IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO;

RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;

PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University;

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

ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of 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,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

CIVIL DIVISION

Docket No. 2013-2082

BRIEF IN SUPPORT OF RESPONSE TO MOTION TO OVERRULE OBJECTIONS BY DEFENDANT PENN STATE UNIVERSITY TO NOTICE OF INTENT TO ISSUE SUBPOENA TO PEPPER HAMILTON LLP PURSUANT TO RULE 4009.21

Filed on Behalf of:
The Pennsylvania State University

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ORAL ARGUMENT SCHEDULED FOR MAY 19, 2014, 10:00 A.M.

IN THE COURT OF COMMON PLEAS
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GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO;	)	CIVIL DIVISION
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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,	)	
and	)	
THE PENNSYLVANIA STATE UNIVERSITY,	)	
Nominal Defendant.	)	

BRIEF IN SUPPORT OF RESPONSE TO MOTION TO OVERRULE OBJECTIONS BY DEFENDANT PENN STATE UNIVERSITY TO NOTICE OF INTENT TO ISSUE SUBPOENA TO PEPPER HAMILTON LLP PURSUANT TO RULE 4009.21

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The Pennsylvania State University ("Penn State" or "the University"), by and through its undersigned counsel, hereby files this brief in support of its response to the motion to overrule its objections to certain plaintiffs' Notice of Intent to Issue Subpoena to Pepper Hamilton LLP Pursuant to Rule 4009.21 (the "Motion").

Plaintiff George Scott Paterno is asking the Court to determine, in a vacuum, that all of the documents the Freeh Firm collected, analyzed, and created in the course of its litigation are relevant, and that none of those documents are privileged. Penn State maintains, in contrast, that: (a) no blanket waiver of any privilege or other applicable protection occurred; (b) the vast majority of the documents Paterno seeks – literally, millions of records – are not relevant to any issue in the litigation; and (c) in any event, all of these issues need to be determined on a document-by-document basis. For all of the reasons set forth herein, this Court should sustain Penn State's Objections and enter an order barring Paterno, the "duly appointed representative of" the Estate and "family" of Joseph Paterno ("Paterno") from serving his proposed subpoena on the law firm of Pepper Hamilton LLP ("Pepper Hamilton").

INTRODUCTION

The proposed subpoena at issue here is directed to the Pepper Hamilton law firm, which employs the attorneys who formerly were with the law firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm").[1] The Freeh Firm was retained by Penn State as legal counsel during one of the most difficult periods in the University's history.

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 "Grand Jury Presentment"). The Grand Jury Presentment raised allegations of the sexual abuse of children by former football coach Gerald Sandusky and allegations that Penn State

[1] Penn State's response erroneously described Pepper Hamilton as the "successor" to the Freeh Firm.

personnel failed to report that abuse to the appropriate police and governmental authorities. The Grand Jury Presentment also charged two high-ranking University officials with perjury concerning their testimony before the grand jury.

In addition, as indicated in a letter the U.S. Department of Education ("DOE") sent the then-President of the University on November 9, 2011, the Grand Jury Presentment also prompted the 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"). The first of several of Sandusky's victims, "John Doe A," filed a civil suit against the University in the Court of Common Pleas of Philadelphia County on November 30, 2011.

In this intense environment, which also included what it would not be an overstatement to describe as a media frenzy, on November 18, 2011, the University retained the Freeh Firm to advise it as external legal counsel and to conduct an investigation into 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, LLC (the "Freeh Group") to assist with the investigation.

The Freeh Firm conducted a lengthy and comprehensive investigation of the allegations. As part of its investigation, it collected over 3.5 million emails and other documents, which it analyzed as necessary and appropriate. It also conducted over 430 interviews of University personnel and other knowledgeable individuals and created other attorney work product. The information was gathered and analyzed under an express agreement that it was subject to the attorney-client privilege and the attorney work product doctrine.

On July 12, 2012, in accordance with a limited waiver of the otherwise applicable privileges, the Freeh Firm set forth its findings and opinions 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* Motion, Ex. D (Freeh Report) p. 10 ("[t]his report sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege").

On July 23, 2012, shortly after the Freeh Report was made public, the University accepted the Consent Decree that the National Collegiate Athletic Association ("NCAA") imposed on it. The Consent Decree is the foundation for this litigation.

In September 2012, after the Freeh Report was issued and the Consent Decree was signed, the attorneys from the Freeh Firm became affiliated with Pepper Hamilton, which also acquired the Freeh Group. Thus, the subpoena that Paterno proposes to serve seeks the production of documents in the possession of the lawyers who represented the University in an extremely difficult and sensitive legal engagement.

