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-00006-YK**
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.	:	(THE HONORABLE YVETTE KANE)

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

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INTRODUCTION

Plaintiff argues that this Court should ignore the controlling Supreme Court and Third Circuit precedents because he has alleged that the NCAA's sanctions against Penn State University ("PSU") were motivated by nothing more than a desire to "boost[] the competing football programs of certain member colleges and universities by removing from competition one of the leading competitors," Compl. ¶65. That allegation is conclusory and absurd, and this Court is not required to accept it as true. Plaintiff has not alleged *any* actual evidentiary facts that could possibly render that outrageous accusation plausible. And even if he *had* alleged such facts, his antitrust claims would still fail as a matter of law.

Plaintiff continues to insist that the NCAA and its member institutions could not possibly have any legitimate interest in sanctioning PSU, because Jerry Sandusky's crimes were not about athletics. Plaintiff still has not come to grips with the facts uncovered in the Freeh Report *and accepted by PSU in the Consent Decree*—facts that his Complaint does not contradict. These sanctions were not imposed because of Sandusky's criminal behavior. They were imposed because important members of the University's senior leadership (including its President, Athletic Director, and football coach) decided not to report those crimes, at least in part because of an inappropriate culture of reverence for, and a desire to protect, the University's football program. The NCAA's member institutions are entitled

to conclude that a culture that places football over basic morality is inconsistent with the particular form of athletic competition in which they wish to participate and foster through the NCAA—and to insist on remedial measures if PSU desires to continue participating in NCAA-sponsored athletic competition. PSU explicitly accepted those findings for purposes of the Consent Decree, and agreed that its behavior violated numerous provisions of the NCAA's Constitution and Bylaws.[1]

The rest of Plaintiff's arguments are inconsistent with settled law. The law of this Circuit is that NCAA sanctions are not "commercial," and therefore not subject to antitrust scrutiny, unless the *rules* that they enforce are directed at regulating commercial activity such as salaries or television contracts. Plaintiff's argument that these sanctions will have financial *effects* on PSU is true of every NCAA enforcement action and would have required a different result in *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998). His argument that the NCAA's conduct here is somehow subject to *per se* or "quick look" condemnation is likewise flatly inconsistent with *Smith* as well as with the Supreme Court's decisions in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 102 (1984), and

[1] Plaintiff challenges whether the PSU Board formally voted to ratify the Consent Decree. This issue is irrelevant to the legal issues presented here. Regardless, it is undisputed that PSU agreed to the Consent Decree in accord with its own internal procedures, and that the "vast majority" of Board members supported that decision. *See, e.g.*, WJAC Web Staff & Bill Waddell, *PSU Board of Trustees Discuss NCAA Sanctions on Public Phone Conference, Back Pres. Erickson*, wjactv.com (Aug. 12, 2012, 7:30 PM), http://www.wjactv.com/news/news/psu-board-trustees-discuss-ncaa-sanctions-public-p/nQ8gq/.

American Needle, Inc. v. NFL, 130 S. Ct. 2201, 2216 (2010). Those cases recognize that even outright limitations on commercial competition imposed by the NCAA are evaluated under the Rule of Reason—which requires a properly-defined, relevant market and proof of actual harm to competition. The sanctions here are procompetitive and easily satisfy the Rule of Reason, as a matter of law, under *Smith*. And Plaintiff's theory of antitrust standing ignores contrary circuit precedent and has no limiting principle.

Plaintiff obviously believes that the sanctions that PSU agreed to are too harsh. College sports elicit strong passions, and creative lawyers can always wrap those feelings in the language of antitrust. But the Supreme Court and the Third Circuit have made clear that the scarce resources of the court and the parties should not be wasted providing a forum for grievances like these.

