IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
PENNSYLVANIA
CIVIL ACTION – LAW

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

Plaintiffs,

v.

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

Defendants.

Docket No. 2013-2082

Type of Case: Commercial

Type of Pleading: Discovery Motion

Filed on Behalf of: Plaintiff George Scott Paterno as Duly Appointed Representative of the Estate and Family of Joseph Paterno

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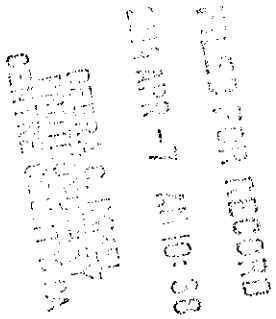
IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

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;	)	Civil Division Docket No. 2013-2082
PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University;	)	
WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and	)	
ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,	)	
Plaintiffs,	)	
v.	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),	)	
MARK EMMERT, individually and as President of the NCAA, and	)	
EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,	)	
Defendants.	)	
and	)	
THE PENNSYLVANIA STATE UNIVERSITY,	)	
Nominal Defendant.	)	



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

Plaintiff George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno ("Paterno"), served the parties in the above captioned matter with a Notice of Intent to Serve a Subpoena for production of documents and things upon a third party, the law firm Pepper Hamilton LLP ("Pepper Hamilton"), pursuant to Pa. R.C.P. No. 4009.21 ("the Pepper Hamilton subpoena") on February 26, 2014.[1] Exh. A. On March 14, 2014, Defendant Pennsylvania State University ("Penn State") served objections to the notice of intent to issue the Pepper Hamilton subpoena. Objections to Subpoena Pursuant To Rule 4009.21 ("Objections"), Exh. B. No other party objected to the Notice of Intent to serve the Pepper Hamilton subpoena. Having failed to reach agreement during a conference on Penn State's objections, *see* Statement of Conference Pursuant to Local Rule 208.2(e), Plaintiff Paterno now requests that the Court overrule Penn State's objections and enter an Order of the form submitted with this motion, authorizing him to serve the Pepper Hamilton subpoena.

PENN STATE'S GENERAL OBJECTIONS LACK FOUNDATION

1. The law firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm") was retained in 2011 by a Special Investigative Task Force of the Board of Directors of Penn State (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." *See* Engagement Letter between the Freeh Firm and the Task Force, (the "Engagement Letter"). Exh. C at 1.

[1] Plaintiff Paterno originally served the Notice of Intent to Serve a Subpoena to Pepper Hamilton LLP to produce documents pursuant to Rule 4009.21 on February 25, 2014 but inadvertently did not include an exhibit to the subpoena, and therefore re-served the corrected Notice of Intent on February 26, 2014.

2. The Freeh Firm issued its *Report of Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A Sandusky* (July 12, 2912) (the "Freeh Report") Exh. D, on July 12, 2012, and on July 23, 2012, the NCAA imposed a Consent Decree on Penn State based on the findings and recommendations of the Freeh Report.

3. The terms of the Consent Decree (falsely) charged that Plaintiff Paterno and others failed to protect children from a child sexual predator, Jerry Sandusky, and concealed Sandusky's activities from the Penn State Board of Trustees.

4. The claims in this case deal with the NCAA's abuse of authority, including its improper wholesale adoption of the Freeh Report and the imposition of draconian sanctions that have severely and adversely affected the plaintiffs in this action.

5. The Pepper Hamilton subpoena is addressed to the successor to the Freeh Firm, and calls for production of 25 categories of documents related to the Freeh Firm's work, and the conclusions and recommendations of the Freeh Report.

6. Penn State has asserted General Objections to the Pepper Hamilton subpoena on numerous grounds, which it incorporates by reference as objections to each of the 25 individual requests in the subpoena.

7. With respect to six requests (Nos. 1, 4, 17, 18, 20, 21), which call for production of documents related to communications by the Freeh Firm with third parties, Penn State sets forth certain "exceptions" to its otherwise broad objections to production of any responsive documents.

