ORIGINAL

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

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

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
NCAA's Reply in Support of Its Motion to Compel the Production of Documents from Plaintiffs Jay Paterno and William Kenney

Filed on Behalf of:
National Collegiate Athletic Association, Mark Emmert, Edward Ray

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ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO, et al., Plaintiffs,	)	Civil Division
v.	)	Docket No. 2013-2082
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al., Defendants.	)	

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS FROM PLAINTIFFS JAY PATERNO AND WILLIAM KENNEY

After more than a year had passed since the NCAA served Plaintiffs Jay Paterno ("Paterno") and William Kenney ("Kenney") (collectively, "Plaintiffs") with document requests, the NCAA filed a motion to compel based on two fundamental grounds: (1) in at least three instances, Plaintiffs had objected to producing plainly relevant and discoverable documents; and (2) in many other instances, Plaintiffs' productions remained substantially deficient on their face.

Plaintiffs' Opposition fails to justify their unfounded objections or otherwise explain the sorry state of their document productions to date. Instead, their Opposition demonstrates (once again) that Plaintiffs view the "search for truth" as a one-way street, and reveals the utter lack of any factual support for key allegations in the Second Amended Complaint ("SAC").

The NCAA's Motion to Compel ("Motion") challenged three blanket objections by Plaintiffs that they would not produce documents related to: (1) Paterno's book, *Paterno Legacy*, (2) their efforts to obtain employment prior to 2011, and (3) their financial information prior to 2011. In response, Plaintiffs' Opposition attempts a variety of tactics:

- First, finally facing a motion to compel, Plaintiffs dropped their unsupported objections and agreed to (and, to some extent, have) produced documents concerning their pre-2011 financial data and searches for employment. Unfortunately, Plaintiffs' response remains incomplete.

- Second, Paterno continues to stand on his objection to producing documents concerning his book on the grounds they are not relevant. But the book was written *by Paterno* himself about some of the *key events underlying this litigation*. The relevance of such documents is obvious, and Paterno's resistance to producing them raises serious questions.

- Third, the Opposition doubles down on Plaintiffs' objections, raising—for the very first time—entirely new objections to producing documents. These include the specious contention that *all* communications with a public relations specialist are somehow protected from disclosure by the attorney-client privilege, and that documents concerning Paterno's contemplated run for public office are irrelevant (notwithstanding their clear relevance to his public reputation, which he has put at issue in this case).

The NCAA also argued in its Motion that Plaintiffs' productions were incomplete on their face. Plaintiffs' response: that is all we have to support our claims. In particular, Plaintiffs have alleged that the NCAA's conduct (independent of all of the other Sandusky-related events of 2011-2012) interfered with their ability to obtain certain coaching positions and other employment. When asked for the evidence that supports this claim, Paterno spent a year to produce a small smattering of letters, draft emails, and handwritten notes—some dated more than a year *after* the filing of the original complaint. The meager response from Plaintiffs is telling. If Plaintiffs truly have no additional documents in their possession regarding their potential employment opportunities or responsive to the NCAA's other requests, they should be required to so certify.

In the end, Plaintiffs largely tie their Opposition to the contention that the NCAA failed to sufficiently engage in a meet and confer process with them before filing its motion to compel. But the NCAA engaged in multiple meet and confers with Plaintiffs' counsel, and did not file a motion to compel until *a year after serving discovery*. Local Rule 208.2(e), which requires a good faith effort to resolve discovery disputes without seeking the Court's assistance, does not require a party to beg and plead endlessly for responsive documents before seeking judicial assistance. The NCAA plainly satisfied its obligations under Local Rule 208.2(e), and Plaintiffs cannot blame the NCAA for their failure to respond to

discovery in over a year (much less for asserting claims in a verified complaint that are so lacking in factual basis).

The Court should grant the NCAA's motion to compel, and require Plaintiffs to certify that, after a reasonable search, they have produced all documents in their possession, custody and control.

ARGUMENT

I. PLAINTIFFS' OBJECTIONS TO PRODUCING RELEVANT DOCUMENTS ARE BASELESS

A. Plaintiffs Abandon Their Objections to Employment Records and Financial Data Prior to 2011

Facing a motion to compel, Plaintiffs have effectively abandoned their objections to producing pre-2011 documents concerning efforts to obtain employment and financial information. Nor could they do otherwise. Such documents are clearly relevant and important to answering questions about the status quo ante: what were Plaintiffs employment prospects and financial status before the Consent Decree was announced?

Plaintiffs now claim that they have no documents to produce concerning their attempts to gain employment prior to 2011. This position is curiously at odds with Paterno's claim that "he had been approached during his time [at Penn State] by other universities and search firms exploring his potential interest in head coaching vacancies." SAC ¶ 147. In any event, if Plaintiffs never sought other employment prior to the announcement of the Consent Decree, it will be difficult

for them to demonstrate (as they must) that the NCAA's alleged conduct impaired any prospective opportunities. Indeed, the current record shows that in the one instance in which Paterno sought a head coaching position well prior to the announcement of the Consent Decree—at Penn State itself—he was passed over. Ultimately, if Plaintiffs truly have no documents responsive to this request, they should certify that they have conducted a reasonable search for such documents and have identified none.

Plaintiffs also claim to have abandoned their objection to providing financial data, but their production remains deficient. Kenney has produced tax returns and a few other compensation documents, but no pay stubs (as requested). Paterno produced tax returns and three W2s, but no pay stubs or other documents. This can hardly be a complete production. The Court should order Plaintiffs to produce *all* responsive documents, or certify that they have no additional documents.

B. Documents Related to Paterno's Book Are Highly Relevant

At the same time, Plaintiffs continue to argue that documents related to Jay Paterno's book, *Paterno Legacy*, are so plainly irrelevant that they fall outside the broad scope of discovery. But Plaintiffs' Opposition demonstrates the clear relevance of such documents. Indeed, Plaintiffs spend an entire page of their Opposition arguing that statements in the book support their legal claims. They argue that the book disapproves of the "Freeh Report, the investigation by Penn

State, and the media's rush to judgment – just as the Plaintiffs do in this suit." Opp'n at 8. They claim "the book also refers to the NCAA as directly responsible for tarnishing the name of his father and causing his reputational injury." *Id.* Given the book's obvious relevance, there can be no doubt that drafts, outlines, and documents related to the book likewise contain relevant information, or at the very least, are "reasonably calculated to lead to the discovery of admissible evidence." *See* Pa. R.C.P. No. 4003.1(a), (b).

Plaintiffs' arguments to the contrary are wholly unconvincing. First, they claim that the book was published after the relevant discovery period. But Plaintiffs already produced the book,[1] and drafts and notes related to the book necessarily date from *before* the book's publication.

Second, Plaintiffs argue that the drafts and communications about the book are "not 'admissions'" and therefore are not admissible at trial. That position misreads Pennsylvania law. But more importantly, that is an objection for trial, not discovery. *See* Pa. R.C.P. No. 4003.1(b) ("It is not ground for objection that the information sought will be inadmissible at the trial ...."). At this stage, documents need not be admissible to be subject to production—they need only be "relevant to

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[1] Plaintiffs have also produced other documents from 2014.

the subject matter involved in the pending action." Pa. R.C.P. No. 4003.1(a).[2]

Third, Plaintiffs argue that production of the final version of the book suffices because the NCAA cannot show that drafts and related documents contain anything that is not duplicative of the final book. *See* Opp'n at 7. But this would be impossible to show given that Plaintiffs refuse to produce these materials. And Plaintiffs' *own* arguments confirm that the requested documents contain statements *not* "duplicative of [the] final book." *See id.* ("Jay Paterno's book drafts reflect, by their nature, *non-final thoughts...that were revised* in the process of preparing the final published version." (emphasis added)).

Finally, as a last ditch effort, Plaintiffs argue that producing these documents is burdensome.[3] Opp'n at 6-8. But Plaintiffs do not explain the burden, nor do they address why any such burden is so unreasonable as to excuse them from their obligations. Rule 4011 requires no less, and Plaintiffs' Opposition does not come

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[2] *See also George v. Schirra*, 2002 PA Super 395, ¶ 11, 814 A.2d 202, 205-06 (2002) (affirming lower court order allowing discovery and stating that "[a]lthough the [documents at issue] may not ultimately be admissible at trial or may not prove germane to the matters that will be litigated, we believe the relevancy standard applicable to discovery matters has been met."); *Commonwealth ex rel. Pappert v. TAP Pharm. Prods., Inc.*, 904 A.2d 986, 994 (Pa. Commw. Ct. 2006) ("The rules of discovery involve a standard that is necessarily broader than the standard used at trial for the admission of evidence.").

[3] Plaintiffs' Opposition abandons and waives any previous objection that responsive documents are privileged or protected by a confidentiality agreement.

close to the showing necessary to avoid a motion to compel.[4] In any event, Plaintiffs are represented by a law firm of 800 lawyers, with a stable of them dedicated to their case. Surely it is not a particularly difficult task to collect and produce these documents, especially given that the NCAA had no difficulty producing over *16,000* documents (comprising 50,327 pages) of its own long before now. The Court should compel Plaintiffs to produce the requested documents.

C. Plaintiffs' Blanket Objection to Producing Communications With Public Relations Strategists Is Unfounded

After the NCAA's Motion, Plaintiffs raised a new blanket objection to producing *any* communications with any public relations strategists. *See* Letter from P. Maher to S. Gragert (July 28, 2015), attached as Ex. 1. The Parties previously met and conferred on this request, and Paterno agreed to produce documents or inform the NCAA whether he was objecting based on privilege.[5]

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[4] *See Weber v. Campbell Soup Co.*, 41 Pa. D. & C.3d 229, 233 (Ct. Com. Pl. 1985) (granting motion to compel and stating that "[m]erely showing that the production will occasion some investigative effort and expense, without some evidence that the burden so imposed would be unreasonable, is not sufficient to prevail under Rule 4011"); *Epstein v. Safeway Trails, Inc.*, 68 Pa. D. & C.2d 175, 176-77 (Ct. Com. Pl. 1974) (dismissing objections to discovery where objecting party did not "clearly set forth" the "manner in which the [discovery is a violation] of Rule 4011" so that "the court may understand the nature of the objection").

[5] Ex. 6 to Mot., Letter from S. Gragert to P. Maher at 3 (Apr. 21, 2015) (stating that Paterno "did not yet know whether he intended to withhold responsive documents on [privilege] grounds, but that [counsel for Paterno] would inform the

Counsel never informed the NCAA that they were objecting wholesale based on an expansive assertion of privilege, and Paterno did, in fact, produce four emails with the Paterno family's public relations strategist, Dan McGinn. Plaintiffs' last-minute claim that that communications with Mr. McGinn are protected by attorney-client privilege (presumably including the communications they already produced) is baseless and contrary to well-established law.[6] Indeed, this Court recently rejected Penn State's attempt to claim privilege over emails related to the Sandusky fallout, where its public relations director included an attorney on the communication. Opinion, *McQueary v. Pa. State Univ.*, No. 2012-1804 (Ct. Com.

NCAA should he choose to do so in order to permit a discussion of the grounds for the objection"); Letter from P. Maher to S. Gragert (May 19, 2015) ("Paterno will produce responsive, non-privileged documents, if any."), attached as Ex. 2.

[6] *See, e.g.*, *Commonwealth v. Noll*, 443 Pa. Super. 602, 607-08, 662 A.2d 1123, 1126 (1995) (the attorney-client privilege protects only communications that are "*necessary* to obtain informed *legal* advice" (emphasis added)); *McNamee v. Clemens*, No. 09 CV 1647(SJ), 2013 WL 6572899, at *6 (E.D.N.Y. Sept. 18, 2013) (communications with public relations consultant hired by defendant's attorney were not privileged), attached as Ex. 3; *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 431-32 (S.D.N.Y. 2013) (public relations firm's participation in attorney-client communications resulted in waiver of the privilege—"even if [its] functions were related to ... litigations"—where firm "was retained before this litigation began"); *In re New York Renu with Moistureloc Prod. Liab. Litig.*, No. MDL 17885, CA 2:06-MN-77777-DCN, 2008 WL 2338552, at *8 (D.S.C. May 8, 2008) (emails to a public relations firm were not privileged, and noting that the "few" cases finding "communications to public relations consultants to be within the attorney-client privilege . . . arise from unusual and extreme facts"), attached as Ex. 4; *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (communications with public relations consultant as part of litigation are not privileged).

Pl. July 24, 2015), attached as Ex. 5. Plaintiffs' claim is much broader: that every single communication involving a public relations strategist—whether or not it includes an attorney—is privileged. Certainly this is not the case.

The Court should order Plaintiffs to produce these documents, or in the alternative, immediately produce a privilege log containing these documents and any engagement letter with Mr. McGinn, so that the Court and the NCAA can assess properly the privilege claim.[7]

D. Paterno's Objection to Producing Documents About His Run For Political Office is Baseless

Paterno also now objects to producing documents concerning his decision to run for public office.[8] Paterno claims that these documents—including communications with strategists, pollsters, and others—are "not inherently relevant to the case."[9] Opp'n at 13-14. Of course, that is not the legal standard for discoverable evidence, and Paterno offers no explanation or authority to support his position.

Paterno's decision to run for or withdraw from the race for statewide political office is highly relevant to his defamation claim. His claim is based on

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[7] Counsel for the NCAA requested these documents from Paterno's counsel on July 31, 2015.

[8] *See* Ex. 3 to Mot. (Paterno's response to Request No. 21).

[9] Paterno does not object on any other grounds, including privilege or confidentiality.

the allegation that the NCAA "irreparably harmed [his] reputation[] and lowered [it] in the estimation of the nation." SAC ¶ 169. Yet, despite this allegation, and even after the NCAA's alleged conduct, Mr. Paterno obviously thought his reputation was strong enough that he could be elected Lieutenant Governor of Pennsylvania. These documents thus necessarily relate to his reputation and status and are therefore relevant to his defamation claim. They must be produced. *See* Pa. R.C.P. No. 4003.1(a).

II. PLAINTIFFS SHOULD BE REQUIRED TO CERTIFY THEIR POSITION THAT THEY HAVE NO DOCUMENTS RESPONSIVE TO MOST OF THE NCAA'S REQUESTS

Plaintiffs' Opposition claims that their meager productions are "reasonable" and "not suspect." Opp'n at 11. They suggest they have produced all responsive documents, but boldly refuse to state that they have undertaken a reasonable search to locate additional materials and that there are none. They claim that such a certification is "inappropriate and unnecessary" (Opp'n at 10), "unjustified" and "extraordinary" (*id.* at 3). However, it is plainly required by the Pennsylvania Rules of Civil Procedure. *See* Pa. R.C.P. No. 4009.12(b)(5) (A party must "state that after reasonable investigation, it has been determined that there are no documents responsive to the request.").

If Plaintiffs have truly preformed a reasonable search and produced all

responsive documents – they should stand by it and certify that fact.[10] And they certainly should not be permitted to later introduce documents into this case that they that should have produced already.

