

June 13, 2013

VIA HAND-DELIVERY

Michael F. Krimmel, Chief Clerk
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
P.O. Box 69185
Harrisburg, PA 17106-9185

RE: *Corman & McCord v. NCAA*, No. 1 MD 2013

Dear Mr. Krimmel:

On behalf of Plaintiffs Senator Jake Corman and Treasurer Robert McCord, I write to request that the Court place the above matter into the Commonwealth Court's mediation program, as provided by Section 501 of the Internal Operating Procedures.

This litigation concerns primarily who will administer, oversee, and disburse some \$60 million in fine money owed by the Pennsylvania State University ("Penn State") for the treatment and prevention of child abuse. The fine is the result of the so-named "Consent Decree" between Penn State and the Defendant here, the National Collegiate Athletic Association ("NCAA"), entered into in the wake of the Jerry Sandusky scandal. In the matter before the Court, Plaintiffs contend that under the Institution of Higher Education Monetary Penalty Endowment Act ("the Endowment Act"), 24 P.S. §§ 7501-7505, the fine must be deposited into an endowment administered by the Pennsylvania Treasurer and to be disbursed as directed by the Pennsylvania Commission on Crime and Delinquency. The NCAA contends that it is the lawful administrator of the fine money and can disburse it according to its own terms. Preliminary objections in this matter will be heard by the Court sitting *en banc* on June 19, 2013.

Perhaps because of the impending argument, over the last two days, the parties to this matter received an exchange of correspondence from counsel for Penn State and counsel for the NCAA (enclosed). Collectively, the letters establish a persuasive argument for this Court to compel the litigants to participate in Court-administered mediation in order to resolve the underlying dispute. To illustrate, Penn State, stating that it has "no legal or financial interest in the litigation and therefore is not an indispensable party," made clear in its letter that the pending matter places the University in the untenable position of fighting "conflicting legal demands" – those of the Endowment Act and those of the NCAA. As a consequence, Penn State requested that the parties make a "good faith effort to settle the litigation," and offered its assistance in that regard.

Unfortunately, the NCAA responded to Penn State's earnest letter with what can at best be described as a dismissive response. In fact, the NCAA outright rejected Penn State's suggestion that a brokered settlement would be both appropriate and in the public interest. The NCAA's letter makes plain that absent Court involvement, the NCAA does not intend to yield any ground, even if equity and good faith would counsel that action.

In reaction to the exchange of letters, Senator Corman and Treasurer McCord sympathize with the concerns raised by Penn State and believe that avoiding lengthy litigation would be in the public interest. Therefore, Senator Corman and Treasurer McCord, in good faith and in the public interest, jointly request that the Court refer this matter to the mediation program at such time as the Court deems appropriate. With the referral, Senator Corman and Treasurer McCord believe a prompt and reasonable settlement may be reached.

Respectfully,



Matthew H. Haverstick

Enclosures

(via email and U.S. Mail)
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Enclosure 1

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RE: THE PENNSYLVANIA STATE UNIVERSITY

Dear Sirs:

As you are aware, in July 2012, the National Collegiate Athletic Association ("NCAA") imposed a Consent Decree (the "Consent Decree") on The Pennsylvania State University (the "University") which contained a number of sanctions against the University. One of the sanctions imposed on the University is a \$60 Million fine to be paid over a five-year period into an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse. The Consent Decree further provides that the proceeds of this fine may not be used to fund programs at the University.

In August 2012, the University began discussions with the staff of the NCAA with respect to the endowment and the University's obligations under the Consent Decree. In those discussions, representatives of the University were told by the NCAA that the NCAA believed that the Consent Decree requires the \$60 Million to be paid to the NCAA or to an endowment to be created by the NCAA, and that the NCAA and its endowment -- and not the University -- would decide where and how the money would be expended. As a result of the NCAA's insistence on its interpretation of the Consent Decree and to avoid possible litigation with the NCAA on this issue, in the fall of 2012 the University began to work with the NCAA with respect to the details of the endowment the NCAA said it would create.

In September 2012, the NCAA publicly announced that it was forming a national task force to oversee an endowment funded by the \$60 Million fine imposed on the University. The NCAA directed the task force to develop a philosophy for how the endowment funds would be used, including what types of programs are eligible, grant criteria and investment and spending policies. The task force was also charged by the NCAA with

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determining how the assets will be managed both financially and legally, and identifying an independent third party to administer and manage the endowment. The NCAA appointed two individuals recommended and employed by the University to serve on the nine member task force created by and operated under the direction of the NCAA.

