given deference, but it is also an individual  
25 who is going to be sanctioned. Now, the

1 consent decree -- no one ever talks about this  
2 and there is a lot of argument whether  
3 mentioning him is a form of sanction as opposed  
4 to a form of injury, but no one ever mentions  
5 that the consent decree answers the question.  
6 It says that no individual is being sanctioned  
7 and it specifically reserves the right to  
8 sanction individuals in the future. So, when  
9 we come to court and say it is obvious that  
10 Coach Paterno was being sanctioned, the consent  
11 decree answers that question. No individual is  
12 sanctioned.

13 THE COURT: Well, that is its  
14 conclusion.

15 MR. JOHNSON: Correct.

16 THE COURT: Okay.

17 MR. JOHNSON: Correct. I think it is  
18 also the case that Coach Paterno's estate will  
19 argue that the vacation of wins is a sanction  
20 personal to him.

21 THE COURT: Personal versus  
22 institutional.

23 MR. JOHNSON: Personal versus  
24 institutional, and to state the obvious, Your  
25 Honor, I do not think that Coach Paterno's

1 estate would agree with this -- Coach Paterno  
2 does not own those wins. Those are wins at  
3 Penn State University at a time when he was  
4 employed, an important employee, to be sure.  
5 He was the head coach of the football program,  
6 but, nevertheless, the wins are the team wins  
7 and the team is an institution -- they are not  
8 owned by Coach Paterno or any individual. So  
9 why is he mentioned there? He is mentioned  
10 there because the rule that talks about what  
11 happens when wins are vacated mentions head  
12 coaches, not just Coach Paterno, all head  
13 coaches, and what it says is, if the wins of an  
14 institution are adjusted, then the record of  
15 the head coach will be adjusted in a conforming  
16 way to reflect that adjustment.

17 THE COURT: So, in this instance, we  
18 are following the NCAA procedure.

19 MR. JOHNSON: Exactly -- well, we are  
20 doing something that the NCAA does all the time  
21 without finding the head coach to be an  
22 involved person, and we give you two examples  
23 in our papers, Your Honor. One is North  
24 Carolina and the other is Florida State, Coach  
25 Bowden, where wins of those institutions were

1 vacated, both of their records were adjusted to  
2 reflect those wins, and they had literally no  
3 involvement in the underlying violation, and  
4 what this illustrates, Your Honor, is how the  
5 NCAA interprets its rule and whether the  
6 vacation of wins is an individual as opposed to  
7 a team sanction, and whether Coach Bowden, like  
8 Coach Paterno, was an involved individual. So  
9 all of these things demonstrate that the most  
10 reasonable construction of involved individual  
11 is a person who was sanctioned, and our rule  
12 and our practice tell us that Coach -- and the  
13 consent decree itself -- tell us that Coach  
14 Paterno was not individually sanctioned.

15           Now, I was born at night, but it was  
16 not last night. I understand why Coach  
17 Paterno's estate would be unhappy with the  
18 references to Judge Freeh's conclusion in the  
19 consent decree, but his remedy is not found as  
20 a third-party beneficiary and as involved  
21 individual. If he has a remedy, it is found in  
22 the common law, in commercial disparagement,  
23 and we have talked about that and we said why  
24 that is not the case, so it is not as if a  
25 person who is defamed or goods and services



1 that are disparaged can do nothing about it.  
2 It is just that that is the path they have to  
3 follow because they were not sanctioned by the  
4 NCAA.

5           So I said I would say two things, but  
6 the first thing I said I would say is that he  
7 is not an involved individual within the  
8 meaning of our rules. I am not going to dwell  
9 much on Mr. Clemens, because it stands to  
10 reason that, if Coach Paterno was not an  
11 involved individual, Mr. Clemens could not have  
12 been for the reasons that we have discussed.

