IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO;	
	Civil Division
WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs,	Docket No. 2013-2082
	Discovery Motion
	Filed on Behalf of the Plaintiffs
v.	Counsel of Record:
	Thomas J. Weber
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");	GOLDBERG KATZMAN, P.C.
	4250 Crums Mill Road, Suite 301
	P.O. Box 6991
MARK EMMERT, individually and as President of the NCAA;	Harrisburg, PA 17112
	Telephone: (717) 234-4161
	Email: tjw@goldbergkatzman.com
And	
	Wick Sollers (admitted *pro hac vice*)
EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,	L. Joseph Loveland (admitted *pro hac vice*)
	Patricia L. Maher (admitted *pro hac vice*)
	Ashley C. Parrish (admitted *pro hac vice*)
	KING & SPALDING LLP
Defendants,	1700 Pennsylvania Avenue, NW
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And	Telephone: (202) 737-0500
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PENNSYLVANIA STATE UNIVERSITY,	jloveland@kslaw.com
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Defendant.	aparrish@kslaw.com

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; 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 PENNSYLVANIA STATE UNIVERSITY, Defendant.	Civil Division Docket No. 2013-2082 Counsel of Record: Thomas J. Weber GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301 P.O. Box 6991 Harrisburg, PA 17112 Telephone: (717) 234-4161 Email: tjw@goldbergkatzman.com Wick Sollers (admitted *pro hac vice*) L. Joseph Loveland (admitted *pro hac vice*) Patricia L. Maher (admitted *pro hac vice*) Ashley C. Parrish (admitted *pro hac vice*) KING & SPALDING LLP 1700 Pennsylvania Avenue, NW Washington, DC 20006 Telephone: (202) 737-0500 Email: wsollers@kslaw.com jloveland@kslaw.com pmaher@kslaw.com aparrish@kslaw.com

MOTION TO STRIKE BLANKET DESIGNATION OF ALL PEPPER HAMILTON DOCUMENTS AS "HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY - INFORMATION"

It has been almost a year since plaintiffs served non-party Pepper Hamilton LLP with a subpoena *duces tecum* on September 16, 2014, after this Court overruled objections to the

subpoena by Pepper Hamilton's client, Pennsylvania State University. Since that time, Pepper Hamilton and Penn State have repeatedly failed to comply with their discovery obligations and resisted production of responsive documents. On May 8, 2015, this Court ordered them to comply with the subpoena. Pepper Hamilton and Penn State then jointly sought a stay of that order, which was denied by the Superior Court.

On July 22, 2015, Pepper Hamilton notified plaintiffs that it would produce the responsive documents required by this Court's orders, but it has still not complied with its basic discovery obligations. In particular, Pepper Hamilton also advised that it was designating all of the documents as "Highly Confidential" material under the Protective Order, and specifically noted the "additional restrictions on the dissemination of Highly Confidential material" under the Protective Order. The only additional restriction is that parties to the litigation are denied access to "Highly Confidential" material. Accordingly, by designating in blanket fashion all of the documents as "Highly Confidential," Pepper Hamilton is preventing plaintiffs from obtaining access to the documents they need to prepare their case.

Pepper Hamilton has produced approximately 70,000 pages since July 22, all of which it has designated "Highly Confidential - Attorneys Eyes Only - Information." Most, if not all, of the Pepper Hamilton documents do not meet the standard for the more restrictive confidentiality designation set forth in the Protective Order. Pepper Hamilton's blanket designation was clearly done in order to preclude plaintiffs from accessing the documents while Penn State and Pepper Hamilton appeal their privilege claims. But that is improper and an abuse of the Protective Order. Having failed in its efforts to obtain a stay of this Court's discovery orders, Pepper Hamilton should not be allowed to misuse this designation to restrict plaintiffs' access to documents that have been ordered produced, while purporting to comply with this Court's May 8

enforcement order. Accordingly, for the reasons set forth below, plaintiffs respectfully request that the Court strike the blanket confidentiality designation and allow plaintiffs full access to the documents produced by Pepper Hamilton.

FACTUAL AND PROCEDURAL BACKGROUND

1. Plaintiffs embarked on the process of obtaining documents from non-party law firm Pepper Hamilton LLP in February 2014, by giving notice of intent to serve a subpoena *duces tecum* on Pepper Hamilton.

2. An account of the prolonged efforts by Pepper Hamilton and its client, Penn State University, to resist production of the responsive documents through a series of motions, responses and orders, was set forth in Plaintiffs' Motion for Enforcement of Subpoena *Duces Tecum* that plaintiffs filed with this Court on January 22, 2015.

3. Unfortunately, the prolonged efforts by Pepper Hamilton to deprive plaintiffs of proper discovery have continued.

4. Following entry of this Court's May 8, 2015 Order enforcing the subpoena *duces tecum* to Pepper Hamilton, Penn State and Pepper Hamilton jointly sought a stay pending appeal from the Pennsylvania Superior Court. Ex. A.

5. The Superior Court denied the joint stay request on June 19, 2015. Ex. B.

6. Penn State and Pepper Hamilton then petitioned the Superior Court for Reconsideration and Reargument En Banc of the stay petition, which the Superior Court denied by a per curiam order on July 17. Exs C, D.

7. On July 22, 2015, Pepper Hamilton advised plaintiffs that it continued to claim privilege with respect to the documents responsive to the subpoena *duces tecum* but that it was

producing approximately 60,000 pages of documents in its possession "because we have been ordered to do so by the Court." July 22, 2015 letter from Thomas E. Zemaitis to L. Joseph Loveland, Ex. E.

8. Pepper Hamilton also stated that it had designated all of the documents "Highly Confidential - Attorneys Eyes Only – Information," and that it expected plaintiffs' counsel to abide by the restrictions in the September 11, 2014 Stipulated Confidentiality Agreement and Protective Order (the "Protective Order") applicable to such documents. *Id.*

9. The Protective Order provides that a designation of "Highly Confidential - Attorneys Eyes Only - Information" means that a document contains "non-public information the disclosure of which would create a substantial risk of serious irreparable injury to the designating Party or another that cannot be avoided by less restrictive means, including but not limited to non-public personally identifiable information (*i.e.*, social security number, place of birth, or home address), confidential medical records or medical information, or other sensitive personal information." Ex. F at para. 2(b).

10. Documents and information designated "Highly Confidential - Attorneys Eyes Only - Information" are for attorneys' eyes only and may not be shared with parties to the action. *Id.* at para. 6 (a).

11. Pepper Hamilton made a second production of responsive documents on August 6, 2015, again stating that all of the documents it produced must be treated as "Highly Confidential - Attorneys Eyes Only - Information." Ex. G. The combined total of the two Pepper Hamilton productions amounted to approximately 70,000 pages in total, or 17,193 separate documents.

12. After reviewing documents produced by Pepper Hamilton and determining that they do not satisfy the criteria for designation as "Highly Confidential - Attorneys Eyes Only - Information" in the Protective Order, plaintiffs' counsel conferred with Pepper Hamilton's counsel.

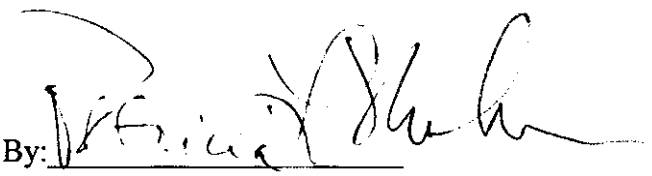
13. Plaintiffs' counsel requested that Pepper Hamilton comply with its discovery obligations, reconsider its improper blanket designation of all responsive documents as "Highly Confidential - Attorneys Eyes Only – Information," and properly designate documents as required by the terms of the Protective Order. (Under the terms of the Protective Order, documents designated "Confidential" could be shared with the parties to the litigation but would remain protected from public disclosure.)

