IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

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.	CIVIL DIVISION Docket No. 2013-2082 **Pepper Hamilton LLP's Opposition to Motion to Strike Blanket Designation of All Pepper Hamilton Documents as "Highly Confidential – Attorneys Eyes Only"** Filed on Behalf of: Non-Party Pepper Hamilton LLP Counsel of Record: Thomas E. Zemaitis (PA 23367) PEPPER HAMILTON LLP 3000 Two Logan Square Eighteenth & Arch Streets Philadelphia, PA 19103-2799 Tel: 215.981.4000 Fax: 215.981.4750

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

ESTATE of JOSEPH PATERNO; and	)	CIVIL DIVISION
	)	
WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University;	)	Docket No. 2013-2082
	)	
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.	)	

PEPPER HAMILTON LLP'S OPPOSITION TO MOTION TO STRIKE BLANKET DESIGNATION OF ALL PEPPER HAMILTON DOCUMENTS AS "HIGHLY CONFIDENTIAL – ATTORNEYS EYES ONLY"

This Court should deny plaintiffs' challenge to Pepper Hamilton's designation of documents for which it or Penn State claim a privilege as "Highly Confidential – Attorneys' Eyes Only" for several reasons. *First*, the Motion to Strike is based on a demonstrably incorrect reading of the "Highly Confidential" clause of the Protective Order by which plaintiffs attempt to restrict the scope of that designation contrary to the plain language of the Protective Order – language to which plaintiffs agreed. *Second,* these materials are already available to plaintiffs' counsel and their further disclosure to the plaintiffs is highly likely to have a deleterious effect – not only on Pepper Hamilton and Penn State, but also on the legions of individuals who cooperated with the Freeh Firm during its investigation under promises of confidentiality. *Third,* it would be particularly inappropriate for plaintiffs to be able to review those sensitive materials

given that the vast majority of them have no conceivable relevance to the claims that remain in this litigation. And, *fourth,* the Motion sets forth no reason why plaintiffs' attorneys *need* to share these materials with their clients in order to prepare their remaining claims against the NCAA.

Pepper Hamilton respectfully submits that there *is no bona fide* reason for plaintiffs to have access to these materials. Pepper Hamilton, in consultation with Penn State, carefully took into account the competing interests – including the very significant privacy interests of hundreds of non-party individuals who cooperated with the investigation – when it designated these materials as "Highly Confidential." Maintaining the "Highly Confidential" designation strikes the right balance between protecting the privilege claims pending resolution of Pepper Hamilton's and Penn State's appeals, protecting non-parties' very substantial privacy interests, and permitting plaintiffs' counsel to prepare plaintiffs' case.

I. BACKGROUND

Contrary to plaintiffs' intimations, Pepper Hamilton has complied with this Court's Order of May 8, 2015 ("May 8 Order") enforcing the subpoena served on Pepper Hamilton. Indeed, plaintiffs admit that Pepper Hamilton has produced thousands of documents to plaintiffs' counsel which Pepper Hamilton and Penn State claim to be protected by the attorney-client privilege or the work product doctrine. Included among those documents are highly sensitive notes of hundreds of interviews conducted by the Freeh Firm lawyers and their colleagues, emails among the Freeh investigation team discussing strategies, potential areas of inquiry, and tentative observations, confidential assessments of individuals and documents, and drafts of the Freeh Report. While this Court has rejected Penn State's attorney-client privilege

claim and decided to enforce the subpoena,[1] its decisions are on appeal to the Superior Court, which has not yet ruled upon those appeals (Nos. 1709 MDA 2014, 877 MDA 2015 and 878 MDA 2015). If the Superior Court sustains the privilege claims, then Pepper Hamilton will have a right to claw back the documents from plaintiffs' counsel, and plaintiffs will not be able to make any use whatsoever of those documents or their contents. Of course, if those documents or their contents are disclosed *before* the Superior Court rules, the privilege(s) that may attach to them will be lost and any favorable ruling by the Superior Court effectively rendered moot. For this reason, and to protect the privacy interests of others, Pepper Hamilton designated produced documents subject to its and Penn State's privilege claims as "Highly Confidential" under the Protective Order. That designation does not in any way constitute a failure to comply with the May 8 Order, and plaintiffs' attempt to conflate the making of those designations with non-compliance is scurrilous.

