UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, THOMAS W. CORBETT, JR., GOVERNOR,	:	ELECTRONICALLY FILED
Plaintiff,	:	Civil Action No.: 1:13- cv-00006-YK
v.	:	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,	:	(THE HONORABLE YVETTE KANE)
Defendant.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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The Memorandum of Law filed by the National Collegiate Athletic Association ("NCAA") ("NCAA Mem.") repeatedly injects factual assertions that flatly contradict the well-pleaded allegations of the Complaint, and are improper to consider at this motion to dismiss stage of the proceedings. Perhaps the most egregious example is the NCAA's assertion on the very first page of its memorandum that Pennsylvania State University's ("PSU") "governing board . . . voted to ratify the Consent Decree" between PSU and the NCAA. This is not alleged in the Complaint, and it never occurred. At a minimum, it raises material factual disputes that cannot be resolved on a motion to dismiss.

The NCAA's memorandum also contains a great deal of rhetoric regarding both its motives and the economic impact of its actions. These assertions also contradict the Complaint. The specific and well-pleaded allegations of the Complaint are more than sufficient to warrant denial of this motion to dismiss.

With respect to the legal sufficiency of the Complaint, the NCAA's principal argument is its extraordinary assertion that its unprecedented sanctions against PSU, including a $60 million fine against one of the nation's largest universities, are not "commerce." The NCAA wrongly claims that its arbitrary decimation of the PSU football program is no different than its enforcement of rules regulating player eligibility or uniforms—which do enhance collegiate competition—although PSU was not found to have violated a single NCAA rule and the NCAA's

own president insisted that the Consent Decree was not an enforcement action. Complaint ¶ 57.

Neither are these sanctions "clearly procompetitive." The NCAA merely used its enforcement authority as a pretext for an anticompetitive attack on PSU, as evidenced by its abdication of its own enforcement process—which its memorandum never even attempts to defend.

The NCAA's argument that the Commonwealth failed to allege anticompetitive effects is similarly meritless. The Commonwealth alleges conduct that constitutes a *per se* antitrust violation, or at least conduct that can be analyzed under a "quick look" review. Neither scenario necessitates a showing of a specific anticompetitive effect. Even if the rule of reason were applied, the Commonwealth has pleaded substantial anticompetitive effects in the form of higher prices, reduced output, and diminished quality.

Finally, Governor Corbett has standing to enjoin an antitrust violation targeted at the state's largest state-related, taxpayer-funded university, with effects on the statewide economy. The NCAA improperly applies a heightened standing analysis that is applicable only to damage actions. More importantly, it ignores that the Pennsylvanians on whose behalf injunctive relief is sought include those who the NCAA admits have standing: customers (PSU students), suppliers

(prospective student athletes), and an aggrieved competitor (PSU) in the relevant markets.

The NCAA's consistent attempt to assert unpleaded "facts"—such as the non-existent "ratification" of the Consent Decree by the PSU Board of Trustees—displays the same disregard for the Federal Rules of Civil Procedure that the NCAA has shown for its internal rules with respect to PSU. In trying to persuade the Court to endorse a remarkably expansive scope of its power, the NCAA's memorandum appears to have been written more to advance the NCAA's broader agenda, and to combat the recent groundswell of public criticism against the embattled organization, than to raise legal issues appropriate to a motion to dismiss.

STATEMENT OF FACTS

The roots of this litigation lie not in an NCAA rule violation, or any activity that jeopardized competitive fairness, but rather in the criminal conduct by Gerald Sandusky, a former assistant football coach. Sandusky's crimes, and the response of PSU and certain of its representatives (the "Sandusky Offenses"), have been well-documented in the press and are the subject of criminal proceedings. Complaint ¶¶ 37-43.

The NCAA did not investigate PSU's conduct, but instead relied on a report commissioned by PSU to investigate the Sandusky Offenses (the "Freeh Report").

Complaint ¶ 41. While the reaction to the Freeh Report was condemnatory of PSU, the report found no NCAA rule violation. *Id.* ¶¶ 43, 45.