14. Pepper Hamilton has refused to change the designation of any of the documents it produced pursuant to the subpoena. Ex. H. Instead, it has continued to assert that each and every one of the 17,193 documents it has produced is properly designated as Highly Confidential and therefore, under the terms of the Protective Order, may not be shared with the parties to the action.

WHEREFORE, plaintiffs respectfully request that this Court grant this Motion to Strike the Blanket Confidentiality Designation of All Pepper Hamilton Documents as "Highly Confidential – Attorneys Eyes Only" so that plaintiffs may have access to the documents.

Date: August 24, 2015

Respectfully submitted,

By: 

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; 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 PENNSYLVANIA STATE UNIVERSITY, Defendant.	Civil Division Docket No. 2013-2082 Counsel of Record: Thomas J. Weber GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301 P.O. Box 6991 Harrisburg, PA 17112 Telephone: (717) 234-4161 Email: tjw@goldbergkatzman.com Wick Sollers (admitted *pro hac vice*) L. Joseph Loveland (admitted *pro hac vice*) Patricia L. Maher (admitted *pro hac vice*) Ashley C. Parrish (admitted *pro hac vice*) KING & SPALDING LLP 1700 Pennsylvania Avenue, NW Washington, DC 20006 Telephone: (202) 737-0500 Email: wsollers@kslaw.com jloveland@kslaw.com pmaher@kslaw.com aparrish@kslaw.com

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE BLANKET DESIGNATION OF ALL PEPPER HAMILTON DOCUMENTS AS "HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY - INFORMATION"

The claims in this case pertain to the Consent Decree between the NCAA and Penn State, which adopted the findings and conclusions reached in the Freeh Report. A key issue in this case

is whether the NCAA had any basis for adopting the Freeh Report and, in turn, whether there is any factual basis for the Freeh Report's findings and conclusions.

When the parties negotiated the Protective Order, they provided for a classification of "Highly Confidential – Attorneys Eyes Only – Information" because of the possibility that highly sensitive personal information might be the subject of discovery, e.g., information about victims of Jerry Sandusky. The Protective Order specifies that designating documents or information as "Highly Confidential" means that the documents or information contain non-public personally identifiable information such as confidential medical records or other "sensitive personal information."

The Protective Order limits access to documents and information that are designated "Confidential" to an enumerated list of persons, including the parties to the litigation. Ex. F at para. 5(b). The Protective Order provides that the same list of persons may have access to documents and information that are designated "Highly Confidential - Attorneys Eyes Only – Information," with the exception the parties to the litigation. *Id.* at para. 6. Thus, the practical effect of designating documents "Highly Confidential" rather than "Confidential" is to preclude the parties from having access to documents and information produced in discovery.

Pursuant to paragraph 10 of the Protective Order, Plaintiffs challenge the blanket designation of all 17,193 documents that Pepper Hamilton has produced as "Highly Confidential - Attorneys Eyes Only." That designation under the Protective Order was intended to be limited to a narrow category of documents for which there was no less restrictive alternative. The vast majority of the Pepper Hamilton documents that plaintiffs have reviewed to date do not contain sensitive personal information of the type referenced in the Protective Order such as social security numbers, home addresses, or medical information, the disclosure of which would create

a risk of serious injury to Pepper Hamilton or another. Pepper Hamilton's use of this restrictive confidentiality designation has denied plaintiffs access to any of the responsive documents, while purporting to comply with orders of this Court and the Superior Court.

This Court has appropriately rejected Pepper Hamilton and Penn State's privilege arguments, and the Superior Court has denied a stay pending the outcome of Penn State's appeal on those privilege claims. Pepper Hamilton should not be permitted to abuse the Protective Order's confidentiality provisions as a way of circumventing the Court's orders and denying plaintiffs meaningful access to the documents obtained through discovery. Plaintiffs subpoenaed from Pepper Hamilton documents and information that directly relate to the investigation that culminated in the Freeh Report. There is no reason that the named plaintiffs — those who were directly harmed by the NCAA's unlawful Consent Decree and its reliance on the Freeh Report — should not have access to those documents so that they can assist their counsel in the preparation of their case.

As the designating party under the Protective Order, Pepper Hamilton bears the burden of justifying that there is good cause for the confidentiality designation for each document so designated. Ex. F at para. 10(b). Pepper Hamilton has not justified that this designation properly applies to *any* — let alone all — of the 17,193 documents produced to Plaintiffs' counsel.

At the hearing on September 9, Plaintiffs will provide the Court with sample documents form Pepper Hamilton's production, and have available a disk containing pdf versions of all the documents produced to plaintiffs' counsel by Pepper Hamilton, so the Court can review them during the hearing or *in camera.*

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant this Motion To Strike the Blanket Designation of All Pepper Hamilton Documents as "Highly Confidential - Attorneys Eyes Only - Information."

Date: August 24, 2015

Respectfully submitted,

By: _____

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO;	)	
	)	Civil Division
AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and	)	Docket No. 2013-2082
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	)	
PENNSYLVANIA STATE UNIVERSITY, Defendant.	)	

STATEMENT OF CONFERENCE PURSUANT TO LOCAL RULE 208.2(e)

Pursuant to Local Rule 208.2(e), the undersigned counsel for movant plaintiffs hereby certifies that on August 18, 2015, a good faith conference was conducted by telephone with Thomas E. Zemaitis, counsel for Pepper Hamilton LLP, in an effort to resolve the issues raised in the Motion to Strike Blanket Designation of All Pepper Hamilton Documents as "Highly Confidential- Attorneys Eyes Only - Information" without the need for intervention by the Court. Counsel for the parties were unable to resolve the issues raised in the motion.

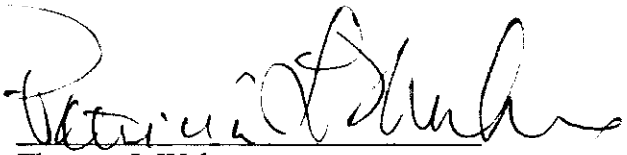

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EXHIBIT A

Received 05/27/2015 Superior Court Middle District

IN THE

Superior Court of Pennsylvania

NO. 877 MDA 2015
NO. 878 MDA 2015

The ESTATE of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,

Plaintiffs-Appellees,

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-Appellant (No. 878 MDA 2015).

PEPPER HAMILTON LLP,

Non-Party-Appellant (No. 877 MDA 2015)

APPLICATION FOR STAY OF TRIAL COURT'S MAY 8, 2015, ORDER PENDING APPEAL

EXPEDITED CONSIDERATION REQUESTED

Pursuant to Rule 1732 of The Pennsylvania Rules of Appellate Procedure, the Pennsylvania State University ("Penn State" or "the University," Appellant in

No. 878 MDA 2015) and Pepper Hamilton LLP ("Pepper Hamilton," Appellant in No. 877 MDA 2015) hereby seek a stay of the trial court's May 8, 2015, order, compelling Pepper Hamilton to produce documents for which Appellants claim privilege by June 8, 2015, pending the resolution of these and other related appeals. Because of the impending date for production in the May 8, 2015 order, Appellants request expedited consideration of this Application. In support of this Application, Penn State and Pepper Hamilton aver as follows and submit the accompanying Memorandum of Law:

1. On February 26, 2014, plaintiffs served the parties with a Notice of Intent to Serve a Subpoena for the production of documents upon non-party Pepper Hamilton. As explained more fully in the Memorandum of Law, lawyers affiliated with Pepper Hamilton, who formerly were affiliated with the law firm of Freeh Sporkin & Sullivan (the "Freeh Firm"), had been retained by Penn State. A true and correct copy of the engagement letter between Penn State and the Freeh Firm is attached hereto as Exhibit 1. Throughout its investigation, the Freeh Firm went to great lengths to preserve both the confidentiality of its work product and the attorney-client privilege. *See generally* Exhibit 2 hereto (Declaration of Omar McNeill). The proposed subpoena sought those lawyers' files, as well as the files of the investigators who assisted them, in connection with their representation of Penn State.

