

**INITIAL RESPONSE OF MARK GOTTFRIED
TO NCAA ENFORCEMENT STAFF'S
NOTICE OF ALLEGATIONS**

**CASE NO. 00935
DECEMBER 9, 2019
SUBMITTED BY:
SCOTT TOMPSETT
TOMPSETT COLLEGIATE SPORTS LAW
AND
ELLIOT ABRAMS
CHESHIRE PARKER SCHNEIDER**

Hyperlinked Key Record List

A. Key Factual Information

a. Key Factual Information Currently Identified by The Enforcement Staff

- i. Tr. of NCAA Int. of M. Gottfried May 8, 2019 –
<https://app.box.com/file/484981965300>.
- ii. Tr. of NCAA Int. of J. Dunlap on May 8, 2019 at 16 -
<https://app.box.com/file/484987445837>
- iii. Memorandum of NC State Interview of Dennis Smith Jr. on April 30, 2019 - <https://app.box.com/file/484982859009>
- iv. Tr. of NCAA Int. of C. Doyle on January 10, 2019, Interview -
<https://app.box.com/file/484987323043>
- v. Tr. of NCAA Int. of M. Ford on Feb. 14, 2019 -
<https://app.box.com/file/484981997515>
- vi. Tr. of NCAA Int. of M. Ford on June 13, 2019 -
<https://app.box.com/file/484990604800>
- vii. Tr. of NCAA Int. of C. Doyle on June 21, 2019 -
<https://app.box.com/file/484982105962>.

b. Key Supplemental Factual Information

- i. Exhibit 1: Media Report Regarding May 22, 2019 statement of Kevin Lennon, NCAA Vice President of Division I Governance -
<https://app.box.com/file/573241257267>
- ii. Exhibit 2 – Media Report Regarding Statements of Stan Wilcox -
<https://app.box.com/file/573238475929>
- iii. Exhibit 3 – Gatto et al. Docket Sheet as of December 7, 2019 -
<https://app.box.com/file/573244289178>
- iv. Exhibit 4 – Gatto Notice of Appeal -
<https://app.box.com/file/573222934185>
- v. Exhibit 5 – Code Notice of Appeal -
<https://app.box.com/file/573247239859>
- vi. Exhibit 6 – Dawkins Notice of Appeal -
<https://app.box.com/file/573245963715>

- vii. Exhibit 7 – Second Circuit Docket Sheet as of December 7, 2019 for United States v. Gatto, Second Circuit Case No. 19-783 - <https://app.box.com/file/573246543150>
- viii. Exhibit 8 – Gatto et al. Jury Verdict Form - <https://app.box.com/file/573241136743>
- ix. Exhibit 9 – Gatto et al. Trial Tr. from Oct. 22, 2018 - <https://app.box.com/file/573243890429>
- x. Exhibit 10 – Gatto et al. Trial Tr., Oct. 10, 2018 - <https://app.box.com/file/573236928854>
- xi. Exhibit 11 – Gatto et al. Trial Tr., Oct. 11, 2018 - <https://app.box.com/file/573245847659>
- xii. Exhibit 12 – Gatto et al. Trial Tr., Oct. 9, 2018 - <https://app.box.com/file/573234507165>
- xiii. Exhibit 13 – Principles of Institutional Control as prepared by the NCAA Committee on Infractions - <https://app.box.com/file/573239165173>
- xiv. Exhibit 14 – NCAA Brochure entitled “Responsibilities of Head Coaches: Understanding rules compliance and monitoring” - <https://app.box.com/file/573238138376>
- xv. Exhibit 15 – NCAA Division I Enforcement Charging Guidelines - <https://app.box.com/file/573235979086>

B. Other Key Authorities

- i. COI IOP 4-14-1
- ii. Bylaw 19.7.8.3.1

Introduction

Mark Gottfried, by and through his attorneys, Scott Tompsett and Elliot Abrams, submits this Initial Response to the NCAA enforcement staff's Notice of Allegations. Gottfried cooperated fully with the staff's investigation. He is named only in Allegation 3, which alleges a failure to monitor.

A. The NCAA has Prejudged this Case

The NCAA enforcement staff is supposed to be vested with sole and exclusive authority to investigate potential violations and to decide whether to bring allegations of violations for adjudication by the Committee on Infractions.

However, well before the staff had finished its investigation and conducted its internal meetings to determine whether to bring formal allegations against NC State and Gottfried, the NCAA executive leadership made clear that decisions had already been made to move forward with formal allegations and impose consequences.

For example, according to published reports of a meeting of the Knight Commission on May 22, 2019, Kevin Lennon, NCAA vice president of Division I Governance, said notices of allegations "will be coming." See Exhibit 1 – Media Report Regarding May 22, 2019 statement of Kevin Lennon, NCAA Vice President of Division I Governance – <https://app.box.com/file/573241257267>. According to the published report, Lennon also said, "[N]ow that the court cases are done, now we're in a position where you're likely to see notices of allegations going to institutions *that have violated NCAA rules, etc.*" *Id.* (emphasis added).

At the time Lennon stated that institutions "have violated NCAA rules," NC State, Gottfried and his counsel were still involved in the investigation phase of this case. In fact, Gottfried's nearly three-hour interview with the enforcement staff had taken place *just two weeks earlier* on May 8, 2019 in Los Angeles. The staff had not even prepared a transcript of Gottfried's interview or scheduled its Allegation Review Board meeting, yet the NCAA executive administration had publicly proclaimed that a notice of allegations was coming and that rules had been violated.

That is the definition of prejudgment.

Stan Wilcox, NCAA vice president for regulatory affairs doubled-down on Lennon's assertions when he made the following statements to Dennis Dodd of CBSSports.com on June 12, 2019:

- “Two-high profile programs would receive notices of allegations by early July.”
- ““We’re moving forward and **you’ll see consequences.**””
- ““Those top coaches that were mentioned in the trials where the information shows what was being said was a violation of NCAA rules, yes. **They will be a part of these notices of allegations.**””¹
- ““It’s a great opportunity for the enforcement staff, the committee on infractions, as well as our whole community to now try to . . . put things back where they need to be.””

Exhibit 2 – Media Report Regarding Statements of Stan Wilcox (quoting Stan Wilcox) (emphasis added) (alteration in original) - <https://app.box.com/file/573238475929>.

These public statements of prejudgment by the NCAA executive administration prior to a notice of allegations being issued are virtually unprecedented in an NCAA infractions case. They are unprecedented because it is improper for the NCAA executive administration to state publicly that a notice of allegations is coming in a case in which information is still being gathered, reviewed and analyzed.

It is impossible now for Gottfried to get a fair hearing after the NCAA executive administration has prejudged and told the public that rules have been violated, that there will be consequences, and that “top coaches” are a part of the violations.²

Gottfried has been an NCAA DI coach for 32 years and a head coach for almost 25 years. He recently served on the NABC Board of Directors. Like most longtime head coaches, Gottfried has his

¹ Wilcox's statement suggesting head coaches face strict liability for actions of their assistant coaches reveals an astonishing ignorance of NCAA head coach control legislation. Head coaches are presumed responsible for violations committed by their assistant coaches, but the presumption may be rebutted by demonstrating the head coach promoted an atmosphere of compliance and monitored his staff. Given the evidence of prejudgment, Gottfried was never given a fair opportunity to rebut the presumption of responsibility.

² Imagine the public backlash and humiliation for the NCAA and Messrs. Lennon and Wilcox should the COI acquit NC State and Gottfried of the charges. It will never happen.

supporters and detractors in terms of whether he knows how to coach. Gottfried can live with that. But the NCAA is using its awesome and untethered power to call him a cheater. And they have done so before the enforcement staff had even completed its investigation. That is not right, and it violates the clear dictates and overarching spirit of the NCAA infractions process.

In short, through the actions and public statements of its top officials, the NCAA has made clear that a decision has already been made. Such a decision was made well before any facts have been found at an infractions hearing, and well before Gottfried had an opportunity to challenge those facts or any related allegations. Indeed, the NCAA's prejudicial public statements were made not only before Gottfried received the notice of allegations, but before the NCAA's investigation had concluded.

Moreover, as discussed below, the NCAA's prejudicial public statements were based on a legal proceeding that is under appeal, meaning that the NCAA enforcement staff was prohibited from considering any evidence from that legal proceeding in determining whether to issue a Notice of Allegations and the Committee on Infractions is prohibited from considering any evidence submitted or facts established from that proceeding.

Ultimately, the NCAA is a powerful entity and Gottfried is just a coach. By announcing a public decision of guilt before allegations had been issued, in clear violation of NCAA Bylaws and general conceptions of due process, and by basing this public announcement of predetermined guilt on information that the NCAA is barred from considering, the NCAA has indicated that facts and rules matter less than appearances. Although we hope the Committee will do its duty to consider only facts appropriately presented to it, the history of this case strongly suggests that the outcome of this proceeding has already been determined—on the basis of improper evidence no less.

