



IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL DIVISION

GRAHAM B. SPANIER,

Plaintiff-Counterdefendant,

v.

THE PENNSYLVANIA STATE
UNIVERSITY,

Defendant-Counterplaintiff.

)Docket No. 2016-0571
)
)Type of Pleading: PRELIMINARY
)OBJECTIONS
)
)**PRELIMINARY OBJECTIONS TO**
)**SECOND AMENDED COMPLAINT**
)
)Filed on behalf of The Pennsylvania State
)University
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2017 JUN 31 PM 3:30
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PRELIMINARY OBJECTIONS TO SECOND AMENDED COMPLAINT

The Pennsylvania State University (“Penn State” or “the University”), by its undersigned counsel, respectfully submits these Preliminary Objections to Counts I, I, III, IV, and V of the Second Amended Complaint.

FIRST PRELIMINARY OBJECTION: FAILURE OF PLEADING TO CONFORM TO LAW OR RULE OF COURT (Pa. R. Civ. P. 1028(a)(2)) (COUNTS I, II, III, IV)

1. On December 19, 2016, Penn State filed an Answer to Counts I, II, III, and IV of the First Amended Complaint. That same day, Penn State filed Preliminary Objections to Count V of the First Amended Complaint.
2. On January 12, 2017, Dr. Spanier filed a Second Amended Complaint.
3. The Second Amended Complaint contains substantive amendments to all five counts of the First Amended Complaint.
4. Specifically: (a) paragraph 16 of the Second Amended Complaint does not appear, in whole or in any part, in the First Amended Complaint; (b) paragraph 122 of the First

Amended Complaint has been amended – as paragraph 123 of the Second Amended Complaint and (c) paragraphs 155, 157, and 159 of the First Amended Complaint have been amended – as paragraphs 156, 158, and 160 of the Second Amended Complaint. *See* Exhibit 1 hereto (referenced paragraphs of the First Amended Complaint) and Exhibit 2 (referenced paragraphs of the Second Amended Complaint).¹

5. Those paragraphs are among the paragraphs that are incorporated by reference in Counts I, II, III, IV (and V) of the Second Amended Complaint. *See* Exhibit 2, ¶ 220 (incorporating paragraphs 1 through 219 into Count I); *id.*, ¶ 234 (incorporating paragraphs 1 through 233 into Count II); *id.*, 247 (incorporating paragraphs 1 through 246 into Count III); *id.*, ¶ 260 (incorporating paragraphs 1 through 259 into Count IV).

6. In the cover letter that accompanied Dr. Spanier’s Second Amended Complaint, his counsel represented to the Court where the Second Amended Complaint substantively amends the First Amended Complaint. However, the foregoing paragraphs are absent from counsel’s representation to the Court. *See* Exhibit 3 (Jan. 12, 2017 letter from Thomas A. Clare).

7. The only time a litigant has an unqualified right to file an amended complaint is within twenty (20) days of receipt of the defendant’s preliminary objections. Pa. R. Civ. P. 1028(c)(1).

8. In all instances not covered by Rule 1028(c)(1), a litigant who wishes to amend his complaint must seek and obtain either leave of court or the opposing party’s consent. Pa. R. Civ. P. 1033.

¹ As Penn State discovered when it compared the two pleadings with a computer program, the Second Amended Complaint also contains other changes to Counts I, II, III and IV of the First Amended Complaint. Although those amendments, too, violate Rule 1033, because they are non-substantive, Penn State does not challenge them here.

9. An amended complaint that is not filed in accordance with Rule 1028(c)(1) or Rule 1033 is a legal nullity.

10. Although Dr. Spanier was entitled to amend Count V of the First Amended Complaint, he did not seek, much less obtain, either this Court's permission or Penn State's consent to further amend Counts I, II, III, or IV of the First Amended Complaint.

WHEREFORE, The Pennsylvania State University respectfully requests that the Court sustain its First Preliminary Objection and strike the Second Amended Complaint, with prejudice and without leave to amend the Counts I, II, III and IV that appear in the First Amended Complaint, and without prejudice with respect to Count V, and grant such other and further relief as the Court deems appropriate.

**SECOND PRELIMINARY OBJECTION: INCLUSION OF IMPERTINENT MATTER
(Pa. R. Civ. P. 1028(a)(2)) (COUNTS I, II, III, IV, V)**

11. In paragraph 16 of the Second Amended Complaint, Dr. Spanier alleges that one of the University's Trustees had a relationship with The Second Mile charity, and that this Trustee "never advised Dr. Spanier of any knowledge [that Trustee] may have had about an investigation of Sandusky." *See* Exhibit 2, ¶ 16.

12. These gratuitous and inaccurate allegations have no bearing on, and are completely irrelevant to, Dr. Spanier's claims. Indeed, Dr. Spanier never references those allegations in any other place in any of the Counts of the Second Amended Complaint.

13. As explained *supra*, Dr. Spanier had only the right to amend Count V of the First Amended Complaint, as that was the only count to which Penn State asserted preliminary objections. In Count V, Dr. Spanier seeks indemnification for certain legal and public relations

expenses he has incurred, pursuant to the terms of his 2010 Employment Agreement and his Separation Agreement. Paragraph 16 of the Second Amended Complaint has absolutely no conceivable bearing on Dr. Spanier's indemnification rights under either of those contracts.²

14. To the contrary, paragraph 16 of the Second Amended Complaint is nothing more than an improper "pot shot" at one of the University's Trustees. It appears to have been included in the Second Amended Complaint solely in furtherance of an effort to garner the attention of the media.

15. Because paragraph 16 of the Second Amended Complaint is impertinent, it should be stricken.

WHEREFORE, The Pennsylvania State University respectfully requests that the Court sustain its Second Preliminary Objection, strike paragraph 16 of the Second Amended Complaint, including its incorporation by reference into Counts I, II, III, IV, and V, and grant such other and further relief as the Court deems appropriate.

**THIRD PRELIMINARY OBJECTION: INCLUSION OF IMPERTINENT MATTER
(Rule 1028(a)(2)) (COUNT V)**

16. Count V of the Second Amended Complaint also should be dismissed pursuant to Rule 1028(a)(2) because it contains impertinent matter of a different sort as well.

