



By: Caroline M. Roberto (I.D. No. 41524)
carolineroberto@comcast.net
 429 4th Avenue, Suite 500
 Pittsburgh, PA 15219
 (412) 391-4071

Attorney for Non-Party Timothy M. Curley

MICHAEL J. MCQUEARY,
 Plaintiff,

v.

THE PENNSYLVANIA STATE UNIVERSITY,
 Defendant.

COURT OF COMMON PLEAS
 OF CENTRE COUNTY

DOCKET NO. 2012-1804

FILED FOR RECORD
 2015 APR 17 PM 4:13
 DEBRA C. HINCH
 PROthonotary
 CENTRE COUNTY, PA

**NON-PARTY TIMOTHY M. CURLEY'S
 EMERGENCY PETITION TO INTERVENE**

Non-party Timothy M. Curley petitions to intervene in this matter pursuant to Pennsylvania Rule of Civil Procedure 2327(4) for the purpose of filing a motion for protective order (attached hereto as Exhibit A) to prevent disclosure of work product and privileged communications. In support of this petition, Mr. Curley submits the accompanying memorandum of law, which is incorporated by reference herein, and avers as follows:

1. On October 12, 2012, plaintiff filed a complaint alleging counts in: (1) Whistleblower; (2) Defamation; and (3) Misrepresentation against defendant Pennsylvania State University ("PSU").
2. Mr. Curley was not named as a defendant in this action.
3. Documents sought in this case from the Defendant-PSU include communications between Cynthia Baldwin, who previously acted as Mr. Curley's attorney in relation to matters that are the subject of plaintiff's complaint, and present counsel to Mr. Curley.

4. Plaintiff's December 4, 2014 Motion to Compel these communications threatens to infringe Mr. Curley's attorney-client privilege, common interest privilege and work product doctrine.

5. Mr. Curley is currently the subject of criminal proceedings involving allegations related to those made against PSU in this case. In the criminal case, Mr. Curley filed motions to dismiss the charges against him and to preclude the testimony of Ms. Baldwin, on the grounds that Ms. Baldwin's testimony breached the attorney-client privilege and the charges against him were based on Ms. Baldwin's improper grand jury testimony.

6. On January 14, 2015, Judge Todd Hoover of the Court of Common Pleas of Dauphin County held that no individual attorney-client relationship existed between Mr. Curley and Ms. Baldwin. *See Commonwealth v. Curley*, No. 3614 CR 2013; 5165 CR 2011, slip op. at 27-28.

7. Because orders rejecting claims of privilege are immediately appealable, Mr. Curley appealed the order to the Superior Court, challenging Judge Hoover's conclusion that there was no attorney-client relationship between him and Ms. Baldwin. *Commonwealth v. Curley*, Superior Court No. 299 MDA 2015.

8. Plaintiff in this action now seeks to compel production of documents. *See* 12/4/14 Plaintiff's Motion to Compel Defendant's Production of Documents, para. 6 (seeking to compel production of "more than a dozen emails 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."").

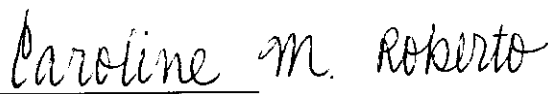
9. Through his Motion to Compel, the Plaintiff clearly seeks documents which touch on issues within the scope of the attorney client privilege, work product doctrine and common interest privilege, as asserted by Mr. Curley.¹

10. Because allowance of such discovery would result in the disclosure of privileged communications, Mr. Curley now 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 limiting the scope of the documents produced.

WHEREFORE, the Court should enter an order in the form proposed allowing Mr. Curley to intervene in this case and file the attached motion for protective order.

Respectfully submitted,

Dated: April 17, 2015

 by HED
Caroline M. Roberto (Pa. I.D. No. 41524)
429 4th Avenue, Suite 500
Pittsburgh, Pa. 15219
Telephone: 412-391-4071
Facsimile: 412-391-1190
carolineroberto@comcast.net
Attorney for Timothy M. Curley

¹ Counsel for Mr. Curley sent a letter advising This Honorable Court of her position with regard to these documents. See February 17, 2015 Ltr. from Caroline M. Roberto to The Honorable Thomas G. Gavin, carbon copied to multiple counsel for PSU as well as counsel for the plaintiff. This letter is attached hereto as Exhibit B.