Immediately after the publication of the report, the NCAA informed PSU President Rodney Erickson that if PSU did not waive its rights under the NCAA's Constitution and Bylaws (the "Manual") to an investigation, factual findings, a hearing, and other safeguards, and acquiesce to unprecedented sanctions, the NCAA would impose the "death penalty"—the elimination of PSU football —for four years. Complaint ¶ 50. The NCAA threatened Erickson that if word of their communications reached the press, the NCAA would impose the death penalty. *Id.* Faced with no viable alternative, Erickson signed a "Consent Decree" without seeking approval or ratification from PSU's Board of Trustees. *Id.* ¶¶ 50-51.

The Consent Decree does not identify a single NCAA rule that PSU violated. Complaint ¶ 52. Rather, the NCAA relied, and continues to rely, upon a handful of undefined and vague "principles" in its Manual such as "ethical conduct" and "institutional control." *Id.* ¶¶ 49, 52. A review of the Manual, as well as the NCAA's enforcement history, demonstrates that these provisions are merely governing principles or preambles. Complaint ¶¶ 49, 52; NCAA Mem. Exh. A. For example, Article 1.2(b), which references "the principle of institutional control," appears only as one of the "purposes of the [NCAA]," not an NCAA rule.

The Consent Decree conceded the critical point that the conduct at issue "ordinarily would not be actionable by the NCAA." Complaint ¶ 54. NCAA President Mark Emmert acknowledged that the sanctions were "unprecedented," even though the public record is replete with reports of NCAA inaction in the wake of criminal conduct by athletes—including murder and rape—that was covered up or even enabled by university officials, but where the NCAA has taken little or no action. *Id.* ¶¶ 56-57. Never before had the NCAA injected itself into criminal conduct already being addressed by the justice system, let alone into offenses that did not involve cheating, academic fraud, recruiting violations, or other conduct designed to give athletic programs an unfair competitive advantage. *Id.* ¶ 47. The only aspect of this case that was "unique," according to the Consent Decree, was that the conduct was enabled by a "culture" of "reverence for Penn State football." Complaint ¶ 54.[1] However, as the Complaint alleges, this "culture of reverence" was not unique to PSU. Complaint ¶¶ 55-59.

The NCAA also, for the first time, ignored its own enforcement rules. Complaint ¶¶ 49-50. Pursuant to the Manual, the NCAA's Committee on Infractions is the *only* entity permitted to administer the enforcement program.

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[1] It is ironic that the NCAA attempts to maintain a pious tone throughout its brief, *see, e.g.,* NCAA Mem. 11-13, in light of its recent revelations about its own misconduct while investigating the University of Miami. *See* http://www.usatoday.com/story/sports/college/2013/02/18/miami-ncaa-enforcement-investigation-mark-emmert/1928263/.

Complaint ¶ 27. The President, Division I Board of Directors, and Executive Committee are explicitly barred from participating in enforcement proceedings. *Id.* ¶ 28. Accused members are entitled to an evidentiary hearing and an appeal. *Id.* ¶ 29.

None of this occurred here. Rather, Emmert, the Division I Board of Directors, and the Executive Committee handled the matter directly, side-stepping the Committee on Infractions and forcing PSU to accept draconian sanctions without any investigation. Complaint ¶ 50. Emmert insisted that the punishment "was and is action by the Executive Committee exercising their authority. . . . It was completely different than an enforcement process." *Id.* ¶ 57.

The Complaint alleges that these departures from rules and precedent demonstrate that the NCAA and its members' justification is a pretext for ulterior, anticompetitive motives. Complaint ¶¶ 7, 55, 60. These sanctions threaten harm to competition, PSU, and the Commonwealth.

ARGUMENT

"A court confronted with a Rule 12(b)(6) motion must accept the truth of all factual allegations in the complaint and must draw all reasonable inferences in favor of the non-movant." *Revell v. Port Auth.*, 598 F.3d 128, 134 (3d Cir. 2010). The factual allegations in the Complaint, together with reasonable inferences that may be drawn from them, are more than sufficient to withstand the NCAA's motion.