17. Through the use of the incorporation-by-reference provision of paragraph 270 (which incorporates paragraphs 1 through 269), Count V contains legions of factual allegations that have no bearing whatsoever on whether the University has a contractual duty to indemnify

² Paragraph 16 has no bearing on any of the other counts, either.

Dr. Spanier under the terms of the Separation Agreement and/or the 2010 Employment Agreement.

18. Specifically, Count V contains: allegations about the University's removal of Coach Paterno from his coaching position and the decision to retain the Freeh Law Firm (¶¶ 62-68); allegations that Freeh ignored information Dr. Spanier had provided (¶¶ 69-70); allegations that the Freeh Report falsely labelled Spanier a pedophile, including detailed discussions of the 1998 and 2001 Incidents involving Jerry Sandusky (¶¶ 71-105); and allegations that Penn State knew that the Freeh Report would "scapegoat" Dr. Spanier (¶¶ 106-124). *See* Exhibit 2.

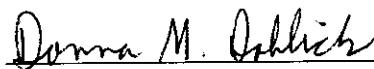
19. Whether Penn State admits or denies those allegations, and whether Dr. Spanier is able to prove them or not, will have no bearing whatsoever on Dr. Spanier's ability to prove the elements of, or recover on, the contractual indemnity claim pleaded in Count V. Accordingly, those allegations are impertinent to Count V for purposes of Rule 1028(a)(2), and should be stricken from Count V.

20. Penn State has no objection to Count V being re-pleaded without the offending impertinent material.

WHEREFORE, The Pennsylvania State University respectfully requests that the Court grant its Third Preliminary Objection, dismiss Count V of the Second Amended Complaint without prejudice, and grant such other and further relief as the Court deems appropriate.

DATED this the 31st day of January, 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for The Pennsylvania State University, hereby certify that I caused to be served a true and correct copy of the foregoing PRELIMINARY OBJECTIONS TO SECOND AMENDED COMPLAINT this 31st day of January, 2017, by mailing same via U.S. mail, first class, postage prepaid, upon the following counsel of record:

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GRAHAM B. SPANIER,

Plaintiff,

v.

PENNSYLVANIA STATE UNIVERSITY

Defendant.

COURT OF COMMON PLEAS
OF CENTRE COUNTY

No. 2016-0571

FIRST AMENDED COMPLAINT

NATURE OF THE ACTION

1. This is a breach of contract action brought by Dr. Graham B. Spanier ("Dr. Spanier") against Pennsylvania State University ("Penn State" or "University"). The lawsuit arises out of negative and disparaging statements made by Penn State and certain members of the University's Board of Trustees, and other

EXHIBIT

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153. As set forth above, Dr. Spanier did not fail to keep the Board informed of information regarding Sandusky's criminal activities, the Attorney General's investigation into Sandusky's criminal activities, or the Grand Jury investigation into Sandusky's criminal activities. Dr. Spanier shared all of the limited information he had regarding these matters with the Board in a forthcoming and timely manner.

154. Moreover, Dr. Spanier did not fail to recognize the severity of the situation regarding Sandusky's indictment nor did he act with a lack of urgency in response to the unfolding situation.

155. Dr. Spanier was never informed, officially or unofficially, by the Office of the Attorney General that charges would be forthcoming against any University employees. In fact, the University's then-General Counsel repeatedly assured Dr. Spanier that "there was nothing there" and that there was little likelihood that the University would be implicated or affected by the allegations regarding Sandusky. Although he was aware that Curley, Schultz, and Paterno had been called to testify before the Grand Jury investigating Sandusky, Dr. Spanier was not even made aware of the other subpoenas that had been issued to Penn State or to himself personally.

156. However, upon learning the leaked information that Sandusky, Curley, and Schultz would be charged criminally, Dr. Spanier felt and acted with an immense sense of urgency. He immediately informed the Chair of the Board, and met daily or near-daily with the Chair of the Board in the days leading up to the issuance of

the Grand Jury presentment. He took part in a series of emergency meetings that followed.

157. In fact, after the release of the Grand Jury presentment on November 5, 2011, the Chairman of the Board felt that a meeting of the Board could wait until Monday, November 7. Dr. Spanier insisted that emergency Board meetings be held on Saturday, November 5, and Sunday, November 6, in order to quickly address the unfolding crisis.

158. Dr. Spanier was also under orders from John Surma, Vice Chair of the Board, not to make any public statements or hold a press conference, because the Board would be handling the crisis management rather than University officials.

159. The negative accusation that Dr. Spanier altered a University press release regarding the Sandusky indictment is also false. The substance of the press release in question was discussed in a full session of the Board of Trustees on Sunday, November 6, 2011. Following the board meeting, in conjunction with the Board Chair and the University's Office of Public Information, Dr. Spanier assisted in finalizing the press release that emanated from the board meeting. Dr. Spanier in fact sent the final draft of the draft of the press release to the Chair of the Board of Trustees for review prior to its issuance, and did not substantively alter the planned release in any way before it was disseminated on Monday, November 7, 2011.

160. The negative comments about Dr. Spanier made by these Board members in January 2012 were made voluntarily to the news media. The statements were not made to comply with any legal requirement or obligation, and they were not made for the purpose of providing truthful information in connection with any ongoing or forthcoming investigations.

161. Each of the foregoing comments by Penn State and its Board members regarding Dr. Spanier are negative and false.

162. During his tenure as President of Penn State, Dr. Spanier never received any information that Sandusky had abused a child, and Dr. Spanier was never provided information that would lead him to conclude that Sandusky had ever committed a criminal act directed at a child until *after* Sandusky's criminal indictment. Dr. Spanier did not seek to, nor did he, conceal or cover up any information regarding Sandusky's criminal activities from the Board of Trustees or anyone else.

Dr. Spanier Has Suffered Significant Reputational, Emotional, And Economic Harm As A Result Of Penn State's And the Board Members' Statements

163. Penn State's and its Board Members' disparaging statements regarding Dr. Spanier have caused him severe damage.

164. Dr. Spanier has suffered severe reputational harm as a result of these negative statements. The false, malicious and disparaging statements regarding

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GRAHAM B. SPANIER,

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PENNSYLVANIA STATE UNIVERSITY

Defendant.

