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;	)	CIVIL DIVISION
RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;	)	Docket No. 2013-2082
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.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY PENDING APPEAL AND FOR PROTECTIVE ORDER BY NON-PARTY PEPPER HAMILTON LLP

Non-party Pepper Hamilton LLP ("Pepper Hamilton") hereby moves Motion for Stay Pending Appeal and for Protective Order pursuant to Rule 4012 of the Pennsylvania Rules of Civil Procedure.

I. Procedural History

On February 26, 2014, Plaintiffs served the parties with a Notice of Intent to Serve a Subpoena for the production of documents and things upon non-party Pepper Hamilton ("Subpoena"). Defendant The Pennsylvania State University ("Penn State") objected to that notice on grounds including the attorney-client privilege and the work product doctrine. On September 11, 2014, this Court entered an Opinion and Order ("the Opinion and Order") overruling most of Penn State's objections. The Court held that the work product privilege belongs to the attorney, not the client, and that, accordingly, Penn State lacked standing to assert it. On September 15, 2014, Plaintiffs served the Subpoena on Pepper Hamilton. Ex. G. On October 8, 2014, Penn State filed a Notice of Appeal from the Opinion and Order, stating that it is appealing the Opinion and Order to the extent that it overruled Penn State's objections based on attorney-client privilege and the work product doctrine. Ex. F.

By way of this motion, Pepper Hamilton asserts the work product doctrine, thereby curing any lack of standing on Penn State's part to do so. With that cure, the Court should enter an order to protect against any disclosure of work product in response to the Subpoena.

Furthermore, the Court's ruling on the attorney-client privilege is based on a misapprehension of the facts, and its ruling on the work product privilege is based on an error of law. Both of those issues will be addressed in Penn State's appeal from the Opinion and Order. As the appellate courts of the Commonwealth have consistently recognized, a claim of privilege is irreparably lost by the compelled production of documents prior to appellate review of a trial

court's order overruling claims of privilege. To preclude the irreversible disclosure of privileged documents within the scope of Penn State's appeal, the Court should issue a stay of the Opinion and Order to the extent it overruled Penn State's objections to the Subpoena as well as any obligation on the part of Pepper Hamilton to produce documents in response to the Subpoena that may be privileged, pending the resolution of Penn State's appeal.[1]

II. Factual Background

In 2011, the Board of Trustees of Penn State, through a Special Investigations Task Force ("Task Force"), retained the law firm of Freeh Sporkin & Sullivan LLP ("FSS") as outside legal counsel to conduct an independent, full and complete investigation of allegations involving sexual abuse by Gerald Sandusky, a former Penn State assistant football coach, and to provide associated recommendations. *See* Ex. A, Engagement Letter. FSS in turn engaged Freeh Group International Solutions LLC ("FGIS") to provide investigative support to FSS.[2] *Id.* at 5. Following completion of its investigation, FSS issued a report of its findings ("Freeh Report"). The Freeh Report was made public on July 12, 2012. On September 1, 2012, the attorneys of FSS became partners of or otherwise associated with Pepper Hamilton, and, at the same time, Pepper Hamilton acquired FGIS.

The whole reason for the FSS investigation was to allow Penn State to understand the underlying facts and to get FSS's advice as to Penn State's legal obligations and options in

[1] Pepper Hamilton hereby reasserts the attorney-client privilege and work product arguments raised in Penn State's objection to Plaintiffs' notice of intent to serve the Subpoena, but recognizes that the Court has already considered and ruled on those arguments. By this motion, Pepper Hamilton is asserting its right to seek a protective order under Rule 4012 of the Pennsylvania Rule of Civil Procedure, seeking as relief a stay sufficient to allow the arguments it has adopted to be resolved on appeal. In addition, given the Court's holding that Penn State does not have standing to assert the work product doctrine, Pepper Hamilton seeks a protective order pursuant to Rule 4012 to prevent the production of documents responsive to the Subpoena that contain work product.

