



FARRELL & REISINGER, LLC
By: Thomas J. Farrell, Esquire
436 Seventh Avenue
Koppers Building, Suite 300
Pittsburgh, PA 15219
Telephone: (412) 894-1380
Facsimile: (412) 894-1381
E-mail: tfarrell@farrellreisinger.com

*Counsel for Gary C. Schultz,
Petitioner*

MICHAEL J. McQUEARY,

Plaintiff

v.

THE PENNSYLVANIA STATE UNIVERSITY,

Defendant

CENTRE COUNTY
COURT OF COMMON PLEAS

CIVIL ACTION NO. 2012-1804

HON. THOMAS G. GAVIN

**GARY C. SCHULTZ'S
EMERGENCY PETITION TO INTERVENE**

FILED FOR RECORD
2015 APR 17 PM 4:08
RECEIVED
PROthonotary
CENTRE COUNTY, PA

Non-party GARY C. SCHULTZ, Petitioner, by his attorneys, Thomas J. Farrell, Esquire, and Farrell & Reisinger, LLC, moves this Honorable Court for the entry of an Order permitting him to intervene pursuant to Pa.R.Civ.P. 2327(4) for the limited purpose of seeking protection of privileged information in the above-captioned proceeding, and in support thereof, avers the following:

1. On October 2, 2012, Plaintiff Michael McQueary filed a complaint, raising (1) Whistleblower, (2) Defamation, and (3) Misrepresentation claims against Defendant Pennsylvania State University ("PSU").

2. Mr. Schultz is not named as a defendant in this action.

3. On December 4, 2014, Plaintiff filed a Motion to Compel Defendant's Production of Documents. That Motion directs this Honorable Court's attention to several document requests. Of concern to Mr. Schultz, Document Request No. 4 asks this Court to compel PSU's production of several e-mails between PSU's then-General Counsel Cynthia Baldwin and undersigned counsel for Mr. Schultz pertaining to a statement issued by PSU in November 2011.

4. Defendant PSU has asserted the attorney-client and work product privileges regarding these e-mails. Mr. Schultz and Mr. Curley are former employees of PSU.

5. Mr. Schultz is currently a defendant in criminal proceedings.¹ The charges against Mr. Schultz involve circumstances that allegedly occurred when he was employed by PSU. Plaintiff McQueary is a Commonwealth witness in those proceedings. Mr. Schultz has asserted attorney-client and work product privileges regarding his communications with Ms. Baldwin.

6. On January 14, 2015, Judge Todd Hoover of the Court of Common Pleas of Dauphin County issued a Memorandum Opinion and Order ruling that no individual attorney-client relationship existed between Mr. Schultz and Ms. Baldwin.

7. Pursuant to *Commonwealth v. Kennedy*, 876 A.2d 939 (Pa. 2005), *Commonwealth v. Harris*, 32 A.2d 243 (Pa. 2011), and Rule 313 of the Pennsylvania Rules of Appellate Procedure, orders denying claims of privilege are immediately appealable. On February, 12, 2015, Mr. Schultz filed a Notice of Appeal to the Superior Court, challenging Judge Hoover's conclusions regarding the attorney-client relationship between him and Ms. Baldwin. That appeal is docketed at 280 MDA 2015.

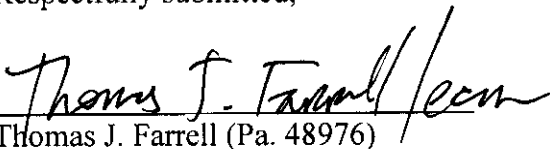
¹ Mr. Schultz is charged in Dauphin County at *Commonwealth v. Gary C. Schultz*, CP-22-CR-03616-2013 and CP-22-CR-05164-2011

8. Plaintiff's Motion to Compel, if granted, would allow access to documents Mr. Schultz submits are protected under the work product doctrine. Because allowance of such discovery would result in the disclosure of privileged material, Mr. Schultz seeks leave to intervene in this case to file the attached motion for a protective order pursuant to Rule 4012(a) of the Pennsylvania Rules of Civil Procedure.

WHEREFORE, Mr. Schultz respectfully requests that this Honorable Court grant his Emergency Petition and enter an order in the form proposed allowing Mr. Schultz to intervene in this case and file the attached motion for protective order.