ARGUMENT

I. THE COMPLAINT'S ALLEGATION OF ANTICOMPETITIVE MOTIVE IS CONCLUSORY AND IMPLAUSIBLE, AND SHOULD BE IGNORED

Almost all of Plaintiff's arguments hinge on his allegation that the NCAA's stated justification for penalizing PSU is a "sham" intended to conceal "a naked conspiracy" between the NCAA and its members "to deprive a competitor of essential benefits." Corbett Br. 8, 14-15. Plaintiff's allegation of a clandestine conspiracy between the NCAA and various unidentified members, motivated by an

anticompetitive desire to create on-field and recruiting advantages for PSU's football rivals, is wholly conclusory and totally implausible. NCAA sanctions often produce allegations like these from angry fans, and courts have recognized for decades that they are "absurd." *Justice v. NCAA*, 577 F. Supp. 356, 379 & n.16 (D. Ariz. 1983) (rejecting suggestion that NCAA members imposed sanctions to exclude University of Arizona from television and bowl appearances "to increase their [own] chances of reaping such benefits").[2]

To survive a motion to dismiss, "a bare assertion of conspiracy will not suffice." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A plaintiff must allege *evidentiary facts* that if true, would "raise a right to relief above the speculative level" and "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 555-56. That burden requires the plaintiff to "plead[] 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); *see also Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011) ("We … reject bare statements that the Defendants purportedly 'conspired and agreed among themselves' to … 'boycott [the plaintiff]'") (citation omitted). When evaluating whether allegations give rise to an inference of conspiracy, a court may consider "obvious alternative explanation[s]" for what

[2] The *Justice* case was cited with approval by the Supreme Court in *Board of Regents*. *See* 468 U.S. at 102 n.24.

happened, *Twombly*, 550 U.S. at 566-67, as well as "judicial experience and common sense," *Iqbal*, 556 U.S. at 679.

Plaintiff alleges *no* actual evidentiary facts that could satisfy his burden. Plaintiff relies heavily, for example, on his allegation that the NCAA imposed sanctions in the "absence of a violation of any NCAA rule." Corbett Br. 10. But PSU agreed in the Consent Decree that it had breached the standards expected by and articulated in several specific provisions of the NCAA's Constitution and Bylaws, Consent Decree 2 (listing eight distinct provisions), and the complaint admits that the "Constitution and Bylaws … set forth … the rules governing [NCAA] member institutions," Compl. ¶25.[3] The prohibition on unethical conduct (Manual art. 10.1, attached in NCAA Br. as Ex. A) appears in the same section of the NCAA Manual as the rules requiring reporting of illegal drug use (*id.* art. 10.2) and banning sports wagering by coaches and athletes (*id.* art. 10.3). The "Exemplary Conduct" rule (*id.* art. 19.01.2) in the Manual immediately precedes the basic obligation of member institutions to cooperate with NCAA enforcement staff (*id.* art. 19.01.3).

Plaintiff persists in arguing that the NCAA must have had some nefarious motive because there was supposedly no "connection between the sanctions and

[3] *See also, e.g.*, Manual art. 3.2.4.1 (requiring all members "to administer their athletics programs in accordance with the constitution, bylaws and other legislation of the [NCAA]"), attached as Ex. A; *id.* 5.2.2 (explaining that Operating Bylaws "provide rules and regulations" governing intercollegiate sports).

'fair competition in intercollegiate athletics,'" such that the sanctions "served no legitimate purpose." Corbett Br. 11 (citation omitted). We should not have to keep saying this, but—to be blunt—choosing not to report a serial child rapist to the proper authorities in order to avoid bad publicity for the football team, or because one has come to believe that standing up to the football program is impossible or inappropriate, is appalling conduct *closely* related to athletics. The Freeh Report—which PSU accepted in full—concluded that PSU's leaders had "empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued … affiliation with the University's prominent football program," Freeh Report 15, and "worked together to conceal Sandusky's crimes for fear of bad publicity" to the team, Compl. ¶42. Those facts connect the sanctions to intercollegiate competition and to the NCAA's prohibition on unethical conduct in the operation of an NCAA football program. The fact that the NCAA thought that conduct merited sanctions is not remotely suspicious.