Prior to the filing of the Motion to Strike, plaintiffs' counsel requested that Pepper Hamilton change the designation of the documents marked "Highly Confidential." The only reason for that request offered by plaintiffs' counsel was that, since those documents did not contain personally identifiable information, they did not qualify for "Highly Confidential"

[1] Although this Court compelled Pepper Hamilton to produce its work product, it bears noting that the Court has never actually addressed the merits of Pepper Hamilton's work product objections to the subpoena. First, in its September 11, 2014 Order, the Court held that Penn State lacked standing to raise the work product objection. Second, in its November 20, 2014 Order, the Court did not reach the merits because it accepted plaintiffs' argument that Pepper Hamilton was obligated to raise its work product objection in a formal written response to the subpoena, which it had not yet done. Third, in the May 8 Order, despite the fact that Pepper Hamilton served such a response raising the work product objection (among others), the trial court held that it lacked jurisdiction to consider the merits of Pepper Hamilton's work product claim because that issue is on appeal before the Superior Court. The vast majority of the documents designated "Highly Confidential" that are the subject of this Motion fall within Pepper Hamilton's work product privilege claim. At a minimum, the merits of that objection should be squarely addressed before the documents are made available to anyone other than plaintiffs' counsel of record.

treatment under the Protective Order. Plaintiffs' counsel *did not contend* that the designation should be removed because the documents would not qualify for privileged treatment under any circumstances, even if the Superior Court otherwise sustained the privilege claims; rather, counsel's request was based solely on plaintiffs' manifestly incorrect reading of the Protective Order's definition of "Highly Confidential" to include *only* documents containing personally identifiable information.

II. ARGUMENT

A. Plaintiffs' Motion Rests On A Fundamentally Flawed Reading Of The Protective Order

Plaintiffs' Motion to Strike is based on a narrow and demonstrably inaccurate reading of the definition of "Highly Confidential" in Paragraph 2(b) of the Protective Order this Court entered on September 11, 2014. Contrary to plaintiffs' suggestion, that definition is *not* limited to personal information about victims of abuse by Jerry Sandusky. Indeed, it is not limited to "personal information" at all. To the contrary, that definition provides, in pertinent part:

> As used in this Order, "Highly Confidential – Attorneys' Eyes Only – Information" means non-public information the disclosure of which would create a substantial risk of serious irreparable injury to the designating party or another that cannot be avoided by less restrictive means . . . .

Although the definition continues with a reference to personally identifiable information, that reference is preceded by the crucial words "*including but not limited to.*" In other words, by its express terms, the definition of "Highly Confidential" material encompasses ***all*** types of information – personal or otherwise – which, if disclosed, would create a substantial risk of irreparable injury "to the designating party or another."

Plaintiffs' Motion to Strike is premised on their misguided attempt to rewrite the definition. According to them, "[t]he Protective Order specifies that designating documents or information as 'Highly Confidential' means that the documents or information contain *non-public personally identifiable information* such as confidential medical records or other 'sensitive personal information.'" MOL at 2 (emphasis supplied).[2] As the quotation above establishes, however, the "Highly Confidential" designation means something quite different and is much broader than plaintiffs would have this Court believe. Thus, plaintiffs' Motion to Strike is based on a patently false premise, and plaintiffs' argument that the potentially privileged documents designated as "Highly Confidential" should not have that designation is without basis. The Motion to Strike should be denied for that reason alone.