8. In each case, Penn State does not object to production of documents that constitute the actual communications, but does object to the production of documents that "evidence, reflect or relate" to such communications, as called for by the Requests.

9. As to the 19 other requests, Penn State objects to production of any responsive documents based on its general and specific objections.

10. For the following reasons, Penn State's general and specific objections should be overruled.

A. The Requested Documents Are Not Protected By Any Applicable Privilege.

11. Penn State contends that other than publicly disclosing the Freeh Report itself, it did not waive any privileges or immunities applicable to the Freeh investigation or work of the Freeh Firm. Objections, Exh. B at 2.

12. Asserting that all the requests in the Pepper Hamilton subpoena to some extent seek documents that are protected from discovery by either the attorney-client privilege or work product doctrine, Penn State objects to the production of documents called for other than as provided in its specific exceptions to six requests.

13. In light of the circumstances under which the Freeh Firm was engaged by the Task Force and produced its Report, none of the privileges invoked by Penn State applies or precludes production of responsive documents.

1. Requirements of Attorney-Client Privilege Not Met.

14. With respect to all of the documents called for by the Pepper Hamilton subpoena, other than the "actual communications" described in the exceptions to the six responses referenced above, Penn State objects that the documents are protected by the attorney-client privilege, the

work product doctrine, and the self-examination privilege and therefore objects to production of *any* documents except as it specifically indicates otherwise. Objections, Exh. B at 2-3.

15. Not only has Penn State failed properly to assert its privilege objections, but none of these privileges applies here.

16. In Pennsylvania, the attorney-client privilege is codified at Section 5928 of the Judicial Code, which provides:

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa. C.S. § 5928.

17. Penn State's privilege objection is unsupportable because it was clear from the outset that the work for which the Task Force engaged the Freeh Firm would not be kept confidential. Indeed, the Freeh Report states on its face that "[t]his report sets forth the essential findings of the investigation, pursuant to the appropriate *waiver of the attorney-client privilege* by the Board." Exh. D at 10 (emphasis added).

18. Further, the terms of the Freeh Firm's engagement provided that its work could be shared with others, and would be made public as part of Penn State's efforts to respond to the fallout from the indictment of former assistant football coach Jerry Sandusky for child abuse. *See Commonwealth v. Goldblum,* 447 A. 2d 234 (Pa. 1982) (privilege no longer exists when communications are publicly disclosed at the direction of the client).

19. The Engagement Letter expressly authorized the Freeh Firm to "immediately report any discovered evidence of criminality to the appropriate law enforcement authorities" and "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." Exh. C at 1, 2.

20. The Task Force permitted the Freeh Firm to make disclosures to law enforcement authorities without consultation, and specified that "neither the Trustees nor the Task Force will interfere with FSS's reporting evidence of criminality or identities of any victims of sexual crimes or exploitation." *Id.* at 2.[2]

21. While the purposes of Penn State and the Task Force in permitting such disclosures may have been laudable, the authorization to the Freeh Firm to communicate its findings directly to law enforcement is inconsistent with maintaining the confidentiality required for the attorney-client privilege to apply. *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382, 390 (W.D. Pa. 2005) ("[A]ny voluntary disclosure by the holder of the privilege is inconsistent with the confidential nature of the relationship, and thereby waives the privilege.") (citations and internal quotation marks omitted).

22. Soon after its engagement, the Freeh Firm was communicating with a third party, the Big Ten Athletic Conference, "regarding an agreeable process of collaboration on gathering and *sharing information*." *See* Dec. 8, 2011 letter from James E. Delany to Mark Emmert, Exh. E (emphasis added).