COURT OF COMMON PLEAS
OF CENTRE COUNTY

No. 2016-0571

SECOND AMENDED COMPLAINT

NATURE OF THE ACTION

1. This is a breach of contract action brought by Dr. Graham B. Spanier ("Dr. Spanier") against Pennsylvania State University ("Penn State" or "University"). The lawsuit arises out of negative and disparaging statements made by Penn State and certain members of the University's Board of Trustees, and other

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subsequently reelected for second and third terms. He was elected Chair of the Board in January 2013.

15. Karen Peetz (“Peetz”) is currently the President of BNY Mellon. Peetz was elected to the Penn State Board of Trustees in 2010 as a business and industry Trustee and became Chairman of the Board of Trustees in 2012. Peetz resigned from the Board of Trustees effective January 15, 2015.

16. Ira Lubert (“Lubert”) is a Philadelphia-based businessman who manages an investment fund and conducts several business ventures including real estate, gaming and casinos, and other enterprises. He has served as a member of Penn State’s Board of Trustees through two different appointments and currently serves as Chair of the Board. Documents from The Second Mile show that Lubert donated at least \$50,000.00 to the organization in 2001 alone. In addition, he was listed as a member of The Second Mile Southeast Region Board of Directors from 2005 until 2008. His membership on the board concluded at approximately the same time the Sandusky investigation began. Lubert also served as a limited partner with Green Hills Sports Camp in Berks County, Pennsylvania, and his company allowed Sandusky and The Second Mile to conduct its Summer Challenge camps at Green Hills. Lubert never advised Dr. Spanier of any knowledge Lubert may have had about an investigation of Sandusky.

The Freeh Engagement

62. On the same day that Dr. Spanier's presidency ended, the Board of Trustees fired Joe Paterno as the head coach of the Penn State football team. Thousands of Penn State students took to the streets of Penn State's campus, riots erupted, and the national media feverishly reported the growing controversy:



63. The Board of Trustees' premature and careless firing of Coach Paterno created a full-scale media and public relations disaster.

64. To address the growing media frenzy — and to vindicate its hasty decision to terminate Coach Paterno — Penn State's Board of Trustees retained

Louis Freeh and his law firm Freeh Sporkin & Sullivan (“FSS”) on or about November 21, 2011, to conduct a purportedly “independent, full, and complete” investigation of “the alleged failure of Penn State University personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky.”

65. Freeh’s firm was not the only option that Penn State officials considered. In fact, Penn State officials were concerned that FSS was too small and simply did not have the manpower to conduct a complete and comprehensive investigation. There was also concern about the close association between FSS and Pepper Hamilton LLP, a Philadelphia-based law firm, because Pepper Hamilton has many attorneys that are active and involved in Pennsylvania politics.

66. In the end the Penn State Board of Trustees chose Freeh principally because of his personal experience with, and ability to navigate, the media and public relations aspects of such investigations. The fact that Freeh was known as being very focused on the media narrative was a deciding factor in his retention.

From: Frazier, Kenneth C. (mailto:kken_frazier@merck.com)
 Sent: Thursday, November 17, 2011 3:21 PM
 To: Ammerman, Paula
 Cc: Garban; John P. Surma (jpsurma@uex.com); Baldwin, Cynthia
 Subject: Special Committee

Dear Colleagues,

I write to report on the progress Ron Tomalis and I made today with regard to the vetting of candidates for the independent counsel role. This morning we interviewed Louis Freeh (former Director of the FBI) and Michael Chertoff (former Secretary of the Department of Homeland Security). In addition to the notes described in the foregoing parentheticals, both men have served as former U.S. Attorneys and federal judges. They are both highly experienced in these kinds of investigations and are eminently qualified. On balance, Ron and I recommend Judge Freeh. He strikes us as more at ease with the media side of things and it is clear that this will be his #1 priority. We also think the FBI credential lends itself to an investigation of this type.

Both could independently gain your approval and consent. Of course, if anyone wants us to set up a call for tonight or early tomorrow, we will be happy to do so.

Please forgive my initial choice of e-mail for this report. However, given the time pressures, I thought this would allow us to more efficiently gain your approval and consent. Of course, if anyone wants us to set up a call for tonight or early tomorrow, we will be happy to do so.

Thank you and please advise whether you will allow us to proceed.

67. To date, Penn State paid Freeh and FSS over \$8.3 million for their work on the Sandusky matter. Moreover, the University indemnified Freeh and FSS, thus pre-insuring Freeh against the risk of the adverse legal consequences arising from his defamatory Report, and effectively giving him carte blanche to make statements he deemed necessary to accomplish the Board of Trustees' objectives.

68. Freeh and FSS issued the Freeh Report on the Sandusky matter on July 12, 2012, at which time he described his work on the Penn State engagement as "largely completed."

Penn State and the Board of Trustees Ignored Contradictory Information in Its Possession and Provided by Dr. Spanier About the Commissioned Report

69. Prior to, and at the time of, publication of the Freeh Report, Penn State had access to Freeh's source materials, Spanier's emails, and his calendar which all included information that contradicted the Freeh Report and its

conclusions. Moreover, the Board of Trustees received a letter from Dr. Spanier specifically rebutting Freeh's conclusions, providing additional information directly contradicting Freeh's conclusions.

70. Dr. Spanier's attorneys also privately submitted to the university's general counsel a detailed summary of errors and omissions in the Freeh Report. Dr. Spanier even requested a meeting with the Board to answer any and all questions and to set the record straight. His written and oral requests were all ignored.

The Freeh Report Falsely Labeled Dr. Spanier a Pedophile-Enabler Based on a 1998 Incident in Which Authorities Cleared Sandusky of Any Wrongdoing

71. The Freeh Report largely focuses on the response of Penn State officials — including Dr. Spanier — to two incidents involving Sandusky. The first occurred in 1998, when Sandusky was employed by The Second Mile and still employed by Penn State. The second incident occurred in 2001, long after Sandusky had retired, and while Sandusky was employed by The Second Mile.

72. According to the Freeh Report, on May 4, 1998, a State College woman called the University Police Department — the police agency for the Penn State campus — to report that Sandusky had apparently showered with her 11-year-old son in an athletic facility on the Penn State campus following a workout. The mother did not allege that Sandusky sexually abused or assaulted her son.

73. The Penn State Police Department immediately launched an investigation, and the detective assigned to the case interviewed the boy that same day. In addition to the Police Department, the Department of Public Welfare, Centre County Children and Youth Services, and the Centre County District Attorney's Office also investigated the matter.