[2] The Order and Opinion mistakenly concludes that FGIS was retained to provide legal advice and that FSS was not so retained. Op. at 20-21. In fact, as the engagement letter between the Penn State Board of Trustees states (and as quoted in the Opinion and Order), FSS that was retained as "legal counsel," and FSS retained FGIS to assist FSS in providing those legal services. *See* page 9 *infra*.

responding to the crisis resulting from the disclosure of the Sandusky scandal. Ex. B, McNeill Verification ¶¶ 3-5. Throughout its investigation, FSS took great pains to preserve both its work product and the attorney-client privilege.[3] The investigation was structured to allow FSS to receive communications from interviewees in confidence for purposes of rendering legal advice. FSS communicated with the Task Force in confidence, and it was the Board's decision as to how that information would be used and what actions it would take in light of FSS's legal advice. Penn State engaged FSS not only in anticipation of litigation, but with the knowledge that litigation was already pending. "Among the types of anticipated litigation was litigation from those who might be adversely affected by decisions the Trustees made, such as how it dealt with the NCAA or Big Ten Conference . . . ." *Id.* ¶ 5.

Plaintiffs allege that defendant NCAA abused its authority in taking action on basis of the Freeh Report that adversely affected Plaintiffs. On February 26, 2014, Plaintiffs served notice on the parties to this action that they intended to serve the Subpoena on non-party Pepper Hamilton for 25 broad categories of documents relating to FSS's work on behalf of the Board of Trustees. *See* Ex. C, Notice of Intent. Defendant Penn State objected in part to Plaintiffs' notice of the Subpoena, asserting numerous grounds upon which certain categories of requests in the Subpoena should be rejected, including the attorney-client privilege and the work product doctrine. Penn State did not object to certain categories of requests to the extent they

[3] As explained in the McNeill Verification, the working papers of the FSS team were secured and kept confidential, and they worked in a secure facility. The team maintained their papers in an evidence locker, they all worked on secured and encrypted laptops, and they directed staff not to share work products with outsiders. The interviewers explained to witnesses that the interviews were confidential and protected by the attorney-client privilege, and that they were being conducted to help give Penn State guidance on legal issues. The standard instruction to investigators was to mark their reports and papers with headers making clear that the documents were work product and privileged and confidential. The interviews also were marked to reflect that they contained the mental impressions of counsel and the investigators. As the Freeh Report stated, "The information in this report was gathered under the applicable attorney-client privilege and attorney work product doctrine, and with due regard for the privacy of the interviewees and the documents reviewed." Ex. B at ¶¶ 6-9.

sought communications between FSS or its agents and third parties, or to the extent Plaintiffswould agree to a reasonable search protocol for millions of source documents to narrow the extraordinary breadth of his requests. Ex. D, Penn State's Response at 5-6. In that portion of its Opinion and Order ruling on Penn State's discovery objections,[4] the Court overruled nearly all of objections raised by Penn State, in whole or in part. *See* Ex. E, Opinion and Order at 37-39. With regard to the work product doctrine, this Court stated that, "[u]nlike the attorney-client privilege, which belongs to the client to assert, the work product doctrine is asserted by the attorney," and overruled Penn State's work product objection in part on the basis that it lacked standing. *Id.* at 22-23.

III. Questions Presented

Question: Should the Court issue a stay of the Opinion and Order to the extent that it overruled Penn State's objections to the Subpoena on the bases of work product and attorney-client privilege, and a stay of any obligation on the part of Pepper Hamilton to produce documents within the scope of those objections?

Suggested Answer: Yes.

Question: Should the Court issue a protective order to preclude the disclosure of documents subject to the work product doctrine in response to the Subpoena?

Suggested Answer: Yes.

[4] The Opinion and Order also ruled on preliminary objections to the Amended Complaint. Those rulings are not at issue in this motion.

