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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

___Medical Professional Liability Action (check if applicable)

Type of Pleading:
Motion for Post-Trial Relief

Filed on Behalf of:
Defendant, The Pennsylvania State University

Counsel of Record for this Party:
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DOCKET NO. 2012-1804

EXHIBITS

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EXHIBIT I

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MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:
	: HON. THOMAS G. GAVIN
	:
Defendant.	:

TRIAL MEMORANDUM ON BEHALF OF DEFENDANT, THE PENNSYLVANIA STATE UNIVERSITY IN SUPPORT OF ITS MOTION FOR COMPULSORY NONSUIT ON PLAINTIFF'S MISREPRESENTATION CLAIM

Defendant, The Pennsylvania State University ("the University"), by and through its undersigned counsel, submits the within Memorandum in support of its Oral Motion for Compulsory Nonsuit pursuant to Rule 230.1(a) of the Pennsylvania Rules of Civil Procedure. The University moves for compulsory nonsuit on the claim of Intentional Misrepresentation (Count III) asserted by Plaintiff, Michael J. McQueary ("Plaintiff" or "Mr. McQueary").

EXHIBIT "I"

II. ARGUMENT

During the course of Plaintiff's case-in-chief, Plaintiff failed to present clear and convincing evidence to support his alleged intentional misrepresentation claim. For this and the foregoing reasons, this Court should enter a compulsory nonsuit against Plaintiff.

A. Legal Standard.

Rule 230.1 of the Pennsylvania Rules of Civil Procedure provides that:

> (1) In an action involving only one plaintiff and one defendant, the court, on oral motion of the defendant, may enter a nonsuit on any and all causes of action if, at the close of the plaintiff's case on liability, the plaintiff has failed to establish a right to relief.
>
> (2) The court in deciding the motion shall consider only evidence which was introduced by the plaintiff and any evidence favorable to the plaintiff introduced by the defendant prior to the close of the plaintiff's case.

Pa. R.C.P. No. 230.1(a).

In determining whether the plaintiff has established a right to relief,

> [t]he plaintiff must be allowed the benefit of all favorable evidence and reasonable inferences arising therefrom, and [*59] any conflicts in the evidence must be resolved in favor of the plaintiff. Further, [i]t has been long settled that a compulsory nonsuit can only be granted in cases where it is clear that a cause of action has not been established. However[,] where it is clear a cause of action has not been established, a compulsory nonsuit is proper.

Staiger v. Holohan, 100 A.3d 622, 624 (Pa. Super. Ct. 2014) (quoting Braun v. Target Corp., 983 A.2d 752, 754 (Pa. Super. Ct. 2009).

B. Plaintiff's Intentional Misrepresentation Claim Fails.

Plaintiff's intentional misrepresentation claim in Count III of the Complaint is based on three (3) statements allegedly made by Tim Curley and Gary Schultz to Plaintiff during a meeting attended by all three in February 2001. See Complaint, ¶¶ 15-16, and 59-64. Plaintiff failed to present clear and convincing evidence of any intentional misrepresentation that proximately caused him harm.

1. Burden of Proof.

In order to establish entitlement to relief on a claim of intentional misrepresentation, Plaintiff must establish: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or reckless as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and, (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citing Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994), in turn citing, Restatement (Second) of Torts § 525 (1977)). Plaintiff bears the burden of proving each of those elements by clear and convincing evidence. Cresswell v. Nat'l Mut. Cas. Ins. Co., 820 A.2d 172, 179 (Pa. Super. Ct. 2003).

2. Plaintiff failed to produce sufficient evidence of an intentional misrepresentation that proximately caused him harm.

Plaintiff claims that Curley and Schultz intentionally misrepresented to him that they would see that the matter would be properly investigated and that appropriate

action would be taken so as to induce Plaintiff not to report the matter to law enforcement. See Complaint, Par. 61. Plaintiff has failed to offer sufficient evidence to establish a misrepresentation that proximately caused him harm.

Plaintiff testified that Curley and Schultz made the statements upon which the misrepresentation claim is based during a February 22 or 23, 2001 meeting at the Bryce Jordan Center. (See N.T., Jury Trial A.M. Day 5, at pgs. 45, 51, and 54.) Plaintiff further testified that "possibly ten days, roughly a week" after the February 22 or 23, 2011 meeting in which the alleged misrepresentations were made, he received a telephone call from Curley. (N.T. Jury Trial A.M. Day 5, at pg. 55.) During that call, Curley told Plaintiff: ***"[W]e told The Second Mile and we've told Jerry he's no longer allowed to bring kids into the facility" and "we've decided to take Jerry's keys away."*** Id.

Based on Plaintiff's own testimony, there can be no finding of a misrepresentation with respect to the actions that Mr. Curley and Mr. Schultz represented would be taken during the February 22 or 23, 2001 meeting. Indeed, and following this meeting, Plaintiff admits that Mr. Curley told him what actions were **actually** taken, which did not include reporting the matter to law enforcement. Plaintiff cannot now viably claim that Mr. Curley or Mr. Schultz intentionally made any misrepresentations to induce him not to report the matter to law enforcement.

Plaintiff also provided no testimony or evidence that he raised any objection to Curley or Schultz to the stated course of action at that time, or at any time prior to the

initiation of this lawsuit. ***Indeed, Plaintiff testified at trial that he "could not believe it" when he learned that Curley was "in trouble" and was to be charged.*** (Id. at pg. 68.) Plaintiff's shock demonstrates that he believed the steps Curley laid out to Plaintiff by telephone ten years earlier were proper and appropriate. (Id.). Relatedly, because Plaintiff failed to establish any misrepresentation, any harm suffered by Plaintiff was not proximately cause by any action of the University.

III. CONCLUSION

For all the foregoing reasons, the University's Motion should be granted.

Respectfully submitted,

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Dated: October 25, 2016

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MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	: IN THE COURT OF COMMON : PLEAS OF CENTRE COUNTY : : : CIVIL ACTION NO. 2012-1804 : : HON. THOMAS G. GAVIN : :

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 25th day of October, 2016, a true and correct copy of the TRIAL MEMORANDUM ON BEHALF OF DEFENDANT, THE PENNSYLVANIA STATE UNIVERSITY IN SUPPORT OF ITS MOTION FOR COMPULSORY NONSUIT ON PLAINTIFF'S MISREPRESENTATION CLAIM was served upon the following persons via hand delivery in court:

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By: _____

EXHIBIT J

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MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
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	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE	:
UNIVERSITY,	: HON. THOMAS G. GAVIN
	:
Defendant.	:

PROPOSED POINTS FOR CHARGE ON BEHALF OF DEFENDANT, THE PENNSYLVANIA STATE UNIVERSITY

Defendant the Pennsylvania State University ("the University"), by and through its counsel, White and Williams LLP, hereby submits its proposed jury instructions. Counsel has modified some of the suggested standard civil jury instructions below to reflect the proper identification of the parties by name, gender, and entity association, as well as the general nature of the claims asserted by Plaintiff Michael McQueary ("Plaintiff") in this action. The University reserves the right to amend, supplement, or withdraw any of these proposed instructions prior to and during trial.

EXHIBIT "J"

COMPLETE PROPOSED JURY INSTRUCTIONS (STANDARD, MODIFIED STANDARD, AND SUPPLEMENTAL)

Defense Instruction No. 1. **Preliminary Instructions**

Jury service is an important responsibility of citizenship, fundamental to our entire system of justice. The courts cannot function unless citizens serve as jurors. Thanks to jurors, our society resolves its disputes in a civilized manner, in a courtroom where citizens decide upon a verdict.

By your verdict, you will decide disputed questions of fact from the evidence presented in the case. I will decide all questions of law that arise during the trial. Before you retire to deliberate at the close of the case, I will instruct you more fully on the law that you must follow and apply in deciding your verdict. It is your duty as jurors to follow the law as I shall state it to you and apply that law to the facts as you find them from the evidence presented in the case. You are not to be concerned with the wisdom or soundness of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty for you to base a verdict on any view of the law other than that given in my instructions, just as it would also be a violation of your sworn duty, as finders of the facts, to base a verdict on anything other than the evidence in this case.

Pennsylvania Standard Civil Jury Instructions 1.10; Adapted from O'Malley, Grenig & Lee, Federal Jury Practice and Instructions - Civil §§ 101.01, 101.10, 101.31 (5th ed. 2000).

Defense Instruction No. 2. **Binding Instruction**

Under the facts presented to you, your verdict on Plaintiff's defamation claim must be in favor of the Defendant, the Pennsylvania State University.

Defense Instruction No. 3. **Binding Instruction**

Under the facts presented to you, your verdict on Plaintiff's misrepresentation claim must be in favor of the Defendant, the Pennsylvania State University.

Defense Instruction No. 4. **Sympathy**

In making your decision as to whether or not the University is liable to the Plaintiff, you may not permit sympathy for any parties in this case to influence your decision even in the slightest degree. It would be improper for you to allow any feelings you might have about the nature of the claims against the University to influence you in any way. Rather, there must be evidence upon which logically your conclusions are based.

Tauber v. Wilkinson, 309 Pa 331, 335 (Pa. 1932).

Defense Instruction No. 5. **Bias**

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, socioeconomic status, or *corporate status*.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 1.140 (4th Ed. with 2016 Supplements) (amendment italicized)

Defense Instruction No. 6. **Corporate Defendants**

It is the law of Pennsylvania that a non-profit corporation has the same rights and obligations as any individual, and in deciding this case, you must not allow the fact that the University is a non-profit corporation and that the Plaintiff is an individual to affect or influence your judgment in any way.

Gift v. Palmer, 392 Pa. 628, 632 (1958); Schofield v. King, 388 Pa. 132, 135 (1957).

Defense Instruction No. 7. **Evidence – Definition**

I have mentioned the word "evidence" and will use that term more during these instructions. "Evidence" includes the testimony of witnesses. Evidence also includes documents and other exhibits admitted during the trial. Certain things are not evidence and you cannot base your verdict upon them. I will now describe what is not evidence:

1. The lawyers are not witnesses and what they say is not evidence in the case. Their opening statements, arguments, questions, comments, and closing arguments are not evidence.

2. Anything you see or hear about this case outside the courtroom is not evidence and should never be considered by you in reaching your verdict.

3. I may strike from the record certain statements or exhibits. If that happens, I will tell you what you may not consider as evidence.

Any verdict which you return must be based solely and entirely upon the evidence presented and the law that is applicable. Filing of a lawsuit is not evidence of liability.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 1.190 (4th Ed. with 2016 Supplements)

Defense Instruction No. 8. **Ruling on Evidentiary Objections**

Judges and lawyers must follow Pennsylvania Rules of Evidence, which control what evidence lawyers may introduce during trial.

When a lawyer asks a question or offers an exhibit into evidence, and a lawyer on the other side thinks it is not proper under the Rules of Evidence, then the lawyer must "object" and I must rule on the objection.

If I overrule the objection, that means that the question can be answered or the exhibit received into evidence.

If I sustain [or uphold/approve] the objection, that means it was a proper objection under the law and, therefore, the witness cannot answer the question, or the exhibit cannot be put into evidence.

If I sustain [or uphold/approve] an objection to a question, you must not guess what the answer might have been.

If I sustain [or uphold/approve] an objection to an exhibit, you must not guess what the exhibit contains.

Please be assured that my ruling on what questions may be asked or what evidence may be presented is based upon the law and Rules of Evidence. As the judge of the law, I must apply the Rules of Evidence established over the past 200 or more years. My rulings have nothing whatsoever to do with whether or not I believe a witness or favor one party or parties over the other.

Sometimes a witness may answer a question before I have the opportunity to rule on an objection. I may order that the question and answer be removed and stricken from the record, and I may tell you that you must disregard or ignore the evidence I have stricken. If this should happen, you must not consider the evidence I told you to disregard. I understand this may be difficult, so we will do our best to see that this does not happen.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 1.200 (4th Ed. with 2016 Supplements)

Defense Instruction No. 9. **Deposition Testimony**

The sworn testimony of [name], taken by [deposition] [videotape] prior to this trial, is about to be presented to you. The testimony of a [witness] [party] who for some proper reason cannot be present to testify in person, may be presented in this form. Such testimony is given under oath and in the presence of lawyers for the parties, who question the witness. A court reporter takes down everything that is said and then transcribes the testimony. [The use of videotape permits you to see and hear the witness as [he] [she] appeared and testified under questioning by the lawyer.] This form of testimony is entitled to the same consideration as if the testimony of the [witness] [party] testified in court.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 2.10 (4th Ed. with 2016 Supplements)

Defense Instruction No. 10. **Stipulations of Fact**

[First Alternative]

The stipulation of fact[s] that has been offered and received in evidence constitutes an agreement by the opposing parties, through their lawyers, that [this] [these] fact[s] may be accepted as undisputed. [This fact] [These facts] require[s] no further proof, and no contradictory evidence will be permitted. [This fact is] [These facts are] to be accepted by you as binding and conclusive for the purposes of this trial.

[Second Alternative]

You have heard the stipulation, or agreement, by the parties through their lawyers, as to the testimony that would be given by [name] if [he] [she] testified as a witness in this case. This is simply evidence that you will consider with all the other evidence in the case and you may accept or reject all or any part of such evidence.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 2.50 (4th Ed. with 2016 Supplements)

Defense Instruction No. 11. **Exhibits**

The exhibits that have been identified and received in evidence are now being shown to you for your careful examination, without discussion at this time, to aid you in understanding the testimony.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 2.80 (4th Ed. with 2016 Supplements)

Defense Instruction No. 12. **Evidentiary Admissions – Answers to Interrogatories**

Before the trial began, the lawyer for the University sent Plaintiff what we call "Interrogatories," which are written questions.

Plaintiff provided written answers, under oath. You [will now hear] [heard] the sworn answers given by Michael McQueary in his answers to interrogatories. These answers are entitled to the same consideration as if the witness said them in court. You should consider [this] [these] answer[s] using the same factors to evaluate their believability as if the witness testified in person in the courtroom.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 3.10 (4th Ed. with 2016 Supplements)

Defense Instruction No. 13. **Evidence Admitted Only as to One Party or for One Purpose**

You will now [hear] [see] evidence that:

a. applies only to [insert party], and/or

b. you may consider only for one purpose: [insert purpose].

You should not consider it for [any other party] [any other purpose].

Pennsylvania Suggested Standard Jury Instruction (Civ.) 3.40 (4th Ed. with 2016 Supplements)

Defense Instruction No. 14. **Direct and Circumstantial Evidence**

The evidence presented to you may be either direct or circumstantial evidence.

Direct evidence is testimony about what a witness personally saw, heard, or did.

Circumstantial evidence is testimony about one or more facts that logically lead you to believe the truth of another fact.

You should consider both direct and circumstantial evidence in reaching your verdict.

You may decide the facts in this case based upon circumstantial evidence alone.

I will give you an example of the difference between direct and circumstantial evidence. A person may testify that it was snowing at a particular time because he looked outside and saw the snow falling. If, however, he did not actually see the snow coming down, but when he first looked outside one morning he saw fresh snow where there had been none the night before, he can testify to these facts and the jury may conclude from those facts that it had snowed during the night.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.00 (4th Ed. with 2016 Supplements) (selecting first alternative example for circumstantial evidence)

Defense Instruction No. 15. **Believability of Witnesses Generally**

As judges of the facts, you decide the believability of the witnesses' testimony. This means that you decide the truthfulness and accuracy of each witness's testimony and whether to believe all, or part, or none of each witness's testimony.

The following are some of the factors that you may and should consider when determining the believability of the witnesses and their testimony:

a. How well could each witness see, hear, or know the things about which he or she testified?

b. How well could each witness remember and describe those things?

c. Was the ability of the witness to see, hear, know, remember, or describe those things affected by age or any physical, mental, or intellectual disability?

d. Did the witness testify in a convincing manner? How did the witness look, act, and speak while testifying?

e. Was the witness's testimony uncertain, confused, self-contradictory, or presented in an evasive manner?

f. Did the witness have any interest in the outcome of this case, or any bias, or any prejudice, or any other motive that might have affected his or her testimony?

g. Was a witness's testimony contradicted or supported by other witnesses' testimony or other evidence?

h. Does the testimony make sense?

i. If you believe some part of the testimony of a witness to be inaccurate, consider whether that inaccuracy casts doubt upon the rest of that same witness's testimony. You should consider whether the inaccuracy is in an important matter or a minor detail.

You should also consider any possible explanation for the inaccuracy. Did the witness make an honest mistake or simply forget, or was there a deliberate attempt to present false testimony?

j. If you decide that a witness intentionally lied about a significant fact that may affect the outcome of the case, you may, for that reason alone, choose to disbelieve the rest of that witness's testimony. But, you are not required to do so.

k. As you decide the believability of each witness's testimony, you will at the same time decide the believability of other witnesses and other evidence in the case.

l. If there is a conflict in the testimony, you must decide which, if any, testimony you believe is true.

As the only judges of believability and facts in this case, you, the jurors, are responsible to give the testimony of every witness, and all the other evidence, whatever weight you think it is entitled to receive.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.20 (4th Ed. with 2016 Supplements)

Defense Instruction No. 16. **Conflicting Testimony**

You may find inconsistencies within the testimony of a single witness, or conflicts between the testimony of several witnesses. Conflicts or inconsistencies do not necessarily mean that a witness intentionally lied. Sometimes two or more persons witnessing the same incident see, hear, or remember it differently. Sometimes a witness remembers incorrectly or forgets. If the testimony of a witness seems inconsistent within itself, or if the testimony given by several witnesses conflicts, you should try to *reconcile* the differences. If you cannot reconcile the differences, you must then decide which testimony, if any, you believe.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.30 (4th Ed. with 2016 Supplements)

Defense Instruction No. 17. **Intentionally False Testimony**

If you decide that a witness intentionally lied about a fact that may affect the outcome of the case, you may, for that reason alone, choose to disbelieve the rest of that witness's testimony. But, you are not required to do so. You should consider not only the lie, but also all the other factors I have given you, in deciding whether to believe other parts of the witness's testimony.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.40 (4th Ed. with 2016 Supplements)

Defense Instruction No. 18. **Impeachment or Corroboration of Witness by Prior Inconsistent or Consistent Statements**

Inconsistent Statement

You may have heard evidence that a witness made [an earlier statement] [earlier state-ments] inconsistent with [his] [her] testimony in court. You may consider the earlier [statement] [statements] to evaluate the believability, in other words, the truthfulness and accuracy of the witness's testimony in court.

Consistent Statement

You may have heard evidence that a witness made [an earlier statement] [earlier statements] consistent with [his] [her] testimony in court. You may consider the earlier [statement] [statements] only to evaluate the truthfulness and accuracy of the witness's testimony in court.

Pennsylvania Standard Civil Jury Instructions 4.50.

Defense Instruction No. 19. **Expert Testimony**

During the trial you have heard testimony from both fact witnesses and expert witnesses.

To assist juries in deciding cases such as this one, involving scientific, technical, or other specialized knowledge beyond that possessed by a layperson, the law allows an expert witness with special education and experience to present opinion testimony.

An expert witness gives his or her opinion, to a reasonable degree of professional certainty, based upon the assumption of certain facts. You do not have to accept an expert's opinion just because he or she is considered an expert in his or her field.

In evaluating an expert witness's testimony, or in resolving any conflicting expert witness's testimony, you should consider the following:

- the witness's knowledge, skill, experience, training, and education;
- whether you find that the facts the witness relied upon in reaching his or her opinion are accurate; and
- all the believability factors I have given to you.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.80 (4th Ed. with 2016 Supplements)

Defense Instruction No. 20. **Expert Testimony: General**

Any evidence which is placed before you by an expert witness is opinion evidence. Opinion evidence is merely that - an opinion that you are free to accept or disregard. If you believe that either the opinion or the person who proposes the opinion lacks credibility, then you may disregard the evidence offered.

Rhoades, Inc. v. United Airlines, 340 F. 2d 481 (3d Cir. 1965).

Defense Instruction No. 21. **Expert Testimony; Hypothetical Question**

The expert witnesses were asked to assume that certain facts were true and to give an opinion based upon those assumptions. These are called hypothetical questions.

If you find that any important fact assumed in the hypothetical question has not been established by the evidence, you should disregard the expert's opinion given in response to that question.

Similarly, if the expert has made it clear that his or her opinion is based on the assumption that an important fact did not exist, and you find that it did exist, you should disregard that opinion.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.90 (4th Ed. with 2016 Supplements)

Defense Instruction No. 22. **Expert Testimony – Function of Expert**

If you disbelieve the facts upon which the opinion is based you may disregard that expert's opinion.

Kozak v. Struth, 515 Pa. 554, 558, 531 A.2d 420, 422 (1987).

Defense Instruction No. 23. **Weighing Conflicting Expert Testimony**

In resolving any conflict that may exist in the testimony of expert witnesses, you are entitled to weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and reliability of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.100 (4th Ed. with 2016 Supplements)

Defense Instruction No. 24. **Expert Testimony: Basis of Opinion**

An expert witness may use only factors supported by the evidence to reach his or her conclusion. An expert is not permitted to reach a conclusion and then supply through speculation or conjecture the facts necessary to support that conclusion. If you find that the facts necessary to support the opinion of any expert witness were supplied only by that expert, then the expert opinion is of no value and you should not consider it.

Collins v. Hand, 431 Pa. 378, 246 A.2d 398 (1968).

Defense Instruction No. 25. **Expert Opinion – Basis for Opinion Generally**

In general, the opinion of an expert has value only when you accept the facts upon which it is based. This is true whether the facts are assumed hypothetically by the expert, or they come from the expert's personal knowledge, from some other proper source, or from some combination of these.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.120 (4th Ed. with 2016 Supplements)

Defense Instruction No. 26. **Expert Testimony – Cautionary Charge**

The mere fact that this court has permitted a witness to testify as an expert witness should not be interpreted by you to mean that the court in any way sanctions the testimony given. In permitting a witness to testify as an expert, the court's only function is to determine whether or not the witness has any reasonable pretension to specialized knowledge on the subject matter in question "and the weight to be given to his evidence is for the jury."

Adapted from Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.110 (4th Ed. with 2016 Supplements); Moodie v. Westinghouse Elec. Corp., 367 Pa. 493, 80 A.2d 734 (1951); Taylor v. Celotex, 393 Pa. Super. 566, 574 A.2d 1084, 1092 (1990).

Defense Instruction No. 27. **Burden of Proof and Preponderance of Evidence**

Under the law, the Plaintiff has the burden of proving his claims.

As I said before, this is a civil case, not a criminal case. The burden of proof in a civil case is different from the burden of proof in a criminal case. In a civil case, the Plaintiff must generally prove his claims by a legal standard called a "preponderance of the evidence." Preponderance of the evidence means that a fact is more likely true than not.

Think about an old-fashioned balance scale with a pan on each side to hold objects. Imagine using the scale as you deliberate in the jury room. Place all the believable evidence favorable to the Plaintiff in one pan. Place all the believable evidence favorable to the University in the other. If the scales tip, even slightly, to the Plaintiff's side, then the Plaintiff has met his burden of proving that fact. If, however, the scales tip even slightly on the University's side, or if the two sides of the scale balance equally, the Plaintiff has not met his burden of proof.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 5.00 (4th Ed. with 2016 Supplements) (amended to fit facts of this case); O'Rourke v. Department of Corrections, 778 A.2d 1194, 1200 (Pa. 2001) (whistleblower elements); BLACK'S LAW DICTIONARY 1206 (7th ed. 1999).

Defense Instruction No. 28. **Clear and Convincing Evidence**

Plaintiff must prove his fraudulent misrepresentation and defamation claims by a legal standard called "clear and convincing evidence." The clear and convincing standard is the highest level of proof in civil actions. The clear and convincing standard imposes a heavier burden on the Plaintiff than the "preponderance of the evidence" standard I previously defined for you.

To establish his claims by "clear and convincing evidence," Plaintiff must present evidence that is so clear, direct, and substantial that you are convinced, without hesitation, that a fact is true. Although this is a significant burden of proof, it does not mean the Plaintiff must prove the facts at issue beyond all doubt or beyond a reasonable doubt.

In order to succeed with his defamation claim, Plaintiff must prove with clear and convincing evidence that Spanier's November 5, 2011 statement was materially false. In addition to proving falsity, Plaintiff must prove that the University acted with actual malice when it published Spanier's November 5, 2011 statement. To establish actual malice, Plaintiff has the burden of proving by clear and convincing evidence that the University published Spanier's November 5, 2011 statement:

1. knowing it was false;

- or -

2. after entertaining serious doubt as to the truth of the statement.

Falsity of a statement is insufficient to prove malice. Mere negligence or carelessness is not evidence of actual malice. Evidence of ill-will or the University's desire to harm the Plaintiff's reputation, although probative of the University's state of mind, without more, does not establish actual malice.

Plaintiff also has the burden of proving his fraudulent misrepresentation claim by clear and convincing evidence. To succeed with his fraudulent representation claim, Plaintiff has the burden of proving each of the following elements with clear and convincing evidence:

1. That Tim Curley and Gary Schultz made a material representation to Plaintiff;

2. That when Curley and Schultz made the representation to Plaintiff they knew the representation was false or entertained serious doubt as to the truth of the representation;

3. That Curley and Schultz made the representation with the intent of misleading Plaintiff into relying on it;

4. That Plaintiff's reliance on Curley and Schultz's misrepresentation was justifiable; and

5. The harm Plaintiff alleges he sustained was proximately caused by his reliance on Curley and Schultz's misrepresentation.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 5.10 (4th Ed. with 2016 Supplements) (with edits to account for defamation charge); *Pittsburgh Live,*

Inc. v. Sevov, 615 A.2d 438, 442 (Pa. Super. 1992) (elements of intentional misrepresentation); *Curran v. Philadelphia Newspapers, Inc.*, 546 A.2d 639, 642 (Pa. Super. 1988), *appeal denied*, 559 A.2d 37 (Pa. 1989); *Goldstein v. Phillip Morris, Inc.*, 854 A.2d 585, 591 (Pa. Super. 2004).

Defense Instruction No. 29. **Employer Liability for Employee Engaged in Intentional Conduct – Scope of Employment**

An employer is legally responsible for the wrongful acts of an employee committed during the course of and within the scope of employment. In certain circumstances, an employer's liability may extend to intentional acts committed by the employee.

In determining whether the acts of the employee were within the course and scope of the employment, you should consider the following factors:

First, whether the act was of a kind and nature the employee was employed to perform;

Second, whether the act occurred substantially within the authorized time and space limits; and

Third, whether the act was set in motion, at least in part, by a purpose to serve the employer.

Modified Pennsylvania Suggested Standard Jury Instruction (Civ.) 6.100 (4th Ed. with 2016 Supplements)

Defense Instruction No. 30. **Defamation – Defamatory Meaning**

A communication is defamatory if it tends to so harm the reputation of that person as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. A communication that states or implies that a person has acted in a way that would be inconsistent with the proper, honest, and lawful performance of his or her job, profession, or office, or has a character that would make him or her unfit to properly, honestly, and lawfully perform his or her job, profession, or office, is defamatory. Words are not defamatory merely because they are annoying or embarrassing to the person referred to in the communication.

In deciding whether the communication was defamatory, you should consider the message the communication would send to the average people who could have been expected to receive it. This means you should consider the innuendoes and implications of what was said, as well as inferences the recipients would have drawn from what may not have been said. You should also consider the context in which the allegedly defamatory statement was made.

Adapted from Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.100 (4th Ed. with 2016 Supplements)

Defense Instruction No. 31. **Defamation – Publication**

A defendant is responsible for communicating a defamatory statement if the defendant personally communicated it or directed or participated in another's publication of the defamatory statement. The burden is on the Plaintiff to show that the University either personally published the communication or directed or participated in another's publication of the defamatory statement.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.110 (4th Ed. with 2016 Supplements)

Defense Instruction No. 32. **Defamation – Identification of the Plaintiff**

It is not necessary for the Plaintiff to be specifically identified by name or official position for the communication to defame him. The Plaintiff may be defamed if the University intended the communication to refer to the Plaintiff, or if a description or reference tends to identify him. The Plaintiff also may be defamed where a recipient of the communication is familiar with the circumstances mentioned in the communication and recognizes that it concerns the Plaintiff. The burden is on the Plaintiff to show that a description or reference in the communication, or familiarity with the circumstances, would lead the recipients of the communication to reasonably understand it as referring to the Plaintiff.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.120 (4th Ed. with 2016 Supplements)

Defense Instruction No. 33. **Defamation – Proof of Falsity Where the Plaintiff is a Public Figure or Public Official**

A communication may be false either because it contains untrue or incomplete statements of fact or because its implication is untrue. The burden is on the Plaintiff to prove that the communication was defamatory and was false.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.140 (4th Ed. with 2016 Supplements)

Defense Instruction No. 34. **Defamation – Expression of Opinion**

The University asserts that the allegedly defamatory communication is purely an expression of opinion. The Plaintiff denies that this is so. A defendant is not liable for a communication that is pure opinion and does not state or imply any facts.

A fact is something that can be proven true or false. An opinion, on the other hand, cannot be proved true or false.

A communication is not protected merely because it is said to be an opinion. A communication is not protected if it states a defamatory fact or implies that undisclosed defamatory facts exist concerning the Plaintiff.

The Plaintiff must prove that the communication stated a defamatory fact or implied the existence of undisclosed defamatory facts concerning the Plaintiff.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.150 (4th Ed. with 2016 Supplements)

Defense Instruction No. 35. **Defamation – Proof of Fault Where the Plaintiff is a Public Official or Public Figure**

The Plaintiff is required to prove, by clear and convincing evidence, that the University published the communication either with knowledge of its falsity or with a reckless disregard for whether it was true or false. A person recklessly publishes a defamatory communication when he or she does so despite serious doubts about the truth of the communication or when he or she possesses a high degree of awareness of its probable falsity. Serious doubt or the possession of a high degree of awareness of probable falsity may be inferred from relevant circumstantial evidence of the state of mind of the person who published the defamation.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.170 (4th Ed. with 2016 Supplements)

Defense Instruction No. 36. **Defamation – Actual Malice**

In order to succeed with his defamation claim, Plaintiff must prove that the University acted with actual malice when it published Spanier's November 5, 2011 statement. To establish actual malice, Plaintiff has the burden of proving by clear and convincing evidence that the University published Spanier's November 5, 2011 statement:

1. knowing it was false;

- or -

2. after entertaining serious doubt as to the truth of the statement.

Actual malice is not measured by whether a reasonably prudent person would have published, or would have investigated before publishing. Falsity of a statement is insufficient to prove malice. Mere negligence or carelessness is not evidence of actual malice. Evidence of ill-will or the University's desire to harm the Plaintiff's reputation, although probative of the University's state of mind, without more, does not establish actual malice.

Lewis v. Philadelphia Newspapers, Inc., 833 A.2d 185, 191-192 (Pa. Super. 2003); Reiter v. Manna, 436 Pa. Super. 192, 647 A.2d 562, 565 (Pa. Super. 1994)

Defense Instruction No. 37. **Defamation – Truth as a Defense**

An essential element of defamation is that the statement published was false. Consequently, if the statement was in fact true, there can be no defamation regardless of the University's motivations. The University has the burden to prove that the statement was more likely true than not.

42 Pa. C.S. §8343(b)(1); American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania, 923 A.2d 389, 396 (Pa. 2007).

Defense Instruction No. 38. **Defamation - Public Concern**

The University is not liable if it has proven that Spanier's November 5, 2011 statement was a matter of public concern. Speech upon matters of public concern is entitled to special protection under the First Amendment. Even statements that are considered inappropriate or controversial are entitled to protection. Speech deals with matters of public concern when it relates to any matter of political, social, or other concern to the community or when it is a subject of legitimate news interest. Speech by public employees is also deemed to be speech about public concern when it relates to their employment. You, the Jury, must determine whether President Spanier's November 5, 2011 statement was a matter of public concern.

42 Pa.C.S. § 8343; *Snyder v. Phelps*, 562 U.S. 443, 451 (2011); *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 467 (3d Cir. 2015) (applying Pennsylvania law); *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

Defense Instruction No. 39. **Defamation – Failure to Verify**

A defendant's failure to verify his facts may constitute negligence, but does not rise to the level of actual malice. That is, while it arguably may be negligent not to check independently the veracity of information before publication, this fault does not rise to the level of actual malice.

Reiter v. Manna, 436 Pa. Super. 192, 647 A.2d 562, 565 (Pa. Super. 1994)

Defense Instruction No. 40. **Damages – Defamation**

The Plaintiff is entitled to be fairly and adequately compensated for all harm he suffered as a result of the false and defamatory communication published by the University.

A. The injuries for which you may compensate the Plaintiff by an award of damages against the University include:

First, the actual harm to the Plaintiff's reputation that you find resulted from the University's conduct;

Second, the emotional distress, mental anguish, and humiliation that you find the Plaintiff suffered as a result of the University's conduct.

Third, any other special injuries that you find the Plaintiff suffered as a result of the University's act.

B. If you find that the University acted either intentionally or recklessly in publishing the false and defamatory communication, you may presume that the Plaintiff suffered both injury to his reputation and the emotional distress, mental anguish, and humiliation that would result from such a communication. This means you need not have proof that the Plaintiff suffered emotional distress, mental anguish, and humiliation in order to award him damages for such harm because such harm is presumed by the law when a defendant publishes a false and

defamatory communication with the knowledge that it is false or in reckless disregard of whether it is true or false.

In determining the amount of an award for such presumed injury to the Plaintiff's reputation and suffering of emotional distress, mental anguish, and humiliation by the Plaintiff, you may consider the character and previous general standing and reputation of the Plaintiff in his community. You may also consider the character of the defamatory communication that the University published, its area of dissemination, and the extent and duration of the publication. If the University made a public retraction or apology to the person or persons to whom the publication was made, that fact, together with the timeliness and adequacy of the retraction or apology, is important in determining the probable harm to the Plaintiff's reputation.

The motive and purpose of the University, his belief or knowledge of the falsity of the publication, and the conduct of the Plaintiff are not to be considered by you in determining the amount of the damages to which the Plaintiff is entitled for the above-stated items. Such factors are only important to the question of whether you will award punitive damages against the University and if you choose to make such an award, the amount of the award.

Where the Plaintiff is a public official or a public figure, for purposes of awarding punitive damages, the Plaintiff must also prove that the University acted

with ill will or evil motive toward the Plaintiff in publishing the allegedly defamatory communication in order to recover punitive damages.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.180 (4th Ed. with 2016 Supplements)

Defense Instruction No. 41. **Fraudulent Misrepresentation or Nondisclosure**

A person must use reasonable care to disclose a material fact if:

First, the person knows he or she is making or later learns he or she has made a misrepresentation, or

Second, the person knows he or she is making or later learns he or she has made a misleading representation, or

Third, the person knows he or she is making a misrepresentation or misleading representation or later learns that another is about to act in reliance upon it. If that person fails to do so, he or she is responsible for all harm resulting from that other person's reliance on the misrepresentation or misleading representation.

A misrepresentation is any assertion by words or conduct that is not in accordance with the facts.

A misleading representation is an assertion by words or conduct that is likely to mislead another regarding the facts.

A fact is material if it is one that would be of importance to a reasonable person in determining a choice of action. A material fact, however, need not be the sole or even a substantial factor in inducing or influencing a reasonable person's decision. A fact is also material if the person who fails to disclose it knows that the

person to whom it is made is likely to regard it as important even though a reasonable person would not regard it as important.

"Reliance" means a person would not have acted as he or she did or would not have failed to act unless he or she considered the misrepresentation or misleading representation to be true.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.260 (4th Ed. with 2016 Supplements)

Defense Instruction No. 42. **Damages**

It is necessary that I charge you on damages so that you have all of the law before you; however, merely because I have charged you on damages should not be construed by you as an indication that there is liability in this case or that you should find liability in this case.

Further, the fact that I charge you on the measurement of damages does not indicate, nor should it be considered by you as an indication, that I think damages should be awarded. I give you instructions on damages solely because I am required to charge you on all phases of the case which you might have to consider. The court is instructing you on damages only so you may know the applicable law if you reach that question on the jury verdict form.

Only if you find liability should you then consider the issue of damages.

Dupont v. Gallagher, 62 A.2d 28 (Pa. 1948); Based on Pennsylvania Suggested Standard Civil Jury Instruction (Civ.) 7.00 (4th. Ed. with 2016 Supplements).

Defense Instruction No. 43. **Plaintiff's Burden to Prove Damages**

It is the Plaintiff's burden to prove each element of the damages they claim. If you find any element of the damages claimed has not been proved, then your verdict may not include compensation for that element of damages.

Gordon v. Trovato, 338 A.2d 653 (Pa. Super. 1975).

Defense Instruction No. 44. **Compensatory Damages**

A party may recover only those damages that will fairly compensate that party for the injuries legally caused by a defendant.

Incollingo v. Ewing, 282 A.2d 206 (Pa. 1971).

Defense Instruction No. 45. **Damages as Compensation**

The fundamental principle on which damages is based is that compensation should be just. Plaintiff should not profit from or be overcompensated for any alleged harm he sustained. The burden is on the Plaintiff to establish damages, not the University.

Incollingo v. Ewing, 282 A.2d 206 (Pa. 1971).

Defense Instruction No. 46. **Damages are not Punishment**

In determining the amount of damages, you should not attempt to punish the University. Just as your verdict should not be influenced by sympathy for the individual who suffered the injury, it should not be influenced by prejudice against any party who caused the injury.

Incollingo v. Ewing, 282 A.2d 206 (Pa. 1971).

Defense Instruction No. 47. **Damages May Not Be Speculative**

Proof in support of a claim for damages including future damages must permit more than a mere guess or speculation.

Fish v. Gosnell, 316 Pa. Super. 565, 4631 A.2d 1042 (1983); Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980).

Defense Instruction No. 48. **Mitigation of Damages**

Plaintiff had a duty to act to mitigate his damages. If substantially comparable work was available and the Plaintiff failed to exercise reasonable diligence in seeking that work, then the plaintiff has failed to properly mitigate his damages. The University must prove that substantially comparable employment was available and the Plaintiff failed to take reasonable steps to obtain a replacement position. You, the Jury, determine whether the Plaintiff has acted with reasonable diligence to mitigate his damages in this case.

See Merrell v. Chartiers Valley Sch. Dist., 51 A.3d 286, 298 (Pa. Commw. Ct. 2012).

Defense Instruction No. 49. **Punitive Damages – General Instructions**

If you find that the conduct of the University was outrageous, you may award punitive damages, as well as any compensatory damages, in order to punish the University for its conduct and to deter the University and others from committing similar acts.

Conduct is outrageous when it is malicious, wanton, willful, or oppressive, or shows reckless indifference to the interests of others.

Modified Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.00 (4th Ed. with 2016 Supplements)

Defense Instruction No. 50. **Punitive Damages against a Principal**

You may also award punitive damages against the Pennsylvania State University, if you find that the actions of Tim Curley or Gary Schultz or Graham Spanier:

First, were outrageous;

Second, occurred during and within the scope of Tim Curley or Gary Schultz or Graham Spanier's duties; and

Third, were not committed to satisfy Tim Curley or Gary Schultz or Graham Spanier's personal ill will or malice, but instead were committed with the intent to further the University's interests.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.10 (4th Ed. with 2016 Supplements)

Defense Instruction No. 51. **Outrageous Conduct Defined**

Conduct is outrageous when it is malicious, wanton, willful, or oppressive. Therefore, you may only find that the University's conduct was outrageous if you determine that the University acted maliciously, wantonly, willfully, or oppressively.

Adapted from Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.00 (4th Ed. with 2016 Supplements) ; e.g. Feld v. Merriam, 485 A.2d 742, 747 (Pa. 1984) (citing Restatement (Second) of Torts § 908(2)); Martin v. Johns-Manville Corp., 494 A.2d 1088, 1096 (Pa. 1985); Evans v. Philadelphia Transportation Co., 212 A.2d 440, 443 (Pa. 1965); see also Lewis v. Miller, 543 A.2d 590, 592 (Pa. Super. 1992).

Defense Instruction No. 52. **Reckless Indifference Defined**

Reckless indifference to the rights of others, sometimes referred to as "wanton misconduct," has been defined to mean that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. You may only find that the University's conduct was recklessly indifferent to the rights of Plaintiff if you determine that the University intentionally disregarded a known or obvious risk with an awareness that doing so made it highly probable that harm would result.

Adapted from Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.00 (4th Ed. with 2016 Supplements); e.g. Feld v. Merriam, 485 A.2d 742, 747 (Pa. 1984) (citing Restatement (Second) of Torts § 908(2)); Martin v. Johns-Manville Corp., 494 A.2d 1088, 1096 (Pa. 1985); Evans v. Philadelphia Transportation Co., 212 A.2d 440, 443 (Pa. 1965); see also Lewis v. Miller, 543 A.2d 590, 592 (Pa. Super. 1992).

Defense Instruction No. 53. **More than an Intentional Tort is Required to Award Punitive Damages**

The commission of an intentional tort such as defamation and fraudulent misrepresentation alleged here is not sufficient to award punitive damages. Punitive damages may only be awarded if the Plaintiff showed additional evidence of willful, malicious, wanton, reckless or oppressive conduct beyond the underlying tort of defamation or fraudulent misrepresentation.

Chambers v. Montgomery, 192 A.2d 355, 358 (Pa. 1962); Rizzo v. Haines, 555 A.2d 58, 69 (Pa. 1989); Long v. McAllister, 118 A. 506 (Pa. 1922), Erie City Iron Works v. Barber, 102 Pa. 156, 164 (1883); Smith v. Renault, 564 A.2d 188 (Pa. Super. 1989); Pittsburgh Live, Inc. v. Sevov, 615 A.2d 438, 442 (Pa. Super. 1992);Delahanty v. First Pennsylvania Bank, 464 A.2d 1243 (Pa. Super. 1983). Accord Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 741 (3d Cir. 1992) (applying Pennsylvania law); In re Lemington Home for the Aged, 777 F.3d 629, 631 (3d Cir. 2015) (same); Contractor Utility Sales Co., Inc. v. Certain-Teed Corp., 748 F.2d 1151, 1156 (7th Cir. 1984) (same).

Defense Instruction No. 54. **Punitive Damages – Defamation**

A public figure Plaintiff such as Michael McQueary may not recover punitive damages in a defamation action unless he proves actual malice. Actual malice means that the statements were made with knowledge that it was false or with reckless disregard of whether it was false or not.

New York Times Co. v. Sullivan, 376 U.S. 254, 280 (U.S. 1964); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755 (1985); Sprague v. Porter, 2014 Pa. Super. Unpub. LEXIS 1659, *66 (Pa. Super. Ct. 2014).

Defense Instruction No. 55. **Punitive Damages – Amount of Award**

If you decide that the Plaintiff is entitled to an award of punitive damages, it is your job to fix the amount of such damages. In doing so, you may consider any or all of the following factors:

1. the character of the University's act,

2. the nature and extent of the harm to the Plaintiff that the University caused or intended to cause,

3. the wealth of the University insofar as it is relevant in fixing an amount that will punish it and deter it and others from like conduct in the future.

It is not necessary that you award compensatory damages to the Plaintiff in order to assess punitive damages against the University, as long as you find in favor of the Plaintiff and against the University on the question of liability.

The amount of punitive damages awarded must not be the result of passion or prejudice against the University on the part of the jury. The sole purpose of punitive damages is to punish the University's outrageous conduct and to deter the University and others from similar acts.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.20 (4th Ed. with 2016 Supplements)

Defense Instruction No. 56. **Concluding Instructions Generally**

1. You now have all the rules of law to properly reach a verdict in this case. In a few minutes, you will begin your deliberations. Before you do so, I would like to give you a few final guidelines on conducting your deliberations and properly arriving at a verdict.

2. My responsibility, as judge, is to decide all questions of law; therefore, you must accept and follow my rulings and these instructions as to matters of law. But I am not the judge of the facts. You, the jurors, are the only judges of the facts. So your responsibility is to consider the evidence and decide what are the true facts. By applying the rules of law as given to you, to the facts as you find them, you must decide whether the Plaintiff has proven his claims.

3. The decision in this case, as I am sure you understand, is a matter of considerable importance. Your responsibility, as jurors, is to reach a verdict based on the evidence presented during the trial, and upon your evaluation of that evidence. You must consider all of the testimony you have heard, and all of the other evidence presented during this trial, in order to decide the facts.

4. In deciding the facts, you may properly apply common sense and draw upon your own everyday practical knowledge of life. You should keep your deliberations free of any bias or prejudice. All parties have the right to expect you

to consider the evidence conscientiously, and to apply the law as I have outlined it to you.

5. Before you begin to deliberate, you should select one of your group to be the foreperson. The foreperson will announce the verdict in this courtroom after you have finished deliberating. If, during deliberations, you have a serious doubt about some portion of these instructions, write your question in a note, signed by the foreperson. Give the note to the bailiff. The bailiff will give it to me for response. You should not, however, reveal to anyone how the jury stands numerically.

6. Some of you have taken notes during the trial. You will be permitted to take your notes with you to the deliberation room. In addition, you are permitted to share your notes with other jurors during your deliberations. Your notes may help you refresh your recollection of the testimony and should be treated as a supplement to, rather than a substitute for, your memory. Your notes are merely memory aids; they are not evidence or the official record. Those of you who have not taken notes are reminded to not be overly influenced by the notes taken by other jurors. Give no more or no less weight to the view of a fellow juror just because he or she did or did not take notes. Following your deliberations and after your verdict has been accepted by the court, your notes will be collected by the court and destroyed, without inspection.

7. The verdict should be rendered only after careful and thoughtful deliberations. In the course of your deliberations, you should consult with each other and discuss the evidence freely and fairly, in a sincere effort to arrive at a just verdict. It is your obligation to consider the evidence and the issues presented with a view toward reaching agreement, if you can do so without violating your own individual judgment. Each juror must decide this case for himself or herself, after examining the issues and the evidence with proper regard to the opinions of other jurors. Proper consideration of the issues before you means that you should be willing to reexamine your views and change your opinion, if convinced that it is erroneous; but you are not required to surrender an honest conviction as to the weight or effect of the evidence only because of another juror's opinion, or solely for the purpose of returning a verdict.

8. Your verdict must represent the jury's considered, final judgment. While the view of every juror must be considered, your verdict need not be unanimous. A verdict rendered by five-sixths of the jury shall constitute the verdict of the entire jury. Five-sixths of eight is seven. So when seven of you have agreed that you have reached a verdict, indeed, you have. You should tell the bailiff, and we will reconvene court to accept your verdict.

9. Please keep in mind that this dispute between the parties is, for them, a most serious matter. They and the court rely upon you to give full and

conscientious consideration to the issues and the evidence before you. Neither sympathy nor prejudice may influence your deliberations. You should not be influenced by anything other than the law and the evidence in this case, together with your own judgment and evaluation of that evidence. All parties stand equally before the court, and each is entitled to the same fair and impartial treatment in your hands.

10. I am well aware that in daily life, you may regularly communicate with friends and family through text messaging, e-mail, Twitter, social networking sites, chat rooms, Facebook, MySpace, *Instagram. Snapchat*, LinkedIn, YouTube, blogs, or other websites. Remember--you must not communicate about this case in any way, even electronically.

I also am well aware that in daily life, many of you regularly use the Internet to obtain all types of information. As I told you at the beginning of the trial, anyone can put anything on the Internet and that information may or may not be accurate or reliable, and probably would not have been admissible as evidence during this trial. During this trial, I had to decide that the information you heard was sufficiently reliable to be admissible under the Rules of Evidence and the law. Relying on any information you obtain outside the courtroom is not only a violation of these rules, it is unfair because the parties would not have the opportunity to refute it, explain it, or correct it.

You may begin your deliberations.

Combined Pennsylvania Suggested Standard Jury Instructions (Civ.) 12.00 and 12.10 (4th Ed. with 2016 Supplements) (amendments in italics)

Defense Instruction No. 57. **Copy of the Written Jury Instructions Provided to the Jury**

You will receive copies of some of my concluding instructions.

You should give equal weight to the written instructions and the instructions I am now verbally giving you.

Do not place greater emphasis on the instructions I provide you in writing.

Consider all the instructions as a whole and each in light of the others.

During your deliberations, if you have a question and need further instruction, write your question on a sheet of paper and give it to a [court officer] [jury tipstaff] who will give it to me.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 12.11 (4th Ed. with 2016 Supplements)

Defense Instruction No. 58. **Post-Deliberation Communications**

After you leave today, the lawyers, the media, or others may contact you to discuss this case.

Lawyers may want to talk to you to understand why you reached the verdict, get suggestions on how they could do better in their next trial, or various other reasons. Your friends might communicate with you personally or on your own social media sites.

As private citizens, you were called on by this court to perform one of the great duties of citizenship--to serve as a juror. It is NOT part of your responsibility to be a spokesperson for the justice system or to explain to anyone why you or your fellow jurors reached your verdict.

You have performed your duty as jurors in this case.

You have no obligation to answer anyone's questions, whether from the lawyers, the media, or anyone else. You certainly may communicate with them.

If you do discuss the case, please remember how important it is not to say anything that would be hurtful to another person and be considerate of your fellow jurors and respect their right to privacy.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 12.11 (4th Ed. with 2016 Supplements)

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: _____

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Dated: September 29, 2016

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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE	:
UNIVERSITY,	: HON. THOMAS G. GAVIN
	:
Defendant.	:

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 29nd day of September, 2016, a true and correct copy of the Proposed Points of Charge on behalf of The Pennsylvania State University was served upon the following persons via electronic and regular mail:

Elliot A. Strokoff, Esquire
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Counsel for Plaintiff

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Respectfully submitted,

WHITE AND WILLIAMS LLP

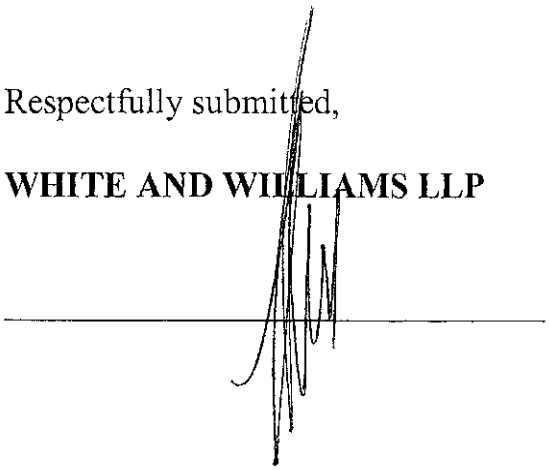
By: 

EXHIBIT K

MICHAEL J. MCQUEARY,	:	IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Plaintiff,	:	
v.	:	
	:	CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:	
Defendant.	:	

AFFIDAVIT OF GEORGE C. MORRISON REGARDING SPECIAL JURY INTERROGATORIES

I, GEORGE C. MORRISON, attorney for The Pennsylvania State University ("University") in the above captioned matter, hereby state and certify the following:

1. On or about October 17, 2016, a jury trial commenced in this matter in Centre County, Pennsylvania.

2. On or about October 26, 2016, counsel for the University requested the opportunity to submit proposed special jury interrogatories to the Court for its review and consideration in advance of jury deliberations.

3. In response to the University's request, the Court indicated that it would only consider a verdict slip that proposed basic questions to the jury, such as "did the Spanier statement defame Mr. McQueary? Yes or no. And depending on

EXHIBIT "K"

that, you get to answer a damage question and then the same thing with misrepresentation." N.T., 10/26/2016, P.M., at 62-63.

4. On or about October 27, 2016, counsel for the University handed the Court a copy of Defendant's Proposed Verdict Slip and Special Interrogatories to the Jury, attached hereto as Exhibit "A" and requested that more detailed inquiries be made of the Jury in this matter consistent with its proposed special interrogatories.

5. The Court declined to entertain the University's Proposed Verdict Slip and Special Interrogatories to the Jury.

6. The Court proceeded to utilize the Verdict Slip as completed by the Jury on October 27, 2016 and filed in this Court on or about October 28, 2016.

The statements set forth above are true and correct to the best of my knowledge, information, and belief. I understand that false statements made by me are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsifications to authorities.

Date: 2/6/17

George C. Morrison

EXHIBIT "A"

WHITE AND WILLIAMS LLP
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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE	:
UNIVERSITY,	: HON. THOMAS G. GAVIN
	:
Defendant.	:

DEFENDANT'S PROPOSED VERDICT SLIP AND SPECIAL INTERROGATORIES TO THE JURY

AND NOW, this _____ day of October, 2016, we the Jurors empaneled in the above entitled case, find as follows:

AS TO DEFAMATION

QUESTION 1:

Is the Spanier Statement (Exhibit P-38 & D-20) a statement of pure opinion?

Yes _____ No _____

If you answered Question 1 "Yes," you should not answer Questions 2 through 11, and you should proceed to Question 12. Otherwise, please answer Question 2.

QUESTION 2:

Was the subject of the Spanier Statement a matter of public concern?

Yes _____ No _____

If you answered Question 2 "Yes," please answer Question 3. Otherwise, please proceed to Question 4.

QUESTION 3:

Did Plaintiff prove that the Spanier Statement was false?

Yes _____ No _____

If you answered Question 3 "No," then you should not answer Questions 4 through 11, and should proceed to Question 12. Otherwise, please answer Questions 4 through 11.

QUESTION 4:

Did the Spanier Statement tend to harm the reputation of Plaintiff so as to lower him in the estimation of the community or deter third persons from associating or dealing with him?

Yes _____ No _____

QUESTION 5:

Was the Spanier Statement published by the University?

Yes _____ No _____

QUESTION 6:

Did the Spanier Statement apply to Plaintiff?

Yes _____ No _____

QUESTION 7:

Did any actual recipients of the Spanier Statement interpret it to apply to Plaintiff?

Yes _____ No _____

QUESTION 8:

Did any actual recipients of the Spanier Statement interpret it to mean that Plaintiff lied to law enforcement or to the grand jury?

Yes _____ No _____

QUESTION 9:

Did the Spanier Statement cause Plaintiff to suffer harm to his reputation or ability to earn a living?

Yes _____ No _____

QUESTION 10:

Was the Spanier Statement published with actual malice?

Yes _____ No _____

If you answered any of Questions 4 through 10 "No," do not answer Question 11, and proceed to Question 12. Otherwise, please answer Question 11.

QUESTION 11:

State the compensatory damages, if any, to which Plaintiff proved his entitlement.

$ _____

State the punitive damages, if any, to which Plaintiff proved his entitlement.

$ _____

Please proceed to Question 12.

AS TO INTENTIONAL MISREPRESENTATION

QUESTION 12:

Did Tim Curley or Gary Schultz state to Plaintiff during a meeting of those three individuals in the Bryce Jordan Center in February 2001 that they thought this was a serious matter, they would see that it was properly investigated, and appropriate action would be taken?

Yes _____ No _____

If you answered Question 12 "No," then you need not answer Questions 13 through 18 and should proceed to Question 19. Otherwise, please answer Question 13.

QUESTION 13:

Were those statements material?

Yes _____ No _____

If you answered Question 13 "No," then you need not answer Questions 14 through 18 and should proceed to Question 19. Otherwise, please answer Question 14.

QUESTION 14:

Were those statements made falsely or with reckless disregard to whether they were true or false?

Yes _____ No _____

If you answered Question 14 "No," then you need not answer Questions 15 through 18 and should proceed to Question 19. Otherwise, please answer Question 15.

QUESTION 15:

Were those statements, made with the intent to mislead Plaintiff into relying on them?

Yes _____ No _____

If you answered Question 15 "No," then you need not answer Questions 16 through 18 and should proceed to Question 19. Otherwise, please answer Question 16.

QUESTION 16:

Did Plaintiff justifiably and reasonably rely on those statements?

Yes _____ No _____

If you answered Question 16 "No," then you need not answer Questions 17 and 18 and should proceed to Question 19. Otherwise, please answer Question 17.

QUESTION 17:

Did Plaintiff suffer harm because he justifiably relied on those statements?

Yes _____ No _____

If you answered Question 17 "No," then you need not answer Question 18 and should proceed to Question 19. Otherwise, please answer Question 18.

QUESTION 18:

State the amount of compensatory damages, if any, to which Plaintiff proved his entitlement.

$ _____

State the amount of special or punitive damages, if any, to which Plaintiff proved his entitlement.

$ _____

Regardless of this answer, please answer Questions 19 and 20.

AS TO MITIGATION OF ANY DAMAGES:

QUESTION 19:

Were substantially comparable employment positions available after the conclusion of Plaintiff's appointment with Defendant on June 30, 2012?

Yes _____ No _____

QUESTION 20:

Did Plaintiff exercise reasonable diligence in seeking substantially comparable employment?

Yes _____ No _____

The above answers represent the deliberate conclusion of the following:

Each juror concurring in the foregoing answers and verdict should initial below, and the Foreperson should sign and date the form when complete. When the form is complete and signed, please inform the Court.

1) _____ 2) _____

3) _____ 4) _____

5) _____ 6) _____

7) _____ 8) _____

9) _____ 10) _____

11) _____ 12) _____

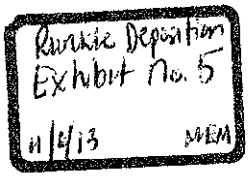
Date:_____, 2016

_____
Foreperson

EXHIBIT L

PENNSTATE POLICY MANUAL
General University Reference Utility

PENN STATE - HUMAN RESOURCES



Policy HR06 TYPES OF APPOINTMENTS

POLICY'S INITIAL DATE: June 1, 1955
THIS VERSION EFFECTIVE: July 24, 2009

Contents:

- Purpose
- Standing Appointment
- Fixed-Term Multi-Year Appointment
- Fixed-Term I Appointment
- Fixed-Term II Apointment
- Supplementary I Appointment
- Supplementary II Appointment
- Visiting Appointment
- Appointments Without Remuneration
- Personnel Appointments

PURPOSE:

The purpose of this policy is to list the types of appointments which may be made to the faculty or staff of the University and to enumerate certain personnel and budget provisions applicable to each type.

STANDING APPOINTMENT:

Standing appointment designates those appointments which are full-time and for which no ending date is specified. Such appointments are terminable only upon appropriate notice of termination in accordance with University policy. Standing appointments are regular* and must be backed by permanent budgeted funds. The position for each Standing appointment appears as a line item of a departmental budget salary schedule and is assigned a budget position number on the payroll record. Standing appointments are made for both academic and nonacademic personnel. If such an appointment is academic, a Memorandum of Personal Service form outlining the terms of the appointment is completed and given to the incumbent.

FIXED-TERM MULTI-YEAR APPOINTMENT:

Fixed-Term Multi-Year appointment designates those appointments which are full-time for a minimum of 36 weeks, but which have an ending date specified. Such appointments are regular*. The position appears as a line item on the departmental budget salary schedule and is assigned a budget position number on the payroll record. Funding must be committed on a permanent basis from the Non-Standing Fixed-Term Multi-Year Academic budget category before appointments can be made. Such appointments are discontinued at the stated ending date, but may be renewed.

EXHIBIT "L"

Fixed-Term Multi-Year appointments are made for academic personnel. A Memorandum of Personal Service form outlining the terms of the appointment is completed and given to the incumbent.

Fixed-Term Multi-Year appointments may exceed one year in duration, up to a maximum of five years for a single appointment. These appointments are renewable.

FIXED-TERM I APPOINTMENT:

Fixed-Term I appointment designates those appointments which are full-time for at least six calendar months, but which have an ending date specified. Such appointments are regular*. The position does not appear as a line item of the departmental budget salary schedule and is not assigned a budget position number on a payroll record. The Fixed-Term I position is funded on a temporary basis, although the original source may be either permanent (such as allocation fund) or temporary (such as salary savings from an unfilled position). Such appointments are discontinued at the stated ending date, but may be renewed.

Fixed-Term I appointments are made for both academic and nonacademic personnel (other than technical-service). If such an appointment is academic, a Memorandum of Personal Service form outlining the terms of the appointment is completed and given to the incumbent. If such appointment is nonacademic, a Confirmation of Fixed-Term I Staff Appointment is completed and given to the incumbent.

FIXED-TERM II APPOINTMENT:

Fixed-Term II appointment designates those academic or exempt staff appointments which are:

(a) full-time but less than six calendar months; or

(b) less than full-time.

Such appointments are defined as non-regular*. The position does not appear as a line item on the departmental budget salary schedule and is not assigned a budget position number on the payroll record. The Fixed-Term II appointment position is funded on a temporary basis, although the original source may be either permanent (such as allocation fund) or temporary (such as salary savings from an unfilled position). Such appointments are made to academic or exempt staff personnel only. If such an appointment is academic, a Memorandum of Personal Service form outlining the terms of the appointment is completed and given to the incumbent. If such an appointment is exempt staff, a Confirmation of Fixed-Term II Staff Appointment form is completed and given to the incumbent.

Fixed-Term II appointments are discontinued at the stated ending date, but may be renewed. If an individual receives a second Fixed-Term II appointment on a full-time basis immediately following a full-time Fixed-Term II appointment such that the total continuous full-time service equals or exceeds six calendar months, that individual will be considered as a Fixed-Term I appointment for purposes of classification as regular or non-regular*. Individuals who qualify as Fixed-Term I appointments within the preceding definition shall be classified as regular* as of the date the appointment is considered to have changed from Fixed-Term II to Fixed-Term I. Individuals who continue to be reappointed as full-time Fixed-Term II appointments for consecutive appointments shall retain the classification of regular* as long as the employment is consecutive.

SUPPLEMENTARY I APPOINTMENT:

Supplementary I appointments designate those appointments which are supplementary to Standing appointments and have the effect of providing additional contractual obligation beyond the terms of the Standing appointment. For example, a Supplementary appointment will be made so that an individual whose standing contractual obligation is for 36 weeks is employed temporarily for one to twelve additional weeks.

Funds are provided on a temporary basis, although the original source may be either permanent (such as allocation fund) or temporary (such as salary savings from an unfilled position). Normally, Supplementary I appointments are discontinued at the stated ending date, but may be renewed. Supplementary I appointments are made to both academic and exempt staff personnel. If such an appointment is academic, a Memorandum of Personal Service form outlining the terms of the appointment is completed and given to the incumbent.

Payment for Supplemental I appointments is made at the time the services are performed (whenever possible this should be in the same tax year). In no circumstance will the University process payment for services performed more than six months in the past.

SUPPLEMENTARY II APPOINTMENT:

Supplementary II appointments designate appointments which are supplementary to Standing or Fixed-Term I appointments for approved additional services provided during the same weeks of service of these appointments. Funds are provided on a temporary basis. Supplementary II appointments are discontinued at the stated ending dates, but may be renewed. Supplementary II appointments are made to academic personnel, and may be made to exempt staff personnel when performing extra non-continuing assignments as outlined in HR90.

The faculty member's first duty and responsibility is to his/her primary appointment at the University. Therefore, the dean (or assistant or associate dean if delegated by the dean) of the faculty member's college of primary appointment must approve any arrangement for Supplemental II compensation made with another University unit.

Payment for Supplemental II appointments is made at the time the services are performed (whenever possible this should be in the same tax year). In no circumstance will the University process payment for services performed more than six months in the past. The rate of pay for supplemental compensation shall not exceed the amount paid for services under the terms of the faculty member's primary appointment. In addition, any supplementary compensation arrangements which would raise the employee's total pay received from the University to more than 20% above his/her base salary in any fiscal year must be approved by the dean of the faculty member's college of primary appointment. The record of such extraordinary payments will be reviewed annually by the Executive Vice President and Provost.

There may also be unique situations that require the use of Supplemental II appointments for academic personnel, which do not fall under the normal guidelines. In those rare situations, the dean must obtain the approval of the Executive Vice President and Provost before making any commitment to the academic employee regarding Supplemental II compensation.

VISITING APPOINTMENT:

Visiting appointment designates an appointment in which "visiting" is part of the title. Such an appointment is non-regular, whether full-time or part-time. All other conditions for either Fixed-Term I

or II appointments apply to Visiting appointments. Visiting appointments apply to academic personnel only.

APPOINTMENTS WITHOUT REMUNERATION:

Appointment without remuneration designates an appointment of an individual who does not receive remuneration for the academic position held in the University. Such individuals include those designated as Adjunct, Clinical Faculty, or Faculty Associate as outlined in HR07; those designated as Affiliate in HR85; or those visiting faculty who are not being paid by The Pennsylvania State University. The position does not appear as a line item on the departmental budget salary schedule and is not assigned a budget position number on the payroll record.

PERSONNEL APPOINTMENTS:

Type of Appointment	Covered By Employee Benefits	Not Covered By Employee Benefits	Academic Assignment Only	Paid On Monthly Payroll	Line Item on Dept Budget
Standing	X			X	X
Fixed-Term Multi-Year	X		X	X	X
Fixed-Term I	X			X	
Fixed-Term II		X		X	
Supplementary I	X			X	
Supplementary II	X			X	
Visiting		X	X	X	
Without Remuneration	Affiliate Only	X	X		

NOTE: See HR05 for definitions and conditions for employment for "regular" and "non-regular" appointments.

REVISIONS:

July 24, 2009 - Payment provisions added to Supplementary I and Supplementary II Appointment sections.

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GURU home | GURU Tech Support | Penn State website

EXHIBIT M

MICHAEL J. MCQUEARY	)	
	)	IN THE COURT OF COMMON PLEAS
Plaintiff	)	OF CENTRE COUNTY
	)	
vs.	)	
	)	
THE PENNSYLVANIA STATE UNIVERSITY,	)	CASE NO. 2012-1804
	)	
Defendant	)	

ORAL VIDEOTAPED/TELEPHONIC DEPOSITION

MR. WILLIAM J. O'BRIEN

October 18, 2016

ORAL VIDEOTAPED/TELEPHONIC DEPOSITION OF MR. WILLIAM J. O'BRIEN, produced as a witness at the instance of the Defendant and duly sworn, was taken in the above-styled and numbered cause on the 18th day of October, 2016, from 5:35 p.m. to 6:06 p.m., before Michelle Hartman, Certified Shorthand Reporter in and for the State of Texas and Registered Professional Reporter, reported by computerized stenotype machine at the offices of The Houston Texans, 2 NRG Park, Houston, Texas 77054, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

EXHIBIT "M"

APPEARANCES

FOR THE PLAINTIFF:

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E-mail: eas@strokoffandcowden.com

ALSO PRESENT:

Mr. Mike Flores, videographer

VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
1801 Market Street - Suite 1800
Philadelphia, PA 19103

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EXHIBITS

(None offered)

THE VIDEOGRAPHER: My name is Mike Flores representing Veritext Legal Solutions. Today's date is October 18th, 2016. The time is 5:35 p.m.

The deposition is being held at NRG Stadium located at NRG Parkway, Houston, Texas, 77054. The caption of the case is McQueary, Michael versus Penn -- Pennsylvania State University.

MR. STROKOFF: I can tell you I'm not hearing anything that the videographer's saying.

THE VIDEOGRAPHER: The name of the witness is William O'Brien.

At this time would Counsel please state their presence for the record.

MS. CONRAD: Nancy Conrad for the Defendant, the Pennsylvania State University.

MR. STROKOFF: Elliott Strokoff for the Plaintiff.

THE VIDEOGRAPHER: At this time our court reporter, Michelle Hartman, will swear in the witness.

MR. WILLIAM L. O'BRIEN,

having been first duly sworn, testified as follows:

EXAMINATION

Q. (BY MS. CONRAD) Coach, my name is

Nancy Conrad, and I represent the Pennsylvania State University.

Could you state your name for the record, please.

A. Sure. William J. O'Brien.

Q. Good afternoon, Coach O'Brien. Thank you for taking the time during this very busy season for this deposition.

Could you state your current position, please.

A. Head football coach of the Houston Texans.

Q. And how long have you held that position?

A. It's about two and a half years, going on three years.

Q. And I would like to take you through your coaching experience at this time.

Could you summarize with us starting with your first coaching position?

A. Sure. I started at my alma mater at Brown University right -- right after I graduated, and then I went to -- well, I was there for two years, and then I went to Georgia Tech for -- I believe it was about eight or nine years, and then I

went to the University of Maryland, and then the New England -- that -- University of Maryland for two years, and then the New England Patriots for five years; and then I was have hired as the head football coach at Penn State in 2012 -- beginning of 2012; and then after two years at Penn State, I -- I was hired as the head football coach of the Houston Texans.

Q. And at any time, did you coach at Duke?

A. I'm sorry. I'm sorry, yes. I try to forget my years at Duke, but I -- I was at Duke for two seasons. My -- I'm sorry about that.

Yeah, it was 2000 and -- 2005 and 2006 I was at Duke. Sorry.

Q. And would that have been between Maryland and the Patriots?

A. That's right. That's right. That's right.

Q. Okay. And no need to be sorry.

A. It's 20 --

Q. This isn't a memory test.

A. -- 25 years of coaching, so it kind of blends together after a while.

Q. I -- I understand that, Coach.

Could you brief --

MR. STROKOFF: I would like to say

that if two people speak at the same time, I can't hear either of them.

MS. CONRAD: Thank you, Elliott. We will try our best to speak one at a time.

MR. STROKOFF: Thank you.

Q. (BY MS. CONRAD) A few follow-up questions.

What was -- what were the coaching position or positions you held at Brown?

A. I was basically, you know, like a graduate assistant or a restricted-earnings coach there. So I worked for the linebacker coach. I worked for the offensive the coordinator. I did a lot of football-type grunt coaching work.

Q. And how about Georgia Tech?

A. I was -- I kind of filled a lot of different positions there. I was a graduate assistant for three years, and then I was the running back coach and also the recruiting coordinator for a couple of years. I was the offensive coordinator quarterback coach for a couple of years.

I was the assistant head coach for a year there, so I -- I was kind of every position there except for head coach.

Q. And while you were at Georgia Tech, did

you coach with Coach Stan Hixon?

A. Yes.

Q. Okay. And how long did you coach with Coach Hixon?

A. I think it was -- I think it was four years.

Q. And then what -- what coaching positions did you hold at Maryland?

A. At the University of Maryland, I was the running back coach.

Q. And then Duke, that one you forgot?

A. Yeah. Then at Duke, I was the offense coordinator and quarterback's coach.

Q. Then you went to the Patriots, correct?

A. Right.

Q. And what positions did you hold with the Patriots?

A. The Patriots, I started off as an offensive assistant, and then I became the wide receiver coach in 2008; and then in 2009, I was the quarterback coach for two years; and then in 2011, I was the offensive coordinator and quarterback coach.

Q. And from the Patriots, you then went to Penn State; is that correct?

A. That's right.

Q. Now, at the time you were interviewing for the head coach position at Penn State, did you have in mind the assistant coaches that you wanted to bring with you?

A. Yes.

Q. And who was on that list of assisting coaches that you wanted to bring with you at the time you were interviewing?

A. Well, you're allowed to have nine -- I believe at that time it was nine coaches on your staff -- full-time coaches on your staff at -- at Penn -- you know, in the divisional on the football side, I had Ted Roof to be the defensive coordinator, I had Stan Hixon to be the wide receiver coach, Charles London to be the running back coach, John Strollo to be the tight end coach. Mack (sic) McWatter to be the offensive line coach, Charlie Fisher to be the quarterback coach, and I can't think of all -- John Butler to be the secondary coach.

I'm trying to think. And then there were -- there were two -- two guys that I retained from the previous -- from Coach Paterno's staff and that was Larry Johnson and Ron Vanderlinden.

Q. Okay. And we're going to get to some questions about Coach Johnson and Coach Vanderlinden.

Now, were -- these assistant coaches that you just named, did you already have them in mind even before you were hired by Penn State?

A. Well, the way that it works is you have a list of -- when you're -- when you're rising up the ladder, you have a list of potential coaches for your staff, you know.

So for a few years, as I was, you know, in a pretty good position at New England, I had been contacted for various head coaching jobs. So I had a -- whether it was college or professional, so I had a list of coaches for each, you know, professional staff and college staff; and that -- you know, some of those names were the same.

But yeah, so you have a -- you have a -- a list of coaches that you would like to inquire about when you get your head job.

Q. And why was Stan Hixon on that list?

A. Stan was a guy that I had coached with at -- at Georgia Tech that had -- you know, I thought had done a really good job there; had coached a lot of good players, had professional experience with the Washington Redskins; had worked with Joe Gibbs; had worked at LSU for Nick Saban; you know, just had a lot of -- a lot of -- a lot of good experience.

Q. And then what about Charles London?

A. Charles London had worked for me at Duke. He was my graduate assistant when I was at Duke and then -- in my first year, and then in my second year at Duke, he became the running back coach.

And then when I went to the Patriots, he went to the Chicago Bears, and he also worked for the Tennessee Titans in the years I was at the Patriots, so I -- I felt like he had really good experience, and he and I -- you know, he and I shared the same football philosophies.

Q. And then once you were hired by Penn State and appointed to the head coach position, did you have discretion to hire your own staff?

A. Yes.

Q. And was that complete discretion?

A. Yes, they didn't -- yes, it -- it was complete discretion.

Q. And generally in the field of -- of football, what is the general practice when a -- for a new head coach with respect to retaining the former staff or the staff that is already at that team?

A. Well, you know, I'm only familiar with the -- the staff changes that -- that I have been

involved with and, you know, most -- most of the staff changes, what happens is you have to have your own team around you, you know, your own -- your own people that -- that you've worked with in the past or that you know through common -- you know, common acquaintances, and -- and they believe in the same thing: They believe in your offensive philosophy, your defensive philosophy, your special teams, how to -- how to manage a roster, how to get your guys in shape, discipline.

You know, we -- we all -- we all share the same common, you know, way -- thoughts of how to run a football team.

Q. Now, you did retain two of the coaches that had coached under Head Paterno -- or under head Coach Paterno, didn't you?

A. Yes, I did.

Q. And who were those two coaches?

A. I retained -- I retained Ron Vanderlinden and I retained Larry Johnson.

Q. And what made you decide to retain Coach Vanderlinden?

A. Well, there were two -- there were two positions that basically I had contacted people for, a linebacker job and a defensive line job, and, you

know, whatever the reason was, those people that I had contacted couldn't either leave their current jobs or whatever.

So I felt like two of the better candidates at that time to fill those two positions were, you know, Ron and Larry; and, you know, I also thought that they could help the transition. You know, it was a -- you know obviously a tough time at Penn State and those -- those two guys were, you know, well respected by the players.

Q. And did you have any information about their reputation?

You -- you referenced that they were respected by the players.

A. Right. I had -- when I went to -- I had two -- basically two interviews for the Penn State job. One was from Gillette Stadium, where I did a Skype interview, and then one was on the campus. So I had -- for lack of a better phrase, I had spent a lot of time with the people -- the search committee, and in those conversations with the search committee, and then also when I was on campus, I had met a few players, and so within those conversations, you know, those were two guys that were definitely mentioned quite a bit.

Q. And were -- Coach Vanderlinden -- linden and Coach Johnson referenced with the players that you met with --

A. There was a --

Q. -- is that correct?

A. If I remember correctly, there were a couple of -- not a ton of players that I met with before I retained those guys, but there were a couple that, you know, said that those guys were good coaches and good men.

Q. And did you -- did there come a point in time that you met with the coaches on Coach Paterno's staff?

A. Yes.

Q. And how did that meeting come about?

A. When I -- when I was hired, it was kind of a -- there were two different conversations. When I was hired, I was told that, you know, they would -- basically administration would take care of those guys as far as talking with them; and then the next day or whatever, two days later, I don't remember the exact date, but then I was asked to talk to the guys on -- on Coach Paterno's staff, and that -- that included, you know, strength coaches, operations guys, not just coaches.

You know, that was like -- I can remember for -- I don't know the exact number, but there were several people that I met with in one day.

Q. And did you meet with Mike McQueary?

A. No.

Q. At the time of the meetings, was there an open spot for Mike McQueary on your staff?

A. No.

Q. Did you know that Mike McQueary had been the wide receiver's coach under Joe Paterno?

A. Yeah, I knew the previous staff just from the -- the -- you know, the Media Guide and things like that, yes.

Q. And at the time you conducted those meetings with Coach Paterno's coaches and staff, had you already filled the wide receiver's position with Stan Hixon?

A. Yes.

Q. Did Mike McQueary have the same qualifications or experience as Coach Hixon?

A. No.

Q. If you had met with Mr. McQueary at the same time you were meeting with the other coaches or staff and -- and staff, would you have hired Mike McQueary?

A. No.

Q. Do you know Mike McQueary as a coach by reputation?

A. No.

Q. And finally, was there an open slot on your staff for Mike McQueary?

A. No.

MS. CONRAD: Thank you. I have no further questions.

Attorney Strokoff?

EXAMINATION

Q. (BY MR. STROKOFF) Sir, I believe you said that one of the universities where you were employed that you were employed for a couple of years as recruiting coordinator.

Did I hear that correctly?

A. Yes.

Q. Where was that, sir?

A. I was a recruiting coordinator at Georgia Tech for I think it was a year or two. I'm not sure what the years were. I don't -- I would have to go back and look. I think it was, like, '90 -- 1998, maybe 1999.

Q. Okay. And -- and was that in addition to assistant coach duties or was that a separate

position?

A. That was in a -- that was -- I was the running back coach and the recruiting coordinator.

Q. Okay. Now, sir, do you recall the date of your first Skype interview --

A. It was --

Q. -- the Penn State head coaching position?

A. It was the day before -- I believe it was -- excuse me. It was the -- the exact week before we were playing the Denver Broncos in a playoff game. So whatever date that was. I don't remember the exact date, but it had to be early January. It was -- it was a --

Q. The "we" being the New England Patriots?

A. Yes, sir. It was on a Saturday. I know it was on a Saturday, if I'm correct. So I think it was -- I don't know the exact date. I'm sorry.

Q. Well, what about the dates you came up to the university for an in-person interview?

A. Yeah, that was --

Q. That one?

A. Yeah, we -- we had a -- we had a buy.

So we -- we had -- I'm going to try to keep this short. We -- we had -- we had the first seed in the AFC playoffs, so we had a buy. So Coach Belichick said, "If you're going to do this, you need to do it like now." He gave me about eight hours to -- to do it -- or 12 hours to do it, you know.

So I believe that -- I flew I believe it was like a -- I want to say a Saturday and then I spent the night there and then maybe flew back on a Sunday.

Q. Now, sir, do you recall that there was an introductory press conference here at State College on January 2nd, 2012?

A. Yes, yes.

Q. You recall that was the date of the public announcement that you were engaged?

A. Yes.

Q. Okay. So that these two interviews --

A. They happened before that.

Q. -- had been -- had been before January 7th, right?

A. Yeah, they were. They were. I just -- you know, again, I'm -- I apologize, but I don't know the exact date. I would have to -- it was be -- it was -- you know, one -- the Skype interview was

probably a week before that instru -- introductory press conference and then the interview on campus was probably basically the -- the day or two days before that introductory press conference.

You know, I'm all -- you know, I'm sitting here trying -- I'm getting ready to coach a football game against the Denver Broncos, so excuse me if I don't remember the exact dates.

Q. All right. Well, what I would want to know is: After that second interview, how much time passed before you found out you had the position?

A. After the second interview, I believe I was -- I was hired that same day. So whether it was, you know, 12 hours or whatever it was, it was a -- it was that night or maybe the next morning that I was offered the job.

Q. So you -- you flew back to Boston and then they called you later to say you got the job if you want it?

A. They -- they -- they offered me the job face to face. You know, they interviewed me and then I was -- you know, I was at a hotel or wherever I was staying. They told me to hang tight for a few hours, and then basically, you know, sometime after that I was offered the job; and I called my wife, said,

"What do you think," took the job.

Q. All right. When did you hire Stan Hixon?

A. So I -- when I was in the process of interviewing for the job, I started to put together this staff and he was one of the first guys I called. So I -- basically he knew that if I was to get this job that he would have a job with me. So that would be -- you know, when I officially hired him would be the day after I got the job, but he already -- he knew that if I job got the job, I was hiring him, you know, a week before I got the job.

You know, right around the first Skype interview I started -- because you have to get your ducks in a row, so to speak, and that's what I was doing.

Q. When you say you hired him the day after you were hired, you mean you actually signed a contract with him?

A. I mean, he signed a contract pretty quickly. Now, I don't know if he signed it that very next day, but it was -- he was on campus pretty quickly. I'm not sure of the exact date of when he signed his contract.

Q. Getting back to of your introductory

interview here at State College, do you remember saying towards the end of that interview -- I'm sorry, toward the end of that press conference, "I'm going to put together the best possible staff of Penn State, and what I'm going to do over the next couple of days here is I'm going to meet with the current staff members. Okay, I definitely got to do that. Those guys have worked their butts off for Penn State and won a lot of games here, and I'm going to talk to them"?

Do you remember saying that to the public --

A. I remember --

Q. -- introductory?

A. Yeah, I mean, I remember something to that effect, yes.

Q. All right. With respect to who you interviewed on this here, were you given a list of folks who you were to interview?

A. I was -- was given a list.

Q. And Mike McQueary's name was not on the list, right?

A. No.

Q. And who gave you the list of folks who you were to interview?

A. I don't -- I don't -- I really don't remember that. I -- I did it in a room over in the -- I interviewed all those guys -- or, you know, those -- those staff guys from Coach Paterno's staff, I did it over at the BJC in a room over there. I don't remember who exactly handed me, you know, the -- the -- the pieces of paper or whatever it was, you know.

I just -- it may have even been written on a board or something. Do you know what I mean? It wasn't -- it was pretty informal, and -- and it was just the times that they were going to come into that room to interview me.

Q. So somebody even told you what times you were going to interview?

A. Well, it was -- you know, yeah, like not exact times but, you know, a.m., p.m.-type deal, if I remember correctly.

Q. When was the first time you met Ron Vanderlinden?

A. I met him -- I met him basically right after I was offered the job. And I had known him. I had met him before. I had known him at previous stops, just -- not well, but I had met him before when he was the head coach of University of Maryland,

and so I had met him that way.

Q. But did you interview Ron Vanderlinden at a time different than when you interviewed the other assistance coaches that were here?

A. I met Ron -- yes. I mean, I don't think I interviewed him in that room. I interviewed him at the hotel I was staying at or whatever it was.

Q. Was that before or after you had these interviews with the rest of Coach Paterno's staff?

A. That was -- that was before. Probably like the day before.

Q. Okay. What about Larry Johnson --

A. It was sim --

Q. -- when did you meet him?

A. It was similar. I think it was day before. It was similar to Ron's. You know, it was kind of back to back.

Q. Was there any suggestion on the part of anybody at Penn State that you might want to consider retaining those two individuals?

A. Yes. Yeah, they -- the people that -- you know, that were familiar with that staff at Penn State, they definitely gave their -- their thumbs up, their recommendation, their -- for -- for keeping those two guys.

Q. Okay. Who was -- in the administration gave the thumbs up for those two guys?

A. There were a lot of -- you know, there were different people, you know, obviously Dave Joiner, Frank Ganner, but several other people.

I can't remember all the people that were -- you know, that were on that -- there were different people that I met. I met so many people in that two- or three-day span, but several people, you know, recommended those two guys.

Q. And have you ever met Mike McQueary?

A. I have never met Mike McQueary.

Q. Do you know what his coaching philosophy is?

A. His philosophy? No.

Q. Do you know what his work ethic is?

A. No.

Q. Other than -- let me ask you this, did you read about Mike McQueary in the Media Guide before you settled all your staff?

A. I did, I read -- I read about every everybody, every play and coach. I studied that Media Guide because that's what helps you get familiar with the players and the -- the people that were there before or -- or people that may still be

in the building. So yes, I -- I read the whole Media Guide.

Q. And you were aware that among other things, aside from being coach, Mike was also recruiting coordinator; isn't that correct?

A. When I read the Media Guide, yes. Yeah.

Q. And wasn't there a concern about retaining athletes who had committed to come to Penn State at the time you became the head coach?

A. I had absolutely no concern about retaining -- I -- when I -- my philosophy is when I take a new job, as far as if it's a college job, I would tell you that whoever wants to stay, I will honor their commitments, but if they want to leave, go ahead and leave.

There wasn't one concern about me, you know, wanting to make sure that I hung on to every commitment. That -- that is certainly not the case.

Q. I'm not talking about the athletes that were already here. I'm talking about the high school.

A. That's what I am talking about. I'm talking about the high school athletes that were committed at that time to Penn State. If they wanted

to come, I called their parents and I told them, "I will honor their commitment," even though I had never watched them play football or known anything about them. And -- and -- and I said I would honor their commitment, but if they wanted to go elsewhere, I said, "Go for it," and I will go out and try to recruit players that the staff and I would like to have on our team.

So just that question alone, just that doesn't -- that's not anything that -- anybody that knows me knows that I'm going to try to get the players that I think can win for us.

Q. And who did you select to be your recruiting coordinator?

A. Well, it was a -- it was a two -- two-person deal. On the staff -- on the full-time coaching staff, Charles London was our recruiting coordinator; and then on the -- on the operations side of things, we had a guy that -- named Bill Cavanaugh, who did an excellent job for us.

Q. And he was at Penn State already; isn't that correct?

A. He was already there, yes.

Q. And he was an assistant recruiting coordinator by the time you became head coach?

A. Right. He had been a G.A. and then he was whatever -- whatever Joe had him doing, but he -- he was definitely involved in recruiting.

Q. But he was solely involved in recruiting and wasn't doing any coaching?

A. Well, he had been coaching when in -- when the -- he -- he took over the -- the coaching of the wide receivers in 2011 at the end of the year, and then when I came in, I hired Stan Hixon and -- but I kept him to help us with recruiting.

Q. Okay. I -- and I'm sorry. That -- that's what I meant to say.

That in the organization you ended up with, he was solely employed in a recruiting capacity?

A. That's right. That's right.

Q. At the time you conducted the interviews of the incumbent staff, were you aware that you weren't interviewing Mike McQueary?

A. I mean, I was -- I was aware that basically I was doing something -- basically what I was doing, for the most part, was a courtesy. That's what I felt like it was.

In fact, when -- I'll give you an example. When a couple of the guys came into the

room, they were older coaches and they -- they told me flat out, "Like, can you just tell me that I'm fired so that I can collect my severance?"

So that's -- that was -- you know, I felt like I was doing it as a courtesy. I wasn't keeping most of those guys.

Q. Did anybody in the administration refer to these interviews as "courtesy interviews"?

A. No. But I -- I knew that -- I don't remember anybody saying that to me. I just knew that -- and the guys knew basically that I was not keeping them, and they were very cordial, professional interviews, but I was bringing my own -- basically my own staff with me.

Q. And is conducting these courtesy interviews standard in the coaching business when there is a new head coach?

A. I would say that it depends. You know, in my -- my experience, and that's all I can go off of, sometimes the -- the previous -- you know, the athletic director tells those guys, "Look, he's not retaining you and he's not going to interview you," and then other places do it the way that Penn State did it.

So I think it depends. I don't

think -- I wouldn't say that it's common. I think it's to each his own.

Q. Well, did you regard the courtesy interviews as an imposition on your time?

A. Yes, I did, because they knew who I was --

Q. Did you regard these interviews as a sign of respect for the coaches that had been here a long time?

A. I definitely had a ton of respect for the coaches that had been there a long time and -- and I was going to do whatever I needed to do for that, but I also knew that, like, I wasn't going to spend, you know, three days interviewing those guys.

And those guys knew that -- that -- that they weren't being retained, so, you know, I felt like it was -- it was -- a waste of time on my part.

Q. Did you feel that -- let me rephrase that.

You had a ton of with respect for the guys you interviewed.

A. Yes.

Q. What about Mike McQueary?

A. Say that again. I'm sorry. I can't

hear.

Q. You had a ton of respect for the guys you interviewed.

Did you have a ton of respect for Mike McQueary?

A. Well, I mean, I have respect for -- for all coaches. So I just -- yeah, I mean, I don't -- I never met Mike, so -- but I would say as a coach, I just have -- you know, just because of my profession and the respect I have for the profession, yes.

MR. STROKOFF: Pass the witness.

MS. CONRAD: Just a few follow-up questions, Coach. I know that this is a busy time and we want to conclude.

FURTHER EXAMINATION

Q. (BY MS. CONRAD) You indicated that you read the Media Guide of Penn State with respect to every coach; is that correct?

A. Yes.

Q. And did you read about Mike McQueary.

A. Yes.

Q. And did anything stand out after you read about Mike McQueary that would cause you to want to meet with him or hire him?

A. No.

MS. CONRAD: No further questions. Thank you, Coach.

MR. STROKOFF: Thank you.

THE VIDEOGRAPHER: Off the record.

MS. CONRAD: Good luck in your upcoming game and the season.

THE VIDEOGRAPHER: Off the record.

(Proceedings concluded at 6:06 p.m.)

STATE OF TEXAS

COUNTY OF HARRIS

REPORTER'S CERTIFICATE

ORAL VIDEOTAPED DEPOSITION OF

MR. WILLIAM J. O'BRIEN

October 18, 2016

I, Michelle Hartman, the undersigned Certified Shorthand Reporter in and for the State of Texas and Registered Professional Reporter, certify that the facts stated in the foregoing pages are true and correct.

I further certify that I am neither attorney or counsel for, related to, nor employed by any parties to the action in which this testimony is taken and, further, that I am not a relative or employee of any counsel employed by the parties hereto or financially interested in the action.

That the deposition transcript was duly submitted on _____ to the witness or to the attorney for the witness for examination, signature, and returned to me by _____.

SUBSCRIBED AND SWORN TO under my hand and seal of office on this 19th day of October, 2016.



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William J. O'Brien

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I, _____, do hereby certify that I have read the foregoing pages and that the same is a correct transcription of the answers given by me to the questions therein propounded, except for the corrections or changes in form or substance, if any, noted in the attached Errata Sheet.

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Texas Rules of Civil Procedure

Part II, Section 9, Evidence and Discovery

Rule 203

203.1 Signature and Changes.

(a) Deposition transcript to be provided to witness. The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness.

(b) Changes by witness; signature. The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition officer within 20 days of the date the transcript was provided to the witness or the

witness's attorney, the witness may be deemed to have waived the right to make the changes.

(c) Exceptions. The requirements of presentation and signature under this subdivision do not apply:

(1) if the witness and all parties waive the signature requirement;

(2) to depositions on written questions; or

(3) to non-stenographic recordings of oral depositions.

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VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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EXHIBIT N

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

- - -

MICHAEL J. MCQUEARY :
:
Plaintiff, :
: No. 2012-1804
vs. :
:
THE PENNSYLVANIA STATE :
UNIVERSITY :
:
Defendant. :

- - -

CONFIDENTIAL - SUBJECT TO PARTIES' CONFIDENTIALITY AGREEMENT

- - -

THURSDAY JULY 28 2016

- - -

Videotaped deposition of COACH MATT RHULE, taken at the law offices of WHITE & WILLIAMS, LLP, Philadelphia, Pennsylvania, commencing at 10:16 a.m., before Theresa F. Franco, a Court Reporter and Notary Public.

- - -

VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
1801 Market Street - Suite 1800
Philadelphia, Pennsylvania 19103

EXHIBIT "N"

- - -

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R. ADAM LAZAROFF - CLVS

- - -

- - -

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COACH MATT RHULE

- - -

VIDEOGRAPHER: We are now on the video record. Please note the microphones are sensitive and may pick up whispering and private conversations. Please turn off all cell phones or place them away from the microphone as they can interfere with the deposition audio. Recording will continue until all persons agree to go off the video record.

My name is R. Adam Lazaroff representing Veritext Legal Solutions. The date today is July 28th, 2016, and the time is approximately 10:14. This deposition is being held at White and Williams, located at 1650 Market Street, Philadelphia, PA 19103.

The caption of this case is Michael J. McQueary versus The Pennsylvania State University. This case is being held in the Court of Common Pleas for the County of Centre Pennsylvania, Case Number 2012-1804.

The name of today's witness is

COACH MATT RHULE

Coach Matt Rhule. At this time the attorneys present in the room will identify themselves and the parties they represent, after which our court reporter, Theresa Franco representing Veritext, will swear in the witness and we will proceed.

MS. CONRAD: Nancy Conrad on behalf of The Pennsylvania State University.

MR. STROKOFF: Elliot A. Strokoff for the plaintiff, Michael McQueary.

MR. PUMA: Mike Puma from Morgan Lewis for Coach Rhule.

MS. CONRAD: In addition.

MR. MORRISON: George Morrison, White & Williams, on behalf of The Pennsylvania State University.

- - -

COACH MATT RHULE, having been first duly sworn, was examined and testified as follows:

- - -

EXAMINATION

- - -

COACH MATT RHULE

BY MS. CONRAD:

Q. Thank you. Coach, as you're aware, my name is Nancy Conrad, and I represent The Pennsylvania State University in this action that Michael McQueary filed against Penn State claiming violations -- making claims under the whistleblower statute, making claims of defamation and misrepresentation.

We're here today to take your deposition, and I intend only to raise questions about information that you possess in your knowledge and information.

Have you been deposed before?

A. I never have.

Q. All right. Well, welcome to our world. I will be asking the questions. You are here today represented by counsel. Before you answer a question, please let me know whether or not you don't understand it.

A. Okay.

Q. Also, please, before you answer the question, give your attorney, along with attorney Strokoff, the opportunity to assert objections.

COACH MATT RHULE

If you answer the question, then I will assume you understand what's been asked. If you do not know the answer to a question, I request that you do not guess or speculate. We're here to obtain factual information, so I ask you to answer with facts and information that you have firsthand knowledge and possess.

If at any time during the deposition you want to consult with your attorney, I request that you answer the pending question, and then we, certainly, can provide opportunities for a break for you to consult with your attorney or simply to take a break if you so choose.

Do you have any -- are you on any medications or do you have any medical conditions that would affect your ability to testify truthfully today?

A. No, ma'am.

Q. And in preparation for today's deposition, did you, other than your meetings with your attorney, which are privileged and I will not be asking you about those communications, did you meet with or review any

COACH MATT RHULE

documents in preparation for today's deposition?

A. No, ma'am.

Q. Could you state your full name for the record then?

A. Sure. Matthew Kenneth Rhule.

Q. And are you here today pursuant to a subpoena?

A. I'm sorry? I was asked to come. I came. I'm not sure.

Q. Understood.

Would you mark that, please?

- - -

(Whereupon the document was marked, for identification purposes, as Rhule-1.)

- - -

BY MS. CONRAD:

Q. I'm showing you a document that's being marked Rhule Exhibit-1, and I want to direct your attention to the second page. It's titled, Subpoena to Attend and Testify. And it's directed to you in care of your attorney, Attorney Puma. Are you here today pursuant to that subpoena?

COACH MATT RHULE

A. Yes, ma'am. I'm sorry.

Q. No need to apologize. And the subpoena requested production of any documents with respect to the request that is on the last page of the subpoena, that is any and all information in your possession and control related to Michael McQueary.

Did you produce documents in response to that subpoena?

A. I believe I did.

- - -

(Whereupon the document was marked, for identification purposes, as Rhule-2.)

- - -

BY MS. CONRAD:

Q. Handed you a document that's been marked Rhule-2. Are you familiar with it?

A. Yes, ma'am.

Q. What is it?

A. It's a text message off of one of my phones.

Q. And who is it a text message with?

A. From Mike McQueary.

Q. And it contains two pages.

COACH MATT RHULE

A. Yes, ma'am.
Q. What is contained on the second page?
A. Just a second text message from Mike.
Q. How did you come about locating these text messages?
A. They were on my phones. So I had given -- I have two phones. So I had given the phone to my son, and kind of cleaning up to go to the shore, we found it. And, you know, looked for it and pulled it off and gave it to counsel.
Q. And did you locate any other text messages on either of your two phones that related in any way to Michael McQueary?
A. No, ma'am.
Q. I'm going to ask you just some general background information, even though it's in Wikipedia and across the internet, we still want to make it part of this record.
Could you briefly summarize for us your educational background?
A. I graduated from State College High

COACH MATT RHULE

School. I attended Penn State University where I got a Bachelor in political science, a Bachelor of Arts in Political Science. And I got my Masters, MA, in educational psychology from the State University of New York in Buffalo.
Q. And while at State College High School, did you participate in any sports?
A. I played football, and I played -- I think I played a half a year of baseball.
Q. And what position did you play while at State College High School?
A. I played center, and I played defense end.
Q. And with respect to your time at Penn State, did you participate in athletics at Penn State?
A. Yes, ma'am, I did.
Q. What athletic programs did you participate in?
A. I played football.
Q. And was that for your entire time at Penn State?
A. Not my first year, but after my

COACH MATT RHULE

first year for the next four years.
Q. And what position did you play?
A. I ended up -- I played a little bit of tight end and I played line backer.
Q. And did you earn any distinctions or awards in conjunction with your time at Penn State?
A. I think I was -- I won a student athlete -- Penn State student athlete, scholar athlete award, and I think I was Academic All Big Ten or something of that nature.
Q. And didn't you -- weren't you designated a Penn State scholar athlete three times?
A. Yeah, probably, yes, ma'am.
Q. And during your time in high school or college, did you have any occasion to become acquainted with Mr. McQueary?
A. Yes.
Q. What was your first contact with Mr. McQueary?
A. It would be when I first moved to State College and joined the football team, the first practice.

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Q. And how would you characterize your relationship with him in high school? Was it one as a player? Was it a social relationship? Best friends?
A. We were teammates. We were classmates. We were always friendly.
Q. Would you consider Mr. McQueary to be one of your best friends in high school?
A. No, ma'am.
Q. And then how about in college? Could you describe your relationship with Mr. McQueary?
A. I'd say the same. You know, we were teammates and always friendly.
Q. Would you consider Mr. McQueary to be a close or best friend --
A. No.
Q. -- in college?
A. No, ma'am.
Q. Now I'd like to take you through your professional experience post Penn State.
A. Okay.
Q. Starting with after graduation at Penn State, can you take me through the lineup?

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A. Yeah. So my first job was at Albright College in Reading, Pennsylvania, where I was, sort of, an intern linebacker coach and lived in the dorms and coached football.

Then next I went to SUNY Buffalo where I was a graduate assistant working on a masters degree. I got promoted at the end of that first year and was a full-time assistant defense line coach. Our staff got fired, so I finished my masters and went to UCLA to be a graduate assistant again, wrote my thesis and was a graduate student at UCLA for a year.

I then went to Western Carolina University in Cullowhee, North Carolina. I guess we stayed there for four years. I then came to Temple as an assistant coach.

Q. I'm sorry, before you leave West Carolina -- I apologize for the interruption -- could you summarize the positions?

A. Oh, yes. I'm sorry. Should I -- should I go back and do that for all the places?

Q. If you've referenced them.

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A. I have. Okay. I'm sorry. So I went there as the special teams coordinator and linebacker's coach. Then I became the assistant head coach, special teams coordinator and linebacker's coach. And then my last year, I became the offensive line coach, special teams coordinator, assistant head coach. And I think that's -- I think that's all those pieces.

And then I came to Temple. I was gonna be -- I got hired as a linebacker coach -- or the D line coach. And then I was promoted to quarterback coach and recruiting coordinator. I was the recruiting coordinator and quarterback coach. Then after a year I was the offensive coordinator. I was the offensive coordinator for, I guess, it would have been three years. And then our head coach left, and I stayed on with the new coach. And I think I was recruiting coordinator again. I was assistant offensive coordinator, tight ends coach.

Then I left and went to the New York Giants. And with the New York Giants, I

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was the assistant offensive line coach. So I might -- I might be wrong on these or I might be saying them too fast, but... And then I came back to be the head coach after being -- spending a year with the New York Giants.

Q. When you were at Temple, and I believe it was in '06 to '11, you referenced you worked under two head coaches.

A. Yes, ma'am.

Q. Who were those head coaches?

A. I worked for Al Golden, and then my last year, I worked for Steve Addazio.

Q. And you were at Temple for approximately nine seasons during '06 to '11?

A. I was -- I was there for six seasons, and then I left. And now I've had -- I have three seasons. So six the first time and three the second time, yes, ma'am.

Q. You've moved around quite a bit.

A. I have.

Q. And, in fact, one media report stated, "To obtain the advanced football training he needed, Matt Rhule hopped between major east coast cities, leaving an assistant

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coordinator position at Temple to become a low-level assistant with the New York Giants.

Would you agree with that statement?

A. Yeah, probably. Yes.

Q. Since your graduation from Penn State and entry into the professional coaching positions you've just summarized, did you have any relationship with Mr. McQueary prior to November or December 2012?

A. Yes.

Q. Okay. What was your relationship between the 1998 period and November 2012?

A. I think we were both in coaching, so I would see him places. We would talk about coaching. We would both network with each other. I'd see him at conventions and clinics.

Q. And how would you describe your relationship with Mr. McQueary?

A. Very friendly. Professional.

Q. Would you consider him during that time period, that is the 1998 to November 2012 period, a good or best friend?

A. No, ma'am.

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Q. I'd like to direct your attention now to your appointment as head coach at Temple.
A. Yes, ma'am.
Q. When you took that position, there was an existing -- there were existing assistant coaches.
A. Yes, ma'am.
Q. Did you have the option to select your own head -- your own assistant coaches?
A. Yes, ma'am.
Q. How did you go about that process?
A. Well, I think it would probably -- it probably started -- you know, for me it probably started years before. You know, I kind of have always probably tried to keep a list in my mind when I've worked with different people, you know, I'd hire this guy, wouldn't hire that guy. You know, I think, you know, so I kind of probably went into that process as you go into the interview sort of, hey, these are the guys I think I'm going to keep, or these are the guys I'd like to have come with me. So I think first is sort of having that

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list in your head. And then the first thing I did was sit down and meet with all the assistant coaches.
Q. The existing?
A. The existing assistant coaches. And, number one, try to find out who was going to go with Steve to Boston College, because he had a choice to take who he wanted. And then, you know, let some -- I let some people go. And I inter- -- you know, talked to other people just to sort of see where we were going to be, and I kept some people.
Q. Did you -- strike that.
With the guys that you knew you wanted on your staff, was Mr. McQueary one of those guys?
A. No, ma'am.
Q. Why not?
A. You know, I just -- I just think for that -- he had only coached receivers, and, you know, I kind of knew who I wanted -- at least initially I knew who I wanted at receiver coach, and I just didn't think he was probably the right fit for that job.

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Q. Did you have criteria or certain characteristics that you were looking for in the staff that you wanted to select?
A. Oh, yes, ma'am.
Q. What was that criteria?
A. Well, the first thing is, I always prefer, if I can, to have worked with the person before. I think that's the best barometer of -- of what they're going to be like at 6:00 in the morning or at 11:00 at night or -- you know, you've worked with them; you know what they know. So I -- you know, I tried that.
I would say that they have to be the -- they have to be an expert at their position. I mean, I want them to really know what they're teaching, and it's different for each one. Some positions, I like a guy who's played the position. Other -- you know, other positions, I want someone who's done it for a long time.
And then I want guys who are tremendous recruiters. You know, I want guys who are going to go out and, you know, get in

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the trenches and recruit the way we recruit at Temple.
And then I want player -- guys who I want to work with every day; I think they're going to be great guys to be around; they're gonna -- they're gonna, you know, click, and we're gonna have a great staff dynamic.
And then I want guys who are completely committed to developing the players. You know? And that's not the case everywhere I've been. You know?
So I want guys who understand that our number one job is to raise men and that they're going to put the time in to do that. So...
Q. What makes a good recruiter?
A. I think there's lots of things. I think that -- I can just speak for Temple, you know, because that's my expertise. I think it has to be someone that's, you know, going to watch one more film than everybody else. I think it's somebody that's gonna, you know, build great relationships with the kids. I think it's got to be someone that's going to be

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tireless on the road. I just think it comes down to sort of a -- a humbleness and a work ethic that make people want to trust their kids with you.

Q. Does the prospective coach's geographic connections come into play?

A. Yeah, absolutely, especially in areas where, you know, maybe I'm not as strong. You know? So I knew I was really strong in sort of, like, Central Pennsylvania, you know, in Pennsylvania. So that's why I had always recruited with Eastern Pennsylvania. I knew all those coaches. But my concerns were, you know, North Jersey, Pittsburgh, Virginia, areas that I maybe didn't have as much experience in.

Q. I want to ask you now about some of your selections that first year, starting first with offensive coordinator. Did you have somebody in mind for offensive coordinator?

A. Yes. So when I first got the job, I wanted to hire Nick Rolovich. He was the offensive coordinator at Nevada, and Nick agreed to take the job and then later backed out, decided to stay in Nevada.

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I had -- in the interim, I hired Marcus Satterfield to come be the wide receivers' coach, who I had worked with and I had tried to hire when I was the offensive coordinator at Temple, I wanted him to come be my receivers' coach. And, you know, I said, hey, you're going to be the receivers' coach, and if something falls through with Nick, I might make you the coordinator. And so I ended up making Marcus the offensive coordinator.

Q. Okay. So let's start with Coach Nick Rolovich.

A. Yes, ma'am.

Q. What criteria did you apply to him in terms of making him your first choice?

A. I think there were probably three. Number one -- maybe four -- number one, he had called plays before. You know, he had been an offensive coordinator before. So, you know, I didn't want to do any, sort of, on-the-job training. I -- I had called plays and I wasn't great at it, and I knew how hard it was. So I wanted someone -- my first time being a head coach, I wanted someone like Nick who had been

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through the fire.

I wanted someone who coached quarterbacks. You know? Again, I had coached quarterbacks and I wasn't great at it. So I knew I was going to be a great offensive line help, but I wanted someone who I thought would be a great quarterback coach and Nick had done that.

And then the third thing was, I had just come from the New York Giants, and Coach Gilbride, not to sound too technical, but he had, kind of, run a hybrid of the run-and-shoot offense, and I loved it. And I wanted to bring that to Temple. And Nick was a run-and-shoot guy and, you know. So Kevin Gilbride, Jr. had said, you should talk to Nick, and I had -- you know, I had built a relationship with him over time, based on that, those three connections.

And then the fourth thing's probably, could they handle me, you know? Could they handle coach -- working for me everyday and kind of being involved in the offense but them having to be strong enough to still run it. So...

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Q. Had you ever coached with Rolovich before?

A. I had not.

Q. Did you receive any recommendation with respect to him?

A. Yes, ma'am. Like I said, Kevin -- Kevin Gilbride and Kevin Gilbride, Jr. both had talked about Nick. And I had known Nick for -- for the, you know, past couple years because of this mutual interest in this -- a specific offense.

Q. And then Coach Satterfield, what were the qualities or criteria that you applied to your selection of Coach Satterfield?

A. As the offensive coordinator?

Q. As, first, the receivers coach because that's what you initially --

A. Yes, ma'am.

Q. -- slotted him for.

A. Yeah. I just knew Marcus was, since I worked with him at Western Carolina, I would always try to hire him. He was great with the kids. I thought he was -- you know, he was tough. He had played receiver in

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college. He would demand that the kids played well, but he'd spend a lot of time with them. And he had -- he had been recruiting Atlanta and some places down south that I thought maybe we would consider getting into. So I thought, you know what, he'll come in; he'll coach our wide receivers for us.

Q. And then the transition from receivers coach to offensive coordinator, what characteristics did you note to qualify him for that position?

A. Just the -- the same four that I said before. You know, I knew -- first of all, I knew he could handle me. He had coached with me before. He had coached quarterbacks. His quarterback had just gone to the Green Bay Packers. So I was excited about that quarterback development. He had been an offensive coordinator, you know, he had called plays at Chattanooga. So, you know -- and I knew he would let me say, hey, these are the concepts we're going to run, you know, because he was, sort of, someone I -- I don't want to say mentored, but I had kind of brought up in

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coaching and stayed in contact with. I could say, hey, this is what we're doing. He could go visit the Giants and I'd still get the offense I wanted.

Q. You've referenced a couple times whether the prospective coach could coach with you. What do you mean by that?

A. Just, you know, when you're the offensive coordinator, you're in charge of the offense. And when you're the defensive coordinator, you're in charge of the defense. And typically the head coach is -- leans one way or the other. So, well, you know, it can go anywhere from being laissez-faire to micromanaging. I'm probably a little bit more up here, so I just wanted someone that I knew wasn't going to have an ego about it, wasn't gonna, you know, fight me on it.

There was some -- there were a lot of really experienced offensive coordinators out there that may have done a great job. They kept reaching out -- you know reaching out to me, but I just was afraid of that dynamic. And I knew the dynamic of these guys. I trusted

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them, that they would -- we would have a great connection.

Q. So when you made reference to the right fit, it references the prospective coach being able to fit with your coaching style?

A. Yes, ma'am, the culture I want to create.

Q. And what was that culture that you wanted to create and have created?

A. Yeah. I think it's a culture of just tireless, hard work, toughness, and then putting the student athlete, you know, at the -- at the center of everything we do. You know, we are here to serve the student athletes. And so I didn't want -- some of the guys I've coached with over the years who, you know, they're there to just coach football and that's it. I wanted some, you know, guys that were gonna worry about if the kids went to class. They were gonna know their families. They were -- you know, that's what I was looking for.

Q. You also made reference to getting calls and contacts. Were you receiving

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contacts from assistant coaches who were looking for a position on your staff?

A. Yeah. I would say that's the most hectic, hardest, probably two months of my life. I mean, I might have gotten thousands and thousands of calls and texts. And one of those articles, you know, made reference to when I got the job at Temple, I drove to Temple and sat there and waited. So there were peopling showing up at the Giants. There were people -- because I was still working at the Giants and recruiting. I was doing both jobs, so I had thousands of people reach out, show up, everything.