Importantly, the University has not objected to the production of every document Paterno seeks. To the contrary, the University has stated that it has no objection to the production of communications between the Freeh Firm and the NCAA, the Big Ten Conference, or other third-parties, to the extent those communications are relevant to the claims in this litigation. Also, as part of the meet and confer process, the University advised Paterno's counsel that, subject to an agreed-upon orderly and reasonable process in which any privileges or immunities that may apply to recovered documents are protected, it has no objection to searching the electronic

database of over 3.5 million items that the Freeh Firm assembled and then producing relevant, non-privileged responsive documents.[2]

Paterno's position, however, is that he is entitled to all of the documents he seeks because, he contends, any applicable privileges or immunities from discovery have been waived by virtue of the public disclosure of the Freeh Report. That position is incorrect. In agreeing to the public disclosure of the Freeh Report without an advance review, the University made a knowing, but expressly limited, waiver of the attorney-client privilege and the attorney work product doctrine. Many of the documents Paterno seeks remain immune from discovery by virtue of those privileges and protections. In addition, a large number of the millions of records Paterno seeks are not relevant to any issue in this case. Accordingly, as further described herein, the Court should sustain Penn State's Objections and should not permit the subpoena to be issued to Pepper Hamilton in its present form.

I. Penn State's Objections To The Issuance Of The Subpoena To Pepper Hamilton Are Well-Grounded, And The Court Should Deny The Motion To Overrule Them.

In his proposed subpoena to Pepper Hamilton, Paterno seeks the production of 25 broad categories of documents. As described further herein, the subpoena is objectionable on many grounds and the Court should not permit it to be issued.

As its Objections make clear, Penn State would *not* object to a tailored subpoena to Pepper Hamilton that seeks the production of certain relevant communications the Freeh Firm had with third parties (*e.g.*, the NCAA and representatives of the Big Ten Conference). *See, e.g.*, Penn State's response to Request No. 1 (no objection to a subpoena that seeks the communications between the Freeh Firm or the Freeh Group, and the NCAA, Emmert, or Ray about Joe Paterno or the other plaintiffs); Penn State's response to Request No. 4 (no objection to

[2] As the University has informed Plaintiffs, although Pepper Hamilton may be in possession of some documents responsive to the proposed subpoena, Pepper Hamilton is no longer in possession of the electronic database of over 3.5 million records that were gathered by the Freeh Firm as part of its investigation. The University is prepared to search that database, subject to the conditions referenced above.

a subpoena that seeks the communications between the Freeh Firm or the Freeh Group and the NCAA, Emmert, or Ray about the investigation or the Consent Decree); Penn State's response to Request No. 17 (no objection to a subpoena that seeks the communications between the Freeh Firm or the Freeh Group and the Mayer Brown law firm (counsel to the Big Ten Conference) about the investigation or the Consent Decree); Penn State response to Request No. 18 (no objection to a subpoena that seeks actual communications between the Freeh Firm or the Freeh Group with any athletic governing body regarding the investigation or the Consent Decree); Penn State's response to Request No. 21 (no objection to a subpoena that seeks the communications between the Freeh Firm or the Freeh Group and the NCAA, Emmert, or Ray about their conclusions or recommendations); Penn State's response to Request No. 23 (no objection to a subpoena that seeks drafts of the Consent Decree that were exchanged with the NCAA).

Nor would Penn State object to a tailored subpoena that requests the performance of targeted searches, using agreed-upon search terms, of the millions of documents the Freeh Firm obtained from hundreds of University employees and maintained in a massive electronic database, provided: (a) those searches returned a reasonable number of documents; and (b) counsel for Penn State had the opportunity to first review those documents for relevancy, potential privileges, confidentiality, and privacy issues before producing them.[3]

Paterno's proposed subpoena, however, sweeps far more broadly. Indeed, because the subpoena is fatally overbroad in numerous respects, and overtly seeks documents that are protected by various privileges, including the attorney-client privilege and the attorney work product doctrine, this Court should not permit it to be served. For example, Paterno would like Pepper Hamilton to be compelled to produce:

[3] Counsel for Penn State made this representation to counsel for Paterno in the meet-and-confer session the parties conducted March 28, 2014. Counsel for Penn State also advised counsel for Paterno during that session that the database the Freeh Firm created is no longer in the possession of Pepper Hamilton.

- communications between the Freeh Firm and the Freeh Group and Penn State, its client (Request No. 2);

- the Freeh Firm's entire "client file" (Request No. 3);

- drafts of the Freeh Report (Request No. 22);

- documents relating to "question[s] or concerns within the Freeh Firm or the Freeh Group" about "any aspect of" the investigation or the conclusions reached in the Report (Request No. 25);

- documents that evidence, reflect, or relate to services provided by any person the Freeh Firm or the Freeh Group retained to work with them in connection with the investigation (Request No. 16); and

- the invoices the Freeh Firm sent Penn State (Request No. 24).