IV. Argument

A. This Court Should Stay The Opinion And Order Pending Penn State's Appeal Because Penn State And Pepper Hamilton Will Suffer Irreparable Injury If Protectable Documents Are Prematurely Disclosed

1. Legal Standard

A stay pending appeal under Rule 1732(a) of the Pennsylvania Rules of Appellate Procedure is warranted when the movant establishes that the equities balance in its favor by demonstrating: (1) a strong showing that it is likely to prevail on the merits; (2) that without such relief the movant will sustain irreparable injury; (3) a stay will not substantially harm other interested parties; and (4) a stay will not harm the public interest. *Pa. Pub. Utility Comm'n v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983). In applying this standard, a court should "exercise its discretion to grant or deny a stay so that injustice will not follow from the court's decision." *Reading Anthracite Co. v. Rich*, 577 A.2d 881, 884 (Pa. 1990). The case for issuing a stay is compelling when the order on appeal implicates the attorney-client privilege and, without a stay, documents arguably subject to that privilege will be irretrievably disclosed. *See, e.g., Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263 (Pa. Super. Ct. 2007).

2. Without a Stay, Pepper Hamilton And Penn State Will Suffer Irreparable Harm

If the Court does not stay the effect of the Opinion and Order pending Penn State's appeal, Pepper Hamilton and Penn State will lose the ability to argue that the documents in Pepper Hamilton's possession are protected by the attorney-client privilege or work product doctrine once they are produced. *See Berkeyheiser v. A-Plus Investigations, Inc.*, No. 2910 EDA 2006, No. 2911 EDA 2006, 2007 Pa. Super. LEXIS 3869, at *17 (Pa. Super. Ct. Nov. 16, 2007); *Carbis Walker, LLP v. Hill, Barth & King, LLC*, 930 A.2d 573, 577 (Pa. Super. Ct. 2007) (noting that "the claimed right will be irreparably lost if immediate review is denied"). Indeed,

Pennsylvania appellate courts have recognized that the risk of irreparable harm if a party is compelled to disclose potentially privileged information is so great that they consistently hold that an appeal from an interlocutory order directing such disclosure is immediately appealable under the collateral order doctrine. *E.g., T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1058 (Pa. Super. 2007) (holding that the third prong of the collateral order test is met because, "if we do not review the propriety of the discovery orders at this point, Elwyn's claim of privilege would be irreparably lost"), citing *Ben v. Schwartz,* 556 Pa. 475, 729 A.2d 547 (1999).

Thus, if Pepper Hamilton was forced to produce arguably privileged documents prior to the resolution of the privilege questions on appeal, Penn State would effectively be denied its appeal rights on this important issue. The threat of irreparable harm to Penn State and Pepper Hamilton is manifest. For this reason alone, a stay is compelled under these circumstances.

3. The Public Interest Strongly Favors Grant of a Stay

The Court should issue a stay of its Opinion and Order because of the public interest in protecting the attorney-client privilege. Under Pennsylvania law, "the attorney-client privilege is frequently viewed as the most important evidentiary privilege in the law because of the role of counsel in the administration of justice." *Orix USA Corp. v. DVI Inc.*, 37 Pa. D. & C. 4th 491, 497 (C.P. Allegheny 1997); *see also Brennan v. Brennan*, 422 A.2d 510, 514 (Pa. Super. Ct. 1980) (noting that "the privileged nature of communications between an attorney and his client is the oldest testimonial privilege known to law"); *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C. 4th 23, 25 (Allegheny C. P. 1996) (Pennsylvania appellate courts have consistently sought to preserve the integrity of the attorney-client privilege because of its significance to a socially important relationship). Improvident disclosure of any attorney-client privileged document causes direct harm to the administration of justice. *See Kofsky*, 409 A.2d at

1362. Moreover, the Pennsylvania Supreme Court acknowledged that "protecting attorney work product from discovery [] encourage[s] efficient and effective client representation." *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A.3d 680 (Pa. 2014).

Given the important public policy interests served by the attorney-client privilege, the Court should stay enforcement of its Opinion and Order pending resolution of Penn State's appeal.