Q. Okay. What did you do with those thousands of contacts?

MR. STROKOFF: I'm sorry. I didn't hear that.

BY MS. CONRAD:

Q. What did you do with those thousands of contacts?

A. You know, I -- I tried to be respectful of people. I tried to -- I, you know, I tried to do a good job of reaching back

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out to as many people as I could. You know, I -- I was the guy that always had to plug and try to get jobs, and so when people reached back out to me, I appreciate it. So I tried to, as much -- as best I could, talk to everybody I could and say where they stood or, you know, tell them, hey, I don't have a job for you. I tried to listen to people, knowing that, you know, maybe in three years, I might need somebody else. And some people I just had to -- you know, I couldn't keep up with and just had to say, you know, ignore. So...

Q. Your offensive -- strike that.

Your wide receiver coach, Terry Smith, tell me about what characteristics made you select Coach Smith.

A. I think there were several. And I had not known Terry on the personal level. I had not worked with him. He was a high school coach with, I think, one year of college experience. But, number one, he was a really successful high school coach in Western Pennsylvania. And I really felt like, over the years, we've never done a great job in

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Pittsburgh, and he had several Division One kids even on his own team. And really his reputation out there was -- was pretty impressive. I had, you know, coaches -- other high school coaches and college coaches reach out and say, you should really talk to Terry. He's a great guy. So, you know, I thought, a chance to get out there. He had played in the position of wide receiver, and he had, you know, been drafted.

He had a son, I believe, a stepson -- but he had a son that played major college football and then was -- played in the NFL, and I thought, what better way as I go out to recruit then to have someone who played the position, played in the NFL; they have a kid that's been through the process. I thought those would all be great fits.

And then, you know, I just -- I just knew that as a high school coach, he's -- he's had to line the field and work with the kids, and he'd do a great job with our players because I felt like that position needed a mentor. There were a bunch of young kids and I

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needed someone that could really get in there, and I thought he would do a good job.

Q. He's been described as one of the nation's most "highest profile high school coach." Do you agree with that character -- characterization?

A. I mean, I know he was high pro -- I don't know that, but I know he was high profile. I know he -- I think he, in his res- -- he coached in like ten -- you know, U.S. Army, All-American, all these national all star games. So he was someone who people knew.

You know, when he came to us, kids from Detroit would call Terry, you know, because he had -- he had worked with him at a seven-on-seven camp or all the things that high school coaches can do. So he had a great reputation out there, but also nationally as well.

Q. Turned out more than 70 students on D-One scholarship?

A. Wow. I think one important thing for me was, as an aside, he -- three of his kids -- now, I didn't -- it wasn't like a quid

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pro quo, but, you know, three of his kids ended up coming to us the next year. So it panned out. Some kids went to Michigan State, but you know, he -- his connections paid off for us, as we hoped.

Q. He's now at Penn State.

A. He left after a year to go to Penn State.

- - -

(Whereupon the document was marked, for identification purposes, as Rhule-3.)

- - -

BY MS. CONRAD:

Q. Handed you a document that's been marked Rhule-3. Are you familiar with this document?

A. Roster from that year, I believe, yes.

Q. And is this the 2013 roster which includes your picks at -- once named head coach?

A. I'm sorry. Yeah, that was the coaches that were on my staff.

Q. And out of that roster, how many

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coaches did you retain from the staff prior -- coaches that were on staff when you came in as head coach?

A. So it's going -- it's three, but two of them had off-the-field positions. I kept them but elevated them to on-the-field positions.

Q. Who are those?

A. Tyree Foreman, I retained as the running back coach. And Francis Brown was the -- was off the field; he was player development, and I promoted him to defensive back's coach. And Ed Foley was the tight ends coach. He had been my tight ends coach when I was the offensive coordinator there. He was off the field when Steve was there, and I put him back on the field once I got the job.

I also retained two other assistant coaches at one point who, then, later left before the year started. So they were there for a couple weeks and then got other jobs.

Q. And who was that?

A. That was Chuck Heater, who was the head -- the offensive coordinator for Steve

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Addazio. I retained him, and then he left to go to Marshall. And Sean McGowan, I retained as a linebacker coach, and then he left, late, to go to Boston College to be a linebackers coach with Coach Addazio.

Q. Well, you may have answered this question in part, what qualities made -- went into your decision to retain Ed Foley?

A. I had worked with him. I knew he was a great worker. I just, you know, I knew he was someone that I wanted. He's a -- he's a South Jersey guy, so he gives us a great connection over there. You know, he's recruited the area for years. And he's a Temple guy. I mean, he's -- he put in ten years there, and I thought he was a great coach, great teacher, great technician, and he believed what I believed.

Q. And because you worked with him, you knew that he would fit?

A. I knew all those things, yeah.

Q. Tyree Foreman, what made you decide to retain him?

A. Same thing, I had worked with him.

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I thought he would be a great fit. He had -- for years, he had coached some of our running backs who had been, sort of, great players but, you know, he had done a great job mentoring them. They might not have always wanted to go to class and do those things. I had just seen him, firsthand, doing a great job of going and getting those guys and making sure they grew up into men.

And I thought he was someone that I could make -- turn into the special teams coordinator. I thought he was really intelligent and was ready for a promotion in his career. So I -- I knew that I wanted to work with him; he'd be a great fit as well.

Q. Francis Brown?

A. I had coached -- recruited Francis and coached Francis at Western Carolina University. He's -- he's from Camden. His son is my godson. So we both have 11 year-old boys. So I got him, sort of, his start as a -- I guess he was -- I might get them flipped. He started as a graduate assistant and then became an off-the-field job. Or that might have

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been -- it might have been an off-the-field job and then became a graduate assistant under Coach Addazio.

And I felt like he was a young coach who the players would relate to, who was a tireless worker, and he's as close -- he's as close to me as I can get. You know, he thinks like I do, and he played defensive back. Had a little stint in the NFL, and I thought he'd be great for our kids.

Q. I want to now focus on those characteristics that you've highlighted that you applied in your selection of your staff and, in particular, your assistant coaches, and ask you about Mr. McQueary.

You had identified that an important characteristic was that you had worked with the assistant coach and that it would be a right fit. Had you ever worked with Coach McQueary?

A. I had not.

Q. You referenced that the assistant coach, or the prospective assistant coach, be an expert at their position. Did you have any

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firsthand knowledge or information about Mr. McQueary's expertise in his coaching position?

A. I did not.

Q. You referenced whether the coach had -- the prospective coach had played or coached the position that you were considering him for. Did Mr. McQueary play or coach any position that you were drawn to?

A. Well, I mean, he had played quarterback but hadn't coached it. And I was, you know, as I said at quarterback, I was looking for someone who had coached the position. The problem was also going to be my coordinator because, you know, they're the same -- usually the same job. And at receivers, I know he had coached it and -- but he hadn't played it, which I thought was important for those kids.

Q. With respect to the recruiting connection, did you have any firsthand knowledge or information or experience with Mr. McQueary's recruiting connections and work?

A. I had not.

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Q. Okay. You also referenced in conjunction with recruiting the importance of a geographic diversity. Did Mr. McQueary have any geographic connections that were brought to your attention?

A. He may have, but not -- you know, not that I was aware of or knew.

Q. Did you know where Mr. McQueary was from?

A. I did.

Q. Where was he from?

A. State College.

Q. You already had a State College connection?

A. Yeah, and in, you know, sort of Central Pennsylvania, that whole area.

Q. You referenced that it was important that the prospective coach was someone you could work with every day.

Did you have any knowledge or information as to whether Mr. McQueary was someone you could work with every day?

A. I didn't really know because I had -- I hadn't worked with him. You know, I

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wasn't sure if he would be, you know, that he would be a fit. But, you know, one of the things about the guys I hired was, I was hiring a lot of guys who this was the greatest moment, a step up, the greatest moment in their life. You know? They had come from a smaller school lot and they were there.

And, you know, Mike had always been just at Penn State and had never really, kind of, been anywhere else. So that was -- that was an important part of that fit for me was just guys who were, you know, coming to Temple and from smaller schools, or not -- not always smaller schools, but this was a step up in their career.

Q. As someone who had hopped from east coast cities to low-level assistant positions when it was needed to advance their position?

A. Yeah. I've -- I've -- I've moved a lot, and I probably haven't moved as much as some of the guys, you know, some guys I've been around.

Q. And you mentioned an additional characteristic as a prospective coach who was

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committed to developing the players. Did you have any firsthand knowledge or information about Mr. McQueary's commitment?

A. Yeah. I -- I -- I hadn't worked with him. I didn't know how he would be with the players.

Q. So you didn't have any knowledge or information?

A. No, I had, you know -- I had, you know, never been there with him or seen, you know, seen how he, you know, related to his players or anything like that. I had heard at one point that maybe his players didn't always like him, but, you know, I don't know how that, you know, that can be a good and a bad thing. But that was, for me, really important to me that our players at -- our receivers at Temple had a -- had a great connection with somebody, you know, that they could really, really be mentored by.

Q. You had a very clear vision of who you wanted on your staff?

A. Yes, ma'am.

Q. And you achieved that vision?

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A. I did. I think so.
Q. In this course of this litigation, Mr. McQueary provided Answers to Interrogatories. Interrogatories are written questions --
A. Okay.
Q. -- that we serve on a plaintiff to obtain information in their possession. And in the course of those interrogatories, we asked Mr. McQueary to state all facts and identify all documents to support his position that he had an excellent reputation and track record as a coach and a recruiter in a Division One college coaching community.
In answering that interrogatory, that question, Mr. McQueary stated --
MR. STROKOFF: Counsel, could you identify which interrogatory, specifically, you're referring to so that I can get to it?
MS. CONRAD: Certainly. It's plaintiff's answers to defendant's second set of interrogatories, Interrogatory Number One.

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MR. STROKOFF: And do you have that with you today?
MS. CONRAD: I do.
MR. MORRISON: May I have a copy?
MS. CONRAD: You may.
BY MS. CONRAD:
Q. In answer to that interrogatory, Mr. McQueary stated, under oath, that he believes "Matt Rhule would confirm my success and reputation as a recruiter."
Are you in a position or do you have firsthand knowledge and information to confirm Mr. McQueary's success and reputation as a recruiter?
A. You know, I -- I -- I never recruited with him. I don't think I've ever recruited against him, so it would be hard for, you know, hard for me to state yes or no to that. You know?
Q. Sitting here today, do you possess any facts or information with respect to Mr. McQueary's success and reputation as a recruiter?
A. I don't.

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Q. Mr. McQueary also states, under oath, that he believes "Matt Rhule will confirm his excellent reputation as a coach."
Do you have any firsthand knowledge or information to confirm Mr. McQueary's excellent reputation as a coach?
A. And so by reputation, you mean amongst players? Peers? I mean...
Q. I only have his answer.
A. I got you.
Q. "I believe," this is Mr. McQueary speaking, "Matt Rhule will confirm my excellent reputation as a coach."
Do you have any firsthand knowledge or information about Mr. McQueary's reputation as a coach?
A. I don't.
Q. Also in the course of this litigation, Mr. McQueary has produced text messages between you and him. I'm going to ask the court reporter to mark this document, which is a series of text messages, and then provide an opportunity for you and your counsel to review them. And then I have a series of

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questions about the messages.
- - -
(Whereupon the document was marked, for identification purposes, as Rhule-4.)
- - -
MS. CONRAD: I suggest we go off the record at this point.
VIDEOGRAPHER: The time is now 10:55. We're going off the video record.
- - -
(A short recess was taken.)
- - -
VIDEOGRAPHER: The time is now 11:10. We are back on the video record.
BY MS. CONRAD:
Q. Coach, I've handed you a document that's been marked Rhule-4, and it is a multipage document that contains a series of text messages.
Have you had the opportunity to review this exhibit?
A. Just now, yes.
Q. Okay. And are you familiar with it or at least portions of it?

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A. You know, it's the first time I've seen it. I hadn't seen it before today. And it's not from my phone. I don't really recognize most of it, you know, to be quite honest. As I said, that was a pretty tough time. There -- there was one that does stick out. I do remember one of the texts, or at least parts of it. I remember it kind of -- just reading it brought a little bit of it back to me. But most of it I don't recall, and some of it's not with me. So...

Q. Understood. I'm going to take you through it and ask you some questions about the exchanges, and I certainly respect, even after reviewing the document, if you have no recollection of the message or what it meant, and ask that you just testify accordingly.

A. Yes, ma'am.

Q. Okay? So starting on the first page. And if you look at the bottom, there are page numbers. It starts with MM257. Do you see those page numbers?

A. Yes, ma'am.

Q. I'll refer to them as we proceed.

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It's -- the first page, it includes your name, Matt Rhule, and it appears to make reference to a statement, or it includes a statement that you make, which says, "I will call Steve tonight." Do you see that --

A. I do, yes, ma'am.

Q. -- statement? Does that refresh your recollection with any exchange with Mr. McQueary, and the time period, if you look, is December 3, 2012, in which you related to Mr. McQueary that you would call Steve tonight?

A. I don't remember that.

Q. Okay. Do you have any understanding of who Steve is?

A. Yeah. I think it's Steve Addazio when we went -- he left Temple and went to Boston College.

Q. And do -- did you -- do you have any recollection of calling Steve with respect to Mr. McQueary?

A. I don't -- I don't remember.

Q. Do you recall Mr. McQueary asking you to call Steve?

A. I remember -- I remember at that

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time talking to Mike, but I don't remember that specifically, no.

Q. Okay. And do you have any recollection of connecting in any way with Steve with reference to Mr. McQueary?

A. I don't remember that.

Q. Turning your page -- turning your attention to page 258, the second half of the document appears to contain a date, December 12, 2012, and it repeats the contact "To Steve, RE: BC"; do you see that reference?

A. Yes, ma'am.

Q. What does BC refer to?

A. I would assume Boston College.

Q. There then is a reference in which it appears you communicate, "Should know next day or two, Temple." Do you see that reference?

A. Yes, ma'am.

Q. Does that refresh your recollection as to any exchange with Mr. McQueary in or around December 12, 2012?

A. I mean, not specifically, no.

Q. Okay. Do you have any

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understanding of what that meant, "Should know next day or two, Temple"?

A. Probably if -- if I was going to get the job or not.

Q. Okay. There then is a statement that says, "Okay, man, in ags office now." Do you see that statement?

A. Yes, ma'am.

Q. It is my understanding, based on having deposed Mr. McQueary, that is a statement Mr. McQueary made. Do you recall that statement?

A. I don't.

Q. There then is a question, "What's agas?" Do you see that --

A. Yes, ma'am.

Q. -- communication? Is that a statement or question that you raised?

A. I don't remember this.

Q. Okay. There's a repeat of AG at the bottom of the page. And then onto the next page --

A. Got you.

Q. -- page 259, Al Golden, question

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mark, or attorney general, question mark. Do you recall asking that question to Mr. McQueary?

A. No, ma'am.

Q. There's a response, "second one," and then, "got it." Does that refresh your recollection?

A. No, ma'am.

Q. In the second part of the exchange, there is a statement by Mr. McQueary, "Extremely hungry to coach" -- and I'm going to read from my notes --

A. Yes, ma'am.

Q. -- since we've already had Mr. McQueary clarify much of this exchange during his deposition. "Extremely hungry to coach. Just need a break. If you or AD need to speak to AG's office, can do. QBs, quarterbacks, wide outs."

Do you remember that communication from Mr. McQueary?

A. Not -- not specifically.

Q. Do you remember Mr. McQueary contacting you about consideration to be on

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your staff?

A. I do.

Q. So what do you remember about that exchange?

A. I remember him texting me about -- about it. I remember us kind of talking back and forth.

Q. Okay.

A. Specifically, I don't remember what I said or what he said, you know.

Q. Okay. So you referenced there were text message exchanges with Mr. McQueary, correct?

A. Yes, ma'am.

Q. Were there any other exchanges, phone calls, in-person meetings, or any other types of communication?

A. I don't remember. I don't remember seeing him in person, no.

Q. All right.

- - -

(Whereupon the document was marked, for identification purposes, as Rhule-5.)

- - -

COACH MATT RHULE

BY MS. CONRAD:

Q. I'm handing you a document that's been marked Rhule-5. Would you review it and let me know when you've completed your review?

A. Yes, ma'am.

Q. Are you familiar with the document marked Rhule-5?

A. No, ma'am.

Q. Do you recall receiving -- strike that.

Did you have an email address, MattRhule1@gmail.com?

A. Yes, ma'am.

Q. And do you recall receiving an email message from Mr. McQueary in -- on December 14, 2012?

A. I don't.

Q. Having reviewed the email message, does that refresh your recollection with respect to receipt of this email?

A. No, ma'am.

Q. Were you receiving a lot of communications at this time?

A. Yeah. And I had a seven month,

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eight-month-old -- my wife was eight months pregnant and I had two jobs, so I was getting a lot of emails, resumes, text messages, so...

Q. And I believe you characterized them as hundreds maybe even --

A. Oh, yeah.

Q. -- up to a thousand?

A. Yes, ma'am.

Q. Mr. McQueary states in this email message that's contained in Rhule-5, "I need a break, and I know you will not be sorry." Do you see that statement?

A. Yes, ma'am.

Q. Do you know what he meant by "I need a break?"

A. I'm not sure what he meant. I mean, I'm assuming, you know --

Q. I don't want you to assume.

A. -- he wanted to get hired by me. No, yeah, when I read that I think someone wants me to hire them.

Q. All right. He says, "I can coach QBs and WRs with anyone." Do you see that statement?

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A. Yes, ma'am.
Q. What did you take QBs to mean?
A. Quarterbacks.
Q. And WR?
A. Wide receivers.
Q. And although we discussed this previously, in December -- on December 14th of 2012, did you have any firsthand knowledge or information about Mr. McQueary's abilities and experience in coaching quarterbacks?
A. I did not know anything about his abilities. I knew his resume, where he had been, but I didn't have any firsthand knowledge.
Q. Did you know whether or not he coached quarterbacks?
A. I knew that he -- I was under the impression he had not coached quarterbacks.
Q. And with respect to wide receivers, did you have any knowledge or information about Mr. McQueary's ability, skills, and experience in coaching wide receivers?
A. Again, I knew his resume, and I had coached -- I had competed against him, our

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teams had played, but I had never seen him on a practice field or in a meeting room coaching.
Q. Okay. He then says I can recruit. On December 14th, 2012, did you have any knowledge, firsthand knowledge or information about his recruiting skills and experience?
A. No, ma'am.
Q. He then states, "I will be honest and loyal with and to you." Do you see that statement?
A. Yes, ma'am.
Q. In December of 2012, did you have any firsthand knowledge or experience with reference to Mr. McQueary's honesty and loyalty?
A. I mean, just growing up with him, nothing -- nothing professionally or working-with-him-wise.
Q. In December of 2012, did you receive any recommendations from anyone with respect to Mr. McQueary's experience and skills?
A. Not that I remember.
Q. Turning back then to the text

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message documents, on page 260 -- and this one's hard to read. It's the second entry, "Don't want to bother you. Keep me in mind. Can be OC along with you. Can coach QBs or W" -- I'm presuming Rs. "I have people ready to talk to higher-ups. Everything can be worked out." Do you see that statement?
A. Yes, ma'am.
Q. Having reviewed that statement, does that refresh your recollection of receiving that message from Mr. McQueary?
A. Yes, it does.
Q. And what do you recall, if anything, about that message or subsequent exchange?
A. I remember feeling a little bit, like, annoyed. I don't know if that's the right word. I just -- I felt like -- you know, I felt like he wasn't qualified to be the O Coordinator. I felt like -- because he had not called plays, and I felt like he had never coached quarterbacks before, and I felt like sort of like it was a hubris, like I'm going from Penn State to just Temple so I can coach

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all these positions I've never done before. And in my mind, coaching -- being an offensive coordinator is a real opportunity and you should be qualified for it.
So, I probably felt that way about a lot of people that requested that position, so -- to be fair. But I just, in my mind, sort of like, you've never coached quarterbacks, and you've never been the offensive coordinator, so I remember that sort of a feeling of like, you know, a sort of hubris about it.
Q. So was he in the running for consideration?
A. No, ma'am.
Q. This reference to "people ready to talk to higher-ups. Everything can be worked out." Do you recall receiving that statement?
A. Not specifically, no.
Q. Okay. Does that refresh your recollection at all? Did you have any rec -- any reaction to that statement?
A. No, ma'am.
Q. Do you know what he meant by, "People ready to talk to higher-ups?"

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A. I didn't -- I mean, I'd have to assume what he was talking about.
Q. But you didn't know?
A. No, ma'am.
Q. In the next section, it starts with a message from McQueary, "In meeting now. In meeting now with Attorney General's Office. They said again that they would love to talk with people at Temple. I am ready to go Matt. Let me know what needs to be done."
Having reviewed that message, does that refresh your recollection to receipt of that message?
A. No, ma'am.
Q. Do you recall any reaction to Mr. McQueary's statement that he's in a meeting with Attorney General's Office?
A. No.
Q. Did you react or respond at all that, with respect to his message, that they said, "Again, they'd love to talk to people at Temple"?
A. No. I didn't react to that.
Q. Okay. Did you ever speak to anyone

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at the AG's office about Mr. McQueary?
A. No, ma'am.
Q. Do you know whether anyone at the AG's office ever spoke to someone -- to people at Temple about Mr. McQueary?
A. I don't know that.
Q. Next, page 261. The first message seems to be a message from you. Can you read that into the record?
A. "Hey, Mike, Merry Christmas to you as well. Believe me, I know you would be great. I am still working through things. Should have better idea where I will head closer to January 2nd."
Q. Having reviewed that message, does that refresh your recollection as to the message you sent to Mr. McQueary?
A. No, ma'am.
Q. Okay. In that message, you do make a statement, "believe me, I know you would be great." Do you see that statement?
A. Yes, ma'am.
Q. Sitting here today, do you have any recollection of what you meant by that

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statement?
A. I don't.
Q. "I'm still working through things." Sitting here today, do you have any recollection of what you meant by that statement?
A. No, ma'am.
Q. "Should have better idea where I will head closer to January 2nd." Any recollection of what you meant by that statement?
A. No, ma'am.
Q. The next entry appears to be a message that Mr. McQueary sent to you, and in the second part of it, he states, "I know I am in a tough position for you. If you or anyone at the university need to talk to people in Harrisburg, they are eager to do so." Do you see that entry?
A. Yes, ma'am.
Q. Sitting here today, do you recall receipt of that message from Mr. McQueary?
A. I don't.
Q. Did you have any reason to want to

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talk to people in Harrisburg in conjunction with Mr. McQueary?
A. No, ma'am.
Q. Directing your attention to the last entry on page 261, Mr. McQueary states, "I can be an asset. Just have to get over initial" -- I believe it's hump of potential questions. Do you recall receiving this message?
A. No, ma'am.
Q. Do you have any -- having reviewed it, do you have any recollection of this message?
A. No, ma'am.
Q. Directing your attention to page 262. At the first part of the page, there's a message from Mr. McQueary, and I want to read it from the record. It states, "It will be a week when everything comes out. They will give you a lot of credit. Again, you can talk to all the authorities. They will share everything, very confidential info with you in administration -- or with your administration. I want this, man. I would be a great OC, along

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with you and the others you're bringing in."
Do you see that message?
A. Yes, ma'am.
Q. Having reviewed that message, does that refresh your recollection of receipt of that message?
A. No, ma'am.
Q. Sitting here today, did you draw any inference or make any determination about Mr. McQueary's representation "when everything comes out, they will give you a lot of credit."
Do you know what he meant by that?
A. He said -- say that again. I'm sorry. Is that okay if I ask like that?
MR. PUMA: Would you please say that again.
BY MS. CONRAD:
Q. When Mr. McQueary states, "When everything comes out, they will give you a lot of credit." Do you know what Mr. McQueary meant by that statement?
A. I don't.
Q. "Again, you can talk to all the authorities." Did you have any reason to talk

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to the authorities?
A. No, ma'am.
Q. And why not?
A. Because Mike wasn't in the running for me for those positions.
Q. "They will share everything, very confidential information with you -- with your administration."
Did that raise any question for you about what confidential information he's referring?
A. I don't remember that.
Q. Okay. "I want this, Matt. I would be a great OC along with you and others you're bringing in."
Was it your opinion that he would be a great OC?
A. I just didn't feel that he was qualified for what I was looking for.
Q. In the next entry, you respond, "You're not bugging me." Do you see that entry?
A. Yes, ma'am.
Q. Is that a message that you sent to

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Mr. McQueary?
A. I don't remember.
Q. Could you read that one into the record?
A. Yes, ma'am. "You're not bugging me. I have known you for a long time and know you would do a good job and need a break. Unfortunately, I have attained/hired the guys on offense. It is not going to work out right now."
Q. Having read that, does that refresh your recollection as to what you informed Mr. McQueary with respect to his chances to be on your staff?
A. I don't remember that, ma'am.
Q. You don't remember that. Had you, at that point in time -- and this is the December -- this is now December 31, 2012 -- had you retained the guys on offense?
A. I believe so. That would be Coach Foley and Coach Foreman. When I walked in, I told them they had jobs, the first day, maybe before.
Q. And the statement, "It is not going

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to work out right now." Does that refresh your recollection, at all, in -- in information that you provided to McQueary?
A. It doesn't.
Q. Directing your attention back to Rhule-2, and we'll come back to the text messages, but I want to refer to Rhule-2 because it falls within the time line. This is a message that you produced. It's dated January 4 -- it does not have a year. Can you put a year on it?
A. It would be this past January.
Q. This past January?
A. Yes, ma'am.
Q. As in?
A. 2016.
Q. Oh, then I stand corrected. That doesn't fit in at this point in time. Going back, then, referring back to page 263, we're still in the January 2013 time line. And there appears to be a message to you from Mr. McQueary, "Hey, did you hire Jeremy Scott?"
Do you see that message?
A. Yes, ma'am.

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Q. And what is the answer?
A. Yes.
Q. And who's Jeremy Scott?
A. He is my head strength coach, strength and conditioning coach. And he was an assistant coach when Mike and I played at Penn State, and then I think he worked with -- I would assume -- he did work with -- yeah, he worked with Mike all the way up until he left.
Q. And then directing your attention to the next page, 264, there's a date that appears to be January 10, 2013, and a question, "Did you really lose OC?"
Do you see that one?
A. Yes, ma'am.
Q. And you answer that question, based on what's contained in this document?
A. Yes, ma'am.
Q. And what is that answer?
A. "Kind of, yes."
Q. Can you explain what you mean by that?
A. I don't remember sending it, so I would -- I would assume that it was because

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Mike -- he hadn't actually come, but he was going to come. And then Nick Rolovich -- and then backed out, based upon that time frame.
Q. So this relates to Rolovich backing out and then Satterfield --
A. Sliding over.
Q. -- sliding over?
A. Yes, ma'am.
Q. Mr. McQueary then raises a question, "Is the problem with me, administration? You can tell me, Matt."
Do you see that entry?
A. Yes, ma'am.
Q. Do you recall Mr. McQueary asking that question?
A. I do not.
Q. Do you recall responding at any point in time to a question of that nature by Mr. McQueary?
A. I don't.
Q. In his deposition, I asked Mr. McQueary:
"Q Did you ever get an answer to that question from Coach Rhule? That is,

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referring to, 'Is the problem with me, administration? You can tell me Matt.'"
And Mr. McQueary testified, under oath:
"A I believe on a phone call, he" -- referring to you -- "said, the administration won't let me hire you because of the lawsuit and the situation you're in."
Mr. McQueary repeated that statement three times.
"A He's on a phone call. He mentioned to me that, because of the lawsuit and situation I am in, they were not going to let him consider me. That's what he" -- referring to you -- "said on a phone call."
And then the third time:
"A Again, I'm saying there is a phone call and Matt said, definitely because of my lawsuit and definitely because of the situation, they weren't going to let him consider me."
Do you recall a phone call with

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Mr. McQueary in which you provided information to him about your hiring process?
A. I don't.
Q. Do you recall telling him in any form of communication that the administration wasn't going to let you consider him because of the lawsuit and situation he is in?
A. I don't remember saying that, no.
Q. Did you, at any time, consult with anyone in Temple administration about the consideration of or hiring of Michael McQueary?
A. No, I did not.
Q. Why not?
A. I -- I wasn't going to consider him based on just my staff and the fit and the guys I wanted to hire.
Q. Did you, at any time, receive any input, direction, or any communication from anyone in the Temple administration regarding the consideration or hiring of Mr. McQueary?
A. No, ma'am.
Q. Directing your attention to page 265, in this exchange, Mr. McQueary in about -- in January -- late January 2013, raised a

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question about attending a spring practice. Do you see that exchange?

A. I do.

Q. And did you, at any time -- do you recall any communications with Mr. McQueary about his attendance at a spring practice?

A. I don't remember that.

Q. Based on the text message that Mr. McQueary produced, there's a response that you provide; "Yes, would be great."

Do you see that response?

A. Yes, ma'am.

Q. Do you recall informing Mr. McQueary that it would be great or, sure, join a spring practice?

A. I don't remember that conversation.

Q. Do you recall whether or not Mr. McQueary ever attended a practice?

A. I don't -- I don't recall ever seeing him at a practice.

Q. Do you recall having any exchanges with Fran Ganter about Michael McQueary?

A. I don't remember that.

Q. Do you recall who Fran Ganter is?

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A. Yes, ma'am.

Q. Who is Fran Ganter?

A. He was the offensive coordinator and running back coach at Penn State, and then he later transitioned to an off-the-field role.

Q. And then directing your attention back to Rhule-2.

A. Yes, ma'am.

Q. I believe you testified that these were text messages that you received from Mr. McQueary in January of 2016; is that correct?

A. Yes, ma'am.

Q. In January of 2016, did you have an open offensive position?

A. I'm not sure when -- the time frame, so I would assume yes. I think yes. So this past year, Marcus Satterfield was -- well, got offered the Tennessee Tech head coaching job. When exact -- I think that was in December, but, you know, I'm not a hundred percent sure.

No, it must have been January. I'm sorry, no. We played in the bowl game, and

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then he went to Tennessee Tech. Pardon me.

Q. Did you respond to this message from Mr. McQueary?

A. I don't believe I did.

Q. Why not?

A. I don't know why. I mean, at this point, I was -- he wasn't a fit for me, and I wasn't going to hire him. And I don't -- I don't know why, specifically, at that moment I did not, but...

Q. And this second text message on the next page, January 30th, again, is this 2016?

A. Yes, ma'am.

Q. Mr. McQueary writes, "If you have an open spot, I would jump at it, work my butt off for you."

Do you see that message?

A. Yes, ma'am.

Q. Did you respond to that message from Mr. McQueary?

A. I did not, not that I recall.

Q. And why not?

A. I believe that I -- I had already settled on who I was hiring, but I can't recall

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why I didn't actually respond and say something nice or not. But I wasn't going to hire him and had already, sort of, decided what direction I was going to go.

Q. At any point in time since your appointment as head coach at Temple, was Mr. McQueary ever in the running or in consideration for a coaching position?

A. No, ma'am.

Q. Why not?

A. It just never felt like he was, sort of, the right fit, and I think it's, each job is a little bit different. I didn't think he was -- he hadn't -- didn't have what I was looking for for an offensive coordinator. He hadn't coached the quarterbacks, and I never felt like he was the right fit at receiver. So it just never kind of felt like it was something that was the right fit for us.

Q. Thank you.

MS. CONRAD: Attorney Strokoff?

MR. STROKOFF: Why don't we take ten minutes?

VIDEOGRAPHER: The time is now

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11:40. We are off the video record.

- - -

(A short recess was taken.)

- - -

VIDEOGRAPHER: The time is now 12:00. We are back on the video record. This begins media two.

- - -

EXAMINATION

- - -

BY MR. STROKOFF:

Q. Coach Rhule, good afternoon.

A. Good afternoon.

Q. My name is Elliot Strokoff, and I represent Mike McQueary in this matter. And I'm going to be asking you some questions to clarify some points and go over some points that -- that were made this morning in your direct testimony in questions from Ms. Conrad.

A. Yes, sir.

Q. Okay.

A. Yes, sir.

Q. I would ask two things; number one, I'm a bit -- seated further away from you than

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Ms. Conrad was, so I would ask you to, if you can, elevate your voice just a little bit more.

A. Yes, sir.

Q. And I would also reiterate what Ms. Conrad said this morning, and that is, we don't want you guessing. And if you don't understand a question, then just ask me to rephrase it. Okay?

A. Yes, sir.

Q. During direct examination, earlier on, Ms. Conrad asked you some questions about whether or not you considered Mr. McQueary to be a best friend or a good friend.

And my question to you is: How did you understand the meaning of the term "good friend" when she was putting those questions to you?

A. I probably took it as, like, one of my top three, four friends. You know?

Q. So, there's one best friend and then a good friend is the top three, four friends?

A. Yeah. You know, I guess. Someone -- someone that, maybe, like I spend

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time with, someone that I've been to their house, they've been to my house, you know, those kinds of things.

Q. Okay. But you would agree that Mr. McQueary, for example, had your cell number?

A. Oh, yes, sir.

Q. And that even prior to November of 2012, through the years, you would communicate with him and he would communicate with you?

A. Yes, sir.

Q. Okay. I would also, now, like to try to put some dates on your history.

A. Yes, sir.

Q. Do you recall when it was that you graduated State College High School?

A. 1993.

Q. So were you in the same high school class as Mr. McQueary?

A. Yes. We were seniors together, juniors and seniors together.

Q. And you had just moved to State College just before your junior year?

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A. Yes, sir.

Q. Okay. And then, I believe you said, you obtained a bachelor's degree in political science from The Pennsylvania State University?

A. Yes, sir.

Q. And do you recall what year that was?

A. Oh, jeez, I think 1997, December of '97.

Q. And do you recall if that was the same class as Mr. McQueary's class?

A. We entered Penn State at the same time. I'm not sure when he graduated. I took four and a half years, so...

Q. And I believe you also said you have a masters in educational psychology?

A. Yes, sir.

Q. When did you obtain that, sir?

A. I wouldn't know without looking at it. 2000, roughly. Might have been 2000, '99, somewhere in there.

Q. And from where did you obtain that degree?

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A. SUNY Buffalo.
Q. And I believe you testified that after you graduated college, after you received your bachelor's, you went to Albright College in some capacity?
A. Yes, sir.
Q. And then when was that and in what capacity?
A. I went there in July or August of, I guess it would be '98, and I was an intern, so I -- I coached football and worked in the office, but I wasn't a full-time employee.
Q. And how long did you remain at Albright College?
A. Till that, I believe, December or January of that winter.
Q. And then you went to SUNY Buffalo?
A. Yes, sir.
Q. And who was the head coach at Albright College when you went as an intern?
A. E.J. Sandusky.
Q. And how did you obtain a position as an intern at Albright College?
A. I went down and interviewed with

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those guys and met with them.
Q. Okay. "Those guys" being Mr. Sandusky and other people?
A. Yeah, the defensive coordinator, Jeff Collins.
Q. And is E.J. Sandusky related to Jerry Sandusky?
A. Yes, sir, I believe so.
Q. And do you know what that relationship is?
A. I'm -- I believe he's a son. I don't know if he's a biological son. I know some -- some of the children were adopted.
Q. Okay. And when you played football at Penn State, I believe you said you were tight end and a linebacker?
A. Yes, sir.
Q. Okay. And who was the linebackers coach when you played football at Penn State?
A. Jerry Sandusky.
Q. And who was the defensive coordinator at Penn State when you played football there?
A. Jerry Sandusky.

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Q. So you were a grad assistant at SUNY Buffalo for what time period?
A. The spring of, I guess it would be 1998. No, I'm sorry, sir, the year after I left Buffalo. The year after I left Albright College would have been, I guess, the fall of '98. So the spring of '99, I would say. The fall -- I don't have the dates in front of me, but two years -- two and a half years, I'm sorry, two seasons. And then I left in the summer. If that's 2000 or 2001, I'm not sure.
Q. So as a grad assistant, that's when you were able to pick up your master's?
A. So I started my master's -- my master's program as a graduate assistant. I was there in the spring and the fall, and after the first season, I got promoted to a full-time position coach. So I no longer was taking classes. I took one -- we got let go. We got fired. I took -- I can't remember if it was the spring or the summer, I took two more classes. Then took a job at UCLA, and I finished my SUNY Buffalo master's at UCLA. I took classes at UCLA and I just had to write my

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thesis. So I wrote my thesis out there and sent it back to Buffalo. Sorry, that's long-winded, but...
Q. So you began at UCLA as a grad assistant about when?
A. The year after I left Buffalo, maybe 2000. I got there in the summer, August.
Q. Well, if you arrived at SUNY Buffalo -- and I realize it's hard recollecting things.
A. Yes, sir, I'm sorry.
Q. If you think I'm misleading you, then one of the lawyers or you will tell me. But if you were at SUNY Buffalo for two and a half years beginning in the spring of '99, then that -- that would put you into, I think, 2001 when you went out to UCLA; does that make sense?
A. Yeah. Let me do the math real quick, make sure I have it right. So I graduated in the fall of '97. Spring of '97, I worked at Chili's. In that summer, I went -- so the -- excuse me, the spring of '98. Fall of '98, I was at Albright. In the spring of

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'99, I was at Buffalo. Fall of '99, Buffalo. Spring of 2000, Buffalo. Fall of 2000, Buffalo. So I must have gone to UCLA in, I guess, 2001.

Q. Okay. As a grad assistant?

A. Yes, sir.

Q. And how did you get to be a grad assistant at UCLA?

A. So after I -- after we got fired, I made a decision I was going to just fight to stay in Division One football, so I was willing to take a step back. So Jeff Collins, who I worked with at -- at Albright, was a defensive coordinator, he was now at Georgia Tech or somewhere, and he just said, hey, there's some graduate assistant jobs open. You should go do that. And UCLA was one of the ones where you didn't have to have any connections because you had to be able to get into the graduate school. Not many people could get into UCLA's graduate school. I was able to get in because I had already almost finished my master's. So I -- I just kept calling out there and calling them and calling them and calling them until finally

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they offered me the job.

Q. And who was the head coach out there then?

A. His name was Bob Toledo.

Q. And how long were you a GA at UCLA?

A. I was there that fall and that spring.

Q. One year?

A. Yes, sir, one year.

Q. And we're now in 2002?

A. Again, I -- I'm sorry, I don't have that date in front of me.

Q. Okay. And where did you go, then, next?

A. So I left that summer, and I went to Western Carolina University in Cullowhee, North Carolina.

Q. How long were you at Western Carolina?

A. I believe it would be -- it was four seasons, so...

Q. Okay. And then you went to Temple?

A. Yes, sir.

Q. And who was the head coach there?

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A. Al Golden.

Q. Sir, do you recall that Mr. McQueary offered to call Al Golden on your behalf when you were seeking employment on his staff?

A. Yeah. I think I recollect that, yes. I would say that's true.

Q. And do you recall if Mr. McQueary called Mr. Golden on your behalf?

A. I don't know that.

Q. Mr. Golden never said words to that effect that he heard from Mike McQueary about you?

A. I don't remember that.

Q. But Mr. McQueary offered to call Mr. Golden, and you told him that would be good?

A. Oh, I asked -- I'm sure I asked him to, yes, sir.

Q. You asked him to because you knew he had a good relationship with Mr. Golden?

A. I didn't know the relationship. I knew he -- they worked together.

Q. Okay. So you started at Temple

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in 2006. In what capacity?

A. I came; I was the defensive line coach my first season.

Q. And correct me if -- if I'm wrong, but your playing experience as a football player --

A. Yes, sir.

Q. -- was as a center, a tight end, linebacker, and maybe special teams?

A. Yes, sir. I did do -- I played special teams, yes, sir.

Q. But you, yourself, had not ever been an offensive -- I'm sorry, a defensive player?

A. I did not play defensive line, no, sir.

Q. Okay. And when you were in high school as a center, you were centering the ball to the quarterback, Mike McQueary; isn't that correct?

A. Yes, sir.

Q. And in high school, aside from being teammates, would you not on occasion socialize in and about town with Mr. McQueary

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and other high school classmates?
A. I probably did, yes, sir.
Q. What about when you guys were in college?
A. I would see him out.
Q. Well, does Mr. McQueary know your wife, Julie?
A. I think he -- yes, I would say he does, yes.
Q. Okay. When did your position next change at Temple?
A. So after that season, I was promoted to be the recruiting coordinator. And then was, later that spring, was promote -- was moved to be the quarterback coach.
Q. And you never coached quarterbacks?
A. No, sir, never had.
Q. Okay. Had you ever played quarterback?
A. When I was in, like, ninth grade. Maybe tenth grade too.
Q. Okay. Any other positions while you were at Temple?
A. I coached the tight ends my last

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season.
Q. Okay. And then after you coached tight ends your last season at Temple, where did you then go?
A. I went to the New York Giants.
Q. Okay. Now the last season you coached tight ends, who was the head coach?
A. Steve Addazio.
Q. When was it that Mr. Golden left Temple; do you remember?
A. After five years, so right before that last year when I was the tight end coach.
Q. So Mr. Addazio was the head coach at Temple for one year?
A. He was the head coach for two years. I was only with him for one.
Q. Okay. And you then went to the Giants. Did you have any particular connection to the Giants team?
A. Yes. So Kevin Gilbride, Jr., who had been, when I was the offensive coordinator, had been my receiver coach, had just gotten promoted at the Giants. His father was the offensive coordinator. So Kevin was my initial

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"in" there. I think he talked to Coach Coughlin and his dad and said that I would be a -- hoped that I -- I would be a great fit.
Q. Okay. Do you recall when Mr. Addazio came to Temple -- scratch -- scratch that.
In end of 2012, I believe you said that after you were appointed head coach, you met with all the assistant coaches?
A. Yes, sir.
Q. Why?
A. Why did I meet with those coaches?
Q. Yeah.
A. I thought it was the right thing to do.
Q. You met with all of them?
A. Every -- well, the ones that were there. A couple of them had already left, I think, and gone with Coach Addazio. But the -- the remaining coaches.
Q. Okay. So the coaches that had not announced that they were going to be going with Mr. Addazio to Boston College, you interviewed all of them?

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A. I wouldn't say I interviewed them. I talked with some.
Q. You spoke to them?
A. I spoke to them, yes, sir.
Q. And you said you thought it was the right thing to do?
A. Yes, sir.
Q. Do you recall if, when Coach Addazio came to Temple two years before you became head coach, did he meet with all the assistant coaches?
A. I don't remember. I know he had called me before he got -- before he had gotten there. So it was sort of at a weird time; it was Christmas break, so I don't know if he met with everybody else.
Q. He met with you?
A. He met with me.
Q. And is it your understanding that -- you said -- if it was the right thing to do, that this is common practice, where new head coaches meet with incumbent assistant coaches?
MS. CONRAD: Objection as to form,

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as well as I don't know what you mean by common practice.

MR. STROKOFF: Well, I'm going to rephrase the question to try and get past it.

BY MR. STROKOFF:

Q. But you said you thought it was the right thing to do?

A. Yes, sir.

Q. Was it your understanding at the time you spoke to all the assistant head coaches that this was a common practice for new head coaches?

MS. CONRAD: Same objection, but you may answer if you understand the question.

THE WITNESS: In my experience, and I've been through this, unfortunately, a couple times on the other end, it's -- they've always met with me. So I got -- when I got fired at Buffalo, they met with me. When I got fired at -- when Coach Addazio came in, I was, in all effects, fired, he met with me at least. So I felt

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like I should do that with those guys.

BY MR. STROKOFF:

Q. Okay. Let's -- let's clarify this: When the head coach was fired, and the new head coach came in?

A. Any time a new head coach had come in, yeah, you know, the staff was basically, you feel like you're fired. It was ultimately...

Q. Did you have, for example, while you were at Temple, did you have a written contract as an assistant coach?

A. Yes, I believe so.

Q. Okay. And according to that written contract, you could just be fired?

A. I don't remember the contents of that. I believe -- I believe I was on -- on -- under contract until July 1st.

Q. Okay. Going back to your days as a student at Penn State, do you recall residing at University Terrace with John Koltay and Dave Rocco?

A. They were two of my roommates there, yes, sir.

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Q. And do you recall that Mr. McQueary would come over to socialize on a regular basis to your apartment at University Terrace?

A. I wouldn't -- I wouldn't characterize it exactly like that.

Q. How would you characterize it?

A. I would say he was good friends with John Koltay, really good friends, maybe, you could say maybe best friends. I'd say he was really good friends with Dave, and he would be at our -- at our apartment at times. And when --

Q. What does "at times" mean?

A. Not regularly. We were -- we were a pretty social group at the time, and we had, you know, people around. And, you know, we had a big apartment, so we had a lot of people come through there.

Q. After you graduated Penn State in December of 1997, did your family continue to live in State College?

A. Yes.

Q. And did you, after you graduated from Penn State, return to the university for

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some football events?

A. In terms of what?

Q. Well, homecoming?

A. No, sir.

Q. Bowl games?

A. No, sir.

Q. Award dinners, lettermen dinners?

A. No, sir.

Q. So other than visiting your family at State College, you wouldn't return to university football events?

A. I've been to the Pennsylvania High School Football Coaches Association Clinic, which is held in State College, so I go there as a -- as a representative of Temple. I've been to one Penn State game, and that was the year after I was done playing. My wife and I, I think, went to the Michigan State game. And other than that -- I'd (sic) have to be more specific. I'm not sure if there's something I'm not -- I'm not remembering.

Q. All right. Did you have pride in having graduated from Penn State?

A. Absolutely.

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Q. Still do?
A. Absolutely.
Q. I now want to ask you some questions about reputation.
A. Please.
Q. Do you understand the difference or do you believe there is a difference -- I should rephrase it.
Do you believe there is a difference between what a person is and what her or his reputation may be?
MS. CONRAD: Objection as to form, but you may answer if you understand the question.
THE WITNESS: I -- I -- I believe there's a difference.
BY MR. STROKOFF:
Q. Okay. Do you understand that a reputation is what folks say about you and that might not necessarily be what you are?
MS. CONRAD: Objection as to form, but you may answer.
THE WITNESS: I do understand that. I believe that.

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BY MR. STROKOFF:
Q. Okay. So with respect to Mr. McQueary's recruiting, is it your testimony that you didn't cross paths with him on the recruiting trails over the years?
A. I did not say that.
Q. Okay. You did cross paths with him?
A. Yes, sir.
Q. In answer to a question put to you by Ms. Conrad, she asked about, I think, what you personally knew about Mr. McQueary's reputation as a recruiter. And I believe you said you had no knowledge of his reputation. So did you mean that to mean you didn't know what other people said about him as a recruiter?
MS. CONRAD: Objection as to form, but you may answer.
THE WITNESS: Yes. I didn't know what other people's opinions of him were as a recruiter.
BY MR. STROKOFF:
Q. In the recruiting territories that

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you had personal knowledge of, some of those were recruited by Mr. McQueary; isn't that correct?
A. I believe so.
Q. And you did have personal knowledge, did you not, that in those areas, he was able to recruit some very good athletes for the Penn State football team?
MS. CONRAD: Object to form, but you may answer.
THE WITNESS: So I would -- I would say that I know that he's recruited some -- some good players. I -- I don't -- I can't say anything about how he, you know, how he is as a recruiter. I know he's gotten some good players.
BY MR. STROKOFF:
Q. Okay. And as a Penn State alum, do you recall that between the years 2000 -- football season 2000 through 2004, Penn State only went to one bowl game?
A. I'm not -- I'm not -- I don't have those dates in my head. I'm sorry.
Q. Well, do you recall that there was

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a period of time in the early 2000s when Penn State did not have the winning records that it traditionally had over the years?
A. I would say probably so, yes.
Q. And do you recall that very shortly after Mr. McQueary became recruiting coordinator for Penn State in 2004, he was able to recruit some of the fastest wide-outs in the history of the university?
MS. CONRAD: Objection as to form, but you may answer.
THE WITNESS: I don't -- I don't know that context.
BY MR. STROKOFF:
Q. Well, what context do you know about wide-outs that he recruited, especially in those years following the lean years?
MS. CONRAD: Objection as to form, but you may answer.
THE WITNESS: I'm sorry. I would have to know who they were. You know, I don't know who they were. I don't know who recruited them, and I don't know how fast -- you know, I don't have -- I don't

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have the knowledge of how fast they were.
BY MR. STROKOFF:
Q. Do you have knowledge as to the number of recruits of Mr. McQueary's that ended up in the NFL?
A. I -- I don't have that.
Q. Over the years before you became head coach at Temple, would you read the Penn State football guides that would be put out in the beginning or before the season began?
A. Well, which -- I'm sorry, by guides?
Q. The media, the guides for the media, informational guides that the football team would put out --
A. No, sir.
Q. -- before its season?
A. No, sir, I would not.
Q. With respect to Mr. McQueary's reputation as a coach, what knowledge, if any, do you have of his reputation? I should say what knowledge, if any, do you have of his reputation as a coach?
A. I don't have any knowledge of that.

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Q. Sir, were you aware that Mr. McQueary recruited Jordan Norwood?
A. I was not.
Q. You are aware that he's in the NFL?
A. Yes, sir.
Q. And I think he set a Superbowl record this past year, did he not?
A. I don't know that, I'm sorry.
Q. Deon Butler, were you aware that Mr. McQueary recruited him?
A. I did not know that.
Q. He's in the NFL -- or was in the NFL. How about Allen Robinson? Did you know that Mr. McQueary recruited him?
A. I did not know that.
Q. He's in the NFL; is that correct?
A. I believe so, yes.
Q. How about Derrick Moye, M-O-Y-E; did you know Mr. McQueary recruited him?
A. I did not know that.
Q. And he's in the NFL -- or was. So is it fair to say that when Mr. McQueary was approaching you for work in December of 2012 and January of 2013, that you didn't check to

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see what his recruiting results had been over the years?
A. Did I look up his recruiting results, you're asking me?
Q. Yes.
A. No, sir, I did not.
Q. Sir, did you ever, after you graduated -- let's say -- rephrase that.
From 2004 through 2011, did you ever watch Penn State football on television?
A. Yes, sir.
Q. And when you would watch Penn State football on television, you would see your former teammate, Mike McQueary, on the sidelines; isn't that correct?
A. Yes, sir.
Q. He would be calling in the plays; isn't that correct?
A. I believe so, yes.
Q. I believe one of the criteria for an assistant coach that you mentioned, and I'm paraphrasing here -- I'm not trying to misstate it, so you can correct me --
A. Yes, sir.

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Q. -- but they'd be great guys to be around, end quote. Mr. McQueary would not be a great guy to be around in that context?
MS. CONRAD: Objection as to form, but you may answer.
THE WITNESS: I did not say that.
BY MR. STROKOFF:
Q. Well, I'm just -- but I just want to know whether or not he was a great guy to be around in your opinion.
A. I had never worked with him, so I wouldn't be able to say what he would be like in the office or around. I had always been friendly with him so I had no knowledge of not liking him, but, I think as I said, like I'm -- I liked the experience of being with guys through hard times and good times and, you know, with the guys I've worked with, that's helped me.
Q. Also, I believe you said there was a requirement that there be a complete commitment to develop players as people. Is that correct?
A. Yes, sir.

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Q. What did you know about whether or not Mr. McQueary met that criteria?
A. I didn't know very much about that.
Q. Okay. Did you make any inquiry with respect to that criteria for Mr. McQueary?
A. No, sir. The only thing I -- I think I stated before, was I had sort of heard that the players, his players, didn't always really like him. And as I said, I don't know if that's a good thing or a bad thing.
Q. Well, let's follow up on that. Who did you hear that from?
A. I don't know. I -- I, you know, I just heard that kind of as you go around in coaching and hear things, and so I try not to ever give too much value to things you hear.
Q. You heard that from a former player or player?
A. No. It wouldn't have been from a player. I think from coaches.
Q. From coaches at other schools or from Penn State?
A. Not from Penn State. It would -- I think maybe high school coaches or around.

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Q. So you heard from one -- well, how many high school coaches?
A. I don't know that.
Q. So you heard from a few high school coaches that maybe his players didn't like him?
A. Right. I couldn't say who.
Q. And how much credit did you give that information?
A. Not a -- not a lot. Go back to what you said, I think that was sort of like reputation, but I didn't have any firsthand knowledge to offset that or confer it.
Q. Sir, in 2012, were you aware of what territory Mr. McQueary had recruited during his time as an assistant coach at Penn State?
A. I wouldn't say that I knew everything he did. I knew some of the places that I think he had.
Q. But you never inquired as to exactly what territories he recruited; is that right?
A. No, I did not.
Q. Sir, by whom were you employed on

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November 5, 2011?
A. I'm not sure.
Q. Well, it's 13 months before you became head coach at Temple.
A. So Temple.
Q. So you were wrapping up at Temple, and then you went to the New York Giants?
A. Yes, sir.
Q. So on November 5, 2011, Jerry Sandusky's indictment or criminal complaint was made public, as well as the criminal complaints against Gary Schultz and Tim Curley. How do you recall finding out about those events?
MS. CONRAD: Objection as to form; assumes facts not in evidence, but you may answer.
THE WITNESS: Maybe on TV. I don't remember that day.
BY MR. STROKOFF:
Q. November 5, 2011, was still during football season at Temple.
A. Okay.
Q. Right?
A. Yes, sir. It would be.

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Q. Okay. And that was a Saturday. May have even been a game day.
A. I don't remember.
Q. Okay. As an alum of Penn State or proud alum, once you heard about it on TV, what efforts, if any, did you make to find out more about the situation?
A. I don't remember making any efforts to find out more.
Q. Did you check Penn State's website for information?
A. I don't know. I don't think I checked Penn State's website.

- - -

(Whereupon the document was marked, for identification purposes, as Rhule-6.)

- - -

BY MR. STROKOFF:
Q. I believe this will be marked as Rhule Deposition Exhibit 6. Sir, could you take a moment to read this deposition exhibit?
A. The statement?
Q. Yes.
A. "Statement from President" --

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Q. No, no, no, you don't have to read it out loud. Read it to yourself.
A. Oh, sorry. I thought you said read it to you. Pardon me.
Q. My apologies.
Sir, can you tell me if you had read Rhule Deposition Exhibit Number 6 prior to this deposition?
A. I have not.
Q. Okay. Sir, do you recall that at some point in time during the week following November 5, 2011, that it was announced that Mr. McQueary was being placed on administrative leave?
A. I'm not sure of the timing, but I remember that happening.
Q. And between the original announcement of the criminal complaints against Sandusky and Curley and Schultz and your finding out that Mr. McQueary was being placed on administrative leave, did you make any effort to gain any more information about what the situation was at Penn State concerning this matter?

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A. I don't remember doing so, no.
Q. What did you think once you found out that Mr. McQueary was being placed on administrative leave?
A. I don't remember.
Q. What did you think when you found out that Joe Paterno had been terminated?
A. I don't remember exactly what I felt.
Q. Well, what did you think when you found out that Mr. Gerald Sandusky had been charged with numerous criminal complaints involving sexual matters?
MS. CONRAD: I'm going to object at this point on relevancy on relation to this witness' testimony. You can ask the question, but we'll revisit this at pretrial.
THE WITNESS: Can you say it to me one more -- I'm sorry, sir?
BY MR. STROKOFF:
Q. What do you remember thinking, if anything, once you found out that your former coach, Gerald Sandusky, was being charged with

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numerous criminal misconduct involving sexual molestation?
A. I was --
MS. CONRAD: Same objection.
THE WITNESS: Sorry. I was saddened.
BY MR. STROKOFF:
Q. And you don't remember any reaction when you found out that Mr. McQueary had been placed on administrative leave by the university?
MS. CONRAD: Objection; asked and answered.
THE WITNESS: I don't remember the specific emotions and all that.
BY MR. STROKOFF:
Q. Do you remember speaking, during this week of November 25, 2011, with former teammates of yours at Penn State about the situation that was unraveling?
A. I don't know. I'm sorry.
MS. CONRAD: Objection. You may answer.
THE WITNESS: Sorry. I don't

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remember that.
BY MR. STROKOFF:
Q. Sir, I'm just going to ask a few questions about Rhule Deposition Exhibit Number 4. That's screen shots of text messages.
A. Yes, sir.
Q. And you will notice, as you probably have noticed, that there are page numbers at the bottom of each page?
A. Yes, sir.
Q. I may be referring to them. The first page of Rhule Deposition Exhibit Number 4, MM0257, purports to be a screen shot of some text messages of December 3rd and December 4th, 2012. I believe you testified that Steve was Steve Addazio, the Temple coach who had just left to go to Boston College.
A. I believe so.
Q. Okay. Now, you don't recall this text message exchange; is that correct?
A. I don't recall this conversation.
Q. But over the years, you did exchange text messages with Mr. McQueary; isn't that correct?

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A. And I recall -- yeah, I recall having conversations. I just don't recall -- I remember always talking, you know, during this time getting text messages from Mike. I just don't recall these specific ones.

Q. Well, if you texted Mike McQueary on December 4, 2012, quote, I will call Steve tonight, end quote. Do you believe that you intended to call Steve Addazio in Mike McQueary's behalf?

A. I don't remember.

Q. Well, do you think that you were saying that to him but you didn't intend to call Steve Addazio on Mike McQueary's behalf?

A. I don't know.

Q. And you don't recall whether or not you called Mr. Addazio?

A. Yeah. I was speaking to Coach Addazio a lot, so I know I talked to him. Because we were in the process of changing our staff together. I don't -- I don't know if I talked about Mike or not.

Q. And if we go to the second page, MM0258, and it looks like, on the second screen

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shot on the page, December 10th, 2012, there's a text message that says, quote, I brought you up to Steve, Ray: BC, we will see. If you texted that to Mr. McQueary, do you believe that you did bring Mr. McQueary's name up with Mr. Addazio concerning potential employment?

A. I don't remember.

Q. Would it have been within the realm of possibility that you would have texted Mr. McQueary that you brought his name up to Steve Addazio when you really hadn't?

MS. CONRAD: Objection as to form, but you may answer.

THE WITNESS: I -- I don't know. I don't, you know, I don't know.

BY MR. STROKOFF:

Q. So it's something you -- are you saying it's something that you could have misled Mr. McQueary about?

MS. CONRAD: Objection as to form.

THE WITNESS: I think throughout, kind of, this process I probably sometimes let people down easy, and, you know, I don't know if that's this case right now.

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But I don't -- I don't know. I have no -- I have no recollection of this or Steve or that whole time really.

BY MR. STROKOFF:

Q. Well, let me ask you this: Why would you have not brought Mr. McQueary's name up to Steve Addazio during this time frame?

A. Because I -- I know Steve was taking the -- if I didn't, and I don't know if I didn't, but I know Steve was taking his receiver coach from Temple to go be the coordinator at Boston College. It was a little bit contentious at times with Steve and I as we were both kind of fighting over our staffs and recruits.

And Steve is someone that I had recommended guys to for years, when I worked -- for a year when I worked with him. And he had his guys usually, so he didn't -- well, I think he valued me, but he didn't always listen to my opinions. So if I did not, I don't know, it would probably be one of those answers.

Q. And you're saying you would rather have misrepresented this to Mr. McQueary then

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tell him Steve Addazio is not going to listen to me?

MS. CONRAD: Objection as to form, but you may answer.

THE WITNESS: I'm not saying that, no.

BY MR. STROKOFF:

Q. Do you think it more likely than not that you brought up Mr. McQueary's name with Mr. Addazio, that you texted in which you did?

A. I don't know.

Q. On MM0259, the top screen shot, in the middle of the December 14th, 2:31 p.m. text message it says, "Just need a break." Do you see that?

A. Can you say the number one more time, sir? I'm sorry, I must be on the wrong page.

Q. 0259 is at the bottom. There are two screen shots on the page.

A. Yes, sir, I got it. I'm sorry.

Q. And the top screen shot toward the bottom is December 14, 2012.

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A. Got it, yes, sir.
Q. Text message, "Just need a break." Did you understand that in December of 2012, that Mike McQueary was desperate for a break?
MS. CONRAD: Objection as to form.
THE WITNESS: I knew he was out of work.
BY MR. STROKOFF:
Q. Did you or did you not believe that in the status of being in the -- in the middle of the -- this controversy, that it would be very difficult for him to find a coaching position?
MS. CONRAD: Objection as to form. Objection as to assuming facts not in evidence.
THE WITNESS: Regarding us, I never really got there for us.
BY MR. STROKOFF:
Q. I'm not saying us.
A. Okay.
Q. I meant as a football coach at the college level. Did you have any opinion as to whether or not his testifying as a witness for

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the prosecution in the Jerry Sandusky case, which had already happened now, December of 2012, because he testified in June of 2012, and the recent announcement of criminal complaints against President Spanier and additional complaints against Gary Schultz and Tim Curley, that that would negatively impact his ability to get a football coaching position in college?
MS. CONRAD: In addition to objection to form, this witness is not here today as an expert. He is here today as a fact witness. He is here today to testify as to facts within his personal knowledge and information. He is not here today to render opinions.
MR. STROKOFF: This is a hybrid deposition. It's not limited to it being a trial deposition. It's not limited by the Subpoena, so this is both a discovery deposition, parts of which, probably most of which, if Coach Rhule is not available to testify at trial, may be used at trial. I certainly don't believe that he's

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precluded from answering the question. He is -- in addition to being a fact witness, he may qualify as an expert witness.
MS. CONRAD: He is not here today as an expert witness. Regardless of the nature of this deposition being a discovery deposition or a trial deposition, he is here today as a fact witness and is only to testify as to facts within his personal knowledge and information.
MR. STROKOFF: Well, I think with that you can -- the objection and the answer to the objection has been documented for the record, so I would ask you to answer the question.
THE WITNESS: I would -- I would -- I would not say that testifying would hurt his coaching career.
BY MR. STROKOFF:
Q. Okay. What would, in your opinion, hurt his chances for being a coach in college football, if anything?
A. In general, I would say that -- I

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would say the, sort of, things may be said about him, right or wrong. I have no idea, you know, what he did, what he didn't do. If you look him -- look up, you know, if you look him up on Google or something it can be somewhat controversial. That might in some ways in college football impair his ability in recruiting for some people.
Q. With respect to recruiting, one of the criteria which you did not mention, and I'm going to give you an opportunity to do so if you think you want to, is, you didn't mention integrity with respect to criteria for an assistant coach. Is that not an important criteria?
A. Integrity?
Q. Yes.
A. Oh, yes, sir, I would say so.
Q. Honesty?
A. Yes, sir.
Q. Especially in recruiting, right?
A. I would say in everything.
Q. When you're recruiting high school athletes to come to a particular school to

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obtain a college education and play football, it's important that the parents and the athletes themselves believe in the honesty of the recruiter; isn't that correct?

A. I would -- I would say yes.

Q. Isn't that paramount?

A. I would say it is.

Q. Are you saying that in the post-November 5, 2011, time frame, through the end of December 2012, that 13-month period, you formed no understanding as to what the university was saying about Mr. McQueary's honesty?

MS. CONRAD: Objection as to form.

THE WITNESS: I don't know that I said that. And I don't know that I know the answer to that.

BY MR. STROKOFF:

Q. Well, you did know that the university was supporting Mr. Schultz, Mr. Curley, and then later Dr. Spanier in defending against the criminal conviction, right, or criminal complaints --

MS. CONRAD: Object --

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BY MR. STROKOFF:

Q. -- isn't that right?

MS. CONRAD: Objection as to form. Objection as assumes facts not in evidence.

THE WITNESS: I don't know those facts, those details about those gentlemen.

BY MR. STROKOFF:

Q. Did you ever, sir, see any statement from The University which led you to believe that The University felt that Mr. McQueary was honest?

MS. CONRAD: Objection as to form. You may answer.

THE WITNESS: I don't know that I've seen that statement or a statement.

BY MR. STROKOFF:

Q. All right. Well, were -- were you aware of any statements from The University indicating that Mr. McQueary wasn't telling the truth?

MS. CONRAD: Objection as to form. Assumes a fact not in evidence.

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THE WITNESS: I don't know that.

BY MR. STROKOFF:

Q. His being placed on administrative leave did not signify to you that The University felt that Mr. McQueary had done something wrong?

MS. CONRAD: Objection as to form.

THE WITNESS: I don't know that I took it that way.

BY MR. STROKOFF:

Q. Well, which way did you take it?

A. I don't think -- I mean, I don't think I thought about it other than, you know, hoping that Mike was okay and that was it.

Q. Sir, when you were hired as head coach, who was the athletic director at Temple?

A. Bill Bradshaw.

Q. And is he still the Athletic Director?

A. No, sir.

Q. And do you know where Mr. Bradshaw is now?

A. I believe he's the interim athletic director at La Salle.

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Q. Going to 263 on Rhule Deposition Exhibit 4, on the second screen shot, there's a question about hiring Jeremy Scott, and you replied, yes, you did hire him. Is that correct?

A. I don't remember this exchange, but I see it.

Q. But I mean, you did hire Jeremy --

A. Yes, sir, I did. I hired Jeremy.

Q. And you knew Jeremy Scott from your days at Penn State?

A. Yes, sir.

Q. And I think there's a Brandon Noble on Rhule Deposition Exhibit 3, defensive line coach?

A. Yes, sir. I hired him.

Q. And you knew him from your days at Penn State?

A. Yes, sir.

Q. He was a teammate of yours?

A. Yes, sir.

Q. And looking at Rhule Deposition Exhibit 3, where you get to the coaching staff part, aside from the graduate assistants, what

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were the off-field positions that were on your staff when you started, off the field?

A. Yes, sir. At that time, I had director of athletic training, video coordinator, athletic equipment supervisor, director of football operations, head strength and conditioning coach, coordinator of external operations, coordinator of internal operations, then the assistant strength and conditioning coach, assistant athletic equipment manager, and assistant trainer and my administrative specialist.

Q. The coordinator of external operations, was that an incumbent who was there before you became head coach?

A. So the incumbent stayed, but this is not him. He stayed through the spring, and then I hired Charlie after that.

Q. The incumbent voluntarily went somewhere else?

A. He went to -- he was trying to get his MBA and do something else with his life.

Q. What about the coordinator of internal operations, Mr. Klein?

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A. So he -- I kept Andre Odom, and then Andre left in the spring to, I think, go to the NFL, and I hired Jarret Klein.

THE WITNESS: Do you mind if I take a minute?

MS. CONRAD: Go ahead.

MR. PUMA: We're just going to take a quick break while you're conferring, if that's all right.

MR. STROKOFF: I don't have too much more.

VIDEOGRAPHER: The time is now 13:02. Were off the video record.

- - -

(A short recess was taken.)

- - -

VIDEOGRAPHER: The time is now 13:15. We're back on the video record.

BY MR. STROKOFF:

Q. Mr. Rhule, I just have a few more questions. Sir, do you recall whether or not you told mutual acquaintances of you and Mr. McQueary that you would like to have hired him but Temple administration wouldn't let you do so?

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A. I -- I don't recall saying that.

Q. All right. Do you recall saying that, for example, to Kevin Conlin?

A. I don't recall saying that.

Q. Who is Kevin Conlin?

A. He was a teammate of ours.

Q. Okay. Teammate of ours, meaning yours and Mr. McQueary's?

A. Yeah. I'm sorry, yes, me and Mr. McQueary.

Q. And do you recall any teammates of yours and Mr. McQueary's, during those four years at Penn State, that you talked to concerning hiring Mr. McQueary in any capacity?

A. I don't -- I don't think so. I don't recall.

Q. Okay. Do you recall any of them asking you to consider Mr. McQueary?

A. Not that I can recall.

Q. Sir, do you remember back in your college days, being quoted in Sports Illustrated about making a comment concerning Mr. McQueary?

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A. I remember being quoted about that. I don't know what -- I can't remember what it was, but I remember being quoted.

Q. You didn't save a clipping?

A. No, sir. My mom might have. I don't have anything like that.

Q. Are you aware of any policy at Temple which would have barred you from hiring Mr. McQueary?

A. I'm not aware of anything.

Q. Are you aware of any law that would have barred you from hiring Mr. McQueary?

A. I'm not aware of anything.

Q. Are you aware of any NCAA rule that would have barred you from hiring Mr. McQueary?

A. I'm not aware of any.

MR. STROKOFF: Pass the witness.

- - -

EXAMINATION

- - -

BY MS. CONRAD:

Q. Coach, I have a few follow-up questions.

When you provided information about

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your consideration of Nick Rolovich, I believe you testified that he had called plays. Do you recall that testimony?

A. Yes, ma'am.

Q. And what does that mean, "he called plays?"

A. That's -- that's, you know, sort of every down deciding, you know, run, pass, what play we're going to run, making that decision.

Q. When counsel asked you about observing Penn State games on TV and seeing Mr. McQueary; do you recall that testimony?

A. Yes, sir, I do -- ma'am, I'm sorry.

Q. I believe he asked you whether you observed Mr. McQueary calling in plays; do you recall that testimony?

A. I do.

Q. Is calling in plays the same as calling plays?

A. No, ma'am.

Q. What's the difference?

A. Calling plays is, like I said, selecting the play that's to be run. And calling in plays, I believe what he was

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referring to with Mike was, once a decision has been made, signaling in the play. So that would be the difference.

Q. So what you observed was Mr. McQueary signaling in a play?

A. Yes, ma'am.

Q. A play that had been called by someone else?

A. Yes, ma'am.

Q. You testified that it's your experience that when a new head coach comes in, the assistant coaches assume they're fired; is that correct?

A. Yeah. I mean, it's probably not the right way to say it, but there's a good chance you -- you know, you're at the discretion of the next coach usually, so...

Q. And I believe you also testified that it's been your experience that you've had the opportunity to meet with the new head coach --

A. Yes, ma'am.

Q. -- in most of those circumstances?

A. Yes, ma'am, I have.

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Q. In any of those circumstances where you met with a new head coach were you on administrative leave?

A. No, ma'am, I was not.

Q. You testified that you learned that Mr. McQueary had been placed on administrative leave from Penn State, correct?

A. I don't know that I said it like that.

Q. Okay. What did you say?

A. I think he said -- I don't remember exactly how it was. I think he said, how did you feel or do you recall that. I don't recall exactly, but I generally recollect that that's what was...

Q. So you recall that at some point in time you became aware that Mr. McQueary had been placed on administrate leave by Penn State?

A. Yes, ma'am.

Q. So were you aware that prior to being placed on administrative leave, The University and Mr. McQueary had received death threats?

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A. I would say that maybe I recall like either reading that or hearing that. I couldn't say who or, you know, if that's -- you know, if that's -- who -- where I heard that from or anything like that, but I might have read it.

Q. And then you testified, and please correct me if I didn't get this a hundred percent accurate, that what may hurt Mr. McQueary in being considered or hired as an assistant coach relates to the things that have been said about him in the media. Did I characterize that correctly?

A. Yeah, I -- yes, ma'am.

Q. What did you mean about those things that had been said about him in the media?

A. Just, you know -- you know, the question -- and again I have no opinion on this -- but did Mike do the right thing or the wrong thing in terms of if he, you know, did, in fact, see something going on, why did he run out. Why didn't he defend the child?

Again, I have no knowledge of any

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of that, but I think there's a possibility that if you go out in the world of recruiting, sort of that negativity around that decision or that 30-minute occurrence could be used against him or hurt him in some way.

Q. And that information about leaving a child in the shower was information you obtained from reading media reports?

A. Yeah, just seeing it, you know, in the media or, you know, generally.

Q. Thank you.

MR. STROKOFF: Few more.

THE WITNESS: Yes, sir.

- - -

EXAMINATION

- - -

BY MR. STROKOFF:

Q. Did you hear -- let me rephrase.

Did you understand that Joe Paterno stated that Mike McQueary did the right thing?

MS. CONRAD: Objection; you may answer.

THE WITNESS: I believe that I heard -- I saw that.

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BY MR. STROKOFF:

Q. Okay. Does that mean anything to you, significant, that Coach Paterno expressed his opinion that Mike McQueary did the right thing?

MS. CONRAD: Same objection.

THE WITNESS: I'm glad to hear that -- you know, I'm glad for Mike that Coach -- that Joe stood up for him.

BY MR. STROKOFF:

Q. Sir, are you aware of efforts that certain Penn State football players engaged in to discredit Mr. McQueary?

MS. CONRAD: Objection; you may answer.

THE WITNESS: I'm not.

MR. STROKOFF: No further questions.

MS. CONRAD: Thank you so much. We're concluded.

VIDEOGRAPHER: The time is now 13:24. This concludes today's videotaped deposition of Coach Matt Rhule.

MS. CONRAD: On the court reporter's transcript, I would like to note for the record that there is a confidentiality agreement in place. The parties may designate the transcript, the testimony, as confidential, and we reserve the right to do so.

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MR. PUMA: And I would just add that I would ask that we have agreement that pending any designation by the parties, the transcript is provisionally designated as confidential. There's been a variety of discussion of personnel decisions and personnel information of third parties.

MS. CONRAD: Absolutely.

MR. STROKOFF: May I ask why we don't just designate it as confidential and then we don't have to worry about something later?

MR. PUMA: We have no objection to that.

MS. CONRAD: I reserve the right to review it because there may be portions of it that don't fall within that concern.

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MR. PUMA: Yeah, I think all I would ask is that we can all confer about that, given as a third party we may choose to seek some relief from the Court to have pieces designated as confidential by the Court, regardless of the University's position.

MS. CONRAD: Absolutely. We agree prior to not designating or intending to include any portion of the transcript in a public filing, we will consult with you first. Thank you.

MR. STROKOFF: I would like a copy. I just want the mini.

MR. PUMA: Thank you. We will read and sign and want to get a copy.

- - -

(Witness excused.)

- - -

(Deposition concluded at 1:30 p.m.)

- - -

CERTIFICATE

I do hereby certify that I am a Notary Public in good standing, that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deponition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 14th day of August, 2016.

Theresa F. Franco
Notary Public

COACH MATT RHULE
INSTRUCTIONS TO WITNESS

Please read your deposition over carefully and make any necessary corrections. You should state the reason in the appropriate space on the errata sheet for any corrections that are made.

After doing so, please sign the errata sheet and date it.

You are signing same subject to the changes you have noted on the errata sheet, which will be attached to your deposition.

It is imperative that you return the original errata sheet to the deposing attorney within thirty (30) days of receipt of the deposition transcript by you. If you fail to do so, the deposition transcript may be deemed to be accurate and may be used in court.

COACH MATT RHULE

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ERRATA

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Assignment Number: 2349306

ACKNOWLEDGMENT OF DEPONENT

I, COACH MATT RHULE, do hereby certify that I have read the foregoing pages _____ to _____ and that the same is a correct transcription of the answers given by me to the questions therein propounded, except for the corrections or changes in form or substance, if any, noted in the attached Errata Sheet.

_____ _____

DATE SIGNATURE

Subscribed and sworn to before me this

_____ day of _____, 2016.

My commission expires:

_____

_____

Notary Public

Assignment No. 2349306

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wrote 14:13 81:2
wrs 53:24

x

x 3:2,8

y

y 99:19
yeah 12:16 14:2 17:6 22:8 25:21 28:11 29:4 33:23 35:22 39:16 40:20 41:5 47:16 52:25 53:7,21 66:9 75:24 79:5 81:20 84:7 88:14 91:8 110:2,19 124:11 127:15 129:15 130:10 133:2
year 11:11,25 12:2 14:10,14 15:6,16 16:6,13 22:18 30:21 33:3,8,18 34:21 36:21 65:11,12 71:19 76:25 77:8 80:5,6 81:7 83:9,10 87:13,15 93:18 99:8 112:19
years 12:2 14:17 15:19 18:16 25:10 28:17 30:10,25 35:15,17 36:3 76:10 77:16 80:10,10 81:16 87:12,17 89:10 95:6 96:20 97:4,18,18 98:8 100:3 109:23 112:18 124:15
york 11:6 15:25,25 16:6 17:3 24:11 87:6 104:8
young 31:25 37:5

Commonwealth of Pennsylvania Rules of Civil Procedure

Title 231, Chapter 4000

Depositions and Discovery

Rule 4017

(c) When the testimony is fully transcribed a copy of the deposition with the original signature page shall be submitted to the witness for inspection and signing and shall be read to or by the witness and shall be signed by the witness, unless the inspection, reading and signing are waived by the witness and by all parties who attended the taking of the deposition, or the witness is ill or cannot be found or refuses to sign. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the person before whom it was taken with a statement of the reasons given by the witness for making the changes. If the deposition is not signed by the witness within thirty days of its submission to the witness, the person before whom the deposition was taken shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the refusal to sign together with the reason, if

any, given therefor; and the deposition may then be used as fully as though signed, unless the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY. THE ABOVE RULES ARE CURRENT AS OF SEPTEMBER 1, 2014. PLEASE REFER TO THE APPLICABLE STATE RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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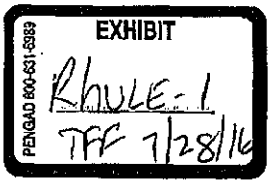
White and Williams LLP



Nancy Conrad

3701 Corporate Parkway, Suite 300 | Center Valley, PA 18034-8233
Direct 610.782.4909 | Fax 610.782.4935
conradn@whiteandwilliams.com | whiteandwilliams.com

July 20, 2016

VIA Certified Mail & E-mail
Matt Rhule
c/o Michael J. Puma, Esquire
Morgan Lewis
1701 Market Street
Philadelphia, PA 19103-2921

RE: McQueary v. The Pennsylvania State University
Civil Action No. 2012-1804

Dear Coach Rhule:

Enclosed please find a Subpoena to Attend and Testify in the above-captioned matter on **Thursday, July 28, 2016 at 10:00 a.m.** This deposition has been scheduled pursuant to the Pennsylvania Rules of Civil Procedure, and will take place at **White and Williams LLP, located at 1650 Market Street, One Liberty Place, Suite 1800, Philadelphia, PA.** This deposition will be recorded stenographically and by videotape.

If you have any questions regarding the Deposition, please contact me. Thank you.

Very truly yours,

WHITE AND WILLIAMS LLP

Nancy Conrad
George C. Morrison

NC:sbc
cc: Elliott Strokoff, Esquire (w/ enclosure) – via e-mail
William Fleming, Esquire (w/ enclosure) – via e-mail

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CENTRE

Michael J. McQueary

vs.

The Pennsylvania State University

File No. 2012-1804

SUBPOENA TO ATTEND AND TESTIFY

TO: Matt Rhule c/o Michael Puma
Morgan Lewis
1701 Market St., Philadelphia, PA 19103-2921

1. You are ordered by the court to come to White and Williams LLP, 1650 Market Stree One Liberty Place, Suite 1800

(Specify courtroom or other place)

at Philadelphia, Philadelphia County, Pennsylvania, on July 28, 2016 at 10:00 o'clock, A M., to testify on behalf of and/or at the request of The Pennsylvania State University, at a videotaped deposition.

in the above case, and to remain until excused.

2. And bring with you the following: See attachment.

If you fail to attend or to produce the documents or things required by this subpoena, you may be subject to the sanctions authorized by Rule 234.5 of the Pennsylvania Rules of Civil Procedure, including but not limited to costs, attorney fees and imprisonment.

REQUESTED BY A PARTY/ATTORNEY IN COMPLIANCE WITH Pa.R.C.P. No. 234.2(a):

NAME: Nancy Conrad, Esquire
ADDRESS: 3701 Corporate Pkwy, Ste 300
Center Valley, PA 18034
TELEPHONE: (610) 782-4909
SUPREME COURT ID # 56157

BY THE COURT: Debra C Summy

Prothonotary/Clerk, Civil Division

DATE: 07/20/2016
Seal of the Court

Deputy

OFFICIAL NOTE: This form of subpoena shall be used whenever a subpoena is issuable, including hearings in connection with depositions and before arbitrators, masters, missioners, etc. in compliance with Pa.R.C.P. No. 234.1. If a subpoena for production documents, records or things is desired, complete paragraph 2.

CC 107

RETURN OF SERVICE:

On the _____ day of

_____, 20____ ,

I, _____

served _____
(name of person served)

with the foregoing subpoena by:
(Describe method of service)

_____

_____

_____

I verify that the statements in this return of service are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

DATE: _____

_____
(signature)

Michael McQueary v. The Pennsylvania State University
Civil Action No. 2012-1804

ATTACHMENT TO SUBPOENA (MATT RHULE)

Any and all information and documents in your possession and control related to Michael McQueary, including but not limited to, documents and communications concerning Michael McQueary's lawsuit against Penn State University, and all documents and communications related to Michael McQueary's efforts to secure or obtain employment. (Documents include: the original and all copies of any writing of any type, including but not limited to any book, pamphlet, periodical, letter, e-mail message, text message, memorandum, telegram, report, record, study, office communication, note, working paper, diary, journal, log, schedule, calendar, appointment book, application, tax return, chart, paper, graph, survey, index, tape, disc, data sheet or data processing printout or any other written, recorded, transcribed, electronic or graphic matter).

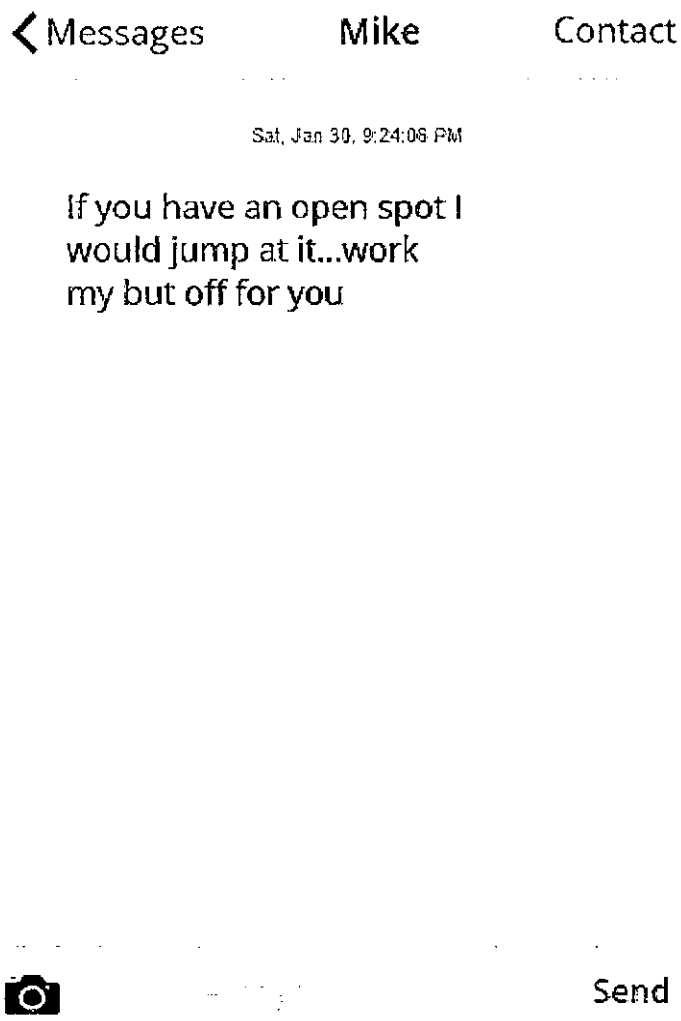
Messages Mike Contact

Mon, Jan 4, 10:38:57 PM

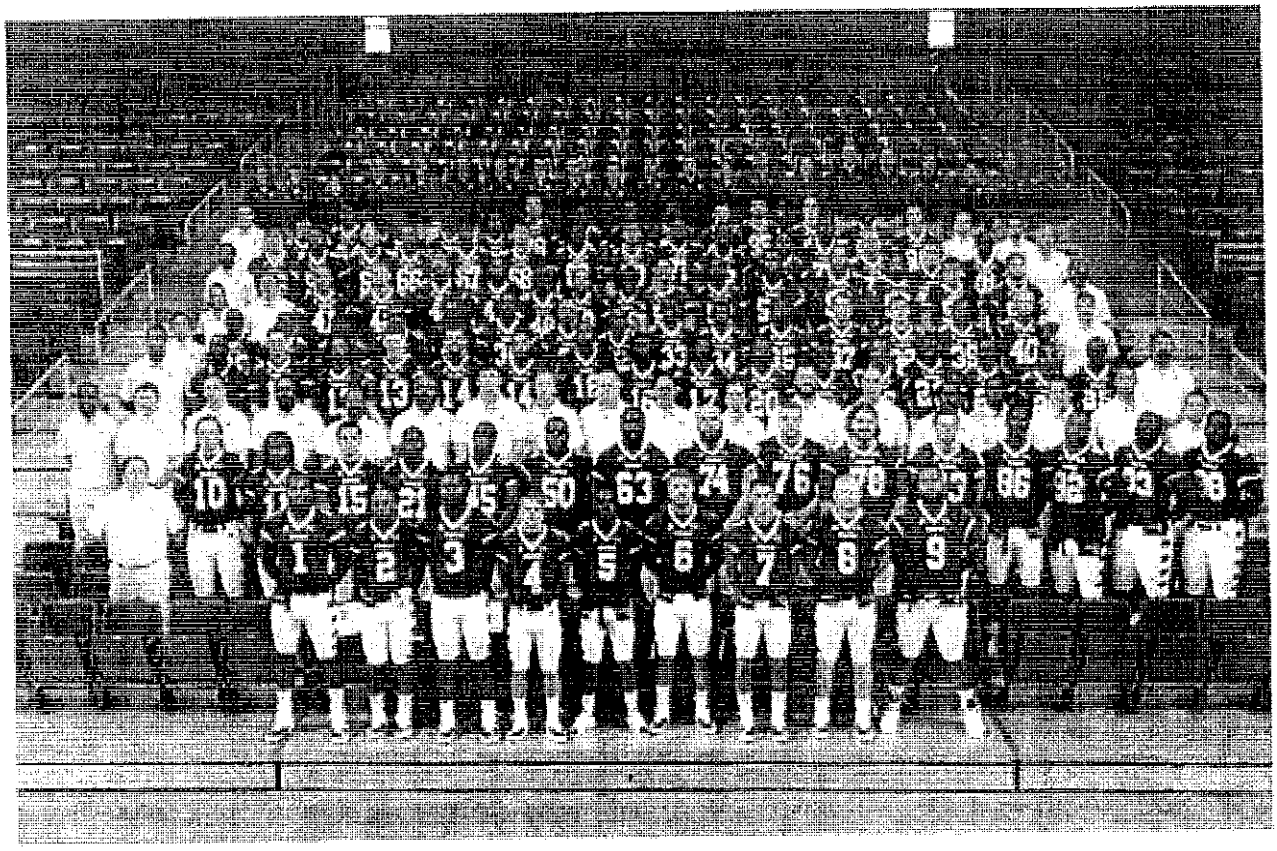
Matt, please consider me for a position on your offensive staff...I can forward updated resume to you

Send

EXHIBIT
Rhule-2
TFF 7/28/16
PENGAD 800-631-6989


Messages
Mike
Contact
Sat, Jan 30, 9:24:06 PM
If you have an open spot I would jump at it...work my but off for you
Send

Temple University Athletics - 2013 Football Roster



Team captains: Ryan Alderman, Levi Brown, Kyle Friend, Tyler Matakevich

2013 Football Roster

NO	NAME	POS	YR	HT	WT	HOMETOWN	HIGH SCHOOL	PREVIOUS SCHOOL
2	Anthony Robey	DB	Jr.	5-10	190	Norristown, Pa.	Norristown Area	
3	Clinton Granger	QB	Sr.	6-3	230	Philadelphia, Pa.	George Washington	Pierce College
4	Ryan Alderman	WR	Sr.	5-9	175	Downingtown, Pa.	Bishop Shanahan	
5	Jalen Fitzpatrick	WR	Jr.	5-11	180	Harrisburg, Pa.	Harrisburg	
6	Blaze Caponegro	LB	Sr.	6-1	225	Allenwood, N.J.	Wall Township	

EXHIBIT
Rhule-3
9/28/16

90	Bryan Osei	DL	R-	6-2	250	Abington, Pa.	Abington	
91	Shahbaz Ahmed	DE	So.	6-3	255	Lindenwold, N.J.	Paul VI	
93	Kamal Johnson	DL	Sr.	6-4	310	Willingboro, N.J.	Willingboro	
94	Kiser Terry	DL	Fr.	6-3	250	Feasterville, Pa.	Neshaminy	Milford Academy
95	Matt Ioannidis	DL	So.	6-4	285	Ringoes, N.J.	Hunterdon Central Regional	
95	Tyler Mayes	P/PK	So.	6-2	215	Downingtown, Pa.	Downingtown East	
96	Bret Niederreither	DL	R-	6-3	285	Etters, Pa.	Red Land	
97	Brian Carter	DL	Fr.	6-3	280	Harrisburg, Pa.	Harrisburg	
97	Wanemi Omuso	TE	Jr.	6-2	255	Burlington, N.J.	Burlington Township	
98	Jaimen Newman	TE	Jr.	6-4	290	Colonial Heights, Va.	Matoaca	
99	Colby Perry	PK/P	R-	6-2	180	Coatesville, Pa.	Coatesville Area	

Coaching Staff

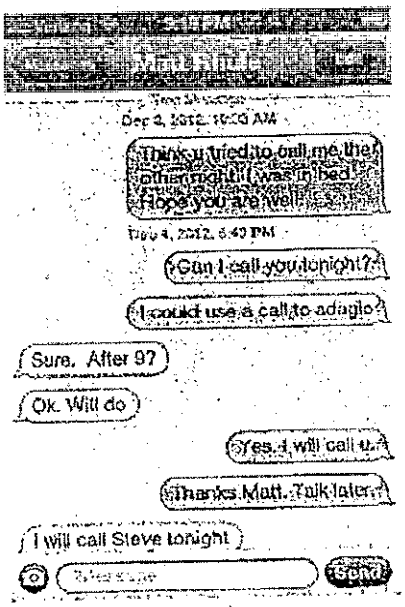
Coaching Staff

Name	Title
Matt Rhule	Head Coach
Ed Foley	Assistant Head Coach / Tight Ends Coach
Marcus Satterfield	Offensive Coordinator
Phil Snow	Defensive Coordinator
Francis Brown	Defensive Backs Coach
Tyree Foreman	Running Backs Coach
Allen Mogridge	Offensive Line Coach

Brandon Noble	Defensive Line Coach
Mike Siravo	Linebackers Coach
Terry M. Smith	Wide Receivers Coach
Shawn Bryson	Graduate Assistant-- Offense
Colin Clancy	Graduate Assistant-- Defense
Evan Cooper, Jr.	Graduate Assistant-- Defense
Adam DiMichele	Graduate Assistant-- Offense
Al Bellamy	Director of Athletic Training
Ben Cauthen	Video Coordinator
Paul Kelley	Athletic Equipment Supervisor
Sean Padden	Director of Football Operations
Jeremy Scott	Head Strength & Conditioning Coach
Charlie Cantor	Coordinator of External Operations
Jarret Klein	Coordinator of Internal Operations
Shelton Gaffney	Assistant Strength & Conditioning Coach
Dan O'Connor	Assistant Athletic Equipment Manager
Masahiro Takahagi	Assistant Athletic Trainer (Football)
Kevin Kroboth	Graduate Assistant / Strength & Conditioning
Dominique Harris	Graduate Assistant-- Operations
Marc Schaffer	Graduate Extern - Sports Medicine (Football)
Katie Guynn	Academic Advisor
Nadia Harvin	Administrative Specialist, Head Football Coach
Matt Falcone	Student Assistant Coach
Eric Fargo	Student Assistant Coach
Damiere Shaw	Student Assistant Coach



- RT Temple_VB ★ ★ ★ on the court AND in the classroom! Read » https://t.co/flSKscbSPb #GDQ https://t.co/WqAZ8laeM1
  Retweeted by TempleOwls and 4 others
- RT TUMBBHoops Spin class is no joke... Just ask #TUMBB. https://t.co/ySiSzTnsuy
  Retweeted by TempleOwls and 6 others


Dec 3, 2012, 10:03 AM
Think u tried to call me the other night. I was in bed. Hope you are well.
Dec 4, 2012, 5:40 PM
Can I call you tonight?
I could use a call to adagio
Sure. After 9?
Ok. Will do
Yes, I will call u
Thanks Matt. Talk later
I will call Steve tonight
Send

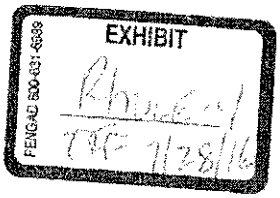
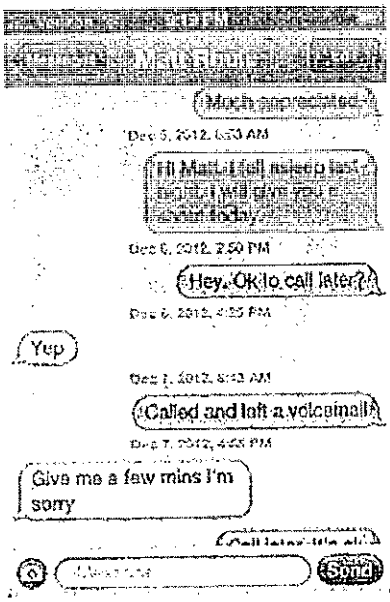


EXHIBIT
FENGAD 800-631-6989



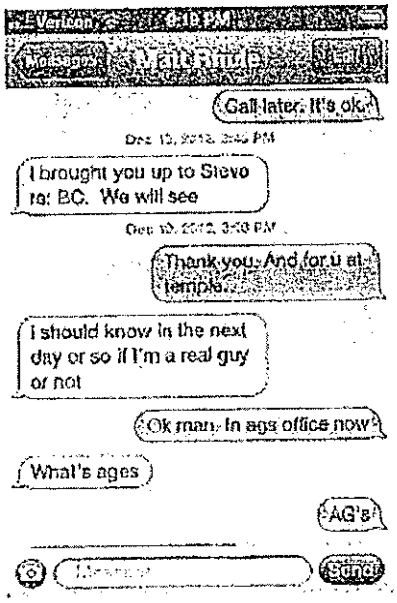
Hey. Ok to call later?

Yep

Called and left a voicemail

Give me a few mins I'm sorry

Send



Call later. It's ok.

I brought you up to Stevo re: BC. We will see

Thank you. And for u at temple.

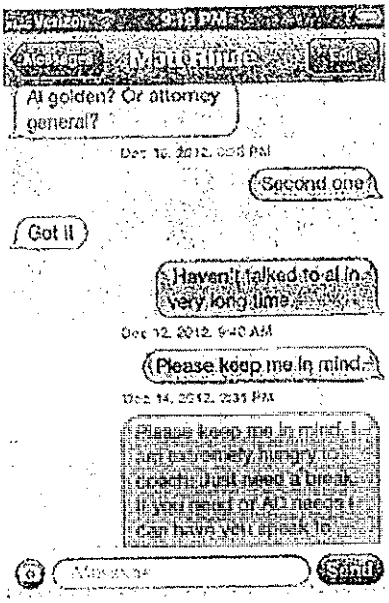
I should know in the next day or so if I'm a real guy or not

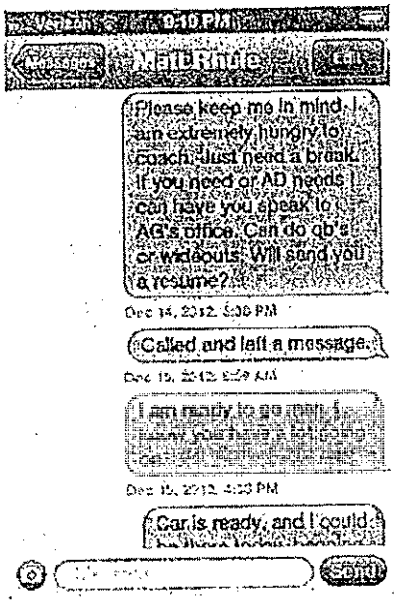
Ok man. In ags office now

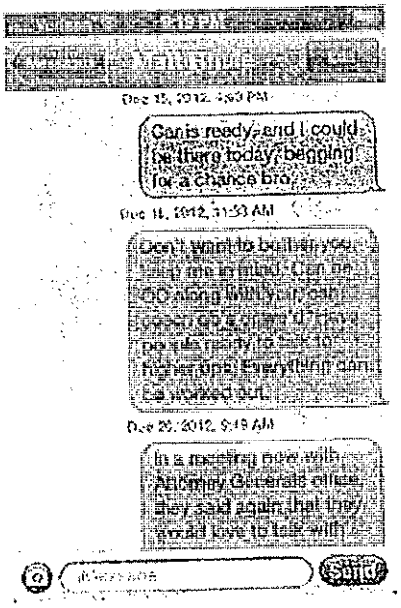
What's ages

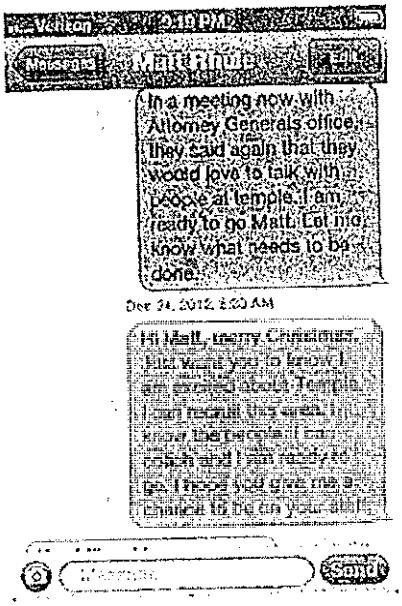
AG's

Send


Al golden? Or attorney general?
Second one?
Got it
Haven't talked to al in very long time.
Please keep me in mind.
Send


Please keep me in mind. I am extremely hungry to coach. Just need a break. If you need or AD needs I can have you speak to AG's office. Can do qb's or wideouts. Will send you a resume?
Called and left a message.
Car is ready, and I could
Send





Dec 15, 2012, 4:03 PM

Can is ready, and I could be there today, begging for a chance bro.

Dec 16, 2012, 11:53 AM

Don't want to bother you, keep me in mind. Can be GO along with you, can [illegible] people ready to talk to higher ups. Everything can be worked out.

Dec 20, 2012, 9:19 AM

In a meeting now with Attorney Generals office, they said again that they would love to talk with

Send

Verizon 9:19 PM

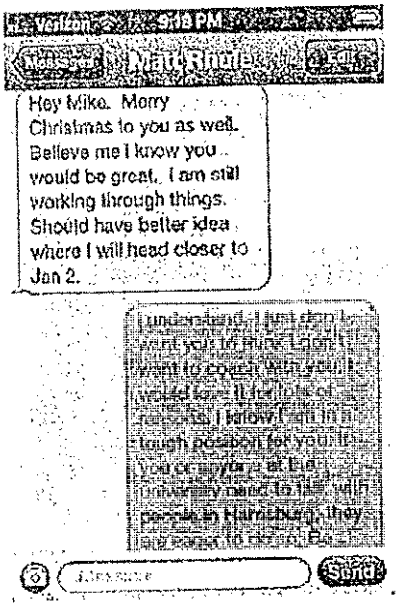
Matt Rhule

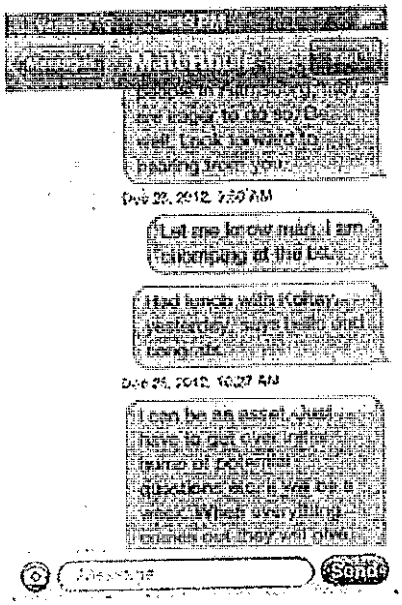
In a meeting now with Attorney Generals office, they said again that they would love to talk with people at temple. I am ready to go Matt. Let me know what needs to be done.

Dec 24, 2012, 8:30 AM

Hi Matt, merry Christmas. Just want you to know I am excited about Temple. I can recruit this area. I know the people. I can coach and I am ready to go. I hope you give me a chance to be on your staff.

Send





Verizon 9:18 PM

Matt Rhule

Hey Mike. Merry Christmas to you as well. Believe me I know you would be great. I am still working through things. Should have better idea where I will head closer to Jan 2.

I understand. I just don't want you to think I don't want to coach with you. I would love it for lots of reasons. I know I am in a tough position for you. If you or anyone at the university need to talk with people in Harrisburg, they are eager to do so. Be

Send

Matt Rhule

people in Harrisburg, they are eager to do so. Be well. Look forward to hearing from you.

Dec 23, 2012, 7:50 AM

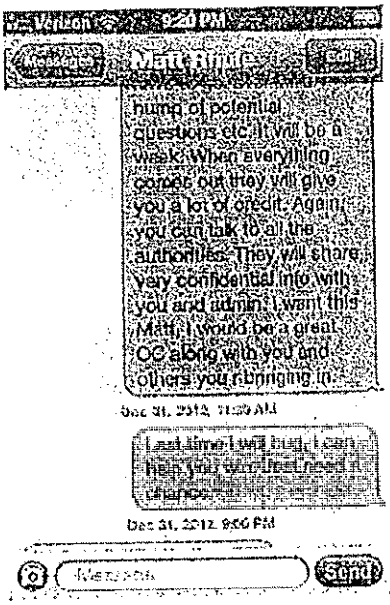
Let me know man. I am champing at the bit.

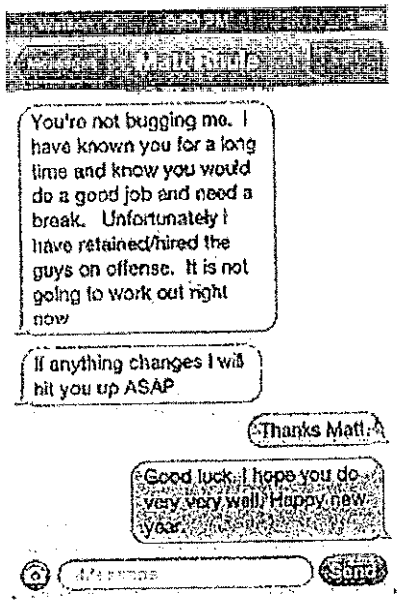
Had lunch with Kelley yesterday, says hello and congrats.

Dec 25, 2012, 10:27 AM

I can be an asset. Just have to get over initial hump of potential questions etc. It will be a week. When everything comes out they will give

Send





Verizon 9:20 PM

Messages Matt Rhule Edit

hump of potential questions etc. It will be a week. When everything comes out they will give you a lot of credit. Again, you can talk to all the authorities. They will share very confidential info with you and admin. I want this Matt. I would be a great OC along with you and others you r bringing in.

Dec 31, 2012, 11:30 AM

Last time I will bug, I can help you wrote/test need a chance.

Dec 31, 2012, 9:00 PM

Message Send

Verizon 9:20 PM

Messages Matt Rhule Edit

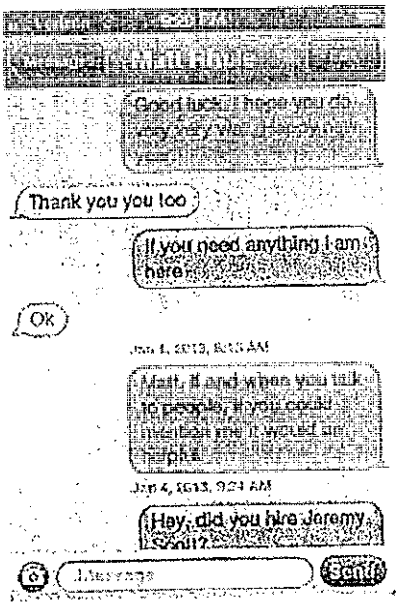
You're not bugging me. I have known you for a long time and know you would do a good job and need a break. Unfortunately I have retained/hired the guys on offense. It is not going to work out right now

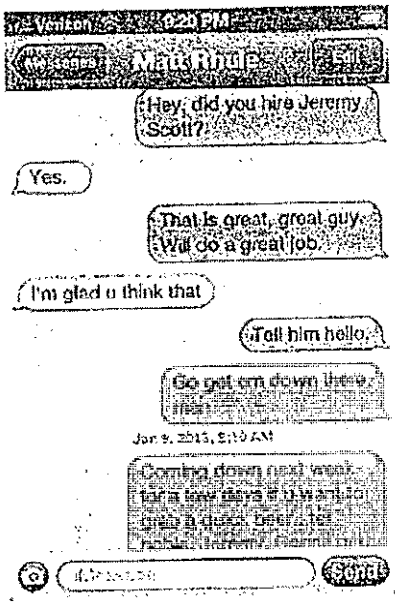
If anything changes I will hit you up ASAP

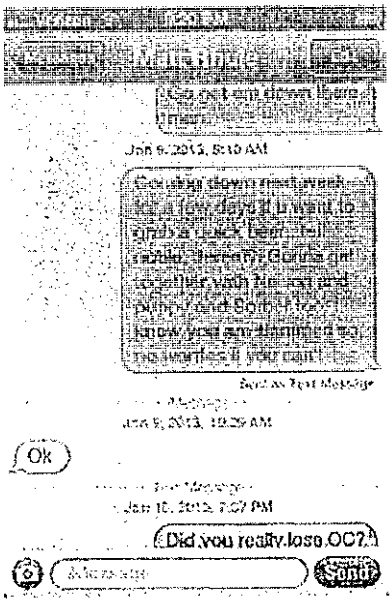
Thanks Matt.

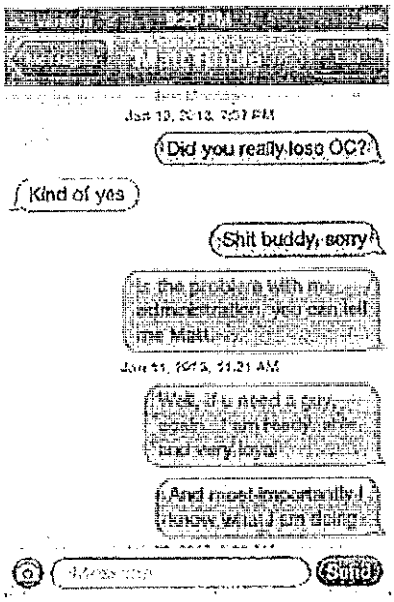
Good luck. I hope you do very very well. Happy new year.