B. Because The Disclosure Of Potentially Privileged Information Would Create A Substantial Risk Of Serious Irreparable Injury, The Documents Produced By Pepper Hamilton Qualify For The "Highly Confidential" Designation

The courts of the Commonwealth have consistently held that the forced disclosure of privileged documents or information would cause irreparable harm to the owner of the privilege because it would preclude effective appellate review of the trial court's ruling against application of the privilege. *See Ben v. Schwartz,* 556 Pa. 475, 485, 729 A.2d 547, 552 (1999); *Rhodes v. USAA Cas. Ins. Co.,* 21 A.3d 1253, 1258 (Pa. Super. 2011); *T.M. v. Elwyn, Inc.,* 950

[2] Even if the language of the "Highly Confidential" designation could support plaintiffs' interpretation – which it cannot – any ambiguity in the Protective Order should be construed against plaintiffs, whose counsel participated in its drafting, and not against Pepper Hamilton, which was not involved in the drafting in any respect and had no control over the Protective Order's content. Pepper Hamilton is entitled to rely on the plain language of the definition of "Highly Confidential," which allows it, in its good faith exercise of judgment, to so designate *any* documents "the disclosure of which would create a substantial risk of serious irreparable injury to the designating party or another."

A.2d 1050, 1056-58 (Pa. Super 2008); *Berkeyheiser v. A-Plus Investigations, Inc.*, 936 A.2d 1117, 1124 (Pa. Super. 2007). The Superior Court put it best in *T.M. v. Elwyn*:

> [I]f we do not review the propriety of the discovery orders at this point, Elwyn's claim of privilege would be irreparably lost, as it would be forced to disclose information in conformance with the trial court's discovery orders. Such disclosure could not be undone in a subsequent appeal.

950 A.2d at 1058.

Given this precedent, there can be no bona fide dispute that – to use the words of the Protective Order – the disclosure of the potentially privileged information "would create a substantial risk of serious irreparable injury" to Pepper Hamilton and Penn State (among many others). In other words, there can be no dispute that the documents designated as "Highly Confidential" meet the definition in the Protective Order. Plaintiffs' assertion that those documents "do not contain sensitive personal information" is utterly irrelevant to the analysis and is simply is not grounds to grant the Motion to Strike.

Plaintiffs note that the Superior Court has denied the motion to stay the May 8 Order pending the outcome of the appeals, but that ruling does nothing to alter the unassailable fact that these documents meet the definition of "Highly Confidential" in the Protective Order. Nor is the Superior Court's denial of a stay pending appeal any indication of the Superior Court's assessment of the merits of the appeals, as plaintiffs intimate. Indeed, plaintiffs argued in their opposition to the motion for stay pending appeal that no stay was needed *precisely because* the Protective Order was in place to prevent further harm to Pepper Hamilton and Penn State by restricting the disclosure of the potentially privileged documents that the May 8 Order required Pepper Hamilton to produce.[3] Having trumpeted to the Superior Court the protections in the

[3] Specifically, plaintiffs argued to the Superior Court, "neither Pepper Hamilton nor Penn State will suffer any harm, much less irreparable harm, absent a stay. There is already a

Protective Order as a basis for denying the stay pending appeal, plaintiffs cannot now be heard to complain when Pepper Hamilton has made legitimate use of the "Highly Confidential" designation in that Protective Order.

In any event, many of the documents produced by Pepper Hamilton do contain personal information of the sort that even plaintiffs concede warrant "Highly Confidential" treatment under their crabbed misinterpretation of the Protective Order.[4] Among the documents produced are notes of interviews conducted by the Freeh lawyers and investigation team, as well as emails and other communications among the Freeh team that comment on the individuals who had been interviewed. A central purpose of Penn State's retaining an outside law firm to conduct the investigation was to allow interviews to be conducted in a confidential manner so that interviewees – including employees at all levels of the Penn State organization – would feel free to discuss their knowledge with the Freeh Firm lawyers and investigators without fear of exposure, embarrassment, or retaliation by others.[5]

Moreover, plaintiffs' Motion to Strike should be evaluated against the backdrop of the extraordinarily broad scope of the subpoena pursuant to which Pepper Hamilton made its

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protective order in place that will prevent Plaintiffs-Appellees from using documents produced in response to the subpoena for any purpose other than preparing and prosecuting this case." Opp. to Mot. for Stay at 1. "The protective order means that any materials disclosed pursuant to the subpoena will not be made public." *Id.* at 13.