A. Paterno Has Produced Virtually No Support For His Claims

Paterno's production is either incomplete, or there is exceedingly insufficient documentary evidence underlying the allegations in his verified complaint.[11]

- **Employment Applications**. Paterno alleges—in a verified Complaint—that he applied for coaching positions at the University of Connecticut (SAC ¶ 149), James Madison University (*id*), the University of Colorado (SAC ¶ 150), and Boston College (*id*).[12] Yet he has produced ***no*** email correspondence and ***no*** formal applications with any school. For James Madison, Paterno has not produced a single shred of documentary evidence that he ever applied there. For the University of Connecticut, he produced only scribbled notes of contact information (which include email addresses, but he has not produced any emails). And for the University of Colorado and Boston College he produced a single,

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[10] *See, e.g.*, Pa. R.C.P. No. 4009.12(b)(1), (2), (5); *Yadouga v. Cruciani*, 66 Pa. D. & C.4th 164, 185-86 (Ct. Com. Pl. 2004) (noting that "[a]t the time of oral argument, defense counsel confirmed that ... there are no other documents which are responsive" to a certain discovery request); *cf. Commonwealth v. Reid*, 99 A.3d 470, 499 (Pa. 2014) (noting that a party "confirmed on the record that there were no documents or other [responsive] materials"). Plaintiffs' ambiguous discovery responses—which state that they will produce documents, "if any"—are obviously insufficient. *See* Pa. R.C.P. No. 4009.12(b)(1), (2), (5).

[11] Despite claims in the Opposition that Paterno's productions were complete, just last week Paterno produced a responsive August 2012 letter from Donald Trump in which Trump says that the Freeh Report was a "total hatchet job" and encourages Paterno to "get the right lawyer!" and "sue the hell out of the incompetent Penn State [Board of Trustees]." JAYP_0001395.

[12] He also lists "another Division I school in the mid-Atlantic."

unsigned letter expressing "interest" in a position.[13] Yet, he produced three handwritten notes to other colleges that were dated over a year after the original complaint was filed.

Indeed, Paterno has not produced any documentary evidence indicating that a coaching contract was probably forthcoming (an essential element of his claim). Nor has he produced anything indicating that the NCAA interfered with any alleged contractual relationship (much less that the NCAA *intended* to do so). If Paterno's production is, in fact, complete, his claims are doomed.

- **Social Media**. Plaintiffs' Opposition skirts the NCAA's request for social media, claiming that such material is publicly available. But the request includes private communications sent via social media (similar to a short email), which can be sent on many platforms such as Facebook and Twitter. Given that Jay Paterno has touted himself "as named to The Sports Illustrated Twitter 100 recognizing the world's best Sports Tweeters," it is highly unlikely that his Twitter account, at least, does not include at least some responsive non-public messages. *See* Jay Paterno, LinkedIn, https://www.linkedin.com/in/jaypaterno (last visited Aug. 3, 2015). Yet Plaintiffs ignore that possibility and refuse to state whether they searched for and collected these responsive materials.

- **Consent Decree, Experts, Jerry Sandusky, and Penn State Employment**. Paterno concedes that he has only 14 documents referencing the Consent Decree—the basis of his entire case. He also claims to have no documents related to the 'experts' or Jerry Sandusky (someone he coached with for five years), and only a handful of documents related to his employment at (and termination from) Penn State—where he worked for 17 years.

If Paterno truly has no additional documents in his possession responsive to the NCAA's requests, he should be required to so certify.

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[13] JAYP_0001334 (Colorado), attached as Ex. 6; JAYP_0001332 (Boston), attached as Ex. 7.

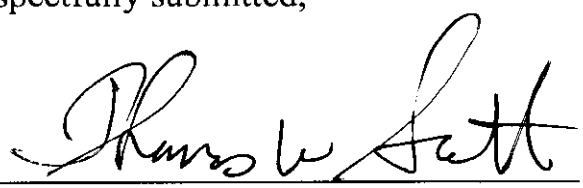
B. Kenney Has Failed To Produce Documents Responsive to Most of the NCAA's Requests

Kenney also claims that he does not have any additional responsive documents, but he has only produced documents partially responsive to 5 or 6 of the NCAA's 30 requests. Plaintiffs claim that Kenney's production of 211 pages is "certainly reasonable" and that "Kenney cannot be compelled to produce documents he does not have." Opp'n at 11. The NCAA understands that Mr. Kenney will not have the magnitude of documents the NCAA has, but it has no way of knowing if his production is complete until Kenney certifies he has performed a reasonable search for responsive documents and located none.

CONCLUSION

Plaintiffs have had over a year to comply with their discovery obligations. Yet they continue to shirk them. The Court should grant the NCAA's motion to compel, and require Plaintiffs to certify that, after a reasonable search, they have produced all documents in their possession, custody and control.

Respectfully submitted,



Date: Aug. 3, 2015

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EXHIBIT 1

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VIA E-MAIL AND FIRST CLASS MAIL

July 28, 2015

Sarah M. Gragert, Esquire
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Re: Paterno v NCAA, et al.

Dear Sarah,

I am writing as a follow up to our discovery conference on July 10. You requested additional information with respect to several interrogatory responses from Jay Paterno, and we agreed to follow up on your requests. The following supplemental responses are provided on behalf of Jay Paterno:

Interrogatory No. 1. Jay Paterno has produced his tax returns going back to 2005, so you have his salary information for those years.

Interrogatories Nos. 2-3. David Joyner told Jay Paterno on January 6, 2012 that he would not be hired as the next Head Football Coach at Penn State.

Ed Placey of ESPN told Jay in late summer 2012 that ESPN would not hire him as an analyst for college football game broadcasts.

At CBS, Ben Stauber had attended Jay Paterno's meeting with Harold Bryant on April 23, 2013. Several weeks after that meeting, Ben Stauber told Jay that CBS would not be comfortable hiring him.

At Fox Sports, Jacob Ullman told Jay Paterno that Fox Sports would not be comfortable hiring him.

Brett Senior told Jay Paterno in late 2013 that Temple University would not consider hiring any former Penn State coaches.

The University of Connecticut worked with the Parker Executive Search firm from Atlanta on its search for a new head football coach. Jay Paterno's communications were with Daniel Parker and were oral communications.

In addition to the information previously provided in his Response to Interrogatory No. 2, there was another job prospect that Jay Paterno lost due in whole or in part to the actions of the NCAA. In the Fall of 2013, through Gene Rice, a Philadelphia headhunter, Jay Paterno discussed a possible position at the Disney Institute with Kevin Harry of the Disney Institute. Gene Rice told Jay in later 2013 or early 2014 that the Disney Institute considered him too controversial to hire.

Interrogatory No. 4. Jay Paterno does not recall the name of Mark Emmert's assistant who contacted him about re-publishing an article he had written. Those communications took place while Jay Paterno was still employed by Penn State, and he does not have access to his Penn State email account to search for them.

Interrogatory No. 7. In mid-February 2013, the State College Borough police alerted Jay Paterno that a death threat had been made against him on Twitter on February 14, 2013. That threat was not conveyed to Jay Paterno directly. After consulting with Jay Paterno, the police took steps to deal with the source of the threat.

Interrogatory No. 10. Jay Paterno has already responded to this interrogatory.

Interrogatory No. 11. Any additional reasons for withdrawal from Lt. Governor's race other than challenge to petitions? No.

Your July 16, 2015 letter presents a new and different interrogatory requesting information about Jay Paterno's release from the Penn State football coaching staff by Coach Bill O'Brien. As his response to that new interrogatory, Jay Paterno met with Bill O'Brien on January 8, 2012 to interview for the position as quarterback coach. The following day, on January 9, 2012, O'Brien called Jay Paterno and told him that he would not need Jay on his coaching staff. Several weeks later, O'Brien announced the hiring of a quarterback coach. O'Brien did not terminate Jay from Penn State University.

In response to the NCAA's motion to compel production of documents from Jay Paterno with respect to Request for Production No. 28, we offered to provide a written response to that request which was inadvertently overlooked in the initial responses by Jay Paterno, apparently due to the mis-numbering in the NCAA's First Requests For Production of Documents to Plaintiff Jay Paterno.

Request No. 28. All communications with a public relations or media consultant or specialist.

Response to Request No. 28. For the applicable discovery period, January 1, 2011 through May 30, 2013, any communications Jay Paterno had with Penn State's public relations consultant or media specialist would be on his Penn State email account to which he no longer has access. The NCAA has asserted in its motion to compel that Jay Paterno's communications

with Dan McGinn are "relevant and responsive" to this request. Mot. to Compel Br. at 25. Jay Paterno objects to producing documents reflecting communications with Dan McGinn or anyone else at McGinn and Company ("McGinn") based on attorney-client privilege. McGinn was retained by King & Spalding to assist in the preparation and presentation of the legal positions of Coach Paterno and his family, including in litigation. Jay Paterno has no other non-privileged communications responsive to Request No. 28.

Finally, we are posting to our FTP site one additional document responsive to Request No. 2 to Jay Paterno, Bates stamped JAYP 0001394. We will send you the FTP instructions by email.

Sincerely,

Patricia L. Maher

cc: Thomas W. Scott, Esq.
Everett C. Johnson, Esq.
Brian E. Kowalski, Esq.

EXHIBIT 2

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May 19, 2015

Via Email and First Class Mail

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Re: Estate of Joseph Paterno v. NCAA, et al., Case No. 2013-2082 (Centre County Common Pleas)

Dear Sarah,

I am writing with respect to your letters of April 21 and May 13 following up on our March 27 discovery conference. First, your statement that plaintiffs have produced "virtually nothing" in response to the NCAA's document requests is incorrect. Your expectations of the volume of the responsive documents that the individual plaintiffs have in their possession may be colored by the volume of documents your client, the NCAA, has in its possession. But the plaintiffs are not institutional parties like the NCAA or Penn State and, because they were not involved in investigating Penn State, do not have anything close to the same volume of responsive documents. Your characterization of the production to date as "only a small fraction" of the responsive documents is therefore incorrect. Nonetheless, we are preparing additional productions for each of the plaintiffs, which we expect to make later this week.

We also do not agree that your letter of April 21 accurately reflects the discussion we had a month earlier, on March 27. Among other things, the requests to Bill Kenney, Jay Paterno, and Al Clemens seek different documents and, where they seek the same documents, they were not numbered consistently. Your letter refers to all the requests by the same numbers, and thus did not correctly summarize what we discussed, which differed for Clemens, Kenney, and Jay Paterno, and creates the potential for confusion.

We assume you will agree that our discussions with respect to the damage claims of Al Clemens have been mooted by his recent withdrawal as a plaintiff.

Regarding the requests for communications with a public relations specialist, addressed in your April 21 letter under Request 14 to Clemens, this confirms that Bill Kenney has no responsive documents. Jay Paterno will produce responsive, non-privileged documents, if any.

Jay Paterno stands by his objections in response to Request 25 that all communications and drafts of his book, *Paterno Legacy*, are not relevant, are protected by confidentiality agreements or applicable privileges, and that the request is vague, overly broad, and unduly burdensome.

The individual plaintiffs also object to producing financial information from the period of 2006 through 2010, which has no relevance to the harm asserted in this action. Material from January 1, 2011 through May 30, 2013 is sufficient to show their relevant financial situation and the resulting harm from the NCAA's actions.

You asked for clarification of the objections to several requests that Bill Kenney and Jay Paterno lack access to files that may contain responsive documents. Penn State retains possession of plaintiffs' personnel files, which plaintiffs have requested. Penn State initially objected to those requests on multiple grounds. During a discovery conference with Penn State's counsel on May 1, however, Penn State agreed to produce the personnel files for Bill Kenney and Jay Paterno, as well as documents related to their terminations, but it has not done so to date. A copy of my May 7, 2015 letter to Donna Doblick summarizing that discussion, which went to Kip Johnson and Brian Kowalski, is enclosed

Finally, we appreciate the offer you made during our March 27 call to clarify the meaning of the term "institutional control" as used in Request 12 to Bill Kenney and Jay Paterno. If the NCAA does provide greater specificity regarding the documents it seeks, we will consider those requests and respond accordingly.

Sincerely,

Patricia L. Maher

Enclosure

cc: Everett C. Johnson, Jr.
Brian E. Kowalski
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May 7, 2015

VIA EMAIL AND FIRST CLASS MAIL

Donna M. Doblick, Esq.
Reed Smith LLP
225 Fifth Avenue
Reed Smith Centre
Pittsburgh, PA 15222-2716

Re: *Paterno v NCAA, et al.*

Dear Donna,

I am writing to confirm our discussion on May 1, 2015 in which you advised that Penn State is withdrawing its objections to the requests from Jay Paterno and Bill Kenney for their personnel files and documents related to their terminations from Penn State. Accordingly, we understand that Penn State will produce whatever it has that is responsive to their requests.

We also discussed again plaintiffs' request for documents related to the removal of Coach Paterno's statue from public display on Penn State's campus. We did not accept Penn State's offer to produce only what you deem to show a 'link" between the removal of the statue and the Consent Decree. Penn State's proposal is unduly restrictive because the statue was removed the day before the Consent Decree was announced, and months after Coach Paterno had been terminated. Further, as we have discussed, discovery has already yielded documents reflecting one Board member's communication to President Erickson urging him to remove the statue to placate the NCAA and its president, Mark Emmert.

The request is clearly relevant to the subject matter of this action, and satisfies the broad discovery standard in Pa. R. C. P. 4003.1. We want all documents related to the removal of the statue, including who made the decision to remove the statue, when the decision was made, and how it was carried out. We appreciate your willingness to consult again with your client on this request, however, the request has been outstanding since July, 2014 and we have now conferred

about it several times. Please let us know by next week if Penn State will produce documents responsive to this request so we can then pursue the matter if necessary.

Sincerely,

Patricia L. Maher

cc: Daniel I. Booker
Joseph P. Green
Everett C. Johnson, Jr.
Brian E. Kowalski
Thomas W. Scott
Thomas J. Weber

EXHIBIT 3

2013 WL 6572899
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Brian G. McNAMEE, Plaintiff,
v.
William Roger CLEMENS, Defendant.

No. 09 CV 1647(SJ). | Sept. 18, 2013.

Attorneys and Law Firms

Debra L. Greenberg, Earl Ward, Richard D. Emery, David A. Lebowitz, Emery Celli Brinckerhoff & Abady LLP, New York, NY, for Plaintiff.

Jeremy T. Monthy, Rusty Hardin & Associates, LLP, Joe M. Roden, Rusty Hardin & Associates, P.C., Houston, TX, for Defendant.

ORDER

CHERYL L. POLLAK, United States Magistrate Judge.

***1** On December 12, 2008, plaintiff Brian G. McNamee ("McNamee") commenced this action in the Supreme Court of the State of New York against defendant William Roger Clemens ("Clemens"), claiming that Clemens defamed him by accusing McNamee of lying and manufacturing evidence regarding Clemens' alleged use of performance enhancing drugs. On April 22, 2009, the case was removed to federal court.

Presently before the Court is plaintiff's motion to compel discovery of three categories of documents. For the reasons stated below, the Court grants plaintiff's motion to compel in part and denies it in part.

BACKGROUND

On December 13, 2007, United States Senator George Mitchell released the "Mitchell Report," which included statements by plaintiff McNamee that he had injected defendant Clemens with performance enhancing drugs. (PL's Mem. [1] at 2). Plaintiff alleges that Clemens "immediately launched a coordinated public relations offensive against McNamee to brand him a liar."(*Id.*) Clemens also filed a defamation suit against plaintiff McNamee in Texas state court and, according to plaintiff, "obtained from Congress a public hearing to further brand McNamee as a liar."(*Id.*)

1 Citations to "Pl.'s Mem." refer to Plaintiff's Memorandum of Law in Support of Motion to Compel Discovery, dated August 2, 2013.