1. The PSU sanctions are "trade or commerce."

The NCAA's reliance on *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), ignores a crucial allegation in the Complaint. Unlike *Smith*, the Commonwealth is not challenging an NCAA rule or the enforcement of an NCAA rule. Instead, the Commonwealth alleges that the NCAA and its members used the NCAA's rulemaking and enforcement authority as a pretext to launch an anticompetitive attack on PSU. Neither *Smith* nor any other case even suggests that such a collective assault on a competitor is "noncommercial."

"On a motion to dismiss, the Court should determine whether the challenged conduct is commercial based on the factual allegations in the Complaint." *Silicon Economics v. Fin. Accounting Found.*, No. 11-163, 2011 U.S. Dist. LEXIS 92322, at *20-21 (D. Del. Aug. 17, 2011). Here, the allegations not only distinguish the rulemaking/enforcement cases cited by the NCAA, Complaint ¶¶ 44-50; they also

provide powerful support for the Commonwealth's allegation that the NCAA's stated justification for the PSU sanctions, unlike in the *Smith* cases, was a sham.

a) The Complaint alleges commercial activity.

"Courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of surrounding circumstances." *United States v. Brown Univ.*, 5 F.3d 658, 666 (3d Cir. 1993). With respect to the NCAA, the Supreme Court has articulated the inquiry as whether the challenged restraints "fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 117 (1984). The PSU sanctions, as alleged in the Complaint, do not fit this mold.

The distinction between commercial and noncommercial NCAA activity is described in *Silicon Economics*, 2011 U.S. Dist. LEXIS 92322, at *22. In *Silicon Economics*, the court acknowledged that "[c]ourts have concluded that when the challenged conduct consists of academic rules or player-eligibility requirements, the conduct is non-commercial in nature." 2011 U.S. Dist. LEXIS 92322, at *22 (citing, *inter alia*, *Smith*). The court added, however, that "when the challenged conduct restrains revenue, output, or salaries, the rules are almost always commercial." *Id.* at *23.

The PSU sanctions fall well on the commercial side of the line. The Commonwealth alleges that the sanctions are likely to cause a significant decline in the role of PSU football as revenue generator for the university, ultimately hindering PSU's ability to compete for high-quality students, faculty and research programs. Complaint ¶ 73. The reduction in football scholarships is an output restriction, and courts have recognized that scholarship limits constitute "commercial" activity. *See, e.g., Agnew v. NCAA,* 683 F.3d 328, 341 (7th Cir. 2012) ("the transactions [NCAA] schools make with premier athletes—full scholarships in exchange for athletic services"—are "commercial in nature").

It is laughable to claim that a $60 million fine, coupled with the gutting of one of the most lucrative programs at one of the nation's largest universities, is "noncommercial activity." Indeed, on February 20, 2013, the NCAA filed a lawsuit in this Court alleging that the Commonwealth's law governing the disposition of this "noncommercial" fine is an unconstitutional regulation of interstate commerce. Complaint, NCAA v. Corbett, Civil Action No. 13-cv-457-YK, attached hereto as Exh. A.

b) The cases cited by the NCAA are inapposite.

None of the cases cited by the NCAA involved an alleged conspiracy to harm a member institution. Moreover, this allegation is not "conclusory." *See* NCAA Mem. 13 & n.5. The Commonwealth alleges hallmarks of an ulterior, anticompetitive motive, absent from *Smith* and its progeny:

- The absence of a violation of any NCAA rule. Any "admissions" in the Consent Decree are immaterial, because, as the Complaint alleges, PSU entered into the Consent Decree only because the NCAA left it with no rational economic alternative. Forcing PSU to execute the Consent Decree *is* the antitrust violation alleged.