Attorney for Non-Party Timothy M. Curley

COURT OF COMMON PLEAS
OF CENTRE COUNTY

DOCKET NO. 2012-1804

Non-party Timothy M. Curley (“Curley”) seeks to intervene in this case for the purpose of filing the attached motion for protective order (Ex. A) limiting production of certain documents on the ground that the documents touch upon matters of attorney-client privilege, work product doctrine and common interest privilege. Because Mr. Curley is not a party in this action and is not the person from whom discovery is sought, this Court should grant Mr. Curley leave to intervene in this case so that he may assert his interest as the holder of that privilege.

The matter before the Court is Mr. Curley's emergency petition to intervene.

II. QUESTION PRESENTED

Should this Court allow non-party Timothy M. Curley to intervene under Pa. R. Civ. P. 2327(4) for the purpose of filing a motion for protective order when plaintiff is seeking documents from the Pennsylvania State University (“PSU”) relating to matters protected by the attorney-client privilege, work product doctrine and common interest privilege.

SUGGESTED ANSWER: Yes.

III. BACKGROUND

Plaintiff alleges a whistleblower, defamation and misrepresentation claim against defendant PSU. Mr. Curley is currently the subject of criminal proceedings involving allegations related to those made against PSU in this case.

Plaintiff has sought discovery of communications between present counsel for Mr. Curley and Cynthia Baldwin, who previously acted as Mr. Curley’s attorney in relation to matters that are the subject of plaintiff’s complaint. Mr. Curley now seeks to intervene in this matter for the purpose of seeking to limit document production only to those matters that are not within the scope of the attorney-client and work product privilege and common interest privilege. Intervention is necessary to prevent disclosure of confidential communications.

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 production of documents will reveal matters protected by the attorney-client and common interest privilege as well as the work product doctrine. For example, plaintiff has requested “Any and all documents relating to the writing and publication of Exhibit B to the Complaint”. 12/4/14 Motion to Compel at para. 4. Exhibit B is the public statement by the PSU President and in relation thereto, Plaintiff has specifically sought “more than a dozen emails... between the then General Counsel of the Defendant and the then attorneys for two Penn State employees”. *Id.*, at para. 6.

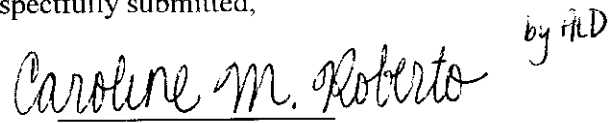
It is clear that plaintiff intends to seek documents and information to and explore subjects that Mr. Curley has repeatedly asserted are covered by attorney-client privilege, work product doctrine and common interest privilege based on Ms. Baldwin’s role as his attorney in the investigation. In the criminal case, Mr. Curley filed motions to dismiss the charges against him and to preclude the testimony of Ms. Baldwin, on the grounds that Ms. Baldwin’s testimony breached the attorney-client privilege and the charges against him were based on Ms. Baldwin’s improper grand jury testimony. On January 14, 2015, Judge Todd Hoover of the Court of Common Pleas of Dauphin County held that no individual attorney-client relationship existed between Mr. Curley and Ms. Baldwin. *See Commonwealth v. Curley*, No. 3615 CR 2013; 5165 CR 2011, slip op. at 27-28. Mr. Curley has filed an appeal of this Order with the Superior Court, as such orders are immediately appealable as of right. *See Commonwealth v. Harris*, 32 A.3d 243, 251 (Pa. 2011). The criminal case has been stayed pending the outcome of that appeal.

Because production of documents without the entry of a protective order would affect Mr. Curley's interest, he should be permitted to intervene to file the attached motion for protective order.

V. CONCLUSION

For these reasons, Mr. Curley respectfully requests that the Court grant Mr. Curley's petition to intervene pursuant to Rules 2327 and 2328 and file the attached motion for protective order.

Respectfully submitted,

 by *iflD*

Dated: April 17, 2015

Caroline M. Roberto (Pa. I.D. No. 41524)

429 4th Avenue, Suite 500

Pittsburgh, Pa. 15219

Telephone: 412-391-4071

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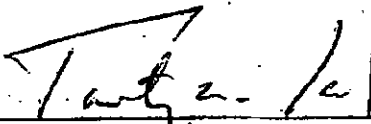
Attorney for Non-Party Witness Timothy M. Curley

VERIFICATION

I, Timothy M. Curley, verify that the statements made in the foregoing 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:

4/15/15



Timothy Mark Curley

EXHIBIT A

By: Caroline M. Roberto, Esquire
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429 4th Avenue, Suite 500
Pittsburgh, PA 15219
412-391-4071
412-391-1190 (facsimile)

Attorney for Intervenor Timothy M.
Curley

MICHAEL J. MCQUEARY
Plaintiff,

v.

