

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JAKE CORMAN, in his official capacity as
Senator from the 34th Senatorial District of
Pennsylvania and Chair of the Senate Committee
on Appropriations; and ROBERT M. McCORD, in
his official capacity as Treasurer of the
Commonwealth of Pennsylvania,

Plaintiffs,

v.

THE NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION,

Defendant,

v.

PENNSYLVANIA STATE UNIVERSITY,

Defendant.

No. 1 MD 2013

JOINT PRE-TRIAL STATEMENT

Pursuant to this Court's October 9, 2014 Scheduling Order, the parties, through counsel, hereby submit this Joint Pretrial Statement.¹ The lettered sections correspond to the format identified in paragraph four of the Court's October 9 Order.

A. CAPTION OF THE CASE

Jake Corman, in his official capacity as Senator from the 34th Senatorial District of Pennsylvania and Chair of the Senate Committee on Appropriations; and Robert M. McCord, in his official capacity as Treasurer of the Commonwealth of Pennsylvania v. The National Collegiate Athletic Association v. Pennsylvania State University, Commonwealth Court of Pennsylvania, No. 1 MD 2013.

B. DESIGNATED TRIAL COUNSEL FOR EACH PARTY

1. Plaintiffs Senator Jake Corman:

- a. Matthew H. Haverstick, Conrad O'Brien PC
- b. Mark E. Seiberling, Conrad O'Brien PC

2. Plaintiff Treasurer Rob McCord:

- a. Christopher Craig, Chief Counsel, Pennsylvania Treasury

3. Defendant The National Collegiate Athletic Association ("NCAA"):

- a. Everett C. Johnson, Latham & Watkins LLP

¹ Discovery remains ongoing in this case. The Parties therefore reserve the right to supplement or modify this pretrial statement as necessary and appropriate.

- b. Allen M. Gardner, Latham & Watkins LLP
- c. Brian E. Kowalski, Latham & Watkins LLP
- d. Sarah M. Gragert, Latham & Watkins LLP
- e. Thomas W. Scott, Killian & Gephart LLP

3. Defendant The Pennsylvania State University (“Penn State”):

- a. Michael T. Scott, Reed Smith LLP
- b. Donna M. Doblick, Reed Smith LLP

C. CONTESTED JURISDICTIONAL FACTS²

This Court has previously ruled on jurisdictional factual questions.

D. STATEMENT OF LEGAL ISSUE TO BE DECIDED BY THE COURT

Plaintiffs’ Statement: As set forth in Court’s Opinion in *Corman II*, the statement of legal issues presented are: (1) whether the NCAA acted in accordance with its Constitution and Bylaws; (2) the validity of the Consent Decree; and (3) whether the NCAA acted in good faith. *Corman v. NCAA*, 93 A.3d 1 (Pa. Cmwlth. 2014) (*Corman II*).

NCAA’s Statement: Whether “the Consent Decree[] is valid.” *Corman v. NCAA*, Slip Op., 5 (Pa. Cmwlth. No. 1 MD 2013, filed October 3, 2014) (*Corman III*).

² The NCAA expressly reserves its right to raise on appeal orders previously entered regarding the Court’s jurisdiction. Plaintiffs’ requested that the NCAA note its reservation of right elsewhere. The NCAA declined.

E. PLAINTIFFS' BRIEF STATEMENT OF THE FACTS AND THE LEGAL THEORY, AS WELL AS THE REMEDY REQUESTED

The Second Amended Complaint in this case asks this Court to declare the Institution of Higher Education Monetary Penalty Endowment Act (“the Endowment Act”), 24 P.S. §§ 7501-05, constitutional and that the Court compel the NCAA’s compliance with the same. While this Court has entered judgment that the Endowment Act is constitutional under state and federal law, a significant legal question with “far-reaching implications” remains: whether the Consent Decree is valid. *See Corman v. NCAA*, 1 MD 2013, slip op. (Pa. Cmwlth. Oct. 3, 2014) (Covey, J.) (“*Corman III*”). As this Court has explained, there are several factual issues upon which validity turns, including “whether the NCAA acted in accordance with its Constitution and Bylaws . . . and whether the NCAA acted in good faith.” *Corman III* at 2-3 (quoting *Corman v. NCAA*, 93 A.3d 1 (Pa. Cmwlth. 2014) (“*Corman II*”). Plaintiffs submit that the evidence at trial, as outlined in the brief statement that follows, will show that the NCAA failed to act in good faith and in accordance with its Constitution and Bylaws. This failure renders the Consent Decree invalid and unenforceable as a matter of law.

1. Statement of Facts

Shortly after the Jerry Sandusky criminal matter broke in early November 2011, the National Collegiate Athletic Association publically took the position that the Sandusky scandal was a criminal matter in which it would not get involved.

Behind the scenes, however, the NCAA, through its president, Mark Emmert, pressed forward with internal meetings and dialogue in an effort to “leverage the moment.”

After Penn State retained Freeh, Sporkin & Sullivan LLP (hereafter, the Freeh Group) to independently investigate the Sandusky matter, the NCAA injected itself into the Freeh investigation, arranging regular weekly calls with the Freeh Group and Big Ten Conference about the status of the Freeh Group investigation. But the collaboration between the NCAA and the Freeh Group was not simply limited to calls. The NCAA suggested witnesses to interview and questions to ask, proposed search terms for document collection and review, and gave the Freeh Group a presentation on how the NCAA enforcement staff historically has examined issues involving institutional control and ethical conduct. Near the end of the Freeh investigation, the “extremely image conscious” NCAA began considering how it could capitalize on Penn State’s precarious position to impose sanctions.

Upon release of the Freeh Report on July 12, 2012, the NCAA “immediately” began review of the Report per President Mark Emmert’s instructions. By July 13, 2012, the NCAA executive staff, led by President Emmert, had already formed “plans” on how to respond with Penn State, based on its assessment that Penn State was “so embarrassed they will do anything”; indeed,

the NCAA was “banking” on that embarrassment to achieve a desired outcome. Most importantly, these “plans” apparently were hatched and put into motion by President Emmert and his executive staff prior to the NCAA Executive Committee convening to discuss the Penn State matter or how the NCAA should respond.

The NCAA’s plan, based on the contemporaneous written record, was this: President Emmert and the NCAA would threaten Penn State with the “death penalty” (a loss of the football program altogether) for one or more years if they did not agree to “accept” the Freeh Report and “agree” to immediate, onerous sanctions. Internally, President Emmert and the NCAA knew that the penalties it was demanding were “harsher penalties than staff believe can be gained through the standard enforcement process.” Nevertheless, the NCAA, led by President Emmert, who “leverage[d] the moment” and knowingly manipulated both the NCAA Executive Committee and Penn State in conveying the relative positions of each to the other, pressed forward with its demand for a “Consent Decree.” It did so in a “rush” to judgment with “deadlines for no reason.” President Emmert and his executive staff also did so without the full knowledge of, or any material input from, the NCAA Executive Committee.

Whether the death penalty was ever used as a “threat” against Penn State has been the subject of much debate. But the contemporaneous record and recollection of the parties reveals a clear answer: it was and President Emmert used it as tool to

deceive and manipulate both the NCAA Executive Committee and Penn State to achieve his “plan” on how to respond to the Penn State matter. As President Mark Emmert stated in his July 24, 2012 discussion with ESPN.com: “[T]he death penalty was unequivocally on the table[.]” Not only was the “death penalty” on the table, but President Emmert and his executive staff misleadingly convinced Penn State that the NCAA Executive Committee “wanted blood” and was overwhelmingly in favor of the “death penalty,” even though a vote was held by the NCAA Executive Committee specifically on the “death penalty” issue and it was overwhelmingly rejected as a potential penalty. Nevertheless, President Emmert used the hollow threat of the “death penalty” to lure Penn State into the consideration of a “summary disposition” option that did not include the “death penalty.”

The NCAA, both during and after the abbreviated process, made clear that Penn State was not a bargaining partner; they were a take-it-or-leave-it recipient of a “cram down.” The Freeh Report came out on July 12, 2012, and the *Consent Decree was made public a mere* eleven days later on July 23. Penn State saw a draft of the Consent Decree for the first time after 11:00 PM on Friday, July 20, and the draft of the Consent Decree already had a pre-printed execution date of July 23. Further, the press conference for the Consent Decree had been scheduled even before the final Consent Decree was signed and executed by the parties.

2. Legal Theories

Before turning to the substantive basis for Plaintiffs' legal theories, Plaintiffs must address a preliminary matter that has come to their attention. As this Court is aware, the NCAA has made repeated attempts to circumvent this Court's prior rulings by seeking more favorable rulings in federal court; the efforts of which began with the filing of a parallel lawsuit in federal court. *NCAA v. Corbett*, No. 13-457 (M.D. Pa. 2013). Most recently in federal court, the NCAA filed a motion for judgment on the pleadings in which it seeks a final judgment that the Endowment Act is unconstitutional under federal law, an issue upon which this Court has already entered judgment. *NCAA v. Corbett*, No. 13-457, Doc. No. 58, 59. The NCAA has also opposed a motion filed by Treasurer McCord that seeks to give this Court's already entered judgment on constitutionality appropriate preclusive effect. The NCAA opposes that motion under the misguided belief that the order was not "final." Against this background, counsel for the NCAA has suggested that they believe that judgment in the NCAA's favor will render this Commonwealth Court action moot and will preclude the upcoming trial. Plaintiffs disagree.

The validity of the Consent Decree does not depend upon the constitutionality of the Endowment Act. A finding that the Endowment Act is unconstitutional does not render the Consent Decree valid and enforceable. Rather,

whether the Consent Decree is enforceable turns on disputed issues of fact that remain at issue in these proceedings. Accordingly, Plaintiffs submit that the outcome of the motions pending in federal court will not impact trial in this case. A contrary conclusion (i.e., a finding in federal court that the Endowment Act is unconstitutional) would have the effect of rewarding the NCAA for their repeated attempts to forum shop.

a. The NCAA has the burden to prove the validity of the Consent Decree

As this Court held in its December 8, 2014 Memorandum and Order, because the NCAA raised the issue of the Consent Decree's validity in its New Matter, the NCAA has the burden of proof at trial. *Corman v. NCAA*, 1 MD 2013, slip op. (Pa. Cmwlt. Dec. 8, 2014).

b. The NCAA did not have the authority to enter into the Consent Decree

NCAA's Constitution and Bylaws govern the legal relationship between the NCAA (a non-profit, unincorporated association regulating intercollegiate athletics) and Penn State (a NCAA member institution). The Bylaws, in essence, operate as a contract between the NCAA and its member institutions, including Penn State. *See Corman II* at 18-19. In the instant case, the NCAA's failure to act in conformity with its limited authority under the Bylaws operates as a breach of this agreement and renders the Consent Decree invalid.

