IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants.	Civil Division Docket No. 2013-2082 Counsel of Record: Thomas J. Weber GOLDBERG KATZMAN, P.C. 4250 Crums Mill Road, Suite 301 P.O. Box 6991 Harrisburg, PA 17112 Telephone: (717) 234-4161 Email: tjw@goldbergkatzman.com Wick Sollers (admitted *pro hac vice*) L. Joseph Loveland (admitted *pro hac vice*) Patricia L. Maher (admitted *pro hac vice*) Ashley C. Parrish (admitted *pro hac vice*) KING & SPALDING LLP 1700 Pennsylvania Avenue, NW Washington, DC 20006 Telephone: (202) 737-0500 Email: wsollers@kslaw.com jloveland@kslaw.com pmaher@kslaw.com aparrish@kslaw.com

PLAINTIFFS' RESPONSE TO PENN STATE'S AND PEPPER HAMILTON'S JOINT MEMORANDUM OF LAW IN SUPPORT OF PRIVILEGE CLAIMS

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INTRODUCTION AND SUMMARY OF ARGUMENT

When the Superior Court remanded this case for further fact finding, it apparently did not recognize that all of the documents underlying the Freeh Report have been produced to plaintiffs and that the parties for several months have been using those documents in the course of witness depositions. It also may not have recognized that the fact that there has been no privilege log or effort to tie specific objections to specific documents is entirely the result of strategic litigation decisions made by Penn State and Pepper Hamilton, and not the fault of either plaintiffs or this Court. Instead of raising fact-intensive arguments for protecting specific documents from disclosure, Penn State and Pepper Hamilton sought to delay these proceedings and achieve other litigation advantages by leveling sweeping, blanket objections claiming that essentially all of the documents underlying the Freeh Report should be deemed privileged.

There is no reason Penn State and Pepper Hamilton should be permitted at this late juncture — after more than two years of litigating the same privilege issues — to raise new fact-intensive arguments that until now they have deliberately failed to raise. A subpoena is not "an invitation to a game of hare and hounds, in which" the recipient must comply "only if cornered at the end of the chase." *United States v. Bryan*, 339 U.S. 323, 331 (1950). Instead, Penn State and Pepper Hamilton should be held to their strategic decisions, including their decision not to produce a privilege log and, instead of preserving fact-intensive arguments, to rest their case on blanket objections. The Court should therefore reaffirm its earlier rulings that (1) Penn State and Pepper Hamilton have not carried their burden to demonstrate that either the attorney-client privilege or attorney work product doctrine applies, and (2) the Special Committee Task Force expressly waived any privilege when the Freeh Firm publicly released its investigative report.

In any event, in light of the Superior Court's order, the burden was on Penn State and Pepper Hamilton to come forward with a detailed explanation why — taking into account this Court's earlier rulings — certain, specific documents should not be subject to those rulings and instead should fall within a narrow category of documents protected as privileged. Penn State and Pepper Hamilton have not even attempted to carry that burden. Almost all of their brief is devoted to rehashing the blanket objections and sweeping arguments that this Court has already carefully considered and properly rejected. They never bring into focus any particularized reason why the Court should conclude, contrary to its earlier findings, that any specific narrow category of documents was held in confidence and not subject to the express waiver of privileges that occurred when the Freeh Firm published its Report. Instead, their proposed categories are merely window dressing for asking this Court to reconsider its earlier rulings.

Finally, as explained in more detail below, new evidence has come to light that further underscores that Penn State and Pepper Hamilton have no valid basis for raising any privilege objection. [redacted] Nonetheless, almost four years after the Freeh Firm publicly released its Report, Penn State and Pepper Hamilton are continuing their charade, urging the Court to accept their bare representations that, contrary to the terms of the engagement letter and Louis Freeh's testimony, Penn State hired the Freeh Firm to provide confidential legal advice in connection with anticipated litigation. It is time for this to end.

FACTUAL BACKGROUND

This dispute centers around plaintiffs' multi-year efforts to gain access to documents underlying the Freeh Report that are directly relevant to the claims and defenses asserted in this

case. As the Court is aware, that investigative report was prepared by the Freeh Firm at the request of the Task Force and released to the public subject to an express waiver of any relevant privilege. The Report was never intended to be maintained in confidence. The Report's authors acted with total independence and had unchecked discretion to share documents and information with law-enforcement authorities and other third parties.