In this current motion, McNamee seeks an Order requiring the production of all communications with Clemens' public relations strategist, Joe Householder ("Householder"), and Householder's firm, Public Strategies, Inc. ("Public Strategies" or the "PR Firm"), which have been withheld from production on grounds of attorney-client privilege and work product. (Pl.'s Mem. at 7; Def.'s Mem. [2] at 10). Clemens' counsel, Rusty Hardin & Associates ("Rusty Hardin"), hired Public Strategies five days after the Mitchell Report was released. (Pl.'s Mem. at 3). According to plaintiff, the contract between Rusty Hardin and Public Strategies provided that the PR Firm would provide consulting services "with respect to media relations advice and counsel."(*Id.;* Greenberger Aff., [3] Ex. A [4]). McNamee claims that the services provided by Public Strategies included coordinating an appearance by Clemens on "60 Minutes," issuing press releases, and responding to media inquiries.(*Id.*) In support of his claim that communications with Public Strategies was privileged, Clemens asserts that Householder was "a full-fledged, yet non-attorney, member of [defendant's] legal team."(Def.'s Mem. at 3–4).

2 Citations to "Def.'s Mem." refer to defendant Roger Clemens' Response in Opposition to Motion to Compel Discovery, dated August 10, 2013.

3 Citations to "Greenberger Aff." refer to the Affirmation of Debra L. Greenberger, Esq., in Support of Plaintiff's Motion to Compel Discovery, filed August 2, 2013.

4 Citations to "Greenberger Aff., Ex. A" refer to the Consultant Agreement between Public Strategies, Inc. and Rusty Hardin and Associates, PC, dated December 18, 2007.

McNamee also seeks to compel Clemens to produce all communications with Randal ("Randy") Hendricks (Pl.'s Mem. at 7), which have also been withheld from production on grounds of attorney-client privilege and work product. (Def.'s Mem. at 14). According to plaintiff, defendant Clemens employed Hendricks Sports Management ("Hendricks"), which is run by Randy and

Alan Hendricks, as his sports agents. (*Id.* at 4). McNamee claims that Clemens retained Hendricks in 1998 "to assist him in contract negotiations, to provide financial planning and management, and to coordinate endorsement opportunities."(*Id.*) According to McNamee, the contract between Clemens and his sports agent, Hendricks, "contains no mention of legal services"(*id.* at 4–5; Greenberger Aff., Ex. H[5]), and Hendricks does not hold itself out as providing legal services. (*Id.* at 5). Instead, McNamee asserts that, after the Mitchell Report was released, Randy Hendricks[6] "performed 'marketing' services for Clemens ..., in an attempt to bolster Clemens' reputation by smearing McNamee's."(*Id.* at 5). For example, Randy Hendricks released a press statement on Clemens' behalf, communicated with the press, and told reporters that he "deferred to Rusty Hardin on legal matters."(*Id.*) In response, Clemens claims that Randy Hendricks has served as Clemens' legal advisor since 1983, and as "the equivalent of in-house counsel ... and an active member of the team of attorneys representing Clemens" since 2007. (Def.'s Mem. at 6).

5 Citations to "Greenberger Aff., Ex. H" refer to the Hendricks Sports Management Agency Contract with Roger Clemens, signed by Roger Clemens on November 21, 1998.

6 Plaintiff does not dispute the fact that Randy Hendricks was a lawyer at some point in his career, but contends that he only practiced law over 30 years ago before he left to found Hendricks in the 1970s. (Pl.'s Mem. at 4). Defendant asserts that Mr. Hendricks is currently licensed to practice law in Texas. (Def.'s Mem. at 6).

DISCUSSION

A. *Privilege Waiver*

***2** As an initial matter, McNamee argues that Clemens' failure to provide a privilege log operates as a waiver of any applicable privilege. (PL's Mem. at 9). Clemens does not dispute the fact that a traditional privilege log was not produced in response to the plaintiff's request for documents, but contends that his assertion of privilege over broad categories of documents as part of his response to plaintiff's discovery requests is sufficient. (Def.'s Mem. at 7).

Federal Rule of Civil Procedure 26(b)(5)(A) requires that a party withholding discovery on the basis that the requested information is privileged or subject to work product protection must "describe the nature of the documents, communications, or tangible things not produced or disclosed —and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."Fed.R.Civ.P. 26(b) (5)(A).Local Civil Rule 26.2(b)"commands, *inter alia,* that when documents sought ... are withheld on the ground of privilege, [a privilege log] shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the court."[7] *FG Hemisphere Assocs., L.L.C. v. Republique Du Congo,* No. 01 CV 8700, 2005 WL 545218, at *5 (S.D.N.Y. Mar.8, 2005). Accordingly, "the starting position is that the privilege log must be served with the objections [to discovery requests] ... and that the failure to do so may result in waiver of the privilege claims."*In re Chevron Corp.,* 749 F.Supp.2d 170, 181 (S.D.N.Y.), *aff'd sub nom., Lago Agrio Plaintiffs v. Chevron Corp.,* 409 F. App'x 393 (2d Cir.2010).

7 The required privilege log need not necessarily provide descriptions on a document-by-document basis. Local Civil Rule 26.2(c) encourages any "[e]fficient means of providing information regarding claims of privilege" as agreed to by the parties. Local Civil Rule 26.2(c). For example, the Local Rules specify that, where a party asserts the same privilege with respect to multiple documents, "it is presumptively proper to provide the information required by this rule by group or category."*Id.* Objections to a privilege log compiled in this manner may be made where "the substantive information required by this rule has not been provided in a comprehensible form."*Id. See also* Committee Notes to Local Civil Rule 26.2 (noting that "the purpose of Local Civil Rule 26.2(c) is to encourage the parties to explore methods appropriate to each case").

Courts in this Circuit have refused to uphold a claim of privilege "where privilege log entries fail to provide adequate information to support the claim,"*OneBeacon Ins. Co. v. Forman Int'l, Ltd.,* No. 04 CV 2271, 2006 WL 3771010, at *5 (S.D.N.Y. Dec. 15, 2006) (citing *United States v. Constr. Products Research, Inc.,* 73 F.3d 464, 473 (2d Cir.1996)), or where "no privilege log has been produced."*Id.; see also Allied Irish Banks, P.L.C. v. Bank of Am., N.A.,* 252 F.R.D. 163, 167 (S.D.N.Y.2008) (noting that "[c]ases rejecting claims of privilege based on the inadequacy of the privilege log alone typically involve an absence of basic information ... or a failure to produce a log at all"); *FG Hemisphere Associates, L.L.C. v. Republique Du Congo,* 2005 WL 545218, at *6 (citing cases) (holding that "the unjustified failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege").

Taking into account "all relevant factors," when the party fails to produce an adequate privilege log, it is "within the Court's discretion to grant leniency as to documents which would be covered by [a privilege or protection] except for the waiver."*In re Chevron Corp.*, 749 F.Supp.2d at 181–82 (noting that Local Rule 26.2"has not always been enforced rigidly," as some courts "have limited enforcement to situations in which there was no sufficient justification for the failure to produce a log on time or to seek leave to delay"); *see also OneBeacon Ins. Co. v. Forman Int'l, Ltd.*, 2006 WL 3771010, at *8 (observing that granting leniency is "risky," but nonetheless declining to order production of documents and instead directing the withholding party to submit an appropriate privilege log).

***3** The circumstances of this case warrant a finding that defendant Clemens has waived his claims of privilege and work product protection by virtue of his failure to timely submit a privilege log. Defendant's attorneys are obligated to familiarize themselves with the Local Civil Rules, which are clear as to the requirement to provide a privilege log. *See In re Chevron Corp.*, 749 F.Supp.2d at 182 (taking into account the clarity of Rule 26.2 as cutting in favor of waiver). Defendant's failure to comply with the Local Rule and provide the required privilege log was brought to his attention by July 9, 2013, when plaintiff filed a request for a pre-motion conference regarding the instant motion to compel. Nevertheless, it was not until this Court issued an Order to produce the withheld documents for *in camera* review that defendant finally produced a privilege log on August 20, 2013.

Moreover, a review of the privilege log that was produced demonstrates that it continues to fail to satisfy the requirements of the Local Rules. Although defendant is correct that a traditional, document-by-document privilege log is not always required by Local Rule 26.2, in this case, the defendant's written summary continues to lack sufficient information as to the content of the documents to enable plaintiff or the Court to evaluate whether each of the withheld documents is privileged. *See*Fed.R.Civ.P. 26(b)(5)(A); *In re Chevron Corp.*, 749 F.Supp.2d at 183; Local Civil Rule 26.2(b) (providing that a privilege log must "be furnished in writing at the time of the response to such discovery or disclosure"). While it may, in some cases, be appropriate to identify purportedly privileged documents by category, *Fleisher v. Phoenix Life Ins. Co.*, 11 CV 8405, 2013 WL 42374, at *3 (S.D.N.Y. Jan.3, 2013), "broad classes of documents" with "exceedingly general and unhelpful" descriptions will not satisfy defendant's obligations. *Id.* The privilege log enclosed with the documents submitted for *in camera* review lists each document individually and provides each document's date, author, recipients, and subject. However, the subject line contains, in many instances, exceedingly unhelpful descriptions. Examples of such vague subjects include single word descriptions, such as: "tomorrow," "Media," "My info," "statement," "Costs," "Letter," "notes," "Inquiry," and "Discussion." [8] These types of descriptions clearly do not provide sufficient information as to the content of the documents to enable plaintiff or the Court to evaluate whether each of the withheld documents is privileged, as required by Rule 26, and as a consequence, the Court's *in camera* examination of the records has been seriously impeded. [9]

8 Defendant's privilege log is lacking in additional ways. The log lists incorrect Bates numbers for the communications with Randy Hendricks numbered 247–260. Defendant has provided a list of "positions and affiliations of people other than Mr. Clemens named in the log [to] aid" the Court's review. On this list, seven people, including Mr. Householder, are listed as "Consultants," without further explanation. In the absence of a showing that each of these people were integral to the communication of legal advice or litigation strategy, any privileges applicable to communications with them are waived. *See Allied Irish Banks, P.L.C. v. Bank of Am., N.A.*, 252 F.R.D. at 168 (finding that, "[g]enerally, communications made between a defendant and counsel in the known presence of a third party are not privileged").

9 The Court also notes that defendant has already failed to comply with Rule 26(b)(5)(A) once in connection with his discovery responses in this case. In the Court's May 21, 2013 Order, resolving a separate discovery dispute, the Court noted that a privilege log compiled by the defendant "often group[ed] a broad range of documents together as one document in violation of Federal Rule of Civil Procedure 26(b)(5)(A). For example, more than 900 pages of documents [were] listed as Document Number 6 and described as 'various records provided by the Toronto Blue Jays in response to grand jury subpoena, and court documents from legal proceedings in Canada to obtain the documents.'" Based upon an *in camera* review of these documents, it became immediately apparent to the Court that this single entry on the log consisted of very different categories of documents, including *inter alia*, press clippings and

published newspaper articles, publicly available team rosters, and internal memoranda, only some of which may have been privileged. The Court Ordered production of the vast majority of the documents and, for the remaining documents, Ordered defendant to revise his privilege log to comply with Rule 26. On June 7, 2013, plaintiff informed the Court that defendant had produced all of the documents at issue rather than revise his privilege log.

Accordingly, the Court finds that Clemens has waived his claims of privilege and work product protection by virtue of his failure to timely submit an adequate privilege log.

B. *Privilege/Protection Claims*

***4** Even if Clemens had not waived claims of privilege or work product protection as a result of his failure to provide a proper privilege log under the Local Rules, the Court has undertaken the arduous task of reviewing the over 900 pages of documents for which a claim of protection has been raised and has determined that neither protection applies to the vast majority of records. [10]

10 Had Clemens not waived such claims under the Local Rules, the following documents might potentially be considered privileged or work product depending on a further showing that the documents were prepared as part of litigation strategy and not media strategy—a showing that has not been made in defendant's supporting papers: *Householder in Camera*—00101, 00102, 00145, 00146, 00328, 00334, 00393, 00402, 00403, 00404, 00405, 00478, 00479, 00480, 00492, 00493, 00494, 00495, 00496, 00572, 00600; *Hendricks in Camera*—00001, 00034, 00035, 00036, 00037, 00050, 00051, 00052, 00176, 00177, 00178, 00214, 00250, 00251, 00252, 00253, 00300, 00301, 00302, 00303, 00304, 00305, 00306, 00307, 00308. Indeed, for many of these records, additional information and context is required to determine whether claims of privilege or work product protection are valid. The Court also notes that while Document No. 00402 purports to attach litigation documents, none are actually included. The Court further notes that some of the above listed documents appear multiple times throughout the records furnished for *in camera* review.

"The burden of establishing the existence of an attorney-client privilege or work product protection rests with the party asserting the privilege/protection."*OneBeacon Ins. Co. v. Forman Int'l, Ltd.*, 2006 WL 3771010, at *4 (citing *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir.2000)). The party resisting disclosure carries "the heavy burden of establishing its applicability, *Chevron Corp. v. Salazar*, 275 F.R.D. 437, 444 (S.D.N.Y.2011), which is "not discharged by mere conclusory or *ipse dixit* assertions."*In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 224–25 (2d Cir.1984); *see also S.E.C. v. NIR Grp., LLC*, 283 F.R.D. 127, 131 (E.D.N.Y.2012). Rather, any claimed protection "must be narrowly construed [,] and its application must be consistent with the purposes underlying the immunity."*Allied Irish Banks, P.L.C. v. Bank of Am., N.A.*, 252 F.R.D. at 169–69.

1. *Attorney–Client Privilege*

Since this Court's jurisdiction is based on diversity, "state law provides the rule of decision concerning the claim of attorney-client privilege."*Egiazaryan v. Zalmayev*, No. 11 CV 2670, 2013 WL 945462, at *4 (S.D.N.Y. Mar. 8, 2013) (citing Fed.R.Evid. 501); *Allied Irish Banks, P.L.C. v. Bank of Am., N.A.*, 252 F.R.D. at 168. In this motion, plaintiff cites New York case law, and although Clemens "expressly reserves his right to rely on" Texas law, he also cites New York law, claiming that "the aspects of privilege law in dispute here are similar in both states."(Def .'s Mem. at n. 2). Accordingly, "[i]n these circumstances, the parties have implicitly consented to having New York privilege law apply and this implied consent is sufficient to establish choice of law on the privilege question."*Allied Irish Banks v. Bank of Am. ., N.A.*, 240 F.R.D. 96, 102 (S.D.N.Y.2007).*See also Wall v. CSX Transp., Inc.*, 471 F.3d 410, 415 (2d Cir.2006) (finding that, under New York's conflict of laws approach, "the first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved").

"[T]he attorney-client privilege is one of the 'oldest recognized privileges for confidential communication' and it is intended to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice .' " *Collins v. City of New York*, No. 11 CV 766, 2012 WL 3011028, at *3 (E.D.N.Y. July 23, 2012) (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998)) (internal citations omitted).*See also D'Alessio v. Gilberg*, 205 A.D.2d 8, 10, 617 N.Y.S.2d 484, 485 (2d Dep't 1994) (finding that the purpose of the attorney-client privilege "is to ensure that one seeking legal advice will be able to confide fully and freely in his attorney").