74. Over the course of that month, officials would interview the boy multiple times, question Sandusky, interview a friend of the boy who also had contact with Sandusky, and actually eavesdrop on two different conversations Sandusky had with the boy's mother about the matter.

75. As the Freeh Report notes, a report by a Counselor for Children and Youth Services who interviewed the boy found that *nothing* sexual occurred between Sandusky and the boy. The Freeh Report quotes from the Counselor's written opinions, which stated that "there seems to be no incident which could be termed as sexual abuse, nor did there appear to be any sequential pattern of logic and behavior which is usually consistent with adults who have difficulty with sexual abuse of children." The Counselor informed the University Police detective investigating the case that he too found no evidence of sexual abuse.

76. Soon after, the same detective and a Department of Public Welfare caseworker named Jerry Lauro interviewed Sandusky. The detective's notes from

the interview state that both he and the caseworker agreed after interviewing Sandusky that *no sexual assault* had occurred.

77. The last entry in the detective's report of the investigation, dated June 3, 1998, states: "As a result of the investigation it could not be determined that a sexual assault occurred and SANDUSKY was advised of such. LAURO also advised that he agreed with Reporting Officer that no sexual assault occurred. Reporting Officer advised Sandusky not to shower with any child. Sandusky stated he wouldn't. CASE CLOSED."

78. In late May or June 1998, the Centre County District Attorney's Office decided it would not press any charges against Sandusky regarding the incident. The Freeh investigators did not interview anyone involved with that decision, but acknowledged that it was due to the fact that the report issued by the Youth Services Counselor explicitly found that nothing sexual occurred between Sandusky and the boy that night. Therefore, there was no crime to prosecute.

79. Ultimately, the records of the 1998 investigation were even expunged from Pennsylvania's statewide "ChildLine" database of suspected child abuse reports. This was because, pursuant to Pennsylvania's Child Protective Services Law, the 1998 report regarding Sandusky was classified as "*unfounded*."

80. The Freeh Report also notes that certain Penn State officials were aware of and kept informed of the investigation. In particular, Athletic Director Tim

Curley, Senior Vice President of Finance and Business Gary Schultz, and the University Police Chief, Tom Harmon, corresponded regarding the course of the investigation. On June 1, 1998, Harmon emailed Schultz to tell him that the police had informed Sandusky that no criminal behavior had been established, and the investigation was closed.

81. According to the Freeh Report itself, there was no evidence of any awareness by Dr. Spanier of the 1998 report other than the possibility that he could have seen two emails between others on which Dr. Spanier was merely copied. The first, from May 5, 1998, is an email from Curley to Schultz, which does not mention Sandusky's name, and simply states, without any additional context or background: "I have touched base with the coach. Keep us posted. Thanks." Schultz responds, again merely copying Dr. Spanier, "Will do. Since we talked tonight I've learned that the Public Welfare people will interview the individual Thursday." The Freeh Report claims that because Dr. Spanier was copied on this email, Dr. Spanier was necessarily aware of the 1998 investigation of Sandusky. But there is no evidence that this email even involved Sandusky at all.

82. Then, on June 9, 1998, Schultz emailed Curley, copying Dr. Spanier, and wrote that investigators "met with Jerry on Monday and concluded there was *no criminal behavior and the matter was closed as an investigation....* I think the matter has been appropriately investigated and I hope it is behind us."

83. Dr. Spanier has no recollection of receiving or reviewing these emails. But Dr. Spanier's detailed calendar entries from 1998 show that he was out of the country on an international trip to the United Kingdom from June 8 to June 16, 1998. This occurred at a time before BlackBerry-type devices were available, and during a trip when Dr. Spanier was moving each day from one U.K. university to another.

84. Dr. Spanier was without email access and could not have possibly seen the June 9 email until he returned to the United States a week later, if he saw it at all, at which time it would have been among a thousand emails waiting in his inbox.

85. At the time, Dr. Spanier received approximately 25,000 emails a year. Moreover, Dr. Spanier's calendar shows he turned right around and left town on the morning of June 17 for a board meeting in Washington, D.C. for two days. Furthermore, there is no record of any response to or acknowledgment of receipt of such emails.

86. Freeh and FSS had access to and made copies of Dr. Spanier's calendars. Freeh was aware that Dr. Spanier had been travelling internationally at the time the June 9, 1998 email was sent, that he would have had up to a thousand emails waiting for him when he got back, and that he therefore may have never even seen the June 9 email, or may have skimmed past it quickly without an understanding of who or what the email referred to.

87. Accordingly, Freeh and FSS knew it was likely that Dr. Spanier did not see the June 9, 1998 email, and that even if he did, he was merely copied on an exchange between others on an email expressly stating that there was “*no evidence of criminal behavior.*” Freeh recklessly and intentionally minimized the import of this information to reinforce his claim that Dr. Spanier knew Sandusky was a pedophile and chose to conceal that information.

88. Thus, the Freeh Report details an incident in 1998 in which (1) Sandusky allegedly showered with a boy in a locker room after a workout; (2) numerous agencies of the State and County were informed of the situation by appropriate law enforcement authorities who conducted investigations; (3) trained professionals concluded that no sexual abuse or impropriety took place, and the report was determined to be “unfounded;” (4) the authorities declined to prosecute, finding no crime; and (5) Dr. Spanier was copied on two emails (the first with a vague reference and no name mentioned and the second of which was sent while he was out of the country and may never have seen, and consisted of his subordinate — who *was* following the investigation — stating that the matter was appropriately investigated and that the case was closed).

89. The Freeh Report then claims that Dr. Spanier’s failure to act on this information renders him a pedophile enabler. The Report rails that Dr. Spanier “took no action to limit Sandusky’s access to Penn State facilities or [] any measures to

protect children on their campuses.” And despite begrudgingly acknowledging that Sandusky was effectively cleared of any wrongdoing, the Freeh Report then faults Dr. Spanier, who was not involved in any way, for not declaring Sandusky a “persona non grata” on the Penn State Campus.

90. Finally, the Freeh Report, after concluding that the 1998 incident had nothing to do with Sandusky’s retirement, then accuses Dr. Spanier of actively deciding “to allow Sandusky to retire in 1999, not as a suspected child predator, but as a valued member of the Penn State football legacy....” This Report, authored by a former federal prosecutor and judge, makes this accusation with absolutely no explanation as to how or why Dr. Spanier could have or should have considered Sandusky a “suspected child predator” in 1999, after law enforcement officials determined that Sandusky *did not* abuse the boy or commit any other criminal act.