Plaintiff asserts that "[t]he NCAA's total disregard of its own enforcement procedure" suggests an ulterior, anticompetitive motive. Corbett Br. 11. But the fact that PSU chose to embrace the findings of the Freeh Report—*which PSU itself commissioned*—and to accept an expedited sanctions process rather than risk lengthy and intrusive proceedings and potentially harsher penalties lends no support to any inference of conspiracy or anti-competitive motive. And Plaintiff

ignores that Article 4.1.2(e) of the NCAA Manual expressly empowers the Executive Committee to act, as it did here, on behalf of the Association in association-wide matters. Attached as Ex. A.

At the time of the sanctions, Plaintiff acknowledged the "appalling actions" at PSU necessitated a corrective process, recognized that "[p]art of that corrective process is to accept the serious penalties imposed today by the NCAA on Penn State University and its football program," and expressed that he was "grateful that the NCAA did not impose the 'death penalty.'" Laura Nichols, *Penn State Football: Gov. Tom Corbett Responds to NCAA Sanctions*, StateCollege.com (July 23, 2012, 3:40 PM), http://www.statecollege.com/news/local-news/penn-state-football-gov-tom-corbett-responds-to-ncaa-sanctions-1097083/. Plaintiff now pretends to find these sanctions so baffling and inexplicable that they could only have been the product of a naked desire to harm PSU on the football field. But this Court is entitled to employ "judicial experience and common sense" in evaluating whether allegations are genuinely plausible enough to merit expensive further proceedings. *Iqbal*, 556 U.S. at 679. These are not.

II. THE COMPLAINT FAILS TO STATE A CLAIM

A. The Challenged Sanctions Are Not A Restraint Of Trade or Commerce

The Third Circuit held in *Smith* that the NCAA's noncommercial activities, including enforcement of NCAA rules that do not directly pertain to economic

matters, are not subject to the Sherman Act at all. NCAA Br. 10-13. That holding requires dismissal here. Plaintiff's contrary arguments are unpersuasive and rely on out-of-circuit precedent inconsistent with *Smith*.

The Consent Decree explains that the NCAA imposed sanctions based on PSU's decision to "accept the findings of the Freeh Report" and acknowledges "that those facts constitute violations of the [NCAA's] Constitutional and Bylaw principles." Consent Decree 2. Those principles have nothing to do with trade or commerce; rather, they establish the basic standards of honesty, ethical conduct, and institutional control that the NCAA and its members deem necessary to preserve the character and integrity of college sports.

Plaintiff argues that the sanctions will have a commercial *impact* on PSU. But under *Smith*, the line between commercial and noncommercial enforcement actions turns not on the nature or effect of the sanctions, but on the nature of the underlying rules that the sanctions are enforcing.[4] *Smith* made clear that the proper focus is on the substantive content of the NCAA's rule, and not on the "alleged

[4] Plaintiff's contrary argument draws heavily on the Seventh Circuit's decision in *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012), to suggest that sanctions with the *effect* of reducing scholarship limits would always be subject to antitrust scrutiny regardless of the character of the rule being enforced. *See* Corbett Br. 9. Even assuming that characterization of *Agnew* was accurate, the Seventh Circuit itself recognized that view cannot be squared with governing Third Circuit precedent. *See Agnew*, 683 F.3d at 339 (noting Third Circuit and other aligned courts distinguish between "NCAA's commercial rules and noncommercial rules").

injuries" suffered by the plaintiff as a result of the NCAA's enforcement of that rule. 139 F.3d at 184-86. As the Sixth Circuit has explained, "the enforcement of non-commercial rules is not a commercial activity." *Bassett v. NCAA*, 528 F.3d 426, 433-34 (6th Cir. 2008). If Plaintiff's theory were right, then *any* NCAA sanction imposed for violation of *any* rule—including violations of recruiting and eligibility rules that Plaintiff concedes are noncommercial—would constitute commercial activity under the Sherman Act.