***5** The attorney-client privilege protects "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice."*In re County of Erie,* 473 F.3d 413, 419 (2d Cir.2007); *Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc.,* No. 12 CV 1579, 2013 WL 1195545, at *9 (S.D .N.Y. Mar. 25, 2013) (applying New York law to a party's claim of attorney-client privilege)."Generally, communications made between a defendant and counsel in the known presence of a third party are not privileged."*Allied Irish Banks, P.L.C. v. Bank of Am., N.A.,* 252 F.R.D. at 168 (citing *People v. Osorio,* 75 N.Y.2d 80, 84, 550 N.Y.S.2d 612, 549 N.E.2d 1183, 1185 (1989)).

The privilege may be expanded to those assisting a lawyer in representing a client, such as public relations consultants and agents. *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.,* No. 02 CV 7955, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003); *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness,* 265 F.Supp.2d 321, 325 (S.D.N.Y.2003) (finding that the attorney-client privilege may extend, in appropriate circumstances, to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services). However, it is not sufficient that communications with a PR Firm "prove important to an attorney's legal advice to a client."*Calvin Klein Trademark Trust v. Wachner,* 198 F.R.D. 53, 54 (S.D.N.Y.2000). Instead, the "critical inquiry" is whether the communication with the person assisting the lawyer was made in confidence and for the purpose of obtaining legal advice. *Allied Irish Banks PT C v. Bank of Am., N.A.,* 252 F.R.D. at 168 (citing *Spectrum Sys. Int'l Corp. v. Chem. Bank,* 78 N.Y.2d 371, 379, 575 N.Y.S.2d 809, 581 N.E.2d 1055 (1991)); *Hangh v. Schroder Inv. Mgmt. N. Am. Inc.,* 2003 WL 21998674, at *3. *See also In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness,* 265 F.Supp.2d at 325 (holding that communications with a PR Firm were protected by the attorney-client privilege where the public relations consulting firm was hired to assist counsel to create a climate in which prosecutors might feel freer not to indict the client)."The communication itself must be primarily or predominantly of a legal character."*Allied Irish Banks v. Bank of Am., N.A.,* 240 F.R.D. at 103. Expansions should be "cautiously extended." *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.,* 2003 WL 21998674, at *3 (citing *United States v. Weissman,* 195 F.3d 96, 100 (2d Cir.1999)).*See also Allied Irish Banks v. Bank of Am., N.A.,* 240 F.R.D. at 103 (finding that the attorney client privilege is not waived if involvement of a third party is "nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications"). If the advice sought is that of a non-legal professional rather than a lawyer, no privilege exists. *Id.* (citing *United States v. Kovel,* 296 F.2d 918, 922 (2d Cir.1961)).

***6** McNamee argues that communications with Householder and Hendricks are not protected by the attorney-client privilege, because such communications were not "necessary so that counsel could provide Clemens with legal advice."(Pl.'s Mem. at 10, 16 (citing *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.,* 2003 WL 21998674, at *3)). In response, Clemens claims that Householder was an agent or employee of Rusty Hardin, and Householder's role "was limited to the confidential assistance of defense counsel."(Def.'s Mem. at 10- 11). Defendant likens Randy Hendricks to "in-house counsel" for defendant Clemens, and claims that Hendricks was not acting as a sports agent to Clemens during the relevant time period. (Def.'s Mem. at 14–15).

However, for the vast majority of documents provided for *in camera* review, defendant has not shown that Householder or Hendricks performed anything other than standard public relations or agent services for Clemens, nor has he shown that his communications with either were necessary so that Rusty Hardin could provide Clemens with legal advice. *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.,* 2003 WL 21998674, at *3. Instead, the Court's *in camera* review revealed that the majority of the communications with both Householder and Hendricks facilitated the development of a public relations campaign and media strategy primarily aimed at protecting Clemens' public image and reputation in the face of allegations that he used performance-enhancing drugs. [11] This is decidedly different from the use of the public relations firm in *In re Grand Jury Subpoenas,* where the firm was hired by plaintiff's counsel with the specific aim of reducing public pressure on prosecutors and regulators to bring charges. 265 F.Supp.2d at 323. The use of the PR firm was thus directly related to litigation strategy and consequently protected by attorney-client privilege. 265 F.Supp.2d at 323, 331. No such showing has been made here.

11 For example, certain emails from Householder to Rusty Hardin suggest contacting reporters and columnists who might be sympathetic to Clemens. Similarly, a series of emails from Hendricks to Rusty Hardin, Householder

and others discusses whether Clemens should agree to a televised interview with a specific reporter.

Furthermore, although some emails reviewed by the Court potentially discuss pending legal proceedings and the risks of litigation, only a small number of documents could even remotely be considered privileged and Clemens has failed to provide adequate background or context (in the privilege log or otherwise) to demonstrate to the Court that the questionable documents are worthy of protection. Given the lack of clarity in the privilege log and the emails themselves, it is impossible to determine the specific purpose of many of the documents, [12] and, for the vast majority of emails that potentially relate to litigation, most seem designed to manage the public's perception of Clemens as opposed to discussing legal strategy. Without more information as to the relationship of these communications to the development of litigation strategy, defendant has failed to fulfil his burden to show that these communications were made for the purpose of obtaining legal advice or because of litigation. Moreover, it was counsel's responsibility to identify the potentially privileged documents scattered throughout a large number of unprivileged documents, rather than to submit a blanket privilege claim over broad categories of communications, many of which are clearly not privileged. Defendant's failure to narrow the scope of his privilege claims is troubling to the Court.

12 For example, an email from Andy Drumheller to Randy Hendricks and others, dated September 28, 2010, contains a draft memorandum summarizing a conversation with an attorney regarding the federal investigation of performance enhancing drugs in Major League Baseball.

*7 Defendant's "conclusory descriptions" of the role played by Householder and Hendricks "fail to bring the [documents at issue] within the ambit of the attorney-client privilege."*Haugh v. Schroder Inv. Mgmt. N. Am. Inc.,* 2003 WL 21998674, at *3. Accordingly, the Court finds that the communications with Householder and Hendricks not protected by the attorney-client privilege.

2. *Work Product Protection*

Defendant also claims that the work product protection applies to communications with Householder and Hendricks. "While state law governs the question of attorney-client privilege in a diversity action, federal law governs the applicability of the work product doctrine."*Egiazaryan v. Zalmayev,* 290 F.R.D. 421, 2013 WL 945462, at *11: *Danza v. Costco Wholesale Corp.,* No. 11 CV 4306, 2012 WL 832289, at *1 (E.D.N.Y. Mar. 12, 2012); *Allied Irish Banks, P.L.C. v. Bank of Am., N.A.,* 252 F.R.D. at 173 (citing *Weber v. Paduano,* No. 02 CV 3392, 2003 WL 161340, at *3 (S.D.N.Y. Jan. 22, 2003)).Rule 26(b)(3) of the Federal Rules of Civil Procedure provides the general rule that material prepared by or at the request of an attorney in anticipation of litigation is not subject to discovery. *See*Fed.R.Civ.P. 26(b)(3); *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2.2002,* 318 F.3d 379, 383 (2d Cir.2002); *A Michael's Piano, Inc. v. Fed. Trade Comm'n,* 18 F.3d 138, 146 (2d Cir.) (quoting *Hickman v. Taylor,* 328 U.S. 495, 510–11 (1947)).*cert. denied,*513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d 490 (1994).

To invoke the work product doctrine, the party withholding discovery must show that the withheld material is: 1) a document or tangible thing; 2) that was prepared in anticipation of litigation; and 3) was prepared by or for a party, or by his representative. *Allied Irish Banks, P.L.C. v. Bank of Am., N.A.,* 252 F.R.D. at 173 (holding that the work product protection was inapplicable because the withholding party had not shown that it "actually anticipated litigation" at the time of the creation of the documents); *OneBeacon Ins. Co. v. Forman Int'l. Ltd.,* 2006 WL 3771010, at *4 (finding that to invoke the work product protection, "a party must show that the documents were prepared principally or exclusively to assist in anticipated or ongoing litigation"). The protection is not available for documents "that would have been created in essentially the same form irrespective of litigation."*Allied Irish Banks, P.L.C. v. Bank of Am., N.A.,* 252 F.R.D. at 173 (citing *United States v. Adlman,* 134 F.3d 1194 (2d Cir.1998) (noting that the withholding party had not shown that the documents at issue were prepared *"because of* the prospect of [ ] litigation") (emphasis in the original).

McNamee argues that the work-product protection is inapplicable to communications with both Householder and Hendricks, because the documents at issue were not prepared "because of" anticipated litigation or at the behest of counsel. (Reply [13] at 4, 8 (citing *United States v. Adlman,* 134 F.3d at 1203); Pl.'s Mem. at 11, 17–18 (citing *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002,* 318 F.3d at 383)). In response, Clemens claims that communications with Householder and Hendricks are "worthy of protection" "for the same reason"—namely, that they were retained "to offer guidance and advice in anticipation of filing and defending lawsuits and Congressional inquiries."(Def.'s Mem. at 12, 15).

13 Citations to "Reply" refer to Plaintiff's Reply Memorandum of Law in Further Support of Motion to Compel Discovery, dated August 14, 2013.

***8** Defendant has failed to show that the work-product doctrine protects the documents at issue here. Based on the Court's *in camera* review of the records, the topic of litigation strategy is rarely mentioned and in the rare instances when it is brought up, it is often contained within communications predominately focused on public relations and media strategy. Although the communications sought may have ultimately "played an important role" in Rusty Hardin's litigation strategy, "as a general matter public relations advice, even if it bears on anticipated litigation, falls outside the ambit of protection of the so-called 'work product' doctrine.... That is because the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally."*Calvin Klein Trademark Trust v. Wachner,* 198 F.R.D. at 55 (citing *United States v. Adlman,* 68 F.3d at 1501); *Egiazaryan v. Zalmayev,* 290 F.R.D. 421, at *12. The Court's review of the withheld documents reveal that they deal almost exclusively with the latter. [14]

14 For example, in an email from Hendricks to Rusty Hardin and others, Hendricks discusses the possibility of future litigation as a means of preserving Clemens' public image in the face of negative publicity. Similarly, in an email from Householder to Rusty Hardin, Hendricks, others, Householder proposes a time line for filing suit, publicizing the suit, and thereby driving public viewers to an evening talk show featuring Clemens.

Accordingly, the work product doctrine is inapplicable to most of the documents at issue. Therefore, having reviewed the 900 plus pages of documents *in camera* and considered the parties' arguments, the Court grants plaintiff's motion to compel production.

C. *Financial Documents*

Plaintiff seeks financial information regarding Clemens' net worth, claiming that this information is relevant to plaintiff's claim for punitive damages. (Pl.'s Mem. at 7, 18 (citing *Vasbinder v. Scott,* 976 F.2d 118, 121 (2d Cir.1992))). Although defendant Clemens "reserves his right to object to the breadth of this request and the relevance of requested materials," at this time, the parties' only dispute is whether the discovery plaintiff seeks is premature in light of defendant's intention to file a motion for summary judgment motion upon the close of discovery. (Def.'s Mem. at 17).

"Courts in this circuit are split on the issue of allowing pretrial disclosure of financial information relevant to a determination of punitive damages. Some permit it. Others have found that such disclosure is premature."*Pasternak v. Dow Kim,* 275 F.R.D. 461, 463 (S.D.N.Y.2011) (quoting *Copantitla v. Fiskardo Estiatorio, Inc.,* 09 CV 1608, 2010 WL 1327921, at *16 (S.D.N.Y. Apr.5, 2010)); *see also Hazeldine v. Beverage Media, Ltd.,* No. 94 CV 3466, 1997 WL 362229, at *2 (S.D.N.Y. June 27, 1997) (noting that the case law on the timing and scope of financial discovery relative to a punitive damages claim is "somewhat conflicting").

Several courts have found that "pre-trial financial discovery and a bifurcated trial is the more efficient method of managing a trial involving a punitive damages claim."*Hazeldine v. Beverage Media, Ltd.,* No. 94 CV 3466, 1997 WL 362229, at *3; *Open Housing Center Inc. v. Kings Highway Realty,* No. 93 CV 766, 1993 U.S. Dist. LEXIS 15927, at *8 (Nov. 8, 1993 E.D.N.Y.) (allowing pre-trial discovery of financial information in an expedited trial); *Tillery v. Lynn,* 607 F.Supp. 399, 402 (S.D.N.Y.1985) (allowing discovery of financial information before a bifurcated trial, but after denial of a motion for summary judgment). More recent cases, however, have found that pre-trial discovery of financial information is premature where the documents sought are "highly sensitive and confidential" and where "the need for disclosure may be abrogated by motion."*See Pasternak v. Dow Kim,* 275 F.R.D. at 463; *Copantitla v. Fiskardo Estiatorio, Inc.* 2010 WL 1327921, at *16 (declining to order production of financial information where it was "conceivable" that a summary judgment motion would "abrogat[e] the need for disclosure" of "highly confidential information").

***9** The financial information sought here is clearly sensitive and confidential, and Clemens has indicated that he intends to file a motion for summary judgment which may negate the need for disclosure. Under the circumstances of this case, the Court finds *Pasternak* and *Copantitla* persuasive, and finds that discovery of financial information regarding Clemens' net worth is premature. Accordingly, plaintiff's motion to compel discovery of documents relating to defendant's net worth is denied at this time, with leave to re-file after defendant's motion for summary judgment is decided.

D. *Whether all documents have been produced*

On August 19, 2013, defendant submitted a letter along with the documents provided for *in camera* review. Defendant's letter indicates that "some, but not all" confidential communications with Randy Hendricks have been produced to the Court. (Def.'s Let. [15] at 1). Defendant claims that a search of Rusty Hardin's email server is being performed, and that, if the Court finds it necessary, defendant will require additional time to produce all of the potentially responsive emails. (*Id.* at 2). In response, plaintiff complains that not all potentially responsive documents have been produced and argues that Randy Hendrick's email server should also be searched for responsive documents. (Pl.'s Let. [16] at 1). Plaintiff also expresses concern that defendant has only produced communications that he had "directly" with Public Strategies, rather than "all communications with Public Strategies regardless of whether Public Strategies was in the 'to,' 'from,' or 'CC' fields."(*Id.* at 2).

15 Citations to "Def.'s Let." refer to defendant's letter accompanying documents submitted for *in camera* review, dated August 19, 2013.

16 Citations to "Pl.'s Let." refer to plaintiff's letter to the Court, dated August 20, 2013.

Defendant is directed to clarify whether he has produced all potentially responsive documents to the plaintiff. If there are any others, defendant is to explain what they are and why they should not also be produced based on this Order's findings.

CONCLUSION

For the reasons stated herein, defendant is directed to produce all documents responsive to plaintiff's Document Requests 55 and 57 by **September 30, 2013.**Financial documents responsive to Request 62 need not be produced at this time, but plaintiff may renew his motion to compel such documents after defendant's proposed motion for summary judgment is resolved.

