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**IN THE COURT OF COMMON PLEAS  
OF CENTRE COUNTY, PENNSYLVANIA**

The ESTATE of JOSEPH PATERNO; WILLIAM  
KENNEY and JOSEPH V. ("JAY") PATERNO,  
former football coaches at Pennsylvania State  
University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President  
of the NCAA; and

EDWARD RAY, individually and as former  
Chairman of the Executive Committee of the  
NCAA,

Defendants.

CIVIL DIVISION

Docket No. 2013-2082

**BRIEF IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
LEAVE TO FILE UNDER  
SEAL AND TO ENFORCE  
THE COURT'S EARLIER  
PRIVILEGE  
DETERMINATIONS  
PURSUANT TO THE  
PROTECTIVE ORDER**

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University and Pepper Hamilton  
LLP

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**BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE  
UNDER SEAL AND TO ENFORCE THE COURT'S EARLIER PRIVILEGE  
DETERMINATIONS PURSUANT TO THE PROTECTIVE ORDER**

As a threshold matter, Penn State and Pepper Hamilton submit that the Motion is superfluous and wholly unnecessary, for two principal reasons. As further described *infra*, the inadvertently produced documents for which a privilege is claimed that are the subject of the

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Motion fall into two general categories: (A) work product prepared by the law firm of Freeh Sporkin & Sullivan (the “Freeh Firm”) and the investigators who worked with the Freeh Firm in the course of the investigation into the Sandusky allegations and related matters (primarily interview notes); and (B) emails between and among University trustees in 2011-2012, including numerous emails with the University’s attorneys. With respect to Category A: *these documents* have also been produced by Pepper Hamilton LLP, in response to this Court’s May 8, 2015, order enforcing the plaintiffs’ subpoena against Pepper Hamilton.<sup>2</sup> Given that the plaintiffs already have those identical documents in their possession from another source (Pepper Hamilton), the plaintiffs should simply have returned them to Penn State, and there simply is no reason – **none** – for this Court to review them in camera for purposes of ruling on the work product argument. If, however, the Court nevertheless elects to review the Category A documents in camera, it should conclude that the documents are protected from disclosure by the attorney work product doctrine and order plaintiffs’ counsel to return or destroy them immediately pursuant to paragraph 14 of the Stipulated Confidentiality Agreement and Protective Order (attached as Exhibit D to the Motion).<sup>3</sup>

The documents in Category B pose a different issue. *First*, as the undersigned counsel for Penn State previously explained to plaintiffs’ counsel, those documents – which contain

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<sup>2</sup> As this Court is aware, although Pepper Hamilton and Penn State have appealed this Court’s rulings with respect to their privilege claims, this Court and the Superior Court refused to stay Pepper Hamilton’s production obligations while those appeals are pending. Accordingly, in order to comply with this Court’s May 8, 2015, order (enforcing the plaintiffs’ subpoena *duces tecum*), Pepper Hamilton produced the very documents that are in Category A (and thousands of others) over objection and subject to the pending appeals.

<sup>3</sup> Penn State respectfully submits that the documents in Category A that consist of communications between Penn State representatives (*e.g.*, notes of interviews of high-ranking University representatives) are also protected by the attorney-client privilege. Penn State is mindful, however, that the Court has rejected its assertion of that privilege on the basis that the Freeh Firm had not been retained to provide “legal services” to the University. Accordingly, although Penn State preserves that argument for appeal, it will not repeat it here.

hundreds upon hundreds of attorney-client communications - are *utterly irrelevant* to the plaintiffs' remaining claims in this litigation. *Second*, this Court has never ruled that the communications in question (between and among University Trustees and the University's own counsel — **not the Freeh Firm**) are discoverable. *In fact, plaintiffs have never even argued – including in this Motion – that these attorney-client communications are not privileged.* In short, the inadvertently-produced documents in Category B plainly are not discoverable under the Pennsylvania Rules of Civil Procedure, and plaintiffs are acting in bad faith by keeping them. Moreover, in order to determine whether the communications in Category B are privileged and subject to clawback, the Court would need to review hundreds of emails on a document-by-document basis. This would be an extraordinarily time-consuming effort, one that the Court should decline to undertake given: (a) the documents' abject lack of relevance; and (b) the fact that plaintiffs advance no argument whatsoever as to why they are entitled to keep them.

In short, for any and all of these reasons, Penn State and Pepper Hamilton submit that the Court should deny the Motion in its entirety and direct plaintiffs' counsel to immediately destroy or return all of the inadvertently produced documents and destroy all notes they may have made about those documents, as paragraph 14 of the Protective Order requires.