In February 2014, more than two years ago, plaintiffs served a notice of subpoena on Pepper Hamilton, the law firm that Louis Freeh and other members of the Freeh Firm joined, seeking documents underlying the Freeh Report. In response, Penn State raised a series of blanket objections, asserting that *all* of the documents requested by the subpoena were privileged. This Court considered those objections at a hearing on May 19, 2014, and, on September 11, 2014, issued an Opinion and Order with 15 pages of analysis devoted to addressing Penn State's objections, which it almost entirely overruled. *See* 2014-09-11 Opinion & Order. Penn State appealed that order, but it did not seek a stay.

Plaintiffs then served the subpoena on Pepper Hamilton. The subpoena directed Pepper Hamilton to comply within 20 days, which Pepper Hamilton asked to be extended. At that time, Pepper Hamilton could (and should) have responded to the subpoena, produced responsive documents, and submitted a privilege log for any documents that it contended were privileged. Pepper Hamilton instead moved for a stay of its obligations under the subpoena pending a ruling on Penn State's appeal, and also for a protective order. It never served a privilege log nor did it identify with any specificity which documents it claimed were privileged. Instead, in its request for a stay, Pepper Hamilton merely "reassert[ed]" the blanket "attorney-client and work product arguments raised in Penn State's objection to plaintiffs' notice of intent to serve a subpoena."

2014-10-13 Pepper Hamilton Mot. For Stay, at 3 n.1. Penn State joined Pepper Hamilton's stay motion on October 2.

On November 20, 2014, this Court declined to enter a stay, finding that Pepper Hamilton had not made the required showing that Penn State was likely to prevail in its appeal. 2014-11-20 Opinion & Order. Pepper Hamilton then appealed that order, but it did not seek a stay from the Superior Court pending Penn State's appeal, which would have been the proper course. *See* Pa. R. App. P. 1732. It nonetheless refused to comply with the subpoena. Instead, on December 16, 2014 — three months after service of the subpoena, two months after the extended return date, and a month after this Court denied its motion for a stay — Pepper Hamilton served an untimely written response objecting generally to the subpoena. It still did not identify or log any specific documents as to which it claimed a privilege applied.

On January 23, 2015, plaintiffs moved to enforce the subpoena. The Court granted that motion on May 8, 2015. *See* 2015-05-08 Opinion & Order. Penn State and Pepper Hamilton each appealed this Court's May 8 order, but they did not seek a stay from this Court. Nor did they seek reconsideration. Instead, they waited until May 27, 2015, and then asked the Superior Court for a stay pending appeal. The Superior Court entered a temporary stay pending disposition by the motions panel, which it later vacated the temporary stay and, on June 19, 2016, denied the motion. The Superior Court then consolidated the various appeals filed by Penn State and Pepper Hamilton. After receiving briefing in the consolidated appeals, the Superior Court heard oral argument on February 2, 2016.

Because the Superior Court denied their stay request, Penn State and Pepper Hamilton finally produced documents in response to the subpoena. They continued to assert blanket objections that the documents they produced were privileged and confidential, but they still did

not provide a privilege log or bring into focus any specific reason that any particular document should be deemed privileged. The documents they have produced have since been used by the parties (both plaintiffs and the NCAA) in witness depositions and to prepare for trial.

On April 26, 2016, the Superior Court entered an order in the consolidated appeals. The Superior Court's order suggests that "fact-intensive probing may be necessary to determine the applicability, if any, of the attorney-client privilege or work product doctrine." Without recognizing that all of the disputed documents have already been produced, it directed this Court to oversee a process to ensure that plaintiffs obtain access to all of the "source" and "non-source" documents underlying the Freeh Report. It recognized, however, that neither Penn State nor Pepper Hamilton had identified "specific documents for objection" or produced a "privilege log." It then remanded for this Court to consider whether any of the documents underlying the Freeh Report should be protected under any applicable privilege.

ARGUMENT

I. Penn State And Pepper Hamilton Have Failed To Carry Their Burden To Establish That Either The Attorney-Client Privilege Or The Work Product Protection Applies.

As the parties seeking to shield documents from disclosure, Penn State and Pepper Hamilton bear the burden to "set forth facts showing that [a] privilege has been properly invoked." *Custom Designs & Mfg. Co. v. Sherwin-Williams Co.*, 39 A.3d 372, 376 (Pa. Super. 2012); *see also Conoco Inc. v. U.S. Dept. of Justice*, 687 F.2d 724, 730 (3d Cir. 1982) ("The burden of demonstrating that a document is protected as work-product rests with the party asserting the doctrine"). "If the party asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked, then the burden never shifts to the other party, and the communication is not protected." *Custom Designs*, 39 A.3d at 376 (quoting *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1267 (Pa. Super. 2007)).