THE PENNSYLVANIA STATE UNIVERSITY,

Defendant.

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: COURT OF COMMON PLEAS
: OF CENTRE COUNTY
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: DOCKET NO. 2012-1804
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NOTICE OF PRESENTATION

To: Elliot A. Strokoff
Strokoff & Cowden, P.C.
132 State Street
Harrisburg, PA 17101
Attorney for Plaintiff

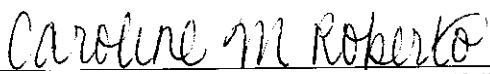
W. Tim Fleming
Fleming Law Office
204 E. Calder Way, Suite 304
State College, PA 16801
Attorney for Plaintiff

Nancy Conrad, Esq.
White and Williams, LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
Attorney for Defendant
Pennsylvania State University

PLEASE TAKE NOTICE that Intervenor Timothy M. Curley's Motion for Protective Order will be presented to the Court in City Hall, Courtroom ___, on _____, 2015, at _____.m.

Dated: April 17, 2015

Respectfully submitted,


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Attorney for Intervenor Timothy M. Curley

by AED

Attorney for Intervenor Timothy M.
Curley

COURT OF COMMON PLEAS
OF CENTRE COUNTY

DOCKET NO. 2012-1804

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Defendant.

AND NOW, this _____ day of _____, 2015, upon

consideration of non-party witness Timothy M. Curley's ("Curley") Motion for Protective Order, and any response thereto, it is hereby **ORDERED** and **DECREED** that the motion is **GRANTED**. It is further **ORDERED** that Pennsylvania State University shall not produce documents or disclose communications between Timothy M. Curley and Cynthia A. Baldwin or communications between Cynthia A. Baldwin and present counsel for Mr. Curley regarding the investigation of Gerald Sandusky and Mr. Curley's grand jury testimony.

J.

3. Documents sought in this case from the Defendant-PSU include communications between Cynthia Baldwin, who previously acted as Mr. Curley's attorney in relation to matters that are the subject of plaintiff's complaint, and present counsel to Mr. Curley.

4. The Motion to Compel these communications threatens to infringe Mr. Curley's attorney-client privilege, common interest privilege and work product doctrine.

5. Mr. Curley is currently the subject of criminal proceedings involving allegations similar to those made against PSU in this case. In the criminal case, Mr. Curley filed motions to dismiss the charges against him and to preclude the testimony of Ms. Baldwin, on the grounds that Ms. Baldwin's testimony breached the attorney-client privilege and the charges against him were based on Ms. Baldwin's improper grand jury testimony.

6. On January 14, 2015, Judge Todd Hoover of the Court of Common Pleas of Dauphin County held that no personal attorney-client relationship existed between Mr. Curley and Ms. Baldwin. *See Commonwealth v. Curley*, No. 3614 CR 2013; 5165 CR 2011, slip op. at 27-28.

7. Because orders rejecting claims of privilege are immediately appealable, Mr. Curley appealed the order to the Superior Court, challenging Judge Hoover's conclusion that there was no attorney-client relationship between him and Ms. Baldwin. In light of that appeal, the criminal case was stayed. *Commonwealth v. Curley*, Superior Court 299 MDA 2015.

8. Plaintiff in this action now seeks to compel production of documents. *See* 12/4/14 Plaintiff's Motion to Compel Defendant's Production of Documents, para. 6 (seeking to compel production of "more than a dozen emails 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.”).

9. Through his Motion to Compel, the Plaintiff clearly seeks documents which touch on issues within the scope of the attorney client privilege, work product doctrine and common interest privilege, as asserted by Mr. Curley.¹

10. Discovery into privileged matters is impermissible. *See* Pa. R. Civ. P. 4003.1(a).

11. Because allowance of the discovery sought from PSU regarding Ms. Baldwin would result in the disclosure of privileged communications, Mr. Curley seeks a protective order pursuant to Rule 4012 of the Pennsylvania Rules of Civil Procedure directing PSU not to disclose communications between Ms. Baldwin and Mr. Curley or Ms. Baldwin and present counsel for Mr. Curley regarding the investigation of Gerald Sandusky and Mr. Curley’s grand jury testimony.

WHEREFORE, Timothy M. Curley respectfully requests that the Court enter an order in the form proposed directing PSU not to produce documents regarding communications with Mr. Curley and present counsel for Mr. Curley regarding the investigation of Gerald Sandusky and Mr. Curley’s grand jury testimony.