91. The Freeh Report’s accusations that Dr. Spanier knowingly failed to protect potential sexual abuse victims, and his faulting of Dr. Spanier for affirmatively choosing to allow Sandusky to retire in 1999 without labeling him a “suspected child predator” — even though Freeh and FSS knew no sexual abuse was alleged or occurred, and they knew that Dr. Spanier likely did not even know of the investigation — are false.

The Freeh Report Falsely Accused Dr. Spanier of Conspiring to Cover up a Sexual Assault by Sandusky in 2001

92. The second Sandusky incident that the Freeh Report focuses on is a 2001 incident in which a Penn State football staffer reported witnessing Sandusky and a male in the showers of an athletic facility on the Penn State campus. Graduate assistant Mike McQueary is believed to have reported to Joe Paterno on February 10, 2001 that on the evening before, Friday, February 9, 2001, he witnessed something that made him uncomfortable. More than a decade later, McQueary testified that he entered the locker room of the Lasch Building between 9:00 p.m. and 9:30 p.m. and heard what he described as “sexual sounds.” McQueary’s story about what he saw that night has been inconsistent at best.

93. McQueary says he saw Sandusky — who by that time was employed solely by The Second Mile — with a boy McQueary believed to be between 10 and 12 years old. Exactly what McQueary saw that night may never be known. As multiple news outlets have reported, and as transcripts of his court testimony reveal, McQueary’s stories of what he saw and what he reported varied widely and changed multiple times.

94. According to McQueary, the first persons he informed immediately after the alleged incident were his father, John McQueary, and a family friend and colleague of his father’s, a prominent local physician named Dr. Jonathon Dranov at

John McQueary's home. During Sandusky's criminal trial, Dr. Dranov — who under Pennsylvania law is *required* to report suspected child abuse — testified under oath that McQueary reported that he was upset by the incident, but, when pressed by Dr. Dranov three times, said that he *did not witness anything sexual*.

95. Acting on his father and Dr. Dranov's suggestions, McQueary then set up a meeting with head coach Joe Paterno. Both McQueary and Paterno later testified that McQueary told Paterno nothing specific, but rather advised that he saw something that he felt was inappropriate.

96. On Sunday, February 11, Paterno spoke with Athletic Director Curley. Paterno passed along substantially the same information that was related to him by McQueary, and Curley later testified that all he understood was that the graduate assistant saw something in the shower area that made him uncomfortable. Curley later relayed this information to Senior Vice President Schultz, who had the impression that Paterno described the events very generally, and speculated that the incident may have involved "wrestling around" activity. Schultz believed that the incident was inappropriate, but not a crime.

97. On February 12, 2001 Schultz and Curley met briefly with Dr. Spanier to give him a "heads up" regarding the situation. During his interview with Freeh and two of his investigators, Dr. Spanier related that this was a short meeting, and that he was told of Sandusky and a youth "horsing around" in the showers. Dr.

Spanier specifically asked if that is how the incident was described, and they answered affirmatively. Dr. Spanier was and is adamant that neither Curley or Schultz told him that there was anything abusive, criminal or sexual that occurred between Sandusky and the young male. Curley and Schultz independently have verified Dr. Spanier's account. Dr. Spanier was told the shower was after a workout and the witness was unsure what he saw because it was "indirect and around a corner." McQueary's name was not mentioned. Dr. Spanier was not aware of the witness, the specific location, or time of day and did not know that The Second Mile youth might be below high school age.

98. Dr. Spanier explained to Freeh that he recalled an agreed-upon plan for Curley to advise Sandusky that (1) he was being directed to not shower again with youth, and (2) that the head of The Second Mile should be advised of this directive.

99. On February 27, 2001, Curley emailed Schultz and Dr. Spanier to say that he believed the best course of action was to meet with Sandusky and tell him that bringing young men into the campus facilities was inappropriate. Moreover, Curley would meet with the head of The Second Mile, the youth charity that employed Sandusky, to inform the organization of the allegations.

100. Dr. Spanier responded to this email to say that this approach was acceptable and a reasonable way to proceed.

101. Dr. Spanier told Freeh investigators that several days later, he saw Curley, who informed him that both the meeting with Sandusky and the meeting with The Second Mile had occurred and gone well. Dr. Spanier considered this to have been an appropriate response to what he understood to be mere horseplay between a Second Mile employee and a youth that took place on campus. Dr. Spanier considered the matter closed at that time.

102. Dr. Spanier did not hear of any other incidents involving Sandusky, including any allegations of abuse by Sandusky, until Sandusky was criminally indicted a decade later.

103. The Freeh Report makes numerous sweeping and defamatory statements regarding Dr. Spanier and his actions in 2001. The Report charges that nothing indicates that Dr. Spanier “made any effort to identify the child victim or determine if he had been harmed.” Freeh accuses Dr. Spanier of “total and consistent disregard ... for the safety and welfare of Sandusky’s child victims,” and of “fail[ing] to protect against a child sexual predator harming children for over a decade.” Freeh further accuses Dr. Spanier of “conceal[ing] Sandusky’s activities from the Board of Trustees, the University community and authorities,” and of “exhibit[ing] a striking lack of empathy for Sandusky’s victims by failing to inquire as to their safety and well-being, especially by not attempting to determine the identity of the child who Sandusky assaulted in the Lasch Building in 2001.”

Finally, Freeh claims that by knowingly failing to alert the Board of Trustees of “child sexual abuse allegations against Sandusky,” Dr. Spanier is guilty of intentionally “empower[ing] Sandusky to attract potential victims to the campus.”

104. Freeh and his colleagues made these severe, irreparably harmful allegations despite a lack of any evidence whatsoever that Dr. Spanier was informed of any allegations of sexual assault or child abuse in 2001 or at any other time. Not only did Freeh know that his investigation was glaringly deficient and far too inadequate to allow him a basis to make such accusations, he in fact willfully ignored, purposefully avoided, or downplayed actual evidence regarding exactly what Dr. Spanier knew — evidence that uniformly shows that Dr. Spanier was *not* informed of any allegation of sexual abuse of any child by Sandusky.