Penn State and Pepper Hamilton have not carried their burden at this stage of litigation, any more than they did at earlier stages. [redacted]

A. Because The Freeh Firm Did Not Represent Penn State, No Confidential Relationship Ever Existed Between The Freeh Firm And Penn State.

[redacted] That

has now been proven false. [redacted]

The Freeh Firm's engagement letter states that the Freeh Firm was engaged by the Board of Trustees *on behalf of the Special Investigations Task Force established by the Trustees*. *See* Ex. A, Engagement Ltr., at 1. It also states that the engagement was limited "solely" to the Task Force and the Freeh Firm did not represent any other individuals or entities. *See id.* at 6 ("Engagement Limited to Identified Client"); *see also id* at 2 (noting that the Freeh Firm "will act under the sole direction of the Task Force in performing the services hereunder"). [redacted] Indeed, the Task Force was specially created to undertake a "complete and independent and separate investigation" into the circumstances surrounding Sandusky's crimes, *see* 2011-11 Bd. of Trustees Minutes at 6. Accordingly, while some members of the Task Force served on the Board, the Task Force also included Penn State students, faculty, and distinguished alumni. *See* Ex. C, Penn State Press Release: *Former FBI director Freeh to conduct independent investigation*, at 2 (Nov. 11, 2011); *see also* Ex. D, Freeh Report at 8 n.*. The fact that the Task Force was distinct from Penn State and included independent members was critical to fostering the public perception that the Task Force (and, by extension, the investigators it hired) would be fair and impartial, and would act independently with no interference, control, or oversight by the University.

The terms of the engagement letter — making clear that the Freeh Firm represented only the Task Force and did not represent the University — have been recently confirmed by Louis Freeh, who signed the engagement letter on the Freeh Firm's behalf. [redacted]

[redacted]

[redacted] A party can invoke the attorney-client privilege or the attorney work product doctrine only with respect to communications involving, or work product prepared by, its own counsel. *See, e.g., In re Estate of Wood*, 818 A.2d 568, 571 (Pa. Super. 2003) (attorney-client privilege "applies only to confidential communications made *by the client* to the attorney in connection with providing legal services") (emphasis added); Pa. R. Civ. P. 4003.3 (work product protection applies only to prevent "disclosure of the mental impressions of a party's attorney"); *Brown v. Greyhound Lines, Inc.*, No. 1167 EDA 2015, 2016 WL 3079975, at *6 (Pa. Super. May 24, 2016) (recognizing that work product doctrine applies

only to materials "prepared by an attorney 'acting for his client in anticipation of litigation'"). The Task Force has not asserted any purported privilege, and the University has no privilege to assert.

B. Penn State And Pepper Hamilton Have Not Carried Their Burden To Show That The Attorney-Client Privilege Applies.

Even if put to one side the fact that Penn State did not have an attorney-client relationship with the Freeh Firm, Penn State and Pepper Hamilton have not carried their burden to show that the documents underlying the Freeh Report are protected by the attorney-client privilege. Penn State did not retain the Freeh Firm to provide legal advice. *See* 42 Pa. C.S.A. § 5928. Nor did Penn State ever have any reasonable expectation that the documents underlying the Freeh Report would be maintained in confidence.

1. Penn State Did Not Hire The Freeh Firm To Provide Legal Advice.

Penn State and Pepper Hamilton have not carried their burden to show that the Freeh Firm was retained by Penn State to provide legal advice or services. As this Court previously concluded, "an essential element of an attorney-client privileged document is that the document must relate to 'securing either an opinion of law, legal services[,] or assistance in a legal matter.'" 2014-09-10 Order at 10 (quoting *Com. v. Mrozek*, 657 A.2d 997, 998 (Pa. Super. 1995)). The privilege does not "protect disclosure of underlying facts," *Upjohn v. United States*, 449 U.S. 383, 385 (1981), and it does not apply when "a lawyer provides non-legal business advice." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007); *see also In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 117 (E.D. Pa. 2011) (the privilege applies only to confidential communications made "for the purpose of securing legal advice").