4. Penn State Will Likely Prevail on the Merits of the Appeal

Given that Penn State retained FSS (whose attorneys joined Pepper Hamilton after the Freeh Report was issued) as outside counsel, that FSS attorneys directed the massive investigation at issue, and that Plaintiffs requests specifically or obviously encompass communications between Penn State and FSS,[5] this Court's rulings on attorney-client privilege and the work product doctrine pose a grave threat to Pepper Hamilton and Penn State.[6] Because those rulings are premised on a misapprehension of the facts and a misapplication of the law, it is highly likely that the Superior Court will reverse them.

a. The Attorney-Client Privilege Attaches to Communications between Penn State and FSS or FGIS

The attorney-client privilege is a matter of statute in Pennsylvania, which provides that, "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 privilege applies equally to protect communications from client to attorney,

[5] *E.g.* Ex.C, Subpoena request nos. 2 (communications between FSS, FGIS and Penn State); 3 (FSS's entire "client file"); 22 (drafts of the Freeh Report); 24 (invoices FSS sent to Penn State).

[6] Pepper Hamilton recognizes that the Opinion and Order has reached a different conclusion that Pepper Hamilton advances here. However, a court may conclude that a stay is proper even if it disagrees with the movant's position. *See Process Gas Consumers Group*, 467 A.2d at 554 n.8.

and from attorney to client. *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011). Furthermore, communications between an agent of an attorney (*e.g.*, FGIS) 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).

As a preliminary matter, it appears that the Court's ruling on attorney-client privilege proceeds on a misapprehension of the facts. The Order and Opinion states that "Freeh Group International [FGIS] was providing legal services to Penn State" (Ex. E at 21), but FGIS is not a law firm. Penn State retained FSS (which is a law firm) as outside counsel, and FSS in turn retained FGIS as an agent to assist FSS in providing legal services to Penn State. In light of the protection accorded communications between a client and lawyer as well as between a client and a lawyer's agent, it is highly likely that the Superior Court will conclude that communications between Penn State and either FSS or FGIS are equally covered by the attorney-client privilege.

The Order and Opinion states that an "essential element" for the application of the attorney client privilege is missing between Penn State and FSS under *Commonwealth v. Mrozek*, 441 Pa. Super. 425, 428, 657 A.2d 997, 998 (1995), because the scope of the engagement did not relate to "securing either an opinion of law, legal services or assistance in a legal matter." Ex. E at 20. However, portions of the engagement letter cited in the Opinion and Order plainly state that "FSS has been engaged to serve as independent, external *legal counsel*," and that FSS would retain FGIS to assist in the engagement "[f]or *the purposes of providing legal services*." *Id.* (emphasis added). Other portions of engagement letter are also clear: "The work and advice which is provided to the [Penn State] 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 . . . .*" Ex. A at 5 (emphasis added). Moreover, there can be no doubt that the fallout from the Sandusky scandal confronting Penn State at the time it engaged FSS – including litigation and investigations – constituted a pressing "legal matter" for which it was seeking assistance. For these reasons, it is likely that the Superior Court will conclude that an attorney-client relationship existed between Penn State and FSS for the purposes of privilege under *Mrozek.*

To the extent the Opinion and Order is premised on the notion that providing legal advice was not the only reason or not the primary reason for retaining FSS, it misses the mark. A recent decision from the Court of Appeals for the D.C. Circuit provides a compelling analysis of the scope of the privilege in the context of an investigation of wrongdoing in a corporate setting, much like the investigation undertaken by FSS for Penn State. *In re: Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) ("*KBR*"). In *KBR,* the district court had rejected privilege claims with respect to communications occurring in the context of an internal investigation of alleged bribes and kickbacks. Among the reasons for rejecting the privilege claim was that the communications would have occurred even if the investigation had not been undertaken to provide legal advice. The court of appeals rejected this "but-for" test:

> Under the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. . . . The District Court's novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry. In turn, businesses would

> be less likely to disclose facts to their attorneys and to seek legal advice, which would limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.