Gottfried was privileged to coach at NC State for six seasons and even though NC State fired him, he cheers for NC State to this day (except when NC State plays his team). He is very disappointed that the alleged violations happened under his watch. But he does not know what he was supposed to do differently to either prevent or detect the alleged violations in this case and as will be discussed throughout this

response, the NCAA enforcement staff has failed and refused to tell Gottfried and his counsel what they think Gottfried failed to do that he should have done.

In NCAA head coach control cases, men and women who have coached their entire careers sometimes lose their jobs, careers and livelihoods. Men and women who have families lose their ability to support their families. Men and women who have worked their entire life to build a reputation of character and honesty have that reputation sullied and tarnished for eternity. One would think that when you are about to possibly destroy a man's reputation and career you might be inclined to give some fair and reasonable due process before you pull the trigger.

Not the NCAA, it appears.

B. The NCAA has Refused to Give Gottfried Fundamental Procedural Fairness

One of the fundamental elements of procedural due process for an accused is the opportunity to review the allegations and evidence and to have ample time to prepare a thoughtful and thorough defense. The NCAA has denied Gottfried that fundamental right in this case.

As is done routinely in infractions cases, on Tuesday, November 26, 2019, Gottfried's counsel submitted a request for an extension to the December 9, 2019 response deadline. Per NCAA enforcement procedure, Gottfried's counsel first checked with both NC State and the enforcement staff whether they objected to an extension. Both NC State and the staff advised that they did not object to an extension as long as they received the same extension for their respective filing deadlines.

The standard for granting an extension is "good cause." COI IOP 4-14-1. The bases for Gottfried's unopposed requested extension were:

- That the case file – which Gottfried and his counsel are permitted to access only through a secure read-only website – contains over 250,000 files, most of which are not word

searchable.³

- That Gottfried's lead counsel had an extremely busy workload since the issuance of the NOA, including representing involved individuals in other high-profile, complex SDNY cases.
- That Gottfried's other counsel is on parental leave, with a newborn child having recently been released from the hospital.
- That while the request for an extension was pending, the enforcement staff notified Gottfried's counsel that it intended to supplement the case file with additional documents which the staff had since September 2019 but had not added to the case file for review by Gottfried and his counsel.

Request for Extension - <https://app.box.com/file/566360152793>.

Unopposed requests for extension are virtually always granted and granted promptly. Not in this case. Dr. Carol Cartwright, a member of the COI and the designee to handle prehearing matters in the SDNY cases, waited until 5 pm on Friday, December 6 – ten days after the request was submitted and 72 hours before the deadline – to respond, and denied the request stating in effect that she thinks Gottfried and his counsel have had long enough and the COI is determined to have the hearing of this matter in February 2020.⁴ Response Denying Request for Extension - <https://app.box.com/file/571867283559>.

Astonishingly, Cartwright also cautioned the parties to be mindful in not submitting too much information for the COI to review:

Mr. Tompsett has identified that the record in this case is voluminous. Because the COI will soon be reviewing the case record, parties should be mindful of the size of the record *and remain cautious in submitting supplemental or other written material.*

³ Many, if not most, of the hundreds of thousands of documents are scores of pages in length. In addition to this absurd volume, counsel can review these documents only using an online portal, which is notoriously difficult, time consuming and cumbersome to use. It does not even contain a search engine for individual documents; the documents cannot be printed or downloaded or reorganized; many of the documents are uploaded sideways and counsel cannot rotate them.

⁴ Cartwright provided no explanation for waiting until late Friday afternoon prior to the Monday deadline to deny the request.

Id. (emphasis added).

To sum up, the NCAA executive administration has made unprecedented public statements of prejudgment; Gottfried has been denied a six-week extension of time to permit his counsel to thoroughly review the case file and prepare his written response in a case that took the NCAA nearly two years to investigate and bring allegations; Cartwright has cautioned Gottfried not to submit too much written material in his defense; and the basis for the primary allegation (Allegation 1(c)) is evidence that the enforcement staff is prohibited from considering, see Procedural Issues section below.

The result in this case is written on the wall.

C. Summary of Response to the Allegations Against Gottfried

Relying on a presumption of responsibility, the staff has alleged that Gottfried is presumed responsible for some of the alleged recruiting and extra benefit violations in Allegation 1 and 2⁵ because, it alleges, he has not yet sufficiently shown that he fulfilled his duty to monitor specific aspects of the program. Importantly, the enforcement staff has concluded that Gottfried has established that he promoted an atmosphere of compliance. Thus, he is charged only with a failure to monitor.

Specifically, the staff alleges that Gottfried has not shown that he adequately monitored certain aspects of then assistant coach Orlando Early's recruitment of prospective student-athlete Dennis Smith, Jr. The staff has also alleged that Gottfried has not shown that he adequately monitored his staff's provision of complimentary admissions on the men's basketball office pass list resulting in individuals associated with prospects (IAWP) and Smith's family and friends receiving impermissible complimentary admissions.

Allegation 1(c) alleges that Early arranged for T.J. Gassnola, a representative of NC State's athletics interests and then outside consultant for Adidas, which also was a representative of NC State's

⁵ The staff has alleged that Gottfried is presumed responsible only for the violations alleged in Allegation 1(c), 1(d) and 1(e), and 2. Thus, Gottfried will respond only to the allegation that he failed to monitor with respect to these specific allegations.

athletics interests, to provide Early with \$40,000 in cash to ensure Smith's commitment to NC State. The allegation further alleges that Early informed Gassnola that he intended to provide the money to Shawn Farmer, an individual responsible for teaching or directing an activity in which a prospective student-athlete is involved and the trainer of Smith, who would then provide the money to the Smith family.

The staff has not alleged that Gottfried either knew about or was involved in any way with the alleged provision of money; nor has the staff alleged that the money was actually provided to either Farmer or the Smith family.⁶

Allegations 1(d) and (e) and 2 allege that Early violated recruiting and extra benefit legislation as well as the principles of ethical conduct when he provided impermissible complimentary admissions to Farmer and to Smith's family and friends.

Allegation 2 alleges that men's basketball staff members violated NCAA recruiting legislation when they provided impermissible complimentary admissions to individuals responsible for teaching or directing an activity in which a prospective student-athlete is involved. Specifically, it alleges that one individual improperly received eight tickets during January and February 2016 and that on March 8 and 9, 2016, another individual improperly received three tickets to two ACC Tournament games.

Gottfried's response to these allegations is straightforward:

(1) He fulfilled his duty to monitor Early's recruitment of Smith consistent with NCAA head coach control legislation and the expectations of NC State. The information reported to the staff shows that Gottfried was a compliance-oriented head coach who was universally respected by his staff and administrators at NC State for his efforts to both promote an atmosphere of compliance and to monitor his staff. If Early engaged in the conduct alleged to provide \$40,000 to Farmer to give to Smith or Smith's

⁶ See Allegation 1(c) (alleging that Early "arranged for" money to be provided to Early, but failing to allege either that Early actually received the money or that the money was actually provided by Early to Farmer or the Smith Family).

family, he did so directly against Gottfried's direction, and he did so despite Gottfried's reasonable efforts to monitor. Indeed, other than alleging in bare conclusory fashion that Gottfried did not rebut the presumption of responsibility, the staff has not alleged a single thing that it believes Gottfried failed to do or should have done differently to monitor Early's recruitment of Smith.

(2) Regarding the alleged violations involving complimentary admissions, Gottfried was aware of and relied on the existence of the compliance monitoring system under which the compliance office monitored complimentary admissions, and he ensured that his staff timely provided the relevant and necessary information to the compliance office so they could fulfill their monitoring obligation. Under this commonplace and commonsense process, it was compliance staff, not Gottfried, that had frontline responsibility to monitor the complimentary admissions process, and because Gottfried ensured that compliance staff had the information necessary to fulfill this task, he fulfilled his duty to monitor. University compliance staff are, of course, the institutional experts on NCAA compliance, and Gottfried was never informed that he needed to check behind the compliance staff or otherwise directly review the complimentary admissions lists that the compliance staff was reviewing. Therefore, by ensuring that the institutional compliance experts were reviewing the admissions list with full information, Gottfried fulfilled his duty to monitor the complimentary admissions aspects of his program.

Procedural Issues

A. Bylaw 19.7.8.3.1 Prohibits the Importation of Facts from or Consideration of Evidence Submitted in *United States v. Gatto et al.*

Under the Importation of Facts bylaw, Bylaw 19.7.8.3.1, facts established or evidence submitted in judicial proceedings that are under appeal may not be considered “in the infractions process.”