### PROCEDURAL BACKGROUND

On June 29, 2015, counsel for Penn State produced 634 “documents” responsive to plaintiffs' document requests, of which 181 documents were inadvertently produced.<sup>4</sup> On July 6,

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<sup>4</sup> All of the documents are in electronic format. Due to a miscommunication or misunderstanding, document review attorneys for the University who had been tasked with pulling the documents cited in the endnotes to the Freeh Report identified those documents by clicking a box in the electronic database marked “Responsive.” When the database was swept for purposes of preparing the University's June 29 production, those documents that erroneously had been marked as “Responsive” by the reviewers were inadvertently included in the production. Plaintiffs do not dispute that the production was wholly inadvertent.

2015, plaintiffs' counsel wrote to the undersigned advising that the June 29 production included notes of interviews the Freeh Firm took during the investigation, and inquiring whether the University had intended to mark those materials as "Confidential" pursuant to the Protective Order. *See* Motion, Exhibit A (7/6/15 email from Trish Maher to Donna Doblick). This was the first time the University realized that those materials — which Penn State and Pepper Hamilton consistently have contended are protected from disclosure by the attorney work product doctrine and the attorney-client privilege — had been inadvertently produced. The very next day, acting pursuant to paragraph 14 of the Protective Order, counsel for the University: (a) requested that all of the parties return or destroy the inadvertently-produced documents; and (b) designated all of the inadvertently-produced documents as "Highly Confidential – Attorneys' Eyes Only" pursuant to paragraph 2(b) of the Protective Order. *See* Motion, Exhibit B (7/7/15 letter from Donna Doblick to all counsel of record) (the "Clawback Letter").

Counsel for the NCAA promptly certified that they had destroyed all of the documents in question. Counsel for the plaintiffs, however, refused to return or destroy the documents, and instead, filed the instant Motion, pursuant to paragraph 14 of the Protective Order, which provides that a party in receipt of inadvertently-produced documents may "seek leave of Court to file the specified document or information under seal and request a determination of the claim of privilege or other protection . . . ."

Upon closer review, counsel for the University recognized that some of the documents that were listed in the July 7 Clawback Letter, while produced inadvertently, are not privileged.

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*Continued from previous page*

These document numbers are actually understated, insofar as one of the electronic "documents" (produced bearing Bates numbers PSUPAT130136 to PSA132202) actually is a 2,066-page collection of thousands of emails spanning several months by and among University Trustees and counsel for the University (collectively, the "Category B" documents).

See Exhibit 1 (7/13/15 email from Donna Doblick to Joe Loveland). Accordingly, on August 18, 2015, counsel for the University sent a list of documents for which the University does *not* claim a privilege, thereby limiting the population of the documents that are the subject of the plaintiffs' Motion.<sup>5</sup> See Exhibit 2 hereto (8/18/15 email from Donna Doblick to Trish Maher, et al).

## ARGUMENT

### 1. The Freeh Firm's Work Product ("Category A" Documents)

The Court should order plaintiffs to return the inadvertently-produced Freeh Firm work product, both because plaintiffs have those documents from another source and because the documents plainly are protected from discovery by the attorney work product doctrine.

#### a. **There is no bona fide reason for plaintiffs to keep the copies of the Freeh Firm work product the University inadvertently produced, given that they have received them from another source.**

As a preliminary matter, plaintiffs have absolutely no legitimate reason to keep the Freeh Firm work product that the University inadvertently produced on June 29. As described *supra*, plaintiffs have received these same documents – *the identical documents* – from Pepper Hamilton. When advised of that fact, plaintiffs' response was nothing short of incredible: they claim that they "do not have the documents from either [Penn State or Pepper Hamilton] to the extent [they] are entitled" because both Penn State and Pepper Hamilton designated those documents as "Highly Confidential – Attorneys' Eyes Only." See Exhibit 2 (8/18/15 email from Donna Doblick to Trish Maher and Ms. Maher's 8/27/15 response). This contention is completely specious. It also is contrary to the terms of the Protective Order, which expressly allows a party (or in the case of Pepper Hamilton, a non-party) to mark documents as

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<sup>5</sup> Many of the Category B documents that are not privileged are plainly not relevant and thus are not within the scope of discoverable material under Pa. R. Civ. P. 4003.1. Without conceding the relevance of any of those documents, in order to limit the matters this Court must address, the University is not pursuing the return of those documents.

“Attorneys’ Eyes Only” if it believes that the disclosure of the material “would create a substantial risk of serious irreparable injury to the designating Party or another . . . .” *See* Motion, Exhibit D (Protective Order), § 2(b)).<sup>6</sup> There can be absolutely no dispute that Pepper Hamilton has produced to plaintiffs all of the Category A documents that are the subject of this Motion. Because plaintiffs unquestionably have received those documents from another source, they have absolutely no bona fide reason to keep the duplicate copies they received (inadvertently) from Penn State, and the inquiry should end there. For this reason alone, the Court should deny plaintiffs’ motion for in camera review of the Category A Freeh Firm documents, and order the plaintiffs to either return or destroy those materials pursuant to the provisions of the Protective Order.