2. Penn State objected to the notice of an intent to subpoena Pepper Hamilton on multiple grounds, including on the grounds that the proposed subpoena sought documents protected by the attorney-client privilege and the attorney work product doctrine.

3. On September 11, 2014, the trial court entered an opinion and order overruling Penn State's privilege objections (the "September 11 Order"). A true and correct copy of the September 11 Order is attached hereto as Exhibit 3.

4. Penn State filed a timely notice of appeal from the September 11 Order. That appeal is pending in this Court at No. 1709 MDA 2014.

5. Plaintiffs subsequently served the subpoena on Pepper Hamilton. A true and correct copy of the subpoena is attached hereto as Exhibit 4. In response, Pepper Hamilton filed a motion seeking a stay of its obligations to produce documents for which Penn State had asserted a privilege and also seeking a protective order (the "Motion for Protective Order and Stay"). Seeking to protect its privileges while its appeal from the September 11 Order is pending, Penn State joined in Pepper Hamilton's Motion for Protective Order and Stay.

6. The trial court denied the Motion for Protective Order and Stay on November 20, 2014 ("the November 20 Order"). A true and correct copy of the November 20 Order is attached hereto as Exhibit 5.

7. Pepper Hamilton filed a timely notice of appeal from the November 20 Order. That appeal is pending in this Court at No. 2168 MDA 2014.

8. On December 16, 2014, Pepper Hamilton served a written response, including objections, to the subpoena, wherein it once again asserted all applicable privileges against discovery. A true and correct copy of Pepper Hamilton's response to the subpoena is attached hereto as Exhibit 6.

9. On January 23, 2015, plaintiffs filed a Motion for Enforcement of Subpoena *Duces Tecum,* wherein they asked the trial court to compel Pepper Hamilton to produce the documents that Penn State and Pepper Hamilton assert are protected by the attorney-client privilege and the work product doctrine. Plaintiffs filed this motion, notwithstanding the pendency of Penn State's and Pepper Hamilton's appeals to this Court and notwithstanding Pepper Hamilton's objections, which had never been brought before the trial court (the "Motion for Enforcement").

10. Pepper Hamilton and Penn State each filed briefs in opposition to the Motion for Enforcement, explaining that enforcing the subpoena as written would vitiate the privileges that are the subject of their appeals and would deprive this Court of an opportunity to rule on the merits of the privilege claims.

11. In an order entered May 8, 2015, the trial court, citing Pa. R. App. P. 1701(a), concluded that it lacked jurisdiction to rule on Penn State's and Pepper

Hamilton's privilege arguments, due to the pendency of the appeals (the "May 8 Order"). A true and correct copy of the May 8 Order is attached hereto as Exhibit 7. The trial court concluded that it was compelled to maintain the "status quo" — which it interpreted as requiring it to enter an order directing Pepper Hamilton to comply with the subpoena by, *inter alia*, producing the privileged documents that are the subject of Pepper Hamilton's and Penn State's appeals. Specifically, the trial court directed Pepper Hamilton to provide plaintiffs with all documents requested in the subpoena within 30 days (by June 8, 2015).

12. Penn State filed a timely notice of appeal from the May 8 Order. That appeal has been docketed as No. 878 MDA 2015.

13. Pepper Hamilton also filed a timely notice of appeal from the May 8 Order. That appeal has been docketed as No. 877 MDA 2015.

14. Because the trial court has held that it lacks jurisdiction to entertain Penn State's and Pepper Hamilton's arguments that enforcing the subpoena pending the resolution of Penn State's and Pepper Hamilton's appeals would completely eviscerate the privileges at issue, and because the trial court rejected Pepper Hamilton's and Penn State's prior efforts to stay the production of privileged materials while this Court addresses Appellants' privilege arguments, it would be futile for Appellants to seek a stay of the May 8 Order from the trial court in the first instance. *See* Pa. R. App. P. 1732(b) (litigant may seek a stay

from this Court in the first instance where the application to the lower court for the relief sought is not practicable, or where the lower court has failed to afford the relief the applicant sought).

15. As explained further in the accompanying Memorandum of Law, this Court's jurisprudence clearly recognizes that a privilege is irreparably lost by the compelled production of documents prior to appellate review. Indeed, for this very reason, orders compelling the disclosure of documents for which a litigant claims a privilege are immediately appealable under the collateral order doctrine articulated in Rule 313 of the Pennsylvania Rules of Appellate Procedure.

16. The same considerations that afford a litigant the right to take an interlocutory appeal from an order overruling privilege objections counsel very strongly in favor of staying an order compelling the production of documents for which a privilege is claimed. Were the procedure otherwise — if a litigant could be forced to produce documents for which it claims a privilege before it obtains appellate review of its privilege objections — interlocutory appeals from privilege rulings would be pointless and the right to an immediate appeal accorded by Rule 313 would be rendered nugatory.

17. Because the trial court has ordered Pepper Hamilton to produce documents for which a privilege has been claimed by June 8, 2015, Pepper

Hamilton and Penn State respectfully request that the Court give this Application expedited consideration.

WHEREFORE, for all of these reasons, and for the reasons set forth in the accompanying Memorandum of Law, The Pennsylvania State University and Pepper Hamilton LLP respectfully request that the Court (a) grant expedited consideration of this Application; and (b) stay the trial court's May 8, 2015, Order pending the resolution of the appeals pending at No. 1709 MDA 2014, No. 2168 MDA 2014, No. 877 MDA 2015, and No. 878 MDA 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, one of the attorneys for Appellant The Pennsylvania State University, hereby certify that I caused a true and correct copy of the foregoing to be served upon the following by U.S. mail, first class, postage prepaid, and via email, this 27th day of May, 2015:

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/s/ Donna M. Doblick

EXHIBIT B

Filed 06/19/2015

The Estate of Joseph Paterno, et al	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
	:	(C.P. Centre County
v.	:	No. 2013-2082)
	:	
National Collegiate Athletic Association (NCAA), et al	:	No. 877 MDA 2015

ORDER

The Application for Stay pending appeal filed on behalf of The Pennsylvania State University and Pepper Hamilton LLP is hereby **DENIED**.

This Court's temporary stay order of June 4, 2015 is **VACATED**.

Per Curiam

EXHIBIT C

IN THE

Superior Court of Pennsylvania

NO. 877 MDA 2015
NO. 878 MDA 2015

The ESTATE of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,

Plaintiffs-Appellees,

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-Appellant (No. 878 MDA 2015).

PEPPER HAMILTON LLP,

Non-Party-Appellant (No. 877 MDA 2015).