Furthermore, defendant Clemens has waived his claims of attorney privilege and work product protection for all documents contained in the Hendricks and Householder *in camera* files by failing to produce an adequate privilege log and accordingly defendant must provide both files to plaintiff McNamee.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 6572899

End of Document

EXHIBIT 4

2008 WL 2338552
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina.

In re: NEW YORK RENU WITH MOISTURELOC PRODUCT LIABILITY LITIGATION
This Document Applies to All Cases
In re: BAUSCH & LOMB CONTACT LENS SOLUTION PRODUCT LIABILITY LITIGATION
This Document Applies to All Cases

No. MDL 1785, CA 2:06-MN-77777-DCN. | May 8, 2008.

MEMORANDUM OPINION AND ORDER ON DOCUMENTS ASSERTED AS PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR AS WORK PRODUCT

CAPRA, J.

***1** In this litigation, Defendant Bausch & Lomb has refused to produce a number of otherwise responsive documents on the ground that they are protected by the attorney-client privilege or the work product doctrine. This order involves the "first wave" of documents that Bausch & Lomb claims are so protected. The parties are currently working through a "second wave" of documents for the Special Master's consideration.

The documents that are subject to this Order have been set forth in exhibits to an affidavit by Robert Bailey, Esq., Vice President and General Counsel for Bausch & Lomb. The Order follows the exhibit form as presented and as argued by the parties.

I have reviewed the pertinent case law and the extensive written submissions by the parties. I also entertained oral argument on some of the more difficult legal questions presented by these exhibits. What follows is a short discussion of the pertinent case law, and a justification for the orders. Because there is a need for expedition, the case law discussion is truncated.

In evaluating the privilege claims, I applied four fundamental legal principles:

1) Defendant, as the party invoking the privilege, has the burden of showing that the requirements of the privilege are met. *See, e.g., United States v. Landof,* 591 F.2d 36 (9th Cir.1978) (as the privilege is in derogation of the search for truth, the party who seeks to invoke it has the burden of establishing it).

2) Intra-corporate communications to counsel may fall within the privilege if the predominant intent is to seek legal advice. *United States v. IBM,* 66 F.R.D. 206, 212-13 (S.D.N.Y.1974) (applying the test of predominant intent).

3) Intra-corporate communications to and from counsel can retain a privilege if disclosure is limited to those who have a "need to know" the advice of counsel; the company's burden "is to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein."*Federal Trade Comm'n v. GlaxoSmithKline,* 294 F.3d 141, 147-48 (D.C.Cir.2002).

4) As this case is in diversity, the applicable privilege law is *state* law. See Fed.R.Evid. 501. And of course state privilege law applies to the actions in New York state court. Choice of law principles appear to point to New York privilege law as determinative, as that is the location of defendant's principal place of business. Federal courts have recognized that the New York law of privilege is substantially similar to federal common law. *See, e.g., NXIVM Corp. v. O'Hara,* 241 F.R.D. 109, 124 (N.D.N.Y.2007) ("the distinction between New York and federal law on attorney-client privilege is quite indistinguishable, as the law intersects in all of its facets, and are viewed interchangeably"); *Bank of Am., N.A. v. Terra Nova Ins. Co. Ltd.,* 211 F.Supp.2d 493 (S.D.N.Y.2002) ("New York law governing attorney-client privilege is generally similar to accepted federal doctrine."). This statement is helpful when the federal common law is itself clear and undisputed. But a difficulty arises where the federal courts are in dispute about the federal common law, and there appears to be no clear state law on the subject. Where such a situation arises, I have chosen the result that appears most consistent with the approach to privilege questions undertaken by the New York Court of Appeals; that approach is to use a utilitarian analysis to provide protection to communications to and from counsel that would not be made in absence of

the privilege. *See generally* Martin & Capra, New York Evidence Handbook § 5.2 (2d ed.2003).

Exhibit 1 (BL100370591)

***2** This is an email from Alan Wilson, Director of Vision Care and Special Project Manager for the Fusarium investigation, to corporate counsel and other high-level personnel, concerning a possible presentation to the FDA. It is seeking a combination of business and legal advice, but it is fair to assume that the predominant reason for sending it to corporate counsel is to seek legal advice. The fact that Wilson was probably seeking business advice from the non-legal corporate personnel does not lose the privilege if the reason for communicating *with the lawyer* is to obtain the lawyer's legal viewpoint.*Federal Trade Comm'n v. GlaxoSmithKline,* 294 F.3d 141, 147-48 (D.C.Cir.2002). Moreover, all the recipients were those who had a "need to know" counsel's advice, and so the privilege was not lost by disclosure to these personnel.

It is notable that legal advice may be sought implicitly or explicitly. *See, e.g., In re CV Therapeutics, Inc. Sec. Litig.,* 2006 U.S. Dist. LEXIS 41568 at *12-13, 2006 WL 1699536 (N.D.Cal.):

> The Court looks to the context of the communication and content of the document to determine whether a request for legal advice is in fact fairly implied, taking into account the facts surrounding the creation of the document and the nature of the document. The attorney-client privilege protects documents which "involve either client communications intended to keep the attorney apprised of continuing business developments, with an implied request for legal advice based thereon, or self-initiated attorney communications intended to keep the client posted on legal developments and implications, including implications of client activity noticed by the attorney but with regard to which no written request for advice from the client has been found."*Jack Winter, Inc. v. Koratron Co. .,* 54 F.R.D. 44, 46 (N.D.Cal.1971).

The email from Wilson, fairly read, implicitly seeks legal advice from Mr. Bailey.

Privilege claim sustained.

Exhibit 2 (BL105793290-318)

This is a draft of a powerpoint presentation that Bausch & Lomb was preparing in order to make a presentation to the FDA. The final version of the powerpoint presentation has already been produced, as have other drafts. Bausch & Lomb argues that this particular draft is privileged because it was submitted to in-house counsel for his legal advice on whether any changes to the draft should be made before it would be presented to the FDA.

The federal common law on drafts submitted to counsel is in conflict. The split of authority is discussed in *Schenet v. Anderson,* 687 F.Supp. 1280, 1282-4 (E.D.Mich.1988):

> A split of authority exists regarding whether information disclosed to an attorney with the intention that the attorney draft a document to be released to third parties is protected by the attorney-client privilege. Plaintiff cites *In re Grand Jury Proceedings,* 727 F.2d 1352, 1355 (4th Cir.1984) as support for its position [that the draft is not privileged]. The Fourth Circuit held, in that case, that the attorney-client privilege did not apply to information communicated by the client to the attorney with the understanding or intention that the communication was to be made known to others (e.g., in the form of a stock offering brochure or an income tax return.) *In re Grand Jury* at 1356.
>
> ***3** "[A] statement or communication made by a client to his attorney with the intent and purpose that it be communicated to others is not privileged."Nor is the loss of the privilege confined to "the particular words used to express the communication's content" but extends "to the substance of a communication," since the disclosure of " 'any significant part' of a communication waives the privilege" and requires the attorney to disclose "the details underlying the data which was to be published ."
>
> *In re Grand Jury* at 1356.

In *In re Grand Jury,* the government subpoenaed an attorney to testify before a grand jury regarding conversations with his client made in connection with the preparation of a prospectus for a proposed private placement of limited partnership interests. (The proposed prospectus was never issued.). The *In re Grand Jury* court held that the information given to the attorney was to assist in preparing a document to be seen by others, and was not intended to be kept confidential. Thus, the attorney-client privilege was not applicable.

Subsequently, the Fourth Circuit limited its holding in *In re Grand Jury,* in *U.S. v. (Under Seal),* 748 F.2d

871, 875 (4th Cir.1984). The *(Under Seal)* court noted that, while the existence of the attorney-client relationship does not, by itself, lead to a presumption that attorney-client communications are confidential, "a layman does not expect his attorney to routinely reveal all that his client tells him. Rather than look to the existence of the attorney-client relationship or to the existence or absence of a specific request for confidentiality, we must look to the services which the attorney has been employed to provide, and determine if those services would reasonably be expected to entail the publication of the clients' communications."*U.S. v. (Under Seal)* at 875.The court distinguished *In re Grand Jury* from the case before it, because, in *In re Grand Jury,* the client had decided to publish a prospectus before approaching their attorneys, thus indicating that the attorney had been retained to convey information to third parties, not to provide legal advice for the client's guidance. In *(Under Seal),* the client had retained an attorney to investigate the possibility of filing papers, which if filed, would be disclosed to third parties. The court went on to hold that it is only when the client authorizes the attorney to perform services which demonstrate the client's intent to have his communications published that the client will lose the right to assert the privilege as to the subject matter of those communications.

Other courts have extended the attorney-client privilege to cover all information not actually published to third parties, even if the information were disclosed to an attorney in connection with the preparation of a document to be issued to a third party. *U.S. v. Schlegel,* 313 F.Supp. 177, 179 (D.Neb.1970). The *Schlegel* court stated:

> ***4** [A] ... more realistic rule would be that the client intends that only as much of the information will be conveyed to the [third party] as the attorney concludes should be, and ultimately is, sent to the [third party]. In short, whatever is finally sent to the [third party] is what matches the client's intent. The fact that the client has relinquished to his attorney the making of the decision of what needs to be included within the tax return should not enlarge his intent or decrease the scope of the privilege. A different rule would not really support the purpose of the privilege, which is to encourage free disclosure of information by the client to the attorney. If the client, not knowing what the attorney would advise be sent or would choose to send to the [third-party], were to think that all information given to his attorney would lose its confidential status by the act of delivery to his attorney, the tendency would be to withhold information which he, without advice of counsel, would suppose was detrimental to him, the client. Thus the attorney, the very one professionally capable of evaluating information, could be of no help in evaluating it, because he would not receive it.

The *Schlegel* rule has been adopted by several other courts: *S.E.C. v. Texas International Airlines, Inc.,* 29 F.R.Serv.2d 408 (D.D.C.1979); *U.S. v. Schmidt,* 360 F.Supp. 339, 350, n. 35 (M.D.Penn.1973); *U.S. v. Willis,* 565 F.Supp. 1186, 1193 (S.D.Iowa 1983).

The *Schenet* court opted for the *Schlegel* rule protecting drafts to the extent that the information in those drafts was not ultimately disclosed:

> In the Court's opinion, the *Schlegel* rule encourages clients to disclose information freely to their attorneys, and thus is most consistent with the purpose of the attorney-client privilege. Therefore, the Court declines to follow the Fourth Circuit's opinion in *In re Grand Jury* (as modified by *U.S. v. (Under Seal),* and adopts the holding of the court in *U.S. v. Schlegel,* 313 F.Supp. 177, 179 (D.Neb.1970). Accordingly, the attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all documents reflecting such information, *to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons.*With regard to preliminary drafts of documents intended to be made public, the court holds that preliminary drafts may be protected by the attorney-client privilege. Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney-client privilege. *The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties. S.E.C. v.*

> *Texas International Airlines, Inc.*, 29 F.R.Serv.2d 408, 410 (D.D.C.1979); *U.S. v. Willis*, 565 F.Supp. 1186, 1193 (S.D.Iowa 1983). (emphases added).

***5** At least one court has taken the position that an entire draft remains privileged if it is given to counsel with the proviso that counsel will provide suggestions on the draft. The court in *Macario v. Pratt & Whitney Canada, Inc.*, 1991 U.S. Dist. LEXIS 597, 1991 WL 1004 (E.D.Pa.), held that a draft was protected in its entirety because "[n]o evidence has been presented to indicate that at the time the second draft was submitted to [the lawyer] for his review, Pratt & Whitney had any intention to publish the release *in the form provided.*However, the critical issue in determining whether the document was to remain confidential is whether Pratt & Whitney intended that the draft was to be released *in the form given to [the lawyer] for his review.*Because the release was contingent on [the lawyer's] approval and subject to his revision, it is reasonable to assume that Pratt & Whitney intended the document to remain confidential until a final draft was achieved, and thus the second draft would fall within the attorney-client privilege."(emphases added).

The New York law on drafts is unclear. New York of course accepts the unremarkable proposition that if a client communicates to the lawyer with the intent that the communication is to be released to the public, that communication is not privileged. See Martin & Capra, *supra* at 318.But I have found no cases on the specific question of whether drafts are protected when they are given to counsel with the intent that counsel would provide suggestions on what should be cut from (or added to) the draft before it is released to the public. Weinstein Korn & Miller provide the following cryptic statements at ¶ 4503.18:

> A common example of communications which are not privileged because it is intended that they be disclosed to third persons are the communications made in the preparation of legal documents such as contracts, deeds and complaints. Only that information which the client knew or should have known would be disclosed is outside the privilege; other matter remains privileged

But the cases cited do not involve drafts and are more in the nature of general statements that there is no privilege if the client anticipates that the communication will be made public.

The question is which law to apply regarding drafts. Under the Fourth Circuit law, and despite defendant's argument to the contrary, the draft is unprivileged in its entirety, as are any pertinent lawyer notes. This is because defendant made the decision to present the powerpoint to the FDA, in some form, by the time the draft was sent to Mr. Bailey. Defendant certainly has not proved otherwise. But the problem with the Fourth Circuit view is that it appears to look at the client's intent to publish in an undifferentiated way. A client may have decided to publish *some* information in *some* form, yet the precise form and content could well be subject to review by counsel. The Fourth Circuit law does not provide protection in the more nuanced situation in which the client is going to make a public disclosure but submits it to the lawyer in order to determine whether the final form is consistent with the client's legal interest. Yet that is the very situation in which the client ought to be able to seek confidential advice of counsel; the Fourth Circuit rule thus deters the client from communicating with counsel about what should or should not go into a public statement, and therefore undermines the attorney-client privilege. Because the Fourth Circuit view deters communications that are necessary to the free flow of information between client and attorney, it is contrary to the underlying principles of the attorney-client privilege under New York law.

***6** On the other hand, the result in *Macario, supra*-that the entire draft is protected by the privilege if given to the lawyer for a legal-advice review-is overprotective. It would mean that the draft would be protected even if the lawyer made no changes, and even as to parts of the draft which were understand by both attorney and the client to be an inevitable part of the public presentation. The *Macario* rule allows the client to shield an unprotected document simply by referring it to the lawyer. As such it is contrary to the limitations inherent in the privilege. *See In re Bekins Record Storage Co.*, 62 N.Y.2d 324, 476 N.Y.S.2d 806, 465 N.E.2d 345 (1984) (preexisting documents compellable if in the hands of the client do not become privileged when referred to an attorney).

The compromise view is that of *Schenet/Schlegel*-if the draft is sent to the lawyer for a legal-advice review, then any statements in the draft are privileged to the extent that they are not ultimately revealed to the public. Put the other way, only the portions of the draft that are ultimately disclosed

in the final document are subject to disclosure. The problem with this view is that it requires a line-by-line redaction of the draft. Arguably the costs of a line-by-line redaction might be considerable if the case involves hundreds of drafts. Yet despite its costs, the *Schenet/Schegel* view is the one most consistent with the policy of the privilege. It allows and encourages the client to seek legal advice on the propriety of language in a draft, without overprotecting the draft in such a way that its disclosure is barred even as to portions that are clearly intended for public disclosure. As the *Schenet/ Schlegel* view is most consistent with the policies of the privilege, I conclude that it is most consistent with the New York Court of Appeals' approach to privilege (especially the corporate attorney-client privilege) in such cases as *Rossi v. Blue Cross & Blue Shield,* 73 N.Y.2d 588, 542 N.Y.S.2d 508, 540 N.E.2d 703 (1989) and *Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 N.Y.2d 371, 575 N.Y.S.2d 809, 581 N.E.2d 1055 (1991).

