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

Thomas W. Scott (PA No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Gregory L. Curtner, *PHV pending*
Kimberly K. Kefalas, *PHV pending*
SCHIFF HARDIN LLP
350 South Main Street, Suite 210
Ann Arbor, MI 48104
Telephone: (734) 222-1500
Facsimile: (734) 222-1501
gcurtner@schiffhardin.com

Everett C. Johnson, Jr., *PHV pending*
J. Scott Ballenger, *PHV pending*
Roman Martinez, *PHV pending*
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
everett.johnson@lw.com

Attorneys for Defendant
The National Collegiate Athletic Association

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,

/s/Thomas W. Scott

Thomas W. Scott (PA No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Attorneys for Defendant
The National Collegiate Athletic Association

Everett C. Johnson, Jr., *PHV pending*
J. Scott Ballenger, *PHV pending*
Roman Martinez, *PHV pending*
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
everett.johnson@lw.com

Gregory L. Curtner, *PHV pending*
Kimberly K. Kefalas, *PHV pending*
SCHIFF HARDIN LLP
350 South Main Street, Suite 210
Ann Arbor, MI 48104
Telephone: (734) 222-1500
Facsimile: (734) 222-1501
gcurtner@schiffhardin.com

Date: February 7, 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 4,979 words.

Date: February 7, 2013

/s/Thomas W. Scott

Thomas W. Scott (PA No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Facsimile: (717) 238-0592
tscott@killiangephart.com

Attorney for Defendant
The National Collegiate Athletic Association

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.

Date: February 7, 2013

/s/Thomas W. Scott

Thomas W. Scott (PA No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Facsimile: (717) 238-0592
tscott@killiangephart.com

Attorney for Defendant
The National Collegiate Athletic Association

SERVICE LIST

James D. Schultz, General Counsel
Governor's Office of General Counsel
Commonwealth of Pennsylvania
333 Market Street, 17th Floor
Harrisburg, PA 17101
Telephone: (717) 783-6563
Facsimile: (717) 787-1448
jamschultz@pa.gov

First Class U.S. Mail, Postage Prepaid

Jarad W. Handelman, Executive Deputy General Counsel
Governor's Office of General Counsel
Commonwealth of Pennsylvania
333 Market Street, 17th Floor
Harrisburg, PA 17101
Telephone: (717) 783-6563
Facsimile: (717) 787-1448
jhandelman@pa.gov

Electronic Filing

Melissa H. Maxman, Esquire
COZEN O'CONNOR
1627 I Street, N.W., Suite 1100
Washington, DC 20006
Telephone: (202) 912-4800
Facsimile: (202) 640-5520
mmaxman@cozen.com

Electronic Filing

Ronald F. Wick
COZEN O'CONNOR
1627 I Street, NW, Suite 1100
Washington, DC 20006-4007
Telephone: (202) 912-4800

First Class U.S. Mail, Postage Prepaid

BRENTWOOD ACADEMY v. TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually

NO. 3:97-1249

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2008 U.S. Dist. LEXIS 55312*; *2008-2 Trade Cas. (CCH) P76,317

July 18, 2008, Filed

PRIOR HISTORY: *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 2001 U.S. App. LEXIS 23759 (6th Cir., Oct. 29, 2001)*

COUNSEL: [*1] For Brentwood Academy, Plaintiff: Abigail Turner, H. Lee Barfield, II, Ross I. Booher, LEAD ATTORNEYS, W. Brantley Phillips, Jr., Bass, Berry & Sims, Nashville, TN; James Franklin Blumstein, LEAD ATTORNEY, Vanderbilt Legal Clinic Vanderbilt School of Law, Nashville, TN.

For Tennessee Secondary School Athletic Association, Defendant: Maurice E. Stucke, LEAD ATTORNEY, University of Tennessee College of Law, Knoxville, TN; Richard Lee Colbert, LEAD ATTORNEY, Courtney L. Wilbert, Colbert & Winstead, Nashville, TN.

For Ronnie Carter, Executive Director of the Tennessee Secondary Schools Athletic Association and individually, Defendant: Richard Lee Colbert, LEAD ATTORNEY, Courtney L. Wilbert, Colbert & Winstead, Nashville, TN.

JUDGES: TODD J. CAMPBELL, UNITED STATES DISTRICT JUDGE.

OPINION BY: TODD J. CAMPBELL

OPINION

MEMORANDUM

Pending before the Court are Plaintiff's Motion for Judgment in its Favor on Equal Protection Claim (Docket No. 349); Plaintiff's Renewed Motion for Summary Judgment on Antitrust Claims (Docket No. 351); and Defendant's Motion for Summary Judgment (Docket No. 354).

For the reasons stated herein, Plaintiff's Motion for Judgment in its Favor on Equal Protection Claim (Docket No. 349) is DENIED; Plaintiff's **[*2]** Renewed Motion for Summary Judgment on Antitrust Claims (Docket No. 351) is DENIED; and Defendant's Motion for Summary Judgment (Docket No. 354) is GRANTED.

INTRODUCTION

Defendant Tennessee Secondary Schools Athletic Association ("TSSAA") is a not-for-profit membership corporation organized to regulate interscholastic sports among its members, which include some 290 public and 55 private high schools in Tennessee. *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 127 S.Ct. 2489, 2492, 168 L. Ed. 2d 166 (2007)*. Brentwood Academy is one of those private schools. Id. [1] The TSSAA is a state actor for purposes of the Constitution, *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n., 531 U.S. 288, 121*

S.Ct. 924, 148 L. Ed. 2d 807 (2001), but it is not entitled to antitrust immunity. *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n, 442 F.3d 410, 443 (6th Cir. 2006)*.

> 1 Defendant Ronnie Carter, against whom Plaintiff brought its constitutional claims, was dismissed from this case based upon qualified immunity.

This case has a long history, having produced opinions in this Court, in the Sixth Circuit Court of Appeals, and in the U.S. Supreme Court. For purposes of the pending Motions, Plaintiff argues two **[*3]** claims: (1) that the TSSAA "Recruiting Rule" violates the equal protection rights of Brentwood Academy and (2) that the TSSAA has violated the antitrust laws of the United States, specifically Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1* and *2*. Defendant contends that there is only one remaining claim, the antitrust claim, and that it is entitled to summary judgment on that claim.

EQUAL PROTECTION

Initially, the Court must address Defendant's argument that the equal protection claim is not properly before the Court, having been determined in an earlier opinion by this Court and not appealed by Plaintiff. In its first opinion to address Plaintiff's equal protection claim, this Court stated:

> It is axiomatic that a Court should not rule upon constitutional questions unnecessarily. Given the other rulings of this Court in favor of Brentwood Academy, it is unnecessary for the Court to reach the equal protection ("as written and as applied") and substantive due process ("as written") issues. Accordingly, the Court declines to make findings of fact or conclusions of law on these issues.

Brentwood Academy v. TSSAA, 304 F.Supp.2d 981, 1009 (M.D. Tenn. 2003) (citations omitted).