There is nothing in the NCAA's Constitution or Bylaws that permits the imposition of sanctions by the Executive Committee in the form of a Consent Decree. While NCAA witnesses consistently testified that they *believed* the NCAA Executive Committee had the authority to impose the Consent Decree, they were unable to identify any provision actually bestowing the Executive Committee with authority to punish. NCAA President Mark Emmert, even when presented with the specific bylaw upon which the Executive Committee misguidedly relied, could not confirm or deny that this provision provided the basis for the NCAA's authority to enter into the Consent Decree, testifying that he simply deferred to the "advice of counsel." Emmert Dep. 150:15-153:1.

NCAA Vice President of Division I, David Berst, one of the most senior members of the NCAA's staff, suggested that NCAA bylaw 4.1.2(e), which outlines "the duties of the executive committee, [and which] indicates that they may establish policies or take actions in matters that had association-wide impact" provides the basis for the NCAA's authority to act in this instance. Berst Dep. 140:4-141:16. However, the version of 4.1.2(e) in effect at the time the Consent Decree was signed provides only that the Executive Committee may "[a]ct on behalf of the Association *by adopting and implementing policies* to resolve core issues and other Association-wide matters." NCAA Bylaw 4.1.2(e) (emphasis added). As plainly stated under this Bylaw, the Executive Committee *only* had the

authority to adopt and implement *policies* resolving core issues; it did *not* have the authority to adopt and implement *sanctions* or to unilaterally resolve a purported core issue by entering into a consent decree.

Under this provision then, which is the only one identified by the NCAA as the purported basis for the Executive Committee to act as it did, there is simply no basis for the NCAA's impositions of sanctions under the circumstances. As such, the Consent Decree is invalid.

c. The NCAA breached an actual and/or implied covenant of good faith and fair dealing under the Bylaws

As explained above, the NCAA's Constitution and Bylaws operate as a contract between Penn State and the NCAA. As such, the law implies a covenant of good faith and fair dealing, as it does in every contract. *Liazis v. Kosta, Inc.*, 618 A.2d 450, 454 (Pa. Super. 1992) (“[E]very contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract.”); *Long v. Valley Forge Military Acad. Found.*, No. 05-cv-4454, 2008 WL 515750, 2008 U.S. Dist. LEXIS 99358, 29 (E.D. Pa. Dec. 8, 2008) (“State and federal courts interpreting Pennsylvania law have repeatedly stated that every contract in Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and its enforcement.” (collecting cases) (internal quotation marks and citations omitted)). Additionally, the NCAA Constitution in section 2.8.2 contains an explicit contractual obligation to act in good faith. It

provides: “The Association shall assist the institution in its efforts to achieve full compliance with all rules and regulations and shall afford the institution, its staff and student-athletes fair procedures in the consideration of an identified or alleged failure in compliance.”

As evident from the facts set-forth above, the Consent Decree was a product of an abbreviated, eleven-day process wherein Penn State, though involved in “discussions,” was deprived of a meaningful choice in the matter and was ultimately the recipient of a “cram down.” That cram down was the product of a false threat that Penn State would otherwise receive the death penalty. These facts support a finding that the NCAA failed to act in good faith. This failure to act in good faith operates as a breach of the express and/or implied covenant of good faith and fair dealing, and renders the contract unenforceable.

d. The Consent Decree is unconscionable and therefore unenforceable

Assuming for the sake of argument that the NCAA Executive Committee had the authority to enter into the Consent Decree and that the Consent Decree otherwise operates as a binding contract, the Consent Decree is nevertheless unenforceable pursuant to the doctrine of unconscionability. It is well-established “[t]hat equity does not enforce unconscionable bargains.” *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948). Where a party to a contract lacks a “meaningful choice” and enters into a contract “with contract terms which are

unreasonably favorable to the other party,” the contract is unconscionable and unenforceable. *Witmer v. Exxon Corp.*, 434 A.2d 1222, 1228 (Pa. 1981) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965))). As set forth above, Penn State lacked a meaningful choice regarding the terms and imposition of the Consent Decree, and the terms of the Decree unreasonably favor the NCAA. Consequently, the Consent Decree is unenforceable.

3. Relief Requested

Plaintiffs initiated this action “to ensure that Pennsylvania funds are appropriately and lawfully allocated, managed and distributed in compliance with the law.” Second Am. Compl. at 1. To that end, Plaintiffs requested the following in the Second Amended Complaint: “a. A declaration that the Endowment Act is a valid and constitutional law; b. A declaration that the NCAA violated the Endowment Act; c. A declaration that the entirety of the monetary penalty in the Consent Decree be paid to the State Treasury; d. An order compelling the NCAA to immediately pay or direct payment of the first \$12 million installment to the State Treasury; e. An injunction compelling compliance by the NCAA with the Endowment Act; f. Attorneys’ fees and costs; and g. Such other relief as this Court deems just and proper.” *Id.*, Count I, Prayer for Relief.

In the course of the proceedings and beginning with the NCAA’s representations in its New Matter, the validity of the Consent Decree has been

called into question. Discovery has revealed, and the evidence at trial will show, that the Consent Decree was not a product of arms-length negotiation; rather, it was unilaterally imposed without authority and is unconscionable. Under these circumstances, the Consent Decree is invalid and unenforceable.

In light of this fact, Plaintiffs request: a declaration that the Consent Decree is *void ab initio*; an order compelling the NCAA to immediately refund Penn State's initial \$12 million installment and all subsequent installments; an order enjoining the NCAA from attempting to enforce the Consent Decree; attorneys' fees and costs; and such other relief as the Court deems just and proper. In the alternative, Plaintiffs request that the Court reform the Consent Decree to strike down all of the penalties contained in the Consent Decree except for the \$60 million fine component, which would then be deposited with the State Treasury and disbursed under the Endowment Act to benefit programs preventing child sexual abuse and/or assisting the victims of child sexual abuse.

To the extent the Court determines that the Consent Decree is a valid agreement, Plaintiffs request the following: a declaration that the NCAA violated the Endowment Act; a declaration that the entirety of the monetary penalty in the Consent Decree be paid to the State Treasury; an order compelling the NCAA to immediately pay or re-direct the first \$12 million installment and all subsequent installments to the State Treasury and compelling NCAA's compliance by the

NCAA with the Endowment Act; attorneys' fees and costs; and such other relief as this Court deems just and proper.

F. DEFENDANTS' BRIEF STATEMENT OF THE FACTS AND THE LEGAL THEORY SUPPORTING EACH DEFENSE TO BE OFFERED AT TRIAL

1. The NCAA

Background

This case involves an unprecedented scandal in the history of intercollegiate athletics. In November 2011, the nation was shocked by revelations that longtime Penn State Assistant Football Coach Jerry Sandusky used his position of authority and respect on campus to commit brutal acts of sexual abuse against young children within and around the Penn State athletic facilities. Sandusky was subsequently convicted on 45 criminal counts arising from these allegations. Penn State's former President, its former Athletic Director, and another senior official currently face felony charges for child endangerment arising from their role in responding to Sandusky's crimes.

Shortly after Sandusky was indicted, Penn State's Board of Trustees commissioned former FBI Director and federal judge Louis Freeh to conduct an exhaustive independent investigation. The independent investigation, which cost in excess of \$8 million, took place over a period of eight months, involved more than 430 interviews and analysis of more than 3.5 million pieces of electronic data

and documents, and culminated in a report released on July 12, 2012, known as the Freeh Report. Freeh Report 9. The Freeh Report concluded, among other things, that the most senior leaders of Penn State had exhibited “total and consistent disregard ... for the safety and welfare of Sandusky’s victims” and had worked together to conceal Sandusky’s crimes for fear of bad publicity and out of sympathy for Sandusky. *Id.* at 14-15. The Freeh Report specifically concluded that a “culture of reverence for the football program that is ingrained at all levels of the campus community” contributed to those failures. *Id.* at 16-17.

The day the Freeh Report was released, the Penn State Board—without any involvement by the NCAA—issued a statement that “[t]oday’s comprehensive report is sad and sobering in that it concludes that at the moment of truth, *people in positions of authority and responsibility did not put the welfare of children first.* The Board of Trustees ... *accepts full responsibility for the failures that occurred.*” *See* Press Release, Penn State (July 12, 2012), attached as Ex. 24 (emphasis added), <http://progress.psu.edu/resource-library/story/penn-state-issues-statement-on-freeh-report>. The statement went on to explain that “Judge Freeh’s report concludes that certain people at the University who were in a position to protect children or confront the predator failed to do so. *There can be no ambiguity about that.*” *Id.* (emphasis added). And it stated that the “Board of Trustees acknowledges that it failed to create an environment of accountability and

transparency and did not have optimal reporting procedures or committee structures.” *Id.*

These developments indicated a profound lack of institutional integrity and institutional control over the athletics program and Penn State, and raised serious questions about whether Penn State, as an institution, acted in a manner consistent with the NCAA Constitution and Bylaws. In July 2012, the NCAA and Penn State agreed that rather than address these unprecedented issues through the infractions process set forth in the NCAA Bylaws, they would enter into Consent Decree pursuant to which Penn State would accept a set of punitive and corrective measures. In the Consent Decree, Penn State “accept[ed] the findings of the Freeh Report for purposes of this resolution” and “acknowledge[d] that those facts constitute violations of the Constitutional and Bylaw principles described in the [NCAA’s] letter.” Consent Decree 2 (July 22, 2012) (citing Manual arts. 2.1, 2.4, 6.01.1, 6.4, 10.01.1, 10.1, 11.1.1, 19.01.2). Penn State also explicitly “waive[d] any claim to further process, including, without limitation, any right to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, and any judicial process related to the subject matter of this Consent Decree.” *Id.*

Since executing the Consent Decree over two years ago, neither the NCAA and Penn State have ever challenged its validity. Indeed, as recently as August

2014, Penn State’s Board of Trustees passed a resolution—by a 2-1 margin—in which it resolved that “[f]or the past two years, the University, with appropriate vigor, has complied with the terms of the Consent Decree, *and the University remains committed to full compliance with the Consent Decree as amended from time to time.*” Penn State Board of Trustees Resolution (Aug. 13, 2014), <http://www.psu.edu/trustees/pdf/Resolution.pdf> (emphasis added).