Plaintiff tries to distinguish *Smith* by arguing that there were no allegations of an "ulterior, anticompetitive motive" in that case. Corbett Br. 7, 10. To the contrary, allegations like these are made in almost every case challenging NCAA sanctions, including *Smith*. *See Smith v. NCAA*, 978 F. Supp. 213, 216, 218 (W.D. Pa. 1997) (rejecting argument that by enforcing its bylaws the NCAA "[wa]s attempting to provide itself and its member institutions with a commercial advantage"); *see also Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 577 (E.D. Pa. 2004) (finding NCAA rule immune from antitrust scrutiny under *Smith* despite plaintiff's allegation that rule's purpose was "to protect institutional basketball camps and to harm non-institutional basketball camps").[5]

[5] Plaintiff is wrong to suggest (Corbett Br. 9) that the NCAA's Commerce Clause challenge to a recent Pennsylvania statute appropriating the PSU fine to the state treasury contradicts its arguments in this case. That lawsuit challenges the

The NCAA sanctioned PSU because PSU admitted to violating fundamental rules and principles—codified in the NCAA manual—defining the character and ideals of intercollegiate sports. These provisions have nothing to do with trade or commerce, and the sanctions enforcing them are *non*commercial as a matter of law.

B. The Challenged Sanctions Are Procompetitive

In *Smith*, the Third Circuit also recognized that "'most of the regulatory controls of the NCAA,'" particularly eligibility rules for competition, are so clearly procompetitive that an antitrust challenge can be rejected at the motion to dismiss stage. 139 F.3d at 186 (quoting *Bd. of Regents*, 468 U.S. at 117). Enforcement of principles that define the unique "character" of intercollegiate athletics, *Bd. of Regents*, 468 U.S. at 102, 120, should be upheld "in the twinkling of an eye" and without any need for "detailed analysis." *Am. Needle*, 130 S. Ct. at 2216-17 (citation omitted).

Plaintiff's contrary argument again rests entirely on his conclusory allegations that the NCAA had an anticompetitive motive and that sanctions against PSU for unethical conduct and a lack of institutional control were not "necessary." Corbett Br. 12-13. Governor Corbett's personal opinion about what

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prohibition on using the fine to fund charitable programs outside of Pennsylvania, and nothing in the NCAA's position implies that its imposition of the PSU sanctions was itself commercial activity.

is "necessary" or "inherent" to college sports is irrelevant and misconceives the issue before this Court. The NCAA has long had rules requiring "Ethical Conduct," which impose numerous restrictions that Governor Corbett might consider "unnecessary," such as restraints prohibiting the use of certain *non-performance-enhancing* drugs, wagering on other sports, or engaging in competition under an assumed name.

Regardless, a court's task in reviewing an antitrust complaint is not to decide whether a particular rule is "necessary" as imagined by the plaintiff or by the court. The NCAA's member institutions are entitled to decide for themselves how they want the competition they sponsor and participate in to be governed, and the principles they want it to promote. *See, e.g., Bd. of Regents*, 468 U.S. at 120 (NCAA is due "ample latitude" in maintaining "revered tradition of amateurism in college sports"). That is a basic associational freedom protected by the First Amendment. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000).

The only question for an antitrust court is whether a particular rule seems likely to restrain commercial competition in a manner that is not reasonably related to any legitimate conception of what college sports should be. Plaintiff may not like the NCAA's decision to enforce its rules governing ethical conduct and institutional control, but these are rules that articulate and enforce the NCAA's conception of "the integrity of college football as a distinct and attractive product,"

no less than the recruiting and academic requirements that have been routinely upheld against antitrust challenges. *Bd. of Regents*, 468 U.S. at 116; *see also* NCAA Br. 14-15. There is nothing *anticompetitive* about the NCAA's members concluding that they do not want to be associated with any form of athletic competition that encourages or incentivizes university officials to prioritize protecting a football team over reporting horrible crimes against children, or enforcing rules that make clear that such cover-ups will not be tolerated.

C. The Complaint Fails To Allege Harm To Competition Or A Proper Relevant Market

The antitrust laws are concerned with the "protection of competition, not competitors," so alleging harm to a single competitor's strength or ability to compete is not enough. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quotation marks and citation omitted). "[A]n individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market." *Eichorn v. AT&T Corp*, 248 F.3d 131, 140 (3d Cir. 2001).