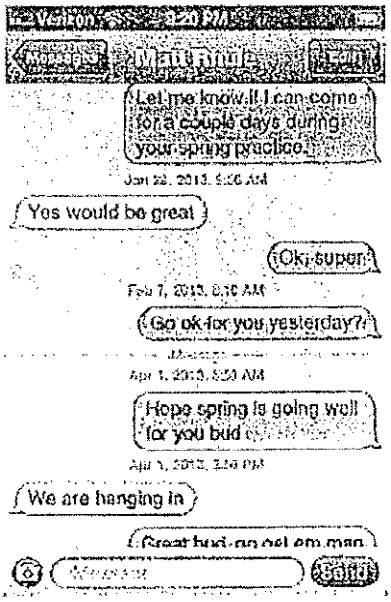
Message Send

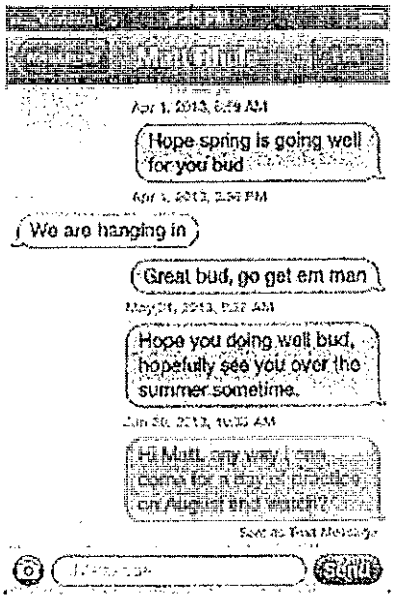

Good luck. I hope you do
Thank you you too
If you need anything I am here
Ok
Jan 4, 2013, 8:03 AM
Matt, if and when you talk to people, if you could
Jan 4, 2013, 9:24 AM
Hey, did you hire Jeremy Scott?
Send

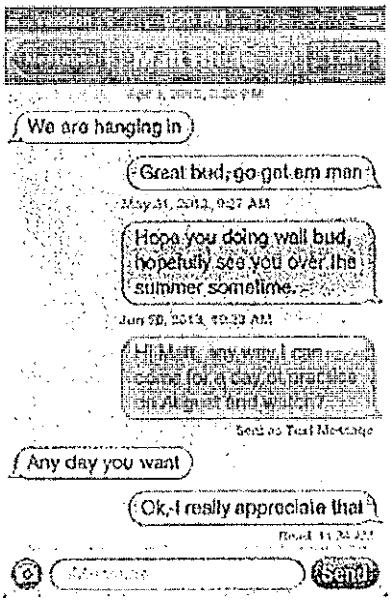

Hey, did you hire Jeremy Scott?
Yes.
That is great, great guy. Will do a great job.
I'm glad u think that
Tell him hello.
Go get em down there.
Jan 9, 2013, 5:10 AM
Coming down next week for a few days if I want to
Send

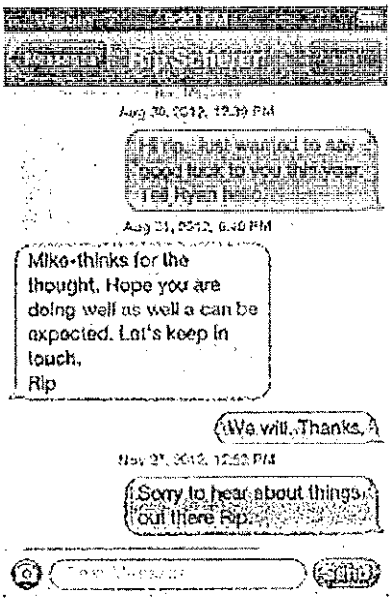

Jan 9, 2013, 8:10 AM
Ok
Jan 10, 2013, 7:07 PM
Did you really lose OC?
Send

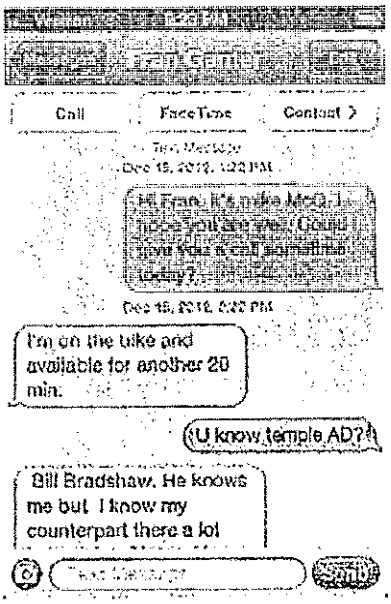

Jan 10, 2013, 7:07 PM
Did you really lose OC?
Kind of yes
Shit buddy, sorry
Jan 11, 2013, 11:21 AM
Send

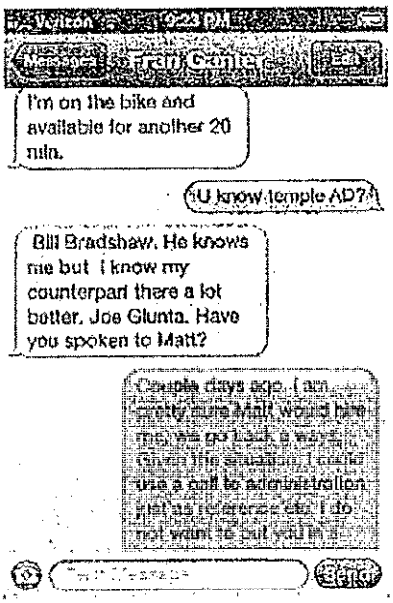

Let me know if I can come for a couple days during your spring practice.
Yes would be great
Ok, super
Go ok for you yesterday?
Hope spring is going well for you bud
We are hanging in
Send


Hope spring is going well for you bud
We are hanging in
Great bud, go get em man
Hope you doing well bud, hopefully see you over the summer sometime.
Send

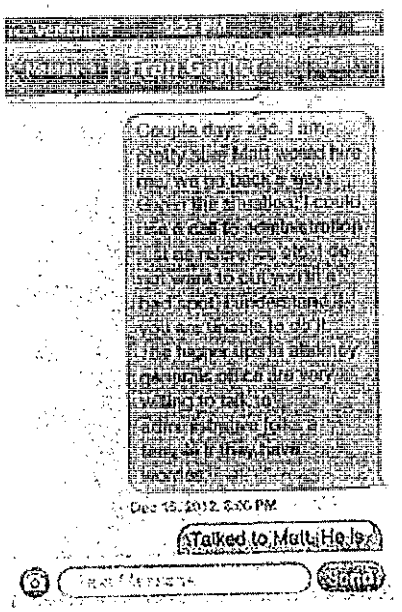

We are hanging in
Great bud; go get em man
May 31, 2012, 9:27 AM
Hope you doing well bud, hopefully see you over the summer sometime.
Jun 20, 2012, 10:33 AM
Any day you want
Ok, I really appreciate that
Send


Aug 30, 2012, 12:39 PM
Aug 31, 2012, 6:40 PM
Mike-thinks for the thought. Hope you are doing well as well a can be expected. Let's keep in touch.
Rip
We will..Thanks, R
Nov 2, 2012, 12:53 PM
Sorry to hear about things out there Rip.
Send


Call
FaceTime
Contact >
Dec 15, 2018, 5:20 PM
I'm on the bike and available for another 20 min.
U know temple AD?
Bill Bradshaw. He knows me but I know my counterpart there a lot

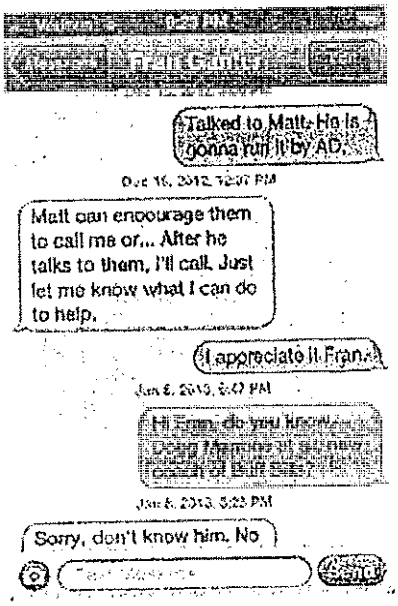

I'm on the bike and available for another 20 min.
U know temple AD?
Bill Bradshaw. He knows me but I know my counterpart there a lot better. Joe Glunta. Have you spoken to Matt?

MM0275



Dec 16, 2012, 3:00 PM

Talked to Matt. He is



Talked to Matt. He is gonna run it by AD.

Dec 16, 2012, 12:07 PM

Matt can encourage them to call me or... After he talks to them, I'll call. Just let me know what I can do to help.

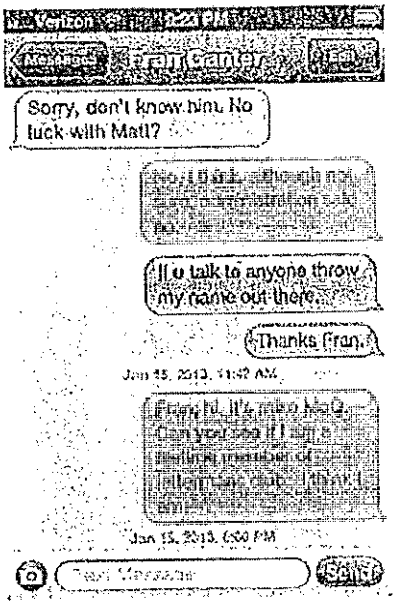
I appreciate it Fran.

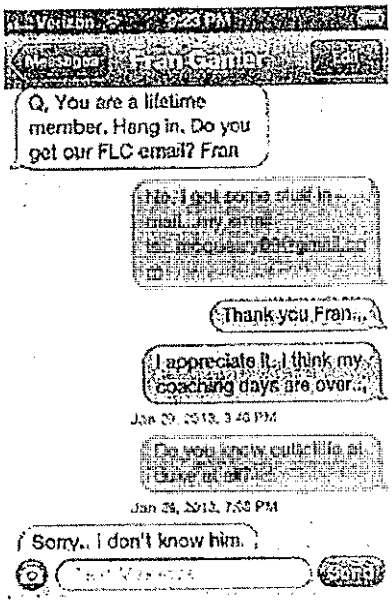
Jan 8, 2013, 5:47 PM

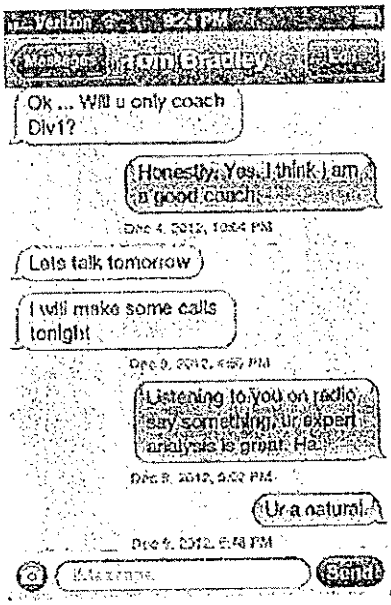
Hi Fran, do you know

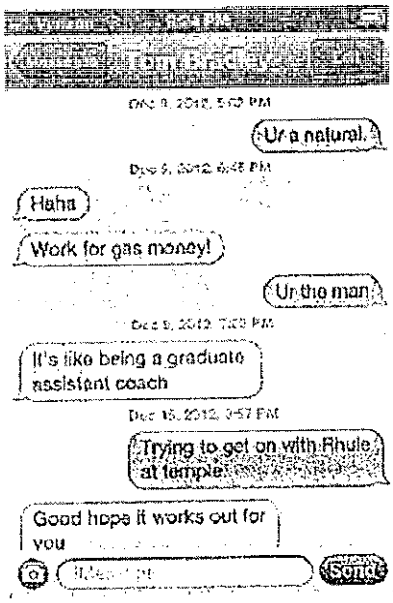
Jan 8, 2013, 5:23 PM

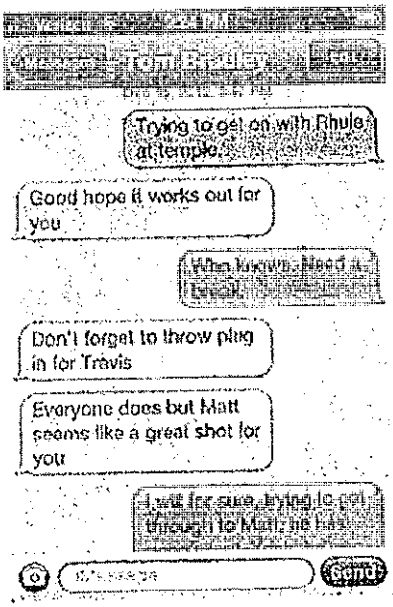
Sorry, don't know him. No

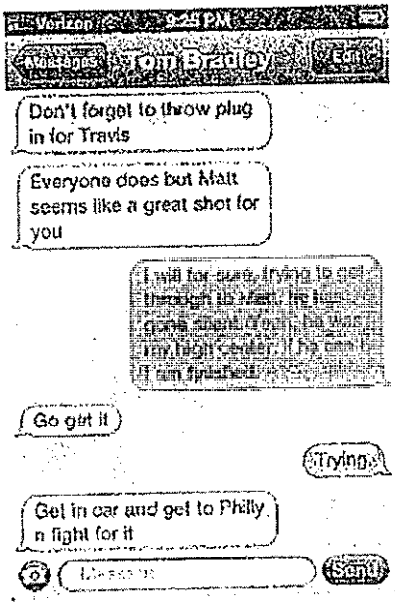

Sorry, don't know him. No luck with Matt?
[redacted]
[redacted] to talk to anyone throw my name out there.
Thanks Fran.
Jan 15, 2013, 11:42 AM
[redacted]
Jan 15, 2013, 6:50 PM

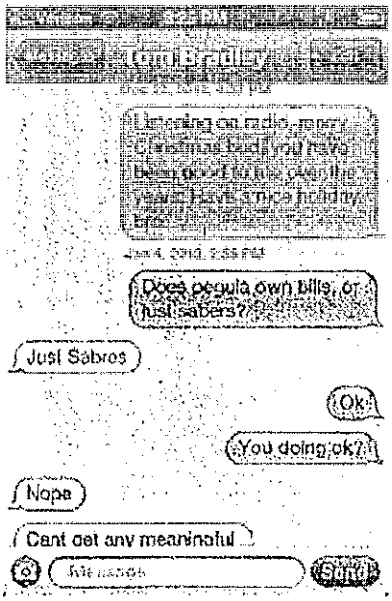

Q, You are a lifetime member. Hang in. Do you get our FLC email? Fran
[redacted]
Thank you Fran...
I appreciate it. I think my coaching days are over...
Jan 29, 2013, 3:46 PM
[redacted]
Jan 29, 2013, 7:53 PM
Sorry.. I don't know him.

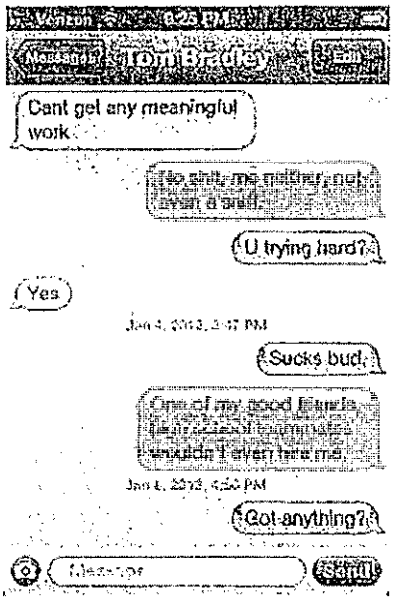

Ok ... Will u only coach Div1?
Honestly, Yes, I think I am a good coach
Lets talk tomorrow
I will make some calls tonight
Listening to you on radio say something, ur expert analysis is great! Ha!
Ur a natural.
Send

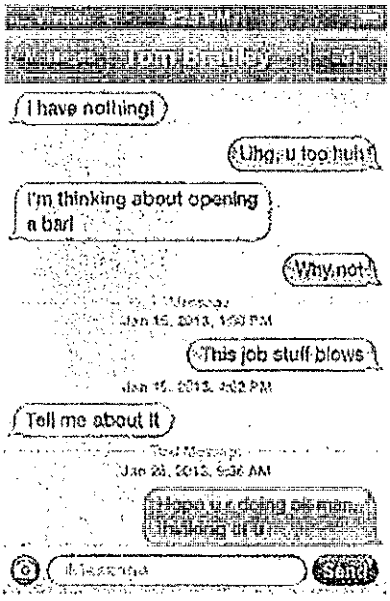

Ur a natural.
Haha
Work for gas money!
Ur the man
It's like being a graduate assistant coach
Trying to get on with Rhule at temple
Good hope it works out for you
Send

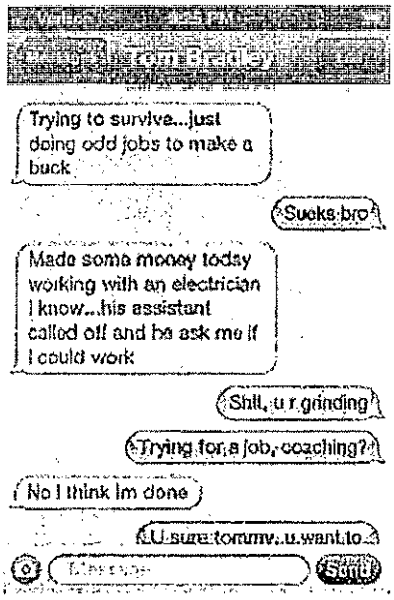

Tom Brady
Trying to get on with Phyle at temple
Good hope it works out for you
Don't forget to throw plug in for Travis
Everyone does but Matt seems like a great shot for you
Send

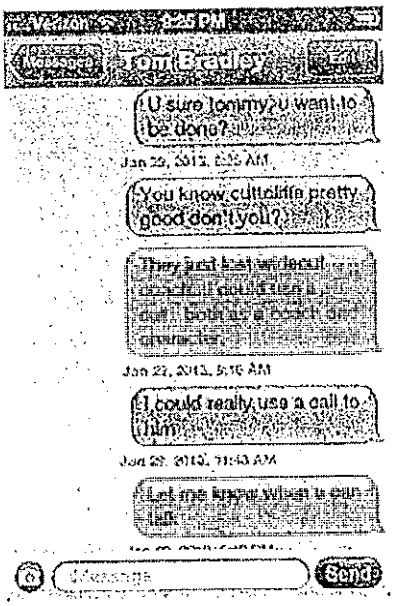

Tom Brady
Edit
Don't forget to throw plug in for Travis
Everyone does but Matt seems like a great shot for you
Go get it
Trying
Get in car and get to Philly n fight for it
Send

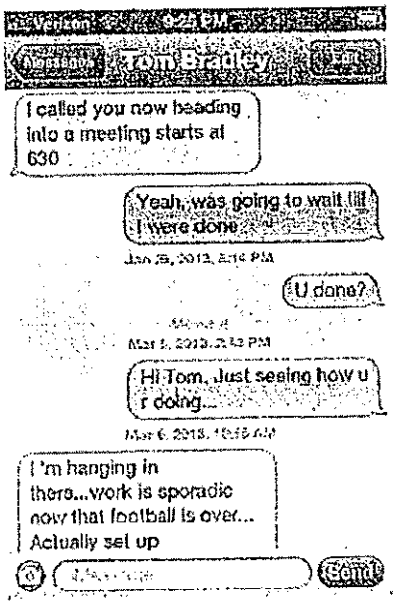

Does pequla own bills, or just sabers?
Just Sabres
Ok
You doing ok?
Nope
Cant get any meaningful
Send


Cant get any meaningful work
U trying hard?
Yes
Sucks bud.
Got anything?
Send


I have nothing!
Uhg..u too huh
I'm thinking about opening a bar!
Why not
This job stuff blows
Tell me about it
Send


Trying to survive...just doing odd jobs to make a buck
Sucks bro
Made some money today working with an electrician I know...his assistant called off and he ask me if I could work
Shit, u r grinding
Trying for a job, coaching?
No I think Im done
R U sure tommy..u want to
Send


Tom Bradley
U sure tommy? u want to be done?
You know cuttlefish pretty good don't you?
I could really use a call to him
Send


Tom Bradley
I called you now heading into a meeting starts at 630
Yeah, was going to wait till I were done
U done?
Hi Tom. Just seeing how u r doing...
I'm hanging in there...work is sporadic now that football is over... Actually set up
Send

Gmail
beta

(no subject)

Mike McQueary <mcqueary09@gmail.com> Fri, Dec 14, 2012 at 3:32 PM
To: mattrhule1@gmail.com

Matt:

I am very hungry to coach. I want to be on your staff at Temple. I need a break and I know you will not be sorry. I can coach QB's and WR's with anyone. I can recruit, and I will be honest and loyal with and to you. I can be there tomorrow ready to go.

Attached is my resume.

Mike

Michael J McQueary Resume (1).docx
25K

EXHIBIT
Rhule-5
TF 7/28/16
PENGAD 800-631-6989

EXHIBIT
McQueary
31
2-29-16
3-1-16
PENGAD 800-631-6989

PENNSTATE

1855

Topics
Home
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Impact
Campus Life
Athletics
Administration
Arts and Entertainment

Statement from President Spanier

November 5, 2011

Share this story
Tweet

The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.

With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee.

Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.

Graham Spanier

Penn State has heard from the attorneys representing both Tim Curley and Gary Schultz. They have released the following statements:

Attorney Tom Farrell:

"Gary Schultz is innocent of all charges. We believe in the legal system, and we believe it will vindicate him. We will fight these charges in court, and Gary Schultz will be proven innocent of all of them."

Attorney Caroline Roberts:

"Tim Curley is innocent of all charges against him. We will vigorously challenge the charges in court, and we are confident he will be exonerated."

Last Updated November 22, 2011

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EXHIBIT
PENGAD 800-631-6989
RHULE-6
TFF 7/28/16

Powers Deposition
Exhibit No. 3
6/19/14 MEM

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UPDATE: Beaver Stadium grass parking lots now closed

Penn State announces parking changes for Illinois game

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TOPICS

Administration

Progress

TAGS

News, sports

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PSU 000357

EXHIBIT O

COPY

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary, Plaintiff, vs. **The Pennsylvania State University,** Defendant.	Docket No. 2012-1804
	Type of Case: Whistleblower
	____ Medical Professional Liability Action (check if applicable)
	Type of Pleading: Motion to Stay Proceedings
	Filed on Behalf of: Defendant, The Pennsylvania State University
	Counsel of Record for this Party: Nancy Conrad, Esquire White and Williams LLP 3701 Corporate Parkway, Suite 300 Center Valley, PA 18034 (610) 782-4909 conradn@whiteandwilliams.com PA I.D. Number 56157

FILED FOR RECORD
2012 OCT 22 A 10:18
DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

EXHIBIT "O"

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WHITE AND WILLIAMS LLP
Nancy Conrad, Esq.
PA Identification No. 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:
	:
Defendant.	:

THE PENNSYLVANIA STATE UNIVERSITY'S MOTION TO STAY PROCEEDINGS

Defendant, The Pennsylvania State University ("Penn State"), hereby requests that this Honorable Court Stay this civil action and in support thereof avers as follows:

I. FACTS AND PROCEDURAL POSTURE

1. Plaintiff, Michael J. McQueary (hereinafter "Plaintiff"), commenced this action on or about May 8, 2012 by filing a Praecipe to Issue Writ of Summons against Penn State.

FILED FOR RECORD
2012 OCT 22 A 10:18
DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

2. On October 2, 2012, Plaintiff filed a three-count Complaint alleging Whistleblower (Count I), Defamation (Count II), and Misrepresentation (Count III) claims against Penn State (hereinafter "Complaint").[1]

3. Plaintiff supports his Complaint with numerous allegations related to the actions or inactions of former Penn State employees whom are subject to parallel and well-publicized criminal proceedings, including Timothy Curley and Gary Schultz, captioned as Commonwealth of Pennsylvania v. Timothy Mark Curley, Court of Common Pleas, Dauphin County, No. CP-22-CR-5165-2011; and Commonwealth of Pennsylvania v. Gary Charles Schultz, Court of Common Pleas, Dauphin County, No. CP-22-CR-5164-2011. See Complaint, ¶¶ 13-19, 21-23, 26-27, 39, 46-47, 60-64.

4. Plaintiff alleges that Penn State violated the Pennsylvania Whistleblower Law when it discriminated against Plaintiff for "his providing truthful testimony to the Statewide Investigating Grand Jury, his truthful testimony at the criminal preliminary hearing for Athletics Director Curley and Senior Vice President Schultz and further because Plaintiff is expected to be a key prosecution

---

[1] Plaintiff's counsel has agreed to extend the deadline for Penn State to file an Answer or otherwise plead to the Complaint until after the Court's disposition of the instant Motion. In the event the Motion to Stay is not granted, Penn State's responsive pleading to the Complaint shall be filed within ten (10) days after the Court's ruling.

COPY

witness at the criminal trials of the Athletics Director Curley and Senior Vice President Schultz." Complaint, ¶ 46.

5. Plaintiff further alleges that "Athletics Director Curley and Senior Vice President Schultz intentionally misrepresented to the Plaintiff that they thought [the reported incident] was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken." Id., ¶ 60.

6. Plaintiff claims as a result of the above intentional misrepresentations, Plaintiff has suffered "irreparable harm to his ability to earn a living." Id., ¶ 63.

7. The alleged conduct of Messers. Curley and Schultz, individually and in connection with Penn State, will be addressed in the instant civil action.

II. DISCRETIONARY FACTORS WEIGH IN FAVOR OF A STAY

8. This Court possesses "broad discretion to grant or deny a stay." In re Penn-Delco Sch. Dist., 903 A.2d 600, 607 (Pa. Cmwlth. 2006). Whether a stay of the civil case in parallel criminal and civil proceedings should be granted depends upon the "particular circumstances of the case." United States v. Kordel, 397 U.S. 1 (1970). A court should grant a stay "where refusal to do so would prejudice the rights of one of the parties." Bierstein v. Whitman, 50 A.2d 334, 335 (Pa. 1947).

9. To determine whether prejudice or interference exists, and whether a stay is justified, courts generally balance the interests of the parties and the public. See e.g. Kordel, 397 U.S. 1 (public interest in protecting consumers from

misbranded drugs required prompt agency action and justified denial of stay). Five factors are typically cited in this inquiry, including: (1) the private interests of the plaintiff in proceeding expeditiously within the civil litigation, (2) the private interests of and burden on the defendant, (3) the convenience of the courts, (4) the interests of persons not parties to the civil litigation, and (5) the public's interest. See e.g. Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980).

10. Applying the above standard, the Philadelphia Court of Common Pleas has already stayed multiple civil actions that involve Penn State, Curley and Schultz. See Exhibit "A."

11. In this case, Plaintiff will not be prejudiced if this action is stayed.

12. Penn State will be prejudiced if the civil action moves forward while parallel criminal proceedings are active. Penn State is being sued in this action with allegations made against current or former employees, including Curley and Schultz, and those same individuals are criminal defendants, with both Curley and Schultz currently awaiting trial.

13. Penn State would be severely prejudiced if forced to move forward in litigation, and discovery, while its representatives are subject to parallel criminal proceedings.

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14. Staying the instant action will also serve the interests of the Court and the public. The criminal proceedings are moving forward expeditiously, with both Curley and Schultz scheduled for criminal trials in January 2013.

WHEREFORE, Defendant, The Pennsylvania State University, respectfully requests that this Honorable Court Grant its Motion to Stay Proceedings.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By:_____

Nancy Conrad, Esq.
Attorney PA I.D. No. 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com
Attorneys for Defendant,
The Pennsylvania State University

Dated: October 19, 2012

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WHITE AND WILLIAMS LLP
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610.782.4909
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY : : : CIVIL ACTION NO. 2012-1804 : : : :

CERTIFICATE OF NON-CONCURRENCE

Pursuant to Centre County Rule 208.2(d), I, Nancy Conrad, certify that I made a good faith effort to seek concurrence in the instant Motion from Plaintiff, and that it has been denied.

WHITE AND WILLIAMS LLP

By:_____
Nancy Conrad

Date: October 19, 2012

COPY

WHITE AND WILLIAMS LLP
Nancy Conrad, Esq.
Identification No. 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:
Defendant.	:

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 19th day of October, 2012, a true and correct copy of the foregoing MOTION TO STAY PROCEEDINGS, PROPOSED ORDER, and SCHEDULING REQUEST was served upon the following persons via first class, United States mail, postage prepaid:

Elliot A. Strokoff, Esq.
Strokoff & Cowden, PC
132 State Street
Harrisburg, PA 17101

COPY
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2012 OCT 22 A 10: 18
DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

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WHITE AND WILLIAMS LLP

By: _____

Nancy Conrad, Esq.
Attorney PA I.D. No. 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com
Attorneys for Defendant,
The Pennsylvania State University

EXHIBIT A

JOHN DOE B

Plaintiff,

v.

THE SECOND MILE;
GERALD SANDUSKY; and
THE PENNSYLVANIA STATE UNIVERSITY

Defendant.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

JUNE TERM, 2012

CASE No. 03727

JURY TRIAL DEMANDED

DOCKETED

OCT 18 2012

F. CLARK
DAY FORWARD

ORDER

AND NOW, this 18th day of Oct, 2012, upon consideration of the Unopposed Joint Motion For Extraordinary Relief of All Represented Parties, it is hereby **ORDERED** that:

(1) The Motion is GRANTED;

(2) By Agreement of the Parties, this Civil Action shall be removed from the Expedited Track, and placed onto the Complex Track; however,

(3) This Civil Action is immediately **STAYED** in light of the parallel criminal proceedings; except that

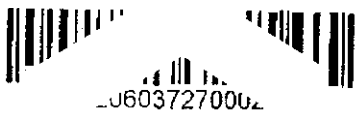
(4) Should stay be lifted in any of *Doe A v. The Pennsylvania State University et al.*, *Doe C v. The Pennsylvania State University et al.*, or *C. Miller v. The Pennsylvania State University et al.* for reasons that also apply to this Civil Action, the stay in this case shall be lifted as well.,

(5) The Court shall revisit this stay after the criminal proceedings have concluded.

BY THE COURT:

_____, J.

Doe B Vs The Second Mil-ORDER



329.1

EXHIBIT A

Case ID: 120603727

ORIES SENT PURSUANT TO Pa.R.C.P. 236(b) F. BROWN-CLARK 10/18/2012

Control No.: 12101544

JOHN DOE A Plaintiff, v. THE SECOND MILE and GERALD SANDUSKY and THE PENNSYLVANIA STATE UNIVERSITY Defendants.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION NO. 111102968

ORDER

AND NOW, this 21st day of March, 2012, upon consideration of the Unopposed Joint Motion For Extraordinary Relief, it is hereby ORDERED that:

(1) The Motion is GRANTED;

(2) ~~This Civil Action shall be removed from the Expedited Track, and placed onto the Complex Track; however~~,

(3) This Civil Action is ~~immediately STAYED~~ placed in deferred status in light of the parallel criminal proceedings; and

(4) Any party is permitted to move this Court for a subsequent order lifting the stay, provided that each other party has thirty (30) days to respond.

BY THE COURT:

[signature], J.

Doe A Vs The Second Mil-ORDER

111102968 34

144.1 03/13/2012

Case ID: 111102968
Control No.: 12031860

COPIES SENT PURSUANT TO Pa.R.C.P. 236(b) J. DIROSA 03/27/2012

EXHIBIT A

Control No. 12033108

C. MILLER Plaintiff, v. THE SECOND MILE, GERALD SANDUSKY, AND THE PENNSYLVANIA STATE UNIVERSITY Defendants.	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL ACTION TRIAL DIVISION DECEMBER TERM, 2011 CASE NO. 02933

ORDER

AND NOW, this 29th day of March, 2012, upon consideration of the Unopposed Joint Motion For Extraordinary Relief, it is hereby ORDERED that:

(1) The Motion is GRANTED;

(2) This Civil Action shall be removed from the Expedited Track, and placed onto the Complex Track; however,

(3) This Civil Action is immediately STAYED in light of the parallel criminal proceedings; and

(4) The Court shall revisit this stay, after the currently pending criminal proceedings are completed, upon Motion of any Party.

Miller Vs The Second Mi-ORDER

11120293300026

BY THE COURT:

, J.

Case ID: 11120293

COPIES SENT PURSUANT TO Pa.R.C.P. 236(b) N. MONTE 03/30/2012

Control No.: 1203310

EXHIBIT A

JOHN DOE C Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY Defendants.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION NO. 120704291

DOCKETED
SEP 28 2012
F. CLARK
DAY FORWARD

ORDER

AND NOW, this 28th day of Sept, 2012, upon consideration of the Unopposed Joint Motion For Extraordinary Relief, it is hereby ORDERED that:

(1) The Motion is GRANTED;

(2) By Agreement of the Parties, this Civil Action shall be removed from the Expedited Track, and placed onto the Complex Track; however,

(3) This Civil Action is immediately STAYED in light of the parallel criminal proceedings; and

(4) The Court shall revisit this stay after the criminal proceedings have concluded.

BY THE COURT:

Teresa Sarmina
, J.

Doe C V- The Pennsylvan-ORDER
120704291[illegible]016

COPIES SENT PURSUANT TO Pa.R.C.P. 236(b) F. BROWN-CLARK 09/28/2012

EXHIBIT A

COPY

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

____ Medical Professional Liability Action (check if applicable)

Type of Pleading:
Memorandum of Law in Support of Motion to Stay Proceedings

Filed on Behalf of:
Defendant, The Pennsylvania State University

Counsel of Record for this Party:
Nancy Conrad, Esquire
White and Williams LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
(610) 782-4909
conradn@whiteandwilliams.com
PA I.D. Number 56157

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2012 NOV 16 P 2:05
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PROTHONOTARY
CENTRE COUNTY, PA

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2012 NOV 16 P 2:05
DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

WHITE AND WILLIAMS LLP
Nancy Conrad, Esq.
PA Identification No. 56157
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610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Plaintiff,	
v.	
	CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF THE PENNSYLVANIA STATE UNIVERSITY'S MOTION TO STAY PROCEEDINGS

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MEMORANDUM OF LAW IN SUPPORT OF THE PENNSYLVANIA STATE UNIVERSITY'S MOTION TO STAY PROCEEDINGS

Defendant, The Pennsylvania State University ("Penn State"), hereby submits this Memorandum of Law in support of its Motion to Stay this civil action pending resolution of the related criminal proceedings.

I. INTRODUCTION

The interests of the parties, the Court, and the public overwhelmingly favor a Stay. The related criminal proceedings are the well-publicized indictments that the Commonwealth of Pennsylvania has issued against three former Penn State administrators: Director of Intercollegiate Athletics, Timothy Curley ("Curley"); Senior Vice President, Gary Schultz ("Schultz"); and President, Graham B. Spanier ("Spanier"). All three indictments concern actions or inactions these three individuals took or failed to take with respect to alleged instances of sexual assault of minor male children perpetrated by the former Assistant Football Coach and Defensive Coordinator of Penn State, Gerald A. Sandusky ("Sandusky").

Critical factual events – Plaintiff, Michael J. McQueary's ("McQueary") witnessing Sandusky's improper conduct with a minor boy on February 9, 2001 in a Penn State locker room; McQueary's subsequent reporting of the incident to former Penn State Head Football Coach, Joseph Vincent Paterno ("Paterno"); and

Penn State's alleged response to the incident – lie at the heart of the indictments as well as the claims raised by McQueary in this litigation. McQueary is expected to be a key prosecution witness at the criminal trials of Curley, Schultz and Spanier.

To date, Penn State has not answered or otherwise responded to the instant Complaint, and cannot do so until the criminal proceedings are resolved. Penn State would need to contact Curley, Schultz and/or Spanier to obtain information, and these three individuals are highly likely to invoke their rights against self-incrimination under the Fifth Amendment of the United States Constitution, as well as Article I, Section 9 of the Pennsylvania Constitution, and not provide any information to Penn State. Therefore, this civil action must be stayed pending resolution of the criminal proceedings.

There are seven factors the Court should consider when deciding this Motion, which are discussed in detail below and all of which favor a stay. A brief discussion of these factors is warranted. First, this civil action and the criminal proceedings overlap greatly, as they all concern the Sandusky incident witnessed by McQueary, McQueary's subsequent reporting of the incident, and the conduct of Curley, Schultz and Spanier thereafter. Second, the status of these criminal proceedings favors a stay, as indictments have been issued against Curley, Schultz and Spanier, rendering it highly likely that these individuals will invoke their Constitutional rights and refuse to provide information or testify.

Third, McQueary will not be harmed by a stay of this matter, as there is no risk of evidence being destroyed and as McQueary will not suffer any economic harm. Fourth, Penn State would be greatly prejudiced if this litigation were not stayed, as it would be unable to obtain information from Curley, Schultz or Spanier, and most likely even McQueary; the prejudice to Penn State is evidenced by the fact that Penn State is unable to even answer or otherwise respond to the instant Complaint until the criminal proceedings are resolved.

Fifth, the interests and convenience of this Court favor a stay of this matter, as proceeding with discovery before Penn State responds to the instant Complaint, even if discovery is somehow limited by the Court, would be highly inefficient and a waste of the Court's valuable resources – it is simply not in the best interests of the Court for discovery to proceed in a piecemeal fashion. Sixth, the public interest favors a stay, as this will assure fair trials in the related criminal proceedings and a fair trial in the present case. Lastly, the interests of persons not parties to this litigation – the Commonwealth of Pennsylvania; Curley, Schultz and Spanier; other witnesses to the criminal proceedings; and the alleged victims of Sandusky – all favor a stay of this civil litigation. Therefore, Penn State respectfully requests that this Court stay the present matter until conclusion of the related criminal proceedings.

II. PROCEDURAL HISTORY OF THE CASE

McQueary commenced this action on or about May 8, 2012 by filing a Praecipe to Issue Writ of Summons against Penn State. On October 2, 2012, McQueary filed a three-count Complaint alleging Whistleblower (Count I), Defamation (Count II), and Misrepresentation (Count III) claims against Penn State (hereinafter "Complaint"). On October 22, 2012, Penn State filed this instant Motion to Stay Proceedings. McQueary's counsel has agreed to extend the deadline for Penn State to file an Answer or otherwise plead to the Complaint until after the Court's disposition of the instant Motion. Penn State is now submitting this Memorandum of Law in support of its Motion to Stay Proceedings.

III. STATEMENT OF FACTS

McQueary supports his Complaint with numerous allegations related to the actions or inactions of former Penn State employees whom are subject to parallel and well-publicized criminal proceedings, including Curley and Schultz, captioned as Commonwealth of Pennsylvania v. Timothy Mark Curley, Court of Common Pleas, Dauphin County, No. CP-22-CR-5165-2011; and Commonwealth of Pennsylvania v. Gary Charles Schultz, Court of Common Pleas, Dauphin County, No. CP-22-CR-5164-2011. See Complaint, ¶¶ 13-19, 21-23, 26-27, 39, 46-47, 60-64. Further, additional charges have recently been filed against Curley and Schultz on November 1, 2012 (see In Re: Timothy Mark Curley, Court of Common Pleas,

Dauphin County, No. CP-22-MD-1385-2012; and In Re: Gary Charles Schultz, Court of Common Pleas, Dauphin County, No. CP-22-MD-1386-2012), and Spanier has also recently been indicted (see In Re: Graham B. Spanier, Court of Common Pleas, Dauphin County, No. CP-22-MD-1387-2012).

McQueary alleges that Penn State violated the Pennsylvania Whistleblower Law when it discriminated against him for "his provision of truthful testimony to the Statewide Investigating Grand Jury, his truthful testimony at the criminal preliminary hearings for Athletics Director Curley and Senior Vice President Schultz and further because Plaintiff is expected to be a key prosecution witness at the criminal trials of the Athletics Director Curley and Senior Vice President Schultz." Complaint at ¶ 46. Now that Spanier has been indicted, McQueary will most like be a key prosecution witness in that case too.

McQueary's defamation claim stems from alleged oral and written statements made by Spanier, which purportedly suggested McQueary lied when reporting the aforementioned Sandusky incident. See Complaint at ¶¶ 50-54.

McQueary further alleges that "Athletics Director Curley and Senior Vice President Schultz intentionally misrepresented to the Plaintiff that they thought [the reported incident] was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken." Id. at ¶ 60.

McQueary claims as a result of these intentional misrepresentations, he has suffered "irreparable harm to his ability to earn a living." Id. at ¶ 63.

The alleged conduct of Messers. Curley, Schultz and Spanier, individually and in connection with Penn State, will be addressed in the instant civil action. However, as discussed above, all of these individuals have been indicted and are not likely to communicate with Penn State or testify in this proceeding due to fear of self-incrimination. Thus, Penn State is moving to stay this litigation pending resolution of the related criminal proceedings. Applying the standard discussed herein to stay a civil matter pending resolution of related criminal proceedings, the Philadelphia Court of Common Pleas has already stayed multiple civil actions that involve Penn State, Curley, Schultz and Spanier. See Exhibit "A" to Penn State's Motion to Stay Proceedings.

IV. STATEMENT OF QUESTION INVOLVED

Question: Should the Court, after weighing the seven factors outlined above and discussed in detail below, stay the instant civil litigation pending resolution of the related criminal proceedings?

Suggested Answer: Yes.

V. ARGUMENT

This Court has broad discretion to stay civil proceedings, and, in doing so, the goal is to balance the various interests of the parties, the Court, and the public.

In Re Adelphia Communications Securities Litigation, No. 02-1781, 2003 WL22358819, at *2 (E.D. Pa. May 13, 2003) (citation omitted) attached hereto as Exhibit "A".[1] "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." Adelphia Communications, 2003 WL22358819, at *2.

When deciding whether to stay a civil case pending the resolution of a related criminal case, a court can consider the following factors: "(1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest." Adelphia Communications, 2003 WL22358819, at *3 (citing Walsh Securities, Inc. v. Cristo Prop. Mgmt. Ltd.,

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[1] Pennsylvania state courts routinely look to federal precedent in deciding analogous issues of federal procedure. See, e.g., Schacter v. Albert, 212 Pa. Super. 58, 62, 239 A.2d 841, 843 (1968) (looking to federal jurisprudence to interpret Pennsylvania's summary judgment rules); Janicik v. Prudential Ins. Co. of America, 305 Pa. Super. 120, 127 n.3, 451 A.2d 451, 454 n.3 (1982) (looking to federal jurisprudence to interpret Pennsylvania's class action rules).

7 F.Supp.2d 523 (D.N.J. 1998)). An additional factor to be considered is the interests of persons not parties to the civil litigation. Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980) (listing factors similar to those in Adelphia Communications in addition to the interests of these non-parties).[2] Applying these factors to the present case, it is clear that the Court should stay this matter pending resolution of the related criminal proceedings.

A. The Issues in This Case and the Related Criminal Proceedings Overlap Substantially

The extent to which the issues in the civil and criminal cases overlap is the most important factor in determining whether or not to grant a stay. Adelphia

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[2] McQueary's attempt to distinguish Golden Quality Ice Cream (see Plaintiff's Answer to Defendant's Motion to Stay Proceedings, at 5-6) is of no avail. In Golden Quality Ice Cream, the only discovery that was allowed was the narrow request by the plaintiffs for copies of documents in the defendants' possession that were turned over to the grand jury investigating the alleged criminal violations, which had already completed its investigation. Golden Quality Ice Cream, 87 F.R.D. at 59. Further, the District Court held that "discovery of these documents poses no Fifth Amendment threat to the individual criminal defendants, and it is not otherwise significantly onerous as to them." Id. In the present case, Penn State believes that McQueary will not so limit his discovery requests. More importantly, as discussed above, Penn State cannot even Answer or otherwise respond to the Complaint because of the indictments against Curley, Schultz and Spanier, let alone engage in discovery. There was no allegation in Golden Quality Ice Cream that the defendants were incapable of responding to the complaint therein and thus could not even formulate their defense of the matter. In the present case, Penn State is faced with these issues, and therefore this case should be stayed pending resolution of the related criminal proceedings.

Communications, 2003 WL22358819, at *3 (citing Walsh Securities, 7 F.Supp.2d at 527). The issues and parties in the civil and criminal cases need not be identical, but rather merely "implicate similar facts or issues of law." Resco Products, Inc. v. Bosai Minerals Group Co., Ltd., Civ. A. No. 06-235, 2010 WL 2331069, at *4 (W.D. Pa. June 4, 2010), attached hereto as Exhibit "B" (finding that courts within the Third Circuit "have stayed proceedings in numerous cases where another pending action contained similar questions of fact or law").

In Adelphia Communications, the civil cases were private consolidated securities actions brought against Adelphia and its officers and directors; the criminal cases were brought by the federal government against former Adelphia officers, and included charges of wire fraud, securities fraud, and conspiracy. Adelphia Communications at *1. The District Court found that Count I of the 24-count indictment against these individuals contained issues and allegations similar to those in the private securities lawsuits, including allegations that these individuals improperly co-mingled funds, engaged in self-dealing, and failed to disclose co-borrowing arrangements that ultimately led to Adelphia's collapse. Id. The Adelphia Communications Court found that "these overlapping issues are integral to both the civil and criminal cases. Accordingly, this factor weighs heavily in favor of granting the stay." Id. at *3.

In the present case, there are overlapping issues that are integral to both this civil litigation and the related criminal proceedings. Both cases allege that McQueary observed improper conduct between Sandusky and a minor child in the Lasch Football Building; both cases allege that McQueary reported his observations to Paterno; both cases allege that McQueary met with Curley and Schultz about his observations; both cases allege that Curley and Schultz told McQueary that they would take further action; both cases allege that Curley and Schultz engaged in a course of conduct that attempted to avoid an investigation and keep McQueary's report of the underlying incident a secret; and McQueary avers that he was treated in a discriminatory fashion, defamed and that his employment was terminated because of his reporting of the Sandusky incident and his participation in the criminal proceedings. There can be no doubt that these overlapping issues are integral to both the present civil litigation and the related criminal proceedings. Therefore, the first factor weighs heavily in favor of granting a stay.

B. The Stage of the Related Criminal Proceedings Favors a Stay

When determining whether to grant a stay, "a court must also consider the status of the related criminal proceedings, which can have a substantial effect on the balancing of the equities." Adelphia Communications, 2003 WL22358819, at *3. If criminal proceedings have resulted in indictments being issued against

individuals accused of crimes, this factor strongly favors staying the civil proceedings. Id. (citations omitted).

> The strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned. The potential for self-incrimination is greatest during this stage, and the potential harm to civil litigants arising from delaying them is reduced due to the promise of a fairly quick resolution of the criminal case under the Speedy Trial Act.

Walsh Securities, 7 F.Supp.2d at 527 (quoting Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (1989)). Further, "the indicted defendants risk exposing their criminal defense strategy during civil discovery." Adelphia Communications, 2003 WL22358819, at *3.

In Adelphia Communications, indictments were handed down, and the District Court held that this posed Fifth Amendment problems and also risked the defendants exposing their criminal defense strategies to the government and/or their co-defendants. Id. at *4. Thus, the District Court held that the stage of the related criminal proceedings weighed strongly in favor of staying the civil cases. In the present case, indictments have been handed down against Curley, Schultz and Spanier. There is a definite belief that these individuals will invoke their Federal and State constitutional rights against self-incrimination and refuse to discuss the civil case until the criminal proceedings are concluded. Staying this matter until that time will alleviate these constitutional concerns. Thus, this post-

indictment stage of the related criminal proceedings warrants staying the present civil litigation.

C. McQueary Will Not Be Harmed By a Stay of This Case

When considering the prejudice to the plaintiff caused by a stay, the plaintiff must establish "more prejudice than simply a delay in his right to expeditiously pursue his claim.... Instead, the plaintiff should demonstrate a particularly unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay." Adelphia Communications, 2003 WL22358819, at *4 (citations omitted). McQueary has not demonstrated any such particularly unique injury. In Adelphia Communications, the District Court found that the plaintiffs did not demonstrate sufficient prejudice to warrant lifting the stay, as they had not shown "any prejudice other than delay in pursuing their suits, which is insufficient to support vacating the stay." Id. at *4 (citing Walsh Securities, 7 F.Supp.2d at 528). This is the only alleged prejudice McQueary will suffer if the case is stayed. Further, there is no risk of loss or destruction of documents, as evidence has been properly preserved by Penn State. In addition, McQueary will not suffer any economic harm from the stay, as he is receiving severance (see Complaint at ¶ 40), and if he is successful on any of his claims, he may be able to recover interest as part of his judgment (see Walsh Securities, 7 F.Supp.2d at 528).

Not only will McQueary not be prejudiced, it is actually in his interest to have this case stayed. His claims relate to and require evidence from Curley, Schultz and Spanier, and until the respective criminal proceedings for these individuals are resolved, he will most assuredly not obtain evidence from them.[3] In addition, McQueary's claims relate to and require evidence from other Penn State current and former representatives, including Penn State's General Counsel, Cynthia Baldwin ("Baldwin"), who are subject to ongoing criminal investigations; McQueary will most likely not obtain evidence from these individuals either. Thus, McQueary will not be prejudiced by a stay, and it is actually in his interest to stay this civil action until the criminal proceedings are concluded and discovery can then proceed unimpeded by any invocation of the constitutional rights against self-incrimination or any motions for protective orders.

D. The Burden on Penn State if This Case is Not Stayed Would be Substantial

Penn State will clearly be prejudiced if this case is not stayed, as it needs information and testimony from Curley, Schultz and Spanier. McQueary's Complaint alleges factual and legal issues directly related to these individuals. His Whistleblower claim relates to the alleged reasons he was placed on leave in 2011.

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[3] On the advice of counsel, Curley and Schultz declined to be interviewed by the Freeh group and on that basis it is anticipated that counsel will seek a Protective Order if discovery is sought in this action.

McQueary's Defamation claim relates to the alleged statements and state of mind of Spanier in 2011. Finally, his Misrepresentation claim relates to the alleged conduct and state of mind of Curley and Schultz in 2001. He is seeking in excess of $4 million from Penn State. Penn State obviously needs information and testimony from Curley, Schultz and Spanier to defend against these substantial claims.

While concerns of self-incrimination do not necessarily require staying a civil litigation, courts certainly can consider these concerns when deciding whether to stay a civil case. Adelphia Communications, at *5. Because Curley, Schultz and Spanier have already been indicted, they face substantial self-incrimination concerns and are therefore almost certain to refuse to provide information to Penn State or to testify. Doing so could also force them to reveal their criminal defense strategies.

Further, McQueary's claims relate to and require evidence from other Penn State current and former representatives, including Baldwin. These individuals not only may also refuse to provide information or testify for fear of self-incrimination, but they also may be harmed if Curley, Schultz and/or Spanier refuse to provide information or testimony. Without information or testimony from these three indicted individuals, these other Penn State current and former representatives may

not provide information or testimony in this civil litigation, further prejudicing Penn State.

In addition, the Pennsylvania Office of Attorney General ("OAG") may prevent McQueary from testifying under oath in this action before he testifies in the criminal proceedings.[4] This would also greatly prejudice Penn State.

Without information from Curley, Schultz or Spanier, and possibly other Penn State representatives, Penn State will not be able to answer or otherwise respond to the Complaint. If it cannot Answer or otherwise respond to the Complaint, discovery should not be allowed to commence. It is a cardinal principle of law that a court "may properly defer or delay discovery while it awaits an answer to a complaint." Spotts v. United States, Civil Nos. 3:12-CV-0583, 3:12-CV-0743, 1:12-CV-0407, 2012 WL3994223, at *2 (M.D. Pa. Sept. 11, 2012), attached hereto as Exhibit "C" (citation omitted). The District Court in Spotts held that deferring discovery while awaiting a response to a complaint was warranted; this would allow the defendants to file dispositive motions in lieu of answering the complaint, which may present meritorious and complete legal defenses to the claims. The District Court further held that, until the defendants answered or otherwise responded to the complaint, they should not be put to the time, expense,

[4] At the request of the OAG, the Freeh group did not interview McQueary and on this basis it is anticipated that the OAG will intervene in this action if discovery is sought from McQueary.

and burden of factual discovery until any legal defenses raised by dispositive motions are addressed by the court.

In the present matter, Penn State is unable to adequately formulate its defense to the substantial claims asserted by McQueary, as it has not and is not likely to be able to communicate with Curley, Schultz or Spanier. Further, Penn State may not be able to obtain information from the other Penn State representatives for the same reasons. These are yet more reasons why this matter should be stayed.

E. The Interests of the Court Favor Staying This Case

This Court "has an interest in efficiently managing its caseload," and staying the matter promotes judicial efficiency. Adelphia Communications, at *5 (citation omitted). Without a stay, Curley, Schultz and Spanier, and possibly the other Penn State representatives, will likely intervene to stay this litigation or assert their constitutional rights against self-incrimination, and this will cause the Court to have to decide a number of issues during discovery. See id. If the matter is stayed until the conclusion of the related criminal proceedings, then these rulings will no longer be necessary. Id. (citing Walsh Securities, 7 F.Supp.2d at 528).

In addition, if this matter is stayed, there will be no need to engage in piecemeal discovery. In Plaintiff's Answer to Defendant's Motion to Stay Proceedings (at p. 7), McQueary argues that if any discovery invokes constitutional

issues – which it surely will – the appropriate response would be to wait until this occurs and then seek Court intervention. This solution is not only inefficient, it is likely to lead to the need to re-depose witnesses who have already had their deposition taken. However, this type of piecemeal discovery is not favored by courts, as it is inefficient and costly to all involved. See, e.g., McClendon v. Dougherty, No. 2:10-CV-1339, 2011 WL 4345901, at *1 (W.D. Pa. Sept. 15, 2011), attached hereto as Exhibit "D" (holding that "'discovery under the Federal Rules of Civil Procedure is intended to be obtained as expeditiously as possible.... Piecemeal discovery ... does not contribute to the expeditious completion of discovery.'"); Carpenter Technology Corp. v. Armco, Inc., Civ. A. No. 90-0740, 1990 WL 61180, at *4 (E.D. Pa. May 8, 1990), attached hereto as Exhibit "E" (requiring witnesses to be deposed twice, once before and once after production of documents, "would result in undesirable, piecemeal discovery").

Thus, staying this civil action will preserve judicial resources, promote judicial efficiency, save the parties unnecessary expense, and prevent the parties from engaging in piecemeal discovery.

F. The Public's Interest Favors a Stay

The public interest will not be harmed by staying this civil action. For example, there is no need to deny the stay to protect the public, such as in cases where allowing the civil case to proceed will protect the public by halting the

distribution of mislabeled drugs or preventing the dissemination of misleading information to the investing public. See Walsh Securities, 7 F.Supp.2d at 529. McQueary's suit only concerns claims that would benefit him, and have no bearing on the public. Further, the public would benefit from a stay by allowing the Commonwealth to complete, unimpeded, its criminal prosecution of the cases against Curley, Schultz and Spanier. See id.; Adelphia Communications, at *6. Thus, the public's interest weighs in favor of the stay.

G. The Interests of Non-Parties Favor a Stay

The last factor – the interests of persons not parties to the civil litigation – also favors a stay. As discussed above, non-parties, such as Curley, Schultz or Spanier, or the other former and current Penn State representatives, including Baldwin, could be burdened with self-incrimination issues and/or the need to seek a protective order from the Court. See, e.g., Golden Quality Ice Cream, 87 F.R.D. at 58 (holding that "the pressures of civil discovery are likely to weigh most heavily on certain key managerial officials in defendant companies;" these individuals, facing criminal charges, may be forced to invoke their constitutional rights against self-incrimination). "The dilemma for such persons is severe because they face serious penalties in the event of a criminal conviction, and because they are not themselves parties to th[e] civil action." Id.

Staying this matter would prevent the OAG from having to intervene to seek a stay or protective order. At the request of the OAG, the Freeh group did not interview McQuery and on this basis it is anticipated that the OAG does not want McQueary providing information or answering questions under oath before he testifies in the Curley, Schultz or Spanier criminal matters. Further, the alleged victims of Sandusky – the John Does in the various civil cases – may be negatively affected by development of the facts if this case were allow to proceed before the criminal proceedings conclude.

Thus, the interests of these non-parties weigh in favor of a stay.

VI. CONCLUSION

Balancing the factors discussed above, it is clear that they all favor granting a stay. Thus, Penn State respectfully requests that this Court stay this civil action pending resolution of the related criminal proceedings.

Respectfully submitted,

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MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY : CIVIL ACTION NO. 2012-1804

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this ____ day of November, 2012, a true and correct copy of the foregoing Memorandum of Law In Support of The Pennsylvania State University's Motion to Stay Proceedings was served upon the following persons via first class, United States mail, postage prepaid:

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EXHIBIT "A"

Westlaw

Not Reported in F.Supp.2d, 2003 WL 22358819 (E.D.Pa.)
(Cite as: 2003 WL 22358819 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
In re ADELPHIA COMMUNICATIONS SECURITIES LITIGATION

No. 02-1781.
May 13, 2003.

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MEMORANDUM AND ORDER

HUTTON, J.

*1 THIS DOCUMENT RELATES TO ALL ACTIONS

Presently before the Court are two Motions for Reconsideration of the Court's Order, dated September, 26, 2002, staying these securities class action cases. One motion (Docket No. 84) was filed on January 17, 2003, by a group of arbitrage funds ("Argent/Eminence Plaintiffs"). The other motion (Docket No. 88) was filed on January 29, 2003, by several public employee pension funds ("Pension Fund Plaintiffs"). In each of these motions, Plaintiffs ask the Court to (1) remove these cases from the civil suspense docket; (2) reconsider the stay order; and (3) rule on Plaintiffs' Motions for Appointment of Lead Plaintiff and Counsel. For the reasons discussed below, the motions are denied.

I. *BACKGROUND*

These cases arise from the financial collapse of Adelphia Communications Corporation, a company providing cable television and communications services to consumers. The first of these private securities actions against Adelphia and its officers and directors was filed on April 20, 2002. Since that date, approximately 40 similar actions have been filed. The cases were consolidated before this Court in an order dated April 30, 2002. Included among the Defendants in these actions are Adelphia, John Rigas, Timothy Rigas, and Michael Rigas ("Rigas Defendants").

Adelphia's collapse also spawned other litigation that is relevant to the instant case. First, on June 25, 2002, Adelphia filed a Chapter 11 Bankruptcy petition in the Southern District of New York. Presently, Adelphia's bankruptcy petition is still pending in that court.

Second, on July 24, 2002, the United States Securities and Exchange Commission ("SEC") filed a civil enforcement action in the Southern District of New York against Adelphia, the Rigas Defendants, and two other former Adelphia officers, James Brown and Michael Mulcahey. In its complaint, the SEC makes allegations similar to those contained in the various complaints filed in the private securities suits currently before this Court. Specifically, the SEC charges that Adelphia, as directed by the Rigas Defendants and others, fraudulently hid liabilities from Adelphia's consolidated financial statements, falsified company earnings, and concealed self-dealing by the Rigas Defendants. *See* Compl., *SEC v. Adelphia Comm. Corp,* No. Civ.A. 02-5776 (S.D.N.Y. July 24, 2002). On October 29, 2002, the

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court stayed the SEC enforcement action pending resolution of the related criminal proceedings against the defendants, described below.

On September 23, 2002, the Rigas Defendants, James Brown, and Michael Mulcahey were indicted in the Southern District of New York on criminal charges related to their conduct at Adelphia, including charges of wire fraud, securities fraud, and conspiracy. While Mr. Brown pleaded guilty to several charges in November, 2002, the criminal proceedings are ongoing against the remaining defendants. Count I of the 24-count indictment contains issues and allegations similar to those in the instant private securities suits, including allegations that the Rigas Defendants improperly co-mingled funds, engaged in self-dealing, and failed to disclose co-borrowing arrangements that ultimately resulted in Adelphia understating its liabilities by approximately $3 billion. *See* Argent/Eminence Pls .' Compl. at ¶¶ 29-33, 44, 46; Indictment, *United States v. Rigas,* No.Crim.A. 02-1236, at ¶¶ 16-21, 73-91.

*2 On September 27, 2002, this Court issued an order (Docket No. 72) which: (1) stayed the consolidated action and placed it on the Civil Suspense Docket; and (2) denied all pending motions with leave to renew. Subsequent to this order, the Argent/Eminence Plaintiffs petitioned the United States Court of Appeals for the Third Circuit, requesting a writ of mandamus requiring this Court to lift the stay. On December 26, 2002, the Third Circuit denied the petition, stating that "the proper course is for plaintiffs to file a motion to reconsider the stay.... We are confident the District Court will review this matter and set forth its reasons for granting or denying the stay." *In Re Eminence Capital LLC,* No. 02-3889, at 1 (3d Cir. Dec. 26, 2002). As a result of this ruling, Plaintiffs filed the instant motions.

II. *LEGAL STANDARD*

"The standards controlling a motion for reconsideration are set forth in Federal Rule of Civil Procedure 59(e) and Local Rule of Civil Procedure 7.1." *Vaidya v. Xerox Corp.,* No. Civ. A. 97-547, 1997 WL 732464, at *1 (E.D.Pa. Nov.25, 1997). The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Max's Seafood Café by Lou-Ann, Inc. v. Quinteros,* 176 F.3d 669, 677 (3d Cir.1999) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.,* 52 F.3d 1194, 1218 (3d Cir.1995)). Therefore, a court should grant a motion for reconsideration only "if the moving party establishes one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or prevent manifest injustice." *Drake v. Steamfitters Local Union No. 420,* No. Civ. A. 97-585, 1998 WL 564886, at *3 (E.D.Pa. Sept. 3, 1998) (citing *Smith v. City of Chester,* 155 F.R.D. 95, 96-97 (E.D.Pa.1994)).

III. *DISCUSSION*

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.,* 299 U.S. 248, 254-55, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936) (citing *Kansas City Southern R. Co. v. United States,* 282 U.S. 760, 763, 51 S.Ct. 304, 305-6, 75 L.Ed. 684 (1931)); *see also Texaco, Inc. v. Borda,* 383 F.2d 607, 608 (3d Cir.1967) (quoting same). Thus, the decision to stay civil proceedings calls for the trial court, in its discretion, to balance the various interests of the parties, the court, and the public. *Landis,* 299 U.S. at 254-56. In the instant motions, Plaintiffs argue that this Court abused its discretion by failing to give adequate weight to the Plaintiffs' interests. *See* Argent/Eminence Pls.' Mem. at 3-4; Pension Fund Pls.' Mem. at 3.

*3 In this case, the Court based its stay order on two parallel proceedings directly affecting the instant private securities suits: (1) the ongoing criminal case in the Southern District of New York;

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and (2) Adelphia's pending bankruptcy petition. The impact of each action on the consolidated securities cases is discussed in turn below.

A. *Related Criminal Proceedings*

As noted above, the Rigas Defendants in this suit are currently under indictment in the Southern District of New York for engaging in allegedly fraudulent conduct that contributed to Adelphia's collapse. In deciding whether to stay a civil case pending the resolution of a related criminal case, courts consider many factors, including: (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest. *Walsh Securities, Inc. v. Cristo Prop. Mgmt. Ltd.*, 7 F.Supp.2d 523 (D.N.J.1998) (citing *Trustees of Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.* ., 886 F.Supp. 1134, 1138 (S.D.N.Y.1995)); *see also Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D.Pa.1980) (listing similar factors). Each of these factors is discussed in turn below.

1. Similarity of Issues

The similarity of the issues underlying the civil and criminal actions is considered the most important threshold issue in determining whether or not to grant a stay. *Walsh Securities,* 7 F.Supp.2d at 527 (quoting Milton Pollack, *Parallel Civil and Criminal Proceedings,* 129 F.R.D. 201, 203 (1989) (*"Parallel Proceedings"*)). The consolidated Adelphia securities actions have a significant overlap of issues with the Rigas Defendants' criminal case. For example, both cases allege that the Rigas Defendants made material omissions and misstatements regarding certain co-borrowing arrangements, which were used by the Rigas Defendants to purchase Adelphia stock. Moreover, both cases allege that the Rigas Defendants improperly commingled funds and used Adelphia assets for their own purposes. The Court finds that these overlapping issues are integral to both the civil and criminal cases. Accordingly, this factor weighs heavily in favor of granting the stay.

2. Stage of Related Criminal Proceedings

In determining whether to grant a stay, a court must also consider the status of the related criminal proceedings, which can have a substantial effect on the balancing of the equities. If criminal indictments are returned against the civil defendants, then a court should strongly consider staying the civil proceedings until the related criminal proceedings are resolved. *Parallel Proceedings,* 129 F.R.D. at 203 (citing *SEC v. Dresser Indus., Inc.,* 628 F.2d 1368, 1375-76 (D.C.Cir.1980)); *see also Walsh Securities,* 7 F.Supp.2d at 527-28. Civil defendants subject to criminal indictment face a significant risk of self-incrimination during the civil discovery process. *Walsh Securities,* 7 F.Supp.2d at 527 (citing *Parallel Proceedings,* 129 F.R.D. at 203). Moreover, the indicted defendants risk exposing their criminal defense strategy during civil discovery. *Id.* Additionally, the burden of delay on the civil litigants is minimal because the Speedy Trial Act requires prompt resolution of the related criminal proceedings. *Id.* In contrast, because there is less risk of self-incrimination and greater burdens imposed by the delay, stays are rarely granted at the pre-indictment stage. *See State Farm Mut. Auto. Ins. Co. v. Beckham-Easley,* No. Civ.A. 01-5530, 2002 WL 31111766, at *2 (E.D.Pa. Sept.18, 2002). *But see Walsh Securities,* 7 F.Supp.2d at 527-28 (granting temporary stay at pre-indictment stage).

**4 In this case, indictments were returned against several of the civil defendants on September 23, 2002. Because the civil and criminal issues are so closely intertwined, the Court finds that these defendants face a substantial risk of self-incrimination if the civil cases are allowed to proceed. In addition to the Fifth Amendment problems, the defendants risk exposing their criminal defense

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strategies to the government and to their co-defendants. Thus, this factor weighs strongly in favor of staying the consolidated securities actions pending resolution of the related criminal proceedings.

3 Prejudice to the Plaintiff

In evaluating the plaintiff's burden resulting from the stay, courts may insist that the plaintiff establish more prejudice than simply a delay in his right to expeditiously pursue his claim. *Golden Quality Ice Cream*, 87 F.R.D. at 56. Instead, the plaintiff should demonstrate a particularly unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay. *Beckham-Easley*, 2002 WL 31111766, at *3; *Walsh Securities*, 7 F.Supp.2d at 528.

In their filings, Plaintiffs primarily argue that they are prejudiced by the stay because a Lead Plaintiff and Lead Counsel have not yet been appointed to manage the consolidated actions. The Pension Fund Plaintiffs argue that, without Lead Counsel, Plaintiffs do not "have someone with authority to speak for them in this litigation." *See* Pension Fund Pls.' Mem. at 3. Similarly, the Argent/Eminence Plaintiffs assert that stay order deprives "tens of thousands of purchasers of Adelphia securities ... of representation" and prevents Plaintiffs from making important strategic decisions regarding the course of this litigation. *See* Argent/Eminence Pls.' Mem. at 2-3. Finally, both sets of Plaintiffs implicitly assert that the stay order is counter to Congressional intent in enacting the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 ("PSLRA"). *See Id.*; Pension Fund Pls.' Mem. at 3. In their filings, Plaintiffs point out that Congress gave Lead Plaintiffs and Lead Counsel important roles in shaping the strategic direction of securities class action suits. *Id.* It follows, Plaintiffs argue, that staying the proceedings before making these appointments is counter to the scheme envisioned by Congress in the Act. *Id.*

The Court finds that Plaintiffs have failed to demonstrate sufficient prejudice to warrant reconsideration of the stay in this case. First, Plaintiffs have not shown any prejudice other than delay in pursuing their suits, which is insufficient to support vacating the stay. *See Walsh Securities*, 7 F.Supp.2d at 528. For example, Plaintiffs point to no evidence that Defendants are intentionally liquidating assets or otherwise trying to gain an advantage during the delay. *Contra Beckham-Easley*, 2002 WL 31111766, at *3 (finding the defendants' willful assets transfers militated against stay). Second, the lack of a Lead Plaintiff or Lead Counsel does not prevent the individual plaintiffs and their respective counsel from making the kinds of strategic decisions, such as intervention in other suits, described by Plaintiffs in their filings. Finally, nothing in the PSLRA indicates that Congress intended for private securities actions to proceed during related criminal proceedings. While the Court agrees that Congress gave Lead Plaintiffs and Lead Counsel important roles in shaping the strategic direction of securities class actions, the legislative record does not reveal an intent to limit a Court's inherent discretion to control its own docket. Accordingly, because the Court finds that Plaintiffs are not prejudiced by the delay resulting from the stay, this factor militates in favor of the stay.

4 Burden on the Defendants

*5 As noted above, civil defendants subject to a criminal indictment must often choose between waiving their Fifth Amendment rights during civil discovery or asserting the privilege and losing the civil case. *Walsh Securities*, 7 F.Supp.2d at 528. While it is not unconstitutional to place a defendant in this position, *see Baxter v. Palmigiano*, 425 U.S. 308, 318-19, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976), courts may consider these conflicts when deciding whether to stay a civil case. *Dresser Indus.*, 628 F.2d at 1375; *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F.Supp.2d 573, 577-78 (S.D.N.Y.2001).

In this case, the Court finds that Defendants potentially face a significant burden if the civil

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cases are allowed to go forward. As noted above, because the Rigas Defendants are already under criminal indictment in a case concerning identical allegations and issues, they face substantial risks of self-incrimination. Moreover, Defendants also may be forced to reveal their criminal defense strategies if the case is allowed to proceed.

Finally, the unindicted civil defendants also face prejudice unless the civil proceedings are stayed. The Rigas Defendants are the key figures in both the civil and criminal cases. *See Volmar Distribs., Inc. v. New York Post Co., Inc.*, 152 F.R.D. 36, 41 (S.D.N.Y.1993). Because their actions lie at the center of the civil cases, their testimony and documents will be essential to resolving those cases. *Id.* Staying the civil cases pending resolution of the criminal proceedings will preclude the Rigas Defendants from invoking the Fifth Amendment privilege during the civil cases. *Id.* If a stay is not issued, then remaining Defendants, who are not protected by the Fifth Amendment, may not be able to adequately defend themselves. Accordingly, this factor weighs in favor of staying the civil proceedings.

5. Interest of the Court

The Court has an interest in efficiently managing its caseload. *Beckham-Easley*, 2002 WL 31111766, at *3. In this case, granting a stay promotes judicial efficiency. First, without a stay, the civil defendants will likely assert their Fifth Amendment rights, causing the court to decide a number of privilege issues during civil discovery. In contrast, if the civil actions are stayed until the conclusion of the criminal proceedings, then these rulings will no longer be necessary. *Walsh Securities*, 7 F.Supp.2d at 528. Moreover, if the indicted defendants assert the privilege throughout the litigation, then it will be "difficult or impossible to fairly apportion liability because of the differing factual record among the defendants." *Id.* at 528-29. Additionally, criminal convictions against any of the civil defendants will likely encourage them to settle the civil suits, thereby eliminating the need to litigate some issues in the civil cases. Thus, staying the civil actions preserves judicial resources and streamlines some of the complexities of the consolidated securities actions. As a result, this factor weighs in favor of staying the civil actions.

6. Public Interest

*6 The public interest is not harmed by staying the civil action. In their filings, Plaintiffs argue that the public interest in protecting the integrity of the securities markets militates in favor of letting the civil action proceed. *See* Pension Fund Pl.'s Mem. at 3. While the Court agrees that the public has a strong interest in protecting capital markets, the related criminal proceedings serve to advance those same interests. *Volmar Distribs. ., Inc. v. New York Post Co., Inc.*, 152 F.R.D. 36, 40 (S.D.N.Y.1993) (citing *Brock v. Tolkow*, 109 F.R.D. 116, 121 (E.D.N.Y.1985)). Accordingly, the public interest may be served by staying the civil cases pending resolution of the criminal proceedings. As a result, this factor militates in favor of staying the consolidated civil cases.

7. Balancing the Equities

On balance, the factors listed above support staying the consolidated civil cases pending resolution of the criminal proceedings. While the Court appreciates that the delay will cause some inconvenience to Plaintiffs, this prejudice is outweighed by the other factors supporting the stay.

B. *Related Bankruptcy Proceedings*

The Court also based its stay order on the pendency of Adelphia's bankruptcy proceedings. The stay is independent of the automatic stay provision of § 362(a) of the Bankruptcy Code, which applies only to the debtor-defendant in this case, Adelphia. Rather, the stay is based on the Court's inherent power to control its docket. *Landis*, 299 U.S. at 254-55. Under circumstances such as those present in this case, courts may stay civil proceedings against non-debtor defendants that are not subject to the Bankruptcy Code's automatic stay provision. *In re the Loewen Group, Inc. Sec. Litig.*, No. Civ.A. 98-6740, 2001 WL 530544, at *1-3 (E.D.Pa. May

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16, 2001); *Smith v. Dominion Bridge Co.*, No. Civ.A. 96-7580, 1999 WL 111465 (E.D.Pa. March 2, 1999).

In *Loewen Group*, a series of securities class actions were filed against Loewen, alleging, *inter alia*, that the company inflated profits in its securities filings. 2001 WL 530533, at *1. While these class actions were pending, Loewen filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. *Id.* The court, *sua sponte*, placed the consolidated class actions in civil suspense pending the resolution of the bankruptcy proceedings. *Id.* In response, the plaintiffs filed motions to remove the cases from the suspense calendar and allow them to proceed against the non-debtor defendants. *Id.*

The court, applying four factors listed in *Dominion Bridge*, denied the motion to reconsider the stay. In denying the motion, the court considered the following factors: (1) plaintiff's interest in having a forum and whether a satisfactory alternative forum exists; (2) whether the defendant may wish to avoid multiple litigation or inconsistent relief for liability shared with third parties; (3) the extent to which judgment may impede the debtor-party's ability to protect its interest; and (4) the interest of the courts and the public in the consistent and efficient settlement of controversies. *Loewen Group*, 2001 WL 530544, at *1 (citing *Dominion Bridge*, 1999 WL 11465, at *4). Application of the factors to this case demonstrates that the consolidated civil actions should be stayed pending resolution of Adelphia's bankruptcy petition.

*7 Regarding the first factor, the consolidated securities actions have merely been placed in suspense. Thus, Plaintiffs retain this Court as the forum to adjudicate their securities claims. Accordingly, this factor weighs in favor of staying the consolidated securities actions. *Accord Loewen Group*, 2001 WL 530544, at *1; *Dominion Bridge*, 1999 WL 11465, at *4.

Regarding the second and fourth factors, the Court, the public, and the parties all have an interest in the efficient resolution of both the civil and the bankruptcy claims. The Court finds that this interest is best served by staying the consolidated civil actions as to all defendants, not just Adelphia, pending resolution of Adelphia's bankruptcy petition. As in *Loewen*, the securities actions in this case will require significant and burdensome discovery on the part of the debtor-defendant, Adelphia. 2001 WL 530544, at *3. Thus, it will be difficult, if not impossible, to proceed against the non-debtor defendants without substantial involvement by Adelphia. *Id.* Accordingly, these factors militate towards staying the consolidated securities actions.

Finally, regarding the third factor, because many of the individual defendants were officers of Adelphia and the claims against them arise out of their conduct at the company, Adelphia cannot adequately protect its interests if the civil actions are allowed to proceed without Adelphia's involvement. In *Loewen*, the Court found that, because the claims against the individual defendants were based upon actions taken as officers of the debtor-defendant, the plaintiffs could not "meaningfully separate the actions of the company from the actions of its officers and directors." *Loewen Group*, 2001 WL 530544, at *3. *See also Dominion Bridge*, 2001 WL 530544, at *4 (extending stay to non-debtors where "there is such identity between the debtor and third-party that the debtor may be said to be the real party defendant"). As a result, an action solely against the non-debtor defendants risked unnecessary duplication of issue and inconsistent relief.

Similarly, in this case, proceeding against the individual defendants risks subjecting Adelphia to duplicative and inconsistent litigation. For example, if Plaintiffs are allowed to proceed against the individual defendants, Adelphia risks being collaterally estopped from relitigating issues decided in Plaintiffs' favor based on the Adelphia officers' actions. *Accord Loewen Group*, 2001 WL 530533, at *3. Thus, this factor also supports staying the civil actions until the conclusion of Adelphia's bankruptcy proceedings so that Adelphia may ad-

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equately represent its interests. Therefore, all four factors discussed in *Loewen Group* and *Dominion Bridge* militate in favor of staying the civil cases as to all defendants.

IV. *CONCLUSION*

Based on the foregoing discussion, the Court finds that its stay order, dated September 6, 2002, is adequately supported by precedent. Accordingly, Plaintiffs fail to demonstrate that the Court committed a clear error of law by staying these civil cases. Plaintiffs' Motions for Reconsideration are denied.

*8 An appropriate Order follows.

ORDER

AND NOW, this 13th day of May, 2003, upon consideration of Plaintiffs' Motions for Reconsideration (Docket Nos. 84 & 88), IT IS HEREBY ORDERED that Plaintiffs' Motions are DENIED.

E.D.Pa.,2003.
In re Adelphia Communications Securities Litigation
Not Reported in F.Supp.2d, 2003 WL 22358819 (E.D.Pa.)

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EXHIBIT "B"

Not Reported in F.Supp.2d, 2010 WL 2331069 (W.D.Pa.), 2010-1 Trade Cases P 77,061
(Cite as: 2010 WL 2331069 (W.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Pennsylvania.
RESCO PRODUCTS, INC., Plaintiff,
v.
BOSAI MINERALS GROUP CO., LTD., and CMP Tianjin Co., Ltd., Defendants.

Civil Action No. 06–235.
June 4, 2010.

Austin P. Henry, Mills & Henry, Pittsburgh, PA, Jennifer Milici, William A. Isaacson, Boies, Schiller & Flexner LLP, Washington, DC, Richard E. Donovan, Kelley Drye & Warren LLP, Parsippany, NJ, for Plaintiff.

Benjamin J. Lambiotte, Paul S. Hoff, Richard D. Gluck, Garvey Schubert Barer, Washington, DC, Lizbeth R. Levinson, Kutak Rock LLP, Washington, DC, Frederick B. Goldsmith, Goldsmith & Ogrodowski, LLC, Pittsburgh, PA, for Defendants.

MEMORANDUM OPINION

CONTI, District Judge.

*1 An action was filed February 22, 2006 by Resco Products, Inc. ("plaintiff") alleging that defendants Bosai Minerals Group Co., Ltd. and CMP Tianjin Co., Ltd. ("defendants") entered into a conspiracy with the purpose and effect of fixing prices and controlling the supply of refractory grade bauxite, and committed other unlawful practices designed to inflate the prices of refractory grade bauxite sold to plaintiff and other purchasers in the United States and elsewhere. (Pl.'s First Am. Compl. (Docket No. 92) at 1.) Plaintiff submits these actions violated section 1 of the Sherman Act, 15 U.S.C. § 1.

Two motions to dismiss were filed on October 7, 2009. The first motion to dismiss was a joint motion filed by defendants pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). (Docket No. 98). The second motion to dismiss was filed by CMP Tianjin pursuant to Federal Rule of Civil Procedure 12(b)(2). (Docket No. 99). Plaintiff filed responses and defendants filed replies, and a hearing was held on January 21, 2010 regarding both motions to dismiss. The court requested additional briefing with respect to a pending World Trade Organization ("WTO") proceeding, and the implications of the WTO proceeding on the application of the act of state doctrine. (Mot. to Dismiss Hr'g Tr. (Docket No. 130) at 49.) CMP Tianjin later withdrew the motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(2). (*See* Docket Nos. 140, 142.)

After considering the parties' supplemental briefs (Docket Nos. 127 and 131) with respect to the joint motion to dismiss, the court will stay the proceedings until July 21, 2010, at which time the parties will inform the court about the status of the pending WTO proceeding and the stay will be re-evaluated.

A. WTO proceeding

The pending WTO proceeding was initiated by the United States Trade Representative ("USTR") in its Request for the Establishment of a Panel by the United States, *China—Measures Related to the Exportation of Raw Materials*, WT/DS394/7 (Nov. 9, 2009). (Defs.' Reply to Pl.'s Opp'n to Defs.' Joint Mot. to Dismiss (Docket No. 123), Ex. 4 ("Panel Request").) In response to the Panel Request, the Dispute Settlement Body ("DSB") of the WTO established a single panel on December 21, 2009 to examine complaints by the United States and others concerning China's export restrictions on various raw materials, including bauxite. (Pl.'s Reply to Defs.' Supplemental Br. (Docket No. 131), Ex. 4 at 1.)

The USTR's Panel Request, among other things, alleges the following:

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China ... imposes quantitative restrictions on the exportation of the materials [(including bauxite)] by requiring that prices for the materials meet or exceed a minimum price before they may be exported. Further, through its ministers and other organizations under the State Council as well as chambers of commerce and industry associations, China administers the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable.

*2 (Panel Request at 6.) The USTR's Panel Request asserts that the actions are inconsistent with specific provisions of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N .T.S. 194 ("GATT"), and the Protocol on the Accession of the People's Republic of China (WT/L/432) ("Accession Protocol"), which incorporates certain commitments of China contained in the WTO's Working Party Report on the Accession of China (WT/MIN(01)/3) ("Working Party Report"). (*See generally* Panel Request.)

Normally, a panel must conduct its examination of the complaints and issue a final report to the parties within six months. (Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-- Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994) ("DSU"), art. 12.8.) A panel's final report will "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." (DSU art. 12.7.) Parties to the dispute have a right under the DSU to appeal issues of law covered in the panel report and legal interpretations developed by the panel. (DSU art. 17.4, 6.) Parties may make written submissions to, and be given an opportunity to be heard by, an Appellate Body. (DSU art. 17.4.) Generally, "the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall ... not exceed nine months where the panel report is not appealed or 12 months where the report is appealed." (DSU art. 20.) Finally, the DSU states that "where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement." (DSU art. 19.1.)

Discussion

B. Motion to stay

Defendants raised four major arguments in support of their joint motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b) (1) and (6):(A) the act of state doctrine prohibits the court from declaring defendants' restrictions on the trade of bauxite unlawful, (B) the foreign sovereign compulsion doctrine provides immunity for defendants' actions, (C) the court should decline jurisdiction for reasons of international comity, and (D) the first amended complaint fails to state a claim.

The court suggested at the hearing on January 21, 2010 that a stay of the action until the WTO proceeding concluded might be appropriate. (Mot. to Dismiss Hr'g Tr. (Docket No. 130) at 10.) The court requested supplemental briefing "with respect to the import of the proceeding before the [WTO] and the act of state doctrine and how that applies [to this case]." (*Id.* at 49.)

Defendants raised five arguments in their supplemental brief: (A) in dispute resolution cases, the WTO issues detailed decisions including findings of fact and conclusions of law, (B) moving forward with this case while the WTO proceeding is pending creates a substantial risk of interference with the conduct of foreign policy of the executive branch, (C) the act of state doctrine compels abstention, (D) comity factors weigh heavily in favor of abstention, and (E) a stay is within the court's discretion. (Defs.' Supplemental Br. (Docket No. 127).)

*3 Plaintiff raised four main arguments in its reply to defendants' supplemental brief: (A) the act of state and comity defenses are fact-based analyses

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that do not justify abstention at this point, (B) there is no genuine risk of inconsistent findings or rulings until the court is ready to make them, which should occur after discovery has clarified whether defendants were acting pursuant to a governmental mandate, (C) no court has stayed an otherwise valid action pending the conclusion of WTO proceedings, and deference to the WTO is not required, and (D) a stay would prejudice plaintiff. The crux of issue concerning whether a stay should be ordered relates to the act of state doctrine, which will be addressed below.

a. Act of state doctrine

The act of state doctrine "is the judiciary's institutional response to the foreign relations tensions that can be generated when a United States court appears to sit in judgment on a foreign state's regulation of its internal affairs." *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1057 (3d Cir.1998). American courts are to refrain from judging "the validity of a foreign state's governmental acts in regard to matters within that country's borders." *Id.* at 1057–58. The burden of proving dismissal on the grounds of the act of state doctrine is on the moving party. *Id.* at 1058.

When considering the act of state doctrine, a court must be mindful of the extent to which, in the context of a particular dispute, separation of powers concerns may be implicated. *Grupo Protexa, S.A. v. All Am. Marine Slip,* 20 F.3d 1224, 1237 (3d Cir.1994), *cert. denied,* 513 U.S. 986, 115 S.Ct. 481, 130 L.Ed.2d 395 (1994). The court in *Grupo Protexa* stated:

> [T]he court must determine whether there is evidence of a potential institutional conflict between the judicial and political branches such that a judicial inquiry into the validity of a foreign state's actions could embarrass the political branches in their conduct of foreign affairs. *See* [*Environmental Tectonics,* 847 F.2d at 1058]. This analysis "must always be tempered by common sense." [*Allied Bank Int'l v. Banco Credito Agricola de Cartago,* 757 F.2d 516, 521 (2d Cir.1985)] (citations omitted). "The less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." ' *Id.* (quoting [*Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 428, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)]).

Id. The basis for this analysis is found in the underlying policy concerns of the act of state doctrine, which "focus on the preeminence of the political branches, and particularly the executive, in the conduct of foreign policy." *Allied Bank Int'l,* 757 F.2d at 520.

Defendants argue that price coordination and supply limits were mandated by China's export control regulations and policies. Under those circumstances, any alleged antitrust violation arguably was an act of state, and not a private conspiracy. Defendants claim that the Chinese organization responsible for the alleged antitrust violations is known as the China Chamber of Commerce of Chemical, Metals and Minerals Importers and Exporters ("CCCMC").

*4 Defendants rely on an amicus brief filed by the Ministry of Foreign Commerce of the People's Republic of China in *In re Vitamin C Antitrust Litigation,* 584 F.Supp.2d 546 (E.D.N.Y.2008), for the proposition that the CCCMC, which is one of the Chinese chambers of commerce, "is a Ministry-supervised entity authorized by the Ministry to regulate ... export prices and output levels, and the price coordination,' or so-called voluntary self-restraint,' it facilitated is a government-mandated price and output control regime." (Defs.' Mem. in Supp. of Joint Mot. to Dismiss (Docket No. 101), Ex. A at 3 ("Amicus brief").) Defendants allege that the CCCMC is under the direct supervision of the Chinese Ministry of Foreign Commerce, a government body with plenary authority to mandate export control policy, including supply and prices.

b. The court's power to stay

The United States Court of Appeals for the Third Circuit has held that a district court has broad

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power to stay proceedings. *Bechtel Corp. v. Local 215, Laborers' Int'l Union,* 544 F.2d 1207, 1215 (3d Cir.1976) (affirming stay in deference to the trial court's discretionary power to grant a stay). The "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.,* 299 U.S. 248, 299, 57 S.Ct. 163, 81 L.Ed. 153 (1936) (Cardozo, J.). Central to this power is a court's ability to "hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *Bechtel Corp.,* 544 F.2d at 1215 . Of particular importance is that the issues and parties to the two causes need not be identical before one suit may be stayed to abide the proceedings in another suit. *See Landis,* 299 U.S. at 254. When two cases implicate similar facts or issues of law, the pending cause "may not settle every question of fact and law" in the current suit, but it may "in all likelihood ... settle many and simplify them all." *Id.* at 256. Before exercising the power to stay proceedings, a court must weigh competing interests and maintain an even balance. *Id.* at 255.

Courts within the Third Circuit have weighed the competing interests of the parties in deciding whether to exercise the power to stay proceedings. Tellingly, courts have stayed proceedings in numerous cases where another pending action contained similar questions of fact or law. *See, e.g., Cheyney State College Faculty v. Hufstedler,.* 703 F.2d 732 (3d Cir.1983) (holding "that the district court did not clearly abuse its discretion in delaying the suit pending the potential resolution of some important issues in ongoing administrative proceedings"); *Chartener v. Provident Mut. Life Ins. Co.,* No. 02–8045, 2003 WL 22518526, at *4 (E.D.Pa. Oct.22, 2003) (granting stay for six months to abide the determination of a state court settlement agreement); *Schwarz v. Prudential–Bache Sec., Inc.,* No. 90–6074, 1991 WL 137157, at * 1 (E.D.Pa. July 19, 1991) (district court granted stay pending the settlement of a class action in which the plaintiff was a potential class member).[FN1]

FN1. Plaintiff cites several decisions for the proposition that the court does not have the authority to grant a stay in a case to await the resolution of a pending WTO proceeding. *See NSK Ltd., v. United States,* 416 F.Supp.2d 1334, 1337 (Ct. Int'l Trade 2006) (citing *Timken Co. v. United States,* 354 F.3d 1334, 1344 (Fed.Cir.2004) and *Corus Staal B.V. v. Dep't of Commerce,* 395 F.3d 1343, 1348 (Fed.Cir.2005)). The holdings in those decisions were based on the determination that the court was not required to treat the WTO's handling of a zeroing and antidumping policy as binding on its interpretation of United States statutory law. *See, e.g. Corus Staal,* 395 F.3d at 1346 ("[the Department of] Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law"); *Timken,* 354 F.3d at 1344 (refusing to overturn the Department of Commerce's zeroing practice based upon a WTO Appellate Body decision; holding that the Department of Commerce's "longstanding and consistent administrative interpretation is entitled to considerable weight").

Each decision relied upon by plaintiff is distinguishable from this case. *NSK Ltd.* is distinguishable because the United States was a party to the case and opposed the stay—here the United States is not a party and does not challenge the stay. In *Timken,* the United States Department of Commerce calculated a weighted average based upon the dumping margins of a producer of roller bearings, and the Department of Commerce used the weighted average to assess duties upon the producer. The producer argued that the WTO issued a report prohibiting this practice. *Timken,* 354 F.3d at 1338–39. The WTO proceeding at is-

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> sue, however, concerned a trade dispute between European nations and India, and the WTO's decision was not binding on the United States. *Id.* at 1343–44. The plaintiff in *Corus Staal* argued the Department of Commerce was in violation of its international obligations in light of three WTO decisions, one in which the United States was not a party. *Corus Staal*, 395 F.3d at 1348. The court in *Corus Staal* reviewed the decisions cited by the plaintiff and held those decisions were not relevant to the interpretation of a United States statute. *Id.* at 1349. Of significance is that, unlike the situation in this case, all the WTO proceedings in *Corus Staal* had concluded and a stay was not an issue. Here the United States initiated the WTO proceeding and advanced a position potentially adverse to plaintiff in this case. For the reasons stated above, the decisions plaintiff relies upon do not constrain this court in exercising its power to stay the proceedings.

*5 Several courts have identified the competing interests as: (1) the length of the stay; (2) the balance of harm to the parties; and (3) whether a stay will simplify issues and promote judicial economy. *Gunduz v. U.S. Citizenship and Immigration Servs.*, No. 07–780, 2007 WL 4343246, at *1 (W.D.Pa. Dec.11, 2007); *see Smithkline Beecham Corp. v. Apotex Corp.*, No. 03–3365, 2004 WL 1615307, at *7 (E.D.Pa. July 16, 2004). Other courts have recognized five factors relevant to the balancing analysis:

> (1) The interest of the plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil ... litigation.

Morgenstern v. Fox Television Stations of Phila., No. 08–0562, 2010 WL 678113, at —— 1–2 (E.D.Pa. Feb.23, 2010) (holding case in abeyance pending the resolution of a bankruptcy proceeding to which the defendant was a party); *see Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D.Pa.1980) (granting limited pretrial discovery).[FN2]

> FN2. While the court is aware that decisions to stay cases usually involve pending lawsuits and not pending WTO proceedings, the same universal principles relevant to granting a stay (i.e., judicial autonomy, judicial economy, and resolving similar issues) should apply by analogy in this case. *See Landis* and *Bechtel* discussed *supra.*

Each balancing framework considers several overlapping factors, including the interests of and burdens on the parties, the length of the stay, and the interests of the court in promoting judicial efficiency. The court finds that the decision to stay these proceedings would not change regardless of which framework is applied to the facts of the case. For purposes of completeness, however, the court will weigh the interests of the parties under the five *Golden Quality* factors.

i. Plaintiff's interest and potential prejudice

District courts should operate in a manner that ensures a just, speedy, and inexpensive determination of every action and proceeding. *See* FED. R. CIV. P. 1. This goal is facilitated when plaintiffs and defendants use the discovery procedures to determine the merit, or lack thereof, of a case and to develop a strategy to guide them through litigation. *See Golden Quality*, 87 F.R.D. at 56. Plaintiff argues that it is not necessary to stay this case pending the issuance of the report of the WTO dis-

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pute resolution panel because the court is not required to make any potential inconsistent findings of fact or conclusions of law until after discovery is completed. Plaintiff asserts that, consequently, discovery ought to continue and the court should deny the defendants' motion to dismiss as premature. Plaintiff submits that to stay the proceedings for six to twelve months would be prejudicial and would cause "more documents [to be] lost or discarded, witnesses [to] leave their companies, and memories [to] fade." (Pl.'s Reply to Defs.' Supplemental Br. (Docket No. 131) at 14.)

*6 It should be noted that the issues before the court and those pending in the WTO proceeding are similar. The USTR alleged in its Panel Request that the Chinese government, working through chambers of commerce, has been imposing restrictions on the exportation of bauxite by requiring that prices meet or exceed a minimum price before the material can be exported. Plaintiff argues alternatively that defendants have voluntarily entered into agreements to fix prices of bauxite before the material is exported, thereby controlling supply. The arguments of plaintiff and the USTR are similar in that they target a common method of price-fixing; where they differ is what entity is responsible for the price arrangements—the Chinese government or defendants.[FN3]

> FN3. Price-fixing is defined as "the artificial setting or maintenance of prices at a certain level, contrary to the workings of the free market." BLACK'S LAW DICTIONARY 1227 (8th ed.2004). This definition appears to incorporate the alleged practices plaintiff complains about in this lawsuit and those which the USTR complains about in its Panel Request.

The difference in the position of plaintiff and the USTR focuses on factors that affect how the act of state doctrine should be applied in this case. Defendants argue that the act of state doctrine applies to this case because China is requiring the CCCMC to fix prices of bauxite before the material can be exported. If the panel determined that the United States is correct in its assertion that the Chinese government has been working through chambers of commerce to impose restrictions on the exportation of bauxite by requiring that prices meet or exceed a minimum price before the material can be exported, that finding may favor the defendants' arguments in this case. A contrary holding likewise could impact whether the act of state doctrine applies. While the court recognizes, and the parties do not dispute, that decisions adopted by the DSB are not binding, the findings of fact and conclusions of law made by the WTO panel may at the very least simplify the analysis of the act of state doctrine here.

Plaintiff's interest in pursuing discovery at this time does not outweigh other interests. To advance discovery now without a final determination in the pending WTO proceeding could lead the court to resolve the pending motion to dismiss or future dispositive motions in a manner that may be inconsistent with the position of the USTR and the eventual decision rendered by the WTO panel. While not dispositive, the WTO panel's report may implicate separation of powers concerns, which would be appropriate for this court to consider in determining whether a decision by this court would interfere with the executive branch's conduct of foreign policy. *See Grupo Protexa* discussed *supra*. The court determines it is prudent under those circumstances to await the resolution of WTO proceedings in order to minimize the delicate separation of powers concerns at this juncture.

Mindful that proceedings should be carried out in a manner that ensures a just, speedy, and inexpensive determination of the action, the court does not agree with plaintiff's position that staying the proceedings for six to twelve months would be substantially prejudicial. It should be noted that the WTO panel was formed on December 21, 2009. A final report by the panel is likely to be made six months from that date—about June 21, 2010. If an appeal is taken, a final appellate report should be adopted by the DSB by December 2010. From the

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date of this order, the proceedings here will likely be stayed between two and seven months. If the court were to permit unfettered discovery, it is possible that a final report could be issued by the WTO before any significant progress is made in this case. Any prejudice to plaintiff caused by such a short delay is outweighed by the minimization of separation of powers concerns raised by the WTO proceedings.

ii. Burden on defendants

*7 Defendants argue that a stay in this case is warranted because a final report in the pending WTO proceeding could obviate further discovery, particularly concerning the act of state doctrine. Defendants submit that the court is within its power to abide the outcome of the WTO proceeding which may substantially affect this case or be dispositive of the issues. *See Bechtel* discussed *supra*. The court agrees with defendants' position that substantial time, effort, and resources may be saved by exercising the court's broad power to hold this case in abeyance until a final report is adopted by the DSB. It does not comport with fairness or economy to allow the parties further discovery at this stage in the case, when the court believes such efforts could soon be proven wasteful. *E.g., Golden Quality,* 87 F.R.D. at 57 ("The mere possibility that a substantial amount of the court's work, if undertaken now, may shortly prove to have been unnecessary, cautions against undue haste in proceeding with this civil action"). This factor weighs in favor of defendants.

iii. The burden on the court

The pretrial discovery phase is lengthy and complicated in private antitrust cases, especially in matters concerning international litigants. In weighing the interests of judicial economy in this case, the court considers the United States Court of Appeals for the Ninth Circuit's discussion in *Chronicle Publ'g Co. v. Nat'l Broad. Co., Inc.,* 294 F.2d 744, 747–48 (9th Cir.1961):

> We are ... confronted with the prospect of two tremendously complex proceedings simultaneously assembling the same factual data in painstaking detail for the purpose of considering these facts from different points of view. The situation is one which cries out for the elimination of wasteful duplication of effort. If the mechanics of justice are not to be wholly overwhelmed by the steadily increasing burden of complex antitrust litigation, means must be found for easing that burden.

Staying the proceedings in this case for a period between two and seven months may reduce the duplication of effort between the WTO panel and this court, as the two proceedings involve overlapping facts with regard to the Chinese government's alleged involvement in price-fixing of exported bauxite.

iv. Burden on nonparties

Neither party addresses in their briefing, and the court is not presently aware of, a burden on nonparties if this litigation were to advance at this time. This factor weighs in favor of granting the stay.

v. The public interest

The public has an "interest in having private antitrust actions proceed expeditiously." *Golden Quality,* 87 F.R.D. at 58; *see Phila. Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.,* 269 F.Supp. 540, 542 (E.D.Pa.1967) (stating that the strong incentive of treble damages "encourages private litigants to vigorously enforce the antitrust laws" and that "unwarranted stays of proceedings stymie and offset any incentive otherwise contained in the possibility of triple recovery"). The court cannot ignore, however, the United States' position taken before the WTO panel with regard to alleged price-fixing of bauxite in China. The United States, represented by the executive branch through the USTR, has an interest in making its case before the WTO panel.

*8 Were this court to rule on the pending motion to dismiss or proceed with discovery, there may be duplication of effort by the parties here and

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the United States in the WTO proceedings, and there is a possibility for a conflict in decisions that may be avoided if a brief stay is issued. This potential conflict between the judicial and executive branches could implicate separation of powers concerns if decisions of this court were to embarrass the executive branch in the conduct of foreign affairs. *See Grupo Protexa* discussed *supra*. [FN4] The public interest in favor of advancing the USTR's position in the pending WTO proceeding supports a stay of this case until a final report is released by the WTO panel.

> FN4. The court does not rule on whether the act of state doctrine or any other theory of abstention defendants assert would act as a bar to plaintiff's suit. There are unresolved issues that remain before those defenses can be properly addressed. The resolution of the pending WTO proceeding will likely shed light on those issues—a factor deserving substantial weight in the court's analysis of staying this case.

Conclusion

After considering the five *Golden Quality* factors, the court holds that this case will be stayed until July 21, 2010, at which time the parties will inform the court about the status of the pending WTO proceeding and the stay will be re-evaluated. The pending joint motion to dismiss (Docket No. 98) will be denied without prejudice and may be renewed when the stay is lifted.

W.D.Pa.,2010.
Resco Products, Inc. v. Bosai Minerals Group Co., Ltd.
Not Reported in F.Supp.2d, 2010 WL 2331069 (W.D.Pa.), 2010-1 Trade Cases P 77,061

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EXHIBIT "C"

Westlaw

Slip Copy, 2012 WL 3994223 (M.D.Pa.)
(Cite as: 2012 WL 3994223 (M.D.Pa.))

Only the Westlaw citation is currently available.

United States District Court,
M.D. Pennsylvania.
Kelvin Andre SPOTTS, et al., Plaintiffs
v.
UNITED STATES of America, et al., Defendants.
John Legrand, et al., Plaintiffs
v.
Fenstermaker, et al., Defendants.
Antron Russell, et al., Plaintiffs
v.
United States of America, et al., Defendants.

Civil Nos. 3:12–CV–0583, 3:12–CV–0743, 1:12–CV–0407.
Sept. 11, 2012.

Kelvin Andre Spotts, Waymart, PA, pro se.

Broderick York, Waymart, PA, pro se.

Roderick Wheless, Waymart, PA, pro se.

Maurice Davis, Waymart, PA, pro se.

Justin Blewitt, U.S. Attorney's Office, Scranton, PA, for Defendants.

Roderick Wheless, Waymart, PA, pro se.Maurice Davis, Waymart, PA, pro se. Justin Blewitt, U.S. Attorney's Office, Scranton, PA. for Defendants.

MEMORANDUM ORDER

MARTIN C. CARLSON, United States Magistrate Judge.

I. ***Statement of Facts and of the Case***

***1** In the above-captioned related actions, a number of federal inmates have sued the United States of America and certain individual Defendants, alleging injuries stemming from the consumption of salmonella-contaminated chicken that was served at the United States Penitentiary, Canaan, in June 2011. The Defendants have not yet filed an answer to the complaint or otherwise moved to dismiss this complaint, and the deadline for filing a responsive pleading in each of these cases has been enlarged until October 1, 2012. Nonetheless the *pro se* Plaintiffs have lodged discovery demands upon the Defendant, inspiring the Defendants to file motions for protective orders in each action, seeking a stay of discovery, or an extension of time in which to respond to the discovery propounded by Plaintiffs, until a case management schedule is issued after the Defendants have filed an initial pleading or otherwise responded to the complaints. [FN1]

FN1. The motions for protective orders are located at the following docket entries: *Kelvin Andre Spotts, et al., v. United States of America, et al.,* No. 3:12–CV–0583 (Doc. 67); *John Legrand, et al ., v. Fenstermaker, et al.,* No. 3:12–CV0743 (Doc. 76); and *Antron Russell, et al., v. United States of America,* No. 1:12–CV–0407 (Doc. 98).

For the reasons set forth below, the motions will be GRANTED.

II. ***Discussion***

Several basic guiding principles inform our resolution of the instant discovery matter. Rulings regarding the proper scope of discovery, and the extent to which discovery may be compelled, are matters consigned to the court's discretion and judgment. Thus, it has long been held that decisions regarding Rule 37 motions are "committed to the sound discretion of the district court." *DiGregorio v. First Rediscount Corp.,* 506 F.2d 781, 788 (3d Cir .1974). Similarly, issues relating to the scope of discovery permitted under Rule 26 also rest in the sound discretion of the court. *Wisniewski v. Johns–Manville Corp.,* 812 F.2d 81, 90 (3d Cir.1987). Thus, a court's decisions regarding the conduct of discovery, and whether to compel disclosure of certain information, will be disturbed

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only upon a showing of an abuse of discretion. *Marroquin–Manriquez v. I.N.S.*, 699 F.2d 129, 134 (3d Cir.1983). This far-reaching discretion extends to rulings by United States Magistrate Judges on discovery matters. In this regard:

> District courts provide magistrate judges with particularly broad discretion in resolving discovery disputes. See *Farmers & Merchs. Nat'l Bank v. San Clemente Fin. Group Sec., Inc.*, 174 F.R.D. 572, 585 (D.N.J.1997). When a magistrate judge's decision involves a discretionary [discovery] matter ..., "courts in this district have determined that the clearly erroneous standard implicitly becomes an abuse of discretion standard." *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 174 (E.D.Pa.2004) (citing *Scott Paper Co. v. United States*, 943 F.Supp. 501, 502 (E.D.Pa.1996)). Under that standard, a magistrate judge's discovery ruling "is entitled to great deference and is reversible only for abuse of discretion." *Kresefky v. Panasonic Commc'ns and Sys. Co. .*, 169 F.R.D. 54, 64 (D.N.J.1996); *see also Haxbrouck v. BankAmerica Hous. Servs.*, 190 F.R.D. 42, 44–45 (N.D.N.Y.1999) (holding that discovery rulings are reviewed under abuse of discretion standard rather than de novo standard); *EEOC v. Mr. Gold, Inc.*, 223 F.R.D. 100, 102 (E.D.N.Y.2004) (holding that a magistrate judge's resolution of discovery disputes deserves substantial deference and should be reversed only if there is an abuse of discretion).

***2** *Halsey v. Pfeiffer*, No. 09–1138, 2010 WL 3735702, *1 (D.N.J. Sept.17, 2010).

We note that this broad discretion over discovery matters extends to decisions under Rule 26(c) relating to the issuance of protective orders limiting and regulating the timing of discovery. Indeed, it is undisputed that: " '[t]he grant and nature of [a protective order] is singularly within the discretion of the district court and may be reversed only on a clear showing of abuse of discretion.' *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir.1973) (citation omitted)." *Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 19 (2d Cir.1992). This discretion is guided, however, by certain basic principles. Among these cardinal principles, governing the exercise of discretion in this field, is that the district court may properly defer or delay discovery while it awaits an answer to a complaint, *see United Sweetener USA, Inc. v. Nutrasweet Co.*, 766 F.Supp. 212 (D.Del.1991); or considers a potentially dispositive pretrial motion, provided the district court concludes that the pretrial motion does not, on its face, appear groundless. *See, e.g., James v. York County Police Dep't*, 160 F.App'x 126, 136 (3d Cir.2005); *Nolan v. U.S. Dep't of Justice*, 973 F.2d 843,849 (10th Cir.1992); *Johnson v. New York Univ. Sch. of Ed.*, 205 F.R.D. 433, 434 (S.D.N.Y.2002). Briefly deferring discovery in such a case, while the court awaits a response to the complaint and determines the threshold issue of whether a complaint has sufficient merit to go forward, recognizes a simple, fundamental truth: Parties who file motions which may present potentially meritorious and complete legal defenses to civil actions should not be put to the time, expense and burden of factual discovery until after these claimed legal defenses are addressed by the court. In such instances, it is clearly established that:

> "[A] stay of discovery is appropriate pending resolution of a potentially dispositive motion where the motion 'appear[s] to have substantial grounds' or, stated another way, 'do[es] not appear to be without foundation in law.' " *In re Currency Conversion Fee Antitrust Litigation*, 2002 WL 88278, at *1 (S.D.N.Y. Jan.22, 2002) (*quoting Chrysler Capital Corp. v. Century Power Corp.*, 137 F.R.D. 209, 209–10 (S.D.N.Y.1991)) (*citing Flores v. Southern Peru Copper Corp.*, 203 F.R.D. 92, 2001 WL 396422, at *2 (S.D.N.Y. Apr.19, 2001)); *Anti–Monopoly, Inc. v. Hasbro, Inc.*, 1996 WL 101277, at *2 (S.D.N.Y. March 7, 1996)).

Johnson v. New York Univ. School of Educ., 205 F.R.D. 433, 434 (S.D.N.Y.2002).

Guided by these legal tenets we conclude that

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discovery should be briefly stayed in these cases at the present time. We note that the Defendants have not yet filed answers or any potentially dispositive motions in response to the complaints filed in these cases. Once the Defendants have responded to the complaints we will, by separate order, set a discovery schedule in this matter, at which time the parties may freely engage in discovery. However, until the merits of these claims are initially addressed by the Defendants and the Court, we conclude, consistent with settled case law, that a stay of discovery is appropriate in the exercise of our discretion. *Johnson v. New York Univ. School of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y.2002); *United Sweetener USA, Inc. v. Nutrasweet Co.*, 766 F.Supp. 212 (D.Del.1991).

*3 Furthermore, in this case, one other consideration calls for a stay of the discovery that has been propounded, and a more comprehensive and coherent approach to all related discovery being undertaken in this matter. There are currently more than 20 cases pending in the Middle District of Pennsylvania involving the same alleged food contamination incident: *Fuquan Anthony Spells, et al., v. United States of America, et al.*, Docket No. 3:12–CV–0455; *Kelvin Andre Spotts, et al. v. United States of America*, et al., Docket No. 1:12–CV–0583; *Antron Russell v. United States of America*, et al., Docket No. 1:12–CV–407; *John Legrand, et al., v. Fenstermaker*, et al., Docket No. 3:12–CV–0743; *Charron Butts v. United States of America*, Docket No. 1:12–CV–0785; *Reginald Barnett, et al., v. Fenstermaker*, et al., Docket No. 1:12–CV–0183; *Roddy McDowell v. United States of America*, et al., Docket No. 3:12–CV–01132; *Louis Rundolph v. United States of America*, et al ., Docket No. 1:12–CV–01177; *David A. Ragers v. Warden Ronnie Holt*, et al., Docket No. 1:12–CV–1041; *Austin Grupee v. Warden Ronnie Holt* et al., Docket No. 1:12–CV–1015; *Jorge Gonzales–Vasquez v. United States of America*, Docket No. 1:12–CV–1031; *Richard Randolph v. United States of America*, Docket No. 1:12–CV–0784; *Estac Love v. Holt*, et al., Docket No. 1:12–CV–1030; *Eugene Kenneth Brinson, et al., v. United States of America*, Docket No. 3:12–CV–1451; *Anthany Murphy v. United States of America*, Docket No. 3:12–CV–1415; *Nafis Woods v. United States of America*, Docket No. 1:12–CV–0900; *Tito Strang v. Ronnie Holt*, Docket No. 3:12 CV–1036; *Barabbas Brown v. United States of America*, Docket No. 3:12–CV–0956; Paul *Peraza v. United States of America*, Docket No. 3:12–CV–1356; *Christopher Ramos v. Holt*, et al., Docket No. 3:12–CV–01454; *Eric Cannelly v. United States of America*, Docket No. 1:12–CV–1187; and *Joseph Bonilla v. United States*, et al., Docket No. 3:12–CV–1490.

These cases would all greatly benefit from a coordinated approach to discovery and litigation, and while we have declined to formally consolidate these cases because they entail different parties, multiple *pro se* plaintiffs, and disparate claims, we are committed to keeping these cases on consistent and coherent litigation tracks. Briefly deferring pre-answer discovery in this case, while we await the government's response to these complaints, will achieve this goal in a fashion which will ultimately benefit all parties to this litigation, in our view. Therefore, we will defer further discovery pending the filing of answer and further order of the Court. of the outstanding motion.

An appropriate order follows.

III. ***Order***

Accordingly, for the foregoing reasons, the Defendant's motions for protective orders staying discovery in each of the above-captioned cases are GRANTED.

So ordered.

M.D.Pa.,2012.
Spotts v. U.S.
Slip Copy, 2012 WL 3994223 (M.D.Pa.)

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EXHIBIT "D"

Not Reported in F.Supp.2d, 2011 WL 4345901 (W.D.Pa.)
(Cite as: 2011 WL 4345901 (W.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Pennsylvania.
Kellen McCLENDON, Plaintiff,
v.
Charles J. DOUGHERTY, an individual; Ralph L. Pearson, an individual; and DUquesne Universtiy, a Pennsylvania Corporation, Defendants.

Civil Action No. 2:10–cv–1339.
Sept. 15, 2011.

Rachel M. Yantos, Millstein & Knupp, David J. Millstein, Youngwood, PA, for Plaintiff.

Kimberly A. Craver, Martha Hartle Munsch, Reed Smith, LLP, Pittsburgh, PA, for Defendants.

MEMORANDUM ORDER

NORA BARRY FISCHER, District Judge.

*1 AND NOW this 15th day of September, 2011, having considered the Plaintiffs Motion for Reconsideration [79] of my Memorandum Order, (Docket No. 78), denying his Second Motion to Compel Discovery, (Docket No. 73), the Defendant's response to Plaintiffs motion for reconsideration, (Docket No. 82), and the parties' arguments before this Court, made on August 29, 2011, (Docket No. 83), the Court DENIES the pending motion for reconsideration [79].