On April 9, 2014, however, after rejecting all of the NCAA’s defenses to enforcement of the Endowment Act, this Court held that the NCAA’s Answer and New Matter included certain factual allegations which, taken together, “present factual disputes relating to the NCAA’s authority to impose the sanctions and the validity of the Consent Decree.”³ Opinion & Order 21-22 (Apr. 9, 2014). The Court has made clear that it believes a trial is necessary to resolve such “factual disputes.” In subsequent months, the evidence revealed in discovery has overwhelmingly demonstrated that the Consent Decree is a valid agreement between the NCAA and Penn State and that there are no viable grounds to invalidate it. The evidence presented at trial will do the same.

³ As the Court is aware, the NCAA contends that the Consent Decree’s validity is not a material, disputed fact in this case, nor is it relevant to any remaining issue under the Endowment Act.

The Consent Decree Satisfies All of the *Prima Facie* Elements of a Valid, Enforceable Contract.

The evidence at trial will establish that the Consent Decree satisfies all of the *prima facie* elements of a valid, enforceable contract. As this Court explained in its September 2013 opinion and order, “[a] consent decree ... is merely an agreement between the parties—a contract binding the parties thereto to the terms thereof[.]” Opinion & Order 22 (Sept. 4, 2013) (“*Corman I*”) (quoting *Lower Frederick Twp. v. Clemmer*, 543 A.2d 502, 510 (1988)). Under Pennsylvania law, the party with the burden to establish the validity of a contract must demonstrate that the formal requisites of contract are present. *500 James Hance Court v. Pa. Prevailing Wage Appeals Bd. Bureau of Labor Law Compliance*, 33 A.3d 555, 576 (Pa. 2011). (“[W]hen a party seeking to enforce a contract generates a *prima facie* case that the contract is valid, the defending party—the one seeking to invalidate the contract—bears the burden of production as to the defenses of fraud, duress, coercion, mistake, undue influence, or incompetence.” (emphasis added) (citing *Cannon v. Cannon*, 865 A.2d 563, 573 (Md. 2005))); see also *Porter Twp. Initiative v. E. Stroudsburg Area Sch. Dist.*, 44 A.3d 1201, 1209 (Pa. Commw. Ct. 2012) (same). These formal requisites are “an offer, an acceptance, and consideration.” *Maint. Specialties, Inc. v. Gottus*, 314 A.2d 279, 285 (Pa. 1974); see also *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587

A.2d 1346, 1349 (Pa. 1991) (“[T]he essence of a settlement is contractual in nature. There is an offer ..., acceptance, and consideration.”).

At trial, the NCAA will demonstrate that the Consent Decree easily satisfies the “formal requisites” of a valid contract—a point which is not contested by Plaintiffs. *See* Pls.’ Summ. Judgment Resp. 22 (contending that the only “issue of fact” left in this case is “whether the NCAA had authority” to enter into the Consent Decree).

Offer/Acceptance. The Consent Decree is a written agreement, executed by both parties. This alone satisfies the elements of “offer” and “acceptance,” and demonstrates “mutual assent to the terms of a contract.” *Shovel Transfer & Storage, Inc. v. Pa. Liquor Control Bd.*, 739 A.2d 133, 136 (1999). Further, witness testimony and documentary evidence presented at trial will confirm that the elements of “offer” and “acceptance” are present, and that the NCAA and Penn State “mutual[ly] assented” to the terms of the Consent Decree.

Consideration. The NCAA will also demonstrate at trial that the Consent Decree is supported by consideration. *Commonwealth Dep’t of Transp. v. First Pa. Bank, N.A.*, 466 A.2d 753, 754 (Pa. Commw. Ct. 1983) (“The requirement of consideration, of course, is nothing more than a requirement that there be a bargained for exchange.”). In short, the consideration underlying the Consent Decree is similar to the consideration underlying any settlement agreement. *See*

SKF USA, Inc. v. Workers Comp. Appeal Bd., 714 A.2d 496, 500 (Pa. Commw. Ct. 1998) (“[T]he surrender or compromise of a doubtful or disputed claim and forbearance to sue thereon constitute sufficient consideration.”) The evidence will show that Penn State chose to enter into the Consent Decree because, in its view, resolving any potential NCAA Constitution or Bylaw violations quickly and with certainty was preferable to taking its chances with the lengthier and less predictable traditional infractions process, or otherwise challenging the NCAA’s actions through protracted litigation. In particular, the evidence will show that by entering into the Consent Decree, Penn State received the following benefits:

- Penn State avoided a lengthy, costly, and disruptive investigation by the NCAA enforcement staff, which would have cast an “ominous cloud” over the football program potentially for a period of years.
- Penn State eliminated the risk of potentially harsher sanctions imposed by the NCAA Committee on Infractions, including a suspension in competition, or the so-called “death penalty.”
- Penn State eliminated the risk that an NCAA investigation would have uncovered additional violations of the NCAA Constitution and Bylaws.
- Penn State received an opportunity for the sanctions to be reduced, which came to fruition.
- Penn State avoided the litigation expense of defending the NCAA infractions process or an in-court challenge to the NCAA.
- At a time when its handling of the Sandusky affair was receiving intense criticism throughout the country, Penn State was able to re-position itself as a leader at the forefront of institutional control and child sexual abuse issues.

For its part, the NCAA benefited by entering into the Consent Decree because, *inter alia*, it was able to quickly resolve an unprecedented and horrific matter with a long-standing member of the Association, avoid deploying significant resources to initiate a duplicative investigation of the underlying events, avoid any litigation risk that would exist in the traditional infractions process, and the opportunity to work together with Penn State and its athletics integrity monitor to move forward.

No Viable Contract Defenses Can Invalidate the Consent Decree.

With the prima facie case established, the evidence at trial will also prove that there are no viable contract defenses that can invalidate the Consent Decree. Under Pennsylvania law, once a party has established the formal requisites of the contract, “the defending party—the one seeking to invalidate the contract—bears the burden of production as to the defenses of fraud, duress, coercion, mistake, undue influence, or incompetence.” *500 James Hance Court*, 33 A.3d at 576 (emphasis added); *see also id.* (“[R]arely, if ever, does our legal system impose a burden upon one party to parry a potentially limitless series of accusations of wrongdoing by repeatedly proving the negative. Rather ... when one party makes out a prima facie case in its favor ... it is generally incumbent upon the opposing party to undermine that case in some way.”).

Until today, Plaintiffs have contended that there is only one potential contract defense at issue here: “whether the NCAA had authority” to enter into the Consent Decree.⁴ *See* Pls.’ Summ. Judgment Resp. 22. Importantly, Plaintiffs acknowledge—as the facts and law require—that the Consent Decree was not the product of duress, thus acknowledging that both the NCAA and Penn State entered into it willingly, even if not happily. *Id.* at 1-2. Therefore, the only question to be decided at trial is whether the NCAA and a member institution can willingly enter into an agreement that contains penalties and corrective actions. And in considering this question, Pennsylvania law requires this Court to defer to the NCAA’s own “reasonable construction of [its] Constitution and by-laws.” *See Musicians’ Protective Union Local No. 274 v. Am. Fed’n of Musicians*, 329 F. Supp. 1226, 1236 (E.D. Pa. 1971) (citation omitted).

As an initial matter, Penn State itself has not challenged the authority of the NCAA to enter into the Consent Decree, and neither Senator Corman nor Treasurer McCord have any standing to do so. In any event, the witness testimony and documentary evidence presented at trial will establish that the NCAA had the

⁴ The Court’s December 8, 2014 order indicated that Plaintiffs’ pleadings were devoid of any specific challenge to the validity of the Consent Decree, *see* Order 2, and Plaintiffs have otherwise identified a single issue to be resolved in this case: the NCAA’s *authority* to enter into the Consent Decree. *See supra*. The Court should not permit any other challenges to the Consent Decree. However, the NCAA reserves the right to—and will—supplement its case to rebut any additional contract defenses that Plaintiffs may raise at trial, but which have not been raised at this time.

authority to enter into the Consent Decree, and such authority is based on the following, non-exclusive grounds:

- The NCAA has the general authority to enter into contracts, which it frequently does in the ordinary course of business. The Consent Decree reflects an exercise of this basic legal authority.
- For its part, Penn State is free to waive any rights or process under the NCAA Constitution and Bylaws, and, as such, agree to accept penalties and corrective measures through a consent decree rather than through the traditional infractions process. The Consent Decree itself—supported by witness testimony and documentary evidence—will demonstrate that is precisely what Penn State did in this case. *See Corman I* at 21-22 (holding that Penn State was not an indispensable party in part because “PSU clearly waived its right to participate in any judicial process contemplated to arise from the Consent Decree” and “[a]bsent fraud, accident or mistake, this Court may not modify or vary the parties’ express contractual language.”). As such, the NCAA’s entry into the Consent Decree with Penn State was not inconsistent with or constrained by provisions of its Constitution or Bylaws.
- The NCAA’s Executive Committee has extensive authority under the NCAA’s Constitution, including, but not limited to, the authority to “[a]ct on behalf of the Association by adopting and implementing policies to resolve core issues and other Association-wide matters” and to “[i]nitiate and settle litigation.” NCAA Constitution and Bylaws (effective Aug. 1, 2011), art. 4.1.2(e), (f). Pursuant to such authority, the Executive Committee can—and did—authorize President Emmert to enter into a Consent Decree with Penn State.

Finally, the NCAA’s authority to enter into the Consent Decree with Penn State is *not* dependent on whether the Court concludes—or the Committee on Infractions would have found—that the facts set forth in the Freeh Report constitute violations of the NCAA Constitution and Bylaws. As this Court has recognized, a “consent decree is *not a legal determination ... of the matters in*

controversy but is merely an agreement between the parties” *Corman I* at 22 (emphasis added). Indeed, Penn State explicitly waived “any right to a determination of violations by the NCAA Committee on Infractions..., or any judicial process related to the subject matter of this Consent Decree.” Consent Decree 2. Thus, as in any settlement, the question of whether NCAA violations occurred should not be before the Court at all—the only question is whether the parties’ were authorized to enter into the agreement. Nonetheless, the evidence at trial, including the Freeh Report and Penn State’s express acceptance of same, as well as other documentary evidence and witness testimony (including candid admissions from Penn State’s counsel, the former Chair of the NCAA Committee on Infractions), will make clear that the issues addressed in the Freeh Report are plainly within the NCAA’s purview and that Penn State, in fact, violated the NCAA Constitution and Bylaws.