13           THE COURT: And I understand your  
14 position on that.

15           MR. JOHNSON: The second point, Your  
16 Honor, but I think it is critically important,  
17 is it would not make any difference if they are  
18 involved individuals. Apparently, the  
19 plaintiffs take the following view: That I am  
20 an involved individual and that gives me the  
21 right to prevent Penn State from resolving this  
22 case; that they cannot do what they have a  
23 right to do because I am involved, and that  
24 would take the principle of third-party  
25 beneficiary and flip it on its head. It would

1 make the third-party beneficiary more important  
2 than the contracting parties, so whether or not  
3 Coach Paterno is an involved individual, the  
4 remedy of seeking to invalidate the consent  
5 decree, which does not involve Coach Paterno --

6 THE COURT: Whether he is involved  
7 under NCAA rules or not.

8 MR. JOHNSON: Whether he is involved  
9 under NCAA rules or not, the remedy that they  
10 seek is not available, because that just puts  
11 the cart right in front of the horse and says  
12 Coach Paterno or Coach Paterno's estate or Mr.  
13 Clemens is now in charge of the university. We  
14 can now decide whether or not the university  
15 can enter into a consent decree, and to simply  
16 say it is to kind of illustrate how silly that  
17 would be under the circumstances. Let me give  
18 you an example, Your Honor. I have tried to  
19 think of one that takes us way out of Penn  
20 State and way out of football and as far away  
21 as we can be. Let's imagine that the head  
22 coach of a Division I basketball program on the  
23 West Coast paid a student-athlete \$50,000 to  
24 attend the university. The student-athlete  
25 admits it. We have it on tape. The head coach

1 denies it. Can the university settle that or  
2 does it have to go through and contest that?  
3 It must be the case that -- if the head coach  
4 is going to be sanctioned, he may or may not  
5 have rights as an involved individual, but it  
6 must be the case that the university involved  
7 in the situation can make an intelligent and  
8 informed --

9 THE COURT: Under the NCAA rules.

10 MR. JOHNSON: Yes, exactly. Can  
11 they --

12 THE COURT: As they are now being  
13 applied.

14 MR. JOHNSON: Well, yes is the answer,  
15 Your Honor, but I want to come back to  
16 something you said a moment ago, because I  
17 think it is critically important. I think, as  
18 was correctly said any number of times today,  
19 neither the NCAA nor Penn State is arguing that  
20 its traditional enforcement procedure was  
21 followed in this case. Nobody says that. In  
22 fact, the consent decree itself acknowledges --

23 THE COURT: Yes, it does.

24 MR. JOHNSON: -- that that is  
25 unnecessary under these circumstances. So the

1 question becomes, can the organization and a  
2 member agree? Or, stated differently, can Penn  
3 State waive its rights to have that procedure  
4 followed? Now, I know the plaintiffs think  
5 these procedures are real important and just  
6 have to be followed all the time even if the  
7 parties to the agreement do not want to follow  
8 them. Let me come back to an example from  
9 earlier today.

10 THE COURT: Well, I think they are  
11 alleging that Penn State was basically given  
12 little choice in the matter, I think is what  
13 they have alleged.

14 MR. JOHNSON: And we are right back at  
15 indispensable party in that regard if that is  
16 the case.

17 THE COURT: Yes, we are.

18 MR. JOHNSON: And so I am not going to  
19 repeat that, given the time of day, Your Honor,  
20 but the idea must be that the contracting  
21 parties, the member institutions and the NCAA,  
22 can agree or not agree to follow whatever the  
23 procedures, just as litigants in Your Honor's  
24 court can agree to waive important rights.  
25 They can agree to exercise their rights to

1 certain procedures and they can agree to waive  
2 those rights. That is a right owned by the  
3 university. Coach Paterno and Mr. Clemens  
4 cannot take that right away from the  
5 university, and this is why, when I say whether  
6 or not they were involved individuals and  
7 whether or not there could be any legal  
8 consequences to that, the consequence to that  
9 cannot be that they now run the university.  
10 The consequence to that cannot be that they can  
11 undo the university's decision to resolve this  
12 matter, put it in the rearview mirror, and  
13 return to becoming one of the greatest  
14 institutions of higher learning in the country.