- The absence of any connection between the sanctions and "fair competition in intercollegiate athletics." *See Smith*, 139 F.3d at 185. The NCAA cites cases involving rules indisputably necessary to prevent conduct creating an unfair competitive advantage and/or compromising the promotion of amateur athletics. *See id.* at 185 (recruiting rules); *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) (recruiting); *Bowers v. NCAA*, 475 F.3d 524, 535 n.11 (3d Cir. 2007) (academic eligibility); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 581-84 (E.D. Pa. 2004) (recruiting); *Adidas Am., Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1286 (D. Kan. 1999) (uniforms). PSU, however, did not improperly recruit players, falsify academic credentials, or otherwise give itself an

unfair competitive advantage over other NCAA members. The conduct of which its employees were accused is expressly covered by laws that are being enforced, Complaint ¶ 44, and arguably put PSU at a competitive *disadvantage*. The sanctions thus served no legitimate purpose.

- The arbitrariness of the NCAA's decision to sanction conduct that had never been sanctioned outside the context of a specific violation of NCAA rules. In contrast to *Smith*, the Commonwealth alleged examples of similarly situated NCAA member institutions that, despite evidence of potential high-level cover-ups of egregious crimes—including murder, rape, and massive academic fraud—were never sanctioned by the NCAA. Complaint ¶ 56.

- The NCAA's total disregard of its own enforcement procedure. Unlike the *Smith* line of cases, the Consent Decree openly acknowledged that it was not subject to "traditional investigative and administrative proceedings," and the NCAA's president conceded that the PSU sanctions were "completely different than an enforcement process." This admission contradicts the NCAA's repeated characterization of the PSU sanctions as simply an "enforcement action."[2] *See* NCAA Mem. 10, 13-14.

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[2] Notwithstanding the NCAA's misstatement of the holding of *Northwest Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985), ignoring internal enforcement procedures is entirely relevant to a rule-of-reason analysis of an association's disciplinary action against a member. *See, e.g.,*

If *Smith* protected the conduct alleged in the Complaint, the NCAA would be free to issue massive fines and participation restrictions at its whim, without antitrust scrutiny, so long as it could tie the penalty to some purportedly "dishonest" or "immoral" conduct. This is not the law, and the NCAA's actions against PSU are fully subject to review under the Sherman Act.

2. The PSU sanctions are not procompetitive.

The NCAA wrongly argues that the sanctions are procompetitive. The Complaint alleges precisely the opposite: that the NCAA members recognized that PSU was badly weakened, saw an opportunity to benefit themselves further at PSU's expense, singled out PSU for conduct that had never been punished by the NCAA before, and used vague "standards" to concoct a *post hoc* justification for crippling a major competitor. Complaint ¶¶ 44-60.

The NCAA's "institutional control and ethical standards" are not necessary to "provide consumers with a distinctive choice that would otherwise not exist in

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Carleton v. Vermont Dairy Herd Improvement Ass'n, 782 F. Supp. 926, 932 (D. Vt. 1991) ("process issues . . . may factor into the rule-of-reason analysis"); *Pretz v. Holstein Friesian Ass'n*, 698 F. Supp. 1531, 1540 (D. Kan. 1988) (absence of fair hearing "certainly affects the factfinder's determination of defendant's motive or intent and the reasonableness of defendant's restraints under a rule of reason analysis"). *Northwest Wholesale Stationers* held only that the absence of process was irrelevant to whether the restraint should be treated as a *per se* violation or evaluated under the rule of reason. 472 U.S. at 293.

the marketplace." *See* NCAA Mem. 13. The NCAA has existed for more than a century without enforcing these "standards" on a standalone basis.

Neither does the NCAA's status as a sports league entitle its actions to deference. Although the Supreme Court has recognized that sports leagues "are not trapped by antitrust law" with respect to the need "to cooperate *in the production and scheduling of games*," their conduct can still be "concerted activity that is subject to § 1 analysis." *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010) (emphasis added). There is no "presumption" that *any* NCAA action is lawful; rather, courts have simply recognized that rules "fostering competition among amateur athletic teams" are generally procompetitive. *Board of Regents*, 468 U.S. at 117.