Paterno also is seeking documents that "evidence, reflect, or relate in any way to" the factual bases for various statements the Freeh Firm made in its Report and the conclusions and recommendations set forth therein, including the statements that:

- Joe Paterno, among others, "failed to protect against a child sexual predator harming children for over a decade" (Request No. 5);

- the University's Board of Trustees "did not perform its oversight duties" and "failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable" (Request No. 6);

- Joe Paterno, among others, concealed Jerry Sandusky's activities from the University's Board of Trustees (Request No. 7); *see also* Request No. 8 (seeking "all documents that evidence, reflect, or relate in any way to whether Joe Paterno concealed critical facts regarding Jerry Sandusky from the authorities, the Penn State Board of Trustees, the Penn State community, and the public at large"); Request No. 9 (seeking "all documents that evidence or reflect that, at the time of Jerry Sandusky's resignation from the coaching staff at Penn State, Joe Paterno suspected or believed that Sandusky was a sexual predator");

- "[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behavior and no one warned the public about him" (Request No. 10);

- an individual described Timothy Curley to the Freeh Firm in the course of its investigation as "Joe Paterno's errand boy" (Request No. 12);

- Joe Paterno, among others, was kept informed of an investigation by Penn State Police and/or the Department of Public Welfare into a possible sexual assault by Jerry Sandusky in the Lasch Building in May 1998 (Request No. 13);

- individuals told the Freeh Firm in the course of its investigation that Joe Paterno knew "everything that was going on" at the Penn State football facilities" (Request No. 14); and

- all documents that support every conclusion and every recommendation set forth in the Freeh Report (Request No. 19).

The premise of Paterno's proposed subpoena (and the Motion) – that the public release of the Freeh Report rendered "fair game" every document the Freeh Firm reviewed, considered, or created in the course of its investigation – is fatally flawed. Penn State has not waived any of its privileges, including the attorney-client privilege, and neither the Freeh Firm nor Pepper Hamilton has waived the protection of the attorney work product doctrine. The requests in the proposed subpoena, however, all seek, to some extent, the production of documents that are protected from discovery by one or more of these privileges.

In addition to these and numerous other shortcomings, many of Paterno's proposed document requests are overly broad and seek to impose extremely costly, time-consuming and excessively burdensome requirements on Pepper Hamilton. As explained in its Objections, Penn State has a direct interest in ensuring that the subpoena not impose those costs, insofar as (a) Penn State would be required to expend substantial amounts of time and incur very substantial and unwarranted expenses in order to protect its privileges, and (b) the University's engagement letter with the Freeh Firm requires the University to reimburse the Freeh Firm (and Pepper Hamilton, as its successor) for the time and expenses *it* incurs responding to a subpoena. Paterno should not be permitted to impose those costs on Penn State by means of the grossly overbroad and intrusive subpoena that is before the Court. This Court accordingly should sustain Penn State's Objections and require Paterno to propose an alternative subpoena that is tailored to address those Objections.

In any event, the Court should not permit Paterno to issue this (or any other) subpoena until the Court rules on the Preliminary Objections to the Amended Complaint filed by Penn State and the NCAA. Those Preliminary Objections, if sustained in whole or in part, would markedly limit both the claims in the litigation and the plaintiffs entitled to assert those claims, thereby impacting the scope of documents that fairly could be demanded from a third party in a subpoena.

A. The Vast Majority Of The Documents Paterno Requests In The Proposed Subpoena Are Privileged.

The Motion is premised on the supposition that, because the Freeh Report was made public, any and all privileges that otherwise would have attached to the materials that were gathered, considered, and/or created in the course of the Freeh Firm's investigation have been waived. *See, e.g.,* Motion ¶ 13. That premise is false. As the Freeh Report itself made plain, all that the Freeh Firm released publicly (and all that Penn State authorized the Freeh Firm to release publicly) were "the essential findings of the investigation. . . ." Motion, Ex. D (Freeh Report) p. 10. Although the Freeh Report itself is public, the vast amount of information the Freeh Firm gathered, created, and considered in the course of its investigation and in preparing its Report is not public, and it was never intended or reasonably expected that otherwise applicable privileges and protections surrounding those materials would be waived by the release of the Report itself.