Defendant **[*4]** contends that, because Plaintiff did not include the equal protection claim in its appeal, that claim is now barred. As indicated above, however, this Court never reached the merits of the equal protection claim. Therefore, there has been no final ruling on the merits of that claim. Plaintiff has now filed a Motion for Judgment on the Record on the equal protection claim. Accordingly, that claim will be considered under *Fed. R. Civ. P. 52*, based upon the evidence at trial, and not under the standards of *Fed. R. Civ. P. 56* or *12*.

The *Equal Protection Clause* commands that no State shall deny to any person within its jurisdiction the equal protection of the laws. *U.S. Const., amend. XIV, § 1*. To establish a claim under the *Equal Protection Clause*, a plaintiff must demonstrate that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis. *Club Italia Soccer & Sports Org. v. Charter Township of Shelby, Mich., 470 F.3d 286, 298 (6th Cir. 2006)*; see also *Engquist v. Oregon Dept. of Agr., 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008)*.

Plaintiff's First Amended Complaint **[*5]** alleges that the TSSAA Recruiting Rule, on its face and as applied to Brentwood Academy, violates the *Equal Protection Clause* by discriminating against certain speech based on its content and based on the identity of the speaker. Docket No. 205. Plaintiff alleges that the classifications used by the TSSAA in regulating speech impinge on Brentwood Academy's fundamental *First Amendment* rights, are not necessary to promote compelling governmental interests, and therefore are unconstitutional. Id.

Plaintiff does not assert that it is a member of a suspect class. Plaintiff contends that Defendant burdened its fundamental *First Amendment* rights. The Supreme Court has already ruled, however, that Defendant did not unconstitutionally burden Plaintiff's *First Amendment* rights. [2] That finding is the law of this case. Therefore, the Court finds, as a matter of law, that Defendant has not burdened Plaintiff's fundamental *First Amendment* rights. Plaintiff asserts no other "fundamental right" which has allegedly been burdened.

> 2 "The anti-recruiting rule strikes nowhere near the heart of the *First Amendment*." *127 S.Ct. at 2493*. "TSSAA's limited regulation of recruiting conduct poses no significant *First Amendment* **[*6]** concerns." *Id. at 2495*. ". . . the *First Amendment* does not excuse Brentwood from abiding by the same anti-recruiting rule that governs the conduct of its sister schools." *Id. at 2496*.

Because neither a fundamental right nor a suspect class is at issue, the rational basis standard applies. *Michael v. Ghee, 498 F.3d 372, 379 (6th Cir. 2007)* (citing *Club Italia Soccer & Sports, 470 F.3d at 298*). Equal protection claims can be brought by a "class of one," where the plaintiff alleges that the state treated the plaintiff differently from others similarly situated and that there is no rational basis for such difference in treatment. *Warren v. City of Athens, Ohio, 411 F.3d 697, 710 (6th Cir. 2005).*

Under rational basis scrutiny, government action amounts to a constitutional violation only if it is so unrelated to the achievement of any combination of legitimate purposes that the Court can only conclude that the government's actions were irrational. *Michael, 498 F.3d at 379*. Where no suspect class or fundamental right is implicated, governmental action subject to rational basis scrutiny must be sustained if *any* conceivable basis rationally supports it. *Trihealth, Inc. v. Board of Comm'rs. Hamilton County, Ohio, 430 F.3d 783, 790 (6th Cir. 2005)*. **[*7]** Rational basis review begins with a strong presumption of constitutionality. *Graham v. Mukasey, 519 F.3d 546, 551 (6th Cir. 2008)*. Plaintiff bears the burden of demonstrating that Defendant lacks a rational basis, and it may satisfy this burden either by negating every conceivable basis which might support Defendant's actions, or by demonstrating that the challenged actions were motivated by animus or ill-will. [3] Id.

> 3 The Sixth Circuit has expressly found that there is no evidence to suggest that Defendant maliciously and intentionally abused its state authority in order to injure Brentwood in this case. *442 F.3d at 432*.

This Court, the Sixth Circuit, and the U.S. Supreme Court have all found that Defendant had substantial governmental interests in establishing and enforcing the Recruiting Rule. See *304 F.Supp.2d at 994*; *442 F.3d at 425-26*; *127 S.Ct. at 2495-96*. Those interests [4] clearly withstand rational basis review. The Court finds, as a matter of law, that the TSSAA's challenged actions were related to the achievement of its legitimate purposes and were rational. Therefore, Plaintiff has not carried its burden of establishing that the Recruiting Rule violates the *Equal Protection Clause*.

> 4 Those **[*8]** interests are (1) keeping high school athletics subordinate to academics, (2) protecting student athletes from exploitation, and (3) fostering a level playing field between schools. See, e.g., *304 F.Supp. 2d 981, 994*.

Accordingly, Plaintiff's Motion for Judgment in its Favor on Equal Protection Claim (Docket No. 349) is DENIED, and Defendant's Motion for Summary Judgment (Docket No. 354) is GRANTED with regard to Plaintiff's equal protection claim.

ANTITRUST [5]

> 5 Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Meyers v. Columbia/HCA Healthcare Corp., 341 F.3d 461, 466 (6th Cir. 2003)* The Court, with regard to Plaintiff's antitrust claims, has considered the complete record filed in support and opposition to the pending Motions.

Section One of the Sherman Act provides that every contract, combination or conspiracy in restraint **[*9]** of trade or commerce is illegal. *15 U.S.C. § 1*. Thus, Plaintiff must first show that the challenged restraint involves trade or commerce. *Bassett v. National Collegiate Athletic Ass'n ("NCAA"), 528 F. 3d 426, 433 (6th Cir.2008)*; *Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F.Supp.2d 569, 580 (E.D. Pa. 2004)*. If the restraint is not commercial, it cannot be analyzed under the antitrust laws. Id.

The three "restraints" which Plaintiff alleges violated the antitrust laws in this case are (1) the Division I/Division II split for football in the TSSAA, [6] (2) the Recruiting Rule, and (3) the punishment exacted upon Plaintiff for violation of the TSSAA By-laws. Defendant contends that none of the challenged actions restrains trade or commerce.

> 6 A Bylaw promulgated by the TSSAA created two "divisions" (Division I and Division II) for championship tournament competition within the TSSAA. Division II is for schools which provide need-based financial aid to varsity athletes and

> any other school which chooses to participate in Division II. Division I is for all the rest of the member schools. The Division I/Division II classification applies only to tournament competition, not to regular season **[*10]** play.

The dispositive inquiry in determining whether the alleged restraints are commercial in nature is whether the rules (or enforcement thereof) are commercial, not whether the TSSAA is commercial. *Worldwide Basketball and Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959 (6th Cir. 2005)*; *Bassett at 433*. If the rules themselves and the corresponding sanctions are not commercial, then the enforcement of those rules cannot be commercial. Id.

In Bassett, the court found that Section One of the Sherman Act did not apply to the NCAA's enforcement of its rules on recruiting student athletes, because that enforcement was not a restraint of trade or commerce. *Bassett at 434*. Similarly, in *Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998), vacated on other grounds, NCAA v. Smith, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999)*, the court held that the NCAA's eligibility rules were not commercial activity covered by the Sherman Act. See also *Gaines v. NCAA, 746 F.Supp.738 (M.D. Tenn. 1990)* (NCAA eligibility rules are not subject to antitrust analysis).