The PSU sanctions, however, do not fit this description. There is nothing inherent in staging competition among college sports teams that requires the NCAA to inject itself into pending criminal investigations. At a minimum, the necessity of such interference cannot be ascertained "in the twinkling of an eye," as required to dismiss without an evidentiary record. *See American Needle*, 130 S. Ct. at 2216-17.

Unlike this case, the cases cited by the NCAA challenged the undisputedly legitimate application of a specific NCAA rule directly related to facilitating amateur athletic competition, and thus enforced real standards. *See Banks v.*

NCAA, 977 F.2d 1081, 1089-90 (7th Cir. 1992) (eligibility rules); *McCormack v. NCAA*, 845 F.2d 1338, 1343-45 (5th Cir. 1988) (athlete compensation). Although the NCAA likens those rules to its judgment of PSU's "basic morality," NCAA Mem. 15, such a subjective standard is an invitation to the type of anticompetitive abuse that has occurred here.

3. The Complaint should not be dismissed for failure to allege anticompetitive effects.

The NCAA's argument that the Complaint is deficient for failure to allege anticompetitive effects is incorrect for two reasons. First, the Complaint alleges conduct that qualifies as a *per se* violation of Section 1—or at a minimum is subject to "quick look" review—in which case a showing of market effects is unnecessary. Second, even under the rule of reason, the Commonwealth adequately alleges anticompetitive effects in the form of increased prices, diminished quality, and reduced output.

a) The Commonwealth need not allege anticompetitive effects.

Although the NCAA argues that the rule of reason governs "NCAA rules and enforcement actions," NCAA Mem. 14, no NCAA rule is challenged here, and the NCAA has taken great pains to emphasize that the PSU sanctions were *not* an enforcement action. Complaint ¶ 57. The Complaint alleges a naked conspiracy among the NCAA and its members to deprive a competitor of essential

benefits required to compete effectively, including the ability to compete in postseason play, offer a competitive quantity of football scholarships, and reinvest the revenue from a successful football program. Such conduct amounts to a *per se* antitrust violation—or, at most, warrants a "quick look" analysis—neither of which requires a showing of anticompetitive effects.

The NCAA's conduct, as alleged in the Complaint, constitutes a group boycott, which is "often listed among the classes of economic activity that merit per se invalidation under § 1." *Northwest Wholesale Stationers*, 472 U.S. at 293. "Cases to which [the Supreme Court] has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *Id.* at 294. The Commonwealth alleges precisely such a boycott: joint efforts by NCAA members to disadvantage a competitor (PSU) by directly denying it relationships (full participation in the NCAA) it needs to compete.

The Supreme Court has recognized other key characteristics common to *per se* unlawful group boycotts, including (i) "the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete"; (ii) "the boycotting firms possessed a dominant position in the relevant market"; and (iii) "the practices were generally not justified by plausible arguments that they

were intended to enhance overall efficiency and make markets more competitive." *Id.* All three characteristics are alleged here: the sanctions have cut off PSU's access to key NCAA benefits needed to compete, the remaining NCAA members collectively possess a dominant position in all relevant markets, and, as explained above, the sanctions have no procompetitive justification. "Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Id*.

"Quick look" or "truncated rule of reason" analysis is used where the *per se* framework is inappropriate, but "where no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement," and proof of market power is not required. *Agnew v. NCAA,* 683 F.3d 328, 336 (7th Cir. 2012) (citing *Board of Regents,* 468 U.S. at 109). Among other situations, the "quick look" approach is used when a restraint would normally be considered illegal *per se* but "a certain degree of cooperation is necessary if the [product at issue] is to be preserved." *Agnew,* 683 F.3d at 336 (citing *Board of Regents,* 468 U.S. at 117); *see also* Herbert Hovenkamp, *Antitrust Law, ¶* 1911c, at 274 (1998). Even if the conduct alleged in the Complaint is not unlawful *per se*, it requires no more than a "quick look."

