

FILED FOR RECORD  
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DEBRA C. JIMMEL  
PROTHONOTARY  
CENTRE COUNTY, PA

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**MICHAEL J. MCQUEARY**  
Plaintiff

vs.

**THE PENNSYLVANIA STATE  
UNIVERSITY,**  
Defendant

: IN THE COURT OF COMMON PLEAS  
: CENTRE COUNTY, PENNSYLVANIA  
:  
: NO. 2012-1804  
:  
: CIVIL ACTION  
:  
: JURY TRIAL DEMANDED

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**PLAINTIFF'S ANSWER TO DEFENDANT'S MOTION  
TO STAY PROCEEDINGS**

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The Plaintiff, Michael J. McQueary, by his attorneys Strokoff & Cowden, P.C., requests that this Honorable Court deny the Defendant's Motion to Stay this civil action averring in support thereof as follows:

1. Admitted.
2. Admitted.
3. Admitted in part, denied in part. It is admitted that

Plaintiff's Complaint contains a number of allegations related to Timothy Curley and Gary Schultz, who are the subjects of the cited criminal actions

pending in the Court of Common Pleas of Dauphin County, Pennsylvania. It is denied that these criminal actions are “parallel” criminal proceedings as that term is used in the precedent cited by the Defendant in ¶8 and ¶9 of its Motion. On the contrary, a “parallel criminal proceeding” is a criminal proceeding which is brought by the federal or state government at or about the same time as, or subsequent to, civil proceedings which had been initiated by the federal or state government concerning the same subject matter. It is also believed, and therefore averred, that Timothy Curley is not a former Penn State employee, but rather is a current employee on paid administrative leave.

4. It is admitted that this averment is an accurate partial quote from ¶46 of the Complaint.

5. It is admitted that this averment is an accurate partial quote from ¶60 of the Complaint.

6. It is admitted that this averment is an accurate partial quote from ¶63 of the Complaint.

7. This averment is capable of more than one interpretation.

For purposes of this motion, it is admitted that if the Defendant, notwithstanding its embrace of the “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” (hereafter the Freeh Report), disputes ¶60 of this Complaint, then the conduct of Messrs. Curley and Schultz would be a matter to be tried in this instant civil action.

8. The legal citations in this averment are inapposite to the case at bar.

In Re: Penn-Delco School District involved a tax assessment appeal in Common Pleas Court where the parties agreed to stay the action pending disposition of an appeal pending in the Commonwealth Court. 903 A.2d at 603. Following the Commonwealth Court's decision in the appeal the trial court lifted the stay and scheduled a trial. Id. The taxpayer objected to the lifting of the stay because a Petition for Allowance of Appeal to the Supreme Court was still pending. The sentence immediately following the statement of "broad discretion to grant or deny a stay" quoted by the Defendant in its motion, continued "Within its discretion, a trial court possesses the inherent power to stay a case during the pendency of another matter which may resolve the stayed case." 903 A.2d 607. The outcome of the Curley and Schultz criminal proceedings will not resolve the instant case.

The case of United States v. Kordel, cited by the Defendant, actually undermines its motion. In Kordel, the respondents were corporate officers who were convicted, along with the corporation, for violations of the Federal Food, Drug and Cosmetic Act. 397 U.S. at 2. At issue in Kordel was whether the federal government's use of answers to interrogatories in a nearly contemporaneous civil proceeding brought by the federal government operated to violate the individual corporate officer's Fifth Amendment privilege against compulsory self-incrimination. Id. at 2-3. In Kordel, the United States Supreme Court held that the individual corporate officers had the right to

invoke a Fifth Amendment privilege against compulsory self-incrimination, even if the corporation had no such privilege. 397 U.S. at 8.

However, the Supreme Court went on to hold that the corporation was obliged, upon being served with interrogatories,

“to ‘appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation.’ The corporation could not satisfy its obligation under Rule 33 simply by pointing to an agent about to invoke his constitutional privilege. It would indeed be incongruous to permit a corporation to select an individual to verify the corporation’s answers, who because he fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have.” Id.

The United States Supreme Court in Kordel opined that in the event that “no one can answer the interrogatories addressed to the corporation without subjecting himself to a ‘real and appreciable’ risk of self-incrimination . . . the appropriate remedy would be a protective order under Rule 30(b) postponing civil discovery until termination of the criminal action.” 397 U.S. at 9.

The Defendant in the case at bar has not alleged that no employee or agent of the Pennsylvania State University can be found who can answer the Complaint without a “real and appreciable risk of self-incrimination.”

Similarly, Bierstein v. Whitman, cited by Defendant, is inapposite. The Bierstein case dealt with a situation where the trial of a medical malpractice case was continued on a number of occasions and the trial judge granted a last continuance on condition that the case had to be disposed of at the subsequent trial term. 50 A.2d at 334-335. The Plaintiff’s attorney then

withdrew from the case and the Plaintiff was unable to engage a new attorney until just a few days before the trial was scheduled to begin. The just-engaged plaintiff's attorney first asked for a general continuance, which was denied by the trial judge. The just-engaged attorney thereupon put on one witness and then asked for leave to adjourn for the day and present additional testimony the following day, which was denied. Thereupon, the plaintiff's attorney was constrained to rest and the trial court granted a compulsory nonsuit. The Supreme Court held that under the unusual circumstances of the case, the denial of the less than one day continuance was an abuse of discretion. 50 A.2d at 335-336. The Defendant, in the case at bar, is not asking for a one day stay, but rather seeks an open ended stay; nor is the Defendant in this case facing an immediate and potentially prejudicial dispositive court order.