Applying the *Schenet/Schlegel* view, I find first that the draft powerpoint presentation was referred to Mr. Bailey with the implicit request for legal advice. Therefore, the portions of the draft powerpoint that were not disclosed in the final draft may be redacted. The portions that were ultimately revealed to the FDA are not privileged. Defendant must therefore produce the draft, but may make redactions in accordance with this opinion and order.

Privilege claim sustained in part and denied in part.

Exhibit 3 (BL100101027)

This exhibit consists of two-email strings regarding a contact with the FDA about a planned public statement about MoistureLoc. The first email is from Barbara Kelley to Ron Zarella, Bob Bailey, and others, including two public relations consultants from Hill & Knowlton, a public relations firm employed by Bausch & Lomb. Plaintiffs contend that any privilege is lost because of the disclosure to Hill & Knowlton. For the reasons discussed below, I agree with plaintiffs and accordingly find that this email is not privileged and must be produced in its entirety.

*7 Communications to non-lawyers can be brought within the privilege under the *Kovel* doctrine-the court in *United States v. Kovel,* 296 F.2d 918, 921 (2d Cir.1961) held that confidential communications to non-lawyers could be protected by the privilege if the non-lawyer's services are necessary to the legal representation. But the *Kovel* protection is applicable only if the services performed by the non-lawyer are necessary to promote the lawyer's effectiveness; it is not enough that the services are beneficial to the client in some way unrelated to the legal services of the lawyer. Id at 922 (the "communication must be made in confidence for the purpose of obtaining legal advice from the lawyer.... If what is sought is not legal advice but only accounting services ... or if the advice sought is the accountant's rather than the lawyer's, no privilege exists."). *See generally NXIVM Corp. v. O'Hara,* 241 F.R.D. 109 (S.D.N.Y.2007) ("the extension of the privilege to non-lawyer's communication is to be narrowly construed. If the purpose of the third party's participation is to improve the comprehension of the communication between attorney and client, then the privilege will prevail."). *See also United States v. Ackert,* 169 F.3d 136, 139 (2d Cir.1999) (ruling that the communication "between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client").

Courts are in some dispute on whether public relations firms are "necessary to the representation" so as to fall within the *Kovel* protection. Most courts agree, however, that basic public relations advice, from a consultant hired by the corporate client, is not within the privilege. The court in *NXIVM, supra* at 141, surveys this basic case law:

> This legal notion that even a public relations firm must serve as some sort of "translator," much like the accountant in *Kovel,* was visited in *Calvin Klein Trademark Trust v. Wachner,* 198 F.R.D. 53 (S.D.N.Y.2000). Much like the services being rendered here, the public relations firm in *Calvin Klein* was found to have simply provided ordinary public relations advice and assisted counsel in "assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client's own communications that could otherwise be appreciated in the rendering of legal advice."198 F.R.D. at 54-55 (citing *United States v. Ackert,* 169 F.3d at 139). Thus, no attorney client privilege was extended to its communications with either the client or the firm. Id. at 53-55.A similar result occurred in *Haugh v. Schroder Inv. Mgmt. North Am. Inc.,* 2003 U.S. Dist. LEXIS 14586, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003), wherein the court found that the record did not show the public relations specialist performed anything other than standard public relations services for the plaintiff, and noting that a media campaign is not a legal strategy. See also *De Beers LV Trademark Ltd. v. De Beers Diamond Syndicate Inc.,* 2006 U.S. Dist. LEXIS 6091, 2006 WL 357825 (S.D.N.Y. Feb.15, 2006).

*8 Judge Cote in *Haugh v. Schroder Inv. Mgmt. North Am. Inc.*, 2003 U.S. Dist. LEXIS 14586, 2003 WL 21998674, at *8 (S.D.N.Y.2003) summed up the basic law, and held that disclosure to a public relations firm lost the privilege, in the following passage:

> Plaintiff has not shown that Murray [the p.r. consultant] performed anything other than standard public relations services for Haugh, and more importantly, she has not shown that her communications with Murray or Murray's with Arkin [the lawyer] were necessary so that Arkin could provide Haugh with legal advice. The conclusory descriptions of Murray's role supplied by plaintiff fail to bring the sixteen documents within the ambit of the attorney-client privilege. The documents transmitted from plaintiff to Murray and the one document from Murray to Arkin are consistent with the design of a public relations campaign. Plaintiff has not shown that Murray was "performing functions materially different from those that any ordinary public relations" advisor would perform. *Calvin Klein Trademark Trust v. Wachner et al.*, 198 F.R.D. 53, 55 (S.D.N.Y.2000). As such, Haugh's transmission of documents to Murray, even simultaneously with disclosure to former counsel, and Murray's transmission of a meeting agenda to Arkin, vitiates the application of the attorney-client privilege to these documents.

Judge Cote relied on the compelling point that "[a] media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice."

It is true that a few cases have found communications to public relations consultants to be within the attorney-client privilege. But those cases arise from unusual and extreme facts and do not involve the basic provision of public relations advice by a company retained by the client, as in the instant case. For example, in *In re Copper Market Antitrust Litig.*, 200 F.R.D. 13 (S.D.N.Y.2001), a foreign company found itself in the midst of a high profile scandal involving both regulatory and civil litigation aspects, and hired a public relations firm because it lacked experience both in English-speaking and in dealing with Western media. The public relations firm acted as the corporation's spokesperson when dealing with the Western press and conferred with the company's U.S. litigation counsel. Judge Swain upheld the attorney-client privilege claim, reasoning that the public relations firm, in the extreme circumstances of the case, was the functional equivalent of an in-house department of the corporation and thus part of the "client ." Obviously the facts of *Copper Market* do not approach those of this case, in which a public relations consulting firm provides basic consulting advice.

Likewise, the facts of *In re Grand Jury Subpoenas*, 265 F.Supp.2d 321 (S.D.N.Y.2003) are vastly different from the instant case. Judge Kaplan held that the privilege applied to a public relations consulting firm hired to assist counsel to create a climate in which prosecutors might feel freer not to indict the client. He concluded that this was an area in which counsel were presumably unskilled and that the task constituted "legal advice." As Judge Cote stated in *Haugh*:"There is no need here to determine whether *In re Grand Jury Subpoenas* was correctly decided."Bausch & Lomb has not identified with particularity any legal advice that required the assistance of a public relations consultant; Bailey's affidavit simply states, in conclusory fashion, that Hill & Knowlton's presence was "necessary." Bausch & Lomb has not, for example, identified any nexus between the consultant's work and the attorney's role in defending against possible litigation or a regulatory action or proceeding.

*9 I am most reluctant to rely on the broad applications in *Copper Market* and *In re Grand Jury Subpoenas* in light of the well-reasoned case law indicating that the privilege is lost when the corporate client communicates to an outside consultant, hired by the corporation, and providing nothing more than basic public relations advice. *See, e.g.*, Ann M. Murphy, *Spin Control and the High-Profile Client-Should the Attorney-Client Privilege Extend to Communications With Public Relations Consultants?*, 55 Syracuse L.Rev. 545 (2005) (concluding that "expanding the attorney-client privilege to communications with public relations consultants is inadvisable and against the interests of justice"). A conservative approach is, indeed, mandated by New York law, which appears to recognize the *Kovel* doctrine only in narrow circumstances in which the non-lawyer's services are absolutely necessary to effectuate the lawyer's legal services. *See, e.g., People v. Edney*, 39 N.Y.2d 620, 385 N.Y.S.2d 23, 350 N.E.2d 400 (1976).

Accordingly, the email from Barbara Kelley dated May 11, 2006 is not privileged because it was routed to employees of Hill & Knowlton. (If not for that routing, the email would be privileged because it was implicitly seeking Bob Bailey's legal advice on discussions with the FDA).

In contrast, the second email in the string, dated May 11, 2006 at 11:07 p.m., is privileged. It discusses the need to seek legal advice from Bob Bailey, and this email was *not* sent or routed to Hill & Knowlton.

Privilege claim sustained in part and denied in part.

Exhibit 4 (BL105792209)

Exhibit 4 is an email from Michael Santaluccia to outside counsel and Bob Bailey, as well as others with a "need to know" (*see Federal Trade Comm'n v. GlaxoSmithKline,* 294 F.3d 141, 147-48 (D.C.Cir.2002)), concerning communications with an FDA official about investigations respecting MoistureLoc. It is clear that at the time of the email, Bausch & Lomb faced a situation involving legal liability, and that discussion and interaction with the FDA was critical to Bausch & Lomb's legal position. I find that the request for legal advice is implicit in the email. *See Jack Winter, Inc. v. Koratron Co.,* 54 F.R.D. 44, 46 (N.D.Cal.1971) (implicit requests for legal advice in the corporate context can qualify for privilege protection). Accordingly, the email is privileged.

Privilege claim sustained.

Exhibit 5 (BL100879259)

This is an email string involving the drafting of a response to the Australian counterpart to the FDA, concerning Fusarium keratitis cases in Asia. The three emails in the string reference an attachment, which is the draft on which each of the email writers provides comments. Bausch & Lomb asserts that plaintiffs have not challenged its privilege claim as to the attachment (the draft response), and that the only challenge is to the emails themselves. But plaintiffs' memorandum in opposition to the Bailey affidavit, at 8, specifically contends that "drafts of material meant to be shown to third parties, such as the TGA, are not privileged."I therefore find that plaintiffs have sufficiently raised the issue of whether the draft itself is privileged-and I find, consistently with the discussion of Exhibit 2, that the draft is privileged only as to the statements and information not contained in the published document. The attachment must be produced with any redactions to be made in accordance with this Opinion and Order.

***10** As to the emails themselves, there are three. The first, dated February 26, 2006, at 1:20 a.m., is not sent or routed to a lawyer. But this does not necessarily mean that it is unprotected by the privilege. A number of cases hold that communications among non-lawyer corporate personnel are protected if the dominant intent is to prepare the information in order to get legal advice from the lawyer. *See, e.g., AT & T Corp. v. Microsoft Corp.,* 2003 U.S. Dist. LEXIS 8710, at *7-8 (N.D.Cal.):

> Communications between non-lawyer employees about matters which the parties intend to seek legal advice are likewise cloaked by attorney-client privilege.U.S. v. Chevron Texaco Corp., 241 F.Supp.2d 1065 (N.D.Cal.2002). The only question to consider is whether DSP intended to seek legal advice of any kind over the subject matter contained in the memoranda? See *Upjohn v. United States,* 449 U.S. 383, 396, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *In re Grand Jury,* 974 F.2d at 1071 fn. 2;*see also United States v. Chevron Corp.,* 1996 U.S. Dist. LEXIS 4154 at *5 (N.D.Cal.)....
>
> Communications containing information compiled by corporate employees for the purpose of seeking legal advice and later communicated to counsel are protected by attorney-client privilege. *Upjohn* at 394-95.As long as the legal implications were understood at the beginning at the inquiry and the communications were covered by a veil of confidentiality, then the privilege attaches. *See Upjohn,* at 394-95.

See also Santrade, LTD. v. General Electric Co., 150 F.R.D. 539, 543 (E.D.N.C.1993) ("A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds.").

The question, then, is whether the personnel involved in the first email in the string "intended to seek legal advice of any kind over the subject matter contained in the memoranda."While this is a close question, I find that there is an implicit understanding that a lawyer's review of the response to the Australian regulator will be necessary (as there were obvious legal ramifications to the Australian inquiry) and that the initial review by non-lawyers was appropriate before the lawyer's review. I also note that all the email recipients had a "need to know."

As to the second and third email in the string, these were 1) routed to Bailey, 2) implicitly seek his legal advice, and 3) sent only to those with a "need to know". Accordingly they are privileged. Plaintiffs argue that emails cannot be privileged if the lawyer is only "cc:d" on the email, as

opposed to a direct recipient. Such a limitation would be inconsistent with the way that emails are sent. Sending an email by "cc" is usually a question of convenience rather than an expression of some intent to delineate priorities. Moreover, given the law providing than an attorney need not be a recipient *at all* for the privilege to attach, it must surely be the case that a "cc" to an attorney can qualify for the privilege. *See generally Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35 (E.D.N.Y.1973) (privilege applied where lawyer indirectly receives copies of confidential documents).

***11** *Privilege claim sustained with respect to emails and sustained and denied in part with respect to attachment.*

Exhibit 6 (BL 100089266-BL100089276; BL 157420111; and BL 157420112-BL157420118)

The first challenged document is a draft script for investment analyst calls, explaining the decision to voluntarily recall Renu with MoistureLoc. It is dated May 13, 2006. This draft was sent to Bob Bailey and others with a need to know, for comments on the draft. As stated in the discussion of Exhibit 2, this draft is privileged only as to the statements and information not contained in the published document. The attachment must be produced with any redactions to be made in accordance with this Opinion and Order.

The second challenged document is an email dated May 15, 2006, clearly seeking legal advice from Bob Bailey. Other recipients had a "need to know." BL 157420111 is privileged.

The third challenged document is a draft of the script dated May 15, 2006. Once again, this draft is privileged only as to the statements and information not contained in the published document. The attachment must be produced with any redactions to be made in accordance with this Opinion and Order.

Privilege claim sustained in part and denied in part.

Exhibit 7 (BL105792809)

Exhibit 7 is an email relating to draft q & a's prepared in anticipation of the voluntary recall of ReNu with MoistureLoc. Two of the recipients are public relations consultants with Hill & Knowlton. For reasons discussed under Exhibit 3, this email is not privileged. There is no indication that Hill & Knowlton is providing anything other than ordinary public relations advice. Bausch & Lomb has not satisfied its burden of showing that Hill & Knowlton is necessary to the legal representation under *Kovel.*

Privilege claim denied.

Exhibit 8 (BL122438503-BL122438503A; BL105792872; BL105792873-BL105792878; BL105792879; BL105792880-BL105792881)

The first challenged document is a redacted email from Brian Levy, referring drafts to Bob Bailey and others, regarding proposed public communications. The redacted part of the email contains an implicit request for legal advice and provides information that would be helpful to Mr. Bailey in reviewing the document. The redacted material is privileged.

The attachments to the email are also challenged. Once again, these drafts are privileged only as to the statements and information not contained in the published documents. The attachments must be produced with any redactions to be made in accordance with this Opinion and Order.

BL122438503-BL122438503A-Privilege claim as to redaction in email sustained. Privilege claim as to attachments sustained in part and denied in part.

The remaining challenged documents correspond to the attachments to the Brian Levy email, i.e., the various drafts of planned public responses. For reasons stated immediately above, these drafts are privileged only as to the statements and information not contained in the published documents. The attachments must be produced with any redactions to be made in accordance with this Opinion and Order.

***12** *BL105792872; BL105792873-BL105792878; BL105792879; and BL105792880-BL105792881: Privilege claim sustained in part and denied in part.*

Exhibit 9 (BL134450950-BL134450961)

Exhibit 9 is an email string relating to Bausch & Lomb's response to patient complaints in Singapore. It has been produced to plaintiffs with multiple redactions.