The fact that the NCAA is in the business of staging athletic competition does not preclude application of the *per se* or quick look rule. The Supreme Court

has held the rule of reason applicable to sports leagues only in the context of restraints that indisputably arose out of the members' joint interest in the promotion of their product. *See American Needle*, 130 S. Ct. at 2216 (joint licensing of NFL teams' intellectual property); *Board of Regents*, 468 U.S. at 100-01 (restrictions on NCAA members' televising of games). The Commonwealth alleges that the PSU sanctions were motivated by no such joint interest, but were imposed with the purpose of injuring a competitor.

Because the PSU sanctions are *per se* unlawful, no showing of anticompetitive effects is necessary. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959); *see also Pace Electronics, Inc. v. Canon Computer Systems, Inc*., 213 F.3d 118, 123 (3d Cir. 2000) (requiring showing of anticompetitive effects "comes dangerously close to transforming a per se violation into a case to be judged under the rule of reason"). At a minimum, under a "quick look" analysis, the Commonwealth "is not required to make a full showing of anti-competitive effects within the market; rather defendant has the burden of demonstrating pro-competitive justifications." *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 209 (3d Cir. 2012).

b) The Commonwealth alleges anticompetitive effects.

Even under a rule of reason analysis, the Commonwealth adequately alleges that the PSU sanctions have both actual and threatened anticompetitive effects.

"At the pleading stage, a plaintiff may satisfy the unreasonable-restraint element by alleging that the conspiracy produced anticompetitive effects in the relevant markets. . . . Anticompetitive effects include increased prices, reduced output, and reduced quality." *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 100 (3d Cir. 2010). The Commonwealth has alleged all of these effects.

The Commonwealth has alleged a direct effect on output in the market for Division I football players: the reduction in scholarships that PSU may offer recruits. Complaint ¶ 71. In the rarefied air in which PSU football competes, a marketwide decrease of ten initial scholarships and twenty total scholarships threatens to pose a significant restraint on the ability of the nation's top scholastic football players to obtain scholarships at the Division I championship level.

Moreover, the Commonwealth has alleged reduced quality. In *West Penn*, when reversing the denial of a motion to dismiss, the Third Circuit held that the plaintiff met its burden by alleging that "by denying West Penn capital, the conspiracy caused West Penn to cut back on its services (including specialized hospital services) and to abandon projects to expand and improve its services and facilities." 627 F.3d at 101. Similarly, the Commonwealth alleges that by denying PSU revenue, as well as imposing a $60 million fine, the NCAA is likely to force PSU to "reduce the availability and/or quality of some of its programs," which

ultimately "can be expected to harm the university's ability to compete for high-quality faculty and research programs." Complaint ¶ 73.

The Complaint further alleges PSU's significance in the relevant markets, as one of the largest universities in the nation, a longtime football powerhouse, and, according to one survey of employers, the number one college in the nation for preparing students for employment. Complaint ¶ 70. The Complaint alleges a likelihood that PSU will be forced to raise "prices," i.e., tuition, which not only would affect a substantial portion of the market by itself, but also would remove a significant restraint on the tuition charged by colleges and universities that regard themselves among PSU's nearest competitors. *Id.* ¶ 73. Similarly, the reduction in quality that is likely to result from the limitation on PSU's ability to invest in its programs and facilities could easily impact the incentives of PSU's nearest rivals to invest. *See id.* If PSU is unable to upgrade a research laboratory or build a new natatorium for its swim team, its inability will remove a key incentive for competitors to do the same.

The Commonwealth alleges that the PSU sanctions are likely, if not certain, to adversely affect price, quality, and output in the relevant markets. Although the NCAA may challenge the precise definition and likelihood of the effects, these are

issues appropriate for factual development, and not for dismissal at this early stage.[3]

4. The Commonwealth has standing to seek injunctive relief.

a) Binding precedent establishes the Commonwealth's standing.