This motion for reconsideration comes in the wake of the Court's denial of Plaintiff's second motion to compel discovery. In that motion, Plaintiff sought to compel production of Dr. Judith Griggs for supplemental deposition, as well as certain of Dr. Griggs' files and the files of Defendant Pearson. (Docket No. 73 at 7). The Court denied this motion because Plaintiff delayed in requesting production of the documents, because Defendants had already agreed to produce Dr. Griggs for supplemental deposition, and because the Court did not find the requested documents relevant. (*See generally* Docket No. 78).

Motions for reconsideration are granted sparingly "[b]ecause federal courts have a strong interest in finality of judgments." *Jacobs v. Bayha,* Civ. A. No. 07–237, 2011 WL 1044638, at *2 (W.D.Pa. Mar.18, 2011) (quoting *Continental Cas. Co. v. Diversified Indus., Inc.,* 884 F.Supp. 938, 943 (E.D.Pa.1995)) (emphasis added). "Because of the interest in finality, at least at the district court level ... the parties are not free to relitigate issues the court has already decided." *Williams v. City of Pittsburgh,* 32 F.Supp.2d 236, 238 (W.D.Pa.1998) (citing *Rottmund v. Continental Assurance Co.,* 813 F.Supp. 1104, 1107 (E.D.Pa.1992)). The purpose of a motion for reconsideration is " 'to correct manifest errors of law or fact or to present newly discovered evidence.' " *Max's Seafood Café v. Quinteros,* 176 F.3d 669, 677 (3d Cir.1999) (quoting *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir.1985)). A Court may grant a motion for reconsideration if the moving party shows: (1) an intervening change in the controlling law; (2) the availability of new evidence which was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *Max's Seafood Café,* 176 F.3d at 677 (citing *North River Ins. Co. v. Cigna Reinsurance Co.,* 52 F.3d 1194, 1218 (3d Cir.1995)). Plaintiff's motion clearly relies on the third rationale, as he claims that the Court committed clear error of law or fact in its disposition of his primary motion. (*See* Docket No. 79 at ¶ 2) (claiming that this Court's original order "constitutes an error of both law and fact and creates a manifest injustice."). The Court finds Plaintiff's argument to be without merit.

First, the Court reiterates its earlier point that "discovery under the Federal Rules of Civil Procedure is intended to be obtained as expeditiously as possible ... Piecemeal discovery, such as would arise if the Court were to grant this motion, does

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not contribute to the expeditious completion of discovery." (*See* Docket No. 78 at 1) (internal citation omitted). Plaintiff's dilatory actions, which would result in *de facto* extension of the Court's discovery deadlines, do not contribute to the expeditious acquisition of discovery and disposition of the case.

*2 Second, the request to produce Dr. Griggs for deposition is moot because, as Plaintiff's Counsel has admitted, Dr. Griggs has already been produced for supplemental deposition. (Docket No. 89 at 59). In fact, at oral argument, Plaintiff's Counsel admitted to having prepared the primary motion before receiving a response from Defendant's Counsel, and then he clearly failed to make changes to his motion. In this Court's estimation, Plaintiff's Counsel should be aware of the content of his own filings, and avoid wasting the Court's time and that of opposing counsel with a request over which there is no dispute.

As to the files of Dr. Griggs and Defendant Pearson, the Court reiterates that Plaintiff had more than ample opportunity to request the documents at issue. The Court did not impose any requirements upon Plaintiff's Counsel to delay his request for production of files; that was done on his own accord, as he stated that "[i]t has always been [his] practice since [he has] been practicing law to have files produced right before a deposition so [he] could review them and use them in the deposition." (Docket No. 89 at 8). While this may be his practice,[FN1] seasoned counsel should modify his practice when he sees the end of discovery approaching and the window quickly closing on his opportunity to request production of documents. Despite Plaintiff's Counsel's assertions to the contrary, the end of discovery seems to this Court to be a "compelling reason" to request production. (*See id.* at 9) (counsel stating that he did not see "any compelling reason to [request production] at that time.").

> FN1. For future reference in this case, to the extent that Counsel's practice does not conform to the Federal Rules of Civil Procedure, the local rules of this district, or this Court's Orders, the Court would recommend that Counsel modify his practices to match the rules that govern this case.

Indeed, as Plaintiff's Counsel could have discovered through a quick search on Westlaw, only a few months ago, on June 22, 2011, the Third Circuit upheld a discovery order denying a motion to compel under circumstances similar to those of the instant case. *See Nowell v. Reilly,* 2011 WL 2464645, *2 (3d Cir.2011) (upholding district court's denial of a motion to compel where documents were requested only nineteen days prior to close of discovery). As in *Nowell,* Plaintiff's Counsel has provided no "proof ... that more diligent discovery was impossible." *Id.* (citing *In re Fine Paper Antitrust Lit.,* 685 F.2d 810, 818 (3d Cir.1997)). Rather, as I discuss momentarily, he has provided proof to the contrary: that he easily could have requested the documents on April 27, 2011—more than 30 days prior to the close of discovery.

Plaintiff's Counsel strenuously argues that he "did not want to burden [Defendant Pearson] with the obligation of going through files and produce files and take care of all those issues while he was that sick." (Docket No. 89 at 28). While this is admirable, even if the Court was to accept this justification as the basis for his delay in requesting production, the Plaintiff's own exhibit, (Docket No. 83-2), entered during the hearing, shows that he could have requested the documents with no pangs of conscience as early as April 27, 2011, when he was informed that Defendant Pearson was healthy. April 27, the Court notes, is more than 30 days prior to the June 6, 2011 close of discovery. Still, Plaintiff's Counsel failed to make his request at this time. It seems to this Court that "more diligent discovery" was imminently possible.

*3 Turning next to Plaintiff's assertions that *Ansell v. Green Acres Contracting Company,* 347 F.3d 515 (3d Cir.2003), is justification for this Court to allow him discovery into claims of non-

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racial discrimination at Duquesne University, the Court finds this argument unavailing. At argument, Plaintiff's Counsel quoted *Ansell,* stating: "[e]vidence of an employer's conduct toward other employees have long been held relevant and admissible to show that employer's proffered justification is pretext." (Docket No. 89 at 23). Plaintiff would probably have been better served citing a few lines later in that opinion, where the Court of Appeals for the Third Circuit stated that evidence can be brought to show "that the employer treated other, similarly situated persons out of [plaintiff's] protected class more favorably, or that the employer has discriminated against other members of his protected class *or other protected categories of persons." Ansell,* 347 F.3d at 521 (citing *Fuentes v. Perskie,* 32 F.3d 759, 765 (3d Cir.1994)) (emphasis added).

Even so, there is "no bright line rule for determining when evidence is too remote to be relevant." *Ansell,* 347 F.3d at 525 (citing *United States v. Pollock,* 926 F.2d 1044, 1048 (11th Cir.1991)). Instead, "such determination must be based on the potential the evidence has for giving rise to reasonable inferences of fact which are 'of consequence to the determination of the action.' " *Ansell,* 347 F.3d at 525 (citing FED.R.EVID. 401).

The Court does not see how any of the files of Dr. Griggs or Defendant Pearson are relevant, outside of the file of Valerie Harper, which has already been produced. 8/29/2011 *Transcript* at 34 (Plaintiff's Counsel admitting that Defense Counsel has produced the Harper file). As Plaintiff's Counsel clearly stated during his supplemental deposition of Dr. Griggs, cases involving a white complainant and white respondent are "of no interest to" him. *Transcript of Supplemental Depositian of Dr. Griggs,* at 102; *id.* at 100 ("If they're white on white, it's not something that I need to discuss with you.").[FN2] This limitation makes perfect sense, as any "white on white" cases cannot possibly teach anything about racial discrimination—obviously, a white person will win, but a white person will also lose. Such instances do not, in this case, give rise to any reasonable inference of consequence to the action. A non-white party is therefore necessary to show any kind of racial bias by Defendant. As Defendant's Counsel has already produced the sole relevant file, all other requests for production appear to this Court to be nothing more than a fishing expedition.

> FN2. Per her statement during the August 29 hearing, (Docket No. 89 at 18–19), Defense Counsel provided the Court with a copy of Dr. Griggs' supplemental deposition on August 29. The Court has reviewed the same.

Dr. Griggs' sworn testimony at her deposition corroborates Defense Counsel's statements, which this Court relied upon in its original Order, (*see* Docket No. 78 at 2), that the *only* file which might be shown to involve racial animus had already been provided to Plaintiff. *Transcript of Supplemental Deposition of Dr. Griggs,* at 99 ("Well, if it's a white complainant and a white respondent, that's the rest of these ..."). Plaintiffs Counsel admits that he is in possession of the of the Harper file, (Docket No. 89 at 32–33) ("They've [Defendants] given us the Valerie Harper case and said this is not a racial discrimination case but it's close and we are going to give it to you because we think it may be relevant."). Moreover, Dr. Griggs states in her supplemental deposition that she thought that her key recommendations in the Harper case were followed. *Transcript of Supplemental Deposition of Dr. Griggs,* at 93 ("I know that my recommendations—or at least I'm thinking that they may not have been fully accepted, but the thing that I focused on was that the complainant was satisfied."). Thus, in the only case where race *could* have been an issue, Dr. Griggs' key recommendations were followed *in favor of an African–American female* and against a white male.

*4 Finally, the files that were sent from Dr. Griggs to Defendant Pearson for review and action are irrelevant because Pearson could not have ob-

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tained Plaintiffs file in this case for two reasons. First, Plaintiff had filed a complaint with PHRC, and it is the University's policy, in all cases, to terminate its investigations when complaints are filed with PHRC. (Docket No. 89 at 44). Second, Defendant Pearson was listed as a respondent in that complaint, so the file should not have gone to him anyway. (*Id.* at 61–62). The Plaintiff is, therefore, not similarly situated to those parties whose files would have gone to Defendant Pearson, because Plaintiffs file would have been reviewed and acted upon by a different party *if* the file had gone to Pearson, which it did not. *Cf. Goins v. EchoStar Commc'ns Corp.*, 148 Fed.App'x 96, 98 (3d Cir.2005) ("the operative employment decision made by a different independent manager asserting her discretion is sufficient to differentiate two otherwise similarly situated employees.").

Finally, the Court is of the opinion that production of Pearson's files would unduly complicate this case. The effect would likely be that the Court would be called to engage in mini-trials addressing each of the various claims in Pearson's files. In addition, the little benefit there seems to be in the requested discovery is far outweighed by inherent compromise to the privacy of individuals not party to this litigation. Finally, it would further delay the already protracted resolution of this rather straightforward case of alleged employment discrimination.

For these reasons, the Court sees no reason to overturn its previous Order. Plaintiffs Motion [79] is therefore DENIED.

W.D.Pa.,2011.
McClendon v. Dougherty
Not Reported in F.Supp.2d, 2011 WL 4345901 (W.D.Pa.)

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EXHIBIT "E"

Westlaw

Not Reported in F.Supp., 1990 WL 61180 (E.D.Pa.)
(Cite as: 1990 WL 61180 (E.D.Pa.))

H
Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
CARPENTER TECHNOLOGY CORP., Plaintiff,
v.
ARMCO, INC., Defendant.

CIV. A. No. 90–0740.
May 8, 1990.

Richard C. Rizzo, Dechert Price & Rhoads, Robert A. Limbacher, Philadelphia, Pa., for plaintiff.

Robert A. Nicholas, Reed Smith Shawl & McClay, Arland T. Stein, Philadelphia, Pa., for defendant.

MEMORANDUM AND ORDER

HUYETT, District Judge.

***1** Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, defendant Armco, Inc. ("Armco") has noticed the deposition of a corporate designee of plaintiff Carpenter Technology Corporation ("Carpenter").[FN1] In the instant motion for a protective order, Carpenter argues that certain portions of the deposition notice are irrelevant to the issue raised by its complaint. In addition, Carpenter objects to other portions of the deposition notice because it fails to identify the matters upon which testimony is sought with reasonable particularity. Finally, Carpenter asks this Court to postpone the taking of depositions until after document production is complete to avoid the need for costly, piecemeal depositions. For the reasons stated below, I will grant Carpenter's motion for a protective order, and order the parties to establish a comprehensive deposition schedule which shall commence after the initial exchange of documents.

I.

Resolution of this discovery dispute requires a detailed discussion of the factual background of this suit. In 1973, Carpenter entered into a patent license agreement with Armco regarding United States Patent No. 3,556,776 ("the '776 patent"). The agreement required Carpenter to pay a royalty of 5% of the net selling price of the products covered by the '776 patent. Carpenter has complied with this obligation.

A third party, Cyclops Corporation ("Cyclops"), began selling products covered by the '776 patent without a license in the early 1980's. As a result, Armco filed an infringement action against Cyclops in the Western District of Pennsylvania ("the *Cyclops* action"). As a defense, Cyclops maintained that the '776 patent was invalid because the invention was in public use and on sale for more than one year prior to the date of the patent application.

Subsequently, in October 1982, Carpenter initiated a declaratory judgment action in the Eastern District of Pennsylvania which alleged that the '776 patent was invalid and unenforceable. Carpenter and Armco settled this action on October 23, 1983.

Pursuant to the settlement agreement ("the 1983 Agreement"), Carpenter continued paying royalties to Armco pending the resolution of the *Cyclops* action. In the event the '776 patent was declared invalid in the *Cyclops* action, Armco agreed to reimburse Carpenter for all royalties paid from the date of the 1983 Agreement plus interest. The 1983 Agreement dealt with the possibility of settlement of the *Cyclops* action as follows:

6. In the event the *Armco v. Cyclops* case is terminated by settlement which has the effect of according Cyclops an effective royalty rate less than or more favorable to Cyclops than the royalty rate provided for in the Armco/Carpenter License Agreement of December 31, 1973, Armco shall promptly notify Carpenter of such lower or more favorable royalty rate (by furnishing Carpenter with a true copy of all portions of the Settlement Agreement bearing on the effective royalty rate, including all portions dealing with royalties and/or other pay-

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ments), and Carpenter shall be entitled to recalculate royalties theretofore paid to Armco covering the period for which Cyclops is paying royalties as to have the benefit of such lower or more favorable royalty rate; Carpenter shall also have the benefit of such lower or more favorable royalty rate for royalty payments thereafter accruing under the December 31, 1973 agreement; in the event that such recalculation by Carpenter shall result in a sum due and owing to Carpenter, Armco shall pay the same to Carpenter within 15 days after written notice from Carpenter to Armco. In the event Carpenter shall be required to institute litigation to collect any such sum, Carpenter shall be entitled to recover in such litigation its reasonable attorney's fees for conducting the same.

*2 *See* Carpenter's Exhibit A, pp. 3–4.

In July 1985, the '776 patent was declared invalid in the *Cyclops* action on Cyclop's motion for summary judgment. The Federal Circuit reversed and remanded the case for resolution of certain factual disputes regarding the validity of the '776 patent.[FN2] *See Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147 (Fed.Cir.1986).

Nearly three years later, the *Cyclops* action was settled ("the *Cyclops* settlement agreement"). The *Cyclops* settlement agreement provided for a cash payment by Cyclops in the amount of $225,000 over the period of a year [FN3] and an exchange of services. Pertinent portions of the *Cyclops* settlement agreement provide for an exchange of services as follows:

4.1 CYCLOPS' Cytemp Division (hereinafter "CYTEMP"), shall make available to BALTIMORE the following conversion work at the prices per pound to BALTIMORE and maximum volume (tons/mo.) listed below, for a period of thirty (30) consecutive months from the date of execution of this Agreement:

5.1 CYCLOPS' CYTEMP Division or any successor to substantially all of the assets of the CYTEMP Division shall purchase conversion work from BALTIMORE an BALTIMORE's rotary forge for an aggregate 3,000 tons of material during a period of seven (7) years from the date of execution of this Agreement.

See Carpenter's Exhibit B, pp. 2–3, 7. Subsequent to the *Cyclops* settlement agreement, Armco, through its subsidiary, advised Carpenter that "[t]he royalty to Carpenter is 5% of sales, and the settlement with Cyclops is equivalent to an effective royalty of 5% of sales." *See* Carpenter's Exhibit C.

Carpenter disputed Armco's calculation of the effective royalty rate provided to Cyclops by virtue of the *Cyclops* settlement agreement at 5%, and has filed suit to recover under paragraph 6 of the 1983 settlement agreement. [FN4] The sole issue presented by this action is whether the *Cyclops* settlement agreement has the effect of according Cyclops an effective royalty rate more favorable than the 5% royalty rate paid by Carpenter pursuant to the 1973 patent license agreement with Armco. This is complicated by the fact that the *Cyclops* settlement agreement involves an exchange of services.

II.

The scope of permissible discovery is set forth in the Federal Rules of Civil Procedure. Rule 26(b)(1) states:

parties may obtain discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears *reasonably calculated to lead to the discovery of admissible*

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evidence.

*3 [emphasis supplied]. While the scope of discovery is generally broad, it is not without its bounds. *See McCalin v. Mack Trucks, Inc.*, 85 F.R.D. 53, 57 (E.D.Pa.1979). In defining the permissible scope of discovery, I may issue an order limiting discovery to certain matters.

Carpenter objects to the following areas of examination identified in Armco's notice of corporate deposition as irrelevant:

7. The making, using and selling by Carpenter of 13–8 Mo and other alloys in accordance with United States Patent No. 3,556,77[6], including but not limited to the amount of sales and usages of each alloy.

8. The costs and the profits to Carpenter with regard to sales and usages of 13–8 Mo and other alloys made in accordance with United States Patent 3,556,776, including but not limited to an identification of the items of costs and their amounts and the items of profit and their amounts.

10. The capacity of Carpenter to make 13–8 Mo and other alloys in accordance with United States Patent 3,556,776.

11. The services performed by Carpenter for Armco or Cyclops Corporation, including but not limited to the identification of each service, the capacity to perform each such service, sales price with regard to the performance of each such service, the cost to carpenter for performance of each such service, and the profits to Carpenter for performance of each such service.

12. The products sold by Carpenter to Armco or Cyclops Corporation, including but not limited to the identification of each such product, the sales price with regard to each such product, the costs to Carpenter for each such product, and the profits to Carpenter with regard to each such product.

13. The performance of annealing of billets by Carpenter for another company and by another company for Carpenter since January 1, 1981, including but not limited to the capacity to perform such annealing of billets, the identity of each such other company involved in each such annealing of billets, the costs of performing each such annealing of billets and the profits to Carpenter and to the other company in performing each such annealing of billets.

See Carpenter's Exhibit F, pp. 3–5. Carpenter claims that paragraphs 14 through 16, which are substantially similar to paragraph 13 except that they deal with pickling (¶ 14), VIM melting (¶ 15) and rotary forge conversion (¶ 16), also seek the production of irrelevant information.

Carpenter argues that "none of these subjects are remotely relevant to the fundamental issue of what is the effective royalty rate being paid by *Cyclops* to *Armco* under their 1989 Agreement." *See* Plaintiff's Brief in Support of Motion for a Protective Order, p. 14 (emphasis in original). In response, Armco argues that these matters relate directly "to valuation of the benefits received by Plaintiff under the terms of the 1973 License Agreement," and that it is necessary "to compare the relative value of the two effective royalty rates." *See* Defendant's Brief in Response to Plaintiff's Motion for a Protective Order, pp. 4–5. Armco incorrectly srgues that this case involves a comparison of the benefits accorded to Carpenter under the 1973 license agreement with the benefits accorded to Cyclops under the *Cyclops* settlement agreement.

*4 The language of the 1983 Agreement demonstrates that a valuation of the benefits received by Carpenter under the 1973 license agreement are not relevant to this suit. Paragraph 6 of the 1983 Agreement provides that in the event that the *Cyclops* action "is terminated by a settlement which has the effect of according to Cyclops an effective royalty rate less than or more favorable to Cyclops than the royalty rate provided for in the Armco–Carpenter License Agreement of 1973 ..."

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The only question to be resolved by this suit is whether the *Cyclops* settlement agreement had the effect of according to Cyclops a royalty rate less than or more favorable than 5%—the rate negotiated by Armco and Carpenter as a part of the 1973 license agreement. The fact that Carpenter may have realized large sales or profits, by virtue of a high volume of sales of the subject matter of the '776 patent and 1973 license agreement, does not affect the ultimate issue to be resolved by this litigation. Therefore, the subject matter of paragraphs 7 and 8 are not relevant or reasonably calculated to lead to admissible evidence. Similarly, Carpenter's performance of annealing of billets, pickling, VIM melting, and rotary forge conversion for other companies or another companies' performance of same for Carpenter is *not* relevant to the narrow issue raised by Carpenter's complaint. Thus, the subject matter of the deposition notice contained in paragraphs 10 through 16 is also improper. Therefore, I will grant Carpenter's motion for a protective order, and strike these portions of Armco's notice of deposition.

III.

I will also grant Carpenter's request that I issue an order postponing the taking of depositions on the remaining areas of the deposition notice. I have "broad discretion" in controlling the timing of discovery. *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir.1979); *see also Marroquin–Manriquez v. Immigration and Naturalization Service*, 699 F.2d 129, 134 (3d Cir.1983), *cert. denied*, 467 U.S. 1259 (1984).

In addition to the deposition notice referred to above, Armco has filed a request for production of documents which duplicates all 16 subject areas contained in the deposition notice. Carpenter has not responded to this request. However, Armco proposes to conduct the depositions of various Carpenter corporate designees without the benefit of prior document production. This could lead to the need to reconvene the depositions of certain corporate officers for the purpose of a separate examination regarding the documents. I conclude that requiring Carpenter to produce the same witnesses on two separate occasions would result in undesirable, piecemeal discovery. This is both an inefficient and costly means of pursuing discovery. For this reason, I shall grant Carpenter's request.

Armco shall be prohibited from conducting any depositions of Carpenter's corporate designees until after all document production from its request for production of documents is completed and counsel have had an opportunity to negotiate a mutually convenient deposition schedule. During these negotiations, Armco may designate specific persons to be produced for deposition based upon its examination of the records produced or simply notice the deposition of an unspecified corporate designee with a description of the matters upon which examination will be taken. Fed.R.Civ.Proc. 30(b)(6); *see also GTE Products Corp. v. Gee*, 115 F.R.D. 67, 68 (D.Mass.1987).

IV.

*5 For the reasons stated above, Carpenter's motion for a protective order is granted and paragraphs 7, 8, and 10 through 16 of Armco's notice of deposition of Carpenter's corporate designee are stricken. In addition, all depositions of Carpenter's corporate designees are stayed pending production and review of all relevant corporate documents pursuant to outstanding requests for production of documents, and the negotiation by counsel of a mutually convenient and efficient deposition schedule for these corporate officers.

Counsel are reminded that the Court expects counsel to cooperate as much as possible in an effort to resolve discovery disputes without seeking judicial intervention. Counsel are further expected to proceed with discovery in an efficient and expeditious manner.

An appropriate order follows.

ORDER

Upon consideration of plaintiff's Motion for a

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Protective Order Regarding the Rule 30(b)(6) Deposition Notice of defendant and supporting memorandum of law, the response of defendant, the reply of plaintiff, and for the reasons stated in the attached memorandum, it is ordered as follows:

(a) Plaintiff's motion is GRANTED;

(b) The subject matter of paragraphs 7, 8, and 10 through 16 of defendant's Rule 30(b)(6) deposition notice is not permissible discovery, and these paragraphs are hereby STRICKEN;

(c) The taking of the deposition of Carpenter's corporate officers or designees shall be STAYED until after: (1) the production and review of all documents produced by Carpenter pursuant to defendant's presently outstanding Request for Production of Documents, and (2) counsel for both parties agree upon a mutually convenient and efficient deposition schedule.

IT IS SO ORDERED.

FN1. The deposition was scheduled to take place on April 17, 1990. However, by agreement of counsel, it was postponed pending order of this Court on Carpenter's motion for a protective order.

FN2. The '776 patent disclosed stainless steel alloys of the general type of PH 13-8 MO fabricated by the air melt or double vacuum melt process. *Id.* at 148.

FN3. This amount was to be paid to Baltimore Specialty Steels Corporation ("Baltimore"), a subsidiary of Armco.

FN4. Carpenter seeks to recalculate royalties paid to Armco to obtain the benefit of the allegedly more favorable royalty rate accorded to Cyclops by virtue of the *Cyclops* settlement agreement. In addition, Carpenter seeks costs and attorney's fees.

E.D.Pa.,1990.
Carpenter Technology Corp. v. Armco, Inc.
Not Reported in F.Supp., 1990 WL 61180 (E.D.Pa.)

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EXHIBIT P

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CENTRE COUNTY, PA

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

_Medical Professional Liability Action (check if applicable)

Type of Pleading:
Second Motion to Stay Proceedings

Filed on Behalf of:
Defendant, The Pennsylvania State University

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EXHIBIT "P"

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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:
Defendant.	:

THE PENNSYLVANIA STATE UNIVERSITY'S
SECOND MOTION TO STAY PROCEEDINGS[1]

Defendant, The Pennsylvania State University (the "University"), hereby requests that this Honorable Court stay this civil action and in support thereof avers as follows:

[1] On December 20, 2012, this Court denied The Pennsylvania State University's Motion to Stay Proceedings. Since that time, Mr. Timothy Curley and Mr. Gary Schultz have appeared for depositions in this matter and asserted their Fifth Amendment Rights to all substantive questions related to Plaintiff's claims and the University's defenses, as set forth below.

FACTS AND PROCEDURAL POSTURE

1. Plaintiff, Michael J. McQueary (hereinafter "Plaintiff"), commenced this action on or about May 8, 2012 by filing a Praecipe to Issue Writ of Summons against the University.

2. On October 2, 2012, Plaintiff filed a three-count Complaint alleging Whistleblower (Count I), Defamation (Count II), and Misrepresentation (Count III) claims against the University (hereinafter "Complaint").

3. Plaintiff supports a large portion of his claims with numerous allegations related to the actions or inactions of former University employees who are subject to parallel and well-publicized ongoing criminal proceedings, including Timothy Curley and Gary Schultz, captioned as Commonwealth of Pennsylvania v. Timothy Mark Curley, Court of Common Pleas, Dauphin County, No. CP-22-CR-5165-2011; and Commonwealth of Pennsylvania v. Gary Charles Schultz, Court of Common Pleas, Dauphin County, No. CP-22-CR-5164-2011. See Complaint, ¶¶ 13-19, 21-23, 26-27, 39, 46-47, 60-64.

4. In particular, in Paragraph 15 of the Complaint, Plaintiff alleges that he "met with Athletics Director Curley and Senior Vice President Schultz in a conference room in the Bryce Jordan Center and told them about the aforementioned highly inappropriate sexual misconduct that he had witnessed the night of February 9, 2001." Id., ¶ 15.

5. Plaintiff further alleges that "Senior Vice President Schultz and Athletics Director Curley thanked the Plaintiff for providing them with this information, told the Plaintiff that they thought this was a serious matter, that they would see it was properly investigated and that appropriate action be taken." Id., ¶ 16.

6. In Count I of the Complaint (Whistleblower), Plaintiff claims that the University violated the Pennsylvania Whistleblower Law when it discriminated against him allegedly because of his "cooperation with investigators for the Pennsylvania Attorney General, his provision of truthful testimony to the Statewide Investigating Grand Jury, his truthful testimony at the criminal preliminary hearings for Athletics Director Curley and Senior Vice President Schultz and further because Plaintiff is expected to be a key prosecution witness at the criminal trials of the Athletics Director Curley and Senior Vice President Schultz." Id., ¶ 46.

7. The Plaintiff further alleges in the Whistleblower Count that Plaintiff's "aforementioned reports ... [and] testimony ... were truthful, and made without malice or consideration of personal benefit." Id., ¶ 47.

8. As a result of the above alleged violations, Plaintiff seeks damages, including back pay, reinstatement or front pay, plus general damages as

compensation for distress, anxiety, embarrassment, plus costs of litigation, including counsel fees for this claim.

9. In Count II of the Complaint (Defamation), Plaintiff alleges that the University issued a written statement on November 4, 2011 and a verbal statement on November 7, 2011, that "clearly suggest that the Plaintiff was lying in his reports and testimonies that he had reported the sexual misconduct he had witnessed on February 9, 2001 to Athletics Director Curley and Senior Vice President Schultz." Id., ¶ 50.

10. The plaintiff further alleges in the Defamation Count that the "written statement released by the University President Spanier on November 4, 2011 ... and the verbal statement made by University President Spanier to the Athletic Department staff meeting on November 7, 2011, clearly suggest that the Plaintiff had lied to law enforcement officials and committed perjury to the Statewide Investigating Grand Jury when he stated and testified that he had reported the sexual misconduct he had witnessed on February 9, [2001] to Athletics Director Curley and Senior Vice President Schultz." Id., ¶ 51.

11. As a result of the above alleged statements Plaintiff seeks damages in excess of $4,000,000.00 for this claim.

12. In Count III of his Complaint (Misrepresentation), Plaintiff alleges that "during the meeting in February [2001] Athletics Director Curley and Senior

Vice President Schultz intentionally misrepresented to the Plaintiff that they thought [the reported incident] was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken." Id., ¶ 60 (emphasis added).

13. Plaintiff further alleges in the Misrepresentation Count that "Athletics Director Curley and Senior Vice President Schultz intended that their misrepresentation induce the Plaintiff not to report the matter to any other law enforcement authority." Id., ¶ 61.

14. Plaintiff claims as a result of the above alleged intentional misrepresentations, Plaintiff suffered "irreparable harm to his ability to earn a living" and he seeks damages in excess of $4,000,000.00 for this claim. Id., ¶ 63.[2]

15. Per this Court's April 16, 2013 Order, the University filed an Answer with New Matter to the Complaint.

16. The parties have engaged in extensive discovery, including, but not limited to, serving and responding to extensive written discovery and conducting over twenty (20) depositions.

17. Per the Court's directives, this Motion is due on or before May 31, 2016, the discovery deposition deadline in this matter is June 15, 2016, dispositive

[2] The Court's December 20, 2012 Order on the University's Motion to Stay did not address Plaintiff's misrepresentation claim. This claim is based solely on the above referenced alleged communications between Mr. Schultz, Mr. Curley, and Plaintiff regarding the report. See Court Order, dated December 20, 2012.

motions are due on or before June 30, 2016, and trial is to commence on October 17, 2016. See Court Correspondence, dated January 13, 2016.

18. While the University has diligently pursued discovery, it has been unable to access or otherwise ascertain critical information related to Messrs. Curley or Schultz that is necessary to formulate its defenses.

19. More specifically, the alleged conduct of Messrs. Curley and Schultz, individually and in connection with the University, continues to remain a central point of contention in the instant civil action.

20. Messrs. Curley and Schultz remain subject to pending criminal charges which include endangering the welfare of children and failing to report suspected child abuse, and the factual allegations related to these charges are intrinsically intertwined with Plaintiff's claims in this civil action.

21. On March 9, 2016, the parties deposed Mr. Schultz, where the scope of questions focused on the specific allegations of this case.

22. During the deposition, Mr. Schultz asserted his Fifth Amendment Rights to all substantive questions related to Plaintiff's claims and the University's defenses.

23. Specifically, Mr. Schultz asserted his Fifth Amendment Rights with respect to questions that involve: (1) all facts and circumstances regarding Mr. Schultz's knowledge and involvement in a 1998 incident involving Mr. Gerald

Sandusky and a child; (2) all facts and circumstances regarding Mr. Schultz's 2001 involvement with Plaintiff's alleged report of "highly inappropriate sexual misconduct" as between Mr. Gerald Sandusky and a young boy; (3) all information regarding the 2001 alleged verbal communications and meeting(s) between Mr. Schultz and Plaintiff regarding the aforementioned report; (4) information related to his employment history and job duties with the University during the relevant time periods of this case; and, (5) various 2011 communications as between Mr. Schultz and non-parties regarding the alleged misconduct and Plaintiff's report.

24. During Mr. Schultz's deposition, University counsel engaged in the following specific colloquy:

> [Nancy Conrad]: I direct your attention, Mr. Schultz, back to Exhibit 20.
>
> A. (Witness complies)
>
> Q. On Page 4, Paragraph 15; on Paragraph 15, Mr. McQueary alleges in his Complaint that he met with you and Mr. Curley sometime after February 11, 2001. Are the allegations in Paragraph 15 consistent with your recollection of any such meeting
>
> MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer that question.
>
> Q. Directing your attention then to Paragraph 16. In Paragraph 16, Mr. McQueary alleges that during a meeting that took place sometime after February 10, 2001, Mr. Curley and you made certain statements as referenced in Paragraph 16. Are Mr. McQueary's allegations contained in Paragraph 16 consistent with

your recollection of any statements that either Mr. Curley or you made?

MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer that question.

(26-Page Plaintiff's Answers to Defendant First Set of Interrogatories marked Schultz Exhibit No. 21.)

A. Reviewing.

Q. I handed you a document that's been marked Schultz 21. I'm not going to ask you – you're welcome to review the entire document, but I'm going to ask you questions with respect to particular items.

Directing your attention to Page 8, the Answer contained to Interrogatory No. 18. In this Answer, Mr. McQucary makes certain allegations about statements that Mr. Curley and you made during that meeting we previously discussed.

Are Mr. McQueary's allegations consistent with your recollection with regard to the statements that were made in that meeting?

MS. MCNALLY: I'll direct Mr. Schultz not to answer.

Q. Were the statements that you made in that meeting about Mr. Curley and Mr. McQueary and yourself, truthful statements?

MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer.

Q. Were the statements that you made – were the statements that you made in the February 2001 meeting, with Mr. McQueary, made with the intent to mislead Mr. McQueary?

MS. MCNALLY: Objection. I direct Mr. Schultz not to answer.

> Q. Direct your attention to Page 9 of Interrogatory Answers and in particular Answer Number 23. Mr. McQueary alleges in his Answer to Interrogatory Number 23 that you made certain statements to his father as referenced in Answer 23. Are these statements consistent – or strike that. Are [those] allegations consistent with your recollection of any statement that you made to Mr. McQueary's father?
>
> MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer.
>
> Q. I'm going to direct your attention to paragraph – page 22, Interrogatory Number – or Number 2 on that page. In Answer Number 2, Mr. McQueary alleges that he would expect you to testify to certain items as referenced in Number 2. Is it your position that you would be testifying to those items as alleged by Mr. McQueary in Number 2?
>
> MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer.
>
> Q. I have no further questions.

Deposition Transcript of Gary C. Schultz, dated March 9, 2016, at 62-65.

25. During the deposition, this Court ruled that Mr. Schultz properly invoked his Fifth Amendment Rights.

26. On April 1, 2016, the parties also deposed Mr. Curley, where the scope of questions again focused on the specific allegations of this case.

27. During his deposition, Mr. Curley asserted his Fifth Amendment Rights to all substantive questions related to Plaintiff's claims and the University's defenses.

COPY

28. Mr. Curley asserted his Fifth Amendment Rights with respect to the questions that involved: (1) all facts and circumstances regarding Mr. Curley's knowledge and involvement in a 1998 incident involving Mr. Gerald Sandusky and a child; (2) all facts and circumstances regarding Mr. Curley's 2001 involvement with Plaintiff's alleged report of "highly inappropriate sexual misconduct" as between Mr. Gerald Sandusky and a young boy; (3) all information regarding the 2001 alleged verbal communications and meeting(s) between Mr. Curley and Plaintiff regarding the report; (4) information related to his employment history and job duties with the University during the relevant time periods of this case; and, (5) various 2011 communications as between Mr. Curley and non-parties regarding the allegations of the Complaint.

29. During Mr. Curley's deposition, University counsel engaged in the following specific colloquy:

> [Nancy Conrad]: At any time did Mr. McQueary report to you that he had witnessed, quote, "inappropriate and illegal sexual conduct," on the night of February 9, 2001?
>
> MS. ROBERTO: On behalf of Mr. Curley, we assert the privilege.
>
> Q. ... In Paragraph 15, Mr. McQueary alleges that at some point in time, he met with you and Mr. Schultz in a conference room in the Bryce Jordan Center and informed you about the highly inappropriate sexual misconduct that was previously described in the Complaint. Is that allegation contained in Paragraph 15 consistent with your recollection of a meeting that took

place among Mr. Curley – among Mr. Schlutz, Mr. McQueary, and you?

MS. ROBERTO: Assertion of the privilege.

Q. Paragraph 17, Mr. McQueary alleges that he formed certain beliefs and relied upon certain statements that were made during the meeting. Is your recollection of the statements that were made during the meeting with Mr. Schultz and Mr. McQueary, is your recollection consistent with the allegations contained in Paragraph 17:

MS. ROBERTO: Assertion of the privilege.

Q. In Paragraph 18, Mr. McQueary alleges certain facts in conjunction with your role with respect to the meeting that took place with Mr. McQueary. Are the allegations asserted in Paragraph 18, consistent with your understanding of your position at that time?

MS. ROBERTO: Assertion of the privilege.

* * *

Q. Mr. Curley, I've handed you a document identified as Curley 9 and we'll represent to you these are Answers that Mr. McQueary provided to interrogatories in conjunction with [this] lawsuit. I want to direct your attention to certain answers; however, if you want to read the entire document we certainly can wait until you've completed it.

Q. So in Curley Number 9, I would like to direct your attention to Page 6, Number 12. In Answer to Interrogatory Number 12, Mr. McQueary asserts that on the night of February 9, 2001, he observed an exchange between Mr. Sandusky and a boy that he describes as, in quote, sexual intercourse, end quote. At any point during your interactions with Mr. McQueary, did he report to you that he had observed an incident that was in – that he described as sexual intercourse?

MS. ROBERTO: Assertion of the privilege.

Q. On Page 7, Interrogatory Answer Number 17, in the first part of the Answer to Interrogatory Number 17, Mr. McQueary asserts that he received a telephone call from you and in that first paragraph he describes the exchange. Is that – is Mr. McQueary's statement in the first paragraph consistent with your recollection of your telephone exchange with Mr. McQueary.

MS. ROBERTO: Assertion of the privilege.

Q. In the second paragraph of the Answer to Interrogatory Number 17, Mr. McQueary states an exchange that took place in a meeting among Mr. Schultz, Mr. McQueary, and yourself. Is your recollection consistent with how Mr. McQueary describes it in that second paragraph of Interrogatory Answer Number 17?

MS. ROBERTO: Assertion of the privilege.

Q. In Interrogatory Answer Number 18, Mr. McQueary asserts certain acknowledgements and statements that Mr. Schultz and you made during that meeting with him. Is your recollection of your statements and Mr. Schultz's statements consistent with the information that Mr. McQueary asserts in Answer Number 18?

MS. ROBERTO: Assertion of the privilege.

* * *

Q. In the Answer to the Interrogatory Number 36, Mr. McQueary asserts information that he received from you in a telephone call. Is your recollection of the information that you provided to Mr. Curley – or to Mr. McQueary, consistent with the information that Mr. McQueary provides in the Answer to Interrogatory Number 36?

MS. ROBERTO: Assertion of the privilege.

* * *

Q. On Page 21, Interrogatory Number 73, Mr. McQueary lists witnesses that he intends to call at trial. And Witness Number 1 would be yourself, Tim Curley . . . . Can you provide information to me about that alleged information?

MS. ROBERTO: Assertion of the privilege.

Q. Mr. McQueary asserts that you would be expected to testify [about] what you did subsequent to receiving that report. Could you provide me information about what you did subsequent to receiving that report?

MS. ROBERTO: Assertion of the privilege.

Q. Mr. McQueary asserts that you would be expected to testify about your meeting with Mr. McQueary concerning what the Plaintiff has witnessed. Can you provide information to me about what occurred in that meeting?

MS. ROBERTO: Assertion of the privilege.

Q. Mr. McQueary asserts that you would be expected to testify to his job performance and the results of the poll of the Athletic Department staff concerning who ought to succeed Coach Paterno when he retired. Could you provide to me information about the alleged – about his job performance and the results of this alleged poll?

MS. ROBERTO: Assertion of the privilege.

Deposition Transcript of Timothy M. Curley, dated April 1, 2016, at 46-54.

30. Following the deposition, this Court was informed of Mr. Curley's assertion of his Fifth Amendment Rights.

31. The University is severely prejudiced in its ability to defend against Plaintiff's claims, which involve critical knowledge and information that is solely possessed by Messrs. Schultz and/or Curley.

LEGAL BACKGROUND

32. This Court has broad discretion to stay civil proceedings, and, in doing so, the goal is to balance the various interests of the parties, the Court, and the public. In Re Adelphia Communications Securities Litigation, Civ. A. No. 02-1781, 2003 WL 22358819, at *2 (E.D. Pa. May 13, 2003).

33. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with the economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." Id.

34. When deciding whether to stay a civil case pending the resolution of a related criminal case, a court can consider the following factors: "(1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the

interests of the court; and (6) the public interest." Id., at *3 (citing Walsh Securities, Inc. v. Cristo Prop. Mgmt. Ltd., 7 F.Supp.2d 523 (D.N.J. 1998)).

35. An additional factor to be considered is the interests of persons not parties to the civil litigation. Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980) (listing factors similar to those in Adelphia Communications in addition to the interests of these non-parties).

DISCRETIONARY FACTORS WEIGH IN FAVOR OF A STAY

The Issues In This Case and the Related Criminal Proceedings Overlap Substantially

36. The extent to which the issues in the civil and criminal cases overlap is the most important factor in determining whether or not to grant a stay. Adelphia Communications, 2003 WL 22358819, at *3 (citing Walsh Securities, 7 F.Supp.2d at 527).

37. The issues and parties in the civil and criminal cases need not be identical, but rather merely "implicate similar facts or issues of law." Resco Products, Inc. v. Bosai Minerals Group Co., Ltd., Civ. A. No. 06-235, 2010 WL 2331069, at *4 (W.D. Pa. June 4, 2010) (finding that courts within the Third Circuit "have stayed proceedings in numerous cases where another pending action contained similar questions of fact or law").

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38. There are substantial overlapping factual issues that are integral to both this civil litigation and the related criminal proceedings of Mr. Schultz and Mr. Curley.

39. As outlined above, both Mr. Schultz and Mr. Curley invoked their Fifth Amendment privilege with respect to the following subject matters of this case: (1) all facts and circumstances regarding their knowledge and involvement in a 1998 incident involving Mr. Gerald Sandusky and a child; (2) all facts and circumstances regarding their 2001 involvement with Plaintiff's alleged report of "highly inappropriate sexual misconduct" as between Mr. Gerald Sandusky and a young boy; (3) all information regarding the 2001 alleged verbal communications and meeting(s) between them and Plaintiff regarding the aforementioned report; (4) information related to their employment histories and job duties with the University during the relevant time periods of this case; and, (5) various 2011 communications as between them and non-parties regarding the allegations of the Complaint. See supra, at ¶¶ 21-29.

40. The facts and circumstances of this case are intrinsically intertwined with the key factual issues of the underlying criminal matters.

41. There can be no doubt that these overlapping issues are integral to both the present civil litigation and the related criminal proceedings and, therefore, the first and most important factor weighs heavily in favor of granting a stay.

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The University Will Continue To Suffer Substantial Prejudice Without a Stay.

42. The denial of a stay in this matter would prejudice the University's ability to defend against the claims asserted in this case.

43. As set forth more fully above, the University is severely constrained and unable to develop its defenses to Plaintiff's $4,000,000.00 claims because the facts and claims are intrinsically intertwined with the factual allegations in the underlying criminal charges against Mr. Schultz and Mr. Curley.

44. Plaintiff's whistleblower, defamation and intentional misrepresentation claims raise factual issues that relate to information Plaintiff allegedly communicated to Mr. Schultz and Mr. Curley and the alleged responses of Mr. Schultz and Mr. Curley regarding the report of the alleged misconduct. In particular, Plaintiff's intentional misrepresentation claim involves the state of mind of Mr. Schultz and Mr. Curley, as well as remaining substantial questions of fact as to the substance of communications between them and Plaintiff regarding the report of misconduct.

45. Without the testimony from Mr. Schultz or Mr. Curley, the University is unable to adequately develop its defenses to this case, including developing a record to test the veracity of what Plaintiff claims to have allegedly caused him millions of dollars in damages.

46. Further, and in light of the remaining pending charges against Mr. Schultz and Mr. Curley, these individuals will again assert their Fifth Amendment Rights at the October 2016 trial in this case.

47. The assertions of the Fifth Amendment by both Mr. Schultz and Mr. Curley on pivotal factual issues will not only prejudice the University's defenses but will also cause jury confusion.

48. If this matter proceeds to trial at this time, Plaintiff will be at an unfair advantage to testify about alleged communications with and to argue the intent of Mr. Schultz and Mr. Curley, while the University will be at the extreme disadvantage of being unable to illicit testimony from any of the only other witnesses on the same factual matters.

49. Under these circumstances, the University is suffering and will continue to suffer from severe prejudice and, therefore, an immediate stay of proceedings is warranted.

The Stage of the Related Criminal Proceedings Favor a Stay

50. When determining whether to grant a stay, "a court must also consider the status of the related criminal proceedings, which can have a substantial effect on the balancing of the equities." Adelphia Communications, 2003 WL 22358819, at *3.

51. If criminal proceedings have resulted in indictments being issued against individuals accused of crimes, this factor strongly favors staying the civil proceedings. Id.

52. The strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned. Id.

53. The potential for self-incrimination is greatest during this stage, and the potential harm to civil litigants arising from delaying them is reduced due to the promise of reasonably prompt resolution of the criminal case under the jurisdiction's speedy-trial rules. Walsh Securities, 7 F.Supp.2d at 527 (quoting Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (1989)).

54. Further, "the indicted defendants risk exposing their criminal defense strategy during civil discovery." Adelphia Communications, 2003 WL 22358819, at *3.

55. In the present case, indictments have been handed down against Mr. Schultz and Mr. Curley which are intrinsically intertwined with the same critical facts and circumstances that underlie the claims asserted by Plaintiff in this case.

56. Mr. Schultz and Mr. Curley have invoked their Fifth Amendment privilege and refuse to discuss the claims in the instant civil action until the criminal proceedings are concluded.

57. Per an April 30, 2016 statement by Attorney General Kathleen Kane, "no further resources ... will be expended to pursue a possible appeal" as related to the underlying charges against Mr. Curley and Mr. Schultz and the Attorney General's Office is now preparing for the criminal trials.

58. Further, the court in the criminal case issued a Scheduling Order dated May 25, 2016 directing Messrs. Schultz and Curley to file all pretrial motions and supporting briefs by July 1, 2016 and the Commonwealth to file its responses by July 31, 2016. The criminal case is moving forward.

59. Under these circumstances, a stay of the instant proceedings is warranted pending conclusion of the underlying criminal trials.

Plaintiff Will Not Be Harmed By a Stay of This Case

60. When considering the prejudice to the plaintiff caused by a stay, the plaintiff must establish "more prejudice than simply a delay in his right to expeditiously pursue his claim.... Instead, the plaintiff must demonstrate a particularly unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay." Adelphia Communications, 2003 WL 22358819, at *4.

61. In Adelphia Communications, the District Court found that the plaintiffs did not demonstrate sufficient prejudice to warrant lifting the stay, as they had not shown "any prejudice other than delay in pursuing their suits, which

is insufficient to support vacating the stay." Id. at *4 (citing Walsh Securities, 7 F.Supp.2d at 528).

62. Here, Plaintiff cannot establish a particular unique injury.

63. Plaintiff has already received a voluminous amount of written discovery and he has conducted numerous depositions of his self-identified key witnesses.

64. Plaintiff will also not suffer any economic harm from a stay, as if he is successful on any of his claims, he will be able to recover interest as part of his judgment. See Walsh Securities, 7 F.Supp.2d at 528.

65. Not only will Plaintiff not be prejudiced, it is actually in his interest to have this case stayed.

66. Plaintiff's claims relate to and require evidence from Mr. Schultz and Mr. Curley,[3] and until the respective criminal proceedings for these individuals are resolved, he, like the University, will remain unable to obtain this critical evidence prior to October 2016.

67. Under these circumstances, a stay is warranted and Plaintiff will not suffer any prejudice.

[3] In fact, Plaintiff noticed the depositions in this action during which Messrs. Curley and Schultz asserted their Fifth Amendment Rights.

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The Interests of the Court Favor Staying This Case

68. This Court "has an interest in efficiently managing its caseload," and staying the matter promotes judicial efficiency. Adelphia Communications, 2003 WL 22358819, at *5.

69. If this matter is stayed, there will be no need to continue to engage in piecemeal litigation and trial practice, which is generally disfavored by courts as inefficient and costly to all involved. See, e.g., McClendon v. Dougherty, No. 2:10-CV-1339, 2011 WL 4345901, at *1 (W.D. Pa. Sept. 15, 2011); Carpenter Technology Corp. v. Armco, Inc., Civ. A. No. 90-0740, 1990 WL 61180, at *4 (E.D. Pa. May 8, 1990).

70. As fully discussed above, to date, the University has been unable to adequately develop its defenses to Plaintiff's claims and is not in a position to proceed to trial at this time. Any bifurcation of issues that are not trial ready will result in substantial inefficiencies, prejudice, and costs. See id.

71. Staying this civil action will preserve judicial resources, promote judicial efficiency, save the parties unnecessary expense, and prevent the parties from engaging in further piecemeal litigation, which has already resulted in significant fees and costs, as evidenced by the depositions of Mr. Schultz and Mr. Curley where the Fifth Amendment was asserted on all matters of significance to this case. See supra, at ¶¶ 18, 23.

The Public's Interest Favors a Stay

72. The public interest will not be harmed by staying this civil action.

73. There is no need to deny the stay to protect the public, such as in cases where allowing the civil case to proceed will protect the public by halting the distribution of mislabeled drugs or preventing the dissemination of misleading information to the investing public. See Walsh Securities, 7 F.Supp.2d at 529.

74. The public would benefit from a stay by allowing the Commonwealth to complete, unimpeded, its criminal prosecution of the cases against Mr. Schultz and Curley. See Adelphia Communications, 2003 WL 22358819, at *6.

75. Under these circumstances, the public's interest weighs in favor of a stay.

The Interests of Non-Parties Favor a Stay

76. The last factor – the interests of persons not parties to the civil litigation – also favors a stay.

77. As discussed above, non-parties, such as Mr. Schultz and Mr. Curley have already faced self-incrimination issues in this case. See, e.g., Golden Quality Ice Cream, 87 F.R.D. at 58 (holding that "the pressures of civil discovery are likely to weigh most heavily on certain key managerial officials in defendant companies;" these individuals, facing criminal charges, may be forced to invoke their constitutional rights against self-incrimination). "The dilemma for such

persons is severe because they face serious penalties in the event of a criminal conviction, and because they are not themselves parties to th[e] civil action." Id.

78. If this matter proceeds to trial before resolution of the underlying criminal charges, these non-parties will again be presented with self-incrimination issues via pre-trial motions and further questioning at trial.

79. The interests of these non-parties weigh in favor of a stay.

80. Balancing the factors discussed above, it is clear that they all favor granting a stay.

WHEREFORE, Defendant, The Pennsylvania State University, respectfully requests that this Honorable Court grant its Second Motion to Stay Proceedings.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: _____

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Dated: May 31, 2016

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MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY : : : CIVIL ACTION NO. 2012-1804 : : : :

CERTIFICATE OF NON-CONCURRENCE

Pursuant to Centre County Rule 208.2(d), I, Nancy Conrad, certify that I made a good faith effort to seek concurrence in the instant Second Motion from Plaintiff, and that it has been denied.

WHITE AND WILLIAMS LLP

By:_____
Nancy Conrad

Date: May 31, 2016

COPY

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MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY : CIVIL ACTION NO. 2012-1804

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 31st day of May, 2016, a true and correct copy of the foregoing SECOND MOTION TO STAY PROCEEDINGS, PROPOSED ORDER, and CERTIFICATE OF NON-CONCURRENCE was served upon the following persons via email and/or first class, United States mail, postage prepaid as follows:

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MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:
	:
	:
Defendant.	:

ORDER

AND NOW, this ____ day of _____, 2016, upon consideration of Defendant's Second Motion to Stay Proceedings, and any response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED.

BY THE COURT:

_____
J.

MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY : CIVIL ACTION NO. 2012-1804

SCHEDULING ORDER

WHEREAS, on the _____ day of _____ _____, 2016, Defendant, The Pennsylvania State University, filed its Second Motion to Stay Proceedings, it is ORDERED as follows:

1. The brief of the Defendant shall be filed with the Centre County Prothonotary and copies sent to the Chambers of Senior Judge Thomas G. Gavin and to the opposing party on or before _____, 2016.

2. The brief of the Plaintiff shall be filed with the Centre County Prothonotary and copies sent to the Chambers of Senior Judge Thomas G. Gavin and the opposing party on or before _____, 2016.

3. Oral argument/hearing shall be held on the ____ day of _____, 2016 at _____ in Courtroom No. ____, Centre County Courthouse, Bellefonte, Pennsylvania.

BY THE COURT:

Dated: _____

_____
Thomas G. Gavin
Senior Judge Specially Presiding

ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary, Plaintiff, vs. **The Pennsylvania State University,** Defendant.	Docket No. 2012-1804
	Type of Case: Whistleblower
	___Medical Professional Liability Action (check if applicable)
	Type of Pleading: Memorandum of Law in Support of Defendant's Second Motion to Stay Proceedings
	Filed on Behalf of: Defendant, The Pennsylvania State University
	Counsel of Record for this Party: Nancy Conrad, Esquire White and Williams LLP 3701 Corporate Parkway, Suite 300 Center Valley, PA 18034 (610) 782-4909 conradn@whiteandwilliams.com PA I.D. Number 56157

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MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:
Defendant.	:

MEMORANDUM OF LAW IN SUPPORT OF THE PENNSYLVANIA STATE UNIVERSITY'S SECOND MOTION TO STAY PROCEEDINGS

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ORIGINAL

MEMORANDUM OF LAW IN SUPPORT OF THE PENNSYLVANIA STATE UNIVERSITY'S SECOND MOTION TO STAY PROCEEDINGS

Defendant, The Pennsylvania State University ("the University"), hereby submits this Memorandum of Law in support of its Second Motion to Stay.

I. INTRODUCTION

Recent developments in this case necessitate a stay. Plaintiff, Michael J. McQueary ("Plaintiff") filed a three-count Complaint against the University alleging Whistleblower (Count I), Defamation (Count II), and Misrepresentation (Count III) (hereinafter "Complaint"). Plaintiff supports these claims with numerous allegations related to the actions or inactions of former University employees who are subject to parallel ongoing criminal proceedings, including former University Director of Intercollegiate Athletics, Timothy Curley ("Curley") and former University Senior Vice President, Gary Schultz ("Schultz").

In March and April, 2016, Curley and Schultz asserted their Fifth Amendment Rights during their depositions in this case. Both Curley and Schultz invoked their Fifth Amendment Rights with respect to all factual matters that are integral to both this civil action and criminal proceedings that are now proceeding against them. These matters include knowledge and information that is solely possessed by Messrs. Curley and/or Schultz. For example, both Curley and Schultz asserted their Fifth Amendment Rights regarding the sum and substance of

alleged oral conversations between Plaintiff, Curley, and/or Schultz. These communications and the concomitant state of mind of Curley and Schultz form the sole basis of Plaintiff's instant intentional misrepresentation claim. Likewise, these factual issues are essential to the whistleblower and defamation claims. A stay is necessary under the facts and circumstances of this case.

More specifically, Courts consider seven factors when determining whether to stay a matter, all of which favor a stay here. First, this civil action and the criminal proceedings against Curley and Schultz present substantial overlapping factual issues that are integral to this case. Second, the assertion of the Fifth Amendment by both Curley and Schultz on pivotal factual issues severely prejudices the University's ability to defend against Plaintiff's claims. Third, the status of the criminal proceedings favors a stay, as indictments have been issued against Curley and Schultz and the criminal proceedings are now moving forward. Fourth, Plaintiff will not be harmed by a stay of this matter, as there is no risk of evidence being destroyed and Plaintiff will not suffer any economic harm, as he is entitled to recover interest on any award. Fifth, the interests and convenience of this Court favor a stay of this matter, as it is simply not in the best interests of the Court for this matter to proceed in a piecemeal fashion. Sixth, the public interest favors a stay, as this will assure fair trials in the related criminal proceedings and a fair trial in the present case. Lastly, the interests of persons not parties to this

litigation – including, but not limited to, Curley and Schultz – favor a stay. If this matter proceeds to trial in October 2016, both Curley and Schultz will again be presented with self-incrimination issues.

For all of these reasons, as well as the reasons set forth at length below, the University respectfully requests that this Court stay this matter.

II. PROCEDURAL HISTORY OF THE CASE

Plaintiff commenced this action on or about May 8, 2012 by filing a Praecipe to Issue Writ of Summons against the University. On October 2, 2012, Plaintiff filed the three-count Complaint against the University. On October 22, 2012, the University filed a Motion to Stay Proceedings, which the Court denied on December 20, 2012. The Court did not address Plaintiff's misrepresentation claim. See Court Order, dated December 20, 2012. [1] The University proceeded to file an Answer with New Matter to the Complaint.

The parties have engaged in extensive discovery, including, but not limited to, serving and responding to extensive written discovery and conducting over twenty (20) depositions. While the University has diligently pursued discovery, it has been unable to access or otherwise ascertain critical information related to Messrs. Curley or Schultz that is necessary to formulate its defenses.

[1] The misrepresentation claim is based solely on alleged communications between Mr. Schultz, Mr. Curley and Plaintiff regarding the report.

On May 31, 2016, the University filed the instant Second Motion to Stay Proceedings. Per the Court's most recent oral instructions to the parties, depositions may continue up to the time of trial and the deadline to file summary judgment motions is stayed pending adjudication of the instant Motion. Trial is set to commence on October 17, 2016. The University now submits this Memorandum of Law in support of its Motion.

III. STATEMENT OF FACTS

Plaintiff supports a large portion of his claims with numerous allegations related to the actions or inactions of former University employees who are subject to parallel and well-publicized ongoing criminal proceedings, including Timothy Curley and Gary Schultz, captioned as Commonwealth of Pennsylvania v. Timothy Mark Curley, Court of Common Pleas, Dauphin County, No. CP-22-CR-5165-2011; and Commonwealth of Pennsylvania v. Gary Charles Schultz, Court of Common Pleas, Dauphin County, No. CP-22-CR-5164-2011. See Complaint, ¶¶ 13-19, 21-23, 26-27, 39, 46-47, 60-64. In particular, in Paragraph 15 of the Complaint, Plaintiff alleges that he "met with Athletics Director Curley and Senior Vice President Schultz in a conference room in the Bryce Jordan Center and told them about the aforementioned highly inappropriate sexual misconduct that he had

witnessed the night of February 9, 2001." Id., ¶ 15.[2] Plaintiff further alleges that "Senior Vice President Schultz and Athletics Director Curley thanked the Plaintiff for providing them with this information, told the Plaintiff that they thought this was a serious matter, that they would see it was properly investigated and that appropriate action be taken." Id., ¶ 16.

In Count I of the Complaint (Whistleblower), Plaintiff claims that the University violated the Pennsylvania Whistleblower Law when it discriminated against him allegedly because of his "cooperation with investigators for the Pennsylvania Attorney General, his provision of truthful testimony to the Statewide Investigating Grand Jury, his truthful testimony at the criminal preliminary hearings for Athletics Director Curley and Senior Vice President Schultz and further because Plaintiff is expected to be a key prosecution witness at the criminal trials of the Athletics Director Curley and Senior Vice President Schultz." Id., ¶ 46. Plaintiff further alleges in the Whistleblower Count that Plaintiff's "aforementioned reports ... [and] testimony ... were truthful, and made without malice or consideration of personal benefit." Id., ¶ 47. Plaintiff seeks damages, including back pay, reinstatement or front pay, plus general damages as compensation for distress, anxiety, embarrassment, plus costs of litigation, including counsel fees for this claim.

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[2] This allegation, in turn, relates to Paragraphs 16-19, 21-23, 26-34, 36-48, 50-58, 60-64.

In Count II of the Complaint (Defamation), Plaintiff alleges that the University issued a written statement on November 4, 2011 and a verbal statement on November 7, 2011, that "clearly suggest that the Plaintiff was lying in his reports and testimonies that he had reported the sexual misconduct he had witnessed on February 9, 2001 to Athletics Director Curley and Senior Vice President Schultz." Id., ¶ 50. Plaintiff further alleges in the Defamation Count that the "written statement released by the University President Spanier on November 4, 2011 ... and the verbal statement made by University President Spanier to the Athletic Department staff meeting on November 7, 2011, clearly suggest that the Plaintiff had lied to law enforcement officials and committed perjury to the Statewide Investigating Grand Jury when he stated and testified that he had reported the sexual misconduct he had witnessed on February 9, [2001] to Athletics Director Curley and Senior Vice President Schultz." Id., ¶ 51. As a result of these alleged statements, Plaintiff seeks damages in excess of $4,000,000.00 for this claim.

In Count III of his Complaint (Misrepresentation), Plaintiff alleges that "during the meeting in February [2001] Athletics Director Curley and Senior Vice President Schultz intentionally misrepresented to the Plaintiff that they thought [the reported incident] was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken." Id., ¶ 60

(emphasis added). Plaintiff further alleges in the Misrepresentation Count that "Athletics Director Curley and Senior Vice President Schultz intended that their misrepresentation induce the Plaintiff not to report the matter to any other law enforcement authority." Id., ¶ 61. Plaintiff claims that, as a result of these alleged intentional misrepresentations, he suffered "irreparable harm to his ability to earn a living" and he seeks damages in excess of $4,000,000.00 for this claim. Id., ¶ 63.

While the University has diligently pursued discovery, it has been unable to access or otherwise ascertain critical information related to Messrs. Curley or Schultz that is necessary to formulate its defenses to the above claims.[3] The alleged conduct of Messrs. Curley and Schultz, individually and in connection with the University, continues to remain a central point of contention in the instant civil action. Messrs. Curley and Schultz remain subject to pending criminal charges which include endangering the welfare of children and failing to report suspected child abuse, and the factual allegations related to these charges are intrinsically intertwined with Plaintiff's claims here.

On March 9, 2016, the parties deposed Mr. Schultz, where the scope of questions focused on the specific allegations of this case. During the deposition,

[3] As recognized in the 2012 Freeh Report, "Very few individuals declined to be interviewed, including some who declined to be interviewed on the advice of counsel." See *Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky*, Freeh Sporkin & Sullivan, LLP, dated July 12, 2012. These individuals included Curley and Schultz. See id.

Mr. Schultz asserted his Fifth Amendment Rights to all substantive questions related to Plaintiff's claims and the University's defenses. Specifically, Mr. Schultz asserted his Fifth Amendment Rights with respect to questions that involve: (1) all facts and circumstances regarding Mr. Schultz's knowledge and involvement in a 1998 incident involving Mr. Gerald Sandusky and a child; (2) all facts and circumstances regarding Mr. Schultz's 2001 involvement with Plaintiff's alleged report of "highly inappropriate sexual misconduct" as between Mr. Gerald Sandusky and a young boy; (3) all information regarding the 2001 alleged verbal communications and meeting(s) between Mr. Schultz and Plaintiff regarding the aforementioned report; (4) information related to his employment history and job duties with the University during the relevant time periods of this case; and, (5) various 2011 communications as between Mr. Schultz and non-parties regarding the alleged misconduct and Plaintiff's report.

During Mr. Schultz's deposition, University counsel engaged in the following specific colloquy:

> [Nancy Conrad]: I direct your attention, Mr. Schultz, back to Exhibit 20.
>
> A. (Witness complies)
>
> Q. On Page 4, Paragraph 15; on Paragraph 15, Mr. McQueary alleges in his Complaint that he met with you and Mr. Curley sometime after February 11, 2001. Are the allegations in Paragraph 15 consistent with your recollection of any such meeting?

MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer that question.

Q. Directing your attention then to Paragraph 16. In Paragraph 16, Mr. McQueary alleges that during a meeting that took place sometime after February 10, 2001, Mr. Curley and you made certain statements as referenced in Paragraph 16. Are Mr. McQueary's allegations contained in Paragraph 16 consistent with your recollection of any statements that either Mr. Curley or you made?

MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer that question.

(26-Page Plaintiff's Answers to Defendant First Set of Interrogatories marked Schultz Exhibit No. 21.)

A. Reviewing.

Q. I handed you a document that's been marked Schultz 21. I'm not going to ask you – you're welcome to review the entire document, but I'm going to ask you questions with respect to particular items.

Directing your attention to Page 8, the Answer contained to Interrogatory No. 18. In this Answer, Mr. McQueary makes certain allegations about statements that Mr. Curley and you made during that meeting we previously discussed.

Are Mr. McQueary's allegations consistent with your recollection with regard to the statements that were made in that meeting?

MS. MCNALLY: I'll direct Mr. Schultz not to answer.

Q. Were the statements that you made in that meeting about Mr. Curley and Mr. McQueary and yourself, truthful statements?

> MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer.
>
> Q. Were the statements that you made – were the statements that you made in the February 2001 meeting, with Mr. McQueary, made with the intent to mislead Mr. McQueary?
>
> MS. MCNALLY: Objection. I direct Mr. Schultz not to answer.
>
> Q. Direct your attention to Page 9 of Interrogatory Answers and in particular Answer Number 23. Mr. McQueary alleges in his Answer to Interrogatory Number 23 that you made certain statements to his father as referenced in Answer 23. Are these statements consistent – or strike that. Are [those] allegations consistent with your recollection of any statement that you made to Mr. McQueary's father?
>
> MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer.
>
> Q. I'm going to direct your attention to paragraph – page 22, Interrogatory Number – or Number 2 on that page. In Answer Number 2, Mr. McQueary alleges that he would expect you to testify to certain items as referenced in Number 2. Is it your position that you would be testifying to those items as alleged by Mr. McQueary in Number 2?
>
> MS. MCNALLY: Objection. I'll direct Mr. Schultz not to answer.
>
> Q. I have no further questions.

Deposition Transcript of Gary C. Schultz, dated March 9, 2016, at 62-65. During the deposition, this Court ruled that Mr. Schultz properly invoked his Fifth Amendment Rights. See id., at 84-85.

On April 1, 2016, the parties also deposed Mr. Curley, where the scope of questions again focused on the specific allegations of this case. During his deposition, Mr. Curley asserted his Fifth Amendment Rights to all substantive questions related to Plaintiff's claims and the University's defenses. Mr. Curley asserted his Fifth Amendment Rights with respect to the questions that involved: (1) all facts and circumstances regarding Mr. Curley's knowledge and involvement in a 1998 incident involving Mr. Gerald Sandusky and a child; (2) all facts and circumstances regarding Mr. Curley's 2001 involvement with Plaintiff's alleged report of "highly inappropriate sexual misconduct" as between Mr. Gerald Sandusky and a young boy; (3) all information regarding the 2001 alleged verbal communications and meeting(s) between Mr. Curley and Plaintiff regarding the report; (4) information related to his employment history and job duties with the University during the relevant time periods of this case; and, (5) various 2011 communications as between Mr. Curley and non-parties regarding the allegations of the Complaint.

During Mr. Curley's deposition, University counsel engaged in the following specific colloquy:

> [Nancy Conrad]: At any time did Mr. McQueary report to you that he had witnessed, quote, "inappropriate and illegal sexual conduct," on the night of February 9, 2001?
>
> MS. ROBERTO: On behalf of Mr. Curley, we assert the privilege.

Q. ... In Paragraph 15, Mr. McQueary alleges that at some point in time, he met with you and Mr. Schultz in a conference room in the Bryce Jordan Center and informed you about the highly inappropriate sexual misconduct that was previously described in the Complaint. Is that allegation contained in Paragraph 15 consistent with your recollection of a meeting that took place among Mr. Curley – among Mr. Schultz, Mr. McQueary, and you?

MS. ROBERTO: Assertion of the privilege.

Q. Paragraph 17, Mr. McQueary alleges that he formed certain beliefs and relied upon certain statements that were made during the meeting. Is your recollection of the statements that were made during the meeting with Mr. Schultz and Mr. McQueary, is your recollection consistent with the allegations contained in Paragraph 17:

MS. ROBERTO: Assertion of the privilege.

Q. In Paragraph 18, Mr. McQueary alleges certain facts in conjunction with your role with respect to the meeting that took place with Mr. McQueary. Are the allegations asserted in Paragraph 18, consistent with your understanding of your position at that time?

MS. ROBERTO: Assertion of the privilege.

* * *

Q. Mr. Curley, I've handed you a document identified as Curley 9 and we'll represent to you these are Answers that Mr. McQueary provided to interrogatories in conjunction with [this] lawsuit. I want to direct your attention to certain answers; however, if you want to read the entire document we certainly can wait until you've completed it.

Q. So in Curley Number 9, I would like to direct your attention to Page 6, Number 12. In Answer to Interrogatory Number 12, Mr. McQueary asserts that on

the night of February 9, 2001, he observed an exchange between Mr. Sandusky and a boy that he describes as, in quote, sexual intercourse, end quote. At any point during your interactions with Mr. McQueary, did he report to you that he had observed an incident that was in – that he described as sexual intercourse?

MS. ROBERTO: Assertion of the privilege.

Q. On Page 7, Interrogatory Answer Number 17, in the first part of the Answer to Interrogatory Number 17, Mr. McQueary asserts that he received a telephone call from you and in that first paragraph he describes the exchange. Is that – is Mr. McQueary's statement in the first paragraph consistent with your recollection of your telephone exchange with Mr. McQueary.

MS. ROBERTO: Assertion of the privilege.

Q. In the second paragraph of the Answer to Interrogatory Number 17, Mr. McQueary states an exchange that took place in a meeting among Mr. Schultz, Mr. McQueary, and yourself. Is your recollection consistent with how Mr. McQueary describes it in that second paragraph of Interrogatory Answer Number 17?

MS. ROBERTO: Assertion of the privilege.

Q. In Interrogatory Answer Number 18, Mr. McQueary asserts certain acknowledgements and statements that Mr. Schultz and you made during that meeting with him. Is your recollection of your statements and Mr. Schultz's statements consistent with the information that Mr. McQueary asserts in Answer Number 18?

MS. ROBERTO: Assertion of the privilege.

* * *

Q. In the Answer to the Interrogatory Number 36, Mr. McQueary asserts information that he received from you

in a telephone call. Is your recollection of the information that you provided to Mr. Curley – or to Mr. McQueary, consistent with the information that Mr. McQueary provides in the Answer to Interrogatory Number 36?

MS. ROBERTO: Assertion of the privilege.

* * *

Q. On Page 21, Interrogatory Number 73, Mr. McQueary lists witnesses that he intends to call at trial. And Witness Number 1 would be yourself, Tim Curley . . . . Can you provide information to me about that alleged information?

MS. ROBERTO: Assertion of the privilege.

Q. Mr. McQueary asserts that you would be expected to testify [about] what you did subsequent to receiving that report. Could you provide me information about what you did subsequent to receiving that report?

MS. ROBERTO: Assertion of the privilege.

Q. Mr. McQueary asserts that you would be expected to testify about your meeting with Mr. McQueary concerning what the Plaintiff has witnessed. Can you provide information to me about what occurred in that meeting?

MS. ROBERTO: Assertion of the privilege.

Q. Mr. McQueary asserts that you would be expected to testify to his job performance and the results of the poll of the Athletic Department staff concerning who ought to succeed Coach Paterno when he retired. Could you provide to me information about the alleged – about his job performance and the results of this alleged poll?

MS. ROBERTO: Assertion of the privilege.

Deposition Transcript of Timothy M. Curley, dated April 1, 2016, at 46-54. Following the deposition, this Court was informed of Mr. Curley's assertion of his Fifth Amendment Rights.

The University is severely prejudiced in its ability to defend against Plaintiff's claims, which involve critical knowledge and information that is solely possessed by Messrs. Schultz and/or Curley.

IV. STATEMENT OF QUESTION INVOLVED

Should the Court, after weighing the seven factors outlined above and discussed in detail below, stay the instant civil litigation pending resolution of the related criminal proceedings?

Suggested Answer: Yes.

V. ARGUMENT

A. Courts Weigh Multiple Factors When Considering a Stay.

The Courts of the Commonwealth of Pennsylvania have the common law powers to stay a proceeding *sua sponte.* Luckett v. Blaine, 850 A.2d 811, 819 (Pa. Commw. 2004). "Every court has the inherent power to schedule disposition of the cases on its docket to advance a fair and efficient adjudication. *Incidental to this power is the power to stay proceedings, including discovery."* Id. (emphasis added). Trial courts possess broad discretion to grant or deny a stay or place a matter in abeyance. In re Penn-Delco Sch. Dist., 903 A.2d 600, 606-07 (Pa. Commw. 2006) (citing Gwynedd Props., Inc. v. Bd. of Supervisors of L. Gwynedd

Twp., 635 A.2d 714 (Pa. 1993)). Pennsylvania courts have found that "it may be appropriate, in some situations, for a court to grant a stay in one proceeding until a resolution is reached in [another] proceeding." Anderson v. Scott, 2011 WL 10795429, at *1 (Pa. Com. Pl. 2009).

When deciding whether to stay a civil case pending the resolution of a related criminal case, the court must consider the following factors: (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest. Id. at *2 (citing Kaiser v. Stewart, 1997 WL 66186, at *2 (E.D. Pa. Feb. 6, 1997) and Walsh Securities, Inc. v. Cristo Property Management, Ltd., F. Supp. 2d 523. 527 (D.N.J. 1998)).[4] See also In Re Adelphia Communications Securities Litigation, No. 02-1781, 2003 WL22358819, at *3 (E.D. Pa. May 13, 2003) (also citing Walsh Securities, Inc., 7 F.Supp.2d at 523).

[4] The Anderson court explicitly noted the dearth of case law on this issue from the courts of the Commonwealth of Pennsylvania. Accordingly, the court held as follows: "Although not binding on this Court's decision, comparable case law exists from neighboring jurisdictions and from the District Courts, which provides this Court with ample guidance in its determination." Id. at 2.

An additional factor to be considered is the interests of persons not parties to the civil litigation. In Re Plastics Additives Antitrust Litigation, 2004 WL 2743591, at *4 (E.D. Pa. Nov. 29, 2004); DiPalma v. Med. Mavin, Ltd., 1998 WL 113432, at *2 (E.D. Pa. Feb. 5, 1998); Kaiser v. Stewart, 1997 WL 66186, at *2 (E.D. Pa. Feb. 6, 1997); Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980) (all listing factors similar to those in Anderson and Adelphia Communications in addition to the interests of non-parties). Applying these factors to the present case, as set forth below, it is clear that the Court should stay this matter pending resolution of the related criminal proceedings.

B. Discretionary Factors Weigh In Favor of a Stay.

1. The Issues in This Case and the Related Criminal Proceedings Overlap Substantially.

The extent to which the issues in the civil and criminal cases overlap is the most important factor in determining whether or not to grant a stay. Adelphia Communications, 2003 WL22358819, at *3 (citing Walsh Securities, 7 F.Supp.2d at 527). The issues and parties in the civil and criminal cases need not be identical, but rather merely "implicate similar facts or issues of law." Resco Products, Inc. v. Bosai Minerals Group Co., Ltd., Civ. A. No. 06-235, 2010 WL 2331069, at *4 (W.D. Pa. June 4, 2010) (finding that courts within the Third Circuit "have stayed

proceedings in numerous cases where another pending action contained similar questions of fact or law").

In Anderson, the Lawrence County Court of Common Pleas addressed a defendant physician's request to stay his deposition in a civil action due to his plan to invoke the Fifth Amendment in related criminal proceedings against him. Id. at * 1. The civil action at issue in Anderson involved a claim for wrongful-death of the defendant's former patient. Id. at *2. Meanwhile, the criminal complaint against the defendant physician included similar allegations of medical malfeasance, but did not involve the decedent in the civil case. Id. Despite the lack of the decedent's direct involvement in the criminal proceedings, the court found overlapping evidentiary issues, stating that "any evidence offered against the defendant in the civil case would be relevant to the criminal case. This factor weighs heavily in favor of granting the defendant's request for a protective order and stay his deposition until a conclusion of the criminal case." Id.

Similarly, in Adelphia Communications, the civil cases involved private consolidated securities actions brought against Adelphia and its officers and directors; the criminal cases were brought by the federal government against former Adelphia officers, and included charges of wire fraud, securities fraud, and conspiracy. Adelphia Communications 2003 WL22358819, at *1. The District Court found that Count I of the 24-count indictment against these individuals

contained issues and allegations similar to those in the private securities lawsuits, including allegations that these individuals improperly co-mingled funds, engaged in self-dealing, and failed to disclose co-borrowing arrangements that ultimately led to Adelphia's collapse. Id. The Adelphia Communications Court found that "these overlapping issues are integral to both the civil and criminal cases. Accordingly, this factor weighs heavily in favor of granting the stay." Id. at *3.

In the present case, much like in Anderson and Adelphia Communications, there are overlapping factual issues that are integral to both this civil litigation and the related criminal proceedings. As outlined above, both Mr. Schultz and Mr. Curley invoked their Fifth Amendment privilege with respect to the following subject matters of this case: (1) all facts and circumstances regarding their knowledge and involvement in a 1998 incident involving Mr. Gerald Sandusky and a child; (2) all facts and circumstances regarding their 2001 involvement with Plaintiff's alleged report of "highly inappropriate sexual misconduct" as between Mr. Gerald Sandusky and a young boy; (3) all information regarding the 2001 alleged verbal communications and meeting(s) between them and Plaintiff regarding the aforementioned report; (4) information related to their employment histories and job duties with the University during the relevant time periods of this case; and, (5) various 2011 communications as between them and non-parties regarding the allegations of the Complaint. See supra, at 8-15. The facts and

circumstances of this case are intrinsically intertwined with the key factual issues of the underlying criminal matters. See Anderson; Adelphia Communications. There can be no doubt that these overlapping issues are integral to both the present civil litigation and the related criminal proceedings and, therefore, the first and most important factor weighs heavily in favor of granting a stay.

2. The University Will Continue to Suffer Substantial Prejudice Without a Stay.

The denial of a stay in this matter would prejudice the University's ability to defend against the claims asserted in this case. As set forth more fully above, the University is severely constrained and unable to develop its defenses to Plaintiff's $4,000,000.00 claims because the facts and claims are intrinsically intertwined with the factual allegations in the underlying criminal charges against Mr. Schultz and Mr. Curley.

Plaintiff's whistleblower, defamation, and intentional misrepresentation claims all raise factual questions that ultimately relate to the February 2001 incident and what, in particular, occurred and was communicated subsequent to that incident in meetings and communications between Plaintiff, Mr. Curley, and/or Mr. Schultz. The University cannot fully explore such questions without access to Messrs. Curley and Schultz. Thus, the University cannot adequately prepare its defense and would be significantly prejudiced if forced to defend those claims at trial without the opportunity to do so. Plaintiff's intentional

misrepresentation claim presents those questions most directly. In particular, Plaintiff's intentional misrepresentation claim involves the state of mind of Mr. Schultz and Mr. Curley, as well as remaining substantial questions of fact as to the substance of communications between them and Plaintiff regarding the report of misconduct. Without the testimony from Mr. Schultz or Mr. Curley, the University is unable to adequately develop its defenses to this case, including developing a record to test the veracity of what Plaintiff claims to have allegedly caused him millions of dollars in damages.[5]

Further, and in light of the remaining pending charges against Mr. Schultz and Mr. Curley, these individuals will again assert their Fifth Amendment Rights at the October 2016 trial in this case. The assertions of the Fifth Amendment by both Mr. Schultz and Mr. Curley on pivotal factual issues will not only prejudice the University's defenses but will also cause jury confusion. If this matter proceeds to trial at this time, Plaintiff will be at an unfair advantage to testify about alleged communications with, and to argue the intent of, Mr. Schultz and Mr.

[5] Plaintiff's whistleblower claim also illustrates this issue. As protected reporting activity supporting his whistleblower claim, Plaintiff relies on his grand jury testimony and his testimony at the December 2011 criminal preliminary hearing against Messrs. Curley and Schultz. Without the ability to question Messrs. Curley and Schultz about what, specifically, Plaintiff communicated to them in February 2011 and how, specifically, they responded to Plaintiff at that time, the University cannot fully explore the factual issues of Plaintiff's multiple claims.

Curley, while the University will be at the extreme disadvantage of being unable to illicit testimony from any of the only other witnesses on the same factual matters.

Under these circumstances, the University is suffering and will continue to suffer from severe prejudice and, therefore, an immediate stay of proceedings until resolution of the criminal trial is warranted.

3. The Stage of the Related Criminal Proceedings Favors a Stay.

When determining whether to grant a stay, "a court must also consider the status of the related criminal proceedings, which can have a substantial effect on the balancing of the equities." Adelphia Communications, 2003 WL 22358819, at *3. If criminal proceedings have resulted in indictments being issued against individuals accused of crimes, this factor strongly favors staying the civil proceedings. Id.

The strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned. Id. See also Anderson, 2011 WL 10795429, at *2 ("A court is most likely to grant a stay of civil proceedings where an indictment has been returned.") (citing State Farm Mut. Auto. Ins. Co. v. Bechham-Easley, 2002 WL 31111766, at *2 (E.D.Pa. Sept. 18, 2002)). The potential for self-incrimination is greatest during this stage, and the potential harm to civil litigants arising from delaying them is reduced due to the promise of reasonably prompt resolution of the criminal case under the jurisdiction's speedy-

trial rules. Walsh Securities, 7 F.Supp.2d at 527 (quoting Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (1989)). Further, the prevailing case law in Pennsylvania and its neighboring district courts provides that delaying a civil matter is appropriate when a criminal trial is reasonably close at hand. Anderson, 2011 WL 10795429, at *2-3 (citing State Farm Mut. Auto. Ins. Co., 2002 WL 31111766, at *3).

Here, indictments have been handed down against Mr. Schultz and Mr. Curley that are intrinsically intertwined with the same critical facts and circumstances that underlie the claims asserted by Plaintiff in this case. Mr. Schultz and Mr. Curley have invoked their Fifth Amendment privilege and have refused to discuss the claims in the instant civil action. The stage of the criminal proceedings favors a stay of this action.

As in Anderson, trial in the instant criminal matter is imminent. Per an April 30, 2016 statement by Attorney General Kathleen Kane, "no further resources ... will be expended to pursue a possible appeal" as related to the underlying charges against Mr. Curley and Mr. Schultz and the Attorney General's Office is now preparing for the criminal trials. Further, the court in the criminal proceedings issued a Scheduling Order dated May 25, 2016 directing Messrs. Schultz and Curley to file all pretrial motions and supporting briefs by July 1, 2016 and the

Commonwealth to file its responses by July 31, 2016. The criminal case is moving forward to trial.

On June 9, 2016, this Court notified counsel as follows:

> I am advised that a Senior Judge will be requested to handle the pending criminal cases filed in Dauphin County. I am unaware of a pending scheduling order and can only assume that we are months away from any meaningful progress in those cases. Given the normal life cycle of a high profile criminal case, the amount of discovery involved . . . I [do not] see them being resolved until late 2017 at the earliest.

See Email from J. Gavin, dated June 9, 2016. As discussed above, the Dauphin County Court of Common Pleas' May 25, 2016 Scheduling Order unequivocally demonstrates that the criminal matters are moving forward with meaningful progress. Further, Plaintiff will suffer no individualized harm if this matter is stayed pending further resolution of these matters, see infra, at 24, and a delay is necessary under the circumstances of this case. See supra, at 20-21.

Finally, and even if this Court disfavors a stay pending final resolution of the criminal cases through any appellate proceedings, the Court should, at a minimum, grant a more limited stay pending conclusion of the criminal trials. To this end, and as fully discussed above, Curley and Schultz have asserted their Fifth Amendment Rights while their criminal trials are pending. The need for a stay may become moot when the criminal trials have ended.

Under these circumstances, a stay of the instant proceedings is warranted pending further conclusion of the underlying criminal proceedings.

4. Plaintiff Will Not Be Harmed By a Stay of this Case.

When considering the prejudice to the plaintiff caused by a stay, the plaintiff must establish "more prejudice than simply a delay in his right to expeditiously pursue his claim.... Instead, the plaintiff must demonstrate a particularly unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay." Adelphia Communications, 2003 WL 22358819, at *4. In Adelphia Communications, the District Court found that the plaintiffs did not demonstrate sufficient prejudice to warrant lifting the stay, as they had not shown "any prejudice other than delay in pursuing their suits, which is insufficient to support vacating the stay." Id. at *4 (citing Walsh Securities, 7 F.Supp.2d at 528).

Here, Plaintiff cannot establish a particular unique injury. Plaintiff has already received a voluminous amount of written discovery and he has conducted numerous depositions of his self-identified key witnesses. Plaintiff will also not suffer any economic harm from a stay, as if he is successful on any of his claims, he will be able to recover interest as part of his judgment. See Walsh Securities, 7 F.Supp.2d at 528. Not only will Plaintiff not be prejudiced, it is actually in his interest to have this case stayed. Plaintiff's claims relate to and require evidence

from Mr. Schultz and Mr. Curley,[6] and until the respective criminal proceedings for these individuals are resolved, he, like the University, will remain unable to obtain this critical evidence prior to October 2016. Further, as evidenced by the criminal court's May 25, 2016 scheduling order, trial will commence in the near future. Under these circumstances, a stay pending resolution of the criminal trial is warranted.

5. The Interests of the Court Favor Staying This Case.

This Court "has an interest in efficiently managing its caseload," and staying the matter promotes judicial efficiency. Adelphia Communications, 2003 WL 22358819, at *5. If this matter is stayed, there will be no need to continue to engage in piecemeal litigation and trial practice, which is generally disfavored by courts as inefficient and costly to all involved. See, e.g., McClendon v. Dougherty, No. 2:10-CV-1339, 2011 WL 4345901, at *1 (W.D. Pa. Sept. 15, 2011); Carpenter Technology Corp. v. Armco, Inc., Civ. A. No. 90-0740, 1990 WL 61180, at *4 (E.D. Pa. May 8, 1990). As fully discussed above, to date, the University has been unable to adequately develop its defenses to Plaintiff's claims and is not in a position to proceed to trial at this time. Any bifurcation of issues that are not trial

[6] Plaintiff noticed the depositions in this action during which Messrs. Curley and Schultz asserted their Fifth Amendment Rights. If Plaintiff did not notice the depositions, the University would have subpoenaed both Curley and Schultz for depositions because both were represented by counsel during all material times in this case.

ready will result in substantial inefficiencies, prejudice, and costs. See id. Staying this civil action will preserve judicial resources, promote judicial efficiency, save the parties unnecessary expense, and prevent the parties from engaging in further piecemeal litigation, which has already resulted in significant fees and costs, as evidenced by the depositions of Mr. Schultz and Mr. Curley where the Fifth Amendment was asserted on all matters of significance to this case.

6. The Public's Interest Favors a Stay.

The public interest will not be harmed by staying this civil action. There is no need to deny the stay to protect the public, such as in cases where allowing the civil case to proceed will protect the public by halting the distribution of mislabeled drugs or preventing the dissemination of misleading information to the investing public. See Walsh Securities, 7 F.Supp.2d at 529. The public would benefit from a stay by allowing the Commonwealth to complete, unimpeded, its criminal prosecution of the cases against Mr. Schultz and Curley. See Adelphia Communications, 2003 WL 22358819, at *6. Under these circumstances, the public's interest weighs in favor of a stay.

7. The Interests of Non-Parties Favor a Stay.

The last factor – the interests of persons not parties to the civil litigation – also favors a stay. As discussed above, non-parties, such as Mr. Schultz and Mr. Curley have already faced self-incrimination issues in this case. See, e.g., Golden

Quality Ice Cream, 87 F.R.D. at 58 (holding that "the pressures of civil discovery are likely to weigh most heavily on certain key managerial officials in defendant companies;" these individuals, facing criminal charges, may be forced to invoke their constitutional rights against self-incrimination). "The dilemma for such persons is severe because they face serious penalties in the event of a criminal conviction, and because they are not themselves parties to th[e] civil action." Id. If this matter proceeds to trial before resolution of the underlying criminal charges, these non-parties will again be presented with self-incrimination issues via pre-trial motions and further questioning at trial. The interests of these non-parties weigh in favor of a stay.

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VI. CONCLUSION

Balancing the factors discussed above, it is clear that they all favor granting a stay. Thus, the University respectfully requests that this Court grant its Second Motion to Stay Proceedings.

Respectfully submitted,

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By: _____

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MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:
Defendant.	:

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 29th day of June, 2016, a true and correct copy of the foregoing Memorandum of Law In Support of The Pennsylvania State University's Second Motion to Stay Proceedings was served upon the following persons via first class, United States mail, postage prepaid:

Elliot A. Strokoff, Esq.
Strokoff & Cowden, PC
132 State Street
Harrisburg, PA 17101

and

ORIGINAL

William T. Fleming, Esquire
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Respectfully submitted,

WHITE AND WILLIAMS LLP

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EXHIBIT Q

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

MICHAEL J. MCQUEARY, Plaintiff Vs THE PENNSYLVANIA STATE UNIVERSITY, Defendant	:	No. 2012-1804 Type of Case: Whistleblower

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BRIAN C. IMHEL
PROTHONOTARY
CENTRE COUNTY, PA

OPINION

ISSUE

Should these proceedings be stayed in whole or in part pending the outcome of the criminal cases against Graham B. Spanier, Gary C. Schultz and Timothy M. Curley?

The Pennsylvania State University (hereinafter "Penn State") asserts that this matter should be stayed because there are overlapping factual and legal issues arising out of the criminal prosecutions of **Graham B. Spanier, Gary C. Schultz, and Timothy M. Curley** which should be resolved first. Penn State further asserts that its ability to respond to the complaint may be hampered by the aforementioned criminal defendants' invocation of their 5th Amendment rights and that it would be at a disadvantage in framing a response to the complaint and formulating a defense. Finally, Penn State asserts that the interests of not only itself, but the criminal defendants, the abuse victims, the court and the public would be served by a stay.

Background

In order to analyze the issue presented, it is necessary to view this case in the overall context of the investigation into and the litigation resulting from the sexual abuse committed by

EXHIBIT "Q"

Gerald A. Sandusky, hereinafter ("Sandusky"), on Penn State's premises dating back to at least 1998.

I have read the "Freeh Report"[1] and reviewed the criminal complaints filed against Athletic Director Timothy M. Curley,[2] (hereinafter "Curley"), Senior Vice President-Finance and Business, Gary C. Schultz,[3] (hereinafter "Schultz"), and President of Penn State, Graham B. Spanier, [4] (hereinafter "Spanier"). The Rule 119 Affidavit attached to the complaints incorporates as Exhibit "A" the Report of the Thirty-Third Statewide Investigating Grand Jury. These documents, the Freeh Report, the Rule 119 Affidavits and the Grand Jury Report, provide the time line within which this case can be viewed.

Chronology of Events

1. A report was made that Sandusky showered with an eleven (11) year old on May 3, 1998 and that both were naked.[5]
2. Michael J. McQueary, (hereinafter "McQueary"), was a Graduate Assistant Coach on the Penn State football team during the period 2000-2003.
3. On the evening of February 9, 2001, McQueary observed Sandusky and a young boy in the shower at Lasch Building, part of the Penn State athletic complex. Both were naked.

[1] "Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky" by Freeh Sporkin & Sullivan, LLP, July 12, 2012. I note that Penn State has publicly embraced this report. *See*, Remarks of Chairman Karen Peetz at Penn State Board of Trustees regular meeting, September 12, 2012, *available at:* http://progress.psu.edu/resource-library/story/board-of-trustees-chairman-karen-peetz-delivers-remarks.
[2] *See* Court of Common Pleas, Dauphin County, No. CP-22-CR-5165-2011 and No. CP-22-MD-1385-2012.
[3] *See* Court of Common Pleas, Dauphin County, No. CP-22-CR-5164-2011 and No. CP-22-MD-1386-2012.
[4] *See* Court of Common Pleas, Dauphin County, No. CP-22-MD-1387-2012.
[5] As this incident is not relevant to my analysis, I do not discuss the response of Curly, Schultz and Spanier to it.

McQueary believed inappropriate sexual conduct was occurring and made his presence known prompting Sandusky to separate from the boy.

4. On the morning of February 10, 2001, McQueary visited Joseph V. Paterno, (hereinafter "Paterno"), at his home and reported what he saw.

5. Paterno was Penn State's head football coach and Sandusky had been his long time assistant defensive coordinator.

6. Paterno reported McQueary's observations to Curley and Schultz on February 11, 2001.

7. On February 12, 2001, Curley and Schultz met with Spanier.

8. Sometime before February 19, 2001, McQueary met with Curley and Schultz and told them what he had observed.

9. While Curley and Schultz told McQueary they would get back to him about what he had seen, they did not.

10. On or about March 1, 2004, McQueary was hired as an assistant football coach by Penn State.

11. On or about January 7, 2010, the Pennsylvania Attorney General's Office (hereinafter "AG"), served subpoenas on Penn State for the personnel records of Sandusky and correspondence pertaining to him.

12. On December 14, 2010, McQueary appeared before the Grand Jury and testified that he had discussed his observations of February 9, 2001, with Curley and Schultz.

13. On January 12, 2011, Curley, Schultz and Paterno testified before a Grand Jury.

14. On March 22, 2011, Spanier was interviewed by law enforcement authorities.

15. Curley, Schultz and Spanier were questioned as to what they knew about the incident reported by McQueary and when they knew about it.

16. On November 4, 2011, criminal charges were filed against Sandusky in Centre County and against Curley and Schultz in Dauphin County.

17. On November 5, 2011, Spanier caused to be published on Penn State's official news site his statement of support for Curley and Schultz. See Exhibit "B" to McQueary's complaint.

18. On November 6, 2011, the Board of Trustees of Penn State placed Curley on administrative leave and announced that Schultz had retired.

19. On November 9, 2011, the Board of Trustees of Penn State removed Spanier as President and Paterno as head football coach of Penn State.

20. On November 13, 2011, McQueary was placed on administrative leave.

21. Sandusky was convicted of multiple sexual offenses on June 22, 2012. One of those convictions related to the incident McQueary had reported to Curley and Schultz. McQueary was a witness at Sandusky's trial.

22. The suit Doe B. v. The Second Mile, Gerald Sandusky and The Pennsylvania State University, was filed in the Court of Common Pleas of Philadelphia County on June 28, 2012 at Case No. 03727 June Term, 2012.

23. On July 5, 2012, McQueary's employment with Penn State was terminated.

24. The suit, Doe C. v. The Pennsylvania State University was filed in the Court of Common Pleas of Philadelphia County on July 31, 2012 at Case No. 120704291.

25. The suit, Doe A. v. The Second Mile, Gerald Sandusky and The Penn State University, was filed in the Court of Common Pleas of Philadelphia County on November 30, 2011 at Case No. 111102968.

26. The suit, C. Miller v. The Second Mile, Gerald Sandusky and The Penn State University was filed in the Court of Common Pleas of Philadelphia County on December 22, 2011 at Case No. 02933 December Term, 2011.

27. McQueary's suit against Penn State was filed on October 2, 2012.

28. Additional criminal charges were filed against Curley and Schultz on November 1, 2012.

29. Spanier was indicted on November 1, 2012.

30. As of December 5, 2012, the preliminary hearings on the new charges filed against Curley and Schultz and the charges filed against Spanier were indefinitely continued.

31. Curley and Schultz's trial date of January 7, 2013, has also been indefinitely continued.

32. McQueary is expected to be a witness in the pending criminal cases.

Discussion

Counsel for the parties agree that the factors to be considered in weighing whether a stay should be granted are set forth in, In Re Adelphia Communications Securities Litigation, 2003 WL 22358819 (E.D.Pa.) at *3, to wit:

> (1) The extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest.

and Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc., et al., 87 F.R.D. 53 at 56, to wit,

> Broadly stated, in terms of the problems presented by this litigation, the principal factors are five-fold: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Preliminarily, I note that several of the cases cited by Penn State involve situations where one or more of the defendants in the criminal proceedings were also defendants in the civil litigation. Further, the conduct at issue was an element common to both cases. As such, defendants had legitimate self-incrimination concerns. Also, a criminal conviction necessarily lessened the burden of discovery and proof on the civil plaintiffs, such that delaying the civil case was appropriate. Those factors do not exist here.

1. Issue Overlap Between Civl and Criminal Cases

The AG in the criminal cases will be focused on the time period up to March 22, 2011, and what the defendants knew of and when they knew of Sandusky's improper sexual conduct. Penn State has no role in prosecuting the criminal charges, nor is it defending the defendants. Thus, the criminal cases impose no burden on Penn State. As the Freeh Report makes clear, Penn State has already made the information it has pertaining to Sandusky regarding THIS

INCIDENT available to the AG.[6] Its employees with knowledge of the events concerning Sandusky's conduct regarding this incident have already been interviewed.

Penn State is the defendant in this case and may well want to call one or more of the criminal defendants as witnesses. If called, the criminal defendants have no 5th Amendment right to refuse to testify, nor need they fear that information gathered in this case can be used against them in the criminal proceedings. The focus in the criminal proceedings is what defendants knew about Sandusky's improper conduct on the date they appeared before the Grand Jury or met with investigators, not the reason why McQueary was let go. As to the defamation count, the sole issue is whether the Spanier statement in support of Curley and Schultz defamed McQueary. Whether the criminal defendants were truthful in their testimony regarding what they knew about the incident McQueary observed and reported is factually and legally distinct from McQueary's whistleblower and defamation claims.

Simply put, while there may be overlapping witnesses, there are no overlapping issues in the criminal and civil cases.

This factor does not support the grant of a stay.

2. Status of Criminal Proceedings

It is my understanding that as of December 5, 2012, all pending criminal matters have been indefinitely continued. While defendants may well not want to be deposed, etc. in this

[6] "The Special Investigative Counsel performed the forensic analysis and review of this raw data independent of the University staff. From this review and analysis, the Special Investigative Counsel discovered the most important documents in this investigation – emails among former President Graham B. Spanier, former Senior Vice President-Finance and Business Gary C. Schultz and Athletic Director Timothy M. Curley from 1998 and 2001 – relating to Sandusky's crimes. The Special Investigative Counsel immediately provided these documents to law enforcement when they were discovered." Freeh Report at 11.

matter, their interests can and will be protected by the court pending resolution of their criminal cases.

I note, as did the Freeh Report,[7] that if a similar contemporaneous electronic record exists as to their discussions[8] or those of any other Penn State official involved in the decision to terminate McQueary, as exists concerning Sandusky, there may be no need to call them as witnesses. The written word is as powerful as the spoken word in proving one's case.

This factor does not support the grant of a stay.

3. Burden on Defendants

As I have already made clear, the criminal defendants have no burden imposed on them in this case other than the burden placed on any non-party witness.

I note from both the Freeh Report and the Second Grand Jury Report that Penn State's Information Technology Department contains a specialized unit denominated the "SOS" unit, which is "trained and dedicated to assembling responsive electronically stored data in response to litigation needs or other legal process[9]." This unit was able to retrieve more than 3.5 million pieces of electronic data and documents spanning twelve (12) plus years when requested to do so by the Freeh investigators. As the Grand Jury also noted, Penn State "has in place a well defined historical practice and procedure for responding to subpoenas, "at page 23. In this day

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[7] "Moreover, the extensive contemporaneous documentation that the Special Investigative Counsel collected provided important insights, EVEN INTO THE ACTIONS OF THOSE WHO DECLINED TO BE INTERVIEWED." (emphasis added) Freeh Report at 12.

[8] I do not imply that such a record exists or that any one of the defendants participated in or made the decision to terminate McQueary's employment.

[9] Second Grand Jury Report, p. 23, *available at*: http://www.attorneygeneral.gov/uploadedFiles/Press/spanier-schultz-curley_presentment-11-1-12.pdf.

of electronic discovery and in light of Penn State's specialized expertise in this area, I see no meaningful burden placed on Penn State to search its files for relevant information regarding why McQueary was let go. Indeed, an electronic search may eliminate the need for the in person examination of individuals, only to discover they have no relevant information.

While hundreds of persons had to be interviewed and thousands of documents reviewed to determine the full scope of Sandusky's improper conduct spanning many years and involving multiple victims, who knew of it and when, no such far-reaching inquiry is needed here. One or more persons likely made the decision to end McQueary's employment. Once that person is identified and deposed, McQueary's Whistleblower action can be resolved. Identifying the decision maker now, as opposed to after the conclusion of the criminal trials, imposes no burden whatsoever on Penn State. In fact, it may lessen the burden on Penn State as it will avoid unnecessary discovery, expense, etc.

If the decision maker turns out to be one or more of the defendants, the court can control the method and timing of discovery addressed to them so as not to interfere with their criminal trial preparation. If it is someone else, then the issue of their participation in this case is moot.

Penn State infers that other current or former employees may decline to cooperate for self-incrimination reasons if the defendants do not testify. As I believe they are not at risk of incriminating themselves, this argument is unpersuasive. The suggestion that these same unidentified witnesses may not want to testify without prior or contemporaneous testimony from the defendants defies logic and experience. A person with relevant testimony must provide it absent a legal basis for refusing to do so. Until such a basis is asserted, I am unprepared to

assume that Penn State employees with relevant information will decline to provide it. The experience of the Sandusky case does not support this suggestion.

Penn State also believes that its access to McQueary may be limited by the AG. I know of no authority by which the AG can prevent a willing witness from testifying. McQueary's counsel has indicated that he will make McQueary available to Penn State when requested. Should the AG object, the issue can be dealt with then.

This factor does not favor the grant of a stay.

4. The Interests of the Court

Sandusky's conduct has resulted in ongoing litigation in three counties.

The victims suits are being handled by the 1st Judicial District, Philadelphia County. Sandusky, his charitable organization, The Second Mile, and Penn State are named defendants. Penn State has publicly stated its interest in resolving these cases in light of Sandusky's conviction. As neither Sandusky nor Second Mile have any direct connection to the McQueary suit, resolution of either the victims' or McQueary suits will not advance or delay resolution of the other.

Similarly, the criminal cases pending in Dauphin County involve DIFFERENT PARTIES, witnesses, elements and burdens of proof. The only common denominator between those cases and the present case is that McQueary and PERHAPS one or more of the defendants will be witnesses. As with the victims' cases, resolution of either the criminal or civil case neither advances nor delays resolution of the other.

The interests of any one court in awaiting the outcome in another results in no advantage to the court, nor does it serve to conserve any judicial resources. Accordingly, each court should be free to resolve the matter before it as expeditiously as it sees fit.

This factor does not favor the grant of a stay.

5. The Public Interest

I believe that if the court insures the parties receive a fair and prompt hearing, the public interest is satisfied.

This factor is neutral regarding a stay.

6. The Interests of Non-Parties

Judge Pollak in his Golden Quality opinion addressed this factor noting that several of the non-parties to the civil proceedings were facing criminal prosecution. The dilemma for those non-parties was that they were officers of the corporate civil defendant and could be called upon to speak on behalf of the corporate defendant. Seeing a real risk to their 5th Amendment right, Judge Pollak deemed this impediment to carry significant weight regarding the requested stay. No such concern exists here. Assuming, arguendo, that Curley, Schultz and/or Spanier individually or collectively terminated McQueary in violation of the Whistleblower Act, that fact is irrelevant to their pending criminal prosecutions.

Whether Spanier defamed McQueary is also irrelevant in his criminal case.

Penn State asserts that the victim-civil plaintiffs may be affected if this case proceeds before the criminal cases conclude. I disagree. Those plaintiffs have not named Curley, Schultz and Spanier as defendants. The Sandusky conviction is clearly admissible against him

and McQueary has already testified in the Sandusky trial as to what he saw, who he told and when. To the extent that the McQueary trial or discovery process readdresses that testimony, no information not already publicly known would be disclosed. Accordingly, the victim-plaintiff involved in the McQueary testimony suffers no harm by allowing this case to proceed. As McQueary has no personal information regarding the other victim-plaintiffs, their cases likewise are not impacted by any testimony in this case.

This factor does not favor the grant of a stay.

7. Plaintiff's Interest in Prompt Resolution versus prejudice to Plaintiff Caused by Delay

Penn State asserts that plaintiff should be required to demonstrate, "a particularly unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay," Adelphia Communications, 2003 WL 22358819 *4, as opposed to the mere delay in his right to promptly pursue his claim.

Judge Pollak introduced the concept of "potential prejudice" in his Golden Quality Opinion. In discussing this point he noted the overlapping nature of the criminal and civil cases, the fact that both were proceeding in the SAME judicial district and that a result favorable to the government in the criminal case would "obviate much of the expenditure of time and dollars which plaintiffs would otherwise be compelled to invest in their civil suits," Golden Quality at 56. Based on this belief, he found that some delay was acceptable. Here, as I have already noted, the criminal and civil cases do not overlap, and involve different defendants, different elements. The discovery requested differs and the conviction or acquittal of one or more of the defendants

will not advance McQueary's claims. As the basis of Judge Pollak's concerns do not here exist, his "potential prejudice" test is inapplicable.

Penn State asserts that McQueary, if he prevails, may be entitled to interest, etc. and that he is not currently suffering any economic harm as he is receiving his severance pay. I note that Exhibit "A" to his complaint, his employment agreement, calls for eighteen (18) months' severance pay. Those payments will end by January 2014 at the latest. During conference and at oral argument on this Motion, plaintiff's counsel stated that he anticipated discovery, etc. would consume the better part of one (1) year. Penn State did not disagree with his assessment. If this case is stayed, McQueary may well find himself without funds to live on and/or to prosecute his claim which, to me, rises to the level of economic harm.

McQueary asserts that pursuant to Article I, Section 11 of the Pennsylvania Constitution, he has the right to the prompt resolution of his case. I have not previously had a plaintiff argue this ground and credit counsel for his novel approach. However, it is unnecessary to remind the court of this right as every court strives to resolve all matters in a timely fashion. Obviously, as here, there are competing factors to be assessed in determining what constitutes a timely fashion. Many of those factors have already been discussed.

An additional factor that I deem relevant is the publicly stated (through various members of Penn State's Board of Trustees) desire of Penn State to restore its reputation as promptly as possible. Certainly, McQueary should have the same right. Allowing this case to proceed now will afford both parties that opportunity.

This factor does not support the grant of a stay.

Based on the foregoing, I enter my

ORDER

AND NOW, this 19th day of December, 2012, the Motion for Stay is **DENIED**.

BY THE COURT:

Thomas G Gavin

THOMAS G. GAVIN SJ

EXHIBIT R

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

MICHAEL J. McQUEARY, Plaintiff vs. THE PENNSYLVANIA STATE UNIVERSITY, Defendant	:	No. 2012-1804 Type of Case: Whistleblower

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Elliott A. Strokoff, Esq. and William T. Fleming, Esq., Attorneys for Plaintiff
Nancy Conrad, Esquire, Attorney for Defendant

OPINION

Issue

Should these proceedings be stayed pending the outcome of the criminal cases against Graham B. Spanier, Gary C. Schultz and Timothy M. Curley?

The Pennsylvania State University (hereinafter "Penn State") again[1] asserts that this matter should be stayed because of the unavailability of **Gary C. Schultz and Timothy M. Curley.** Penn State asserts that its ability to respond to the Complaint is hampered by the aforementioned criminal defendants' invocation of their Fifth Amendment rights and that it would be at a disadvantage in framing a response to the Complaint and formulating its defense. Finally, Penn State asserts that the interests of not only itself, but the criminal defendants, the Court and public, would be served by a stay.

[1] See Motion filed on May 31, 2016. A similar request was denied on December 19, 2012.

EXHIBIT "R"

Background

I previously addressed and denied a similar motion. I provide an updated chronology to bring the reader current with what has happened in the intervening years and how that bears on my decision as to this motion.

Updated Chronology of Events

I incorporate herein by reference thereto the chronology of events set forth in my December 19, 2012, Opinion. I **add** the following:

1. The case of *Commonwealth of Pennsylvania vs. Gerald A. Sandusky* was appealed to the Pennsylvania Superior Court which entered an Order denying the appeal. *See*, 338 MDA 2013, Pa. Superior Court, October 2, 2013.
2. The Pennsylvania Supreme Court denied allocatur.
3. Gerald Sandusky filed a Post-Conviction Hearing Act petition on April 2, 2015, which is currently pending.
4. Messrs. Curley and Schultz have pending criminal charges in the Court of Common Pleas of Dauphin County. No trial date has been set.
5. Messrs. Curley and Schultz appeared for depositions in this case and upon advice of counsel invoked their federal and state constitutional privileges against testifying.
6. I found that Messrs. Curley and Schultz properly invoked their right against self-incrimination.
7. It appears from news accounts that Penn State has amicably

resolved all known claims of Mr. Sandusky's **victims**.

8. Plaintiff is expected to be a witness in the Curley and Schultz criminal trials.

Discussion

Both parties agree that *In Re Adelphia Communications Securities Litigation*, 2003 WL 22358819 (E.D. Pa. 2003) and *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc., et al*, 87 F.R.D. 53, (E.D. Pa. 1980) set forth the factors to be considered in deciding this motion, to wit:

> Broadly stated, in terms of the problems presented by this Litigation, the principal factors are five-fold: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Golden Quality, 87 F.R.D. at 56.