Penn State and Pepper Hamilton argue that because boilerplate references to "legal services" are sprinkled throughout the engagement letter between the Freeh Firm and the Task

Force, the Court should assume that an attorney-client relationship existed between the Freeh Firm and Penn State. But as the Court previously found, the engagement letter belies that characterization. The Freeh Firm was retained by the Task Force — not by Penn State — "to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of [Penn State] personnel to report such sexual abuse to appropriate police and government authorities." 2014-09-10 Order at 10. "At no point does the scope mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter." *Id.*

To the contrary, the engagement letter's "Scope of Engagement" clarifies that the Freeh Firm's mission was to prepare "findings concerning i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff," and to recommend "actions to be taken to attempt to ensure that those and similar failures do not occur again." Ex. A, Engagement Ltr., at 1–2. Moreover, the letter states that the Freeh Firm's engagement was limited "solely" to the "specific matter described" therein — that is, performing the work described in the "Scope of Engagement." *Id.* at 6. There is no evidence that the Freeh Firm was engaged for any other purpose. *Cf.* PSU Answer ¶¶ 53, 54 (admitting that "[t]he purpose and scope of the Freeh Firm's engagement is set forth in [the] engagement letter"); NCAA 2d Am. Answer ¶ 53 (same).

2. The Freeh Report And Its Investigation Were Never Intended To Be Maintained In Confidence.

Penn State and Pepper Hamilton also have not carried their burden to show that the attorney-client privilege applies because they have not shown that communications between Penn State and the Freeh Firm were ever intended to be confidential. As courts have long

recognized, the attorney-client privilege "applies only to confidential communications." *Wood*, 818 A.2d at 571 ("First and foremost is the rule that the privilege applies only to confidential communications"); *Com. v. Boyd*, 580 A.2d 393, 394 (Pa. Super. 1990) (privilege is "confined to confidential communications"); *see also Wachtel*, 482 F.3d at 231 (same). It is "vital to a claim of privilege that the communications between client and attorney were made in confidence and have been maintained in confidence." *In re Horowitz*, 482 F.2d 72, 81–82 (2d Cir. 1973). "Communications made with no expectation of confidentiality are . . . not protected by the privilege." *In re Grand Jury Investigation*, 557 F. Supp. 1053, 1056 (E.D. Pa. 1983).

Penn State and Pepper Hamilton have not carried their burden to demonstrate (1) that the communications at issue were made by the client (as opposed to current and former employees and third parties); or (2) that Penn State had any expectation that those communications were made in confidence and would be maintained in confidence. *See id.* ("burden of proving the confidentiality of [a] communication rests on the party asserting the privilege"). To the contrary, the evidence establishes the opposite.

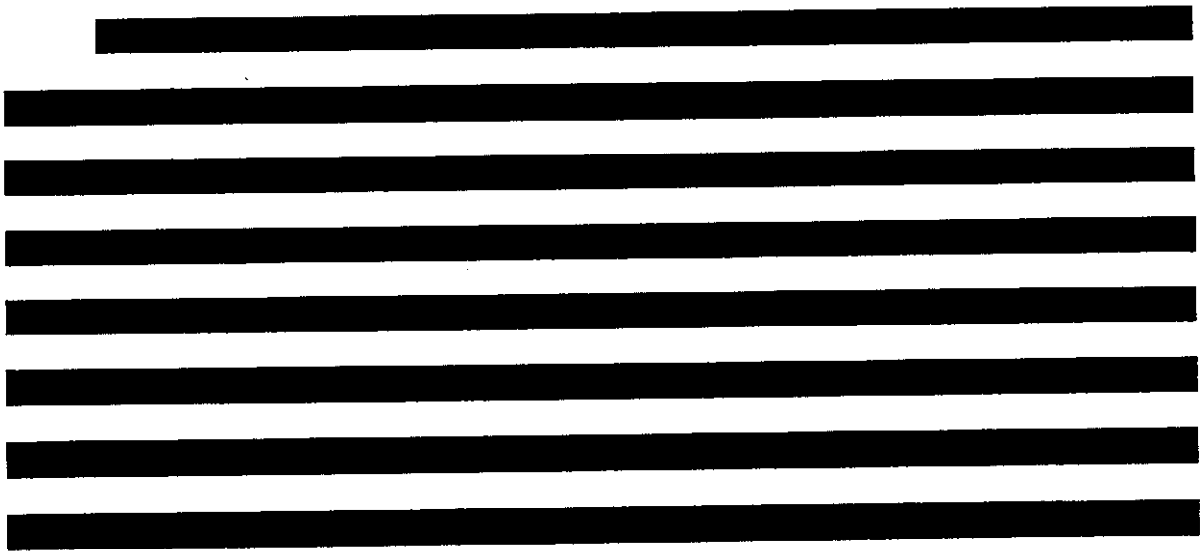
First, as noted above, the Freeh Firm did not represent Penn State and Louis Freeh told the University that any attempt to claim a privilege would be "ridiculous." It is also clear that Penn State is trying to claim privilege with regard to communications made not by the University itself, but instead by many current and former employees and third parties who were, again, not clients of the Freeh Firm. [redacted] These facts make clear that when Penn State or those individuals shared information with the Freeh Firm, there was no reasonable expectation that the information would be held in confidence.