23. Around the same time, Penn State's then-General Counsel, Cynthia Baldwin, acknowledged that the NCAA would be able to "continue to monitor these investigations" as

[2] Although the Engagement Letter includes statements that the "confidentiality and privilege protection of the attorney-client and attorney work product privileges" apply to the work of the Freeh Firm, Exh. C at 5, such boilerplate language is inconsistent with ceding to the Freeh Firm the decision of what information to disclose to law enforcement authorities without involvement of Penn State or the Task Force.

they were ongoing, and "will have access to the report of the Special Investigations Task Force." *See* Dec. 12, 2011 letter from Cynthia Baldwin to Mark Emmert, Exh. F.

24. During the course of the investigation conducted by the Freeh Firm from November 2011 until the issuance of its Report on July 12, 2012, Penn State and the Freeh Firm made disclosures of information.

25. For example, on May 4, 2012, the Chairman of the Task Force announced the Freeh Firm's interim findings and reiterated that "it remains the board's intention that at the conclusion of Freeh's independent work, the full findings and recommendations will be made public." Penn State Press Release, *Frazier Provides Update on Special Investigations Task Force*, (May 4, 2012), Exh. G.

26. Penn State's use of the "interim findings" of the Freeh Firm, and its sharing of information with third parties regarding the ongoing developments of the investigation, belies Penn State's current claim of privilege with respect to all documents and information of the Freeh Firm called for by the Pepper Hamilton subpoena.

27. Further, the Freeh Report is replete with accounts of information provided by Penn State's General Counsel, summaries of the contents of her notes, and advice to the Board and other Penn State personnel. Exh. D, *passim*; *see also e.g.*, *id.* at 53 (describing Baldwin's account of grand jury questions to Penn State president); *id.* at 71 (relating the content of Baldwin's notes of telephone conference with Penn State president).

28. It is clear under Pennsylvania law that a party asserting the attorney-client privilege must demonstrate that the material it seeks to protect has been treated as confidential. *See Murray v.*

Gemplus Int'l, S.A., 217 F.R.D. 362 (E.D. Pa. 2003) (a party that attempts to utilize privilege as weapon by selectively disclosing communications waives privilege).

29. The Pennsylvania Supreme Court has cited the reasoning of *Murray,* as instructive, noting that when "one party intentionally discloses privileged material with the aim, in whole or in part, of furthering that party's case, the party waives its attorney-client privilege with respect to the subject-matter of the disclosed communications." *Nationwide Mut. Ins. Co. v. Fleming*, 992 A.2d 65, 69 (Pa. 2010) (internal quotation mark omitted); *see also Miniatronics Corp. v. Buchanan Ingersoll, P.C.*, 23 Pa. D. & C.4th 1, 18-21 (1995) (voluntary disclosure of confidential information to gain tactical advantage waives attorney-client privilege for all communications involving same subject matter).

30. Penn State authorized disclosure of material by permitting the Freeh Firm to disclose information to law enforcement authorities without even consulting the Task Force, and to share information with the NCAA and the Big Ten. *See Messner v. Korbonits*, 39 Pa. D. & C.3d 182-187 (1982) ("by reason of [party's] later selective disclosure of certain material within the claimed privilege, we find that the attorney-client privilege has been waived").

31. Penn State's failure to maintain the confidentiality of the work performed by the Freeh Firm undercuts its broad claim of privilege in response to the Pepper Hamilton subpoena.

32. To permit such an assertion of privilege would enable Penn State to use the privilege as a sword (by selectively disclosing documents to law enforcement, the NCAA, and the public to enhance its position), and as a shield (by preventing disclosure of information it does not want disclosed in the context of this litigation). Because "[t]he intended beneficiary of th[e] policy [of attorney-client privilege] is not the individual client so much as the systematic administration of

justice," Penn State should not be permitted to both invoke and waive the privilege as suits its needs. *In re Investigating Grand Jury of Phil. Cnty. No. 88-00-3505*, A.2d 402, 406 (Pa. 1991).