By Establishing the Validity of the Consent Decree, the NCAA Will Carry Any Burden Regarding the Specific Assertions in its Answer and New Matter

The Court’s April 9, 2014 order held that eight specific assertions in the NCAA’s Answer and New Matter, taken together, presented the issues of whether the NCAA had “authority to impose the sanctions and the validity of the Consent Decree.” Order 21-22; *see also* Pls.’ Summ. Judgment Resp. 22 (contending that only issue of fact is whether the NCAA had authority to enter into the Consent Decree). Thus, by prevailing on the questions of validity and authority, the NCAA

will have carried any burden regarding the individual assertions identified by the Court (*see, e.g.*, NCAA Answer and New Matter ¶ 96 (PSU “gave and received valuable, bargained-for consideration.”); *id.* ¶ 105 (Consent Decree “constitutes a binding contract between the NCAA and [PSU].”); *id.* ¶ 137 (NCAA was “justified in entering into the Consent Decree.”); *id.* ¶ 138 (the NCAA “had a privilege to enter into the Consent Decree.”); *id.* ¶ 139 (The NCAA “acted in good faith.”)), or otherwise rendered them irrelevant (*see, e.g., id.* ¶ 103 (Members of NCAA “accept and observe principles set forth in the constitution and bylaws.”); *id.* ¶ 104 (describing consequences for a “major violation”); and *id.* ¶ 140 (NCAA “imposed sanctions ... in response [to] conduct [in] violation of the NCAA’s Constitution and Bylaws.”)).

The NCAA does not understand the Court’s rulings in this case to suggest that the eight specific assertions give rise to questions of law or fact that are independent of the issues of validity and authority. To the extent the Court determines any specific assertion has independent legal relevance, the NCAA stands ready to address them at trial, as necessary.

The Court Should Strike Plaintiffs’ Last Minute, Meritless Challenges to the Consent Decree

Today, Plaintiffs raised two purported challenges to the Consent Decree for the very first time: breach of the covenant of good faith and fair dealing, and unconscionability. These challenges do not involve the NCAA’s authority to enter

into the Consent Decree (*i.e.*, the only “issue of fact” that, according to Plaintiffs’ recent filings, exists in this case) and, like duress, were never asserted in any pleading. As the court made perfectly clear, such challenges are therefore impermissible, should be stricken from the pre-trial statement, and the court should not allow them to be advanced in this case. *See* December 8, 2014 Order at 2 (denying NCAA motion for summary judgment on the ground that “the pleadings do not contain a cause of action or defense that the Consent Decree was entered into under duress”).

These challenges are also meritless. Plaintiffs have no standing to assert a breach of the NCAA Constitution and Bylaws or any covenant of good faith that is express or implied therein—as they are, quite obviously, not a party to that contract. In any event, the “facts” and argument that Plaintiffs contend will support this theory will be refuted at trial, and the evidence will show that the NCAA acted fairly and in good faith in all its dealings with Penn State, the NCAA believed that the Consent Decree was an appropriate and reasonable resolution for both parties, and that Penn State was always free to reject the Consent Decree and trigger the Committee on Infractions process under the NCAA Bylaws.

Similarly, Plaintiffs have no standing to assert unconscionability as a contract defense where they are not a party to the contract, and they certainly have not (nor can they) meet their burden to proving unconscionability. *See Denlinger*,

Inc. v. Dendler, 415 Pa. Super. 164, 175 (Pa. Super. Ct. 1992). In any event, their contention that Penn State lacked a “meaningful choice” is simply an effort to pursue a duress claim that Plaintiffs already expressly disavowed, fails as a matter of law, and is flatly contradicted by the record evidence.

2. Penn State

Penn State accepted the Consent Decree to avoid harsher sanctions, including the “death penalty” and/or a prolonged investigation and hearings with potentially harsher sanctions, the harm and loss of revenue the University would have suffered from such actions, and for the other reasons explained by President Erickson at the public meeting of Penn state’s Board of Trustees on August 12, 2012. Penn State has fully complied with the Consent Decree and intends to continue to comply with the Consent Decree, as it may be amended. Penn State will, of course, also comply with applicable law, including the Endowment Act, and any orders of this Court. In the event the Court were to hold the Consent Decree to be fully or partially invalid, Penn state reserves the right to brief any issues as to the appropriate relief and the extent of Penn State’s continuing obligations, if any.

G. A COMPREHENSIVE STATEMENT OF ALL UNCONTESTED FACTS

1. Plaintiff Jake Corman is Senator for the 34th Senatorial District of Pennsylvania in the General Assembly. He is a resident of the Commonwealth of Pennsylvania, residing in Centre County.

2. Plaintiff Robert McCord is Treasurer of the Commonwealth of Pennsylvania.

3. Defendant the NCAA is a voluntary membership association of more than 1,000 colleges and universities.

4. Penn State University is a Division I member institution of the NCAA.

5. On November 4, 2011 the Attorney General of the Commonwealth of Pennsylvania (“Attorney General”) filed criminal charges against Gerald A. Sandusky (“Sandusky”), including four counts of involuntary deviate sexual intercourse, nine counts of indecent assault, eight counts of corruption of minors, eight counts of unlawful contact with minors and endangering the welfare of children (“Sandusky matter”).

6. The Attorney General also filed criminal charges against Penn State Athletic Director Timothy M. Curley and Senior Vice President Finance and Business Gary C. Schultz for failing to report allegations of child abuse against Sandusky to law enforcement or child protection authorities in 2002 and for

committing perjury during their testimony about the allegations to the Grand Jury in Dauphin County, Pennsylvania, in January 2011.

7. Penn State President Graham B. Spanier was subsequently charged with perjury, endangering the welfare of children, obstruction of law, and conspiracy, in November 2012, and superseding indictments were issued for Curley and Schultz.

8. By the November 11, 2011 meeting, the Penn State Board of Trustees had established a Special Investigations Task Force (“Task Force”) to investigate the Sandusky matter.

9. The Task Force interviewed and retained Louis Freeh of the law firm, Freeh, Sporkin & Sullivan LLP (the “Freeh Group”), to independently investigate the Sandusky matter.

10. On November 17, 2011, Dr. Mark Emmert, President of the NCAA, sent a letter to Dr. Rodney Erickson, Penn State President.

11. The then-General Counsel for Penn State, Cynthia Baldwin, sent a response to Dr. Emmert’s letter on December 12, 2011.

12. On December 20, 2011, Donald Remy, then the Executive Vice President and General Counsel of the NCAA, responded to Ms. Baldwin’s letter.

13. In November 2011, Reed Smith, which had already done unrelated work for Penn State, was retained by Penn State's Board of Trustees as outside counsel with regard to various issues, including the Sandusky matter as assigned.

14. On June 22, 2012, a jury found Sandusky guilty of 45 out of a total of 48 counts charged in the case, which involved ten victims. He was convicted on eight counts of Involuntary Deviate Sexual Intercourse, seven counts of Indecent Assault, nine counts of Unlawful Contact With Minors, ten counts of Corruption of Minors, ten counts of Endangering Welfare of Children, and one count of Criminal Attempt to Commit Indecent Assault.

15. On July 12, 2012, "The Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University related to the Child Sexual Abuse Committed by Gerald A. Sandusky" (the "Freeh Report") was publicly released.

16. The Freeh Report was 267 pages and included 702 footnotes.

17. Prior to the release of the Freeh Report, Gene Marsh, Esquire, a former Chair of the NCAA's Committee on Infractions, was retained by Penn State.

18. Between approximately July 11, 2012, and July 23, 2012, President Emmert and President Erickson communicated via email and telephone.

19. During that same time period, Mr. Marsh communicated with Donald Remy and David Berst of the NCAA.

20. During the same time period, multiple meetings and/or calls were scheduled internally among certain senior NCAA management.

21. A call was scheduled for July 17, 2012 with the NCAA Executive Committee and the Division I Board of Directors.

22. A call was scheduled for July 19, 2012 with the Penn State Board of Trustees Executive Committee.

23. A call was scheduled for July 20, 2012 with the Penn State Board of Trustees Executive Committee.

24. On July 21, 2012, the NCAA Executive Committee met and a “Report of the NCAA Executive Committee” was generated.

25. A draft of the “Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by the Pennsylvania State University” (the “Consent Decree”) was sent to Penn State on July 20, 2012.

26. The Consent Decree was executed on July 22, 2012. It was signed by President Emmert on behalf of the NCAA and President Erickson on behalf of Penn State.

27. The Consent Decree included a number of punitive and corrective measures, including a \$60 million fine that was to be used for the prevention of child abuse and/or treatment of child abuse victims.

28. That Consent Decree had a provision providing for amendments and several such amendments have been made to date, principally to reduce the punitive sanctions set forth therein.

29. A call was scheduled for members of the Penn State Board of Trustees Executive Committee on July 22, 2012.

30. The Consent Decree was announced by the NCAA to the public by press conference on July 23, 2012.

31. On July 25, 2012 and on August 12, 2012, the Penn State Board of Trustees met to discuss, inter alia, the Consent Decree.

H. A COMPREHENSIVE STATEMENT OF ALL CONTESTED ISSUES OF FACT

1. Plaintiffs' Statement of Contested Facts

1. The NCAA's involvement with Penn State began shortly after news of the Jerry Sandusky indictment broke in November 2011.

2. In November 2011, the NCAA began to act against Penn State, despite its assertions to the public and in the media that the Jerry Sandusky matter was a criminal investigation and the NCAA does not get involved in criminal investigations.

3. By mid-November 2011, NCAA President Mark Emmert began scheduling internal meetings and calls to discuss potential action against Penn State, which meetings and calls continued regularly for a two week period in November 2011.

4. After the NCAA sent its November 17, 2011 letter to Penn State, the NCAA and the Big Ten Conference began to insert themselves into Penn State's institutional response to the Sandusky investigation.

5. When drafting an initial response to the NCAA's November 17, 2011 letter, then-General Counsel for Penn State, Cynthia Baldwin, sent a draft of the proposed letter to the then Executive Vice President and General Counsel of the NCAA, Donald Remy, requesting his review and comment.

6. Mr. Remy responded to Ms. Baldwin with his substantive comments and, only then, was the NCAA-approved letter sent by Penn State to the NCAA on December 12, 2011.

7. Shortly after the Freeh Group was retained by Penn State in November 2011 to investigate the Jerry Sandusky matter, Mr. Remy expressed an interest in contacting Judge Louis Freeh of the Freeh Group to arrange a phone call between Judge Freeh and NCAA President Mark Emmert.