Respectfully submitted,

Dated: April 17, 2015


Thomas J. Farrell (Pa. 48976)
FARRELL & REISINGER, LLC
436 Seventh Avenue
Koppers Building, Suite 300
Pittsburgh, PA 15219
Telephone: (412) 894-1380
Facsimile: (412) 894-1381
tfarrell@farrellreisinger.com

Counsel for Gary C. Schultz

FARRELL & REISINGER, LLC
By: Thomas J. Farrell, Esquire
436 Seventh Avenue
Koppers Building, Suite 300
Pittsburgh, PA 15219
Telephone: (412) 894-1380
Facsimile: (412) 894-1381
E-mail: tfarrell@farrellreisinger.com

*Counsel for Gary C. Schultz,
Petitioner*

MICHAEL J. McQUEARY,

Plaintiff

v.

THE PENNSYLVANIA STATE UNIVERSITY,

Defendant

:
:
: CENTRE COUNTY
: COURT OF COMMON PLEAS

:
:
: CIVIL ACTION NO. 2012-1804

:
:
: HON. THOMAS G. GAVIN
:
:
:

**GARY C. SCHULTZ'S
MEMORANDUM OF LAW IN SUPPORT OF
HIS EMERGENCY PETITION TO INTERVENE**

Gary C. Schultz seeks to intervene in this case for the purpose of filing the attached Motion for Protective Order (Ex. A) to prevent disclosure of privileged work product materials. Because Mr. Schultz is not a party in this action and is not the person from whom discovery is sought, this Honorable Court should grant Mr. Schultz leave to intervene in this case so that he may assert his interest as the holder of that privilege.

I. MATTER BEFORE THE COURT

The matter before the Court is Mr. Schultz's Emergency Petition to Intervene.

II. QUESTION PRESENTED

Should this Court allow Gary C. Schultz to intervene under Pa. R. Civ. P. 2327(4) for the purpose of filing a motion for protective order when plaintiff is seeking to compel production of

documents that are the work product of undersigned counsel, Mr. Schultz's attorney, and Cynthia Baldwin, Mr. Schultz's former attorney, and are therefore privileged?

SUGGESTED ANSWER: Yes.

III. BACKGROUND

Plaintiff McQueary brings whistleblower, defamation, and misrepresentation actions against defendant Pennsylvania State University (PSU). Mr. Schultz is currently a defendant in criminal proceedings involving incidents that occurred while Mr. Schultz was still employed by PSU. Plaintiff is a witness for the Commonwealth in those proceedings. The criminal proceedings, *Commonwealth v. Gary Schultz*, are docketed at CP-22-CR-03616-2013 and CP-22-CR-05164-2011.

Plaintiff has filed a Motion to Compel Production of Documents, seeking disclosure of e-mails exchanged between undersigned counsel, counsel for Mr. Schultz's codefendant Tim Curley, and Cynthia Baldwin, who previously acted as Mr. Schultz's attorney in relation to matters that are the subject of plaintiff's complaint and Mr. Schultz's criminal charges. Mr. Schultz now seeks to intervene in this matter for the purpose of asking this Court to prevent disclosure of those e-mails as non-discoverable work product. Intervention is necessary to prevent disclosure of privileged work product material.

IV. ARGUMENT

Pennsylvania Rule of Civil Procedure 2327(4) provides that at any time during the pendency of an action, a non-party shall be permitted to intervene if determination of the action may affect a legally enforceable interest of the non-party. *See also* 3 STANDARD PA. PRACTICE 2d § 14:364 (2009). Rule 2327(4) is satisfied where a party has "some right, whether legal or equitable, which will be affected by the proceedings." *Acorn Dev. Corp. v. Zoning Hr'g Bd. of*

Upper Merion Twp., 523 A.2d 436, 437-38 (Pa. Cmwlth. 1986) (quoting 8 Goodrich-Amram 2d §2327:7). Intervention is appropriate when a “cause of action of the applicant’s own . . . will be affected” by the action in which intervention is sought. 3 STANDARD PA. PRACTICE 2d § 14:363 (2009). See also *Marion Power Shovel Co. v. Fort Pitt Steel Casting Co.*, 426 A. 2d 696, 700 (Pa. Super. 1981).

