



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

**MOTION FOR STAY PENDING  
APPEAL AND FOR PROTECTIVE  
ORDER BY NON-PARTY  
PEPPER HAMILTON LLP**

Filed on Behalf of:  
Non-party Pepper Hamilton LLP

Counsel of record for this non-party:

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CIVIL DIVISION

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**V.**

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

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**MOTION FOR STAY PENDING APPEAL AND FOR PROTECTIVE ORDER BY  
NON-PARTY PEPPER HAMILTON LLP**

Plaintiffs have served a subpoena for documents on non-party Pepper Hamilton LLP. Defendant and Pepper Hamilton client, The Pennsylvania State University (“Penn State”), had objected to that subpoena upon notice on grounds including work product and attorney-client privilege. The Court largely overruled Penn State’s objections by Opinion and Order of September 11, 2014, nearly all of Penn State’s attorney-client and work product objections. Plaintiffs have since served the subpoena on Pepper Hamilton, and Penn State has served notice that it will appeal the Opinion and Order with regard to attorney-client privilege and work product. For the following reasons, and those stated at length in its accompanying Memorandum of Law, Pepper Hamilton respectfully requests that the Court stay the Opinion and Order, and any obligation of Pepper Hamilton to produce documents, to the extent of the issues on appeal pending resolution of the appeal, and further requests the Court enter an protective order stating that Pepper Hamilton need not produce documents subject to the work product doctrine:

1. 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”). Ex. C. Penn State objected to that notice on grounds including the attorney-client privilege and the work product doctrine. Ex. D.

2. On September 11, 2014, this Court entered an Opinion and Order (“the Opinion and Order”) overruling most of Penn State’s objections, holding in part that work product doctrine must be asserted o the attorney, not the client, and that attorney-client privilege was inapplicable or waived as to certain categories of documents. *See* Ex. E at 19-23.

3. On October 8, 2014, Penn State filed a Notice of Appeal from the Opinion and Order (“Appeal”), 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. E.

4. On September 15, 2014, Plaintiffs served the Subpoena on Pepper Hamilton. Pepper Hamilton seeks a stay of any obligation to respond to the Subpoena to the extent of any requests within the scope of the Appeal, and objects to the production of work product as Penn State’s attorney.<sup>1</sup> Ex. G.

### **BACKGROUND**

5. 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”) to investigate allegations sexual abuse at Penn State and make associated recommendations. *See* Ex. A, Engagement Letter. FSS in turn engaged Freeh Group International Solutions LLC (“FGIS”) to provide investigative support to FSS. *Id.* at 5.

6. The attorneys of FSS have since become partners of or are otherwise associated with Pepper Hamilton, and FGIS is now a subsidiary of Pepper Hamilton.

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<sup>1</sup> 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.

7. FSS was expressly retained as legal counsel to Penn State, and the agents FSS retained assisted in the provision of legal advice. FSS understood and expected that its work would be subject to attorney-client privilege and the work product doctrine, and conducted the investigation accordingly. The investigation was conducted in the anticipation of, and in fact with knowledge of, litigation. *See* Ex. A; Ex. B, McNeill Verification ¶¶ 3-5

### **THE OPINION AND ORDER SHOULD BE STAYED PENDING APPEAL**

8. A stay pending appeal under Rule 1732(a) of the Pennsylvania Rules of Appellate Procedure is warranted when the movant establishes: (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).

9. 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).

10. Without a Stay, Pepper Hamilton and Penn State will suffer irreparable harm because the privilege cannot be recovered once documents 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”).

11. Public interest strongly favors protecting 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”).

12. Penn State will likely prevail on appeal as to attorney-client privilege because the privilege attaches to communications between Penn State and FSS or agents of FSS. Under Pennsylvania law, “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. Communications between an agent of an attorney and the client 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).

13. The Opinion and Order appears to be based on a misapprehension of facts. It states that “Freeh Group International [FGIS] was providing legal services to Penn State.” Ex. E at 21. 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. 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.

14. The Order and Opinion also 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.

15. However, the engagement letter plainly stated, as quoted in the Opinion and Order, 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).

16. The Opinion and Order also 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 the Big Ten or the NCAA. Ex. E at 21-22. But 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. *Murray v. Gemplus International, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003). Neither Penn State nor FSS could have waived privilege as to the subject matter in communications with the Big Ten or the NCAA because neither was litigating against those parties.

17. 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.

18. With regard to the scope of engagement, 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." The rule does not limit application of the work product protection to the case for which the material was prepared. The authority on which the Court relied applies only in the context of bad faith claims in insurance disputes, where the legal opinion of an attorney is put at issue. *See Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D.&C. 5th 242 (Centre C.P. 2007). This distinction was amply explained by the Superior Court in *Rhodes v. USAA Casualty Insurance Co.*, 21 A.3d 1253 (Pa. Super. 2011). *See id* at 1256-61.

19. Plaintiffs will not suffer substantial harm because of a stay (as opposed to the irreparable injury that Penn State and Pepper Hamilton would suffer). 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.



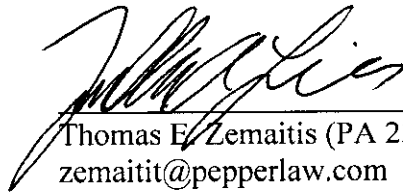
**A PROTECTIVE ORDER IS WARRANTED AS TO WORK PRODUCT**

20. Having standing to invoke the work product doctrine under the reasoning of the Court, where Penn State did not have standing, 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.

**WHEREFORE**, for the foregoing reasons, and the reasons stated at length in its accompanying Memorandum of Law, 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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# **EXHIBIT A**



PRIVILEGED AND CONFIDENTIAL

November 18, 2011

Stéve A. Garban  
Chairman, Board of Trustees  
and  
Paula R. Ammerman  
Director, Office of the Board of Trustees  
The Pennsylvania State University  
205 Old Main  
University Park, PA 16802

Re: Engagement to Perform Legal Services

Dear Mr. Garban and Ms. Ammerman:

*Investigations Task Force*

*Task Force*

We are pleased that the Board of Trustees of The Pennsylvania State University ("Trustees", "you" or "your"), on behalf of the Special Committee established by the Trustees (the "Special Committee"), has engaged us to represent the Special Committee. This is a new engagement for Freeh Sporkin & Sullivan, LLP ("FSS"). Accordingly, this is to set forth the basic terms upon which FSS has been engaged to represent the Special Committee, including the anticipated scope of our services and billing policies and practices that will apply to the engagement. Although our services are limited at this time to the specific matter described herein, the general terms of this letter will apply to any other matters that FSS may hereafter undertake to handle for the Trustees or the Special Committee.

1. Scope of Engagement. FSS has been engaged to serve as independent, external legal counsel to the Special Committee 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 government authorities. The results of FSS's investigation will be provided in a written report to the Special Committee and other parties as so directed by the Special Committee. 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 Special Committee and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

Task Force  
 It is understood by FSS, the Trustees and the ~~Special Committee~~ that FSS will act under the sole direction of the ~~Special Committee~~ in performing the services hereunder. It also is understood by FSS, the Trustees and the ~~Special Committee~~ that FSS's investigation will be completed in parallel to, but independent of, any other investigation that is conducted by any policy agencies, governmental authorities or agencies, or other organizations within or outside of (e.g., The Second Mile) PSU, and will not interfere with any such other investigations.

Task Force  
 It also is understood by FSS, the Trustees and the ~~Special Committee~~ that during the course of FSS's independent investigation performed hereunder, FSS will immediately report any discovered evidence of criminality to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~. If FSS's investigation identifies any victims of sexual crimes or exploitation, FSS will immediately report such information to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~.

Task Force  
 FSS also will communicate regarding its independent investigation performed hereunder with media, police agencies, governmental authorities and agencies, and any other parties, as directed by the ~~Special Committee~~. However, it also is understood by FSS, the Trustees and the ~~Special Committee~~ that neither the Trustees nor the ~~Special Committee~~ will interfere with FSS's reporting of evidence of criminality or identities of any victims of sexual crimes or exploitation discovered throughout the course of FSS's independent investigation performed hereunder, as discussed in the paragraph immediately above.

The precise time frame in which FSS's services will be performed cannot presently be determined. However, FSS, the Trustees and the ~~Special Committee~~ all recognize that the investigation must be completed in a thorough manner, but also as expeditiously as possible.

2. Rates. It is anticipated that Louis J. Freeh will be the lead and billing attorney on this engagement. Other FSS, and other non-FSS professionals, will be assigned from time to time to assist in the representation. FSS will charge you for the services provided under the terms of this engagement letter based on the hourly rates of the professionals working on this matter, plus reasonable expenses as described below in the "Disbursements" section of this engagement letter. The hourly rates that will be charged in connection with this matter are as follows: Mr. Freeh -- [REDACTED] USD per hour; other FSS partners -- [REDACTED] USD per hour; investigators and FSS non-partner lawyers -- [REDACTED] USD per hour; and paraprofessional support staff -- [REDACTED] USD per hour. We reassess our hourly rates from time to time and adjustments are made when we believe such adjustments are appropriate. These adjustments may be reflected in the billing rates utilized to determine our charges to you during the course of our engagement. FSS bills in quarter of an hour increments.

3. Disbursements. In addition to fees for our services, we also charge separately for certain costs incurred on the ~~Special Committee's~~ <sup>Trial Office's</sup> behalf, such as travel related expenses. Our invoices also will include costs incurred on the ~~Special Committee's~~ <sup>Trial Office's</sup> behalf for services and materials provided by third-party vendors, including but not limited to courier and messenger service, airfreight service, outside copy service, shipping and express mail, filing fees, deposition transcripts, and court reporters. Under certain circumstances, for certain large disbursements, we may either bill you directly or ask you to advance funds outside our normal billing cycle. In addition to the third-party disbursements noted above, other charges that will be reflected on our invoices include the following:

- International calling costs will be charged at the standard provider rates.
- Computerized research costs will be charged at the standard provider rates.
- Office supply costs are not passed on to a client unless a purchase is specifically required for a particular engagement.

We make every effort to include disbursements in the invoice covering the month in which they are incurred. However, there may be occasions when disbursements may not be posted in the billing system until the following month. If the required payment of our invoices is based on the completion of a specific assignment, pursuant to any alternative timing arrangements that have been established and are described in the "Rates" section of this engagement letter, an estimate of unposted disbursements in addition to an estimate of unposted charges for services will be included in our invoice payable at completion.

4. Payment Terms. Generally, our invoices are prepared and forwarded to our clients monthly covering fees and costs incurred for the prior month. Any alternative timing arrangements for invoicing that have been established are described in the "Rates" section of this engagement letter.

Unless stated differently in the "Rates" section of this engagement letter, our invoices for service are due and payable within thirty (30) days of receipt. Clients whose invoices are not paid within this period may have a late charge assessed on their unpaid balance at the rate of 1% per month. The intent of the late charge is to assess on an equitable basis additional costs incurred by FSS in carrying past-due balances.

FSS requires payment at the conclusion of this engagement of all accrued and unpaid fees and disbursements to the extent invoiced, plus such additional amounts of fees and disbursements as shall constitute our reasonable estimate of fees and disbursements incurred or to be incurred by us through the conclusion of this engagement (though such estimate shall not thereafter preclude a final settling of accounts between us when final detailed billing information is available).

During this engagement, the Trustees and the <sup>Task Force</sup> ~~Special Committee~~ may request from us an estimate of fees and/or costs that we anticipate incurring on the ~~Special Committee's~~ behalf. While we may provide an estimate for your or the ~~Special Committee's~~ general planning purposes, our estimate is only a preliminary approximation based on facts that are currently available and the currently anticipated level of work required to complete the engagement. In no event is an estimate to be construed as a commitment of FSS to render services at a minimum or maximum cost.