15 Your Honor, that is all I have on this  
16 issue.

17 THE COURT: Thank you.

18 Mr. Loveland.

19 MR. LOVELAND: Thank you, Your Honor.

20 Can I ask that we just leave that up  
21 for a moment?

22 MR. JOHNSON: Sure.

23 MR. LOVELAND: Your Honor, I believe  
24 we are the end of a fairly long morning, but I  
25 think we have actually come --

1           THE COURT:  Actually, we are into the  
2  afternoon now.

3           (Laughter.)

4           MR. LOVELAND:  I think we have finally  
5  come to the issue that, in many ways, is what  
6  this case is about, and that is, do, in fact,  
7  the estate of Mr. Paterno and Mr. Clemens have  
8  rights as involved individuals, given rights as  
9  third-beneficiaries under the NCAA's rules,  
10  regulations, and constitution?  I must say I  
11  find it fascinating that, when the NCAA  
12  believes there is some aspect of the rules and  
13  regulations that help them, they want to clothe  
14  themselves in the rules and regulations, and  
15  when the NCAA says, "Well, that may be what the  
16  rules and regulations say, but we were not  
17  following those rules and regulations," then --

18           THE COURT:  Albeit not following them  
19  with Penn State's consent.

20           MR. LOVELAND:  Well, under the  
21  coercion --

22           THE COURT:  Correct.

23           MR. LOVELAND:  Under the coercion,  
24  Your Honor, of this situation, and, you know,  
25  it is important to go back to the timeline for

1 this and the timeline we have outlined in chart  
2 three, I believe, of the materials we handed  
3 the Court earlier, which is the Freeh report  
4 comes down on July 12. Mr. Emmert announces  
5 the, quote, "acceptance of the report by Penn  
6 State" that day, before most members of the  
7 board or others, as we allege, have had a  
8 chance to even read it. Mr. Emmert of the NCAA  
9 is apparently announcing that Penn State has  
10 accepted it. Then Mr. Emmert and others from  
11 the NCAA, through a series of discussions with  
12 Mr. Erickson and outside counsel of Penn State,  
13 threatening the death penalty, give them a  
14 draft of the consent decree on July 20 or 21,  
15 which is signed by Mr. Erickson on the 23rd and  
16 announced by the NCAA, and, again, with no vote  
17 by the board or otherwise. This was coercion  
18 and a cram-down of the highest order, but what  
19 does that have to do with the issues of breach  
20 of contract? I want to go back to the NCAA's  
21 rules and the NCAA's language, and, Your Honor,  
22 we have the definition of an involved  
23 individual on slide six of the materials we  
24 have handed the Court. It is a fascinating  
25 circular definition. First, there is Section

1 32.1.5 that defines an involved individual.  
2 Involved individuals are former or current  
3 student-athletes or former or current  
4 institutional staff members who have received  
5 notice -- and here is the language -- of  
6 significant involvement in alleged violations  
7 through the notice of allegations.

8           Now, the NCAA actually argues in their  
9 papers -- Mr. Johnson did not repeat it here --  
10 that these individuals are not involved  
11 individuals because they did not get notice.  
12 Well, look at the next provision, 32.6.2,  
13 notice to involved individuals. The  
14 enforcement staff shall notify involved  
15 individuals as defined in Bylaw 32.1.5. There  
16 is only one conceivable logical explanation of  
17 those two provisions, and that is an individual  
18 who is supposedly significantly involved in  
19 alleged violations must receive notice and then  
20 that triggers all sorts of rights. Those  
21 rights are on the next page, Your Honor, page  
22 7. An involved individual has access to all of  
23 the information through a secure website that  
24 the NCAA is to establish. The involved  
25 individual has an ability to not only see the



1 evidence, but to participate in the  
2 proceedings. An involved individual can, in  
3 fact, object to the resolution of matters by  
4 the institution that involve that individual  
5 and participate in that, and Coach Paterno and  
6 Mr. Clemens were denied all of those rights  
7 here. The NCAA said, "We are not going to do  
8 it." And when we sought to appeal, when we  
9 sent a letter appealing, the response we get  
10 back did not say you are not an involved  
11 individual. It said there is no appeal because  
12 we did not follow any of our enforcement  
13 processes. We made it up as we went along, and  
14 you have no rights. And neither Mr. Erickson  
15 on behalf of the university, Mr. Emmert on  
16 behalf of the NCAA, or anyone else was  
17 empowered to waive the rights of the Paterno  
18 estate and waive the rights of Mr. Clemens in  
19 that regard. They simply had no ability to do  
20 that.