1. The Requirements Of The Attorney-Client Privilege Are Satisfied And Penn State Has Not Waived The Privilege.

Many of the categories of documents Paterno seeks are protected from disclosure, in whole or in part, by the attorney-client privilege. Paterno's assertions that Penn State waived that privilege with respect to every communication with the Freeh Firm by authorizing the Freeh Firm to make specific, particularized disclosures, is not well-grounded in the facts or in Pennsylvania law.

a. The subpoena seeks documents that are protected by the attorney-client privilege.

In Pennsylvania, the attorney-client privilege is codified at section 5928 of the Judicial Code, which provides: "In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa. C.S. § 5928. The Supreme Court of Pennsylvania has confirmed that the attorney-client privilege "operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice." *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011).[4]

An attorney-client relationship plainly existed between Penn State and the Freeh Firm. Furthermore, communications between an agent of an attorney (*e.g.*, the Freeh Group) and the client (Penn State) also are protected by the attorney-client privilege where, as here, the agent is assisting the attorney in giving advice to the client. *Commonwealth v. Noll,* 662 A.2d 1123, 1126 (Pa. Super. 1995).

The November 18, 2011, engagement letter between Penn State and the Freeh Firm specifically contemplates that there would be confidential, privileged communications. Specifically, paragraph 6 of that letter provides:

> 6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the [Penn State] Task Force under this engagement by [the Freeh Firm], and any third party working on behalf of [the Freeh Firm] 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. In the event that [the Freeh Firm], or an third party working on behalf of [the Freeh Firm] to perform services in connection with this engagement, is required to respond to a subpoena or other formal request from a third party or a governmental agency for our records or

[4] *Gillard* overturned highly-criticized Superior Court precedent holding that the privilege was available only for confidential communications made by the client.

> other information relating to services we have performed for [Penn State], or to testify by deposition or otherwise concerning such services, to the extent permitted by law, we will provide [Penn State] notice of such a request and give you and [Penn State] reasonable opportunity to object to such disclosure or testimony . . . .

Motion, Ex. C p. 5 (emphasis added).

b. Penn State has not waived the privilege.

Paterno's assertion that a blanket waiver of all otherwise privileged communications relating to the investigation occurred when Penn State instructed the Freeh Firm to make its findings public is not well-founded. As the November 18, 2011, engagement letter itself makes clear, Penn State authorized the Freeh Firm to "waive" the attorney-client privilege only to the limited extent that the Freeh Firm was authorized to publicize its final report. Ex. C p. 1. Even then, consistent with the limited scope of the University's instruction to waive the privilege, the Freeh Firm was careful to redact identifying information of the individuals it interviewed in the course of its investigation. Indeed, far from giving the Freeh Firm carte blanche to disclose its preliminary findings, observations or privileged communications with Penn State, the November 18, 2011, engagement letter made clear that the Freeh Firm would be permitted "to communicate regarding its independent investigation . . . with media, police agencies, governmental authorities and agencies, and any other parties," only "*as directed by*" Penn State. Ex. C p. 2 (emphasis added).

To resolve allegations of waiver, courts must employ the two-part inquiry pronounced in *In re Investigating Grand Jury of Philadelphia County, No. 88-00-3503,* 593 A.2d 402, 406-07 (Pa. 1991). Under this two-part test, a court must determine: (1) whether the attorney-client privilege applies to the particular communication in question; and if so, (2) whether an exception or waiver applies that overcomes the privilege. *Id.* Notably, the burden shifts during this two-part inquiry. *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1265-66 (Pa. Super. 2007)

("*Nationwide II*"). Specifically, "[t]he party who has asserted attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked; then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, *e.g.*, because the privilege has been waived or because some exception applies." *Id.* at 1266. If the court determines that a particular disclosure effectuated a waiver, it then may turn to the question of how far the waiver extends.

Here, as discussed supra, the University has satisfied its burden of establishing that the attorney-client privilege applies. Paterno, however, has failed to satisfy his burden of establishing that the privilege has been waived with respect to *any* communication (other than the Freeh Report itself), much less that it has been waived on a global basis. In order to establish a subject matter waiver beyond the four corners of the Freeh Report, Paterno would be required to show that Penn State voluntarily disclosed otherwise confidential information "*to gain a tactical advantage*." *Nationwide Mut. Ins. Co. v. Fleming,* 992 A.2d 65, 68 (Pa. 2010) (emphasis added). *Accord Murray v. Gemplus Int'l S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (applying Pennsylvania law and finding that "[w]here one party attempts to utilize the privilege as an offensive weapon, selectively disclosing communications *in order to help its case*, that party should be deemed to have waived the protection otherwise afforded it by the privilege it misused") (emphasis added). Paterno has not made, and cannot make, such a showing. The University's decision to allow the Freeh Report to be published simply was not made to achieve a tactical advantage in any litigation, including this one. The University does not in any way benefit from that release in any legal proceeding. Accordingly, the release of the Freeh Report into the public domain is not grounds for finding that a global waiver of the attorney-client privilege occurred.

