UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, THOMAS W. CORBETT, JR., GOVERNOR, Plaintiff,	:	ELECTRONICALLY FILED
v.	:	Civil Action No.: **1:13-cv-000060-YK**
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.	:	(THE HONORABLE YVETTE KANE)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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Date: February 7, 2013

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STATEMENT OF QUESTION INVOLVED

Whether the Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

INTRODUCTION

In this case, the Governor of the State of Pennsylvania seeks to undo an agreement freely entered into by Pennsylvania State University ("PSU") with the National Collegiate Athletic Association ("NCAA") addressing the misconduct of senior University leaders in covering up the crimes of former PSU Assistant Football Coach Jerry Sandusky. PSU's own investigation concluded that University leaders were aware of Sandusky's crimes and failed to report them, at least in part because of a desire to protect the football program. Based on those facts, PSU accepted a Consent Decree embodying sanctions and remedial measures designed to change the football culture at PSU and ensure that competitive zeal never again facilitates child abuse.

Pennsylvania law gives PSU the authority to manage its own athletics program, join voluntary associations like the NCAA, and agree to contracts. Governor Corbett is a member of PSU's governing board, which voted to ratify the Consent Decree. In this case the Governor seeks, under the guise of antitrust law, to overrule his fellow Trustees and usurp the discretion that the Legislature delegated to PSU. This lawsuit is an inappropriate attempt to drag the federal

courts into an intra-state political dispute. The remedial measures that Penn State agreed to were controversial, and have elicited strong feelings on all sides. Some think they are too harsh, and some think they are too lenient. But none of those feelings have *anything* to do with the antitrust laws.

This lawsuit should be dismissed on the pleadings for at least four independent reasons:

First, under binding Third Circuit precedent, the NCAA's regulation of college sports is subject to antitrust scrutiny only if it directly regulates economic activity, like television contracts or the salary of coaches. *See Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998). Enforcement of rules relating to program integrity and eligibility for competition is not regulation of *commerce*, and is outside the scope of the Sherman Act. Indirect economic effects on businesses resulting from the NCAA imposing major sanctions are not uncommon, and do not alter the analysis.

Second, even if the antitrust laws were applicable, the Complaint fails to state a claim because the ethical standards enforced by the NCAA are part of what makes college athletics unique and distinctive. As the Supreme Court has explained, "the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984). "In performing this role, [the NCAA's] actions widen consumer choice—

not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive." *Id.* The Third Circuit and numerous other courts have held that antitrust suits challenging NCAA enforcement of rules defining the unique character of college sports satisfy the antitrust rule of reason and can be dismissed *on the pleadings*.

Plaintiff contends that these sanctions exceed the NCAA's appropriate role as the regulator of college athletics, and that Sandusky's conduct is merely a criminal matter. But the Consent Decree is not about Jerry Sandusky; it is addressed to the behavior of senior University officials, including the former head football coach, who learned of evidence of Sandusky's crimes and chose not to act—for reasons that, as Penn State has acknowledged, included an inappropriate culture of reverence for the football program and a desire to protect it. The NCAA and its member institutions are entitled to conclude that they do not want to condone a culture that places athletics above reporting crimes against children. Plaintiff's suggestion that these sanctions have nothing to do with the regulation of athletic competition ignores this obvious and direct interest of the NCAA and its members.

Third, the Complaint fails to allege harm to economic competition in the three (insufficiently pled) markets it identifies—for higher education, athletic apparel, and football recruits. The Complaint does not allege that lessened

competition from Penn State has made it possible for other universities to raise tuition or the price of athletic apparel, or to reduce the number or quality of scholarships that they offer to student-athletes. Nor would such allegations be remotely plausible, given how large and robust these alleged nationwide markets would be. Plaintiff alleges only that PSU, a single competitor, might be athletically disadvantaged by the Consent Decree, but the antitrust laws protect *competition*, not *competitors*.