Adopted August 8, 2018, Bylaw 19.7.8.3.1 reads:

19.7.8.3.1 Importation of Facts. Facts established by a decision or judgment of a court, agency, accrediting body, or other administrative tribunal of competent jurisdiction, **which is not under appeal**, or by a commission, or similar review of comparable independence, authorized by a member institution or the institution’s university system’s board of trustees and regardless of whether the facts are accepted by the institution or the institution’s university system’s board of trustees, may be accepted as true in the infractions process in concluding whether an institution or individual participating in the previous matter violated NCAA legislation. **Evidence submitted and positions taken in such a matter may be considered in the infractions process.**

Bylaw 19.7.8.3.1 (emphasis added).

By its terms, the bylaw sets forth two categories of “matters” from which facts found may be accepted as true or evidence submitted may be considered “in the infractions process” : (1) “a decision or judgment of a court, agency, accrediting body, or other administrative tribunal . . . , **which is not under appeal**”; and (2) “a commission, or similar review of comparable independence, authorized by a member institution or the institution’s university system’s board of trustees.” *Id.* (emphasis added).

Because *United States v. Gatto et al.*⁷ is under appeal and has been under appeal since March 2019, it is not a matter from which facts found may be accepted as true or evidence submitted may be considered “**in the infractions process.**” Thus, not only is the Committee on Infractions prohibited from considering any of the facts found or evidence submitted in the *Gatto et al.* matter, the enforcement staff also was

⁷ The case number for the pending appeal is United States Court of Appeals for the Second Circuit Case No. 19-783. The case number for the trial-level case is Southern District of New York Case No. 17-cr-0686.

prohibited from considering any of the facts found or evidence submitted in Gatto et al. in determining whether to issue a Notice of Allegations.

The case of Gatto et al. was brought by the United States Attorney for the Southern District of New York against three individual defendants: James Gatto, Merl Code, and Christian Dawkins. Exhibit 3 - Gatto et al. Docket Sheet as of December 7, 2019 - <https://app.box.com/file/573244289178>. Although a jury convicted each defendant, each case is plainly “under appeal.” On March 28, 2019, each defendant filed a Notice of Appeal. Exhibits 4, 5, & 6 - Notices of Appeal filed by Gatto, Code, and Dawkins, respectively - Exhibit 4: <https://app.box.com/file/573222934185>, Exhibit 5: <https://app.box.com/file/573247239859>, Exhibit 6: <https://app.box.com/file/573245963715>. These appeals are currently pending in the United States Court of Appeals for the Second Circuit. Exhibit 7: Second Circuit Docket Sheet as of December 7, 2019 for United States v. Gatto, Second Circuit Circuit Case No. 19-783 (establishing that the appeal is currently pending) - <https://app.box.com/file/573246543150>.

Under Bylaw 19.7.8.3.1, relevant proceedings from which facts, evidence and/or positions may be imported or considered specifically excludes court proceedings that are “under appeal.” Bylaw 19.7.8.3.1.

Under the well-established canon of legislative interpretation that when one thing is explicitly authorized, things not explicitly authorized are excluded,⁸ by authorizing the importation of facts, and consideration of evidence and positions, from matters that are not under appeal, the bylaw establishes that facts, evidence and positions from matters that are under appeal may not be considered in the infractions process. Bylaw 19.7.8.3.1 does not merely leave matters under appeal off the list of permitted matters; instead, matters under appeal are specifically excluded as matters from which the Committee can import

⁸ This canon is referred to as *expressio unius est exclusio alterius* (expression of one is the exclusion of another) and has been used to interpret legislation since the founding of this country. See, e.g., *United States v. Arredondo*, 31 U.S. 691, 725, 8 L. Ed. 547 (1832) (United States Supreme Court explaining that “‘Expressio unius est exclusio alterius,’ is an universal maxim in the construction of statutes.”).

facts or consider evidence submitted. This establishes the unmistakable legislative intent to prohibit the use or consideration of facts established or evidence submitted in matters under appeal in the infractions process.

Therefore, the Committee cannot import facts from or consider evidence submitted (or positions taken) in, the matter of Gatto et al. Moreover, the allegations involving the alleged payment from Gassnola and Gottfried's alleged failure to monitor Early's recruitment of Smith must be withdrawn because they are based on evidence submitted in Gatto et al., and the enforcement staff was prohibited from relying on that evidence in determining whether to bring allegations.

B. Even If the Committee Disregards the Limitations of Bylaw 19.7.8.3.1 and Elects to Import Facts Found in the Matter of *United States v. Gatto et al.*, There Are No Relevant Facts to Import Because the Judgment Did Not "Establish" Any Facts Relevant to NC State

Even if the Gatto et al. case was not under appeal and thus not off-limits to both the enforcement staff and the Committee, the case did not "establish" facts relevant to NC State.

Bylaw 19.7.8.3.1 draws a distinction between "facts established" and "[e]vidence submitted"/"positions taken." The latter (that is, evidence submitted and positions taken) encompasses items of evidence and assertions of fact that are presented to the fact-finder but are not specifically found to be true, whereas "facts established" are limited to those facts that were specifically found by the fact-finder to be true.

In judicial proceedings, facts are "found" in one of two ways, depending on who is acting as the find-finder. If a judge is sitting as the finder of fact (for example in a bench trial, as opposed to a jury trial), the judge will typically issue a court order setting forth the "findings of fact" and "conclusions of law." However, in a jury trial, the jury is the judge of the facts (also known as the fact-finder). Rather than issuing a court order that lists detailed findings of fact, the jury issues a verdict.

Although verdict forms can list detailed factual findings, in criminal cases, such as Gatto et al., such forms often simply have two options: guilty or not guilty. Such is the case in Gatto et al.; the jury

found Gatto, Code, and Dawkins guilty of the charges set forth in Counts One, Two and Three of the Second Superseding Indictment by checking beside the word “guilty” on the verdict form. Exhibit 8 – Gatto et al. Jury Verdict Form - <https://app.box.com/file/573241136743>. The jury was not asked to, and did not, issue specific findings of fact underlying their legal conclusion that the defendants were guilty as charged. Id.

Although the jury did not identify specific facts found, the jury must have found certain facts in order to draw the legal conclusion that the defendants were “guilty” of each criminal charge. The facts that the jury found are the essential elements of each offense of conviction. Therefore, to determine whether any relevant facts were found by the jury and thus whether any relevant facts were “established” by the matter under Bylaw 19.7.8.3.1, it is necessary to review the elements of each offense.

Elements of offenses are set forth in the jury instructions given by the judge to the jury. Those instructions explain to the jury the law and the essential elements (that is, essential facts) the jury must find to be true in order to conclude that the defendants are guilty of the charged offenses.

The trial judge in Gatto et al. read the jury instructions to the jury on October 22, 2018. Exhibit 9 – Gatto et al. Trial Tr. from Oct. 22, 2018 at p. 17 - <https://app.box.com/file/573243890429>. The court first explained that, “[w]ith any criminal charge, there are certain basic facts that the government must prove . . . before a defendant may be found guilty. Those basic, necessary facts are called the essential elements of the charge.” Id.

There were three charges against the defendants. Count One was a conspiracy count and Counts Two and Three were what is known as “substantive counts.” The trial judge explained the distinction to the jury as follows:

Count One of the indictment charges the defendants with the crime of conspiracy. The other two counts charge what we call substantive crimes. . . .

[A] conspiracy is a little different from a substantive count. A conspiracy charge, generally speaking, alleges that two or more persons agreed together to accomplish some unlawful objective. The focus of a conspiracy count, therefore, is on whether there was an unlawful agreement. A substantive count, on the other hand, charges a defendant with the actual commission, or with causing someone else to engage in certain actions necessary for the actual commission, of an offense.

Id. at 19.

The judge continued:

And since the essence of the crime of conspiracy is an agreement or an understanding to commit a crime, it doesn't matter if the crime, the commission of which was the objective of the conspiracy, ever was actually committed. In other words, if a conspiracy exists and certain other requirements are met, the conspiracy is punishable as a crime even if its purpose is not established or accomplished.

Consequently, in a conspiracy charge, there is no need to prove that the crime or crimes that were the objective or objectives of the conspiracy actually were committed.

Id. at 19-20.

The judge provided the essential elements (or necessary factual findings) as follows:

In order to sustain its burden of proof with respect to the conspiracy charged in Count One, the government must prove beyond a reasonable doubt each of two elements:

First, it must prove the existence of the conspiracy charged in Count One.

Second, it must prove that the defendant you are considering knowingly and willfully became a member of, and joined in, the conspiracy.

Id. at 48.

The judge then explained that “a conspiracy is a combination, an agreement or an understanding of two or more people to accomplish by concerted action a criminal or unlawful purpose.” Id.

The judge further explained, “the conspiracy charged in Count One allegedly had one objective -- that is, it had a single illegal purpose, according to the allegations of the indictment, that the conspirators are alleged to have hoped to accomplish – that was to commit wire fraud against *one or more universities*.”

Id. at 50 (emphasis added).