Second, reflecting the non-confidential nature of its engagement, the Freeh Firm's engagement letter reserved to the firm, and to the firm alone, the right to disclose "any discovered evidence of criminality to the appropriate law enforcement authorities," without any advance review or input by the Task Force (or by any other party, including Penn State). Ex. A, Engagement Ltr., at 2; [redacted] Consistent with the expectation that documents would not be held in confidence, the "most important documents" in the Freeh Firm's investigation were "immediately provided" to law enforcement when they were discovered, with no discussion or input from the Task Force or anyone else. Ex. D, Freeh Report 11; [redacted] As Louis Freeh explained when he released the report, the Freeh Firm "continuously interfaced and cooperated" with "agencies and governmental authorities, including the Pennsylvania Attorney General, Pennsylvania State Police, United States Attorney, Federal Bureau of Investigation, and U.S. Department of Education." Ex. I, Remarks of Louis Freeh in Conjunction with the Release of the Freeh Report, July 12, 2012; [redacted] An engagement where an attorney has carte blanche to disclose whatever he wants to law enforcement without any prior review or approval by the client is the antithesis of a confidential attorney-client relationship.

Third, it was understood that the Freeh Firm would conduct its investigation independently and that its findings and conclusions would be revealed to the public with no advance review by Penn State. The Freeh Report makes clear that the Freeh Firm was "expected to operate with *complete independence*" and, in fact, did "operate[] with *total independence* as it

conducted [its] investigation." Ex. D, Freeh Report 11 (emphasis added). The Freeh Firm also emphasized that it "revealed [its] report and the findings herein to the Board of Trustees and the general public at the same time." *Id.* at 12 ("No advance copy was provided").

When the Freeh Firm was first retained by the Task Force, both the Task Force and the Freeh Firm announced publicly that Louis Freeh would lead an "impartial" and "total[ly]" independent investigation that would be performed "with no favoritism toward any" party and would result in findings and recommendations that would be released to the public. Ex. C, Penn State Press Release: *Former FBI director Freeh to conduct independent investigation*, at 2, 5 (Nov. 11, 2011). The whole point of the Freeh Firm's independent investigation, with the Freeh Firm retained by the independent Task Force, was to prove to the world that a transparent review process would occur without any input, interference, or control by Penn State. That arrangement is fundamentally inconsistent with the basic duty of loyalty a lawyer owes to a client, which requires that a lawyer's professional judgment be exercised "solely for the benefit of his client." Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. Pitt. L. Rev. 307, 322 (1988) (a "lawyer's principal duty" of undivided loyalty "runs hard and straight to the client").



[redacted] The self-serving testimony on which they rely is not credible, but it also misses the larger point. Regardless of what information was ultimately shared with third parties, the Freeh Firm was "expected to operate" with "total independence" and was authorized to disclose information to third parties at its discretion and without oversight by Penn State. *See* Ex. D, Freeh Report 11; *see also* Ex. A, Engagement Ltr., at 2 (noting that the Freeh Firm acted "under the sole direction of" the Task Force, not Penn State). Because Penn State knew that the information it provided to the Freeh Firm could be disclosed to third parties (and law enforcement) at any time, it could not have had any reasonable expectation that the information it provided would be maintained in confidence. *See United States v. Rockwell Int'l*, 897 F.2d 1255, 1265 (3d Cir. 1990) (the "attorney-client privilege does not apply to communications that are intended to be disclosed to third parties or that in fact are so disclosed"). [redacted]

[redacted]

C. Penn State And Pepper Hamilton Have Not Carried Their Burden To Show That The Attorney Work Product Doctrine Applies.

Penn State also has not carried its burden to show that the documents underlying the Freeh Report are protected by the attorney work product doctrine. There is no evidence that the Freeh Firm's investigative files were prepared in anticipation of litigation. Moreover, because the work product privilege is not absolute, it can be overcome where, as here, the underlying materials are relevant to the claims in litigation.

1. The Freeh Firm's Files Were Not Work Product Prepared In Anticipation Of Litigation.

The work-product protection is narrow: "work product is discoverable, with the exception of the mental impressions and opinions of the party's attorney and other representatives." *Dominick v. Hanson*, 753 A.2d 824, 926 (Pa. Super. 2000); *see also* Pa. R. Civ. P. 4003.3. "Documents, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file. The Rule is carefully drawn and means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more." Pa. R. Civ. P. 4003.3, 1978 explanatory cmt.