Unless otherwise agreed, our invoice will be presented in our standard format. If this format is not sufficient for your needs, we will work with you to find one that is. FSS will review individually any requests to use a third party vendor for electronic billing. Depending on the vendor requested, we might provide alternative recommendations in order to insure that electronic billing through a third party is both practical and efficient. All charges related to using a third party vendor for this purpose, including initial start-up costs and maintenance fees, will be payable by the Trustees directly.

Where required, your billing statement may include applicable international taxes such as VAT, GST, and consumption tax, etc.

Upon request, we will forward our billing statements to a third party designated by you who is assuming payment responsibility for your or the <sup>Task Force</sup> ~~Special Committee's~~ legal expenses, e.g., an insurance carrier who holds your liability coverage. In the event that timely payment is not received from the third party, we will look to the Trustees for payment of our legal fees and costs and you agree that you are responsible for prompt payment in that event.

All payments should be sent directly to: 3711 Kennett Pike, Suit 130, Wilmington, Delaware 19807. If you choose to pay by wire transfer, wire transfer instructions are as follows:

Account Holder: Freeh Sporkin & Sullivan, LLP

Bank:

Account No.:

ABA/Routing No.:  
(For Domestic Payments)

SWIFT Code:  
(For International Payments)

The billing attorney assigned to this matter will review your billing statement before it is sent to you and make any adjustments he or she views as appropriate. If you have

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Wilmington, DE 19807  
+1 (302) 824-7139

1185 Avenue of the Americas, 30<sup>th</sup> Floor  
New York, NY 10036  
+1 (646) 557-6286

2445 M Street, NW, Third Floor  
Washington, DC 20037  
+1 (202) 390-5959

any questions concerning any invoice item, please do not hesitate to contact the billing attorney.

5. Retention of Third Parties. We may determine that it is necessary to involve third parties to assist us in performing services in connection with this engagement. If that determination is made, we will notify the ~~Special Committee~~ <sup>Task Force</sup> promptly to discuss the proposed third parties, the expected scope of the services to be provided by the third parties and the related fees and costs expected to be charged by those third parties. FSS will consult with the ~~Special Committee~~ <sup>Task Force</sup> about any changes to the third parties' scope of services or related fees and costs that may occur throughout the course of this engagement.

For the purpose of providing legal services to the ~~Special Committee~~ <sup>Task Force</sup>, FSS will retain Freeh Group International Solutions, LLC ("FGIS") to assist in this engagement. It should be noted that Louis J. Freeh is a partner and member in FSS and FGIS, respectively, and has a controlling interest in both. FSS is a law firm and FGIS is a separate investigative and consulting group.

As described in the "Disbursements" section of this engagement letter, our invoices will include fees and costs incurred on the ~~Special Committee~~ <sup>Task Force</sup>'s behalf for services and materials provided by third parties, unless stated otherwise in the "Rates" section of this engagement letter, or in a separate writing signed by FSS and the Trustees.

6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the ~~Special Committee~~ <sup>Task Force</sup> 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. In the event that FSS, or any third party working on behalf of FSS 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 other information relating to services we have performed for the ~~Special Committee~~ <sup>Task Force</sup>, or to testify by deposition or otherwise concerning such services, to the extent permitted by law, we will provide you and the ~~Special Committee~~ <sup>Task Force</sup> notice of such a request and give you and the ~~Special Committee~~ <sup>Task Force</sup> a reasonable opportunity to object to such disclosure or testimony. It is understood that you will reimburse us for our time and expense incurred in responding to any such demand, including, but not limited to, time and expense incurred in search and photocopying costs, reviewing documents, appearing at depositions or hearings, and otherwise litigating issues raised by the request.
7. General Responsibilities of Attorney and Client. FSS will provide the above-described legal services for the ~~Special Committee~~ <sup>Task Force</sup>'s benefit, for which the Trustees will be billed in the manner set forth above. We will keep the ~~Special Committee~~ <sup>Task Force</sup>

apprised of developments as necessary to perform our services and will consult with the ~~Special Committee~~ <sup>Task Force</sup> as necessary to ensure the timely, effective and efficient completion of our work. However, although we will make every reasonable effort to do so, we cannot guarantee that we will be able to provide specific results and the Trustees and the ~~Special Committee~~ <sup>Task Force</sup> acknowledge that FSS does not promise any result.

We understand that the ~~Special Committee~~ <sup>Task Force</sup> will provide us with such factual information and documents as we require to perform the services, will make any business or technical decisions and determinations as are appropriate to facilitate the completion of our services, and will remit payment of our invoices when due, pursuant to the terms of this engagement letter.

Moreover in connection with any investigation, civil or criminal action, administrative proceeding or any other action arising out of this matter, the Trustees have agreed to indemnify FSS, its partners, employees, agents and third-party vendors who have provided or are providing services in connection with this engagement, for all costs, expenses, attorney's fees (to be paid as accrued and billed) and judgements, including any amounts paid in settlement of any claims. This obligation shall survive the termination of this engagement.

8. Waiver of Future Conflicts. Our agreement to represent the ~~Special Committee~~ <sup>Task Force</sup> is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to either you or an affiliate in any matters (whether involving the same substantive areas of law for which you have retained us on behalf of the ~~Special Committee~~ <sup>Task Force</sup> or some other unrelated areas, and whether involving business transactions, counseling, litigation or otherwise), which do not involve the same factual and legal issues as matters for which you have retained us on behalf of the ~~Special Committee~~ <sup>Task Force</sup> or may hereafter retain us. In this connection, you and the ~~Special Committee~~ <sup>Task Force</sup> should be aware that we provide services on a wide variety of legal subjects, to a number of clients, some of whom are or may in the future operate in the same areas of business in which you are operating or may operate. Subject to our ethical and professional obligations, we reserve the right to withdraw from representing the ~~Special Committee~~ <sup>Task Force</sup> should we determine that a conflict of interest has developed for us.
9. Engagement Limited to Identified Client. This will also confirm that, unless we otherwise agree in writing, our engagement is solely related to the ~~Special Committee~~ <sup>Task Force</sup> established by The Pennsylvania State University Board of Trustees and the specific matter described above. By entering into this engagement, we do not represent any individuals or entities not named as clients herein, nor do we represent any owner, officer, director, founder, manager, general or limited partner, employee, member, shareholder or other constituent of any entity named as a client in this letter, in their individual capacities or with respect to their individual affairs.



10. Termination. Our engagement may be terminated at any time by FSS or the ~~Special Committee~~ upon written notice and, with respect to FSS, subject to our ethical and professional obligations. In addition to other reasons, the Trustees and the ~~Special Committee~~ agree that FSS may terminate its legal services and withdraw from this engagement in the event our invoices are not paid in a timely manner, pursuant to the terms of this engagement letter. Upon termination, all fees and expenses due and owing shall be paid promptly. Your and the ~~Special Committee~~'s acceptance of this engagement letter constitutes your and the ~~Special Committee~~'s understanding of, and consent to, the particular terms, conditions, and disclosure herein.

11. Client Files. In the course of our representation of the ~~Special Committee~~, we will maintain a file containing, for example, correspondence, pleadings, agreements, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary for the ~~Special Committee~~'s representation ("Client 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 ("Work Product"). The ~~Special Committee~~ is entitled upon written request to take possession of its Client File, subject to our right to make copies of any files delivered to the ~~Special Committee~~. The Trustees and the ~~Special Committee~~ agree that the Work Product is and shall remain our property. Under our document retention policy, we normally destroy files ten years after a matter is closed, unless other arrangements are made with the client.

FSS, of course, is delighted to be asked to provide legal services to the ~~Special Committee~~, and we are looking forward to working with the ~~Special Committee~~ on this engagement. While ordinarily we might prefer to choose a less formal method of confirming the terms of our engagement than a written statement such as this, it has been our experience that a letter such as this is useful both to FSS and to the client. Moreover, in certain instances, FSS is required by law to memorialize these matters in writing. In any event, we would request that the Trustees and the ~~Special Committee~~ review this letter and, if it comports with your and the ~~Special Committee~~'s understanding of our respective responsibilities, so indicate by returning a signed copy to me at your earliest convenience so as not to impede the commencement of work on behalf of the ~~Special Committee~~. If you or the ~~Special Committee~~ have any questions concerning this engagement letter, or should the ~~Special Committee~~ ever wish to discuss any matter relating to our legal representation, please do not hesitate to call me directly, or to speak to one of our other attorneys who is familiar with the engagement.

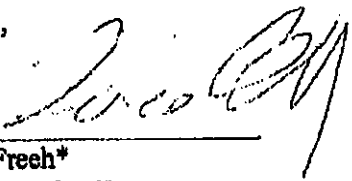
3711 Kennett Pike, Suite 130  
Wilmington, DE 19807  
+1 (302) 824-7139

1185 Avenue of the Americas, 30<sup>th</sup> Floor  
New York, NY 10036  
+1 (646) 557-6286

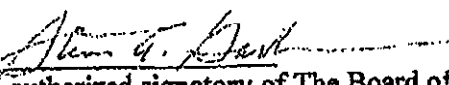
2445 M Street, NW, Third Floor  
Washington, DC 20037  
+1 (202) 390-5959

~~Task Force~~ Again, we look forward to serving the ~~Special Committee~~ <sup>Task Force</sup> and thank the Special Committee and the Trustees for looking to FSS to assist the ~~Special Committee~~ <sup>Task Force</sup> in this matter.

Sincerely,

  
Louis J. Freeh\*  
Senior Managing Partner  
Freeh Sporkin & Sullivan, LLP

APPROVED AND AGREED TO ON BEHALF OF  
The Board of Trustees of The Pennsylvania State University:

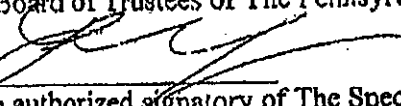
By:   
an authorized signatory of The Board of Trustees of The Pennsylvania State University

Printed Name: Steve A. Garban

Title: Chair, Board of Trustees  
The Pennsylvania State University

Date: 12/2/11

<sup>Investigation Task Force</sup>  
APPROVED AND AGREED TO ON BEHALF OF  
The Special Committee established by  
The Board of Trustees of The Pennsylvania State University:

By:   
an authorized signatory of The Special Committee established by  
The Board of Trustees of The Pennsylvania State University

Printed Name: K.C. Frazier

Title: Chair, Special Investigations Task Force

Date: 12/2/11

\* Licensed to practice law in New York, New Jersey and Washington, DC only.

3711 Kennett Pike, Suite 130  
Wilmington, DE 19807  
+1 (302) 824-7139

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New York, NY 10036  
+1 (646) 557-6286

2445 M Street, NW, Third Floor  
Washington, DC 20037  
+1 (202) 390-5959

# **EXHIBIT B**

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO	)	
as duly appointed representative of the	)	
ESTATE and FAMILY of JOSEPH	)	Docket No. 2013-2082
PATERNO, et al.	)	
	)	Type of Case: Commercial
Plaintiffs,	)	
	)	
vs.	)	
	)	
NATIONAL COLLEGIATE ATHLETIC	)	
ASSOCIATION ("NCAA"), et al.	)	
	)	
Defendants.	)	

**VERIFICATION OF OMAR Y. MCNEILL**

I, Omar Y. McNeill, do hereby declare and say as follows based on personal knowledge:

1. I am an adult citizen of Delaware and have been admitted to practice law in Delaware since 1992.
2. From 2009 to 2012, I was an attorney with Freeh Sporkin & Sullivan, LLP ("FSS"), a partnership engaged in the practice of law, ultimately holding the title of Partner and General Counsel. In late 2011, I began work on an investigation at The Pennsylvania State University and served for the next eight months as the lead project manager of this engagement.
3. On or about December 2, 2011, a Special Investigations Task Force ("Task Force") formed by the Board of Trustees of The Pennsylvania State University ("Penn State") entered into an engagement with FSS to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at its facilities by Gerald Sandusky, a

former assistant football coach, and the alleged failure of Penn State personnel to report such sexual abuse to appropriate police and government authorities.