2. Penn State Has Not Properly Asserted Attorney-Client Privilege.

33. Even if Penn State had taken steps to ensure the confidentiality of the Freeh Firm's work, it has not properly asserted privilege with respect to documents called for by the Pepper Hamilton subpoena. Instead, Penn State has made a blanket assertion of privilege, and then purported to carve out limited exceptions in response to six of the subpoena requests. *See* Objections, Exh. B at 2-3 ("except for specific exceptions . . . , [it] objects to the production of any documents or other materials in response to the subpoena . . . .").

34. Because the attorney-client privilege stands in derogation of the search for truth, it is strictly construed and the party asserting the privilege bears the burden of proving the applicability of the privilege. *Martin Marietta Materials*, 227 F.R.D. at 389. The party invoking the privilege must set forth facts showing the privilege has been properly invoked. *Customs Design & Mfg. Co. v. Sherwin-Williams Co.* 39 A.3d 372, 376 (Pa. Super. Ct. 2012).

35. Penn State has turned the procedure for asserting privilege on its head, by making sweeping assertions of privilege which it then lifts for certain categories of documents that it acknowledges are not privileged. It has not even attempted to demonstrate the applicability of the attorney-client privilege (or other privileges, discussed below) with respect to the particular documents or categories of documents responsive to individual requests of the Pepper Hamilton subpoena, or stated why such documents should be protected under the attorney-client privilege. Therefore, Penn State has not carried its burden of asserting attorney-client privilege.

3. The Work Of The Freeh Firm Is Not Protected Work Product.

36. Penn State's blanket assertion that materials being sought are covered by the work product doctrine is also unsupportable.

37. At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. *Commonwealth v. Kennedy*, 876 A.2d 939 (2005).

38. The work product protections do not apply to the work of the Freeh firm because it was engaged not in anticipation of litigation, but to conduct 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") to report such sexual abuse to appropriate police and governmental authorities." Exh C at 1.

39. Moreover, in Pennsylvania, the work product protection extends only to the impressions of counsel, and "only to the litigation of the claims for which the impressions, conclusions, and opinions were made." *Graziani v. OneBeacon Ins., Inc.*, 2 Pa. D. & C.5th 242, 249 (2007) (*citing Little v. Allstate Ins. Co.*, 16 Pa. D. & C.3d 110 (1980) and *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C.4th 23 (1998)).

40. The work product doctrine thus does not apply here because the work performed by the Freeh Firm does not involve the litigation of claims for which any impressions, conclusions, or opinions of counsel were made.

41. Even if the work of the Freeh Firm had been prepared in anticipation of litigation, under Pa. R.C.P. No. 4003.3 "a party may obtain discovery of any matter discoverable under rule

4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney."

42. When counsel has been engaged in anticipation of litigation, the rule restricts discovery of a "lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more." *Id.* at Explanatory Note. Memoranda and notes of a non-lawyer representative are not protected, and "[d]ocuments, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file." *Id.*

43. In any event, as noted above, even if the work product doctrine is properly invoked in this matter, Penn State waived such protections by the widespread disclosure of such material. "The work product doctrine is not absolute but, rather, is a qualified privilege that may be waived." *Kennedy*, 876 A.2d at 945; ("[W]hen the defendant elected to call a witness who had prepared a report for the defendant prior to trial, the defendant waived the protections of the work product doctrine with respect to matters covered in the witness' testimony." (internal quotation marks omitted)).

4. Pennsylvania Does Not Recognize the Self-Examination Privilege.

44. Penn State's assertion of the self-examination privilege is meritless because the privilege is not recognized in Pennsylvania.

45. As the United States District Court for the Eastern District of Pennsylvania has explained, "Pennsylvania has not recognized the self-critical analysis privilege. Although a few lower Pennsylvania state courts have applied the privilege in limited situations, no Pennsylvania appellate court has adopted it. In fact, the Pennsylvania Commonwealth Court has specifically noted that the privilege has not been recognized in this state." *Drayton v. Pilgrim's Pride Corp.*,

Nos. 03-2334, *et. al.* 2005 U.S. Dist. LEXIS 18571, *4-5 (E.D. Pa. Aug. 30, 2005); *see also Van Hine v. Dep't of State of the Commw. Of Pa.*, 856 A.2d 204 (Pa. 2004).

