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

ESTATE of JOSEPH PATERNO;

and

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

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),

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

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

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment
Injunction Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
NCAA's Opposition to Plaintiffs' Motion to Overrule Objections to Issuance of Document Subpoena to Third Party Pennsylvania State University

Filed on Behalf of:
National Collegiate Athletic Association & Mark Emmert

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

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

NCAA'S OPPOSITION TO PLAINTIFFS' MOTION TO OVERRULE OBJECTIONS TO ISSUANCE OF DOCUMENT SUBPOENA TO THIRD PARTY PENNSYLVANIA STATE UNIVERSITY

The National Collegiate Athletic Association ("NCAA") hereby submits this brief in opposition to Plaintiffs' January 9, 2017 motion to overrule the NCAA's objection to Plaintiffs' proposed subpoena to third-party The Pennsylvania State University ("Penn State").

Plaintiffs' motion is a red herring. Plaintiffs' proposed subpoena to Penn State is plainly untimely, as fact discovery closed long ago, except for discrete issues permitted by the Court. Rather than address the nature of the NCAA's timeliness objection, Plaintiffs misdirect their attention to purported deficiencies in an NCAA production. Regardless of whatever attacks they make against the NCAA, quite simply, the NCAA's production has nothing to do with the appropriateness of their untimely request for a brand new discovery expedition with a third party. And their complaints of the NCAA's production are

groundless—unable to accept that the NCAA does not have additional responsive materials, Plaintiffs unfairly accuse it of "resistance and delay."

Plaintiffs' subpoena is untimely. As noted in the NCAA's objections, fact discovery closed long ago, on April 29, 2016. At that time, a few outstanding discovery issues remained. Accordingly, the Court permitted additional discovery, exclusively limited to those subjects. Order (May 16, 2016). Yet nearly eight months later, Plaintiffs oddly served the NCAA with notice of intent to serve a brand new subpoena to a third party, Penn State. Pls.' Mot. at 5.[1]

Plaintiffs argue that recent amendments to the scheduling order refer to the close of fact discovery, without reference to the limitations contained in the Court's May 16 Order and, therefore, fact discovery is open "with no restriction on scope." *Id.* at 6, 7. This argument cannot be taken seriously. Simply because the amended orders did not needlessly restate which subjects remained open for

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[1] Plaintiffs' motion is replete with gratuitous and irrelevant attacks on the NCAA. Among other things, Plaintiffs repeat their well-worn mantra that the "NCAA's approach to discovery [is] a one-way street" because the NCAA continues to seek discovery related to the John Doe Sandusky victims while objecting to Plaintiffs' proposed subpoena. Pls.' Mot. at 6-7. But, of course, the John Doe discovery is a part of the limited discovery permitted by the Court in its May 16 Order, while Plaintiffs' new subpoena is not.

Plaintiffs also contend that the NCAA did not waive the 20-day notice period, even though Plaintiffs had done so for the NCAA in the past. *Id.* at 5. Plaintiffs omit that the NCAA also has agreed to waive the 20-day notice period to numerous third-party subpoenas served by Plaintiffs. But here, it could not do so because the subpoena was on its face objectionable; even then, the NCAA promptly filed its objection, rather than waiting for the 20-day clock to expire.

discovery does not mean that fact discovery was, by default, reopened as to all matters. And this has been the parties' understanding; until Plaintiffs' recent subpoena attempt, no party has sought discovery outside of the topics permitted in the May 16 Order.

The NCAA's production was not deficient. Rather than defend the untimeliness of their new discovery request to Penn State—because they cannot—Plaintiffs misdirect their attention to the NCAA's production related to the Court's September 19, 2016 order. As an initial matter, this is irrelevant. If Plaintiffs perceived shortfalls in the NCAA's production, the proper remedy would have been to address them in the context of the discovery requests Plaintiffs served on the NCAA, rather than serving a new subpoena on a third party. They did not do so.[2] The untimeliness of their subpoena is the beginning and end of the analysis—their motion should be denied.

In any event, the NCAA's production is not deficient. To the contrary, it contained *exactly the results that the NCAA had repeatedly forewarned Plaintiffs it would have.* As Plaintiffs recognize, the NCAA cautioned that the settlement of the *Corman* litigation was, naturally, a "lawyer-driven process," involving

[2] The first time Plaintiffs ever expressed concern to the NCAA about its production was during a January 4, 2017 meet and confer call among the parties, well-after Plaintiffs served their notice of intent to subpoena Penn State and after the NCAA had filed its objections to the proposed subpoena. Decl. of Sarah M. Gragert ¶ 5 (Jan. 13, 2017) ("Gragert Decl."), attached as Ex. A. Nor have Plaintiffs filed a motion addressing the NCAA's production.

communications between the parties' outside counsel. Pls.' Mot. at 3. The Court's September 19 order narrowed Plaintiffs' original request to exclude lawyer-to-lawyer communications, permitting Plaintiffs to seek only documents that "contain communications between the NCAA's board members and administrators and communications between the NCAA and the Pennsylvania State University." Order at 14. Plaintiffs cannot now feign surprise when the request resulted in few responsive documents, as the NCAA had warned.