4. FSS was to provide the results of the investigation in a written report to the Task Force and to other parties as the Task Force may direct. Pursuant to the engagement letter, the written report was intended to “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.”

5. FSS’s engagement was conducted in anticipation of litigation. Indeed, as the investigation took place, litigation already was pending and more litigation was anticipated. 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 or how to address personnel decisions made by the Trustees.

6. The work and advice provided to the Task Force 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 and attorney work product privileges, unless appropriately waived by the parties or otherwise determined by law.” If FSS were required to respond to a subpoena or other formal request from a third party or governmental agency for FSS records or other information relating to the services performed for the Task Force, or to testify by deposition or otherwise concerning such services, FSS was to provide the Task Force with notice of the request to provide a reasonable opportunity to object to such disclosure or testimony.

7. FSS staff communicated with the Task Force in confidence. It was the decision of the Task Force as to how information gathered in the investigation would be utilized.

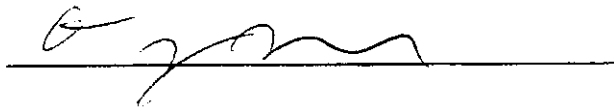
It further was the decision of the Task Force and the Board of Trustees on how to address, adopt and implement any recommendations made by FSS to the Task Force.

8. FSS understood and expected that its work would be subject to the attorney-client privilege and the work product doctrine, and FSS conducted the investigation accordingly. It was routine practice, for instance, for the investigators to advise Penn State employee witnesses that information provided in interviews would be protected by an attorney-client privilege that belonged to the Task Force, and for the investigators to advise witnesses that the interviews were confidential. The notes taken by FSS staff and third parties working on behalf of FSS incorporated the mental impressions of the investigators.

9. FSS took other steps to protect the confidentiality and attorney-client and attorney work product privileges of the engagement. FSS staff and third parties working on behalf of FSS were advised in writing of confidentiality expectations for the engagement. The staff worked within a secured facility with access controlled by electronic locks. Physical evidence was stored in a locked room within the secured facility. The staff frequently were briefed on the importance of maintaining confidentiality on the engagement.

10. I hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: October 12, 2014

A handwritten signature in black ink, appearing to be "G. J. M.", is written over a horizontal line.

# **EXHIBIT C**

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

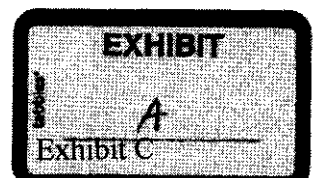
THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Civil Division

Docket No. 2013-2082

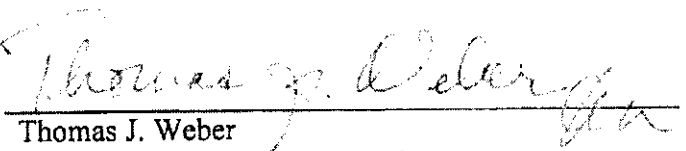
**NOTICE TO DEFENDANTS BY PLAINTIFF GEORGE SCOTT PATERNO AS DULY  
APPOINTED REPRESENTATIVE OF THE ESTATE AND FAMILY OF JOSEPH  
PATERNO OF INTENT TO SERVE A SUBPOENA TO PEPPER HAMILTON LLP TO  
PRODUCE DOCUMENTS PURSUANT TO RULE 4009.21**





Plaintiff George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno ("Paterno"), by and through the undersigned counsel, intends to serve a subpoena identical to the one that is attached to this Notice. You have twenty (20) days from the date listed below in which to file of record and serve upon the undersigned an objection to the subpoena. If no objection is made, the subpoena may be served.

Dated this 25th day of February, 2014.



Thomas J. Weber  
GOLDBERG KATZMAN, P.C.  
4250 Crums Mill Road, Suite 301  
P. O. Box 6991  
Harrisburg, PA 17112  
Telephone: (717) 234-4161

Wick Sollers  
L. Joseph Loveland  
Mark A. Jensen  
Ashley C. Parrish  
KING & SPALDING LLP  
1700 Pennsylvania Avenue, NW  
Washington, DC 20006  
Telephone: (202) 737-0500

*Counsel for Plaintiff George Scott Paterno, as duly  
appointed representative of the Estate and Family  
of Joseph Paterno*

COMMONWEALTH OF PENNSYLVANIA  
CENTRE COUNTY  
GEORGE SCOTT PATERNO, as duly appointed  
representative of the ESTATE and FAMILY of JOSEPH  
PATERNO; et al.,

*Plaintiff*

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION ("NCAA"); et al.,

*Defendant*

Court of Common Pleas

Civil Division

No. 2013-2082

**Subpoena to Produce Documents or Things  
for Discovery Pursuant to Rule 4009.22**

TO: Pepper Hamilton LLP

*(Name of Person or Entity)*

Within twenty (20) days after the service of this subpoena, you are ordered by the Court to produce the following documents or things: See Exhibit A, attached.

at Goldberg Katzman, P.C., 4250 Crums Mill Road, Suite 301, P.O. Box 6991, Harrisburg, PA 17112

*(Address)*

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

**This subpoena was issued at the request of the following person:**

Date: March 18, 2014

Name: Thomas J. Weber

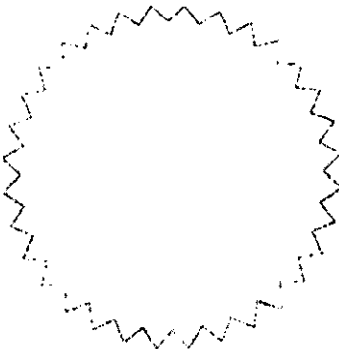
Address: 4250 Crums Mill Road, Suite 301, P.O. Box 6991  
Harrisburg, PA 17112

Telephone: (717) 234-4161

Supreme Court ID#: 58853

George Scott Paterno, as duly appointed  
Attorney for: representative of the Estate and Family of Joseph Patern

**BY THE COURT:**



COMMONWEALTH OF PENNSYLVANIA  
CENTRE COUNTY

GEORGE SCOTT PATERNO, as duly appointed  
representative of the ESTATE and FAMILY of JOSEPH :  
PATERNO; et al., :

vs. :

NATIONAL COLLEGIATE ATHLETIC :  
ASSOCIATION ("NCAA"); et al., :

Court of Common Pleas

Civil Division

No. 2013-2082

TO: Pepper Hamilton LLP

*(Person Served with Subpoena)*

You are required to complete the following Certificate of Compliance with producing documents or things pursuant to the Subpoena. Send the documents or things, along with this Certificate of Compliance (with your original signature), to the person at whose request the subpoena was issued (see address on the reverse).

***Do not send the documents or things,  
or the Certificate of Compliance,  
to the Prothonotary's Office.***

**Certificate of Compliance With Subpoena to Produce  
Documents or Things Pursuant to Rule 4009.23**

I, \_\_\_\_\_ on behalf of Pepper Hamilton LLP  
*(Person Served with Subpoena)*

certify to the best of my knowledge, information and belief that all documents or things required to be produced pursuant to the subpoena issued on March 18, 2014 have  
*(Date of Subpoena)*  
been produced.

Date: \_\_\_\_\_

\_\_\_\_\_  
*(Signature of Person Served with Subpoena)*

## **EXHIBIT A**

### ***Records and Documents from Pepper Hamilton LLP ("Pepper Hamilton").***

## **DEFINITIONS**

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under Pa. R.C.P. No. 4009.21-27. As used in these Requests, the following terms are to be interpreted in accordance with these definitions:

1. "You," "your," or "yours," shall refer to the person to whom these requests are addressed, and all of that person's agents, representatives, and attorneys.

2. "Plaintiffs" shall refer to Plaintiffs George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno, Ryan McCombie, Anthony Lubrano, Al Clemens, Adam Taliaferro, Peter Bordi, Terry Engelder, Spencer Niles, John O'Donnell, William Kenny, Joseph V. ("Jay") Paterno, Anthony Adams, Gerald Cadogan, Shamar Finney, Justin Kurpeikis, Richard Gardner, Josh Gaines, Patrick Mauti, Anwar Phillips, and Michael Robinson, as well as any person acting, authorized to act, or purporting to act on behalf of any of the Plaintiffs.

3. "Communication" means the transmittal of information by any means, and shall mean and be deemed to refer to any writing or oral conversation, including, but not limited to, telephone conversations, conversations in meetings, letters, memoranda, notes, or electronic communications.

4. "Document" is defined as broadly as possible to include anything stored in any medium, including but not limited to, all written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, of every type and description that is in your

possession, control, or custody, or of which you have knowledge, including but not limited to, correspondence; memoranda; transcriptions of any conversation or testimony; tapes; stenographic or hand-written notes; studies; publications; books; diaries; phone records; logs; instant messaging (public and private IM); electronic mail (email), including but not limited to, server-based email, web-based email (i.e. gmail.com, yahoo.com, hotmail.com), dial up email, email attachments, deleted email, and email stored on hard drives or portable media; voicemail; information stored on social media and social networking sites; information created or received with the use of PDAs or smartphones; information stored in a cloud environment; text messages; information stored on removable hard drives, thumb drives, flash drives, CDs, DVDs, disks and other portable media; pamphlets; pictures (drawings and photographs); films; images; microfilms; recordings (including any analog, digital, electromagnetic, optical, phonographic, or other media of audio and/or visual recordings); maps; reports; recommendations; surveys; appraisals; charts; minutes; statistical computations; spreadsheets; telegrams; telex messages; listings of telephone calls; calendars; datebooks; books of account; ledgers; expense records; accounts payable; accounts receivable; presentations; analyses; computer records, data compilations and/or databases; every draft of each such document; every copy of each such document where the original is not in your possession, custody or control; and every copy of each such document where such copy is not an identical copy of an original, or other copy, or where such copy contains any commentary or notation whatsoever that does not appear on the original or other copy. "Document" includes any electronically stored information ("ESI") and all metadata associated with a document.

5. "Evidence, reflect, or relate to" means in the broadest sense and includes documents and things alluding to, responding to, concerning, connected with, commenting on, in respect of,

about, regarding, discussing, evidencing, contradicting, showing, describing, reflecting, analyzing and/or constituting the subject matter of the request.

6. "Person" means any natural person or any business, corporation, public corporation, municipal corporation, state government, local government, agency, partnership, group, association, or other organization, and also includes all of the person's representatives.

7. "Penn State" shall refer to employees, administrators, and personnel of The Pennsylvania State University, as well as any attorney, assignee, agent, employee, representative, or any other person acting, authorized to act, or purporting to act on behalf of Penn State.

8. "Joe Paterno" or "Paterno" shall refer to former Penn State head football coach Joseph ("Joe") V. Paterno, as well as any attorney, assignee, agent, representative, or any other person acting, authorized to act, or purporting to act on behalf of Joe Paterno, or his estate and family.

9. "Jerry Sandusky" or "Sandusky" shall refer to former Penn State assistant football coach Gerald A. Sandusky, as well as any attorney, assignee, agent, representative, or any other person acting, authorized to act, or purporting to act on behalf of Gerald A. Sandusky.

10. "NCAA" shall refer to Defendant NCAA, as well as any attorney, assignee, agent, employee, representative, or any other person acting, authorized to act, or purporting to act on behalf of the NCAA.

11. "Mark Emmert" or "Emmert" shall refer to the President of the NCAA, Defendant Mark Emmert, as well as any attorney, assignee, agent, representative, or any other person acting, authorized to act, or purporting to act on behalf of Mark Emmert.

12. "Edward Ray" or "Ray" shall refer to the former Chairman of the NCAA's Executive Committee, Defendant Edward Ray, as well as any attorney, assignee, agent,

representative, or any other person acting, authorized to act, or purporting to act on behalf of Edward Ray.