Intervention is warranted in this case because the Document Request No. 4 e-mails that Plaintiff seeks in in his Motion to Compel include materials protected by the attorney-client and work product privileges.

Rule 4003.3 of the Pennsylvania Rules of Civil Procedure excludes from discovery “the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. Further, the work product doctrine protects “the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *Bagwell v. Pa. Dept. of Education*, 103 A.3d 409, 416 (Pa. Commw. 2014). Anticipation of litigation is not required for the work product privilege to attach. *Id.* at 417.

The existence and scope of the attorney-client relationship between Mr. Schultz and Ms. Baldwin remains unsettled. In the criminal case, Mr. Schultz filed numerous motions regarding that attorney-client relationship and seeking to preclude the testimony of Ms. Baldwin, on the grounds that Ms. Baldwin’s grand jury testimony was in violation of the attorney-client and work product privileges. In a January 14, 2015 Memorandum Opinion and Order, Judge Todd Hoover

of the Court of Common Pleas of Dauphin County ruled that no individual attorney-client relationship existed between Mr. Schultz and Ms. Baldwin.¹

Under Pennsylvania law, orders denying claims of privilege are immediately appealable as of right, pursuant to *Commonwealth v. Kennedy*, 876 A.2d 939 (Pa. 2005), *Commonwealth v. Harris*, 32 A.2d 243 (Pa. 2011), and Rule 313 of the Pennsylvania Rules of Appellate Procedure. Accordingly, on February, 12, 2015, Mr. Schultz filed a Notice of Appeal to the Superior Court, challenging Judge Hoover's conclusions regarding the attorney-client relationship between Mr. Schultz and Ms. Baldwin. That appeal is docketed at 280 MDA 2015. Various motions and transcripts related to the issue of the attorney-client relationship remain under seal at the direction of Judge Hoover in the criminal case, and Judge Hoover granted a stay of the proceedings pending the outcome of the appeal, indicating that the trial court intends to respect the appellate courts' process and Mr. Schultz and his codefendants' right to seek review.

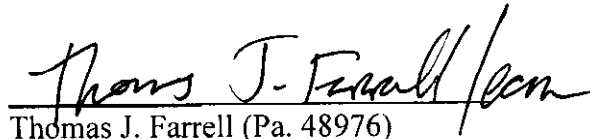
The matter is currently within the jurisdiction of the Pennsylvania Superior Court – there has not yet been any ultimate resolution. “Once putatively privileged material is in the open, the bell has been rung, and cannot be unrung by a later appeal.” *Commonwealth v. Harris*, 32 A.3d 243, 249 (Pa. 2011) (internal citations omitted). Mr. Schultz has a clear and undeniable interest in preventing disclosure of privileged material and he should be permitted to intervene to file the attached motion for protective order.

¹ See Memorandum Opinion and Order, *Commonwealth v. Schultz*, Nos. 3616 CR 2013, 5164 CR 2011, available online at <http://www.dauphincounty.org/government/Court-Departments/Curley-Schultz-Spanier/Documents/January%2014,%202015%20-%20Memorandum%20Opinion%20and%20Order%20on%20Curley,%20Schultz%20and%20Spanier.pdf>

V. CONCLUSION

For the above reasons, Mr. Schultz respectfully requests that this Honorable Court grant his Emergency Petition to Intervene pursuant to Pennsylvania Rules of Civil Procedure 2327 and 2328 and accept for filing the attached Motion for Protective Order.

Dated: April 17, 2015

Handwritten signature of Thomas J. Farrell in black ink, written over a horizontal line.

Thomas J. Farrell (Pa. 48976)

FARRELL & REISINGER, LLC

436 Seventh Avenue

Koppers Building, Suite 300

Pittsburgh, PA 15219

Telephone: (412) 894-1380

Facsimile: (412) 894-1381

tfarrell@farrellreisinger.com

Counsel for Gary C. Schultz

VERIFICATION

I, Gary C. Schultz, verify that the statements made in the foregoing Emergency Petition to Intervene are true and correct to the best of my knowledge, information and belief. I understand this verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

Dated:



Gary C. Schultz

EXHIBIT A

*Counsel for Gary C. Schultz,
Petitioner*

CENTRE COUNTY
COURT OF COMMON PLEAS

CIVIL ACTION NO. 2012-1804

HON. THOMAS G. GAVIN

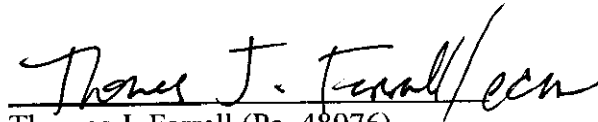
To: Elliot A. Strokoff, Esq.
Strokoff & Cowden, P.C.
132 State Street
Harrisburg, PA 17101
[eas@strokoffandcowden.com](mailto: eas@strokoffandcowden.com)
Counsel for Plaintiff

W. Tim Fleming, Esq.
Fleming Law Office
204 E. Calder Way, Suite 304
State College, PA 16801
Local Counsel for Plaintiff

Nancy Conrad, Esq.
White and Williams, LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
conradn@whiteandwilliams.com
Counsel for Defendant
Pennsylvania State University

PLEASE TAKE NOTICE that Intervenor Gary C. Schultz's Motion for Protective Order will be presented to the Court in Courtroom ____, on ____, 2015, at _____.m.

Dated: April 17, 2015

Handwritten signature of Thomas J. Farrell in cursive script.

Thomas J. Farrell (Pa. 48976)
FARRELL & REISINGER, LLC
436 Seventh Avenue
Koppers Building, Suite 300
Pittsburgh, PA 15219
Telephone: (412) 894-1380
Facsimile: (412) 894-1381
tfarrell@farrellreisinger.com

Counsel for Gary C. Schultz

FARRELL & REISINGER, LLC
By: Thomas J. Farrell, Esquire
436 Seventh Avenue
Koppers Building, Suite 300
Pittsburgh, PA 15219
Telephone: (412) 894-1380
Facsimile: (412) 894-1381
E-mail: tfarrell@farrellreisinger.com

*Counsel for Gary C. Schultz,
Petitioner*

MICHAEL J. McQUEARY,
Plaintiff

v.

THE PENNSYLVANIA STATE UNIVERSITY,
Defendant

:
:
:
:
CENTRE COUNTY
COURT OF COMMON PLEAS

:
:
:
:
CIVIL ACTION NO. 2012-1804

:
:
:
:
HON. THOMAS G. GAVIN

**NON-PARTY GARY C. SCHULTZ'S
MOTION FOR PROTECTIVE ORDER**

Intervenor Gary C. Schultz hereby moves pursuant to Pennsylvania Rule of Civil Procedure 4012 for a protective order to prevent disclosure of privileged material. In support of this petition, Mr. Schultz avers as follows:

1. On October 2, 2012, Plaintiff Michael McQueary filed a complaint, raising (1) Whistleblower, (2) Defamation, and (3) Misrepresentation claims against Defendant Pennsylvania State University ("PSU").

2. Mr. Schultz was not named as a defendant in this action, but has been granted leave to intervene to protect his interest in preventing disclosure of privileged communications.

3. Plaintiff has filed a Motion to Compel Production of Documents seeking disclosure of numerous documents, including e-mails from November 1, 2011 – November 3,

2011 [PSU000341-352] between Cynthia Baldwin, then-General Counsel for PSU; counsel for Timothy Curley; and undersigned counsel for Mr. Schultz pertaining to a statement issued by PSU in November 2011.

4. Mr. Schultz is currently a defendant in criminal proceedings.¹ The charges against Mr. Schultz involve circumstances that allegedly occurred when he was employed by PSU. Plaintiff McQueary is a Commonwealth witness in those proceedings. Mr. Schultz has asserted attorney-client and work product privileges regarding his communications with Ms. Baldwin, and has consistently maintained that Ms. Baldwin was his attorney during the investigation that led to his charges.

5. On January 14, 2015, Judge Todd Hoover of the Court of Common Pleas of Dauphin County issued a Memorandum Opinion and Order ruling that no individual attorney-client relationship existed between Mr. Schultz and Ms. Baldwin.

6. Because orders rejecting claims of privilege are immediately appealable², Mr. Schultz filed a Notice of Appeal on February 12, 2015 challenging Judge Hoover's conclusions regarding the attorney-client relationship between him and Ms. Baldwin. That appeal is docketed at 280 MDA 2015. In light of that appeal, the criminal trial has been stayed.