I also note that the testimony of Messrs. Curley and Schultz is relevant to the defense of Count III, alleging misrepresentation. Their testimony is NOT relevant as to Counts I and II. As to Count I, the Whistleblower Law, 43 P.S. §1421, *et seq.*, Plaintiff is required to establish that he reported wrongdoing to his superiors. Penn State cannot reasonably dispute this given that a criminal jury convicted Mr. Sandusky of the conduct Plaintiff says he reported (counts 8-11 at docket number CP-14-CR-2011-2422) and did so pursuant to the highest evidentiary standard, proof beyond a reasonable doubt. Of course,

Plaintiff must still establish that he was terminated for having done so. As to Count II, Mr. Spanier approved the press release, a seemingly undisputed fact. Whether it is defamatory remains to be seen. Mr. Spanier has **not** invoked his right to refuse to testify as to the press release.

Against this background, I address the *Golden Quality* factors.

1. Issue Overlap Between Civil and Criminal Cases

A. Whistleblower Count

My Chronology of Events notes that:

1) Mr. Curley was placed on administrative leave on November 6, 2011;
2) Mr. Schultz retired on November 6, 2011;
3) Plaintiff was placed on administrative leave on November 13, 2011; and
4) Plaintiff's employment was terminated on July 5, 2012.

Clearly someone other than Messrs. Curley and Schultz made the decision to terminate Plaintiff given that the termination occurred more than six (6) months after they left Penn State's employ.

B. Defamation Count

Penn State has not asserted that Mr. Spanier is unavailable to testify. There is no dispute that he authorized publication of the message. Whether it is capable of a defamatory meaning is up to the fact finder.

C. **Misrepresentation Count**

Penn State is disadvantaged here where what Messrs. Curley and Schultz said to Plaintiff is clearly at issue. Given their pending criminal charges, they are unavailable to Penn State as witnesses.

Discussion

The only prejudice to Penn State in mounting its defense is the unavailability of Messrs. Curley and Schultz to testify as to Count III, Misrepresentation. In his misrepresentation count, Plaintiff avers that Messrs. Curley and Schultz stated they "would see the matter was properly investigated and appropriate action taken." While Messrs. Curley and Schultz can possibly deny the statements attributed to them, the objective circumstantial evidence is that no such action was taken by them. Certainly, Penn State as the possessor of its own records has had adequate time to search them to determine what, if any, action they took in order to refute Plaintiff's claim.

The use of juror questions on the verdict slip will enable the court to assess and address the impact of Messrs. Curley and Schultz's unavailability on any verdict rendered on the misrepresentation count and take appropriate action, if required.

This factor does not support a stay.

2. **Status of Criminal Proceedings**

I am advised that a Senior Judge has recently been assigned to oversee the criminal cases. Assuming that they can be fast tracked[2], they are years from resolution unless there is a not guilty verdict. Were either man to be convicted of any offense, the appeals process would be lengthy and they would continue to be unavailable.

Discussion

Given the history of how the cases against Messrs. Curley and Schultz have progressed, it is reasonable to conclude that they are unlikely to be resolved in the foreseeable future despite the best efforts of all to move them forward expeditiously.

As neither party has a say as to the progress of the criminal cases, this factor is neutral.

3. **Burden on Defendants**

Penn State has not asserted, nor do I believe they could, that Messrs. Curley and Schultz are relevant to their whistleblower or defamation defense. Accordingly, their only burden is as to the misrepresentation count.

Discussion

I find interesting Mr. Strokoff's answer to this motion, wherein he asserts that Penn State failed to ask its then (2001) counsel, Mr. Courtney, what he recalled of any contact with Mr. Schultz regarding this issue.

[2] The Sandusky case was fast tracked. He was convicted on June 22, 2012 and FOUR YEARS LATER his case is still ongoing!

Penn State has had almost four years to search its records for relevant information. If Messrs. Curley and Schultz were available to Penn State as witnesses, they could deny meeting with, discussing with, or representing anything to plaintiff. Of course, Penn State's counsel would then have to weigh the wisdom of presenting such testimony in light of the other circumstantial evidence available bearing on what did or did not occur in 2001. Not every known or available witness is called to testify. It might well be that after speaking with Messrs. Curley and Schultz, Penn State would not call them as witnesses. If that were to occur, years would have passed for no reason.

This factor does not support a stay.

4. <u>Interests of the Court</u>

I repeat what I said in December of 2012:

> The interests of any one court in awaiting the outcome in another results in no advantage to the court, nor does it serve to conserve any judicial resources. Accordingly, each court should be free to resolve the matter before it as expeditiously as it sees fit ...

when I noted that three courts were involved.

The First Judicial District cases involving the Sandusky victims appear to be resolved AS TO THE VICTIMS. This case and the criminal cases against Curley, Schultz and Spanier remain active.

Discussion

This factor does not support a stay as the criminal cases are on a separate track and I have ruled that Messrs. Curley and Schultz have properly invoked their right not to testify in this matter.

My interest is and has been to promptly resolve this case. This factor does not support a stay.

5. The Public Interest

Interest in the Sandusky and related cases remain high and the sooner the remaining cases can be resolved, the better.

This is a neutral factor.

6. The Interests of Non-Parties

No non-party has an interest in the outcome of these proceedings.

This is a neutral factor.

7. Plaintiff's Interest in Prompt Resolution Versus Prejudice to Plaintiff Caused by Delay

I have been informally[3] advised that Plaintiff, despite his best efforts, has been unsuccessful at obtaining a coaching position at **any** level. I question whether this is a reflection on his coaching skills or due to the notoriety surrounding him resulting from his involvement in the Sandusky case. In either event, he has no job. His counsel has also advised both Penn State and me that he has expended the resources available to him, such as pension funds, etc., to meet his expenses. Accordingly, I believe it safe to

[3] I use the term to designate a statement not made on the record. Informal discussions with counsel are an accepted means of obtaining relevant information.

assume that he is suffering ongoing economic harm. Economic harm is a recognizable form of prejudice.

Discussion

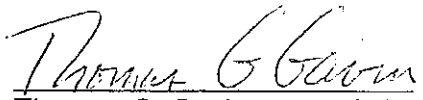
This is the dispositive factor. Of all the Sandusky related cases, the only open cases are those of Plaintiff and Messrs. Curley, Schultz and Spanier. It is worth noting that while Penn State is properly exercising its legal right to contest Plaintiff's claims, it is simultaneously fully funding the defense of Messrs. Curley and Schultz in their criminal cases that make them unavailable to Penn State to address Plaintiff's claims. The fact that Plaintiff must self-fund this litigation, while Penn State's proposed witnesses can litigate at Penn State's expense means they (Curley and Schultz) will be unavailable until the termination of their criminal cases either by a favorable jury verdict or exhaustion of their appeal rights. I have spoken to the Honorable John A. Boccabella who has been assigned to handle the criminal cases. Based on our conversation, I do not see Messrs. Curley and Schultz being available in this case before the middle of 2017 under the best case scenario. Should that not occur, given the Sandusky precedent, their cases will be working their way through the system for years to come.

I am mindful of what I said in my December 19, 2012 Opinion:

> McQueary asserts that pursuant to Article I, Section 11 of the Pennsylvania Constitution, he has the right to the prompt resolution of his case. I have not previously had a plaintiff argue this ground and credit counsel for his novel approach. However, it is unnecessary to remind the court of this right as every court strives to resolve all matters in a timely fashion.

The time has come to resolve this case. Accordingly, I enter my Order.

BY THE COURT:



Thomas G. Gavin S.J.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

MICHAEL J. McQUEARY, Plaintiff vs. THE PENNSYLVANIA STATE UNIVERSITY, Defendant	:	No. 2012-1804 Type of Case: Whistleblower

Elliott A. Strokoff, Esq. and William T. Fleming, Esq., Attorneys for Plaintiff
Nancy Conrad, Esquire, Attorney for Defendant

ORDER

AND NOW, this 11th day of August, 2016, the Motion to Stay is hereby **DENIED**.

The Court Administrator of Centre County is directed to attach counsel for jury selection beginning on **October 10, 2016**, and Trial on **October 17, 2016**.

BY THE COURT:

Thomas G. Gavin S.J.

EXHIBIT S

129 F. R. D. 201

Federal Rules Decisions
March, 1990
Transferee Judges' Conference, October 17-19, 1989[a]

PARALLEL CIVIL AND CRIMINAL PROCEEDINGS

Milton Pollack[aa]

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The subject assigned to me to be covered at this morning's session is titled 'Coordinating Related Government and Private Pretrial.' This topic arises for consideration where civil coordinated cases have parallel criminal counterparts going on at the same time. Involved also are situations in which the Government is represented in the civil and criminal cases by two governmental agencies, for example, where the Department of Justice is investigating crime or has brought an indictment and the Securities and Exchange Commission has commenced civil injunctive or enforcement proceedings in the protection of the public interest.

As I'm sure most of you are well aware, a good number of the multidistrict civil cases we assign out to various parts of the country have counterparts in criminal proceedings on the same or similar issues.

The subject of parallel cases going on at the same time and the administration of the pre-trial proceedings in each has given rise to a whole body of jurisprudence which determine when and how a judge overseeing civil proceedings can best handle them so as to protect both the individual litigants' interests—constitutional and otherwise—as well as the public's interest in seeing the fast and efficient resolution of litigation.

Handling of the pretrial process in the civil cases has posed a balancing of the divergent interests in the parallel litigations; and, like most balancing processes, involves a number of factors which at first can seem confusing and complicated but which can be broken down to a couple of overriding themes.

In analying these factors, it is important to remember who is seeking relief in one or the other of the parallel cases. Let us first examine some of the questions from the viewpoint of the defendant in each case who is faced with the double barreled attack on him in the criminal and civil forums. Let us suppose that his pursuers seek to go forward in the civil ***202** pretrial arena that has been committed to the assigned multi-district judge.

My task is not so much to *educate* you as to *inform* you of some of the different approaches taken by various courts on this subject. I hope this talk will serve to illumine some of the philosophy and treatment of the subject matter by different courts and how the problems have been resolved in the reported authorities.

When parallel civil and criminal actions arising from the same transactions or issues have been instituted, a court is faced with a dilemma. On the one hand, a parallel civil proceeding can vitiate the protections afforded the accused in the criminal proceeding if the prosecutor can use information obtained from him through civil discovery or testimony elicited in the civil litigation. This also may cause him to confront the prospect of divulging information which may incriminate him. On the other hand, the pendency of a parallel criminal proceeding can impede the search for truth in the civil proceeding if the accused resists disclosure and asserts his privilege against self-incrimination and thereby conceals important evidence. It may be that the Government seeks to withhold discovery which is § 3500 material for the criminal trial and thereby deprives the defendant in the civil case of the means to defend fully therein.

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EXHIBIT "S"

Dicta from the leading case of *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir.1962) has led some to conclude that standard operating procedure entails *staying* civil proceedings altogether while a parallel criminal investigation or prosecution is being conducted. In *Campbell*, Judge Wisdom speaking for the Fifth Circuit announced the doctrine that '[a]dministrative policy gives priority to the public interest in law enforcement' and that the trial judge should consider that policy in balancing 'the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.' *Id.* at 487. *Campbell* reflects the weight of authority. However, there may be a substantial public interest to be conserved by proceeding promptly with the civil side.

Those who read Judge Wisdom's dicta to *require* a stay of civil proceedings are in error. Regardless of who brings the civil action, the Government or a private litigant, the Constitution does not ordinarily require a stay of civil proceedings pending the outcome of related criminal proceedings. In fact, there are a number of reasons weighing against granting a motion for a stay of the civil suits.

Private litigants have a substantial interest in the efficient conduct of complex litigation in compliance with the Federal Rules of Civil Procedure. Stalling the civil case for a defendant who has ample means to protect himself, or fragmenting the litigations, may be counter-productive and prejudicial to private plaintiffs, particularly in class suits, especially when there are many claimants to a potentially limited pot.

The interests of a government agency appearing as the civil litigant are often substantial as well. In the securities context, prompt processing of SEC enforcement or injunction proceedings is often necessary to protect the public interest promptly, and, in particular, there may be an urgency to protect the integrity of financial markets. The SEC's interest ***203** is separate from and additional to the public interest which the Justice Department protects when it brings a criminal action. So the argument that there is no harm in staying a governmental civil action when a sister agency brings a criminal suit is just a red herring.

The District of Columbis Circuit recognized the different public interests to be served by sister agencies in the following language: 'The SEC cannot always wait for Justice to complete the criminal proceeding if it is to obtain the necessary prompt civil remedy; neither can Justice always await the conclusion of the civil proceeding without endangering its criminal case.' *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1377 (D.C.Cir.), *cert. denied*, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980).

The Supreme Court has said that it would, and I quote, 'stultify enforcement of federal law' to require an administrative agency invariably to choose between recommending a matter for criminal prosecution or deferring civil proceedings. *United States v. Kordel*, 397 U.S. 1, 11, 90 S.Ct. 763, 769, 25 L.Ed.2d 1 (1970).

The District of Columbia Circuit did, however, add that a stay of all proceedings would be appropriate in 'special circumstances.' The $64,000 question, then, is just what are these 'special circumstances'?

Generally, the courts have great discretion in regard to this question and, as you may expect, must balance the competing concerns of the private (or Government) plaintiff with the harm to the defendant by letting both proceedings go forward at once under special circumstances. In addition, a court should consider any prejudice which would be caused to both parties and non-parties if the civil suit is delayed and should consider the convenience to the courts as well. Balancing the equities can get a little complicated.

In more practical terms, the courts generally treat four factors as significant, if not dispositive, weights which can tip the balance either in favor of or against a stay of the plaintiff's quest for discovery. These four factors are: (1) the commonality of transactions or issues, (2) the timing of the motion, (3) judicial efficiency, and (4) the public interest.

First. The most important factor at the threshold is the degree to which the civil issues overlap with the criminal issues. Some civil issues are irrelevant to related criminal proceedings. For example, the issue of damages for wrongful death would not

arise in most related criminal negligence prosecutions; in such a case, a stay of the civil proceedings on the issue of damages would rarely be appropriate.

Second. The current stage of the parallel criminal proceeding will often substantially affect the net balance of equities. Is resolution nearby or remote in time?

The strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned. The potential for self-incrimination is greatest during this stage, and the potential harm to civil litigants arising from delaying them is reduced due to the promise of a fairly quick resolution of the criminal case under the Speedy Trial Act. *See. eG., Dresser*, 628 F.2d at 1375-76.

***204** The chances of the defendant's procuring a stay are less favorable (but still possible) if the government is conducting an active parallel criminal *investigation* in which an indictment or information has not yet been filed. An example reported was permitting a three-year stay of a civil action in 1977 in a case where the civil plaintiff was threatened with criminal prosecution until 1980. *See Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1089 (5th Cir.1979). The chances of a stay at the instance of the Department of Justice are substantial under the *Campbell* doctrine.

If no indictment has been returned and no known investigation is underway, the case for a stay of discovery, no matter at whose instance, is 'far weaker.' *Dresser*, 628 F.2d at 1376. A criminal action may never commence. The civil plaintiff may be substantially affected by the delays involved in waiting for the criminal action to commence; and, unless it does, the stay will end only when the criminal statute of limitations has run—possibly severed years hence.

If criminal proceedings are over or there is no substantial criminal exposure, the courts are most likely to deny a delay of plaintiff's discovery or other pre-trial relief. The accused's trial tactics have already been exposed, and the likelihood of self-incrimination may be diminished, particularly if the defendant has testified at trial. And, the appeal process is an uncertain, potentially long-ranging, process. Only unusual circumstances would justify an order staying a post-conviction civil proceeding. Thus, the Eighth Circuit upheld the denial of an indefinite stay of civil proceedings sought after conviction but during appeal. *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1215 (8th Cir.1973). In another case, the Court ruled that a stay was not warranted where the defendant had already entered a plea of guilty and where the court could prevent prejudice by granting leave to amend the civil answer and permit the assertion of counterclaims. *Arden Way Associates v. Boesky*, 660 F.Supp. 1494 (S.D.N.Y.1987).

Third. Judicial efficiency is also a factor in the balancing analysis. Resolution of the criminal case may increase prospects for settlement of the civil case. Due to differences in the standards of proof between civil suits and criminal prosecutions, the possibility always exists for a collateral estoppel or res judicata effect on some or all of the overlapping issues. Conviction of a defendant in a parallel criminal case may effectively dispose of all common issues in a subsequent civil action, although the reverse is not true. Thus, it was held that a district court did not abuse its discretion in deciding that judicial economy was best served by granting a stay of the civil case, where the proceedings involved substantial overlap of issues such that 'resolution of the criminal case would moot, clarify, or otherwise affect various contentions in the civil case.' *United States v. Mellon Bank N.A.*, 545 F.2d 869, 873 (3d Cir.1976).

This, however, might be thought to assume that the criminal proceedings will result in a conviction of the defendant, which as you know should not and cannot be predicted prematurely. And again, the degree to which the issues in the two proceedings overlap will greatly influence the extent to which such issues may later be precluded at all.

***205** *Fourth.* The effect of a stay of the civil case upon the 'public interest' is perhaps the most important factor in the equation, albeit the one hardest to define. As I noted before, both plaintiffs and defendants have an interest in a timely judgment. In civil securities actions, the public has an interest in the maintenance of and preservation of the integrity of the securities market. These interests can be substantially prejudiced by stays imposing significant delays upon the civil proceeding. To this end it would behoove both the litigants and the court to tailor a stay at the instance of the defendant (if one is to be granted) to minimize any delays upon the process.

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One additional, although relatively uncommon, factor which almost inevitably results in a denial of a motion for a stay is where the movant intentionally creates the impediment which he seeks to erect as a shield. Thus, where a criminal defendant pleads guilty to criminal charges and agrees to assist the government's prosecution of others while keeping such matters confidential, it is questionable whether at his insistence the civil proceedings against him should be held in abeyance because he purportedly cannot disclose confidential information in his answer to a civil complaint pursuant to his agreement with the Department of Justice and pursuant to the Fifth Amendment. *See Arden Way Associations v. Boesky*, 660 F.Supp. at 1498. A New York Court denied a stay upon finding that litigant 'deliberately courted legal impediments' and 'cannot now be heard to assert its good faith after this expectation was realized.' *Securities and Exchange Commission v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117 (S.D.N.Y.1981). However as we shall shortly see, in cases of regulatory civil suits brought by an arm of the Government during the pendency of a parallel criminal prosecution, other considerations may come into play when it is the Government who is moving for some relief.

With that said, let's turn to some specific examples of the grounds upon which a motion for a stay by a defendant or one at the request of the Department of Justice may properly be based and to cases which address the issue.

Criminal defendants who move for a stay of related civil proceedings against them usually do so on one of two grounds: they may assert their participation in civil proceedings jeopardizes their right against self-incrimination under the Fifth Amendment, or, in civil cases in which the government is a party, they may contend the prosecution can circumvent strict criminal discovery guidelines or learn the basis of the defendant's criminal defense by receiving information gathered by another branch of the federal government in the civil case.

Let's examine the Fifth Amendment argument first. On the one hand, failure to invoke the privilege waives it, and the evidence in the civil case can then be used for criminal prosecution. *United States v. Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970). On the other hand, if a party invokes the privilege to prevent pre-trial discovery of evidence in the civil case, the court may preclude the party from presenting evidence withheld on his own behalf. *See, e.g., Securities and Exchange Commission v. Cymaticolor Corp.*, 106 F.R.D. 545, 549-550 (S.D.N.Y.1985). In addition the court may, but is not required to, in a civil proceeding draw ***206** an adverse inference from a party's refusal to testify on Fifth Amendment grounds. *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976).

The courts have held that the discomfort of this position does not rise to the leve of a deprivation of due process, and that an application for a general stay is within the discretion of the district court. *See, e.g., Kordel*, 397 U.S. at 11, 90 S.Ct. at 769. These principles have also been specifically applied in cases involving the SEC and related criminal proceedings. *See, e.g., Securities and Exchange Commission v. First Financial Group of Texas, Inc.*, 659 F.2d 660 (5th Cir.1981). It has been held that an adverse inference arising from assertion of the Fifth Amendment was insufficient prejudice to warrant a total stay of an SEC enforcement action although the related criminal investigation had commenced. *Securities and Exchange Commission v. Grossman*, 121 F.R.D. 207, 210 (S.D.N.Y. March 10, 1987).

In a civil case, a defendant had moved to quash an administrative subpoena issued by the SEC on the grounds that compliance would prejudice him with respect to a parallel criminal investigation by the Department of Justice; but it was held that the moving party had not made a sufficient case for a stay. The Court found that no indictment had yet been returned, no Fifth Amendment privilege was threatened, Rule 16(b) of the Federal Rules of Criminal Procedure had not come into effect, and the subpoena did not require the basis for the defendant's defense to be revealed. It also found that the prejudice to the moving party as the result of the continuing SEC investigation did not outweigh the harm to the public interest should the matter be stayed. *Dresser*, 628 F.2d at 1377. Accordingly, the Court denied the motion for a general stay. Notwithstanding, the Court did note that 'the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil action involving the same matter.' *Id.* at 1375-76. Some commentators have pointed out the need for increased sensitivity to a defendants' Fifth Amendment rights in civil forfeiture cases, for example. Under federal civil forfeiture provisions (which covers all cases brought for the forfeiture of 'any vessel, vehicle, merchandise, or baggage'), the government's initial burden is merely to demonstrate probable cause (defined as 'less than prima facie proof, but more than mere suspicion') to believe that the property is subject to forfeiture.

Then, the ultimate burden shifts to the defendant to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture. 19 U.S.C. § 1615.

This shifted burden of proof in civil cases may diminish the value of the Fifth Amendment privilege against self-incrimination. A property owner cannot defend a forfeiture claim without, in effect, testifying to ownership of the property. Accordingly, in 1984 Congress amended the civil forfeiture statute to allow a stay of the forfeiture proceedings 'upon good cause shown' upon the filing of an indictment or information alleging a violation of the Controlled Substances Act. 21 U.S.C. § 881(h).

***207** A defendant may also move to stay civil proceedings to prevent Due Process violations incurred by governmental circumvention of the limited discovery guidelines under Rule 16(b) of the Federal Rules of Criminal Procedure, as well as to prevent disclosure of the basis for his or her defense. The strongest case for granting a stay on these grounds is in a situation where the defendant offers specific evidence of agency bad faith or malicious governmental tactics, i.e., where the civil suit was instituted primarily to circumvent the criminal discovery procedures. *Dresser*, 628 F.2d at 1376. Where, however, there is a bona fide independent purpose for the parallel civil proceeding, such due process concerns may be dissipated. *Id.* at 1377.[1]

For example, in a case involving parallel Food and Drug Administration and criminal proceedings, the defendants unsuccessfully argued that use of the civil discovery process to compel respoonse to interrogatories that could be used to build the government's case in the criminal proceeding reflected such unfairness that their criminal convictions should be reversed. *Kordel*, 397 U.S. at 11, 90 S.Ct. at 769. The Supreme Court disagreed and held that where the government had not brought the civil action 'solely to obtain evidence for its criminal prosecution,' or had not 'failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution,' the investigation of both the civil and criminal claims need not be curtailed in the absence of 'any other special circumstances that might suggest the unconstitutionality or even the impropriety of [the] criminal prosecution.' *Id.* at 11-12, 90 S.Ct. at 769.

The U.S. Court of Claims recently held that administrative removal proceedings, in which a government agency was seeking to remove an employee for theft while the employee was facing a criminal action arising out of the same facts, need not have been stayed pending the outcome of a concurrent criminal prosecution. *Hearne v. United States*, 7 Cl.Ct. 362, 370 (Cl.Ct.1985). Although the defendant argued that the dual proceedings created a 'whipsaw' effect that made it impossible to defend either proceeding, the court held that 'special circumstances' had not been shown which would justify the entire suspension of the matter because the defendant could not establish that civil proceedings were used solely to obtain evidence for the prosecution. *Id.*

Criminal Rule 16(b) may provide an especially pronounced situation in reviewing the equities in civil proceedings instituted by the SEC. Section 21(d) of the Securities Exchange Act of 1934 specifically authorizes cooperation between the SEC and the Department of Justice. This assistance includes such activities as explaining the structure and content of the files received in discovery, indicating the violations of law discovered or under investigation, advising as to further investigative efforts or proceedings anticipated by the staff, and providing non-expert, non-opinion testimony for the purpose of document authentication or as to non-provileged, non-work-product facts. The courts, however, have tended to treat motions for stays in SEC actions the same way as they ***208** treat all other litigants presenting such motions. The SEC's express authority to investigate violations of securities laws with a view to both civil and criminal enforcement outweighs--on paper at least—the defendants' interest in deferral of the proceeding. *See Dresser*, 628 F.2d at 1376-77.

Thus far the emphasis of our analysis has been cast in attempts by a plaintiff to go forward with discovery and the plaintiff is met with applications from the defendant or from the Department of Justice to stay disclosure.

We turn now to situations where it is the defendant who is seeking some sort of relief, such as documentary disclosure and depositions of particular witnesses, and the defendant is met by an attempt of the Government or by the plaintiff acting on request of the prosecutor to stay or defer the disclosure or the depositions, ostensibly to conserve the public interest in the prosecution of a related criminal case. Usually, this sort of request by the Government occurs when the Government is

proceeding with both barrels blazing in the civil and criminal court, as when the SEC and Justice bring simultaneous actions.

The protection of a pending criminal investigation, or the grand jury process, or even the prosecution following an indictment, has been cited in support of preventing the production in the civil case of relevant and properly discoverable documents or the examination of witnesses on deposition on relevant and non-privileged matter—discovery which would otherwise be routine in civil proceedings—simply because such discovery would not be routine under the disclosure rules governing criminal cases. Such disclosure is usually resisted by the United States Attorney because it might jeopardize ongoing criminal investigations, or, after indictment, it might confer an unwarranted benefit on the defendant in the pending criminal case and thereby prejudice the ongoing prosecution.

Discovery differs in civil and criminal cases. While discovery is traditionally limited in criminal cases, the entire range of discovery, including depositions and document requests, is available in civil proceedings. The prospect of virtually unlimited civil discovery entices both criminal defendants and prosecutors, but the risks usually outweigh the potential benefits until the criminal case is completed.

Under Rule 26, Fed.R.Civ.P., a party to a civil litigation is presumptively entitled to 'obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .' *See Wharton v. Lybrand, Ross Bros. and Montgomery*, 41 F.R.D. 177, 179 (E.D.N.Y.1966); *Coyne v. House*, 584 F.Supp. 1105, 1106 (E.D.N.Y.1984). It has been said that: 'The right of litigants is given great weight in federal courts . . . [I]n examining any claim [by the plaintiff] of exemption . . . there is the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." *Apicella v. McNeil Laboratories*, 66 F.R.D. 78, 22 (E.D.N.Y.1975) (quoting *Democratic National Committee v. McCord*, 356 F.Supp. 1394, 1396 (D.D.C.1973)). Conversely, a party or the Government as an interested intervenor seeking to withhold relevant discovery unprotected by any constitutional, common ***209** law or statutory privilege must move for a protective order and has the burden oif demonstrating 'good cause' for such an order. Fed.R.Civ.P. 26(c).

In contract, the criminal rules of procedure are more restrictive. The criminal defendant initially is only entitled to discovery which 'is material to the preparation of the defendant's defense or [is] intended for use by the government as evidence in chief at the trial . . .' Fed.R.Crim.P. 16. As a trial progresses, under § 3500, the defendant may obtain statements of those witnesses who testify for the U.S. relative to the direct examination of the witness that are in the Government's possession. The defendant, of course, is also always entitled to *Brady* material.

In order to flesh out the parameters of the Government's desire to withhold § 3500 discovery from the civil defendant, let us make certain assumptions. First, we will assume for this exercise that none of the ordinary grounds for a protective order have been or could be asserted by the Government as support for denying the civil defendants the discovery they seek and that the documents or depositions being withheld are unquestionably relevant. Next, we will assume, that the Government does not assert that the production of these documents or the depositions of key witnesses would be unduly burdensome or expensive. Further, we will assume the Government does not assert privilege as a basis for non-disclosure. Indeed, even if such a privilege existed, the holder of the privilege must assert it and establish its applicability. *See, e.g., Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 655-656 (10th Cir.1984).

Finally, we will assume that the Department of Justice (or the hypothetical plaintiff) has made no motion to stay discovery completely in the parallel civil case. On the contrary, assume that the Government—in the form, let us say for clarity's sake of the SEC—wishes to *press its case* against the moving defendant while simultaneously withholding relevant discovery or seeking to have it proceed piecemeal, at the behest of the United States Attorney.

Although every discovery motion requires that the court, and I quote, must 'balance the interests of the litigant[s],' *Ross v. Bolton*, 106 F.R.D. 23, 23 (S.D.N.Y.1985), there is a strong presumption in favor of discovery that any party—the Government no less than any other litigant—must overcome if it seeks to withhold production or depositions.

Where district courts have stayed discovery most frequently in civil proceedings at the request of the Government, the stay

questions have arisen in situations where the Government seeks to protect ongoing criminal *investigations* and pending *grand jury hearings* based on the notion that a stay of *deposition* that the Government asserted would prejudice an 'ongoing grand jury investigation,' *First Merchants Enterprise v. Shannon*, 1989 Fed.Sec.L.Rep. (CCH) ¶94,421, 1989 WESTLAW 25214 (S.D.N.Y.1989), or that a stay of the *entire civil proceeding* was necessary to protect ongoing grand jury investigation, *Integrated Generics, Inc. v. Bowen*, 678 F.Supp. 1004 (E.D.N.Y.1988), or that a stay of *all* discovery by defendants in the civil action is necessary because 'the government is presently conducting a widespread criminal investigation ***210** . . . [and defendant's] discovery requests relate to the principal focus of the investigation.' *Federal Deposit Insurance Corp. v. Kuang Hsung Chuang*, 85 Civ. 7468 (SWK), 1986 WESTLAW 3518 (S.D.N.Y. March 17, 1986).

Cases arise in which the Government no longer claims that any criminal *investigation* of movants will be placed in jeopardy by the discovery it is withholding; rather, the defendant has been indicted and Justice now asserts prejudice to its criminal *prosecution* of defendant and urges in opposition to a motion for pretrial disclosure in the civil suit that since the discovery in question is not at this time required from the *prosecution* under the rules of criminal procedure, it ought not be produced *by the SEC* or other parties or witnesses in the civil cases.

The question presented is whether the policy underlying the limited scope *of discovery under the criminal rules* justifies withholding legitimate discovery in these *civil* litigations. That policy is rooted in concerns about possible perjury, manufacture of *false evidence* and *intimidation* of confidential government informants.

As you can see, it is now the civil case *defendant* who asserts that the 'public interest in the integrity of securities markets militates in favor of the efficient and expeditious prosecution of . . . civil litigations.' *Arden Way*, 660 F.Supp. at 1500.

Allowing the Government to delay and ultimately prolong the conduct of the SEC action, and also the private litigations tagging along, would seem on the surface of things to oppose that public interest.

However, as well shall see, surface appearances are often deceiving. In *Campbell v. Eastland*, 307 F.2d at 487, to which I referred much earlier, the Department of Justice sought a stay of discovery in a civil suit brought by a taxpayer against the IRS on grounds that the civil discovery would give witness statements to the taxpayer that would not be available to the taxpayer in a criminal case. The Fifth Circuit indicated that, in exercising its discretion, the district court had to harmonize the differences between civil and criminal discovery rules: that a litigant should not be able to get through civil discovery what he could not get through criminal discovery. That suggestion was said to apply whether or not the taxpayer's civil suit was brought in good faith, because in either event the improper effect would be to nullify the Jencks Act. *Id.* at 487-88. The District Court for the District of Columbia granted relief to the Government because it 'is well established that a litigant should not be allowed to make use of the liberal [civil] discovery procedures . . . to avoid the restriction on criminal discovery.' *Founding Church of Scientology, Inc. v. Kelley*, 77 F.R.D. 378, 380 (D.D.C.1977). Similarly, a Southern District of New York case held that 'where both civil and criminal proceedings arise out of the same or related transactions the government is ordinarily entitled to a stay of all discovery in the civil action until disposition of the criminal matter.' *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352, 353 (S.D.N.Y.1966).

One court in New York even said, '[a] stay of civil proceedings [upon application by the government] is most likely to be granted where the ***211** civil and criminal actions involve the same subject matter, and is *even more appropriate* when both actions are brought by the government.' *Brock v. Tolkow*, 109 F.R.D. 116, 119 (E.D.N.Y.1985) (emphasis added).

However, while the Fifth Circuit in *Campbell* addressed the question of a complete stay of discovery, it also indicated in dicta that less drastic restraints on discovery were within the discretion of the district court to conserve all interests at stake. Indeed, I should stress that a general stay of all civil discovery is not by any means the best option available to the court or to the litigants. Stays can and should be tailored to avoid undue prejudice. By limiting both the time and subject matter covered in temporary deferrals of particular discovery, a Court can allow civil proceedings to progress as much as possible without prejudicing the relative interests of the litigants. For example, in the recent case of *Securities and Exchange Commission v. Chestman*, 87 Civ. 7148 (RJW) (S.D.N.Y. June 17, 1988), brought in New York, the district court granted the United States Attorney's motion to intervenue and to stay all civil discovery except (1) evidence that would ordinarily be admissible under

Federal Rule of Criminal Procedure 16(a)(1), (2) depositions of expert witnesses, and (3) depositions and other evidence relating to the authentication of business records. A protective order was entered in a another recent case which required confidentiality of what had been disclosed. *See Securities and Exchange Commission v. Musikahn Corp.*, 88 Civ. 2 (JES) (S.D.N.Y. July 20, 1988). The order was agreed to by both the civil case defendant and the Government in order not to expose that defendant to an injunction trial without disclosure of means with which to defend himself therein.

Another possible solution might be to merely suspend or defer a particular deposition or delay production of sensitive documents until a reasonable time before the civil case is allowed to go to trial, such as 60 or 90 days in advance of a civil case trial. Thus discovery has been suspended only to the extent of delaying disclosure of what would represent § 3500 material in the criminal case. *See In re Ivan F. Boesky Securities Litigation*, 128 F.R.D. 47, 1989 WESTLAW 126126 (S.D.N.Y.1989).

One district court has held that pursuant to its inherent equitable powers and the Federal Rules of Criminal Procedure, the *criminal* court may issue protective confidentiality orders binding upon the parties as well as persons who are not party to the criminal action. *United States v. Simon*, 262 F.Supp. 64, 70 (S.D.N.Y.1966). While the Second Circuit assumed without deciding that the district court had the power to issue such an order, however, it cautioned that it is 'only in exceptional circumstances' that the district court in which the criminal case is pending should issue relief to a movant seeking judicial intervention in the progress of parallel proceedings. *United States v. Simon*, 373 F.2d 649, 653 (2d Cir.), *vacated on other grounds*, 389 U.S. 425, 88 S.Ct. 577, 19 L.Ed.2d 653 (1967).

Other alternative used include the issuance of protective orders under Civil Rule 26(c), quashing or modifying subpoenas under Civil Rule 45(b), limiting examinations under Civil Rule 30(d), and sealing confidential ***212** depositions. *See Securities and Exchange Commission v. Grossman*, 86 Civ. 1031 (SWK), slip op. at 5 (S.D.N.Y. March 30, 1987).

Another variation that has been used was to grant a stay of disclosure while also granting leave to the civil defendant to make a motion at the time of the trial to dismiss the complaint, if the defendant could show that he was prejudiced by the delay in discovery. *See In re Boesky, supra*, 128 F.R.D. 47, 1989 WESTLAW 126126.

In each instance, movants, including the Government, who cannot or do not want to show 'special circumstances' sufficient to justify granting a complete stay of civil discovery may still receive one of these alternative, albeit milder, forms of relief. *See, e.g. Grossman*, mem. op. at 5.

Let me summarize:

Obtaining and using evidence in parallel criminal and civil proceedings inherently engender conflict between the government and the parties who seek information or from whom information is being sought.

In the wake of recent trends in federal securities law enforcement, it is clear that these types of issues will arise more frequently, and courts will be required to balance the competing and conflicting interests involved in order to achieve just results.

Neither criminal nor civil procedure, in the Federal Rules, has a provision that explicitly addresses the problems of parallel proceedings. As a result, resort must be had to an *ad hoc* equitable remedy. As you have heard, some courts have stayed the civil proceeding, in whole or in part. Some courts have resorted to sealing or placing the records and proceedings under confidentiality protection. Still other courts have restrained civil discovery of designated specific areas as relates to specific documents and depositions pending developments in the criminal case. Still others have declined to provide any remedy. In all cases, the court must carefully balance the interests of the private litigants against those of the public.

In short, the courts in exercising their equitable powers have a wide range of responses when faced with motions seeking or opposing some form of restraint of discovery in the parallel civil and criminal proceedings and involving protection of the public interest or vindication or protection of the private interest.

Courts of Appeals have repeatedly observed that the decision lies within the informed, sound discretion of the trial court. Basically the avoidance of prejudice in the balancing of the equities is the goal to be set, no matter who is the moving or objecting party.

The brief outline and short bibliography I have provided, which is on your desk, may be of some use as a point of initial reference for you. Thank you.

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***215 OUTLINE OF JUDICIAL TREATMENT OF PARALLEL CIVIL AND CRIMINAL PROCEEDINGS**

I. *Introduction*

A. The interests of law enforcement may give priority to criminal proceedings. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir.1962).

B. A stay of civil proceedings, however, is not automatic.

1. Private litigants have a substantial interest in proceeding with their cases quickly.
2. Governmental civil litigants have a substantial interest as well.

—E.g., SEC has an interest in protecting the integrity of financial markets. *SEC v. Dresser Industries*, 628 F.2d 1368 (D.C.Cir.1980).

—FDA has an interest in protecting consumers from unsafe or improperly marked drugs. *United States v. Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970).

3. 'Sister' governmental agencies cannot adequately protect the 'public interest' served by other agencies or branches.

II. *Standards for Granting a Stay of Civil Proceedings*

A. There must exist 'special circumstances in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government.' *Dresser*, 628 F.2d at 1377.

B. Whether 'special circumstances' exist depends on (1) private interests of the plaintiffs balanced against the prejudice to plaintiffs if delayed; (2) private interests of and burden to defendants; (3) convenience to the courts; (4) interests of persons not parties to the civil litigation (i.e., generally the Department of Justice); (5) the public interest. *In re Mid-Atlantic Toyota Antitrust Litigation*, 92 F.R.D. 358 (D.Md.1981).

Factors:

1. *Commonality of Issues:* the more issues overlap, the greater the need for a stay.
***216** 2. *Stage of Criminal Proceedings:* before proceedings initiated, or after completed, stay rarely granted. If proceedings are in full swing, a stay may be appropriate.
3. *Judicial Efficiency:* Depends primarily on commonality of issues.
4. *The Public Interest.*

C. Stay will not be granted when movant intentionally creates the impediment which he then seeks to erect as a shield against disclosure. *Arden Way Assoc. v. Boesky*, 660 F.Supp. 1494 (S.D.N.Y.1987).

III. *Specific Grounds for Stay*

A. Upon Motion by Criminal Defendant:

1. Fifth Amendment. This element alone generally does not mandate a stay. *United States v. Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970). Strongest case is where movant is under indictment for a serious offense and is required at same time to defend a civil or administrative action involving same subject matter. *Dresser*, 628 F.2d at 1375-76.

—In civil forfeiture cases, stay is granted whenever 'good cause' shown. 21 U.S.C. § 881(h).

2. Government's use of civil discovery process to circumvent criminal discovery rules. Strongest case for stay is where defendant offers specific evidence of agency bad faith or malicious tactics. *Dresser*, 628 F.2d at 1376.

B. Upon Motion by the Department of Justice (for defendant's circumvention of discovery rules):

—Courts generally allow stay of civil proceedings. *See, e.g., Campbell v. Eastland*, 307 F.2d 478 (5th Cir.1962); *Founding Church of Scientology, Inc. v. Kelley*, 77 F.R.D. 378 (D.D.C.1977); *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352 (S.D.N.Y.1966).

IV. *Alternatives to Grant of Stay of All Civil Proceedings:*

A. 'Tailored' stays. *SEC v. Chestman*, 87 Civ. 7148 (RJW) (June 17, 1988).

B. Protective orders. Fed.R.Civ.P. 26(c).

C. Quashing or modifying subpoenas. Fed.R.Civ.P. 45(b).

D. Limiting examinations. Fed.R.Civ.P. 45(b).

E. Sealing confidential material. *SEC v. Grossman*, 86 Civ. 1031 (SWK) (S.D.N.Y. March 30, 1987).

Footnotes

[a] Copyright (c) 1989 by Milton Pollack.

[aa] Senior Judge, United States District Court, Southern District of New York.

[1] This does not mean that the courts will *only* grant relief upon a showing of specific evidence of bad faith or maliciousness; merely, these factors present the strongest case for a stay.

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EXHIBIT T

COMMONWEALTH	: IN THE COURT OF COMMON PLEAS : DAUPHIN COUNTY, PENNSYLVANIA
v.	:
	:
TIMOTHY M. CURLEY	: NO. 3614 CR 2013
	: NO. 5165 CR 2011
GARY CHARLES SCHULTZ	: NO. 3616 CR 2013
	: NO. 5164 CR 2011
GRAHAM BASIL SPANIER	: NO. 3615 CR 2013
	:

ORDER

AND NOW, this 25th day of May, 2016, it is hereby **ORDERED** that:

1. The Defendants shall file all Pre-Trial Motions, along with Briefs in Support Thereof, not later than ***July 1, 2016***.

2. The Commonwealth shall file Answers and Responsive Briefs to such Pre-Trial Motions not later than ***July 31, 2016***.

3. Counsel shall, at the time of filing the Pre-Trial Motions, apprise the Court as to any request for hearing thereon.

4. Counsel shall apprise the Court, not later than ***July 31, 2016***, of previously filed Pre-Trial Motions which are ready for disposition and whether Counsel request that the Court schedule hearings thereon.

BY THE COURT:

RICHARD A. LEWIS
PRESIDENT JUDGE

Distribution on following page:

EXHIBIT "T"

EXHIBIT U

COMMONWEALTH	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
v.	:	
	:	
TIMOTHY M. CURLEY	:	NO. 3614 CR 2013
	:	NO. 5165 CR 2011
GARY CHARLES SCHULTZ	:	NO. 3616 CR 2013
	:	NO. 5164 CR 2011
GRAHAM BASIL SPANIER	:	NO. 3615 CR 2013

SCHEDULING ORDER

AND NOW, this 1st day of ~~January~~ February, 2017 it is hereby **ORDERED** that:

1. Jury selection shall commence on *Monday March 20, 2017 at 8:30 a.m.*.
2. Trial shall commence immediately upon completion of jury selection.
3. Counsel shall, not later than February 27, 2017, :
   a. Submit to the Court proposed jury *voir dire* questions;
   b. File motions *in limine*;
   c. File requested jury instructions.

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BY THE COURT:

JOHN BOCCABELLA, S.J.

Distribution on following page:

EXHIBIT "U"

EXHIBIT V

COMMONWEALTH	: IN THE COURT OF COMMON PLEAS : DAUPHIN COUNTY, PENNSYLVANIA
v.	:
	:
TIMOTHY M. CURLEY	: NO. 3614 CR 2013
	: NO. 5165 CR 2011
GARY CHARLES SCHULTZ	: NO. 3616 CR 2013
	: NO. 5164 CR 2011
GRAHAM BASIL SPANIER	: NO. 3615 CR 2013
	:

ORDER

AND NOW, this 1st day of February, 2017, upon consideration of Defendants' various Pre-Trial filings, and any responses thereto, and having heard oral argument on October 13, 2016, it is hereby ORDERED as follows:

1. Defendants' Petitions for Writ of Habeas Corpus are DENIED;

2. Defendants' Motions to Quash the summary charge of Failure to Report Child Abuse as barred by the Statute of Limitations is GRANTED;

3. Defendants' Motions to Quash the charges of Endangering the Welfare of Children and Conspiracy to commit same as barred by the Statute of Limitations is DENIED;

4. Defendants' Motions to Quash the charges of Endangering the Welfare of Children as barred by the *ex post facto* clause is DENIED;

5. Defendants' Motions to Quash the charge of Endangering the Welfare of Children under 18 Pa. C.S. §4304(a)(2) as the Statute is unconstitutionally vague is DENIED;

EXHIBIT "V"

6. Defendants Schultz and Spanier's Motions to Quash the charge of Endangering the Welfare of Children under 18 Pa. C.S. §4304(a)(1) as violating basic principles of due process is DENIED;

7. Defendant Spanier's Motion to Quash the charges of Endangering the Welfare of Children, asserted on the basis that the charge does not apply to a person in his position is DENIED;

8. Defendants Curley and Spanier's Motions to Quash charge of Failure to Report Child Abuse, asserted on the basis that those Defendant are not mandated reporters is DENIED as MOOT.

9. Defendant Curley's Motion to Quash based on Prosecutorial Misconduct is DENIED;

10. Defendants Curley and Schultz's Motions to Suppress Grand Jury Statements and Testimony is rendered MOOT by stipulation of the Commonwealth;

11. Defendants Curley and Schultz's Motions for severance of counts is DENIED as MOOT;

12. Defendants' Motions for severance of Defendants is DENIED;

13. Defendant Spanier's Motion for Change of Venue or Venire is DENIED; and

14. Defendants' request for a Bill of Particulars is DENIED.

BY THE COURT:

John Boccabella, S.J.

DAUPHIN COUNTY
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EXHIBIT W

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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY : CIVIL ACTION NO. 2012-1804 : HON. THOMAS G. GAVIN

TRIAL MEMORANDUM ON BEHALF OF DEFENDANT, THE PENNSYLVANIA STATE UNIVERSITY CONCERNING PLAINTIFF'S PROPOSED ADVERSE-INFERENCE JURY INSTRUCTION

Defendant, The Pennsylvania State University ("the University"), by and through its undersigned counsel, submits the within Memorandum in opposition to Plaintiff's request for an adverse-inference instruction to the jury regarding the assertion of the Fifth Amendment privilege by former employees and non-parties, Tim Curley and Gary Schultz.[1]

For the reasons expressed below, the University objects to the Court providing an adverse-inference instruction to the jury, as proposed by Plaintiff.

[1] See Plaintiff's Proposed Points for Charge, No. 8 (Adverse Inference).

EXHIBIT "W"

I. A MANDATORY ADVERSE-INFERENCE INSTRUCTION IS NOT AUTHORIZED.

Initially, the University notes that even when the factual record authorizes a trial court to issue an adverse-inference jury instruction based upon a witness's assertion of his or her Fifth Amendment privilege in a civil case, the instruction is for a *permissive* inference only. See RAD Services, Inc. v. Aetna Casualty & Surety Co., 808 F.2d 271, 277 (3d Cir. 1986), cited in Pa. Suggested Standard Civil Jury Instructions ("SSCJI"), § 5.51, Subcommittee Note. Plaintiff does not propose, and no authority supports, an instruction to the jury that it *must* draw an adverse inference against a party based upon a witness's legitimate assertion of his or her Fifth Amendment rights. See Plaintiff's Proposed Points for Charge, No. 8 (proposing "you may, but need not, conclude . . ."); SSCJI, § 5.51.

II. A PERMISSIVE ADVERSE-INFERENCE INSTRUCTION IS NOT WARRANTED BASED ON THE FACTS.

For the reasons expressed below, the factual record in this case does not support issuance of an adverse-inference instruction, as proposed by Plaintiff. In the present case, Tim Curley and Gary Schultz, are third-party witnesses. They are not defendants in this action and are no longer employed by the University. Importantly, the University does not have, nor has it had at any time since the initiation of this action, the ability to compel either to waive his personal and fundamental Fifth Amendment right and to provide testimony in this case.

A. The Fifth Amendment right at issue is fundamental and belongs to the individual.

Curley and Schultz have faced criminal charges and been represented by individual counsel since November 4, 2011. "[I]n the context of criminal defense, '*certain litigation decisions are considered fundamental and are for the client to make*. These include decisions on . . . whether to testify . . . ." Bonfilio v. United States, No. 15-1015, 2016 U.S. Dist. LEXIS 145142, at *49 (W.D. Pa. Oct. 20, 2016) (quoting Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996)) (emphasis added); see also United States v. Aikens, 358 F.Supp.2d 433, 436 (E.D.Pa. 2005) ("The *accused has the ultimate authority* to make certain fundamental decisions . . . [including] as to whether . . . to testify . . . .") (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983)).

In short, Curley and Shultz each are, and have always been, responsible for deciding whether or not to assert their Fifth Amendment right in connection with all testimony and information sought in this case. They each have made, and make, that determination in consultation with their respective individual counsel, who – as discussed below – owe their professional duties solely to Curley and Schultz, not to the University.

B. An attorney's professional duties are to the client, regardless of who pays the fee.

Regardless of whether the University is paying their fee, individual counsel for Curley and Schultz owe their professional duty of loyalty exclusively to their respective individual client. The University has no authority to interfere with the professional judgment of the individual counsel for Curley and Schultz, and there is no evidence that it has attempted to do so.

Under the Pennsylvania Rules of Professional Conduct, an attorney's professional duties run to the client only. Specifically, Rule 5.4 mandates that "[a] lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Pa. RPC 5.4(c).

Rule 1.8[2] and its Explanatory Comment address persons paying for a lawyer's services. The Explanatory Comment notes, in pertinent part, that "[l]awyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer." Pa. R.P.C. 1.8, Explanatory Comment, §

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[2] Rule 1.8 of the Rules of Professional Conduct provides, in pertinent part:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Pa. RPC 1.8(f).

11. The Rules of Professional Conduct mandate that in such situations, "lawyers are prohibited from accepting or continuing such representations *unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment* and there is informed consent from the client."

In short, the University does not have and has never had the ability to compel Curley or Schultz to provide testimony or information in this lawsuit.

C. The factual record and relevant factors do not support the issuance of a permissive adverse-inference instruction to the jury.

A permissive adverse-inference instruction is not warranted in this case based upon the invocation of the Fifth Amendment by Curley and Schultz. As described above, Curley and Schultz are not parties to this action and are no longer University employees.

Although, the United States Supreme Court and the Pennsylvania appellate courts have not addressed the appropriateness of an adverse inference in a civil case where a non-party invokes the Fifth Amendment privilege, the Circuit Courts which have addressed the issue, have approved and directed trial courts to evaluate a non-exhaustive list of factors on a case-by-case basis to determine whether an adverse-inference instruction is appropriate. See Coquina Investments v. TD Bank, 760 F.3d 1300, 1309-1312 (11th Cir. 2014), cited in Pa. SSCJI, § 5.51; Libutti v. United States, 107 F.3d 110, 123-124 (2d Cir. 1997), adopted by Coquina, supra.

Those pertinent factors are (1) the nature of the relevant relationships; (2) the degree of control of the party over the non-party witness; (3) the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and (4) the role of the non-party witness in the litigation. Coquina, 760 F.3d at 1311 (quoting LiButti, 107 F.3d at 123-124).

The first two of the pertinent factors – namely, the nature and extent of relationships, and the degree of control of the party over the non-party – do not support an adverse-inference instruction here. Although, the court in Coquina noted that payment of the non-party's legal fees could provide support on the first factor, 760 F.3d at 1311, the University – as demonstrated above – has no control over the individual decision of Curley and Schultz regarding their Fifth Amendment privilege. Additionally, in Coquina, the non-party who ultimately asserted the Fifth Amendment privilege and whose counsel fees were being paid by the party had agreed to cooperate in party's internal investigations. Here, by contrast, Curley and Schultz have asserted their Fifth Amendment privilege and have provided no information during discovery in this case or during the Freeh Group investigation commissioned by the University. Rather, they declined to participate in the investigation on the advice of their counsel. Accordingly, these factors do not support an adverse-inference instruction in this case.

The third factor – the compatibility of interests – is absent. Curley and Schultz are no longer employed by the University and are not parties in this case. Thus, they have no interest in whether the University prevails in this action.

The fourth and final factor – the role of a non-party witness in the litigation – does not support an adverse-inference instruction in this case. Curley and Schultz each play an important role in this litigation, but that role does not make an adverse inference drawn against the University more reliable.

"The overarching concern that should guide the admissibility inquiry is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." Coquina, 760 F.3d at 1304. "Because the witness cannot be made to explain why the privilege has been invoked, the reliability of the adverse inference drawn from his silence is limited." Id. at 1310.

Although Curley and Schultz play an important role in this litigation, that important role does not make an adverse inference drawn against the University likely to be reliable. It does, however, magnify the unfair prejudice to the University of such an inference, particularly in light of the University's lack of authority to compel them to provide information relevant to its defense.

III. CONCLUSION

For the above reasons, no adverse-inference instruction should be given to the jury in this case.

Respectfully submitted,

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MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE	:
UNIVERSITY,	: HON. THOMAS G. GAVIN
	:
Defendant.	:

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this ____ day of October, 2016, a true and correct copy of the TRIAL MEMORANDUM ON BEHALF OF DEFENDANT, THE PENNSYLVANIA STATE UNIVERSITY CONCERNING PLAINTIFF'S PROPOSED ADVERSE-INFERENCE JURY INSTRUCTION was served upon the following persons via personal delivery:

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By: _____

EXHIBIT X

Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky

Freeh Sporkin & Sullivan, LLP

July 12, 2012

EXHIBIT "X"

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SCOPE OF REVIEW AND METHODOLOGY

Freeh Sporkin & Sullivan LLP, ("FSS"), was engaged by the Special Investigations Task Force ("Task Force") on behalf of The Pennsylvania State University's Board of Trustees ("Board" or "Trustees")[a] as Special Investigative Counsel on November 21, 2011. As Special Investigative Counsel, FSS was asked to perform an independent, full and complete investigation of:

- The alleged failure of Pennsylvania 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 ("Sandusky");
- The circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth.

In addition, the Special Investigative Counsel was asked to provide recommendations regarding University governance, oversight, and administrative policies and procedures that will better enable the University to prevent and more effectively respond to incidents of sexual abuse of minors in the future.

To achieve these objectives the Special Investigative Counsel developed and implemented an investigative plan to:

- Identify individuals associated with the University at any level or in any office, who knew, or should have known, of the incidents of sexual abuse of children committed by Sandusky, the substance of their knowledge, and the point at which they obtained that knowledge;
- Examine how these incidents became known to, and were handled by, University Trustees, staff, faculty, administrators, coaches or others, with

[a] The members of the Special Investigations Task Force are: Chairman, Kenneth C. Frazier, Chief Executive Officer and President, Merck & Co., Inc.; Vice Chairman, Ronald J. Tomalis, Secretary of the Pennsylvania Department of Education; H. Jesse Arnelle, Attorney; Guion S. Bluford, Jr., Ph.D., Colonel, United States Air Force (retired); Mark H. Dambly, President, Pennrose Properties, LLC; Keith W. Eckel, Sole Proprietor and President, Fred W. Eckel & Sons Farms, Inc.; Daniel R. Hagen, Ph.D., Immediate Past-Chair, The Pennsylvania State University Faculty Senate, Professor, College of Agricultural Sciences; Rodney P. Hughes, Doctoral Student, The Pennsylvania State University; Karen B. Peetz, Chairman, Board of Trustees, The Pennsylvania State University, Vice Chairman and Chief Executive Officer, Financial Markets and Treasury Services, Bank of New York Mellon.

particular regard to institutional governance, decision making, oversight and culture.

- Identify any failures and their causes on the part of individuals associated with the University at any level or in any office, or gaps in administrative processes that precluded the timely and accurate reporting of, or response to, reports of these incidents.

The Special Investigative Counsel implemented the investigative plan by:

- Conducting over 430 interviews of key University personnel and other knowledgeable individuals to include: current and former University Trustees and Emeritus Trustees; current and former University administrators, faculty, and staff, including coaches; former University student-athletes; law enforcement officials; and members of the State College community at the University Park, Behrend, Altoona, Harrisburg and Wilkes-Barre campuses, and at other locations in Delaware, Pennsylvania, New York, Maryland and the District of Columbia, and by telephone;
- Analyzing over 3.5 million pieces of pertinent electronic data and documents;
- Reviewing applicable University policies, guidelines, practices and procedures;
- Establishing a toll-free hotline and dedicated email address to receive information relevant to the investigation, and reviewing the information provided from telephone calls and emails received between November 21, 2011 and July 1, 2012;
- Cooperating with law enforcement, government and non-profit agencies, including the National Center for Missing and Exploited Children (NCMEC), and athletic program governing bodies;
- Benchmarking applicable University policies, practices and procedures against those of other large, public and private universities and youth-serving organizations; and
- Providing interim recommendations to the Board in January 2012 for the immediate protection of children.

The information in this report was gathered under the applicable attorney-client privilege and attorney work product doctrine, and with due regard for the privacy of the interviewees and the documents reviewed. All materials were handled and

maintained in a secure and confidential manner. This report sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege by the Board.

Citations in this report have been redacted to protect the identity of people who spoke with the Special Investigative Council. Citations also include references to the internal database maintained by the Special Investigative Council to collect and analyze documents and emails. The references include citation to a unique identifying number assigned to each individual piece of information and are located in the endnotes and footnotes of this report.

INDEPENDENCE OF THE INVESTIGATION

The Special Investigative Counsel's mandate was made clear in the public statement of Trustee Kenneth C. Frazier announcing this investigation. "No one is above scrutiny," Frazier said. "[Freeh] has complete rein to follow any lead, to look into every corner of the University to get to the bottom of what happened and then to make recommendations that ensure that it never happens again." Frazier assured the Special Investigative Counsel that the investigation would be expected to operate with complete independence and would be empowered to investigate University staff, senior administrators, and the Board of Trustees.

The Special Investigative Counsel operated with total independence as it conducted this investigation. Its diverse membership included men and women with extensive legal, law enforcement and child protection backgrounds who were experienced in conducting independent, complex and unbiased investigations. None of the Special Investigative Counsel's attorneys or investigators attended The Pennsylvania State University or had any past or present professional relationship with the University. The Special Investigative Counsel maintained a secure workspace that was separate from all other University offices and classrooms. The workspace was accessible to the public only when accompanied by a member of the Special Investigative Counsel team. The Special Investigative Counsel's computer systems were not connected to the University's network.

The Special Investigative Counsel had unfettered access to University staff, as well as to data and documents maintained throughout the University. The University staff provided a large volume of raw data from computer systems, individual computers and communications devices. The Special Investigative Counsel performed the forensic analysis and review of this raw data independent of the University staff. From this review and analysis, the Special Investigative Counsel discovered the most important documents in this investigation – emails among former President Graham B. Spanier, former Senior Vice President-Finance and Business Gary C. Schultz and Athletic Director Timothy M. Curley from 1998 and 2001 - relating to Sandusky's crimes. The Special Investigative Counsel immediately provided these documents to law enforcement when they were discovered.

The Special Investigative Counsel interviewed a cross-section of individuals including current and former University faculty and staff members, Trustees, and student-athletes. The interviews covered a wide range of academic, administrative and athletic topics relating to Sandusky's crimes and the allegations against Schultz and Curley; as well as the governance and oversight function of the University's administrators and Board of Trustees. The temporal scope of the interviews ranged from the late 1960s, when Sandusky first attended the University, to the present.

The witnesses interviewed in this investigation, with few exceptions, were cooperative and forthright. Very few individuals declined to be interviewed, including some who declined on the advice of counsel (i.e., Sandusky, Schultz, Curley and former University outside legal counsel Wendell Courtney). At the request of the Pennsylvania Attorney General, the Special Investigative Counsel did not interview former Pennsylvania State University Director of Public Safety Thomas Harmon or former coach Michael McQueary, among others. Although the information these individuals could have provided would have been pertinent to the investigation, the findings contained in this report represent a fair, objective and comprehensive analysis of facts. Moreover, the extensive contemporaneous documentation that the Special Investigative Counsel collected provided important insights, even into the actions of those who declined to be interviewed.

No party interfered with, or attempted to influence, the findings in this report. The Special Investigative Counsel revealed this report and the findings herein to the Board of Trustees and the general public at the same time. No advance copy was provided to the Board or to any other person outside of the Special Investigative Counsel's team, and the work product was not shared with anyone who was not part of the Special Investigative Counsel's team.

EXECUTIVE SUMMARY

On November 4, 2011 the Attorney General of the Commonwealth of Pennsylvania ("Attorney General") filed criminal charges against Gerald A. Sandusky ("Sandusky") that included multiple counts of involuntary deviate sexual intercourse, aggravated indecent assault, corruption of minors, unlawful contact with minors and endangering the welfare of minors. Several of the offenses occurred between 1998 and 2002, during which time Sandusky was either the Defensive Coordinator for The Pennsylvania State University ("Penn State" or "University") football team or a Penn State professor Emeritus with unrestricted access to the University's football facilities. On November 4, 2011, the Attorney General filed criminal charges against the University's Athletic Director ("AD") Timothy M. Curley ("Curley") and Senior Vice President Finance and Business ("SVP-FB"), Gary C. Schultz ("Schultz") for failing to report allegations of child abuse against Sandusky to law enforcement or child protection authorities in 2002[b] and for committing perjury during their testimony about the allegations to the Grand Jury in Dauphin County, Pennsylvania, in January 2011.

On June 22, 2012, a Centre County jury in Bellefonte, Pennsylvania found Sandusky guilty of 45 counts of the criminal charges against him. As of the date of this report, the charges against Curley and Schultz have not been heard by the court.

The criminal charges filed against these highly respected University and community leaders are unprecedented in the history of the University. Several senior University leaders who had knowledge of the allegations did not prepare for the possibility that these criminal charges would be filed. In the days and weeks surrounding the announcement of the charges, University leaders (referred to on campus as "Old Main") and the University's Board of Trustees ("Board" or "Trustees"), struggled to decide what actions the University should take and how to be appropriately transparent about their actions. The high degree of interest exhibited by members of the University community, alumni, the public and the national media put additional pressure on these leaders to act quickly.

On November 11, 2011, the Trustees formed the "Special Investigations Task Force ("Task Force") of the Board of Trustees of The Pennsylvania State University" and

[b] This date was later determined by the Special Investigative Counsel to be 2001.

selected Trustees Kenneth C. Frazier and Ronald J. Tomalis to lead its efforts. On November 21, 2011 the Task Force engaged the law firm of Freeh Sporkin & Sullivan, LLP ("FSS") as Special Investigative Counsel, to conduct an investigation into the circumstances surrounding the criminal charges of sexual abuse of minors in or on Penn State facilities by Sandusky; the circumstances leading to the criminal charges of failure to report possible incidents of sexual abuse of minors; and the response of University administrators and staff to the allegations and subsequent Grand Jury investigations of Sandusky. In addition, the Special Investigative Counsel was asked to provide recommendations regarding University governance, oversight and administrative procedures that will better enable the University to effectively prevent and respond to incidents of sexual abuse of minors in the future.

The Pennsylvania State University is an outstanding institution nationally renowned for its excellence in academics and research. There is a strong spirit of community support and loyalty among its students, faculty and staff. Therefore it is easy to understand how the University community was devastated by the events that occurred.

FINDINGS

The most saddening finding by the Special Investigative Counsel is the total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims. As the Grand Jury similarly noted in its presentment,[1] there was no "attempt to investigate, to identify Victim 2, or to protect that child or any others from similar conduct except as related to preventing its re-occurrence on University property."

Four of the most powerful people at The Pennsylvania State University – President Graham B. Spanier, Senior Vice President-Finance and Business Gary C. Schultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno – failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky's activities from the Board of Trustees, the University community and authorities. They exhibited 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. Further, they exposed this child to additional harm by alerting

Sandusky, who was the only one who knew the child's identity, of what McQueary saw in the shower on the night of February 9, 2001.

These individuals, unchecked by the Board of Trustees that did not perform its oversight duties, empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program. Indeed, that continued access provided Sandusky with the very currency that enabled him to attract his victims. Some coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him.

By not promptly and fully advising the Board of Trustees about the 1998 and 2001 child sexual abuse allegations against Sandusky and the subsequent Grand Jury investigation of him, Spanier failed in his duties as President. The Board also failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable.

Once the Board was made aware of the investigations of Sandusky and the fact that senior University officials had testified before the Grand Jury in the investigations, it should have recognized the potential risk to the University community and to the University's reputation. Instead, the Board, as a governing body, failed to inquire reasonably and to demand detailed information from Spanier. The Board's overconfidence in Spanier's abilities to deal with the crisis, and its complacent attitude left them unprepared to respond to the November 2011 criminal charges filed against two senior Penn State leaders and a former prominent coach. Finally, the Board's subsequent removal of Paterno as head football coach was poorly handled, as were the Board's communications with the public.

Spanier, Schultz, Paterno and Curley gave the following reasons for taking no action to identify the February 9, 2001 child victim and for not reporting Sandusky to the authorities:

- Through counsel, Curley and Schultz stated that the "humane" thing to do in 2001 was to carefully and responsibly assess the best way to handle vague but

troubling allegations. According to their counsel, these men were good people trying to do their best to make the right decisions.[2]

- Paterno told a reporter that "I didn't know exactly how to handle it and I was afraid to do something that might jeopardize what the university procedure was. So I backed away and turned it over to some other people, people I thought would have a little more expertise than I did. It didn't work out that way."[3]
- Spanier said, in his interview with the Special Investigative Counsel, that he never heard a report from anyone that Sandusky was engaged in any sexual abuse of children. He also said that if he had known or suspected that Sandusky was abusing children, he would have been the first to intervene.[4]

Taking into account the available witness statements and evidence, the Special Investigative Counsel finds that it is more reasonable to conclude that, in order to avoid the consequences of bad publicity, the most powerful leaders at the University – Spanier, Schultz, Paterno and Curley – repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large.

The avoidance of the consequences of bad publicity is the most significant, but not the only, cause for this failure to protect child victims and report to authorities. The investigation also revealed:

- A striking lack of empathy for child abuse victims by the most senior leaders of the University.
- A failure by the Board to exercise its oversight functions in 1998 and 2001 by not having regular reporting procedures or committee structures in place to ensure disclosure to the Board of major risks to the University.
- A failure by the Board to make reasonable inquiry in 2011 by not demanding details from Spanier and the General Counsel about the nature and direction of the grand jury investigation and the University's response to the investigation.
- A President who discouraged discussion and dissent.
- A lack of awareness of child abuse issues, the Clery Act, and whistleblower policies and protections.

- A decision by Spanier, Schultz, Paterno and Curley to allow Sandusky to retire in 1999, not as a suspected child predator, but as a valued member of the Penn State football legacy, with future "visibility" at Penn State and ways "to continue to work with young people through Penn State," essentially granting him license to bring boys to campus facilities for "grooming" as targets for his assaults. Sandusky retained unlimited access to University facilities until November 2011.
- A football program that did not fully participate in, or opted out, of some University programs, including Clery Act compliance. Like the rest of the University, the football program staff had not been trained in their Clery Act responsibilities and most had never heard of the Clery Act.
- A culture of reverence for the football program that is ingrained at all levels of the campus community.

RECOMMENDATIONS FOR UNIVERSITY GOVERNANCE, ADMINISTRATION, AND THE PROTECTION OF CHILDREN IN UNIVERSITY FACILITIES AND PROGRAMS

From the results of interviews with representatives of the University's Office of Human Resources, Office of Internal Audit, Office of Risk Management, Intercollegiate Athletics, Commonwealth Campuses, Outreach, the President's Council, Faculty Senate representatives and the Board of Trustees, and benchmarking similar practices at other large universities, the Special Investigative Counsel developed 120 recommendations for consideration by University administrators and the Board in the following eight areas:

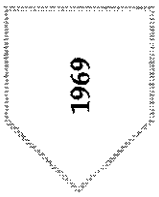
- The Penn State Culture
- Administration and General Counsel: Structure, Policies and Procedures
- Board of Trustees: Responsibilities and Operations
- Compliance: Risk and Reporting Misconduct
- Athletic Department: Integration and Compliance
- University Police Department: Oversight, Policies and Procedures
- Programs for Non-Student Minors and Access to Facilities
- Monitoring Change and Measuring Improvement

These recommendations are detailed in Chapter 10 of this report, and include several that the Special Investigative Counsel recommended to the Board in January 2012. The recommendations made at that time were designed to assist the University in preparing for its upcoming summer programs for children.

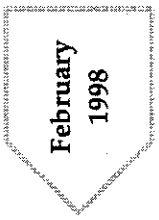
These steps should assist the University in improving structures, policies and procedures that are related to the protection of children. Some of these recommendations will help the University more fully comply with federal and state laws and regulations dealing with the protection of children. Other recommendations support changes in the structure and operations of the Board, or promote enhancements to administrative processes and procedures. Most importantly, the recommendations should create a safer environment for young people who participate in its programs and use its facilities.

One of the most challenging of the tasks confronting the Penn State community is transforming the culture that permitted Sandusky's behavior, as illustrated throughout this report, and which directly contributed to the failure of Penn State's most powerful leaders to adequately report and respond to the actions of a serial sexual predator. It is up to the entire University community – students, faculty, staff, alumni, the Board, and the administration – to undertake a thorough and honest review of its culture. The current administration and Board of Trustees should task the University community, including students, faculty, staff, alumni, and peers from similar institutions and outside experts in ethics and communications, to conduct such a review. The findings from such a review may well demand further changes.

TIMELINE OF SIGNIFICANT EVENTS



- Sandusky joins the Penn State football coaching staff.



- After learning that Paterno has told Sandusky that he would not become the next head football coach, Curley begins discussions with Sandusky about other positions at the University, including an Assistant AD position that Sandusky turns down. Curley keeps Spanier and Schultz informed by email.



- ***Sandusky assaults Victim 6[c] in Lasch Building shower.***

[c] The young boys victimized by Sandusky are designated in this report in the same manner as the Grand Jury presentment.

May 4-30, 1998

- Victim 6's mother reports to the University Police Department that Sandusky showered with her 11-year old son in the Lasch Building on Penn State campus. The police promptly begin an investigation.
- Schultz is immediately informed of the investigation and notifies Spanier and Curley. Schultz's confidential May 4, 1998 notes about Sandusky state: "Behavior – at best inappropriate @ worst sexual improprieties" and "At min – Poor Judgment." Schultz also notes: "Is this opening of pandora's box?" and "Other children?"
- University Police Department Chief Harmon emails Schultz: "We're going to hold off on making any crime log entry. At this point in time I can justify that decision because of the lack of clear evidence of a crime."
- Curley notifies Schultz and Spanier that he has "touched base with" Paterno about the incident. Days later, Curley emails Schultz: "Anything new in this department? Coach is anxious to know where it stands."
- Board meeting on May 15: Spanier does not notify the Board of the ongoing investigation.

June 1998

- District Attorney declines to bring charges against Sandusky.
- University Police detective and Department of Public Welfare caseworker interview Sandusky in Lasch Building so as not to put Sandusky "on the defensive." Sandusky admits hugging Victim 6 in the shower but says there was nothing "sexual about it." The detective advised Sandusky not to shower with any child. Sandusky stated he "wouldn't."
- Harmon emails Schultz: officers "met discreetly" with Sandusky and "his account of the matter was essentially the same as the child's." Sandusky said "he had done this with other children in the past. Sandusky was advised that there was no criminal behavior established and that the matter was closed as an investigation."
- Schultz emails Curley and Spanier: "I think the matter has been appropriately investigated and I hope it is now behind us."

January 1999

- Curley emails Spanier and Schultz: Sandusky wants to coach one more year and then transition to an outreach program.

May-August 1999

- Sandusky writes a letter to Curley saying, because he will not be next head football coach, he is considering retirement. Sandusky also seeks "to maintain a long-term relationship with the University."
- Curley emails Spanier and Schultz, discussing Sandusky's retirement options: "Joe did give him the option to continue to coach as long as he was the coach." Suggests possibility of Sandusky "coaching three more seasons."
- Sandusky proposes continuing connection with Penn State, including running a middle school youth football camp and finding "ways for [Sandusky] to continue to work with young people through Penn State." Paterno handwriting on the note states: "Volunteer Position Director – Positive Action for Youth."
- A retirement agreement with Sandusky is reached in June 1999, including an unusual lump sum payment of $168,000, an agreement for the University to "work collaboratively" with Sandusky on Second Mile and other community activities, and free lifetime use of East Area Locker Room facilities.
- As the retirement package is being finalized, Curley requests the emergency re-hire of Sandusky for the 1999 football season, which is approved.
- In August 1999, Sandusky is granted "emeritus" rank, which carries several privileges, including access to University recreational facilities. Documents show the unusual request for emeritus rank originated from Schultz, was approved by Spanier, and granted by the Provost, who expressed some uneasiness about the decision given Sandusky's low academic rank and the precedent that would be set.

December 1999

- Sandusky brings Victim 4 to 1999 Alamo Bowl in Texas.
- ***Sandusky assaults Victim 4 at team hotel.***

November 2000

- ***Sandusky assaults Victim 8 in Lasch Building shower.***
- Janitor observes assault by Sandusky, but does not report the assault for fear that "they'll get rid of all of us." Another janitor concludes that the University will close ranks to protect the football program.

February 9, 2001

- ***Sandusky assaults Victim 2 in Lasch Building Shower.***
- McQueary witnesses the assault by Sandusky.

February 10-12, 2001

- McQueary reports the assault to Paterno on Saturday, February 10; Paterno tells McQueary, "you did what you had to do. It's my job now to figure out what we want to do."
- Paterno reports the incident to Curley and Schultz on Sunday, February 11 as Paterno did not "want to interfere with their weekends."
- On Sunday, February 11, Schultz consults with University outside counsel Wendell Courtney "re reporting of suspected child abuse."
- On Monday, Spanier, Schultz and Curley meet to discuss a situation that Spanier describes as "unique", and a "heads-up" meeting; Schultz's confidential notes indicate he spoke to Curley, reviewed the history of the 1998 incident, and agreed that Curley would discuss the incident with Paterno and recommend that Curley meet with Sandusky. Schultz notes state: "Unless he confesses to having a problem, [Curley] will indicate we need to have DPW review the matter as an independent agency concerned w child welfare."
- Schultz asks University Police Department Chief Harmon if the report of the 1998 incident is in police files; Harmon responds that it is.

February 25-26, 2001

- Spanier, Schultz and Curley meet and devise an action plan, reflected in Schultz's notes: "3) Tell chair* of Board of Second Mile 2) Report to Dept of Welfare. 1) Tell JS [Sandusky] to avoid bringing children alone into Lasch Bldg *who's the chair??" The plan is confirmed in a subsequent email from Schultz to Curley.

February 27-28, 2001

- Curley emails Schultz and Spanier and says he [Curley] has changed his mind about the plan "after giving it more thought and talking it over with Joe [Paterno] yesterday." Curley now proposes to tell Sandusky "we feel there is a problem" and offer him "professional help." "If he is cooperative we would work with him to handle informing" the Second Mile; if Sandusky does not cooperate, "we don't have a choice and will inform" DPW and the Second Mile. "Additionally, I will let him know that his guests are not permitted to use our facilities."
- Spanier emails Curley and Schultz: "This approach is acceptable to me." He adds: "The only downside for us is if the message isn't 'heard' and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed."
- Schultz concurs with the plan in an email to Curley and Spanier: "this is a more humane and upfront way to handle this." Schultz adds, "we can play it by ear" about informing DPW of the assault.

March 5, 2001

- Scheduled date of meeting between Curley and Sandusky. In his 2011 Grand Jury testimony, Curley said he told Sandusky "we were uncomfortable" about the incident and would report it to the Second Mile. Curley says he also told Sandusky to stop bringing children to the athletic facilities. Sandusky's counsel later reports that no accusation of sexual abuse was made at this meeting and that Sandusky offered to provide the name of the boy to Curley, but Curley did not want the boy's name.

March 16, 2001

- Board of Trustees meeting: Spanier does not report the Sandusky incident to the Board.

March 19, 2001

- Curley meets with the executive director of the Second Mile and "shared the information we had with him." The Second Mile leadership concludes the matter is a "non-incident," and takes no further action.



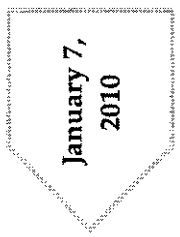
- Schultz leads a transaction to sell a parcel of University property to The Second Mile for $168,500 – the same as the University's 1999 acquisition cost.



- ***Sandusky assaults Victim 5 in Lasch Building shower.***



- Board of Trustees meeting: Board approves land sale to The Second Mile; neither Spanier nor Schultz disclose any issue concerning Sandusky.



- The University receives subpoenas from the Pennsylvania Attorney General for personnel records and correspondence regarding Sandusky.



- *Patriot-News* reporter contacts Spanier; the two exchange emails as to Spanier's knowledge of an investigation of Sandusky for suspected criminal activity while he was a Penn State employee.

December 28, 2010 - January 11, 2011

- Then-Penn State General Counsel Cynthia Baldwin speaks to the Attorney General's Office staff about Grand Jury subpoenas for Schultz, Paterno and Curley; alerts Spanier of subpoenas; meets with Schultz, Paterno and Curley to discuss Sandusky; and calls former University outside counsel Wendell Courtney about his knowledge of Sandusky.
- Courtney emails Schultz: Baldwin "called me today to ask what I remembered about JS issue I spoke with you and Tim about circa eight years ago. I told her what I remembered. She did not offer why she was asking, nor did I ask her. Nor did I disclose that you and I chatted about this."
- Courtney emails Baldwin that "someone ... contacted Children and Youth Services to advise of the situation so that they could do whatever they thought was appropriate under the circumstances, while being apprised of what PSU actions were, i.e., advising JS to no longer bring kids to PSU's football locker rooms."

January 12, 2011

- Schultz, Paterno and Curley testify before the Grand Jury.

March 31, 2011

- *Patriot-News* publishes article on Sandusky investigation.

April 1, 2011

- A Trustee emails Spanier, asking if the Board will be briefed about the Sandusky investigation reported in the paper. Spanier tells the Trustee: "Grand Jury matters are by law secret, and I'm not sure what one is permitted to say, if anything. I'll need to ask Cynthia [Baldwin] if it would be permissible for her to brief the Board on the matter."

April 13, 2011

- The Trustee emails Spanier again: "despite grand jury secrecy, when high ranking people at the university are appearing before a grand jury, the university should communicate something about this to its Board of Trustees." Spanier responds, downplaying the significance of the investigation: "I'm not sure it is entirely our place to speak about this when we are only on the periphery of this." Spanier asks Baldwin to call the Trustee.
- Spanier appears before the Grand Jury.
- Spanier separately emails Baldwin, noting "[the Trustee] desires near total transparency. He will be uncomfortable and feel put off until he gets a report."

April 17, 2011

- Spanier, Baldwin and then Board Chair Garban have a conference call to discuss the Sandusky Grand Jury.

May 12, 2011

- Board of Trustees meeting: Spanier and Baldwin brief Board on status of Grand Jury investigation; Spanier and Baldwin downplay importance of the investigation to Penn State. The Board asks a few limited questions.

July 15, 2011

- Board of Trustees meeting: Spanier and Baldwin do not update the Board on the Sandusky investigation. The Board does not ask about the Sandusky investigation.

September 9, 2011

- Board of Trustees meeting: Spanier and Baldwin do not update the Board on the Sandusky investigation. The Board does not ask about the Sandusky investigation.

October 27-28, 2011

- Baldwin receives information on upcoming Grand Jury indictment.
- Baldwin, Spanier and Curley meet; Baldwin and Spanier also meet with Garban.
- Spanier, Baldwin, Garban and staff draft press statement expressing "unconditional support" for Schultz and Curley.

October 29, 2011

- Sandusky attends Penn State home football game and sits in Nittany Lion Club in Beaver Stadium.

November 4, 2011

- Courtney emails Schultz a newspaper story about the Sandusky charges. Schultz replies: "I was never aware that 'Penn State police investigated inappropriate touching in a shower' in 1998."
- Criminal charges filed against Sandusky in Centre County; Grand Jury presentment attached as Exhibit A to criminal complaint.
- Criminal charges are filed against Schultz and Curley in Dauphin County; Grand Jury presentment attached as Exhibit A to criminal complaint.

November 5, 2011

- Sandusky is arrested.
- Grand Jury presentment released, noting there was no "attempt to investigate, to identify Victim 2 or to protect that child or any others from similar conduct, except as related to preventing its re-occurrence on University property."
- A Trustee asks Spanier, "What is going on, and is there any plan to brief the Board before our meeting next week?" Baldwin advises Spanier to tell the Trustee, "you are briefing the chair and the Board will be briefed next week."
- Spanier issues a press release expressing "unconditional support" for Schultz and Curley; with regard to child victims, Spanier only states, "Protecting children requires the utmost vigilance."
- Spanier emails Baldwin: Spanier says that if the Board is briefed, "it will be nothing more than what we said publicly." The Board meets on a conference call that evening.
- A senior administrator suggests an independent review of Penn State's intercollegiate athletics. Baldwin replies, "If we do this, we will never get rid of this group in some shape or form. The Board will then think that they should have such a group." Spanier agrees.

November 6, 2011

- Board of Trustee meeting: Board places Curley on administrative leave; Schultz re-retires. Spanier issues a second press release stating that Curley and Schultz voluntarily changed their employment status. Board members disagree and express frustration at changed tone of press release. Spanier says he only made "grammatical" edits to the press release.

November 7, 2011

- Pennsylvania Attorney General and Pennsylvania State Police Commissioner announce charges against Sandusky, Schultz and Curley at a press conference.
- A Trustee writes to other Board members: "Unfortunately the statement that was issued last night, in my opinion, did not reflect the sense of the Board."

November 8, 2011

- Board of Trustees conference call: Third press release issued, expressing "outrage" at the "horrifying details" of the Grand Jury presentment, and announcing the formation of an investigative task force to review issues relating to the criminal charges.

November 9, 2011

- Board of Trustees meeting: Board removes Spanier as President; names Rodney Erickson as Interim President (becomes permanent President on November 17, 2011); removes Paterno as Head Football Coach.
- Board sends message to Paterno to phone the Board Vice Chair, who telephonically notifies Paterno that he is no longer Penn State's Head Football Coach.
- Board holds press conference announcing its actions.
- Students demonstrate in protest on Penn State campus.

CHAPTER 1
THE PENNSYLVANIA STATE UNIVERSITY – GOVERNANCE AND ADMINISTRATION

KEY FINDINGS

- Although the University has a central Human Resources department headed by an Associate Vice President, each school and other large departments (such as Intercollegiate Athletics) has its own HR staff. Those individual departments sometimes relaxed or opt out of the standard rules or procedures in implementing University policies and rules.
- The University's administrative controls include over 350 policies and related procedures, however, oversight of compliance with these policies is decentralized and uneven.
- The University has no centralized office, officer or committee to oversee institutional compliance with laws, regulations, policies and procedures; certain departments monitored their own compliance issues with very limited resources.
- The Department of Intercollegiate Athletics ("Athletic Department"), involving approximately 800 student-athletes, has an Associate Athletic Director responsible for compliance and was significantly understaffed.
- Responsibility for Clery Act compliance previously resided with a sergeant in the University Police Department who was only able to devote minimal time to Clery Act compliance.

The Pennsylvania State University ("Penn State" or "University") is one of four public universities within the Commonwealth System of Higher Education and the only "land-grant" educational institution in Pennsylvania. In 1989, the Pennsylvania Legislature designated the University as a "state-related" institution that receives some state appropriated funding, yet remains autonomous from the state's direct control, maintaining its own Board of Trustees ("Board" or "Trustees").

University Park is the central administrative campus for the University located in State College, Pennsylvania. The University has 19 additional campuses located throughout the state, and offers degrees in 160 majors and 150 graduate disciplines. There are 76,460 undergraduate students and 9,745 graduate students that currently attend the University.[5] The University's annual operating budget is approximately $4.1 billion[6] and its endowment is valued at approximately $1.7 billion.[7]

The University's President is responsible for the academic and administrative functions of the institution, including the University's College of Medicine.[8] The academic program includes 17 colleges within the undergraduate and graduate programs, and six research institutes.[9] The President, along with other senior administrators and officials, is responsible for administering University policies and procedures; managing the endowment; handling legal matters; and overseeing the operation of the University's 10 business units, including those related to campus safety, internal audit, human resources, and facilities.

I. KEY LEADERSHIP POSITIONS

A. President

The Board delegates operations and control of the University to the President and his/her designees.[10] As the chief executive officer, the President establishes policies and procedures for operation of the University and reports to the Board on a regular basis.[11] The President also meets regularly with the President's Council, which consists of 17 direct reports including the General Counsel, the Director of the Board of Trustees, and the Senior Vice President - Finance and Business.[12] Graham B. Spanier was President from September 1, 1995 to November 9, 2011. Rodney A. Erickson, appointed on November 9, 2011,[13] is the current President.

B. Executive Vice President and Provost ("EVP-Provost")

The Executive Vice President and Provost serves as chief executive officer in the President's absence and is involved in nearly all operations of the University. The Provost also is the University's chief academic officer, responsible for the academic administration of the University's academic units (colleges, schools and campuses) and research, as well as the general welfare of the faculty and students.[14] The EVP-Provost is a member of the President's Council. Rodney A. Erickson was EVP-Provost from July 1, 1999 until November 9, 2011.[15] Robert N. Pangborn was named the Interim EVP-Provost on November 15, 2011.[16]

C. Senior Vice President – Finance and Business ("SVP-FB")

The Senior Vice President – Finance and Business sits on the President's Council and manages the University's endowment (with assistance from the University Investment Council). The SVP-FB also oversees 10 business units involved with the University's daily operations, including University Police and Public Safety, Office of Internal Audit, and Human Resources. Gary C. Schultz was the SVP--FB from January 1, 1995 to June 30, 2009, when he retired.[17] Albert Horvath replaced Schultz from July 1, 2009 until he resigned on September 14, 2011.[18] Spanier asked Schultz to temporarily return to the position in 2011 while a search was conducted for a successor to Horvath. Schultz held the temporary position from September 15, 2011 until November 6, 2011.[19]

D. General Counsel

Until 2010, the University outsourced most of its legal work to McQuaide Blasko, a law firm in Centre County, Pennsylvania. The Board of Trustees reassessed this legal services model in 2009 based on a study conducted by the SVP-FB and approved the establishment of the Office of General Counsel for the University. The General Counsel is a member of the President's Council. In January 2010, Spanier appointed Cynthia Baldwin, a former Board member and Chair, as the first General Counsel and Vice President of the University. The Board approved Baldwin's appointment on January 22, 2010.[20] Baldwin retired on June 30, 2012 and has been succeeded by Stephen S. Dunham, pending final approval by the Board of Trustees.

II. Principal Administrative Areas

The University has 22 principal administrative areas:[21]

Office of the President
Alumni Relations
Affirmative Action Office
Athletics
Commonwealth Campuses
Development
Diversity
Educational Equity
Executive Vice President and Provost
Finance and Business
General Counsel
Government Affairs
Health Affairs and Medicine
Human Resources
Outreach and Cooperative Extension
Research and Graduate School
Undergraduate Education
University Relations
Student Affairs
Physical Plant
Planning, Institutional Assessment
Vice President for Administration

Several components of these principal administrative areas are particularly important to this investigation: the University Police and Public Safety Department; the Office of Human Resources; the Office of Risk Management; the Office of Internal Audit; Outreach and Intercollegiate Athletics.[22]

A. University Police and Public Safety ("University Police Department")

The University Police Department is part of the Finance and Business unit. It has jurisdiction over all crimes that occur on University grounds. Its officers have the same authority as municipal police officers and enforce both the laws of the Commonwealth of Pennsylvania and University regulations. As part of its responsibilities, the University Police Department collects campus crime statistics that the University must publish annually to comply with The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) ("Clery Act").[23]

The University Police Department is currently staffed with 46 full-time sworn officers. They are assisted by approximately 200 auxiliary officers and escorts who assist with crowd and traffic control at special events and security at residence halls.[24] The police officers provide 24-hour patrol services to the campus and University-owned properties. In addition to the police officers at University Park, approximately 73 full-time and 30 part-time sworn officers work at the various Commonwealth campuses. University Police work regularly with the Pennsylvania State Police, State College Borough Police and surrounding police agencies.[25]

The University Police Department is headed by a Director who reports to the Assistant Vice President of Police and Public Safety ("AVP-Police and Public Safety") who, in turn, reports to the SVP-FB.[26] David E. Stormer was the AVP-Police and Public Safety until April 1998,[27] after which the AVP-Police and Public Safety position was eliminated.[28] In 1998, Thomas R. Harmon was the Director. When Harmon retired in 2005, Stephen G. Shelow became Director. In April 2011, Shelow took over the re-created position of AVP-Police and Public Safety.[29] Tyrone Parham is the current Director and reports to Shelow.[30]

B. Office of Human Resources ("OHR")

The University's OHR is responsible for employee recruitment and background checks, compensation and benefits, professional development and employee relations.[31] Its senior official, Associate Vice President Susan M. Basso, also reports to the SVP-FB.[32] Basso replaced Billie Sue Willits who was Associate Vice President from 1989 until 2010.[33] Although there is a central HR department headed by an Associate Vice President, each school and other large departments (such as Intercollegiate Athletics) has its own HR staff.[34] Those individual departments are charged with enforcing University rules and policies in their own groups but, in practice, they sometimes relaxed or opted out of the standard rules or procedures.[35]

C. Department of Intercollegiate Athletics ("Athletic Department")

The Athletic Department is organized into 30 sports teams and oversees approximately 800 athletes.[36] The Athletic Department is headed by a Director who is not a Vice President, but who sits by invitation on the President's Council and reports to the President. Timothy M. Curley was the Director of Athletics from December 1993 until November 6, 2011.[37] On November 16, 2011, David M. Joyner was named the Acting AD.[38]

The largest sport in the Athletic Department is the football program, which is led by a Head Coach who reports to the AD. Joseph V. Paterno was Head Coach of the football program from 1966 until November 9, 2011.[39] Bill O'Brien was named the new Head Coach on January 6, 2012.[40]

The Athletic Department also conducts sports camps for children. Historically, the Associate Athletic Director for Football Operations and assistant football coaches

have directed the football sports camps without the involvement of the Head Coach.[41] Richard J. Bartolomea has been the Sports Camp Coordinator since 1993.

D. Outreach

The Penn State Outreach program conducts numerous activities, including running various youth camps on campus. The Outreach program is led by the Vice President of Outreach, who also sits on the President's Council. Dr. James H. Ryan was the Vice President of Outreach in 1998 and continued in that position until 2003, when Dr. Craig D. Weidemann took over the position, which he still holds.[42] Outreach oversaw the sports camps until November 2010, when the responsibility was transferred to the Athletic Department.[43]

III. ADMINISTRATIVE CONTROLS

The University's administrative controls include over 350 policies and related procedures designed to ensure reasonable control over its operations.[44] However, as discussed further below, oversight of compliance with such policies is decentralized throughout various University departments and of uneven quality among the departments.

A. Policies and Procedures

The University has had a fairly comprehensive set of policies and procedures in place to safeguard the campus community, promote ethical conduct and encourage crime reporting since 1986. Examples of relevant policies include the following:

- AD12 – Sexual Assault, Relationship and Domestic Violence, and Stalking (created in 1996)
- AD39 – Minors Involved in University-Sponsored Programs or Programs Held at the University and/or Housed in University Facilities (created in 1992)
- AD41 – Sexual Harassment (created in 1998)
- AD47 – General Standards of Professional Ethics (created in 1986)
- AD67 – Disclosure of Wrongful Conduct and Protection from Retaliation (created in 2010)
- AD99 – Background Check Process (created in 2012)
- RA20 – Individual Conflict of Interest (created in 2009)

- RA21 – Institutional Financial Conflict of Interest Involving Sponsored Projects, Dedicated Gifts, Research, Scholarship, and Technology Transfer (created in 2003)
- The Penn State Principles (created in 2001)[45]

B. Oversight and Internal Controls

1. Compliance. The University has no centralized office, officer or committee to oversee institutional compliance with laws, regulations, policies and procedures.[46] Rather, certain departments monitor their own compliance issues, some with very limited resources. As an example, the Athletic Department has an Associate Athletic Director responsible for National Collegiate Athletic Association ("NCAA") compliance, but that group is significantly understaffed.[47] The responsibility for Clery Act compliance previously resided with a sergeant in the University Police Department who was able to devote only minimal time to Clery Act compliance.[48] The University Police Department appointed a full-time Clery Compliance Officer on March 26, 2012.[49]

2. Risk Management. The University's Office of Risk Management ("ORM") identifies and manages potential risks throughout the University relating to financial, physical and reputational loss. The scope of the ORM's work includes managing risks involving physical, personnel and financial resources, privacy, and legal and regulatory compliance,[50] but in reality, most of its work centers on assessing contract-based risks.[51]

3. Audit. The University has internal and external auditing processes that focus on financial and business matters. The Office of Internal Audit ("OIA"), established in 2003, evaluates a range of operational risks throughout the University and oversees an "Ethics Hotline" for reporting financial fraud and human resources issues.[52] The OIA has full access to all University activities, records, property and personnel, including direct access to the President of the University and the Board of Trustees.[53] The OIA is led by an Internal Audit Director who reports to the SVP-FB, and to the Chairman of the Board of Trustees' Subcommittee on Audit[54] (recently renamed the Committee on Finance, Business and Capital Planning).

The OIA has conducted audits relating to compliance with various University policies and procedures, although it is not responsible for ensuring compliance with such policies.[55] The OIA has reviewed the University policies for screening summer camp counselors, but not the policies regarding background checks of University

employees.[56] The OIA has not conducted any audits regarding Clery Act compliance or the safety of minors on campus or summer camps.[57]

The internal auditors issue annual reports on financial matters, which are shared with the Board at its annual meetings. They also perform annual audits on the University's compliance with certain NCAA rules.[58] In addition to the internal audits conducted by the OIA, independent accountants also audit the University.[59]

CHAPTER 2
RESPONSE OF UNIVERSITY OFFICIALS TO THE ALLEGATION OF CHILD SEXUAL ABUSE AGAINST SANDUSKY – 1998

KEY FINDINGS

- Before May 1998, several staff members and football coaches regularly observed Sandusky showering with young boys in the Lasch Building (now the East Area Locker Building or "Old Lasch"). None of the individuals interviewed notified their superiors of this behavior.
- University Police and the Department of Public Welfare responded promptly to the report by a young boy's mother of a possible sexual assault by Sandusky in the Lasch Building on May 3, 1998.
- While no information indicates University leaders interfered with the investigation, Spanier, Schultz, Paterno and Curley were kept informed of the investigation.
- On May 5, 1998, Schultz's notes about the incident state: "Is this opening of pandora's box? Other children? "
- On June 9, 1998, Schultz emails Spanier and Curley: "I think the matter has been appropriately investigated and *I hope it is now behind us* [emphasis added]."
- Detective recalled interviewing Sandusky in the Lasch Building so as not to put him "on the defensive." The detective advised Sandusky not to shower with any child and Sandusky said he "wouldn't."At the conclusion of the investigation, no charges were filed against Sandusky.
- Spanier, Schultz, Paterno and Curley did not even speak to Sandusky about his conduct on May 3, 1998 in the Lasch Building.
- Despite their knowledge of the criminal investigation of Sandusky, Spanier, Schultz, Paterno and Curley took no action to limit Sandusky's access to Penn State facilities or took any measures to protect children on their campuses.
- Spanier and Schultz failed to report the 1998 investigation to the Board of Trustees.
- Sandusky was convicted of several assaults that occurred after the 1998 incident. Some of these sexual assaults against young boys might have been prevented had Sandusky been prohibited from bringing minors to University facilities and University football bowl games.

I. Sandusky's Association with Penn State

Gerald A. Sandusky ("Sandusky") was a student at Penn State from 1962-1966. While an undergraduate he played on the football team, and after his graduation in 1966 he became a graduate assistant in the football program for one year. Sandusky was a physical education instructor and coach at Juniata College from 1967-1968 and at Boston University from 1968-1969. He returned to Penn State in 1969 as an assistant football coach and assistant professor of physical education. He held the positions for 30 years until his retirement in 1999. Sandusky reported to Head Football Coach Joseph Paterno ("Paterno") for his entire career at Penn State. Sandusky was granted tenure in 1980.

Sandusky gained a national reputation as a successful defensive coach. He was well-known in the community and highly thought of for his work with youth.

Sandusky authored or coauthored three books - two about coaching linebackers, and *Touched: The Jerry Sandusky Story,* an autobiography that focuses on his claimed passion for helping disadvantaged youth. According to Sandusky's autobiography, it was his interest in young people that motivated him to found the "Second Mile," a non-profit organization that provides various services and activities for disadvantaged boys and girls in Pennsylvania. Many Penn State officials and some members of the Board of Trustees ("Board" or "Trustees") or their families supported the Second Mile through volunteer service and donations. Over the years, the University has allowed the Second Mile to use its facilities for a variety of educational and support programs for youth.

A. Sandusky's Criminal Activity 1995-1998

Before May 1998, several staff members and football coaches regularly observed Sandusky showering with young boys in the Lasch Building (now the East Area Locker Building or "Old Lasch"). None of the individuals interviewed by the Special Investigative Counsel notified their superiors of this behavior. Former Coach Richard Anderson testified at Sandusky's trial in June 2012 that he often saw Sandusky in the showers with children in the football facilities but he did not believe the practice to be improper.[60]

The Centre County jury convicted Sandusky in June 2012 of assaulting three different boys at Penn State's football facilities and other places on campus before May 1998. These assaults occurred against Victim 4 (assaults on various dates from October 1996 to December 2000 at, among other places, the East Area Locker Building ("Old Lasch") and Lasch Football Building ("Lasch Building"); Victim 7 (assaults on various dates from September 1995 to December 1996 at East Area Locker Building and elsewhere); and Victim 10 (assaults on various dates from September 1997 to July 1999 in an outdoor pool at University Park and elsewhere).[61]

Another adult male, not part of the June 2012 Sandusky trial, alleged that he was molested by Sandusky over 100 times as a child and that Sandusky took him to the Penn State Rose Bowl game in Pasadena, California in 1995.[62] He also said that Sandusky brought him to the Penn State football locker room showers where Sandusky fondled him and performed oral sex on him.

II. Events of May 3, 1998 at the Lasch Building

According to Centre County court records and University Police Department records, on the afternoon of May 3, 1998, Sandusky called the home of an 11-year-old boy[63] and invited him to go to a Penn State athletic facility that evening to exercise.[64] The boy, who met Sandusky through the Second Mile youth organization about a month earlier, accepted the invitation.[65] Sandusky picked up the boy at about 7:00 p.m., and took him to the Lasch Building on the Penn State campus.[66] As the central facility for Penn State football, the Lasch Building contained a number of exercise machines as well as dressing rooms, showers and Sandusky's office, which for many years was the office closest to Paterno's.

Sandusky and the boy went to a coaches' locker room, where the two wrestled and Sandusky tried to "pin" the boy.[67] After wrestling, the boy changed into clothes that Sandusky provided and followed him to work out on exercise machines.[68] When they finished exercising, Sandusky kissed the boy's head and said, "I love you."[69] Sandusky and the boy then went to a coaches' locker room[70] where Sandusky turned on the showers and asked the boy if he wanted to shower.[71] The boy agreed and began to turn on a shower several feet from Sandusky.[72] Sandusky directed him to a shower head closer to Sandusky, saying it took some time for the water to warm up.[73]

While in the shower, Sandusky wrapped his hands around the boy's chest and said, "I'm gonna squeeze your guts out."[74] The boy then washed his body and hair.[75] Sandusky lifted the boy to "get the soap out of" the boy's hair, bringing the boy's feet "up pretty high" near Sandusky's waist.[76] The boy's back was touching Sandusky's chest and his feet touched Sandusky's thigh. [77] The boy felt "weird" and "uncomfortable" during the time in the shower.[78]

Sandusky brought the boy home around 9:00 p.m. and left. The boy's mother noticed that her son's hair was wet and he told her that he had showered with Sandusky. The mother also observed that her son was acting in a way that he did when he was upset about something,[79] that he did not sleep well and took another shower the next morning.[80]

III. Investigation of Sandusky – 1998

A. May 4–6, 1998: Police Report, Initial Investigation and Psychological Evaluation of the Victim

At 7:43 a.m. on May 4, 1998, the boy's mother called Alycia Chambers, a licensed State College psychologist[81] who had been working with her son, to see if she was "overreacting" to Sandusky's showering with her son.[82] The psychologist assured the mother that she was not overreacting and told her to make a report to the authorities.[83] The boy's mother called the University Police Department and reported the incident to Detective Ron Schreffler around 11:00 a.m.[84]

Around 11:30 a.m., Detective Schreffler interviewed the boy.[85] The boy told Schreffler what happened with Sandusky the previous evening,[86] and added that a 10-year-old friend of his had been in a shower with Sandusky on another occasion where Sandusky similarly squeezed the friend.[87]

Later that day, Chambers met with the boy[88] who told her about the prior day's events and that he felt "like the luckiest kid in the world" to get to sit on the sidelines at Penn State football games.[89] The boy said that he did not want to get Sandusky in "trouble," and that Sandusky must not have meant anything by his actions.[90] The boy did not want anyone to talk to Sandusky because he might not invite him to any more games.[91] Chambers made a report to the Pennsylvania child abuse line[92] and also consulted with colleagues. Her colleagues agreed that "the incidents meet all of our

definitions, based on experience and education, of a likely pedophile's pattern of building trust and gradual introduction of physical touch, within a context of a 'loving,' 'special' relationship."[93]

That afternoon Schreffler contacted John Miller, a caseworker with the Centre County Children and Youth Services ("CYS") about the allegation.[94] However, there were several conflicts of interest with CYS's involvement in the case[95] (e.g., CYS had various contracts with Second Mile - including placement of children in a Second Mile residential program;[96] the Second Mile's executive director had a contract with CYS to conduct children's evaluations;[97] and the initial referral sheet from Chambers indicated the case might involve a foster child).[98] In light of these conflicts, the Department of Public Welfare ("DPW") took over the case from CYS on May 5, 1998. DPW officials in Harrisburg, Pennsylvania took the lead because of Sandusky's high profile and assigned it to caseworker Jerry Lauro.[99]

Schreffler also contacted Karen Arnold, Centre County prosecutor in the District Attorney's office, to discuss the case.[100] Schreffler had decided to call the prosecutor at the outset of the investigation so he did not "have to worry about Old Main sticking their nose in the investigation," which he knew from experience could occur.[101]

Around 8:00 p.m. on May 4, 1998, Schreffler and Miller spoke with the boy's friend about his contact with Sandusky.[102] The friend stated that he had gone to the Penn State campus on two occasions with Sandusky, whom he met through the Second Mile.[103] Sandusky took him to the Lasch Building, where they wrestled and then showered together.[104] While in the shower, Sandusky came from behind and lifted him in a bear hug.[105] Following this interview, Schreffler and Miller re-interviewed the first boy.

On May 6, 1998, Schreffler reviewed voicemail messages and caller identification information from the home of the victim. Sandusky had called the boy twice on May 3, 1998 and once on May 6, 1998. Sandusky left a voicemail on May 6, 1998, inviting the boy to work out. The boy did not return the call.[106]

B. May 7–9, 1998: A Second Evaluation of the Victim

On May 7, 1998, Chambers provided a copy of her written report to Schreffler. Chambers said she was pleased with the response of the agencies involved, as the "gravity of the incidents seems to be well appreciated."[107]

Also on May 7, 1998, Lauro interviewed the boy's mother. According to Schreffler's notes, Lauro had received copies of the boy's recorded statement,[108] yet Lauro advised the Special Investigative Counsel that he did not have full access to the facts of the case and was unaware of psychologist Chambers' evaluation.[109] Lauro said that if he "had seen [Chambers'] report, I would not have stopped the investigation," which he thought at the time fell into a "gray" area and involved possible "boundary" issues.[110]

Schreffler had a discussion with Arnold that day as well. Arnold told Schreffler to postpone a second psychological evaluation of the boy until an additional investigation could be completed.[111] Nonetheless, a second evaluation of the boy occurred on May 8, 1998 as part of DPW's investigation. Counselor John Seasock, who had a contract to provide counseling services to CYS, conducted the evaluation.[112]

During the meeting with Seasock the boy described the incident with Sandusky.[113] Given that the boy did not feel forced to engage in any activity and did not voice discomfort to Sandusky, Seasock opined 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."[114] Seasock's report ruled out that the boy "had been placed in a situation where he was being 'groomed for future sexual victimization.'"[115] Seasock recommended that someone speak with Sandusky about what is acceptable with young children and explained, "The intent of the conversation with Mr. Sandusky is not to cast dispersion (sic) upon his actions but to help him stay out of such gray area situations in the future."[116]

On May 9, 1998, Schreffler discussed the outcome of Seasock's evaluation with Seasock.[117] While Seasock said he identified some "gray areas," he did not find evidence of abuse and had never heard of a 52-year-old man "becoming a pedophile."[118] When Schreffler questioned Seasock's awareness of details of the boy's experience, Seasock acknowledged he was not aware of many of the concerns Schreffler raised but

stated Sandusky "didn't fit the profile of a pedophile,"[119] and that he couldn't find any indication of child abuse.

Seasock served as an independent contractor at Penn State from 2000 to 2006. His first payment from Penn State was made on April 20, 2000 for $1,236.86.[120] His total payments were $11,448.86.[121] The Special Investigative Counsel did not find any evidence to suggest that these payments had any relation to Seasock's work on the Sandusky case in 1998. According to the Second Mile's counsel, there was no business relationship between Seasock and the Second Mile.[122]

C. May 12-19, 1998: Police Overhear Sandusky Admit to Showering with the Victim

On May 12, 1998, Sandusky called the boy again and arranged to pick him up at his house the next day. On May 13, 1998, Schreffler and a State College police officer went to the boy's house and hid inside. When Sandusky arrived they covertly listened in to his conversation with the boy's mother.[123] Schreffler overheard Sandusky say he had gone to the boy's baseball game the night before but found the game had been cancelled.[124] The boy's mother told Sandusky that her son had been acting "different" since they had been together on May 3, 1998[125] and asked Sandusky if anything had happened that day. Sandusky replied, "[w]e worked out. Did [the boy] say something happened?"[126] Sandusky added that the boy had taken a shower, and said "[m]aybe I worked him too hard."[127] Sandusky also asked the boy's mother if he should leave him alone, and she said that would be best. Sandusky then apologized.[128]

On May 19, 1998, at the direction of the police, the boy's mother met with Sandusky again in her home. As they listened from another room,[129] the officers heard the mother ask Sandusky about the bear hug in the shower, and whether his "private parts" touched the boy while they hugged. Sandusky said, "I don't think so ... maybe."[130] He also said he had showered with other boys before, but denied having "sexual feelings" when he hugged her son.[131] He admitted telling the boy that he loved him. Sandusky asked to speak with her son and the mother replied that she did not feel that was a good idea as her son was confused and she did not want Sandusky to attend any of the boy's baseball games. Sandusky responded, "I understand. I was wrong. I wish I could get forgiveness. I know I won't get it from you. I wish I were dead."[132]

The law enforcement officers did not question Sandusky at this time. Had the officers been better trained in the investigation of child sexual abuse they would have

interrogated Sandusky directly after his confrontation with the boy's mother. A timely interview with Sandusky may have elicited candid responses such as the identification of other victims.

D. Late May 1998: District Attorney's Decision to Not Prosecute Sandusky

Sometime between May 27, 1998 and June 1, 1998, the local District Attorney declined to prosecute Sandusky for his actions with the boy in the shower in the Lasch Building on May 3, 1998. A senior administrator of a local victim resource center familiar with the 1998 incident said the case against Sandusky was "severely hampered" by Seasock's report.[133]

The District Attorney at the time of the 1998 incident has been missing for several years and has been declared dead. The prosecutor assigned to the Sandusky case declined to be interviewed by the Special Investigative Counsel.

E. June 1, 1998: University Police Speak with Sandusky

On June 1, 1998, Schreffler and Lauro interviewed Sandusky. Lauro said he did not discuss an interview strategy with Schreffler before meeting with Sandusky. Lauro recalled that the interview took place in a small weight room in the Lasch Building while Sandusky was seated on a weight bench and [134] that Lauro asked most of the questions.[135] Schreffler recalled that the interview was conducted in an office in the Lasch Building so as not to put Sandusky on the defensive.[136]

According to the interview notes in the case file, Sandusky told the interviewers that he hugged the boy in the shower but said there "wasn't anything sexual about it." Sandusky also said that he had showered with other boys in the past. Lauro advised Sandusky that it was a mistake to shower with kids. Sandusky agreed and said, "honest to God nothing happened."[137] Schreffler advised Sandusky not to shower with any child and Sandusky replied that he "wouldn't."[138] Schreffler and Lauro also told Sandusky that the police[139] could not determine if a sexual assault occurred. No notes or records reflect that Schreffler or Lauro consulted with the District Attorney during or after the interview.

Lauro also told the Special Investigative Counsel that he never spoke to Schreffler about whether improper actions took place between Sandusky and the boy.[140] Lauro stated, "it wasn't until Schreffler told me that there wasn't anything to the case

that I closed mine."[141] Schreffler's file notes state that Lauro agreed that no sexual assault occurred.[142]

IV. Involvement of University Officials in The Sandusky Investigation

A. May 4 - 30, 1998: Notifications and Updates to Spanier, Schultz, Paterno and Curley

On the advice of counsel, Schultz and Curley declined to meet with the Special Investigative Counsel to discuss their knowledge and actions pertaining to the 1998 Sandusky incident. However, the Special Investigative Counsel discovered and reviewed numerous emails between Spanier, Schultz and Curley concerning the incident, and reviewed some of Schultz's files and handwritten notes as well. These documents provide a contemporaneous record of the 1998 events.