46. None of the privileges invoked by Penn State is applicable.

B. The Requested Documents Are Relevant

47. Penn State asserts repeatedly that the documents requested are not relevant to the subject matter of this lawsuit, which it reduces to just three words: "the Consent Decree." Objections, Exh. B at 4.

48. Despite its compact characterization of the claims, the Pennsylvania Rules of Civil Procedure provide for a broad scope of discovery as to "any matter, not privileged, which is relevant to the subject matter involved." Pa. R.C.P. No. 4003.1.

49. "Under Pennsylvania's broad discovery rules, as long as it is relevant to the litigation, whether directly or peripherally, a party may obtain discovery regarding any unprivileged matter. . . . As a practical matter, that means that nearly any relevant materials are discoverable, because this Commonwealth recognizes only a limited number of privileges." *McMillen v. Hummingbird Speedway, Inc.*, No 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, *3 (Sept. 9, 2010).

50. Penn State has made no attempt in its Objections to explain why the documents called for by the subpoena do not fall within the permissible scope of discovery.

51. The requests of the Pepper Hamilton subpoena for information about the Freeh investigation, the Freeh Report, and contacts between the Freeh Firm and others, including the NCAA, are clearly relevant to the subject matter involved in the pending action.

52. Penn State has asserted that only a small percentage of the vast amount of electronically stored information and other material collected by the Freeh Firm has any relevance to the issues in the Freeh Report.

53. This is not a proper basis for objecting to the production of responsive documents and information. Plaintiff Paterno has made clear to counsel for Penn State that the Pepper Hamilton subpoena does not call for the production of all the material collected by the Freeh Firm, but only the material responsive to its 25 requests.

54. While Penn State has objected that only a small portion of the material collected is relevant to the issues discussed in the Freeh Report, the Pepper Hamilton subpoena does even not call for all material relevant to the Freeh Report, but only for documents and information that relate to certain specific conclusions and statements in the Freeh Report.

55. Plaintiff Paterno and Penn State agree that production of the entirety of what the Freeh Firm collected during the course of its investigation is not required would not be produced in response to the Pepper Hamilton subpoena.

56. Penn State also specifically objected on grounds of relevance to Request No. 24, which calls for production of invoices for services submitted by the Freeh Firm to Penn State, and supporting documents.

57. The First Amended Complaint includes a civil conspiracy count, which alleges that the NCAA and individual defendants conspired with the Freeh Firm to impose unwarranted and unprecedented sanctions on Penn State, thereby unlawfully harming plaintiffs. First Amended Complaint at Count V, ¶¶ 162-165.

58. Invoices for legal services typically recount the nature of the work provided, with additional detail in supporting documents such as time entry. The request for such information in Request No. 24 clearly falls within the broad scope of permissible discovery in light of Count V.

C. Penn State's "Potential Objections" Are Improper.

59. Penn State has asserted several potential objections to the Pepper Hamilton subpoena that according to Penn State "may apply," although it has not yet determined whether any documents responsive to the subpoena will actually be covered by the objections.

60. Specifically, Penn State objects that: (a) the Freeh Firm "*may have* gained access" to documents and records protected from disclosure by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), a federal statute, and the Criminal History Record Information Act, 18 Pa. C.S.A. § 9102 ("CHRIA"), a Pennsylvania law, Objections, Exh. B at 3 (emphasis added); (b) some of the requested documents "*may relate* to ongoing criminal investigations," *id.* (emphasis added); (c) "to the extent the Requests seek documents in the possession, custody or control of the University that may 'support' or 'relate to' an opinion or conclusion expressed by the Freeh Firm," *id.*; and (d) the requests are "invasive of *any confidentiality duties that may be owed to other parties*, including individual employees, and as intruding upon any privacy interest of such persons," *id.* at 4 (emphasis added).