PETITION FOR RECONSIDERATION AND REARGUMENT EN BANC

The Pennsylvania State University and Pepper Hamilton LLP respectfully seek reconsideration and reargument *en banc* of this Court's June 19, 2015 *per curiam* Order (Exhibit 1). That order effectively directs Penn State's lawyers to produce their entire legal file to adversaries in litigation despite the fact that

Petitioners have strong arguments that those materials are protected by the attorney-client privilege and the attorney work product doctrine and are pursuing those arguments in these appeals.

The equities weigh heavily in favor of reconsideration of the June 19 Order. The motions panel has created a tension in the case law that is likely to create significant harm. The entire point of cases like *Berkeyheiser* and *Gillard* (discussed *infra*) is to afford persons a right to come before this Court and obtain interlocutory review of privilege arguments, *while preserving the sanctity of the privilege in the meantime.* As this Court has recognized many times, once the privilege horse is out of the barn, closing the door does no good. By denying a stay, the motions panel has eviscerated both the privileges and Petitioners' rights of appellate review.

Petitioners further aver as follows:

1. The June 19 Order overlooks the significant body of case law (discussed *infra*) that recognizes that a privilege is lost if a party is required to produce allegedly privileged documents while seeking appellate review of the production order. Moreover, to the extent the June 19 Order is premised on the notion that Petitioners are not likely to prevail on the merits of their appeals, it conflicts with recent decisions of the Commonwealth Court (discussed *infra*) that held that the same or similar documents are protected from disclosure.

2. Reargument is warranted under Pa. R. App. P. 2543 because the privileges at issue are vitally important to the preservation of the attorney-client relationship and the efficient functioning of the judicial system, as described more fully in the amicus brief the Association of Corporate Counsel ("ACC") submitted in related appeal 1709 MDA 2014.

3. **Background.** In 2011, Penn State retained the law firm of Freeh Sporkin & Sullivan LLP ("FSS") as outside legal counsel pursuant to an engagement letter for legal services, to investigate allegations of sexual abuse by Gerald Sandusky and provide associated recommendations. Exhibit 2. On September 1, 2012, the FSS attorneys became associated with Pepper Hamilton.

4. In the course of rendering legal services to Penn State, FSS went to great lengths to preserve confidentiality. Exhibit 3 ¶¶ 6-9. The investigation was structured to allow FSS to communicate with interviewees in confidence for purposes of rendering legal advice. Then, with Penn State's permission, FSS made the results of its investigation public (the "Freeh Report").

5. On February 26, 2014, plaintiffs served a Notice of Intent to Serve a Subpoena upon Pepper Hamilton in which they sought all of FSS's records. Penn State objected, arguing that the subpoena sought documents protected by the attorney-client privilege and the work product doctrine. The trial court overruled those objections (the "September 11 Order," Exhibit 4), concluding., *first,* that

Penn State had not retained FSS to provide legal advice, and, accordingly, no attorney-client privilege attached (p. 21), and *second,* that Penn State lacked standing to assert the work product doctrine. *Id. Id.* Penn State appealed (1709 MDA 2014.)

6. Plaintiffs subsequently served the subpoena. Exhibit 5. Pepper Hamilton sought a stay of its obligations to produce documents for which Penn State had asserted a privilege and for which Petitioners had asserted the work product doctrine, and also sought a protective order (the "Motion for Protective Order and Stay"). Penn State joined that motion. The trial court denied the Motion for Protective Order and Stay ("the November 20 Order," Exhibit 6), and Pepper Hamilton appealed.[1]

7. Pepper Hamilton then served written responses to the subpoena (Exhibit 7), wherein it again asserted the work product doctrine and the attorney-client privilege.

8. Plaintiffs then filed a Motion for Enforcement of Subpoena, asking the court to compel Pepper Hamilton to produce the privileged documents (the "Motion for Enforcement"). Petitioners opposed, explaining that enforcing the

[1] In light of subsequent developments that mooted the need for that appeal (discussed *infra*), Pepper Hamilton withdrew it.

subpoena as written while the appeals were pending would vitiate the privileges in question.

9. The trial court concluded that, because the appeals were pending, it lacked jurisdiction to rule on Petitioners' privilege arguments, and that it was compelled to maintain the "status quo" (the "May 8 Order," Exhibit 8). Purportedly to maintain that "status quo," the court granted plaintiffs' Motion for Enforcement, and ordered Pepper Hamilton to comply with the subpoena by June 8.

10. Petitioners filed timely notices of appeal (877 MDA 2015 & 878 MDA 2015). The day after those appeals were docketed in this Court, Petitioners filed an Application for Stay, asking this Court to stay the May 8 Order while the Court considers Petitioners' privilege arguments on the merits.

11. On June 4, 2015, this Court issued an interim order staying the June 8 production deadline. On June 19, however, the Court denied the Application for Stay.

12. Petitioners respectfully ask the Court to reconsider and reverse the June 19 Order. That order, which requires Pepper Hamilton to produce thousands of documents for which *bona fide* assertions of privilege have been made while this Court considers the privilege arguments, is flatly inconsistent with the

rationale behind the Court's prior decisions to allow adverse privilege rulings to be appealed on an interlocutory basis under the collateral order doctrine.

13. A stay pending appeal is warranted when the movant establishes that the equities weigh in its favor, by demonstrating: (1) likelihood of success on appeal; (2) that without a stay it 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. Public Utility Comm'n v. Process Gas Consumers Group,* 467 A.2d 805, 808-09 (Pa. 1983). It is particularly appropriate to issue a stay where, as here, without a stay, documents arguably subject to the attorney-client privilege will be irretrievably disclosed. *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1263 (Pa. Super. 2007), *aff'd by an equally divided court,* 992 A.2d 74 (Pa. 2010). The considerations governing the forced disclosure of documents arguably protected by the attorney work product doctrine compel the same result.

14. **Irreparable harm.** This Court recognizes that a privilege is irreparably lost by the compelled production of documents prior to appellate review, which is why orders compelling the disclosure of documents for which a litigant claims a privilege are immediately appealable under Pa. R. App. P. 13. *Gillard v. AIG. Ins.,* 15 A.3d 44 (Pa. 2011); *Berkeyheiser v. A-Plus Investigations, Inc.*, 936 A.2d 1117 (Pa. Super. 2007); *Carbis Walker, LLP v. Hill, Barth & King,*

LLC, 930 A.2d 573, 577 (Pa. Super. 2007); *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1058 (Pa. Super. 2008).

15. If this Court does not reconsider the June 19 Order, Petitioners will lose the ability to protect privileged documents from disclosure. The privileges will, in a very real sense, be eviscerated. Similarly, if Pepper Hamilton is forced to produce privileged documents now, Petitioners would be denied their rights of appellate review.

16. **The public interest.** The public interest in protecting these privileges also counsels strongly in favor of reconsideration. "[T]he 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 (Allegheny Cty. C.C.P. 1997); *see also Brennan v. Brennan,* 422 A.2d 510, 514 (Pa. Super. 1980). Improvident disclosure of attorney-client privileged documents directly harms the administration of justice. *Estate of Kofsky,* 409 A.2d 1358, 1362 (Pa. 1979). As the ACC noted in its amicus curiae brief, the privilege is "inextricably linked to the very integrity and accuracy of the fact finding process" and is "essential to the just and orderly operation of our legal system."

17. The ACC also has expressed concern that the trial court's construction of the work product doctrine will have an adverse effect on companies' willingness to commission attorney-led investigations. *Accord Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity,* 91 A.3d 680 (Pa. 2014) ("protecting attorney work product from discovery . . . encourage[s] efficient and effective client representation").

18. **Likelihood of success on the merits.** Petitioners also are likely to prevail on appeal.