Id. at 759 (internal quotes and citation omitted). The court of appeals concluded, "if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply." *Id.* at 760. Thus, even if the investigation by FSS was undertaken for multiple purposes, the fact that legal advice was among them means the protection accorded by the attorney-client privilege exists, and the Superior Court is likely to so hold.

Finally, the Order and Opinion states that FSS or Penn State waived privilege as to an entire subject matter to whatever extent FSS may have merely discussed that subject matter in a communication with third parties the Big Ten or the NCAA.[7] It is likely that the Superior Court will take a contrary view on this point. As the court held in *Murray v. Gemplus International, S.A.*, 217 F.R.D. 362 (E.D. Pa. 2003), a case cited in the Opinion and Order, a party can only waive privilege as to an entire subject matter when that party intentionally seeks to use privilege as both a shield and a sword in litigation to gain advantage vis-à-vis another party in that litigation. *Id.* at 367 ("when one party intentionally discloses privileged material with the aim, in whole or in part, of furthering that party's case, the party waives its attorney-client privilege with respect to the subject-matter of the disclosed communications"). Neither Penn State nor FSS could have waived privilege as to the entire subject matter in any communication with either the Big Ten or the NCAA because none of the communications occurred in the context of litigation against those parties. Indeed, a rule that any discussion of a subject matter with a third party constitutes waiver of that subject matter would swallow the privilege, as there would be no privilege as to any drafts and discussions relating to any

[7] Ex. E at 21-22. Penn State and Pepper Hamilton do not dispute that the actual communications between FSS and a non-agent third party, such as the Big Ten or the NCAA, are discoverable.

document that is ultimately published. Thus, Penn State is likely to prevail on this aspect of its appeal.

b. The Work Product Doctrine Applies in the Context of the FSS Investigation

With regard to the work product doctrine, the Opinion and Order overruled Penn State's objections on the bases that (1) Penn State, as the client rather than the attorney, lacked standing to object, and that (2) the scope of the engagement of FSS "did not contemplate legal advice or services in conjunction with the case at bar." Ex. E at 22-23. The first basis is now moot because the attorney, not the client, is now asserting the protection of the work product doctrine.[8]

As to the second basis, Rule 4003.3 of the Pennsylvania Rules of Civil Procedure provides that "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." There nothing in the rule that limits the application of the work product protection to the case for which the material was prepared, and no such limitation applies here.

Graziani v. OneBeacon Ins. Inc., 2 Pa. D.&C. 5th 242 (Centre C.P. 2007), on which the Court relies, is one of a series of cases involving bad faith claims against insurance companies in which courts have held that the protection for work product materials prepared in the underlying litigation against the insured no longer exists to the extent those materials are relevant to the bad faith claims. These cases do not stand for the broad proposition that the work

[8] In any event, the Court's conclusion that the work product privilege can only be asserted by the attorney is mistaken. Indeed, the Pennsylvania Supreme Court's recent decision in *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A.3d 680 (Pa. 2014) makes clear that clients have standing to assert work product objections, given that the Court sustained the work product objections of a party, without counsel appearing as a party to the motion practice. *Id.* at 689. Moreover, the federal court opinion cited in the Opinion and Order, *Rhone-Poulenc Rorer v. Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994), does not stand for the proposition that *only* an attorney is able to invoke the work product doctrine.

product doctrine applies only to materials prepared strictly for the particular litigation in which the work product claim is asserted, as the Court seems to conclude. Rather, the crux of these cases is that the work product protection accorded the materials in the underlying litigation is lost in the bad faith claim because the work product becomes directly relevant to that later, derivative claim.