The only exception to the requirement in the November 18, 2011, engagement letter that disclosures needed to be cleared with, and directed by, Penn State, relates to the instruction that the Freeh Firm should immediately report discovered evidence of criminality to law enforcement personnel. Motion, Ex. C, p. 2. That instruction does not, however, constitute a waiver of the attorney-client privilege, either. *See* Motion ¶ 19. Any such reports of criminal conduct would have related to the activities of particular *individuals,* not the actions of Penn State, which was the Freeh Firm's client. As paragraph 9 of the November 18, 2011, engagement letter makes clear, none of the University's employees were the Freeh Firm's clients. *Id.*, p. 6. Accordingly, Penn State's act of authorizing the Freeh Firm to report the potential criminal actions of individuals with whom the Freeh Firm had no attorney-client relationship could not have formed, and did not form, the factual basis for a waiver of *Penn State's* attorney-client privilege.

Paterno's sole cited case on this point, *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382 (W.D. Pa. 2005), simply does not support his assertion that, by permitting the Freeh Firm to disclose the criminal conduct of non-clients to law enforcement, Penn State waived its attorney-client privilege. *First, Martin Marietta* was a patent infringement case, and, as such, it involved the attorney-client privilege as recognized and applied by the U.S. Court of Appeals for the Federal Circuit, *not* 42 Pa. C.S. § 5928. 227 F.R.D. at 392 ("Federal Circuit law applies to Plaintiff's alleged waiver of attorney-client privilege and work-product doctrine."). And, *second,* in any event, *Martin Marietta* is factually distinguishable as involving whether the deposition testimony of the plaintiff's lawyer, in which she revealed discussions with the client's inventors, and her advice concerning a decision not to disclose certain prior art to the Patent Office, implicated a "reliance on advice of counsel" defense to the accusation that plaintiff had engaged in inequitable conduct before the Patent Office. *Id.* at 396-97.

In sum, because Paterno has not established, and cannot establish, that any subject matter waiver of the attorney-client privilege occurred, the applicability of the privilege, and the determination of whether it was waived with respect to any particular document, must, of necessity, be evaluated on a document-by-document basis. The requests in Paterno's subpoena, however, are *a frontal assault on* the attorney-client privilege (*e.g.*, Request No. 2, which seeks all communications between Penn State and the Freeh Firm and the Freeh Group; and Request No. 24, which seeks all invoices the Freeh Firm sent Penn State). As such, they are facially objectionable and preclude the issuance of the proposed subpoena in its present form.

2. Penn State Has Properly Asserted The Attorney-Client Privilege.

Paterno's allegation that Penn State has "not properly asserted" the attorney-client privilege is difficult to understand. Penn State followed all applicable procedures; specifically, it objected to the issuance of the proposed subpoena to Pepper Hamilton in a timely and procedurally proper manner, all pursuant to Pa. R. Civ. P. 4009.21. Moreover, Paterno's allegations notwithstanding, Penn State's Objections to the proposed subpoena *do* set forth the requisite factual bases for its claim of privilege: Penn State asserted the existence of an attorney-client relationship with the Freeh Firm; it asserted that communications were made to and received from the Freeh Firm in the course of that relationship; and it asserted that it did not waive any applicable privilege. The suggestion implicit in the Motion — that Penn State was required at this juncture to identify with specificity each of the tens of thousands (or potentially hundreds of thousands) of documents covered by Paterno's broad requests which Penn State claims are protected by the attorney-client privilege—is untenable, unworkable, and not required by any rule of civil procedure. In short, the Court should summarily reject Paterno's assertion that Penn State has not properly invoked this (or any other) privilege in connection with the proposed subpoena.

3. The Work Of The Freeh Firm Is Protected Attorney Work Product And That Protection Has Not Been Waived.

a. The attorney work product doctrine applies.

Penn State's objection to the issuance on the subpoena as calling for the production of materials protected by the attorney work product doctrine also is well-founded. The attorney work product doctrine provides even broader protections than the attorney-client privilege. *Commonwealth v. Noll,* 662 A.2d 1123, 1126 (Pa. Super. 1995). In this regard, 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 vast majority of the requests in Paterno's proposed subpoena expressly seek the production of documents that are protected by the attorney work product doctrine. For example, Request Nos. 5-10, 12-14, and 19 all seek documents evidencing, referring, or relating to various statements, conclusions, and recommendations that appear in the Report—without excluding documents that evidence the Freeh Firm's mental impressions, opinions, notes, or the like. And, as the Freeh Firm noted in its Report, it interviewed more than 430 individuals in the course of its investigation. The lawyers' notes of these interviews plainly are protected as attorney work product. Pa. R. Civ. P. 4003.3, Explanatory Note (a lawyer's notes and memoranda of an oral

interview of a witness who does not sign a written statement are protected as attorney work product). *See 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). *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 (see Request No. 22) also are protected attorney work product, as are communications among members of the Freeh Firm and the Freeh Group (or with others those entities retained to work with them in connection with the investigation) (Request Nos. 16, 25).