Plaintiff has not demonstrated a relevant difference between the NCAA's recruiting rules and the TSSAA's Recruiting Rule for purposes of this antitrust analysis. Indeed, Plaintiff has **[*11]** admitted that the TSSAA is like the NCAA. Docket No. 223, n. 2. Further, Plaintiff has not demonstrated a relevant difference between the NCAA's enforcement of its eligibility rules in *Bassett* and the TSSAA's enforcement of its Recruiting Rule in this case. Plaintiff's attempt to distinguish Bassett is not persuasive. Bassett involved the NCAA recruiting rules and an alleged infraction of those rules. The court found that the NCAA recruiting rules, like the eligibility rules in *Smith*, were explicitly non-commercial. *Bassett at 433*. "In fact, those rules are *anti-commercial* and designed to promote and ensure competitiveness amongst NCAA member schools." Id.(emphasis in original).

Just as the recruiting rules in the NCAA are "anti-commercial" and designed to promote and ensure competitiveness amongst NCAA member schools, the Recruiting Rule of the TSSAA, as noted above, has been found to promote similar, if not identical, interests. See *304 F.Supp.2d at 994* (keeping high school athletics subordinate to academics, protecting student athletes from exploitation, and fostering a level playing field between schools); *442 F.3d at 425-26*; *127 S.Ct. at 2495-96*.

In *NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, **[*12]** the Supreme Court held that the NCAA's restrictions on television broadcasts were commercial in nature and subject to the Sherman Act. In so doing, however, the Court distinguished television broadcasts from the challenged conduct in this case by stating:

> It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, 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.

Id. at 2969. [7]

> 7 The Court stated in Gaines that there is a clear difference between the NCAA's efforts to restrict the televising of college football games and the NCAA's efforts to maintain a discernible line between amateurism and professionalism and protect the amateur objectives of NCAA college football by enforcing the eligibility rules. *Gaines, 746 F.Supp. at 743*. **[*13]** The challenged restraints in this case are more like the efforts of the NCAA to maintain amateurism in college sports than the efforts to restrict televising games.

The Court finds that, for the reasons stated in the above-cited cases, neither the Division I/Division II football split, the Recruiting Rule, nor the punishment exacted against Plaintiff for violation of the Recruiting Rule involves trade or commerce as required for proving violation of the antitrust laws. The purposes of the challenged restraints in this case are pro-competitive and

relate to the promotion of fair athletic competition, not to giving Defendant any commercial advantage. Plaintiff has not proven otherwise.

Thus, because Plaintiff has not carried its burden [8] of showing that the challenged restraints affect trade or commerce, Plaintiff has not shown that the Defendant's actions are prohibited under Section One of the Sherman Act, and Plaintiff's antitrust claim under Section One fails.

8 Because Plaintiff insists that the *per se* approach or the "quick look" analysis, discussed below, applies in this case, Plaintiff proceeds on the assumption that the burden of proof has shifted to Defendant. To the contrary, **[*14]** the ultimate burden remains on the Plaintiff to demonstrate that the alleged restraints involve trade or commerce. Plaintiff has not carried that burden.

Alternatively, even if Plaintiff had shown that the challenged restraints were restraints on trade or commerce, Plaintiff would still have to show that the challenged restraints unreasonably restrain trade in the relevant market, and Plaintiff has not carried that burden.

In this regard, the courts use two analytical approaches to determine whether conduct unreasonably restrains trade, the *"per se* rule" and the "rule of reason." *National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003).* The *per se* rule identifies certain practices that are entirely void of redeeming competitive rationales. Id. For the reasons stated above, specifically the substantial, non-commercial, governmental interests underlying the alleged restraints, those alleged restraints clearly do not fall within the *per se* rule requirements.

The rule of reason analysis, including the "quick look" analysis to which Plaintiff aspires, employs a burden-shifting framework, wherein Plaintiff must first establish that the restraint **[*15]** produces a significant anticompetitive effect within the relevant geographic and product markets. Id. In addition, under either approach, a private antitrust plaintiff, in addition to having to show injury-in-fact and proximate cause, must allege and eventually prove "antitrust injury." *Bassett at 434.* Plaintiff has not demonstrated that it suffered an antitrust injury.

Even if Plaintiff allegedly has shown injury to *itself*, it has not shown injury to a relevant market as required by the antitrust laws. The purpose of the Sherman Act is to rectify the injury to *consumers* caused by diminished competition. *Bassett at 434.* Thus, Plaintiff must allege not only an injury to itself, but an injury to the market as well. Id. The purpose of the antitrust laws is the protection of *competition*, not *competitors. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S.Ct. 2705, 2724, 168 L. Ed. 2d 623 (2007).*

Under either market alleged by Plaintiff [9] -- high school education in Tennessee or the regulation of interscholastic athletics at the high school level in Tennessee -- Plaintiff has not carried its burden of showing that the three challenged restraints have a negative effect on *economic* (rather than athletic) **[*16]** competition. For example, Plaintiff has not proven that the Division I/Division II split, the Recruiting Rule, or the sanctions imposed upon Brentwood Academy have increased the costs of membership in the TSSAA, negatively affected the gate receipts for high school football games, or increased the costs of high school education, particularly where the majority of TSSAA members are free public schools.

9 The Court assumes, for purposes of this Motion, the geographic and product markets proposed by the Plaintiff.

Plaintiff has not shown that Defendant's Bylaws were enacted for the purpose of affecting any price in interstate commerce and has not shown evidence of injury to *economic* competition. The harm Plaintiff alleges is not the sort of economic harm which the antitrust laws were intended to prevent.

Therefore, even if Plaintiff had shown that the facts of this case involved a restraint on trade or commerce, which it has not, Plaintiff has not shown another requisite for relief, antitrust injury. For all these reasons, Plaintiff's Renewed Motion for Summary Judgment on its Section One claims is DENIED, and Defendant's Motion for Summary Judgment (Docket No. 354) on the Section One claims **[*17]** is GRANTED.

Section Two of the Sherman Act provides that it is illegal for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States. *15 U.S.C. § 2.* The

offense of monopoly under Section Two of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S.Ct. 2072, 2089, 119 L. Ed. 2d 265 (1992)*.

Here, Plaintiff alleges that Defendant has monopoly power in the relevant geographic market (Tennessee) and in the relevant product market, which Plaintiff alleges to be either (1) high school education, including the component of that market comprised by interscholastic athletics and the regulation thereof, or (2) the regulation of interscholastic athletics at the high school level. Docket No. 223, pp. 23-24.

Assuming for purposes of this discussion that Plaintiff has identified the relevant markets, Plaintiff also has **[*18]** to show that Defendant has monopoly power, which has been defined as the "power to control prices or exclude competition." *Eastman Kodak, 112 S.Ct. at 2090*; *Gaines, 746 F.Supp. at 745*; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)* (market power entails "cutting back output in the market and thus driving up prices to consumers").

This Court has previously found that the TSSAA is, for all practical purposes, the "only game in town" for the regulation of interscholastic athletics at the high school level in Tennessee and reiterates that finding. The TSSAA has monopoly power in the market for the regulation of high school athletics in Tennessee. The TSSAA, however, is *not* the only game in town for high school *education* in Tennessee. Neither does the TSSAA control prices [10] or exclude competition for high school education in Tennessee.