This distinction was explained by the Superior Court in *Rhodes v. USAA Casualty Insurance Co.*, 21 A.3d 1253 (Pa. Super. 2011). In *Rhodes,* the trial court had ordered plaintiff-insured in a bad faith case to turn over to the insurer the entire contents of its attorney's file in the underlying case in which the insured was the defendant. On appeal, the insurer attempted to justify this order on the ground that the work product protection no longer applied because the material was not prepared for the bad faith case, relying on decisions like *Graziani. Id.* at 1256-57. The Superior Court rejected that broad approach and held that the trial court's order violated the work product doctrine. The Superior Court explained that the reason the work product protection was lost in bad faith cases where *insurers* were ordered to turn over their attorney's files was because the content of those files became relevant to determining whether the insurer acted in good faith. As the Court observed, the explanatory note to Rule 4003.3 expressly provides that work product may be discoverable in situations under the Rule where the legal opinion of an attorney becomes a relevant issue in an action. *Id.* at 1261.

Nor is the work product doctrine overcome by the suggestion that the work product at issue was prepared for or in anticipation of litigation other than that brought by Plaintiffs here. In the first place, that is simply not an accurate characterization. Penn State and FSS anticipated all manner of litigation emerging from the investigation, including challenges to the way Penn State responded to the crisis by those who might have been harmed by that

response. Second, the work product protection exists even when the material was not prepared in anticipation of specific litigation. As the court held in *Mueller, supra,* a bad faith case like *Graziani*:

> 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. Instead, the line between what work product is discoverable and what work product is protected is that drawn by Judge Avellino in the *Tate* case. Matters involving "value," "merit," "strategy" or "tactics" are protected unless they have evidentiary value. [*Tate v. Philadelphia Savings Fund Society,* 1 Pa. D.&C. 4th 131, 141-21 (Phila. C.P. 1987)]. *See Sedat Inc. v. Department of Environmental Resources, 163 Pa. Commw. 29, 33, 641 A.2d 1243, 1245 (1994),* where the court held that the work product protections of Rule 4003.3 apply even though counsel's communication was without reference to any specific anticipated litigation – the rule's protection of an attorney's mental impressions "is unqualified."

31 Pa. D.&C. 4th at 30. Thus, Penn State's position on the application of the work product doctrine is likely to prevail on appeal.

5. Plaintiffs Will Not Suffer Substantial Harm Because of a Stay

As opposed to the irreparable injury that Penn State and Pepper Hamilton would suffer if the Court does not stay its Opinion and Order pending appeal, Plaintiffs will suffer no harm as a result of a stay. Pepper Hamilton will produce responsive documents outside of the scope of the matters on appeal, and Plaintiffs will be free to proceed with other discovery in this matter during the pendency of the appeal. To whatever extent the appeal might cause a delay in the litigation, the discovery schedule can be adjusted to ensure that Plaintiffs have sufficient time to review any additional materials that may ultimately be produced.

6. This Court Should Accordingly Stay the Opinion and Order with Respect to Attorney-Client Privilege and Work Product Pending Penn State's Appeal

For the foregoing reasons, this Court should stay the operation of the Opinion and Order to the extent it overruled Penn State's objections with regard to work product and attorney-client privilege, and accordingly stay any obligation of Pepper Hamilton to produce documents within the scope of those objections, pending the resolution of Penn State's appeal.

B. This Court Should Enter A Protective Order To Preclude The Disclosure Of Documents Subject To The Work Product Doctrine

Having standing to invoke the work product doctrine, and having demonstrated above that this protection applies to the work product of FSS and its agents in connection with the investigation, Pepper Hamilton is entitled to a protective order precluding the production of such work product in response to the Subpoena.

V. Conclusion

For the foregoing reasons, Pepper Hamilton respectfully requests the entry of an order in the form attached staying the Opinion and Order to the extent it overruled Penn State's objections to the Subpoena with regard to work product and attorney-client privilege, and staying any obligation of Pepper Hamilton to produce documents within the scope of those objections, pending the resolution of Penn State's appeal, and further ordering that Pepper Hamilton shall not produce documents in response to the Subpoena that contain mental impressions, conclusions, opinions, notes or summaries, legal research or legal theories of an attorney.

Respectfully submitted,

Dated: October 13, 2014

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