Indeed, section 6 of the November 18, 2011, engagement letter expressly acknowledges that the work of the Freeh Firm would constitute attorney work product. Motion, Ex. C p. 5 ("The work and advice which is provided to [Penn State] under this engagement by [the Freeh Firm], and any third party working on behalf of [the Freeh Firm] . . . is subject to the confidentiality and privilege protection of the . . . attorney work product" doctrine).

Pennsylvania courts have recognized that the attorney work product doctrine is especially protective of material, regardless of whether it is confidential, prepared by an attorney in anticipation of litigation. *Nat'l R.R. Passenger 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).

Here, the work of the Freeh Firm and the Freeh Group plainly was done 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 Grand Jury Presentment

public on November 5, 2011. That document indicated, in connection with Sandusky's indictment, that several of the University's high-ranking executives were facing allegations that they had violated the law. The Presentment charged two high-ranking University executives with perjury concerning their testimony before the grand jury. The Grand Jury Presentment also prompted the DOE to review the University's compliance with federal crime reporting obligations under the Clery Act, as revealed in a letter sent to the University's then-President on November 9, 2011. And, the first of many of Sandusky's victims, "John Doe A," filed a civil suit against Penn State in the Court of Common Pleas of Philadelphia County, Pennsylvania 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 facts.

In any event, Pennsylvania does not even *require* that material be prepared in anticipation of litigation in order to qualify for protection by the attorney work product doctrine. 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.,* 1996 WL 910155, *5 (Pa. 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.").

b. The protections of the attorney work product doctrine have not been waived.

For many of the same reasons discussed above with respect to the attorney-client privilege, the protections of the attorney work product doctrine have not been waived, either.

The attorney work product privilege is waived "only as to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary." *Sullivan v. Warminster Twp.*, 274 F.R.D. 147, 154 (E.D.Pa. 2011) (internal quotation omitted). The courts are especially reluctant to find a waiver of all attorney work product where, as here, a partial disclosure of the attorney's work product was made in an extra-judicial setting. *Id.* (partial disclosure to the media of an attorney's work product did not constitute implied waiver of privileges of the remainder of the report). *See LaValle v. Office of General Counsel of Commonwealth*, 769 A.2d. 449, 460 n. 16 (Pa. 2001) (acknowledging the federal courts' "limited waiver concept" as applied to the attorney work product doctrine).

4. The Self-Examination Privilege.

Penn State also has objected to the proposed subpoena as seeking documents protected by the self-examination privilege. Paterno's assertion that the Commonwealth Court held in *Van Hine v. Dep't of State of the Commw. of Pa.,* 856 A.2d 204 (Pa. Commw. 2004) that Pennsylvania does not recognize the privilege overstates that case. In *Van Hine,* the court noted that the self-critical analysis privilege "is grounded on the premise that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law or professional standards." 856 A.2d at 212. The court went on to assume, *arguendo,* that the privilege *would* be recognized in Pennsylvania, but concluded that the party asserting that privilege had failed to establish the factual predicate for its application. This, however, is the type of case in which the Court *should* recognize the self-critical analysis privilege, and all of the prerequisites to applying it are met.

B. Many Of The Requested Documents Are Not Relevant To The Claims Asserted In This Litigation.

The Freeh Firm collected over 3.5 million pieces of data in the course of its investigation. The vast majority of those documents are not relevant to any issue in this litigation. Similarly,

the requests for all of the Freeh Firm work product, including interview notes and memoranda, also indiscriminately seek information that is neither relevant to any issue in this litigation or likely to lead to discoverable information. Paterno's broadly-worded requests, however, which repeatedly seek "all documents" that "evidence, reflect, or relate in any way to" broad categories of statements and issues, as well as his request for the Freeh Firm's entire "client file" (Request No. 3) conceivably request the production of all 3.5 million pieces of data. The burden of sorting through that volume of data grossly outweighs its probative value. Accordingly, Penn State's relevancy objection is well-founded and provides still another reason why the Court should not permit the subpoena to be issued to Pepper Hamilton in its present form.

C. Penn State's Other Objections Are Proper As Protecting Against Potential Violations Of State And Federal Privacy Statutes.