Given this narrow protection, there is little doubt that the vast majority of what plaintiffs' subpoena seeks is not and has never been attorney work product. The Freeh Report describes its methodology as including over 430 interviews; review of 3.5 million pieces of electronic data and documents; review of applicable Penn State policies, guidelines, practices, and procedures; and the establishment of a hotline to receive information relevant to the investigation. Ex. D, Freeh Report, at 9. At a minimum, plaintiffs are entitled to all of the factual information

collected by the Freeh Firm as part of its investigation, as well as any factual statements or summaries in the firm's files and any other information the firm obtained from witnesses.

Similarly, work-product protection would not extend to any communications between the Freeh Firm, Penn State, the NCAA, the Big Ten, or others. "The 'protective cloak' of the qualified work product privilege 'does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.'" *Com. v. Harrell*, 65 A.3d 420, 431 (Pa. Super. 2013) (quoting *Com. v. Brinkley*, 480 A.2d 980, 984 (Pa. 1984)); *see also Brinkley*, 480 A.2d at 983 (affirming a trial court's order to disclose "substantially verbatim statements of the witnesses"). Penn State and Pepper Hamilton have not demonstrated that the communications between the Freeh Firm and third parties reflect anything other than factual information that became the basis for the Freeh Firm's public report.

Penn State and Pepper Hamilton have not even carried their burden to show that any of the Freeh Firm's opinions and mental impressions qualify as protected attorney work product. "[T]he work product doctrine seeks to promote the adversary system . . . 'by protecting the confidentiality of papers prepared by or on behalf of attorneys *in anticipation of litigation.*'" *Com. v. Williams*, 86 A.3d 771, 782 n.7 (Pa. 2014) (emphasis added); *see also Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) ("Rule 4003.3, on its overall terms, manifests a particular concern with matters arising in anticipation of litigation."); *Levy v. Senate of Pa.*, 94 A.3d 436, 443 (Pa. Commw. 2014) (work product protection provides "a privileged area within which [the attorney] can analyze and prepare his client's case") (internal quotation marks omitted). To meet this requirement, a party must identify a "specific claim of impending litigation"; that requirement is not satisfied by pointing to the "mere involvement of, consultation

with, or investigation by an attorney." *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 484 (E.D. Pa. 2005) (citations omitted).

[redacted] Moreover, courts have recognized that, even if litigation is not imminent, "the primary motivating purpose behind the creation of the document" must be "to aid in possible future litigation." *Rockwell Int'l*, 897 F.2d at 1266; *Sharp v. Gov't of V.I.*, 77 F. App'x 82, 85 (3d Cir. 2003). As Penn State's own cases make clear, "the line between what work product is discoverable and what work product is protected is" drawn at matters involving "'value,' 'merit,' 'strategy,' or 'tactics,'" which are "protected unless they have evidentiary value." *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C.4th 23, 30 (C.P. Allegheny 1996).

[redacted] No one doubts that Penn State may have faced a potential litigation threat and retained counsel (most prominently, Reed Smith) to provide legal advice. [redacted]

[redacted]

There is also no evidence that the Freeh Firm's client, the independent Task Force, faced litigation. Nor is there any evidence demonstrating that *the Freeh Firm* was retained *by the Task Force* to provide legal advice in connection with any anticipated litigation. Penn State and Pepper Hamilton cannot escape the fact that the Freeh Report was prepared for the express purpose of making available *for public consumption* the results of the Freeh Firm's factual investigation regarding what happened at Penn State and who was responsible, and that the results of that independent investigation were released with an *express waiver* of all applicable privileges. The Freeh Firm was retained solely by the Task Force for that purpose, and its engagement had nothing to do with strategy, tactics, or preparing for litigation. At a minimum, Penn State has made no showing that litigation strategy was the primary motivating purpose for the Freeh Firm's work, and the work product doctrine therefore has no application here.[1]

2. The Work Product Privilege Is Not Absolute And Does Not Apply Where, As Here, Materials Are Directly Relevant To The Claims.

Courts have long recognized that "the work-product privilege is not absolute and items may be deemed discoverable if the 'product' sought becomes a relevant issue in the action." *Gocial v. Indep. Blue Cross*, 827 A.2d 1216, 1222 (Pa. Super. 2003); *see also Lane v. Hartford Accident & Indem. Co.*, 5 Pa. D. & C.4th 32, 41–42 (C.P. Dauph. 1990); *Exec. Risk Indem. Inc. v. Cigna Corp.*, 81 Pa. D. & C.4th 410, 425–26 (C.P. Phila. 2006). Applying this principle, courts have also found that the protections in Rule 4003.3 generally apply "only to the litigation