[4] Plaintiffs concede as much when they say that the "vast majority" – not *all* – of the documents produced by Pepper Hamilton "do not contain sensitive personal information . . . ." MOL at 2. Pepper Hamilton submits that many more of the documents contain sensitive personal information than plaintiffs allow, but whatever the extent, plaintiffs' concession is flatly inconsistent with their request that the "Highly Confidential" designation be stricken from *all* of the documents produced by Pepper Hamilton.

[5] The Freeh Firm was able to offer interviewees assurances of confidentiality because, as the Explanatory Note to Rule 4003.3 expressly notes, "a lawyer's notes and memoranda of an oral interview of a witness, who signs no written statement, are protected" as attorney work product. Pa. R. Civ. P. 4003.3, Explanatory Comment – 1978.

productions. Plaintiffs demanded that Pepper Hamilton produce the entire file from the Freeh Firm's investigation, and Pepper Hamilton has produced tens of thousands of pages in response to that demand. As this Court is aware, the Freeh Firm conducted a very broad investigation, and then issued a sweeping report that covered dozens of different topics. The vast majority of those topics have nothing at all to do with Joe Paterno and nothing at all to do with plaintiffs, with the result that many of the documents Pepper Hamilton produced in response to the very broad subpoena have no relationship whatsoever to plaintiffs' remaining claims against the NCAA in this litigation.[6] This includes many of the documents Pepper Hamilton claims to be privileged,

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[6] Just how far the investigation ranged and how little of it related to Joe Paterno or plaintiffs is apparent from a review of the contents of most of the chapters in the Freeh Report:

- Chapter 1: Flaws/shortcomings in Penn State's governance and administration generally;
- Chapter 5: Penn State's response to the grand jury investigation, the presentment and the criminal charges against Messrs. Sandusky, Schultz, and Curley in October/November 2011;
- Chapter 6: The Board of Trustee's failures of oversight and reasonable inquiry;
- Chapter 7: Sandusky's post-retirement access to the Nittany Lion Club, continued running of football camps, and his continued business dealings with the University, none of which are described in the report as involving either Joe Paterno or any of the plaintiffs;
- Chapter 8: The University-wide failures to understand the obligations under the Clery Act;
- Chapter 9: Shortcomings in Penn State's policies with respect to the protection of children in the University facilities and programs; and
- Chapter 10: Extensive recommendations for university governance, administration, and the protection of children in University facilities and programs.

and which it therefore designated as "Highly Confidential," that are the subject of the Motion to Strike. Those documents, while irrelevant to this case, contain information the disclosure of which may embarrass or harm individuals who cooperated with the broad Freeh investigation. There simply is no bona fide reason for these documents to be placed in the hands of the plaintiffs. Indeed, plaintiffs' motion identifies none.

In short, Pepper Hamilton, working closely with Penn State, has made a good-faith effort to balance the many competing privacy interests on the one hand against the ability of plaintiffs' counsel to prepare plaintiffs' case on the other. Pepper Hamilton respectfully submits that the Court should respect its designation of the interview notes, internal Freeh Firm communications, and related documents as "Highly Confidential," and deny plaintiffs' Motion to Strike.

C. The Severe Risk Of Further Disclosure Of Potentially Privileged Documents Supports The "Attorneys' Eyes Only" Limitation In The Protective Order

The only consequence of designating documents as "Highly Confidential" is that those documents will be for "Attorneys' Eyes Only" ("AEO"), meaning they will be available to plaintiffs' counsel of record, but not to plaintiffs themselves. The very fact that the Protective Order contains an AEO category is a recognition that attorneys, as members of the Bar and officers of the Court, have special responsibilities that do not apply to the parties to an action. Indeed, attorneys are bound by the strict confidentiality requirements of Rule 1.6 of the Rules of Professional Conduct and frequently must deal with confidential information produced during discovery. As a consequence, they are well-versed in the steps that need to be taken to protect confidential information from disclosure.