It is not known how Schultz learned of the incident involving Sandusky, but it is clear that he knew of it by the time he attended a meeting about it at 5:00 p.m. on May 4, 1998. In documents Schultz held confidentially in his office and that had been concealed from the Special Investigative Counsel, Schultz had handwritten notes summarizing this meeting.[d] Other notes written by Schultz and contemporaneous records pertaining to the matter indicate that then-University Police Department Chief Thomas Harmon regularly informed Schultz of the investigation's progress. In fact, when the case began, Harmon told Schreffler that he wanted to be kept updated on the case so he could "send everything up the flag pole" and advise Schultz.[143]

Schultz's confidential notes dated May 4, 1998 state: a woman reported that her "11 1/2 yr old son" who had been involved with the Second Mile was taken by "Jerry" to the football locker rooms; that taped police interview reflected "Behavior - at best inappropriate @ worst sexual improprieties;" the conduct was "At min – Poor Judgment;" that Sandusky and the child were in the shower, and Sandusky "came up behind & gave him a bear hug - said he would squeeze guts out – all;" and that the boy's ten-year-old friend "claims same thing went on with him." The notes conclude with the words "Critical issue - contact w genitals? Assuming same experience w the second boy? Not criminal."[144]

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[d]Exhibit 2-H. Schultz's notes do not indicate who was present at the meeting.

It is not clear if Schultz, or another person, determined the matter was "not criminal" on the first day of the investigation. Schultz's confidential notes also show that sometime before 9:00 a.m. on May 5, 1998, Harmon reported to Schultz that the victim had been re-interviewed and had provided additional details about the incident[145] and demonstrated "on chair how Jerry hugged from back hands around abdmin (sic) & down to thighs - picked him up and held him at shower head - rinse soap out of ears."[e] The notes also state that "the mother had spoken to a psychologist who had been seeing the boy, who would call child abuse hot line & will generate an incident no - with Dept of Public Welfare;" and that the police interviewed the second boy who reported "Similar acct. Locker room. Wrestling. Kissed on head. Hugging from behind in shower. No allegation beyond that."[146] Schultz's notes end with these questions: "Is this opening of pandora's box? Other children?"[147]

By May 5, 1998, Schultz had communicated with Curley about the Sandusky incident. In an email from Curley to Schultz and Spanier at 5:24 p.m. captioned "Joe Paterno," Curley reports, "I have touched base with the coach. Keep us posted. Thanks."[f] In an interview with the Special Investigative Counsel, Spanier said he did not recall this email, and pointed out that he received numerous emails everyday that provide him with updates on various issues.[148] In a written statement from Spanier, he characterized the May 5, 1998 email as a "vague reference with no individual named."[g]

On May 5, 1998, Schultz also learned from Harmon that the Penn State University Police were "going to hold off" making any crime log entry for the Sandusky allegations.[149] The crime log entry would have been a public record of the incident concerning Sandusky with the boy, yet Harmon reported to Schultz before noon on May 5 that "[w]e're going to hold off on making any crime log entry. At this point in time I can justify that decision because of the lack of clear evidence of a crime."[150]

Schreffler said he delayed pulling an incident number for the Sandusky investigation because it was his normal procedure for drug investigations and he was not initially sure of what type of investigation he had.[151] Schreffler did not know why the report ultimately was opened as an "Administrative Information" file but said he

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[e] Exhibit 2-I.

[f] Exhibit 2-A (Control Number 00643730).

[g] Exhibit 2-J.

may have been the one who decided on the label.[152] All pages of the police report are labeled "Administrative Information."[153]

Schreffler also noted that no referral of the Sandusky incident was made to the Penn State Office of Human Resources ("OHR").[154] Schreffler said such referrals routinely were made in other cases.[155] A senior OHR official recalled no report of the Sandusky incident in 1998, and the OHR files contained no such report.[156] The official thought the Sandusky case was so "sensitive" that it was handled by Schultz alone.[157] The official said no written policy required OHR to be notified by the campus police of incidents involving employees, but it was "very rare" for OHR not to be notified.[158]

Harmon continued to provide Schultz with information about DPW's role in the investigation and their potential conflict of interest with the Second Mile.[159] Harmon provided an update to Schultz on May 8, 1998 reporting that Lauro "indicated that it was his intent to have a psychologist who specializes in child abuse interview the children. This is expected to occur in the next week to week and a half. I don't anticipate anything to be done until that happens."[160]

As the investigation progressed, Curley made several requests to Schultz for updates. On May 13, 1998 at 2:21 p.m., Curley emailed Schultz a message captioned "Jerry" and asked, "Anything new in this department? Coach is anxious to know where it stands."[h] Schultz forwarded Curley's note to Harmon,[161] who provided an email update that Schultz then forwarded to Curley.[162] The reference to Coach is believed to be Paterno.

On May 18, 1998, Curley requested another update by email.[i] Schultz responded that there was no news and that he did not expect to hear anything before the end of the week.

On May 30, 1998, Curley asked for another update by email.[163] Schultz was on vacation at the time, but responded on June 8, 1998, saying that he understood before he left for vacation that "DPW and Univ Police services were planning to meet with him. I'll see if this has happened and get back to you."[164]

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[h]Exhibit 2-B (Control Number 00641616).

[i]Exhibit 2-C (Control Number 00644098).

B. June 1 - 10, 1998: Report to University Officials on Sandusky Interview and Case Closure

Sometime between May 27 and June 1, 1998, when he learned Sandusky would not face criminal charges, Harmon called Schultz to advise him of the District Attorney's decision.[165] On June 1, 1998, the same day as Sandusky's interview, Harmon sent Schultz an email describing the interview. Harmon reported that the DPW caseworker and Schreffler "met discreetly" with Sandusky, and his "account of the matter was essential[ly] the same as the child's."[j] Sandusky said "he had done this with other children in the past." The investigators told Sandusky there "was no criminal behavior established [and] that the matter was closed as an investigation." Sandusky was "a little emotional" and concerned as to how this incident might affect the boy. Harmon's message to Schultz did not mention that Sandusky was told not to shower with children.

On June 9, 1998, after returning from a vacation, Schultz updated Curley and Spanier on the Sandusky interview by email. He wrote that the investigators:

> met with Jerry on Monday and concluded that there was no criminal behavior and the matter was closed as an investigation. He was a little emotional and expressed concern as to how this might have adversely affected the child. I think the matter has been appropriately investigated and *I hope it is now behind us.* [emphasis added].[k]

Schultz's message to Curley and Spanier also did not mention that Sandusky was advised not to shower with children.

Neither Harmon nor Schultz's emails set forth, or suggest, that they planned to discuss the incident with Sandusky, to review or monitor his use of University facilities, to discuss his role at the Second Mile and his involvement in Second Mile overnight programs operated in Penn State facilities, or to consider the propriety of a continuing

[j]Exhibit 2-D (Control Number 00645223).
[k]Exhibit 2-E (Control Number 00646346).

connection between Penn State and the Second Mile. There also is no mention of whether Sandusky should receive counseling.[l]

Further, the emails do not indicate that any officials attempted to determine whether Sandusky's conduct violated existing University policy or was reportable under The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) ("Clery Act"). The emails also do not indicate if any person responsible for Penn State's risk management examined Sandusky's conduct. A risk management review might have resulted in the University providing contractual notice to its insurers about the incident, imposition of a general ban on the presence of children in the Lasch Building, or other limitations on Sandusky's activities.[m]

After Curley's initial updates to Paterno, the available record is not clear as to how the conclusion of the Sandusky investigation was conveyed to Paterno.[166] Witnesses consistently told the Special Investigative Counsel that Paterno was in control of the football facilities and knew "everything that was going on."[167] As Head Coach, he had the authority to establish permissible uses of his football facilities. Nothing in the record indicates that Curley or Schultz discussed whether Paterno should restrict or terminate Sandusky's uses of the facilities or that Paterno conveyed any such expectations to Sandusky. Nothing in the record indicates that Spanier, Schultz, Paterno or Curley spoke directly with Sandusky about the allegation, monitored his activities, contacted the Office of Human Resources for guidance, or took, or documented, any personnel actions concerning this incident in any official University file.

Spanier told the Special Investigative Counsel that no effort was made to limit Sandusky's access to Penn State.[168] Spanier said he was unaware that Sandusky

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[l] When Penn State officials considered meeting with Sandusky in 2001 in response to allegations that he brought children into the Lasch Building showers, Curley wrote "I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help." Exhibit 2-F (Control Number 00679428).

[m] Penn State officials were familiar with the issues of liability that could arise from Sandusky bringing minors to the Lasch Building. For example, notes maintained by Paterno reflect that Sandusky proposed several continuing connections with Penn State when he retired in 1999. Among these connections was that he would have continuing "[a]ccess to training and workout facilities." A handwritten note on this proposal reads: "Is this for personal use or 2nd Mile kids. No to 2nd Mile. Liability problems." Exhibit 2-G (Control Number JVP000027).

continued to run camps at Penn State and have access to children sleeping in Penn State dormitories.[169]

Spanier never declared Sandusky a "persona non grata" on Penn State campuses, as he did toward a sports agent who, before the 1997 Citrus Bowl, bought $400 worth of clothing for a Penn State football player. Spanier was very aggressive in that case[170] and banned the agent from campus. Spanier said the agent "fooled around with the integrity of the university, and I won't stand for that."[171] The University conducted its own investigation, and provided the results to law enforcement.[172] In an email dated May 13, 1998, Spanier said, "The idea is to keep [the sports agent] off campus permanently, to keep him away from current athletes, and to keep him away from current graduates or students whose eligibility has recently expired."[173]

Despite his initial concern about "Old Main sticking their nose in the investigation" Schreffler told the Special Investigative Counsel that no one from the University interfered with the Sandusky investigation.[174] The Special Investigative Counsel did not find any evidence of interference by University administrators with the 1998 Sandusky investigation.

C. 2011 Grand Jury Testimony of Spanier, Schultz, Paterno and Curley

When he appeared before the Grand Jury in January 2011, to answer questions about the 1998 incident involving Sandusky, Schultz testified that he did not recall that he, "knew anything about the details of what the allegation was from the mother." He stated, "I do recall there was a mother with a young boy who reported some inappropriate behavior of Jerry Sandusky. But I don't recall it being reported in the Lasch Building or anything of that sort."[175] On November 4, 2011, Schultz emailed Wendell Courtney, Penn State's former outside legal counsel, stating, "I was never aware that 'Penn State police investigated inappropriate touching in a shower' in 1998."[176]

At the same Grand Jury hearing in January 2011, Curley was asked if an incident involving alleged criminal conduct by a coach on campus would be brought to his attention. Curley said he thought so, but did not know. Curley then was asked, "[b]ut the 1998 incident was never brought to your attention?" He replied, "[n]o, ma'am, not that I recall."[177]

Paterno also testified in January 2011 before the Grand Jury. Paterno was asked, "Other than the [2001] incident that Mike McQueary reported to you, do you know in any way, through rumor, direct knowledge or any other fashion, of any other inappropriate sexual conduct by Jerry Sandusky with young boys?" Paterno responded, "I do not know of anything else that Jerry would be involved in of that nature, no. I do not know of it. You did mention — I think you said something about a rumor. It may have been discussed in my presence, something else about somebody. I don't know. I don't remember, and I could not honestly say I heard a rumor."[178] The Special Investigative Counsel requested an interview with Paterno in December 2011. Through his counsel, Paterno expressed interest in participating but died before he could be interviewed. Paterno's family has publicly denied that Paterno had knowledge of the 1998 incident.[179]

Spanier told the Special Investigative Counsel that his first knowledge of the 1998 event came when he was before the Grand Jury on April 13, 2011.[180] Yet notes from Spanier's interview on March 22, 2011 with members of the Attorney General's Office reflect he was asked, "[d]id you have info @ the 1998 incident?"[181] Cynthia Baldwin, who was then General Counsel, confirmed to the Special Investigative Counsel that Spanier was asked about the 1998 event in the interview before the Grand Jury appearance.[182] According to Baldwin, after the interview, Spanier said the interview "was no big deal" and he was "quite comfortable" going before the Grand Jury.[183] Finally, on January 4, 2011, when State Police came to Penn State to obtain a copy of the 1998 police report concerning Sandusky, Albert Horvath, then Senior Vice President - Finance and Business said he would "let Graham and Tim know" that the police requested the 1998 report as part of a "Jerry Sandusky investigation which has been ongoing for the past year."[184]

D. University Officials Do Not Notify the Board of the Sandusky Investigation

The Penn State Board of Trustees met on May 14 and 15, 1998. Nothing in the Board's records or from the Special Investigative Counsel's interviews of Trustees indicates that Spanier, or any University official, notified the Board of the Sandusky investigation, or that there were any contemporaneous discussions with Board members of the 1998 Sandusky investigation. In 1998, the Board of Trustees did not have a process or a committee structure for receiving regular reports from University officials on risk issues such as the Sandusky investigation.

E. Sandusky's Criminal Activity 1998 - 2001

The Centre County jury convicted Sandusky in June 2012 of assaulting five different boys at Penn State's football facilities and other places on campus after May 1998. These assaults occurred against Victim 2 (assault in the Lasch Building in February 2001); Victim 3 (assaults on various dates from July 1999 to December 2001 in the Lasch Building and at other places); Victim 4 (assaults on various dates from 1999 to 2000 in Old Lasch and the Lasch Building and a Penn State football bowl trip to Texas in December 1999); Victim 5 (assault in August 2001 in the Lasch Building); and Victim 8 (assault in November 2000 in the Lasch Building).[185]

CHAPTER 3
SANDUSKY'S RETIREMENT FROM THE UNIVERSITY – 1999

KEY FINDINGS

- Before the May 1998 incident, Sandusky knew that he was not going to be selected to succeed Joseph Paterno as Head Football Coach at Penn State.
- Curley talked with Sandusky about his future role with the football program and offered him the possibility of an Assistant Athletic Director position.
- Sandusky explored taking an early retirement and requested several benefits from Penn State (i.e., a $20,000 yearly annuity in addition to his pension; to run a middle school youth football camp; "active involvement in developing an outreach program featuring Penn State Athletics;" and finding "ways for [Sandusky] to continue to work with young people through Penn State."
- On June 29, 1999, Spanier approved a one-time lump sum payment to Sandusky of $168,000. A senior University Controller's office official and a retired Senior Vice President both stated that they had never known the University to provide this type of payment to a retiring employee.
- While Sandusky's retirement agreement was being finalized, Curley sought and received authorization for Sandusky to be re-employed as an "emergency hire" for the 1999 football season.
- Sandusky was also awarded "emeritus" rank, with special privileges including access to the University's East Area locker room complex. Sandusky's positions in the University did not meet the general eligibility requirements for this honor, yet University administrators found themselves in a "bind" because Spanier had promised the emeritus rank to Sandusky.
- The Special Investigative Counsel found no evidence to indicate that Sandusky's retirement was related to the police investigation of him in 1998.

I. Sandusky's Decision to Retire

Before the May 3, 1998 incident in the Lasch Building, Curley had already spoken with Sandusky about his future role in the University's football program. On February 8, 1998, for example, Curley emailed Spanier and Schultz, stating that he had several conversations over the past week with Sandusky about taking an Assistant Athletic Director position.[n] Curley stated in the email that Paterno had also met with Sandusky about his future with Penn State football.[186]

On February 9, 1998, Curley emailed Schultz and Spanier reporting that Sandusky did not want the Assistant Athletic Director position, and would continue coaching for the next year.[o] Curley told them Sandusky "will have 30 years in the system next year, which will give him some options after next season."[187] He added, "Joe tells me he made it clear to Jerry he will not be the next head coach."[188]

Curley's reference to the "system" is the Pennsylvania State Employees' Retirement System ("SERS") to which Sandusky belonged. From July 1, 1998 to June 30, 1999, SERS provided a "30-and-out" retirement window, allowing members like Sandusky who had 30 years of service to retire at any age without the usual early retirement penalty, and receive all retirement benefits earned to that date.[189] Without the window, the SERS code required that members have 35 years of credited service at any age - or reach age 60 - before they could retire with full benefits.[190]

Sandusky and others explored the possibility of starting a Division III football program at the University's Altoona campus where Sandusky could coach. Sandusky even spoke with a businessman who was a supporter of Penn State athletics in March 1998 about financing for the plan.[191] Paterno's undated, handwritten notes, maintained in his home office and provided to the Special Investigative Counsel by his attorney, discussed the plan, and suggested that Sandusky work on making "FB at Altoona Happen" until the "window closes."[192] If Sandusky could not get the program established before the window closed, "he retires with a pension fully vested with a severance pkg. which could include deferred income or a supplemental payment for 20 year (sic)."[193]

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[n]Exhibit 3-A (Control Number 00644655).

[o]Exhibit 3-B (Control Number 03008143).

On May 19, 1998, a senior administrator in University Development and Alumni Relations emailed Spanier, Curley, Schultz and others raising questions to consider while conducting "a limited feasibility study" of football at Altoona that Spanier had requested.[194] The administrator reported that the financial support needed for the program could not be raised.[195] The Special Investigative Counsel found no evidence that the decision regarding the establishment of a football program at Altoona was related to the incident in the Lasch Building on May 3, 1998.[196]

II. Negotiating the Agreement

On January 19, 1999, Curley wrote to Spanier and Schultz to report on a meeting with Sandusky.[p] Curley told them that Sandusky "is interested in going one more year and then transition into a spot that handles our outreach program."[197] Curley noted as a postscript that "[Sandusky] is not pleased about the entire situation as you might expect."[198]

Several notes and documents provided by Paterno's attorney to the Special Investigative Counsel pertain to Sandusky's retirement.[199] One page of these notes, which appear to be in Paterno's handwriting, relate a conversation, or planned conversation, between Paterno and Sandusky concerning Sandusky's coaching future. The notes state:

> We know this isn't easy for you and it isn't easy for us or Penn State. Part of the reason it isn't easy is because I allowed and at times tried to help you with your developing the 2nd Mile. If there were no 2nd Mile then I believe you belief [sic] that you probably could be the next Penn State FB Coach. But you wanted the best of two worlds and I probably should have sat down with you six or seven years ago and said look Jerry if you want to be the Head Coach at Penn State, give up your association with the 2nd Mile and concentrate on nothing but your family and Penn State. Don't worry about the 2nd Mile – you don't have the luxury of doing both. One will always demand a decision of preference. You are too deeply involved in both.[q]

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[p]Exhibit 3-C (Control Number 03013385).

[q]Exhibit 3-D (JVP000017).

One of the documents provided from Paterno's file is a letter signed by Sandusky, dated May 28, 1999. In the letter Sandusky acknowledged that he would not be the next Penn State football head coach, and outlined options for his future.[r] Sandusky wanted an on-going relationship between the Second Mile and Penn State, as well as continuing "visibility" at Penn State.[200] Sandusky also wanted "active involvement in developing an outreach program featuring Penn State Athletes"[201] and sought "ways for [him] to continue to work with young people through Penn State."[202]

Also in the file was a "Retirement Requests" list from Sandusky.[s] This list included a request for a $20,000 yearly annuity to cover the difference between Sandusky's retiring with 30 years of service and retiring with 35 years of service,[203] and a title reflecting his relationship with Penn State. Sandusky also asked to run a middle school youth football camp.[204] Handwriting on the note states: "Volunteer Position Director – Positive Action for Youth."[205] An employee who worked closely with Paterno for 10 years and knew his handwriting identified this note as written by Paterno.[206]

On June 13, 1999, Curley updated Spanier and Schultz by email advising that Sandusky was leaning toward retirement if Penn State would agree to the $20,000 yearly annuity. Curley noted, "Joe did give him the option to continue to coach as long as [Paterno] was the coach."[t] Curley suggested another option of Sandusky "coaching three more seasons and we get creative with his base salary or some other scheme that makes him whole and then some, but doesn't cost us an arm and a leg," and stated he was not comfortable with the annuity.[207] Curley noted that "[s]ince Joe is okay with [Sandusky] continuing to coach this might make more sense to all concerned."[208] The Special Investigative Counsel did not find evidence that Sandusky's retirement was caused by the May 3, 1998 incident at the Lasch Building.

On June 13, 1999, Curley emailed Spanier and Schultz that he "touched base with Joe and we are in agreement that we should not do anything more for Jerry."[209] Two days later, Curley emailed Spanier that Sandusky appeared headed for taking retirement.[210] The next day, Schultz and Sandusky met to talk "about the supplemental annuity."[211] Schultz's notes say that he told Sandusky "we wanted to help [Sandusky]

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[r]Exhibit 3-E (JVP000025-26).

[s]Exhibit 3-F (JVP000027).

[t]Exhibit 3-G (Control Number 03014658).

though [sic] this important decision."[212] Undated notes from Paterno indicated: "Jerry Annuity: Take 138 Buy Insurance > amount his retirement fund is worth. Variable Annuity and take full retirement."[213]

On June 17, 1999, Wendell Courtney, the University's then outside legal counsel, provided Curley with a draft "retirement perquisites" agreement for Sandusky that included having the University pay Sandusky a lifetime annuity of $12,000 per year.[214] The draft also provided that Sandusky and Penn State would "work collaboratively in the future in community outreach programs, such as the Second Mile."[215] A June 21, 1999 revision of the agreement added free use for life of "University weight rooms and fitness facilities available to faculty and staff."[216] On June 22, 1999, Sandusky and Curley agreed to revise the permitted use to include "a locker, weight rooms, fitness facilities and training room in the East Area locker room complex."[217]

After an issue arose over the taxation of annual annuity payments, the parties amended the draft agreement to provide Sandusky with a one-time lump sum payment of $168,000. The parties agreed to these terms on June 29, 1999.[u]

III. Sandusky's Retirement Agreement

Penn State's payroll records show that Sandusky received a $168,000 special payment on June 30, 1999. After tax withholding and other deductions, the net amount was $111,990.18.[218] A senior official in the University Controller's office advised the Special Investigative Counsel that in his many years at the University, he had never heard of a payment being made to a retiring employee like the one made to Sandusky.[219] A retired Senior Vice President who worked at Penn State for over 32 years similarly said he had never heard of this type of lump sum payment being made to a retiring employee.[220] While the $168,000 lump sum payment made to Sandusky at his retirement in 1999 was unusual, the Special Investigative Counsel did not find evidence to show that the payment was related to the 1998 incident at the Lasch Building.

At the same time Sandusky's retirement agreement was being finalized, Curley sought to have him re-employed as an "emergency hire," because Sandusky had been "integrally involved in the planning and instructional aspects of preparation for this coming [1999] football season and is essential to the continuity of the program's success

[u]Exhibit 3-H (Control Number 006_0000043).

during this time frame."[221] Curley submitted a request for Sandusky's re-hire on June 30, 1999.[222] Sandusky was re-hired for 95 days at his existing salary plus a six percent cost of living increase.[223]

On August 31, 1999, Sandusky also was awarded "emeritus" rank, which carries with it a number of special privileges including access to the University's recreational facilities.[224] According to Penn State policy, this rank is granted to those who leave and hold the title of professor, associate professor, librarian, associate librarian, senior scientist, or senior research associate, or to personnel classified as executive, associate dean, or director of an academic unit in recognition of their meritorious service to the University.[225] Age and service qualifications also exist.[226] The President may grant or deny emeritus rank on "an exception basis."[227]

When he retired, Sandusky held the positions of assistant football coach and assistant professor of physical education, neither of which are among the positions listed as eligible for emeritus rank. On August 13, 1999, the then Assistant Vice President of Human Resources sent a fax to the Dean of the College of Health and Human Development ("Dean").[228] The fax included a draft memo from Schultz to Spanier that contained handwritten edits that changed the name of the memo's originator from Schultz to the Dean.[229] The former Dean did not recall the request but advised the Special Investigative Counsel that the request did take an unusual path.[230] The former Assistant Vice President, after being shown the Sandusky emeritus paperwork by the Special Investigative Counsel, said it was clear the request had come from Schultz or at least Schultz's office and was forwarded by the former Assistant Vice President to the former Dean for submission.[231]

When the Provost's office received the emeritus request, the staff conducted research to see if similar situations existed.[232] While not able to find "specific precedent," the staff found itself in a "bind" as Spanier had promised the emeritus rank to Sandusky.[233] A contemporaneous email from a staff member to the Provost explained that:

> [Spanier] told [Sandusky] that we would do this – he was wholly within his rights here since the policy [HR 25] says "The President may grant (or deny) Emeritus Rank on an exception basis" – then informed [Curley], who suggested going through the college and went to [the Dean], who then made the request of

us. (I had wrongly assumed all along that the request originated with [the Dean].)[v]

On August 31, 1999, Rodney Erickson, who had been Provost since July 1, 1999, honored Spanier's promise to grant Sandusky emeritus rank given the President's broad discretion under the policy.[234] He told the staff member that he hoped that "not too many others take that careful notice."[235] In an interview with the Special Investigative Counsel, Erickson described feeling "uneasiness" about the decision on Sandusky because of Sandusky's low academic title and the prior history of who was granted emeritus rank.[236] While the decision to grant Sandusky emeritus rank was unusual, the Special Investigative Counsel found no evidence to show that the emeritus rank was related to the 1998 events at the Lasch Building.

[v]Exhibit 3-I (Control Number RAE_000001).

CHAPTER 4
RESPONSE OF UNIVERSITY OFFICIALS TO THE ALLEGATION OF CHILD SEXUAL ABUSE AGAINST SANDUSKY – 2001

KEY FINDINGS

- In the Fall of 2000, a University janitor observed Sandusky sexually assault a young boy in the East Area Locker Building and advised co-workers of what he saw. Also that evening, another janitor saw two pairs of feet in the same shower, and then saw Sandusky and a young boy leaving the locker room holding hands. Fearing that they would be fired for disclosing what they saw, neither janitor reported the incidents to University officials, law enforcement or child protection authorities.
- On Friday, February 9, 2001, University graduate assistant Michael McQueary observed Sandusky involved in sexual activity with a boy in the coach's shower room in the University's Lasch Building. McQueary met with and reported the incident to Paterno on Saturday, February 10, 2001. Paterno did not immediately report what McQueary told him, explaining that he did not want to interfere with anyone's weekend.
- McQueary testified that he reported what he saw to Paterno because "he's the head coach and he needs to know if things happen inside that program and inside that building." He said that Paterno's response was that he [Paterno] needed to "tell some people about what you saw" and would let McQueary know what would happen next. After Sandusky's arrest, Paterno told a reporter that he told McQueary, "I said you did what you had to do. It's my job now to figure out what we want to do."
- On Sunday, February 11, 2001, Paterno met with and reported the incident to Curley and Schultz.
- On Sunday, February 11, 2001, Schultz reached out to then University outside legal counsel Wendell Courtney to discuss the "reporting of suspected child abuse." Courtney conducted legal research on this issue and had another conference with Schultz about it that day.
- On February 12, 2001, Schultz and Curley met with Spanier to give him a "heads up" about the report concerning Sandusky. Spanier said this meeting was "unique" and that the subject matter of a University employee in a shower with a child had never come up before

- A contemporaneous "confidential" note of a February 12, 2001 meeting between Schultz and Curley reflects that the men "[r]eviewed 1998 history." The note states that Schultz and Curley "[a]greed [Curley] will discuss w JVP [Paterno] & advise we think [Curley] should meet w JS [Sandusky] on Friday. Unless he confesses to having a problem, [Curley] will indicate we need to have DPW [Department of Public Welfare] review the matter as an independent agency concerned w child welfare." Without ever speaking to McQueary, Schultz and Curley had already decided that not reporting Sandusky's conduct to authorities may be an option.
- On February 12, 2001, Schultz asked University Police Chief Tom Harmon if a police report still existed of the 1998 incident. Harmon replied that it did.
- By February 12, 2001, Schultz and/or Curley had: met with Paterno who reported what McQueary had told him; had a "heads up" meeting with Spanier advising him about the incident; discussed the "reporting of suspected child abuse" with outside counsel; reviewed the history of the 1998 incident; checked to see if the incident was documented in police files; agreed that Curley would discuss with Paterno the idea of approaching Sandusky to see if he would "confess to having a problem;" and researched the Board membership of the Second Mile.
- There is no information indicating that Spanier, Schultz, Paterno or Curley made any effort to identify the child victim or determine if he had been harmed.
- At a February 25, 2001 meeting, Spanier, Schultz, and Curley discussed an action plan for addressing the Sandusky incident. Schultz's handwritten notes from this meeting indicate: "3) Tell chair* of Board of Second Mile 2) Report to Dept of Welfare. 1) Tell JS [Sandusky] to avoid bringing children alone into Lasch Bldg* who's the chair??"
- On February 26, 2001 Schultz emailed Curley, confirming the plan from the prior day's meeting. This email and several that follow are written in unusually cryptic tones, without the use of proper names or titles.
- On February 27, 2001, however, after discussing the matter with Paterno the day before, Curley recommended a different course of action to Spanier and Schultz: they would offer Sandusky "professional help;" assist him in informing "his organization" (the Second Mile) about the allegation; and, if Sandusky was "cooperative," not inform the Department of Public Welfare of the allegation.
- Advising Sandusky that the February 9, 2001 assault in the Lasch Building had been reported exposed the victim to additional harm because only Sandusky knew his identity.

- On March 5, 2001, Curley met with Sandusky and told him: we are "uncomfortable" with this information about the incident, that he was going to report the incident to the Executive Director of the Second Mile; and that Sandusky was not to be in athletic facilities with any young people. According to Sandusky's counsel, Curley never accused Sandusky of abusing children or used the words "sex" or "intercourse" during the discussion.
- Schultz and Spanier, having prior knowledge of the 1998 child sex abuse allegation against Sandusky, approved Curley's revised plan. Spanier noted in an email that the "only downside for us is if the message isn't 'heard' and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed."
- Curley met with the Second Mile executive director in March 2001, and reported that an unidentified person saw Sandusky in the locker room with a young boy, was "uncomfortable" with the situation, and that Curley had discussed the incident with Sandusky and determined nothing inappropriate had occurred.
- Curley told the Second Mile's executive director that Sandusky would not be permitted to bring children onto the Penn State campus in order to avoid publicity issues; Curley also asked the executive director to emphasize that to Sandusky.
- The Second Mile executive director informed two Second Mile Trustees about the incident involving Sandusky and they concluded it was a non-incident for Second Mile and there was no need for further action.
- The Second Mile executive director also met with Sandusky and passed on Curley's prohibition about bringing children on campus. Sandusky replied that the prohibition applied only to the locker rooms.
- Board meeting, March 15-16, 2001: There is no record that the President briefed the Board about the ongoing investigation of Sandusky.
- On September 21, 2001, Schultz obtained Board approval for the sale of a parcel of Penn State land to the Second Mile. The Board minutes do not reflect any contemporaneous discussion of the 2001 investigation, the propriety of a continuing relationship between Penn State and the Second Mile, or the risks involved by allowing Sandusky to be prominently associated with Penn State. Schultz even issued a press release about the transaction lauding Sandusky.
- After the February 2001 incident, Sandusky engaged in improper conduct with at least two children in the Lasch Building. Those assaults may well have been prevented if Spanier, Schultz, Paterno and Curley had taken additional actions to safeguard children on University facilities.

I. Janitors' Observations of Sandusky – 2000

According to the testimony of witnesses in Gerald A. Sandusky's ("Sandusky") trial in Centre County in June 2012,[237] in the Fall of 2000, a temporary University janitor ("Janitor A")[238] observed a man, later identified to him as Sandusky, in the Assistant Coaches' locker room showers of the Lasch Building with a young boy in the Fall of 2000. Sandusky had the boy pinned against the wall and was performing oral sex on him. The janitor immediately told one of his fellow janitors ("Janitor B") what he had witnessed, stating that he had "fought in the [Korean] War...seen people with their guts blowed out, arms dismembered... . I just witnessed something in there I'll never forget."

On that same night, Janitor B observed two pairs of feet in this same shower at the Lasch Building but could not see the upper bodies of the two persons.[239] He waited for the two to finish their shower, and later saw Jerry Sandusky and a young boy, around the age of 12, exit the locker room holding hands.[240] Janitor B frequently saw Sandusky in the Lasch Building after hours, usually accompanied by one or more young boys.[241] Janitor B closely followed Penn State football, and knew Sandusky from watching football games.[242]

A senior janitorial employee ("Janitor C") on duty that night spoke with the staff, who had gathered with Janitor A to calm him down.[243] Janitor C advised Janitor A how he could report what he saw, if he wanted to do so. Janitor B said he would stand by Janitor A if he reported the incident to the police, but Janitor A said, "no, they'll get rid of all of us."[244]

Janitor B explained to the Special Investigative Counsel that reporting the incident "would have been like going against the President of the United States in my eyes."[245] "I know Paterno has so much power, if he wanted to get rid of someone, I would have been gone."[246] He explained "football runs this University," and said the University would have closed ranks to protect the football program at all costs.[247w]

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[w] Some individuals interviewed identified the handling of a student disciplinary matter in 2007 as an example of Paterno's excessive influence at the University. The April 2007 incident involved a fight at an off-campus apartment in which several individuals were severely injured by Penn State football players. The former University official responsible for the student disciplinary process, who the Special Investigative Counsel interviewed, perceived pressure from the Athletics Department, and particularly

Later the same night, two of these janitors saw Sandusky in the parking lot, driving by slowly and looking into the windows of the Lasch building.[248] The first time was around 11:00 p.m., the second was around 2:00 a.m.[249] The young boy was not observed with Sandusky at these times. Janitor B thought that Sandusky had returned to determine whether anyone had called the police to report the incident.[250]

II. McQueary's Observations of Sandusky – 2001

The November 2011 Grand Jury presentment described an incident, observed by Penn State assistant football coach Michael McQueary, of a "sexual nature" between Sandusky and a boy in the Lasch Building that allegedly took place in March 2002. During this investigation, the Special Investigative Counsel found evidence that this incident actually occurred on or about February 9, 2001 and promptly reported this information to the Pennsylvania Attorney General's Office.[251]

McQueary testified at a December 2011 Grand Jury hearing, and again on June 12, 2012 at Sandusky's criminal trial, about what he saw. At the time of the incident, McQueary was a graduate assistant with the football program and had gone to the support staff locker room in the Lasch Building around 9:00 or 9:30 p.m. on a Friday night.[252] Upon opening the locker room door, McQueary heard "rhythmic slapping sounds" from the shower.[253] McQueary looked into the shower through a mirror and saw Sandusky with a "prepubescent" 10- or 12-year-old boy.[254] McQueary saw Sandusky "directly behind" the boy with his arms around the boy's waist or midsection.[255] The boy had his hands against the wall, and the two were in "a very sexual position."[256] McQueary believed Sandusky was "sexually molesting" the boy and "having some type of intercourse with him" although he "did not see insertion nor was there any verbiage or protest, screaming or yelling."[257]

McQueary testified that he slammed his locker shut and moved toward the shower.[258] He said Sandusky and the boy separated and looked directly at McQueary

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the football program, to treat players in ways that would maintain their ability to play sports, including during the 2007 incident.[-] Interview (3-9-12) When the Student Affairs Office ("SAO") sanctioned the players involved, the sanctions were subsequently reduced by Spanier to enable players to participate in football practice. [-] Interview (3-22-12) A senior staff member in the SAO advised that his office handles over 4,000 cases a year of off-campus student conduct violations. [-] Interview (12-12-11) In all of the cases he has managed over the years, this incident and one other involving a football player were the only incidents in which issued sanctions were reduced. [-] Interview (12-12-11); [-] Interview (3-22-12)

without saying a word.[259] Seeing the two had separated, McQueary said he "thought it was best to leave the locker room."[260] McQueary went to his office and called his father[x] for advice.[261] He then went to his father's house to discuss the matter further.[262] The two decided McQueary should tell Head Football Coach Joseph V. Paterno ("Paterno"), who was McQueary's immediate superior, about the incident.[263]

McQueary testified that he called Paterno at home around 7:30 or 8:00 a.m. the next morning and told him that he needed to meet with him.[264] McQueary recalled Paterno said he did not have a job for McQueary,[y] so "if that's what it's about, don't bother coming over."[265] McQueary told him the matter was "something much more serious"[266] and Paterno agreed to a meeting. McQueary went to Paterno's home to talk, and according to his Grand Jury and trial testimony, he told Paterno he saw Sandusky and "a young boy in the shower and that it was way over the lines."[267] Recalling the activity as "extremely sexual in nature," McQueary described the "rough positioning" of Sandusky and the boy "but not in very much detail" and without using the terms "sodomy" or "anal intercourse."[268]

Paterno told the Grand Jury in 2011 that he recalled having this discussion with McQueary on a Saturday morning[269] and that McQueary told him he saw Sandusky "fondling, whatever you might call it -- I'm not sure what the term would be -- a young boy" in the showers at the Lasch Building.[270] Paterno explained, "[o]bviously, he was doing something with the youngster. It was a sexual nature. I'm not sure exactly what it was. I didn't push Mike to describe exactly what it was because he was very upset."[271]

McQueary testified that he reported what he saw to Paterno because "he's the head coach and he needs to know if things happen inside that program and inside that

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[x]John McQueary and his supervisor (a medical doctor) heard Mike McQueary's initial report of the Lasch Building events the evening it happened. Preliminary Hearing Trans. (12-16-11), 134. John McQueary advised his son to report the matter to Paterno, and neither John McQueary nor his boss advised him to immediately call the police. *Id.* John McQueary later had a conversation with Schultz about what his son saw, and how Schultz handled the situation. *Id.* The conversation may have come up in discussions John McQueary had with Schultz in mid-May 2001 about a past due amount on a lease for a medical business where John McQueary worked. *See* Control Number 00675188.

[y]McQueary was hired as a permanent assistant football coach in 2004. The Special Investigative Counsel found no information to suggest that McQueary's selection for that job was related to his witnessing Sandusky assault a boy in the shower room at the Lasch Building. Three witnesses stated that McQueary was very well-qualified for the position. [-] Interview (3-8-2012); [-] Interview (3-12-2012); [-] Interview (3-1-2012).

building."[272] He said that Paterno's response was that he [Paterno] needed to "tell some people about what you saw" and would let McQueary know what would happen next.[273] After Sandusky's arrest, Paterno told a reporter that he told McQueary, "I said you did what you had to do. It's my job now to figure out what we want to do."[274]

No record or communication indicates that McQueary or Paterno made any effort to determine the identity of the child in the shower or whether the child had been harmed.

III. University Leaders' Response to McQueary's Observations

A. February 11, 2001: Paterno Reports Sandusky Incident to Schultz and Curley

Paterno also testified to the Grand Jury that he "ordinarily would have called people right away, [after hearing McQueary's report] but it was a Saturday morning and I didn't want to interfere with their weekends." Paterno thought he spoke to Curley "early the next week" or "within the week."[275] Paterno had a telephone call with Curley and said, "[h]ey, we got a problem, and I explained the problem to him."[276] When asked if the "information that [he] passed along was substantially the same information that [McQueary]" had given him, Paterno said "yes."[277]

Curley testified to the same Grand Jury that Paterno called him on a Sunday and asked him and Schultz to come to Paterno's home[278] where Paterno related that an assistant coach saw "two people" in the shower of the football building locker room.[279] Curley recalled that Paterno said the assistant saw the people through a mirror, "was uncomfortable with the activity in the shower area," and had reported the issue to Paterno.[280]

Schultz testified to the same Grand Jury in 2011 that he attended the meeting with Paterno and Curley and that it occurred in Schultz's office or "possibly" at Paterno's house.[281] Schultz told the Grand Jury that Paterno said "someone" had seen Sandusky and "some unnamed boy" engaging in "some behavior in the football locker room that was disturbing." He testified, "I believe the impression I got was it was inappropriate and he wanted to bring that to Tim Curley and my attention."[282] Schultz did not recall Paterno's precise words, and said Paterno described the events "in a very general way."[283] Schultz thought the conduct might involve "wrestling around activity" and Sandusky "might have grabbed the young boy's genitals or something of that

sort."[284] Schultz said the "allegations came across as not that serious. It didn't appear at that time, based on what was reported, to be that serious, that a crime had occurred. We had no indication a crime had occurred."[285]

B. February 11, 2001: Schultz Discusses "Reporting of Suspected Child Abuse" with University's Outside Legal Counsel

On Sunday, February 11, 2001, Schultz had a conference call about the "reporting of suspected child abuse" with Penn State's then outside legal counsel, Wendell Courtney.[z] Courtney conducted legal research on this issue and had another conference that day with Schultz about the matter.[286] Courtney charged 2.9 hours of time to Penn State for his legal work. Courtney's work on the 2001 matter is confirmed in an email Courtney sent to Schultz in 2011 when Penn State received subpoenas for testimony by Schultz and others concerning the criminal investigation of Sandusky.[aa]

Nearly 10 years later, on January 10, 2011, Courtney emailed Schultz and said, *"Gary - Cynthia Baldwin called me today to ask what I remembered about JS issue I spoke with you and Tim about circa eight years ago* [emphasis added]. I told her what I remembered. She did not offer why she was asking, nor did I ask her. Nor did I disclose that you and I chatted about this."[287] The initials "JS" in Courtney's 2011 email appear to indicate Jerry Sandusky.

Courtney served as Penn State's outside legal counsel for 28 years and was a partner at a law firm that performed legal work for the University for nearly 50 years. Based on the advice of counsel, Courtney declined to be interviewed by the Special Investigative Counsel. Thus, the Special Investigative Counsel was unable to learn Courtney's explanation about the legal work he performed on February 11, 2001.

C. February 12, 2001: Initial Response of Spanier, Schultz and Curley to Sandusky Incident

After the Commonwealth brought criminal charges against Schultz in November 2011, Schultz's assistant removed some of the Sandusky files from Schultz's Penn State office and delivered them to Schultz. The assistant failed to disclose in two interviews with the Special Investigative Counsel that the Sandusky files had been removed.[288]

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[z]Exhibit 5-A (McQuaide Blasko documents).

[aa]Exhibit 5-B (Control Number 11118161).

Only in May 2012 did the existence of these important files come to light so that the documents could be retrieved.[289]

Schultz's handwritten notes, which he marked as "confidential," reflect a Monday, February 12, 2001 meeting with Curley to discuss the Sandusky allegations. According to Schultz's notes, Curley and Schultz talked and first "[r]eviewed 1998 history."[bb] The notes state that Schultz and Curley "[a]greed [Curley] will discuss w JVP & advise we think [Curley] should meet w JS on Friday. Unless he 'confesses' to having a problem, TMC will indicate we need to have DPW review the matter as an independent agency concerned w child welfare."[290] The initials "JVP" in Schultz's notes appear to indicate Joseph V. Paterno. The initials "JS" in Schultz's notes appear to indicate Jerry Sandusky. The initials "TMC" appear to indicate Curley.

In an interview with the Special Investigative Counsel, Spanier said that he met with Schultz and Curley to discuss Sandusky around 2:30 p.m. on February 12, 2001.[291] Spanier said the men gave him a "heads up" that a member of the Athletic Department staff had reported to Paterno that Sandusky was in an athletic locker room facility showering with one of his Second Mile youth after a workout. Sandusky and the youth, according to Spanier, were "horsing around" or "engaged in horseplay."[292] Spanier said the staff member "was not sure what he saw because it was around a corner and indirect."[293] Spanier said this meeting was "unique" and that the subject matter of a University employee in a shower with a child had never come up before.[294] Spanier also said that he did not ask, nor did Schultz or Curley define, what was meant by "horsing around" or "horseplay."[295]

Spanier said he asked two questions: (i) "Are you sure that it was described to you as horsing around?" and (ii) "Are you sure that that is all that was reported?"[296] According to Spanier, both Schultz and Curley said "yes" to both questions. Spanier said the men agreed that they were "uncomfortable" with such a situation, that it was inappropriate, and that they did not want it to happen again.[297] Spanier says he asked Curley to meet with Sandusky and tell him that he must never again bring youth into the showers. Spanier said the men also agreed to inform the Second Mile that this direction was given to Sandusky and "we did not wish Second Mile youth to be in our showers."[298] Spanier said there was no mention of anything abusive or sexual, and he

[bb]Exhibit 5-C (Schultz documents).

was not aware of the hour of day, the specific building involved, the age of the child, or any other prior shower incident.[299] Spanier also said he did not ask for such details.

When then-Penn State General Counsel Cynthia Baldwin first heard that the Attorney General's office planned to subpoena Schultz, Paterno, and Curley to appear before the Grand Jury, she called Spanier to inform him of the news.[300] Baldwin's notes from this call on December 28, 2010 reflect that Baldwin informed Spanier of the situation.[301] Baldwin's notes of the call reflect that Spanier said he "[m]ay have consulted w/Wendell when Tim, Gary & Graham spoke" when he first heard of the 2001 incident.[302]

On February 12, 2001, at about 11:10 a.m., Schultz researched the internet about the Board members of the Second Mile, the charitable organization Sandusky founded.[303] On February 12, 2001, Schultz also asked Penn State University Police Chief Tom Harmon if a police file still existed for the 1998 event.[304] At 9:56 p.m., Harmon emailed Schultz to report, "[r]egarding the incident in 1998 involving the former coach, I checked and the incident is documented in our imaged a[r]chives."[cc]

By February 12, 2001, Schultz and/or Curley had: (i) given Spanier a "heads up" concerning a "unique" situation involving Sandusky in the showers with a child;[305] (ii) met with Paterno, who reported to them the "same information" McQueary had given to Paterno; (iii) discussed the "reporting of suspected child abuse" with Penn State's then outside legal counsel and also with Spanier,[306] (iv) reviewed the history of the 1998 Sandusky incident;[307] (v) checked to see if the 1998 police report on Sandusky was documented in University police files;[308] (vi) agreed that Curley would discuss with Paterno the idea about approaching Sandusky to see if he "confesses to having a problem;"[309] and, (vii) researched the Board membership of the Second Mile.[310] There is no indication that Spanier, Schultz, Paterno, Curley or any other leader at Penn State made any effort to determine the identity of the child in the shower or whether the child had been harmed.

D. Schultz and Curley Meet with McQueary – February 2001

Schultz and Curley did not meet with McQueary to hear directly from him as to what he observed in the Lasch Building shower before taking these actions. McQueary

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[cc]Exhibit 5-D (Control Number 00675162).

testified at the Grand Jury that he first heard from Curley when Curley called to arrange a meeting to discuss what McQueary had reported to Paterno on a Saturday morning, about "nine or 10" days earlier.[311] Curley could not recall how many days it was after hearing from Paterno that he met with McQueary to get the information directly from him, but he thought it was within a week.[312]

McQueary also testified to the Grand Jury that he met with Schultz and Curley either the same day he received Curley's call or the next day. McQueary said he told the men he saw Sandusky in the shower with a young boy, with Sandusky's arms wrapped around the boy.[313] McQueary said he told the men that the situation was "extremely sexual" and that McQueary "thought that some kind of intercourse was going on."[314]Curley testified to the Grand Jury that McQueary told him he had heard people in the shower who were "horsing around, that they were playful, and that it just did not feel appropriate."[315]

Schultz told the same Grand Jury that he did not recall specifically what McQueary reported, but his impression was that there was some physical conduct, some horsing around, some wrestling that resulted in contact with a boy's genitals in the context of wrestling.[316] Schultz testified that he did not understand the incident to have involved sexual conduct or intercourse.[317]

E. February 25, 2001: Spanier, Schultz and Curley Meet Again to Discuss Sandusky Incident

On Thursday, February 22, 2001, Schultz sent an email to Spanier and Curley, stating, "Graham, Tim and I will meet at 2:00 p.m. on Sunday in Tim's office."[318] Spanier acknowledged the 2:00 p.m. meeting in an email to Schultz and Curley on February 23, 2001.[319] The February 25 meeting was arranged 12 days after McQueary notified Paterno about seeing Sandusky in the Lasch Building sexually abusing a young boy. McQueary testified before the Grand Jury that he met with Curley and Schultz about "nine or 10" days after the Saturday morning discussion with Paterno.[320]

Among documents that Schultz held confidentially in his office and that had been withheld from the Special Investigative Counsel, were handwritten notes for a meeting on "2/25/01." The notes do not identify who was present for the meeting, but

indicate: "3) Tell chair* of Board of Second Mile 2) Report to Dept of Welfare. 1) Tell JS to avoid bringing children alone into Lasch Bldg * who's the chair??"[dd]

Spanier's hardcopy calendar of February 25, 2001 indicates a 2:00 p.m. appointment in "TMC office."[321] Spanier told the Special Investigative Counsel that the February 25 meeting was with only Curley.[322] He denied that Schultz was present.[323] He also denied that any mention was made of the Department of Public Welfare.[324] He stated that Curley was worried about how to handle things if he informed Sandusky that he was forbidden to bring Second Mile youth to Penn State facilities and Sandusky disagreed.[325] Spanier explained that he was concerned with Sandusky because the situation "doesn't look good, I was concerned with what people will think, the visibility and the public relations aspects of it. I was not concerned with criminality. There was no suggestion of anything about abuse or sexual contact."[326]

The next day, on February 26, 2001, Schultz sent an email to Curley confirming the plan from the prior day's meeting. Schultz wrote: "Tim, I'm assuming that you've got the ball to 1) talk with the subject ASAP regarding the future appropriate use of the University facility; 2) contacting the chair of the Charitable Organization; and 3) contacting the Dept of Welfare. As you know I'm out of the office for the next two weeks, but if you need anything from me, please let me know."[ee]

The February 26, 2001 email and related emails that follow among Curley, Schultz and Spanier over the next two days are unique from the hundreds of thousands of other emails reviewed by the Special Investigative Counsel. These messages are the rare documents where proper names and identifying information are replaced with generic references. Spanier told the Special Investigative Counsel that Curley communicated in "code" in sensitive emails because the Athletic Department was notorious for leaks.[327] When Curley communicated about other sensitive issues involving Sandusky, however, he did not use "code" words. For example, emails written between February 25 and February 28, 2001, refer to Sandusky as the "subject,"[328] the "person involved,"[329] or "the person."[330] The emails refer to the Second Mile as "his organization;" and to the Department of Public Welfare as "the other organization"[331] and the "other one."[332] This contrasts with emails written in 1998, concerning the police investigation, in which Curley and Schultz frequently referred to

[dd]Exhibit 5-E (Schultz documents).

[ee]Exhibit 5-F (Control Number 00677433).

Sandusky as "Jerry."[333] This also contrasts with emails written in 1999, concerning Sandusky's retirement, where Curley, Schultz and Spanier frequently referred to Sandusky as "Jerry."[334]

On March 22, 2011, Spanier met with members of the Pennsylvania Attorney General's Office accompanied by Baldwin.[335] The General Counsel's notes of that meeting reflect Spanier's statement that Schultz and Curley met with Spanier to explain that an employee had seen Sandusky "horsing around" in a shower with a child and thought they should bring the issue to Spanier's attention.[336] The notes also indicate that Spanier said to Schultz and Curley that if "nothing more detailed was reported, Tim should tell JS that we request that he not bring children into shower again. Since JS no longer employed that we advise chair of Board of Second Mile of what we heard."[337]

F. February 27-28, 2001: Curley Proposes Revised Response to the Sandusky Incident

On Tuesday, February 27, 2001, Curley emailed Schultz and Spanier:

> I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday-- I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and [sic] maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities. I need some help on this one. What do you think about this approach?[ffgg]

[ff]Exhibit 5-G (Control Number 00679428).

[gg] The Special Investigative Counsel discovered these emails after Joe Paterno died. When the Special Investigative Counsel questioned Paterno's representatives about the emails, they stated that because they did not have the benefit of the emails before Paterno's death, they were unable to inquire with Paterno about the emails.

Several people told the Special Investigative Counsel that Curley is a State College native with a long family history at Penn State, including his father and brothers who worked at Penn State.[338] A senior Penn State official referred to Curley as Paterno's "errand boy."[339] Athletic Department staff said Paterno's words carried a lot of weight with Curley, who would run big decisions by Paterno.[340] Others interviewed described Curley as "loyal to a fault" to University management and the chain of command, someone who followed instructions regardless of the consequences, and someone who avoided confrontation.[341]

Also on Tuesday, February 27, 2001, at 10:18 p.m., Spanier responded to Curley's proposal for dealing with Sandusky. Spanier emailed Curley and Schultz:

> Tim: This approach is acceptable to me. It requires you to go a step further and means that your conversation will be all the more difficult, but I admire your willingness to do that and I am supportive. The only downside for us is if the message isn't "heard" and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed.[342]

A reasonable conclusion from Spanier's email statement that "[t]he only downside for us is if the message isn't 'heard' and acted upon, and we then become vulnerable for not having reported it" is that Spanier, Schultz and Curley were agreeing not to report Sandusky's activity.

It also is reasonable to conclude from this email statement that the men decided not to report to a law enforcement or child protection authority because they already had agreed to "report" the incident to Second Mile. Spanier's oral and written statements to the Special Investigative Counsel do not address this "reported it" reference. Spanier told the Special Investigative Counsel that the comment related "specifically and only to [Curley's] concern about the possibility that [Sandusky] would not accept our directive and repeat the practice. Were that the outcome of his discussion I would have worried that we did not enlist more help in enforcing such a directive."[343]

Spanier said that his use of the word "humane" refers "specifically and only to my thought that it was humane of [Curley] to wish to inform Sandusky first and allow him to accompany [Curley] to the meeting with the president of the Second Mile.

Moreover, it would be humane to offer counseling to Sandusky if he didn't understand why this was inappropriate and unacceptable to us."[344]

On Wednesday, February 28, 2001, at 7:12 p.m., Schultz responded to Curley's proposal for dealing with Sandusky. Schultz wrote to Curley and Spanier:

> Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.[hh]

The "other organization" mentioned by Schultz appears to be a reference to the Department of Public Welfare. Again, at no time did Spanier, Schultz, Paterno or Curley try to identify the child in the shower or whether the child had suffered harm. By advising Sandusky, rather than the authorities, that they knew about the February 9, 2001 assault, they exposed this victim to additional harm because only Sandusky knew the child victim's identity at the time.

On February 28, 2001, Curley emailed Schultz and Spanier, explaining in part that he was "planning to meet with the person next Monday on the other subject."[ii] Spanier replied the same day, telling Curley, "[i]f you need to start in one direction without me, do so. I think we are on the same wavelength and I will support you."[345]

IV. Curley Meets with Sandusky – March 1998

Curley testified to the Grand Jury that he met twice with Sandusky, as Sandusky did not "initially" admit to being in the shower with a boy.[346] According to Curley's testimony, Sandusky later returned to admit he had been present.[347] Curley said he told Sandusky:

> [a]bout the information that we received, that we were uncomfortable with the information and that I was going to take the information and report it to the executive director of the Second Mile and that I did not want him in the future to be in our athletic facilities with any young people.[348]

[hh]Exhibit 5-G (Control Number 00679428).

[ii]Exhibit 5-H (Control Number 00676529).

While Sandusky declined an interview with the Special Investigative Counsel, Sandusky's counsel stated in a telephone call with the Special Investigative Counsel that Sandusky generally agreed with Curley's version of the 2002 incident, which Sandusky thought took place in 2001.[349] Sandusky's counsel said Curley told Sandusky that they had heard Sandusky had been in the shower with a young child, and someone felt this was inappropriate.[350] According to Sandusky's counsel, Curley never used the word sex or intercourse in the discussion.[351] Counsel said Sandusky offered to give the child's name to Curley, but Curley did not accept this invitation.[352] Counsel also said Curley told Sandusky he did not want Sandusky to bring children to the shower any more.[353] Sandusky's counsel said no one accused Sandusky of abusing kids.[354]

On March 7, 2001, Schultz's assistant wrote to Curley, asking if he had updated Schultz on the actions set out in Schultz's February 26, 2001 email.[ii] Before he left for vacation, Schultz had left directions for his assistant to check on this issue.[355] Curley reported to the assistant that he had updated Schultz.[356]

Schultz testified before the Grand Jury that he had the "impression that Tim did follow through and make sure Jerry understood that he was no longer permitted to bring Second Mile children into the football facility."[357] Penn State's General Counsel's notes from a March 2011 conversation with Spanier, reflect that Spanier said he "[b]umped into Tim Curley and Tim advised" that he had a conversation with Sandusky not to bring children into the shower again.[358]

Spanier told the Special Investigative Counsel that a "few days after the brief Sunday interaction, [he] saw [Curley] and he reported that both of the discussions had taken place, that those discussions had gone well and our directive accepted, and that the matter was closed."[359] Spanier did not know whether Sandusky ever received counseling.[360]

Paterno gave the following explanation to a reporter for the *Washington Post* as to why he did not more aggressively pursue the information that McQueary provided. "I didn't know exactly how to handle it and I was afraid to do something that might jeopardize what the University procedure was. So I backed away and turned it over to some other people, people I thought would have a little more expertise than I did. It

[ii]Exhibit 5-I (Control Number 00674655).

didn't work out that way." Paterno added, "In hindsight, I wish I had done more" and regretted that he had not.[361]

V. March 19, 2001: Curley Meets with Second Mile Leadership

Curley testified at the Grand Jury that he met "the executive director of the Second Mile. I shared the information that we had with him." The Special Investigative Counsel found no written records concerning this meeting.

The Second Mile executive director declined to be interviewed. Counsel for the Second Mile told the Special Investigative Counsel, however, that the executive director told him that the executive director had a calendar entry for a meeting with Curley on March 19, 2001.[362] He also told counsel that during the executive director's meeting with Curley that Curley related that an unidentified person saw Sandusky in the locker room shower on campus with a boy and felt uncomfortable with the situation;[363] and that Curley had discussed the issue with Sandusky and concluded that nothing inappropriate occurred.[364] According to Counsel for the Second Mile, Curley told the executive director, that "to avoid publicity issues," the University would not permit Sandusky to bring kids on campus.[365] Curley also told the executive director that he was telling Second Mile so that the executive director could emphasize the issue to Sandusky.[366]

The executive director later advised two Second Mile Trustees of the meeting, and they concluded the matter was a "non-incident for the Second Mile and there was no need to do anything further."[367] He also talked to Sandusky, who admitted showering with boys but nothing more.[368] The executive director passed on Curley's advice on the prohibition against bringing kids on campus, and Sandusky responded that it applied only to the locker rooms.[369] The executive director urged him to get the issue clarified.[370]

VI. University Officials Do Not Notify the Board of the Sandusky Incident

The Penn State Board of Trustees ("Board" or "Trustees") met on March 15 and 16, 2001. Nothing in the Board records or interviews of Trustees indicate any contemporaneous discussions of the 2001 Sandusky incident and investigation during the meeting. The Board did not have a process or committee structure at that time for

receiving regular reports from University officials about matters of potential risk to the University, such as the allegation against Sandusky.

On July 24, 2001, Schultz met with leaders of the Second Mile and agreed to sell a parcel to the Second Mile for $168,500.[371] The University had bought the property in 1999 for $168,500.[372] On September 21, 2001, less than eight months after the Sandusky incident, the Board approved the sale of a parcel of land to the Second Mile.[373] Nothing in the Board's records or interviews of Trustees indicate any contemporaneous discussions of the 2001 Sandusky incident and investigation, the propriety of a continuing relationship between Penn State and the Second Mile, or the risks created by a public association with Sandusky when the land transaction was discussed. Schultz, who oversaw the transaction, did not make any disclosure of the Sandusky incident during the Board's review of the land deal. In fact, Schultz approved a press release, issued September 21, 2001 announcing the land sale in which he praised Sandusky for his work with Second Mile. [374]

VII. Sandusky's Criminal Activity After 2001

The Centre County jury convicted Sandusky in June 2012 of assaulting two boys at Penn State's football facilities and other places on campus after February 2001. These assaults occurred against Victim 3 (assaults on various dates from July 1999 to December 2001 in the Lasch Building and at other places) and Victim 5 (assault in August 2001 in the Lasch Building).

At the preliminary hearing, Curley agreed that there was no "practical way to enforce [Sandusky] not bringing children onto the campus" after he was warned not to do so.[375] There is no indication that Spanier, Schultz, Paterno, or Curley had discussions about any other enforceable actions that could have been taken to safeguard children. Spanier told the Special Investigative Counsel that he did not do anything to prohibit Sandusky from using Penn State facilities, nor did he instruct anyone else to do so.[376]

CHAPTER 5
RESPONSE OF UNIVERSITY OFFICIALS TO THE GRAND JURY INVESTIGATION - 2010, 2011

KEY FINDINGS

- In early 2010 the Pennsylvania Attorney General, in connection with a Grand Jury investigation of Sandusky, issued subpoenas to the University for certain documents; in late 2010 the Grand Jury issued subpoenas for Spanier, Schultz, Paterno, Curley and various members of the Athletic Department in relation to a Grand Jury investigation of Sandusky for child sexual abuse.
- In 2011, Spanier, Schultz, Paterno, Curley and various members of the Athletic Department testified before the Grand Jury. The Grand Jury appearances and the Sandusky investigation were reported in a news story on March 31, 2011.
- Neither Spanier nor the University's General Counsel, Cynthia Baldwin, briefed the Board of Trustees about the Grand Jury investigation of Sandusky or the potential risk to the University until the Board's meeting on May 11, 2011 and, then, only at the request of a Trustee who had read the March 31, 2011 article.
- After receiving a Trustee's request for more information about the Grand Jury investigation, Spanier emailed Baldwin noting that "[the Trustee] desires near total transparency. He will be uncomfortable and feel put off until he gets a report."
- At the May 2011 Board meeting, Spanier and Baldwin briefed the Board about the investigation, but minimized its seriousness by not fully describing the nature of the allegations or raising the issue of possible negative impact to the University.
- From March 31 – November 4, 2011, the Board did not make reasonable inquiry of Spanier or Baldwin about the Sandusky investigation or potential risks to the University.
- The Board did not take steps that might have protected the University, such as conducting an internal investigation, engaging experienced criminal counsel, or preparing for the possibility that the results of the Grand Jury investigation could have a negative impact on the University.
- Spanier and Baldwin opposed an independent investigation of the Sandusky issue, with Baldwin stating that "[i]f we do this, we will never get rid of this [outside investigative] group in some shape or form. The Board will then think that they should have such a group." Spanier agreed.

- Even after criminal charges were announced against Schultz and Curley in November 2011, Spanier continued to downplay the serious harm that could result to Penn State's reputation from the criminal charges, and issued a statement of "unconditional support" for Schultz and Curley.
- Within a few hours of the criminal charges becoming public, staff members advised Spanier that the Board needed to be updated. Spanier said that any briefing "will be nothing more than what we said publicly."
- Only after the presentment of criminal charges in November 2011 did the Board call for a Special Investigations Task Force to perform an independent investigation into the allegations, and to challenge Spanier's and Paterno's actions and failures.
- Until Sandusky's arrest in November 2011, Curley continued to invite him to numerous high-profile athletic events at the University, many of which he attended. During the Spring of 2011, Baldwin advised some University personnel that Sandusky's access to the Lasch Building could not be terminated because of his emeritus status and the fact that he had not been convicted of a crime.
- The Board was unprepared to handle the crisis that occurred when Sandusky, Curley and Schultz were charged. This contributed significantly to its poor handling of the firing of Paterno, and the subsequent severe reaction by the Penn State community and the public to the Board's oversight of the University and Paterno's firing.

I. Subpoenas Issued for the Grand Jury Testimony of Senior University Officials

On January 7, 2010, the Grand Jury issued a subpoena seeking production of all the University employment and personnel records for Gerald A. Sandusky ("Sandusky").[377] The Penn State employee handling the subpoena consulted with a lawyer at McQuaide Blasko, the State College law firm that served at the time as outside legal counsel for Penn State, about how to respond to the subpoena.[378] This lawyer, who had no grand jury experience, then spoke with colleague Wendell Courtney, although this lawyer told the Special Investigative Counsel that they did not discuss any potential reason for the subpoena or any prior incidents involving Sandusky.[379] The lawyer also did not discuss the nature of the investigation with anyone from the Attorney General's Office.[380]

Through McQuaide Blasko, Penn State agreed with the Attorney General's Office on a non-disclosure order concerning the subpoena.[381] At the time, Penn State staff compiled a list of all persons who knew of the subpoena, which included Spanier, Paterno and Curley.[382]

On September 16, 2010, a *Patriot-News* reporter contacted Spanier. The two exchanged emails as to Spanier's knowledge of an investigation of Sandusky for suspected criminal activity while he was a Penn State employee.

On December 22, 2010, the McQuaide Blasko lawyer called then-University General Counsel Baldwin to inform her that a prosecutor from the Attorney General's Office had called McQuaide Blasko to say that the Grand Jury would like to hear testimony from "some very important people" at Penn State.[383] The lawyer also provided Baldwin with background information about the January 2010 subpoena.[384]

On December 28, 2010, at 9:30 a.m., Baldwin spoke with two prosecutors from the Attorney General's office, who explained that the office would be issuing subpoenas for Schultz, Paterno and Curley to appear before the Grand Jury.[385] Baldwin explained in an interview with the Special Investigative Counsel that she asked if the University or its staff were targets of the investigation.[386] According to Baldwin, the prosecutors said that they were looking at Sandusky, although Baldwin's notes of the conversation do not reflect discussion of this issue.[387] Baldwin did not seek the assistance of an

attorney experienced in addressing criminal investigations or conducting internal investigations at that time.

At 9:45 a.m. on December 28, 2010, Baldwin informed Spanier of the situation.[388] Baldwin's notes of the call reflect: "[m]ay have consulted w/Wendell when Tim, Gary & Graham spoke."[389] At 10:01 a.m., Baldwin[390] met with Spanier and Schultz.[391]

On December 28, 2010, after Schultz spoke to Baldwin, he contacted Courtney.[392] On December 30, 2010, Courtney emailed Schultz, "[t]he attached is the last thing in my Penn State file re Sandusky. There is nothing regarding the issues we discussed."[393] The attachment to the email was a 1999 letter concerning Sandusky's retirement.[394]

On Monday, January 3, 2011, Baldwin met with Paterno.[395] Baldwin's notes indicate that Paterno recalled McQueary coming to see him on a Saturday morning.[396] According to the notes, Paterno said McQueary "[s]aw Jerry horsing around w the kid a young man in shower inappropriate behavior. Turned it over to Tim Curley. Notified Tim Curley didn't talk to Gary. No conv. since then."[397] Baldwin told the Special Investigative Counsel that she did not investigate the Sandusky matter or look for Schultz, Paterno or Curley emails in the University system that might relate to the Grand Jury's investigation.[398] Baldwin also met with Curley on January 3, 2011.

On January 3, 2011, a Pennsylvania State Police commander visited the University Police Department and reported that an investigation of "sexual allegations against a small child" involving Sandusky had been ongoing for the past year.[399] The commander said they were "wrapping everything up but were also collecting any and all reports of similar situations."[400] The University Police Department provided the commander with a copy of the 1998 police report.[401]

The next day, January 4, 2011, when Baldwin learned that the State Police had received a copy of the 1998 police report,[402] she asked the University Police Department for a copy of the report.[403] Baldwin told the Special Investigative Counsel that she reviewed the 1998 report to find out what happened and if there had been a full investigation.[404]

On January 9, 2011, Baldwin reached out to Courtney about the Grand Jury investigation. Courtney responded by email to Baldwin stating:

> We don't have any file on the matter you and I discussed yesterday, and my recollection of events is as I stated yesterday. However, I also recall that someone (I don't think this was me, since if it was I would have written documentation of contact) contacted Children and Youth Services to advise of the situation so that they could do whatever they thought was appropriate under the circumstances, while being apprised of what PSU actions were, i.e., advising JS to no longer bring kids to PSU's football locker rooms.[405]

Baldwin advised the Special Investigative Counsel that, unknown to her at the time, Courtney emailed Schultz on January 10, 2011. In Courtney's email to Schultz he reported that: Baldwin "called me today to ask what I remembered about JS issue I spoke with you and Tim about circa eight years ago."[406] In the email Courtney said he told her what he remembered, and added that Baldwin "did not offer why she was asking, nor did I ask her. Nor did I disclose that you and I chatted about this."[407]

On January 11, 2011, Baldwin provided an update to Spanier on the Grand Jury investigation.[408] Baldwin told the Special Investigative Counsel that Spanier was surprised to hear of the subpoenas but was not excited over the matter.[409] Spanier told her that things would be fine.[410]

The next day, on January 12, 2011, Schultz, Paterno and Curley appeared before the Grand Jury. Baldwin told the Special Investigative Counsel that she went to the Grand Jury appearances as the attorney for Penn State,[411] and that she told both Curley and Schultz that she represented the University and that they could hire their own counsel, if they wished.[412]

A. Law Enforcement Interviews of University Personnel

On February 15, 2011, Baldwin met with several assistant football coaches to interview them about Sandusky, his interactions with young boys, rumors about him in the community and his decision to retire from Penn State.[413] The next day, investigators from the Pennsylvania Attorney General's Office and the Pennsylvania State Police interviewed approximately eight coaches, with Baldwin present.[414] Between interviews, the investigators told Baldwin that they also wanted to interview Spanier so she scheduled that interview for them.[415]

On March 22, 2011, Spanier met with the Attorney General's investigators to answer questions about Sandusky. Baldwin attended the meeting and, according to her notes, the investigators asked Spanier about the 2002[416] incident and how Penn State handled the incident, why Sandusky retired in 1999, and the relationship between Penn State and the Second Mile.[417] On March 24, 2011, the Attorney General's Office issued a subpoena for Spanier to testify before the Grand Jury.[418]

II. *Patriot-News* Article Reveals Sandusky Investigation – March 2011

On March 28, 2011, Curley received an email from a Harrisburg *Patriot-News* reporter asking about his testimony before the Grand Jury.[419] The reporter told Curley that the paper would be running a story soon about the investigation of Sandusky. Curley advised Baldwin, the Athletic Department and Penn State's communications staffs about the call and impending article.[420] On March 28, 2011, another *Patriot-News* reporter approached Spanier at a budget hearing in Harrisburg to obtain his comments about the story.[421] On March 30, 2011, Spanier received word that the *Patriot-News* would be running a story about a "former football coach" the next day.[422]

On March 31, 2011, the *Patriot-News* ran an article under the headline, "Jerry Sandusky, Former Penn State Football Staffer, Subject of Grand Jury Investigation."[423] The article reported that Sandusky was "the subject of a grand jury investigation into allegations that he indecently assaulted a teenage boy."[424] The article referred to a 2009 incident with a boy at Central Mountain High School and the 1998 incident at Penn State involving Sandusky showering with a 12-year-old-boy in the football building on Penn State's campus.[425] The article also noted that Schultz, Paterno and Curley were among those appearing before the Grand Jury.[426]

The day after the article was published, a Trustee emailed Spanier, asking "[w]hat is the story on allegations against Jerry Sandusky that required testimony by Joe Paterno and Tim Curley, and I heard, also Garry [sic] Schultz? Is this something the Board should know a [sic] be briefed on or what?"[427] Spanier replied by email to the Trustee and copied Baldwin and then Board Chairman Steve Garban. He stated, "I believe that Grand Jury matters are by law secret, and I'm not sure what one is permitted to say, if anything." Spanier told the Trustee he would check with Baldwin on whether it was "permissible" to brief the Board.[428] The next day, Baldwin emailed

Spanier to explain that those who "testify before the Grand Jury are not held to secrecy and can disclose if they so desire."[429] Baldwin offered to put together something for Spanier to provide to the Board.

On April 13, 2011, the Trustee emailed Spanier again and asked, "[w]hat is the outcome on this? I frankly think that, despite grand jury secrecy, when high ranking people at the university are appearing before a grand jury, the university should communicate something about this to its Board of Trustees."[430]

Spanier replied to the Trustee on the same day that he had recently learned "through media reports that the Grand Jury has been investigating for two years and has not yet brought charges. They continue their investigation. I'm not sure it is entirely our place to speak about this when we are only on the periphery of this."[431] Spanier went on to say that Baldwin would report on the issue at the next Board meeting.[432] Spanier separately emailed Baldwin, noting, "[the Trustee] desires near total transparency. He will be uncomfortable and feel put off until he gets a report."[433]

Spanier told the Special Investigative Counsel in July 2012 that the Grand Jury investigation "struck me as a Second Mile issue. This did not strike me as a Penn State issue."[434]

The same day that Spanier responded to the Trustee, he testified before the Grand Jury.[435] Baldwin joined Spanier for his appearance, explaining to the court and Spanier that she represented the University.

In response to the Trustee's emails concerning the Grand Jury investigation, Garban asked for a meeting with Baldwin and Spanier.[436] Garban told the Special Investigative Counsel that he met with Baldwin and Spanier in April 2011.[kk] Baldwin recalled that Spanier provided Garban with an update on the investigation and [437] that Spanier downplayed the Sandusky investigation.[438] Garban recalled Spanier saying "it was the third or fourth Grand Jury and nothing would come of it."[439] Baldwin told the Special Investigative Counsel that she believed that Spanier, as a member of the Board, and Garban, as its then Chair, would have relayed this information to the other Board members.[440]

[kk] Emails confirm the meeting was April 17, 2011.

Beyond one Trustee's request that Spanier brief the Board on the Grand Jury investigation of Sandusky, the March 31, 2011 *Patriot News* article went virtually unnoticed by the Board. The article was not disseminated to the full Board and many Board members did not read the article. The Board members who were aware of the article should have inquired further about Sandusky and the possible risks of litigation or public relations issues, and, most importantly, whether the University has effective policies in place to protect children on its campuses.

III. Board of Trustees Meeting – May 2011

In his interview with the Special Investigative Counsel, Spanier said that at a dinner the evening before the May 12, 2011 Board meeting, he told four Board members about the status of the Sandusky investigation.[441] Spanier stated he told these Trustees at the dinner that he had testified before the Grand Jury.[442] The Special Investigative Counsel re-interviewed the four Trustees present for the dinner. None of the Trustees recalled Spanier mentioning anything at the dinner about the Sandusky Grand Jury or his testimony.[443]

In her interview with the Special Investigative Counsel, Baldwin stated that she provided a briefing on the Sandusky investigation to the Board at its regular meeting on May 12, 2011. Fifty minutes were set aside for the briefing but Baldwin recalled that her report lasted 20 minutes before Spanier directed her to leave. Several Trustees described the briefing as a three to five minute, "oh by the way" presentation, at the end of the day.[444]

In an affidavit Baldwin prepared for the Board in January 2012 to provide her recollection of the May 2011 briefing, she stated that she told the Board that the University did not appear to be a focus of the investigation.[445] Furthermore, she affirmed that she had also explained to the Board: (i) what a grand jury is; (ii) how it works; (iii) the fact that the grand jury process is confidential - although those who testify are free to divulge their testimony; (iv) that Schultz, Paterno, and Curley "had been interviewed" in January 2011 and Spanier "had been interviewed" in April 2011;[446] and (v) that those who testified had been asked about a 2002 incident in the football building.[ll] She also stated that she told the Board that the University Police Department,

[ll]Exhibit 6-A (Baldwin affidavit).

the District Attorney's Office, and Children and Youth Services had investigated an incident involving Sandusky in 1998 and that no charges had been filed.[447]

Baldwin told the Special Investigative Counsel that her affidavit had not been intended to list everything she told the Board.[448] She said that she also explained to the Board that a grand jury could return a "presentment" that, even if not alleging a crime, can nonetheless contain negative information about an institution.[449]

Board members had differing recollections of Baldwin's May 2011 report. Several Trustees had the impression that the Sandusky investigation involved issues at the Second Mile and did not involve Penn State.[450] Several Trustees recalled hearing that this was the third or fourth time a grand jury had investigated Sandusky and took that as an indication that criminal charges were not likely.[451] Some Trustees understood that some Penn State senior administrators had testified,[452] while others did not.[453] A common perception was that this was not an "important" issue for the University and the investigation was not a cause for concern.[454]

Some Trustees faulted Spanier and Baldwin for not informing the Board about the Sandusky investigation in a more useful manner.[455] The common complaint was that Spanier's and Baldwin's May 2011 report to the Board did not address the core question of why four senior Penn State officials needed to appear before the Grand Jury if the investigation did not "involve" Penn State. Their report also did not indicate that the Attorney General's investigators had spent two days interviewing the University's football coaching staff;[456] that the investigators had subpoenaed all emails dating back to 1997 for Spanier, Schultz, Paterno and Curley;[457] that investigators subpoenaed the names of all Penn State Physical Plant employees from 1990;[458] and that more football program staff[mm] were to testify before the Grand Jury.[459]

One Trustee said that Spanier may have been "left to float too freely by himself"[460] because he felt he could fix anything.[461] Other Trustees expressed that Spanier "filtered"[462] issues in the best light of a desired outcome;[463] showed Trustees "rainbows" but not "rusty nails;"[464] and "scripted" or "baked" issues leaving no room to debate issues or confront Spanier even when disagreement arose.[465] One Trustee

[mm] On May 12, 2011, the same day as the Board meeting, Baldwin interviewed a football equipment manager who had been approached that day by Attorney General investigators. According to Baldwin's notes, the manager advised her that McQueary had told him "that [McQueary] saw something that changed his life. [McQueary] had to tell Coach Paterno." Control Number 09325388.

called Spanier's "managing of messages" and the Board's reactive nature a "recipe for disaster."[466]

Trustees generally recalled that members asked Baldwin or Spanier few questions about the investigation.[467] The Trustees did not discuss whether the University should conduct an internal investigation to understand the facts and any potential liability issues, engage experienced criminal counsel, or prepare for the possibility that the Grand Jury investigation might result in some criticism of the University or its staff. One Trustee recalled that the Board did not ask for any investigation into the Sandusky issues because, from the way it was presented, the issue did not seem like a matter of concern.[468] In their report to the Board, Spanier and Baldwin significantly downplayed the nature of the Sandusky investigation and the potential damage it could cause the University. Given the information that was presented to them, the Board members did not reasonably inquire if the University had taken any measures to limit Sandusky's access to its facilities.

IV. University Response to the Presentment and Criminal Charges Against Sandusky, Schultz and Curley - October and November 2011

A. Baldwin, Spanier and Garban Learn of Presentment and Criminal Charges – October and November 2011

In late October 2011, Baldwin learned from an employee at the Attorney General's Office that "Curley and Schultz will be in our presentment," meaning that Curley and Schultz, two prominent Penn State officials, were about to be indicted.[469] Baldwin advised the Special Investigative Counsel that she understood the charges concerned the "duty to protect" and "reporting abuse." There was no mention of perjury.[470] On October 27, 2011, at 3:43 p.m., Baldwin sent Curley an urgent message to meet her and Spanier that evening.[471] They met at 8:00 p.m. and Baldwin told Curley and Schultz that they may be indicted by the Grand Jury.[472]

On October 28, 2011, Spanier and Baldwin had a series of meetings concerning the charges, including one with the Penn State Communications Office staff.[473] A staff member told the Special Investigative Counsel that during that meeting, Spanier said that he knew Curley and Schultz had done nothing wrong.[474] By 1:00 p.m. on October

28, 2011, Spanier had distributed a draft statement to Garban and the Communications staff that read:

> The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance. With regard to the other indictments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee. Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.[475]

Spanier requested input from Baldwin and the Communications staff on the draft.[476] One of the communications staff members stated to the Special Investigative Counsel that the Communications staff member thought the phrase "unconditional support" was "horrendous" but others at the meeting were "sheep" and went along with Spanier's idea.[477] This officer remembered that Spanier said he should back up Curley and Schultz because he had asked them to take care of something, they did it, and something bad happened, and that he should not abandon them merely because things did not turn out well.[478]

In his interview with the Special Investigative Counsel, Spanier stated that the media did not focus on the part of his statement that was empathetic to the victims. When asked if the six words "[p]rotecting children requires the utmost vigilance" sufficiently reflected the harm suffered by children who had been abused on the Penn State campus, Spanier said it was not his "place to jump to any conclusions or declare someone guilty before there was any due process."[479] Spanier said he had not made an effort to investigate the facts concerning Sandusky, and did not want to appear to interfere with the police work.[480]

Spanier and Baldwin met with Garban at noon on October 28, 2011.[481] Baldwin told the Special Investigative Counsel that Garban was the "conduit" to the Board, and Baldwin intended that he pass the information about the charges to the Board members.[482] Garban had a different understanding, however, telling the Special

Investigative Counsel that, in his meeting with Spanier and Baldwin, Spanier said that he still thought nothing would come of the investigation because other grand juries had reviewed the matter without bringing charges.[483]

Over the weekend of October 28-30, 2011, Garban had conversations with Trustees John Surma and Jim Broadhurst and told them what he learned from Spanier and Baldwin.[484] Garban also spoke again with Spanier who told him Baldwin was going to try to convince the Attorney General's Office that they did not have a case.[485] Garban told the Special Investigative Counsel that he was "astounded" to see Sandusky in the Nittany Lion Club at the football game on October 29, 2011, given what he had learned.[486] Neither Garban, Spanier, Broadhurst, Surma nor Baldwin spoke to the remaining Board members about the impending charges until after the charges were filed against Sandusky, Curley and Schultz on November 4, 2011.

Spanier told the Special Investigative Counsel that Baldwin originally had been told that charges would not be brought until November 12, 2011.[487] Spanier said he planned to "scrap" the Board agenda for November 10 and devote the meeting to discussing Sandusky.[488] Spanier said that he took a senior Board staff person into his confidence on November 2 and told that person "we know charges are being brought. We will scrap the Trustee seminar agenda, and devote the day to this matter. It will be good timing, we will get ready."[489] After Spanier's interview, the Special Investigative Counsel re-interviewed the senior Board staff person. The staff person did not recall any conversation with Spanier about scrapping the Board agenda, or about charges that would be filed against Sandusky.[490]

On Friday, November 4, 2011, at 2:26 p.m., newspapers reported that Sandusky had been indicted on charges of indecent assault of minors, among others.[491] The initial stories, however, did not mention charges against Schultz or Curley.[492] The presentment, which was attached to the charging documents, had been inadvertently released on November 4, 2011. On Saturday, November 5, 2011, law enforcement officers arrested Sandusky on the criminal charges, and released a press statement detailing the allegations against Sandusky, Curley, Schultz and others at Penn State.[493]

In his interview with the Special Investigative Counsel, Spanier said that it was his idea to bring the Board together when the presentment was released so the Board could be properly informed.

On November 5, 2011, at 1:41 p.m., a Trustee emailed Spanier and Garban, asking when the Board would be briefed.[494] Ten minutes later, Baldwin advised Spanier that "[i]t may be best to tell [the Trustee] that you are briefing the chair and the Board will be briefed next week."[495] At 2:09 p.m., Spanier wrote to Baldwin, "Steve already said we should alert the Board, but at this point it will be nothing more than what we are saying publicly." Shortly thereafter on that day, Spanier released the statement expressing his "unconditional support" for Curley and Schultz.[496] Spanier remained "confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately."[497]

B. Board of Trustees Conference Call - November 5, 2011

Senior administration staff suggested to Spanier that he brief the Board,[498] and schedule a conference call for 5:00 p.m. on November 5, 2011. According to the Board's notes, Spanier began the call by stating that the charges against Curley and Schultz were erroneous, unfair and unfortunate, and he expected "exoneration."[499] Some Trustees questioned the quality of the University's investigation of the 2002 incident, but Spanier denied that the charges had anything to do with the University's investigative process.[500] One Trustee suggested an "independent investigation" by outside counsel and retention of a crisis management firm.[501] Another Trustee mentioned the employment status of Curley and Schultz.[502] A meeting was called for the next day in which crisis management and legal advisors would make presentations to the Board on how to approach the crisis.[503]

Spanier and Baldwin opposed an independent investigation of the Sandusky issue. Baldwin emailed Spanier that, "[i]f we do this, we will never get rid of this group in some shape or form. The Board will then think that they should have such a group."[504] Spanier agreed.[505]

In meetings with the Special Investigative Counsel, some Trustees recalled that Spanier wanted to wait for the regular Board meeting later in the week to discuss the matter.[506] A Trustee recalled that Spanier said he managed crises every day at Penn State and he could handle this issue.[507]

C. Board of Trustees Meeting - November 6, 2011

Garban called another Board meeting for Sunday, November 6, 2011, at 7:00 p.m. According to the Board notes, several members advocated for the formation of a task force to work with outside counsel on crisis management.[508] Other members questioned whether the Board had received the relevant information about the investigation.[509] One Board member suggested that Curley, Schultz and Spanier should be suspended from their duties, but Garban said Spanier should not be suspended.[510] Some Board members also observed that Spanier's public statements did not sufficiently address harm to the victims of Sandusky's crimes.[511]

Later in the evening of November 6, 2011, the University issued another press release stating that Curley asked to be placed on administrative leave and Schultz would re-retire so that both men could devote time to defending themselves.[512] The release also announced that a "task force" would review the University's policies and procedures on the protection of children.[513] The press release on November 7, 2011 reflected that Curley and Schultz had requested and been granted administrative leave. Some Board members were upset with the wording of the release, as they recalled that it was their decision to place Curley and Schultz on administrative leave.[514]

In meetings with the Special Investigative Counsel, several Trustees described the second press release as a "turning point" for Spanier.[515] Changes that Spanier made to the statement after the Board had agreed on its points angered several members.[516] This led some Trustees to grow concerned with Spanier's ability to lead.[517] In an interview with the Special Investigative Counsel, Spanier denied making anything other than minor grammatical changes to the Board's statement.[518]

Some Trustees thought Garban's history of being previously employed at Penn State, where as SVP-FB he reported directly to Spanier, hampered his ability to lead the Board.[519] Garban told the Trustees that he had not advised them about the presentment when he learned of it because he was not sure it would come to fruition.[520]

On November 7, 2011, a Board member questioned whether the prior day's statement reflected the "sense of the Board," and urged the Board to have another meeting.[521]

D. Board of Trustees Conference Call - November 8, 2011

On November 8, 2011, the Board met again by conference call. Garban announced that he would turn the position of Board Chair over to Vice Chair John Surma. Surma then told the Board that he intended that they discuss forming a special investigative group of the Board, and deliberate on Paterno's and Spanier's leadership.[522]

The Board established the Special Investigations Task Force ("Task Force"). The Board also discussed University leadership,[523] but the members quickly decided that this type of discussion should be held in person.[524] Other members thought that no personnel action should occur until the investigation was completed.[525] The Board reached a consensus to delay decisions until the next day, and to issue a more thorough press release to express the Board's concerns.[526]

During the evening of November 8, 2011, the Board issued its own statement, expressing its outrage over "the horrifying details" of the Sandusky case.[527] The Board stated that it would appoint a special group to examine the circumstances of the charges, including "what failures occurred and who is responsible and what measures are necessary to ensure that this never happens at our University again and that those responsible are held fully accountable."[528] The Board's statement concluded: "We are committed to restoring public trust in the university."[529]

E. Board of Trustees Meeting - November 9, 2011

The Board met again in person on the evening of November 9, 2011. Surma chaired the meeting.[530] The Board discussed Spanier first, and the consensus was that he would be terminated without cause.[531] Executive Vice President and Provost Rodney Erickson was named interim President.[532]

In interviews with the Special Investigative Counsel, all of the Trustees who participated in the deliberations regarding the personnel actions said the decision concerning Spanier was their clear consensus.[533] The decision to terminate Paterno was more difficult because Board members had different viewpoints about his role. Nevertheless, one Board member stated that each of the Trustees reached the same decision in a different way.[534]

Some Board members felt that Paterno could have done more after learning about Sandusky's activities.[535] Some Board members recall former athletes stating that

Paterno had tremendous control over what happened in his program.[536] Several Board members were disturbed by Paterno's attempt to usurp the Board's role by discussing his retirement plans for the end of the season and holding his own press conference.[537] Others said Paterno could not continue to function as coach in the current environment and had become a distraction.[538]

The Trustees have differing recollections of Governor Thomas Corbett's role in the Board discussion. Some Trustees recall people asking if the Governor was still on the phone line, as he was quiet during parts of the call.[539] Some Trustees, including Corbett himself, said Corbett did not assert himself more than other Trustees. At least one said Surma gave Corbett the opportunity to do so.[540] Some Trustees recall Corbett saying something right before the vote on Paterno along the lines of "I hope you'll remember the children."[541] Others described him as being vocal and playing a leadership role in the meeting.[542] One Trustee recalled Corbett saying that the Board needed to take decisive action or there might be a loss of support for Penn State. Corbett told the Special Investigative Counsel that he did not attend the May briefing on Sandusky and his representatives did not report about the meeting to him. Corbett further told the Special Investigative Counsel that, if he had attended the briefing, he would have asked more questions or prompted other Trustees to ask further questions.

Some Trustees felt that the discussion on Paterno's future with the football program was rushed and not sufficient for the situation.[543] One Trustee said the Board was seeking to act quickly when it instead should have acted in a more deliberate way, with all of the facts.[544] The same Trustee feared "getting in front of the facts."[545] Another Trustee argued for placing Paterno on administrative leave and for balancing the tremendous good Paterno did for Penn State against the "worst mistake of his life."[546] A Trustee commented that it was a sad, but necessary, action the Board had to take.[547] The Board did not explore the range of personnel actions available to them regarding Paterno's role in the football program before the Board concluded that Paterno should be removed as Head Football Coach."[548]

The Board did not have a plan in place to notify Paterno of its decision. None of the Board members seem to have considered alternative times or locations for meeting with Paterno and no one appears to have communicated with him in advance of the Board meeting that evening. In hindsight, some Trustees felt that they should have

found a way to go to Paterno's home to notify him in person but at the time they did not feel it was feasible.

Some Trustees were concerned that the crowds and media around Paterno's home precluded having Paterno come to their meeting place or having Trustees go to his home so that they could tell him of its decision. Neither University officials nor the Board contacted local law enforcement about the possible public reaction to its decision, despite the growing crowds on campus and in State College.[549]

Some Trustees also were concerned that the media would report their decision about Paterno before he could be notified. Therefore, in order to inform Paterno of its decision to remove him from his position, the Board directed a staff member from the Athletic Department to deliver a note to Paterno at his home. The note directed Paterno to call a phone number that belonged to Surma. When Paterno called, Surma advised him that the Board was removing him from his position as Head Football Coach. Paterno ended the call without speaking further to Surma. Shortly thereafter, Paterno's wife called Surma to complain about the Board's treatment of her husband. The consequences of this awkward termination resulted in an outpouring of criticism against the Trustees by students, alumni and other Penn State supporters. Students demonstrated on the campus in protest and the media coverage was extraordinary and generally unfavorable.

Most of the Trustees agreed that the Board did not properly handle the termination of Paterno.[550] Some Trustees agreed that the Board was ill-prepared to address the situation.[551]

CHAPTER 6
BOARD OF TRUSTEES

KEY FINDINGS

- The charter, by-laws and standing orders of the Penn State Board state that the Board "shall receive and consider thorough and forthright reports on the affairs of the University by the President or those designated by the President. It has a continuing obligation to require information or answers on any University matter with which it is concerned."
- In 1998 and 2001, the Board of Trustees failed to exercise its oversight and reasonable inquiry responsibilities. In that time, the Board did not have regular reporting procedures or committee structures in place to ensure disclosure to the Board of major risks to the University.
- Because the Board did not demand regular reporting of such risks, the President and senior University officials in this period did not bring major risks facing the University to the Board.
- The Board did not create a 'Tone at the Top' environment wherein Sandusky and other senior University officials believed they were accountable to it.
- Spanier and senior University officials did not make thorough and forthright reports to the Board, which itself equally failed in its continuing obligation to require information or answers on any University matter with which it is concerned.
- Some Trustees reported that their meetings felt "scripted" or that they were "rubber stamping" major decisions already made by Spanier and a smaller group of Trustees.
- After the Sandusky investigation became publicly known in late March 2011, the Board did not independently assess this information or further inquire, up to and including the May 12, 2011 Board meeting.
- After the May 2011 Board briefing on the Sandusky investigation, the Board did not reasonably inquire about this serious matter at Board meetings in July or September 2011.

I. Board Structure and Responsibilities

Established by Charter, the Board of Trustees ("Board" or "Trustees") of The Pennsylvania State University ("Penn State" or "University") is the corporate body that has complete responsibility for the government and welfare of the University and all the interests pertaining thereto, including students, faculty, staff and alumni.[552]

The Board is composed of 32 members. Five are ex officio members: the University President; Governor of Pennsylvania; and secretaries of the departments of Agriculture, Education, and Conservation and Natural Resources. The Governor appoints six Trustees, the alumni elect nine Trustees, the Commonwealth's agricultural societies elect six Trustees, and the Board elects six members from business and industry groups. Elected terms and appointments begin on July 1 and Trustees serve three-year terms and can be reappointed. The six gubernatorial appointments are staggered with two appointed each year for three-year terms or "until their successors are appointed and confirmed." These appointments are subject to confirmation by the State Senate.[553] On May 16, 2003, the Board adopted term limits of 15 years applicable to alumni, agricultural, and business and industry Trustees.[554] Recently, President Erickson invited five additional representatives of several University constituencies, including alumni, faculty, staff and students, to participate in the University's Board committees and meetings, effective July 2012.

The Board also can confer "Trustee Emeritus" status on any living former member of the Board who served for 12 or more years with distinction. Trustees who served 20 years as of May 13, 2011, are entitled to automatic Emeritus status. Referred to as "Emeritus Trustees" or "Trustees Emeriti," these individuals are entitled to all Trustee privileges except those of making motions, voting and holding office.[555] There are currently 16 Emeritus Trustees.[556]

The Board operates under a Charter, Corporate By-Laws and Standing Orders. In the exercise of its responsibilities, the Board is guided by the following policies:

1. The authority for day-to-day management and control of the University, and the establishment of policies and procedures for the educational program and other operations of the University shall be delegated to the President, and by him/her, either by delegation to, or consultation with, the faculty and the student body in accordance with a general directive of

the Board. This delegation of authority requires that the Board rely on the judgment and decisions of those who operate under its authority. However, this reliance of the Board must be based upon its continuing awareness of the operations of the University. *Therefore, the Board shall receive and consider thorough and forthright reports on the affairs of the University by the President or those designated by the President. It has a continuing obligation to require information or answers on any University matter with which it is concerned.* Finally, upon request the Board shall advise the President on any University matter of concern to him/her. [emphasis added].

2. The Board of Trustees shall carry out certain responsibilities as a Board, without delegation. These responsibilities are:

    a. The selection of the President of the University;

    b. The determination of the major goals of the University and the approval of the policies and procedures for implementation of such goals;

    c. The review and approval of the operating and capital budget of the University;

    d. Such other responsibilities as law, governmental directives, or custom require the Board to act upon.

3. The Board of Trustees shall inform the citizens of the Commonwealth of Pennsylvania of the University's performance of its role in the education of the youth of Pennsylvania.

4. The Board of Trustees shall assist the President in the development of effective relationships between the University and the various agencies of the Commonwealth of Pennsylvania and the United States of America which provide to the University assistance and direction.[557]

The Board provides oversight to the University through its standing committees. As of 1998 the Board had three standing committees: (1) Committee on Educational Policy; (2) Committee on Finance and Physical Plant; and (3) Committee on Campus

Environment.[558] The Board established by Standing Order a Subcommittee for Audit on March 19, 2004, and a Subcommittee for Finance on September 19, 2008.[559]

At its meeting of March 16, 2012, the Board replaced the three standing committees with five new committees: (1) Committee on Academic Affairs and Student Life; (2) Committee on Finance, Business and Capital Planning; (3) Committee on Governance and Long-Range Planning; (4) Committee on Audit, Risk, Legal and Compliance; and (5) Committee on Outreach, Development and Community Relations. Each committee oversees its designated area(s) of responsibility and makes recommendations to the full Board for actions that enhance the functionality of the University.[nn] The Board meets six times each year.[560]

II. The Board's Duty of Oversight and Reasonable Inquiry

An effective board exercises objective and independent judgment while overseeing systems to ensure that the institution operates according to the law and its governing framework. Under Pennsylvania law concerning non-profit boards, board members have not only a duty of loyalty, but also a duty of care, including "reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances."[561] Indeed, the standing orders of the Penn State Board reflect this duty of inquiry, directing that the Board "shall receive and consider thorough and forthright reports on the affairs of the University by the President or those designates by the President. It has a continuing obligation to require information or answers on any University matter with which it is concerned."[562]

A board can breach its duty when it "utterly fails to implement any reporting or information system or controls" or having implemented such system or controls "consciously fails to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[563] The board breaches its duty not because a mistake occurs, but because the board fails to provide reasonable oversight in a "sustained or systematic" fashion.[564]

[nn] During the course of this investigation, the Special Investigative Counsel interviewed all current members of the Board, the majority of emeriti members and several former members. The Trustee interviews yielded a number of pertinent recommendations that are included in Chapter 10 of this report.

A. The Board's Failure of Oversight and Reasonable Inquiry in 1998 and 2001

In 1998 and 2001, the Penn State Board failed to exercise its oversight functions. In that time, the Board did not have regular reporting procedures or committee structures in place to ensure disclosure to the Board of major risks. Because the Board did not demand regular reporting of these risks, Spanier and other senior University officials in this period did not bring up the Sandusky investigations. For example, the Board met in May 1998 and March 2001, but was not advised by Spanier regarding the Sandusky incidents. While Spanier failed to disclose these facts, the Board has a continuing obligation to require information about such an important matter. Similarly, in September 2001, the Board approved a favorable land deal to Sandusky's Second Mile, just six months after Sandusky was investigated for assaulting a young boy in the Lasch Building showers. The Board should have elicited such important information from senior University officials before the sale.

Some Trustees reported that their meetings felt "scripted" or that they were "rubber stamping" major decisions already made by Spanier and a smaller group of Trustees."[565] Sometimes Trustees learned of the President's decisions in public meetings where there were no questions or discussions.[566]

B. The Board's Failure of Reasonable Inquiry in 2011

In 2011, the Board failed to perform its duty of inquiry, especially when it was on notice that the University was facing a major risk involving the Grand Jury investigation. While Spanier and Baldwin's May 2011 briefing to the Board downplayed the nature of the Grand Jury investigation of Sandusky, the Board members did not independently assess the information or demand detailed reporting from Spanier and Baldwin on this serious matter.[567] For example, Spanier and Baldwin indicated that the investigation did not involve the University, yet they did not explain why the Grand Jury called four senior Penn State officials to testify.[568] The Board did not inquire about the details of the Attorney General's investigation, including the request for subpoenas seeking historic email information for Spanier, Schultz, Paterno and Curley. When a Board member asked for more information, Spanier complained about this member, noting to Baldwin that "[the Trustee] desires near total transparency. He will be uncomfortable and feel put off until he gets a report."[569]

After the May 2011 briefing, Board members did not ask for further updates on the investigation at Board meetings in July and September 2011. The Board therefore did not meet its "continuing obligation to require information or answers on any University matter with which it is concerned."[570]

Further, because the Board did not push Spanier and other senior officials on such an important matter, Spanier did not feel accountable for keeping the Board immediately informed on serious developments, such as advance notice that Sandusky, Schultz and Curley faced criminal charges. The Board allowed itself to be marginalized by not demanding "thorough and forthright reports on the affairs of the University."[571]

Spanier's communications reflected his attitude toward keeping the Board informed of major developments. For example, hours after Spanier appeared before the Grand Jury, he communicated with a Trustee who asked about the status of the investigation. Spanier avoided the Trustee's question and asserted that he was "not sure it is entirely our place to speak about this when we are only on the periphery of this."[572] However, Spanier did not disclose that he had just been before the Grand Jury. Within a few hours of the criminal charges becoming public, staff members advised Spanier that the Board needed to be updated. Spanier said that any briefing "will be nothing more than what we said publicly."[573] He considered advising the Board that he was "briefing the Chair and the Board will be briefed next week."[574] When he finally briefed the Board, he focused on issues of alleged bias in the government's investigation, calling the charges "erroneous unfair and unfortunate."[575]

It was only on November 5, 2011, that members of the Board first began to press Spanier about the criminal charges. Noting that the charges presented a picture of a "sexual predator" and "perjury," one Trustee asserted that the Board had a duty of oversight and reporting.

CHAPTER 7
SANDUSKY'S POST-RETIREMENT INTERACTIONS WITH THE UNIVERSITY

KEY FINDINGS

- Despite Spanier's, Schultz's, Paterno's and Curley's knowledge of criminal investigations of Sandusky regarding child abuse as early as 1998, they failed to control Sandusky's access to the University's facilities and campuses. In fact, Sandusky was allowed to have a key for, and continued to work out in, the Lasch Building until November 2011, and had keys to other Penn State facilities.
- Even after the Attorney General's investigation became public in March 2011, former Penn State General Counsel Baldwin said that because of Sandusky's "emeritus" status and because he had yet to be convicted, his access to University facilities could not be terminated.
- Between 2002 and 2008 the University also allowed Sandusky to use the University facilities at the Altoona and Behrend (Erie) campuses to run "Jerry Sandusky" summer football camps for youth. Although University policy required a Memorandum of Agreement (MOA) with all third parties using University facilities, Sandusky, who some admired "like a god" because he was a former football coach, was allowed to operate the camps without any MOA.
- The University continued to support the Second Mile throughout this time by providing facilities and services for the organization's day camps and fund-raisers. Sandusky was a corporate officer, volunteer and public "face" of the Second Mile throughout this time.
- The University's visible support of the Second Mile provided Sandusky with numerous opportunities to bring young boys to campus and to interact with them through various camps and activities.
- After his retirement, Sandusky retained access to the Nittany Lion Club, an exclusive seating area at Beaver Stadium. Sandusky continued to be invited by senior University officials and attend Nittany Lion Club events until his November 2011 arrest.
- If University leaders had not granted Sandusky full use of Penn State's football facilities and supported his ways to "work with young people through Penn State," sexual assaults of several young boys on the Penn State campus might have been prevented.

I. Sandusky's Ongoing Contacts with The University

After his retirement from Penn State on June 30, 1999, Gerald A. Sandusky ("Sandusky") continued to maintain a prominent relationship with Penn State. Sandusky was able to use that relationship and the privileges he received in his retirement agreement to continue to bring young boys to University facilities and events.

Spanier, Schultz, Paterno and Curley were aware of the allegations against Sandusky in 1998 and 2001. Nonetheless, they put children in danger by permitting Sandusky to participate in these activities and by providing continued support to Second Mile activities.

A. Sandusky's Continued Access to University Facilities

Sandusky had access to Penn State's exclusive football fitness facilities (i.e., the Lasch Football Building and the East Area Locker Room Building ("Old Lasch")) as part of his retirement agreement,[576] whereas emeritus rank provided him with access only to "University recreational facilities" (among other benefits).[577] Until October 31, 2011, Penn State football staff regularly saw Sandusky working out in the Lasch Building weight room.[578] Sandusky still had keys to the Lasch Building when he was arrested in November 2011.[579] As recently as 2010, Sandusky had a "sub-master" key to the press box at Beaver Stadium, as well as a key for the stadium gates.[580]

The University also provided Sandusky with an office in Old Lasch as a term of his 1999 retirement agreement and emeritus status.[581] Between 2007 and 2008, Sandusky relinquished his office for other sports teams due to a space shortage.[582] Sandusky was able to use this office to store personal notes and documents.[583] University officials were unaware that there were numerous boxes of Sandusky's documents and belongings in Old Lasch until the Attorney General's Office investigators and the Special Investigative Counsel found these documents in April 2012. The documents contained communications between Sandusky and Victim 4, as well as between Sandusky and other victims.

One of Sandusky's documents was a "contract" between Sandusky and Victim 4 that proposed various rewards, including a "possible bowl trip," for personal and school achievements.[584] Victim 4 testified at Sandusky's trial in June 2012 as to the

existence of this contract. A former Second Mile counselor who worked with Sandusky at the Penn State camps recalled that Sandusky kept notes about campers during the camps. Campers were given written goals and benchmarks to achieve during the upcoming school year so the camper could return the following summer. [585]

B. Sandusky's Continued Access to the Nittany Lion Club at Beaver Stadium

After his retirement, Sandusky had regular access to premium season seats for Penn State home football games in the Nittany Lion Club, an exclusive seating area accessible by invitation only. [586] In July 2011, for the first time, Curley deleted Sandusky's name from the annual invitation list for the 2011 football season.[587] In early September 2011, Sandusky's wife called the Nittany Lion Club staff to inquire about his season tickets.[588] The staff brought the issue to Curley, who reversed his previous decision and approved season tickets for Sandusky.[589] On October 7 and 8, 2011, Sandusky participated in the 25th anniversary celebration of the 1986 Penn State national championship team.[590] Sandusky attended six home games in the 2011 season, including the game played the week before criminal charges were filed against him.[591] After his arrest, Sandusky called the Nittany Lion Club and said that he would not attend the last game of the 2011 season.[592]

Several individuals advised the Special Investigative Counsel that, because of his continued attendance at the Nittany Lion Club, they were under the impression that Sandusky was cleared of the allegations in the newspaper reports and was no longer under investigation.[593]

C. Sandusky's Football Camps at University Campuses

After Sandusky retired, the University allowed him to operate summer youth football camps at University facilities through his company, Sandusky and Associates. Sandusky used two University campuses for his camps, Behrend (in Erie) and Harrisburg. The Behrend campus hosted Sandusky's football camps from 2000 to 2008[594] and the Harrisburg campus hosted the Sandusky Football Camp in 2007 and 2008. Both of these campuses provided athletic and recreational facilities, food and lodging for the camps.

It was standard practice and procedure for the University to enter into a Memorandum of Agreement ("MOA") [595] with all external parties that utilized

University facilities. However, the Sandusky Football Camp repeatedly was allowed access to the Behrend campus for its overnight youth football camps without an MOA. The Behrend campus did obtain an insurance certificate from Sandusky and Associates but required only "a handshake" with him to permit him to run his youth football camps each year from 2000 to 2008.[596] Individuals interviewed by the Special Investigative Counsel stated that, during these years, Sandusky was treated as a celebrity and some University employees admired him "like a god."[597] He did not have to go through the usual administrative procedures because he was a former football coach at Penn State and a well-respected employee for over 30 years.[598]

D. Sandusky's Continued Business Dealings with the University

The University continued to conduct business with Sandusky after his retirement. According to University accounting records, 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.[599] Some of these activities included a speech at the American Football Coaches Association meeting in 2000,[600] a speech at the 2007 Penn State Leadership Conference for Student Organization leaders,[601] attendance at a 2000 Football Coaches Clinic held at the Behrend campus,[602] presentations at the 2002 Penn State Spring Conference[603] and the 2002 National Association of College and University Food Services Region II Conference.[604] On May 14, 2010, Curley wrote a letter of recommendation for Sandusky for the American Football Coaches Association Outstanding Achievement Award.

E. Failure to Prohibit Sandusky's Access to University Facilities

Despite Spanier's, Schultz's, Paterno's and Curley's knowledge of criminal investigations of Sandusky regarding child abuse as early as 1998, they failed to control Sandusky's access to the University's facilities and campuses.

After news of the Sandusky investigation appeared in newspapers in March 2011, some members of the Athletic Department staff questioned Sandusky's continued access to athletic facilities.[605] Some members of the Athletics Department staff asked Penn State General Counsel Cynthia Baldwin if Sandusky could be restricted from the athletic facilities.[606] [607] She told them that the University could not take his keys.[608]

Baldwin advised the Special Investigative Counsel that because of Sandusky's emeritus status and the fact that he had not been charged with a crime, his access could not be eliminated without the University being sued.[609] However, Baldwin said that she believed that either Curley or another Athletic Department staff member was going to ask Sandusky to return his keys voluntarily. Baldwin did not recall any further discussion of the topic until Sandusky was charged.[610] At that time, Baldwin requested a human resources supervisor in the Athletic Department to ask Sandusky's lawyer for Sandusky's keys.[611] Before that was done, however, the University changed the locks on the building so that Sandusky would no longer have access.[612][613] The supervisor told the Special Investigative Counsel that the supervisor did not know if Sandusky ever returned his keys.

II. Sandusky's Post-Retirement Involvement In Second Mile Activities

A. Penn State and the Second Mile Organization

The Second Mile is a non-profit organization for underprivileged youth founded by Sandusky in 1977, when he was the Defensive Coordinator for the Penn State football team. Second Mile began as a group foster home for the purpose of helping troubled boys. Over the years, it evolved into a statewide, three-region charity dedicated to the welfare of children. Since its founding, Second Mile has been closely intertwined with the University. In 2011, more than three-quarters of the Second Mile Board were University alumni. University students served as interns and volunteers at Second Mile events and solicited donations from local businesses for these charitable events.

Wendell Courtney was the outside legal counsel at Penn State from 1980 until 2010. From 2008 to 2011, he was also legal counsel for the Second Mile and sat on its Board.

Sandusky acted as a corporate officer, key fundraiser, and the "face"[614] of the organization while continuing to coach football at the University. When he retired from the University in 1999 he became a paid consultant for the Second Mile until August 2010, when he retired[615] from that role. Sandusky remained a part of Second Mile through his presence and contacts even after his retirement.