Finally, Plaintiff is not suing on behalf of anyone who has antitrust injury or standing to sue. PSU chose to compromise its differences with the NCAA by consent decree, and that choice was ratified by the appropriate decision-makers under Pennsylvania law. *Parens patriae* authority does not give Governor Corbett standing to challenge that decision, when the citizens he claims to represent have not themselves suffered antitrust injury. The complaint should be dismissed.

STATEMENT OF FACTS

The NCAA disagrees with almost every allegation in Plaintiff's Complaint. For purposes of this motion only, the NCAA accepts those allegations, as supplemented by documents that the Complaint itself incorporates by reference (*i.e.*, the Consent Decree, the Freeh Report, and the NCAA's Constitution and

Bylaws), and facts appropriate for judicial notice. *See Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).[1]

The NCAA is a voluntary association of more than 1,000 colleges and universities that provides a framework for intercollegiate athletics competition among its members and works to preserve the tradition of college sports, including ideals of character, integrity, amateurism, and fair play. Compl. ¶¶22; NCAA Academic and Membership Affairs Staff, *2011-12 NCAA Division I Manual* arts. 1.2-1.3, 2.4 (2011) ("Manual"), attached as Ex. A. The NCAA's Constitution explains that:

> For intercollegiate athletics to promote the character development of participants, to enhance the integrity of higher education and to promote civility in society, student-athletes, coaches, and all others associated with these athletics programs and events should adhere to such fundamental values as respect, fairness, civility, honesty and responsibility. These values should be manifest not only in athletics participation, but also in the broad spectrum of activities affecting the athletics program.

Manual art. 2.4. To that end, the NCAA's Bylaws require "Exemplary Conduct" from coaches and administrators. *Id*. art. 19.01.2. Such persons "are, in the final analysis, teachers of young people" and "[t]heir own moral values must be so certain and positive that those younger and more pliable will be influenced by a

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[1] If the Court believes that the NCAA has introduced any facts that would necessitate converting this motion into a motion for summary judgment, we ask it to disregard those facts and decide this motion under Rule 12(b)(6).

fine example. Much more is expected of them than of the less critically placed citizen." *Id.* The NCAA's member schools also have charged the NCAA "[t]o uphold the principle of institutional control of, and responsibility for, all intercollegiate sports." *Id.* art. 1.2(b).

In 2011, the nation was shocked by revelations that longtime PSU Assistant Football Coach Jerry Sandusky had used his position to brutally abuse young children. Compl. ¶¶36-40. Sandusky was subsequently convicted on 45 criminal counts arising from these allegations. *Id.* ¶39. PSU's former President, its former Athletic Director, and another senior official currently face felony charges for child endangerment arising from their failure to properly report evidence of Sandusky's crimes. *Id.* ¶¶37, 39.

Shortly after Sandusky's indictment, PSU's Board of Trustees commissioned former FBI Director and federal judge Louis Freeh to conduct an exhaustive independent investigation. *Id.* ¶41; Freeh Sporkin & Sullivan, LLP, *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* 9 (2012) ("Freeh Report"), attached as Ex. B. The Freeh Report "conclud[ed], 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." Compl. ¶42. Specifically, the Freeh Report concluded that a "culture of reverence for the football program that is ingrained at all levels of the campus community" contributed to those failures. Freeh Report 16-17.

The NCAA informed PSU that its conduct was incompatible with the requirements of honesty, moral integrity, and institutional control and responsibility set forth in the NCAA Constitution and Bylaws. The University faced a formal inquiry and potential penalties, which could have included a multi-year ban on participation in football competition. Compl. ¶48.