> 10 Plaintiff asserts that the Division I/ Division II split requires private schools to eliminate need-based tuition discounts, thus controlling prices. The purpose of the Division I/ Division II split, however, is not to give Defendant or its members a *commercial* advantage, because the majority of its members are **[*19]** free, public schools. Defendant's classification system, like the Recruiting Rule, was designed to serve interests that relate to *athletic* competition, not commercial competition.

The fact that the TSSAA has a monopoly in the regulation of high school athletics in Tennessee does not by itself violate Section Two. *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (D.C. Cir. 2001)*. An entity violates Section Two only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct. Id. To be condemned as exclusionary, a monopolist's act must have an anticompetitive effect; that is, it must harm the competitive process and thereby harm consumers. *Microsoft, 253 F.3d at 58*. Harm to one or more competitors will not suffice. Id.

It is the burden of the Plaintiff to demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. *Id. at 58-59*. If the Plaintiff successfully establishes the anticompetitive effect, then and only then does the burden shift to the Defendant to proffer a "procompetitive justification" for its conduct. *Id. at 59*.

The Court finds that Brentwood Academy has not carried its burden of demonstrating **[*20]** that the TSSAA significantly harms the economic competitive process and thereby harms consumers in the market for high school education in Tennessee. As noted above, the TSSAA has no power to control the prices of high school education or raise tuition prices.

As for the market of regulating interscholastic high school athletics in Tennessee, the TSSAA has a monopoly on that regulation, but Brentwood Academy again has failed to show that the TSSAA significantly harms the *economic* competitive process and thereby harms consumers in the market. For example, Brentwood Academy has not shown that the TSSAA's practices have caused prices for its regulatory services to be raised significantly above competitive rates for similar services.

Brentwood Academy asserts that the TSSAA has "doggedly maintained its monopoly by erecting barriers to entry among competitors." Docket No. 223, p. 24. Yet the alleged barriers Brentwood Academy suggests are not barriers to high school education or barriers to other entities which wish to regulate interscholastic high school athletics. The barriers which Brentwood Academy abhors are the alleged barriers to *athletic* competition, and the antitrust laws do not **[*21]** forbid such barriers.

In summary, Brentwood Academy has failed to carry its burden of showing that the TSSAA's control of high

school interscholastic athletics or alleged control of high school education in Tennessee has a significant anticompetitive effect which is *economic*, as opposed to athletic. For these reasons, Brentwood Academy's Section Two antitrust claim cannot be sustained.

Plaintiff's Renewed Motion for Partial Summary Judgment on the Section Two antitrust claims is DENIED, and Defendant's Motion for Summary Judgment on those claims is GRANTED.

CONCLUSION

For the reasons stated above, Plaintiff's Motion for Judgment in its Favor on Equal Protection Claims (Docket No. 349) is DENIED; Plaintiff's Renewed Motion for Summary Judgment on Antitrust Claims (Docket No. 351) is DENIED; and Defendant's Motion for Summary Judgment (Docket No. 354) is GRANTED. Plaintiff's Equal Protection and antitrust claims are DISMISSED.

IT IS SO ORDERED.

/s/ Todd J. Campbell

TODD J. CAMPBELL

UNITED STATES DISTRICT JUDGE

ORDER

Pending before the Court are Plaintiff's Motion for Judgment in its Favor on Equal Protection Claim (Docket No. 349); Plaintiff's Renewed Motion for Summary Judgment on Antitrust Claims **[*22]** (Docket No. 351), and Defendants' Motion for Summary Judgment (Docket No. 354).

For the reasons stated in the accompanying Memorandum, Plaintiff's Motion for Judgment in its Favor on Equal Protection Claim (Docket No. 349) is DENIED; Plaintiff's Renewed Motion for Summary Judgment on Antitrust Claims (Docket No. 351) is DENIED; and Defendants' Motion for Summary Judgment (Docket No. 354) is GRANTED.

Accordingly, Plaintiff's equal protection claim and antitrust claims are DISMISSED. This Order shall constitute the final judgment in this case pursuant to *Fed. R. Civ. P. 58*.

By September 1, 2008, the parties shall file any motions for costs and/or attorneys' fees. *Fed. R .Civ. P. 54(d)* and Local Rule 54.01.

IT IS SO ORDERED.

/s/ Todd J. Campbell

TODD J. CAMPBELL

UNITED STATES DISTRICT JUDGE

SILICON ECONOMICS. INC., Plaintiff, v. FINANCIAL ACCOUNTING FOUNDATION, and FINANCIAL ACCOUNTING STANDARDS BOARD, Defendants.

CIVIL ACTION NO. 11-163

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2011 U.S. Dist. LEXIS 92322

August 17, 2011, Decided
August 18, 2011, Filed

PRIOR HISTORY: *Silicon Econ., Inc. v. Fin. Accounting Found. & Fin. Accounting Stds. Bd., 2010 U.S. Dist. LEXIS 130989 (N.D. Cal., Nov. 24, 2010)*

COUNSEL: [*1] For Silicon Economics Inc., a California Corporation, Plaintiff: Sean T. O'Kelly, LEAD ATTORNEY, O'Kelly & Ernst, LLC, Wilmington, DE; Perry J. Narancic, PRO HAC VICE.

For Financial Accounting Foundation, Defendant: Richard L. Horwitz, LEAD ATTORNEY, Jonathan A. Choa, Potter Anderson & Corroon, LLP, Wilmington, DE; Garrard R. Beeney, Gary A. Greene, Yvonne S. Quinn, PRO HAC VICE.

For Financial Accounting Standards Board, Defendant: Richard L. Horwitz, LEAD ATTORNEY, Jonathan A. Choa, Potter Anderson & Corroon, LLP, Wilmington, DE.

JUDGES: Michael M. Baylson, United States District Judge.

OPINION BY: Michael M. Baylson

OPINION

MEMORANDUM ON MOTION TO DISMISS

Baylson, J.

Silicon Economics, Inc. ("SEI") filed this action seeking damages and clarification of its ownership interest in its invention, "EarningsPower Accounting." which is the subject of *U.S. Patent 7,620,573* (the "Invention"). SEI claims that the Financial Accounting Foundation ("FAF") and the Financial Accounting Standards Board ("FASB." collectively with FAF, "Defendants"), have unlawfully claimed a royalty-free license in the Invention and refuse to release any ownership interest in the Invention. SEI claims violations of federal antitrust law and California's **[*2]** Unfair Competition Law. SEI also seeks declaratory relief under California law.

Defendants have moved to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(1)* for lack of standing and under *Rule 12(b)(6)* for insufficient pleading of each claim. (Mot. to Dismiss, ECF No. 18.) After careful consideration of Defendants' Motion and the parties' briefing and oral argument on August 11. 2011, the Court will grant Defendants' Motion, allowing SEI leave to amend the Complaint.

I. Factual and Procedural History

According to the Complaint in this matter, FASB is "the principal organization in the private sector for

establishing standards of financial accounting which govern the preparation of financial statements by public companies in the United States." (Compl., ECF No. 1 ¶ 9.) FAF is a private, non-governmental. non-profit foundation that governs FASB. (Id. ¶ 4.)