61. Counsel for Penn State has made clear that no determination has actually been made whether these objections will actually apply to documents or information called for by the Pepper Hamilton subpoena because no effort has yet been undertaken to determine what the responsive documents might be.

62. These objections are asserted only as "potential objections," which Penn State contends cannot be resolved in the abstract but will have to await actual review and production of responsive documents.

63. Lacking any basis in fact, the objections are not properly asserted in the abstract. None of these objections is based on the limitations of discovery provided in Pa. R.C.P No. 4011. Particularly where, as here, they prevent service of the Pepper Hamilton subpoena, such objections should be denied.

64. With respect to the potentially applicable statutes, Penn State has not described even generally what documents and records are protected by these statutes, or to which requests of the subpoena such documents would be responsive, although implicitly concedes that it provided such records and documents to the Freeh Firm.

65. As the apparent source for any such information, Penn State is in a position to identify what, if any, such material is responsive to the requests of the subpoena, but has not done so.

66. Similarly, the objection that some of the requested documents "*may relate* to ongoing criminal investigations," is not a legal basis for Penn State to object to Pepper Hamilton producing documents responsive to the Pepper Hamilton subpoena. Even if any such documents are responsive to the subpoena, it is not Penn State's responsibility or prerogative to protect the confidentiality of any ongoing criminal investigation.

67. Penn State's objection that "the Requests seek documents in the possession, custody or control of the University that may 'support' or 'relate to' an opinion or conclusion expressed by the Freeh Firm," misconstrues the purpose of the Notice of Intent and the basis on which parties may object.

68. Penn State's objections pertain to the notice of Plaintiff Paterno's intent to serve a document subpoena on a non-party, Pepper Hamilton.

69. The subpoena to be issued does not call for production of any documents in the possession, custody, or control of Penn State, and therefore does not require Penn State to make decisions about which documents are responsive or to speculate about the bases of opinions held by the Freeh Firm.

70. Similarly, the objection that the requests are "invasive of *any confidentiality duties that may be owed to other parties*, including individual employees, and as intruding upon any privacy interest of such persons," appears to regard the subpoena requests as directed to Penn State rather than to Pepper Hamilton.

71. This objection is hypothetical in the extreme, lacking particularity to any requests in the subpoena, or to the unspecified privacy interests or confidentiality obligations.

72. Pennsylvania law does not provide protection for material that a party unilaterally deems confidential. As stated in the Rules, discovery is permitted into "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Pa. R.C.P. No. 4003.1.

73. Penn State has not contended (and cannot contend) that these requests implicate trade secrets and confidential information,[3] and, absent a showing that they are subject to some specific privilege, the materials sought are discoverable.

74. All of these "potential objections" should be overruled.

D. Penn State's Other Various Objections Lack Merit.

[3] The party seeking a protective order based on a claim of trade secrets or confidential business information must set forth specific and concrete factual allegations that would support either a finding that the information which they are producing constitutes confidential research, development or commercial information, or a finding that the dissemination of such information would harm the defendants. *Chrysler v. Zigray*, 7 D. & C.4th 408 (1990).

1. The Requests Are Not Overbroad.

75. Penn State objects that the requests are vague, overbroad and burdensome, and "compliance with the subpoena . . . would be extremely costly, time consuming, and excessively burdensome," both as to Pepper Hamilton and to Penn State. Objections, Exh. B at 3.

76. This objection is improper insofar as Penn State is asserting objections on behalf of Pepper Hamilton.

77. Further, the proposed requests to Pepper Hamilton ask for a specific set of documents, communications, or correspondence relevant to the claims in this case and thus are not vague or overbroad.

78. For the reasons stated above, the documents at issue are not privileged so Penn State should not have to expend any time protecting privileges that do not apply.