¹ Counsel for Mr. Curley sent a letter advising This Honorable Court of her position with regard to these documents. *See* February 17, 2015 Ltr. from Caroline M. Roberto to The Honorable Thomas G. Gavin, carbon copied to multiple counsel for PSU as well as counsel for the plaintiff. This letter is attached hereto as Exhibit A.

Dated: April 17, 2015

Respectfully submitted,

Caroline M. Roberto

by HED

Caroline M. Roberto (Pa. I.D. No. 41524)
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carolineroberto@comcast.net

Attorney for Intervenor Timothy M. Curley

Attorney for Intervenor Timothy M.
Curley

COURT OF COMMON PLEAS
OF CENTRE COUNTY

[illegible]

DOCKET NO. 2012-1804

Intervenor Timothy M. Curley hereby seeks a protective order pursuant to Rule 6(e) of the Federal Rules of Civil Procedure. Support therefor states as follows:

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

Should this Court enter a protective order preventing the disclosure of communications by Mr. Curley's former attorney, Cynthia Baldwin, which are covered by the attorney-client privilege, common interest privilege and work product doctrine?

III. BACKGROUND

Plaintiff alleges a whistleblower, defamation and misrepresentation claim against defendant PSU. Mr. Curley is currently the subject of criminal proceedings involving allegations related to those made against PSU in this case.

Plaintiff has sought discovery of communications between present counsel for Mr. Curley and Cynthia Baldwin, who previously acted as Mr. Curley's attorney in relation to matters that are the subject of plaintiff's complaint. Mr. Curley now seeks to intervene in this matter for the purpose of seeking to limit document production only to those matters that are not within the scope of the attorney-client and work product privilege and common interest privilege. Intervention is necessary to prevent disclosure of confidential communications.

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). On December 4, 2014, Plaintiff filed a Motion to Compel Production of Documents. On February 13, 2015, Defendant filed a Response to Plaintiff's Motion to Compel Production of Documents which noted present counsel's assertions of privilege over the documents (Bates No. PSU 000341-000352). 2/13/15 Response to Plaintiff's Motion to Compel Production of Documents, at p. 12. In that Response, Defendant does not indicate any intent to further challenge production of those specific documents. *Id.*

Plaintiff's Motion to Compel and Defendant's Response thereto demonstrate that, if a protective order is not issued, documents may be produced that will disclose matters protected by the attorney-client, work product and common interest privilege.

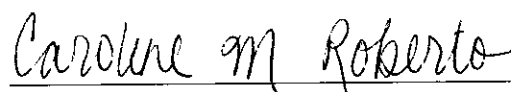
It is clear that plaintiff seeks documents over which Mr. Curley has repeatedly asserted the privileged based on Ms. Baldwin's role in the investigation. In the criminal case, Mr. Curley filed motions to dismiss the charges against him and to preclude the testimony of Ms. Baldwin, on the grounds that Ms. Baldwin's testimony breached the attorney-client privilege and the charges against him were based on Ms. Baldwin's improper grand jury testimony.

On January 14, 2015, Judge Todd Hoover of the Court of Common Pleas of Dauphin County held that no personal attorney-client relationship existed between Mr. Curley and Ms. Baldwin. See *Commonwealth v. Curley*, No. 3614 CR 2013; 5165 CR 2011, slip op. at 27-28. Mr. Curley appealed this Order to the Superior Court, and therefore the question of privilege remains open. Judge Hoover stayed the criminal case pending the outcome of that appeal. "[O]nce [privileged] material has been disclosed, any privilege is effectively destroyed." *Commonwealth v. Harris*, 32 A.3d 243, 247 (Pa. 2011). Thus, allowing disclosure of privileged material in this case is antithetical to the stay of the criminal case, which was put in place to protect against disclosure. Therefore, this Court should grant Mr. Curley's motion and direct PSU not to disclose matters within the scope of the attorney-client, work product or common interest privilege.

V. CONCLUSION

For these reasons, Mr. Curley respectfully requests that the Court enter a protective order pursuant to Rule 4012(a) barring PSU from disclosing the communications between Mr. Curley's present counsel and Ms. Baldwin regarding the investigation of Gerald Sandusky and Mr. Curley's grand jury testimony.