**b. If the Court elects to review the Freeh Firm work product, it should conclude that those materials are protected by the attorney work product doctrine and are not discoverable.**

Plaintiffs also should be ordered to return the inadvertently-produced Category A documents because those materials fall squarely within the attorney work product doctrine and, as such, are not subject to discovery pursuant to Rule 4003.3 of the Pennsylvania Rules of Civil Procedure.

**i. This Court has not ruled on the work product argument.**

Plaintiffs’ Motion disingenuously and repeatedly suggests that all this Court need to is “enforce” its existing orders regarding the discoverability of the Freeh Firm work product. *See, e.g.,* Motion p. 2 (arguing that Penn State’s attempt to clawback the inadvertently-produced documents “is an improper attempt to use the Protective Order to re-litigate issues this Court has

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<sup>6</sup> As this Court is aware, plaintiffs have filed a motion seeking to strike Pepper Hamilton’s “Attorneys’ Eyes Only” (“AEO”) designations across the board. Plaintiffs also have advised counsel for the University that they intend to challenge the University’s designation of the inadvertently-produced privileged documents as AEO as well.



already decided.). These accusations are patently false. As plaintiffs are well aware, *this Court has never concluded that the Freeh Firm work product is discoverable*. First, when ruling on Penn State's objections to plaintiffs' notice of intent to serve a subpoena on Pepper Hamilton, the court ruled that Penn State lacked standing to raise the work product objection. See 9/11/14 Order p. 23 ("Penn State does not have standing to object based on the privilege of work product"). Although the Court suggested in dicta that the work product doctrine did not apply, the Court made it abundantly clear in its Rule 1925 opinion that this observation was dicta, given Penn State's lack of standing to raise the argument. See 12/5/15 Opinion p. 4 ("with respect to Penn State's objection to the Court's ruling that they do not have standing, the Court relies on its Order and Opinion of September 19 [sic, 11], 2014. With respect to Pepper Hamilton's objection to the subpoena based on the work product doctrine, *this issue is not properly before the Superior Court*") (emphasis added).

*Second*, in response to Pepper Hamilton's motion for a protective order and a stay of its obligations to produce privileged materials while Penn State's appeal from the September 11 order is pending, this Court once again concluded that the argument was not properly before it. See 11/20/14 Opinion p. 5 (writing that the work product argument was not properly before the Court because Pepper Hamilton had not yet lodged the objection in a written response to the subpoena). And, *third*, even though Pepper Hamilton subsequently served written objections to the subpoena, when the work product objection came before the Court again (in conjunction with plaintiffs' motion to enforce the subpoena), the Court concluded that it lacked jurisdiction to reach the merits of that argument, because of the pending appeals. See 5/8/15 Opinion and Order p. 4 ("the Court currently lacks jurisdiction to consider" the attorney work product doctrine

position). In short, the Court has never decided the merits of the attorney work product objection, and plaintiffs' contentions to the contrary are simply false.

In any event, the attorney work product argument is properly before the Court *now*. In order to demonstrate that they are entitled to retain documents that Penn State inadvertently produced, plaintiffs need to prove that the documents are discoverable under Pennsylvania law. *See* Pa. R. Civ. P. 4003.1 ("Subject to the provisions of Rules 4003.2 and 4003.5 inclusive and Rule 4011, *a party may obtain discovery regarding any matter, which is not privileged*, which is relevant to the subject matter involved in the pending action . . .") (emphasis added); Pa. R. Civ. P. 4003.3 ("discovery shall not include disclosure of the mental impressions of a party's attorney or his or her legal research or legal theories"); *see also* Motion, Exhibit D (Protective Order) § 14 a party in receipt of inadvertently produced documents may "request a determination of the claim of privilege"). As explained below, the Freeh Firm documents plainly are non-discoverable attorney work product under Rule 4003.3.

**ii. The Freeh Firm documents are protected from discovery by the attorney work product doctrine.**

The Freeh Firm documents that Penn State inadvertently produced on June 29 are protected from discovery as a matter of Pennsylvania law.

**(1) The University retained the Freeh Firm to provide legal services.**

On November 5, 2011, the Office of the Attorney General of Pennsylvania made public a presentment of the Thirty-Third Statewide Grand Jury of the Commonwealth of Pennsylvania (the "Presentment"). The Presentment raised allegations of the sexual abuse of children by former Penn State football coach Gerald Sandusky and allegations that Penn State personnel failed to report that abuse to the appropriate police and governmental authorities, and it also charged two high-ranking University officials with perjury.