Therefore, to find the defendants guilty of engaging in the conspiracy, it was not necessary that the jury find that the defendant agreed to commit any offenses related to NC State, since the charge referenced other universities and the jury needed only to find that the defendants conspired to defraud “one or more” of these universities. Nor was it necessary the jury find that the conduct related to those one or more universities actually occurred. The jury needed only to find that the defendants agreed to commit an offense against one or more of the identified universities.

Because the verdict form does not provide any detail about the facts that the jury found to be true, there is no way to establish whether the jury accepted or rejected the allegation that NC State was one of the universities targeted by the defendants. Moreover, because a conspiracy does not require the commission of the underlying offense, the objective of which is the purpose of the conspiracy, the finding of guilt as to Count One is not a finding that NC State was actually defrauded. More specifically, the finding of guilt as to Count One does not establish as a fact that Gassnola actually paid \$40,000 to Early, or that Early actually told Gassnola that he intended to provide this money to Farmer, or that any of the other information related to this payment or to NC State more generally.

The only charge that mentions NC State is Count One, the conspiracy count, which also lists three other universities. Because the jury merely had to find that an agreement existed to defraud “*one or more* universities,” the jury verdict does not establish that the jury found as a fact that NC State was one of the universities that the jury determined the defendants agreed to defraud. And, of course, even if one were to speculate that the jury found that NC State was the target or one of the targets of the conspiracy, the jury never found that any conduct related to NC State actually occurred—since it is immaterial for a conspiracy charge whether or not the purpose of the conspiracy was accomplished. See id. at 19-20.

In sum, the jury verdict does not “establish” any facts relevant to NC State, Gottfried, or other individuals or matters relevant to this proceeding.

Because the proceeding is on appeal, the plain language of Bylaw 19.7.8.3.1 prohibits not only the importation of facts (if such facts had been established), but also prohibits any consideration of any “[e]vidence submitted [or] positions taken” in the Gatto et al. matter “in the infractions process.” Bylaw 19.7.8.3.1. Because the enforcement staff relied exclusively on evidence from the Gatto et al. matter in bringing Allegations 1(c) and the related general allegation set forth in the introductory section of Allegation 1, those portions of Allegation 1 and the portions of Allegation 3 that are based on Allegation 1(c) must be withdrawn. Moreover, the Committee must exclude from its consideration in this proceeding

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any evidence submitted or positions taken in Gatto et al. and must further decline to import any facts from that matter.

Initial Response to Allegation 1

A. The Allegation

1. [NCAA Division I Manual Bylaws 11.5.1, 11.7.6, 13.1.2.4, 13.2.1 and 13.7.2.1.6 (2014-15); 10.01.1, 10.1, 10.1-(b) and 13.2.1 (2015-16); 12.11.1, 13.8.1, 16.2.1.1, 16.8.1 and 16.11.2.1 (2016-17)]

It is alleged that from September 2014 through March 2017, Orlando Early (Early), then men's basketball assistant coach and lead recruiter, violated the NCAA principles of ethical conduct when he and members of the men's basketball staff committed multiple recruiting violations and provided extra benefits during the recruitment and subsequent enrollment of then men's basketball prospective student-athlete Dennis Smith Jr. (Smith). Early and the men's basketball staff members arranged for and/or provided Smith and individuals associated with him approximately \$46,700 in impermissible inducements and benefits. As a result, Smith competed in 32 contests and received actual and necessary expenses while ineligible. Specifically:

- a. In September 2014, the then director of basketball operations arranged for approximately \$80 in impermissible recruiting inducements in the form of special parking in the loading dock of PNC Arena for Smith and three other prospects to use during their unofficial visits to attend the institution's September 27, 2014, football contest versus Florida State University. [NCAA Bylaws 13.2.1 and 13.7.2.1.6 (2014-15)]
- b. On September 29, 2014, the then head men's basketball coach allowed a former colleague, who was not a countable coach or certified to recruit off-campus, to accompany him to an evaluation of Smith at an off-campus recruiting event at the John D. Fuller Recreational Center in Fayetteville, North Carolina. [NCAA Bylaws 11.5.1, 11.7.6 and 13.1.2.4 (2014-15)]
- c. In November 2015, Early violated the NCAA principles of ethical conduct when he knowingly arranged for and/or provided an impermissible recruiting inducement of \$40,000 to an individual associated with Smith. Specifically, Early arranged for TJ Gassnola (Gassnola), a representative of the institution's athletics interests and then outside consultant for Adidas, which was also a representative of the institution's athletics interests, to provide Early with \$40,000 in cash to ensure Smith's commitment to the institution. Early informed Gassnola that he intended to provide the money to Shawn Farmer (Farmer), an individual responsible for teaching or directing an activity in which a prospective student-athlete is involved and the trainer of then student-athlete Smith who would then provide the money to the Smith family. [NCAA Bylaws 10.01.1, 10.1, 10.1-(b) and 13.2.1 (2015-16)]
- d. On 26 occasions between January 2016 through March 2017, Early violated the principles of ethical conduct when he knowingly provided approximately \$2,119 in impermissible recruiting entertainment benefits in the form of 44 complimentary admissions on the men's basketball office pass list to Farmer. [NCAA Bylaws 10.01.1, 10.1, 10.1-(b) and 13.8.1 (2015-16 through 2016-17)]

- e. On 13 occasions between November 2016 and February 2017, Early violated the principles of ethical conduct when he knowingly provided approximately \$4,562 in impermissible benefits in the form of 106 impermissible complimentary admissions on the men's basketball office pass list to then student-athlete Smith's family and friends. [NCAA Bylaws 10.01.1, 10.1, 10.1-(b), 16.2.1.1 and 16.11.2.1 (2016-17)]

This allegation serves as part of the basis for Allegation Nos. 3 and 4.

B. Gottfried's Initial Response to Allegation 1

Gottfried is not named in this allegation and, therefore, understands he is not expected to respond, but to the extent he is required to respond, he hereby incorporates by reference his response to Allegation 3.

Initial Response to Allegation 2

A. The Allegation

2. [NCAA Division I Manual Bylaw 13.8.1 (2015-16)]

It is alleged that on nine occasions from January through March 2016, men's basketball staff members violated NCAA recruiting restrictions when they provided approximately \$862 in impermissible benefits in the form of 14 complimentary admissions. Specifically:

- a. On seven occasions during January and February 2016, men's basketball staff provided approximately \$436 in impermissible benefits in the form of eight impermissible complimentary admissions on the men's basketball office pass list to Stanley Bland (Bland), an individual responsible for teaching or directing an activity in which a prospective student-athlete is involved. [NCAA Bylaw 13.8.1 (2015-16)]
- b. On March 8 and 9, 2016, the men's basketball staff provided approximately \$426 in impermissible benefits in the form of six impermissible complimentary admissions on the men's basketball office pass list to Keith Stevens (Stevens), an individual responsible for teaching or directing an activity in which a prospective student-athlete is involved. Specifically, the men's basketball staff provided Stevens three complimentary admissions to each of the men's basketball Atlantic Coast Conference Tournament contests against Wake Forest University and Duke University. [NCAA Bylaw 13.8.1 (2015-16)]

This allegation serves as part of the basis for Allegation Nos. 3 and 4.

B. Gottfried's Initial Response to Allegation 2

Gottfried is not named in this allegation and, therefore, understands he is not expected to respond, but to the extent he is required to respond, he hereby incorporates by reference his response to Allegation 3.

Initial Response to Allegation 3

A. The Allegation

3. [NCAA Division I Manual Bylaw 11.1.1.1 (2015-16 and 2016-17)]

It is alleged that during the 2015-16 and 2016-17 academic years, Mark Gottfried (Gottfried), then men's basketball head coach, is presumed responsible for the violations detailed in Allegation Nos. 1-(c), 1-(d), 1-(e) and 2 and did not rebut the presumption of responsibility. Specifically, Gottfried did not demonstrate that he monitored his direct report, Orlando Early (Early), then men's basketball assistant coach and lead recruiter, for compliance as it pertained to Early involving TJ Gassnola (Gassnola), a representative of the institution's athletics interests and then outside consultant for Adidas, and Shawn Farmer (Farmer), an individual associated with then men's basketball prospective student-athlete Dennis Smith Jr. (Smith), in Early's recruitment of Smith, which involved the arrangement and/or provision of a \$40,000 recruiting inducement. Additionally, Gottfried did not demonstrate that he monitored his staff's provision of complimentary admissions on the men's basketball office pass list, which involved the provision of 164 impermissible complimentary admissions to individuals associated with prospects and Smith's family and friends.

B. Gottfried's Initial Response to Allegation 3

a. To Prevail, the Enforcement Staff Must Prove the Allegation by Clear and Convincing Evidence

Gottfried and his counsel used the standard in Bylaw 19.7.8.3 to determine whether Gottfried violated NCAA rules as alleged by the staff:

The committee shall base its decision on information presented to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs. The information upon which the panel bases its decision may be information which directly or circumstantially supports the alleged violation.