SEI alleges that FASB "has at least 90% of the market for establishing and decreeing financial accounting standards in the United States," and the remainder of the market consists of individuals, academics, government bodies, corporations, and accounting firms that articulate accounting standards, as well as the International Accounting **[*3]** Standards Board. (Id. ¶ 10.)

SEI is one of these other participants and is attempting to establish more effective accounting standards in direct competition with FASB. (Id. ¶ 13.) To that end. SEI developed the Invention, an equation that "improv[es] the accuracy of net income measurement and embraces mark-to-market accounting of asset and liability values [to] yield[] accurate and current balance sheets." (Id. ¶ 19.) SEI contends the Invention resolves the fundamental accounting problem, i.e. either the balance sheet or the income sheet can be accurate and useful, but not both. (Id. ¶¶ 14. 19.)

Pertinent to this litigation, on July 6. 2006. FASB requested public comments "concerning the most basic objects for financial reporting and how to accomplish such objects." (Id. ¶ 20.) FASB's invitation also staled that "all comments received by the FASB are considered public information. Those comments will be posted to the FASB's website and will be included in the project's public record." (Id. ¶ 21.) SEI provided comments, including briefing on the Invention. (Id. ¶ 22.) SEI then participated in a roundtable discussion and SEI's founder, Joel Jameson ("Jameson"), privately met with the FASB **[*4]** regarding the Invention. (Id.)

Several months later. Jameson became aware of certain terms and conditions on FASB's website, namely:

> "Any information or material you transmit . . . by . . . sending an e-mail . . . including information such as personal data, comments and suggestions (whether in response to a specific query or otherwise) will be treated as non-confidential and non-proprietary . . . . Unless we agree in writing in advance, anything you transmit, whether electronically or in hard copy may be used by the FAF/FASB and its affiliates for any purpose. including. but not limited to. reproduction. disclosure, transmission, publication, broadcast and posting. This means that the FAF/FASB may use the ideas, concepts, know-how or techniques you transmit . . . ."

(Id. ¶ 23) (the "Website Terms"). Unaware of the Website Terms prior to submitting his comments in July 2006. Jameson contacted FASB to clarify and confirm FASB did not claim any ownership interest in the Invention. (Id. ¶ 24.) After receiving no response for more than two years. Jameson again contacted FASB through legal counsel. (Id. ¶ 25.) In response, FASB "claimed that it ha[s] a royally-free ownership interest in the **[*5]** SEI Invention . . . and categorically refused to release any such interest." (Id.)

After another few months passed, SEI filed suit in California federal court, but the complaint was dismissed for lack of personal jurisdiction over Defendants. (Id. ¶ 26); see *Silicon Econ., Inc. v. Fin. Accounting Found., No. 10-1939, 2010 U.S. Dist. LEXIS 130989, 2010 WL 4942468, at *7 (N.D. Cal. Nov. 24, 2010)*. During the course of that litigation, however, counsel for Defendants expressly disavowed a license to practice the Invention or any claim or ownership interest therein, and affirmed Defendants have no intention of claiming any ownership interest. (Compl. ¶ 27.) "Despite these admissions. [Defendants have] refused to release [their] purported ownership claims in the [Invention]." (Id.)

Still seeking clarity, SEI filed the instant Complaint asserting claims for restraint of trade and monopolization in violation of the Sherman Act, *15 U.S.C. §§ 1, 2*; a claim for declaratory relief under California law; and a claim for unfair competition under California law. (Compl. ¶¶ 28-44.) On April 29, 2011, Defendants filed the instant Motion to Dismiss Plaintiff's Complaint With Prejudice for lack of jurisdiction and for failure to state **[*6]** a claim upon which relief can be granted. SEI also filed a Motion for a Preliminary Injunction (Mot., ECF No. 6). but agreed the Court should first rule on Defendants' Motion to Dismiss (Order. ECF No. 16).

II. Jurisdiction and Standard of Review

A. Jurisdiction

The Court has jurisdiction over SEI's antitrust claims pursuant to *28 U.S.C. §§ 1331* and *1337*, and supplemental jurisdiction over its California law claims under *28 U.S.C. § 1367(a)*. SEI contends venue is proper pursuant to *15 U.S.C. § 22*. Defendants have not objected to venue in this District.

B. Standard of Review

A *Rule 12(b)(1)* motion to dismiss for lack of subject matter jurisdiction presents either a facial attack or a factual attack. *CNA v. United States, 535 F.3d 132, 139 (3d Cir. 2008)*; see *Fed. R. Civ. P. 12(b)(1)*. A facial attack concerns an alleged pleading deficiency, whereas a factual attack concerns the actual failure of a plaintiff's claim to comport factually with the jurisdictional prerequisites. *CNA, 535 F.3d at 139*.

On a facial attack, the Court must consider the allegations of the complaint as true. *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)*. In contrast, there are three important **[*7]** consequences of a factual attack: (1) there is no presumption of truthfulness; (2) the plaintiff bears the burden of proving subject matter jurisdiction: and (3) the Court has authority to make factual findings on the issue, and can look beyond the pleadings to do so. *CNA, 535 F.3d at 145*. Defendants appear to be making a facial attack against SEI's complaint. In their Opening Brief, Defendants assume the veracity of SEI's allegations and challenge the sufficiency of those allegations. (Opening Br., ECF No. 19 at 7-9); see also *Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286. 292 (3d Cir. 2005)* (evaluating sufficiency of plaintiff's factual allegations in complaint on standing challenge).

As for Defendants' Motion pursuant to *Rule 12(b)(6)*, the court must accept as true all well-pleaded factual allegations and must construe them in the light most favorable to the non-moving party. *Phillips v. County of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008)*.

According to the Third Circuit, *Twombly v. Bell Atlantic Corp., 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, establish a three-pronged approach for evaluating the sufficiency of pleadings in all civil actions: first, **[*8]** the court must identify the elements the plaintiff must plead to state a claim; second, the court asks whether the complaint sets forth factual allegations or conclusory statements; third, if the complaint sets forth factual allegations, the court must assume their veracity and draw reasonable inferences in favor of the non-moving party, but then must determine whether the factual allegations plausibly give rise to an entitlement to relief. See *Santiago v. Warminster Twp., 629 F.3d 121, 130 & n.7 (3d Cir. 2010)*; see *Iqbal 129 S. Ct. at 1950, 1953*. For the second step, the court should separate the factual and legal elements of the claims, must accept the well-pleaded facts as true, and may disregard any legal conclusions. *Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009)*.

The plaintiff's complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *W. Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010)*. The complaint must state factual allegations that, taken as a whole, render the plaintiff's entitlement to relief plausible. Id. This does not impose a probability requirement, but instead calls for enough facts **[*9]** to raise a reasonable expectation that discovery will reveal evidence of the necessary elements. Id. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to reasonably infer that the defendant is liable for the misconduct alleged. *Gelman v. State Farm Mut. Auto. Ins. Co., 583 F.3d 187. 190 (3d Cir. 2009)*.