In addition, as indicated in a letter dated November 9, 2011, sent to the then-President of the University, the Presentment prompted the U.S. Department of Education (“DOE”) to review the University’s compliance with federal crime reporting obligations under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics Act, 20 U.S.C. § 1092(f) (the “Clery Act”). *See Penn State’s Brief in Support of Response to Motion to Overrule Objections*, p. 2 (5/9/14). The first of several of Sandusky’s victims, “John Doe A,” filed a civil suit against the University on November 30, 2011. *Id.* On November 17, 2011, the NCAA also announced its intent to investigate Penn State for potential violations of its Constitution and Bylaws. *See First Amended Complaint* ¶ 57 (2/5/14). The Big Ten Conference also advised the University that it intended to investigate as well. *Id.*, ¶ 60.

In this intense environment of criminal charges, civil litigation, administrative investigations, and a media frenzy, the University retained the Freeh Firm to advise it as “external legal counsel” and to conduct an investigation into the allegations of child sexual abuse on the University’s campus and the alleged failure of University personnel to report that abuse to the appropriate police and governmental authorities. The Freeh Firm, in turn, retained Freeh Group International Solutions (“FGIS”), an affiliated investigative and consulting group, to assist it.

Penn State entered into a formal engagement letter with the Freeh Firm on November 18, 2011 (the “Engagement Letter”). *See Exhibit 3. The Scope of Engagement*, set forth in § 1 of the Engagement Letter, provides:

FSS has been engaged to serve as independent, external legal counsel to the Task Force to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University (“PSU”) personnel to report such sexual abuse to appropriate police and governmental authorities. The results of FSS’s investigation will be provided in a written report to the Task Force and other

parties as so directed by the Task Force. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and (iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS's report also will provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.<sup>7</sup>

*Id.* § 1.

The Engagement Letter is replete with references indicating that, in providing those services to the University, members of the Freeh Firm would be acting as lawyers and would be providing legal services to Penn State. *Id.*, § 5 (“For the purpose of *providing legal services* to the Task Force, FSS will retain Freeh Group International Solutions, LLC (‘FGIS’) to assist in this engagement.”) (emphasis added); *id.*, § 7 (“FSS will provide the above-described *legal services* for the Task Force’s benefit, for which the Trustees will be billed in the manner set forth above.”) (emphasis added); *id.*, § 8 (“Our agreement to represent the Task Force is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to [you] in any matters (whether involving the same substantive *areas of law for which you have retained us . . .* which do not involve the same factual and *legal issues as matters for which you have retained us . . .*”) (emphasis added); *id.*, § 10 (“FSS may *terminate its legal services* and withdraw from this engagement in the event our invoices are not paid in a timely manner”) (emphasis added); *id.*, § 11 (“In the course of our representation . . . , we will maintain a file . . . . We may also place in such file documents containing *our attorney work product, mental impressions or notes, drafts of documents*, and internal accounting records”) (emphasis added); *id.* (“FSS, of course, is delighted to be asked to

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<sup>7</sup> The “Task Force” is a reference to the Special Investigative Task Force formed by the University’s Board of Trustees. For convenience, because the Board’s Task Force functioned on behalf of the University, Penn State will simply refer to itself as “the University” throughout this brief.

*provide legal services* to the Task Force”) (emphasis added); *id.* (“should the Task Force ever wish to discuss any matter relating to *our legal representation*, please do not hesitate to call me directly”) (emphasis added).

Consistent with the parties’ understanding that the Freeh Firm was engaged to provide legal services to the University, the Engagement Letter also provides:

The work and advice which is provided to the Task Force under this engagement by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, *is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges*, unless appropriately waived by the parties or otherwise determined by law.

*Id.*, § 6 (emphasis added).

- (2) **Consistent with the terms of the engagement, the Freeh Firm lawyers conduct a confidential investigation, taking great pains not to waive the attorney-client privilege or the protections of the attorney work product doctrine.**

The Freeh Firm conducted a lengthy and comprehensive investigation of the allegations, the role of University personnel, and related matters. As part of its investigation, it collected over 3.5 million emails and other documents from the University and third parties (the “Source Documents”). *See* Exhibit 4 (excerpts of the Freeh Report). The Freeh Firm also conducted over 430 interviews of University personnel and other knowledgeable individuals, and created reports of those interviews and other significant attorney work product. *Id.*, p. 9. The Freeh Firm gathered that information with an understanding with cooperating individuals that the information was subject to the attorney-client privilege and the attorney work product doctrine. *Id.* (the information “was gathered under the applicable attorney-client privilege and work product doctrine, and with due regard for the privacy of the interviewees and the documents reviewed.”).