In July 2012, PSU negotiated a Consent Decree with the NCAA in which it "accept[ed] the findings of the Freeh Report" and "acknowledge[d] that those facts constitute violations of the Constitutional and Bylaw principles described in the [NCAA's] letter." Consent Decree between PSU and NCAA at 2 (July 23, 2012) ("Consent Decree"), attached as Ex. C (citing Manual arts. 2.1, 2.4, 6.01.1, 6.4, 10.01.1, 10.1, 11.1.1, 19.01.2). The University accepted a four-year ban on postseason play, a reduction in football scholarships, and vacatur of football wins since 1998. PSU further agreed to fund a $60 million endowment dedicated to preventing child sexual abuse and assisting its victims, and to implement the Freeh Report's policy recommendations along with an Athletics Integrity Agreement aimed at reestablishing institutional control over the football program. *Id*. at 4-9.

The Consent Decree explained the NCAA's view that these sanctions were necessary because Penn State's acknowledged misconduct reflected "an unprecedented failure of institutional integrity leading to a culture in which a football program was held in higher esteem than the values of the institution, the values of the NCAA, the values of higher education, and most disturbingly the values of human decency." *Id*. at 4. It made clear that remedial action was necessary "to change the culture that allowed this activity to occur and realign it in a sustainable fashion with the expected norms and values of intercollegiate athletics." *Id*. Penn State "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.*

PROCEDURAL HISTORY

On January 2, 2013, Governor Corbett filed this lawsuit on behalf of the Commonwealth of Pennsylvania alleging that the NCAA's enforcement of the Consent Decree violates the Sherman Act, 15 U.S.C. §1. The suit purports to represent the interests of natural citizens of Pennsylvania, and asks this Court to enjoin the sanctions, including the Athletic Integrity Agreement and the remedial measures recommended in the Freeh Report, under the Clayton Act, 15 U.S.C. §26. Compl. ¶1, 42.

LEGAL STANDARD

Dismissal is appropriate unless the Complaint "contain[s] factual allegations that, taken as a whole, render the plaintiff's entitlement to relief plausible." *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 98 (3d Cir. 2010). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint that pleads facts "'merely consistent with' a defendant's liability … 'stops short of the line between possibility and plausibility of "entitlement of relief."'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A VIOLATION OF THE SHERMAN ACT

A. The Third Circuit's Decision In *Smith* Makes Clear That The Complaint Must Be Dismissed

In *Smith v. NCAA*, the Third Circuit considered an antitrust challenge to the NCAA's enforcement of a rule prohibiting otherwise-eligible graduate students from competing at a different institution from where they completed their undergraduate studies. 139 F.3d at 182-84. The Court affirmed the district court's dismissal of the complaint both because the rule did not regulate commercial activity, and because it was so obviously *pro*competitive that any antitrust claim

could be dismissed on the pleadings. *Id*. at 184-87. Both holdings independently require dismissal here.[2]

1. The NCAA's Enforcement Action Was Not "Trade Or Commerce" Subject To Antitrust Scrutiny

The Sherman Act applies only to unreasonable restraints of "*trade* or *commerce*." 15 U.S.C. §1 (emphasis added). It has "only limited applicability to organizations"—like the NCAA—"which have principally *noncommercial* objectives." *Smith*, 139 F.3d at 185-86 (emphasis added). The fact that an action has an "incidental economic effect" on commerce does not make it commercial. *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004).

Smith drew a sharp "distinction between [the NCAA's] commercial and noncommercial activities," holding that the Sherman Act has no application to NCAA rules and enforcement actions primarily addressing non-business aspects of college sports. 139 F.3d at 185-86 & n.4. The Third Circuit grounded that holding in caselaw from across the country, and numerous courts have relied on *Smith* to dismiss antitrust complaints challenging NCAA rules addressing fair play,

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[2] *Smith* was later vacated on other grounds, 525 U.S. 459 (1999), but courts have continued to apply its antitrust analysis as governing precedent. *See, e.g.*, *Bowers v. NCAA*, 475 F.3d 524, 535 n.11 (3d Cir. 2007); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 581-82 & nn.12-13 (E.D. Pa. 2004).

institutional integrity, academic standards, and other noncommercial aspects of college sports.[3]