"[J]udging the sufficiency of a pleading is a context-dependent exercise. Some claims require more factual explication than others to state a plausible claim for relief." *UPMC, 627 F.3d at 98* (reversing district court's application of heightened scrutiny in antitrust context) (citation omitted).

Accordingly, the Court considers the factual allegations in SEI's complaint as true for all purposes of Defendants' Motion.

III. Discussion

Defendants argue the Court should dismiss SEI's Complaint because SEI lacks standing under Article III and has failed to sufficiently plead its claims for relief. Defendants also argue the Court should decline to exercise supplemental jurisdiction over SEI's state law claims if the Court dismisses SEI's federal claims.

A. Standing

Defendants contend that SEI has failed to establish an actual case or controversy exists **[*10]** in this matter

because it cannot satisfy the "injury-in-fact" and "fairly traceable" elements of constitutional standing. As such, they argue the Court lacks jurisdiction over this case. SEI opposes Defendants' Motion and argues its claims are justiciable because Defendants' refusal to release its claimed ownership interest in SEI's patent has created uncertainty regarding SEI's ownership interest. In reply, Defendants contend any alleged harm is only theoretical because they have not made any use of the Invention and that SEI has failed to sufficiently allege any harm. The Court agrees with Defendants.

In its Opposition, SEI conflates Defendants' Article III and California declaratory relief arguments, but California law regarding declaratory relief is inapposite to the question of Article III standing. Article III of the Constitution limits the exercise of federal judicial power to adjudication of actual cases or controversies. *Toll Bros., Inc. v. Twp. of Readington, 555 F.3d 131, 137 (3d Cir. 2009)*. This limitation is enforced through several justiciability doctrines, including, standing, mootness. ripeness, the political-question doctrine, and the prohibition on advisory opinions. **[*11]** Id.

Perhaps the most important of these doctrines is standing. Id. The "irreducible constitutional minimum" of Article III standing consists of three elements: (1) the plaintiff must have suffered a concrete, particularized injury-in-fact, which must be actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the Court: and (3) the plaintiff must also establish that a favorable decision would likely redress the alleged injury. *Id. at 137-38*. Defendants argue SEI has failed to establish the first two elements.

SEI, as the party invoking federal jurisdiction, bears the burden of establishing these elements. See *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Each element must be supported in the same way as any other matter on which SEI bears the burden of proof, i.e. "with the manner and degree of evidence required at the successive stages of the litigation." Id. On a motion to dismiss, allegations may suffice because they are assumed true. Id. Thus, to state an injury-in-fact sufficient to survive a motion to dismiss, SEI must **[*12]** sufficiently plead that it has suffered some concrete harm because of Defendants' conduct. See *N.J. Physicians, Inc. v. President of the United States, 653 F.3d 234, No. 10-4600, 2011 U.S. App. LEXIS 15899, 2011 WL 3366340, at *3 (3d Cir. Aug. 3, 2011)* (noting "standing cannot be inferred argumentatively from averments in the pleadings bu rather must affirmatively appear in the record") (quotations omitted).

To satisfy the injury-in-fact element, the plaintiff must have suffered a palpable and distinct harm that affects the plaintiff in a personal and individual way. *2011 U.S. App. LEXIS 15899, [WL] at *3*; *Toll Bros., 555 F.3d at 138*. In an action for declaratory relief, the plaintiff need not suffer the full harm expected, so long as there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment. *Khodara Envtl., Inc. v. Blakey, 376 F.3d 187, 193-94 (3d Cir. 2004)*; *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands, 218 F.3d 232, 240 (3d Cir. 2000)*.

The injury must be concrete and particularized, and actual or imminent. *Lujan, 504 U.S. at 564 n.2*; *N.J. Physicians, 2011 U.S. App. LEXIS 15899, 2011 WL 3366340, at *3* (stating plaintiff must sufficiently allege **[*13]** both elements to establish standing). Intentions, without concrete plans, do not support a finding of actual or imminent injury. *Lujan, 504 U.S. at 564 n.2* If there is no actual injury, the injury must be at least imminent. Id. Although an elastic concept, it cannot be stretched beyond its purpose which is to ensure the alleged injury is not too speculative but is "certainly impending." Id. Allegations of injury are insufficient when the plaintiff alleges injury at some future time and the acts necessary to make the injury happen are at least partly within the plaintiff's control. Id. Nonetheless, "[i]njury-in-fact is not Mount Everest." *Danvers, 432 F.3d at 294*. The contours of the requirement, though not precisely defined, are very generous, requiring only allegations of some specific, identifiable trifle of injury. Id. (citing *Bowman v. Wilson, 672 F.2d 1145, 1151 (3d Cir. 1982))*.

In its Complaint. SEI alleges Defendants have created uncertainty regarding SEI's exclusive rights in the Invention, which has harmed SEI's reputation and goodwill. (Compl. ¶ 32.) SEI raises two other alleged injuries in its Opposition - SEI's dispute with Defendants has impeded its ability to seek financing **[*14]** and has had "substantial and immediate impact on the business of SEI" - but "[i]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to

dismiss." (Opp'n at 5, 7); see *Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 181 (3d Cir. 1988)* (quotations omitted).

Injury to reputation, including commercial reputation, may constitute a cognizable injury-in-fact for Article III standing. See *Foretich v. United States, 351 F.3d 1198, 1211, 359 U.S. App. D.C. 54 (D.C. Cir. 2003)* (citing *Meese v. Keene, 481 U.S. 465, 473-77, 107 S. Ct. 1862, 95 L. Ed. 2d 415 (1987)*); *GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352. 366 (D. Del. 1975)*. As for the alleged "uncertainty," the Court finds a decision from the Eastern District of Virginia instructive on the issue.

In *Robishaw Engineering, Inc. v. United States*, a patent-holder, who was negotiating a license agreement with the United States Army, filed suit against the United States claiming that the Army's assertion of a royalty-free license put a cloud on the patent and diminished its market value. *891 F. Supp. 1134, 1137 (E.D. Va. 1995)*. Judge Ellis acknowledged that patents represent legal rights, namely the right to exclude parties other **[*15]** than the government. *Id. at 1149*. He also recognized the "simple truism that the value of any legal right depends on the likelihood of successfully enforcing it." Id. Thus, any cloud or uncertainty regarding enforceability diminishes the property's market value, and any party who seeks a judicial declaration to eliminate that uncertainty can point to the diminution in value as an injury-in-fact. Id. But if that uncertainty is always deemed sufficient, standing would become a meaningless requirement. Id.

To exclude the possibility of rendering standing meaningless, Judge Ellis determined that standing requires the cloud or uncertainty to consist of a sufficiently immediate, definite, and concrete threat to the legal right at issue. Id. Thus, the question is whether the defendant has taken definite and concrete steps to assert a claim or has at least threatened to assert a claim adverse to the plaintiff's interests. *Id. at 1150*. In *Robishaw*, the Army took no firm position, only suggesting that it may have a royalty-free license. Id. Therefore, Judge Ellis concluded the plaintiff had failed to sufficiently allege an injury-in-fact based on a cloud on its patent. Id. SEI has similarly failed **[*16]** to sufficiently allege an injury in fact.