Lest there be any doubt, the lead project manager of the engagement for the Freeh Firm, Attorney Omar McNeill, confirmed that:

[t]he work and advice provided under the engagement by FSS and any third party working on behalf of FSS to perform services in connection with the engagement was, again pursuant to the engagement letter, to be “subject to the confidentiality and privilege protection of the attorney-client . . . privilege[ ], unless appropriately waived by the parties or otherwise determined by law.”

Exhibit 5 (12/18/14 Declaration of Omar Y. McNeill) (“McNeill Dec.”), ¶ 6. Attorney McNeill also confirmed that Penn State’s Board of Trustees and the Freeh Firm “understood and expected that FSS’s work would be subject to the attorney-client privilege . . . , and [the Freeh Firm] conducted the investigation accordingly.” *Id.*, ¶ 8. And, toward that end, it was “routine practice” for the Freeh Firm investigators to “advise Penn State employee witnesses that information they provided in interviews would be protected by an attorney-client privilege that belonged to the University . . . .” *Id.*

During the course of its work, the Freeh Firm took significant steps “to protect the confidentiality and attorney-client . . . privileges of the engagement.” *Id.*, ¶ 9. Freeh Firm attorneys, staff, and third parties working on behalf of the Freeh Firm were advised in writing of, and frequently briefed about, the importance of maintaining confidentiality. *Id.* Toward that end, the Freeh attorneys and staff worked in a “secured facility with access controlled by electronic locks,” and stored physical evidence “in a locked room within [that] secured facility.” *Id.* Accord Exhibit 4 (Freeh Report) pp. 9-10 (“All materials were handled and maintained in a secure and confidential manner.”). When members of the Freeh Firm conversed with members of Penn State’s Special Investigative Task Force, they did so in confidence. Exhibit 5 (McNeill Dec.), ¶ 7.

**(3) The University authorized the Freeh Firm to release its Report to the public, but neither the University nor the Freeh Firm otherwise waived the protections of the attorney work product doctrine.**

On July 12, 2012, in accordance with the University's limited waiver of the otherwise applicable privileges, the Freeh Firm set forth its findings, opinions, and recommendations in a written report entitled "Report of Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse committed by Gerald A. Sandusky" (the "Freeh Report"). With the University's consent and agreement, and pursuant to an agreed-upon limited waiver of the attorney-client privilege and the attorney work product doctrine, the Freeh Report was made public without any advance review by the University. *See* Exhibit 4 p. 10 ("[t]his report sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege"). Consistent with its practice of advising individuals that the information they provided in the course of the investigation would be treated as privileged and confidential, when the Freeh Firm released the Report, it first redacted the names of all individuals whose interview notes are cited therein, referring instead only to the date of the interview. *See, e.g., id.*, p. 145 nn. 33-35; *see also id.*, p. 10 ("[c]itations in this report have been redacted to protect the identity of people who spoke with" the Freeh Firm).<sup>8</sup>

The Freeh Report contains a detailed legal analysis of the provisions of the Clery Act and Pennsylvania's reporting requirements with respect to child sexual abuse. The Freeh Report also contains extensive recommendation, relating to:

the University's administrative structure, policies and procedures and the Office of General Counsel; the responsibilities and operations of the Board; the identification of risk; compliance with federal and state statutes and reporting misconduct; the integration of the Athletic Department into the greater University

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<sup>8</sup> Only a small portion of the 430 interviews the Freeh Firm conducted are cited in the Report.

community; the oversight, policies and procedures of the University's Police Department; and the management of programs for non-student minors and access to University facilities.

Other than authorizing the release of the Freeh Report, neither the University nor the Freeh Firm waived the attorney work product doctrine in any other respect. Specifically, notwithstanding the wholly unfounded statements plaintiffs have made to this Court and in social media, **there is absolutely no evidence that the Freeh Firm or FGIS ever disclosed even a single privileged communication or a single piece of attorney work product to the representatives of the NCAA or the Big Ten Conference.** Although Attorney McNeill had periodic brief conference calls with Donald Remy (General Counsel of the NCAA) and Jonathan Barrett (outside counsel (Mayer Brown) for the Big Ten Conference), those calls did not involve any waiver of the attorney-client privilege or the attorney work product doctrine. Exhibit 5 (McNeill Dec.), ¶ 10 ("Those calls did not . . . in any way either compromise the independence of the investigation or result in a waiver of the attorney-client or work product privileges); *accord* Exhibit 4 (Freeh Report) p. 10 ("[No advance copy [of the report] was provided to the Board or to any other person outside of the Special Investigative Counsel's team, and the work product was not shared with anyone who was not part of the Special Investigative Counsel's team.").

The NCAA's Remy confirmed in his deposition (taken in another case) – without qualification – that *the Freeh Firm did not provide any documents whatsoever (source documents, work product or otherwise) to the NCAA at any time:*

Q: Was the idea of NCAA participation in witness interviews — shadowing, as you call it — rejected?

