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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:
) 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

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.	:	

**MEMORANDUM OF LAW IN SUPPORT OF
THE PENNSYLVANIA STATE UNIVERSITY'S
SECOND MOTION TO STAY PROCEEDINGS**

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DEBRA G. HOFF
PROthonOTARY
CENTRE COUNTY, PA

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**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.

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; Adelpia 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,

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

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ORIGINAL

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 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
Fleming Law Offices
111 Sowers Street, Suite 330
State College, PA 16801

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