[1] Even if the doctrine did apply, it is not a blanket basis for withholding documents. Penn State and Pepper Hamilton have made no effort to demonstrate what portions of the documents at issue, if any, reflect the mental impressions of counsel that could be subject to this protection.

of the claim for which the impressions, conclusions, and opinions were made." *Reusswig v. Erie Ins.*, 49 Pa. D. & C.4th 339, 349 (C.P. Monroe 2000); *see also Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C.5th 242, 249 (C.P. Beaver 2007); *Yohe v. Nationwide Mut. Life Ins. Co.*, 7 Pa. D. & C.4th 300, 303–04 (C.P. York 1990); *Little v. Allstate Ins. Co.*, 16 Pa. D. & C.3d 110, 112 (C.P. Allegheny 1980).[2]

[redacted] But this is a rule that applies to waiver of the attorney client privilege, and Pennsylvania courts have never interpreted the rule to apply only in those circumstances. To the contrary, the Pennsylvania Superior Court has made clear that "documents ordinarily protected by the attorney work-product doctrine may be discoverable if the work product itself is relevant to the underlying action." *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 32 A.2d 800, 812 (Pa. Super. 2011).

Here, there can be no reasonable dispute that the materials underlying the Freeh Report are directly relevant to this litigation. The Freeh Report accuses plaintiffs of terrible misconduct — concealing, facilitating, and allowing over a decade of child abuse — and the NCAA adopted the Report's findings in the Consent Decree it imposed on Penn State; plaintiffs are entitled to discovery necessary to determine whether there was any valid factual basis for those accusations. Indeed, the key question in this litigation is whether the NCAA had any lawful basis for

[2] Penn State notes that this line of cases arises from the insurance context, where "the work product protection afforded to the materials in the underlying [insurance] litigation is lost in subsequent 'bad faith' litigation between the insured and the insurer because the work product becomes directly relevant to that later, derivative claim." Jt. Mem. 11. But the parallels to this case are obvious, and Penn State cites no precedent that purports to limit the principles recognized in those cases to the insurance context. Here, the Freeh Firm's files are directly relevant to determining whether the Freeh Firm and its co-conspirator, the NCAA, acted maliciously and in reckless disregard for the truth.

imposing sanctions on Penn State based on the defamatory statements it took from the Freeh Report. *See* 2016-04-26 Superior Court Order ("The core of the [plaintiffs'] action . . . concerns how the Freeh Report was developed and the material relied upon in support of its many statements"). The NCAA has claimed that it was entitled to rely on the Freeh Report and that the statements made in the Consent Decree are supported by the factual investigation conducted by the Freeh Firm.

Moreover, plaintiffs have alleged that the NCAA coordinated and conspired with the Freeh Firm to "avoid the NCAA enforcement procedures in order to impose unwarranted and unprecedented sanctions on Penn State." 2d Am. Compl. ¶ 173. [redacted]

In light of the allegations and defenses raised in this case, whether the Freeh Firm's public report is supported by the facts, including the facts uncovered by the Freeh Firm's investigation, is plainly relevant. Plaintiffs are entitled to know who was involved in preparing the Freeh Report, who influenced its reckless and baseless conclusions, and what facts (if any) provided a basis for those conclusions. That is a very compelling reason to recognize that the qualified attorney work product doctrine does not apply.

II. Any Applicable Privilege Has Been Waived.

Because Penn State and Pepper Hamilton have not carried their burden to show that either the attorney-client privilege or the work-product protection applies, there is no need to revisit the Court's earlier conclusion that any applicable privilege was waived. But even if such an inquiry were appropriate, it is clear that the Court's earlier conclusion is correct.

A. The Task Force Deliberately Waived The Attorney-Client Privilege And Work-Product Protection.

"A privilege can be waived," *Com. v. T.J.W.*, 114 A.3d 1098, 1103 (Pa. Super. 2015), and there is no doubt that it was waived here — by the Freeh Firm's true client, the Task Force, and, assuming for argument's sake that Penn State had any attorney-client relationship with the Freeh Firm, by Penn State as well. The Freeh Report expressly states that it "sets forth the essential findings of the investigation, *pursuant to an appropriate waiver of the attorney-client privilege*." Ex. D, Freeh Report 10. The Report states that it was "revealed to the Board of Trustees and the general public at the same time" and that "[n]o advance copy was provided to the Board or any other person outside" the Freeh Firm. *Id.* at 12. And the widely disseminated Consent Decree imposed by the NCAA lauds Penn State for "agree[ing] to waive [the] attorney-client privilege." Consent Decree, at 4 (July 23, 2012).