As for the alleged harm to reputation and goodwill, SEI offers only bald assertions of injury. SEI has not offered any factual allegations on which it bases its contention it has suffered harm to reputation or goodwill. Failing to meet its burden of alleging standing at this stage of the litigation, the Court will dismiss SEI's Complaint without prejudice to SEI amending its Complaint.[1]

1 The cases SEI relies on do not persuade the Court otherwise. In *Leonard Carder, LLP v. Patten, Faith & Sandford*, the California Court of Appeals found an actual controversy justifying jurisdiction over the claim for state-law declaratory relief. *189 Cal. App. 4th 92, 116 Cal. Rptr. 3d 652, 653 (Cal. Ct. App. 2010)*. Two law firms were disputing the allocation of legal fees from settlement of a class action. *Id. at 654*. The money was held in trust and the defendant claimed it was owed forty percent based on a prior agreement. Id. The plaintiff disputed the existence of the agreement and sent a check for the significantly lower lodestar amount, with a note that the payment was in "final settlement." Id. Before cashing the check, the defendant amended the memo line to reflect the payment **[*17]** was "credit toward final settlement." Id. Unlike in this case, each party had taken a firm position on the amount due the defendant, which created an ongoing controversy warranting declaratory relief. See *id. at 656-57*.

In *Principal Life Insurance Co. v. Robinson*, the Ninth Circuit concluded an actual dispute existed regarding the calculation of rent under a lease agreement. *394 F.3d 665, 668 (9th Cir. 2005)*. The plaintiff had previously attempted to sell its interest in the lease. but the dispute regarding the rent calculation undermined the deal. Id. The Ninth Circuit found this past difficulty suggested the plaintiff would continue to have difficulty, which warranted declaratory relief. *Id. at 672*. SEI, however, has not alleged any such past difficulties or experiences with the Invention, making only conclusory assertions that its title is uncertain and that is has suffered harm to reputation and goodwill. Without more facts, SEI's circumstances are distinguishable from those in *Leonard Carder* and *Principal Life*.

B. Antitrust Claims

Defendants offer two arguments in favor of dismissal

of SEI's antitrust claims. First. they contend they are not engaged in trade or commerce and, therefore, **[*18]** the Sherman Act does not apply to them. Defendants also argue SEI has failed to sufficiently plead a relevant product market because no market exists; it has not sufficiently pled an antitrust injury because Defendants and SEI do not compete; Defendants maintain a monopoly through the Securities and Exchange Commission ("SEC") not any anti-competitive conduct in violation of *§ 2*: and Defendants have engaged in unilateral conduct, not any combination in violation of *§ 1*.

In response, SEI focuses on establishing that Defendants' non-profit status is not dispositive of the trade or commerce issue. Further. SEI contends there is commerce involved because Defendants allegedly misappropriated SEI's patent and SEI is a commercial entity. As for the substance of the claims, SEI argues it sufficiently pled antitrust injuries of reduced innovation and excluded competition. As for the relevant market. SEI argues the Court must also consider potential markets, and SEI could potentially compete with Defendants. For its *§ 2* claim, SEI contends Defendants are unlawfully maintaining their monopoly by taking SEI's property, and for the § 1 claim. SEI argues the Websitc Terms may form an agreement in **[*19]** restraint of trade and both parties to an agreement need not share anti-competitive intent.

In reply, Defendants argue they are not engaged in trade or commerce because their accounting standards are freely available to anyone in the world and are available without charge and without payment to Defendants, save for sales of bounded volumes and unrelated licensing arrangements. They further contend that the challenged conduct, i.e. adoption of and adherence to the Website Terms, is not motivated by commercial objectives or advantages despite receipt of government funds. In addition, Defendants argue they are not participants in the commercial market for accounting standards and SEI only alleges injuries to itself rather than to competition. Further, Defendants maintain they did not engage in concerted action, but unilaterally adopted the Website Terms.

1. "Trade or Commerce"

The purpose of antitrust law is to regulate commerce, which entails determining the applicability of antitrust laws by considering the nature of the activity being challenged, not the nature of the organization engaged in the activity. 1B Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 260, at 158, 161 (3d ed. **[*20]** 2006); see *Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15, 495, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*; see also *United States v. Brown Univ., 5 F.3d 658, 665 (3d Cir. 1993)* (finding antitrust laws apply to non-profit organizations engaged in commerce). Thus, the threshold issue is whether the antitrust laws even apply to the challenged conduct. *Brown Univ., 5 F.3d at 665*.

It is axiomatic that antitrust laws regulate only transactions that are commercial in nature. Id. Courts classify a transaction as commercial in nature based on the nature of the challenged conduct in light of the totality of the surrounding circumstances. *Id. at 666*; see Areeda & Hovenkamp, supra ¶ 262a. at 177 (endorsing objective test which asks whether antitrust defendants are likely to receive direct economic benefit as a result of any reduction in competition in market in which target firms operate). An effect on prices is not essential. *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. The Third Circuit's approach does not encompass restraints that result in incidental economic effects. See *Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569. 584 (E.D. Pa. 2004)* (Brody, J.).

On a motion to dismiss, **[*21]** the Court should determine whether the challenged conduct is commercial based on the factual allegations in the complaint. See *Hamilton Chapter of Alpha Delta Phi. Inc. v. Hamilton Coll., 128 F.3d 59, 66 (2d Cir. 1997)*. In this case. SEI is challenging Defendants' adoption of and adherence to the Website Terms, particularly the reservation of rights to use any submitted ideas for any purpose, and subsequent refusal to release any ownership interest. (Compl. ¶¶ 20, 27.)[2] SEI alleges that Defendants have unlawfully claimed a proprietary interest for the purpose of excluding SEI as a competitor in the market for establishing accounting standards in the United States. (Id. ¶ 37.) SEI contends Defendants' conduct lessens competition, discourages public comment, discourages innovation, and entrenches Defendants' monopoly. (Id. ¶¶ 38, 40.)

2 As noted below, Defendants' counsel's unconditional recantation of an ownership interest at oral argument must be given some weight in assessing Plaintiff's allegations, which will

presumably be clarified in an amended complaint.

It is important at the outset to define the apparent scope of SEI's antitrust claims against Defendants. SEI is not challenging **[*22]** FASB's conduct in setting standards, which is a more common subject of antitrust review. Instead, SEI is challenging Defendants' Website Terms which apply to voluntary submissions of solicited comments.

Federal courts have experience with the "trade or commerce" issue, particularly in the context of the NCAA's regulation of student athletics. Courts have concluded that when the challenged conduct consists of academic rules or player-eligibility requirements, the conduct is non-commercial in nature. E.g., *Smith v. NCAA, 139 F.3d 180, 185-86 (3d Cir. 1998)* (holding Sherman Act does not apply to NCAA rules and eligibility requirements that primarily seek to ensure fair competition in collegiate sports, not to provide the NCAA with a commercial advantage), rev'd on other grounds, *NCAA v. Smith, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999)*; *Pocono Invitational, 317 F. Supp. 2d at 583-84* (concluding rules relating to recruitment at summer camps are like eligibility rules and were enacted in spirit of promoting amateurism in keeping with NCAA's general goals): *College Athletic Placement Serv. Inc. v. NCAA, No. 74-1144, 1974 U.S. Dist. LEXIS 7050, 1974 WL 998, at *4-5 (D.N.J. Aug. 22, 1974)* (finding NCAA policy against for-profit companies **[*23]** that find athletic scholarships for student-athletes was motivated by intent to ensure academic standards and amateurism, not by anti-competitive motive or intent).