B. "Collaborative Relationship" Between Penn State and Second Mile

An article posted on the University's website on July 1, 1999 announced Sandusky's retirement. In this article, Curley stated that Sandusky is "the founder of Second Mile ... [and] will continue to offer his services on a volunteer basis to the athletic department's Lifeskills and Outreach programs."[616] In the same announcement, Paterno praised Sandusky for his contributions to the University's football program and stated that Sandusky was "... a person of great character and integrity."[617] In a memorandum dated August 23, 1999 from Second Mile Chairman Robert Poole to the Second Mile Board, Poole wrote that beginning in January 2000, Sandusky would become a paid consultant for the organization and earn $57,000 per year plus travel expenses.[618]

In Sandusky's retirement agreement with the University, both parties agreed to "work collaboratively" in community outreach programs such as the Second Mile.[619] The collaboration took several forms. Penn State football staff and players helped Sandusky with annual Second Mile Golf Tournaments held at the Penn State golf course(s) from 2003 to 2011.[620] Each year the Second Mile distributed playing cards that displayed both Penn State and Second Mile logos and contained images of Penn State football players, coaches and other student-athletes. A number of the University's football players and other student-athletes routinely volunteered for Second Mile youth programs.

In addition, in February 2009, Schultz contacted a bank on behalf of Sandusky and the Second Mile. Schultz advised the bank "the Second Mile is raising funds to support an expansion of their facilities here in State College.... Would you be agreeable to meet with Jerry Sandusky ... and me? They are really good people and this is a great cause related to kids."[621] Bank officials agreed to meet with Sandusky.[622]

The University's visible support of the Second Mile provided Sandusky with numerous opportunities to bring young boys to campus and to interact with them through various camps and activities.

C. Second Mile Camps on Penn State Campuses

Between 1999 and 2008, the Second Mile operated six one-week long summer youth camps at the University Park campus as well as at other non-University locations.

Sandusky operated numerous summer youth camps at various Commonwealth campuses through Second Mile and his own corporation, Sandusky and Associates.[623]

At the University Park campus, camp activities were held at various locations including classrooms, an outdoor swimming pool, athletic fields and football facilities.[624] Sandusky frequently visited the boys' camps during the swimming pool activity in the afternoon, and the night sessions, which were usually held in one of the football meeting rooms. [625]

Second Mile also offered a "Friend Program," a mentorship program that matched a college volunteer with an at-risk elementary student.[626] The Friend Program events took place in Blair, Centre, Clinton and Lancaster counties as well as in the Lehigh Valley and other locations in Pennsylvania. The Friend Program events included picnics, holiday parties, swimming and bowling.[627] Sandusky sometimes participated in the Friend Program at the Altoona campus. When he did, Sandusky often arrived accompanied by a boy from Second Mile who was not part of the invited group.[628] According to a Director of Programs for Second Mile, the last time he saw Sandusky participate in any Second Mile activities was in 2008.[629]

CHAPTER 8
FEDERAL AND STATE CHILD SEXUAL ABUSE REPORTING REQUIREMENTS

KEY FINDINGS

- The Clery Act requires the University to collect crime statistics relating to designated crimes, including sexual offenses, occurring on University property, make timely warnings of certain crimes that pose an ongoing threat to the community, and prepare an annual safety report and distribute it to the campus community. The Clery Act requires "Campus Security Authorities," including coaches and athletic directors, to report crimes to police. From approximately 1991 until 2007, University officials delegated Clery Act compliance to the University Police Department's Crime Prevention Officer ("CPO"). The delegated CPO was not provided any formal training before taking over the position nor does he recall receiving any Clery Act training until 2007.
- In 2007, the Director of the University Police Department transferred the Clery Act compliance responsibility from the CPO to a departmental sergeant and instituted some Clery Act training programs. The sergeant could only devote minimal time to these duties. Despite the efforts of the University Police Department, awareness and interest in Clery Act compliance throughout the University remained significantly lacking.
- As of November 2011, the University's Clery Act policy was still in draft form and had not been implemented. Many employees interviewed were unaware that they were required to report incidents and had been provided with little, if any, training. Although University administrators identified compliance with laws and regulations as one of the top 10 risks to the University in 2009, Clery Act compliance had never been audited by the University's internal auditors or received attention from any other University department, including the Office of General Counsel.
- The University Police Department instituted an electronic report format in 2007 for easier reporting, but it received only one completed form between 2007 and 2011.
- Paterno, Curley and McQueary were obligated to report the 2001 Sandusky incident to the University Police Department for inclusion in Clery Act statistics and for determining whether a timely warning should be issued to the University community. No record exists of such a report. While Schultz and Spanier were arguably not Campus Security Authorities under the Clery Act, given the leadership positions they held within the University, they should have ensured that the University was compliant with the Clery Act with regard to this incident.

- Spanier advised the Special Investigative Counsel that although the University was "big" on compliance, he was not aware that the Clery Act policy had not been implemented; that anyone had ever advised him that the University was not in compliance with the Clery Act; or whether there had ever been an internal or external audit of the University's Clery Act compliance.

I. The Federal "Clery Act"

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) ("Clery Act"), is a federal law applicable to any institution ("Institution") of higher learning that participates in federal student financial aid programs. The Pennsylvania State University ("Penn State" or "University") participates in such programs and, therefore, must comply with the requirements of the Clery Act. The Clery Act is enforced by the United States Department of Education ("Department of Education"), which has the authority to issue fines for violations of the Clery Act or, in extreme cases, to end federal funding to the Institution.

The purpose of the Clery Act is to provide an Institution's students, parents and employees with information about campus safety so that members of the campus community can make informed decisions to protect themselves from crime. Among other things, the Clery Act requires Institutions to: (1) collect crime statistics relating to designated crimes ("Clery Crimes") occurring on designated locations associated with the Institution; (2) make timely warnings of certain Clery Crimes that pose an ongoing threat to the community; and, (3) prepare and distribute to the campus community an annual safety report that contains the crime statistics described above, as well as other information about the Institution's safety policies and procedures.[oo] Institutions are required to collect crime data from all "Campus Security Authorities."[pp]

A. Campus Security Authorities ("CSAs")

The Department of Education establishes the regulations for implementing the Clery Act and broadly defines the term "Campus Security Authority" to include the following entities or individuals:

1. A campus police department or a campus security department of an Institution.

2. Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a

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[oo] 20 U.S.C. § 1092(f)(1), (3), (5). The Clery Act was originally passed in 1990, and Congress amended the law several times over the years.

[pp] 20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(a).

campus security department . . . such as an individual who is responsible for monitoring entrance into Institutional property.

3. Any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses.

4. *An official of an institution who has significant responsibility for student and campus activities* including, but not limited to, student housing, student discipline, and campus judicial proceedings. [emphasis added][qq]

The Department of Education has defined the last group of CSAs to include, among others, the following individuals:

- A dean of students who oversees student housing, a student center or student extracurricular activities.
- *A director of athletics, a team coach* or a faculty advisor to a student group. [emphasis added]
- A student resident advisor or assistant or a student who monitors access to dormitories.
- A coordinator of [fraternity and sorority affairs].
- A physician in a campus health center, a counselor in a campus counseling center or a victim advocate or sexual assault response team in a campus rape crisis center if they are identified by [an Institution] as someone to whom crimes should be reported or if they have significant responsibility for student and campus activities. . . .[rr]

B. Collecting Crime Statistics

The Clery Act requires Institutions to collect information about all Clery Crimes,[ss] which include forcible and non-forcible sex offenses,[tt] so that the information

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[qq]34 C.F.R. § 668.46(a).

[rr]While the above citation is from 2011, the Department of Education has had similar guidance in place setting forth its interpretation of the definition of Campus Security Authorities since at least 1999. United States Department of Education, Handbook for Campus Safety and Security Reporting (hereinafter U.S. Dept. of Education Clery Handbook) (Washington D.C., February 2011), 75. *See* 64 F.R. 59060, 59063 (November 1, 1999).

[ss]20 U.S.C. § 1092(f)(1)(F)(i).

can be used for reporting statistics to the public on an annual basis and determining whether to issue timely warnings to the campus community. Institutions are required to report Clery Crimes that are "reported to campus security authorities or local police agencies" on an annual basis.[uu] Institutions are required to include any Clery Crime in their collected statistics, even if there is no criminal charge filed or arrest made. The Institution must collect and report the crime if the information is reported to a CSA who believes that the allegation was made to him or her "in good faith."[vv]

C. Issuance of Timely Warnings

The Clery Act requires an institution to issue "timely warnings" of Clery Crimes if the crime is reported to a CSA and is "considered by the Institution to represent a threat to students and employees."[ww] If the Institution, in the exercise of its judgment, determines that the reported crime poses an ongoing threat to students and employees, the Institution must utilize appropriate procedures to notify students and employees of the threat "in a manner that is timely and will aid in the prevention of similar crimes."[xx]

D. Preparation of an Annual Safety Report

The Clery Act requires Institutions to prepare and distribute an annual safety report ("ASR") to the campus community, which includes, among other things, the annual Clery Act crime statistics described above. The Clery Act and accompanying regulations set forth in detail what the ASR must include, including where and how crimes should be reported, crime prevention policies, alcohol and drug information, and emergency response and evacuation information.[yy]

[tt]Clery Crimes include: murder, manslaughter, forcible and non-forcible sex offenses, robbery, aggravated assault, motor vehicle theft, arson, and certain drug and alcohol violations. 20 U.S.C. § 1092(f)(1)(F)(i).

[uu]20 U.S.C. § 1092(f)(1)(F)(i).

[vv]"If a campus security authority receives the crime information and believes it was provided in good faith, he or she should document it as a crime report. In 'good faith' means there is a reasonable basis for believing that the information is not simply rumor or hearsay. That is, there is little or no reason to doubt the validity of the information." U.S. Dept. of Education, Clery Handbook, 73.

[ww]34 C.F.R. § 668.46(e); see 20 U.S.C. § 1092(f)(3).

[xx]34 C.F.R. § 668.46(e).

[yy]20 U.S.C. § 1092(f).

II. The University's Failure To Implement the Clery Act

The Clery Act was passed in 1990 and became effective in 1991. From approximately 1991 until 2007, University officials delegated Clery Act compliance to the University Police Department's Crime Prevention Officer ("CPO").[630] The CPO was not provided any formal training before taking over the position nor does he recall receiving any Clery Act training until 2007.[631] The CPO was supervised by others in the University Police Department, including, ultimately, then Chief Thomas Harmon.[632] Before 2007, the CPO was unaware that the Clery Act included the concept of CSAs or that the University had an obligation to collect crime data from student organizations, coaches, and others who have regular contact with students. To the CPO's knowledge, his supervisors were also unaware of these requirements.[633] In fact, according to the CPO, he told one of his supervisors in 2007 that there was a need for additional personnel to assist with the Clery Act and "we could get hurt really bad here."[634] The supervisor responded by saying "we really don't have the money."[635]

In 2007, the Director of the University Police Department, Stephen Shelow, transferred the Clery Act compliance responsibility from the CPO to a departmental sergeant, because he believed that compliance with the Clery Act had not been handled well in the past.[636] However, the sergeant in the University Police Department was only able to devote minimal time to Clery Act responsibilities.

Shelow also directed a number of University police department employees to attend a training program on the Clery Act. When the trainers discussed the requirements to identify and train CSAs, the attendees realized that the University did not have a sufficient process for those tasks.[637] In fact, Shelow does not believe that anyone at the University understood, before that conference, that the Clery Act requires that information be gathered from outside the University Police Department.[638]

Realizing that the University had serious deficiencies in the way that it gathered Clery Crime information,[639] the University Police Department began to provide training and conduct outreach to the broader group of CSAs to gather crime data. They developed a crime report form to be completed by any CSA to whom a crime was reported and made the form available on the internet.[640] The sergeant created PowerPoint materials and provided some training and information sessions for groups at University Park and some of the Commonwealth campuses.[641] The University Police

Department also held meetings with faculty and staff members involved in athletics, student activities and the fraternity and sorority system to increase awareness of the Clery Act and to explain the obligations of some of these individuals as CSAs.[642]

Despite the efforts of the University Police Department, awareness and interest in Clery Act compliance remained lacking throughout the University.[643] Since making the report form available electronically in 2007, the University Police Department has received only one completed form through 2011.[644] No record reflects that any Commonwealth campus used the form until 2009.[645] The training sessions and outreach efforts were conducted primarily for just one or two years, were "sporadic" and were not well attended.[646]

The Director and the sergeant's intention to properly follow Clery Act regulations also were stymied by their own lack of time and resources. The sergeant, in addition to her Clery Act responsibilities, also was in charge of all criminal investigations and was only able to devote minimal time to Clery Act compliance.[647] The Director suggested to the then Senior Vice President Finance and Business that the University appoint a "compliance coordinator" to assist with Clery Act implementation.[648] The Director was told that while the need for the position existed, the University had other priorities that needed attention first.[649]

In April 2009, the University's outside legal counsel provided information to the University about Clery Act compliance.[650] The Director, the sergeant and others created a "draft" Clery Act policy that would have required written notification to all CSAs of their roles and responsibilities.[651]

As of November 2011, the University's Clery Act policy was still in draft form and had not been implemented.[652] Many University employees interviewed were unaware of their CSA status or responsibilities under the Clery Act. In an interview with the Special Investigative Counsel, Spanier said that he was not aware that the Clery Act policy had not been implemented and remained in draft form.[653] Spanier said no one at Penn State had ever informed him that the University was not in compliance with the Clery Act.[654] Spanier also stated that there had been no internal or external audits for Clery Act compliance.[655] He also said he had never briefed the Board on Clery Act compliance, nor had the Board asked him questions on this issue.[656] Spanier emphasized that Penn State "was big on compliance, more than other universities."[657]

III. Pennsylvania Child Sexual Abuse Reporting Requirements

The Commonwealth of Pennsylvania charged Curley and Schultz in November 2011 with violating Pennsylvania's statute, 23 Pa. C.S. § 6311, relating to the mandatory reporting of child abuse in 2002. That statute requires certain individuals who are "mandatory reporters" to report suspected child abuse to the appropriate state agency. The statute has been amended several times but the relevant provision in effect in 2001 states:

> Persons who, in the course of their employment, occupation or practice of their profession, come into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when they have reasonable cause to suspect, on the basis of their medical, professional or other training and experience, that a child coming before them in their professional or official capacity is an abused child. . . .

The 2012 version of the statute states:

> A person who, in the course of employment, occupation or practice of a profession, comes into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when the person has reasonable cause to suspect, on the basis of medical, professional or other training and experience, that a child under the care, supervision, guidance or training of that person or of an agency, institution, organization or other entity with which that person is affiliated is a victim of child abuse, including child abuse by an individual who is not a perpetrator.

Both the 2001 and 2012 versions of the law also state:

> In addition to those persons and officials required to report suspected child abuse, any person may make such a report if that person has reasonable cause to suspect that a child is an abused child.[zz]

[zz] 23 Pa. C.S. § 6312.

IV. Implications of The University's Failure to Report Allegations of Child Sexual Abuse

McQueary testified at the preliminary hearing on December 16, 2011 that he described the 2002[658] incident involving Sandusky and a child in the Lasch Building to Paterno as "a young boy in the shower and it was way over the lines" and "extremely sexual in nature."[659] McQueary testified at that same hearing that he later met with Curley and Schultz, and told them that he observed Sandusky in the shower with a young boy and that he "thought that some kind of intercourse was going on."[660] While Curley and Schultz dispute McQueary's version of what he told them about the incident, Paterno testified to the Grand Jury on January 12, 2011 that McQueary described the incident to him as "fondling" and "a sexual nature."[661] The conduct described by McQueary and Paterno constitutes the Clery Crime of sexual assault.

Based on the facts uncovered by the Special Investigative Counsel, Paterno, Curley and McQueary were obligated as CSAs to report this incident to the University Police Department for inclusion in Clery Act statistics and for determining whether a timely warning should be issued to the University community. The Special Investigative Counsel found no indication that Paterno, Curley and McQueary met their responsibilities as CSAs by reporting, or ensuring that someone reported, this incident to the University Police Department. As a result, no timely warning could have been issued to the University community and the incident was not included in the University's Clery Crime statistics for 2001.[662]

McQueary, Paterno and Curley did report the incident to Schultz who, as SVP-FB, was ultimately in charge of the University Police Department. However, Schultz was not a law enforcement officer and was not the person designated to receive Clery Crime reports or to collect Clery Crime statistics for the University.[aaa] Arguably, as the most senior leaders of the University, Schultz and Spanier should have ensured compliance with the Clery Act regarding this incident. There is no record that Spanier or Schultz reported, or designated someone to report, the incident to the University Police Department, which should have caused the incident to be included in the

[aaa] 34 C.F.R. § 668.46(b)(2) requires the University to include in its ASR a statement setting forth to whom individuals should report crimes. The University's ASR for 2001 did not contain any such statement; however, it generally states that the police department investigates crimes.

University's Clery Crime statistics and may have triggered the issuance of a timely warning to the University community.

V. Improvements in Clery Act Compliance Since November 2011

After the criminal charges against Sandusky, Curley and Schultz became known, the University assessed its implementation and compliance with the Clery Act. Notwithstanding an investigation begun on November 9, 2011 by the Department of Education concerning the same issues,[bbb] the University moved forward by hiring a reputable national consultant to conduct this assessment. The consultant's study identified several shortcomings in the University's Clery Act procedures, including those cited above.[663]

On January 19, 2012, the Special Investigative Counsel recommended several actions relative to compliance with the Clery Act's training and reporting requirements. As described in Chapter 10 of this report, some of the recommended actions were already in place and the others have now been implemented or are underway, [664] including the appointment of a full-time Clery Compliance Officer on March 26, 2012.

[bbb] As of the date of this report, the Department of Education's investigation is ongoing.

CHAPTER 9
THE PROTECTION OF CHILDREN IN UNIVERSITY FACILITIES AND PROGRAMS

KEY FINDINGS

- The University had two main policies, *Background Check Process,* and *Protection of Minors Involved in University Sponsored Programs,* that were designed to protect children using University facilities and participating in University-supported programs. The policies for background checks on employees and volunteers were significantly inadequate.
- University staff involved with youth programs said that some persons serving as volunteer coaches and counselors "fell through the cracks" and were allowed to participate in youth programs or events without appropriate clearances.
- Factors in the inconsistent application of these policies and procedures include confusion among University staff members about what the background process entails and who is subject to the process.
- The University historically has not trained administrators of youth programs on the policies. The University also has not consistently required timely submission of background applications so as to allow sufficient time for background checks.

I. University Policies for the Protection of Non-Student Minors

The Special Investigative Counsel found that The Pennsylvania State University's ("Penn State" or "University") system for implementing the child protection policies was inadequate, but that corrective efforts are underway. While the identified deficiencies historically may not have had a direct impact on Sandusky's crimes, the issues are serious and reflect that the University has not sufficiently focused on the protection of children in the past.

University programs for youth are diverse and are held at nearly every Commonwealth campus. Youth programs range from summer academic and sport camps that can be day or overnight, to year-round activities and events in arts, theatre, science, sports, adventure, nature, and leadership. Penn State Outreach plays a prominent role in the youth programming offered by the University as does the Intercollegiate Athletics Department ("ICA").[665] At University Park alone, more than 20,000 non-student minors are now attending the 2012 summer sport camps offered by the ICA.[666]

Two University policies – AD 39, *Minors Involved in University-Sponsored Programs or Programs Held at the University and/or Housed in University Facilities (formerly Programs Involving Minors Housed in University Facilities)* [667] and HR 99, *Background Check Process,* are the core policies the University relies on to help protect the many thousands of children who visit its campuses each year.

All 20 Penn State campuses offer an "open-campus" environment, sharing academic and recreational facilities with the local community. The largest campus located at University Park annually invites hundreds of thousands of minors to participate in University sponsored educational, recreational, cultural and sports programs.

A. AD 39, *Minors Involved in University-Sponsored Programs or Programs held at the University and/or Housed in University Facilities*

The Penn State policy on minors involved in University-sponsored programs or youth programs held at the University or housed in University facilities was created in October 1992 and is closely aligned with the nationally accepted American Camping Association Standards.[668] The policy was revised several times over the years and on

April 11, 2012, the University issued another revision. The purpose of the revision is "[t]o provide for appropriate supervision of minors who are involved in University-sponsored programs, programs held at the University and/or programs housed in University facilities at all geographic locations."[669] The policy addresses background clearances; codes of conduct; legal consents; medical information; counselor/staff member training/orientation; adult-to-participant ratios; and child abuse and mandated reporting procedures.[670] Policy AD 39 also applies to any external organization that utilizes University facilities for youth activities through a Memorandum of Agreement ("MOA").[671]

Recent revisions made to Policy AD 39 are intended to strengthen the University's internal controls and procedures for the protection of non-student minors on University campuses. The revised policy expands mandatory background checks for all individuals, paid or unpaid, working with minors.[672] The policy requires self-disclosure of arrests and convictions. The Office of Human Resources ("OHR") must review and approve all background check verifications. The policy also requires mandatory annual training on child protection and reporting incidents of possible abuse to appropriate authorities.

B. HR-99, *Background Check Process*

Historically, background checks at Penn State have been conducted under two policies, Policies HR-95 and HR-96.[673] Policy HR-96 for "other-than-academic appointments," had been the governing policy for those participating in youth programs. The University also developed an implementation guide, the *Reference and Background Check Process Guideline.*

On July 5, 2012, the University implemented Policy HR-99, *Background Check Process,* which supersedes and consolidates the prior policies HR-95 and HR-96.[674] HR-99 establishes "a process for ensuring background checks are completed for any individual who is engaged by the University in any work capacity including employees, volunteers, adjunct faculty, students, consultants, contractors or other

similar positions."[675] The revised background check process will require an additional 23,650 background checks to be conducted annually.[ccc]

The new policy requires any individual engaged by the University in any work capacity to have a University background check and/or verification of successful completion of Pennsylvania Act 34 (background check) and Act 151 (child abuse clearance). Covered staff must provide notice to the University of any criminal charges within 72 hours of their arrest.[676] The new policy also defines key terms such as "minor," "sex and violent offender registry check," and "sensitive/critical positions."[677]

II. Implementation of the University's Child Protection Policies

Penn State staff involved with youth programs explained to the Special Investigative Counsel that some persons serving as volunteer coaches and counselors were "slipping through the cracks"[678] and were allowed to participate in youth programs or events without appropriate clearances. An Outreach employee involved in University summer sport camps stated that participation by unscreened individuals occurred "every year and all the time."[679] One senior Outreach employee described the background check process as a "sieve."[680] A report prepared by an employee in the Outreach Finance Office in May 2010 revealed that 234 of the 735 coaches paid to work at the summer sports camps in 2009 did not have a background check completed before the start of the sport camp for which they worked.[681]

When interviewed by the Special Investigative Counsel, the director of the Sport Camps Office denied that there had ever been any issues or incidents with the summer sport camps.[682] Other interviews conducted and documents reviewed, however, pointed to several instances of unauthorized participation in summer youth camps.[683] For example, in 2010, at least five coaches or counselors with criminal records were allowed to work at University Park summer youth programs.[684] One individual who registered for a coaching position for the University Park Football I camp in 2010 indicated in his self-disclosure statement that he had no criminal history, and camp personnel "cleared" him to participate in the camp. A background check initiated a day later and completed

[ccc]This number is Penn State's estimate of the total number of background checks that the University would need to complete annually if it implemented a policy that required a background check for every category of employee and volunteers, attached hereto as Appendix B.

the following day revealed that the man had a criminal record for child endangerment. The man had already stayed overnight in a Penn State residence hall with minors.[685]

Several significant factors contributed to the inconsistent implementation of Policy AD39 and the background check process. For example, some University staff members appeared confused about the background check and child welfare policies.[686] Even those familiar with the policies had different interpretations of what the background process entailed and who was subject to the process.[687] One HR employee who was involved in the process said the policies are "clear as mud."[688] The University historically has not trained administrators of youth programs on the policies.[689] The University also has not consistently required timely submission of applications so as to allow sufficient time for background checks.[690]

Application of the background check process is not uniform across the Commonwealth campuses. The process varies from the use of a web-based computer application to conduct background checks [691] and background checks using fingerprints, [692] to campuses that never required any background check until the Sandusky charges became public, and now use only a free internet search of questionable accuracy.[693]

In past years, problems with the background check process have been brought to the attention of Penn State administrators and those responsible for overseeing youth programs at Penn State. [694] One employee who presented reports concerning shortcomings in the process felt "like [she] wasn't being heard," but did not pursue the matter because the employee "didn't feel like it was [her] place to say anything." She further stated, "I have to be careful, I had my job [to lose]."[695] Another employee who prepared the May 2010 report on background checks expressed concern for the degree of risk to the University.[696] When the employee voiced concerns to the director of the Sports Camps Office, the director dismissed the issue and said that other matters were more pressing.[697]

The Special Investigative Counsel found only one instance where a University employee was held accountable for not complying with Policy AD39 and the background check process. After multiple failures to enforce the policies in the summer of 2010, a "Memorandum of Conversation" was placed in the personnel file of a senior Sports Camp employee that states, "any future failure...might result in disciplinary

action up to and including termination." The memorandum addressed only one of multiple incidents.[698]

Some Penn State staff expressed concerns with the complexity of the revised policies.[699] According to one employee "[w]e all understand why [a background check process is needed] but the issue now is how are we going to do this?"[700]

III. Use of University Facilities by Third Parties for Youth Programs

Under the University's standard MOAs for use of University facilities by third parties, [701] the party contracting with the University has the duty to ensure that its counselors and staff possess the appropriate background clearances.[702] The revised Policy AD39 provides that non-University groups using University facilities "must provide to the sponsoring unit satisfactory evidence of compliance with all of the requirements of this Policy at least (30) days prior to the scheduled use of University facilities."

CHAPTER 10
RECOMMENDATIONS FOR UNIVERSITY GOVERNANCE, ADMINISTRATION, AND THE PROTECTION OF CHILDREN IN UNIVERSITY FACILITIES AND PROGRAMS

The failure of President Graham B. Spanier ("Spanier"), Senior Vice President – Finance and Business ("SVP-FB") Gary C. Schultz ("Schultz"), Head Football Coach Joseph V. Paterno ("Paterno") and Athletic Director ("AD") Timothy M. Curley ("Curley") to protect children by allowing Gerald A. Sandusky ("Sandusky") unrestricted and uncontrolled access to Pennsylvania State University ("Penn State" or "University") facilities reveals numerous individual failings, but it also reveals weaknesses of the University's culture, governance, administration, compliance policies and procedures for protecting children. It is critical for institutions and organizations that provide programs and facilities for children to institute and adhere to practices that have been found to be effective in reducing the risk of abuse. Equally important is the need for the leaders of those institutions and organizations to govern in ways that reflect the ethics and values of those entities.

The Special Investigative Counsel provided several recommendations to the Board and the University in January 2012 to address exigent needs to reform policies and procedures, particularly those involving upcoming activities, such as summer camps. Before, but especially since November 2011, the Board and University administrators have reviewed, modified, or added relevant policies, guidelines, practices and procedures relating to the protection of children and University governance. Consistent with the recommendations in this report, members of the Board, University administrators, faculty and staff have:

- Strengthened security measures and policies to safeguard minors, students and others associated with the University and its Outreach programs.
- Improved the organization and procedures of the Board to better identify, report, and address issues of significance to the University and members of its community.

- Increased compliance with The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) ("Clery Act") training, information collection and reporting requirements.
- Encouraged prompt reporting of incidents of abuse and sexual misconduct.
- Conducted abuse-awareness training for many University areas, including its top leadership.
- Provided better oversight and governance of the University's educational, research and athletic compliance programs.

One of the most challenging tasks confronting the University community – and possibly the most important step in ensuring that the other recommended reforms are effectively sustained, and that public confidence in the University and its leadership is restored – is an open, honest, and thorough examination of the culture that underlies the failure of Penn State's most powerful leaders to respond appropriately to Sandusky's crimes.

The following recommendations are intended to assist University administrators, faculty, staff and the Board, in improving how they govern and provide protection for children in University facilities and programs. These recommendations relate to the University's administrative structure, policies and procedures and the Office of General Counsel; the responsibilities and operations of the Board; the identification of risk; compliance with federal and state statutes and reporting misconduct; the integration of the Athletic Department into the greater University community; the oversight, policies and procedures of the University's Police Department; and the management of programs for non-student minors and access to University facilities. In addition, recommendations are included that will assist the University in monitoring change and measuring future improvement. [ddd]

[ddd] Recommendations accompanied by an asterisk are being implemented or have been completed as of June 2012.

1.0 – Penn State Culture

The University is a major employer, landholder and investor in State College, and its administrators, staff, faculty and many of its Board members have strong ties to the local community. Certain aspects of the community culture are laudable, such as its collegiality, high standards of educational excellence and research, and respect for the environment. However, there is an over-emphasis on "The Penn State Way" as an approach to decision-making, a resistance to seeking outside perspectives, and an excessive focus on athletics that can, if not recognized, negatively impact the University's reputation as a progressive institution.

University administration and the Board should consider taking the following actions to create a values- and ethics-centered community where everyone is engaged in placing the needs of children above the needs of adults; and to create an environment where everyone who sees or suspects child abuse will feel empowered to report the abuse.

1.1 Organize a Penn State-led effort to vigorously examine and understand the Penn State culture in order to: 1) reinforce the commitment of all University members to protect children; 2) create a stronger sense of accountability among the University's leadership; 3) establish values and ethics-based decision making and adherence to the Penn State Principles as the standard for all University faculty, staff and students; 4) promote an environment of increased transparency into the management of the University; and 5) ensure a sustained integration of the Intercollegiate Athletics program into the broader Penn State community.

This effort should include the participation of representatives from the Special Faculty Committee on University Governance; Penn State's Coalition on Intercollegiate Athletics; Penn State's Rock Ethics Institute; students, alumni, faculty and staff; as well as representatives from peer institutions with experience in reviewing and improving institutional culture in academic settings.

1.2	Appoint a University Ethics Officer to provide advice and counsel to the President and the Board of Trustees on ethics issues and adherence to the Penn State Principles; develop and provide, in conjunction with the Rock Ethics Center, leadership and ethics training modules for all areas of the University; and coordinate ethics initiatives with the University's Chief Compliance Officer.* (See also Recommendation 4.0)
	1.2.1 Establish an "Ethics Council" to assist the Ethics Officer in providing advice and counsel to the President and the Board on ethical issues and training.
	1.2.2 Finalize and approve the proposed modifications to the Institutional Conflict of Interest Policy; identify the senior administrative and faculty positions to which the policy should apply, and implement the policy throughout the University.
1.3	Conduct open and inclusive searches for new employees and provide professional training for employees who undertake new responsibilities.
1.4	Continue to benchmark the University's practices and policies with other similarly situated institutions, focus on continuous improvement and make administrative, operational or personnel changes when warranted.
1.5	Communicate regularly with University students, faculty, staff, alumni and the community regarding significant University policies and issues through a variety of methods and media.
1.6	Emphasize and practice openness and transparency at all levels and within all areas of the University.

2.0 – Administration and General Counsel: Structure, Policies and Procedures

In various ways the University's administrative structure, the absence or poor enforcement of policies relating to the protection of children and employee misconduct,[eee] and the lack of emphasis on values and ethics-based action created an

[eee]The University has policies for investigating employee misconduct: HR-78 created in 1974, and HR-70, created in 2005; and a whistleblower policy, AD67 created in 2010.

environment in which Spanier, Schultz, Paterno and Curley were able to make decisions to avoid the consequences of bad publicity. Standard personnel practices were ignored or undermined by the lack of centralized control over the human resources functions of various departments – most particularly, the Athletic Department.

University administrators, faculty, staff and the Board should consider taking the following actions to create an atmosphere of values and ethics-based decision making.

2.1	Review organizational structures and make adjustments for greater efficiency and effectiveness.
2.1.1	**Evaluate the span of control of the University President and make adjustments as necessary to ensure that the President's duties are realistic and capable of the President's oversight and control.**
2.1.2	**Evaluate the span of control and responsibility of the Senior Vice President – Finance and Business ("SVP-FB") and make adjustments as necessary to ensure that the SVP-FB's duties are realistic and capable of the SVP-FB's oversight and control.**
2.1.3	**Upgrade the position of the Associate Vice President for Human Resources to a Vice President position reporting directly to the University President.**
2.1.4	**Evaluate the size, composition and procedures of the President's Council and make adjustments as necessary.**
2.2	Review administrative processes and procedures and make adjustments for greater efficiency and effectiveness.
2.2.1	**Separate the University's Office of Human Resources ("OHR") from the University's Finance and Business organization.**
2.2.2	**Assign all human resources ("HR") policy making responsibilities to the OHR and limit the ability of individual departments and campuses to disregard the University's human resources policies and rules.**

2.2.3	Centralize HR functions, where feasible, such as background checks, hiring, promotions, terminations, on-board orientation and management training, while recognizing the unique requirements of University components and Commonwealth campuses, and their need for measured autonomy.*
2.2.4	Designate the Vice President for Human Resources ("VP-HR") as the hiring authority for HR representatives throughout the University and establish a "dotted-line" reporting relationship between the HR representatives and the VP-HR similar to that used in the Finance and Audit areas.
2.2.5	Develop job descriptions for all new key leadership positions and incumbent positions if none exist.
2.2.6	Evaluate the size of the OHR staff, benchmark its human capital capacity against public universities of similar size and scope of responsibility, and modify as necessary.
2.2.7	Adopt a Human Resource Information/Capital Management System ("HRIS/HCM") with sufficient growth capacity for use at University Park and all Commonwealth campuses.
2.2.8	Engage external HR professionals to assist in the development of the University's next performance management system.
2.2.9	Provide the OHR with complete access to executive compensation information and utilize the OHR, in conjunction with the University Budget Office, to benchmark and advise the administration and the Board of Trustees on matters of executive compensation.
2.2.10	Develop a mechanism to provide and track all employee training mandated by state and federal law and University policies.
2.2.11	Update, standardize, centralize, and monitor background check procedures.*
2.2.12	Require updated background checks for employees, contractors and volunteers at least every five years.*

	2.2.13 Audit periodically the effectiveness of background check procedures and the University's self-reporting system for employees.*
	2.2.14 Update computer-use policies and regularly inform employees of the University's expectations and employee responsibilities with regard to electronic data and materials.
	2.2.15 Develop a procedure to ensure that the University immediately retrieves keys and access cards from unauthorized persons.*
2.3	Complete the development of the University's Office of General Counsel ("OGC").
	2.3.1 Develop a mission statement for the OGC that clearly defines the General Counsel's responsibilities and reporting obligations to the University and the Board of Trustees.
	2.3.2 Select and hire a permanent General Counsel ("GC").*
	2.3.3 Expand the GC's office staff to provide broader coverage of routine legal issues including employment law.
	2.3.4 Appropriate sufficient budget to the OGC to hire specialized outside counsel when needed.
2.4	Advertise all senior executive positions externally and engage educational search experts to broaden the talent pools for senior executive positions.*
2.5	Integrate faculty and staff from different disciplines and areas in University-wide professional development/leadership training to increase their exposure to other University personnel, programs, challenges and solutions.*
2.6	Implement consistent, state-of-the art records management and retention procedures.
2.7	Provide sufficient support and oversight of the Office of Student Affairs to make certain that all students follow the same standards of conduct.*

2.8	Designate an individual, administrative entity or committee to approve and review all new and modified University policies.
2.8.1	**Develop guidelines for creating, standardizing, approving, reviewing and updating University policies.**
2.8.2	**Review periodically all University policies for relevance, utility and necessity, and modify or rescind as appropriate.**

3.0 – Board of Trustees: Responsibilities and Operations

Spanier and other University leaders failed to report timely and sufficiently the incidents of child sexual abuse against Sandusky to the Board of Trustees in 1998, 2001 and 2011. Nonetheless, the Board's over-confidence in Spanier's abilities, and its failure to conduct oversight and responsible inquiry of Spanier and senior University officials, hindered the Board's ability to deal properly with the most profound crisis ever confronted by the University.

The Board should consider taking the following actions to increase public confidence and transparency, realign and refocus its responsibilities and operations, improve internal and external communications and strengthen its practices and procedures.

3.1	Review the administrative and governance issues raised in this report, particularly with regard to the structure, composition, eligibility requirements and term limits of the Board, the need to include more members who are not associated with the University, and the role of the Emeriti. In conducting this review, the Board should seek the opinions of members of the Penn State community, as well as governance and higher education experts not affiliated with the University. The Board should make public the results and recommendations generated from the review.
3.2	Review, develop and adopt an ethics/conflict of interest policy for the Board that includes guidelines for conflict management and a commitment to transparency regarding significant issues.

	3.2.1 Include training on ethics and oversight responsibilities in the current regulatory environment in Board member orientation.
	3.2.2 Require full and public disclosure by Board members of financial relationships between themselves and their businesses and the University.
3.3	Implement the Board's proposals for revised committee structures to include a committee on Risk, Compliance, Legal and Audit and subcommittees for Audit and Legal matters; and a subcommittee for Human Resources as part of the Committee on Finance, Business and Capital Planning.*[fff]
	3.3.1 Rotate Committee Chairs every five years or sooner.
3.4	Increase and improve the channels of communication between the Board and University administrators.
	3.4.1 Ensure that the University President, General Counsel and relevant members of senior staff thoroughly and forthrightly brief the Board of Trustees at each meeting on significant issues facing the University.*
	3.4.2 Require regular Risk Management, Compliance and Internal Audit reports to the Board on assessment of risks, pending investigations, compliance with federal and state regulations as well as on measures in place to mitigate those risks.
	3.4.3 Require that the SVP-FB, the GC and/or their designee to provide timely briefings to the Board on potential problem areas such as unusual severance or termination payments, Faculty and staff Emeriti appointments, settlement agreements, government inquiries, important litigation and whistleblower complaints.
	3.4.4 Use the Board's Executive Session/Question Period with the President to make relevant and reasonable inquiry into substantive matters and to facilitate sound decision-making.

[fff] Exhibit 10-A, Pennsylvania State University Board of Trustees, Organizational Chart.

	3.4.5 Review annually the University's *Return of Organization's Exempt from Income Tax Form (990)*, Clery Act reports, and the compensation and performance of senior executives and leaders.*
	3.4.6 Conduct an informational seminar for the Board and senior administrators on Clery Act compliance and reporting procedures.
	3.4.7 Continue to provide all Board members with regular reports of local, national and academic media coverage of the University.*
3.5	Increase and improve the channels of communication between the Board and the University community.
	3.5.1 Establish and enforce rules regarding public and press statements made by Board members and Emeriti regarding confidential University matters.
	3.5.2 Increase and publicize the ways in which individuals can convey messages and concerns to Board members.
	3.5.2.1 Provide Board members with individual University email addresses and make them known to the public.
	3.5.2.2 Use common social media communications tools to communicate with the public on various Board matters.
3.6	Develop a critical incident management plan, including training and exercises, for the Board and University administrators.
3.7	Continue to conduct and publicize periodic internal and external self-assessments of Board performance.*

4.0 – Compliance: Risk and Reporting Misconduct

The University's incomplete implementation of the Clery Act was a contributing factor in the failure to report the 2001 child sexual abuse committed by Sandusky. A strong compliance function, much like exists in the University's financial area, should encourage individuals to report misconduct more readily in the future. A regularized risk identification and management system is as prudent and consistent with best business practices.

University administrators and the Board should consider taking the following actions to ensure compliance with the multiple laws, regulations, rules and mandates that effect its operations, risk management and national reputation.

4.1	Establish and select an individual for a position of "Chief Compliance Officer,"* The Chief Compliance Officer should:
	4.1.1 Head an independent office equivalent to the Office of Internal Audit.
	4.1.2 Chair a Compliance Council.
	4.1.3 Coordinate compliance functions in a manner similar to the Office of Internal Audit.
	4.1.4 Have similar access to, and a reporting relationship with the Board, as does the Internal Auditor.
	4.1.5 Coordinate the Chief Compliance Officer's responsibilities with the Office of General Counsel, the Director of Risk Management and the Director of Internal Audit.
	4.1.6 Direct further review of any incidents or risks reported to the Compliance Officer.
4.2	Assign full-time responsibility for Clery Act compliance to an individual within the University Police Department and provide the individual with sufficient resources and personnel to meet Clery Act regulations.* The individual responsible for Clery Act compliance should:

4.2.1	**Establish a University policy for the implementation of the Clery Act.**
4.2.2	**Create a master list of names of those persons with Clery Act reporting responsibilities, notify them annually of the Clery Act responsibilities and publish the list to the University community.**
4.2.3	**Require, monitor and track training, and periodic retraining for Campus Security Authorities ("CSAs") on Clery Act compliance.**
4.2.4	**Provide information to the OHR on Clery Act responsibilities, reporting suspicious activity to CSAs and whistleblower protection for inclusion in the general training for all employees.**
4.2.5	**Coordinate timely notices of incidents and threat warnings with the Vice President for Student Affairs, the Chief Compliance Officer and the General Counsel.**
4.2.6	**Review annual Clery Act reports with the President's Council, the Board of Trustees and the Compliance Officer.**
4.2.7	**Coordinate Clery Act training and compliance with responsible officials at the Commonwealth campuses.**
4.2.8	**Arrange for periodic internal and external audits of Clery Act compliance.**
4.3	Update regularly and prioritize the University's list of institutional risks; determine the appropriate implementation and audit schedule for those risks; and present the results to the Board.
4.4	Send a communication to all University students, faculty and staff at the beginning of each academic term: that encourages the reporting of misconduct; describes the channels for direct or anonymous reporting; and the University's whistleblower policy and protection from retaliation.
4.5	Publicize the employee misconduct hotline regularly and prominently throughout the University on a variety of platforms including social media networks and the webpages of individual University components.*

5.0 – Athletic Department: Integration and Compliance

For the past several decades, the University's Athletic Department was permitted to become a closed community. There was little personnel turnover or hiring from outside the University and strong internal loyalty. The football program, in particular, opted out of most of the University's Clery Act, sexual abuse awareness and summer camp procedures training. The Athletic Department was perceived by many in the Penn State community as "an island," where staff members lived by their own rules.

University administrators and the Board of Trustees should consider taking the following actions to more fully involve the Athletic Department within the broader University community; provide relevant training and support to the Athletic Department staff to ensure compliance with external regulations and University policies; and maintain a safe environment for those who use the University's recreational facilities, especially children.

5.1	Revise the organizational structure of the Athletic Department to clearly define lines of authority, responsibilities and reporting relationships.
5.2	Evaluate security and access protocols for athletic, recreational and camp facilities and modify as necessary to provide reasonable protections for those using the facilities.*
5.3	Conduct national searches for candidates for key positions, including head coaches and Associate Athletic Director(s) and above.
5.4	Integrate, where feasible, academic support staff, programs and locations for student-athletes.*
5.5	Provide the University's Athletic Compliance Office with additional staff and adequate resources to meet its many responsibilities.*
	5.5.1 Benchmark against peer institutions to determine an appropriate staffing level for the office.
	5.5.2 Establish an effective reporting relationship with the University Compliance Officer.

5.5.3	**Realign the compliance-related responsibilities of Athletic Department staff members to ensure that the Athletic Compliance Office has oversight of the entire program.**
5.5.4	**Ensure that new hires and incumbent compliance personnel have requisite working knowledge of the NCAA, Big Ten Conference and University rules.**
5.6	Ensure that Athletic Department employees comply with University-wide training mandates.
5.6.1	**Provide and track initial and on-going training for athletic staff in matters of leadership, ethics, the Penn State Principles and standards of conduct, abuse awareness, and reporting misconduct pursuant to the Clery Act and University policy.**
5.6.2	**Include Athletic Department employees in management training programs provided to other University managers.**

6.0 – University Police Department: Oversight, Policies and Procedures

The University Police Department promptly responded to the 1998 complaint about Sandusky's conduct, but the sensitivity of the investigation and the need to report on its progress to a senior administrator could have compromised the extent of its inquiry. The independence of the University's law enforcement function is essential to providing unbiased service and protection to the University community. The University Police Department's recent restructuring and additional training for its employees is an important step in the continuous improvement of the Department.

The University Police Department and/or University administrators should consider taking the following additional actions to improve the functions and oversight of the University's law enforcement services:

6.1	Arrange for an external examination of the University Police Department's structure, organization, policies and procedures through a professionally recognized accreditation body, [ggg] with a particular emphasis on the University Police Department's training for and qualifications of sex abuse investigators.*
6.2	Review the organizational placement of the University Police Department in the University's Finance and Business area in conjunction with the review of the span of control of the SVP-FB. (See Section 2.0)
6.3	Provide the Vice President/Director of Public Safety with sufficient administrative authority and resources to operate effectively and independently.
6.4	Review records management procedures and controls and revise where needed.*
	6.4.1 Establish a policy to ensure that all police reports alleging criminal conduct by Penn State students, faculty and staff are reported to the OHR.[hhh]
	6.4.2 Establish or reinforce protocols to assign a timely incident number and proper offense classification to all complaints received.[iii]*
	6.4.3 Include the final disposition of each complaint in the original or follow-up report (e.g., founded, unfounded, exceptionally cleared).
6.5	Establish a policy to request assistance from other law enforcement agencies in sensitive or extraordinary cases or where a conflict of interest may exist.

[ggg] The University Police Department has engaged the Pennsylvania State Police Chiefs Association to conduct an external review. For a more expansive review, the University should utilize an organization that has extensive experience in reviewing and accrediting college and university police departments, such as the Commission on the Accreditation on Law Enforcement ("CALEA").

[hhh] Notifications regarding students, faculty and staff who are confirmed suspects of allegations of criminal conduct are made to the OHR as a standard practice, but there is no departmental policy to confirm or guide the practice.

[iii] The University Police Department has established an automatic system to assign timely incident numbers and eliminated the "Administrative" category of offenses.

6.6	Implement consistent law enforcement standards and practices, through regular training at all Penn State campuses.
6.7	Review and update, with the GC, the current policies pertaining to the investigation of various categories of offenses involving Penn State employees.
6.8	Provide specialized training to investigators in the area of sexual abuse of children.

7.0 – Management of University Programs for Children and Access to University Facilities

Over the years, University policies regarding programs for non-student minors were inconsistently implemented throughout the University. Enforcement of those policies was uneven and uncoordinated and, as a result, Sandusky was allowed to conduct football camps at University Park and three Commonwealth campuses without any direct oversight by University officials. The University's background check process also was arbitrarily applied and on-site supervision at camps was sometimes provided by staff members who had not been fully vetted.

University administrators and the Board of Trustees should consider taking the following actions to create a safer environment for children involved in University programs, activities, and who use its facilities. University administrators must provide better oversight of staff members responsible for youth programs and increase abuse awareness through training of responsible adults.

7.1	Increase the physical security and access procedures in areas frequented by children or used in camps and programs for children.*
7.2	Require and provide abuse awareness and mandatory reporter training to all University leaders, including faculty, coaches and other staff, volunteers and interns.[iii]

[iii]On June 6, 2012, the University implemented AD72, *Reporting Suspected Child Abuse*, requiring all University personnel to report incidents or allegations of suspected abuse or be subject to disciplinary action, up to, and including, dismissal.

7.2.1	**Consolidate the responsibility for abuse awareness training and mandatory reporting in the OHR and coordinate an abuse awareness training program throughout the University's campuses.***
7.3	Consolidate oversight of the University's policies and procedures for programs involving non-student minors in the OHR and appoint a coordinator to oversee the implementation of those policies. The Coordinator should have sufficient authority to:
7.3.1	**Develop and maintain an inventory of all University programs for children.***
7.3.2	**Update, revise or create policies for unaccompanied children at University facilities, housing and University programs.***
7.3.3	**Enforce all policies relating to non-student minors involved in University programs at all Penn State campuses.**
7.3.4	**Assist the University's camp and youth program administrators in ensuring that staff and volunteers are appropriately supervised.**
7.3.5	**Provide information to parents of non-student minors involved in University programs regarding the University's safety protocols and reporting mechanisms for suspicious or improper activity.**

8.0 – Monitoring Change and Measuring Improvement

The Pennsylvania State University has taken several significant steps to improve its governance and more adequately protect the hundreds of thousands of children who use its facilities and participate in its programs every year. However, restoring confidence in the University's leadership and the Board will require greater effort over a prolonged period of time. As the institution moves forward, it is incumbent upon its leaders to monitor those changes, make adjustments as necessary and communicate their progress to the Penn State community as well as to the public.

University administrators and the Board of Trustees should consider taking the following actions to ensure that their initiatives to prevent and respond to incidents of sexual abuse of children and to improve University governance are duly enforced, monitored, measured and modified as needed:

8.1	Designate an internal monitor or coordinator to oversee the implementation of recommendations initiated, or adopted, by the Board and/or the University administration. The monitor/coordinator would:
	8.1.1 Chair a panel of the individuals responsible for developing and implementing these and other approved recommendations and for establishing realistic milestones.
	8.1.2 Select a practical and diverse number of members of the University community and solicit input from the larger University community, to provide insights and recommendations to the monitor. (See Recommendation 1.0)
	8.1.3 Report actions and accomplishments regularly to the Board of Trustees and University administration.*
8.2	Provide the monitor, or the Chief Compliance Officer, with the authority and resources to hire appropriate external evaluators/compliance auditors to certify that milestones for implementation of these recommendations are being met.
8.3	Conduct a review of the University's progress 12 months from the acceptance of this report using internal and external examiners and provide the findings to University administrators, the Board and the public.
8.4	Conduct a second review of the University's progress 24 months from the acceptance of this report using internal and external examiners and provide the findings to University administrators, the Board and the public.

ENDNOTES

[1] Presentment of Statewide Grand Jury, November 4, 2011.
[2] http://034fccc.netsolhost.com/WordPress/.
[3] Sally Jenkins, "Joe Paterno's Last Interview," *The Washington Post* (1-14-12).
[4] [-] Interview (7-6-12).
[5] http://www.budget.psu.edu/FactBook/StudentDynamic/UGGREnrollSummary.aspx?YearCode=2011Enr&FBPlusIndc=N.
[6] http://www.budget.psu.edu/factbook/StateAppropriation/TtlOperBudget1112.asp.
[7] http://www.psu.edu/Trustees/pdf/march2012agendafppappendix2.12.pdf; http://www.controller.psu.edu/Divisions/ControllersOffice/docs/FinStmts/2011FinStmts.pdf.
[8] Penn State is accredited by The Middle States Commission on Higher Education, which contacted the University about concerns relating to the Sandusky investigation on November 11, 2011. The University responded in its *Informational Report to the Middle States Commission on Higher Education* on December 21, 2011.
[9] http://www.research.psu.edu/about/documents/strategicplan.pdf.
[10] Standing Orders of the Penn State Board of Trustees, Order IX(1)(b)(1).
[11] Standing Orders of the Penn State Board of Trustees, Order IX(1)(b)(2).
[12] http://www.psu.edu/ur/about/administration.html.
[13] http://president.psu.edu/.
[14] http://www.psu.edu/provost/provost.htm.
[15] http://president.psu/edu/biography.
[16] http://www.psu.edu/provost/provost.htm.
[17] [-] Interview (6-12-12).
[18] [-] Interview (6-12-12).
[19] [-] Interview (6-12-12).
[20] Board of Trustees Minutes of Meeting at 7 (1-22-10).
[21] http://www.psu.edu/ur/about/administration.html.
[22] Although not further described here, the Office of Research Programs manages the University's Conflict of Interest policies.
[23] See Chapter 8, *Federal and State Child Sexual Abuse Reporting Requirements.*
[24] http://www.police.psu.edu/aboutus/.
[25] http://www.police.psu.edu/cleryact/documents/116593_PolicySafety_Up.pdf.
[26] [-] Interview (4-9-12); [-] Interview (2-29-12).
[27] http://www.psu.edu/ur/archives/intercom_1998/May21/partings.html.
[28] *See* Organizational Chart for the Pennsylvania State University Administrative Organization, http://www.psu.edu/provost/assets/President_organizational_chart%2008.pdf.
[29] [-] Interview (2-29-12); [-] Interview (2-1-12).
[30] *See* Organizational Chart for the Pennsylvania State University Administrative Organization, http://www.psu.edu/provost/assets/President_organizational_chart%2008.pdf. [-] Interview (3-1-12).
[31] Office of Human Resources website, http://ohr.psu.edu/; [-] Interview (1-4-12).
[32] *See* Organizational Chart for the Pennsylvania State University Administrative Organization, http://www.psu.edu/provost/assets/President_organizational_chart%2008.pdf.
[33] [-] Interview (12-8-11).
[34] [-] Interview (12-15-11).
[35] [-] Interview (4-11-12).

[36] http://www.gopsusports.com/compliance/psu-compliance.html.
[37] http://www.gopsusports.com/genrel/curley_tim00.html.
[38] http://www.gopsusports.com/genrel/111611aaa.html.
[39] www.gopsusports.com/sports/m-footbl/mtt/paterno_joe00.html.
[40] http://www.gopsusports.com/sports/m-footbl/mtt/obrien_bill00.html.
[41] [-] Interview (12-19-11).
[42] www.outreach.psu.edu/crai-weidemann.html; [-] Interview (1-5-12).
[43] [-] Interview (12-19-11); [-] Interview (1-5-12).
[44] http://guru.psu.edu/policies/.
[45] http://www.psu.edu/ur/2001/principles.html.
[46] [-] Interview (1-4-12); [-] Interview (1-5-12).
[47] [-] Interview (1-10-12).
[48] [-] Interview (1-5-12).
[49] http://live.psu.edu/story/58968.
[50] http://www.controller.psu.edu/divisions/RiskManagement/indexRM.html.
[51] [-] Interview (1-5-12).
[52] [-] Interview (1-4-12).
[53] http://www.internalaudit.psu.edu/.
[54] [-] Interview (1-4-12).
[55] [-] Interview (1-4-12).
[56] [-] Interview (1-4-12).
[57] [-] Interview (1-4-12).
[58] [-] Interview (1-4-12); [-] Interview (1-12-12).
[59] [-] Interview (1-4-12).
[60] Sara Ganim, "Jerry Sandusky Trial: Coaching colleagues describe Sandusky as busy, involved with children," *Patriot-News* (6-18-12).
[61] Amended Bill of Particulars, *Commonwealth v. Sandusky*, CP-14-CR-2421-2011; CP-14-CR-2422-2011 (5-18-12); Bill of Particulars, *Commonwealth v. Sandusky*, CP-14-CR-2421-2011; CP-14-CR-2422-2011 (2-21-12).
[62] Jeremy Roebuck, "Alleged Sandusky victim tells NBC: 'He knows what he did,'" *Philadelphia Inquirer*, (6-12-12).
[63] The Special Investigative Counsel did not interview the boy involved in the Lasch Building incident. The details of the incident are described as found in the Penn State University Police Department report and the Grand Jury report.
[64] Penn State University Police Report 41-98-1609 at 27.
[65] *Id.* at 26.
[66] *Id.* at 2.
[67] *Id.* at 29.
[68] *Id.* at 23.
[69] *Id.*
[70] *Id.* at 30.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 30, 52.
[74] *Id.* at 40.
[75] *Id.* at 31, 44.
[76] *Id.* at 45.

[77] *Id.* at 45-46.
[78] *Id.* at 46, 52.
[79] *Id.* at 22.
[80] *Id.*
[81] [-] Interview (4-18-12).
[82] Penn State University Police Report 41-98-1609 at 22.
[83] *Id.* at 22.
[84] *Id.* at 3.
[85] *Id.* at 3-4.
[86] Details regarding the investigation come from the University Police Department records and his interview; [-] Interview (1-27-12).
[87] Penn State University Police Report 41-98-1609 at 3-4.
[88] *Id.* at 21.
[89] *Id.* at 22.
[90] *Id.*
[91] *Id.* at 23.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 5; http://www.co.centre.pa.us/511.asp.
[95] [-] Interview (4-11-12); Penn State University Police Report 41-98-1609 at 9.
[96] [-] Interview (4-26-12); [-] Interview (1-27-12).
[97] [-] Interview (4-26-12).
[98] Penn State University Police Report 41-98-1609 at 19-20; [-] Interview (4-11-12).
[99] [-] Interview (4-11-12); Id. at 41-98-1609 at 9.
[100] Penn State University Police Report 41-98-1609 at 6.
[101] [-] Interview (1-27-12).
[102] Penn State University Police Report 41-98-1609 at 7.
[103] *Id.* at 41-98-1609 at 7.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 10.
[107] *Id.* at 21.
[108] *Id.* at 10.
[109] [-] Interview (4-11-12).
[110] [-] Interview (4-11-12).
[111] Penn State University Police Report 41-98-1609 at 11; [-] Interview (1-27-12).
[112] [-] Interview (4-26-12); [-] Interview (4-13-12).
[113] Penn State University Police Report 41-98-1609 at 87-88.
[114] *Id.* at 88.
[115] *Id.*
[116] *Id.* at 90.
[117] *Id.* at 12.
[118] *Id.*; [-] Interview (1-27-12).
[119] Penn State University Police Report 41-98-1609 at 12.
[120] Email from [-] (5-31-12), included in Controller Records relating to [-] payments [Box.net].
[121] Email from [-] (5-31-12), included in Controller Records relating to [-] payments [Box.net].

[122] [-] File Memo (3-5-12).
[123] Penn State University Police Report 41-98-1609 at 14.
[124] Penn State University Police Report 41-98-1609 at 14.
[125] *Id.* at 14.
[126] *Id.*
[127] *Id.* at 15.
[128] *Id.*
[129] *Id.* at 16.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 17.
[133] [-] Interview (4-18-12).
[134] [-] Interview (4-11-12).
[135] [-] Interview (4-11-12).
[136] [-] Interview (1-27-12).
[137] [-] Interview (4-11-12).
[138] Penn State University Police Report 41-98-1609 at 18.
[139] Id. at 41-98-1609 at 015_0000018.
[140] [-] Interview (4-11-12).
[141] [-] Interview (4-11-12).
[142] Penn State University Police Report at 18.
[143] [-] Interview (1-27-12).
[144] Exhibit 2-H.
[145] The May 5, 1998 notes refer to a meeting that was scheduled to take place at 9:00 a.m. on May 5 with the "local child abuse people." This reference supports the inference that these notes were taken before 9:00 a.m. on May 5.
[146] Exhibit 2-I.
[147] Exhibit 2-I.
[148] [-] Interview (7-6-12).
[149] Control Number 00649354.
[150] Control Number 00649354.
[151] [-] Interview (1-27-12).
[152] [-] Interview (1-27-12).
[153] Penn State University Police Report at 2-18.
[154] [-] Interview (1-27-12).
[155] [-] Interview (1-27-12).
[156] [-] Interview (2-2-12).
[157] [-] Interview (2-2-12).
[158] [-] Interview (2-2-12).
[159] Schultz confidential file notes (5-1-12).
[160] Control Number 3009518.
[161] Control Number 00641616.
[162] Control Number 00648360.
[163] Exhibit 2-C (Control Number 00644098).
[164] Control Number 644098.
[165] Preliminary Hearing Trans. at 120 (12-16-11).

[166] *See* Exhibits 2-A and 2-B.
[167] [-] Interview (5-1-12); [-] Interview (12-6-11); [-] Interview (4-11-12).
[168] [-] Interview (7-6-12).
[169] [-] Interview (7-6-12).
[170] Michael Raphael, "Penn State Wants Agent Prosecuted," AP News Archive (1-6-98).
[171] *Id.*
[172] *Id.*
[173] Control Number 00644972.
[174] [-] Interview (1-27-12).
[175] Preliminary Hearing Trans. at 219 (12-16-11).
[176] Control Number 06018018.
[177] Preliminary Hearing Trans. at 190 (12-16-11).
[178] Preliminary Hearing Trans. at 177-78 (12-16-11).
[179] Sara Ganim, "Jerry Sandusky book 'Game Over' angers Joe Paterno's family," *Patriot-News* (4-18-12).
[180] [-] Interview (7-6-12).
[181] [-]Notes (3-22-11).
[182] [-] Interview (7-9-12).
[183] [-] Interview (7-9-12).
[184] Control Number 09354508.
[185] Amended Bill of Particulars, *Commonwealth v. Sandusky*, CP-14-CR-2421-2011; CP-14-CR-2422-2011 (May 18, 2012); Bill of Particulars, *Commonwealth v. Sandusky*, CP-14-CR-2421-2011; CP-14-CR-2422-2011 (Feb. 21, 2012).
[186] Control Number 00644655.
[187] Control Number 03008143.
[188] Control Number 03008143.
[189] *"30-and-Out Window Closing,"* SERSNews (Spring 1999), www.portal.state.pa.us/portal/server.pt/document/1079979/1999_q2_pdf; [-] Interview (1-4-12).
[190] *"30-and-Out Window Closing,"* SERSNews (Spring 1999), www.portal.state.pa.us/portal/server.pt/document/1079979/1999_q2_pdf; [-] Interview (1-4-12).
[191] Control Number 00643981.
[192] Control Number JVP-000021.
[193] Control Number JVP-000021.
[194] Control Number 00642802.
[195] [-] Interview (2-2-12).
[196] [-] Interview (2-2-12).
[197] Control Number 03013385.
[198] Control Number 03013385.
[199] Documents provided by Wick Sollers to Special Investigative Counsel.
[200] Control Number JVP000025-26.
[201] Control Number JVP000025-26.
[202] Control Number JVP000025-26.
[203] Exhibit 3-F (Control Number JVP000027).
[204] Exhibit 3-F (Control Number JVP000027).
[205] Exhibit 3-F (Control Number JVP000027).
[206] [-] Interview (7-3-12).
[207] Exhibit 3-G (Control Number 03014658).

[208] Exhibit 3-G (Control Number 03014658).
[209] Control Number 00650775.
[210] Control Number 00650174.
[211] Control Number 00650174.
[212] Control Number 00650174.
[213] Control Number JVP-000023.
[214] Control Number 006_0000014.
[215] Control Number 006_0000014.
[216] Control Number 006_0000011.
[217] Control Number 006_0000005.
[218] [-] Interview (1-12-12).
[219] [-] Interview (1-12-12).
[220] [-] Interview (4-30-12).
[221] Control Number 006_0000029.
[222] Control Numbers 006_0000035, 014_0000127.
[223] Control Number 014_0000133.
[224] Penn State Policy HR-25 (Control Number 014_0000034).
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] Control Number 014_0000136.
[229] Control Number 014_0000136.
[230] [-] Interview (2-22-12).
[231] [-] Interview (3-14-12).
[232] Control Number RAE_000001.
[233] Control Number RAE_000001.
[234] Control Number RAE_000001.
[235] Control Number RAE_000001.
[236] [-] Interview (4-12-12).
[237] [-] Interview (7-2-12).
[238] [-] Interview (4-15-12).
[239] [-] Interview (7-2-12).
[240] [-] Interview (7-2-12).
[241] [-] Interview (7-2-12).
[242] [-] Interview (7-2-12).
[243] [-] Interview (7-2-12).
[244] [-] Interview (7-2-12).
[245] [-] Interview (7-2-12).
[246] [-] Interview (7-2-12).
[247] [-] Interview (7-2-12).
[248] [-] Interview (7-2-12).
[249] [-] Interview (7-2-12).
[250] [-] Interview (7-2-12).
[251] Email from [-] to [-] (3-21-12); Penn State University Press Release, *"Former FBI director Freeh to conduct independent investigation"* (11-21-11) (Judge Freeh noted, "We will cooperate fully with the law enforcement authorities, will defer to them, and will not impede their work in any way").

[252] Preliminary Hearing Trans. at 10 (12-16-11).
[253] *Id.* at 9-10.
[254] *Id.* at 10, 14.
[255] *Id.* at 13.
[256] *Id.*
[257] *Id.* at 13-14, 16-17.
[258] *Id.* at 17.
[259] *Id.* at 17, 19.
[260] *Id.* at 19.
[261] *Id.* at 20-21.
[262] *Id.* at 22.
[263] *Id.* at 22-23.
[264] *Id.*
[265] *Id.* at 23.
[266] *Id.* at 23-24.
[267] [-] Interview (3-1-12).
[268] Preliminary Hearing Trans. at 24-25 (12-16-11).
[269] *Id.* at 176.
[270] *Id.* at 175-76.
[271] *Id.* at 176.
[272] *Id.* at 25-26.
[273] *Id.* at 26.
[274] Sally Jenkins, "Joe Paterno's Last Interview," *Washington Post* (1-14-12).
[275] Preliminary Hearing Trans. at 177 (12-16-11).
[276] *Id* at 177.
[277] *Id.* at 177.
[278] *Id.* at 180, 202.
[279] *Id.*
[280] *Id.* at 181.
[281] *Id.* at 229.
[282] *Id.* at 206.
[283] *Id.* at 211.
[284] *Id.*
[285] *Id.* at 229.
[286] Exhibit 5-A.
[287] Control Number 11118161.
[288] [-] Interview (1-12-12); [-] Interview (4-12-12).
[289] [-] File Memo (5-1-12).
[290] Exhibit 5-C.
[291] Exhibit 2-J.
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*

[298] *Id.*
[299] *Id.*
[300] [-] Notes (12-28-10).
[301] [-] Notes (12-28-10).
[302] [-] Notes (12-28-10).
[303] Schultz confidential file notes (5-1-12).
[304] Schultz confidential file notes (5-1-12).
[305] Exhibit 2-J; [-] Interview (7-6-12).
[306]Exhibit 5-A.
[307]Exhibit 5-C.
[308]Exhibit 5-D (Control Number 00675162).
[309]Exhibit 5-C.
[310] Schultz confidential file notes (5-1-12).
[311] Preliminary Hearing Trans. at 30 (12-16-11).
[312] *Id.* at 202-03.
[313] *Id.* at 32-33.
[314] *Id.* at 35.
[315] *Id.* at 183.
[316] *Id.* at 225.
[317] *Id.*
[318] Control Number 00681288.
[319] Control Number 03030942.
[320] Preliminary Hearing Trans. at 30 (12-16-11).
[321] Spanier 2001 Calendar.
[322] [-] Interview (7-6-12).
[323] [-] Interview (7-6-12).
[324] [-] Interview (7-6-12).
[325] [-] Interview (7-6-12).
[326] [-] Interview (7-6-12).
[327] [-] Interview (7-6-12).
[328] Exhibit 5-F (Control Number 00677433).
[329] Exhibit 5-G (Control Number 00679428).
[330] Exhibit 5-G (Control Number 00679428); Exhibit 5-H (Control Number 00676529).
[331] Exhibit 5-G (Control Number 00679428).
[332] Exhibit 5-G (Control Number 00679428).
[333] *See* Control Number 00642973 (6-9-1998) (email subject is "***Jerry***"); Control Number 00645223 (6-1-1998) ("The DPW investigator and our officer met discreetly with ***Jerry*** this morning"); Control Number 00646346 (6-9-1998)(" They met with ***Jerry*** on Monday and concluded that there was no criminal behavior and the matter was closed as an investigation"); Control Number 00647284 (5-19-1998)(email subject is "***Jerry***"); Control Number 00648360 (5-14-1998) ("Tim, I understand that a DPW person was here last week; don't know for sure if they talked with ***Jerry***").
[334] Control Numbers 00650775, 00650174, 00650775, 03014658, 03013385.
[335] Control Numbers 09302202, 09350582; [-] Notes of meeting with Graham Spanier (3-22-11).
[336] [-] Notes of meeting with Graham Spanier (3-22-11).
[337] [-] Notes of meeting with Graham Spanier (3-22-11).
[338] [-] Interview (2-1-12); [-] Interview (1-23-12); [-] Interview (12-12-11); [-] Interview (1-3-12).

[339] [-] Interview (4-12-12).
[340] [-] Interview (2-6-12); [-] Interview (4-17-12).
[341] [-] Interview (2-6-12); [-] Interview (4-25-12); [-] Interview (1-24-12); [-] Interview (1-3-12); [-] Interview (2-7-12); [-] Interview (1-23-12); [-] Interview (12-12-11).
[342] Exhibit 5-G (Control Number 00679428).
[343] *See* Exhibit 2-J.
[344] *See* Exhibit 2-J.
[345] Exhibit 5-H (Control Number 00676529).
[346] Preliminary Hearing Trans. at 185-86 (12-16-11).
[347] Preliminary Hearing Trans. at 185-86 (12-16-11).
[348] Preliminary Hearing Trans. at 182 (12-16-11).
[349] [-] File Memo (2-28-12).
[350] [-] File Memo (2-28-12).
[351] [-] File Memo (2-28-12).
[352] [-] File Memo (2-28-12).
[353] [-] File Memo (2-28-12).
[354] [-] File Memo (2-28-12).
[355] Schultz confidential file notes (5-1-12).
[356] Control Number 00680519.
[357] Preliminary Hearing Trans. at 215 (12-16-11).
[358] [-]Notes of meeting with Graham Spanier (3-22-11).
[359] Exhibit 2-J.
[360] [-] Interview (7-6-12).
[361] Sally Jenkins, "Joe Paterno's Last Interview," *Washington Post* (1-14-12).
[362] [-] File Memo (4-9-12).
[363] [-] File Memo (3-22-12).
[364] [-] File Memo (3-22-12).
[365] [-] File Memo (3-22-12).
[366] [-] File Memo (3-22-12).
[367] [-] File Memo (3-22-12).
[368] [-] File Memo (3-22-12).
[369] [-] File Memo (3-22-12).
[370] [-] File Memo (3-22-12).
[371] Control Number 03036051.
[372] Control Number 03036051.
[373] Control Number 00684991.
[374] Control Number 00684991.
[375] Preliminary Hearing Trans. at 191-92 (12-16-11).
[376] [-] Interview (7-6-12).
[377] Subpoena from Statewide Investigating Grand Jury, Supreme Court of Pennsylvania, 190 M.D. Misc. Dkt. 2001, Dauphin County Common Pleas, No. 1430, M.D. 2008, Notice 29, Subpoena 671 (1-7-10).
[378] [-] Interview (3-6-12); [-] Interview (2-21-12).
[379] [-] Interview (3-6-12).
[380] [-] Interview (3-6-12); Control Number 09327800 ("The specifics of the investigation were not disclosed to us"); Control Number 09369385 (the prosecutor "kept the core of the issue very close to her vest").
[381] Notes of [-] (2-8-10); [-] Interview (3-6-12).

[382] Notes of [-] (3-1-10); [-] Interview (3-6-12).
[383] Control Number 09327800.
[384] Control Number 09327800.
[385] [-] Notes (12-28-10).
[386] [-] Interview (11-23-11).
[387] [-] Interview (11-23-11); [-] Notes (12-28-10).
[388] [-] Notes (12-28-10).
[389] [-] Notes (12-28-10).
[390] [-] Notes (12-28-10).
[391] [-] Notes (12-28-10).
[392] [-] Notes (12-28-10).
[393] Control Number 11117847.
[394] Control Number 11117847.
[395] [-] Notes (1-3-11).
[396] [-] Notes (1-3-11).
[397] [-] Notes (1-3-11).
[398] [-] Interview (2-29-12).
[399] Control Number 09354508.
[400] Control Number 09354508.
[401] Control Number 09354508.
[402] Control Number 09354508.
[403] Control Number 09361218.
[404] [-] Interview (11-23-11).
[405] Control Number 09382271.
[406] Control Number 04065904.
[407] Control Number 04065904.
[408] Control Number 166851.
[409] [-] Interview (2-29-12).
[410] [-] Interview (2-29-12).
[411] [-] Interview (2-29-12).
[412] [-] Interview (2-29-12).
[413] Control Number 06633947; [-] Notes of [-] Interviews (1-15-11).
[414] Control Number 00045093.
[415] Control Number 09405967.
[416] Spanier was questioned about a 2002 incident that was later determined to have occurred in 2001.
[417] [-] Notes of meeting with Graham Spanier (3-22-11); Control Number 09302202.
[418] Subpoena 92. Spanier suggested in recent court filings that he appeared before the Grand Jury "voluntarily and without subpoena." *Spanier v. Pennsylvania State University*, Verified Complaint in Equity (5-25-12).
[419] Control Number 00035001.
[420] Control Number 00043675.
[421] [-] Interview (1-25-12); Control Number 04046135.
[422] Control Number 4046135.
[423] Sara Ganim, "Jerry Sandusky, former Penn State football staffer, subject of Grand Jury investigation," *Patriot-News* (3-31-11).
[424] *Id.*

[425] *Id.*
[426] *Id.*
[427] Control Number 1096008.
[428] Control Number 1096008.
[429] Control Number 9341973.
[430] Control Number 9365024.
[431] Control Number 9365024.
[432] Control Number 9365024.
[433] Control Number 9365024.
[434] [-] Interview (7-6-12).
[435] [-] Notes (4-13-11).
[436] Control Number 9365024.
[437] [-] Interview (2-29-12).
[438] [-] Interview (2-20-12).
[439] [-] Interview (2-20-12).
[440] [-] Interview (2-29-12).
[441] [-] Interview (7-6-12).
[442] [-] Interview (7-6-12).
[443] [-] Interview (7-6-12); [-] Interview (7-6-12).
[444] [-] Interview (4-20-12); [-] Interview (3-13-12).
[445] Exhibit 6-A (Baldwin affidavit).
[446] Exhibit 6-A (Baldwin affidavit).
[447] Exhibit 6-A (Baldwin affidavit).
[448] [-] Interview (2-29-12).
[449] [-] Interview (2-29-12).
[450] *See, e.g.*, [-] Interview (3-22-12); [-] Interview (4-16-12); [-] Interview (4-12-12); [-] Interview (5-3-12); [-] Interview (4-16-12); [-] Interview (3-13-12); [-] Interview (3-15-12); [-] Interview (4-5-12); [-] Interview (4-16-12).
[451] *See, e.g.*, [-] Interview (3-15-12); [-] Interview (3-22-12); [-] Interview (3-15-12); [-] Interview (4-12-12); [-] Interview (4-16-12); [-] Interview (5-3-12); [-] Interview (4-16-12); [-] Interview (3-13-12); [-] Interview (3-15-12); [-] Interview (3-15-12).
[452] *See, e.g.*, [-] Interview (3-22-12); [-] Interview (4-16-12); [-] Interview (4-12-12); [-] Interview (4-16-12); [-] Interview (5-3-12); [-] Interview (3-15-12); [-] Interview (3-15-12).
[453] [-] Interview (3-13-12); [-] Interview (3-13-12); [-] Interview (4-16-12).
[454] *See, e.g.*, [-] Interview (3-8-12); [-] Interview (3-13-12); [-] Interview (4-11-12); [-] Interview (3-15-12); [-] Interview (3-22-12); [-] Interview (4-16-12); [-] Interview (3-15-12); [-] Interview (4-12-12); [-] Interview (4-16-12); [-] Interview (4-16-11); [-] Interview (5-3-12); [-] Interview (4-20-12); [-] Interview (4-16-12); [-] Interview (3-13-12); [-] Interview (3-15-12); [-] Interview (3-15-12); [-] Interview (4-5-12); [-] Interview (3-13-12).
[455] Control Number 12005881; [-] Interview (4-6-12); [-] Interview (3-15-12); [-] Interview (3-14-12); [-] Interview (3-15-12); [-] Interview (5-3-12); [-] Interview (4-11-12); [-] Interview (3-15-12).
[456] Control Numbers 06633947, 00045093, 09405967, 10615894, 06630379; [-] Notes of [-] Interviews (1-15-11); [-] Notes of [-] Interviews of [-] and [-] (1-17-11).
[457] Grand Jury Subpoena 109 (3-24-11).
[458] Grand Jury Subpoena 191 (5-11-11).
[459] Grand Jury Subpoena 183 (5-9-11); Grand Jury Subpoena 185 (5-10-11).

[460] [-] Interview (4-20-12); [-] Interview (3-15-12).
[461] [-] Interview (4-20-12); [-] Interview (3-13-12).
[462] [-] Interview (3-8-12).
[463] [-] Interview (4-12-12).
[464] [-] Interview (3-14-12).
[465] [-] Interview (3-22-12); [-] Interview (3-15-12); [-] Interview (3-13-12); [-] Interview (3-8-12); [-] Interview (4-16-12); [-] Interview (3-14-12).
[466] [-] Interview (4-16-12).
[467] *See, e.g.*, [-] Interview (3-8-12); [-] Interview (3-15-12); [-] Interview (3-15-12); [-] Interview (5-3-12).
[468] [-] Interview (4-16-12).
[469] [-] Interview (11-25-11).
[470] [-] Interview (11-25-11).
[471] Control Number 00039079.
[472] [-] Interview (7-6-12).
[473] Spanier Calendar 2011; Control Number 01000672.
[474] [-] Interview (1-25-12).
[475] Control Number 01001160.
[476] Control Numbers 01001782, 09377177, 09382920, 09388808, 09398766.
[477] [-] Interview (1-25-12).
[478] [-] Interview (1-25-12).
[479] [-] Interview (7-6-12).
[480] [-] Interview (7-6-12).
[481] Spanier Calendar 2011.
[482] [-] Interview (2-29-12).
[483] [-] Interview (2-20-12).
[484] [-] Interview (2-20-12).
[485] [-] Interview (2-20-12).
[486] [-] Interview (2-20-12).
[487] [-] Interview (7-6-12).
[488] [-] Interview (7-6-12).
[489] [-] Interview (7-6-12).
[490] [-] Interview (7-6-12).
[491] Control Number 00510882.
[492] Control Numbers 09361376, 09368381, 09361329.
[493] Control Numbers 10245114.
[494] Control Number 1001210.
[495] Control Number 1001203.
[496] Control Number 09347465.
[497] Control Number 09347465.
[498] Control Number 1001210.
[499] [-] Notes (11-5-11).
[500] [-] Notes (11-5-11).
[501] [-] Notes (11-5-11).
[502] [-] Notes (11-5-11).
[503] [-] Notes (11-5-11).
[504] Control Number 1001228.

[505] Control Number 1001228.
[506] [-] Interview (3-8-12); [-] Interview (3-13-12); [-] Interview (3-12-12).
[507] [-] Interview (3-8-12).
[508] [-] Notes (11-6-11).
[509] [-] Notes (11-6-11).
[510] [-] Notes (11-6-11).
[511] [-] Notes (11-6-11).
[512] Control Number 01035996.
[513] Control Number 01035996.
[514] [-] Notes (11-6-11).
[515] [-] Interview (4-16-12); [-] Interview (3-8-12).
[516] [-] Interview (4-13-12); [-] Interview (3-12-12); [-] Interview (4-16-12); [-] Interview (4-16-12); [-] Interview (3-13-12); [-] Interview (4-16-12); [-] Interview (3-8-12).
[517] [-] Interview (4-16-12); [-] Interview (3-13-12); [-] Interview (4-16-12); [-] Interview (3-8-12); [-] Interview (3-12-12); [-] Interview (4-13-12)
[518] [-] Interview (7-6-12).
[519] [-] Interview (3-13-12).
[520] [-] Interview (3-13-12).
[521] Control Number 1001535.
[522] [-] Notes (11-8-11).
[523] [-] Notes (11-8-11).
[524] [-] Notes (11-8-11).
[525] [-] Notes (11-8-11).
[526] [-] Notes (11-8-11).
[527] http://live.psu.edu/story/56285.
[528] http://live.psu.edu/story/56285.
[529] http://live.psu.edu/story/56285.
[530] [-] Notes (11-9-11).
[531] [-] Notes (11-9-11).
[532] [-] Notes (11-9-11).
[533] [-] Interview (5-16-12).
[534] [-] Interview (4-23-12).
[535] [-] Interview (4-16-12); [-] Interview (4-16-12); [-] Interview (3-13-12).
[536] [-] Interview (4-16-12); [-] Interview (3-12-12).
[537] [-] Interview (4-16-12); [-] Interview (3-15-12); [-] Interview (4-16-12); [-] Interview (3-13-12).
[538] [-] Interview (3-15-12); [-] Interview (5-16-12).
[539] [-] Interview (4-16-12).
[540] [-] Interview (4-16-12).
[541] [-] Interview (4-16-12).
[542] [-] Interview (4-16-12).
[543] [-] Interview (4-23-12); [-] Interview (4-18-12).
[544] [-] Interview (4-23-12).
[545] [-] Interview (4-23-12).
[546] [-] Interview (4-23-12).
[547] [-] Notes (11-9-11).
[548] [-] Notes (11-9-11).

[549] Jessica VanderKolk, "King says PSU Gave Little Warning," *Center Daily Times* (11-16-11).
[550] [-] Interview (5-9-12); [-] Interview (4-16-12); [-] Interview (4-6-12); [-] Interview (4-11-12); [-] Interview (4-18-12).
[551] [-] Interview (4-6-12); [-] Interview (4-16-12).
[552] Standing Orders of the Penn State Board of Trustees, Order IX(1)(a).
[553] http://www.psu.edu/trustees/selection.html.
[554] *See* Board of Trustees Minutes of Meeting at 208-12 (5-16-03).
[555] Standing Orders of the Penn State Board of Trustees, Order XI.
[556] http://www.psu.edu/trustees/membership.html.
[557] *See* Standing Orders of the Penn State Board of Trustees, Order IX. This statement on the general policies of the Board of Trustees was initially set forth and approved by the Board on June 11, 1970 and amended from time, the most recent being January 19, 1996. www.psu.edu/Trustees/governance.html.
[558] Board of Trustees Corporate By-Laws, Art. 4, Sections 7-9 (2010).
[559] Board of Trustees Minutes of Meeting, March 19, 2004 and September 19, 2008, http://www.psu.edu/trustees/archives.html#2008.
[560] Standing Orders of the Penn State Board of Trustees, Order III. During the period 1998-2002, the Board met six times per year.
[561] *See* 15 Pa. Cons. Stat. § 5712; *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959, 970-71 (Del. Ch. 1996).
[562] Standing Orders of the Penn State Board of Trustees, Order IX(1)(b)(2).
[563] *See Stone v. Ritter*, 911 A.2d 362, 370 (Del. Ch. 2006).
[564] *See Caremark*, 698 A.2d at 970-971.
[565] [-] Interview (3-22-12); [-] Interview (3-15-12); [-] Interview (3-13-12); [-] Interview (3-8-12); [-] Interview (4-16-12); [-] Interview (3-14-12).
[566] [-] Interview (4-16-12); [-] Interview (3-8-12).
[567] [-] Interview (4-16-12).
[568] Control Number 12005881; [-] Interview (4-6-12); [-] Interview (3-15-12); [-] Interview (3-14-12); [-] Interview (3-15-12); [-] Interview (5-3-12); [-] Interview (4-11-12); [-] Interview (3-15-12); [-] Interview (3-22-12); [-] Interview (3-15-12); [-] Interview (4-12-12); [-] Interview (4-16-12); [-] Interview (4-16-12); [-] Interview (3-13-12); [-] Interview (3-15-12).
[569] Control Number 9365024.
[570] Standing Orders of the Penn State Board of Trustees, Order IX(1)(b)(2).
[571] Standing Orders of the Penn State Board of Trustees, Order IX(1)(b)(2).
[572] Control Number 9365024.
[573] Control Number 1001203.
[574] Control Number 1001203.
[575] [-] Notes (11-5-11).
[576] Control Number 006_0000043.
[577] Penn State Policy HR-25 (Control Number 014_0000034).
[578] [-] Interview (2-15-12); [-] Interview (12-7-11); [-] Interview (12-5-11); [-] Interview (12-12-11); [-] Interview (12-16-11).
[579] [-] Interview (12-15-11); [-] Interview (1-25-12).
[580] [-] Interview (1-25-12); keylist.xls.
[581] Penn State Policy HR-25 (Control Number 014_0000034); Control Number 006_0000043.
[582] [-] Interview (12-07-11).

[583] The Special Investigative Counsel and investigators with the Attorney General's Office found Sandusky's documents in April 2012.
[584] *Id.*
[585] [-] Interview (4-19-12).
[586] [-] Interview (1-5-12); [-] Interview (1-10-12); [-] Interview (2-8-12).
[587] Nittany Lion Club Records (7-8-11); [-] Interview (1-5-12); [-] Interview (2-8-12).
[588] [-] Interview (1-5-12); [-] Interview (2-8-12).
[589] Nittany Lion Club Records, November 2011; [-] Interview (1-5-12); [-] Interview (2-8-12).
[590] Letterman Club Records, Nittany Lion Club Records.
[591]Nittany Lion Club Records, September-October 2011.
[592] [-] Interview (2-8-12).
[593] [-] Interview (3-14-12); [-] Interview (12-19-11).
[594] Sandusky was scheduled to conduct a camp in 2009, but his wife called the campus and cancelled the camp.
[595] Penn State Policy AD39.
[596] *See* [-] Interview (4-24-12); [-] Interview (4-24-12).
[597] [-] Interview (4-24-12).
[598] *See, e.g.,* [-] Interview (4-24-12); [-] Interview (4-24-12).
[599] XL spreadsheet of PSU payments to Sandusky provided by the Controller's Office.
[600] XL spreadsheet of PSU payments to Sandusky provided by the Controller's Office.
[601] Control Number 014_0000054.
[602] XL spreadsheet of PSU payments to Sandusky provided by the Controller's Office.
[603] XL spreadsheet of PSU payments to Sandusky provided by the Controller's Office.
[604] XL spreadsheet of PSU payments to Sandusky provided by the Controller's Office.
[605] *See e.g.,* [-] Interview (2-1-12).
[606] [-] Interview (12-5-11); (12-5-11); [-] Interview (12-6-11).
[607] Control Number 00033853; [-] Interview (2-29-12).
[608] [-] Interview (2-22-12).
[609] [-] Interview (2-29-12).
[610] [-] Interview (2-15-12); [-] Interview (2-14-12).
[611] [-] Interview (2-29-12).
[612] [-] Interview (12-16-11); [-] Interview (1-18-12).
[613] [-] Interview (12-16-11); [-] Interview (1-18-12).
[614] Armen Keteyian, "Sandusky's Second Mile charity probed for clues," *CBS Evening News* (11-11-11).
[615] [-] Interview (4-11-12).
[616] http://www.psu.edu/dept/psusportsinfo/football/profiles/sanduskyretires.html.
[617] *Id.*
[618] Memorandum from [-] to The Board of Directors (8-23-1999).
[619] Control Number 006_0000044.
[620] Second Mile Golf Tournament documents provided by Controller's Office (2-9-12).
[621] Control Number 00555509.
[622] Control Number 04122803.
[623] [-] Interview (4-24-12); [-] Interview (4-24-12); Exhibit 3-F.
[624] http://www.foxnews.com/us/2011/11/19/penn-state-paid-by-sanduskys-charity-for-use-facilities-as-recently-as-2009/.
[625] [-] Interview (4-19-12).

[626] [-] Interview (4-19-12).
[627] [-] Interview (4-19-12).
[628] [-] Interview (3-6-12); [-] Interview (4-11-12); [-] Interview (4-11-12).
[629] [-] Interview (4-11-12).
[630] [-] Interview (1-13-12).
[631] [-] Interview (1-13-12).
[632] [-] Interview (1-13-12).
[633] [-] Interview (1-13-12).
[634] [-] Interview (1-13-12).
[635] [-] Interview (1-13-12).
[636] In its 2002 ASR, for example, the University mistakenly reported that there were no sexual assaults in its Clery Act statistics. A watchdog organization noticed the discrepancy; the University discovered that it had made a mistake in its calculation and reissued the statistics. The incident resulted in negative publicity in the local newspaper. *See* Email of 1-12-2004 at 3:47:09 p.m.
[637] [-] Interview (2-1-12); [-] Interview (1-5-12).
[638] [-] Interview (2-1-12).
[639] [-] Interview (1-5-12).
[640] [-] Interview (1-5-12).
[641] [-] Interview (1-5-12).
[642] [-] Interview (1-5-12); [-] Interview (2-1-12); *e.g.*, Control Number 09503459.
[643] [-] Interview (1-5-12); [-] Interview (2-1-12).
[644] [-] Interview (1-5-12).
[645] Control Number 09528529.
[646] [-] Interview (2-1-12); [-] Interview (1-5-12).
[647] [-] Interview (1-5-12).
[648] Control Number 08036801.
[649] [-] Interview (2-1-12).
[650] Control Number 09618422.
[651] [-] Interview (2-1-12).
[652] [-] Interview (2-1-12).
[653] [-] Interview (7-6-12).
[654] [-] Interview (7-6-12).
[655] [-] Interview (7-6-12).
[656] [-] Interview (7-6-12).
[657] [-] Interview (7-6-12).
[658] The Special Investigative Counsel determined that this incident occurred in 2001.
[659] Preliminary Hearing Trans. at 24-25 (12-16-11).
[660] Preliminary Hearing Trans. at 34 (12-16-11).
[661] Preliminary Hearing Trans. at 175-76 (12-16-11).
[662] The University Police Department recently surveyed everyone who worked there in February 2001. None of those employees had ever been informed of this incident. The incident was not included in Penn State's Clery statistics and no timely warning was made about it. [-] Interview (6-1-12).
[663] Report prepared by [-] for Penn State, November 27, 2011.
[664] *See Chapter 9, The Protection of Children in University Facilities and Programs.*
[665] Outreach consists of five major units: Continuing Education, Cooperative Extension, Economic and Workforce Development, Public Broadcasting and Online Education.

[666] Email from [-] to [-] (8-6-10).
[667] *See* Appendix (2), Penn State Policy AD39.
[668] Control Number 09341611.
[669] *See* Appendix (2), Penn State Policy AD39.
[670] *See id.*
[671]Additional clarifications, added June 7, 2012, include updated requirements for high school students visiting on pre-enrollment visits with Penn State students, clarification of reporting process and exclusion of client representation clinics in Dickinson School of Law from policy.
[672]Although Policy AD39 first took effect in 1992, it was not until April 28, 2010 that the Policy addressed background checks. Under the revised Policy AD39, the background check consists of a University background check or evidence of completion of Pennsylvania Act 34 (background check), Pennsylvania Act 151 (child abuse clearance) and FBI background history report clearance before being hired and/or interacting with minors.
[673] *See* Appendix (2), Penn State Policies HR-95 and HR-96.
[674] *See* Appendix (2), Penn State Policy HR-99, *Background Check Process.*
[675] *See* Appendix (2), Penn State Policy HR-99, *Background Check Process.*
[676] *See* Appendix (2), Penn State Policy HR-99, *Background Check Process.*
[677] *See* Appendix (2), Penn State Policy HR-99, *Background Check Process.*
[678] [-] Interview (3-8-12).
[679] [-] Interview (3-12-12).
[680] [-] Interview (2-23-12).
[681] [-] Interview (2-23-12).
[682] [-] Interview (12-19-11).
[683] *See, e.g.* [-] Interview (3-6-12) (stating that, "it has happened here [at Altoona]" on a number of occasions over the years and coaches have always just been told not to do it again); [-] Interview (3-8-12) (stating that the use of individuals that were not registered or subjected to background checks happened once or twice each year. When those in her office would discover such individuals their response was, "guess what happened again?").
[684] [-] Interview (3-8-12).
[685] [-] Interview (2-23-12).
[686] *See, e.g.,* [-] Interview (2-23-12); [-] Interview (3-24-12) (stating that such unauthorized participation occurred every year, "all the time"); [-] Interview (3-6-12)(stating that "it has happened here [at Altoona] and on a number of occasions over the years and coaches have always just been told not to do it again); [-] Interview (3-8-12) (stating that the use of individuals that were not registered or subjected to background checks happened once or twice each year).
[687] Email from [-] to [-] (8-6-10).
[688] [-] Interview (3-1-12).
[689] *See e.g.,* [-] Interview (3-1-12); [-] Interview (3-5-12); [-] Interview (4-25-12); [-] Interview (3-6-12); [-] Interview (4-24-12).
[690] [-] Interview (3-1-12); [-] Interview (3-8-12).
[691] [-] Interview (4-16-12).
[692] [-] Interview (4-25-12).
[693] [-] Interview (4-24-12); [-] Interview (3-6-12); [-] Interview (3-21-12). Using E-PATCH, a coach or counselor can apply for a criminal background check online and, most of the time, a "no record" result is returned immediately. [-] Interview (3-5-12); see also, www.portal.state.pa.us. The coach or counselor requesting the background check bears the cost of this search. If a result of "no record" is returned, the

coach or counselor is allowed to work with youth with the limitation that the coach or counselor is not allowed to stay overnight with youth in a residence hall until the University background check is completed. [-] Interview (3-6-12).

[694] [-] Interview (4-16-12). Senior administrator interviewers were unaware that fingerprinting was being utilized at this campus.

[695] [-] Interview (3-24-12).

[696] [-] Interview (3-8-12).

[697] [-] Interview (3-12-12).

[698] [-] Interview (3-23-12).

[699] [-] Interview (3-23-12).

[700] [-] Interview (3-23-12); [-] Interview (12-19-11).

[701] [-] Interview (3-23-12); [-] Interview (12-19-11).

[702] [-] Interview (3-23-12); [-] Interview (12-19-11).

APPENDICES

APPENDIX A
EXHIBITS

EXHIBIT LIST

2A: EMAIL, SCHULTZ TO CURLEY, 5.6.98; RE: JOE PATERNO

2B: EMAIL, SCHULTZ TO HARMON, 5.14.98; RE: JERRY

2C: EMAIL, SCHULTZ TO HARMON, 6.9.98; EMAIL RE: JERRY; EMAIL SCHULTZ TO CURLEY 6.8.98

2D: EMAIL, SCHULTZ TO HARMON, 6.9.98; RE: CONFIDENTIAL

2E: EMAIL, SCHULTZ TO CURLEY, SPANIER, HARMON, 6.9.98; RE: JERRY

2F: EMAIL, SCHULTZ TO SPANIER, CURLEY, 2.28.01; RE: MEETING

2G: NOTE, TYPED FORM/ HANDWRITTEN NOTES; SANDUSKY RETIREMENT REQUESTS

2H: NOTE, SCHULTZ HANDWRITTEN NOTES, 5.4.98 @ 5:00PM

2I: NOTE, SCHULTZ HANDWRITTEN NOTES, 5.5.98; RE: LAST EVENING

2J: NOTE, SPANIER STATEMENT

3A: EMAIL, CURLEY TO SPANIER, 2.8.99; RE: SANDUSKY UPDATE

3B: EMAIL, SPANIER TO CURLEY, SCHULTZ, 2.10.98; RE: SANDUSKY UPDATE; EMAIL, CURLEY, 2.9.98

3C: EMAIL, SPANIER TO CURLEY, 1.19.99; RE: JERRY

3D: INTERPRETATION OF JVP HANDWRITTEN NOTES, FROM PATERNO RESIDENCE; RE: MEETING WITH JERRY AND TIM C

3E: LETTER, SANDUSKY TO CURLEY, 5.28.99; RE: RETIREMENT OPTIONS

3F: NOTE, TYPED FORM/ HANDWRITTEN NOTES; SANDUSKY RETIREMENT REQUESTS

3G: EMAIL, CURLEY TO SPANIER, 6.13.99; RE: JERRY

3H: LETTER, CURLEY TO SANDUSKY, 6.29.99; RE: RETIREMENT PREREQUISITES

3I: EMAIL, ERICKSON TO SECOR; RE: EMERITUS QUESTION; EMAIL, REBECCA YOUNG TO SECOR, 8.30.99; RE: EMERITUS QUESTION

5A: TIMESHEET, MCQUAIDE BLASKO, INC., COURTNEY, 2.1.01 TO 4.30.01

5B: EMAIL, SCHULTZ TO COURTNEY, 1.10.11; RE: JSRECE; EMAIL COURTNEY TO SCHULTZ, 1.10.11; RE: JS

5C: NOTE, SCHULTZ CONFIDENTIAL HANDWRITTEN NOTE, 2.12.01

5D: EMAIL, HARMON TO SCHULTZ, 2.12.01; RE: INCIDENT IN 1998

5E: NOTE, SCHULTZ HANDWRITTEN NOTES, 2.25.01

5F: EMAIL, SCHULTZ TO CURLEY, COBLE, 2.26.01; RE: CONFIDENTIAL

5G: EMAIL, SCHULTZ TO SPANIER, CURLEY, 2.28.01; RE: MEETING; EMAIL, SPANIER, 2.27.01; RE: MEETING; EMAIL, CURLEY, 2.27.01

5H: EMAIL, SCHULTZ TO CURLEY, 3.1.01; RE: SCHEDULE

5I: EMAIL, COBLE TO CURLEY, 3.7.01; RE: CONFIDENTIAL; EMAIL SCHULTZ TO CURLEY, 2.26.01; RE: CONFIDENTIAL

6A: AFFIDAVIT, BALDWIN, 1.16.12

10A: COMMITTEE LIST, ORGANIZATION CHART BOARD OF TRUSTEES AS OF FEBRUARY 1998, FEBRUARY 2001, JULY 1, 2012

Exhibit 2A

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, May 06, 1998 2:06 PM
To: Tim Curley
Cc: Spanier-Graham (GBS)
Subject: Re: Joe Paterno

Will do. Since we talked tonight I've learned that the Public Welfare people will interview the individual Thursday.

At 05:24 PM 5/5/98 -0400, Tim Curley wrote:
>I have touched base with the coach. Keep us posted. Thanks.
>_____
>Tim Curley
>Tmc3@psu.edu
>
>
>

Exhibit 2B

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Thursday, May 14, 1998 8:55 AM
To: Thomas Harmon
Subject: Re: Jerry

Good, Tom. Thanks for the update and I agree that we want to resolve quickly.

At 04:48 PM 5/13/98 EST, Thomas Harmon wrote:
>The psychologist from DPW spoke with the child. They have not spoken
>to him. It is still my understanding that they intend to do this. I
>have also been advised that they want to resolve this quickly.
>
>> Date: Thu, 14 May 1998 04:11:19 -0400
>> To: Tim Curley <tmc3@psu.edu>
>> From: "Gary C. Schultz" <gcs2@psu.edu>
>> Subject: Re: Jerry
>
>> Tim, I understand that a DPW person was here last week; don't know
>> for sure if they talked with Jerry. They decided to have a child
>> psychologist talk to the boys sometime over the next week. We won't know anything before then.
>>
>> At 02:21 PM 5/13/98 -0400, Tim Curley wrote:
>> >Anything new in this department? Coach is anxious to know where it stands.
>> >_____
>> >Tim Curley
>> >Tmc3@psu.edu
>> >
>> >
>> >
>> Gary C. Schultz
>> Sr. V.P. for Finance and Business/Treasurer
>> 208 Old Main
>> Phone: 865-6574
>> Fax: 863-8685
>>
>>
>Thomas R. Harmon
>Director of Police Services
>The Pennsylvania State University
>30-B Eisenhower Parking Deck
>University Park, PA 16802
>(814) 865-1864
>harmon@police.psu.edu
>
>

Exhibit 2C

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Tuesday, June 09, 1998 2:03 AM
To: Harmon-Thomas (TRH)
Subject: Re: Jerry

Tom, I've been holding some "catch up time" on my calendar on Monday and I'd suggest that we use a piece of it to meet and discuss the status (I also recall the last time we talked you indicated that there was some aspects of this that you felt you should review with me when we had a chance to talk). Please get ahold of Joan and see what time will work. thanks

>Date: Mon, 08 Jun 1998 21:59:42 -0400
>To: Tim Curley <tmc3@psu.edu>
>From: "Gary C. Schultz" <gcs2@psu.edu>
>Subject: Re: Jerry
>
>Tim, I don't have an update at this point. Just before I left for vac, Tom told me that the DPW and Univ Police services were planning to meet with him. I'll see if this has happened and get back to you.
>
>At 10:27 AM 5/30/98 -0400, Tim Curley wrote:
>>Any further update?
>>
>>
>>
>>
>>At 09:46 AM 5/19/98 -0400, you wrote:
>>>No, but I don't expect we'll hear anything prior to the end of this week.
>>>
>>>At 09:37 PM 5/18/98 -0400, Tim Curley wrote:
>>>>Any update?
>>>>
>>>>
>>>>At 04:11 AM 5/14/98 -0400, you wrote:
>>>>>Tim, I understand that a DPW person was here last week; don't know
>>>>>for sure if they talked with Jerry. They decided to have a child
>>>>>psychologist talk to the boys sometime over the next week. We won't know anything before then.
>>>>>
>>>>>At 02:21 PM 5/13/98 -0400, Tim Curley wrote:
>>>>>>Anything new in this department? Coach is anxious to know where it stands.
>>>>>>_____
>>>>>>Tim Curley
>>>>>>Tmc3@psu.edu
>>>>>>
>>>>>>
>>>>>>
>>>>>Gary C. Schultz
>>>>>Sr. V.P. for Finance and Business/Treasurer
>>>>>208 Old Main
>>>>>Phone: 865-6574

>>>>>Fax: 863-8685
>>>>>
>>>>>
>>>>>
>>>>_____
>>>>Tim Curley
>>>>Tmc3@psu.edu
>>>>
>>>>
>>>>
>>>Gary C. Schultz
>>>Sr. V.P. for Finance and Business/Treasurer
>>>208 Old Main
>>>Phone: 865-6574
>>>Fax: 863-8685
>>>
>>>
>>>
>>_____
>>Tim Curley
>>Tmc3@psu.edu
>>
>>
>>
>

Exhibit 2D

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Tuesday, June 09, 1998 2:04 AM
To: Thomas Harmon
Subject: Re: Confidential

Tom, you can ignore my earlier email, unless you feel that we should talk some more about this. thanks

At 01:11 PM 6/1/98 EST, Thomas Harmon wrote:
>Gary,
>
>The DPW investigator and our officer met discreetly with Jerry this
>morning. His account of the matter was essential the same as the
>child's. He also indicated that he had done this with other children
>in the past. He was advised since there was no criminal behavior
>established that the matter was closed as an investigation.
>He was a little emotional and expressed concern as to how this might
>have adversely affected the child.
>
>Tom
>
>
>
>
>Thomas R. Harmon
>Director of Police Services
>The Pennsylvania State University
>30-B Eisenhower Parking Deck
>University Park, PA 16802
>(814) 865-1864
>harmon@police.psu.edu
>
>

Exhibit 2E

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Tuesday, June 09, 1998 2:09 AM
To: Curley-Tim (TMC)
Cc: Spanier-Graham (GBS); Harmon-Thomas (TRH)
Subject: Re: Jerry

They met with Jerry on Monday and concluded that there was no criminal behavior and the matter was closed as an investigation. He was a little emotional and expressed concern as to how this might have adversely affected the child. I think the matter has been appropriatedly investigated and I hope it is now behind us.

>Date: Mon, 08 Jun 1998 21:59:42 -0400
>To: Tim Curley <tmc3@psu.edu>
>From: "Gary C. Schultz" <gcs2@psu.edu>
>Subject: Re: Jerry
>
>Tim, I don't have an update at this point. Just before I left for vac, Tom told me that the DPW and Univ Police services were planning to meet with him. I'll see if this has happened and get back to you.
>
>At 10:27 AM 5/30/98 -0400, Tim Curley wrote:
>>Any further update?
>>
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>>
>>
>>At 09:46 AM 5/19/98 -0400, you wrote:
>>>No, but I don't expect we'll hear anything prior to the end of this week.
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>>>>Any update?
>>>>
>>>>
>>>>At 04:11 AM 5/14/98 -0400, you wrote:
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>>>>>psychologist talk to the boys sometime over the next week. We won't know anything before then.
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>>>>>At 02:21 PM 5/13/98 -0400, Tim Curley wrote:
>>>>>>Anything new in this department? Coach is anxious to know where it stands.
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>>>>>>Tmc3@psu.edu
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>>>>>>
>>>>>Gary C. Schultz
>>>>>Sr. V.P. for Finance and Business/Treasurer
>>>>>208 Old Main
>>>>>Phone: 865-6574

>>>>>Fax: 863-8685
>>>>>
>>>>>
>>>>>
>>>>_____
>>>>Tim Curley
>>>>Tmc3@psu.edu
>>>>
>>>>
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>>>Gary C. Schultz
>>>Sr. V.P. for Finance and Business/Treasurer
>>>208 Old Main
>>>Phone: 865-6574
>>>Fax: 863-8685
>>>
>>>
>>>
>>_____
>>Tim Curley
>>Tmc3@psu.edu
>>
>>
>>
>

Exhibit 2F

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, February 28, 2001 2:13 PM
To: Graham Spanier; Tim Curley
Subject: Re: Meeting

<html>
Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.

 At 10:18 PM 2/27/01 -0500, Graham Spanier wrote:
 <blockquote type=cite cite>Tim: This approach is acceptable to me. It requires you to go a step further and means that your conversation will be all the more difficult, but I admire your willingness to do that and I am supportive. The only downside for us is if the message isn't "heard" and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed.

 At 08:10 PM 2/27/01 -0500, Tim Curley wrote:
 <blockquote type=cite cite>I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday-- I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and and maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities.

 I need some help on this one. What do you think about this approach?</blockquote>

Graham B. Spanier
President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

 Phone: 814-865-7611
 email: gspanier@psu.edu
 </blockquote></html>

Exhibit 2G

Retirement Requests

1. An office and telephone

2. $20,000/year annuity that includes protection for Dottie. Please refer to the enclosed economic justification for this request.

3. A title that reflects my relationship with Penn State.

4. To maintain my option to purchases tickets for games for fund-raising.

5. Access to training and workout facilities.

6. The opportunity to run a football camp for middle school youth.

7. Discuss ways of maintaining visibility.

JVP-000027

Exhibit 2H

5/4/98
5:00pm

- Women
- 11 [illegible]
- Nitty Gardens
- [illegible]
- [illegible] son & invited to FB [illegible]
- Behavior - at best inappropriate @ worst [illegible]
- Police interviewed
  - [illegible]
  - May be [illegible]
  - [illegible]
  - Gave him other clothes - even though he was in shorts

- worked out on Treadmill etc
- Jerry - to take a shower - undressed - ? no other shower? 4 in here.
  - Shampoo:
  - Jerry came up behind & gave him a bear hug - said he would [illegible] guts out - all
- Keep clothes - socks JUP's hat
- took home.

Mother concerned something more - Kid took another shower last night & this a.m

3

Mother - asked how did he give hug.
had to be genital contact because of size difference
but when asked of boy he quickly said NO

- Friend Brandon, age 10, also @ Nittany Gardens - claims same thing went on with him

- Mother also [illegible]
- Children & Youth has been notified - [illegible] to talk to Brandon - tonight

- 4 -

Mother over reacting - NO
generally concerns
Admin - Poor Judgement
Asterisk issue - contact w genitals?

Assuming some experience w Brandon? not [illegible]

Exhibit 2I

Tom Harman 5/5

Last evening

- re interview 11½ yr old
- only change: added what happened in shower demonstrated on chair how Jerry hugged from back

hands around abdomin + down to thighs - picked him up + held him at shower head - rinse soap out of ears

obsessed w PSU FB + concerned about getting Jerry in trouble - getting FB tickets

- Kid has been seeing psychologist
- probably emotional problems but articulate + believable
- Mother to psychologist + said she would call child abuse hot line + will generate an incident no - with Dept of Public Welfare
- Other Boy - interviewed last night

Similar acct
locker room
wrestling
kissed on head.

-3-

Hugging from behind in
Shower
No allegation beyond that

Kids drew diagrams of
shower rooms
he initially went down to
shower 3 yds sticks
away & Jerry told
him to come down
to shower next to his
- Local child abuse people
Mtg at 9:00 today to
decide what to do

-4-

Either way, case worker
felt they would interview
Jerry

Is this opening of Pandora's
box?
Other children?

Exhibit 2J

Initial Heads Up

More than a decade ago, Tim Curley and Gary Schultz asked to catch me after another meeting to give me a "heads up" about a matter. Looking back at my calendar for what is now presumed to be February, 2001, I surmise that meeting to have been on Monday, February 12, at about 2:30pm, following a scheduled meeting of the President's Council. It was common that members of the council would catch me individually for brief updates following such meetings.

The meeting lasted perhaps 10-15 minutes. Curley and Schultz shared that they had received a report that a member of the athletic department staff had reported something to Joe Paterno, and that Joe had passed that report on to Tim and Gary. The report was that Jerry Sandusky was seen in an athletic locker room facility showering with one of his Second Mile youth, after a workout, and that they were "horsing around" (or "engaged in horseplay"). It was reported that the staff member was not sure what he saw because it was around a corner and indirect.

I recall asking two questions:

"Are you sure that is how it was described to you, as horsing around"? Both replied "yes."

"Are you sure that that is all that was reported?" Both replied "yes."

We then agreed that we were uncomfortable with such a situation, that it was inappropriate, and that we did not want it to happen again. I asked that Tim meet with Sandusky to tell him that he must never again bring youth into the showers. We further agreed that we should inform the Second Mile president that we were directing Jerry accordingly and furthermore that we did not wish Second Mile youth to be in our showers.

Notes:

There was no mention of anything abusive, sexual, or criminal.

At no time was it said who had made the report to Joe Paterno. (I never heard Mike McQuery's name associated with this episode until November 7, 2011, when I read it in a newspaper story.)

The hour of the day was not mentioned.

The specific building and locker room were not mentioned.

The age of the child was not mentioned. I had presumed it was a high school age child under Jerry's guardianship or sponsorship, since that is all I knew about the Second Mile.

There was no mention in that meeting of any prior shower incident, and I had no recollection of having heard of a prior incident.