21           The NCAA now argues that involved  
22 individuals mean individuals who are  
23 sanctioned, and, number one, that would mean we  
24 do not know until the end of the day, and that  
25 would make no sense whatsoever. You are an

1 involved individual if you are alleged to have  
2 been involved in the actions and the conduct,  
3 not if you are sanctioned. But, number two, if  
4 they wanted to say that in their definition,  
5 they could have said it. They did not say that  
6 in this definition. Those words do not appear  
7 anywhere. And if the NCAA now wants to tell  
8 this Court that it is their position and it is  
9 their practice, entitled to some sort of  
10 deference, that that is how they apply it, then  
11 I would like some discovery to see if that is  
12 the case. I would like to know who they  
13 provided involved individual notices to in the  
14 past and whether all of those individuals were,  
15 in fact, sanctioned. I do not believe that  
16 would be the case. We suggest that the NCAA  
17 makes up its mind on these things before it  
18 starts, rather than to have the process to work  
19 through it. In this case, that is exactly what  
20 they did.

21 Now, let's talk for a moment about  
22 whether there was, in fact, a sanction here.  
23 The consent decree itself does not say there  
24 are no individual sanctions that I can see. It  
25 reserves the right to go back and consider

1 individual sanctions, individual penalties to  
2 be determined, but look at the prior page. It  
3 is page 5 of the consent decree. It is labeled  
4 "Punitive Component, Vacation of Wins Since  
5 1998. The NCAA vacates all wins of the Penn  
6 State football team from 1998 to 2001." Now,  
7 they could have just stopped right there, and  
8 according to the NCAA rules, that would affect  
9 Coach Paterno's records. They did not. Quote,  
10 "The career record of Coach Joe Paterno will  
11 reflect the vacated records." That is a  
12 punitive penalty. Now, since they are not  
13 following their normal rules, I do not think  
14 they can now come to this Court and say, "But  
15 we are protected by our procedure,  
16 19.2.5.6.1(h) -- wow -- and say because there  
17 it says that, when you vacate the wins, the  
18 coach's record is adjusted. Guess what, Your  
19 Honor? That is the precise provision of the  
20 regulations that Mr. Kelly called the Court's  
21 attention to earlier, saying that vacation of  
22 records in a case in which a student-athlete  
23 has competed while ineligible, may be an  
24 appropriate remedy, and then the NCAA may  
25 include one or more of the following, and one

1 or more of the following that it may include is  
2 vacation of the coach's record. It is a  
3 classic example. They are now trying to  
4 protect themselves with a shield of something  
5 that does not apply, according to them, because  
6 no individual student-athlete competed while  
7 ineligible. That has nothing to do with this  
8 case. So what they did here was they said, "We  
9 are not following our rules. We are not  
10 following our regulations." Does it sound like  
11 Coach Paterno is an involved individual? "Head  
12 Football Coach Joseph V. Paterno failed to  
13 protect against a child sexual predator harming  
14 children for over a decade." Then there are  
15 two others, Mr. Spanier, Mr. Schultz -- excuse  
16 me, three others -- Mr. Schultz, Mr. Curley,  
17 and Mr. Paterno. "These men," those four,  
18 "concealed Sandusky's activities from the board  
19 of trustees, the university community, and  
20 authorities. These individuals," that is again  
21 including Coach Paterno, "empowered Sandusky to  
22 attract potential victims to the campus and  
23 provided him unsupervised access to the  
24 university's facilities. This access enabled  
25 Sandusky to attract his victims and these men

1 then concealed that activity for a period of  
2 time."