This is a high standard. As explained by Professor Josephine Potuto, a former chair of the Division I COI, the standard is equivalent to the clear and convincing evidence standard used in some civil lawsuits. Potuto explained the standard on May 10, 2011, at NCAA headquarters during the "NCAA Enforcement Experience," a presentation sponsored by the NCAA to explain the NCAA enforcement process to journalists and the public.

Thus, to find Gottfried responsible for the allegation, the COI must be persuaded by clear and convincing evidence that Gottfried failed to monitor.

b. Response to Alleged Failure to Monitor Based on Allegation 1(c) – Alleged Arrangement and/or Provision of \$40,000 to Farmer and Smith Family

Staff has alleged that Gottfried failed to monitor in two respects: (1) Early’s recruitment of Smith to the extent that this recruitment involved an alleged payment of \$40,000 from Gassnola to Early, which Early said he would provide to Farmer; and (2) the basketball program staff’s “provision of complimentary admissions on the men's basketball office pass list.” This section addresses the first alleged failure to monitor, and section (c), below, addresses the second alleged failure to monitor.

i. The Staff has Failed and Refused to Provide Gottfried with the Details of How He Allegedly Failed to Monitor Early’s Recruitment of Smith

As noted in the Introduction, the staff has not alleged what it believes Gottfried failed to do to monitor Early’s recruitment of Smith or what Gottfried should have done differently. The staff has alleged only that Gottfried failed to rebut the presumption of responsibility by failing to show that he fulfilled his duty to monitor Early’s alleged “involv[ement] [of] TJ Gassnola (Gassnola) . . . and Shawn Farmer (Farmer) . . . in Early's recruitment of Smith, which involved the [alleged] arrangement and/or provision of a \$40,000 recruiting inducement.” Allegation 3.

Bylaw 19.7.1 requires the staff to include “the details of the allegations” in an NOA. In the context of alleging that a head coach failed to monitor an assistant coach’s recruitment of a PSA, at a very minimum, the staff must detail and specify how the head coach allegedly failed to monitor or what the staff believes the head coach should have done differently.

Indeed, adequate notice of charges is a fundamental aspect of due process.⁹ Merely alleging that a head coach failed to rebut the presumption of responsibility without giving details of how the coach

⁹ See, e.g., *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (explaining that notice sufficient to

allegedly failed to monitor the recruitment of a PSA does not suffice and does not comply with NCAA enforcement procedures.¹⁰

Gottfried and his counsel should not have to guess at what the staff intends to argue to the COI about how Gottfried allegedly failed to monitor. Nor should they have to wait to learn the details of the allegation until the staff files its written reply shortly before the hearing. The NCAA has denied Gottfried procedural due process by failing and refusing to tell him specifically how he allegedly failed to monitor Early's recruitment of Smith or what the staff alleges he was required by NCAA Bylaws to have done differently.

Given the lack of evidentiary support for the allegation that Gottfried failed to fulfil his duty to monitor, it appears that the staff's failure to provide details may be not a lack of desire but a lack of ability.

ii. The Allegation that a Payment Scheme Existed is Based on Improper Evidence

As an initial matter, and as discussed in the Procedural Issue section above, the Committee is barred from considering the evidence submitted in the Gatto et al. matter because that matter is "under appeal." Because all of the information related to Early's alleged involvement of Gassnola and Farmer as detailed in Allegation 1(c) is based on evidence submitted in the Gatto et al. matter, that allegation and the related portions of Allegation 3 must be withdrawn, and there is no information that the Committee can

allow interested parties to "present their objections" is "[a]n elementary and fundamental requirement of due process in any proceeding"); *Johnson v. Dep't of Navy*, No. SE0752910019-R-1, 1994 WL 227147 (M.S.P.B. May 20, 1994) ("Notice that is sufficiently detailed to provide a meaningful opportunity to be heard is a fundamental requirement of due process." (citing *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970))).

¹⁰ Shortly after receiving the NOA, Gottfried's counsel asked the staff to explain how Gottfried allegedly failed to monitor Early's recruitment of Smith. The staff declined to provide any details.

appropriately consider from which the Committee could conclude that the facts alleged in Allegation 1(c) are true.¹¹ Even if the allegation is not withdrawn, because there is no admissible evidence to support the allegations in Allegation 1(c), and because Gottfried's alleged failure to monitor Early with respect the alleged involvement of Gassnola and Farmer is a derivative allegation based on Allegations 1(c), there is necessarily insufficient evidence to conclude that Gottfried failed to monitor Early as alleged.

iii. The Alleged Illicit Conduct and Payment was So Well Concealed that It Took Federal Law Enforcement Authorities to Uncover It

If, contrary to the clear dictates of Bylaw 19.7.8.3.1, the Committee considers the information presented in the Gatto et al. matter and concludes that a payment scheme existed, the details of that scheme establish that it was so well concealed that no amount of head coach monitoring would have uncovered it. Indeed, in evaluating the reasonableness of Gottfried's monitoring efforts, the panel must take into account that the alleged illicit conduct and payment was so secretive and well concealed that it took federal law enforcement authorities to uncover it. Consider the following:

- Prior to the arrests on September 26, 2017, and the unsealing of the criminal complaints and indictments, no one with responsibility for monitoring the conduct at issue – including Adidas, the member institutions who were defrauded, or the NCAA enforcement staff – had any idea that an Adidas employee and consultant had been secretly using Adidas corporate funds to pay families of PSAs and others in violation not only of NCAA legislation but also in violation of federal criminal law.
- The scheme was allegedly referred to by the Adidas participants as a “confidential Black Opps” program. Exhibit 10 – Gatto et al. Trial Tr., Oct. 10, 2018, at 179:2-180:1 - <https://app.box.com/file/573236928854>.¹²

¹¹ As noted above, the allegation should not have been brought because the staff was prohibited from considering the evidence in Gatto et al. The allegation should be withdrawn or dismissed.

¹² Gottfried maintains that the evidence submitted in the Gatto et al. is off-limits to the Committee (as it was off-limits to the enforcement staff). Gottfried references this evidence because the enforcement staff considered it in issuing the Notice of Allegations and apparently intends to rely on it before this Committee. Therefore, it is necessary for

- Only through an extensive, expensive, multi-year federal investigation involving numerous FBI agents, including undercover agents engaged in a long-running sting operation, as well as the use of wire taps, search warrants, grand jury subpoenas, offers of tremendous sentencing leniency in exchange for the cooperation of co-conspirators, including Gassnola, was the federal government able to uncover the scheme.
- Adidas is a global corporation with revenues of more than \$24 billion dollars in 2017 and is on Fortune's list of Most Admired Companies.¹³ Despite its presumably strong corporate monitoring and controls, Adidas did not know of the illicit payments using Adidas corporate funds.
- According to the criminal complaints and indictments, as well as subsequent trial testimony, not a single one of the at least four NCAA institutions at issue in the Gatto et al. matter, or the numerous additional institutions at issue in the various related cases (at least 20 total¹⁴), who were defrauded by this scheme or related schemes knew about the illicit payments. Thus, if monitoring efforts fell short, the monitoring efforts of *every single institution* that was involved and *every single head coach* of the relevant programs at those institutions fell short.
- Gassnola also successfully concealed his alleged payments to Smith and his family from the NCAA Eligibility Center staff. Smith was a highly-rated men's basketball prospective student-athlete who could have been subject to what was then known at the NCAA Eligibility Center as a "complex case review" of the prospect's amateurism status.¹⁵ This enhanced amateurism review was conducted to determine if highly-rated prospects, their families or anyone associated with the prospects accepted cash or any other impermissible benefits contrary to NCAA rules. These reviews, conducted in collaboration with the involved member institutions, included extensive research by the NCAA into the personal lives of the prospects and their families, document requests for bank records and other financial information, evaluation of known associates, interviews of prospects, their families and other individuals and a thorough vetting of the involved prospective student-athletes' lives. See NCAA Eligibility Center Manual.¹⁶ The NCAA Eligibility Center's professional staff did not uncover the alleged payment that is the subject of the NOA.
- The NCAA enforcement staff, with dozens of trained investigators who actively look for violations and have a hotline for receiving anonymous and confidential information about potential violations, apparently knew nothing about any of the illicit payments involving the four member institutions

Gottfried to cite to this improper evidence in order to show that even this improper evidence does not support the allegations. But Gottfried does not waive, but instead explicitly maintains, his procedural objections set forth in the Procedural Issues section above.

¹³ <https://www.rankingthebrands.com/The-Brand-Rankings.aspx?rankingID=118&year=1251> (Listing Adidas as the world's 38th "Most Admired Company" based on the Fortune 2019 survey).

¹⁴ Exhibit 2 at 2 ("At least 20 schools were mentioned during the course of the FBI's investigation").

¹⁵ For reasons that are not clear, the Eligibility Center did not subject Smith to a complex case review.