7. The documents that Plaintiff asks this Court to force PSU to produce are e-mails between Mr. Schultz's former attorney Ms. Baldwin and undersigned counsel, Mr. Schultz's attorney for the criminal matter.

¹ Mr. Schultz is charged in Dauphin County at *Commonwealth v. Gary C. Schultz*, CP-22-CR-03616-2013 and CP-22-CR-05164-2011

² See *Commonwealth v. Kennedy*, 876 A.2d 939 (Pa. 2005), *Commonwealth v. Harris*, 32 A.2d 243 (Pa. 2011), and Pa.R.A.P. 313.

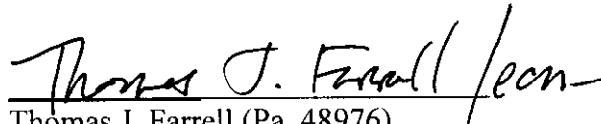
8. These e-mails, as discussed in the accompanying Memorandum of Law, which is incorporated by reference, are privileged under the work product doctrine and are not subject to discovery. *See* Pa. R. Civ. P. 4003.1(a), 4003.3.

9. Because PSU's production of the documents Plaintiff seeks would result in the disclosure of privileged material, Mr. Schultz moves this Court for an order pursuant to Rule 4012 of the Pennsylvania Rules of Civil Procedure protecting e-mails sent between Ms. Baldwin and Mr. Schultz's undersigned counsel during the period November 1 – 3, 2011 regarding a statement issued by PSU.

WHEREFORE, Mr. Schultz respectfully requests that this Court enter an order in the form proposed prohibiting PSU's disclosure of documents that are protected work product.

Respectfully submitted,

Dated: April 17, 2015

A handwritten signature in black ink, reading "Thomas J. Farrell /ecm-". The signature is written over a horizontal line.

Thomas J. Farrell (Pa. 48976)

FARRELL & REISINGER, LLC

436 Seventh Avenue

Koppers Building, Suite 300

Pittsburgh, PA 15219

Telephone: (412) 894-1380

Facsimile: (412) 894-1381

tfarrell@farrellreisinger.com

Counsel for Gary C. Schultz

FARRELL & REISINGER, LLC
By: Thomas J. Farrell, Esquire
436 Seventh Avenue
Koppers Building, Suite 300
Pittsburgh, PA 15219
Telephone: (412) 894-1380
Facsimile: (412) 894-1381
E-mail: tfarrell@farrellreisinger.com

*Counsel for Gary C. Schultz,
Petitioner*

MICHAEL J. McQUEARY,
Plaintiff

v.

THE PENNSYLVANIA STATE UNIVERSITY,
Defendant

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

NOVEMBER TERM, 2013
NO. 2298

**GARY C. SCHULTZ'S
MEMORANDUM OF LAW IN SUPPORT OF
HIS MOTION FOR PROTECTIVE ORDER**

Intervenor Gary C. Schultz hereby seeks a protective order pursuant to Rule 4012, and in support thereof states as follows:

I. MATTER BEFORE THE COURT

The matter before the Court is Mr. Schultz's motion for a protective order.

II. QUESTION PRESENTED

Should this Court enter a protective order preventing the disclosure of e-mails between Mr. Schultz's former attorney Cynthia Baldwin and undersigned counsel, Mr. Schultz's current attorney, when these e-mails are privileged under the work product doctrine?

SUGGESTED ANSWER: Yes.

III. BACKGROUND

Plaintiff brought various claims against defendant Pennsylvania State University (“PSU”). Mr. Schultz is currently the subject of criminal proceedings involving circumstances that allegedly occurred when he was employed by PSU. Plaintiff is a Commonwealth witness in those proceedings. Mr. Schultz now seeks to preclude Plaintiff from compelling the disclosure of work product e-mails between Ms. Baldwin, then-General Counsel for PSU and former attorney for Mr. Schultz, and undersigned counsel regarding the preparation of a statement issued by PSU in November 2011, regarding the Office of Attorney General’s release of the investigating grand jury presentment leading to the charges against Mr. Schultz, Tim Curley, and Gerald Sandusky.