3 THE COURT: Yet they are not involved.

4 MR. LOVELAND: I am sorry?

5 THE COURT: Yet they are allegedly not  
6 involved.

7 MR. LOVELAND: But they are not  
8 involved. They are not involved? What in the  
9 world could be a more involved individual than  
10 President Spanier, Senior Vice President  
11 Schultz, Assistant Director Curley, and Head  
12 Football Coach Joseph V. Paterno? If the words  
13 have any concept of normal English language,  
14 they are involved individuals. If the NCAA's  
15 own rules apply, they are involved individuals  
16 who were entitled to notice and entitled to a  
17 right to participate. There is no rule that  
18 defines it as someone who is sanctioned, and  
19 the NCAA has not provided there is, but if they  
20 want deference to how they have done this, then  
21 let's find out how they have done it. If they  
22 are asking this Court to provide them deference  
23 to what they do and how they interpret this,  
24 then let's find out. The truth of the matter  
25 is they were acting completely in uncharted

1 waters, with nothing whatsoever to support them  
2 on it.

3 Now, let's go finally to the issue --

4 THE COURT: Well, I do not think there  
5 is any dispute as to the first half of that  
6 statement --

7 MR. LOVELAND: That's correct.

8 THE COURT: -- that they were acting  
9 in uncharted waters. I do not think anyone  
10 disagrees with that.

11 MR. LOVELAND: And so then you go back  
12 to the notion of where does the NCAA's power  
13 derive from -- not how do they use it, not  
14 whether they abused it -- where does it derive  
15 from? It is an institutional -- member  
16 institution formed by a contract between those  
17 member institutions and the NCAA.

18 THE COURT: And, again, I do not think  
19 anyone disagrees with that.

20 MR. LOVELAND: And when you form the  
21 contract, you give certain powers to the NCAA  
22 and you tell them how those powers will be  
23 used, and there is nothing in that constitution  
24 that says, "unless we want to do it some other  
25 way, and then we will make it up as we go."

1           So now let's go to the remedy. As I  
2 said to begin with, his fourth one, is not  
3 entitled to void the consent decree, we could  
4 see on that -- we can see if we are entitled to  
5 do that down the road, but what we do know is  
6 that Penn State has waived the right to  
7 participate. If Penn State wanted to come in  
8 here under the Pennsylvania rules, they could  
9 seek a right to intervene. They have waived  
10 their right to participate in this process.  
11 That is the decision in the *Corman* case. They  
12 are not here. They cannot be brought in, in  
13 that regard, in the sense of enforcing their  
14 rights. They are not an indispensable party.  
15 But there are many other remedies available to  
16 this Court other than voiding the consent  
17 decree, so does it matter? That was the  
18 question. Does it matter? Yes, it matters a  
19 great deal. The first declaration that we seek  
20 in the remedy is a declaration that the rights  
21 of the plaintiffs were violated by the NCAA,  
22 and they clearly were. We are entitled to full  
23 discovery. Why? We are entitled to  
24 information on that, but that is a remedy we  
25 want. There are other remedies that we pray

1 for in this complaint. The Court may decide at  
2 the end of the day it need not void the consent  
3 decree. Penn State has done an admirable,  
4 admirable job of implementing many aspects of  
5 that consent decree already, and everyone is  
6 better for that. But, at the end of the day,  
7 there are many things that are left in there.  
8 This Court, I believe, does have the power to  
9 strike scandalous --

10 THE COURT: But isn't that the central  
11 thing that you are seeking, is to void that  
12 consent decree?

13 MR. LOVELAND: That is a thing we are  
14 seeking, Your Honor, and I believe we are  
15 entitled to it, but the Court may decide that  
16 there are things short of that that are  
17 appropriate and are the better remedy. I do  
18 not know that now. I do know that I believe  
19 this Court has the authority to say that the  
20 statements that the NCAA put in this consent  
21 decree about the board of trustees and about  
22 Mr. Paterno were not supported by the facts,  
23 were not in accordance with NCAA rules and  
24 regulations, did not result from any  
25 investigation conducted by the NCAA in