19. *The attorney-client privilege.* The trial court's conclusion that FSS was not providing legal services to Penn State is untenable. The trial court concluded that "[a]t no point does the scope [of engagement section of the engagement letter] mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter." Exhibit 3, p. 20. From there, the court concluded that "communications between Penn State and the Freeh Firm were not sought pursuant to seeking legal services . . ." *Id.*

20. The conclusion that FSS was not retained to provide legal services is wrong as a matter of law and simply cannot be squared with the express language of the Engagement Letter, the parties' own understandings of the nature of FSS's work, and the work product FSS generated. The Engagement Letter notes

repeatedly that FSS would be rendering legal services. In fact, the "Scope of Engagement" section itself notes that "FSS has been engaged to serve as *independent, external legal counsel* to the Task Force." Exhibit 2, p. 1 (emphasis added).[2]

21. Moreover, the Freeh Report contains extensive legal analysis (including an analysis of the reporting requirements of the Clery Act), as well as recommendations designed to help ensure that the crimes and reporting violations that took place on Penn State's campus would not happen again.

22. Penn State also is likely to establish that the trial court erred when it concluded that any attorney-client privilege was waived. Here, the plaintiffs had the burden of proving waiver. *In re Investigating Grand Jury of Philadelphia County No. 88-00-3503,* 593 A.2d 402, 406-07 (Pa. 1991). The burden shifts during this inquiry. *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1265-66 (Pa. Super. 2007).

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[2] *See also, e.g.,* Exhibit 2 § 5 ("For the purpose of *providing legal services* to the Task Force, FSS will retain Freeh Group International Solutions, LLC ('FGIS') to assist"), § 7 ("FSS will provide the above-described *legal services* for the Task Force's benefit"), § 10 ("FSS may terminate its *legal services* and withdraw from this engagement in the event our invoices are not paid in a timely manner") (emphasis added), p. 7 ("FSS, of course, is delighted to be asked to provide *legal services* to the Task Force") (all emphases added).

23. Plaintiffs abjectly failed, however, to establish that the privilege was waived with respect to *any* communication, much less that it was waived on a global, "subject matter" basis. Although the plaintiffs *argued* that FSS "was communicating with third parties during the investigation – specifically, The Big Ten Athletic Conference and the NCAA" (*see* Exhibit 4, p. 21), **the record is *devoid of evidence* that FSS shared *even one* otherwise privileged document with either the NCAA or the Big Ten during the course of the investigation.** To the contrary, the undisputed facts of record establish, *without contradiction,* that FSS did not share **any** privileged information or documents with **any** third party. *See* Exhibit 3.

24. Moreover, as the Commonwealth Court recently observed in *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 419 (Pa. Commw. 2014), Pennsylvania, unlike the federal courts, has "not adopted" the "subject-matter waiver" doctrine.

25. *The attorney work product doctrine. First,* the court's erroneous conclusion that Pen State lacked "standing" to assert the work product doctrine is mooted by the fact that Pepper Hamilton has since asserted the work product objection itself (at issue in appeal 877 MDA 2015).

26. And, *second,* the court's construction of the attorney work product doctrine – that the work product protection is not available unless the documents

were created in anticipation of the sp ecific litigation in which production of the documents are sought (Exhibit 3, pp. 22-23) -- is incorrect and flatly incorrect with recent decisions from the Commonwealth Court.

27. The essential purpose of the work product doctrine (codified at Pa. R. Civ. P. 4003.3) is to immunize from discovery the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories. *Bagwell,* 103 A.3d 409; *Commonwealth v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005); *Commonwealth v. Hetzel,* 822 A.2d 747, 757 (Pa. Super. 2003).

28. Petitioners will be able to establish that FSS's work for Penn State is indeed protected by the attorney work product doctrine. *First,* the Engagement Letter *expressly acknowledges* that the work of FSS would constitute attorney work product. Exhibit 2, § 6. *Second,* well-established case law, as well as the official commentary to Rule 4003.3, confirms that the FSS lawyers' notes of the more than 430 interviews they conducted plainly are protected work product. *See* Pa. R. Civ. P. 4003.3 (Explanatory Comment – 1978) ("a lawyer's notes and memoranda of an oral interview of a witness, who signs no written statement, are protected");[3] *Upjohn Co. v. United States,* 449 U.S. 383, 400 (1981) (interview

[3] The record is devoid of evidence that the interview notes are signed by any witness.

memoranda will be discoverable only in rare situations, in part because they may reveal the attorney's mental processes and have limited utility, especially where the witness is available); *see also In re Grand Jury Investigation,* 599 F.2d 1224, 1231 (3d Cir. 1979); *In re Grand Jury Investigation,* 412 F. Supp. 943, 949 (E.D. Pa. 1976) (an attorney's memorandum of a telephone conversation is "so much a product of the lawyer's thinking and so little probative of the witness's actual words that [it is] absolutely protected from disclosure").

29. Petitioners are likely to establish on appeal that the trial court erred to the extent it concluded that the attorney work product doctrine does not protect the mental impressions of members of FSS because their work was not done specifically in anticipation *of this case.* Indeed, in a recent decision involving the work product FSS prepared during the Penn State engagement, *Bagwell,* 103 A.3d 409, a panel of the Commonwealth Court reached precisely the opposite conclusion, holding that materials *need not be* prepared in anticipation of litigation *at all* in order for the protection of the work product doctrine to attach.

30. Although Pennsylvania courts have recognized that the attorney work product doctrine is *especially protective of* material prepared by an attorney in anticipation of litigation, Pennsylvania *does not require* that material be prepared in anticipation of litigation in order to be protected as work product. *Bagwell,* 103

A.3d at 415. As several courts have recognized, Rule 4003.3 includes no such limitation. *Sedat, Inc. v. Department of Environmental Resources,* 641 A.2d 1243, 1245 (Pa. Commw. 1994); *Mueller v. Nationwide Mut. Ins. Co.,* 31 Pa. D. & C.4th 23 (Allegheny Cty. C.C.P. 1996) (Wettick, J.).

31. Indeed, in *Bagwell,* **the Commonwealth Court squarely rejected — as "novel" and inconsistent with the language of Rule 4003.3 — the requestor's argument that the work product doctrine applies only to materials prepared in anticipation of litigation**. *Bagwell,* 103 A.3d at 416-17 (noting that such a "confined construction" of Rule 4003.3 "would render attorney drafts of contracts, memoranda and countless other examples of work product, prepared in a transactional or any non-litigation capacity, susceptible to discovery or disclosure"). *Accord Bagwell v. Pa. Office of Attorney General,* 2015 WL 3395873 (Pa. Commw. May 27, 2015) (again squarely rejecting the assertion that the work product only applies to materials prepared in anticipation of litigation).

32. In any event, FSS *did* perform its work in anticipation of litigation. Indeed, the threat of litigation at the time Penn State retained FSS was both real and imminent. The Office of the Attorney General made the Grand Jury Presentment public on November 5, 2011. That document indicated that several of Penn State's high-ranking executives were facing allegations that they, too, had

violated the law (failing to report allegations of child abuse and committing perjury concerning their testimony before the grand jury). The Presentment also prompted the Department of Education to review Penn State's compliance with crime reporting obligations under the Clery Act, as revealed in a letter sent to the University on November 9, 2011. And, the first of many of Sandusky's victims filed a civil suit against Penn State on November 30, 2011.