79. In any event, other than referring to millions of electronic documents collected by the Freeh Firm, which are not even called for by the subpoena, Penn State has not estimated the burden that would actually be entailed in responding to the subpoena, or attempted to explain why the effort it would be required to expend should outweigh the plaintiffs' rights to discovery in this case.

80. Such blanket objections are not the correct manner of raising an objection. *See In re Conditional Use Application of Wal-Mart Stores, Inc.*, No. 06-10403, 2007 Pa. Dist. & Cnty. Dec. LEXIS 15 (Jan. 23, 2007) (noting that "general objections of [a party] to discovery" are not favored by the court); *Nedrow v. Pa. Nat'l Mut. Cas. Ins. Co.*, 31 Pa. D. & C.3d 456, 462 n.6 (1981) (stating that "the court [previously] permitted discovery of the entire file of the

[defendant] and its attorney subject to any objections of counsel to the discoverability of specific items in the files").

81. Moreover, having paid the Freeh Firm over $8 million for the investigation and Report, Penn State's suggestion that it would be too expensive to conduct a review of any potentially privileged documents from the highly publicized investigation and report lacks force. *See* Mike Dawson, *Penn State Releases Confidential Copy of Freeh Contract; Cost for Investigation $8 Million,* Centre Daily Times (Mar. 12, 2013), Exh. H.

2. Penn State's "Public Domain" Objection Is Not Recognized Under Pennsylvania Law.

82. Penn State has asserted several objections that are not proper objections to the issuance of a subpoena to a third party. It has objected that many of the documents requested under the subpoena are in the public domain, which it contends are "readily available to the Paterno plaintiffs." Objections, Exh. B at 4.

83. There is no restriction under the Pennsylvania Rules of Civil Procedure to requesting documents just because they may be in the public domain.

84. A determination of which responsive documents are in fact in the public domain would undoubtedly be more burdensome than simply producing what is responsive.

3. The Documents Requests Are Reasonable In Temporal Scope

85. Penn State objects that the requests are "temporally unbounded."

86. In fact, the Instructions in the subpoena specify that the date range of the requests is January 1, 2011 to the present; slightly more than three years.

87. Penn State would limit the requests to half that time, ending at July 23, 2012, the date of the Consent Decree. Penn State flatly asserts that requests for documents after July 23, 2012 are not relevant. *Id.*

88. This objection, like many others by Penn State, is neither explained nor supported.

89. Although Penn State has characterized the subject of the litigation as "the Consent Decree," it has not stated why the date of the Consent Decree should be the end point of any discovery. Indeed, the NCAA has already produced documents that post-date the Consent Decree, including a later amendment to the Consent Decree. Exh. I.

90. The three-year period specified in the Requests is a reasonably limited period, and if there are responsive documents within that period, Penn State has cited no valid reason they should not be produced.

4. Penn State's Standing Objection Is Meritless

91. Penn State's argument with respect to standing seems to be that the Plaintiff Paterno lacks standing to assert his claims, and thus has no right to conduct discovery. Penn State has made its standing objection in its Preliminary Objections to the First Amended Complaint, which it filed on March 17, 2014.

92. The filing of Preliminary Objections does not restrict a party's right to take discovery. Indeed, Pennsylvania courts routinely permit discovery during the pendency of preliminary objections. In *McKissock & Hoffman v. Polymer Dynamics, Inc.*, 17 Pa. D. & C.5th 541, 551 (2010), the defendant law firm was ordered to respond to the plaintiff's discovery requests before the court ruled on the law firm's preliminary objections to the amended complaint. *See also Rhoads v. Phila. Hous. Auth.*, No. 0090 2008 Phila. Ct. Com. Pl. LEXIS 307, *4 (2008)

(discovery requests issued and disputes briefed while preliminary objections to first amended complaint pending) *reversed on other grounds,* 978 A.2d 431 (Pa. Commw. Ct. 2009); *Conner v. Tom*, 811 A.2d 6, 8 (Pa. Super Ct. 2002) (defendant served discovery requests two months after the complaint was filed, but before a ruling on the preliminary objections).