A: **It did not happen.**



Q: Did any of the elements that you have described as typical, in your internal investigative process in which NCAA participates, get folded into the interaction between Freeh Group and NCAA?

A: Status updates.

Q: We'll talk about those. Sharing of documents?

A: We gave them educational information. **They never shared any documents with us**, that I recall of.

Q: Did they ever give you the substance of any documents, even if they didn't show you the documents themselves?

A: Not that I recall.

Q: Did they ever give you, to your recollection, summaries of interviews?

A: No. No.

Q: No interview notes?

A: No.

Q: How about during status updates? Any type of preliminary results?

A: No.

Exhibit 6\_(Transcript of 11/20/14 Deposition of Donald Remy (excerpts) in *Corman v. NCAA*, Pa. Commw. Ct. No. 1 M.D. 2013) at 107:15 – 108:16 (emphasis added).<sup>9</sup>

Indeed, to the contrary, as Mr. McNeill made abundantly clear in *his* deposition, although Penn State had authorized the Freeh Firm to speak with representatives of the NCAA and the Big Ten, Penn State did *not* authorize the Freeh Firm to undermine the privileges in any way in those calls:

Q. Ultimately was there a decision about whether you could communicate information to NCAA and Big Ten?

A. Yes.

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<sup>9</sup> Penn State produced all of the deposition transcripts from the *Corman* litigation to the plaintiffs in response to document requests.

Q. And what was the decision?

A. The decision was that at the direction of the task force and with permission of the task force, could provide general updates to the NCAA, but we couldn't go into anything that, again, would in any way undermine the privilege. **We couldn't share information with them that would in any way be deemed attorney work product.** And we agreed that we would have regular calls, and I think that was the sum and substance.

Exhibit 7 (transcript of 12/17/14 deposition of Omar Y. McNeill (excerpts) in *Corman*) at 39:22-40:11; *see also id.* at 148:13-22 (confirming that Penn State never authorized the Freeh Firm to waive the provisions of the attorney-client privilege and that the Freeh Firm never waived the protections of the work product doctrine).

**(4) The attorney work product doctrine is a broad privilege that protects attorneys' mental impressions.**

The attorney work product doctrine, which is codified in the Pennsylvania Rules of Civil Procedure, provides even broader protections than the attorney-client privilege. *Commonwealth v. Noll*, 662 A.2d 1123, 1126 (Pa. Super. 1995); *Bagwell v. Pennsylvania Dep't of Educ.*, 103 A.3d 409, 415 (Pa. Commw. 2014). Specifically, Pa. R. Civ. P. 4003.3 provides:

Subject to the provisions of Rule 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. *The 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.* With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

(emphasis added). As set forth in Rule 4003.3 itself, the essential purpose of the work product doctrine is to immunize from discovery the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories. The work product doctrine also protects "materials prepared by agents for the attorney." *Bagwell*, 103 A.2d at 416;

*Commonwealth v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005); *Commonwealth v. Hetzel*, 822 A.2d 747, 757 (Pa. Super. 2003). “This includes an attorney’s investigator’s or other agent’s opinions, theories, or conclusions . . . .” *Bagwell*, 103 A.3d at 416 (quotation omitted).

The Category A documents that are the subject of the Motion are classic attorney work product. In fact, the Explanatory Note to Rule 4003.3 expressly notes that “a lawyer’s notes and memoranda of an oral interview of a witness, who signs no written statement, are protected” as attorney work product.<sup>10</sup> Pa. R. Civ. P. 4003.3, Explanatory Comment – 1978. As the U.S. Supreme Court noted in *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981), interview memoranda will be discoverable only in rare situations, in part because they may reveal the attorney’s mental processes and have limited utility, especially where the witness is available; *see also In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979); *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (an attorney’s memorandum of a telephone conversation is “so much a product of the lawyer’s thinking and so little probative of the witness’s actual words that [it is] absolutely protected from disclosure”).

Drafts of the Freeh Report (also among the Category A documents) also are quintessential protected attorney work product, as are communications among members of the Freeh Firm and FGIS (or with others those firms may have retained to work with them in connection with the investigation).

- (5) **The attorney work product doctrine applies even if the materials were not prepared in anticipation of litigation at all, much less in anticipation of this particular litigation.**

Pennsylvania courts have recognized that the attorney work product doctrine is *especially protective of material prepared by an attorney in anticipation of litigation*. *Nat’l R.R. Passenger*

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<sup>10</sup> None of the interview notes are signed by the witnesses.

*Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. 2001); *Gillard*, 15 A.3d at 59 n. 16; *Heavens v. Pennsylvania Dep’t of Environmental Protection*, 65 A.3d 1069, 1077 (Pa. Commw. 2013). Pennsylvania does not, however, *require* that material be prepared in anticipation of litigation in order to qualify for protection by the attorney work product doctrine. *Bagwell*, 103 A.2d at 415. On its face, Pa. R. Civ. P. 4003.3 includes no such limitation. *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243, 1245 (Pa. Commw. 1994) (anticipation of litigation was not required as a prerequisite to application of the attorney work product doctrine because Rule 4003.3’s protection of an attorney’s mental impressions “is unqualified”); *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C.4th 23 (C.C.P. Allegheny Cty. May 22, 1996) (Wettick, J.) (also rejecting the contention that Rule 4003.3 only protects material produced in anticipation of litigation; “Rule 4003.3 protects any mental impressions, conclusions, or opinions respecting the value or merit of a claim or defense. Rule 4003.3 does not refer to information prepared in anticipation of litigation.”).

Indeed, in a case involving a request for the Freeh Firm’s files under Pennsylvania’s Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, the Commonwealth Court squarely rejected — as “novel” and inconsistent with the language of Rule 4003.3 — the requestor’s argument that the work product doctrine applies only to materials prepared in anticipation of litigation. *Bagwell*, 103 A.3d at 416-17. As the Commonwealth Court aptly noted in *Bagwell*, such a “confined construction” of Rule 4003.3 “would render attorney drafts of contracts, memoranda and countless other examples of work product, prepared in a transactional or any non-litigation capacity, susceptible to discovery or disclosure.” *Id.* at 417.

Indeed, the Commonwealth Court recently reiterated that holding in *Bagwell v. Pa. Office of Attorney General*, No. 1861 C.D. 2014, 2015 WL 3395873 (Pa. Commw. May 27, 2015)

(“materials do not need to be prepared in anticipation of litigation for the privilege to attach[;]  
[p]rotection of an attorney’s mental impression[s] is unqualified”) (citations omitted).

**(6) In any event, the Freeh Firm plainly performed its work in anticipation of litigation.**

The Freeh Firm plainly did its work in anticipation of litigation. Indeed, the threat of litigation at the time Penn State retained the Freeh Firm was both real and imminent. The Office of the Attorney General had made the Presentment public on November 5, 2011. The Presentment charged two high-ranking University executives with failing to report allegations of child abuse and committing perjury concerning their testimony before the grand jury. It also prompted the DOE to review the University’s compliance with federal crime reporting obligations under the Clery Act. And, the first of many of Sandusky’s victims filed a civil suit against Penn State on November 30, 2011. In short, any contention that the work of the Freeh Firm was not performed in anticipation of litigation simply is not well-grounded in the undisputed facts of record.<sup>11</sup>

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<sup>11</sup> In one of its earlier opinions, this Court cited *Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C.5th 242, 249 (C.C.P. Centre Cty. 2007) for the notion, expressed in dicta, that the work product doctrine does not apply unless Penn State (or Pepper Hamilton) could establish that the Freeh Firm did its work specifically in anticipation of this case. The Court’s reliance on *Graziani* was misplaced. *Graziani* involved a “bad faith” claim a policyholder asserted against an insurance company. In that context, courts have held that the protection for work product materials prepared in the underlying litigation against the insured does not justify the insurance company withholding those documents from the insured when it sues the insurer for the bad faith handling of its claim. The crux of *Graziani* is that the work product protection afforded to the materials in the underlying litigation is lost in subsequent “bad faith” litigation because the work product becomes directly relevant to that later, derivative claim. Neither *Graziani* nor any of the other cases in this line stands for the proposition that the work product doctrine applies only to materials prepared for the particular litigation in which the protection of the work product doctrine is claimed.

The Superior Court’s decision in *Rhodes v. USAA Casualty Ins. Co.*, 21 A.3d 1253 (Pa. Super. 2011), illustrates the fatal flaw in this Court’s reasoning. In *Rhodes*, the trial court had ordered the plaintiffs-insureds in a “bad faith” case to turn over to the insurer the contents of their attorney’s file in the underlying case (in which the insureds were the defendants). The

### iii. Summary

In sum, for any and all of these reasons, this Court should direct the plaintiffs to immediately return or destroy all of the inadvertently produced documents in Category A. Plaintiffs simply have no colorable claim under Pennsylvania law that they are entitled to keep them.