13. The "Freeh Firm" shall refer to the law firm of Freeh, Sporkin & Sullivan, LLP, and any successor entity, including Pepper Hamilton LLP, as well as current or former attorneys, investigators, or employees, and any person engaged to work with the Freeh Firm on the Freeh investigation, as defined *infra*.

14. The "Freeh Group" shall refer to the Freeh Group International Solutions, LLC, as well as current or former attorneys, investigators, or employees, and any person engaged to work with the Freeh Firm on the Freeh investigation, as defined *infra*.

15. "Pepper Hamilton" shall refer to the law firm of Pepper Hamilton LLP, as well as current or former attorneys, investigators, or employees.

16. The "Freeh investigation" shall refer to the investigation conducted by the Freeh Firm into the alleged failure of certain Penn State personnel to respond to and report certain allegations against Sandusky, pursuant to the engagement letter attached hereto as Exhibit 1.

17. The "Freeh Report" shall refer to the report issued by the Freeh Firm on July 12, 2012, including all footnotes, endnotes, exhibits, drafts, errata sheets, or other documents related to that Report, as well as press conference remarks made by the Freeh Firm concerning the Freeh investigation and Freeh Report.

18. The "NCAA investigation" shall refer to any investigation or evaluation of Penn State undertaken by the NCAA following Defendant Emmert's assertion of NCAA jurisdiction over matters related to Sandusky and Penn State in November 2011.

19. The "Consent Decree" shall refer to the document titled the "Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The

Pennsylvania State University,” released on July 23, 2012, as well as all footnotes, exhibits, drafts, and other notes related to the Consent Decree.

20. The “NCAA’s Operating Bylaws and Administrative Bylaws,” “Operating Bylaws,” or “Administrative Bylaws,” shall refer to the operating policies, procedures, guidelines, and rules set forth in the 2011-2012 NCAA Division I Manual, First Amended Compl. Ex. A.

21. The “Big Ten Conference” or “Big Ten” shall refer to the Big Ten Athletic Conference as well as any attorney, assignee, agent, representative, or any other person acting, authorized to act, or purporting to act on behalf of the Big Ten Athletic Conference.

22. “Mayer Brown” shall refer to the law firm of Mayer Brown LLP, as counsel for the Big Ten, as well as current or former attorneys, investigators, or employees acting in that capacity.

### **INSTRUCTIONS**

The following instructions are applicable throughout these Requests and are incorporated into each individual Request:

1. These instructions and definitions should be construed to require responses based upon the knowledge of, and information available to, the person to whom these Requests are addressed, as well as all agents, representatives, and, unless privileged, attorneys and accountants, of that person.

2. These Requests are continuing in character, so as to require that supplemental responses be served promptly if additional or different information is obtained with respect to any Request.



3. No part of a Request should be left unanswered merely because an objection is interposed to another part of the Request. If a partial or incomplete response is provided, the responding party shall state that the response is partial or incomplete.

4. All objections shall be set forth with specificity and shall include a brief statement of the grounds for such objections.

5. Each Request shall be read to be inclusive rather than exclusive. Accordingly, the words "and" as well as "or" shall be construed disjunctively or conjunctively as necessary, in order to bring within the scope of each Request all information that might otherwise be construed to be outside its scope. "Including" shall be construed to mean "including, without any limitation." The word "all" includes "any" and vice versa. The past tense shall include the present tense so as to make the request inclusive rather than exclusive. The singular shall include the plural and vice versa. The masculine includes the feminine and vice versa.

6. Where a claim of privilege is asserted in objecting to any Request or part thereof, and documents or information is not provided on the basis of such assertion:

A. In asserting the privilege, you shall, in the objection to the Request, or part thereof, identify with specificity the nature of the privilege (including work product) that is being claimed; and

B. The following information should be provided in the objection, if known or reasonably available, unless divulging such information would cause disclosure of the allegedly privileged information:

(1) For documents:

- a. the type of document;
- b. the general subject matter of the document;

- c. the date of the document; and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

7. If, in responding to these Requests, you encounter any ambiguity when construing a Request, instruction, or definition, your response shall set forth the matter deemed ambiguous and the construction used in answering.

8. All documents that are responsive, in whole or in part, to any portion or clause of any paragraph of any Request shall be produced in their entirety.

9. Where any item contains marking(s) not appearing in the original, or drafts are altered from the original, then all such items must be considered as separate documents and identified and produced as such.

10. Unless otherwise specified in a particular Request, the time periods covered by these Requests is January 1, 2011 to the present.

### **DOCUMENT REQUESTS**

#### **Request No. 1:**

Please produce all documents that evidence, reflect, or relate to communications between the Freeh Firm or the Freeh Group, and the NCAA, Emmert, or Ray that relate in any way to Joe Paterno or the Plaintiffs named in this suit.

**Request No. 2:**

Please produce all documents that evidence, reflect, or relate in any way to communications between the Freeh Firm or the Freeh Group and Penn State, including all notes or records of telephone calls, memos, emails, letters, or other forms of communication, relating to the Freeh investigation or the Consent Decree.

**Request No. 3:**

Please produce all documents maintained as part of the Client File created by the Freeh Firm pursuant to the engagement letter attached hereto as Exhibit 1.

**Request No. 4:**

Please produce all documents that evidence, reflect, or relate to communications between the Freeh Firm or the Freeh Group and the NCAA, Emmert, or Ray, relating to the Freeh investigation or the Consent Decree.

**Request No. 5:**

Please produce all documents that evidence, reflect, or relate in any way to the basis for statements in the Freeh Report that Joe Paterno, among others, "failed to protect against a child sexual predator harming children for over a decade."

**Request No. 6:**

Please produce all documents that evidence, reflect, or relate in any way to the basis for statements in the Freeh Report that the 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. 7:**

Please produce all documents that evidence, reflect, or relate in any way to the basis for statements in the Freeh Report that Joe Paterno, among others, concealed Jerry Sandusky's activities from the Penn State Board of Trustees.

**Request No. 8:**

Please produce 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:**

Please produce 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.

**Request No. 10:**

Please produce all documents that evidence, reflect, or relate in any way to the basis for statements in the Freeh Report that "[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him."

**Request No. 11:**

Please produce all documents that evidence, reflect, or relate to the 2011 grand jury testimony of Joe Paterno.

**Request No. 12:**

Please produce all documents that evidence, reflect, or relate to descriptions of Timothy Curley as "Joe Paterno's errand boy," including but not limited to copies of the interview referenced at note 339 of the Freeh Report.

**Request No. 13:**

Please produce all documents that evidence, reflect, or relate in any way to the finding of the Freeh Report that 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. 14:**

Please produce all documents that evidence, reflect, or relate to interviews or other communications in which the Freeh Firm or the Freeh Group was told that Joe Paterno knew "everything that was going on" at the Penn State football facilities, including but not limited to copies of interviews referenced at note 167 of the Freeh Report.

**Request No. 15:**

Please produce all documents that evidence, reflect, or relate in any way to the decision by the Penn State Board of Trustees to terminate Joe Paterno as the head football coach at Penn State, including but not limited to communication of that decision to Joe Paterno.

**Request No. 16:**

Please produce all documents that evidence, reflect, or relate to services provided by any person who was engaged to work with or for the Freeh Firm or the Freeh Group in connection with the Freeh investigation.

**Request No. 17:**

Please produce all documents that evidence, reflect, or relate to communications between the Freeh Firm or the Freeh Group and the Mayer Brown law firm, including all notes or records of telephone calls, emails, letters, or other forms of communication regarding the Freeh investigation or the Consent Decree.

**Request No. 18:**

Please produce all documents that evidence, reflect, or relate to communications between the Freeh Firm or the Freeh Group and any athletic governing body, including representatives of the Big Ten Conference, including all notes or records of telephone calls, emails, letters, or other forms of communication regarding the Freeh investigation or the Consent Decree.

**Request No. 19:**

Please produce all documents that support any conclusions or recommendations for action reached by the Freeh Firm or the Freeh Group as a result of the Freeh investigation, including all notes or records of telephone calls, memos, emails, letters, or other forms of communication.

**Request No. 20:**

Please produce all documents that support any conclusions or recommendations for action reached by the NCAA, Emmert, or Ray as a result of the Freeh investigation, including all notes or records of telephone calls, memos, emails, letters, or other forms of communication.

**Request No. 21:**

Please produce all documents that evidence, reflect, or relate to communications between the Freeh Firm or the Freeh Group and the NCAA, Emmert, or Ray regarding any conclusions or recommendations for action reached by the Freeh Firm or the Freeh Group as a result of the

Freeh investigation, including all notes or records of telephone calls, memos, emails, letters, or other forms of communication.

**Request No. 22:**

Please produce all drafts of the Freeh Report, including electronic versions of such drafts maintained on any computer.

**Request No. 23:**

Please produce all drafts of the Consent Decree, including electronic versions of such drafts maintained on any computer.

**Request No. 24:**

Please produce all invoices for services submitted to Penn State or the Penn State Board of Trustees pursuant to the engagement letter attached hereto as Exhibit 1, including all backup and supporting documents.

**Request No. 25:**

Please produce all documents that evidence, reflect, or relate to question or concerns within the Freeh Firm or the Freeh Group about any aspect of the Freeh investigation or the conclusions reached in the Freeh Report.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **NOTICE TO DEFENDANTS BY PLAINTIFF GEORGE SCOTT PATERNO AS DULY APPOINTED REPRESENTATIVE OF THE ESTATE AND FAMILY OF JOSEPH PATERNO OF INTENT TO SERVE A SUBPOENA TO PEPPER HAMILTON LLP TO PRODUCE DOCUMENTS PURSUANT TO RULE 4009.21** was served this 25th day of February, 2014 by first class mail and email to the following:

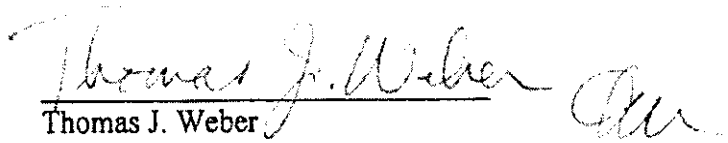
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*Counsel for Plaintiff George Scott Paterno, as duly  
appointed representative of the Estate and Family  
of Joseph Paterno*

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on this 14<sup>th</sup> day of March, 2014, a true and correct copy of the foregoing was served upon the following counsel via first class United States mail, postage prepaid:

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*Counsel for NCAA, Mark Emmert  
and Edward Ray*

  
\_\_\_\_\_  
Attorney for Defendant  
The Pennsylvania State University

# **EXHIBIT D**

**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

**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

Counsel of record for this party:

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2014 APR 28 PM 3:46

COPY FOR RECORD

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) 115 East High Street  
) Lock Drawer 179  
) Bellefonte, PA 16823-0179  
) (814) 355-4769  
) (814) 355-5024 (fax)

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

# **EXHIBIT E**

**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 KENNY 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 Defendants.

CIVIL DIVISION

Docket No. 2013-2082

DEBRA C. JAMES  
PROTHONOTARY  
CENTRE COUNTY, PA.

2014 SEP 11 PM 2:12

2014 SEP 11 PM 2:12

## OPINION AND ORDER

Presently before the Court are Preliminary Objections filed by Defendants National Collegiate Athletic Association (hereinafter "NCAA") and Nominal Defendants The Pennsylvania State University (hereinafter "Penn State") to Plaintiff's First Amended Complaint. Also before the Court are Discovery Objections filed by Penn State, including a disputed provision of an otherwise stipulated Joint Motion for a protective Order. A hearing on all relevant issues was conducted and all parties have submitted briefs. In response, the Court issues the following Opinion and Order.

### Background

A detailed background of this case was discussed in this Court's Opinion and Order of January 6, 2014 (docketed on January 7, 2014, hereinafter "January 7 Order"). To briefly summarize, the genesis of this case was sanctions imposed on Penn State by the NCAA and the language of the publically released Consent Decree entered into between NCAA and Penn State that accompanied said sanctions.