Plaintiff attempts to escape his duty to allege plausible harm to competition by pretending that the PSU sanctions can be evaluated as a *per se* illegal "group boycott." But group boycotts involve the exclusion of the boycotted entity from a relevant supply or market. Here, PSU is not excluded from *any* of the three relevant markets Plaintiff points to. None of the sanctions prohibit PSU from

participating in any "market" for post-secondary education, Division I football players, or the sale of college football-related apparel and memorabilia. Moreover, courts have found the application of standards or eligibility requirements by trade associations and the like do not amount to group boycotts. *See, e.g.*, *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 529-30 (6th Cir. 2001) (accreditation standards not group boycott).

In any event, courts have recognized for at least three decades that "the attributes of a *per se* illegal boycott simply do not exist" when the "NCAA is … enforcing rules contained in its constitution and regulations." *Justice*, 577 F. Supp. at 379. *Board of Regents* involved an outright restriction on televising games that in other contexts might have been viewed as a *per se* illegal horizontal agreement to restrict output, but the Supreme Court held that *per se* treatment of NCAA rules and enforcement actions is inappropriate because sports are "an industry in which horizontal restraints on competition are essential if the product is to be available at all." 468 U.S. at 101; *see also Am. Needle*, 130 S. Ct. at 2216 (reaffirming same).

Plaintiff's allegation that the NCAA and its members imposed the sanctions for the "purpose of injuring a competitor," Corbett Br. 17, would not make this case appropriate for *per se* analysis even if it were plausible (which it is not, *see supra* Part I). The Supreme Court has explained that where the "case involves an industry in which horizontal restraints on competition are essential if the product is

to be available at all," an allegation that a defendant's action "was a pretext" motivated by a desire to "place [the plaintiff] at a competitive disadvantage" is "an argument [that] is appropriately evaluated under the rule-of-reason analysis." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295-96 & n.7 (1985). And, as noted above, the Third Circuit's decision in *Smith* involved a similar allegation.

Plaintiff's suggestion that he can avoid his obligation to allege properly defined markets and anticompetitive effects by invoking "quick look" analysis is similarly flawed. "Quick look" still requires proper market definition and effects allegations.[6] And the "quick-look" approach is appropriate only "when 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" *Agnew v. NCAA*, 683 F.3d 328, 336 (7th Cir. 2012) (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)). Here, it is not true that anyone with a "rudimentary understanding of economics" would conclude immediately that NCAA rules requiring institutional control, honesty, and integrity are more anticompetitive than, for example, the television restrictions the Supreme Court evaluated under the Rule of Reason in *Board of Regents*. Finally, "quick look"

[6] The Supreme Court made clear that plaintiffs seeking a "quick look" analysis from a reviewing court must plead and prove facts *showing* that the restraint has "obvious anticompetitive effects." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (citation omitted).

evaluation is inappropriate if the rules in question "might plausibly be thought to have a net procompetitive effect." *Cal. Dental Ass'n*, 526 U.S. at 771. The NCAA's belief that these sanctions were necessary to protect the basic integrity of college sports is *at least* "plausible."

Plaintiff's complaint specifically alleges harm to three relevant markets: "a market for postsecondary education, a market for Division I football players, and a market for the sale of college football-related apparel and memorabilia." Compl. ¶69.[7] Plaintiff defines the relevant market as "nationwide in geographic scope." *Id.* Those markets are not remotely defined with the specificity that antitrust law requires, and Plaintiff's allegations of harm are either inconsistent with his own complaint, totally implausible, or both.