Plaintiffs may argue that they, too, can be trusted to maintain confidentiality to the same degree as their counsel, but, no matter how well-intentioned plaintiffs may be, the risks

are simply too great in this case to remove the AEO designation from documents that meet the definition of "Highly Confidential." The activities in this case are routinely reported in the press, as are commentaries on the Freeh Report itself, and the Paterno family has a website that collects media reports supportive of their position. http://paterno.com. Jay Paterno and Scott Paterno also both regularly use social media, including Twitter, to attempt to sway public opinion to their point of view. If the Court were to authorize plaintiffs to access AEO information, the temptation for plaintiffs to publicly disclose the documents or discuss the information learned from them in furtherance of their already extensive public relations narrative would be great. In this cauldron and against this backdrop, the risk of disclosure of potentially privileged information is, frankly, enormous, and the prejudice to Pepper Hamilton, Penn State, and non-party individuals would be severe and irreversible. In short, there are extraordinarily good reasons why Pepper Hamilton designated these potentially very sensitive materials as "Highly Confidential," and the Protective Order fully authorizes those designations. Again, this Court should respect the balance Pepper Hamilton, working with Penn State, has reached, and not strike the "Highly Confidential" designations across the board.

D. Plaintiffs Will Suffer No Unfair Prejudice By Restricting Access To Potentially Privileged Documents To Their Counsel

In sharp contrast to the unfair prejudice that Pepper Hamilton, Penn State, and legions of non-parties will suffer if potentially privileged documents or their contents are disclosed before the Superior Court can decide the pending appeals, plaintiffs will suffer no unfair prejudice if the AEO restriction continues to apply. Plaintiffs' counsel of record are highly experienced and fully capable of evaluating the thousands of "Highly Confidential" documents Pepper Hamilton has produced. Moreover, they have been representing the Paterno family at least since the Freeh Report was issued in 2012, and have worked actively through

litigation and public statements to rehabilitate Joe Paterno's reputation, as chronicled on the Paterno family website. Given the depth of their knowledge and their experience in this matter, it is inconceivable that plaintiffs' counsel needs input from the plaintiffs themselves to understand the context and import of the information contained in the documents produced by Pepper Hamilton. *Indeed, nowhere in the Motion to Strike do plaintiffs even suggest otherwise.* This simply is not a case in which the subject matter or the documents are technically complex or otherwise beyond the ken of the typical lawyer, let alone plaintiffs' highly experienced and skilled team of lawyers. Under these circumstances, Pepper Hamilton respectfully submits that removing the AEO designations from the Pepper Hamilton would do little more than satiate personal curiosities on matters having no conceivable relevance to the claims that remain this litigation – but potentially at great cost to others. Because there is no genuine *need* to remove the "Highly Confidential" designation and because Pepper Hamilton, Penn State, and a host of innocent non-party individuals would be irreparably harmed if the designation were removed, removing that designation would be manifestly unjust.

In any event, if plaintiffs' counsel of record conclude that they require input from plaintiffs to effectively analyze *particular* documents, the appropriate course of action would be for them to make focused requests to Pepper Hamilton and Penn State to reclassify those particular documents or else give them permission to discuss the contents of those particular documents with their clients. Either approach would be far more just, far more reasonable, and far more respectful of the many privacy interests at stake than striking the "Highly Confidential" designation from each and every document.

III. CONCLUSION

For the foregoing reasons, the Motion to Strike Blanket Designation of All Pepper Hamilton Documents as "Highly Confidential – Attorneys Eyes Only" should be denied.

Dated: September 3, 2015

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PROOF OF SERVICE

I, Thomas E. Zemaitis, hereby certify that on September 3, 2015 a true and correct copy of the foregoing Pepper Hamilton LLP's Opposition to Motion to Strike Blanket Designation of All Pepper Hamilton Documents as "Highly Confidential – Attorneys Eyes Only" was served via First Class Mail upon the following:

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