1 accordance with its rules and regulations; that  
2 their rights as involved individuals were  
3 overlooked, ignored, and abused; that, when  
4 they sought to enforce those rights, they were  
5 turned away at the door by the NCAA. This  
6 Court can decree all of that, and then, if that  
7 is done, we will see what is left of the  
8 consent decree. I think, if Penn State has  
9 done everything that it has already done -- and  
10 these individuals, if we are right, are cleared  
11 of their good name. At the end of the day,  
12 Your Honor, this case comes down to a very  
13 simple matter, which is, is the NCAA entitled  
14 to ignore all of its rules and procedures, make  
15 up a brand-new thing on the fly, deny anyone  
16 the right to participate in it, and then, with  
17 impunity, from the ability of this Court to  
18 review it or anyone else, drag the name of  
19 Coach Paterno and others through the mud and  
20 say, "We are going to put the NCAA's imprimatur  
21 on it and we are going to take the record 409  
22 wins down to a far lower number, but that is  
23 not a personal sanction. That really does not  
24 have anything to do with you personally, Coach  
25 Paterno, despite the fact that we just said

1 that you were the one who facilitated child  
2 abuse and you were the one who enabled Mr.  
3 Sandusky to do this, but it is really not about  
4 you." It makes no sense.

5 THE COURT: Thank you.

6 MR. JOHNSON: I will be as brief as I  
7 can be. Now, my colleague suggests, and we are  
8 coming back to the indispensable party point,  
9 but I think it is good to come back to it,  
10 because it just tell us how important it is in  
11 everything we have talked about today. He  
12 suggests that you could wait until later in  
13 time to sort out whether invalidating, voiding  
14 the consent decree, is an appropriate remedy or  
15 whether Penn State would be indispensable and,  
16 therefore, it is not the appropriate remedy.  
17 Unfortunately, the law does not permit you to  
18 do that, because the Court has to ascertain its  
19 subject matter jurisdiction at this point in  
20 time, not later in time, and so, therefore, if  
21 the relief sought makes Penn State an  
22 indispensable party, it is an insufficient  
23 answer to the Court's subject matter  
24 jurisdiction to say, well, maybe not, maybe  
25 later we will sort that out. The Court does

1 have to resolve that at the front door.

2 THE COURT: It does have -- the issue  
3 has to be resolved.

4 MR. JOHNSON: Yes, it does, Your  
5 Honor. Thank you. My colleague is concerned  
6 about the rules relating to notice, and the  
7 rule says that an involved individual shall be  
8 given notice, and, of course, he argues, as  
9 perhaps we all sometimes do, that Coach Paterno  
10 must be involved because he is mentioned or  
11 because Judge Freeh found that he was involved  
12 in the underlying conduct, and that involved --  
13 if he is involved in anything, he is involved  
14 within the meaning of the NCAA rules. We have  
15 a more reasonable, narrower construction of  
16 that, and when Mr. Kelly says that we asked  
17 that our interpretation be given deference,  
18 actually it is the law that says that our  
19 interpretation is to be given some deference,  
20 but ask yourself the question, who would you  
21 want to notify? Who would you want to notify?  
22 Does it not stand to reason that the person you  
23 would want to notify is the person you were  
24 about to sanction, not mention, not predicate  
25 the sanctions of the university upon, but

1 someone with respect to whom you about to take  
2 some proscriptive action?