8. On December 7, 2011, representatives of the Freeh Group, the NCAA, and the Big Ten Conference met at the Nittany Lion Inn in State College,

Pennsylvania to discuss the Freeh Group's investigation. The following individuals were listed as being in attendance at that meeting: Judge Louis Freeh, Judge Eugene Sullivan, Omar Y. McNeill, Barbara Mather, Jon Barrett, and Mr. Remy and Julie Roe Lach of the NCAA.

9. Following the December 7, 2011 meeting in State College between representatives of the Freeh Group, the NCAA, and the Big Ten Conference, representatives from the Freeh Group, the NCAA and the Big Ten Conference continued to attend and partake in regular weekly calls about the status of the Freeh Group's ongoing investigation, which weekly calls continued up to and through the Freeh Report's release on July 12, 2012.

10. On December 28, 2011, Mr. Remy emailed Omar McNeill, of the Freeh Group, a lengthy list of questions drafted by the NCAA to be used by the Freeh Group during its investigation of Penn State. These questions focused on allegations of a lack of institutional control and unethical conduct at Penn State.

11. Mr. McNeill also solicited and was provided by the NCAA a list of potential witnesses and database search terms to be used by the Freeh Group during its investigation of Penn State. These potential witnesses and database terms focused on allegations of a lack of institutional control and unethical conduct at Penn State.

12. In late December 2011, the NCAA and the Freeh Group arranged a lengthy conference call scheduled for January 6, 2012, during which 15-17 individuals from the Freeh Group intended to participate, as well as counsel for the Big Ten Conference.

13. The purported purpose of the call was for NCAA Vice President of Enforcement Julie Roe, and other NCAA enforcement group personnel, to make a presentation to representatives from the Freeh Group and the Big Ten Conference on issues involving institutional control and ethical conduct and how these issues were historically handled by the NCAA enforcement staff.

14. In advance of the January 6, 2011 call, the NCAA provided extensive materials to the Freeh Group and the Big Ten Conference, including a comprehensive PowerPoint presentation on the specific NCAA's bylaws addressing lack of institutional control and unethical conduct, as well as finding of the lack of institutional control at other member institutions.

15. The conference call between representatives from the NCAA, the Big Ten Conference and the Freeh Group was held for several hours on January 6, 2012.

16. When the Freeh Group released its investigative Report on July 12, 2012, the NCAA began to immediately review the report and discuss potential actions that the NCAA could take in response.

17. One day after the release of the Freeh Report, by July 13, 2012, President Emmert and his executive staff had already made plans on how to respond to Penn State.

18. The specific plans as to how to respond to Penn State were discussed over a series of internal meetings at the NCAA involving President Emmert and his executive staff, which continued over the course of eleven days between the date the Freeh Report was released (July 12, 2012) and the date the Consent Decree was announced (July 23, 2012).

19. During the eleven-day time period, calls and/or meetings between President Emmert and/or his executive staff were scheduled on the following dates: July 10, 2012; July 11, 2012; July 12, 2012; July 13, 2012; July 17, 2012; July 19, 2012; July 20, 2012; July 21, 2012; and July 23, 2012.

20. NCAA's proposed sanctions to Penn State became consistently harsher over the course of the eleven days, with the years of post-season ban, the loss of scholarships, and the monetary fine all increasing significantly as time progressed.

21. The NCAA was aware that the penalties it was demanding were harsher penalties than the NCAA staff believed could be obtained through the standard enforcement process.

22. Over the course of the eleven days, President Emmert and his executive staff at the NCAA misleadingly threatened Penn State with the imposition of the “death penalty” (a loss of the football program altogether) for one or more years if Penn State did not agree to accept the findings of the Freeh Report and agree to the proposed sanctions.

23. Penn State ultimately did not accept the findings of the Freeh Report and only accepted the Freeh Report findings for the limited purpose of the Consent Decree.

24. During the course of the eleven days, there were two parallel tracks of discussions between Penn State and the NCAA: one between Penn State President Erickson and NCAA President Emmert; and the other between Gene Marsh on behalf of Penn State and Mr. Remy and David Berst on behalf of the NCAA.

25. During the eleven day period, Penn State President Rodney Erickson and NCAA President Mark Emmert spoke four times via telephone and exchanged several emails.

26. During the eleven day period, Mr. Marsh spoke via telephone and exchanged numerous emails with both Donald Remy and David Berst of the NCAA.

27. When the NCAA’s Executive Committee first met on July 17, 2012 to discuss the Penn State matter, there was no consensus or meaningful discussion of

specific penalties to be potentially imposed against Penn State and no formal votes were taken.

28. Despite the lack of consensus amongst the NCAA's Executive Committee, President Emmert misleadingly informed Penn State President Erickson that the Executive Committee "wanted blood" and was overwhelmingly in favor of the "death penalty."

29. President Emmert misleadingly used the threat of the "death penalty" to convince President Erickson and Penn State to agree to the harsh sanctions short of the "death penalty" contained in the Consent Decree.

30. When the NCAA's Executive Committee met again on July 21, 2012, the Executive Committee held a vote on the "death penalty" issue and it was overwhelmingly rejected as a potential penalty.

31. The NCAA insisted that Penn State keep the discussions between the NCAA and Penn State about the proposed Consent Decree and proposed sanctions confidential.

32. Penn State was threatened that if news about the proposed Consent Decree or proposed sanctions was leaked, the NCAA would either impose harsher sanctions against Penn State and/or take the proposed Consent Decree off the table.

33. The Consent Decree process was not a negotiation, but instead was a "take-it-or-leave-it" or "cram down" approach.

34. A draft of the Consent Decree was not sent to Penn State until 11:00 PM on Friday, July 20, 2012, with a pre-printed execution date of July 23, 2012.

35. Penn State President Erickson signed the Consent Decree without presenting the Consent Decree to the full Penn State Board of Trustees for approval prior to signing.

36. The only Bylaw the NCAA Executive Committee relied on as its authority to act was NCAA Bylaw 4.1.2(e).

37. The NCAA directed Penn State where to pay fine money under the Consent Decree.

38. Penn State has already paid at least \$24 million under the Consent Decree.

39. In August 2011, before the Sandusky matter publicly broke in November 2011, the NCAA hosted a presidential retreat.

40. Out of that retreat came a number of “working groups,” including the enforcement working group, whose “goal was to examine the process for adjudicating violations” and “to examine the penalty structure[.]”

41. In the midst of the Consent Decree process, Gene Marsh was told by the NCAA: ““In some respects the PSU case will jump start the work of the Working Groups[.]””

42. The next day, Marsh lamented about the influence of the working groups on the Consent Decree process: “It is also clear to me they are making a bold stroke for reform of college athletics through this case, and this is the starting gun for all their Working Group reports that are close to being finished.”

43. The NCAA used Penn State as the exemplar for a new enforcement regime that was soon coming from the NCAA.

44. The NCAA used Penn State to “leverage” a new era in NCAA power.

45. Just as communicated to Gene Marsh and just three months after the announcement of the Consent Decree, the NCAA adopted a new enforcement structure based on the work of the enforcement working group.

46. The NCAA, on the example of Penn State, announced “a new sheriff in town on the issue of the infractions process and enforcement[.]”

2. Defendant The NCAA’s Statement of Contested Facts⁵

Jerry Sandusky Criminal Indictment

1. In November 2011, the Nation was shocked by revelations that longtime Penn State Assistant Football Coach Jerry Sandusky had used his position of authority and respect on campus to commit brutal acts of sexual abuse against young children, and that, more than a decade earlier, senior members of Penn

⁵ By inclusion of any fact in this section, the NCAA does not admit that any such fact is relevant to the legal issue before the Court. Because Plaintiffs have not previously been asked to present the basis by which they intend to challenge the validity of the Consent Decree, the NCAA cannot anticipate all such facts that may be relevant.

State's administration, including its Athletic Director, had received information about Sandusky's crimes and failed to take appropriate action.

2. Several of the offenses cited in the Thirty-Third Statewide Investigating Grand Jury Presentment (the "Presentment") occurred between 1998 and 2002, during which time Sandusky was either the Defensive Coordinator for the Penn State football team or a Penn State professor Emeritus with unrestricted access to the University's football facilities.

3. The Presentment describes multiple instances of Sandusky showering naked—with seven of the eight victims listed in the Presentment—in various Penn State football facilities, including the Lasch Football Building, old East locker rooms or the lockers next to Holuba Hall. The Presentment also states that "sexual conduct" between Sandusky and a young boy occurred in a sauna located in Penn State football facilities.

4. The Presentment also indicated that Coach Joseph V. Paterno had been informed about Sandusky's sexual abuse of a minor in 2002, and raised serious questions about the sufficiency of his response and follow-up.

5. Until the day of Sandusky's arrest, Sandusky was invited to attend athletic events at Penn State. For example, Sandusky attended the October 29, 2011 Penn State football game and sat in the Nittany Lion Club—less than a week before the Presentment was made public.

6. At the time of his Indictment, according to the Presentment, “[a]s a retired coach, Sandusky had unlimited access to the football facilities, including the locker rooms.” The Presentment also notes that “Sandusky holds emeritus status with Penn State. In addition to the regular privileges of a professor emeritus, he had an office and a telephone in the Lasch Building. The status allowed him access to all recreational facilities, a parking pass for a vehicle, access to a Penn State account for the internet, listing in the faculty directory, faculty discounts at the bookstore and educational privileges for himself and eligible dependents. These and other privileges were negotiated when Sandusky retired in 1999. Sandusky continued to use University facilities as per his retirement agreement.”

Penn State’s Response to the Presentment

7. On November 8, 2011, four days following the charges against Sandusky and others, Penn State released a statement that said the Board “is outraged by the horrifying details contained in the Grand Jury Report.” The Board promised to “take swift, decisive action” and said that “Penn State has always strived for honesty, integrity and the highest moral standards....we will not tolerate any violation of these principles....we are dedicated to protecting those who are placed in our care....we are committed to restoring public trust in the University.”

8. The Board’s statement further provided that the Board “will appoint a Special Committee, members of which are currently being identified, to undertake

a full and complete investigation of the circumstances that gave rise to the Grand Jury Report. This Special Committee will be commissioned to determine what failures occurred, who is responsible and what measures are necessary to insure that this never happens at our University again and that those responsible are held fully accountable. The Special Committee will have whatever resources are necessary to thoroughly fulfill its charge, including independent counsel and investigative teams, and there will be no restrictions placed on its scope or activities.”

9. On November 9, 2011, the Penn State Board of Trustees released President Graham Spanier and head football coach Joe Paterno. The Trustees’ decision was unanimous. The Executive Committee of the Board later reaffirmed and ratified these decisions on December 2, 2011.