As of mid-December 2012, the NCAA's task force had not yet completed its work. At the NCAA's request, the University set aside the first \$12 Million to be paid in a low risk interest bearing account pending further direction from the NCAA. As of the date of this letter, the initial \$12 Million continues to be held by the University in this segregated account. The University has made no payment under the Consent Decree and, in accordance with NCAA instructions, no payment is yet due. The University understands that the NCAA will not ask the University for payment until the litigation between the NCAA and the Commonwealth parties is resolved.

In February 2013, Governor Corbett signed into law the Institution of Higher Education Monetary Penalty Endowment Act (the "Act") which requires that, in these circumstances, if the University "pays a monetary penalty," it must pay the penalty into the State Treasury, rather than to the NCAA. This puts the University in the position, if the NCAA demands payment, of potentially being in violation of the Consent Decree, as interpreted by the NCAA. On the other hand, if the NCAA demands payment from the University, and the University does not at that point pay the funds to the State Treasury, as would then be required by the Act, the University would potentially be in violation of the Act.

Separately, litigation has been filed in both the Commonwealth Court (the "State Court Litigation") and in the United States District Court for the Middle District of Pennsylvania (the Federal Court Litigation") in which the parties to the litigation – but not including the University -- are seeking, through a variety of legal theories, custody and control of the \$60 Million.

The University has been working diligently to comply with its obligations under the Consent Decree and the related Athletics Integrity Agreement, as noted in the first three quarterly reports issued by Senator George Mitchell, the independent monitor appointed by the NCAA to oversee compliance with the Consent Decree and the Athletics Integrity Agreement. At the same time, the University intends to and must comply with all valid and duly enacted laws of the Commonwealth, including the Act, which are applicable to the University.

We want to avoid the risk that the NCAA will claim that the University has breached the Consent Decree by not paying the fine as directed by the NCAA and we want to avoid the risk that the Commonwealth will claim that the University is in violation of the Act by not paying the money to the State Treasury as may be required by the Act.

Over the course of the last several weeks, at the request of the parties, we have had individual discussions with the parties about the issues in the litigation. To avoid any miscommunication, we wish to inform all of you of the following points:

1. The University has no desire to become a party to either the State Court Litigation or the Federal Court Litigation. While we understand and appreciate your respective positions, your dispute over the use of the proceeds of the fine puts the University between the proverbial rock and a hard place. It is not in the best interests of the University to be drawn into litigation in which it is not a party, takes no legal position and has no financial interest in the outcome.

To clarify this point, the University has no legal or financial interest in the outcome of the litigation and therefore is not an indispensable party and should not otherwise be forced to become a party. Under the NCAA's

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interpretation of the Consent Decree, it is the NCAA, and not the University, that controls the task force and the creation and management of the endowment and how the money is spent. Therefore, it is the NCAA, and not the University, that is the proper party in litigation with the Commonwealth parties over the validity and applicability of the Act. The University is potentially in the middle between two conflicting legal demands. We take no legal position as to the issues in or the outcome of the litigation and, therefore, we do not believe that we are a proper or indispensable party.

2. Section 3(a) of the Act provides that if an institution of higher education "pays" a monetary penalty pursuant to an agreement entered into with a governing body and (1) the monetary penalty is at least \$10,000,000 in installments over a time period in excess of one year; and (2) the agreement provides that the monetary penalty will be used for a specific purpose, then the monetary penalty shall be deposited into an endowment that complies with the provisions of subsection 3(b) of the Act. The University's interpretation of this language is that the obligation to pay the money to the State Treasury is not triggered until the University has an obligation to pay the money to the NCAA or an endowment created pursuant to the Consent Decree. Because the NCAA has made no demand for the funds and has instructed the University to continue to hold the funds, the University has no current contractual obligation to pay those funds to the NCAA and thus no statutory obligation to pay such funds to the State Treasury under the Act. As noted, we understand that the NCAA does not intend to ask for payment of the money until the litigation is resolved and, therefore, the trigger in the Act to pay the money to the State Treasury should not occur prior to the outcome of the litigation.

3. The University intends to continue to hold the \$12 Million initial installment of the fine, pending a final judicial resolution and court order or an agreement of the parties. Although we believe it is unnecessary, the University would be willing, pursuant to agreement of all parties, to deposit the money with a Court, the State Treasury or a mutually acceptable third party escrow agent. In any event, we believe that it would be in the best interests of all parties, as well as the University, if the litigants would come to an agreement as to the short term custody of the \$12 Million pending the outcome of the litigation. We ask that the parties reach an agreement that will avoid placing the University in the middle of any dispute as to who should hold the initial \$12 Million.