#### 2. The Emails Between And Among University Representative And Lawyers Representing The University (“Category B” Documents)

Penn State’s inadvertent production included 2,066 documents (bearing Bates numbers PSUPAT130136 to PSUPAT132202) that are emails between and among University Trustees, including emails with counsel for the University. These “Category B” documents include hundreds upon hundreds of email exchanges various Trustees had with Frank Guadagnino, Esq., then a partner at Reed Smith LLP (and presently Associate General Counsel for the University), and Lanny Davis, Esq. and his associates in 2011 and 2012. These communications plainly are protected by the attorney-client privilege and/or the attorney work product doctrine. *Indeed, the plaintiffs have never even argued that communications of this type are not privileged.*

The Category B documents cover a wide variety of subject matters, including, for example: discussions about Joe Paterno’s declining health and eventual death and funeral, the 2012 election for Board offices, and the financial terms on which the University would retain

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*Continued from previous page*

insurer, relying on cases like *Graziani*, attempted to justify that order on the ground that the work product protection no longer applied because the material was not specifically prepared for the bad faith case. 21 A.3d at 1256-57. The Superior Court rejected that approach and reversed, explaining that the reason why the work product protection is lost in bad faith cases where insurers are ordered to turn over their attorney’s files is because the content of those files is relevant to determining whether the insurer acted in good faith. Indeed, the Explanatory Note to Rule 4003.3 expressly provides that attorney work product may be discoverable where the legal opinion of an attorney becomes a relevant issue. *Id.* at 1261.

In short, the considerations animating the decision in *Graziani* simply have no parallel whatsoever in this litigation.

Attorneys Guadagnino and Davis. Having reviewed each and every one of those documents, the undersigned represents in good faith to this Court that *none of these 2,066 documents has any relevance whatsoever to the plaintiffs' remaining claims against the NCAA in this case.*<sup>12</sup> The undersigned advised plaintiffs' counsel of this fact on August 18. *See* Exhibit 2 (“These emails don’t have any conceivable relevance to the plaintiffs’ claim in this litigation. To the contrary, the vast majority of them deal with completely ancillary matters . . .”).

In light of the unassailable facts that: (a) plaintiffs have never even *argued* that these inadvertently produced materials are properly discoverable under Rule 4003.1, and they thus have no basis whatsoever for claiming that they are entitled to keep them, and (b) the documents are wholly irrelevant to the claims in this case, there is no good reason why the court should be asked to spend a considerable amount of time reviewing them in camera. Penn State therefore asked plaintiffs to “reconsider their position with respect to these materials . . . and promptly return or destroy them.”<sup>13</sup> *Id.* Plaintiffs utterly ignored that request. Nor did plaintiffs make any effort whatsoever to explain why they contend these Category B documents are either discoverable or relevant.

In short, Penn State submits that plaintiffs have no good faith basis whatsoever to ask this Court to conduct an in camera review of the inadvertently produced documents in Category B.

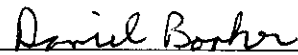
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<sup>12</sup> Indeed, these Trustee emails documents are duplicates of documents that also are located within the 3.5 million-document “Freeh Firm database.” The University searched the Freeh Firm database using mutually-agreed upon search terms months ago and produced the documents those searches located. Thus, to the extent any of the documents in Category B were responsive to those searches, the University would have been produced months ago. To the extent the Category B documents were not produced at that time, it is because they (a) are not relevant and thus would not have been located using the mutually-agreed upon search terms, or (b) the University would have withheld them as privileged attorney-client communications.

<sup>13</sup> Penn State did offer, however, that, “[i]f there are individual documents within this Bates range that plaintiffs believe are relevant, responsive to their document requests, and not privileged,” Penn State is “amenable to discussing those documents” with plaintiffs’ counsel. *Id.*

In addition to being tedious and time-consuming, such an exercise would be wholly unnecessary given the irrelevant nature of the documents in question. Accordingly, Penn State respectfully asks the Court, pursuant to paragraph 14 of the Protective Order, to direct plaintiffs' counsel to return or destroy the documents in Bates range PSUPAT130136-PSUPAT132202, and to destroy any and all notes they may have made about those documents.<sup>14</sup>

Respectfully submitted,



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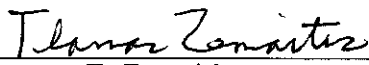
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<sup>14</sup> The Category B documents simply do not lend themselves to a blanket privilege determination and, instead, must be reviewed on a document-by-document basis. Some of the documents are protected from disclosure by the attorney-client privilege, others constitute attorney work product, and others are protected from disclosure by *both* the attorney-client privilege and the attorney work product doctrine. In the event the Court elects to review the Category B documents that are the subject of this Motion, Penn State respectfully requests that the Court establish a protocol whereby Penn State can set forth its position with respect to its privilege claims for each of the hundreds of documents at issue.



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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on this 8th day of September, 2015, a true and correct copy of the foregoing BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE UNDER SEAL AND TO ENFORCE THE COURT'S EARLIER PRIVILEGE DETERMINATIONS PURSUANT TO THE PROTECTIVE ORDER was served upon the following counsel via United States mail, first class, postage prepaid:

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