Plaintiff first declares that PSU's loss of twenty total scholarships "pose[s] a significant restraint on the ability of the nation's top scholastic football players to obtain scholarships at the Division I championship level." Corbett Br. 18. Even if we accepted the notion that there could be such a thing as a "market" for college football scholarships, Plaintiff cannot run away from the nationwide market allegations in his complaint by attempting to define an *ad hoc*, vague submarket of elite teams in his opposition. In any event, his own complaint rejects his claim—

[7] Plaintiff's additional boilerplate allegations that the sanctions will result in "'increased prices, reduced output, and reduced quality,'" Corbett Br. 18 (citation omitted), are paradigmatically conclusory and insufficient to meet his pleading burden, *Iqbal*, 556 U.S. at 678.

alleging that the "[t]he most successful college football programs compete aggressively for the relatively small number of high school seniors who can play at the Division I championship level." Compl. ¶71. These sanctions may temporarily impact PSU's own ability to participate in that aggressive competition, but again the antitrust laws are concerned with the "protection of competition, not competitors." *Brunswick Corp.*, 429 U.S. at 488 (quotation marks and citation omitted). The players who meet Plaintiff's hazily-defined criteria will have scholarship opportunities at strong programs. And the fact that *one* market participant can offer slightly fewer scholarships does not amount to an allegation of a *marketwide* anti-competitive effect across the over 10,000 scholarships available across 120 Division I Football Bowl Subdivision programs. Temporary restrictions on scholarships are a routine NCAA sanction, and they do not render any markets less competitive.[8]

Next, Plaintiff argues that the sanctions' monetary component will likely force PSU to "'reduce the availability and/or quality of some of its programs,'" and harm the university's ability to compete for faculty. Corbett Br. 18-19 (quoting

[8] Although Plaintiff predicted that sanctions such as a postseason ban and the loss of scholarships would "severely cripple" PSU football and result in its "inevitable decline," Compl. ¶48, 73(e), PSU just completed a successful (8-4) 2012 season, ranked higher in the AP Poll than after the two seasons preceding the sanctions. Indeed, the only team in Division I college football to finish the 2012 season undefeated was the Ohio State University, which like PSU received sanctions this season including the reduction of scholarships and a ban from post-season play.

Compl. ¶73(c)). PSU's annual budget exceeds $4 billion, and the suggestion that paying $12 million a year for five years into an endowment for child sexual abuse victims will harm the university's quality is speculative and implausible. Regardless, that alleged impact is restricted to one participant—PSU—not the market. Plaintiff cannot seriously contend that the imposition of a temporary fine amounting to well short of 1% of one school's annual budget will cause harm to the nationwide postsecondary school market for "high quality faculty" or "research programs." *Id.* at 19 (quoting Compl. ¶73(c)). This Court can apply "experience" and "common sense," *Iqbal*, 556 U.S. at 679, to reject that claim.

Finally, Plaintiff alleges that the sanctions will force PSU to raise tuition and reduce its investment in programs and facilities, thereby inducing its "nearest rivals" to follow suit. Corbett Br. 19. Again, Plaintiff pleads that the relevant "markets are nationwide in geographic scope," Compl. ¶69, so any effect limited to PSU's nearest rivals, even if assumed to be true, would be immaterial. But in any event, it is simply absurd to think that the NCAA's sanctions on PSU will cause the improbable chain of events that Plaintiff proposes, leading the University of Maryland or Idaho, for example, to raise tuition or decline to "upgrade a research laboratory or build a new natatorium." Corbett Br. 19.[9]

[9] Plaintiff no longer appears to defend the final market in which his complaint alleged harm—the market for brand apparel. That allegation suffered similar shortcomings. It alleged harm only to PSU's brand, not to nationwide sports

III. PLAINTIFF LACKS STANDING TO SEEK INJUNCTIVE RELIEF

Plaintiff's opposition does not dispute the NCAA's demonstration that a State suing in a *parens patriae* capacity must satisfy the same antitrust injury requirements as any other plaintiff seeking an injunction. NCAA Br. 18-19 & n.8. An injury does not qualify as "antitrust injury" unless it was proximately caused by an antitrust violation; derivative or remote harms do not count. NCAA Br. 19 (citing *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 921-32, 935 (3d Cir. 1999); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 856 (3d Cir. 1996) (same)).