10. According to the Board, they decided to remove Dr. Spanier “because he failed to meet his leadership responsibilities to the Board and took insufficient action after learning of a 2002 incident involving former assistant coach Jerry Sandusky and a young boy in a Penn State facility. This failure of leadership included insufficiently informing the Board about his knowledge of the 2002 incident.” The Board made the decision to fire Coach Paterno—with only three football games left in the season (Paterno had previously announced he was retiring at the end of the season after forty-six years as head coach)—because they

“determined that his decision to do his minimum legal duty and not to do more to follow up constituted a failure of leadership by Coach Paterno.”

11. On November 9, Rodney Erickson was appointed President of Penn State. Around that time, President Erickson made “five promises” to the Penn State community, including that he would “reinforce to the entire Penn State community the moral imperative of doing the right thing—the first time, every time,” “work together” with the Penn State community to “reorient our culture,” and “ensure proper governance and oversight exists across the entire University, including Intercollegiate Athletics.”

12. When the Sandusky presentment was released in November 2011, it immediately occurred to President Erickson that the NCAA might become involved “[b]ecause it involved a relationship to intercollegiate athletics, that our athletic directors was charged, and our ... former senior vice president for finance and business.”

13. On November 21, 2011, the Special Investigations Task Force of the Board of Trustees (“Task Force”) announced that it had engaged the Freeh Group, on behalf the Penn State Board of Trustees, as Special Investigative Counsel.

14. Judge Louis Freeh is a former FBI director and federal judge. Trustee Frazier reported to the Board of Trustees on January 20, 2012 that Freeh has

“unimpeachable credentials and unparalleled experience in law and criminal justice.”

15. In announcing the investigation, Trustee Frazier said that “No one, no one, is above scrutiny....[The Freeh Group] has complete rein to follow any lead, to look into every corner of the University to get to the bottom of what happened and then to make recommendations to ensure that it never happens again.”

16. Penn State asked the Freeh Group to perform an independent, full, and complete investigation of (i) “the alleged failure of Pennsylvania State University personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky” and (ii) “[t]he circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth.” In addition, Penn State asked the Freeh Group to “provide recommendations regarding University governance, oversight, and administrative policies and procedures.”

The NCAA’s Response to the Presentment

17. The NCAA recognized the Sandusky matter presented an unprecedented event in the history of intercollegiate athletics. In the wake of the presentment, NCAA staff engaged in thoughtful and careful deliberation concerning the appropriate response from the NCAA, if any. A number of

approaches were considered. Ultimately, there was a consensus to send a letter to Penn State seeking additional information.

18. Accordingly, on November 17, 2011, President Emmert sent a letter to President Erickson explaining that, in light of the information the Sandusky presentment, the NCAA would review Penn State's exercise of institutional control over its intercollegiate athletics program. The letter presented four questions that Penn State should answer to allow the NCAA to determine any next steps. The November 17, 2011 letter was *not* the initiation of any formal enforcement inquiry or investigation by the NCAA.

19. The November 17, 2011 letter requested Penn State's response by December 16, 2011. However, Penn State had recently selected the Freeh Group to conduct an independent investigation on behalf of the Board of Trustees, and was hopeful that facts and information identified in that investigation could be used to answer the questions in the letter. Penn State further hoped that by conducting its own independent investigation of the Sandusky affair, it would deter the NCAA from conducting its own investigation. Accordingly, Penn State leadership itself requested that the NCAA and Freeh Group engage in communication about the investigation.

20. On December 12, 2011, Penn State Vice President and General Counsel Cynthia Baldwin replied to Dr. Emmert's November 17 letter, requesting

additional time to answer the questions posed in the November 17 letter. Ms. Baldwin's letter stated that the questions "might be answered in the course of the investigation currently in progress." Ms. Baldwin further noted, *inter alia*, "The University understands that the NCAA will continue to monitor these investigations and will have access to the report of the Special Investigations Task Force. At that time the NCAA will determine if a further response from the University is necessary."

21. On December 20, 2011, Mr. Remy replied to Ms. Baldwin's letter. That letter stated, *inter alia*:

The NCAA appreciates the cooperation of the University and the Special Investigative Counsel to the Special Investigations Task Force established by the Pennsylvania State University Board of Trustees.

We recognize the importance, confidentiality and independence of the work of Judge Freeh and his team and value the opportunity to gain appropriate insight into that process and its results as it relates to the areas of interest expressed in our November 17 letter. As Dr. Emmert has pledged, I will continue to work with you, President Erickson and Judge Freeh during his ongoing investigation.

22. From November 2011 to July 2012, the contacts between the NCAA and the Freeh Group were limited in nature and well-known to Penn State.

23. The Freeh Group's investigation was an independent investigation, and the NCAA did not dictate any aspect of the investigation, participate in or attend any witness interviews, play any role in the development of the Freeh

Group's conclusions, receive any substantive briefings on findings and conclusions, or review any drafts or partial drafts of the Freeh Report.

24. The NCAA learned of the planned release of the Freeh Report from Twitter and never saw the report itself until the Freeh Group released it to the public.

The Freeh Report

25. The Freeh Report was released on July 12, 2012. The Freeh Report states that the Freeh Group conducted over 430 interviews and analyzed over 3.5 million pieces of electronic data and documents, and that the Freeh Group had “unfettered access to University staff, as well as to data and documents maintained throughout the University.”

26. The Freeh Report found, among other things:

- (a) [University] President Graham B. Spanier, Senior Vice President-Finance and Business Gary C. Shultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno [] failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky's activities from the Board of Trustees, the University community and authorities. . . .
- (b) These individuals, unchecked by the Board of Trustees that did not perform its oversight duties, empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program. Indeed, that continued access provided Sandusky with the very currency that enabled him to attract his victims. Some coaches, administrators and football

program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him.

- (c) By not promptly and fully advising the Board of Trustees about the 1998 and 2001 child sexual abuse allegations against Sandusky and the subsequent Grand Jury investigation of him, Spanier failed in his duties as President. The Board also failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable.
- (d) The University maintained a "culture of reverence for the football program that is ingrained at all levels of the campus community."

27. The day it was released, Penn State publicly issued a statement about the Freeh Report. Members of the Penn State Board, with assistance from counsel and other advisors, prepared and released the statement prior to any substantive discussion with NCAA personnel about the Freeh Report.

28. Penn State's statement about the Freeh Report said "[t]he Board of Trustees, as the group that has paramount accountability for overseeing and ensuring the proper functioning and governance of the University, accepts full responsibility for the failures that occurred. The Board, in cooperation with the Administration, will take every action to ensure that events like these never happen again in our university community."

29. The statement also said that "[t]here can be no ambiguity" about the Report's conclusion that "certain people at the University who were in a position to protect children or confront the predator failed to do so....[w]e are deeply sorry for

the failure to protect these vulnerable young boys from the pain and anguish they suffered.” It also stated that the “Board of Trustees acknowledges that it failed to create an environment of accountability and transparency and did not have optimal reporting procedures or committee structures.”

The NCAA’s and Penn State’s Negotiation and Execution of the Consent Decree

30. Following the release of the Freeh Report, senior NCAA personnel carefully reviewed the Report and engaged in thoughtful, careful, and extensive internal deliberations concerning the best and most appropriate response to the unprecedented case at Penn State. NCAA personnel took the situation very seriously and endeavored to achieve the right result.

31. Following the release of the Freeh Report, President Erickson and President Emmert engaged in dialogue about the NCAA’s and Penn State’s next steps. At some point during those discussions, they discussed a possible alternative to the traditional infractions process: a summary resolution by which Penn State would accept the findings of the Freeh Report and the NCAA and Penn State could agree on a set of punitive and corrective measures. This alternate approach, which became the Consent Decree, quickly became the focus of communications between President Erickson and President Emmert, as well as Mr. Remy, Mr. Berst, and Mr. Marsh.

32. At no time during these discussions did the NCAA “threaten” that the NCAA Executive Committee would impose unilaterally the so-called death penalty on Penn State’s football program if it did not enter into the Consent Decree. The alternative to the Consent Decree was a traditional infractions process in which if the NCAA staff prevailed, the Committee on Infractions was authorized to impose the death penalty on Penn State. Penn State always remained free to reject an agreed resolution and trigger the traditional infractions process, or otherwise challenge in litigation the NCAA’s authority to act.

33. During the week of July 17, 2012, the NCAA and Penn State engaged in numerous communications concerning a potential package of punitive and corrective measures that could be agreed upon by the NCAA and Penn State. Mr. Marsh was the principal negotiator of the Consent Decree for Penn State, and he frequently communicated with his counterparts at the NCAA, Mr. Remy and Mr. Berst.

34. During this process, the Freeh Report and its acceptance by the University limited Penn State’s negotiating position. Still, Penn State was able to negotiate several important changes to the package as well as the language of the Consent Decree itself from what the NCAA initially proposed. For example, Penn State persuaded the NCAA to (1) reduce the term of the post-season ban from five to four years; (2) change the timing of the scholarship reductions; (3) push back on

proposed restrictions on Trustee activities in relation to the football program; (4) limit the acceptance of the Freeh Report with the language “for purposes of this resolution” (which was viewed as very important by Penn State’s counsel); and (5) add a provision that the Consent Decree could be “modified or clarified by mutual written consent of the parties” (which is the provision that has been invoked to reduce the punitive sanctions in each of the past two years).

35. Between July 12, 2012 and July 23, 2012, the NCAA Executive Committee convened twice to discuss the Penn State matter. On July 17, 2012, the NCAA Executive Committee and Division I Board of Directors had a conference call, along with certain members of the NCAA senior management group, to discuss potential responses to the Sandusky matter. On July 21, 2012, the NCAA Executive Committee met again and unanimously voted, “[p]ursuant to its authority under the NCAA Constitution and Bylaw Provision 4.1.2(e) to resolve core issues of Association-wide import,” to “authorize the NCAA President to enter into a consent decree with Pennsylvania State University and undertake any related activities in furtherance thereof, including the execution of an athletics integrity agreement memorializing the institution’s commitments.” The NCAA Executive Committee has acted in the past to resolve core issues and Association-wide matters. The NCAA Division I Board of Directors also voted to support the

Executive Committee's action authorizing President Emmert to enter into a consent decree.