Follow Up

In reviewing my calendar for February, 2001, I note a double entry for Sunday, February 25. I had been out of town for several days and was scheduled to return in time to see a Penn State women's basketball game at 2pm. My assistant noted on the calendar that I should stop in to see Tim Curley briefly in my way into the game. I have no recollection of that meeting other than that Tim was worried about how he should handle things if he informed Sandusky that we were forbidding him from bringing Second Mile youth into our facilities and then Sandusky disagreed with this directive. I do not recall knowing about any prior incidents, but it is apparent from emails recently released to the media that Tim also indicated that there had been an earlier occasion when Sandusky had showered with a minor. We also now know that I was copied on two emails in 1998 that may have alerted me to that (the first one being a vague reference with no individual named) and the second essentially saying that the matter had been closed. I had absolutely no recollection of that history in 2001 nor do I recall it today. I don't believe I replied to those emails nor was I briefed verbally.

Tim Curley sent me a follow up email that has recently been shared with the news media. My use of the word "humane" refers specifically and only to my thought that it was humane of Tim to wish to inform Sandusky first and to allow him to accompany Tim to the meeting with the president of the Second Mile. Moreover, it would be humane to offer counseling to Sandusky if he didn't understand why this was inappropriate and unacceptable to us. My comment that we could be vulnerable for not reporting it further relates specifically and only to Tim's concern about the possibility that Jerry would not accept our directive and repeat the practice. Were that the outcome of his discussion I would have worried that we did not enlist more help in enforcing such a directive. I suggested that we could visit that question down the road, meaning after Curley informed Sandusky of our directive and learning of his willingness to comply and after talking with Second Mile executives who had responsibility for the Second Mile youth.

A few days after the brief Sunday interaction, I saw Tim Curley and he reported that both of the discussions had taken place, that those discussions had gone well and our directive accepted, and that the matter was closed.

I never heard another word about this from any individual until I learned of the investigation into Sandusky. I was eager to assist the attorney general and was completely honest to the best of my recollection. I had absolutely no idea until midway through my voluntary grand jury testimony that this inquiry was about anything more than the one episode in the shower.

Notes:

I do not recall that I was privy to any follow up discussions between Curley, Schultz, legal counsel, or others. February 2001 was an extraordinarily pressured period for Penn State and me: I had five out of town trips that month, my appropriations hearings, THON, a packed calendar with 164 appointments, an average of 100 incoming and 50 outgoing emails a day, and the turmoil of the Black Caucus disruption and the takeover of the student union.

I do not recall being involved in any discussions about DPW or the police, although I now assume that DPW is the "other organization" being referenced by Curley and Schultz in their emails.

Exhibit 3A

Shared Mailbox

From: Tim Curley <tmc3@psu.edu>
Sent: Sunday, February 08, 1998 11:19 AM
To: gspanier@psu.edu; gcs2@psu.edu
Subject: Sandusky update

Jerry and I had several conversations this past week about the Assistant AD position. He visited with Joe last week and is to let me know early this week if he is interested. I told him he would continue with his base salary and that he would give up his camp and bowl compensation. Also, I indicated that his dealer car may be a concern since Sue Scheetz is not provided one.
We talked about his involvement with the Second Mile and my expectations for the position. I did not get any indication which way he was leaning. I will keep you informed as the week progresses. Thanks.

Tim Curley
Tmc3@psu.edu

Exhibit 3B

Shared Mailbox

From: Graham Spanier <gspanier@psu.edu>
Sent: Tuesday, February 10, 1998 9:40 PM
To: Curley, Tim
Cc: Schultz, Gary C.
Subject: Re: Sandusky update

Thanks for this update. We are looking for a dean of the Eberly College Science. Does Joe Sarra have any background there?

At 08:51 PM 2/9/98 -0500, Tim Curley wrote:
>Jerry is not interested in the Assistant AD position. Joe and Jerry
>have agreed that he will continue in the coaching capacity for the next year.
>Jerry will have 30 years in the system next year, which will give him
>some options after next season. Joe tells me he made it clear to Jerry
>he will not be the next head coach. Joe did indicate that he still
>plans to make a change on the defensive side of the ball. He wants to
>talk to me at a later date about what might be available for Joe Sarra.
>Do you two need an administrative assistant?
>_____
>Tim Curley
>Tmc3@psu.edu
>
>
>

Graham B. Spanier
President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

Phone: 814-865-7611
email: gspanier@psu.edu

Exhibit 3C

Shared Mailbox

From: Graham Spanier <gspanier@psu.edu>
Sent: Tuesday, January 19, 1999 11:12 PM
To: Curley, Tim
Subject: Re: Jerry

Thanks. Let me know if I can be helpful as this moves forward.

At 10:14 PM 1/19/99 -0500, Tim Curley wrote:
>I had a good meeting with Jerry today. He is interested in going one
>more year and then transition into a spot that handles our outreach
>program. We talked about his benefits situation and his expectations
>about salary. I told him that we needed to get with Billie about his
>benefits and that I would take a look at what kind of position we could
>develop and how we might handle his salary situation. Additionally, we
>need to have Joe in support. I plan to follow-up and will keep you in the loop. PS--He is not pleased about
>the entire situation as you might expect.
>
>Tim Curley
>Tmc3@psu.edu
>
>
>

Graham B. Spanier
President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

Phone: 814-865-7611
email: gspanier@psu.edu

Exhibit 3D

The following is typewritten interpretation of handwritten notes of JVP on document JVP- 000017 from Sandusky file kept at Paterno residence.

Meeting with Jerry and Tim C

Jerry

We know this isn't easy for you and it isn't easy for us or Penn State. Part of the reason it isn't easy is because I allowed and at times tried to help you with your developing the 2nd Mile. If there were no 2nd Mile then I believe you belief (sp?) that you probably could be the next Penn State FB Coach. But you wanted the best of two worlds and I probably should have sat down with you 6 or 7 years ago and said "look Jerry if you want to be the Head Coach at Penn State, give up your association with the 2nd Mile and concentrate on nothing but your family and Penn State. Don't worry about the 2nd Mile – you don't have the luxury of doing both. One will always demand a decision of preference. You are too deeply involved in both.

(Interpretation of notes by T. Cloud)

Exhibit 3E

May 28, 1999

Attention: Tim Curley

As I struggle with the difficult decision of a career change, many factors enter my mind. Foremost, I am concerned about my mental health, the financial security of my family and Mother, and the well-being of The Second Mile.

Based on my conversations with Coach Paterno, his concern with the inevitable transition into a new era of Penn State football, the realization that I am not going to be the next head coach, and the opportunity that exists with a thirty-year window, the timing may be right for me to retire from the University and work for The Second Mile. I also appreciate the help that the University has offered to me during this process. However, there are questions that I am struggling to answer:

> What impact will my retirement have on The Second Mile's growth and development? Can a relationship be maintained between Penn State (Athletics) and The Second Mile? Is there a way for me to maintain visibility with Penn State? Is my active involvement in developing an outreach program featuring Penn State Athletes a possibility? Are there ways for me to continue to work with young people through Penn State? What is a fair financial arrangement?

I believe that Penn State football has played a significant role in the foundation of The Second Mile. Additionally, The Second Mile has promoted and enhanced Penn

State football. This is a unique situation and an attempt to satisfy my desire to maintain an long-term relationship with the University.

Many factors have played a significant role in my decisions to stay at Penn State and forego other more lucrative options. One element that was important was the probability of becoming the next head football coach at Penn State. In addition to the personal satisfaction that this would have afforded me this would have also enabled me to better secure my family's economic future. As I have been informed that this will not happen. I continue to make an effort to find avenues of fulfillment and to remain positive about a tremendous experience. With all of this in consideration I enclose a list of requests. Thank you!

Jerry

Jerry Sandusky

Exhibit 3F

Retirement Requests

1. An office and telephone

2. $20,000/year annuity that includes protection for Dottie. Please refer to the enclosed economic justification for this request.

3. A title that reflects my relationship with Penn State.

4. To maintain my option to purchases tickets for games for fund-raising.

5. Access to training and workout facilities.

6. The opportunity to run a football camp for middle school youth.

7. Discuss ways of maintaining visibility.

Exhibit 3G

Shared Mailbox

From: Tim Curley <tmc3@psu.edu>
Sent: Sunday, June 13, 1999 8:19 PM
To: Spanier, Graham
Cc: Schultz, Gary C.
Subject: Jerry

Jerry just called and said he is leaning towards the retirement window option if we will agree to the $20,000 annuity and two basketball tickets in addition to the other items he requested. I am at home and do not have the projected costs for the annuity, but my recollection was it would cost us about $268,000. Joe did give him the option to continue to coach as long as he was the coach. I am not comfortable with the $20,000 annuity, but wanted to check to see if you feel the same way. Perhaps we could suggest another option of him coaching three more seasons and we get creative with his base salary or some other scheme that makes him whole and then some, but doesn't cost us an arm and a leg. Since Joe is okay with him continuing to coach this might make more sense to all concerned. I do need some help on what this third option might be if you agree. Also, I need to run it by Joe. I can get with Gary and Billie first thing tomorrow to see what we can work out if you are in agreement.. We need to respond to him asap since
time is running out. I need some help on this one. Thank you.

Exhibit 3H

Rec'd
2-28-11
6:28 p.m.

June 29, 1999

CONFIDENTIAL - HAND DELIVERED

Gerald A. Sandusky
130 Grandview Road
State College, PA 16801

IN RE: Retirement Perquisites

Dear Mr. Sandusky:

In accordance with our discussions regarding your retirement from University service effective June 29, 1999, and in recognition of your many contributions to the University and its Intercollegiate Athletics Program during the tenure of your employment, I am pleased to confirm the following perquisites to be extended to you upon and after your retirement on June 29, 1999:

1. The University will pay you the amount of One Hundred Sixty-eight Thousand and 00/100 ($168,000.00) Dollars in lump sum, less applicable withholdings as required by law, on or before July 31, 1999.

2. The University will give you four (4) complimentary football season tickets in your current location, and in addition, you will be given the option to purchase four (4) more football season tickets within the thirty-five yard lines and below the walkway. This benefit will continue for the balance of your lifetime.

3. The University will give you two (2) complimentary men's basketball season tickets and two (2) complimentary women's basketball season tickets. The location of these tickets will be within the normal Football Staff ticket location. This benefit will continue for the balance of your lifetime.

4. The University will permit you to use, at no charge, a locker, weight rooms, fitness facilities and training room in the East Area locker room complex. This benefit will continue for the balance of your lifetime.

5. For a period of five (5) years commencing July 1, 1999, and subject to renewal upon concurrence of both parties, you and the University agree to work collaboratively with each other in the future in community outreach programs, such as the Second Mile, and other programs which provide positive visibility to the University's Intercollegiate Athletics Program. It is understood that the nature and extent of such collaborative efforts, which will include continuation of the Nittany Lion TIPS and PEAK Programs and occasional recognitions of the Second Mile in the Beaver Stadium Pictorial and the Penn State Football Story Show, will be as mutually agreed by you and me.

6. For a period of ten (10) years, commencing July 1, 1999, and subject to renewal upon concurrence of both parties, you will be given an office and a phone in the East Area locker room complex for purposes of the collaborative arrangements referenced in no. 5 above.

If the foregoing understandings are agreeable, kindly indicate your acceptance by signing on the line below and returning a copy to me.

Sincerely,

Timothy M. Curley
Director of Athletics

APPROVED BY UNIVERSITY OFFICER:

Gary C. Schultz, Senior Vice President for
Finance and Business/Treasurer

I hereby accept the above-mentioned terms on June 29, 1999.

Gerald A. Sandusky

Exhibit 3I

To: Robert Secor[rxs2@psu.edu]
From: Rodney A. Erickson
Subject: Re: Fwd: Re: Emeritus Question

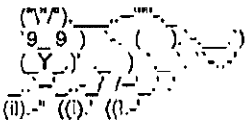
Bob,

Let's go ahead and grant it if Graham has already promised it. We can hope that not too many others take that careful notice. These requests would have to come through the deans in any case, and I can't imagine many deans lobbying for assistant professors.

Rod

At 10:23 AM 8/31/99 -0400, you wrote:
>In addition to the exchange below, I've talked with Billie Willits.
>Although she said we have made exceptions in the past for assistant profs,
>she could not give any particulars because any information would have been
>filed with the faculty member's file and she wouldn't know where to look.
>In other words, if this really happened (and without particulars it is hard
>to know), it may have been way past, and so not terribly helpful if we
>don't have a specific precedent to point to. But we are in a bind.
>Apparently, Graham told [redacted] that we would do this--he was wholly
>within his rights here since the policy says "The President may grant (or
>deny) Emeritus Rank on an exception basis"--then informed Tim, who
>suggested going through the college and went to Barbara, who then made the
>request of us. (I had wrongly assumed all along that the request
>originated with Barbara.) [redacted] is also going to be honored by the college
>as an Alumni Fellow this fall,and I think they may want to present the
>emeritus status to him on that occasion (or at least announce it then,
>although I'm not positive about this connection). I'm not sure what our
>best options are at this point. Maybe we need to go along with the
>Assistant Professor Emeritus of Physical Education/Assistant Coach
>recommendation, since by tying the two there is nobody else with that
>double designation who can claim they have the exact same credentials and
>are not being given the emeritus title.
>
>>X-Sender: ray2@mail.psu.edu
>>X-Mailer: Windows Eudora Pro Version 2.2 (32)
>>Date: Mon, 30 Aug 1999 09:07:06 -0400
>>X-PH: V4.1@f04n07
>>To: rxs2@psu.edu
>>From: Rebecca Young <ray2@psu.edu>
>>Subject: Re: Emeritus Question
>>
>>Dr. Secor,
>>
>>Here are Jeanie's comments regarding emeritus rank for [redacted]. All
>>good points she raises. --Becky
>>
>>
>>>X-Sender: jsa3@email.psu.edu
>>>Date: Mon, 30 Aug 1999 08:39:34 -0400
>>>X-PH: V4.1@f04n01
>>>To: Rebecca Young <ray2@psu.edu>
>>>From: Janine Andrews <jsa3@psu.edu>
>>>Subject: Re: Emeritus Question
>>>
>>>Hi Becky. I had an opportunity to look into your question from a previous
>>>e-mail with regard to exceptions for Assistant Professors. Historically,

>>>we have made exceptions, although not for this exact title, i.e., Assistant
>>>Professor Emeritus of Physical Education/Assistant Coach! In my opinion,
>>>given the circumstances, the most appropriate title would be the one
>>>requested -- Assistant Professor Emeritus of Physical Education/Assistant
>>>Coach. I say this because if we keep the professorial connection out of
>>>the title and just use something like Assistant Coach Emeritus, we then
>>>establish a new precedence by giving someone a "Coach" emeritus status --
>>>which we have never done based on what I could gather. So . . . the
>>>requested title serves two purposes: it keeps the professorial connection,
>>>yet is very inclusive by adding in the "coach" connection.
>>>
>>>Please let me know if you need anything else. Have a great day.
>>>
>>>Jeanie
>>>
>>>
>>>At 01:20 PM 8/25/99 -0400, you wrote:
>>>>Hi, Jeanie. Just wanted to update you on the [redacted] question. Dr.
>>>>Spanier has received the request, as we anticipated. It's for the title
>>>>Assistant Professor Emeritus of Physical Education/Assistant Coach.
>>>>
>>>>Another thought from here. If it's not well advised to grant the
>>>>professorial emeritus rank, how about Assistant Coach Emeritus? We'll wait
>>>>to hear from you. --Becky
>>>>
>>>>**********
>>>>Rebecca A. Young
>>>>Office of the Provost
>>>>201 Old Main
>>>>University Park, PA 16802
>>>>(814) 863-7494 (Telephone)
>>>>(814) 863-8583 (FAX)
>>>>
>>>>**********
>>>>
>>>
>>>Janine S. Andrews
>>>Assistant Manager
>>>Employee Relations Division
>>>Office of Human Resources
>>>Penn State University
>>>(814) 865-1412
>>>e-mail: jsa3@psu.edu
>>>
>>>
>>>>> ("\"/").___..-''"'-.
>>>>> '9_9) `-. ( ).`-.__.')
>>>>> (_Y_.)' ._) `._`. `-..-'
>>>>> _.`-'_..-_/ /-'_.'.'
>>>>> (il).-" ((i).' ((i.-'
>>>>>
>>>>> We ARE.....Penn State!!!
>>>
>>>
>>>
>>>
>>
>>**********
>>Rebecca A. Young



>>Office of the Provost
>>201 Old Main
>>University Park, PA 16802
>>(814) 863-7494 (Telephone)
>>(814) 863-8583 (FAX)
>>
>>**********
>>
>
>Robert Secor
>Vice Provost for Academic Affairs
>201 Old Main
>(814) 863-7494

Exhibit 5A

Working Attorney(s): Select 9

Matter I.D.	Description	Task Activity	Hours	
02-08-01				
4000-465063	PSU - Labor - Human Resources PS010		0.60	
	Conference with J Purdum re holiday pay issue; Conference with R Mancy re same			
4000-490106	PSU - Personnel - Continuing & Distance Educat		0.50	
	Conference with J Elliott re J Marshall; Conference with G Schultz			
4000-490143	PSU - Personnel - Mont Alto Campus		2.20	
	Conference with J Leathers re D Goldenberg; Preparation of correspondence to G Spanier; Review of files; Preparation of correspondence to G Spanier et al; Conference with J Leathers			
4000-481582	PSU - Students - Student Affairs		2.90	
	Interoffice conference re camping policy; Legal research re same			
4000-481582	PSU - Students - Student Affairs		1.70	
	Study/analyze documents re LGB tenant; Interoffice conference re same; Legal research; Preparation of correspondence to G Spanier et al re same			
4000-490163	PSU - Personnel - Human Resources		0.30	
	Conference with R Mancy re R Khalliq			
4000-465026	PSU - Labor - COM - General		1.50	
	Preparation of documents re HMC parking			
** Total for2/8/2001 **			9.70	0.00
02-09-01				
4000-490143	PSU - Personnel - Mont Alto Campus		1.60	
	Review of documents re D Goldenberg; Preparation of correspondence to G Spanier; Preparation of correspondence to J Leathers; Legal research			
4000-451558	PSU - Gifts & Grants - Develop and Alumni Rela		0.20	
	Review of files re Hagan estate			
4000-490117	PSU - Personnel - College of Liberal Arts		1.10	
	Conference with J Battista re R Echemendia; Interoffice conference			
4000-425562	PSU - Contracts - Hershey Medical Center		0.80	
	Review of documents re Purchase of Services Agreement; Interoffice conference re same			
4000-465026	PSU - Labor - COM - General		2.60	
	Conference with L Kushner re HMC parking fees; Preparation of correspondence to L Kushner re same; Preparation of documents; Legal research			
4000-465063	PSU - Labor - Human Resources PS010		0.70	
	Review Schaeffer brief			
** Total for2/9/2001 **			7.00	0.00
02-11-01				
4000-450061	PSU - General - Finance/Business - Central		2.90	
	Conference with G Schultz re reporting of suspected child abuse; Legal research re same; Conference with G Schultz			
02-12-01				

Exhibit 5B

From: Schultz, Gary C.
Sent: Monday, January 10, 2011 8:34 PM
To: First Administrative Group/cn=Recipients/cn=WVCOURTNEY; GCS2@psu.edu
Subject: Re: JSRece

Thanks for letting me know.

Gary

Sent via DROID on Verizon Wireless

-----Original message-----
From: Wendell Courtney <WVCourtney@mqblaw.com>
To: "Schultz, Gary C." <GCS2@psu.edu>
Sent: Mon, Jan 10, 2011 23:59:28 GMT+00:00
Subject: JS

Gary-Cynthia Baldwin called me today to ask what I remembered about JS issue I spoke with you and Tim about circa 8 years ago. I told her what I remembered. She did not offer why she was asking, nor did I ask her. Nor did I disclose that you and I chatted about this.

Wendell V. Courtney, Esquire
McQuaide Blasko Law Offices
811 University Drive
State College, Pa. 16801
wvcourtney@mqblaw.com
Phone: (814) 238-4926
Fax: (814) 234-5620

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Tax Advice Disclosure: Pursuant to requirements imposed under the U.S. Treasury Department Circular 230, we hereby inform you that any U.S. federal tax advice contained in this communication (including any attachments), unless otherwise specifically stated, was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code; or (2) promoting, marketing or recommending to another party any matters addressed herein.

Exhibit 5C

PENNSTATE Confidential

1855

Date: 2/12/01.

From: Gary C. Schultz

To:

Talked w TMC
reviewed 1998 history
- agreed TMC will discuss w JVP &
advise we think TMC should meet
w JS on Friday.
- unless he "confesses" to having a problem,
TMC will indicate we need to
have DPW review the matter
as an independent agency concerned
w Child welfare.
- TMC will keep me posted.

Senior Vice President for Finance and Business/Treasurer

The Pennsylvania State University
208 Old Main
University Park, PA 16802-1503
(814) 865-6574
Fax: (814) 863-7188

Exhibit 5D

From: Thomas R. Harmon <HARMON@SAFETY-1.SAFETY.PSU.EDU>
Sent: Monday, February 12, 2001 4:57 PM
To: gcs2@psu.edu
Subject: Incident in 1998

Regarding the incident in 1998 involving the former coach, I checked and the incident is documented in our imaged achives.

Thomas R. Harmon
Director, University Police
The Pennsylvania State University
30-B Eisenhower Parking Deck
University Park, PA 16802
(814) 865-1864
harmon@police.psu.edu

Exhibit 5E

2/25/01

(3). Tell Chair* Council of Sound Mile.

(2). Report to Dept of Water.

(1). Tell D.S to avoid bringing children alone into Leach Bldg.

* who's the chair ??

Exhibit 5F

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Monday, February 26, 2001 1:57 PM
To: TMC3@psu.edu
Cc: Coble-Joan (JLC)
Subject: Confidential

Tim, I'm assuming that you've got the ball to 1) talk with the subject ASAP regarding the future appropriate use of the University facility; 2) contacting the chair of the Charitable Organization; and 3) contacting the Dept of Welfare. As you know I'm out of the office for the next two weeks, but if you need anything from me, please let me know.

Exhibit 5G

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, February 28, 2001 2:13 PM
To: Graham Spanier; Tim Curley
Subject: Re: Meeting

<html>
Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.

 At 10:18 PM 2/27/01 -0500, Graham Spanier wrote:
 <blockquote type=cite cite>Tim: This approach is acceptable to me. It requires you to go a step further and means that your conversation will be all the more difficult, but I admire your willingness to do that and I am supportive. The only downside for us is if the message isn't "heard" and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed.

 At 08:10 PM 2/27/01 -0500, Tim Curley wrote:
 <blockquote type=cite cite>I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday-- I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and and maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities.

 I need some help on this one. What do you think about this approach?</blockquote>

Graham B. Spanier
President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

 Phone: 814-865-7611
 email: gspanier@psu.edu
 </blockquote></html>

Exhibit 5H

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Thursday, March 01, 2001 4:06 PM
To: Tim Curley
Subject: Re: Fwd: Re: Schedule

<html>
OK, Tim. You can reach me anytime thru my office.

 At 07:34 AM 3/1/01 -0500, Tim Curley wrote:

 <blockquote type=cite cite>Gary: I will be sure to keep in touch with you on the basketball situation.

 <blockquote type=cite cite>X-Sender: gspanier@mail.psu.edu
X-Mailer: QUALCOMM Windows Eudora Pro Version 4.2.0.58
Date: Wed, 28 Feb 2001 21:18:24 -0500
X-PH: V4.1@f04n01
To: Tim Curley <tmc3@psu.edu>
From: Graham Spanier <gspanier@psu.edu>
Subject: Re: Schedule

Tim: I'll be in Australia, and it might be difficult to reach me--a 15 hour time difference. But call if you need me--Carolyn has my phone numbers. I will try to check email from time to time, but who knows how easy that will be. I will return late Saturday night (but that involves starting my return sometime on Friday, US time), so you might try calling me at home on Sunday afternoon if we haven't communicated earlier via email. If you need to start in one direction without me, do so. I think we are on the same wavelength and I will support you.

At 08:19 PM 2/28/01 -0500, Tim Curley wrote:
 <blockquote type=cite cite>Graham: I know you are going out of town. When will you be returning? I may need to touch base with you regarding the basketball situation towards the end of next week. We will play next Thursday and pending the outcome of the next two games I will need to make a recommendation to you next Friday. I am planning to meet with the person next Monday on the other subject. Have a great trip!! You sure deserve a break!!!</blockquote>

Graham B. Spanier
President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

 Phone: 814-865-7611
 email:
gspanier@psu.edu</blockquote>
 </blockquote></html>

Exhibit 5I

From: Joan Coble <jlc9@psu.edu>
Sent: Wednesday, March 07, 2001 8:54 AM
To: TMC3@psu.edu
Cc: gcs2@psu.edu
Subject: Fwd: Confidential

Tim - Have you updated Gary lately? Before he left for FL, he asked me to ck. w/you re this.

Pls. know that he is doing e-mail, but will not be reading until Sun., 3/11. He is spending a few days with Dave Schuckers and you may either phone him on his cellphone at 777-7393 or @ Schuckers at 941/388-3034. Pls. know that the Schuckers live in a Condominium & you may have to go through some referrals to get to speak w/them, so be patient if you go that route.

Thx. Joan

X-Sender: gcs2@imap.cac.psu.edu
X-Mailer: QUALCOMM Windows Eudora Version 4.3.2
Date: Mon, 26 Feb 2001 08:57:16 -0500
X-PH: V4.1@f04n01
To: TMC3@psu.edu
From: "Gary C. Schultz" <gcs2@psu.edu>
Subject: Confidential
Cc: jlc9@psu.edu

Tim, I'm assuming that you've got the ball to 1) talk with the subject ASAP regarding the future appropriate use of the University facility; 2) contacting the chair of the Charitable Organization; and 3) contacting the Dept of Welfare. As you know I'm out of the office for the next two weeks, but if you need anything from me, please let me know.

Gary C. Schultz
Senior Vice President for
Finance & Business/Treasurer
Penn State University
208 Old Main
University Park, PA 16802
814/865-6574
814/863-8685 (fax)
http://www.psu.edu/dept/fab

Joan L. Coble
Administrative Assistant
Office of the Senior Vice President for
Finance & Business/Treasurer
208 Old Main
University Park, PA 16802

814/865-6574 (phone)
814/863-8685 (fax)
http://www.psu.edu/dept/fab

Exhibit 6A

AFFIDAVIT OF CYNTHIA A. BALDWIN

The undersigned, Cynthia A. Baldwin, having been duly sworn according to law, hereby states that the following is true and correct to the best of her knowledge, information and belief:

1. I have been employed with The Pennsylvania State University as Vice President and General Counsel since February, 2010.

2. I was asked to brief the Board of Trustees by President Graham Spanier who was also a member of the Board of Trustees in the month of April,2011.

3. On Thursday, May 12, 2011, I presented a report on an investigation by The Pennsylvania Office of Attorney General into allegations of child sexual abuse by Jerry Sandusky, an employee who had retired from Penn State in 1999, to the Trustees who were in attendance. (See Attachment I)

4. The following items were included in my report:

- Definition and description of a Grand Jury and how it works;
- That the Grand Jury process was confidential, but those who testified before the Grand Jury are free to divulge their testimony;
- That Tim Curley, Gary Schultz and Joe Paterno had been interviewed in January and Graham Spanier had been interviewed in April;
- That the people who had testified had been asked about a 2002 incident in the football building;

- The fact that there had been a 1998 incident involving Mr. Sandusky that had been investigated by the University Police, the District Attorney's Office and Children and Youth Services and that no charges had been filed against Mr. Sandusky; and
- That the University did not appear to be a focus of the investigation;

After the report, I responded to several questions. At that point Dr. Spanier said that he would take over. I left and the Board continued in Executive Session.

The undersigned hereby verifies that the facts set forth in the foregoing Affidavit are true and correct to the best of her knowledge, information and belief and that false statements herein are made subject to penalties of 18 Pa.C.S. § 4094, relating to unsworn falsification to authorities.

Date: January 16, 2012

Cynthia M. Baldwin

COMMONWEALTH OF PENNSYLVANIA }
} ss
COUNTY OF CENTRE }

On this 16th day of January, 2012, before me, the undersigned notary public, personally appeared, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument, and acknowledged the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Elizabeth P. Saupp
Notary Public

Notarial Seal
Elizabeth P. Saupp, Notary Public
State College Borough, Centre County
My Commission Expires June 8, 2012
Member, Pennsylvania Association of Notaries

Exhibit 10A

FEBRUARY 1998 COMMITTEE LIST

ORGANIZATION OF THE BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY

Edward P. Junker III, President
Edward R. Hintz, Vice President
Graham B. Spanier, Secretary
Gary C. Schultz, Treasurer

The President of the Board of Trustees, Edward P. Junker III, and the President of the University, Graham B. Spanier, are, according to the Bylaws, ex officio members of all standing and special committees and subcommittees.

COMMITTEE ON EDUCATIONAL POLICY

Joel N. Myers, Chairman
Mary G. Beahm, Vice Chairwoman

COMMITTEE ON FINANCE AND PHYSICAL PLANT

L. J. Rowell, Jr., Chairman
Robert D. Metzgar, Vice Chairman

COMMITTEE ON CAMPUS ENVIRONMENT

Cynthia A. Baldwin, Chairwoman
Anne Riley, Vice Chairwoman

SUBCOMMITTEE ON ARCHITECHT/ ENGINEER SELECTION

COMMITTEE ON MILTON S. HERSHEY MEDICAL CENTER

William L. Weiss, Chairman
Boyd E. Wolff, Vice Chairman

EXECUTIVE COMMITTEE

Elected by the Board of Trustees on January 16, 1998

Mary G. Beahm
Alvin H. Clemens
Edward R. Hintz
David R. Jones
David A. Morrow
Anne Riley
Barry K. Robinson
L. J. Rowell, Jr.
William L. Weiss

The President of the Board of Trustees is chairman of the Executive Committee, and the Secretary of the Board is the recording secretary of the Executive Committee.

NOMINATING COMMITTEE

David A. Morrow, Chair

FEBRUARY 2001 COMMITTEE LIST

ORGANIZATION OF THE BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY

Edward R. Hintz, Jr., President
Cynthia A. Baldwin, Vice President
Graham B. Spanier, Secretary
Gary C. Schultz, Treasurer

The President of the Board of Trustees, Edward R. Hintz, Jr., and the President of the University, Graham B. Spanier, are, according to the Bylaws, ex officio members of all standing and special committees and subcommittees.

COMMITTEE ON EDUCATIONAL POLICY

Joel N. Myers, Chairman
David R. Jones, Vice Chairman

COMMITTEE ON FINANCE AND PHYSICAL PLANT

L. J. Rowell, Jr., Chairman
Robert D. Metzgar, Vice Chairman

SUBCOMMITTEE ON ARCHITECHT/ ENGINEER SELECTION

COMMITTEE ON CAMPUS ENVIRONMENT

Anne Riley, Chairwoman
Mary G. Beahm, Vice Chairwoman

COMMITTEE ON MILTON S. HERSHEY MEDICAL CENTER

William L. Weiss, Chairman
Steve A. Garban, Vice Chairman

EXECUTIVE COMMITTEE

Elected by the Board of Trustees on January 19, 2001

Cynthia A. Baldwin
Charles C. Brosius
Steve A. Garban
David R. Jones
David A. Morrow
Joel N. Myers
Anne Riley
L. J. Rowell, Jr.
Carl T. Shaffer
William L. Weiss

The President of the Board of Trustees is chairman of the Executive Committee, and the Secretary of the Board is the recording secretary of the Executive Committee

NOMINATING COMMITTEE

Edward P. Junker III, Chair

JULY 1, 2012 COMMITTEE LIST

ORGANIZATION OF THE BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY

Karen B. Peetz, President
Keith E. Masser, Vice President
Rodney A. Erickson, Secretary
David J. Gray, Treasurer

The President of the Board of Trustees, Edward R. Hintz, Jr., and the President of the University, Graham B. Spanier, are, according to the Bylaws, ex officio members of all standing and special committees and subcommittees.

COMMITTEE ON ACADEMIC AFFAIRS AND STUDENT LIFE

Marianne E. Alexander, Chair
Peter A. Khoury, Vice Chair

COMMITTEE ON GOVERNANCE AND LONG-RANGE PLANNING

James S. Broadhurst, Chair
John P. Surma, Vice Chair

COMMITTEE ON FINANCE, BUSINESS, AND CAPITAL PLANNING

Linda B. Strumpf, Chair
Paul H. Silvis, Vice Chair

COMMITTEE ON OUTREACH, DEVELOPMENT AND COMMUNITY RELATIONS

Mark H. Dambly, Chair
Paul V. Suhey, Vice Chair

COMMITTEE ON AUDIT, RISK, LEGAL AND COMPLIANCE

Keith W. Eckel, Chair
Ira M. Lubert, Vice Chair

SUBCOMMITTEE ON ARCHITECT/ ENGINEER SELECTION

SUBCOMMITTEE ON AUDIT

(authorized by board in 2004)

SUBCOMMITTEE ON FINANCE

(authorized by board in 2012)

SUBCOMMITTEE ON LEGAL

(authorized by board in 2012)

SUBCOMMITTEE ON HUMAN RESOURCES

(authorized by board in 2012)

EXECUTIVE COMMITTEE

Elected by the Board of Trustees on March 16, 2012

Marianne E. Alexander
James S. Broadhurst
Mark H. Dambly
Keith W. Eckel
Rodney A. Erickson, Ex Officio
Kenneth C. Frazier
Edward R. Hintz, Jr.
Keith E. Masser
Karen B. Peetz, Ex Officio
Linda B. Strumpf
John P. Surma

The President of the Board of Trustees is chairman of the Executive Committee, and the Secretary of the Board is the recording secretary of the Executive Committee.

APPENDIX B
PENNSYLVANIA STATE UNIVERSITY POLICIES: AD 67, AD 72, HR 99

PENNSTATE POLICY MANUAL
General University Reference Utility

PENN STATE - ADMINISTRATIVE

Policy AD39 MINORS INVOLVED IN UNIVERSITY-SPONSORED PROGRAMS OR PROGRAMS HELD AT THE UNIVERSITY AND / OR HOUSED IN UNIVERSITY FACILITIES (Formerly *Programs Involving Minors Housed in University Facilities*)

Contents:

- Purpose
- Definitions
- Policy
- Cross References

PURPOSE:

To provide for appropriate supervision of minors who are involved in University-sponsored programs, programs held at the University and/or programs housed in University facilities at all geographic locations with the exception of the Penn State Hershey Medical Center campus (including the College of Medicine), the client representation clinics of the Dickinson School of Law, and University Health Services which will follow separate policies that reflect their unique activities. Supervision of minors who are involved in University research is addressed by Institutional Review Board processes as outlined in RA14, and is not addressed by this policy. This policy also does not apply to general public events where parents/guardians are invited/expected to provide supervision of minors.

DEFINITIONS:

Minor -
A person under the age of eighteen (18) who is not enrolled or accepted for enrollment at the University. Students who are "dually enrolled" in University programs while also enrolled in elementary, middle and/or high school are not included in this policy unless such enrollment includes overnight housing in University facilities.

University Facilities -
Facilities owned by, or under the control of, the University with the exception of the Penn State Hershey Medical Center campus (including the College of Medicine) and the Student Health Center (University Park) which will follow separate policies that reflect the unique activities that occur in those locations.

Programs -

Programs and activities offered by various academic or administrative units of the University, or by non-University groups using University facilities subject to Policies AD02 or AD03. This includes but is not limited to workshops, sport camps, academic camps, conferences, pre-enrollment visits, 4H or Cooperative Extension programs and similar activities.

Sponsoring Unit-

The academic or administrative unit of the University which offers a program or gives approval for housing or use of facilities pursuant to AD02 or AD03.

Authorized Adult-

Individuals, age 18 and older, paid or unpaid, who interact with, supervise, chaperone, or otherwise oversee minors in program activities, or recreational, and/or residential facilities. This includes but is not limited to faculty, staff, volunteers, graduate and undergraduate students, interns, employees of temporary employment agencies, and independent contractors/consultants. The Authorized Adults' roles may include positions as counselors, chaperones, coaches, instructors, etc. Authorized Adults are considered to be mandated reporters as defined by Pennsylvania law. Further guidance on mandated reporters is provided in University Human Resources policy(ies).

Direct Contact -

Positions with the possibility of care, supervision, guidance or control of minors and/or routine interaction with minors.

One-On-One Contact -

Personal, unsupervised interaction between any Authorized Adult and a participant without at least one other Authorized Adult, parent or legal guardian being present.

POLICY:

A sponsoring unit offering or approving a program which involves minors or provides University housing for minors participating in a program, or a non-University group being sponsored for a program, whether utilizing University housing or not, shall:

1. Establish a procedure for the notification of the minor's parent/legal guardian in case of an emergency, including medical or behavioral problem, natural disasters, or other significant program disruptions. Authorized Adults with the program, as well as participants and their parents/legal guardians, must be advised of this procedure in writing prior to the participation of the minors in the program.

2. Provide a list of all program participants and a directory of program staff to the campus unit(s) responsible for police services (their contact information will be provided to the sponsors by the University). This list shall include participant's name; local room assignment (if applicable); gender, age, address, and phone number(s) of parent or legal guardian, as well as emergency contact information.

3. Provide information to parent or legal guardian detailing the manner in which the participant can be contacted during the program.

4. Provide a Medical Treatment Authorization form to the campus unit responsible for health services. Any request to amend the approved form must be approved by the Director of University Health Services prior to its distribution or use. All forms must include the following:

a. A statement informing the parent/legal guardian that the University does (or does not, as applicable) provide medical insurance to cover medical care for the minor.
b. A statement authorizing the release of medical information (HIPAA) and emergency treatment in case the parent/legal guardian/emergency contact cannot be reached for permission.
c. A list of any physical, mental or medical conditions the minor may have, including any allergies that could impact his/her participation in the program.
d. All emergency contact information including name, address and phone number of the emergency contact.

5. Follow guidance from University Health Services concerning communicable diseases.

6. University Policy SY21 shall be followed concerning first aid kits and epinephrine ("epi") pens. Participants' medicines may be distributed by program staff, under the following conditions:

a. The participant's family provides the medicine in its original pharmacy container labeled with the participant's name, medicine name, dosage and timing of consumption. Over-the-counter medications must be provided in their manufacturers' container.
b. Staff shall keep the medicine in a secure location, and at the appropriate time for distribution shall meet with the participant.
c. The staff member shall allow the participant to self-administer the appropriate dose as shown on the container.
d. Any medicine which the participant cannot self-administer, must be stored and administered by a licensed healthcare professional associated with the campus or, if no one is available, arrangements must be made with another health care professional in advance of the participant's arrival. The event coordinator should consult with the location's health service and the Office of Affirmative Action ADA Coordinator to discuss reasonable accommodations in the above situation.
e. Personal "epi" pens and inhalers may be carried by the participant during activities.

7. Arrange to access emergency medical services at all locations and, for events at University Park, access to these services must be pursuant to ADG04. Medical care appropriate for the nature of the events, expected attendance and other variables should be discussed with the Director of University Health Services.

8. Follow appropriate safety measures approved by the Office of Environmental Health & Safety for laboratory and research work as outlined in SY01.

9. Ensure adequate supervision of minors while they are on University property. All activities involving minors must be supervised by at least two or more Authorized Adults or by their parent(s) or legal guardian(s) at all times. Some of the factors to consider in determining "adequate supervision" are the number and age of participants, the activity(ies) involved, type of housing if applicable, and age and experience of the counselors. See also, item 15 below.

When Penn State students are hosting High School students, including prospective athletes, participating in pre-enrollment visitation, the requirement for two Authorized Adults will be waived. The requirement also does not apply to licensed psychologists providing psychological and counseling services to minors.

All supervised participants in a University program or a program taking place on University property are permitted in the general use facilities [e.g. athletic fields, public spaces, academic buildings] but may be restricted from certain areas of the facilities [e.g. storage rooms, equipment rooms, athletic training rooms, staff/faculty offices] or from utilizing certain equipment.

10. Develop and make available to participants the rules and discipline measures applicable to the program. Program participants and staff must abide by all University regulations and may be removed from the program for non-compliance with rules. The following must be included in program rules:

a. The possession or use of alcohol and other drugs, fireworks, guns and other weapons is prohibited.
b. The operation of a motor vehicle by minors is prohibited while attending and participating in the program.
c. The parking of staff and participant vehicles must be in accordance with University parking regulations.
d. Rules and procedures governing when and under what circumstances participants may leave University property during the program.
e. No violence, including sexual abuse or harassment, will be tolerated.
f. Hazing of any kind is prohibited. Bullying including verbal, physical, and cyber bullying are prohibited.
g. No theft of property regardless of owner will be tolerated.
h. No use of tobacco products (smoking is prohibited in **all** University buildings) will be tolerated.
i. Misuse or damage of University property is prohibited. Charges will be assessed against those participants who are responsible for damage or misusing University property.
j. The inappropriate use of cameras, imaging, and digital devices is prohibited including use of such devices in showers, restrooms, or other areas where privacy is expected by participants.

11. Obtain all media and liability releases as part of the program registration process. All data gathered shall be confidential, is subject to records retention guidelines, and shall not be disclosed, except as provided by law.

12. Assign a staff member who is at least 21 years of age to be accessible to participants. The staff member must reside in the housing unit, if applicable. Additional Authorized Adults will be assigned to ensure one-on-one contact with minors does not occur and that appropriate levels of supervision are implemented. See also item 15 below.

When there are High School students, including prospective athletes, participating in pre-enrollment visitation, the hosting Penn State University student(s) will not be required to be at least 21 years of age and the requirement for two Authorized Adults will also be waived.

13. All Authorized Adults who have direct contact with minors are required to have a current background check on record with the University at the time of hire and/or beginning work with minors. This background check must be reviewed and approved by the applicable Human Resources department prior to being hired and/or working with minors.

When there are High School students, including prospective athletes, participating in pre-enrollment visitation, the hosting Penn State University student(s) will not be required to undergo a background check.

- New hires will be required to complete the University background check process at the time of hire.
- All other individuals must complete the University background check process **or** provide evidence of completion of PA State Criminal History Record, PA Department of Public Welfare Child Abuse Report and FBI criminal history report clearance dated within 6 months of the initial date of assignment. This includes current employees who have not previously had a background check completed, as well as all other individuals, paid or unpaid.
- If PA State Criminal History Record, PA Department of Public Welfare Child Abuse Report, and FBI criminal history report clearances are to be considered as a replacement for a University background check, verifications must be reviewed and approved by the applicable Human Resources department prior to being hired and/or interacting with minors.
- All Authorized Adults must also complete a self-disclosure form confirming that they have disclosed any arrests and/or convictions that have occurred since the date of a background check and/or clearance and will disclose any arrest and/or convictions within 72 hours of their occurrence. The cost for completion of PA State Criminal History Record, PA Department of Public Welfare Child Abuse Report, and FBI criminal history report clearances for non-employees will be the responsibility of the individual unless specifically authorized for processing and/or payment by the hiring unit.
- Overall guidance for background checks is provided in University Human Resources policy(ies).

14. If applicable, require the program to adopt and implement rules and regulations for proper supervision of minors in University housing. The following must be included:

a. Written permission signed by the parent/guardian for the minor to reside in University housing.
b. A curfew time which is age-appropriate for the participants, but in no case shall it be later than midnight.

c. In-room visitation to be restricted to participants of the same gender.
d. Guests of participants (other than a parent/legal guardian and other program participants) are restricted to visitation in the building lobby and/or floor lounges, and only during approved hours specified by the program.
e. The program must comply with all security measures and procedures specified by University Housing Services and Police Services.
f. Pre-enrollment visit programs for high school students housed overnight in residence halls must be registered with the Office of Residence Life.

15. Require the program to provide and supervise trained counselors (also considered to be Authorized Adults) who must be at least 18 years of age, in accordance with the following:

a. The ratio of counselors to program participants must reflect the gender distribution of the participants, and should meet the following:

Standards for resident camps are:

- One staff member for every five campers ages 4 and 5
- One staff member for every six campers ages 6 to 8
- One staff member for every eight campers ages 9 to 14
- One staff member for every 10 campers ages 15 to 17

Standards for day camps are:

- One staff member for every six campers ages 4 and 5
- One staff member for every eight campers ages 6 to 8
- One staff member for every ten campers ages 9 to 14
- One staff member for every twelve campers ages 15 to 17

b. Training for the counselors must include, at a minimum, information about responsibilities and expectations; policies, procedures, and enforcement; appropriate crisis/emergency responses; safety and security precautions; confidentiality issues involving minors; and University responsibility/liability. Counselors must know how to request local emergency services and how to report suspected child abuse (counselors are considered to be mandatory reporters as defined by Pennsylvania law).
c. Responsibilities of the counselors must include, at a minimum, informing program participants about safety and security procedures, University rules, rules established by the program, and behavioral expectations. Counselors are responsible for following and enforcing all rules and must be able to provide information included herein to program participants and be able to respond to emergency(ies).

16. Each Authorized Adult, who will be participating in a program covered by this Policy shall attend annual mandatory training on the conduct requirements of this Policy, on protecting participants from abusive emotional and physical treatment, and on appropriate or required reporting of incidents of improper conduct to the proper authorities including, but not limited to, appropriate law enforcement authorities. If a program participant discloses any type of assault or abuse (at any time previously or during the program), or an Authorized Adult has reason to

suspect that the participant has been subject to such assault or abuse, the Authorized Adult, as a mandatory reporter should inform the Program Director (Department Manager/Director for non-camp activities) immediately, unless the Authorized Adult believes that the Program Director (Department Manager/Director for non-camp activities) may be involved in the allegations of assault or abuse. The Program Director (Department Manager/Director for non-camp activities) and the Authorized Adult will then call the Commonwealth of Pennsylvania's reporting ChildLine (800-932-0313) together and provide written notification to the Department of Public Welfare within 48 hours of filing the oral report (utilizing form CY 47 available from the County Children and Youth agencies). In addition, the Program Director (Department Manager/Director for non-camp activities) will immediately notify University Police Services, Penn State's Office of General Counsel and Penn State's Risk Management Department. If the Program Director (Department Manager/Director for non-camp activities) is unavailable, or if the Program Director or his/her designee does not call Childline, the Authorized Adult should immediately call the Commonwealth of Pennsylvania's reporting ChildLine (800-932-0313). Authorized Adults must make all reasonable efforts to ensure the safety of minors participating in programs and activities covered by this Policy, including removal of minors from dangerous or potentially dangerous situations, irrespective of any other limitation or requirement. If a situation is felt to present imminent danger to a minor, University Police Services should be called immediately.

17. Authorized Adults participating in programs and activities covered by this Policy shall not:

a. Have one-on-one contact with minors: there must be two or more Authorized Adults present during activities where minors are present. Authorized Adults also shall not have any direct electronic contact with minors without another Authorized Adult being included in the communication.
b. In the case of adults supervising minors overnight, Authorized Adult should not enter a minor's room, bathroom facility, or similar area without another Authorized Adult in attendance, consistent with the policy of not having one-on-one contact with minors.
c. Separate accommodations for adults and minors are required other than the minors' parents or guardians.
d. Engage in abusive conduct of any kind toward, or in the presence of, a minor.
e. Strike, hit, administer corporal punishment to, or touch in an inappropriate or illegal manner any minor.
f. Pick up minors from or drop off minors at their homes, other than the driver's child(ren), except as specifically authorized in writing by the minor's parent or legal guardian.
g. Authorized Adults shall not provide alcohol or illegal drugs to any minor. Authorized Adults shall not provide prescription drugs or any medication to any minor unless specifically authorized in writing by the parent or legal guardian as being required for the minor's care or the minor's emergency treatment. Participants' medicines may be distributed by program staff, following the conditions outlined in Policy IV. 5 in this document.
h. Make sexual materials in any form available to minors participating in programs or activities covered by this Policy or assist them in any way in gaining access to such materials.

Items 17a, 17b, and 17c, do not apply when there are High School students, including

prospective athletes, participating in pre-enrollment visitation, hosted by Penn State University student(s).

Item 17a does not apply to licensed psychologists providing psychological and counseling services to minors.

18. If an allegation of inappropriate conduct has been made against an Authorized Adult participating in a program, s/he shall discontinue any further participation in programs and activities covered by this Policy until such allegation has been satisfactorily resolved.

Authorized personnel/signatories for non-University groups using University facilities must provide to the sponsoring unit satisfactory evidence of compliance with all of the requirements of this Policy at least thirty (30) days prior to the scheduled use of University facilities, as well as sign an approved agreement for use of University facilities, if applicable.

19. Any exceptions to the application of the policy must be approved by the Office of Human Resources Recruitment and Compensation Division.

CROSS REFERENCES:

Other Policies in this Manual should also be referenced, especially the following:

AD02 - Non-University Groups Using University Facilities,

AD03 - Conducting Educational Programs Using the Name of The University,

AD26 - Sales of Food and Beverages at University Locations,

AD27 - Commercial Sales Activities at University Locations,

AD34 - University Recycling Program,

AD42 - Statement on Nondiscrimination and Harassment,

AD72 - Reporting Suspected Child Abuse,

ADG04 - Providing Emergency Medical Services at University Events at University Park,

HR02 - Employment of Minors,

SY01 - Environmental Health and Safety Policy,

SY05 - Persons, Other Than Students or Employees, Who are Injured or Become Ill on University Property,

SY21 - First Aid Kits,

SY28 - Emergency Evacuations and Fire Drills - Residence Halls, and

RA14 - The Use of Human Participants in Research

Effective Date: June 7, 2012
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Most Recent Changes:

- June 7, 2012 - Additional clarifications, including update of requirements for high school students visiting on pre-enrollment visits with Penn State students, clarification of reporting process and exclusion of client representation clinics in Dickinson School of Law from policy.

Revision History (and effective dates):

- April 11, 2012 - Major revisions, reflecting improvements to the process. Revisions include clarifications about procedure, training, clearances, responsibilities and reporting of incidents for individuals who supervising minors that are participating in programs and activities covered by this policy.
- April 28, 2010 - Multiple changes, clarifying policy details pertinent to the administration of youth programs involving minors housed in University facilities.
- June 15, 2006 - Revision History added.
- June 1, 1998 - Added reference to Administrative Guideline ADG04, EMT Services.
- August 28, 1995 - Major Revisions.
- October 20, 1992 - New Policy.

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Policy AD67 DISCLOSURE OF WRONGFUL CONDUCT AND PROTECTION FROM RETALIATION

Contents:

- Purpose
- Policy
- Definitions
- Reporting Wrongful Conduct
- Investigating Allegations of Wrongful Conduct
- Protection From Retaliation
- Disciplinary Sanctions
- Cross References

PURPOSE:

The University is committed to maintaining the highest standards of ethics and conduct, consistent with applicable legal requirements and University policies. Through the establishment of this policy, the University wishes to encourage and protect from **Retaliation** those who desire to report potential violations of these standards.

POLICY:

It is the policy of the University to encourage and enable any member of the University faculty, staff, or student body to make **Good Faith Reports** of suspected **Wrongful Conduct**, and to protect such individuals from **Retaliation** for making such reports to the University or an **Appropriate Authority**, participating in any investigation, hearing, or inquiry by the University or an **Appropriate Authority** or participating in a court proceeding relating to an allegation of suspected **Wrongful Conduct** at the University.

DEFINITIONS:

For purposes of this policy, the following definitions shall apply:

> **"Good Faith Report"** means any report, communication or other disclosure about actual or suspected **Wrongful Conduct** engaged in by a member of the University faculty, staff, or student body, which is made with a good faith reason to believe that **Wrongful Conduct** has occurred.

"Wrongful Conduct" includes a violation of University policy (including guidelines and codes of ethics or conduct which are available on GURU, or as hot links through a policy contained within GURU); a violation of a federal, state, and/or local law, rule, regulation, or ordinance; and the substantive use of University tangible and intangible assets, equipment, supplies and services for personal gain or for another purpose not authorized by the University.

"Appropriate Authority" means a federal, state or local government body, agency, or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization.

"Retaliation" means any adverse action taken by a member of the University faculty, staff, or student body against any individual on the basis of a **Good Faith Report** made by such individual, or on the basis of such individual's participation in an investigation, hearing, or inquiry by the University or an **Appropriate Authority,** or participation in a court proceeding relating to suspected **Wrongful Conduct** at the University. **Retaliation** shall include, but not be limited to, harassment, discrimination, threats of physical harm, job termination, punitive work schedule or research assignments, decrease in pay or responsibilities, or negative impact on academic progress.

REPORTING WRONGFUL CONDUCT:

Any individual having reason to believe that a member of the University faculty, staff, or student body has engaged in **Wrongful Conduct** can report such suspected **Wrongful Conduct** to the designated contacts below. A report should include a description of the facts, avoid speculation and predetermined conclusions, and be based on a good faith reason to believe that suspected **Wrongful Conduct** has occurred.

An individual desiring to submit a **Good Faith Report** should contact the appropriate person as identified under the applicable University policy. Some key contacts are referenced on the University Ethics website. Members of the University community may also report suspected **Wrongful Conduct** on an anonymous, confidential basis through the University's Ethics and Compliance Hotline at 1-800-560-1637.

INVESTIGATING ALLEGATIONS OF WRONGFUL CONDUCT:

Upon receiving a **Good Faith Report** of suspected **Wrongful Conduct**, the University will investigate and resolve the matter. The University may notify the individual suspected of **Wrongful Conduct** and may interview members of the faculty, staff and student body to gather all information necessary to resolve the matter. The University will make every reasonable effort to conduct all investigations in the most confidential manner possible.

PROTECTION FROM RETALIATION:

No individual who makes or advises the University that he or she intends to make a **Good Faith Report** of suspected **Wrongful Conduct** to the University or an **Appropriate Authority,** participates in an investigation, hearing, or inquiry by the University or an **Appropriate Authority** or participates in a court proceeding involving suspected **Wrongful Conduct** at the University shall be subject to **Retaliation** from any member of the University faculty, staff, or student body. Any individual who believes that he or she

may have been subject to prohibited **Retaliation** should notify one of the key contacts identified in the link above. Upon receiving a report of Retaliation, the University will investigate and resolve the matter. Protection from **Retaliation** for persons reporting under this policy is also provided by Pennsylvania's Whistleblower Law, 43 P.S. Section 1421 et seq.

DISCIPLINARY SANCTIONS:

No member of the University faculty, staff, or student body may retaliate against any individual for making a **Good Faith Report** of suspected **Wrongful Conduct** to the University or an **Appropriate Authority,** for participating in an investigation, hearing, or inquiry by the University or an **Appropriate Authority** or for participating in a court proceeding involving suspected **Wrongful Conduct** at the University. Any member of the University who retaliates against any individual in violation of this policy will be subject to disciplinary sanctions, which may range from a disciplinary warning to termination or expulsion from the University.

In addition, any member of the University faculty, staff, or student body who knowingly, or with reckless disregard for the truth, provides false information in a report of **Wrongful Conduct**, or in a report of **Retaliation**, will be subject to disciplinary sanctions ranging from a disciplinary warning to termination or expulsion from the University. Allegations of suspected **Wrongful Conduct** or Retaliation that are not substantiated but are made in good faith are excused from disciplinary action.

CROSS REFERENCES:

AD12 - Sexual Assault, Relationship and Domestic Violence, and Stalking

AD41 - Sexual Harassment

AD42 - Statement on Nondiscrimination and Harassment

FN19 - Policy for Handling and Distributing Confidential Internal Audit Reports and Other Documents

HR01 - Fair Employment Practices

HR11 - Affirmative Action in Employment at The Pennsylvania State University

HR76 - Faculty Rights and Responsibilities

HR79 - Staff Grievance Procedure

RA10 - Handling Inquiries / Investigations into Questions of Ethics in Research and in Other Scholarly Activities

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- June 22, 2010 - New Policy.

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Policy AD72 - REPORTING SUSPECTED CHILD ABUSE

Contents:

- Purpose
- Definitions
- Policy
- Cross References

PURPOSE:

To provide guidance to University employees, regarding mandated reporting requirements, per the University and the Pennsylvania Child Protective Services Law.

DEFINITIONS:

Child abuse - is defined in Pennsylvania as a child under 18 years of age who has experienced:

- **Serious Physical Injury:** must cause the child severe pain or it must significantly impair functioning, either temporarily or permanently.
- **Serious Mental Injury:** a condition diagnosed by a physician or licensed psychologist that renders the child chronically and severely anxious, agitated, depressed, socially withdrawn, psychotic, or in reasonable fear that his/her safety is threatened, or seriously interferes with the child's ability to accomplish age-appropriate developmental and social tasks.
- **Sexual Abuse or Exploitation:** the use or coercion of any child to engage in any sexually explicit conduct, or any simulation of any sexually explicit conduct for the purpose of producing any visual depiction, or the rape, sexual assault, involuntary deviate sexual intercourse, aggravated indecent assault, molestation, incest, indecent exposure, prostitution, sexual abuse, or sexual exploitation of children.
- **Serious Physical Neglect:** any condition that arises from prolonged or repeated lack of supervision or the failure to provide essentials of life, including adequate medical care, which endangers a child's life or development or impairs the child's functioning.
- **Imminent Risk:** any act, or failure to act, that creates an imminent risk of serious physical injury or sexual abuse and exploitation of a child. (23 Pa.C.S. 6303)

POLICY:

Pennsylvania law requires certain individuals to report child abuse, whenever they have reasonable

suspicion of child abuse. However, ANY person may report abuse if they have reasonable suspicion that a child has been abused.

Pennsylvania law requires the following individuals to make a report about the suspected child abuse:

- A person who, in the course of employment comes into contact with children, and the person has reasonable cause to suspect that a child is a victim of child abuse.
- Specifically named professionals include, but are NOT limited to: any licensed physician, osteopath, medical examiner, coroner, funeral director, dentist, optometrist, chiropractor, podiatrist, intern, registered nurse, licensed practical nurse, hospital personnel engaged in the admission, examination, care or treatment of persons, Christian Science practitioner, member of the clergy, school administrator, school teacher, school nurse, social services worker, day-care center worker or any other child-care or foster-care worker, mental health professional, peace officer or law enforcement official. Two exceptions are made in the law for reporting requirement which involve confidential communications to a member of the clergy, and for confidential communications made to an attorney (23 Pa.C.S. § 6311).

Penn State University requires all University employees who have reasonable suspicion of abuse to make a report, with an exception to any confidential communications made to a University-employed attorney, or confidential communication made to University-employed member of the clergy.

As Penn State University is committed to research, Penn State policy (RA14) provides for ethical treatment and protection of human research participants. All human subjects research is safeguarded by the Institutional Review Board. The research environment presents unique circumstances related to reporting of child abuse, and reporting procedures must be reviewed, approved, and monitored by the IRB. The Principal Investigator is responsible for all aspects of the research, including reporting any child abuse identified through the research.

How to make a report of suspected child abuse:

1. If you suspect child abuse, immediately contact ChildLine, which is operated by the Pennsylvania Department of Public Welfare at 1-800-932-0313. This hotline is staffed at all times of day and night. If the call is not answered, then immediately contact the county child welfare agency in the county in which the incident occurred. If you do not reach an individual either through ChildLine or through the local county child welfare office, the reporter must continue calling until they reach an individual to complete the reporting process.
2. If a child is in imminent danger, the employee should contact police at 911 to obtain immediate protection for the child.
3. Finally, if you are considered to be an Authorized Adult as defined in policy AD39, follow the reporting procedure as described in AD39.

Liability

As per Pennsylvania law, any person or institution participating in good faith in the making of a report or testifying in any proceeding arising out of an instance of suspected child abuse shall have immunity from any liability, civil or criminal, that might otherwise result by reason of such actions.

Any person or official required by law to report a case of suspected child abuse who willfully fails to do so shall be guilty of a misdemeanor of the third degree for the first violation and a misdemeanor of the second degree for subsequent violations. Most importantly, without making a report, a child may continue to be at risk. *23 Pa.C.S. §6318 and §6319.*

Compliance

All University employees will be required to complete mandated reporter training annually through the Office of Human Resources, Center for Workplace Learning and Performance.

If any University employee willfully fails to report a case of suspected child abuse, it will result in disciplinary action, up to and including, dismissal.

CROSS REFERENCES:

Other Policies in this Manual should also be referenced, especially the following:

AD39 - Minors Involved in University-Sponsored Programs or Programs Held at the University,

HR05 - "Regular" and "NonRegular" University Employees,

HR70 - Dismissal of Tenured or Tenured-eligible Faculty Members,

HR78 - Staff Employee Failure to Meet Acceptable Standards of Performance, and

RA14 - The Use of Human Participants in Research

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- May 14, 2012- New Policy.

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PENNSTATE POLICY MANUAL
General University Reference Utility

PENN STATE - HUMAN RESOURCES

Policy HR99 Background Check Process

POLICY'S INITIAL DATE: July 5, 2012
THIS VERSION Effective: July 5, 2012

Contents:

- Purpose
- Overview
- Individuals Covered by This Policy
- Definitions
- Background Check Inquiries
- Background Check Process
- Periodic Updates or Additional Background Checks
- Recruitment Notices
- Roles and Responsibilities
- Evaluation of Resulting Report
- Confidentiality
- Related Documents
- Cross-references

PURPOSE:

This policy establishes a process for ensuring background checks are completed for any individuals, age 18 and over, (paid or unpaid) who are engaged by Penn State in any work capacity effective on or after the date of this policy. This includes employees; volunteers, working with minors; adjunct faculty; consultants; contractors; or other similar positions. In addition, it establishes a process requiring all individuals engaged by the University, including those engaged prior to, as of, or after, the effective date of this policy, to self-disclose criminal arrests and/or convictions as outlined in the Penn State Arrest and Conviction self-disclosure form within a 72-hour period of their occurrence.

Background checks will be used solely to evaluate candidates' eligibility to be engaged in any work capacity by the University, and will not be used to discriminate on the basis of race, color, national origin, ancestry, religious creed, gender, disability or handicap, age, veteran's status, gender identity or sexual orientation.

Criminal convictions will be reviewed with respect to the nature and gravity of the offense(s); time since conviction; completion of sentence or any other remediation; relevance to the position for which the candidate is being considered/employee is performing; and discrepancies between the background check and what the candidate/employee self-reported. When a finding adversely impacts eligibility to be engaged by

the University in a specific position, the candidate will be notified of the decision and given associated information required by law.

(Note: Nothing herein is intended to contradict or lessen application of applicable federal or state laws or regulations.)

OVERVIEW:

Penn State strives to provide the safest possible environment for its students, faculty, staff and visitors; to preserve University resources; and to uphold the reputation and integrity of the University. This policy supports the University's efforts to minimize institutional risk, provide a safe environment, and assist hiring authorities in making sound hiring decisions.

INDIVIDUALS COVERED BY THIS POLICY:

Any individual engaged by Penn State in any work capacity beginning on or after the date of this policy including, but not limited to, the following positions:

- Staff
- Faculty (including Adjunct Faculty)
- Technical Service
- Temporary Employees not sponsored by a staffing agency (wage payroll)
- Administrators and Academic Administrators
- Executives
- Volunteers (if working with minors)
- Graduate Assistants
- Graduate and undergraduate student employees
- Work study students
- Interns (paid or unpaid)
- Third-party employees such as consultants, contractors and temporary staffing agency employees
- Any individual not previously described who is either paid directly by the University or who is working in a sensitive/critical position (defined below)

DEFINITIONS:

Consumer Report

Defined by the Fair Credit Reporting Act as: "Any communication of information by a Consumer Reporting Agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, or personal characteristics." This includes background check information such as criminal history, child abuse checks, motor vehicle record checks, educational checks, etc. if provided by a Consumer Reporting Agency. Penn State's use of credit history checks will be limited to circumstances described below in "credit history check" definition.

Consumer Reporting Agency

Defined by the Fair Credit Reporting Act as: "Any person or entity which, for a fee, dues or on a

cooperative nonprofit basis, regularly engages in the practice of assembling or evaluating consumer credit information, or other information, on consumers for the purpose of furnishing Consumer Reports to third parties." For the purposes of this policy, a Consumer Reporting Agency refers to the vendor used by Penn State to conduct Background Checks.

Credit History Check

Review of the individual's detailed credit history, as contained in a Consumer Report in accordance with the Fair Credit Reporting Act. Penn State's use of credit history checks will be consistent with Pennsylvania law that states "it shall be an unlawful discriminatory practice for any employer or any employer's agent, representative or designee to require an employee or prospective employee to consent to the creation of a credit report that contains information about the employee's or prospective employee's credit score, credit account balances, payment history, savings or checking account balances or savings or checking account numbers as a condition of employment unless one of the following applies: (1) Such report is substantially related to the employee's current or potential job. (2) Such report is required by law. (3) The employer reasonably believes that the employee has engaged in a specific activity that constitutes a violation of the law." Federal laws prohibit discrimination against an applicant or employee as a result of bankruptcy.

Criminal Conviction

Being found guilty, entering a guilty plea or pleading no contest to a felony and/or misdemeanor as outlined in the Penn State Arrest and Conviction self-disclosure form. Convictions for which the individual's record has been expunged may not be considered.

Criminal History Check

Verification that the individual does not have any undisclosed criminal convictions in any jurisdiction where he or she has resided or where he or she currently resides.

Educational Verification

Confirmation of the individual's educational credentials listed on the application, resume or cover letter, or otherwise cited by the individual.

Fair Credit Reporting Act (FCRA)

A Federal law designed to promote the accuracy, fairness and privacy of information in the files of Consumer Reporting Agencies, codified at 15 U.S.C. §1681 et seq.

License Verification

Confirmation that the selected candidate or employee possesses all licenses listed on the application, resume or cover letter, or otherwise cited by the candidate or employee, including verification of the disposition of such licenses. This includes any motor vehicle driver's licenses required for a position.

Minor

A person under the age of eighteen (18) who is not enrolled or accepted for enrollment at the University. Students who are "dually enrolled" in University programs while also enrolled in elementary, middle and/or

high school are not included in this policy unless such enrollment includes overnight housing in University facilities.

Penn State University

Any campus, unit, program, association or entity of Penn State with the exception of the Penn State Hershey Medical Center campus (including the College of Medicine) which will follow a separate policy that reflects the unique activities that occur on that campus.

Senior Leader

For the purposes of this policy, the Senior Leader will be considered as one or more of the following:

- President
- Provost
- Vice Presidents
- Chancellors
- Assistant or Associate Vice Presidents
- Vice Chancellors
- Vice Provosts
- Deans
- Department Heads and Chairs

Sensitive/Critical Positions

Positions whose responsibilities may include the following:

- Master key access to all, or the majority of all, offices/facilities within buildings (including residences or other on-site or off-site facilities)
- Direct responsibility for the care, safety and security of people, or the safety and security of personal and University property (includes child care workers, physicians, student affairs officers, residence hall supervisors, coaches, transit drivers, etc.)
- Direct responsibility for the care, safety and security of animals
- Direct responsibility for providing legal counsel to the University and/or outside parties
- Direct access to or responsibility for cash, cash equivalents, checks, credit card account information, or University property disbursements or receipts
- Extensive authority for committing the financial resources of the University
- Direct access to or responsibility for controlled substances or hazardous materials
- Direct access to or responsibility for protected, personal or other sensitive data (includes auditors, information systems personnel, human resources and payroll staff, registrars, etc.)
- Administrator, Academic Administrator and Executive positions, if background check is not completed by executive search firm or other similar agency
- Other positions as defined by units that have a job-related need for additional background checks

Sex and Violent Offender Registry Check

Verification that the selected individual does not have undisclosed convictions of certain sex and violent crimes in every jurisdiction where he or she has resided or currently resides.

Volunteers (working with minors)

Unpaid individuals working with minors as defined and covered by Policy AD39 - Minors involved in University-sponsored Programs or Programs held at the University and/or Housed in University Facilities.

BACKGROUND CHECK INQUIRIES:

Verification of credentials and other information about an employee or other individual (paid or unpaid) may include any or all of the following:

Standard Background Check:

- Criminal History Check
- Sex and Violent Offender Registry Check

Additional Background Check items as required for specific positions based on job-related need:

- Education Verification (required for all academic positions)
- Motor Vehicle Record (required for positions where it can be regularly anticipated that a responsibility of the position will be to drive a University-owned vehicle)
- Credit History Check (conducted only for sensitive/critical positions with extensive authority to commit financial resources of the University including Administrator and Executive positions; or as required by law; or due to a reasonable belief that an employee has engaged in a specific activity that constitutes a violation of the law)
- Employment Verifications
- License Verification
- Other verifications, as needed, based on job requirements

BACKGROUND CHECK PROCESS:

A successful background check must be completed prior to the first day of work/engagement with the University in the position identified. Any exceptions will need to be approved by the Office of Human Resources' Recruitment and Compensation Division.

Employees:

Employees are considered to be any person whose wages are paid directly by Penn State, whether full-or part-time and regardless of whether the position is benefits-eligible. Candidates will be informed that the offer is contingent on a satisfactory background check that will be conducted by a consumer reporting agency for review by the University. The candidate will be required to complete self-disclosure and consent forms authorizing Penn State to complete the background check process.

Candidates for employment who fail to participate fully or who provide inaccurate information in a background check will be eliminated from consideration for the position. Candidates may decline to authorize a background check; in such cases, no background check will be performed, but the candidate will not be considered further.

The existence of a criminal conviction will not automatically disqualify an individual from employment or

employment consideration. The University will consider the nature and gravity of the offense(s); time since conviction; completion of sentence or any other remediation; relevance to the position for which the candidate is being considered/employee is performing; and discrepancies between the background check and what the candidate/employee self-reported. When a finding adversely impacts employment eligibility, the candidate will be notified and may be withdrawn from employment consideration after Human Resources consults with the Senior Leader on the matter.

The University will provide candidates access to a copy of their background check reports upon request, regardless of outcome and without charge to the candidate. In cases where information in the background check report will result in an adverse hiring decision, the University will provide a copy of the report to the candidate without his or her request. In cases in which information in a Consumer Report, such as a background check showing criminal convictions affecting the candidate's ability to perform the specific job in question, will result in an adverse employment decision, the University will provide the candidate with all required notifications pursuant to the Fair Credit Reporting Act and applicable law(s).

Executives, Administrators, and Academic Administrators hired through an executive staffing agency or similar staffing company must complete either a Penn State background check consistent with position requirements or have confirmation of a background check of the required criteria having been completed by the staffing agency.

For employees, a break in service of six months or less does not require a new background check unless the individual returns to an assignment requiring a check(s) which was not previously performed. Individuals with a break in service of six months or less should be reminded that the self-disclosure requirement to report arrests and/or convictions within 72 hours of their occurrence is still in force. Approved employee leaves such as sabbatical leave, maternity leave, or other types of approved leaves of six months or longer will require the employee to complete a Penn State Arrest and Conviction self-disclosure form before returning to work. Other breaks in service for employees of greater than six months require a new background check to be completed.

Unpaid Individuals:

This includes interns, adjunct faculty or other individuals working for or engaged by the University. Depending upon the responsibilities of the position, the individual must either:

1. Follow the instructions for completion of background checks described in Penn State Information for Completing PA Publicly Available Background Checks. Complete Pennsylvania criminal history check via the Pennsylvania State Police website, Pennsylvania child abuse clearance via the Pennsylvania Department of Public Welfare website and an FBI criminal history report clearance via the Cogent Applicant Fingerprint Registration System website. All clearances must be dated within two years prior to the date of the assignment. The cost for these clearances will be the responsibility of the individual unless specifically authorized for reimbursement processing by the sponsoring organization. In addition, the individual must self-disclose any arrests or convictions as outlined in the Penn State Arrest and Conviction self-disclosure form that occur between the time of clearance and the date work begins.
2. Be sponsored by the engaging unit to have a background check(s) completed by the University based on the job requirements of the position. The background check must be satisfactorily completed prior to beginning work.

Volunteers working with minors must follow the requirements of Policy AD39 which requires that successful background checks are dated within 6 months prior to the initial date of assignment.

Successful completion of Pennsylvania criminal history check, Pennsylvania Department of Public Welfare child abuse clearance and FBI criminal history report clearance may be substituted for the Penn State background check process for unpaid individuals unless additional background checks are outlined as being required for the position.

Third-party Employees:

This includes consultants, contractors and temporary staffing agency employees working for or engaged by the University. Depending upon the responsibilities of the position, the individual must either:

1. Follow the instructions for completion of background checks described in Penn State Information for Completing PA Publicly Available Background Checks. Complete Pennsylvania criminal history check via the Pennsylvania State Police website, Pennsylvania child abuse clearance via the Pennsylvania Department of Public Welfare website and an FBI criminal history report clearance via the Cogent Applicant Fingerprint Registration System website. All clearances must be dated within two years prior to the date of the assignment. The cost for these clearances will be the responsibility of the individual unless specifically authorized for reimbursement processing by the sponsoring organization. In addition, the individual must self-disclose any arrests or convictions as outlined in the Penn State Arrest and Conviction self-disclosure form that occur between the time of clearance and the date work begins.
2. Be covered by a signed contractor's/vendor's agreement that confirms its employees have had background checks that meet or exceed the University's standards for the type of work being performed.
3. Be sponsored by the engaging unit to have a background check(s) completed by the University based on the job requirements of the position. The background check must be satisfactorily completed prior to beginning work.

Successful completion of Pennsylvania criminal history check, Pennsylvania Department of Public Welfare child abuse clearance and FBI criminal history report clearance may be substituted for the Penn State background check process for third-party employees unless additional background checks are outlined and communicated to the candidate and/or employee as being required for the position.

PERIODIC UPDATES OR ADDITIONAL BACKGROUND CHECKS:

Penn State retains the right to conduct relevant background checks of current employees when it has reasonable grounds to do so, e.g., no prior check was performed, a workplace incident has occurred, upon self-disclosure of criminal activity, update of information due to designation as sensitive/critical position, or upon a change of assignment.

Further, all individuals engaged by the University (whether paid or unpaid) are required to notify the appropriate Human Resources representative of any criminal activities with which they are charged, as well as, upon final conviction of a felony or a misdemeanor within 72 hours of knowledge of the arrest or conviction. The Penn State Arrest and Conviction self-disclosure form provides the list of arrests and/or convictions that must be disclosed and this form must be used to provide the information in writing to the appropriate Human Resources representative for review. This includes any arrests or convictions that occur

either between the date of disclosure for a University run background check and the date work begins, or the date of issuance of the Pennsylvania criminal history check via Pennsylvania State Police website, Pennsylvania child abuse clearance via the Pennsylvania Department of Public Welfare website and an FBI criminal history report clearance via the Cogent Applicant Fingerprint Registration System website and the date work begins. Failure to report such incidents may result in disciplinary action up to and including termination.

Information will be used only if job related and will not necessarily affect employment. Human Resources will notify the employee's department of an arrest or conviction only if it is determined that the arrest and/or conviction is pertinent to the employee's ability to carry out the duties or functions of his or her position. If reported to the employee's department, such arrests and/or convictions, depending on the facts and the employee's involvement in the events leading to arrest and/or conviction, may subject the employee to discipline, up to and including termination.

Positions where it can be regularly anticipated that a responsibility of the position will be to drive a University-owned vehicle or where an individual may be asked to transport minors, must pass a motor vehicle record check. Motor vehicle checks will be updated every three years for positions, as relevant, and it is the department's and supervisor's responsibility to initiate the process. Employees must comply with the self-disclosure requirement by notifying Human Resources of any arrests or convictions for driving while under the influence or the loss of the individual's driver's license due to traffic violations or other similar charges/convictions. This disclosure must be made within 72 hours of occurrence using the Penn State Arrest and Conviction self-disclosure form. Such convictions may subject the employee or individual to discipline, up to and including termination. Failure to report such incidents may result in disciplinary action up to and including termination.

State or federal law or regulations, professional associations, licensing entities or contracting partners may impose background screening check requirements upon certain individuals. In these cases, the affected individual and department should coordinate the need for such a check with the Office of Human Resources' Recruitment and Compensation Division. Under no circumstances should employees conduct, or seek to conduct, a background check, without first consulting with and receiving approval from Recruitment and Compensation.

RECRUITMENT NOTICES:

All job postings (paid or unpaid) that require more verifications than the standard background check will include language identifying the need for all individuals (including current University employees) to undergo a background check appropriate to the position's responsibilities. All offers of employment to new hires of the University will be made contingent upon the results of the background check. If a current employee applies for a position that requires a non-standard background check, the offer for the new position will be contingent upon the results of the background check. All unpaid positions will be contingent upon the results of the background check or verified successful results from Pennsylvania criminal history check via Pennsylvania State Police website, Pennsylvania Department of Public Welfare child abuse clearance via the Pennsylvania Department of Public Welfare website and an FBI criminal history report clearance via the Cogent Applicant Fingerprint Registration System website. Individuals should review the information concerning completion of background checks described in Penn State Information for Completing PA Publicly Available Background Checks.

ROLES AND RESPONSIBILITIES:

College/Campus/Unit Human Resources Responsibilities:

1. Issue all offer letters as "contingent upon successful background check".
2. Initiate the background check process via methodology proscribed by Recruitment and Compensation; communicate procedures to candidates.
3. Ensure that all individuals engaged by the University (paid or unpaid) have successfully completed a background check or provided evidence of completion of acceptable background checks (Pennsylvania criminal history check; Pennsylvania Department of Public Welfare child abuse clearance and FBI criminal history report clearance; executive search firm background clearance; police officer background check) before beginning any assignments/work responsibilities.
4. Review information provided by Recruitment and Compensation that results from the third-party vendor's background check of an individual and determine whether the information may be relevant to the hiring/engaging decision.
5. Confirm any authorization for payment for background checks for non-employees.

Recruitment and Compensation Responsibilities:

1. Secure contracts with consumer reporting agency for consumer reports including background screening services.
2. Develop procedures for oversight of the background check policy and communicate methodology, forms, and/or computer access needs to college/campus/unit Human Resources departments.
3. Coordinate with the hiring/engaging Human Resources department and the consumer reporting agency throughout the background check process.
4. Review all information resulting from the consumer reporting agency's background check of an individual and determine whether the information may be relevant to the hiring/engaging unit's decision. Forward information along with recommended guidance to the hiring/engaging unit for further review and decision.
5. If a candidate may no longer be considered for a position based on the background check results, provide written notice to the candidate including a copy of the background check report. The written notification will include a specified period of time in which the candidate may respond, which will be no less than five calendar days.
    a. If the candidate fails to respond within the specified time period, issue a second letter informing the candidate that he/she is no longer being considered for the position.
    b. If the candidate responds within the specified time period, review any appeal submitted by the candidate challenging the accuracy of information contained in the report.
6. Implement and interpret this policy and provide guidance to hiring/engaging units.

EVALUATION OF RESULTING REPORT:

The following are among the factors that Human Resources will consider when evaluating the results of the background screening check:

- Nature and gravity of the offense(s),
- Time since conviction, completion of sentence or any other remediation,
- Relevancy to the position for which the candidate is being considered/employee is performing; and

- Discrepancies between the background check and what the candidate/employee self-reported.

The background screening check of a candidate who also is a current employee, may impact the current employee's employment, particularly absent full self-disclosure.

CONFIDENTIALITY:

Records gathered as a result of a background screening check are part of an employee's personnel file. However, Human Resources will keep such records in files separately from the individual's general personnel file.

Records gathered as a result of a background screening check for non-employees will be maintained by the appropriate college/campus/unit Human Resources department.

The records related to the background screening check will include:

- Authorization, Consent and Release forms;
- Information collected from the check;
- Analysis and decision if criminal activity substantially relates to the position; and,
- Correspondence related to criminal background screening check

Alternatively, these records may be maintained in a secure database. Any records related to a candidate or an employee must be returned to Human Resources and will be maintained in accordance with the Penn State records retention schedule.

RELATED DOCUMENTS:

Summary of rights under the Fair Credit Reporting Act:

www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf

Penn State Arrest and Conviction self-disclosure form

Penn State Information for Completing PA Publicly Available Background Checks

CROSS REFERENCES:

Other Policies in this Manual should also be referenced, especially the following:

AD12 - Sexual Assault, Relationship and Domestic Violence, and Stalking

AD29 - Statement on Intolerance

AD33 - A Drug-Free Workplace

AD39 - Minors involved in University-sponsored Programs or Programs held at the University and/or Housed in University Facilities

AD41 - Sexual Harassment

AD42 - Statement on Nondiscrimination

AD72- Reporting Suspected Child Abuse

HR05 - "Regular" and "Nonregular" University Employees

HR06 - Types of Appointments

HR07 - University Appointments without Remuneration

HR08 - Establishment of a Staff or a Technical Service Position

HR11 - Affirmative Action in Employment at The Pennsylvania State University

HR13 - Recommended Procedure for Hiring New Faculty

HR14 - Forms to be Filled Out by and for Each New Regular Employee

HR34 - Employment Conditions for Staff Employees

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EXHIBIT Y

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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY : : CIVIL ACTION NO. 2012-1804 : : HON. THOMAS G. GAVIN :

TRIAL MEMORANDUM ON BEHALF OF DEFENDANT, THE PENNSYLVANIA STATE UNIVERSITY CONCERNING PLAINTIFF'S PUBLIC-FIGURE CLASSIFICATION

Defendant, The Pennsylvania State University ("the University"), by and through its undersigned counsel, submits the within Memorandum per the Court's request and in support of the University's Proposed Points for Charge concerning the public-figure status of Plaintiff, Michael J. McQueary ("Plaintiff" or "Mr. McQueary") for purposes of his defamation claim (Count II) against the University.[1]

[1] That status implicates, in particular, Defense Instruction Nos. 33, 35, 36, 39, 40, and 54, and Plaintiff's Instruction Nos. 9 through 11.

EXHIBIT "Y"

1. The First Amendment to the federal Constitution places limits on state defamation law. Tucker v. Phila. Daily News, 848 A.2d 113, 128 (Pa. Super. Ct. 2004).

2. A plaintiff's status as a public figure will affect his or her burden in a defamation case. Slozer v. Slattery, 134 A.3d 497, ---, 2015 Pa. Super. Unpub. LEXIS 4259, *20 (Pa. Super. Ct. 2015).

3. "If the plaintiff is a public official or public figure, [he or] she must prove also that the defendant, in publishing the offending statement, acted with actual malice, *i.e.*, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." Joseph v. Scranton Times, L.P., 89 A.3d 251, 260-261 (Pa. Super. 2014) ("Joseph II") (quoting Lewis v. Phila. Newspapers, Inc., 833 A.2d 185, 191 (Pa. Super. Ct. 2003)), rev'd on other grounds 129 A.3d 404 (Pa. 2015) ("Joseph III").

4. A public-figure plaintiff must meet that burden by clear and convincing evidence. Slozer, supra (citing Tucker, 848 A.2d at 127-128).

5. Whether a plaintiff is a public figure "may rest on either of two alternative bases." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974).

6. The first basis is where an individual "*voluntarily injects himself or is drawn into a particular public controversy* and thereby becomes a public figure for a limited range of issues." Id.

7. Such individuals are so-called "limited-purpose" public figures. See Joseph v. Scranton Times, L.P., 23 Pa. D. & C. 5th 129, 151 (Luzerne Cnty. 2011) ("Joseph I") (citing Gertz), aff'd and reinstated, Joseph III, supra.

8. A limited-purpose public figure "assume[s] special prominence in the resolution of public questions." Gertz, 418 U.S. at 351.

9. There is a two-part test applied to determine whether someone is a limited-purpose public figure for purposes of a defamation claim. Joseph I, 23 Pa. D. & C. 5th at 151 (citing Gertz, 418 U.S. at 352, and McDowell v. Paiewonsky, 769 F.2d 942, 947 (3d Cir. 1985)).

10. First, does the allegedly defamatory statement involve a public controversy? Id.

11. Here, it is beyond dispute that the Sandusky investigation and subsequent proceedings were a matter of public controversy.

12. Second, what is the "nature and extent of the [p]laintiff's involvement in that controversy[?]" Id.

13. Plaintiff agreed to and did willingly provide information to investigators in the Attorney General's Office and then testified in person before the grand jury, all prior to the allegedly defamatory statements by the University. Indeed, Plaintiff intends to call former Deputy Attorney General Jonelle Eshbach and Attorney General Investigator Anthony Sassano to testify about Plaintiff's

important role in which Plaintiff served in both the Sandusky prosecution and in the prosecution of Mr. Curley and Mr. Schultz.

14. Furthermore, although the grand jury's presentment did not identify Plaintiff personally, his identity was subsequently disclosed by the media (not the University), and the media's disclosure resulted in an onslaught of public criticism and comment about Plaintiff's failure to act following the events he witnessed in February 2001.

15. Alternatively, Plaintiff qualifies as an all-purpose public figure.

16. An individual may "achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." Id.

17. In the present case, Plaintiff became a public figure when he committed to playing football for the University.

18. Plaintiff's notoriety grew when he became a starting quarterback for the University in 1997.

19. Plaintiff became headline news in his first college start when he passed for 366-yards, surpassing University records.

20. Publicity surrounding Plaintiff was renewed when he returned to the University as a coach.

21. Standing on the sidelines, Plaintiff became a familiar face to the hundreds of thousands of fans across the country who tuned into the University's televised games.

22. For all of these reasons, Plaintiff qualifies as either a limited-purpose or all-purpose public figure.

23. Accordingly, the jury should be charged that Plaintiff is considered a public figure for purposes of his defamation claim and must therefore satisfy a heightened evidentiary burden.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: _____

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Dated: October 15, 2016

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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	: HON. THOMAS G. GAVIN
Defendant.	:

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 15th day of October, 2016, a true and correct copy of the TRIAL MEMORANDUM ON BEHALF OF DEFENDANT, THE PENNSYLVANIA STATE UNIVERSITY CONCERNING PLAINTIFF'S PUBLIC-FIGURE CLASSIFICATION was served upon the following persons via electronic and first class mail:

Elliot A. Strokoff, Esquire
Strokoff & Cowden, PC
132 State Street
Harrisburg, PA 17101
Counsel for Plaintiff

William T. Fleming, Esquire
Fleming Law Offices
111 Sowers Street, Suite 330
State College, PA 16801
Local Counsel for Plaintiff

WHITE AND WILLIAMS LLP

By: _____

EXHIBIT Z

Summary of Articles

11/8/11	*Altoona Mirror*	**Title:** "Giger's live blog Monday: McQueary failed to act like responsible human being" **Content:** "I went too easy on Mike McQueary today. I was wrong. He was a grown man who allegedly walked into a shower and saw a man raping a 10-year-old boy. He did nothing about it and left the building. He allegedly didn't try to stop it. He allegedly didn't attack Sandusky and get him to stop. He allegedly didn't help the boy, remove him from the situation or anything of the sort. McQueary, according to his own testimony, left. That is deplorable. What kind of man does that? . . . McQueary failed that young boy that night in the shower. It has to be difficult for him to live with such a horrible mistake in judgment. . . . After thoroughly reading the grand jury report in the afternoon and learning of McQueary's actions, I became outraged, just as many people around the country have after reading the accounts. . . . I'm hearing a lot of people throw McQueary under the bus. I get it to a degree. If he saw what he allegedly saw, why just leave quickly? Many people are saying McQueary should have stepped in and stopped it, maybe even beaten the crap out of Sandusky."	68
11/9/11	*The Bleacher Report* Tom Loughrey, Analyst	**Title:** "Penn State Scandal: Why Mike McQueary Deserves Jail Time" **Content:** "Penn State wide receivers coach Mike McQueary allegedly witnessed Jerry Sandusky performing a sexual act on a young child in a Lasch Football Building shower in 2002 . . . and didn't intervene. This detail is in the grand jury report about the scandal surrounding Sandusky and Penn State University. . . . I understand the idea of an accessory. Usually, however, the	69

EXHIBIT "Z"

		person is a witness to murder. In this instance, McQueary was a witness to an alleged rape. And he left. These are all things that McQueary has admitted. He must feel terrible, being that he was a 28 year old at the time and did nothing. However, the thought that he physically walked away from a rape is disgusting. He could be considered an accessory to rape. . . . By not stopping the crime taking place on March 1, 2002, McQueary could have allowed more rapes to occur. Some say living with that guilt is enough, but McQueary should live with that guilt in jail for some time. . . . It's been over nine years since he saw what he saw, and he's continued to live his normal life. He does not deserve to live his normal life. . . . [A]s ***Mike Golic said on ESPN***, McQueary didn't 'stop the action'. From my understanding, McQueary is the second-most responsible person in this case. He's nowhere near the level of culpability of Sandusky, but he still stood aside for nine years. [Poll Question: Will McQueary be jailed for his lack of action? Yes / No] He must have seen Sandusky in those nine years. In fact, ***Dave Zirin of the San Francisco Chronicle*** reports Sandusky came to a Penn State practice in 2007 with a child. He didn't retire from The Second Mile, his 'charity' to benefit underprivileged children until September, 2010. The victims in the case are listed by number to protect their identity. Here's a quote from Victim Six's mother, as reported by **Sara Ganim of *The Patriot News***. 'I don't even have words to talk about the betrayal I feel. [McQueary] was a grown man, and he saw a boy being sodomized . . . He ran and called his daddy?' McQueary is a coward. If he feared for his job on that day, he should fear for more than that in the coming days."	

11/10/11	*Chicago Now*	**Title:** "Why is Penn State Letting Mike McQueary Stay and Coach?" **Content:** "The ONLY third party witness to one of the child rapes, who didn't even tell the police about it; instead he just told his dad, and this his occupational dad, JoePa, is somehow still allowed to coach? Where's the justice in that? . . . He wouldn't do what's right; and that makes him complicit in this entire sordid affair. He should get the axe just like the rest of them."	72
11/10/11	*SportsGrid* Written by Dan Fogarty, the then Editor-in-Chief of SportsGrid (the Abrams Media Sports Blog); went on to become Senior Editor, Sports Digital Properties, at USA Today, and then the Senior Editor, Moments	**Title:** "The man who walked in on Jerry Sandusky allegedly raping a young boy will coach for Penn State on Saturday" **Content:** "But the worst thing isn't the inaction of McQueary in the moment. The worst thing is the ensuing inaction. Because after he didn't do anything, and it was apparent that no one else was doing anything, he continued to do nothing. For days, and weeks, and months, while Jerry Sandusky was still having sleepovers with kids and that boy from the shower remained unidentified, he did nothing. Then, in the ensuing years as an assistant coach whose primary duty was recruiting, he lied. He went into players' homes, looked their parents in the eye, and told them that Penn State was a good place to play. It wasn't, which is something we didn't know until now, but McQueary knew the second he saw Jerry Sandusky raping that kid. The shaming of McQueary is a shame in [and] of itself, because the guilt he's reportedly carrying with him right now is crushing. [link to another article in the ***Pittsburgh Post Gazette***]. But, that shame, which is only going to get worse in the coming months, won't be without reason. The prolonged and systematic destruction of McQueary's life will serve as a lesson for the	73

	and Living, of Boston.com, a Boston Globe Media Company	next grown man or woman that knows a child is being sexually abused, whether right in front of their face, or somewhere in their midst. They'll know that if they do what McQueary did that night in the showers, and what he did in the ensuing years – which is nothing – their life will be ruined, in addition to the young lives that are being ruing around them. And if even one kid is saved because of that, then the hell that Mike McQueary is about to go through will have served its purpose."	
11/10/11	*TMZ.com*	**Title:** "Ex-Penn State Football Player – Fire Mike McQueary!!!" **Content:** 123 public comments to this article universally condemned Plaintiff. A follow up article engendered 240 public comments, all, once again, universally condemning Plaintiff.	74, 75

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

____ Medical Professional Liability Action (check if applicable)

Type of Pleading:
Answer and New Matter to Plaintiff's Complaint

Filed on Behalf of:
Defendant, The Pennsylvania State University

Counsel of Record for this Party:
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Centre County

EXHIBIT "AA"

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Attorneys for Defendant,
The Pennsylvania State University

To: PLAINTIFF
You are hereby notified to file a written response to the following NEW MATTER to the Complaint, as may be required by Pa. R.C.P. 1029, within 20 days after service, or a judgment may be entered against you and in favor of the defendant.

Nancy Conrad, Esquire
Attorney for Defendant

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:
	:
Defendant.	:

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DEFENDANT, THE PENNSYLVANIA STATE UNIVERSITY'S, ANSWER AND NEW MATTER TO PLAINTIFF'S COMPLAINT

Defendant, The Pennsylvania State University (the "University"), by and through its counsel, White and Williams LLP, for its Answer and New Matter to the Complaint hereby states as follows:

1. Admitted, upon information and belief.

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2. Denied as stated. The University was first formed as the Farmers' High School of Pennsylvania by special act of the legislature of the Commonwealth of Pennsylvania on February 22, 1855. In further answer, the University is a State-related institution of higher education also organized and existing as an instrumentality of the Commonwealth of Pennsylvania. It is admitted that the University maintains an administrative office at 201 Old Main, University Park, Centre County, Pennsylvania.

3. Denied as stated. The University only admits that the General Assembly of the Commonwealth of Pennsylvania appropriated funds to the University.

4. Denied as stated. The University only admits that Plaintiff was a Graduate Assistant Coach sometime in August 2000 through February 2003.

5. Denied. The University denies each and every averment set forth in Paragraph 5 and demands strict proof thereof during discovery and at the time of trial.

6. Admitted.

7. Denied. The University denies each and every averment set forth in Paragraph 7 and demands strict proof thereof during discovery and at the time of trial.

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8. Paragraph 8 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 8 contains factual allegations, the University only admits that the University Police provided law enforcement services to the University Park Campus.

9. Admitted in part, denied in part. It is only admitted that in February 2001, Director of University Police Thomas Harman reported to former Vice President Gary Schultz for budget purposes. The University denies the remaining averments set forth in Paragraph 9 and demands strict proof thereof during discovery and at the time of trial.

10. Paragraph 10 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 10 contains factual allegations, after reasonable investigation, the University lacks knowledge or information to form a belief as to the accuracy of the averments set forth in Paragraph 10. Accordingly, the University denies each and every averment set forth in Paragraph 10 and demands strict proof thereof during discovery and at the time of trial.

11. After reasonable investigation, the University lacks knowledge or information to form a belief as to the accuracy of the averments set forth in Paragraph 11. Accordingly, the University denies each and every averment set forth in Paragraph 11 and demands strict proof thereof during discovery and at the time of trial.

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12. After reasonable investigation, the University lacks knowledge or information to form a belief as to the accuracy of the averments set forth in Paragraph 12. Accordingly, the University denies each and every averment set forth in Paragraph 12 and demands strict proof thereof during discovery and at the time of trial.

13. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 13. Accordingly, the University denies each and every averment set forth in Paragraph 13 and demands strict proof thereof during discovery and at the time of trial.

14. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 14. Accordingly, the University denies each and every averment set forth in Paragraph 14 and demands strict proof thereof during discovery and at the time of trial.

15. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 15. Accordingly, the University denies each and every averment set forth in Paragraph 15 and demands strict proof thereof during discovery and at the time of trial.

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16. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 16. Accordingly, the University denies each and every averment set forth in Paragraph 16 and demands strict proof thereof during discovery and at the time of trial.

17. Paragraph 17 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 17 contains factual allegations, after reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 17. Accordingly, the University denies each and every averment set forth in Paragraph 17 and demands strict proof thereof during discovery and at the time of trial.

18. Paragraph 18 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 18 contains factual allegations, after reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 18. Accordingly, the University denies each and every averment set forth in Paragraph 18 and demands strict proof thereof during discovery and at the time of trial.

19. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 19. Accordingly, the University denies each and every averment set

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forth in Paragraph 19 and demands strict proof thereof during discovery and at the time of trial.

20. Admitted.

21. Denied as stated. The December 17, 2008 letter attached as Exhibit "A" to the Complaint is a document that speaks for itself and all characterizations of same are denied. It is admitted that other University Assistant Football Coaches received a similar correspondence.

22. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 22. Accordingly, the University denies each and every averment set forth in Paragraph 22 and demands strict proof thereof during discovery and at the time of trial.

23. Admitted in part, denied in part. It is admitted upon information and belief that Plaintiff testified before a Statewide Investigating Grand Jury in Harrisburg, Pennsylvania, on or about December 14, 2010. The Grand Jury testimony speaks for itself and all characterizations of same are denied.

24. Admitted in part, denied in part. The University admits that, at certain times, Plaintiff's base salary was approximately $140,000.00 per year, plus fringe benefits, which included family health insurance coverage, pension contributions, a motor vehicle and a cell phone. After reasonable investigation, the University

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lacks knowledge or information sufficient to form a belief as to the meaning of the term "during 2011-2012" and the phrase "discretionary . . . bonus." Accordingly, the University denies the remaining averments set forth in Paragraph 24, including any averment that certain conditions existed "during 2011-2012," and demands strict proof thereof during discovery and at the time of trial.

25. Denied. The University specifically denies each and every averment set forth in Paragraph 25 and demands strict proof thereof during discovery and at the time of trial.

26. Denied as stated. The November 4, 2011 Statewide Investigating Grand Jury Presentment referenced in Paragraph 26 is a document that speaks for itself and all characterizations of same are denied.

27. Denied as stated. The November 4, 2011 Statewide Investigating Grand Jury Presentment referenced in Paragraph 27 is a document that speaks for itself and all characterizations of same are denied.

28. Paragraph 28 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 28 contains factual allegations, the November 5, 2011 written comment attached as Exhibit "B" to the Complaint constitutes a document that speaks for itself and all characterizations of same are denied. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the remaining

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averments set forth in Paragraph 28. Accordingly, the University denies each and every remaining averment set forth in Paragraph 28 and demands strict proof thereof during discovery and at the time of trial.

29. Paragraph 29 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 29 contains factual allegations, the University only admits that former President Graham Spanier met with members of the University's Intercollegiate Athletics Department. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the remaining averments set forth in Paragraph 29. Accordingly, the University denies each and every remaining averment set forth in Paragraph 29 and demands strict proof thereof during discovery and at the time of trial.

30. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 30. Accordingly, the University denies each and every averment set forth in Paragraph 30 and demands strict proof thereof during discovery and at the time of trial.

31. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 31. Accordingly, the University denies each and every averment set

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forth in Paragraph 31 and demands strict proof thereof during discovery and at the time of trial.

32. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 32. Accordingly, the University denies each and every averment set forth in Paragraph 32 and demands strict proof thereof during discovery and at the time of trial.

33. Admitted in part, denied in part. It is admitted that Plaintiff attended a meeting with Acting Athletics Director, Mark Sherburne, Human Resources Manager, Erikka Runkle, and the University's former General Counsel, Cynthia Baldwin, on or about November 13, 2011. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the remaining averments set forth in Paragraph 33. Accordingly, the University denies the remaining averments set forth in Paragraph 33 and demands strict proof thereof during discovery and at the time of trial.

34. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 34. Accordingly, the University denies each and every averment set forth in Paragraph 34 and demands strict proof thereof during discovery and at the time of trial.

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COUNT 1 – (Whistleblower)

35. The University incorporates by reference as though fully set forth at length herein Paragraphs 1 through 34 above.

36. Denied as stated. The University placed Plaintiff on paid administrative leave effective November 11, 2011. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to Plaintiff's allegations related to a bonus. Accordingly, the University denies the remaining averments set forth in Paragraph 36 and demands strict proof thereof during discovery and at the time of trial.

37. Denied as stated. See Exhibit "C" attached to the Complaint which constitutes a document that speaks for itself and all characterizations of same are denied. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the remaining factual allegations contained in Paragraph 37. Accordingly, the University denies each and every remaining averment set forth in Paragraph 37 and demands strict proof thereof during discovery and at the time of trial.

38. Admitted in part, denied in part. The University admits upon information and belief that Plaintiff was not invited to be interviewed. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the remaining averments set forth in

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Paragraph 38. Accordingly, the University denies each and every remaining averment set forth in Paragraph 38 and demands strict proof thereof during discovery and at the time of trial.

39. Admitted in part, denied in part. The University only admits that its insurer has paid certain legal fees incurred by former Vice President Gary Schultz and former Athletics Director Timothy Curley in conjunction with their criminal defense. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 39. Accordingly, the University denies each and every remaining averment set forth in Paragraph 39 and demands strict proof thereof during discovery and at the time of trial.

40. Denied. The University specifically denies that it "refused to honor its commitment to pay severance to the Plaintiff . . . " and demands strict proof thereof during discovery and at the time of trial. To the contrary, the University employed Plaintiff as a Fixed Term I contract employee and, per the contract, his employment ended effective June 30, 2012, upon expiration of the fixed term. Plaintiff was not terminated during the term of his employment -- a condition necessary to trigger severance benefits under the December 17, 2008, correspondence attached to the Complaint as Exhibit "A." Despite the absence of

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said condition, the University voluntarily paid Plaintiff the severance benefits following the expiration of the term and beginning in September 2012.

41. Denied. The University specifically denies that it failed to "honor its commitment to pay severance to the Plaintiff . . ." and demands strict proof thereof during discovery and at the time of trial. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 41, and, therefore, these allegations are denied.

42. Denied as stated. It is only admitted that other Assistant Football Coaches who were not retained by Head Football Coach O'Brien during the term of their employment received notices about their COBRA rights. It is further admitted that Plaintiff received a notice of his COBRA rights.

43. Denied as stated. It is admitted only that other Assistant Football Coaches who were actively employed by the University in 2011 and who were not retained by Head Football Coach O'Brien were notified that they would not be retained by the University during their term of employment.

44. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 44. Accordingly, the University denies each and every averment set

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forth in Paragraph 44 and demands strict proof thereof during discovery and at the time of trial.

45. Denied upon information and belief.

46. Paragraph 46 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 46 contains factual allegations, the University specifically denies each and every averment set forth in Paragraph 46 and demands strict proof thereof during discovery and at the time of trial.

47. Paragraph 47 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 47 contains factual allegations, after reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 47. Accordingly, the University denies each and every averment set forth in Paragraph 47 and demands strict proof thereof during discovery and at the time of trial.

48. Paragraph 48 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 48 contains factual allegations, the University specifically denies each and every averment set forth in Paragraph 48 and demands strict proof during discovery and at the time of trial.

WHEREFORE, the University demands that judgment be entered in its favor and against Plaintiff at Plaintiff's cost.

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COUNT II – (Defamation)

49. The University incorporates by reference as though fully set forth at length herein its responses to Paragraphs 1 through 48 above.

50. Paragraph 50 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 50 contains factual allegations, the University specifically denies that the comments "clearly suggest that the Plaintiff was lying in his reports and testimonies . . ." and strict proof thereof is demanded during discovery and at the time of trial. The written comment attached to the Complaint as Exhibit "B" further constitutes a document that speaks for itself and all characterizations of same are denied.[1]

51. Paragraph 51 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 51 contains factual allegations, the University specifically denies that the comments "clearly suggest that the Plaintiff has lied to law enforcement officials and committed perjury . . ." and strict proof thereof is demanded during discovery and at the time of trial. The written comment attached to the Complaint as Exhibit "B" further constitutes a document that speaks for itself and all characterizations of same are denied.

[1] The November 5, 2011 statement is attached to the Complaint as Exhibit "B," not Exhibit "C" as referenced by Plaintiff.

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52. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 52. Accordingly, the University denies each and every averment set forth in Paragraph 52 and demands strict proof thereof during discovery and at the time of trial.

53. Paragraph 53 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 53 contains factual allegations, after reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 53. Accordingly, the University denies each and every averment set forth in Paragraph 53 and demands strict proof thereof during discovery and at the time of trial.

54. Admitted in part, denied in part. The University admits that the November 5, 2011 written comment attached to the Complaint as Exhibit "B" has not been withdrawn or redacted. The University denies each and every remaining averment set forth in Paragraph 54 and demands strict proof thereof during discovery and at the time of trial.

55. Paragraph 55 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 55 contains factual allegations, the University specifically denies each and every averment set forth in Paragraph 55 and demands strict proof thereof during discovery and at the time of trial.

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56. Paragraph 56 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 56 contains factual allegations, the University specifically denies each and every averment set forth in Paragraph 56 and demands strict proof thereof during discovery and at the time of trial.

57. After reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 57. Accordingly, the University denies each and every averment set forth in Paragraph 57 and demands strict proof thereof during discovery and at the time of trial.

58. Paragraph 58 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 58 contains factual allegations, the University specifically denies each and every averment set forth in Paragraph 58 and demands strict proof thereof during discovery and at the time of trial.

WHEREFORE, the University demands that judgment be entered in its favor and against Plaintiff at Plaintiff's cost.

COUNT III – (Misrepresentation)

59. The University incorporates by reference as though fully set forth at length herein its responses to Paragraphs 1 through 58 above.

60. Paragraph 60 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 60 contains factual allegations, after

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reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 60. Accordingly, the University denies each and every averment set forth in Paragraph 60 and demands strict proof thereof during discovery and at the time of trial.

61. Paragraph 61 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 61 contains factual allegations, after reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 61. Accordingly, the University denies each and every averment set forth in Paragraph 61 and demands strict proof thereof during discovery and at the time of trial.

62. Paragraph 62 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 62 contains factual allegations, after reasonable investigation, the University lacks knowledge or information sufficient to form a belief as to the accuracy of the averments set forth in Paragraph 62. Accordingly, the University denies each and every averment set forth in Paragraph 62 and demands strict proof thereof during discovery and at the time of trial.

63. Paragraph 63 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 63 contains factual allegations, the University specifically denies each and every averment set forth in Paragraph 63 and demands strict proof thereof during discovery and at the time of trial.

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64. Paragraph 64 contains conclusions of law to which no responsive pleading is required. To the extent Paragraph 64 contains factual allegations, the University specifically denies each and every averment set forth in Paragraph 64 and demands strict proof thereof during discovery and at the time of trial.

WHEREFORE, the University demands that judgment be entered in its favor and against Plaintiff at Plaintiff's cost.

NEW MATTER

65. The University incorporates by reference as though fully set forth at length herein its responses to Paragraphs 1 through 64 above.

66. In 2011, the University employed Plaintiff as a Fixed Term I contract employee.

67. The University placed Plaintiff on a paid leave of absence effective November 11, 2011, following receipt of a threat(s) against Plaintiff's life.

68. The University did not terminate Plaintiff's employment during the term of his contract.

69. Plaintiff's employment with the University ended effective June 30, 2012 upon expiration of a fixed term contained in the employment contract.

70. Plaintiff's employment ended for legitimate reasons.

71. The University maintained no duty to pay Plaintiff severance under the December 17, 2008 correspondence attached to the Complaint as Exhibit "A."

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72. At all material times, any actions taken by the University with respect to the terms, conditions or privileges of Plaintiff's employment were taken for lawful and legitimate reasons.

73. The November 5, 2011 written comment and alleged November 7, 2011 verbal comment by former President Spanier constitute opinions and do not imply any knowledge of underlying facts.

74. Plaintiff's claims for damages are barred, in whole or in part, by his failure to mitigate damages.

75. Some or all of the Complaint is barred by the applicable statute of limitations.

76. Plaintiff has failed to establish any basis for asserting a claim for compensatory damages.

77. Plaintiff's Complaint fails to state a cause of action upon which relief may be granted.

78. The actions or inactions of the University were not the proximate cause of any damages sustained by Plaintiff.

79. Plaintiff has not suffered any emotional, psychological and/or physical distress or injury as a result of any actions or inactions of the University, and any condition allegedly suffered by Plaintiff is attributable to causes wholly independent of the University's alleged actions and/or inactions.

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80. No action or inaction of the University caused Plaintiff harm at any time.

81. Plaintiff is not entitled to punitive damages since the University always acted in good faith.

82. Any award of punitive damages against the University would violate the Constitution of the United States and Pennsylvania.

83. If Plaintiff suffered any damages or losses, such damages or losses were caused in whole or in part by Plaintiff's own acts, omissions, or conduct.

84. Plaintiff is not entitled to attorneys' fees under any circumstances.

85. To the extent Pennsylvania Rule of Civil Procedure 1032 mandates that any and all affirmative defenses not set forth are waived, the University asserts any and all affirmative defenses contemplated by Pennsylvania Rules of Civil Procedure 1030 and 1032 to the extent that continuing investigation or discovery reveals facts which show that any such defenses may be pertinent up to and including the time of trial.

WHEREFORE, the University demands that judgment be entered in its favor and against Plaintiff at Plaintiff's cost.

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Respectfully submitted,

WHITE AND WILLIAMS LLP

By:_____

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Attorneys for Defendant,
The Pennsylvania State University

Dated: May 3, 2013

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VERIFICATION

I, NANCY CONRAD, hereby verify that the statements set forth in the foregoing Answer and New Matter to Plaintiff's Complaint are true and correct to the best of my knowledge, information, and belief. I understand that false statements made by me are subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities. This Verification is made by Counsel for Defendant because a Verification from a person with authority to act on behalf of the Defendant cannot be obtained within the time allowed for filing the pleading.

Nancy Conrad, Esquire

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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON
	: PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:
	:
Defendant.	:

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 3rd day of May, 2013, a true and correct copy of the foregoing DEFENDANT'S ANSWER AND NEW MATTER TO PLAINTIFF'S COMPLAINT was served upon the following persons via first class, United States mail, postage prepaid:

Elliot A. Strokoff, Esquire
Strokoff & Cowden, PC
132 State Street
Harrisburg, PA 17101
Attorney for Plaintiff

and

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William T. Fleming, Esquire
Fleming Law Offices
204 East Calder Way, Suite 304
State College, PA 16801
Local Counsel for Plaintiff

WHITE AND WILLIAMS LLP

By:_____

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