33. **No substantial harm to plaintiffs.** Lastly, plaintiffs would suffer no harm, or *de minimis harm,* if a stay is granted. Pepper Hamilton has produced, and is continuing to produce, non-privileged documents responsive to the subpoena. Plaintiffs also are free to proceed with other discovery of non-privileged materials while the appeals are pending. **Moreover, the trial court has neither set a trial date nor established a discovery cut-off.** Any "harm" occasioned by a delay if a stay issues pending these appeals would be *dwarfed* by the harm Petitioners would suffer if no stay is issued.

WHEREFORE, for all of these reasons, Petitioners respectfully request that the Court reconsider the *per curiam* order of June 19, 2015, and then stay the trial court's May 8, 2015, Order pending the resolution of the appeals pending at Nos. 1709 MDA 2014, 877 MDA 2015, and 878 MDA 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rule 2544(d) of the Pennsylvania Rules of Appellate Procedure, the undersigned, one of the attorneys for The Pennsylvania State University, hereby certifies that the foregoing Petition contains 2,897 words, as calculated by the word processing software used to prepare the Petition.

/s/ Donna M. Doblick

EXHIBIT D

Filed 07/17/2015

The Estate of Joseph Paterno, et al	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
	:	(C.P. Centre County
v.	:	No. 2013-2082)
	:	
National Collegiate Athletic Association (NCAA), et al	:	Nos. 877 & 878 MDA 2015

ORDER

The Petition for Reconsideration and Reargument En Banc of this Court's June 19, 2015 order is **DENIED**.

Per Curiam

EXHIBIT E

Pepper Hamilton LLP
Attorneys at Law

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Thomas E. Zemaitis
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July 22, 2015

VIA EMAIL AND OVERNIGHT DELIVERY
jloveland@kslaw.com

L. Joseph Loveland, Esquire
King & Spalding LLP
1180 Peachtree Street
Atlanta, GA 30309-3521

Re: Subpoena directed to Pepper Hamilton LLP

Dear Joe:

I am enclosing a disc containing documents bearing production numbers PEPPER_0004068 – PEPPER_0064048. These documents are also available through a secure FTP site. The credentials for access to that site are found in the cover email to the electronic version of this letter. As you know, Pepper Hamilton and Penn State claim privilege with respect to these documents, and, accordingly, they have been marked "Privileged." Without waiver of our privilege claims, we are producing these documents solely because we have been ordered to do so by the Court. Absent that order, we would not have produced these documents, and, should we obtain a ruling that these documents are protected against disclosure, we will insist upon their return and the destruction of any copies made thereof or of any documents containing information derived therefrom.

These documents have also been marked "Highly Confidential – Attorneys' Eyes Only – Information" in accordance with the Stipulated Confidentiality Agreement and Protective Order ("Protective Order") entered on September 11, 2014. We expect you and your colleagues to strictly abide by the requirements of the Protective Order regarding documents marked in this fashion. Indeed, in your opposition to our application for a stay pending appeal in the Superior Court in Nos. 877 and 878 MDA 2015, you contended that a stay was not necessary because "[t]he protective order means that any materials disclosed pursuant to the subpoena will not be made public." (Opp. at 13.) The Protective Order, on which you relied to oppose our stay application, imposes additional restrictions on the dissemination of Highly Confidential material. Should we determine that those restrictions have been violated, we will take all steps necessary to protect the interests of Penn State and Pepper Hamilton and to seek sanctions for such a violation.

Finally, in your opposition to the stay application you represented to the Superior Court that you "are willing to agree that any documents produced in response to the subpoena that are used in this litigation (as an attachment to any pleading) will be filed under seal until this Court rules on Penn State's appeal of the trial court's September 11, 2014 order . . . ." (Opp. at 14.) Paragraph 9 of the Protective Order requires that "any papers containing or making reference to [Highly Confidential] information, in any pleading or document shall be redacted to conceal the [Highly Confidential] Information or shall be filed under seal." Inasmuch as you have stipulated to the Protective Order, you have already agreed to and are bound by its terms regarding the filing of documents containing Highly Confidential material, and that agreement is in full force and effect.

Pepper Hamilton reserves all of its rights respecting this matter.

Sincerely yours,

Thomas E. Zemaitis

cc: Donna M. Doblick, Esquire
Brian E. Kowalski, Esquire

EXHIBIT F

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, PETER KHOURY, 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

2014 SEP 11 PM 2:12

DEBRA C. INFAEL
PROTHONOTARY
CENTRE COUNTY, PA

RECEIVED

STIPULATED CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER

WHEREAS, the Parties may seek discovery of documents, information, or other materials that qualify for protection from public disclosure or are otherwise required to be maintained as confidential;

WHEREAS, Rule 4012 of the Pennsylvania Rules of Civil Procedure provides for the issuance of protective orders limiting the disclosure and use of certain discovered information;

NOW, THEREFORE, the Parties to this Stipulated Confidentiality Agreement and Protective Order (the "Order") stipulate and agree to the terms of this Order as set forth herein:

1. **Scope.** All documents, the information contained therein, and all other information produced or disclosed in the course of discovery, including responses to discovery requests, deposition testimony and exhibits, and information derived directly therefrom (collectively "documents"), shall be subject to this Order and may be designated as "Confidential Information" or "Highly Confidential – Attorneys' Eyes Only – Information" pursuant to the provision set forth herein. This Order is subject to the Pennsylvania Rules of Civil Procedure on matters of discovery procedure and calculation of time periods.

2. **Confidential Information.**

(a) As used in this Order, "Confidential Information" means information or tangible things that the designating Party reasonably believes constitutes, contains or discloses non-public information that (i) is required by law or agreement or the National Collegiate Athletic Association Constitution, Operating Bylaws, or Administrative Bylaws to be maintained as confidential, or (ii) is proprietary, personal, financial, or other information which qualifies for protection from public disclosure consistent with Pennsylvania Rule of Civil Procedure 4012.

(b) As used in this Order, "Highly Confidential – Attorneys' Eyes Only - Information" means non-public information the disclosure of which would create a substantial risk of serious irreparable injury to the designating Party or another that cannot be avoided by less restrictive means, including but not limited to non-public personally identifiable information (*i.e.*, social security number, place of birth, or home address), confidential medical records or medical information, or other sensitive personal information. Information or documents that are otherwise available to the public may not be designated as Highly Confidential - Attorneys' Eyes Only - Information.

3. Designation.

(a) A Party may designate a document as (i) Confidential Information for protection under this Order by placing or affixing the words "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" on the document and on all copies; or as (ii) Highly Confidential Information for protection under this Order by placing or affixing the words "HIGHLY CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER -- ATTORNEYS' EYES ONLY" on the document and on all copies. As used in this Order, "copies" includes electronic images, duplicates, extracts, summaries or descriptions that contain the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information.

(b) A non-party to the litigation that has agreed to be bound by the terms of the Agreement and Protective Order by executing Attachment A hereto may designate documents containing Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information for protection under this Order so that such information is subject to the terms of this Order and that producing non-party shall then be a producing Party under this Order.

(c) Parties may designate documents containing Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information produced by other Parties or non-parties.

(d) For Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information produced by a non-party or a Party other than the designating Party, a Party seeking a designation of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information pursuant to the terms of this Order may do so by serving on all Parties a log containing the Bates numbers or other description of the documents or information that it seeks to designate Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information Confidential within thirty (30) days of receiving copies of the documents or information. Should any Party object to this designation, such Party shall proceed in accordance with paragraph 10 of this Order.

4. **Designation of and procedure for any deposition testimony.** The following procedures shall be followed if Confidential or Highly Confidential- Attorneys' Eyes Only - Information is discussed or disclosed in any deposition permitted in this proceeding.

