

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

**SENATOR JAKE CORMAN AND TREASURER ROBERT McCORD'S
RESPONSE TO NCAA CROSS MOTION, AND SENATOR CORMAN'S
REPLY IN FURTHER SUPPORT OF MOTION**

In response to Senator Corman's motion to determine propriety of invocation of privilege, the NCAA has effectively filed a cross motion,¹ preemptively asking this Court for an order to prevent inquiry by Senator Corman and Treasurer McCord into the NCAA's extensive and substantive contacts with

¹ Though the NCAA's filing is styled as an "answer," based on the proposed order, the NCAA is in fact asking for affirmative relief (as opposed to a mere denial of the pending motion). Accordingly, Senator Corman and Treasurer McCord are responding to the NCAA's filing as if it were a motion.

the Freeh Group (which subject matter, curiously, was not discussed in Senator Corman’s initial filing).² Indeed, based on the declaration of Donald Remy, Chief Legal Officer of the NCAA, the NCAA seemingly intends to have this Court foreclose examination of this issue purportedly because the Freeh investigation was “entirely independent from the NCAA[.]” See Remy decl. ¶ 7. Yet based on discovery to date in this matter, that characterization of the investigation is woefully incomplete, and certainly not grounds on which to limit examination or to allow the NCAA to continue with its persistent invocations of privilege.

To illustrate, the NCAA’s involvement with the Freeh Group was regular and substantive, and began nearly from the outset of the Freeh Group’s retention by Penn State. In fact, as early as November 30, 2011, the NCAA reached out to Omar McNeill of the Freeh Group to arrange a direct telephone call between President Mark Emmert and Judge Freeh. *See* PSUCOR01343 (Nov. 30, 2011 email) (Exhibit A).³ Next, in December 2011, members of the Freeh Group scheduled a meeting in State College to meet with Donald Remy and Julie Roe (then vice president of enforcement for the NCAA), along with Jonathan Barrett, outside counsel for the Big Ten. *See* NCAAJC00024811 (Dec. 1, 2011 calendar event) (Exhibit B); *see also* PSUCOR01658 (Dec. 5, 2011 email) (Exhibit C);

² For purposes of this motion “Freeh Group” refers both to Freeh, Sporkin & Sullivan, LLP and Freeh Group International Solutions.

³ Plaintiffs have applied redactions to the exhibits to this filing to remove certain personal contact information. The other redactions were applied by the NCAA in its production.

NCAAJC00014343 (Dec. 9, 2011 email) (Exhibit D). It appears that by December 2011 the NCAA was looking into “collaborating with the Freeh Group’s investigation,” as was outside counsel for the Big Ten. *See* PSUCOR01340 (Dec. 5, 2011 email) (Exhibit E).

And indeed, after the December 7 meeting in State College, the collaborating began in earnest. On December 19, 2011, Donald Remy solicited input from Omar McNeill regarding the text of a letter the NCAA was intending to send to Penn State. *See* NCAAJC00035748 (Dec. 20, 2011 email) (Exhibit F). Also around this time, the NCAA, the Freeh Group, and the Big Ten began scheduling and having a series of weekly conference calls to discuss Penn State. *See* NCJAAJC00024790 (Dec. 24, 2011 calendar event for “13 more occurrences”) (Exhibit G). These calls continued regularly right up until days before the Freeh Report’s July 12, 2012 release, *see* PSUCOR01417 (July 7, 2012 email) (Exhibit H), and even beyond. *See* PSUCOR01564 (July 11, 2012 email) (Exhibit I). Indeed, even after the release of the Freeh Report, President Emmert attempted to yet again have a direct “principal to principal” discussion with Judge Freeh (just as he had done in December 2011). *See* PSUCOR01533 (July 17, 2012 email) (Exhibit J).

But the collaboration between the NCAA and the Freeh Group was not simply limited to calls. For example, on December 28, 2011, Donald Remy sent

Omar McNeill a lengthy list of questions for use in the Freeh Group's investigation of Penn State. *See* NCAAJC00035612-35617 (Dec. 28, 2011 email and attachment) (Exhibit K). Thereafter, Omar McNeill not only reviewed the questions, but he also solicited from the NCAA "your list of potential witnesses, database search terms, etc., you would like to provide." *See* NCAAJC00035439 (Dec. 30, 2011 email) (Exhibit L). Whether those search terms were ever actually provided is so far unclear; however, the NCAA did produce in discovery a document dated February 10, 2012 with the title "Search terms," which appears directly responsive to the Freeh Group request. *See* NCAAJC00023947 (Feb. 10, 2012 document) (Exhibit M).

The collaboration did not end with search terms and questions. In fact, in late December, the NCAA and the Freeh Group arranged a lengthy conference call in which "15-17 people" from the Freeh Group intended to participate. *See* NCAAJC00035442 (December 31, 2011 email) (Exhibit N). The purpose of the call was so Julie Roe and others on behalf of the NCAA could make a presentation to the Freeh Group on "how the NCAA enforcement staff historically has examined issues involving institutional control and ethical conduct." *See* NCAAJC00035764 (Jan. 5, 2012 email) (Exhibit O). In advance of the call, the NCAA provided extensive materials to the Freeh Group, including a PowerPoint presentation. *See* NCAAJC00035953-35996 (attachment to Jan. 5, 2012 email)

(Exhibit P). The call was then made as scheduled for several hours on January 6, 2012. *See* NCAAJC00035756 (Jan. 6, 2012 email) (Exhibit Q).

In light of the above, whatever point about privilege that Mr. Remy intended to make by advising the Court that the NCAA only had “periodic status updates from Judge Freeh’s staff” should bear no weight. *See* Remy decl. ¶ 7.⁴ The contacts were routine and substantive, and involved multiple third parties. How this figures into the present pending motion is known only to the NCAA, but since it saw fit to inject the matter into the present dispute, Senator Corman and Treasurer McCord can only presume that the NCAA intends to preemptively foreclose extensive examination of NCAA personnel about the Freeh investigation. Such relief should not be afforded.

⁴ When issued, the Freeh report was publically represented to be “a full, fair and completely independent investigation,” without favoritism toward any party. *See* Prepared Remarks of Louis Freeh at 2 (July 12, 2012), *available at* http://progress.psu.edu/assets/content/Press_Release_07_12_12.pdf (Exhibit R). Though specifically acknowledging the cooperation of the State Attorney General, State Police, United States Attorney, Federal Bureau of Investigation, U.S. Department of Education, and the National Center for Missing & Exploited Children, Judge Freeh made no public mention concerning the extensive involvement of the NCAA revealed above. *Id.* at 3. Though discovery documents suggest some knowledge of the relationship between the NCAA and the Freeh Group by Penn State’s General Counsel, the extent to which Penn State’s President, administration, and members of the Board of Trustees were informed of the extensive NCAA involvement in the investigation and resulting report is presently unknown.

Respectfully submitted,

/s/ Matthew H. Haverstick

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Dated: November 11, 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA COURT OF PENNSYLVANIA

Jake Corman, in his official capacity as : 1 MD 2013
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

PROOF OF SERVICE

I hereby certify that this 11th day of November, 2014, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA COURT OF PENNSYLVANIA

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA COURT OF PENNSYLVANIA

/s/ Matthew Hermann Haverstick

(Signature of Person Serving)

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