Plaintiff's original Complaint, filed May 30, 2013, did not include Penn State as a Defendant, which was joined as a nominal Defendant subsequent to the January 7 Order. After joining Penn State as nominal a Defendant, Plaintiffs filed their Amended Complaint on February 5, 2014. Count I of the Amended Complaint alleged Breach of Contract for Plaintiffs The Estate and Family of Joe Paterno on Behalf of Joe Paterno and Al Clemens, based on their status as third part beneficiaries between the Membership Agreement between Penn State and NCAA.



Count II alleges Intentional Interference With Contractual Relations for Plaintiffs William Kenny and Jay Paterno. Count III asserts a claim for Injurious Falsehood/ Commercial Disparagement for Plaintiffs The Estate and Family of Joe Paterno on behalf of Joe Paterno. Count IV alleges Defamation for Plaintiffs William Kenney, Jay Paterno, and Al Clemens. Finally, Count V asserts a claim for Civil Conspiracy for All Plaintiffs.

On March 17, 2014, NCAA filed the instant Preliminary Objections to the Amended Complaint, pursuant to Pa.R.Civ.P. 1028, asserting: (1) Incapacity to Bring Count I; (2) Impertinent Material and Demurrer to Count I; (3) Incapacity to Bring Count I and Demurrer to Count I; (4) Demurrer to Count II; (5) Demurrer to Count V; (6) Demurrer to Count IV; (7) Demurrer to Count III; (8) Failure of a Pleading to Confirm to Law or Rule of Court; and (9) Lack of Personal Jurisdiction Over Dr. Emmert and Dr. Ray.

On March 17, 2014, Penn State also filed its Preliminary Objections to the Amended Complaint, pursuant to Pa.R.Civ.P. 1028, asserting: (1) Insufficient Specificity With Respect To Counts, Plaintiffs, Relief Sought for All Counts and All Plaintiffs; (2) Demurrer For Lack of Standing to Count I for Plaintiff Al Clemens; (3) Lack of Capacity to Sue for Count I for Plaintiff George Scott Paterno As Representative Of "The Family Of Joseph Paterno"; (4) Demurrer – Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs Al Clemens, George Scott Paterno As The Representative of the Estate of Joe Paterno, and George Scott Paterno as the Representative of the "Family of Joe Paterno"; (5) Demurrer For Failure to Allege A Breach Of Contract to Count I for Plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens; (6) Insufficient Specificity

Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens; (7) Demurrer For Failure To Allege Elements of Civil Conspiracy Against Penn State for Count V for All Plaintiffs; (8) Failure To Comply With Law Or Rule Of Court – No Verification to All Counts for All Plaintiffs; and (9) Failure To Comply With Law Or Rule Of Court – No Notice To Defend Or Plead to All Counts for All Plaintiffs.

The Discovery requests at issue originate from Plaintiff's Notice of Intent to Serve a Subpoena to Pepper Hamilton LLP To Produce Documents Pursuant to Rule 4009.21, filed on February 25, 2014. On March 14, 2014, Penn State filed Objections to the Discovery Request claiming: (1) Attorney-Client/Work Product/Self-Examination Privileges and Limited Waiver; (2) Relevance; (3) FERPA & CHRIA Protections; (4) Criminal Investigation; (5) Speculation as to an Opinion; (6) Vague, Overbroad, and Unduly Burdensome; (7) Costly, Time Consuming, and Excessively Burdensome; (8) Documents already in the Public Domain; (9) Invasive of Confidentiality Duties; Irrelevant in Time; (10) Overbroad and Irrelevant; (11) Standing with respect to "The Paterno Family"; (12) Entry of a Protective Order; and (13) A Missing Letter referenced in Request No. 3.

### **Preliminary Objections Discussion**

For purposes of deciding the Preliminary Objections, "[a]ll material facts set forth in the pleadings as well as all inferences reasonably deducible therefrom are admitted as true". *Foflygen v. R. Zemel, M.D. (PC)*, 420 Pa. Super. 18, 32, 615 A.2d 1345, 1352 (1992).

### NCAA: Incapacity to Bring Count I

NCAA alleges that neither the Estate of Joseph Paterno nor Al Clemens are parties to the Consent Decree, nor are they intended third-party beneficiaries, and as a result they do not have standing to seek to void the Consent Decree. It is true that neither of these Plaintiffs were parties to the Consent Decree, nor were they intended third party beneficiaries, and Plaintiffs state in their brief that they never claimed to be. Instead, Plaintiffs aver that the Consent Decree was imposed through an unlawful and unauthorized exercise of the NCAA's enforcement authority, therefore the Consent Decree is void, not simply voidable. Contracts that "are absolutely void, because they have no legal sanction,...establish no legitimate bond or relation between the parties, and even a stranger may raise the objection." *Pearsoll v. Chapin*, 44 Pa. 9, 15 (1862).

Under *Foflygen, supra*, the Court must accept that the Plaintiffs averment that the Consent Decree was imposed through an illegal and unauthorized exercise of the NCAA's authority is true for the instant Motion, making the Consent Decree void. As a result, under *Pearsoll*, Plaintiffs have standing to challenge the Consent Decree.

It is also worth noting that this case is unique. What distinguishes it from a typical third-party contract challenge is the basis of the alleged harm. The alleged harm does not come from an action, duty, or relationship resulting from the Consent Decree, but instead is derived from the language in the document itself.

The Court finds this distinguishing characteristic alone also warrants Plaintiffs' standing to challenge the Consent Decree.

Impertinent Material and Demurrer to Count I

NCAA correctly states that under Pennsylvania law, voiding a contract<sup>1</sup> is traditionally limited to instances "such as fraud, mistake, or illegality," *In re Frey's Estate*, 223 Pa. 61, 65, 72 A. 317, 318 (1909), or in cases in which a party enters into a contract under extreme duress. See *Sheppard v Frank & Seder Inc.*, 307 Pa. 372, 161 A. 304 (1932).

Plaintiffs allege that Penn State entered the Consent Decree under extreme duress, and as a result, the Consent Decree can be void *ab initio*. NCAA counter-argues, stating that although Penn State may have been under some form of duress, the degree of duress did not rise to the benchmark level of "'extreme' and of a 'forcible or terrorizing character'" required under *Sheppard* to support voiding the Consent Decree.

Whether or not Penn State was under ordinary duress, extreme duress, or any duress at all, is not a question for this Court; instead it falls to the factfinder.

Whether [a] situation and all the attending circumstances were sufficient to establish duress to such extent as to induce [a person] to sign [a document] is a question which should be submitted to a jury.

*Sheppard, supra* at 376, citing *Fountain v. Bigham*, 235 Pa. 35, 48, 84 A. 131, Ann. Cas. 1913D, 1185; *Hogarth v. Grundy & Co.*, 256 Pa. 451, 461, 100 A. 1001.

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<sup>1</sup> or in this case, a Consent Decree.

NCAA: Incapacity to Bring Count I and Demurrer to Count I

NCAA alleges that neither the Estate of Joseph Paterno nor Al Clemens are parties to the NCAA Constitution or Bylaws, nor are they third-party beneficiaries of said documents; therefore, they are not parties to any alleged breach of contract based on them. The Estate of Joseph Paterno and Al Clemens claim they are third-party beneficiaries based on their status as "involved individuals" under NCAA Bylaws article 32.1.5, and as a result, they were entitled to certain procedural mechanisms in connection with the NCAA's and Penn State's entrance into the Consent Decree.

NCAA argues that Plaintiffs' claim is flawed for two reasons. First, any status Plaintiffs may have had under the Constitution and Bylaws is moot, as the purpose behind the Consent Decree, *inter alia*, was to permit Penn State to resolve the Sandusky matter without enduring a full NCAA investigation and enforcement process. Second, NCAA Bylaws define the term "involved individual" to mean,

...former or current student-athletes and former or current institutional staff members who have received notice of significant involvement in alleged violations through the notice of allegations or summary disposition process...

and Plaintiffs concede that they never received such notice from the NCAA.

To claim that Plaintiffs do not have standing to bring suit against NCAA for not following their own rules *because* NCAA did not follow their own rules is circuitous logic, which the Court finds to be contrary to the interest of justice.

#### Estate of Joseph Paterno

NCAA argues that Coach Joe Paterno was not an “involved individual” prior to or at the time of his death in January 2012, and the procedural rights extended to “involved individuals”—such as notice, the opportunity to attend hearings, and the chance to submit written information to assist the NCAA in its investigation—unambiguously and self-evidently contemplate only living individuals. It was therefore impossible for NCAA to deny these rights to Coach Paterno.

Plaintiffs recognize this fact by stating, “[t]o be sure, the rules may have been fashioned with a living, participating individual in mind; but that is not a requirement.” Defendants argue that because that is how the rules were fashioned, that was everyone’s understanding, and Plaintiff’s shouldn’t be allowed to argue otherwise now. The Court agrees.

As Coach Joe Paterno was not an involved individual prior to his death, and he cannot, as a matter of law, be an “involved individual” after his death, he had no rights as an “involved individual” at any time, and as a result, his estate has no rights as an “involved individual” now.

#### Al Clemens

NCAA goes on to claim that Clemens cannot be an “involved individual” as his basis for asserting said status is based on his being a member of the Penn State Board of Trustees. NCAA alleges that Clemens is claiming “involved individual” status by suggesting that the NCAA improperly repeated a conclusion in the Freeh Report that “the Board of Trustees ... did not perform its oversight duties.” NCAA argues that NCAA Rules refers only to an individual who is significantly involved in

violations of NCAA rules, not a corporate body like the Board of Trustees, and the Consent Decree makes no claim that Clemens—or any particular individual from the Board of Trustees—was significantly involved in NCAA violations. NCAA further argues that even if a corporate body could assert rights as an “involved individual” on the basis of the Consent Decree, it could only be the Board of Trustees—the entity named in the Consent Decree—not Clemens, and the Board of Trustees, as a body, has not sought to challenge the conclusions in the Freeh report.

Plaintiffs counter-argue stating NCAA Defendants recognize that the definition of an “involved individual” is related to whether the Consent Decree sufficiently identifies plaintiffs. Therefore, whether or not Clemens is an “involved individual” hinges on whether or not he is identifiable by the NCAA statements. This issue has been addressed in the January 7 Order with respect to Count IV (Defamation). Specifically, this Court Overruled Objections that alleged NCAA statements could not be interpreted as referring to Clemens, and that it would be for a jury to decide that question.

#### NCAA: Demurrer to Count II

NCAA alleges that Plaintiffs Jay Paterno and William Kenney’s tortious interference claim must be dismissed because it is entirely derivative of their defamation claim based on statements in the Consent Decree, and as a result, Plaintiffs are seeking double-recovery for the same allegedly tortious conduct, which the law does not permit.

NCAA also argues that Plaintiffs failed to cure the pleading deficiencies that led the Court to dismiss the tortious interference claim in its January 7 Order. Specifically, NCAA claims that Plaintiffs pleaded no facts which would support a finding that there existed a reasonable probability that a contract would arise with which Defendants interfered.

With respect to NCAA's argument that Plaintiffs are barred from "seeking double-recovery", Plaintiffs correctly counter-argue that Pennsylvania courts have recognized that defamatory statements can provide the basis for a tortious interference claim. *See Empire Trucking Co. v. Reading Anthracite Coal Co.*, 71 A.3d 923, 935-36 (Pa. Super. Ct. 2013); *see also, e.g., Kiely v. Univ. of Pittsburgh Med. Ctr.*, No. 98-1536, 2000 WL 262580, at \*3-5, \*11 (W.D. Pa. Jan. 20, 2000) ("unfounded and unsubstantiated" accusations made by the defendants formed the basis for both defamation and tortious interference claims); *Geyer v. Steinbronn*, 351 Pa. Super. 536, 550-54, 506 A.2d 901, 908-10 (1986) (defamatory statements made to prospective employer gave rise to both defamation and tortious interference claims).