(i) The designating Party shall have the right to exclude from attendance at the deposition, during such time the designating Party reasonably believes Confidential or Highly Confidential Information will be discussed or disclosed, any person other than the deponent, the court reporter, and persons entitled to access to the Confidential or Highly Confidential - Attorneys' Eyes Only - Information.

(ii) At any time on the record during a deposition a Party may designate any portion of the deposition and transcript thereof to contain Confidential Information or Highly Confidential-Attorneys' Eyes Only Information. If such a request is made on the recording during the

deposition, the reporter shall later indicate on the cover page of the transcript that the transcript contains Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information by affixing the words "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" or "HIGHLY CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER -- ATTORNEYS' EYES ONLY" and list the pages and line numbers of the transcript in which Confidential or Highly Confidential - Attorneys' Eyes Only - Information is contained.

(iii) Alternatively, a designation of deposition confidentiality may be made in writing within thirty (30) days after counsel receives a copy of the transcript of the deposition. The designation shall contain a list of the numbers of the pages and lines of the transcript that are being designated as containing Confidential Information. Such designation shall be provided in writing to all counsel of record. All counsel of record shall treat all deposition transcripts as if Confidential for the first thirty (30) days after receipt of such deposition transcripts.

5. **Protection of Documents and Information.**

(a) **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 - Attorneys' 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.

(b) **Limited Third Party Disclosures.** The Parties and counsel for the Parties shall not disclose or permit the disclosure of any documents or information designated as Confidential Information under this Order to any third person or entity except as set forth in subparagraphs (i)-(ix). Subject to these requirements, documents or information designated as Confidential Information under this Order may be disclosed to the following categories of persons:

(i) **Counsel.** Internal or external counsel for the Parties and employees of counsel who have responsibility for the preparation and trial of the action;

(ii) **Parties.** Individual Parties and employees of a Party but only to the extent counsel determines in good faith that the employee's assistance is reasonably necessary to the conduct of the litigation in which the information is disclosed;

(iii) **The Court and its personnel;**

(iv) **Court Reporters and Videographers.** Court reporters and videographers engaged for depositions but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound;

(v) **Contractors.** Those persons specifically engaged for the limited purpose of making copies of documents, or organizing, processing, or hosting documents but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound;

(vi) **Consultants and Experts.** Consultants, investigators, or experts employed by the parties or counsel for the parties to assist in the preparation and trial of this action but only after such persons have completed the certification

contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound;

(vii) **Witnesses at depositions.** During their depositions, witnesses in this action to whom disclosure is reasonably necessary, but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound. If a non-party witness refuses to execute the certificate in Attachment A, the parties agree to urge the non-party witness to execute Attachment A such that examination of the witness with respect to Confidential Information may proceed. Witnesses shall not retain a copy of documents containing Confidential Information, except witnesses may receive a copy of all exhibits marked at their depositions in connection with review of the transcripts. Pages of transcribed deposition testimony or exhibits to depositions that are designated as Confidential Information pursuant to the process set out in this Order must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Order;

(viii) **Authors and Recipients.** Any person who is shown through testimony or documentary evidence to have prepared, received or reviewed the document or information; and

(ix) **Others by Consent or Order.** Other persons only by written consent of the producing Party or upon order of the Court and on such conditions as may be agreed or ordered.

(c) **Control of Documents.** Counsel for the Parties shall make reasonable efforts to prevent unauthorized or inadvertent disclosure of Confidential Information. Counsel shall

maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of three years after the termination of the case.

6. **Protection of Highly Confidential - Attorneys' Eyes Only - Information.**

(a) Access to documents and information designated as Highly Confidential - Attorneys' Eyes Only - Information under this Order shall be limited to the persons identified in Paragraphs 5(b)(i) and 5(b)(iii)-(ix).

(b) **Control of Documents.** Counsel for the Parties shall make reasonable efforts to prevent unauthorized or inadvertent disclosure of Highly Confidential - Attorneys' Eyes Only - Information. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of three years after the termination of the case.

7. **Preliminary Designation of Documents Being Inspected.** If a Party elects to produce documents and things for inspection, it need not label the documents and things in advance of the initial inspection. For purposes of the initial inspection, all documents within the produced files will be considered as having been designated as Highly Confidential - Attorneys' Eyes Only - Information. Thereafter, on selection of specified documents for copying by the inspecting Party, the producing Party shall mark the original documents and/or the copies of such documents with the appropriate confidentiality marking at the time the copies are produced to the inspecting Party.

8. **Inadvertent Failure to Designate.** Inadvertent failure to designate Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information as such may be corrected by supplemental written notice given as soon as practicable. An inadvertent failure to designate documents or information shall not constitute a waiver of a Party's right to so designate such documents or information. As soon as the receiving Party becomes aware of the

inadvertent production, the documents or information must be treated as though they had been timely designated as Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, whichever claimed, under this Order, and the receiving Party must endeavor in good faith to obtain all copies of the documents that it distributed or disclosed to persons who are not authorized by paragraph 5(b) or 6(a). If the receiving Party is unable to obtain the return of all such documents or information, it shall inform the designating Party of those to whom the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information has been disclosed, and the designating Party may undertake to obtain the return of the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information.

9. **Filing of Confidential Information and Highly Confidential Information.** A party wishing to use any Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, or any papers containing or making reference to such information, in any pleading or document filed with the Court in this action, such pleading or document shall be redacted to conceal the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information or shall be filed under seal. The Court may under any circumstances be provided with an unredacted copy of any pleading or documents that is filed.

10. **Challenges by a Party.** The designation of any information as Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information is subject to challenge by any Party. The following procedure shall apply to any such challenge.

(a) **Meet and Confer.** A Party challenging the designation of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information must do so in good faith and must begin the process by conferring directly with counsel for the designating Party. In conferring, the challenging party must explain the basis for its belief that the confidentiality

designation was not proper and must give the designating Party an opportunity to review the designated material, to reconsider the designation, and, if no change in designation is offered, the designating party must explain the basis for the designation.

(b) **Judicial Intervention.** A Party that elects to challenge a confidentiality designation may file and serve a motion that identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with the meet and confer requirements of this procedure. The burden of persuasion of justifying that there is good cause for the confidentiality designation will remain on the designating Party. Until the Court rules on the challenge, all Parties shall continue to treat the materials as they were designated under the terms of this Order. A party will not be obligated to challenge the propriety of a Confidential or Highly Confidential designation at the time made, and failure to do so will not preclude later challenges.

11. **Use of Confidential Documents or Information at Hearings, Pretrial Conferences, or Other Public Court Appearances.** Nothing in this Order shall be construed to affect the admissibility of any document, material, or information at any hearing, pretrial conference, or other public court appearance. Nor shall anything in this Order be construed to prejudice a party's right to use at trial or in a hearing before the Court any Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information. A Party that intends to present, or which anticipates that another Party may present, Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information at a hearing, pretrial conference, or other public court appearance shall first seek to reach an agreement with the other Parties regarding the treatment of such materials. If an agreement is not possible, the Party shall bring

that issue to the Court's attention by motion or in a pretrial memorandum without publicly disclosing the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at a hearing, pretrial conference, or other public court appearance.

12. **Confidential Information or Highly Confidential Information Subpoenaed, Ordered Produced or Requested in Other Proceedings.**

(a) If a receiving Party is served with a subpoena, an order issued in other civil, criminal or administrative proceedings, or any other form of compulsory process that would compel disclosure of any material or document designated in this action as Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, the receiving Party must so notify the designating Party in writing, immediately and in no event more than seven (7) court days after receiving the subpoena, order, process or request. Such notification must include a copy of the subpoena or court order.