The Consent Decree rests on PSU's acknowledgment that it violated key principles of the NCAA Constitution and Bylaws. Consent Decree 2-3. Those principles have *nothing* to do with business or commerce, but instead establish basic standards of honesty, ethical conduct, and institutional control that the NCAA's members believe to be necessary to preserving the character and integrity of college athletics. For example, the "institution itself" must exercise "control and responsibility for the conduct of intercollegiate athletics" and cannot effectively cede that control to a revered coach or athletic program. Manual art. 6.01.1. And all persons associated with athletic programs must:

- "adhere to such fundamental values as respect, fairness, civility, honesty, and responsibility," *id.* art. 2.4;

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[3] *See, e.g.*, *Bassett v. NCAA*, 528 F.3d 426, 432-34 (6th Cir. 2008) (dismissing antitrust challenge to NCAA recruiting rules); *Bowers*, 475 F.3d at 535 n.11 (dismissing antitrust challenge to NCAA eligibility rules because they seek to promote "fair competition" in college sports); *see also Pocono*, 317 F. Supp. 2d at 581-84 (recruiting rules are noncommercial); *Adidas Am., Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1286 (D. Kan. 1999) (rules governing advertising on uniforms and equipment are noncommercial because they "preserve the integrity and uniqueness of intercollegiate sports"); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, No. 97-1249, 2008 U.S. Dist. LEXIS 55312, at *9-13 (M.D. Tenn. July 18, 2008) (recruiting rules analogous to NCAA's rules are noncommercial); *Silicon Economics, Inc. v. Fin. Accounting Found.*, No. 11-163, 2011 U.S. Dist. LEXIS 92322, at *22 (D. Del. Aug. 17, 2011) (NCAA enforcement action is exempt from antitrust scrutiny when it involves "academic rules or player-eligibility requirements").

- "act with honesty and sportsmanship at all times so that intercollegiate athletics as a whole, their institutions and they, as individuals, shall represent the honor and dignity of fair play and the generally recognized high standards associated with wholesome competitive sports," *id*. art. 10.01.1; and

- act as "teachers of young people," not just by avoiding "improper conduct [and] questionable acts" but by demonstrating "moral values … so certain and positive that those younger and more pliable will be influenced by a fine example." *id.* art. 19.01.2.

The NCAA's standards for institutional control and ethical behavior protect a culture of amateur athletics in which on-field competition is tempered by a shared commitment to ideals of character, sportsmanship, and responsibility. PSU has acknowledged that it violated those ideals, and the NCAA Constitution, by ignoring evidence of serial sex abuse of young children to protect PSU, and especially its football program, from bad publicity. Consent Decree 2-4. The NCAA's response to a violation of this nature is not a restraint of *commerce* but an assertion of basic values, and is not an appropriate subject for an antitrust lawsuit.

The Complaint is full of allegations concerning the NCAA's process and motivations. PSU chose to resolve the NCAA investigation by Consent Decree and explicitly waived any further process. Regardless, alleged violations of internal NCAA procedures would not change the noncommercial nature of the

rules at issue or otherwise constitute an antitrust violation.[4] The Complaint's scurrilous allegations that the NCAA's President was motivated by a desire to change the NCAA's supposed "reputation for being soft on discipline" (Compl. ¶¶34-36) or to garner positive publicity (Compl. ¶56), or that PSU was sanctioned only because it "simply could not fight back" (Compl. ¶59), also do not change the character of the rules and have nothing to do with antitrust law.[5]

2. The NCAA's Enforcement Action Was Procompetitive And Easily Satisfies The Rule Of Reason

Even if the antitrust laws did apply to the NCAA's enforcement of its institutional control and ethical standards, those standards are so clearly *pro*competitive that this lawsuit should be dismissed on the pleadings. The NCAA rules PSU violated—and PSU's assent to their enforcement in the Consent Decree—preserve the character of NCAA athletics and thereby provide consumers with a distinctive choice that would otherwise not exist in the marketplace.