Plaintiff argues that the cases cited in the NCAA's brief are "inapposite" because they involved only claims for damages, asserting that *McCarthy* provides that "such factors as the remoteness of the plaintiff and the indirect nature of the injury" are "not relevant" to requests for injunctions. Corbett Br. 21-22 (quoting *McCarthy*, 80 F.3d at 856). These assertions are flatly incorrect. In *Steamfitters*, the plaintiffs sought both damages *and* "extensive injunctive relief." 171 F.3d at 918. The Third Circuit rejected standing for both claims for precisely the same reason—that plaintiffs' injury was too remote from the alleged antitrust violation. *Id*. at 921, 926-28, 930; *id*. at 935 (rejecting request for injunction because, "the

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apparel sales. And notwithstanding decades of experience with NCAA sanctions, Plaintiff failed to allege that any team's sanctions have ever harmed the nationwide market for sports apparel; nor will the sanctions at issue here.

necessary element of proximate cause is missing and therefore, just as plaintiffs lack standing to seek damages for their alleged injuries, they lack standing for equitable relief").

McCarthy likewise explained that injunctive relief requires a showing of an injury "*proximately* resulting from the alleged antitrust violation." 80 F.3d at 856 (citing *Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183, 1186 (10th Cir. 1983) (emphasizing "remote[ness]" is part of proximate cause analysis)). *McCarthy* also made clear that the inquiry into proximate cause incorporates "the directness or indirectness of the asserted injury," which the court identified as the third (of five) factors relevant to antitrust standing set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 541 (1983). *Id*. at 850-51 & n.13. Nothing in *McCarthy* stands for the proposition that the "remoteness of the plaintiff" and the "indirect nature of the injury" are "irrelevant" to requests for an injunction, as Plaintiff asserts.

Plaintiff's specific assertions of antitrust injury all fail under the proper legal analysis. He alleges (1) harm to PSU; (2) generalized harm to the Pennsylvania economy; (3) harm to PSU students and parents flowing from predicted tuition

increases and a diminished college experience; and (4) harm to PSU football players who may lose scholarships. Corbett Br. 20-21 (citing Compl. ¶¶73, 75).[10]

Any harm to PSU itself cannot serve as the basis for Plaintiff's antitrust claims here. As explained above, harm to a single competitor is not harm to *competition.* And by its own terms, the Complaint (at 1) asserts *parens patriae* authority only on behalf of the "*natural* citizens of the Commonwealth." (emphasis added). PSU also has waived any and all legal challenges to the sanctions. Consent Decree 4.

The other alleged harms all reflect the remote, indirect, and highly speculative predicted consequences of injury to PSU's football program. *See* NCAA Br. 20-21. None would be the direct result of any marketwide anticompetitive effects in the nationwide markets for college education, Division I football players, or college memorabilia and apparel. Plaintiff is simply claiming that harm to PSU will negatively impact the Pennsylvania treasury and businesses and individuals who depend on PSU's football program for their financial or emotional well-being. This sort of derivative harm is an incidental byproduct of any alleged harm to PSU, and it is certainly not "the means by which" the NCAA

[10] The portions of the Complaint that the brief cites to establish these allegations assert harm only on behalf of PSU-affiliated individuals. *See* Compl. ¶¶73(a), 73(c), 73(e), 75(i). And of course Plaintiff cannot amend his Complaint by argument in his brief. *See Frederico v. Home Depot*, 507 F.3d 188, 201-02 (3d Cir. 2007).

has sought to achieve any of its allegedly "anticompetitive ends." *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 102 (3d Cir. 2010).[11]

CONCLUSION

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

Respectfully submitted,

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[11] It is revealing that three of the four allegations of harm noted in Plaintiff's brief—the harm to PSU, the harm to students and parents from tuition increases, and the harm to football players from reduced scholarships—appear in ¶73 of the Complaint, which by its own terms addresses the "damaging effects [of the NCAA's alleged misconduct] *on Penn State*," and not in ¶¶75-77, which address "Threatened Harm *to the Commonwealth*."

Date: March 14, 2013

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 4,997 words.

Date: March 14, 2013

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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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