Dated: April 17, 2015



by HED

Caroline M. Roberto, Esquire

Pa. I.D. No. 41524

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Pittsburgh, PA 15219

Telephone: 412-391-4071

Facsimile: 412-391-1190

carolineroberto@comcast.net

Attorney for Intervenor Timothy M. Curley

EXHIBIT A

CAROLINE M. ROBERTO

ATTORNEY AT LAW

429 FOURTH AVENUE

SUITE 500

PITTSBURGH, PENNSYLVANIA 15219

(412) 391-4071

FAX (412) 391-1190

February 17, 2015

The Honorable Thomas G. Gavin
Court of Common Pleas of Chester County
P.O. Box 2746
West Chester, PA 19380-0989

RE: McQueary v. The Pennsylvania State University, No. 2012-1804

Your Honor:

I write on behalf of my client, Penn State's former Senior Athletic Director, Timothy Mark Curley. I represent Mr. Curley in the Dauphin County criminal case, ***Commonwealth v. Curley***, and other related matters. My understanding is that the plaintiff in the above-captioned matter is seeking to obtain email and other communications among myself; Thomas Farrell, counsel for Gary Schultz; and PSU General Counsel Cynthia Baldwin relating to press releases that were issued in November 2011 when criminal charges were initially filed. I am in receipt of Attorney Farrell's February 13, 2015, letter regarding this matter and agree with his position that the communications are privileged.

My position on behalf of Mr. Curley is that these communications fall within the attorney-client work product and common interest privileges. Ms. Baldwin represented Mr. Curley during the early stages of the criminal matter and communicated with me as successor counsel. Thereafter and during the time of the communications at issue, the University, Mr. Curley and Mr. Schultz all had a common interest. Thus, these discussions and emails fall under the common interest privilege and are attorney work product prepared in anticipation of litigation.

The Honorable Thomas G. Gavin
Page Two (2)
February 17, 2015

I request an opportunity to be heard further, in whatever manner the Court deems appropriate, before the Court decides this discovery issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Caroline M. Roberto".

Caroline M. Roberto
Counsel for Timothy Mark Curley

CMR:geb

cc: Nancy Conrad, Esq.
Elliot A. Strokoff, Esq.
Michael Mustokoff, Esq.
Daniel Walworth, Esq.
Thomas J. Farrell, Esq.
Elizabeth K. Ainslie, Esq.

EXHIBIT B

CAROLINE M. ROBERTO

ATTORNEY AT LAW

429 FOURTH AVENUE

SUITE 500

PITTSBURGH, PENNSYLVANIA 15219

(412) 391-4071

FAX (412) 391-1190

February 17, 2015

The Honorable Thomas G. Gavin
Court of Common Pleas of Chester County
P.O. Box 2746
West Chester, PA 19380-0989

RE: McQueary v. The Pennsylvania State University, No. 2012-1804

Your Honor:

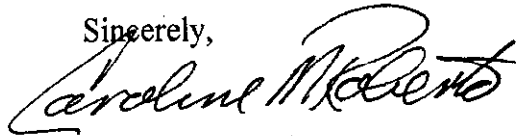
I write on behalf of my client, Penn State's former Senior Athletic Director, Timothy Mark Curley. I represent Mr. Curley in the Dauphin County criminal case, ***Commonwealth v. Curley***, and other related matters. My understanding is that the plaintiff in the above-captioned matter is seeking to obtain email and other communications among myself; Thomas Farrell, counsel for Gary Schultz; and PSU General Counsel Cynthia Baldwin relating to press releases that were issued in November 2011 when criminal charges were initially filed. I am in receipt of Attorney Farrell's February 13, 2015, letter regarding this matter and agree with his position that the communications are privileged.

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The Honorable Thomas G. Gavin
Page Two (2)
February 17, 2015

I request an opportunity to be heard further, in whatever manner the Court deems appropriate, before the Court decides this discovery issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Caroline M. Roberto". The signature is fluid and cursive, with a large, stylized initial "C".

Caroline M. Roberto
Counsel for Timothy Mark Curley

CMR:geb

cc: Nancy Conrad, Esq.
Elliot A. Strokoff, Esq.
Michael Mustokoff, Esq.
Daniel Walworth, Esq.
Thomas J. Farrell, Esq.
Elizabeth K. Ainslie, Esq.

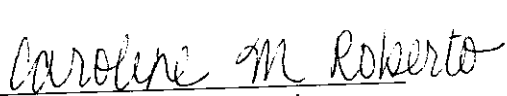
CERTIFICATE OF SERVICE

I, Caroline M. Roberto, hereby certify that on this 17th day of April, 2015, I caused the foregoing Timothy M. Curley's Motion to Intervene to be served upon counsel by electronic mail and first-class mail:

Elliot A. Strokoff
Strokoff & Cowden, P.C.
132 State Street
Harrisburg, PA 17101
Attorney for Plaintiff

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

Nancy Conrad, Esq.
White and Williams, LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
Attorney for Defendant
Pennsylvania State University

 by AED

Caroline M. Roberto, Esquire