But when the challenged conduct restrains revenue, output, or salaries, the rules are almost always commercial. E.g., *NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (finding NCAA's television plan amounted to unlawful horizontal restraint on members' ability to sell television rights to their games because it operated to raise prices and reduce output); *Law v. NCAA, 134 F.3d 1010, 1012 (10th Cir. 1998)* (affirming injunction against NCAA's enforcement of rule that limited salaries of entry-level coaches as unlawful horizontal restraint on trade). The Court finds these cases useful in this case because they suggest a spectrum of conduct to evaluate Defendants' alleged conduct.

Compared to this range of conduct. SEI has not sufficiently alleged that Defendants' conduct is commercial in nature. Considering the totality of circumstances and SEI's allegations, FASB sought voluntary comments from the public in an effort to establish and promulgate accounting standards for public companies within the United States, **[*24]** which is FASB's exclusive prerogative.[3] Defendants also adopted the Website Terms to reserve FASB's right to use any submissions for any purpose, including reproduction, disclosure, and publication. SEI's allegations do not suggest conduct that is commercial in nature - there is no sale, no exchange. and no production. Compare, e.g., *Brown Univ., 5 F.3d at 668* (determining financial assistance for students is part and parcel of price-setting process and, thus, is a commercial transaction), with, e.g., *Apex Hosiery, 310 U.S. at 501-02* (concluding labor union strike intended to compel company to accede to demands not trade or commerce despite delaying interstate shipment of goods); *Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colls. & Secondary Schs., 432 F.2d 650, 654-55, 139 U.S. App. D.C. 217 (D.C. Cir. 1970)* (finding non-profit organization's decision to deny accreditation to for-profit school not commercial absent intent or purpose to affect commercial aspects).

> 3 The SEC has recognized FASB as the only entity whose work-product can be recognized as "generally accepted" for the purpose of public companies' financial reporting. *Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, 68 Fed. Reg. 23,333, 23,333-34 (May 1, 2003)*; **[*25]** see Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 108, 116 Stat. 745, 768-69 (codified at *15 U.S.C. § 77s*). Congress also ensured FASB would remain independent from the targets of its standards by creating an independent source of funding for FASB so that it no longer had to depend on voluntary contributions or sales of its standards. Donna M. Nagy, Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status, *80 Notre Dame L. Rev. 975, 987-89* (2005); see Sarbanes-Oxley Act § 109 (codified at *15 U.S.C. § 7219*).

SEI contends FASB's conduct is commercial because SEI itself is a commercial enterprise and Defendants misappropriated its patented Invention. But it is the nature of the conduct that controls, not the nature of the

organizations. The alleged conduct enables FASB to solicit voluntary submissions of accounting-standard proposals, and then perform its function of establishing and promulgating those standards without being hamstrung by subsequent intellectual property claims. Any economic consequence is an indirect by-product of these efforts. SEI has not alleged that Defendants derive any economic benefit from the Website Terms - it does not allow them **[*26]** to control production, innovation, or quality by asserting an exclusive right in submitted concepts and it does not permit them to set a price. All the Website Terms appear to do is facilitate FASB's consideration and promulgation of appropriate accounting standards for public companies in the United States. SEI's allegations suggest nothing more.

For the foregoing reasons, the Court concludes that SEI has failed to sufficiently allege that Defendants are subject to antitrust scrutiny because it has failed to allege facts showing the challenged conduct is commercial in nature. The Court will grant SEI leave to amend its complaint to address these deficiencies. The Court reserves decision on certain other legal arguments made by Defendants until SEI has amended its Complaint.

C. California Law Claims

The Court will reserve decision on exercising supplemental jurisdiction until SEI has the opportunity to amend those claims over which the Court has original jurisdiction. The Court will determine at that time whether to exercise supplemental jurisdiction over SEI's California law claims. See *28 U.S.C. § 1367(a), (c).*

IV. Court's Review of Discussion at Oral Argument

Prior to oral argument, the **[*27]** Court posed questions in a letter to counsel, including whether the parties would agree to expedite the hearing on the declaratory judgment aspect of the case and stay the antitrust claims. Plaintiff's counsel indicated that Plaintiff was interested in such a proposal. Defendants would prefer a decision on the grounds stated in its Motion to Dismiss before entertaining such an agreement.

After discussing whether Plaintiff sufficiently pleaded its claims, it became obvious to the Court that Plaintiff would welcome the chance to amend the complaint, if only to provide more factual allegations, as now required by *Twombly* and *Iqbal*. The Court indicated it would grant that relief.

The argument contained many good points about the value of standard-setting organizations having an open mind to suggestions and ideas put forward by segments of the industry the organization serves. Defendants assert vigorously that it must have the ability to learn from submissions, such as those made by Plaintiff, and to consider and possibly use them in evolving formulations of industry standards. The Court believes that this is sound public policy and that the antitrust laws were not designed to interfere with **[*28]** such a process.

It also become clear that Plaintiff, as of yet, has not tried to gain commercial value from its patent, but understandably reserved the right to do so in the future.

At the argument, defense counsel unconditionally renounced any ownership interest by Defendants in Plaintiff's Invention. After the argument, the Court indicated it would grant leave to Plaintiff to amend its Complaint. The Court also noted that the positions of the parties should be amenable to a settlement of this dispute, and that a prolonged litigation over such issues as standing, relevant markets, and anti-competitive intent do not seem to be necessary for Defendants to continue their work, and for Plaintiff to, if it so desires. use its patent in a commercial setting. The Court encouraged the parties to work towards a written agreement and, if requested, the undersigned will be available after September 18th to meet with counsel, assuming they have made some progress towards agreement on a written statement and both are desirous of completing the agreement as a means of settling this case.

For the above reasons, Plaintiff is granted leave to file an amended complaint by September 30, 2011.

V. Conclusion

For **[*29]** the foregoing reasons, the Court will **grant** in part and **deny** in part Defendants' Motion to Dismiss. The Court will grant SEI leave to amend its Complaint in conformity with this Memorandum by September 30, 2011.

An appropriate Order will follow.

ORDER

AND NOW, on this 17th day of August, 2011, upon careful consideration of Defendants' Motion to Dismiss (ECF No. 18). the parties' briefing, and oral argument on

the Motion, it is hereby ORDERED as follows:

1. Defendants' Motion is GRANTED in part and DENIED in part in accordance with the accompanying Memorandum.

2. Plaintiff Silicon Economics, Inc. is granted leave to file an amended complaint to cure the deficiencies identified in the accompanying Memorandum by September 30, 2011.

3. Defendants shall have twenty-one (21) days from service of an amended complaint to answer, move, or otherwise plead.

4. Plaintiff shall respond to any defense motion or other pleading within twenty-one (21) days of service of such motion or pleading.

5. Defendants shall reply, if at all, within fourteen (14) days of service.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.