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[4] *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293 (1985) ("the absence of procedural safeguards can in no sense determine the antitrust analysis," as "the antitrust laws do not … impose on joint ventures a requirement of process"); *Bassett*, 528 F.3d at 432-34.

[5] The Complaint declares that the NCAA wanted to "boost[] the competing football programs of certain member colleges and universities by removing from competition one of the leading competitors," Compl. ¶65, but contains no factual allegations sufficient to support a reasonable inference that this conclusory and outlandish accusation is true. *Iqbal*, 556 U.S. at 677.

Antitrust challenges to NCAA rules and enforcement actions are governed by the "rule of reason," which turns on whether the challenged conduct ultimately promotes or impairs economic competition. *Regents*, 468 U.S. at 104; *Am. Needle, Inc., v. NFL*, 130 S. Ct. 2201, 2216 (2010). In other contexts, the rule of reason requires extensive analysis. But the Supreme Court has made clear that sports leagues "are not trapped by antitrust law." *Am. Needle*, 130 S. Ct. at 2216. Because competition cannot exist at all without rules and enforcement, and because NCAA regulation makes possible a distinctive product that otherwise could not exist, there is a strong presumption "that most of the regulatory controls of the NCAA are … procompetitive." *Regents*, 468 U.S. at 117, 102; *see also Am. Needle*, 130 S. Ct. at 2216 (sports league rules are "likely to survive the Rule of Reason"). In the context of athletics the rule of reason therefore often "may not require a detailed analysis" and can "be applied in the twinkling of an eye"—in other words, at the motion-to-dismiss stage. *Id.* at 2216-17 (quotation marks omitted); *see also Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012) (same).

In *Smith*, the Third Circuit held that the challenged player-eligibility rule was not only noncommercial, but also "plainly" valid under the rule of reason because it "further[ed] the NCAA's goal of fair competition and the survival of intercollegiate athletics." 139 F.3d at 187. Courts across the country have dismissed challenges to NCAA rules and enforcement actions based on that

reasoning. In *Banks v. NCAA*, for example, the Seventh Circuit dismissed a lawsuit like this one under the rule of reason because NCAA regulations "preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students." 977 F.2d 1081, 1089-90 (7th Cir. 1992). Likewise, in *McCormack v. NCAA*, the Fifth Circuit dismissed a challenge to the NCAA's player-eligibility rules because they "preserve the character and quality" of college sports "and as a result enable[] a product to be marketed which might otherwise be unavailable." 845 F.2d 1338, 1343-45 (5th Cir. 1988) (quotation marks omitted).

The PSU Consent Decree is obviously procompetitive for similar reasons. It "enable[s] college football to preserve its character" by expressing the judgment of the NCAA and its members about the importance of institutional control, honesty, and basic morality in athletic programs. *Regents*, 468 U.S. at 102, 120. The Complaint's suggestion that the sanctions are not "reasonably related" to the NCAA's appropriate role as the regulator of athletics (Compl. ¶4) ignores facts that PSU has accepted, and that the Complaint does not dispute: that responsible officials ignored evidence of serious criminal behavior in part *because of institutional fear of the football program and a desire to protect it*. Those issues have *everything* to do with athletics, and the inappropriate conduct that sports can sometimes inspire, if not appropriately restrained. As in *Smith*, the NCAA's action

"so clearly survives a rule of reason analysis" that the Court should "not hesitate upholding it" by dismissing Plaintiff's Complaint. 139 F.3d at 187.

B. The Complaint Fails To Allege Any Anticompetitive Effects In The Relevant Markets

The Complaint also fails to state a claim because it does not allege any threat of substantial anticompetitive effects in the alleged relevant markets. Anticompetitive effects—such as increased prices, reduced output, and reduced quality—are a fundamental element of any Sherman Act claim. *Howard Hess Dental Labs, Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 253 (3d Cir. 2010); *W. Penn*, 627 F.3d at 100; *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1991) ("An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services." (quotation marks omitted)).