For the first time, Plaintiffs now contend that the NCAA should have collected and produced (or logged) documents in the custody of their outside litigation counsel. *Id.* at 4, 7-8. The September 19 order is plain and clear: only communications between the NCAA and its board members or Penn State need be produced, not communications among their outside litigation counsel. If the Court had intended to require the highly unusual outcome of requiring a party to produce the documents and communications of its outside litigation counsel, there is no doubt it would have said so explicitly.

Further, throughout three years of discovery, the parties have not interpreted their document requests to require collection of documents not in the parties' custody, but in the custody of their outside litigation counsel. Gragert Decl. ¶ 5. The massive privilege and burden issues that would entail are evident. To suddenly change course now would call into question the adequacy of all

parties'—and third parties'—productions throughout this litigation. The NCAA has never produced such materials and Plaintiffs have never asked, and subject to one exception below, the NCAA has never asked, expected, or received such documents from Plaintiffs.

Plaintiffs contend that the NCAA previously expected Plaintiffs to produce documents from their counsel, King & Spalding. *Id.* at 4, 7, 8-9. Plaintiffs distort the record. Attorneys from King & Spalding are fact witnesses to matters independent of their representation in litigation. Among other things, Wick Sollers and other attorneys authored the publicly released *Critique of the Freeh Report.* For this reason, King & Spalding *agreed* to interpret a specific and finite set of discovery requests served on the Estate as encompassing its law firm in order to avoid the NCAA serving an independent subpoena on King & Spalding. *See* Gragert Decl. ¶ 3. The very fact that the parties discussed construing a finite set of document requests in this manner demonstrates that they did not intend such an interpretation to apply more broadly. Plaintiffs' attempt to manufacturer this purported deficiency in the NCAA's production, after having never raised it previously, can be seen only for what it is: gamesmanship. Plaintiffs' novel position should be rejected.

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Plaintiffs' proposed subpoena to a third party is indefensibly untimely. Complaining because Plaintiffs received from the NCAA exactly what the NCAA told them long ago they should expect has nothing to do with opening a new front of discovery outside of the scope of the Court's Order and long after discovery has closed. The NCAA's objection should be sustained.

Respectfully submitted,

Dated: January 13, 2017

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EXHIBIT A

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

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

DECLARATION OF SARAH M. GRAGERT IN SUPPORT OF NCAA'S OBJECTIONS TO ISSUANCE OF DOCUMENT SUBPOENA TO THIRD PARTY PENNSYLVANIA STATE UNIVERSITY

I, Sarah M. Gragert, declare as follows:

1. I am over 18 years of age and competent to make this declaration. I am counsel for Defendant the National Collegiate Athletic Association ("NCAA") in this litigation, and have personal knowledge of all matters set forth herein.

2. In or around the spring or summer of 2015, myself and other counsel for the NCAA had a telephone conversation with counsel for Plaintiffs from the law firm of King & Spalding. During that call, we explained that after considering the record, it was apparent that attorneys from King & Spalding were witnesses to important factual events relevant to the claims and defenses in this case, which predated this litigation and were independent of their role as litigation counsel for the Plaintiffs.

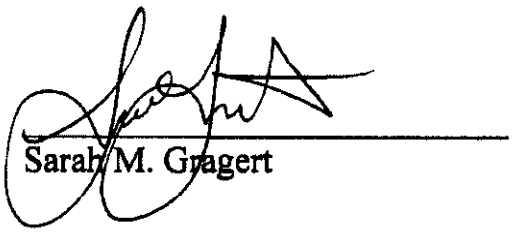
3. During the call, the parties discussed options for the NCAA to seek these materials without having to independently subpoena King & Spalding. To the best of my recollection, attorneys for King & Spalding indicated they were amenable to considering specific documents requests served on the Estate of Coach Paterno as applying to King & Spalding (subject to privilege objections), in order to avoid an independent subpoena. They asked us to provide a list of which documents the NCAA sought from King & Spalding and which document requests those documents corresponded to. We provided that list in July 2015.

4. During discussions with King & Spalding regarding productions from their law firm, counsel for the NCAA were at all times clear that the subject matter of the requests were narrow and that the NCAA was not seeking documents related to King & Spalding's representation in litigation.

5. Aside from this specific course of discovery, the parties have never exchanged documents from outside counsel, and neither party has asked the other side to do so. The NCAA has not asked for, nor received, any other documents from Plaintiffs' outside litigation counsel. And at the outset of the litigation, the NCAA even provided Plaintiffs with their list of custodians, which did not contain NCAA's outside litigation counsel. The first time that Plaintiffs ever asked the NCAA for documents from their outside litigation counsel was during a call on January 4, 2017.

The foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on January 13, 2017



Sarah M. Gragert

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving a copy the *NCAA's Opposition to Plaintiffs' Motion to Overrule Objections to Issuance of Document Subpoena to Third Party Pennsylvania State University* on the following by First Class Mail and email:

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