Regarding the curing of deficiencies from their original Complaint, in their First Amended Complaint, Plaintiffs now allege: Kenney interviewed with such teams as the University of Massachusetts, the New York Giants, and the Indianapolis Colts, and those teams hired "less experienced and less qualified candidates." Jay Paterno alleged to have applied with University of Connecticut and James Madison where the position went to candidates with less coaching experience, and he also applied at University of Colorado and Boston College where he was not granted an interview. Jay Paterno also mentioned negotiations and



tentative arrangements with media companies, such as ESPN, CBS, and FOX Sports, serving as a football commentator. The Court finds that Plaintiffs have cured the Deficiencies of the original Complaint by pleading sufficient facts to proceed with this claim.

#### NCAA: Demurrer to Count V

In Pennsylvania, "absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act." *Goldstein v. Phillip Morris, Inc.*, 2004 PA Super 260, 854 A.2d 585, 590 (Pa. Super. Ct. 2004) (citing *McKeeman v. Corestates Bank, N.A.*, 2000 PA Super 117, 751 A.2d 655, 660 (Pa. Super. Ct. 2000)). Under *Goldstein*, civil conspiracy without an underlying cause of action is a legal impossibility.

In Plaintiffs' Amended Complaint, only the Estate of Joseph Paterno, Jay Paterno, Al Clemens, and William Kenney have alleged a cause of action in addition to Civil Conspiracy. Because the remaining plaintiffs have not alleged any cause of action (other than the civil conspiracy), there is no act upon which they could have conspired to commit. Therefore, these plaintiffs' Civil Conspiracy claim fails, as a matter of law. Further, since the remaining plaintiffs claim for Civil Conspiracy cannot succeed, and these plaintiffs have alleged no other claims, they have no standing in this case and shall be dismissed from this action.

#### NCAA: Demurrer to Count IV

NCAA alleges three reasons why this Count should be dismissed:

1. The alleged statements made by NCAA in the Consent Decree do not mention plaintiffs by name, nor could they be reasonably be interpreted as referring to them;
2. Plaintiffs have not pleaded that Defendant acted with malice or reckless disregard for the truth; and
3. the Statements about which Plaintiffs complain are pure opinions, premised upon disclosed facts. As such they are protected expressions, under *Alston v. PW-Philadelphia Weekly*, 980 A.2d 215, 220 (Pa. Commw. Ct. 2009), and cannot be defamatory as a matter of law.

This Objection was already ruled upon in the January 7<sup>th</sup> Opinion and Order, and NCAA has offered no new argument to justify the Court revisiting its decision with respect to reasons 1 and 2.

With respect to reason 3, the Pennsylvania Commonwealth Court has explained that “when the maker of a comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff’s conduct,” that statement is “protected as a pure expression of opinion.” *Alston, supra* at 220-21. NCAA argues that the statements at issue are opinions based on published fact, and are thus protected. They bolster their argument with a statement made by Plaintiff Jay Paterno, to wit, he states in a media interview that the Freeh Report’s conclusions were “basically an opinion.”

The Court recognizes that Jay Paterno's statement was an attempt to mitigate a perceived damage to his reputation and that of his family name.<sup>2</sup> Consequently, any statements he may have made to the media have no legal effect in determining whether or not the statements were actually opinions.

Further, Plaintiffs argue that this Court, in its January 7 Order, characterized the statements as conclusions, not opinions; therefore *Alston* does not apply. The Court reasserts its characterization of the Consent Decree statements as conclusions, which by definition is "a judgment or decision reached by reasoning." [http://www.oxforddictionaries.com/us/definition/american\\_english/conclusion](http://www.oxforddictionaries.com/us/definition/american_english/conclusion). In making this determination, the Court looked at the language of the Consent Decree.

In their Amended Complaint, Plaintiffs allege the following statements form the basis of their Defamation Claim:

[The 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 my not creating an environment where senior University officials felt accountable;

and

[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him.

These statements are contained in the Consent Decree under the Findings And Conclusions sections of the document. At no point does the Consent Decree state that these statements are opinions of NCAA or Penn State. On the contrary, key

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<sup>2</sup> The Court makes no determination as to whether or not any damage actually occurred, as such a determination is for a jury to decide.

language of the Findings And Conclusions introductory paragraph state, "Penn State has communicated to the NCAA that it accepts the findings of the Freeh Report...", and more definitively "...the findings of the Criminal Jury and the Freeh Report establish a factual basis from which the NCAA concludes that Penn State breached the standards..."

Because the statements at issue are conclusions, as opposed to opinions, *Alston* does not apply; therefore, they are not protected.

#### NCAA: Demurrer to Count III

NCAA alleges two reasons why this Count should be dismissed:

1. the claim for disparagement is not actionable because all of the underlying facts upon which the opinions are premised were disclosed to the public through the Freeh Report; and
2. an estate cannot bring a survival action for tort liability that accrues after the decedent's death.

This Objection was already ruled upon in the January 7<sup>th</sup> Opinion and Order, and NCAA has offered no new argument to justify the Court revisiting its decision.

#### NCAA: Failure of a Pleading to Confirm to Law or Rule of Court

NCAA alleges that Plaintiffs' Amended Complaint has not been verified. This procedural defect has been cured, rendering this Objection moot.

NCAA Lack of Personal Jurisdiction Over Dr. Emmert and Dr. Ray.

As per the Court's, August 16, 2013 Order, this issue has been set aside from the remaining issues, and the Court will set a separate schedule for the objections relating to personal jurisdiction as necessary.

Penn State: Insufficient Specificity With Respect To Counts, Plaintiffs, Relief Sought for All Counts and All Plaintiffs

Penn State correctly alleges that Plaintiffs have not sought relief for each Count listed in the Amended Complaint, instead, Plaintiffs are seeking relief for the Complaint in its entirety. Penn State claims that it is unable to determine which counts of the First Amended Complaint are being directed against it, what actions (or inactions) Penn State is alleged to have committed to support each count, and what relief is being sought in connection with those counts. As a result, Penn State is unable to prepare for its defense. Plaintiffs respond that the Amended Complaint is clear that "no relief is sought against the University, and Penn State has no standing to press objections on the NCAA defendants' behalf."

Plaintiffs' claim that no relief is being sought against Penn State is incorrect. The Amended Complaint contains two paragraphs that describe the relief they are seeking. Paragraph 168 purports to seek relief solely from NCAA, and paragraph 169 seeks relief from NCAA *and* Penn State. Further, ¶ 168 requests the issuance of an injunction to prevent NCAA from further enforcing the Consent Decree to which Penn State is a party—a course of action which presumably Penn State does not wish to pursue.

"The purpose of the pleadings is to place a defendant on notice of the claims upon which he will have to defend." *City of New Castle v. Uzamere*, 829 A.2d 763,

767 (Pa. Commw. Ct. 2003). The Court finds that the pleadings are insufficient to put Penn State on notice of the claims upon which they will have to defend. Plaintiffs will need to file a Second Amended Complaint alleging the actions of each defendant giving rise to each count along with the corresponding relief requested.

Penn State: Demurrer For Lack of Standing to Count I for Plaintiff Al Clemens

This Objection is identical to NCAA's objection *Incapacity to Bring Count I and Demurrer to Count I, supra*.

Penn State: Lack of Capacity to Sue for Count I for Plaintiff George Scott Paterno As Representative Of "The Family Of Joseph Paterno"

This Objection was stipulated to at the hearing. It was agreed that "The Family of Joseph Paterno" does not have any legal standing in Pennsylvania. The phrase "George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno" will be replaced with "The Estate of Joseph Paterno" in the caption of this case.

Penn State: Demurrer – Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs Al Clemens, George Scott Paterno As The Representative of the Estate of Joe Paterno, and George Scott Paterno as the Representative of the "Family of Joe Paterno"

This Objection is identical to NCAA's objection *Incapacity to Bring Count I and Demurrer to Count I, supra*.

Penn State: Demurrer For Failure to Allege A Breach Of Contract to Count I for Plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens

PSU argues that the Amended Complaint is devoid of allegations that Penn State breached the NCAA's Constitution, the NCAA's Operating Bylaws, or the

NCAA's Administrative Bylaws. This objections can properly be categorized as a "subset" of the overall objection to lack of specificity for all counts. Plaintiffs will have the opportunity to cure this defect by submitting a Second Amended Complaint.

Penn State: Insufficient Specificity Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens

PSU alleges that although Plaintiff's claim they have the right to "enforce the provisions of" the NCAA's Constitution and Bylaws, they do not identify:

1. what particular rights any of these plaintiffs purportedly acquired under this alleged contract;
2. how Penn State allegedly violated those claimed contractual rights; or
3. how any of the plaintiffs claim to have been injured by Penn State's alleged breach(es) of said contract.

This objection can properly be categorized as a "subset" of the overall objection to lack of specificity for all counts. Plaintiffs will have the opportunity to cure this defect by submitting a Second Amended Complaint.

Penn State: Demurrer For Failure To Allege Elements of Civil Conspiracy Against Penn State for Count V for All Plaintiffs

PSU claims Plaintiffs do not allege that Penn State combined with any other defendant acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose. Nor do they allege either that Penn State took any overt act in pursuit of any alleged common purpose or that any of

the Plaintiffs suffered actual legal damage as the result of any conspiratorial conduct by Penn State.

This objection can properly be categorized as a "subset" of the overall objection to lack of specificity for all counts. Plaintiffs will have the opportunity to cure this defect by submitting a Second Amended Complaint.

Penn State: Failure To Comply With Law Or Rule Of Court – No Verification to All Counts for All Plaintiffs

This Objection is identical to NCAA's objection *NCAA: Failure of a Pleading to Confirm to Law or Rule of Court, supra*.

Penn State: Failure To Comply With Law Or Rule Of Court – No Notice To Defend Or Plead to All Counts for All Plaintiffs.

Penn State alleges that Plaintiffs' Amended Complaint failed to contain a notice to defend or a notice to plead, as required by rule 1018.1(a) or Rule 1026(a). Because Penn State has responded to Plaintiffs' Amended Complaint, this Objection is moot.

### **Discovery Discussion**

The Court notes that originally Plaintiffs filed a Notice of Intent to Serve a Subpoena to Pepper Hamilton, LLP., as the keeper of the source documents<sup>3</sup>;

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<sup>3</sup> Source documents are the documents that the Freeh firm gathered from University servers and University custodians such as emails and other documents not created



however, during testimony, it was revealed that Pepper Hamilton no longer possess the database on which the source documents are stored, but rather, it is Defendants Penn State which now possesses the database at issue.

Attorney-Client / Work Product / Self-Examination Privileges and Limited Waiver

Penn State alleges that,

[a]lthough Penn State directed that the Freeh Report be made public, beyond the public disclosure of that Report, Penn State did not waive, and hereby asserts, the attorney-client privilege, the work product doctrine, the self-examination privilege and all other privileges or immunities from discovery, relating to the Investigation and the Freeh Report.

In essence, Penn State is alleging "limited waiver" objection to the documents sought, claiming that only the publicly released findings contained in the publically released Freeh Report have been waived.

Plaintiffs counter argue that Penn State waived Attorney-Client in its entirety; Penn State cannot assert work-product on Pepper Hamilton's behalf and work-product does not apply, as the documents at issue were not prepared in anticipation of litigation; and Pennsylvania does not recognize a self-examination privilege.

Attorney-Client

The generally recited requirements for assertion of the attorney-client privilege are: 1) The asserted holder of the privilege is or sought to become a client. 2) The person to whom the communication was made is a member of the bar of a court, or his subordinate. 3) The communication relates to a

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specifically for the investigation. Non-source documents are communications, interview notes, internal memoranda, etc. created for and during the course of the investigation.

fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort. 4) The privilege has been claimed and is not waived by the client.

*Com. v. Mrozek*, 441 Pa. Super. 425, 428, 657 A.2d 997, 998 (1995).