¹⁶ The enforcement staff has been unable to provide undersigned counsel with this exhibit. Undersigned counsel will supplement the Upload Folder with this exhibit once it has been produced by enforcement staff.

allegedly defrauded by the conduct at issue in the Gatto et al. matter or the numerous additional member institutions at issue in the various other related cases.

- Gassnola testified at trial that he, Jim Gatto and others involved in the illicit scheme deliberately concealed their conduct from the head coaches of the institutions, including NC State. *See* Exhibit 11 – Gatto et al. Trial Tr., Oct. 11, 2018 at 45 (When asked by the Assistant United States Attorney, “Aside from Mr. Early, did you discuss your plan to pay money to the family of Dennis Smith with anyone else at North Carolina State University?” Mr. Gassnola answered, “I did not.”) - <https://app.box.com/file/573245847659>; *id.* at Exhibit 10 at 162 (Gassnola testifying that he “didn’t want the universities - - . . . people to find out. [He] wanted to keep it quiet.”); Exhibit 11 at 47 (Gassnola testifying that he didn’t want anyone other than himself or Adidas employee Chris Rivers to know about an alleged payment to Dennis Smith, Jr.).

Given this backdrop and the virtually unprecedented nature of this criminal conspiracy involving, among others, employees of and a consultant to a respected global corporation who engaged in a self-titled “confidential Black Opps” program, Gottfried and his counsel are left wondering what the staff thinks Gottfried should have or could have done differently to either prevent the alleged illicit payment to Smith or to detect it.¹⁷

Again, given the premature, prejudicial statements of the NCAA that the “top coaches” of the universities mentioned in the various legal cases “will be a part of these notices of allegations,” it appears that the enforcement staff was given no choice but to include Gottfried in this notice—even though the facts do not support doing so.

¹⁷ As noted in the Introduction, Gottfried’s counsel asked the staff to explain what it thinks Gottfried should have done differently and the staff declined to provide any details.

iv. Gottfried Fulfilled His Duty to Monitor the Recruitment of Dennis Smith, Jr.

As noted above, under Bylaw 19.7.8.3.1, this allegation must be withdrawn. See Procedural Issues section above. In the alternative, the Committee should find that this alleged failure to monitor is unsupported because Gottfried fulfilled his duty to monitor the recruitment of Dennis Smith, Jr.¹⁸

First, Gottfried more than sufficiently monitored his staff, including Early, through a variety of means, including, but not limited to:

- Establishing a monthly meeting between every member of the basketball staff and the NC State compliance department during which compliance staff and the basketball staff discussed potential issues to be aware of and during which any and all questions basketball staff had regarding any compliance issue were addressed. NCAA Interview of Mark Gottfried on May 8, 2019, Tr. at 66 – <https://app.box.com/file/484981965300>.
- Notably, the basketball program was the only program to have such a regular, program-focused meeting with compliance.
- At these meetings:
 - Basketball staff asked questions a “countless” number of times. Id. at 68.
 - Compliance staff raised specific issues for the basketball staff to be aware of, including questionable or violative practices that had occurred elsewhere, for example. Id. at 66-68.
 - Gottfried utilized these sessions to ensure that there was “a constant communication with [basketball] staff and [compliance] staff.” Id. at 68.
 - Having constant communication with recruiting staff after virtually every recruiting trip, including “constant” phone calls between Gottfried and recruiting staff and “regular” meetings to discuss what occurred at each trip. Id. at 16.
 - Having coaching meetings “almost every day” throughout the season and also often, though less frequently, during the off-season. Id. at 17. The purpose of these meetings was to discuss everything about the program, including recruiting. Id.
 - Providing a written document outlining his expectations for each staff member, which he reviewed with each staff member every year, the first requirement being to “know the rules

¹⁸ Despite having not been told the details of the allegation that he failed to adequately monitor the recruitment of Smith, Gottfried will explain how his monitoring was adequate. If the staff in its reply provides the details of how it believes Gottfried failed to monitor, Gottfried will seek leave to respond with a supplemental response.

– the NCAA rules, [and] don't break them.” Id. at 16.

With regard to Early's recruitment of Dennis Smith, Jr., Gottfried more than sufficiently monitored Early:

- Gottfried talked with Early “[f]requently” about Early's recruitment of Smith. Id. at 20.
- Gottfried made a home visit to Smith's grandmother's home and formed the opinion that the family had a “very positive” attitude, meaning an attitude that compliance with NCAA rules was important to the family. Id. at 23.
- Gottfried monitored Early's recruitment closely enough for Gottfried to have formed his own opinion of the individuals who would ultimately have a say in Smith's decision. See id. at 21.
- As with all recruiting, including in his monitoring of Early's recruitment of Smith, Gottfried explained that he “always . . . monitor[ed], . . . ask[ed] questions, to find out if there's anything alarming, are there any red flags coming up, is anybody involved [in the recruitment process] that's real shady or . . . that we felt like might . . . not have the best interest at heart.” Id. at 25.
- Gottfried even instructed his coaches to “follow [the recruits and current student-athletes] on social media” to see if there were any red flags. Id.
- And, with regard to Shawn Farmer's role in the recruitment, Gottfried monitored closely enough to ask Early who Farmer is and what he does. Id. at 26. Early explained that Farmer owned a business and made a good living from that business, such that Gottfried did not see Farmer as a person who would undermine a compliant recruitment process, particularly in light of Gottfried's belief that the Smith Family was not a family that would risk their child's future by engaging in prohibited conduct.

Gottfried not only instructed his staff to look for red flags, he also personally monitored for red flags and reported them to compliance staff for further investigation:

- Gottfried instructed his staff to monitor the social media accounts of recruits and current student-athletes to look for red flags.¹⁹ Id. at 67.
- Gottfried personally assessed the Smith family (and countless other families) to determine whether the family or others surrounding the recruit posed a threat to compliant recruitment. See id. at 21-22, 25 (discussing home visit and forming impression that Dennis Smith, Jr.'s grandmother was the most influential person in the recruitment decision). (As discussed below, he was not on notice that he needed to monitor a then-well-respected international, multimillion-dollar corporation

¹⁹ Gottfried and his counsel understand that the NCAA does not require coaches to monitor the social media postings of student-athletes and prospective student-athletes.

(Adidas) as a threat).

- A specific example of Gottfried’s monitoring for red flags and related immediate reporting of a potential threat to compliance staff occurred with regard to Eric Leak:
 - Gottfried was at Huntington Prep to evaluate Smith and was sitting with the high school coach when the name Eric Leak came up. Id. at 67.
 - Gottfried understood that Leak had a history of or reputation for corrupting the recruitment process. Id.
 - Gottfried “immediately” called the head of NC State’s compliance department and reported the issue. Id.; see also Exhibit 12 – Gatto et al. Trial Tr., Oct. 9, 2018 at 163 (testimony of Carrie Doyle, head of NCAA Compliance at NC State, that “Coach Gottfried was the one that brought forward the information that Eric Leak might be in contact with Dennis Smith Senior”) - <https://app.box.com/file/573234507165>.
- There was never a red flag suggesting that Adidas or Gassnola might make an illicit payment or that Early, Farmer and the Smith family would participate in an illicit payment in violation of NCAA rules.

Finally, the real threat to the compliant recruiting of Dennis Smith, Jr. was not Farmer, Early, or the Smith family. The true threat was instead a previously well-respected international, multibillion-dollar corporation—that is, Adidas, a company that had established a deep level of trust with NC State and with Gottfried by sponsoring the university, as it had done with other NCAA institutions throughout the country and other entities around the world. As Gassnola testified, it was *his* idea, as a representative of Adidas—not the idea of Early or Farmer or the Smith family—for Adidas to provide the payment in question. Gottfried cannot have been expected to assume that he needed to be on the lookout for a well-respected, international, multibillion-dollar corporation committing federal criminal bribery.

As the Committee on Infractions has explained:

A head coach has special obligation to establish a spirit of compliance among the entire team, including assistant coaches, other staff and student-athletes. The head coach must generally observe the activities of assistant coaches and staff to determine if they are acting in compliance with NCAA rules. Too often, when assistant coaches are involved in a web of serious violations, head coaches profess ignorance, saying that they were too busy to know what was occurring and that they trusted their assistants. Such a failure by head coaches to control their teams, alone or with the assistance of a staff member with compliance responsibilities, is a lack of institutional control.

This is not to imply that every violation by an assistant coach involves a lack of institutional control. If the head coach sets a proper tone of compliance and monitors the activities of

all assistant coaches in the sport, the head coach cannot be charged with the secretive activities of an assistant bent on violating NCAA rules.

Exhibit 13 – Principles of Institutional Control as prepared by the NCAA Committee on Infractions at pp. 3-4 (emphasis added) - <https://app.box.com/file/573239165173>.

Gottfried set a proper tone for compliance and he monitored the activities of Early and the other members of his staff. If Early participated in a scheme to funnel money from Adidas to the Smith family, then Early was “bent on violating NCAA rules” through “secretive activities.” If Gassnola’s testimony is accurate, Early was engaged in a federal criminal conspiracy. No level of monitoring could have discovered and prevented this “secretive” conduct by a person “bent on violating NCAA rules.”