5. Penn State Has Not Proposed Or Sought A Protective Order

93. Penn State objects to the production of *any* documents prior to the entry of a protective order, Objections at 5, but has neither proposed a protective order nor sought one from the Court.

94. A request for a protective order must be supported by "particularization demonstrating that such relief is warranted." *Ornsteen v. Bass*, 50 Pa. D. & C.3d 371, 375 (1988).

95. The party moving for a protective order based on Pa. R.C.P. 4012 bears the burden of establishing the objectionable nature of the discovery he is withholding. A party objecting to discovery has not sustained its burden with a showing of mere annoyance, a showing that Penn State has not even attempted to make here. *Id.*

96. General allegations of harm "are insufficient to meet this burden." *Chrysler v. Zigray*, 7 D. & C.4th 408, 412 (1990). Establishing good cause for the protective order requires appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel. *Ornsteen*, 50 D. & C.3d 371.

97. Penn State has not offered the particularized demonstration required to meet its burden of proof for a protective order.

6. Penn State Was Properly Served

98. Penn State objects to Request No. 3 on the grounds that "no 'Exhibit 1' was attached to the Notice of Intent to Serve a Subpoena to Pepper Hamilton, LLP that was served of the University." Objections, Exh. B at 6.

99. This is incorrect. A Notice of Intent with the Engagement Letter attached as Exhibit 1 was re-served on Penn State by email and first class mail on February 26, 2014. *See* Exh. A, reflecting electronic Re-Service of Notice of Intent to Serve a Subpoena to Pepper Hamilton, LLP to Counsel for Penn State and others, Exh. J and n.1 supra.

For all of the foregoing reasons, Plaintiff Paterno respectfully requests that the Court enter an Order of the form submitted herewith, overruling Penn State's Objections to the Pepper Hamilton subpoena.

Dated this 4th day of April, 2014.

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

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;	)	Civil Division Docket No. 2013-2082
PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University;	)	
WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and	)	
ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,	)	
Plaintiffs,	)	
v.	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),	)	
MARK EMMERT, individually and as President of the NCAA, and	)	
EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,	)	
Defendants.	)	
and	)	
THE PENNSYLVANIA STATE UNIVERSITY,	)	
Nominal Defendant.	)	

STATEMENT OF CONFERENCE PURSUANT TO LOCAL RULE 208.2(e)

Pursuant to Local Rule 208.2(e), the undersigned counsel for movant, Plaintiff George Scott Paterno as duly appointed Representative of the Estate and Family of Joseph Paterno, hereby certifies that on March 28, 2014, a good faith conference was conducted by telephone with counsel for Defendant Penn State University in an effort to resolve the issues raised in the 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, without the need for intervention by the Court. Counsel for the parties reached agreement that production of the all the materials and electronic information collected by the law firm of Freeh Sporkin & Sullivan, LLP is not requested by the subpoena to Pepper Hamilton LLP. Counsel were unable to resolve the other issues raised in the motion.

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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

I HEREBY CERTIFY that a true and correct copy of the foregoing **MOTION TO OVERRULE OBJECTIONS BY DEFENDANT PENN STATE UNIVERSITY TO NOTICE OF INTENT TO ISSUE SUBPOENA TO PEPPER HAMILTON LLP PURSUANT TO RULE 4009.21** was served this 4th day of April, 2014 by first class mail and email to the following:

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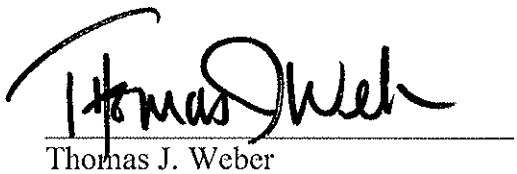

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