105. The Freeh Report’s claims regarding Dr. Spanier’s knowledge of, and response to, the 2001 incident are false.

**Penn State and the Board of Trustees Knew the Freeh Report Would
Scapegoat Dr. Spanier**

106. Freeh went to great lengths in his Report and accompanying press conference to stress that his investigation was comprehensive, complete, and independent. Freeh and the Penn State Board of Trustees knew that, to serve the Report’s intended purpose to convince the public that the “bad apples” had been rooted out, that “closure” had been achieved, and so they could “move on,” it was

essential that Freeh be viewed as an impartial and disinterested neutral, with no stake in the ultimate outcome of the investigation.

107. One way Freeh perpetrated this illusion was by trumpeting the claim that the final Freeh Report was released to the public and the Penn State Board of Trustees at the same time. The fact that the Board did not get an advance copy of the Report was held up as an example of the independence of Freeh's investigation.

108. But in fact Freeh had ongoing discussions with selected Board members regarding the course of the investigation, and its likely outcome, long before the release of the final Report. Emails between Freeh and Board members show that Freeh regularly briefed Board members on the status of the investigation.

109. For example, in April 2012 — three months before Freeh even interviewed Dr. Spanier, and three months before the Report was released — Freeh and two members of the Board openly discussed targeting Dr. Spanier. When a media outlet reported that Dr. Spanier had been asked to take on a national security position with a government agency, Freeh and Board members plotted to deny Dr. Spanier this employment opportunity. Freeh went so far as to refer to the coordinated targeting of Dr. Spanier by the Board and FSS as “our job.”

From: Frazier, Kenneth C. <ken_frazier@merck.com>
Sent: Thursday, April 12, 2012 8:31 AM
To: Louis Freeh
Cc: Tomalis, Ronald; Omar McNeil -- Freeh Group
Subject: Re: Former Penn State University president Graham Spanier to begin new job for federal government

Oh brother...

Sent from my iPad

On Apr 12, 2012, at 8:22 AM, "Louis Freeh" <freeh@freehgroup.com> wrote:

Very interesting--we have done our job notifying the Federal prosecutors regarding the latest information.

Sent from my iPhone

On Apr 12, 2012, at 8:18 AM, "Tomalis, Ronald" <<mailto:rtomalis@pa.gov>rtomalis@pa.gov> wrote:

Seems someone might not have done their homework...

Former Penn State University president Graham Spanier to begin new job for federal government

Sara Ganim

Patriot News

April 11, 2012

Former Penn State University president Graham Spanier said he will soon begin working for the federal government on projects related to national security.

"For the next several months, as I transition to my post-presidential plans, I will be working on a special project for the U.S. government relating national security. This builds on my prior positions working with federal agencies to foster improved cooperation between our nation's national security agencies and other entities," Spanier said in an Email.

Spanier was ousted as the university's leader on Nov. 9, less than a week after former assistant football coach Jerry Sandusky was charged with child sex abuse.

110. Through such discussions, which are not revealed in Freeh's "independent" Report, Freeh kept his client aware of his intentions, and Freeh's client communicated its desires to Freeh. The claim that Freeh released his Report to the Board at the same time as it was released to the public was a public relations

ploy meant to create the illusion that the Board had no involvement at all in Freeh's "independent" investigation. In fact, some members of the Board knew the ultimate accusations the Report would contain before it was released.

111. Indeed, the primary goal of the Freeh investigation was to assign blame to specific individuals, which is evidenced by the engagement letter memorializing the agreement between FSS and the "Special Investigations Task Force," a group formed by the Board of Trustees to oversee the Freeh investigation.

112. The engagement letter states that the express purposes of Freeh's investigation, and the Report that would follow, would be to make findings concerning: "i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches, and other staff." Thus, Freeh's investigation from the outset *assumed* that certain individuals at Penn State were aware of and concealed evidence of sexual abuse by Sandusky, and Freeh's charge was to identify those individuals and explain why they failed to report suspected child abuse.

113. The engagement letter also makes clear that Freeh and FSS were to "act under the sole direction of the Task Force in performing the [above-described] services," and that Freeh and FSS would perform these services "for the Task Force's benefit."

114. Freeh also knew that, at the time he was retained, a media narrative was forming that suggested Penn State officials, particularly Schultz, Curley, and Paterno, had been aware of allegations regarding Sandusky but had not done enough to intervene. In particular, Schultz and Curley were indicted in connection with the investigation along with Sandusky, before Freeh was retained.

115. On June 16, 2012, — a month before the Report was published — the Associated Press published an interview with Penn State University Trustee Keith Masser, in which Masser defended the Board of Trustees' purported decision to oust Dr. Spanier as President of the University. Masser was quoted as saying that Dr. Spanier was "involved in a cover-up," and that "top administration officials and top athletic officials were involved in making the decision to not inform the proper authorities" of Sandusky's criminal activities.

116. The Masser interview was published by the Associated Press and widely circulated by other media outlets nearly three weeks before Freeh interviewed Dr. Spanier and nearly a month before the Freeh Report was released.

117. Before Freeh interviewed Dr. Spanier and before he issued his Report, Freeh knew that his client had publicly accused Dr. Spanier of participating in a cover-up of Sandusky's sexual abuse. Freeh knew that his client expected the Report to echo the public position of the Board of Trustees. Based on the Board's directions, Freeh thus determined before interviewing Dr. Spanier that he was going to issue a

Report accusing Dr. Spanier of actively participating in a cover-up and actively deciding to conceal Sandusky's criminal activities.

118. Freeh also knew that in addition to securing the resignation of Dr. Spanier, the Board of Trustees had also fired Paterno, returned Schultz to retirement, and determined that they would not renew Curley's contract. Freeh knew that by accusing Dr. Spanier of being a "wrongdoer" along with Schultz, Curley, and Paterno, he could release a report that not only justified the Board's actions, but that also reinforced then-Vice Chair Masser's preexisting media narrative. By claiming that Dr. Spanier joined Schultz, Curley, and Paterno in a "cover up" of Sandusky's actions, Freeh knew that he could advance his client's interests by scapegoating a discrete set of individuals and providing a reason — a supposed cover-up — for why the Board should be considered substantively blameless by the public.