In the course of its investigation, the Freeh Firm collected millions of documents from hundreds of Penn State custodians, many of them having no bearing whatsoever on Sandusky's conduct or the University's response thereto. As Penn State explained in its Objections, given the broad swath of documents and information the Freeh Firm gathered in the course of this effort, the Freeh Firm very well may have gained access to documents and records protected from disclosure by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), and Pennsylvania's Criminal History Record Information Act, 18 Pa. C.S.A. § 9102 ("CHRIA").

CHRIA constrains the dissemination of criminal history information and investigative information to persons other than "criminal justice agenc[ies] which request[ ] the information in connection with [their] duties." 18 Pa. C.S.A. § 9106(c)(4). The purpose of CHRIA is to "balance the public's right to know with privacy rights ... by describing what police records may be made available to the public and which records shall be protected from dissemination to any entity other than another law enforcement agency." *In re Pittsburgh Citizen Police Review Bd.*,

16 Pa. D. & C. 5th 435, 445 (Pa. Com. Pls. 2010), *aff'd*, 36 A.3d 631 (Pa. Commw. 2010). CHRIA expressly defines "investigative information" as "[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information." 18 Pa. C.S.A. § 9102. Such investigative information may not be disseminated to individuals (like the Plaintiffs here) who institute a civil action with no connection to a criminal justice agency. *See Mitchell v. Office of Open Records*, 997 A.2d 1262, 1265-66 (Pa. Commw. Ct. 2010) (an automated incident means query response, similar to an incident report, constituted "investigative information" under CHRIA and could not be released to a prisoner); *Dept. of Auditor General v. Pa. State Police*, 844 A.2d 78, 83-84 (Pa. Commw. 2004) (under § 9106, information concerning sexual offenders constituted "investigative information" and thus could not be released to the Auditor General). In the event the 3.5 million pieces of data the Freeh Firm collected contain such information, Penn State is statutorily barred from producing that information to the Plaintiffs in this litigation.

FERPA is a federal statute that protects the privacy of student "education records." Education records are record that are directly related to a student that are maintained by an educational institution or authorized party acting for the institution. 34 C.F.R. § 99.3. FERPA applies to the University because it receives federal funds under an applicable program of the U.S. Department of Education. Generally, under FERPA, schools must have written permission to release any information from a student's education record. *See* 20 U.S.C. § 1232 g(b)(1). It also is the educational institution's responsibility to provide notice to the parent or student involved when presented with a court order or subpoena compelling disclosure of a non-party's education record. *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1061 (Pa. Super. 2008). Here, too, to the extent any covered information about students' education records are contained within the broad

population of data the Freeh Firm collected, Penn State is both entitled and required to see to it that no such documents are produced to Paterno or the other Plaintiffs in this litigation.

D. Penn State's Other Objections Are Meritorious As Well.

1. The Requests Are Overbroad.

For all of the reasons discussed *supra* and *infra*, the requests in Paterno's proposed subpoena are overly broad, in terms of their subject matter, their temporal scope, and their request for the production of documents that are, or may be, protected by various privileges and confidentiality requirements.

2. Paterno Should Not Be Permitted To Put Pepper Hamilton To The Burden Of Searching For And Producing Documents That Are In The Public Domain.

Penn State also objects to the proposed subpoena to the extent it purports to require Pepper Hamilton to search for and produce documents that are readily available to Paterno in the public domain. Since the Sandusky scandal broke, many documents relating to the Freeh investigation, the Freeh Report, and the Consent Decree have been published or otherwise made available in the public domain. The Court has the authority to make an order with respect to a subpoena in order to "protect a party, witness or other person from unreasonable annoyance, embarrassment, oppression, burden or expense." Pa. R. Civ. P. 234.4(b). Here, that would entail, in part, limiting Pepper Hamilton's obligations to producing only those documents that are not available to Paterno elsewhere.

3. The Temporal Scope Of The Document Requests Is Unreasonably Broad.

Penn State also objects to the requests in the proposed subpoena as being temporally unbounded. As such, they seek documents that are neither relevant to nor reasonably calculated to lead to the discovery of evidence admissible in this litigation. The Amended Complaint challenges the NCAA's authority to enter into the Consent Decree, and the soundness and

truthfulness of statements that appear in the Consent Decree. Indeed, even Paterno's Motion acknowledges that "[t]he claims in this case deal with the NCAA's abuse of authority, including its improper wholesale adoption of the Freeh Report and the imposition of draconian sanctions that have severely and adversely affected the plaintiffs . . . ." Motion ¶ 5. The NCAA adopted the Freeh Report and imposed the sanctions on Penn State on July 23, 2012. Accordingly, documents created after that date are not relevant to any claim in this litigation. For this reason, Penn State has objected to the issuance of a subpoena that requests the production of documents created after July 23, 2012. Paterno should be directed to tailor any subpoena to Pepper Hamilton to coincide more closely with the events described in the Amended Complaint; Plaintiffs should not be permitted to go on a temporally unbounded fishing expedition of a third party, especially given all of the other ways (described herein) that the subpoena's breadth is excessive.