As detailed above, the secretive nature of the conduct is highlighted by the fact that internally within Adidas, the effort by Adidas to pay the families of players was referred to as a “confidential Black Opps” program. Indeed, the payments were hidden even from Adidas, were intentionally excluded from internal corporate communications, and were concealed from the corporate financial records, including bank records. Thus, the secret payments eluded Adidas’ monitoring efforts. Indeed, it was only after the FBI established an undercover agent to set a trap for unwary criminals that the conduct came to light. In other words, at the time that this payment allegedly occurred, coaches were not on notice that payments were being made by seemingly legitimate international corporations, such as Adidas, to the families of prospects, and the assumed fact that such a payment occurred does not by itself establish a lack of monitoring by a head coach.

For each of these reasons, Gottfried more than fulfilled his duty to monitor the recruitment of Smith.

v. The Evidence is Insufficient to Find that the Alleged Payment was Even Made to the Smith Family or that the Purpose of the Payment was to Ensure Smith’s Commitment to NC State

It is axiomatic that there must be an underlying violation upon which to base a head coach control violation. The crux of the failure to monitor charge against Gottfried is based on the alleged payment of \$40,000 that Gassnola said he delivered to Early with the understanding that Early would give the money

to Farmer to deliver to the Smith family. Not only is the only available information supporting that Gassnola provided funds to Early information that the Committee is barred from considering, see Procedural Issues section above, but that evidence does not establish that Early provided the funds to Farmer, or that Farmer provided those funds to the Smith family, or that the purpose of the payment was to induce Dennis Smith Jr. to continue with his commitment to attend NC State.

Neither Early nor Farmer cooperated with the investigation, but NC State interviewed Smith and he firmly denied that either he or his family received the alleged payment. Memorandum of NC State Interview of Dennis Smith Jr. on April 30, 2019 - <https://app.box.com/file/484982859009>. Without evidence that either Smith or his family received the alleged payment, there can be no violation of Bylaw 13.2.1.

Moreover, even if the Committee credits Gassnola's testimony, that testimony does not establish that the reason for the payment was "to ensure Smith's commitment to the institution" as alleged in Allegation 1(c), nor does it establish that Farmer or the Smith Family received the funds in question.

Gassnola's testimony about the purpose of the payment was as follows:

In the fall of 2015, [Early] reached out to me . . . [stating] that there were some issues surrounding Dennis and the people around him [and that] . . . and [Early] just seemed to be uncomfortable and he was having some issues with keeping that situation together. . . . I could tell [Early] was uneasy and he was having some issues. So I offered to bring him \$40,000 to calm the situation."

Exhibit 11 at 41.

The prosecutor attempted to clarify, asking, "When you say 'calm the situation,' what did you think that money could do?" Id. at 42.

Gassnola responded, "Just make it easier and keep people happy, whether it was the family or whoever he was referring to. I just figured that was the right thing to do for him." Id.

Thus, Gassnola's testimony, which is the only evidence related to the purpose of the payment, did not establish the purpose of the payment was to "ensure Smith's commitment" to NC State, as alleged. Rather, Gassnola's testimony was that the payment was made in response to "some issues" and was made

to “calm the situation” and “make it easier and keep people happy.” Nor does this testimony in any way establish that Smith was threatening to decommit. Rather, Gassnola was not even sure who was unhappy, “whether it was the family or [someone else].”

Not only does Gassnola’s testimony fail to establish that the purpose of the payment was to ensure Smith’s commitment, but Smith has denied that he or his family received the payment. Memorandum of NC State Interview of Dennis Smith Jr. on April 30, 2019 - <https://app.box.com/file/484982859009>. A close review of Gassnola’s testimony actually supports this denial. Gassnola’s testimony was that Early “informed [Gassnola] that he was giving the money to Shawn Farmer,” Tr. at 43, and that he told Gatto that he (Gassnola) “gave Farmer 40 grand.” *Id.* Thus, Gassnola’s testimony does not support that the Smith Family received the money. He merely testified that Early said that he would give the money to Farmer.

Indeed, the enforcement staff has conspicuously declined to allege that either Farmer or the Smith Family actually received the money. Instead, Allegation 1(c) reads in relevant part, “Early arranged for . . . Gassnola. . . to provide Early with \$40,000 in cash Early informed Gassnola that he intended to provide the money to Shawn Farmer . . . who would then provide the money to the Smith family.” But the last clause (that Early informed Gassnola that Farmer “would then provide the money to the Smith Family”) is not supported by the transcript. More to the point, the allegation is that Early arranged for Gassnola to pay Early and that Early *informed* Gassnola of his intention to pass the money along to Farmer and the Smith Family. The allegation is *not* that the money was actually passed along to the Smith Family. That is a critical difference. Absent evidence that the funds were actually provided to the Smith Family (and such evidence is indeed lacking, because a mere statement of intent is not sufficient evidence from which to conclude that the intended action occurred) there is no recruiting violation, and thus no violation that Gottfried can be presumed responsible for.

c. Gottfried has Rebutted the Presumption of Responsibility for the Complimentary Admissions Allegations (set forth in Allegation Nos. 1-(c), 1-(d), 1-(e) and 2)

A head coach rebuts the presumption of responsibility when he or she knows of and relies on an active compliance monitoring system operated by compliance staff under which compliance staff receives full information in sufficient time to take prior corrective action, because such a process of proactive, real-time monitoring by fully-informed compliance staff is the paragon of compliance monitoring—and when the coach has otherwise promoted an atmosphere of compliance. In other words, ensuring proactive, real-time monitoring by fully-informed compliance staff is sufficient to fulfil a head coach’s duty to monitor on a specific issue, such as monitoring the distribution of complimentary admissions.

Published NCAA guidance regarding head coach responsibility allegations and the lessons of prior similar cases also indicates that a coach who does the following rebuts the presumption of responsibility:

- Communicates a firm commitment to compliance;
- Participates in regular meetings with compliance and requires his staff to do so as well;
- Has a documented pattern of instructing coaching staff members to routinely and proactively contact the compliance staff with questions and concerns;
- Establishes a high level of engagement with compliance staff; and
- Neither failed to act in response to known risks nor was personally involved in the misconduct.

See Exhibit 14 – NCAA Brochure entitled “Responsibilities of Head Coaches: Understanding rules compliance and monitoring” at 4-5 - <https://app.box.com/file/573238138376>.

Enforcement staff correctly concluded that Gottfried promoted an atmosphere of compliance,²⁰ so the only question is whether his monitoring effects were sufficient. Assuming, without conceding, that the

²⁰ See Allegation 3, which noted an alleged failure to monitor but does not allege a failure to promote an atmosphere of compliance. For the reasons discussed in this initial response, enforcement staff’s implicit conclusion that Gottfried promoted an atmosphere of compliance is correct.

allegations of improper complimentary admission/tickets detailed in Allegation Nos. 1-(d), 1-(e), and 2 are proven to be accurate, Gottfried has rebutted the presumption of responsibility for these allegations for at least two reasons.

First, Gottfried engaged in the pinnacle of monitoring of the complimentary admissions/ticket aspect of his program by ensuring that compliance staff was monitoring complimentary admissions and tickets in real-time and that compliance staff had full information in order to perform this proactive compliance monitoring. Tr. of NCAA Int. of J. Dunlap on May 8, 2019 at 16 - <https://app.box.com/file/484987445837> (establishing that the complimentary admissions list goes directly to compliance “as early in the day as possible,” for example, generally four hours before the competition) (“I’m confident that compliance perused our pass list for every game.”); see also Int. of M. Ford at 5-6 (noting that “for every game” compliance staff would review the player list, the recruit list, the high school coach list, and that compliance staff would regularly check the office list—and further establishing that compliance had complete access to these lists). For this reason alone, he has rebutted the presumption of responsibility for the complimentary ticket/admission allegations set forth in Allegation Nos. 1-(c), 1-(d), 1-(e) and 2.

The NCAA Division I Enforcement Charging Guidelines establish that the duty to monitor is not a requirement of perfection in preventing violations. See Exhibit 15 – NCAA Division I Enforcement Charging Guidelines at 3-4 - <https://app.box.com/file/573235979086>. Instead, to rebut the presumption of responsibility for violations, a head coach must demonstrate a good faith “commitment to monitoring.” Id.

The first consideration for whether a head coach has established this commitment to monitoring is the “[e]stablishment of a program of prompt and consistent review of documentation related to monitoring of forms, logs, evaluations and questionnaires within the sport program.” Id. In this way, the Guidelines establish that the establishment of “monitoring systems” is an appropriate method of fulfilling the duty to monitor. See id. (referring to “monitoring systems”).