119. Freeh also knew that the NCAA expected him to target the University's highest-level officials like Dr. Spanier and Coach Paterno to justify the NCAA's highly dubious claim to have jurisdiction to punish Penn State for Sandusky's actions. Freeh's Report, which claims that the investigation was entirely independent, intentionally omits mention of the facts that Freeh and his investigators held multiple meetings and at least 15 conference calls with NCAA officials, that NCAA officials provided the blueprint for the investigation, and that NCAA officials provided Freeh with 32 questions the NCAA expected Freeh to investigate. The

Report also fails to mention that it was understood that Freeh's "independent" investigation was expected to substitute for an NCAA investigation and the prospect of a separate, additional NCAA investigation loomed unless the NCAA was satisfied with Freeh's conclusions.

120. Although the Board of Trustees still has not authorized any meaningful examination of the credibility of the Freeh Report, others have; it has been the subject of numerous critiques, and many of its claims have since been heavily scrutinized. On June 19, 2014, Hearing Examiner Michael Bangs of the Pennsylvania State Employees Retirement System issued an opinion recommending that Sandusky's state pension be restored. Bangs's findings and conclusions addressed the Freeh Report, and specifically rebutted the Report's claim that "Penn State made 71 separate payments to Sandusky for travel, meals, lodging, speaking engagements, camps and other activities from January 5, 2000 through July 22, 2008."

121. Hearing Examiner Bangs's opinion found that "there is no factual support whatsoever that Penn State made 71 separate payments to [Sandusky] between 2000 and 2008, as set forth in the Freeh Report." Instead, "an examination of [Sandusky's] tax records and the records provided by Penn State's legal counsel reveal[ed] that there were no more than six payments made to [Sandusky], with several being reimbursement for travel expenses." Noting that the Freeh Report was

“based on significant hearsay and was mostly ruled inadmissible,” Bangs found that “[t]he *terrifically significant disparity between the findings in the Freeh Report and the actual truth is disturbing.*” He went on to opine that “the use of this remarkably incorrect statistic by the Freeh Report, which was then relied upon to form the basis for a number of its other conclusions, calls into question the accuracy and veracity of the entire report.”

122. Former Penn State President Rodney Erickson, who was President during the investigation and when the Report was released, has also stated that aspects of the Freeh Report are “inaccurate and unfortunate,” and that the Report will “never be a complete record in the sense that not everyone who was involved had an opportunity to or was able to be interviewed.”

123. Indeed, even the current President of Penn State, Eric Barron, has recently said that “[t]here are significant problems with the Freeh Report,” “Freeh did not have subpoena power” and thus he did not “interview many of the most salient individuals,” “Freeh expressed his personal opinions and conclusions about the motivation of individuals, rather than simply presenting factual information,” and finally that “*the limitations of the Freeh report prevent it from being the basis of any decision facing Penn State.*” (Emphasis in original.) Of course as this Second Amended Complaint details, the Freeh Report has been and continues to be the basis

for many important decisions made by the Trustees and the NCAA — including the University’s counterclaims against Dr. Spanier filed in this case.

124. In a commentary on ESPN.com following a settlement between Penn State and the NCAA regarding the sanctions that followed the release of the Freeh Report, college football reporter Ivan Maisel stated, “The Freeh Report, as it turned out, carried all the factual gravitas of a high school term paper.”

Penn State Brazenly and Repeatedly Breaches the Separation Agreement by Making False and Negative Statements About Dr. Spanier

125. Penn State has willfully and repeatedly breached the Separation Agreement and caused further harm and damage to Dr. Spanier.

126. Although the Separation Agreement expressly prohibits Penn State and its Board of Trustees from making “any negative comments about Dr. Spanier” to the media or any other members of the public except in limited circumstances, Penn State and certain members of the Board of Trustees have repeatedly done so in breach of the Separation Agreement.

127. Penn State Board of Trustees member Keith Masser stated in a June 2012 interview with the Associated Press that Dr. Spanier was “involved in a cover-up” of Sandusky’s criminal activities. Masser understood that this statement would be published to the general public when he made it.

157. However, upon learning the leaked information that Sandusky, Curley, and Schultz would be charged criminally, Dr. Spanier felt and acted with an immense sense of urgency. He immediately informed the Chair of the Board, and he met daily or near-daily with the Chair of the Board in the days leading up to the issuance of the Grand Jury presentment. He took part in a series of emergency meetings that followed.

158. In fact, after the release of the Grand Jury presentment on November 5, 2011, the Chair of the Board determined that a meeting of the Board could wait until Monday, November 7. Dr. Spanier insisted that emergency Board meetings be held on Saturday, November 5, and Sunday, November 6, in order to quickly address the unfolding crisis.

159. Dr. Spanier was also under orders from John Surma, Vice Chair of the Board, not to make any public statements or hold a press conference, because the Board would be handling the crisis management rather than University officials.

160. The Trustees' accusation that Dr. Spanier altered a University press release regarding the Sandusky indictment is also demonstrably false and untrue. The press release in question was drafted in consultation with board leadership and the University's Office of Public Information, and the Board of Trustees revised it on the evening of Sunday, November 6, 2011. Dr. Spanier sent the final draft of the press release to the Chair of the Board of Trustees for review before it was issued.

He did not substantively alter the planned release in any way before it was disseminated on Monday, November 7, 2011.

161. The negative comments about Dr. Spanier made by the Trustees in January 2012 were made voluntarily to the news media. The statements were not made to comply with any legal requirement or obligation, and they were not made for the purpose of providing truthful information in connection with any ongoing or forthcoming investigations.

162. Each of the foregoing comments by Penn State and its Board members regarding Dr. Spanier are negative and false.

163. During his tenure as President of Penn State, Dr. Spanier never received any information that Sandusky had abused a child, and Dr. Spanier was never provided information that would lead him to conclude that Sandusky had ever committed a criminal act directed at a child until *after* Sandusky's criminal indictment. Dr. Spanier did not seek to, nor did he, conceal or cover up any information regarding Sandusky's criminal activities from the Board of Trustees or anyone else.

Dr. Spanier Has Suffered Significant Reputational, Emotional, and Economic Harm as a Result of Penn State's and the Board Members' Statements

164. Penn State's and its Board Members' disparaging statements regarding Dr. Spanier have caused him severe damage.

216. To date, Penn State refuses to pay *any* of the Hiltzik Strategies Invoices, in spite of its legal obligation to do so. The Hiltzik Strategies Invoices total \$171,400.00 and are past due and owing.