All of the information in this email string was sent to employees of Hill & Knowlton. There is no indication that Hill & Knowlton was providing anything more than ordinary public relations advice. Bausch & Lomb has not established that communicating to Hill & Knowlton was necessary for the effectiveness of legal representation under *Kovel.*Therefore,

this email string must be produced to plaintiffs without redaction.

I note that the redaction on BL 134450952 was not sent to Hill & Knowlton; moreover, it contains an implicit request for legal advice. However, as Bausch & Lomb admits, the response to that email *is* sent to Hill & Knowlton, along with the previous email as part of the email string. Sending the email to Hill & Knowlton destroyed whatever privilege might have previously existed, for the same reason that any initial communication to Hill & Knowlton loses the privilege.

Privilege claim denied.

Exhibit 10 (BL134452241-BL134452245; and BL135539990-BL135539991)

Exhibit 10 contains two similar email strings relating to responses to patient complaints in Singapore. None of these emails were sent to Hill & Knowlton. All of the recipients of the email had a "need to know" legal advice that would be provided by the lawyer, in this case Mr. Eckman.

With respect to the first email string-BL 135539990-BL135539991-there is a clear request for legal advice, and reporting of information that a lawyer would find necessary in formulating a response to claimed injuries. Response to client complaints, and the possible litigation therefrom, is clearly in the nature of legal advice. See *Rossi v. Blue Cross & Blue Shield,* 73 N.Y.2d 588, 542 N.Y.S.2d 508, 540 N.E.2d 703 (1989) (communications to and from a lawyer in response to a complaint and threat of litigation are protected by the privilege).

BL 135539990-BL135539991-privilege claim sustained.

With respect to the second email string-BL134452241-BL134452245-these emails involve discussions about how to treat claims; even if these claims are not litigated, the processing of these claims clearly affects the legal position of the company as well as its strategy in defending litigated claims. Mr. Eckman is addressed directly and specifically, and provides legal advice. This email string is clearly privileged.

BL134452241-BL134452245-privilege claim sustained.

Exhibit 11 (BL134431726-BL134431729; BL134431723-BL134431725; BL134431718-BL134431719 BL 134450577-BL134450578)

Exhibit 11 contains four email chains discussing the arrangement for handling consumer returns of ReNu products. All of these emails were sent to employees of Hill & Knowlton and for reasons discussed above under Exhibit 3, these documents are not privileged.

***13** Investigation of Hill & Knowlton's contributions on these emails only fortifies the determination that Hill & Knowlton was not involved in furthering (much less necessary to providing) legal advice. In one email, Christina Cheang, an employee of Hill & Knowlton, suggests that optical shops should be used for redemptions, as a means of establishing good business relations with these shops. She has to be told, later on in the string (in an email from Arthur Ng dated February 28, 2006), that Bausch & Lomb cannot legally use optical shops for redemption. Clearly she is not necessary to providing legal advice-indeed she is providing business advice that is contrary to legal advice.

Privilege claim denied.

Exhibit 12 (BL134431951-BL134431952)

Exhibit 12 is a draft press release concerning Bausch & Lomb's consumer product returns for ReNu in Hong Kong. It was emailed to, among others, consultants for Hill & Knowlton. For reasons discussed above under Exhibit 3, the document is not privileged. I note that even if disclosure to Hill & Knowlton did not destroy the privilege, the draft would be protected only as to information not contained in the document published.

Privilege claim denied.

Exhibit 13 (BL103867295-BL103867314; BL144531274-BL144531285; and BL144528650-BL144528652)

Exhibit 13 is three versions of the same email string and discusses requests from the Hong Kong Department of Health. Part of the communications concern whether to obtain third-party verification of testing, and involvement of the Quantic Group. These email strings have been produced with redactions. My analysis will start at the beginning of the string.

Redaction on BL 144528650-Email from Alan Wilson to Cheng, Levy, et. al-there is no lawyer involved in this communication, but the redacted sentence clearly reports legal advice previously received. Everyone on the email has a "need to know." *Privilege claim as to redaction sustained.*

Redaction on BL 144531283-This is the same redaction on a different email string. All recipients have a need to know and the redacted information reflects legal advice. *Privilege claim as to redaction sustained.*

Redaction on BL 144531275-This is a specific request from Wilson for advice on a question that will have legal ramifications. All recipients have a need to know. Bob Bailey is copied and it is reasonable to assume that Wilson is seeking legal advice from Bailey and business advice from other corporate personnel. *Privilege claim as to redaction sustained.*

Redactions on BL 1445311274-There are two redactions on this page. The first in time is the body of an email from Jack Wong to Alan Horne, with Bob Bailey and others ccd. This is an explicit request for legal advice. All recipients have a need to know. *Privilege claim as to redaction sustained.*

The second redaction in time is an email from Bob Bailey to Jack Wong, Alan Wilson and others. It reports FDA and CDC statements about the decision to remove MoistureLoc from the market, and gives the urls for these statements. Despite the fact that a lawyer is directly involved in this communication, the reference to the public statements, along with web addresses, is not privileged. The lawyer is not giving legal advice, he is simply reporting information that any member of the public could know. See 2 Saltzburg, Martin & Capra, *Federal Rules of Evidence Manual* at 501-20 ("Where the attorney is merely acting as a conduit for information, i.e., as a messenger, the privilege is inapplicable."), and the cases cited therein.

***14** While Bailey's reference to, and quotation of, the FDA/CDC statements is not privileged, there are two parts of the email that do reflect legal advice and are privileged: the second sentence of the body of the email, and the last two sentences of the email, immediately after the quotations. I note that under New York law, confidential communications from the lawyer involving legal advice are protected by the privilege even if they do not reflect client communications. See CPLR 4503 (extending the privilege to communications "between the attorney ... and the client"); *Rossi, supra* (explicitly providing protection to communications by the lawyer to the client). The redaction of this information is therefore proper. *Privilege claim as to redaction sustained in part and denied in part.*

Redaction on BL103867311-This is the same redaction as in BL 144528650. *Privilege claim as to redaction sustained.*

Redactions on BL 103867302-There are two redactions on this page. The first in time is the same as the redaction on BL 1445311275: An email from Alan Wilson to Bob Bailey and others, seeking legal advice. *Privilege claim as to redaction sustained.*

The second redaction in time is the same as the first one on BL 1445311274-the body of an email from Jack Wong to Alan Horne, with Bob Bailey and others ccd. This is an explicit request for legal advice. All recipients have a need to know. *Privilege claim as to redaction sustained.*

Redactions on BL 103867301-There are two redactions on this page. The first in time is an email from Arthur Ng to Alan Wilson and Jack Wong, ccd to Bob Bailey and Raymond Cheng. It asks for advice on how to respond to the Hong Kong Department of Health. This is an explicit request for legal advice from Bob Bailey, even though business advice is probably being sought from the others. As such it is privileged. *Privilege claim as to redaction sustained.*

The second email in time (which actually begins on BL103867300) is from Raymond Cheng to James Barton and others. No lawyer is involved in this email. The email sends the prior email string and summarizes the issues on getting a third party endorsement. As such it seeks to implement legal advice and is privileged.. *See, e.g., Santrade, LTD. v. General Electric Co.*, 150 F.R.D. 539, 543 (E.D.N.C.1993) ("documents subject to the privilege may be transmitted between non-attorneys (especially individuals involved in corporate decision-making) so that the corporation may be properly informed of legal advice and act appropriately").*Privilege claim as to redaction sustained.*

Redaction on BL 103867300-This is an email from Tony Tan to James Barton and others. No lawyer is involved in this email. The first line of the email is not privileged as it simply states that Tan will not be able to join a conference call and "here's what I think we should expect ..." Then there are three numbered paragraphs.

Paragraph one summarizes Alan Wilson's position on third-party testing. This reflects legal advice once removed, and is privileged. However, Tan's opinions in paragraphs 2 and 3 appear to reflect his beliefs only, with no reference to legal advice and no indication that legal advice will be sought. Therefore these paragraphs are not privileged. Consequently, the only permissible redaction in this email is for the first numbered paragraph. *Privilege claim as to redaction sustained in part and denied in part.*

***15** *Redaction on BL103867299*-Bausch & Lomb has redacted the entire body of an email from James Barton to Tony Tan, Alan Wilson and others. No lawyer is involved in this email. Most of it provides Barton's assessment on third party endorsement. Most of it neither reflects nor shows the desire to seek legal advice. However, the third paragraph of the email does note the need for obtaining legal advice in one specific respect. This paragraph is the only part of the email that either reflects or prepares information for legal advice. Accordingly, the redaction of the third paragraph is proper but the rest of the redaction is not justified. *Privilege claim sustained as to the third paragraph and denied as to the rest of the email.*

Redactions on BL103867298-There are three redactions on this page. The first email in time (which begins on BL103867298 and runs over to BL103867299) is an email from Brian Levy to a number of corporate officials-but no lawyers. It provides information concerning third party testing. This email does not reflect, nor does it prepare communications or information for obtaining, legal advice. The email must be produced unredacted. *Privilege claim denied.*

The second email in time is from Raymond Cheng to Brian Levy, ccd to others, but no lawyer. All it says is that it "is really great if we will soon have the 3rd party evaluation report."This in no way reflects legal advice, nor any interest in preparing information for the lawyer, and must be produced in unredacted form. *Privilege claim denied.*

The third email in time is from James Barton to Raymond Cheng, Brian Levy and others. No lawyers are involved. It refers to Quantec and notes the urgency of the situation. This in no way reflects legal advice, nor any interest in preparing information for the lawyer, and must be unredacted. *Privilege claim denied.*

Redactions on BL103867297-There are three redactions on this page. The first email in time is from Alan Wilson to James Barton and others. The first sentence simply states that Wilson is on vacation and not able to patch in via phone. It is absolutely not privileged and this sentence must be produced unredacted. The second sentence specifically reflects the need for obtaining legal advice. It is therefore privileged. *Privilege claim denied as to the first sentence and sustained as to the second sentence.*

The second email in time is from James Barton, responding to Wilson's suggestion for seeking legal advice and copying Bob Bailey and providing him an update. This is an explicit request for legal advice and so clearly is privileged. All parties on the email have a need to know. *Privilege claim sustained.*

The third email in time is from Michael Santalucia to James Barton, copied to Bob Bailey and others. It implicitly seeks legal advice from Bailey on how to approach the Hong Kong Department of Health. All parties on the email have a need to know. *Privilege claim sustained.*

***16** *Redactions on BL103867296*-There are three redactions on this page. The first email in time is from James Barton to Michael Santalucia and others, copied to Bob Bailey, expressing Santalucia's opinion on the position of the Hong Kong Department of Health with respect to the third-party endorsement. Santalucia specifically asks for the opinion of Raymond Cheng and Jack Wong. He does not ask for Bailey's opinion. This email appears to be an expression of Barton's opinion and an explicit request for business advice. Simply copying the email to the lawyer does not gain a privilege. It's one thing to allow a corporate agent to seek legal advice from a lawyer and business advice from another corporate official in the same email. It's another for a corporate official to specifically ask for business advice in an email and route it to the lawyer. This email is not privileged and must be produced in unredacted form. *Privilege claim denied.*

The second email in time is from Raymond Cheng to James Barton and others, including Bob Bailey, asking if certain information can be released to the Hong Kong Department of Health. This is an implicit request for legal advice from Bailey and as such is privileged. Unlike the previous email, there is no indication that the lawyer is an afterthought. Everyone on the email has a need to know. *Privilege claim sustained.*

The third email in time starts on the previous page (BL103867295), and is from Alan Wilson to Raymond Cheng, et al, copied to Bob Bailey. This is definitely privileged as it seeks legal advice on whether certain should be released. All on the email have a need to know. *Privilege claim sustained.*

Redactions on BL 103867295-There are two redactions on this page. The first email in time is from Raymond Cheng to Alan Wilson. It explicitly states that he is waiting on Bob Bailey's input on the proper form on content of a disclosure. This is definitely privileged as it refers to the need for legal advice, and all on the email have a need to know. *Privilege claim sustained.*

The second email in time is from Alan Wilson to Raymond Cheng et al, copied to Bob Bailey. The first paragraph (two sentences) simply refers to the attachment "minus my notes and a picture or two (with pictures, it is too big for email)." This sentence involves no legal advice at all and must be produced unredacted. The second paragraph (one sentence) implicitly seeks legal advice on the proper form of a public presentation and is privileged. *Privilege claim denied as to first paragraph and sustained as to second paragraph.*

Exhibit 14-BL000190357-BL000190363

Exhibit 14 is an email string concerning a possible response by Bausch & Lomb officials in the Asia region to the withdrawal of ReNu with MoistureLoc manufactured at the Greenville facility from the worldwide market. The email string was produced with a number of redactions. These redactions are reviewed in reverse order-climbing up the email tree rather than down it seems to be a more effective way to determine what was sent out when.

***17** *Redaction on BL000190361*-Bausch & Lomb has redacted the entire body of an email from Venkteshwaran Suresh (Vision care marketing) to James Barton, and others, including an engineer and another person involved in marketing. Some of these people seem fairly far down in the corporate chain (at least given the information presented to the Special Master). But the "need to know" test from *Glaxo, supra,* is not rigorous-it simply requires that "the contents of the documents are related generally to the employees' corporate duties."That test is met here. I note that the email was not distributed widely throughout the corporation, as was the case in *Coastal States Gas Corp. v. DOE,* 617 F.2d 854, 863 (D.C.Cir.1980) (confidentiality lost when organization "admitted that it does not know who has had access to the documents, and there is undisputed testimony that copies of the memoranda were circulated to all area offices"). Furthermore, the email explicitly reports advice of counsel and so is privileged even though it is not routed to lawyers. *Privilege claim sustained.*

Redaction on BL000190360-Bausch & Lomb has redacted the entire body of an email from Jack Wong to Suresh and others concerning testing in India. This email is a request to obtain advice from local counsel and so is privileged. *Privilege sustained.*

Redactions on BL000190359-This page contains two emails, the bodies of which are redacted in their entirety. (There is also a redaction that runs over from the previous page, that will be considered below). The first email in time is from David Hanlon to Amit Singhal, an engineer, discussing the methods that need to be employed for testing to prevent the generation of bad data. There is no lawyer involved in this email and it appears to be purely about science and proper scientific methods. There is no indication that Hanlon is implementing legal advice in suggesting a scientific protocol. There is no indication that the communication is to prepare information for counsel's use. Accordingly, Bausch & Lomb has not met its burden of showing that legal advice is being or has been sought. This email must be produced without redaction. *Privilege claim denied.*

The second email in time is from Amit Singhal to Dennis Fu and Jugesh Singh, the Managing Director of Office Administration in India. This email clearly relates advice of local counsel. So it is privileged in its entirety. *Privilege claim sustained.*

Redactions on BL000190358-This page contains three redacted emails, one of which runs over to the next page. The first email in time (which runs over) is from Dennis Fu to Amit Singhal and Jugesh Singh, expressing skepticism about certain testing and suggesting a proper procedure for testing by local labs. There is no lawyer on this email. Nothing in the email relates legal advice and there is no attempt to prepare information to obtain legal advice. None of the reservations expressed come from any lawyer. So it is not privileged and must be produced in its entirety. *Privilege claim denied.*

***18** The second email in time is from Dennis Fu to Amit Singhal and others. No lawyer is involved. There is a reference to advice of counsel, which is protected by the privilege, but Fu then expresses his own extra-legal concerns. It is apparent that Fu's expressed concerns involve scientific

and not legal questions. It follows that a portion of this email must be unredacted: specifically, everything after the comma in the second sentence of the email must be produced in unredacted form. *Privilege claim sustained in part and denied in part.*

The third email in time is from Dennis Fu to Jugesh Singh and others. It is partially redacted. The redacted information refers to advice of counsel received and is accordingly privileged. *Privilege claim sustained.*

Exhibit 15 (BL100089618-BL100089620)
Exhibit 15 is an email string concerning the investigation of a Fusarium case in Italy. It was produced with a redaction of one of the emails-that email is from Giuliano Nannini (General Manage of Bausch & Lomb, Italy) to Bob Bailey and others. It apprises Bailey of legal developments and is at least an implicit request for legal advice. All others on the email had a need to know. The redacted information is privileged. *Privilege claim sustained.*

Exhibit 16 (BL107098171)
After discussion with the Special Master, Bausch & Lomb commendably has agreed to withdraw its claim of privilege as to Exhibit 16 and has produced the document.