Plaintiff identifies three separate "nationwide" markets that the sanctions allegedly will purportedly harm: (1) "postsecondary education," (2) "Division I football players," and (3) "the sale of college football-related apparel and memorabilia." Compl. ¶69. But he pleads no facts that could support a reasonable inference that the Consent Decree will cause prices to rise, output to fall, or quality to decline on a marketwide basis in any of these purported "markets."

Plaintiff alleges that the sanctions will harm these markets "through the removal of a major competitor"—PSU. Compl. ¶73. But the antitrust laws "were enacted for the protection of competition, not competitors." *Brunswick Corp. v.*

Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quotation marks omitted). Plaintiff must show "a wider impact on the competitive market" and not merely impairment of an individual competitor. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 140 (3d Cir. 2001). "[T]he impact on the market is the key focus, rather than on the individual participants in the market." *Rossi v. Standard Roofing, Inc.*, 958 F. Supp. 976, 990 (D.N.J. 1997).[6] Plaintiff fails to allege that any harm to PSU's football prowess will result in any anticompetitive economic harm—*i.e.*, tuition increases, reductions in scholarship opportunities, or increases in apparel costs—injurious to consumers in any alleged market. Indeed, most of the "harms" to PSU that the Complaint anticipates are not even harms to PSU as an economic competitor, but as an athletic competitor. The antitrust laws do not protect *athletic* competition. *See, e.g.*, *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 720 (6th Cir. 2003).

Even if Plaintiff *had* alleged a genuine reduction of competition in the identified "markets," that allegation is entirely implausible and thus insufficient

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[6] *See also, e.g., Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 486 (3d Cir. 1992) (en banc) (antitrust claim "[o]bviously" lacks merit "if the plaintiff cannot come up with evidence of injury to competition, not simply to the plaintiffs themselves"); *Military Servs. Realty, Inc. v. Realty Consultants of Va., Ltd.*, 823 F.2d 829, 832 (4th Cir. 1987) ("The elimination of a single competitor standing alone, does not prove anti-competitive effect.").

under *Iqbal* and *Twombly*.[7] Assuming arguendo that the markets alleged in the Complaint are proper commercial markets, on Plaintiff's own allegations those markets would be nationwide, including hundreds of "competitors." It is exceptionally unlikely that sanctions temporarily impairing one school's prowess on the football field would render any of these robust nationwide economic markets less competitive, such that Stanford suddenly could raise tuition, Michigan could offer fewer or less valuable football scholarships, or Notre Dame could charge more for branded football jerseys. This Court can apply "experience" and "common sense," *Iqbal*, 556 U.S. at 679, and determine that Plaintiff's conclusory use of antitrust language is not sufficient to state a claim in the absence of factual allegations supporting a reasonable inference of harm to competition.

II. PLAINTIFF LACKS STANDING TO SEEK INJUNCTIVE RELIEF

Section 16 of the Clayton Act allows *parens patriae* suits for injunctive relief. But Plaintiff must still satisfy the ordinary requirements of antitrust

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[7] Further, none of plaintiff's alleged "markets" are sufficiently defined by reference to reasonable consumer substitutability. *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997); *Agnew*, 683 F.3d 328. Plaintiff does not explain, for example, which programs compete for "top football talent" in the supposed recruiting "market," or what products consumers would see as potential substitutes in the alleged collegiate apparel market, which Plaintiff apparently intends to limit to only those products with a "national 'brand[].'" Compl. ¶¶71-72.

standing.[8] None of the alleged threatened harms to Pennsylvania citizens constitute "antitrust injury," an essential component of antitrust standing. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109-13 (1986).