IV. ARGUMENT

On good cause, discovery shall be prohibited or limited when “justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense” Pa. R. Civ. P. 4012(a). Good cause exists for entry of a protective order in this case. Discovery into privileged matters is impermissible. *See* Pa. R. Civ. P. 4011(c), 4003.1(a), 4003.3. On December 4, 2014, Plaintiff filed a Motion to Compel Production of Documents, asking this Court to force PSU to provide “more than a dozen emails (*sic*) from November 1, 2011 – November 3, 2011 [PSU000341-000352] between the then General Counsel of the Defendant and the then attorneys for two Penn State employees, regarding the draft of the statement which was published as Exhibit B to the Complaint.”¹ PSU has withheld these

¹ Plaintiff’s Motion to Compel Production of Documents, filed December 4, 2014, at ¶6

documents and noted them on a privilege log accompanying the Defendant's Third Supplemental Response.²

Plaintiff claims that these documents are not privileged because they "were not between attorney and client made for the purpose of obtaining or providing legal advice."³ Plaintiff is correct that these e-mails are not confidential communications between attorney and client, but his assertion that they are not privileged is incorrect. These documents are excluded from discovery under the work product doctrine.

Pennsylvania Rule of Civil Procedure 4003.3 provides that "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." This provision, known as the work product doctrine, exists "to shield the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case. The doctrine promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1062 (Pa. Super. 2005) (internal citations omitted). The Pennsylvania Supreme Court has stated, "the work product protection supports our judicial system, based on the adversarial process by allowing counsel privacy to develop ideas, test theories, and explore strategies in support of the client's interest." *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A.3d 680, 686 (Pa. 2013).

The work product doctrine is not restricted to materials created for the purpose of litigation. The Commonwealth Court has stated that "such a confined construction would render attorney drafts of contracts, memoranda and countless other examples of work product, prepared

² *Id.*

³ *Id.* at ¶8.

in a transactional or any non-litigation capacity, susceptible to discovery or disclosure.” *Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 417 (Pa. Commw. 2014).

The e-mails that Plaintiff asks this Court to make discoverable are work product. All of them are communications between Mr. Schultz’ lawyer, Thomas Farrell; Mr. Curley’s lawyer, Caroline Roberto; and Cynthia Baldwin, then PSU’s general counsel concerning the press release that PSU issued in early November 2011 speaking about filing of charges against Mr. Curley and Mr. Schultz. They include the planning, mental processes, opinions, conclusions, and legal theories of Mr. Schultz’s attorneys concerning those charges.

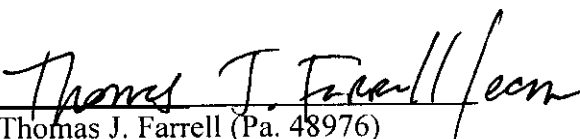
This Court should grant Mr. Schultz’s Motion and deny Plaintiff’s request for the documents PSU has withheld as work product.

V. CONCLUSION

Mr. Schultz respectfully asks that this Honorable Court enter a protective order pursuant to Rule 4012(a) barring disclosure of e-mails sent between counsel during the period of November 1 – 3, 2011 and labeled PSU000341-000352.

Respectfully submitted,

Dated: April 17, 2015


Thomas J. Farrell (Pa. 48976)
FARRELL & REISINGER, LLC
436 Seventh Avenue
Koppers Building, Suite 300
Pittsburgh, PA 15219
Telephone: (412) 894-1380
Facsimile: (412) 894-1381
tfarrell@farrellreisinger.com

Counsel for Gary C. Schultz

CERTIFICATE OF SERVICE

I, Thomas J. Farrell, hereby certify that on this 17th day of April, 2015, a true and correct copy of the foregoing Gary C. Schultz's Emergency Petition to Intervene was served upon counsel via e-mail and first class mail as follows:

Elliot A. Strokoff, Esq.
Strokoff & Cowden, P.C.
132 State Street
Harrisburg, PA 17101
[eas@strokoffandcowden.com](mailto: eas@strokoffandcowden.com)
Counsel for Plaintiff

W. Tim Fleming, Esq.
Fleming Law Office
204 E. Calder Way, Suite 304
State College, PA 16801
Local Counsel for Plaintiff

Nancy Conrad, Esq.
White and Williams, LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
[conradn@whiteandwilliams.com](mailto: conradn@whiteandwilliams.com)
Counsel for Defendant
Pennsylvania State University


Thomas J. Farrell