9. Again, the Golden Quality Ice Cream Company case cited by the Defendant is inapposite to the case at bar. In Golden Quality Ice Cream, five corporations and several individuals were indicted on charges of criminal violations of the federal anti-trust law. 87 F.R.D. at 55. Shortly thereafter, seven civil actions were filed against the five corporate defendants in the criminal case. Id. The corporate defendants moved for a stay of all proceedings in the civil cases pending the completion of the criminal case arguing that the burden of civil discovery would seriously hamper their preparations for the criminal proceeding and also that civil discovery would pose the danger of interfering with the Fifth Amendment rights of the individual defendants in the criminal proceeding. Even though in that case the civil

corporate defendants were simultaneously facing criminal charges, and even though a successful prosecution would resolve the issue of civil anti-trust liability, Judge Pollak refused to issue the broad stay requested. Rather, he allowed the case to proceed with limited discovery, with the intent of temporarily suspending proceedings 60 days before the criminal trial was to begin, “in order to allow defendants an unobstructed period of two months in which to prepare their defense against the criminal charges.” Id. at 60. In the case at bar, there is no claim that the Defendant needs to prepare its defense against criminal charges. In addition, Judge Pollak noted the doubtful relevance of the defendants’ apparent concern “that materials unearthed during civil discovery may eventually inure to the benefit of the Government in the prosecution of the criminal action.” Id. at 57.

10. Denied as stated. It is unclear from the court orders attached as Exhibit A to Defendant’s Motion what “standard” the Philadelphia Court of Common Pleas used with respect to those civil cases. However, it is to be noted that a defendant listed in the caption of 3 of those cases, “Gerald Sandusky” was, and currently is, involved in criminal proceedings. Also, it is believed, and therefore averred, that the pendency of mediation(s) to fully and finally resolve the litigations may likely have influenced the court.

11. Denied as stated. Any significant infringement on a constitutional right, such as the right to a speedy trial under Article I §11 of the Pennsylvania Constitution, constitutes an irreparable harm. And as the Pennsylvania Supreme Court noted in the Bierstein case cited by the

Defendant, parties to a lawsuit, are “entitled to have the controversy between them promptly adjudicated while witnesses are still available and memories are undimmed by long intervening years.” 50 A.2d at 336.

12. Denied. The Defendant has not pled any facts setting forth how it will be prejudiced if this civil action moves forward. The Defendant has the benefit of the comprehensive investigation and evidence provided by the “Freeh Report”, which the Defendant University has publicly embraced, and also has available to it the Grand Jury testimony of Messrs. Curley and Schultz. In addition, Counts I and II of the Complaint (Whistleblower and Defamation) do not depend upon any testimony or knowledge of Messrs. Curley and Schultz. Finally, in the event any discovery in this civil action might invoke Constitutional issues which counsel themselves could not in good faith resolve, then the appropriate response at that time would be to seek a protective order, as suggested by the U.S. Supreme Court in Kordel.

13. Denied. The Defendant has not pled any facts setting forth how it will be severely prejudiced if this civil action moves forward. The Defendant has the benefit of the comprehensive investigation and evidence provided by the “Freeh Report”, which the Defendant University has publicly embraced, and also has available to it the Grand Jury testimony of Messrs. Curley and Schultz. In addition, Counts I and II of the Complaint (Whistleblower and Defamation) do not depend upon any testimony or knowledge of Messrs. Curley and Schultz. Finally, in the event any discovery in this civil action might invoke Constitutional issues which counsel

themselves could not in good faith resolve, then the appropriate response at that time would be to seek a protective order as suggested by the U.S. Supreme Court in Kordel.

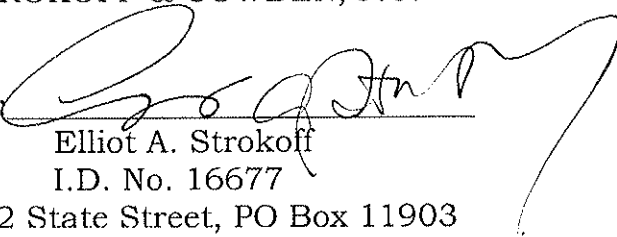
14. It is denied that staying the instant action will also serve the interests of the Court and the public. The Defendant does not specify how indefinitely staying the instant action will serve the interests of the Court and the public. Furthermore, the criminal proceedings against Messrs. Curley and Schultz, although currently scheduled to begin January 7, 2013, are also subject to pending motions by the Defendants for a continuance. Further, any appeals from those criminal proceedings could last for years.

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court deny the Defendant's Motion to Stay Proceedings.

Respectfully submitted,

STROKOFF & COWDEN, P.C.

By



Elliot A. Strokoff  
I.D. No. 16677

DATE: 10/31/12

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(717) 233-5353



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**CERTIFICATE OF SERVICE**  
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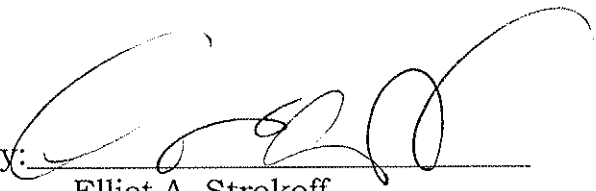
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I, the undersigned, certify that I have this day served a true and correct copy of the foregoing by fax and first-class mail, postage prepaid, on the following person(s):

Nancy Conrad, Esq.  
White and Williams LLP  
3701 Corporate Parkway, Suite 300  
Center Valley, PA 18034

**Via Fax: 610-782-4935**

Dated: 10/31/12

By:   
Elliot A. Strokoff