"[An] injury, although causally related to an antitrust violation, nevertheless will not qualify as an 'antitrust injury' unless it is attributable to … a competition-reducing aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334-44 (1990). The plaintiff's harm also must have been proximately caused by the defendant's antitrust violation; derivative or remote harms are not antitrust injury. *See Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc.*, 171 F.3d 912, 921-32, 935 (3d Cir. 1999) (requiring proximate cause for purposes of injunctive relief under Section 16); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 856 (3d Cir. 1996) (same). The Third Circuit has explained that, as a general matter, "the class of plaintiffs capable of satisfying the antitrust-injury requirement is limited to consumers and competitors in the restrained market, and to those whose injuries are the means by

[8] *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* §355 (last electronic update 2012) (noting that usual "limitations on standing generally apply" to *parens patriae* suits and that "the state as *parens patriae* must still show that residents on whose behalf it sues have a cause of action and could satisfy the usual rules of proximate causation and antitrust injury"); *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 150-51 (D.D.C. 2002) (same).

which defendants seek to achieve their anticompetitive ends." *W. Penn*, 627 F.3d at 102 (internal citations omitted).

Plaintiff alleges threatened harm to individuals and businesses whose economic fortunes indirectly depend on public enthusiasm for PSU football. Compl. ¶¶75-77. He also points to the negative economic effects of an alleged future decline in PSU's spending on capital improvements, on the potential need for students and/or the Commonwealth to fund the $60 million fine, and on harm to students whose "educational and community experience" will allegedly suffer if PSU wins fewer football games. *Id*. ¶75.

None of these (highly speculative) alleged future injuries are the result of increased prices or lower outputs in the Complaint's alleged "markets." These Pennsylvania citizens and businesses are not suffering harm as "consumers" or "competitors" in those markets, and the harms they allegedly may suffer certainly are not the "means by which the [NCAA] seek[s] to achieve [any] anticompetitive ends." *W. Penn*, 627 F.3d at 102. The Complaint's allegation is that those persons will suffer harm in *other* markets (restaurants, hotels, *etc*.) as a derivative consequence of some alleged future harm to Penn State's football prowess. That sort of spillover effect is far too remote and indirect to qualify as "antitrust injury." *See generally Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526-46 (1983) (rejecting antitrust standing based on

remoteness and indirectness of harm); *Steamfitters*, 171 F.3d at 921-32, 935 (applying *Associated Gen. Contractors* to Section 16 claim). Courts regularly deny antitrust standing to parties who suffer harm only indirectly, as the result of antitrust violations directed by the defendant at a third party. *See generally* Areeda & Hovenkamp, *Antitrust Law* §339.

Mr. Sandusky's criminal conduct, and PSU's failure to take action to prevent it, have fueled a public and *political* debate. Some argue that PSU is an innocent victim. Others think that the Consent Decree was too lenient, and that the attacks on that agreement only confirm the Freeh Report's conclusion that football fever has caused some to lose all perspective. But even accepting Plaintiff's baseless factual allegations as true, the target of the NCAA's actions here was PSU, *not* the Pennsylvania citizens on whose behalf Plaintiff claims to sue. And there is no question that PSU has made the deliberate decision that its interests are best served by resolving the issues via the Consent Decree, instead of by denying responsibility, fighting the charges, and miring the University in the spotlight of national shame for years to come.

Allowing this lawsuit to go forward based on Plaintiff's novel and unfounded theories of collateral harm would not only undermine PSU's desire to move forward, it would radically expand the scope of plaintiffs with standing to bring antitrust claims in future cases. The Supreme Court and Third Circuit have

rigorously policed the limits on antitrust standing. This Court should enforce those limits and dismiss this case.

CONCLUSION

For all of the foregoing reasons, the Complaint should be dismissed, in its entirety, with prejudice.

Respectfully submitted,

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CERTIFICATE OF LOCAL RULE 7.8(b)(2) COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Local Rule 7.8(b)(2). This brief contains 4,979 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am this day serving a copy of Defendant's Memorandum in Support of Motion to Dismiss upon the persons and in the manner indicated on the attached Service List.

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