3 THE COURT: But wasn't it alleged that  
4 Coach Paterno, among others, was specifically  
5 involved in wrongdoing?

6 MR. JOHNSON: It was found by Judge  
7 Freeh --

8 THE COURT: Yes, it was. Yes, it was.

9 MR. JOHNSON: -- that he was  
10 specifically involved in wrongdoing, but -- and  
11 this is where I think the lay use of involved  
12 and the regulatory use of involved we have to  
13 be careful about, because he may have been  
14 involved in all kinds of things. He is not  
15 involved in the NCAA review because he is not  
16 being contemplated for sanctions in that  
17 review. They seem to -- I think their argument  
18 is, and I am not exaggerating too much, when  
19 they say if he is involved in something, he is  
20 involved in everything, and we are saying he  
21 may or may not have been involved in the  
22 underlying conduct. That is what Judge Freeh  
23 found, that is what the university accepted,  
24 and that is what the NCAA relied on, that  
25 finding and that acceptance, in imposing

1 sanctions on the university. That says nothing  
2 at all about whether he is involved in the  
3 consent decree, and there, I think, the  
4 examples, Your Honor, that are in our papers  
5 are quite illustrative with respect to the  
6 vacation of wins, that is to say, the North  
7 Carolina and Florida State examples, where it  
8 is undisputed that the head coach was not  
9 involved and nevertheless had his wins  
10 adjusted.

11           Finally, Your Honor, it is the case  
12 that the consent decree specifically says that  
13 the wins of Coach Paterno will be adjusted to  
14 reflect this, and so here is what the rule  
15 says: Vacation of team records and  
16 performances, including wins from the career  
17 record of the head coach in the involved sport  
18 or, in applicable cases, reconsideration of a  
19 team totals, and it is important that we  
20 understand that that comes from the rules, not  
21 from some gratuitous act vis-a-vis Coach  
22 Paterno, and it is important to understand that  
23 it is applied in cases where it is undisputed  
24 that the head coach was not involved, and here  
25 is why: The NCAA maintains two separate

1 records. One is the record of the institution  
2 and the other is the record of the head coach,  
3 and what the rule says and what happens here,  
4 what is true from the consent decree, is, if  
5 the record of the institution is adjusted so  
6 that we do not have inconsistent records, a  
7 conforming change will be made in the record of  
8 the head coach. That is not a sanction of  
9 Coach Paterno. That is how we adjust the  
10 records of the institution.

11 Your Honor, we have taken way more of  
12 your time this morning than we were entitled  
13 to, so I would like to personally thank you for  
14 that.

15 THE COURT: Thank you.

16 MR. JOHNSON: And let me end where I  
17 began. My colleague, Mr. Kelly, at the end  
18 said that Penn State in the agreement waives  
19 its rights to participate and therefore it  
20 cannot be an indispensable party. I think the  
21 language is clear that they waived their right  
22 to challenge. They did not cede to Joe Paterno  
23 the right to terminate the protections of the  
24 consent decree, but I think this argument is  
25 perhaps best illustrated by something they have

1 said all day long, which is they have said that  
2 Penn State was coerced into signing the consent  
3 decree. The waiver is in the consent decree,  
4 so, by definition, if it was obtained by  
5 coercion, it would not bind them, and that is  
6 why all day long, as we have talked about Penn  
7 State this and Penn State that and Penn State  
8 the other, we are simply illustrating something  
9 that I think is reasonably obvious. There is a  
10 big missing elephant in this room, and that is  
11 Penn State University.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 Ladies and gentlemen, are we are all  
15 in and all done on argument?

16 MR. JOHNSON: Nothing further, Judge.

17 MR. LOVELAND: Yes, Your Honor.

18 THE COURT: Okay. I want to thank  
19 both the representatives of the plaintiffs and  
20 certainly the representatives of the defendants  
21 for your presentations. As indicated, we have  
22 a very high volume of paperwork -- I think more  
23 citations than I have seen in any case I have  
24 been involved in over the past 26 years or so.  
25 The matter will be taken under advisement. A

1 written opinion will issue in due course.

2 Thank you, everyone. We are  
3 adjourned.

4 E N D O F P R O C E E D I N G S

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25







1           A C C E P T A N C E    B Y    C O U R T

2           Upon counsel's opportunity to review and  
3 to offer objections to the record, the  
4 foregoing record of proceedings is hereby  
5 accepted and directed to be filed.

6

7

8

9

10

11           Date

---

John B. Leete, Senior Judge  
Specially Presiding

12

13

14

15

16

17

18

19

20

21

22

23

24

25