36. Throughout this time, the NCAA had the authority to initiate its own enforcement investigation concerning the Sandusky affair or to attempt to pursue an infractions case against Penn State before the NCAA Committee on Infractions. NCAA personnel discussed whether the traditional infractions process was the best path forward, and what the outcome of a potential infractions case might be—which could not be predicted with any certainty in an unprecedented case that would be put to an independent adjudicator, the Committee on Infractions. Then-Director of Enforcement, Julie Roe Lach, believed that a “reasonable and logical” case could be pursued against Penn State. However, because the NCAA and Penn State agreed to the Consent Decree, the NCAA did not invoke its authority to initiate an enforcement investigation or infractions case against Penn State.

37. Penn State was advised by no fewer than five experienced lawyers in the drafting, consideration, negotiation, and execution of the Consent Decree. Mr. Marsh—who had served as the Chair of the NCAA Committee on Infractions—specifically advised Penn State regarding the NCAA's authority to act through its Executive Committee, the Committee on Infractions' authority to impose the so-called death penalty, and the advantages and disadvantages of pursuing the traditional infractions process rather than accepting the Consent Decree. Indeed,

Mr. Marsh repeatedly raised for Penn State the option of triggering the infractions process and helped Penn State weigh that alternative against accepting the Consent Decree.

38. Mr. Marsh advised Penn State that the findings in the Freeh Report and the Penn State Board's "embrace" of the Report established violations of NCAA Constitution and Bylaws and the Committee on Infractions would likely impose harsh sanctions on Penn State, potentially including the death penalty.

39. With Mr. Marsh's counsel, Penn State determined that accepting the Consent Decree was the best option available to the University at the time. Penn State concluded that accepting the Consent Decree was preferable to the traditional infractions process because, *inter alia*, the infractions process would be lengthy (with an ominous cloud hanging over the football program for 1-2 years), the ultimate sanctions could be severe, and NCAA investigators could identify additional NCAA violations that were not addressed in the Freeh Report.

40. President Erickson frequently consulted with members of the Executive Committee of the Board of Trustees in the period leading up to execution of the Consent Decree, including in multiple meetings of the Executive Committee. President Erickson called a meeting of the Executive Committee on July 22, 2012 to discuss the terms of the Consent Decree prior to its execution. During this meeting, the Executive Committee was advised that Penn State could

reject the Consent Decree and pursue the infractions process, but that it would not fare well if it did so.

41. It was entirely Penn State's decision to brief the Executive Committee of the Board of Trustees—but not the full Board—prior to execution of the Consent Decree. The NCAA never told President Erickson not to brief the full Penn State Board of Trustees about the Consent Decree. Both the NCAA and Penn State believed that confidentiality was important, and that careful deliberations would not be possible if the discussions were engulfed in a media storm. Thus, Penn State's decision not to brief the full Board was in part driven by the Board's record of leaks in the preceding nine months.

42. Penn State counsel advised President Erickson that he was authorized to execute the Consent Decree on behalf of Penn State. The Executive Committee of the Board of Trustees concurred in this decision. If Board approval had been necessary, President Erickson could have obtained such approval from the Executive Committee, which is authorized to act on behalf of the full Board in certain circumstances. In the Consent Decree, Penn State represented to the NCAA that President Erickson was authorized to execute the agreement.

43. Fully advised by counsel and after consulting with the Executive Committee, President Erickson executed the Consent Decree on July 22, 2012, and the Consent Decree was publicly announced on July 23, 2012.

44. The Consent Decree included a number of punitive and corrective measures, including a \$60 million fine that was to be used for the prevention of child abuse and/or treatment of child abuse victims.

45. The Consent Decree provided that Penn State “accepts the findings of the Freeh Report for purposes of this resolution” and, consistent with Mr. Marsh’s analysis and advice, “acknowledge[d] that those facts constitute violations of the Constitutional and Bylaw principles” set forth in President Emmert’s November 17, 2011 letter. Penn State knowingly and intentionally “waive[d] any claim to further process, including, without limitation, any right to a determination of violations by the NCAA Committee on Infractions..., or any judicial process related to the subject matter of this Consent Decree.”

46. The Consent Decree provides that it “may be modified or clarified by mutual written consent of the parties.” Pursuant to this provision, which was requested by Penn State, the NCAA has since modified the Consent Decree on at least two occasions due to Penn State’s progress in implementing the components of the Consent Decree and the Athletics Integrity Agreement.

47. After the Consent Decree was announced, President Erickson publicly stated that “[t]oday we accept the terms of the consent decree imposed by the NCAA. As Penn State embarks upon change and progress, this announcement

helps to further define our course. It is with this compass that we will strive for a better tomorrow.”

48. From July 23, 2012 to present, Penn State has remained committed to compliance with the Consent Decree, has never challenged its validity, and its Board has specifically declined to do so on several occasions.

49. On August 13, 2014, the Penn State Board of Trustees held a special executive session and public meeting and voted 19-8 to adopt a resolution confirming Penn State’s commitment to compliance with the Consent Decree.

3. Defendant Penn State’s Statement of Contested Facts

1. President Erickson had the authority under Penn State’s Charter, Bylaws and Standing Orders to accept the Consent Decree without a vote of the Penn State Board of Trustees.

2. President Erickson signed the Consent Decree after consulting with the Board’s Leadership and its Executive Committee, and with their unanimous concurrence, and after consulting with in-house and outside legal counsel to the University.

3. President Erickson made the decision to accept the Consent Decree to avoid the risk of imposition of the “death penalty” on Penn State’s football program and the significant adverse economic and other effects such a penalty

would have had on Penn State student athletes, the University community as a whole, the surrounding community, and citizens throughout Pennsylvania; to avoid a prolonged period of investigation and/or litigation with the NCAA; to avoid jeopardizing Penn State's good standing as a member of the Big Ten Conference; to ensure that Penn State would have a defined roadmap for improvements within the University; because the Consent Decree was subject to amendment by mutual consent; because it was the best alternative open to the University; and because for these reasons and others it was in the best interests of Penn State and in furtherance of its mission to do so.

4. Penn State's Board of Trustees met on July 25 to discuss the Consent Decree and issued a public statement reflecting its views. The Board met again on August 12 to discuss the Consent Decree at which Board members, among other things, expressed their support for President Erickson, as reflected in the transcript of that meeting.

5. Penn State has fully complied with all provisions of the Consent Decree.

I. A COMPLETE LIST OF WITNESSES THAT MAY BE OFFERED BY EACH PARTY AT TRIAL⁶

1. Plaintiffs' Witnesses

- a. **Penn State President Rodney Erickson:** This witness is being offered to testify as to (1) the substance of the communications between the NCAA and Penn State regarding the Consent Decree process; and (2) the substance of intra-Penn State communications regarding the Consent Decree process.
- b. **Penn State General Counsel Stephen Dunham:** This witness is being offered to testify as to the substance of intra-Penn State communications regarding the Consent Decree process.
- c. **Penn State Associate General Counsel Frank Guadagnino:** This witness is being offered to testify as to (1) the substance of the communications between the NCAA and Penn State regarding the Consent Decree process; and (2) the substance of intra-Penn State communications regarding the Consent Decree process.
- d. **Attorney Gene Marsh:** This witness is being offered to testify as to (1) the substance of the communications between the NCAA and Penn State regarding the Consent Decree process; and (2) the substance of intra-Penn State communications regarding the Consent Decree process.
- e. **Penn State Board of Trustees Chairman Keith Masser:** This witness is being offered to testify as to the substance of intra-Penn State communications regarding the Consent Decree process.
- f. **Oregon State University President and Former Chairman of the NCAA Executive Committee Ed Ray:** This witness is being offered to testify as to (1) the NCAA working groups;

⁶ Identification of a witness not controlled by a party and who resides beyond the subpoena power of the Court does not guarantee the availability of that witness. Their availability will be subject to the witness's voluntary participation. In addition, the lists contained herein constitute witnesses that a party may call at trial, but need not do so.

and (2) the substance of communications within the NCAA, the Executive Committee, and the Division I Board of Directors regarding the Consent Decree process.

Plaintiffs reserve the right to call any witnesses identified by Defendants.

Plaintiffs also reserve the right to supplement this list.

2. The NCAA's Witnesses

Witness	Short Description
Ann Milner	Ann Miller was on the NCAA Executive Committee in July 2012. If called to testify, Ms. Miller's testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.
Cynthia Baldwin	Cynthia Baldwin is the former General Counsel of Penn State. If called to testify, Ms. Baldwin's testimony may include, but is not limited to, discussions with NCAA representatives regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report and the investigation by the Freeh Group; and internal Penn State discussions regarding said NCAA response.
David Berst	David Berst is the Vice President of Division I of the NCAA. If called to testify, Mr. Berst's testimony may include, but is not limited to, governing rules, regulations, Bylaws, customs, and authority of the NCAA; past practices of the NCAA; the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; internal NCAA communications regarding said response; communications with representatives of Penn State regarding said NCAA response; sanctions accepted by Penn State in the course of

Witness	Short Description
	said NCAA response; and any topics or testimony addressed at Mr. Berst's deposition.
Donald Remy	Donald Remy is currently the Executive Vice President of Law, Policy and Governance and Chief Legal Officer for the NCAA. If called to testify, Mr. Remy's testimony may include, but is not limited to, the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; internal NCAA communications regarding said response; communications with representatives of Penn State regarding said NCAA response; sanctions accepted by Penn State in the course of said NCAA response; governing rules, regulations, Bylaws, customs, and authority of the NCAA; and any topics or testimony addressed at Mr. Remy's deposition.
Frank Guadagnino	Frank Guadagnino is Associate General Counsel of Penn State University. If called to testify, Mr. Guadagnino's testimony may include, but is not limited to, Penn State's response to information contained in the Freeh Report; Penn State's authority to enter into the Consent Decree; Penn State communications with the NCAA regarding the Freeh investigation and the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; internal discussions within Penn State and legal advice provided regarding said NCAA response; sanctions accepted by Penn State in the course of said NCAA response; and any topics or testimony addressed at Mr. Guadagnino's deposition.
Gene Marsh	Gene Marsh is a law professor at the University of Alabama School of Law and of counsel at Jackson Lewis P.C. in Birmingham, Alabama. If called to testify, Mr. Marsh's testimony may include, but is not limited to, his work as Penn State's representative in discussions with the NCAA beginning in July 2012 regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; discussions occurring and legal advice provided in the