The Guidelines and common experience also establish that the institution's NCAA compliance staff are the "appropriate institutional personnel" to evaluate potential compliance issues. See id. (noting that the duty to monitor includes "reporting NCAA violations to the appropriate institutional personnel in a timely manner"). In other words, institutional compliance staff are the in-house compliance experts. And the coach's duty to monitor is, at its core, a duty to ensure compliance staff are notified promptly about known potential issues.

In combination, this guidance and common experience establishes that a head coach fulfills the duty to monitor when the coach is aware of and relies on a process under which that the institution's compliance experts (that is, compliance staff) are monitoring a particular issue through a program review of documentation related to monitoring of forms, logs, [etc.]" and that compliance staff have access to complete and accurate information in order to monitor the issue.

Gottfried did just that. He knew of and relied on the fact that the NC State compliance staff was monitoring the admissions/tickets logs and that compliance staff had complete information upon which to do so. See, e.g., Tr. of NCAA Int. of J. Dunlap at 16 (establishing that the complimentary admissions list goes directly to compliance "as early in the day as possible," for example, generally four hours before the competition); see also Tr. of NCAA Int. of M. Ford on June 13, 2019 at 5-6 (noting that "for every game" compliance staff would review the player list, the recruit list, the high school coach list, and that compliance staff would regularly check the office list—and further establishing that compliance had complete access to these lists).

Specifically, the admission/ticket logs were submitted to compliance staff hours in advance of the competition in question. See Int. of J. Dunlap at 16. Gottfried gave compliance complete access to this information, and generally ensured that his staff communicated directly with the compliance staff on any issues related to compliance—thus ensuring that the compliance staff had complete information.

Because Gottfried knew of and relied on NC State compliance staff's monitoring of the admissions/tickets and ensured that compliance had complete information upon which to do so, he satisfied

the duty to monitor. Because Gottfried both promoted an atmosphere of compliance and fulfilled his duty to monitor with respect to the complimentary admissions/tickets, he has rebutted the presumption of responsibility.

Second, Gottfried:

- Communicated to his staff a firm commitment to compliance^{21, 22};

²¹ See, e.g., Tr. of NCAA Int. of C. Doyle on January 10, 2019, Interview - <https://app.box.com/file/484987323043> - at 10 (“Coach Gottfried and his staff asked a lot of questions. I think Orlando Early was probably in Megan Ford’s office two times a week asking questions about whether this was permissible or whether that was permissible. . . . And so they asked a lot of questions, which again, kind of leads a person to believe that, you know, they’re on it, they’re paying attention, they’re asking the right questions. And as I said before, both Meg and I and Chris Boyer met with them monthly and Megan was . . . on it. . . . [S]he would provide them with an itinerary of what education was being provided and go through it in a very detailed kind of fashion and many times coach Gottfried would stop her and say now hang on just a second. I want to make sure that I understand that. You guys paying attention. . . Now, say that again and he’d want to make sure that everyone in the room understood what it was that Meg was talking about. . . . [I]t was clear to me that they were not interested in violating the rules . . .”).

²² See also Tr. of NCAA Int. of M. Ford on Feb. 14, 2019 - <https://app.box.com/file/484981997515> - at 13 (“I had a really good relationship with the men’s basketball staff. . . . [T]hey asked a lot of questions, I was over in their offices a good bit. . . . [W]e did our monthly standard meetings . . . [and] a lot of times they would give me a call and [ask me to] come over, we’ve got some questions and I would kind of jump over to their office and try to meet with them. . . . [They] saw me as an ally. . . . I felt pretty good [that] . . . at the end of the day, [the basketball staff] seems to care about the NCAA rules, they seemed to care about doing the right thing . . . , [they] want to know about the rules, wanted to ask questions and do things the right way. And so that was . . . the impression I got from the staff at the time I was working with them.”); *id.* at 16 (She met with the basketball staff “at least monthly in a . . . more formal fashion and then . . . depending on the week, depending on the day, depending on the month, probably more often. Again, [they] called [me] over sporadically. . . . And then some of the staff would come to my office directly and ask questions as well when they would have them.”); *see id.* at 18 (noting that Gottfried encouraged his staff members to contact her directly, that he was “proactive in consulting with compliance); *id.* at 19 (Gottfried is a “coach that cares to actually include compliance on a call”) (Gottfried “wanted to loop compliance in and have - - keep open communication lines with compliance”); *id.* (they brought in a consultant to train the staff) (“[W]hen we would have a compliance meeting . . . he would ask questions and then he would actually pause and stop and say guys, do we get this? Everyone understand this? Anybody have any questions?”); *id.* at 20 (“[Gottfried] seemed to want to know what the rules were to make sure he didn’t make any mistakes. I think he was always trying to be . . . transparent [with compliance].”); *id.* at 32 (“[W]e had . . . really good coaches that cared about doing things the right way and asked question and . . . we had a very robust compliance unit . . .”).

- Participated and ensured that his staff participated in regular meetings with compliance²³;
- Has a documented pattern of instructing coaching staff members to routinely and proactively contact the compliance staff with questions and concerns²⁴,
- Established a high level of engagement with compliance staff²⁵, and
- Neither failed to act in response to known risks nor was personally involved in the misconduct²⁶

Gottfried even “hosted an in-person meeting with parents at the beginning of each year,” during “several years,” to discuss compliance related to tickets. NCAA Interview of Carrie Doyle on June 21, 2019 Tr. at 5 - <https://app.box.com/file/484982105962>.

For these reasons as well, Gottfried fulfilled his duty to monitor and thus rebutted the presumption of responsibility.

In sum, Gottfried fulfilled his duty to monitor with respect to the alleged violations related to complimentary tickets/admissions because he fully involved the compliance staff in a monitoring program related to these tickets/admissions and because he otherwise ensured close, open, and regular coordination and communication between his staff and institutional compliance staff. Therefore, he has rebutted the presumption for these alleged violations.

Gottfried anticipates that the institution will attempt to slough off its own failure to identify these allegedly problematic tickets/admissions onto Gottfried. However, like a doctor who takes responsibility for an ailing person, by accepting the responsibility of monitoring the complimentary tickets/admissions,

²³ See id.

²⁴ See id.

²⁵ See id.

²⁶ See id.

the institution's compliance staff accepted responsibility for any failures in its own performance. In other words, compliance staff cannot place the blame on Gottfried for compliance staff's own failure to perform perfectly the task of monitoring. Having ensured that the compliance staff was fully and timely informed, Gottfried fulfilled his duty to monitor, and the compliance staff's failure to identify these allegedly improper tickets/admissions does not undermine the fact that Gottfried fulfilled his duty. To find otherwise would turn the rebuttable presumption of responsibility into a rule that head coaches are *per se* responsible for any violations. The bylaws do not support such a result.

For each of these reasons, the Committee should conclude that Gottfried fulfilled his duty to monitor the complimentary tickets/admissions and therefore that he has rebutted the presumption of responsibility for the violations set forth in Allegation Nos. 1-(c), 1-(d), 1-(e) and 2.²⁷

²⁷ Gottfried also notes that there are ambiguities about whether the allegedly improper complimentary admissions were actually improper, or whether the issue is merely a paperwork or categorization problem. See, e.g., NCAA Int. of M. Ford on June 13, 2019 - <https://app.box.com/file/484990604800> at 12-13. If, as the interview indicates, these admissions were not improper, but simply incorrectly recorded, there would be no underlying violation that Gottfried failed to monitor. Gottfried anticipates supplementing his response on this issue after a review of NC State's position on this matter

Initial Response to Allegation 4

A. The Allegation

4. [NCAA Division I Manual Constitution 2.8.1 (2015-16 and 2016-17)]

It is alleged that during the 2015-16 and 2016-17 academic years, the scope and nature of the violations detailed in Allegation Nos. 1-(d), 1-(e) and 2 demonstrate that the institution violated the NCAA principle of rules compliance when it failed to adequately monitor its men's basketball program's provision of complimentary admissions on the men's basketball office pass list by its failure to establish an adequate system for ensuring compliance with NCAA legislation.

B. Gottfried's Initial Response to Allegation 4

Gottfried is not named in this allegation and, therefore, understands he is not expected to respond.

Conclusion

Gottfried has cooperated fully in this case and is attempting to participate fully so the panel has full and complete information to make a fair and reasoned decision. He and his attorneys have been hindered by what appears to be an artificial and unnecessary time constraint in submitting this Initial Response, and by the staff's failure and refusal to provide the details of the allegation against Gottfried so he and his attorneys can know and understand what the staff thinks he should have done differently. Moreover, the enforcement staff considered improper and unreliable evidence in bringing Allegation 1(c). Gottfried will, of course, continue to participate despite these significant constraints, but he hopes that, going forward, the NCAA will cooperate with him and will also adhere to its own bylaws.

Notwithstanding these procedural failings that require the withdrawal of a substantial portion of the allegations, the evidence in this matter establishes that Gottfried fulfilled his duty to monitor and that the allegations claiming otherwise are unfounded and should be rejected.