217. The Separation Agreement affords Dr. Spanier broad and mandatory indemnification and reimbursement rights from Penn State.

218. Penn State has materially breached the Separation Agreement and refused to indemnify and pay Dr. Spanier for past-due Covered Costs.

219. As set forth above, Penn State's refusal to indemnify, reimburse, or pay Dr. Spanier for Covered Costs is a material breach of the Separation Agreement, and Dr. Spanier has been injured by Penn State's breach.

**COUNT I: BREACH OF CONTRACT FOR NEGATIVE AND UNTRUE
COMMENTS BY PENN STATE AND BOARD MEMBERS KENNETH
FRAZIER AND KAREN PEETZ**

220. Plaintiff incorporates by reference paragraphs 1 through 219 of this Second Amended Complaint as if fully set forth herein.

221. The Separation Agreement between Dr. Spanier and Penn State is a valid and enforceable contract.

222. A copy of the Separation Agreement is attached to this Second Amended Complaint as Exhibit A.

repair the damage to his reputation, and by having to incur the substantial burden and expense of bringing and pursuing this action in order to enforce his rights under the Separation Agreement.

**COUNT II: BREACH OF CONTRACT FOR NEGATIVE AND UNTRUE
COMMENTS OF TRUSTEE KEITH MASSER**

234. Plaintiff incorporates by reference paragraphs 1 through 233 of this Complaint as if fully set forth herein.

235. The Separation Agreement between Dr. Spanier and Penn State is a valid and enforceable contract.

236. A copy of the Separation Agreement is attached to this Second Amended Complaint as Exhibit A.

237. The Separation Agreement prohibits Penn State from making any negative and untrue comments about Dr. Spanier to the media, to his professional colleagues, or to any other members of the public.

238. The Separation Agreement requires Penn State to use reasonable efforts to cause the members of the Board of Trustees not to make any negative comments about Dr. Spanier to the media, to his professional colleagues, or to any other members of the public.

239. Penn State has materially breached the Separation Agreement.

246. Dr. Spanier has been damaged by Penn State's contractual breach by, among other things, having his reputation tarnished, by having Trustee Masser's statement widely published and disseminated in the media, by loss of employment opportunities, by having to hire a professional media relations firm to attempt to repair the damage to his reputation, and by having to incur the substantial burden and expense of bringing and pursuing this action in order to enforce his rights under the Separation Agreement.

**COUNT III: BREACH OF CONTRACT FOR NEGATIVE AND UNTRUE
COMMENTS OF TRUSTEES TO THE NEW YORK TIMES**

247. Plaintiff incorporates by reference paragraphs 1 through 246 of this Second Amended Complaint as if fully set forth herein.

248. The Separation Agreement between Dr. Spanier and Penn State is a valid and enforceable contract.

249. A copy of the Separation Agreement is attached to this Second Amended Complaint as Exhibit A.

250. The Separation Agreement prohibits Penn State from making any negative and untrue comments about Dr. Spanier to the media, to his professional colleagues, or to any other members of the public.

251. The Separation Agreement requires Penn State to use reasonable efforts to cause the members of the Board of Trustees not to make any negative and untrue

repair the damage to his reputation, and by having to incur the substantial burden and expense of bringing and pursuing this action in order to enforce his rights under the Separation Agreement.

**COUNT IV: BREACH OF CONTRACT FOR FAILURE TO PROVIDE
ADMINISTRATIVE SUPPORT**

260. Plaintiff incorporates by reference paragraphs 1 through 259 of this Second Amended Complaint as if fully set forth herein.

261. The Separation Agreement between Dr. Spanier and Penn State is a valid and enforceable contract.

262. A copy of the Separation Agreement is attached to this Second Amended Complaint as Exhibit A.

263. The Separation Agreement requires Penn State to provide Dr. Spanier computer access, IT support, administrative support commensurate with that provided to other tenured faculty members and University Professors, an office, and a staff assistant.

264. Penn State has materially breached the Separation Agreement.

265. Penn State has not provided Dr. Spanier with computer access or IT support. Penn State in fact confiscated from Dr. Spanier his University-issued desktop computer, laptop computer, and iPad, and cut off his ability to access the Penn State network.

266. Penn State has not provided Dr. Spanier with administrative support commensurate with that provided to other faculty members and former presidents. Penn State in fact has not provided Dr. Spanier with any administrative support.

267. Penn State has not provided Dr. Spanier with an office or a staff assistant. Penn State has knowingly and intentionally ignored Dr. Spanier's requests for an assigned office space and a staff assistant.

268. Dr. Spanier has performed all of his obligations under the Separation Agreement.

269. Dr. Spanier has been damaged by Penn State's contractual breach by, among other things, having no access to the University network, by having no ability to teach courses or otherwise work as a tenured University Professor as required by the Separation Agreement, and by having to incur the substantial burden and expense of bringing and pursuing this action in order to enforce his rights under the Separation Agreement.

COUNT V: BREACH OF CONTRACT FOR FAILURE TO PAY LEGAL FEES AND RELATED EXPENSES

270. Plaintiff incorporates by reference paragraphs 1 through 269 of this Second Amended Complaint as if fully set forth herein.

271. The Separation Agreement between Dr. Spanier and Penn State is a valid and enforceable contract.



C L A R E L O C K E
L L P

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January 12, 2017

Via U.S. Mail

Honorable Robert J. Eby
Lebanon County Court of Common Pleas
400 South 8th Street
Lebanon, PA 17042

**Re: *Graham B. Spanier v. The Pennsylvania State University,
Centre County Court of Common Pleas, No. 2016-0571***

Dear Judge Eby:

Enclosed please find Dr. Spanier's: (1) Second Amended Complaint with Exhibits A-E; (2) Preliminary Objections to the Counterclaim filed by Penn State; (3) Brief in Support of Preliminary Objections; and (4) Reply to the New Matter filed by Penn State.

Please note, Dr. Spanier files this Second Amended Complaint in response to Penn State's preliminary objection to Count V seeking more details related to Dr. Spanier's claims for reimbursement and indemnification. The Second Amended Complaint provides the additional details that were requested. The substantive changes in the Second Amended Complaint are reflected in paragraphs 182 through 219 and 270 through 287.

If you have any questions or concerns, please let me know.

Respectfully submitted,

Thomas A. Clare

Enclosures





cc: Michael T. Scott, Esquire (via e-mail and U.S. mail)