Witness	Short Description
	course of that representation; sanctions accepted by Penn State in the course of that representation; the governing rules, regulations, Bylaws, customs, and authority of the NCAA; and any topics or testimony addressed at Mr. Marsh's deposition.
Harris Pastides	Harris Pastides was on the NCAA Executive Committee in July 2012. If called to testify, Mr. Pastides' testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.
J. Patrick O'Brien	J. Patrick O'Brien was on the NCAA Executive Committee in July 2012. If called to testify, Mr. O'Brien's testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.
Jack Ohle	Jack Ohle was on the NCAA Executive Committee in July 2012. If called to testify, Mr. Ohle's testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.
Jake Corman	Jake Corman is a senator from 34 th Senatorial District of Pennsylvania and a plaintiff in this action. If called to testify, Mr. Corman's testimony may include, but is not limited to, his communications with current and former representatives of Penn State, Penn State Board of Trustee

Witness	Short Description
	members, Coach Joe Paterno, family members of Coach Joe Paterno; the Endowment Act; and any topics or testimony addressed at his upcoming deposition.
James Schmotter	James Schmotter was on the NCAA Executive Committee in July 2012. If called to testify, Mr. Schmotter's testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.
Jonathan Barrett	Jonathan Barrett was previously an attorney at the law firm of Mayer Brown LLP. If called to testify, Mr. Barrett's testimony may include, but is not limited to, his communications as a representative of The Big Ten conference with representatives of the Freeh Group and/or with NCAA senior leadership regarding the Sandusky matter, the Freeh investigation, the Consent Decree, or other related topics.
Julie Roe Lach	Julie Roe is the former Vice President of Enforcement for the NCAA. If called to testify, Ms. Roe Lach's testimony may include, but is not limited to, the NCAA enforcement process; the governing rules, regulations, Bylaws, customs, and authority of the NCAA; the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; internal NCAA communications regarding said response; sanctions accepted by Penn State in the course of said NCAA response; and any topics or testimony addressed at Ms. Roe Lach's deposition.
Karen Peetz	Karent Peetz is the former Chair of the Board of Trustees of Penn State. If called to testify, Ms. Peetz' testimony may include, but is not limited to, discussions involving, knowledge of, and decisions by, members of the Penn State Board of Trustees and other Penn State leadership regarding information learned from the Jerry Sandusky Grand Jury

Witness	Short Description
	<p>Presentment and the Freeh Report, including, without limitation, commissioning an independent investigation, the process of that investigation, Penn State's response to the Freeh Report, the NCAA's response to information learned from the Jerry Sandusky Grand Jury Presentment and the Freeh Report, sanctions accepted by Penn State in the course of said NCAA response.</p>
<p>Keith Masser</p>	<p>Keith Masser is currently the Chairman of the Board of Trustees of Penn State University. If called to testify, Mr. Masser's testimony may include, but is not limited to, discussions involving, knowledge of, and decisions by, members of the Penn State Board of Trustees and other Penn State leadership regarding information learned from the Jerry Sandusky Grand Jury Presentment and the Freeh Report, including, without limitation, commissioning an independent investigation, the process of that investigation, Penn State's response to the Freeh Report, the NCAA's response to information learned from the Jerry Sandusky Grand Jury Presentment and the Freeh Report, sanctions accepted by Penn State in the course of said NCAA response. Mr. Masser's testimony may also include any topics or testimony addressed in his deposition.</p>
<p>Kenneth C. Frazier</p>	<p>Kenneth Frazier a member of the Penn State Board of Trustees. If called to testify, Mr. Frazier's testimony may include, but is not limited to, discussions involving, knowledge of, and decisions by, members of the Penn State Board of Trustees and other Penn State leadership regarding information learned from the Jerry Sandusky Grand Jury Presentment and the Freeh Report, including, without limitation, commissioning an independent investigation, the process of that investigation, Penn State's response to the Freeh Report, the NCAA's communications with the Freeh Group and the NCAA's response to information learned from the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response. Mr. Frazier's testimony may also include any topics or testimony addressed at his</p>

Witness	Short Description
	upcoming deposition.
Kevin Lennon	Kevin Lennon is the Vice President of Academic & Membership Affairs for the NCAA. If called to testify, Mr. Lennon's testimony may include, but is not limited to, the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; internal NCAA communications regarding said response; sanctions accepted by Penn State in the course of said NCAA response; and any topics or testimony addressed at Mr. Lennon's deposition.
Lou Anna Simon	Lou Anna Simon was on the NCAA Executive Committee in July 2012. If called to testify, Ms. Simon's testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.
Louis Freeh	Louis Free is a former attorney at the law firm of Freeh Sporkin & Sullivan, a former federal judge, and the former Director of the FBI. If called to testify, Mr. Freeh's testimony may include, but is not limited to, the process, independence, and findings of the Freeh investigation.
Mark Emmert	Mark Emmert is the President of the NCAA. If called to testify, Dr. Emmert's testimony may include, but is not limited to, the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; internal NCAA communications regarding said response; communications with representatives of Penn State regarding said NCAA response; sanctions accepted by Penn State in the course of said NCAA response; governing rules, regulations, Bylaws, customs, and authority of the NCAA; and any topics or testimony addressed at Dr. Emmert's deposition.
Nathan Hatch	Nathan Hatch was on the NCAA Executive Committee in

Witness	Short Description
	<p>July 2012. If called to testify, Mr. Hatch's testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.</p>
<p>Omar McNeill</p>	<p>Omar McNeill is a former attorney at the law firm of Freeh Sporkin & Sullivan. If called to testify, Mr. McNeill's testimony may include, but is not limited to, the process, independence, and findings of the Freeh investigation; communications between or among the NCAA, The Big Ten Conference and the Freeh Group; and any topics or testimony addressed at Mr. McNeill's upcoming deposition.</p>
<p>Paula Ammerman</p>	<p>Paula Ammerman is the Director of the Penn State Board of Trustees Office. If called to testify, Ms. Ammerman's testimony may include, but is not limited to, communications and meetings occurring between and among members of the Penn State Board of Trustees regarding the NCAA's or Penn State's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; sanctions accepted by Penn State in the course of said NCAA response; and notes, minutes, and other writings related to said communications and meetings.</p>
<p>Rodney Erickson</p>	<p>Rodney Erickson is the former President of Pennsylvania State University and signed the Consent Decree on behalf of Penn State. If called to testify, Dr. Erickson's testimony may include, but is not limited to, Penn State's authority to enter into the Consent Decree; Penn State's response to information contained in the Freeh Report; communications with the NCAA regarding its response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; internal discussions within Penn State and legal advice provided regarding said NCAA response; sanctions accepted by Penn State in the</p>

Witness	Short Description
	course of said NCAA response; and any topics or testimony addressed at Dr. Erickson's deposition.
Stan Albrecht	Stan Albrecht was on the NCAA Executive Committee in July 2012. If called to testify, Mr. Albrecht's testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.
Stephen Dunham	Stephen Dunham is the Vice President and General Counsel of Penn State University. If called to testify, Mr. Dunham's testimony may include, but is not limited to, Penn State's authority to enter into the Consent Decree; other issues and discussions surrounding Penn State's decision to execute the Consent Decree; and any topics or testimony addressed at Mr. Dunham's deposition.
Timothy White	Timothy White was on the NCAA Executive Committee in July 2012. If called to testify, Mr. White's testimony may include, but is not limited to, discussions between and among NCAA Executive Committee members regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.
Wally Renfro	Wally Renfro is a consultant to the NCAA. If called to testify, Mr. Renfro's testimony may include, but is not limited to, governing rules, regulations, Bylaws, customs, and authority of the NCAA; past practices of the NCAA; the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report; internal NCAA communications regarding said response; and sanctions accepted by Penn State in the course of said NCAA response.
William Harvey	William Harvey was on the NCAA Executive Committee in

Witness	Short Description
	July 2012. If called to testify, Mr. Harvey's testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.
William Meeham	William Meeham was on the NCAA Executive Committee in July 2012. If called to testify, Mr. Meeham's testimony may include, but is not limited to, discussions between and among members of the NCAA Executive Committee and/or the Division I Board of Directors regarding the NCAA's response to information learned about Penn State through the Jerry Sandusky Grand Jury Presentment and the Freeh Report, and sanctions accepted by Penn State in the course of said NCAA response.

The NCAA reserves the right to call any witness included on another party's witness list in its case in chief and to call witnesses to testify in response to issues raised in Plaintiffs' case in chief. In addition, the NCAA reserves the right to supplement this list in light of the fact that discovery is ongoing.

3. **Penn State's Witnesses**

- a. **Penn State President Rodney Erickson:** Penn State's witnesses are being offered to testify, if necessary, as to the consideration and decision to execute the Consent Decree.
- b. **Penn State Associate General Counsel Frank Guadagnino:** Penn State's witnesses are being offered to testify, if necessary, as to the consideration and decision to execute the Consent Decree.
- c. **Penn State Board of Trustees Chairman Keith Masser:** Penn State's witnesses are being offered to testify, if necessary, as to the consideration and decision to execute the Consent Decree.
- d. **Penn State General Counsel Stephen Dunham:** Penn State's witnesses are being offered to testify, if necessary, as to the consideration and decision to execute the Consent Decree.

Penn State reserves the right to call any witnesses identified by Plaintiffs or the NCAA. Penn State also reserve the right to supplement this list.

J. **EXHIBITS⁷**

- (a) **A Complete List of Exhibits to be Admitted into Evidence by Stipulation**
- (b) **A Complete List of Exhibits to be Offered into Evidence**

Attached are three charts, Exhibits A-C. Entries with no objections and no shading are documents that the parties agree should be admitted into evidence.

⁷ Plaintiffs reserve the right to amend their exhibit list to include documents to be produced in response to outstanding subpoenas and motions.

Entries with objections noted and shading are documents to be offered into evidence.

Plaintiffs and Defendants reserve the right to introduce any documents identified by the other parties. Plaintiffs and Defendants also reserve the right to supplement this list. If any party does so, the other parties reserve the right to object, regardless of whether any objection has been set forth in this pretrial statement.

K. NUMBER OF DAYS NEEDED FOR TRIAL

The parties anticipate that the trial will require 5 days.

Respectfully submitted,

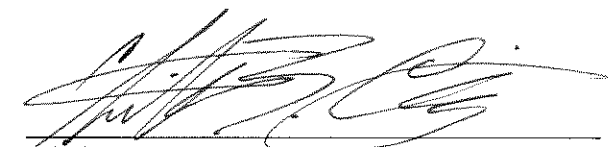
CONRAD O'BRIEN PC

Dated: December 12, 2014

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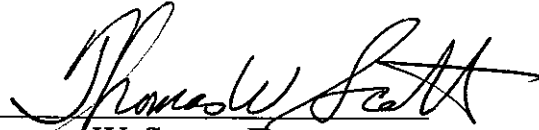
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