4. Finally, beyond the initial \$12 Million, we request that you make good faith efforts to settle the dispute over the proper disposition of the full \$60 Million fine. We note that a settlement of the dispute would permit the funds to be used for their intended purpose in an expeditious manner. This will benefit the child services organizations and the victims of child sexual abuse who are intended to benefit from the endowment. To that end, we would be pleased to meet with you at a mutually convenient date to see if we might assist in facilitating a settlement.

June 11, 2013

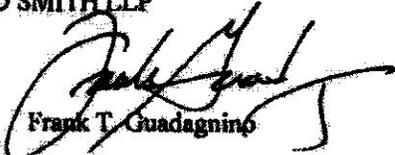
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Again, we believe it is in the best interests of all concerned, including, most importantly, the intended beneficiaries of the funds, if the parties would settle the litigation and agree on the proper disposition of the \$60 Million when and as payment becomes due. We stand ready to help you achieve such a settlement.

Sincerely,

REED SMITH LLP

By:



Frank T. Guadagnino

FTG:ac

cc: Rodney A. Erickson
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David J. Gray
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Enclosure 2

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June 12, 2013

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Re: The Pennsylvania State University

Dear Frank:

We write on behalf of the NCAA in response to your letter of June 11, 2013. While we will not attempt to respond here to every issue you raise, we do want to address the principal concerns.

We are in agreement that, for the reasons you stated, the General Assembly's attempt to compel Penn State to pay funds to the State Treasury leaves the University in a difficult position. Recognizing that difficulty, the NCAA has not demanded payment.

We also agree with you that the Endowment Act, even if it were constitutionally enforceable, and it is not, has not been violated. Pursuant to our mutual understanding, the first \$12 million payment has not yet been paid (nor is payable), and thus no construction of the Endowment Act supports the argument that Penn State is obliged currently to transfer the funds to the Commonwealth. We have encouraged the Commonwealth Court to dismiss Senator Corman's and Treasurer McCord's claims on that basis, among several others. Further, the fact that the Endowment Act has not yet been triggered by any payment—not to mention the general fungibility of money—renders unnecessary your suggestion that the funds be placed in the custody of the court or other third party.

Penn State is, however, an indispensable party to the *Corman* litigation. As you know, whether a party is indispensable under Pennsylvania law is a jurisdictional inquiry required of the court. *See Pilchesky v. Doherty*, 941 A.2d 95, 101 (Pa. Commw. Ct. 2008) (requiring that a case be dismissed in its entirety for lack of jurisdiction where an indispensable party is absent). As your letter recognizes, the litigation necessarily resolves Penn State's rights and obligations, and could even involve a determination that Penn State is in violation of law. Penn State's desire to remain uninvolved and its stated indifference to the outcome do not alter the fact that its rights are "so connected with the claims of the litigants that no decree can be made without impairing those rights," and therefore Penn State's absence from the *Corman* litigation requires that the case be dismissed altogether. *Polydyne, Inc. v. City of Phila.*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002) (quoting *Vernon Twp. Water Auth. v. Vernon Twp.*, 734 A.2d 935, 938 n.6 (Pa.

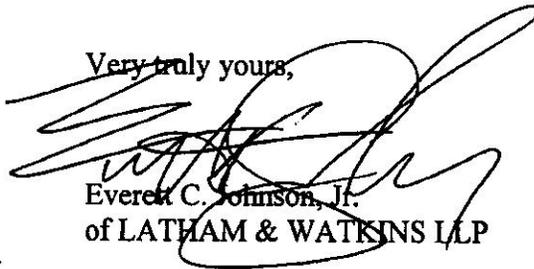
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Commw. Ct. 1999)); *see also* 42 Pa. Cons. Stat. § 7540(a) (“no declaration shall prejudice the rights of persons not parties to the proceeding.”). The Endowment Act represents an extraordinary, indeed unprecedented, attempt to exercise State control over the University’s decision making authority and the expenditure of its own funds. As a matter of governance, the University’s professed indifference to its independence, autonomy, and substantial financial obligations (if true) is surprising.

Finally, you suggest that the parties come to agreement on the expenditure of funds so that the victims of child sexual abuse can begin to benefit, as intended, from the fine proceeds. Of course, but for the Endowment Act and litigation initiated by Pennsylvania officials, the funds would already be benefiting the victims. While we would like to resolve these issues, we are sure you understand that Pennsylvania law, in the form of the Endowment Act, now renders that impossible.

Notwithstanding the above, we appreciate your comments and welcome any constructive thoughts that you or others may have.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'Everett C. Johnson, Jr.', is written over the typed name and firm name.

Everett C. Johnson, Jr.
of LATHAM & WATKINS LLP

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