4. Paterno Should Not Be Permitted To Serve Any Subpoena Until The Court Rules On Penn State's And The NCAA's Preliminary Objections.

As indicated *supra,* this Court also should restrict Paterno from serving any subpoena, including the proposed subpoena to Pepper Hamilton at issue here, until the Court rules on the Defendants' Preliminary Objections to the Amended Complaint. The proposed subpoena is sought by George Scott Paterno, who describes himself as the "duly appointed representative" of the Estate and "the family" of Joseph Paterno. However, as explained more fully in Penn State's Preliminary Objections and the Memorandum of Law filed in support thereof, Coach Paterno's "family" is not a legal entity with any recognized status under Pennsylvania law. As such, all of the claims it purports to assert should be dismissed. Penn State also has sought to dismiss the claims brought by Coach Paterno's Estate on the grounds that the Estate lacks standing to sue Penn State for any alleged breach of the NCAA's Constitution and/or its Bylaws. The NCAA

also has asserted Preliminary Objections that, if granted, would narrow both the scope of the claims left in the litigation and the identities of the plaintiffs who can assert those claims.

A ruling sustaining the Defendants' Preliminary Objections, in whole or in part, would change the complexion of the case, perhaps significantly. Given the lack of urgency associated with the litigation, this Court should exercise its inherent discretion to manage discovery to not permit the subpoena to Pepper Hamilton (or any subpoena) to be issued until the pleadings have closed and the scope of the case, and the identity of the remaining litigants, have been judicially determined.

5. No Documents Should Be Produced Until A Global Protective Order Is In Place, But Plaintiffs Have Largely Rejected The NCAA's Proposed Protective Order.

Penn State also objects to the issuance of the proposed subpoena, and the production of any documents, including by Pepper Hamilton, until a global protective order is in place. In that regard, Penn State has done more than make "[g]eneral allegations of harm" in connection with its assertion that good cause exists for the entry of a protective order. Motion, ¶ 96. To the contrary, as Penn State explained in its Objections, the proposed subpoena raises a host of privacy and confidentiality concerns. For example, as discussed *supra,* in the course of its investigation, the Freeh Firm may have gained access to documents and records protected from disclosure and dissemination pursuant to FERPA and CHRIA. Penn State also objected on the issuance of the proposed subpoena as "invasive of any confidentiality duties that may be owed to other parties, including individual employees, and as intruding upon any privacy interests of such persons." Objections, p. 4. *See* Motion, Ex. D (Freeh Report) p. 9 ("The information in this report was gathered . . . with due regard for the privacy of the interviewees and the documents reviewed."). Penn State has both the right and the duty to ensure that it respects, and takes

appropriate steps to maintain, these rights of privacy and confidentiality. In that regard, a Protective Order is both warranted and necessary.

Paterno's Motion neglects to advise the Court that the NCAA circulated a draft Protective and Confidentiality Order for review by Plaintiffs' counsel on April 2, 2014. Plaintiffs' counsel rejected that Order and counter-proposed significant changes thereto – changes that would impose onerous and expensive obligations on Defendants' efforts to claim and maintain documents' confidential status. Although counsel for the NCAA is negotiating with Plaintiffs' counsel about the proper scope and terms of the Protective Order, Defendants anticipate that the Court will need to intervene in this matter. Again, given the Court's inherent authority and discretion to manage discovery, Penn State respectfully submits that the Court should not permit any third-party subpoena, including Paterno's proposed subpoena to Pepper Hamilton, to issue until an appropriate protective order is in place.

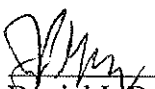
6. Penn State's Objection To Improper Service.

Penn State respectfully withdraws its objection to the improper service of the proposed subpoena.

II. Summary

WHEREFORE, for all of these reasons, The Pennsylvania State University respectfully requests that the Motion be denied.

Respectfully submitted,



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Dated: May 9, 2014

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 9th day of May, 2014, a true and correct copy of the foregoing Brief in Support of Response to Motion to Overrule Objections by Defendant Penn State University to Notice of Intent to Issue Subpoena to Pepper Hamilton LLP Pursuant to Rule 4009.21 was served upon the following counsel via United States mail, first class, postage prepaid:

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