(b) The receiving Party also must immediately inform in writing the person or entity that caused the subpoena, order, process or request to issue that some or all of the material covered by the subpoena or order is the subject of this Order. In addition, the receiving Party must deliver a copy of this Order promptly to the person or entity that caused the subpoena, order, process or request to issue.

(c) The purpose of imposing these duties is to alert the interested persons to the existence of this Order and to afford the designating Party in this case an opportunity to seek protection of its Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information in the court or tribunal from which the subpoena or order issued. The designating

Party shall bear the burden and the expense of seeking protection in that court of its Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, and nothing in these provisions should be construed as authorizing or encouraging a receiving Party in this action to disobey a lawful directive from another court. The obligations set forth in this paragraph remain in effect while the Party has in its possession, custody or control Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information by the other Party to this case.

13. **Obligations on Conclusion of Litigation.**

(a) Unless otherwise agreed or ordered, this Order shall remain in force after dismissal or entry of final judgment not subject to further appeal.

(b) Unless otherwise ordered or agreed to in writing, within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all persons in receipt of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information shall use reasonable efforts to either return such materials and copies thereof to the producing Party or destroy such Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information and certify that fact. Such reasonable efforts shall not require the return or destruction of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information from (i) disaster recovery or business continuity backups, (ii) data stored in system-generated temporary folders or near-line storage, (iii) unstructured departed employee data, and/or (iv) material that is subject to legal hold obligations or commingled with other such material. Backup storage media will not be restored for purposes of returning or certifying destruction of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, but such retained information shall continue to be treated in accordance with the Order. Counsel for the Parties shall be entitled to retain copies of court papers (and exhibits

thereto), correspondence, pleadings, deposition and trial transcripts (and exhibits thereto), legal memoranda, expert reports and attorney work product that contain or refer to Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, provided that such counsel and employees of such counsel shall not disclose such Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information to any person, except pursuant to court order. Nothing shall be interpreted in a manner that would violate any applicable canons of ethics or codes of professional responsibility.

14. Inadvertent production of privileged material. If a Party inadvertently produces or provides information subject to the attorney-client privilege, attorney work product doctrine, or other applicable privilege or immunity, the disclosure of the inadvertently disclosed information is not and will not be construed or deemed to be a general or specific waiver or forfeiture of any such privilege, immunity or work product protection that the producing Party would otherwise be entitled to assert with respect to the inadvertently disclosed information and its subject matter. Where the producing Party informs the receiving Party that privileged or other protected information has been disclosed, the receiving Party or Parties (i) must, within ten (10) business days, return or destroy the specified information and any copies thereof, (ii) must not use or disclose the information until the claim of privilege or other protection is resolved, (iii) must take reasonable steps to retrieve any such information that was disclosed or distributed before the receiving Party was notified of the claim of privilege or other protection and prevent any further dissemination of the information. Notwithstanding the above, in lieu of promptly returning or destroying the specified document or information, the receiving Party may, within five (5) business days, seek leave of Court to file the specified document or information under seal and request a determination of the claim of privilege or other protection while still

complying otherwise with paragraphs (ii) and (iii). However, the receiving Party cannot assert as a basis for the relief it seeks the fact or circumstance that such privileged documents were produced. The producing Party also must preserve the information until the claim is resolved.

15. **Persons Bound.** This Order shall take effect when entered and shall be binding upon all counsel of record and their law firms, the parties, and persons made subject to this Order by its terms.

16. **No Admissions or Waiver of Objections.** Producing, designating or receiving Confidential or Highly Confidential - Attorneys' Eyes Only - Information, or otherwise complying with the terms of this Order, shall not: (a) be construed to affect in any way the admissibility of any document, testimony, or other evidence at any hearing in or trial of the action; (b) prejudice the rights of a Party to object to the production of information or material that the Party does not consider to be within the proper scope of discovery or protected from discovery by virtue of the attorney-client privilege, the work product doctrine, or any other privilege or immunity from discovery; (c) prejudice the rights of a Party to apply to the Court for further protective orders and for additional protection for that Party's Confidential or Highly Confidential - Attorneys' Eyes Only - Information; or (d) prevent the Parties from agreeing in writing to alter or waive the provisions or protections provided for herein with respect to any particular information or material.

17. **Order Subject to Modification.** This Order shall be subject to modification or amendment by agreement of the Parties or by order of the Court.

18. **Enforcement.** A breach of the terms of this Order is subject to the full powers and jurisdiction of the Court, including but not limited to the powers of contempt and injunctive relief, and shall entitle the non-breaching Party to appropriate sanctions, including but not

limited to all attorneys' fees and other costs incurred in the enforcement of this Order.

19. **Trial.** Nothing herein shall govern the procedures to be used at trial, which will be set by the Court prior to the commencement of trial.

SO ORDERED.

Dated: 9/10/14

John B. Leete, Senior Judge
Specially Presiding

EXHIBIT G

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Attorneys at Law

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August 6, 2015

VIA EMAIL AND FIRST CLASS MAIL
pmaher@kslaw.com

Patricia L. Maher, Esquire
King & Spalding LLP
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Re: Paterno Estate v. NCAA
Subpoena directed to Pepper Hamilton LLP

Dear Trish:

I am enclosing a disc containing documents bearing production numbers PEPPER_0064049 – PEPPER_0071572. These documents are also available through a secure FTP site. The credentials for access to that site are found in the cover email to the electronic version of this letter. As you know, Pepper Hamilton and Penn State claim privilege with respect to these documents. Without waiver of our privilege claims, we are producing these documents solely because we have been ordered to do so by the Court. This production is subject to the same terms and conditions as those set out in my letter to Joe Loveland of July 22, 2015 accompanying our production of documents.

Sincerely yours,

Thomas E. Zemaitis

cc: Donna M. Doblick, Esquire
Brian E. Kowalski, Esquire

EXHIBIT H

Maher, Trish

From: Zemaitis, Thomas <ZEMAITIT@pepperlaw.com>
Sent: Thursday, August 20, 2015 11:09 AM
To: Maher, Trish
Subject: Paterno Estate v. NCAA

Trish, we have considered your request that we change the designation on the documents we contend are privileged from "Highly Confidential" to "Confidential" within the meaning of the protective order. We believe that the definition of "Highly Confidential" applies to these documents, and, accordingly, we are not prepared to change the designation on a wholesale basis.

Regards,

Tom

Thomas Zemaitis
Partner

Pepper Hamilton LLP
Attorneys at Law

3000 Two Logan Square | Eighteenth and Arch Streets
Philadelphia, Pennsylvania 19103-2799
p: 215.981.4361 | f: 215.689.4559

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MOTION TO STRIKE BLANKET DESIGNATION OF ALL PEPPER HAMILTON DOCUMENTS AS "HIGHLY CONFIDENTIAL – ATTORNEYS EYES ONLY"** and supporting **MEMORANDUM** were served this 24th day of August, 2015 by first class mail and email to the following:

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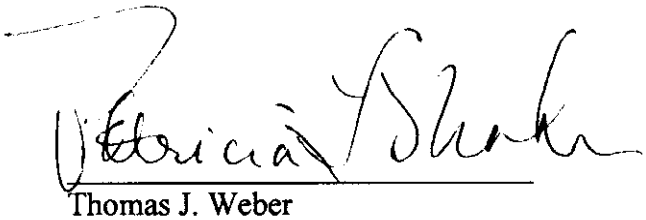

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