Exhibit 17 (BL134452467-BL134452468; and BL134452538-BL134452539)
Exhibit 17 contains two identical, redacted emails from Dwain Hahs (Senior V.P and President Asia) to all Singapore email users and to all Hong Kong email users. It is a litigation hold notice, which among other things identifies those who may be in possession of relevant documents and thus may be subject to the hold. Bausch & Lomb claims the work product protection for the redactions. Plaintiffs claim that the work product protection cannot apply because no lawyer is involved in the emails. But in fact the work product immunity protects material prepared by non-lawyers in anticipation of litigation. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 666 (3d Cir.2003) (noting that "the work product doctrine extends to materials compiled by a non-attorney, who, as the 'agent' of a party or a party's attorney, assists the attorney in trial preparation"). Certainly compiling a list of those with relevant documents involves trial preparation, and disclosure of that list could reveal mental impressions concerning claims or defenses.

While work product protection is qualified and not absolute, plaintiffs have made no case for a need for the information contained in the litigation hold notice. *Accordingly, Bausch & Lomb's assertion of work-product immunity is sustained.*

Exhibit 18 (BL100100417-BL100100422)
Exhibit 18 is an email string, with the body of one email redacted. That email is from Ron Zarella to Ruth McMullin, Director of the Board of Directors, concerning a tax dispute. It appears that the redacted email is unrelated to the rest of the string. No lawyer is involved in the email and so it can be privileged only to the extent that it reflects advice of counsel or is prepared with the intent that information will be provided to counsel. *See Santrade, supra.*

***19** The first two sentences of the email provide Zarella's own opinion concerning the tax matter and states that there have been weekly meetings on the subject. These sentences do not reflect legal advice nor any attempt to obtain legal advice, and therefore they must be produced without redactions.

The third sentence relates a lawyer's legal opinion on the matter and is privileged.

The fourth and fifth sentences refer directly to legal advice and the need to obtain it, and are privileged.

The sixth sentence provides Zarella's assessment of the matter and there is no indication that it is reflective of legal advice. So this sentence must be produced without redaction.

The seventh sentence concerns risk and it is reasonable to assume that it reflects the advice of a lawyer. So it is privileged.

The last sentence of the email is about scheduling and is not reflective of legal advice. It must be produced without redaction.

Privilege claim sustained as to the third, fourth, fifth and seventh sentences of the email. Privilege denied as to the remainder of the email.

Exhibit 19 (BL105793320)
Exhibit 19 is an email from Ron Zarella to Robert Stiles (General Counsel) and Steve McCluski (CFO) concerning an accounting update prepared for a member of the Board of

Directors. The attachment, which is the update, has already been produced. Bausch & Lomb claims privilege with respect to the body of the email, which contains Zarella's observations concerning the accounting update. These observations clearly involve legal matters, and are directed explicitly to the general counsel of the corporation, from whom legal advice is sought. As such, the redacted material is clearly privileged.

Privilege claim sustained.

Order

Defendant must produce the following documents, with the limitations stated, within five days:

Exhibit 2 (BL105793290-318): This document must be produced, but defendant may redact any statement or information that is not included in the document as finally published.

Exhibit 3 (BL100101027): Defendant must produce the email from Barbara Kelley dated May 11, 2006.

Exhibit 5 (BL100879259): The attachment to the email must be produced, but defendant may redact any statement or information that is not included in the document as finally published. (The three emails are protected by the privilege).

Exhibit 6

BL 100089266-BL100089276: This document must be produced, but defendant may redact any statement or information that is not included in the document as finally published.

BL 157420112-BL157420118: This document must be produced, but defendant may redact any statement or information that is not included in the document as finally published.

Exhibit 7 (BL105792809): This document must be produced in its entirety.

Exhibit 8

BL122438503-BL122438503A: The attachments to the email must be produced, but defendant may redact any statement or information that is not included in the documents as finally published. (The redaction in the email is protected by the privilege).

***20** *BL105792872; BL105792873-BL105792878; BL105792879; and BL105792880-BL105792881:* These documents must be produced, but defendant may redact any statement or information that is not included in the documents as finally published.

Exhibit 9 (BL134450950-BL134450961): This email string must be produced in its entirety.

Exhibit 11 (BL134431726-BL134431729; BL134431723-BL134431725; BL134431718-BL134431719 BL 134450577-BL134450578): These email strings must be produced in their entirety.

Exhibit 12 (BL134431951-BL134431952): This document must be produced in its entirety.

Exhibit 13

Redaction on BL 1445311274-The email from Bob Bailey must be produced but defendant may redact the second sentence and the last two sentences of the email.

Redaction on BL 103867300-The email from Tony Tan to James Barton and others must be produced but defendant may redact the first numbered paragraph.

Redaction on BL103867299-The email from James Barton to Tony Tan and others must be produced but defendant may redact the third paragraph.

Redactions on BL103867298-The first email in time (which begins on BL103867298 and runs over to BL103867299), an email from Brian Levy, must be produced in unredacted form. The second email in time, from Raymond Cheng to Brian Levy and others, must be produced in unredacted form. The third email in time, from James Barton to Raymond Cheng and others, must be produced in unredacted form.

Redactions on BL103867297-The first email in time, from Alan Wilson to James Barton and others, must be produced, but defendant may redact the second sentence.

Redactions on BL103867296-The first email in time, from James Barton to Michael Santalucia and others, must be produced in unredacted form.

Redactions on BL 103867295-The second email in time, from Alan Wilson to Raymond Cheng and others, must be produced, but defendant may redact the second paragraph.

Exhibit 14

Redactions on BL000190359-The first email in time, from David Hanlon to Amit Singhal, must be produced in unredacted form.

Redactions on BL000190358-The first email in time (which runs over to BL00190359), from Dennis Fu to Amit Singhal and Jugesh Singh, must be produced in unredacted form. The second email in time, from Dennis Fu to Amit Singhal and others, must be produced, but defendant may redact the first sentence and the second sentence up to the comma.

Exhibit 18 (BL100100417-BL100100422): This email must be produced, but defendant may redact the third, fourth and fifth sentences.

SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2008 WL 2338552

End of Document

EXHIBIT 5

MICHAEL J. McQUEARY,
Plaintiff

VS

THE PENNSYLVANIA STATE UNIVERSITY,
Defendant

:IN THE COURT OF COMMON PLEAS
:CENTRE COUNTY, PENNSYLVANIA

:NO. 2012-1804

:CIVIL ACTION

OPINION

ISSUE

Are the e-mails designated Bates #PSU 000353-000355 discoverable?

DISCUSSION

Plaintiff, a former employee of the Pennsylvania State University, hereinafter PSU, is suing on multiple counts alleging that his termination was improper. Plaintiff seeks discovery of the above referenced e-mails which PSU says are not discoverable based on the attorney-client privilege. The privilege is codified at 42 Pa.CSA §5928. Pursuant to the statute a party asserting the attorney-client privilege must establish the following elements:

(1) The asserted holder of the privilege is or sought to become a client.

(2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.

(3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.

(4) The privilege has been claimed and is not waived by the client.

Nationwide Mutual Insurance Co. vs. Fleming, 924 A.2d 1259, 1264 (Pa Super 2007), aff'd 992 A.2d 65 (Pa 2010).

Element #4 was established. As to element #2, I acknowledge that Attorney Baldwin is a licensed Pennsylvania attorney.

PSU originally submitted the affidavit of Lisa Powers, Exh. D-1, to support its position as to items #1 and #3. She asserted.

> (4) During my employment with the University, I copied University General Counsel Baldwin on e-mail communications to seek legal advice and did so as to the e-mails at issue.

On its face, the affidavit appears persuasive as to those elements. A hearing was held on May 19, 2015 to create a record. The burden was initially on PSU to establish the privilege. PSU called Lisa Powers who testified that in 2011 she was the Director of Public Relations at PSU and that she would seek advice from PSU's general counsel, Attorney Baldwin, by e-mail. She also indicated that she would include Attorney Baldwin in on e-mails, "to essentially allow her and the other recipients to "chime in"." My understanding of the term, "chime in", is that it invites everyone to whom the e-mail was sent to offer whatever comment they deem appropriate regarding the content of the e-mail. Asking non lawyers to comment on the contents of the e-mail constitutes, in my view, a waiver of the confidentiality protected by the rule as the writer is no longer in a confidential relationship with her attorney. I see no need as to these e-mails to discuss whether including counsel among the recipients of an e-mail constitutes a "communication" envisioned by element #3.

Bates # PSU 000353 contains an e-mail from Ms. Powers to Mr. Schultz which was copied to Attorney Baldwin and others. The essence of attorney-client privilege is that it

protects a communication wherein legal advice is being sought. In her affidavit, Exh. D-1, paragraph #5, Ms. Powers asserts that that was her purpose in copying in Attorney Baldwin. I find this statement not credible based on the clear language of the e-mail. The e-mail repeats the public statement made by Dr. Spanier regarding the Sandusky allegations, a statement that had been released to the media and those with ties to PSU thru PSU's own network, Penn State Live. There is absolutely no way this e-mail can be read as posing a question to anyone, let alone counsel. Rather it announced a fait accompli. No legal advice was being sought and therefore the privilege does not apply.

Bates #PSU 000353 also references statements that the attorneys for Messrs. Schultz and Curley requested be forwarded to "any media who MAY ALREADY HAVE INQUIRED" (emphasis mine). Again, no legal advice regarding these comments was sought and therefore the privilege does not apply.

Bates #PSU 000354 contains an e-mail from Mr. Schultz to Ms. Powers acknowledging receipt of the e-mail referenced as Bates # PSU 000353. It too is copied to Attorney Baldwin and others. Again, no advice is sought and no privilege applies.

Bates # PSU 000354 contains a second e-mail that runs over to Bates #PSU 000355. This e-mail is from Ms. Powers to Mr. Schultz and is copied to Attorney Baldwin and others. It is the exact same e-mail set forth at Bates # PSU 000353. Again, it is a statement, not a request for legal advice. As such the privilege does not apply.

Based on the foregoing, I enter my

ORDER

AND NOW, this 20th day of July, 2015, the Prothonotary of Centre County is ORDERED to unseal the documents identified as Bates #PSU 000353 to 000355 and to make same available to plaintiff.

BY THE COURT:

Thomas G. Gavin SJ

EXHIBIT 6

November 28, 2012

Dr. DiStefano,

I write to you to indicate my interest in your Head Coaching vacancy. I am including a biography and contact information. Given my experience across a broad range of areas you will see that I can provide the energy, vision and leadership to make Colorado Football a championship program first in the Pac-12 and then nationally.

In your press conference announcing you would be looking for a new Head Football Coach, you talked about Colorado and that you "want to be competitive in the Pac-12".

After 17 seasons at Penn State, including the last 12 as a coordinator and play-caller I felt confident in coming to you to apply for the position.

I have experience in helping to turn around a program. In 2005 I re-designed Penn State's offense and the team rebounded from a 4-7 season to an 11-1 Big Ten Championship season. In 2008 I re-designed the offense again and that dynamic offense won the Big 10 and ranked among the top 10 offenses in Big 10 History.

But I have faced even greater challenges in my life. For the past eleven months I have had to be the face of my father through trying times, and I have had to stand up and fight for the truth of his legacy even after he had passed away.

I have not flinched, nor will I flinch in the face of any challenge.

Please take a look at my biography. You will see that I have been engaged in the academic mission here at Penn State and I have talents that will transfer to being a highly successful head coach.

At Colorado, I see a vibrant college town, a picturesque college stadium. I see a growing state's flagship academic institution that will benefit from a championship football program. You and I both know that a successful football program run the right way can have tremendous benefits across the entire range of the institution. You're a Buckeye Alum and you've been at Colorado for nearly four decades so you can see it too.

Most important, at Colorado I see a proud past that I want to honor, and I see a giant in Boulder that the right man can awaken. I believe I can be that man for Colorado.

Once you get a chance to meet with me and talk with me I believe you will be sold.

Thank you for your time and consideration.

Sincerely,

Jay Paterno

EXHIBIT 7

November 28, 2012

Brad,

I write to you to indicate my interest in your Head Coaching vacancy. I am including a biography and contact information. Given my experience across a broad range of areas you will see that I can provide the energy, vision and leadership to make Boston College Football a championship program first in the ACC and then nationally.

After 17 seasons at Penn State, including the last 12 as a coordinator and play-caller I felt confident in coming to you to apply for the position.

I have experience in helping to turn around a program. In 2005 I re-designed Penn State's offense and the team rebounded from a 4-7 season to an 11-1 Big Ten Championship season. In 2008 I re-designed the offense again and that dynamic offense won the Big 10 and ranked among the top 10 offenses in Big 10 History.

But I have faced even greater challenges in my life. For the past eleven months I have had to be the face of my father through trying times, and I have had to stand up and fight for the truth of his legacy even after he had passed away.

I have not flinched, nor will I flinch in the face of any challenge.

Please take a look at my biography. You will see that I have been engaged in the academic mission here at Penn State and I have talents that will transfer to being a highly successful head coach.

At Boston College, I see a proud program that is ready to re-emerge. As a Catholic school Boston College has a unique mission. A successful football program run the right way can enhance and further the goals of the entire institution.

Having graduated from Michigan and having helped Miami emerge in football you know that the right vision and the right passion can make all the difference in the world. At Boston College I see a proud past that I want to honor, and I see a giant in Chestnut Hill that the right plan can awaken. I believe I have that plan for Boston College.

Once you get a chance to meet with me and talk with me I believe you will be sold.

Thank you for your time and consideration.

Sincerely,

Jay Paterno

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving *The National Collegiate Athletic Association's Reply in Support of its Motion to Compel* on the following by First Class Mail and email:

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Counsel for Plaintiffs

Via FedEx Overnight Delivery
The Honorable John B. Leete
Senior Judge, Specially Presiding
Potter County Courthouse, Room 30
One East Second Street
Coudersport, PA 16915

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving *The National Collegiate Athletic Association's Reply in Support of its Motion to Compel* on the following by First Class Mail and email:

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Counsel for Plaintiffs

Via FedEx Overnight Delivery
The Honorable John B. Leete
Senior Judge, Specially Presiding
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Dated: August 3, 2015

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