"[T]he existence of an 'antitrust injury' is not typically resolved through motions to dismiss." *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876 (3d Cir. 1995). Here, the Commonwealth has more than met its burden of alleging antitrust injury appropriate for injunctive relief.

The Commonwealth's standing to seek injunctive relief is well established. In *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), the Supreme Court held that a state may bring a *parens patriae* action for injunctive relief to address harm to a state's economy arising out of a conspiracy in violation of the antitrust laws. *Id.* at 447; *see also Commonwealth of Pennsylvania v. Russell Stover Candies, Inc.*, C.A. No. 93-1972, 1993 U.S. Dist. LEXIS 6024, at *22 (E.D. Pa. May 6, 1993) ("a state may still seek injunctive relief for harm to its general economy that is caused

[3] The NCAA's suggestion that the Commonwealth has not defined the relevant markets "by reference to reasonable consumer substitutability" is incorrect. *See* NCAA Mem. 18 n.7. Neither of the cases the NCAA cites holds that a complaint must identify the precise contours or members of each alleged market. In *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997), the relevant market was defined as a single pizza chain, and the complaint failed to account for the existence of obvious substitutes. In *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012), no relevant market was alleged. Neither deficiency is present here.

by a violation of federal antitrust law"). The Complaint alleges, in detail, that the PSU sanctions threaten precisely such harm to the Pennsylvania economy. Complaint ¶ 75.

The NCAA's assertion that the Commonwealth is not representing consumers or competitors in the alleged markets is incorrect. At a minimum, Pennsylvania citizens include students and parents who are consumers in the market for postsecondary education, who face a likely tuition increase, Complaint ¶ 73, and a diminution in the value of the PSU educational and community experience as a direct result of the PSU sanctions. *Id.* ¶ 75. They include student football players who will face a constrained market for their talents as a direct result of the reduction in scholarships. *Id.* ¶ 73. And they include PSU, which is an injured competitor in all three of the alleged markets. *Id.*

b) The cases the NCAA cites seek damages and are thus inapposite.

The requirements for establishing standing under the antitrust laws are less rigorous where, as here, only injunctive relief is sought, than in the damages cases cited by the NCAA. *See, e.g.*, *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 331 (1990) (seeking damages); *Associated General Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529 (1983) (same); *West Penn*, 627 F.3d at 96 (same); *Steamfitters Local Union No. 420 Welfare Fund v. Phillip*

Morris, Inc., 171 F.3d 912, 918 (3d Cir. 1999) (same). "Section 16 has been applied more expansively" than standing analysis for damage actions, "both because its language is less restrictive . . . and because the injunctive remedy is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy." *McCarthy v. Recordex Servs.*, 80 F.3d 842, 856 (3d Cir. 1996) (internal quotations omitted). Also, because injunctive relief raises no threat of duplicative recoveries against the same defendant for the same conduct, such factors as the remoteness of the plaintiff and the indirect nature of the injury "are not relevant under § 16." *Id.,* citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986).

The NCAA's argument that the Complaint threatens to "radically expand" the scope of future antitrust plaintiffs has it backwards. What is "radical" is the NCAA's argument that the governor of a state lacks standing to seek to enjoin an antitrust violation aimed at one of its universities, with direct adverse effects on untold numbers of consumers and other citizens of the state. Such a decision would be unprecedented, inappropriate, and inconsistent with the antitrust laws.

CONCLUSION

The NCAA asks this Court to disregard the Commonwealth's allegations that the PSU sanctions were nothing more than an anticompetitive attack on PSU, using the NCAA's enforcement authority as a pretext. The NCAA's request is

based on self-serving assurances that its only concern was protecting its organization and enforcing "basic values." No Rule 12(b)(6) movant is entitled to such leaps of faith.

DATED: February 25, 2013

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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 4,956 words.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Opposition to Defendant's Motion to Dismiss was served via the ECF Service this 25th day of February, 2013, on each of the following:

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