Under *Mrozek*, an essential element of an attorney-client privileged document is that the document must relate to "securing either an opinion of law, legal services or assistance in a legal matter." The Engagement Letter between Penn State and the Freeh Firm states that the Scope of Engagement is as follows:

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 government 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.

At no point does the scope mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter. Further, section 5 (Retention of Third Parties), paragraph 2 of the engagement letter states,

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. It should be noted that Louis J. Freeh is a partner and member in FSS and FGIS, respectively, and has a controlling interest in both. FSS is a

law firm and FGIS is a separate investigative and consulting group.

It therefore becomes clear that communications between Penn State and the Freeh Firm were not sought pursuant to seeking legal services; as such they are not subject to the attorney client privilege. As a result, any source documents Penn State turned over to the Freeh Firm for the purpose of conducting the investigation are not privileged. Likewise, any non-source documents created by either Penn State or the Freeh Firm is non privileged.

However, since Freeh Group International was providing legal services to Penn State, communications between Penn State and the Freeh Group International may be subject to attorney-client privilege. As such, any non-source documents created by the Freeh Group International may be privileged, and any non-source documents created by Penn State communicated to the Freeh Group International may also privileged, but that privilege may have been waived.

A client disclosing protected communications to a third party has long been considered inconsistent with an assertion of the privilege. *See Serrano v. Chesapeake Appalachia, LLC*, 298 F.R.D. 271 (W.D. Pa. 2014). Plaintiffs note that the Freeh Firm was communicating with third parties during the investigation—specifically, The Big Ten Athletic Conference and the NCAA. It is unquestioned that under *Serrano*, with respect to all documents—source and non-source—that were shared with the Big Ten or NCAA, the attorney-client privilege (if it ever existed) was waived.

Further, the scope of an attorney-client privilege waiver applies to the subject matter of the privileged documents disclosed. Therefore, voluntary

disclosure waives the privilege as to remaining documents of that same subject matter. See *Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) citing *Edwards v. Whitaker*, 868 F. Supp. 226, 229 (M.D. Tenn. 1994); *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.*, 132 F.R.D. 204, 207 (N.D. Ind. 1990). It then falls to the Court to decide how broadly subject matter classifications should be defined. The Court holds the divisions outlined in the Scope of Engagement are appropriate for categorizing subject matters:

- 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

As such, any documents shared with the Big Ten or NCAA regarding any of the aforementioned categories would constitute a subject-matter waiver.

#### Work Product

Unlike the attorney-client privilege, which belongs to the client to assert, the work product doctrine is asserted by the attorney. *Rhone-Poulenc Rorer, Inc. v. Home Inc/em. Co.*, 32 F.3d 851, 866 (3d Cir. 1994). Further, the purpose of work product is to allow an attorney to develop his/her mental impressions, conclusions, and opinions in preparation for trial. However, in Pennsylvania, the work product protection is not available unless the requests are made in connection with the litigation for which the material was prepared. See *Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C.5th 242, 249 (C.C.P. 2007).

Since Penn State does not have standing to object based on the privilege of work product, and the Scope of Engagement did not contemplate legal advice or legal services in conjunction with the case at bar, the Work Product doctrine does not apply.

#### Self-Examination

Pennsylvania Law does not recognize a Self-Examination Privilege. Penn State cites *Van Hine v. Dep't of State of Com.*, 856 A.2d 204, 212 (Pa. Commw. Ct. 2004) for the proposition that Pennsylvania may allow for such a Privilege, based on the Commonwealth Court's hypothetical existence of such a privilege in that opinion; however, this is misplaced. *Van Hine's* use of the hypothetical existence of the privilege is for illustrative purposes only, and the Court goes on to emphasize that no such privilege actually exists.

#### Relevance

Penn State claims that the Freeh Firm collected over 3.5 million source documents, and only a small percentage of those documents would have any relevance. Further, it is not feasible for Penn State to review the vast number of documents to comply with the subpoena requests and or check for any privileges.

At the hearing, it was determined that search terms could be provided to narrow the 3.5 million documents down to a reasonable number. The question remained whether it would fall to Plaintiffs to provide the search terms to Penn State to perform the search, or whether Penn State should turn over the database to Plaintiffs to allow Plaintiffs to run their own search. The Court holds the former

is the correct procedure. This would allow Penn State to screen for and produce a privilege log prior to exposing privileged documents to plaintiffs.

#### FERPA & CHRIA Protections

Penn State claims that Freeh Firm may have gained access to documents and records protected from disclosure and dissemination pursuant to the Family Educational Rights and Privacy Act ("FERPA") and the Criminal History Record Information Act. ("CHRIA").

#### FERPA

There is no evidentiary privilege created by FERPA. *T.M. v. Elwyn, Inc.* 950 A.2d 1050, 1061 (Pa. Super. 2008).

#### CHRIA

Investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic."

18 Pa.C.S.A. § 9106(c)(4) (part of CHRIA)

CHRIA shall apply to "persons within this Commonwealth and to any agency of the Commonwealth or its political subdivisions which collects, maintains, disseminates or receives criminal history record information."

18 Pa.C.S.A. § 9103

'Criminal history record information.' Information collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of

identifiable descriptions, dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom. The term does not include intelligence information, investigative information or treatment information...

18 Pa.C.S.A. § 9102

Penn State claims that it may have in its possession criminal history information on individuals, and it is prohibited from disseminating that information to persons other than criminal justice agencies under 18 Pa.C.S.A. § 9106(c)(4).

Penn State's reliance on § 9106 is misplaced. Under § 9103, any privilege that would be created under CHRIA does not apply to any source or non-source documents obtained or created by the Freeh Firm, as the Freeh Firm is not an agency of the Commonwealth or its political subdivision. Further, any source documents turned over to the Freeh Firm from Penn State likewise is not applicable, as Penn State does not collect, maintain, disseminate, or receive criminal history record information—with one possible exception: the Penn State University Police Department.

Of note, the only information that could conceivably be privileged, under § 9102, would be dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom that were collected by the Penn State University Police Department. All other investigative information including notes and other documents and confiscated evidence in pursuit of potential future criminal prosecution is expressly not subject to CHRIA.

Therefore, this privilege applies solely to notations of arrests, indictments, informations, or other formal criminal charges and any dispositions arising therefrom that were collected from Penn State University Police.

### Criminal Investigation

Penn State claims some of the requested documents may relate to ongoing criminal investigations; therefore they object to the production of any such documents without prior notice to and approval from appropriate law enforcement officials.

The engagement letter instructed the Freeh Firm

to communicate regarding its independent investigation performed hereunder with media, police agencies, governmental authorities and agencies, and any other parties, as directed by the Task Force.

According to the plain language of the engagement letter, any information the Freeh Firm shared with police agencies or governmental authorities is to be shared with the media and/or any other parties. Therefore, these documents are discoverable.

### Speculate as to an Opinion

Penn State claims the subpoena requests documents that may "support" or "relate to" an opinion or conclusion expressed by the Freeh Firm, and Penn State is unable to speculate as to the basis of opinions held by others.

Although not expressly stated in their objection, it can be inferred that Penn State is referring to Plaintiff's requests for documents that support or relate to the Freeh Firm's following statements and/or conclusions:

- Joe Paterno failed to protect against a child sexual predator harming children for over a decade.
- The Board of Trustees did not perform oversight duties



- The Board of Trustees 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 officials felt accountable
- Joe Paterno, among others, concealed Jerry Sandusky's activities from the Penn State Board of Trustees
- 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
- 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
- Some coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him
- Descriptions of Timothy Curley as "Joe Paterno's errand boy"
- 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
- Joe Paterno knew everything that was going on at the Penn State football facilities, including but not limited to copies of interviews referenced at note 167 of the Freeh Report

The plain language of these requests warrants overruling this objection, as any reasonable person would be able to extrapolate the subject matter from a document and easily determine if it applies to one or several of the aforementioned statements.

However, Penn State's objection has merit with respect to one request. Plaintiffs have also requested "all documents that support any conclusions or recommendations for action reached by the NCAA, Emmert, or Ray as a result of the Freeh investigation, including all notes or records of telephone calls, memos, emails, letters, or other forms of communication." While any reasonable person could easily extrapolate the subject matter from a document relating to any "recommendations for action", asking Penn State to determine which documents "support any conclusions reached by the NCAA, Emmert, or Ray" is too speculative; therefore, this Objection shall be Sustained in Part and Overruled in part.

#### Vague, Overbroad, and Unduly Burdensome

Penn State claims that the language in the subpoena "evidence, reflect, or relate to" various subjects is vague, overbroad and unduly burdensome.

Because Penn State objects to turning over the 3.5 million document database over to Plaintiffs to allow them to run their own search terms, they should not be able to object to the burden they will endure by reviewing the documents in responding to the specific requests from the subpoena. In short, Penn State can't have it both ways. As previously discussed, Plaintiffs shall submit their search terms to Penn State to narrow the 3.5 million documents to a feasible number of documents, rendering this Objection moot.

#### Costly, Time Consuming, and Excessively Burdensome

Penn State claims that the broad nature of the language "evidence, reflect, or relate to", the various topics requested, and the efforts required to separate privileged and otherwise protected documents from non-protected documents would require substantial amounts of time and incur very substantial and unwarranted expenses in order to protect the privileges. The analysis and result of this Objection is identical to the Objection immediately preceding it.

#### Public Domain

Penn State claims many documents sought are already in the public domain. The Court holds that the effort required to produce said documents is de minimus.

#### Invasive of Confidentiality Duties

Penn State also objects as the requests may be invasive of confidentiality duties that Penn State may owe other third parties, such as employees. However, there is no privilege based on an individual's status as an employee in Pennsylvania.

#### Irrelevant in Time

Penn State objects to any documents created after July 23, 2012, as that was the creation of the Consent Decree, which is the subject of the litigation; any documents created after this date would be irrelevant.

Plaintiffs argue that an Amended Consent Decree was adopted after that date; therefore, defendants continued to document and evaluate the matters in the Consent Decree well after the July 23, 2012 date. Plaintiffs further argue, if the

work of the Freeh Firm stopped on July 23, 2012, there will not be responsive documents after that date; if there are responsive documents, they were the result of ongoing work and should be produced. The Court Agrees.

#### Overbroad and Irrelevant

Penn State claims many of the requests are so broad that they seek documents and information that are neither relevant to the subject matter, nor reasonably calculated to lead to the discovery of admissible evidence.

The only specific Overbroad and Irrelevant objection Penn State made was in response to request number 24—all invoices for services submitted to Penn State pursuant to the Engagement Letter.

The Court holds the invoices may be relevant. Under Attorney-Client Privilege, *supra*, the Court discussed the distinction between the Freeh Firm, responsible for the Investigation, and Freeh Group International Solutions, responsible for legal services—both of which would be invoiced pursuant to the engagement letter. Because documents produced and/or collected by the Freeh Firm are not subject to attorney-client privilege, and documents produced and/or collected by Freeh Group International Solutions may be privileged, albeit possibly waived, the invoices could reasonably be calculated to lead to the discovery of admissible evidence, specifically, the invoices could be used as evidence to distinguish between documents protected by attorney-client privilege and documents which are not privileged.

### The Paterno Family

Penn State Objects to the issuance of the subpoena that purports to be on behalf of "the family of Joseph Paterno," as the "family" is not a recognized legal entity with standing to sue.

This issue was dealt with in the Preliminary Objections. All references to "The Family of Joe Paterno" are being replaced with "The Estate of Joseph Paterno" by stipulation at the hearing.

### Protective Order

Penn State objects to the production of any documents prior to the entry of an appropriate confidentiality stipulation and protective order in this case.

Recently<sup>4</sup>, the parties have come close to reaching an agreement on the language of a Protective Order; there is only one provision remaining on which they cannot agree. The provision at issue is as follows:

**General Protections.** All pre-trial discovery materials in this litigation (including materials that are not designated as constituting Confidential Information or Highly Confidential – Attorneys' Eyes Only Information) shall be used solely for the purpose of preparing and prosecuting the Parties' respective cases, and shall not be used or disclosed for any other purpose. Nothing in this Order, however limits: (i) the Parties' use of materials not designated as Confidential Information or Highly Confidential – Attorney's Eyes Only – Information that the Parties, in good faith, have made part of the judicial record in this case; or (ii) the use of information a Party legitimately obtained through public sources.

Plaintiffs object to this provision claiming that there is a high public interest in this case and the public has a right to any non-confidential information. Plaintiffs

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<sup>4</sup> As of July 3, 2014

also claim that this provision creates a blanket protective order, and blanket protective orders are disfavored in Pennsylvania.

While it is unquestionable that there is a high public interest in the instant case, Plaintiffs have cited no statutory or case law which stands for the proposition that such an interest creates an increased interest for a party to disseminate pre-trial discovery.

The fact that there is a high public interest in this case more strongly justifies the inclusion of the provision, as the dissemination of pre-trial discovery, which may ultimately not be admissible at trial, is more likely to taint a potential jury pool in a situation where public interest is higher than average, such as the case at bar.

[T]he public may be "excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests...**and to minimize the danger of an unfair trial by adverse publicity**"

*Katz v. Katz*, 356 Pa. Super. 461, 468, 514 A.2d 1374, 1377 (1986)(**emphasis added**)

Further, Private documents collected during discovery are not "judicial records" to which public has presumptive right of access. *See Stenger v. Lehigh Valley Hosp. Ctr.*, 382 Pa. Super. 75, 89, 554 A.2d 954, 960 (1989). And,

[P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

*Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 2207-08, 81 L. Ed. 2d 17 (1984)(citations omitted).

Both Penn State and NCAA have cited *Seattle Times*, to support their claim that the public does not have a right to pre-trial discovery, and both parties are alleging that Plaintiffs' objection to the provision is Plaintiffs' desire to release said documents for public relations purposes. In their Statement in support of including the above provision, the NCAA has proffered evidence in support of this claim. The Court finds NCAA's argument convincing and holds that Plaintiffs using discovery for this purpose would be an abuse of the discovery process.

Because there is no right for the public to have access to pre-trial documents, the risk to contaminate the potential jury pool is high, and the dissemination of pre-trial documents would be an abuse of the discovery process, the provision at issue shall be included in the protective order.

#### Missing Letter in Request No. 3

Discovery Request number three states "Please produce all documents maintained as part of the Client File created by the Freeh Firm pursuant to the engagement letter attached hereto as Exhibit 1." Penn State objects that no "Exhibit 1" was attached to the Subpoena.

This is a procedural defect which was cured in subsequent filings; therefore this objection is moot.

**Order**

AND NOW, this 10 day of September, 2014, upon consideration of Defendants' Preliminary Objections and Defendant Penn State University's Objections to discovery requests, briefs submitted by all parties involved, and a hearing on the matters, the Objections are SUSTAINED in part and OVERRULED in part, as follows:

1. NCAA's Preliminary Objection based on an Incapacity to Bring Count I of the Amended Complaint is OVERRULED.
2. NCAA's Preliminary Objection based on Impertinent Material and Demurrer to Count I is OVERRULED.
3. NCAA's Preliminary Objection based on Incapacity to Bring Count I and Demurrer to Count I is SUSTAINED with respect to the incapacity of the Estate of Joseph Paterno to bring suit; it is OVERRULED in all other respects.
4. NCAA's Preliminary Objection based on Demurrer to Count II is OVERRULED.
5. NCAA's Preliminary Objection based on Demurrer to Count V is OVERRULED for the Estate of Joseph Paterno, Jay Paterno, Al Clemens, and William Kenney; it is SUSTAINED for all remaining Plaintiffs.

Ryan McCombie, Anthony Lubrano, Adam Talliaferro, Peter Bordi, Terry Engelder, Spencer Niles, John O'Donnell, Anthony Adams, Gerald Cadogan, Shamar



Finney, Justin Kurpeikis, Richard Gardner, Josh Gaines, Patrick Mauti, Anwar Phillips, and Michael Robinson are dismissed from this action.

6. NCAA's Preliminary Objection based on Demurrer to Count IV is OVERRULED.
7. NCAA's Preliminary Objection based on Demurrer to Count III is OVERRULED.
8. NCAA's Preliminary Objection based on Failure of a Pleading to Conform to Law or Rule of Court is OVERRULED on mootness.
9. No decision is made on the NCAA's Preliminary Objection based on Lack of Personal Jurisdiction Over Dr. Emmert and Dr. Ray.
10. Penn State's Preliminary Objection based on Insufficient Specificity With Respect To Counts, Plaintiffs, Relief Sought for All Counts and Plaintiffs is SUSTAINED. Plaintiffs shall have 30 days from the date of this Opinion and Order to file a Second Amended Complaint to cure this deficiency.
11. Penn State's Preliminary Objection based on Lack of Capacity to Sue for Count I for Plaintiff George Scott Paterno As Representative Of "The Family Of Joseph Paterno" is SUSTAINED. Plaintiff "George Scott Paterno, As duly appointed representative of the Estate and Family of Joseph Paterno; shall be replaced with "The Estate of Joseph Paterno".

All filings from this point forward shall be as follows:

ESTATE of JOSEPH PATERNO;

AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and

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,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

12. Penn State's Preliminary Objection based on Demurrer – Alleged Intended Third-Party Beneficiary Status for Count I for Plaintiffs Al Clemens, George Scott Paterno As The Representative of the Estate of Joe Paterno, and George Scott Paterno as the Representative of the "Family of Joe Paterno" is SUSTAINED in part and OVERRULED in part.
13. Penn State's Preliminary Objection based on Demurrer For Failure to Allege A Breach of Contract to Count I for plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens is SUSTAINED.

14. Penn State's Preliminary Objection based on Insufficient Specificity Intended Third-Party Beneficiary Status for Count I for Plaintiff The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens is SUSTAINED.
15. Penn State's Preliminary Objection based on Demurrer for Failure to Allege Elements of Civil Conspiracy Against Penn State for Count V for All Plaintiffs is SUSTAINED.
16. Penn State's Preliminary Objection based on Failure to Comply With Law or Rule of Court – No Verification to All Counts for All Plaintiffs is OVERRULED for mootness.
17. Penn State's Preliminary Objection based on Failure to Comply With Law or Rule of Court – No Notice To Defend or Plead to All Counts for All Plaintiffs is OVERRULED for mootness.
18. Penn State's Discovery Objection based on Attorney-Client / Work Product / Self-Examination Privileges and Limited Waiver is SUSTAINED for non-source documents between Penn State and Freeh Group International that are not of the same subject matter Penn State disclosed to third parties. The Objection is OVERRULED for all other documents.
19. Penn State's Discovery Objection based on Relevance is SUSTAINED in part and OVERRULED in part. Plaintiffs shall provide a search terms to Penn State to narrow the database of 3.5 million documents to a reasonable number.
20. Penn State's Discovery Objection based on FERPA and CHRIA Protections is SUSTAINED for dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom that were

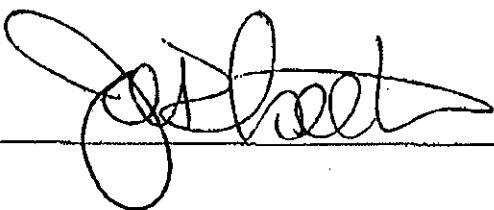
collected by the Penn State University Police Department. The Objection is OVERRULED for all other documents.

21. Penn State's Discovery Objection based on a current Criminal Investigation is OVERRULED.
22. Penn State's Discovery Objection based on Speculation as to an Opinion is SUSTAINED for Plaintiff's request to provide "all documents that support any conclusion or recommendation for action reached by the NCAA, Emmert, or Ray as a result of the Freeh investigation, including all notes or record of telephone calls, memos, emails, letters, or other forms of communication." The Objection is OVERRULED for all other requests.
23. Penn State's Discovery Objection based on Vague, Overbroad, and Unduly Burdensome is OVERRULED. See ¶19.
24. Penn State's Discovery Objection based on Costly, Time Consuming, and Excessively Burdensome is OVERRULED. See ¶19.
25. Penn State's Discovery Objection based on information already in the Public Domain is OVERRULED.
26. Penn State's Discovery Objection based on Invasiveness of Confidentiality Duties is OVERRULED.
27. Penn State's Discovery Objection based on Irrelevant in Time is OVERRULED.
28. Penn State's Discovery Objection based on Overbroad and Irrelevant is OVERRULED.
29. Penn State's Discovery Objection based on The Paterno Family's standing is SUSTAINED. See ¶ 11.

30. Penn State's Discovery Objection based on the need for a Protective Order is  
SUSTAINED. The Protective Order shall be made with the provision at issue  
included.

31. Penn State's Discovery Objection based on a Missing Letter in Request Number 3  
is OVERRULED for mootness.

J.

A handwritten signature in black ink, appearing to read "J. [unclear]", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke at the end.

# **EXHIBIT F**



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.

Notice is hereby given that, pursuant to Rule 313 of the Pennsylvania Rules of Appellate Procedure, The Pennsylvania State University ("Penn State"), defendant in the above-captioned



action, appeals to the Superior Court of Pennsylvania the order issued in this matter on September 11, 2014 (attached hereto). Specifically, Penn State appeals the portions of the order that overruled Penn State's assertion of the attorney-client privilege and the attorney work product doctrine. *See Gillard v. A.I.G. Insurance Co.*, 15 A.3d 44 (Pa. 2011); *Saint Luke's Hospital of Bethlehem v. Vivian*, 2014 WL 4056551 (Pa. Super. Aug. 18, 2014); *Berkeyheiser v. A-Plus Investigations, Inc.*, 936 A.2d 1117 (Pa. Super. 2007). This order has been entered on the Court's docket, as evidenced by the attached entry on the certified docket.

A transcript was prepared of the hearing held in this matter on May 19, 2014. As reflected on the attached docket, that transcript was filed with the Court on June 2, 2014, and an errata sheet thereto was filed on June 25, 2014. No further transcripts are available.

Respectfully submitted,



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*Attorneys for  
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# **EXHIBIT G**

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**Via UPS Overnight**

September 15, 2014

Michael Friedman, Esquire  
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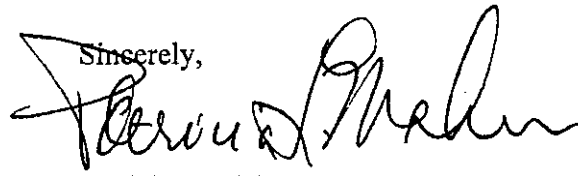
Re: Subpoena in re *The Estate of Joseph Paterno v. The NCAA*, Case No. 2013-2082  
(Centre County, Common Pleas)

Dear Mr. Friedman:

On behalf of the Estate of Joseph Paterno, we are hereby serving you with a subpoena duces tecum in the above-referenced action. In addition to the enclosed subpoena, we have included a copy of the September 11, 2014 Opinion and Order by Judge Leete, overruling objections by the Pennsylvania State University to the subpoena, other than part of the objection to Request No. 20. Accordingly, no response is required to the request for "all documents that support any conclusion or recommendation for action reached by the NCAA, Emmert or Ray, as a result of the Freeh investigation, including all notes or records of telephone calls, memos, emails, letters, or other forms of communication," as stated in paragraph No. 22 of the Order at p. 38.

With that exception, please provide responses to the requests in the enclosed subpoena by October 6, 2014.

Sincerely,



Patricia L. Maher

Enclosures

EXHIBIT G

Michael Friedman, Esquire  
September 15, 2014  
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cc: Daniel I. Booker  
Jack Cobetto  
Donna Doblick  
Brian Kowalski  
Everett Johnson  
Thomas J. Weber