In addition to disclosing the results of its investigation to the public, the Freeh Firm also shared information about its investigation with law-enforcement officials throughout the course of its investigation pursuant to a blanket, advance waiver of privilege by the Task Force. As noted above, the Freeh Firm's engagement letter reserved to the firm, and the firm alone, the right to disclose "any discovered evidence of criminality" to appropriate law enforcement authorities without advance review by either the Task Force or Penn State. Ex. A, Engagement Ltr., at 2. Acting under that authority, the Freeh Firm did not hesitate to disclose emails from senior University officials to law enforcement. *See* Ex. D, Freeh Report 11; *see also In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371–74 (D.C. Cir. 1984) (holding that disclosure to the government waives attorney-client privilege and work-product protection). [redacted]

The Freeh Firm's repeated disclosures waived both the attorney-client privilege and work-product protection, to the extent either ever existed. "[O]nce the attorney-client communications have been disclosed to a third party, the privilege is deemed waived." *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Commw. 2001); *see also Com. v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005) ("[T]he work-product doctrine is not absolute but, rather, is a qualified privilege that may be waived."). As this Court previously determined, "[a] client disclosing

protected communications to a third party has long been considered inconsistent with an assertion of the privilege." Ex. T, 2014-09-11 Opinion & Order.

Penn State and Pepper Hamilton now claim that these waivers were limited and "cannot suffice to waive the attorney work product doctrine that protects all of the *other* work product materials the Freeh team created during is representation of the University." Jt. Mem. 13 (emphasis in original). But Penn State and Pepper Hamilton have not identified with specificity which materials were shared with law enforcement and third parties, or provided any basis for concluding that the waivers were limited. Their suggestion that the Court should simply rely on their ipse dixit assertions that waivers were limited cannot be taken seriously. In any event, as described above, the Freeh Firm never represented the University, and the scope of its engagement was limited to completing an independent investigation that resulted in a public report that was released pursuant to express waiver of any applicable privilege (which is why the Court has limited the waiver to the four categories set forth in the engagement letter's "Scope of Engagement").

Finally, contrary to Penn State's and Pepper Hamilton's assertions, this is not even remotely comparable to demanding production of drafts of a complaint or documents containing an attorney's thought processes or analysis of a complaint's allegations. Jt. Mem. 13–14. A complaint filed in litigation does not result in a subject matter waiver of any underlying documents, because a complaint is not only drafted in anticipation of litigation, it is litigation. A complaint is not *prepared* independently of the represented party, without the party's input or influence, *see, e.g.*, Pa. R. Civ. P. 1024 (verification), and drafts will almost always reflect a lawyer's opinions and mental impressions. That is not true of a factual report that is publicly released at a press conference pursuant to an express waiver of any applicable privilege and

where the investigators are not hired to provide legal advice in anticipation of litigation, but for the purpose of undertaking what is supposed to be an independent, transparent, and non-confidential investigation.

B. Subject-Matter Waiver Is Appropriate Because Privileges May Not Be Used As Both A Sword And A Shield.

The Freeh Firm's disclosures and the Task Force's express waiver of any applicable privilege were part of a deliberate and carefully planned strategy. In one of the most difficult periods in the University's history, and in an effort to placate the NCAA and others, Penn State sought to highlight the independence of the Freeh Firm's investigation and its review of allegations of child abuse on the University campus. Any effort to limit or control what the Freeh Firm could share — a step that would have been taken if the report had been prepared for confidential litigation purposes — would have undermined that strategy. The "independent" Freeh Report became the basis for the NCAA-imposed Consent Decree, which announced to the world that it was pinning the blame for Sandusky's crimes on Coach Paterno and others in the Penn State community.

Penn State cannot avoid the consequences of the Task Force's strategic decision to publicize the Freeh Report, as Penn State at the time used the Freeh Report as a sword for its own strategic purposes. If one principle of privilege law is clear, it is that the attorney-client privilege may not be used as both a sword and a shield: "A litigant attempting to use attorney-client privilege as an offensive weapon by selective disclosure of favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse." *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1265 (Pa. Super. 2007), *aff'd by an equally divided court*, 605 Pa. 468, 992 A.2d 65 (2010). When a party discloses *some* privileged information in order to

allow attacks to be launched on another party, elementary notions of fairness demand that the party disclose all communications regarding the same subject matter.

Just as the attorney-client privilege is "deeply rooted in our common law," *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013) (internal quotation marks omitted), the subject-matter waiver doctrine is no less fundamental. When a party selectively discloses privileged information in an effort to obtain a tactical advantage, fairness requires giving the injured party access to the information. *See, e.g.*, *Adhesive Specialists, Inc. v. Concept Scis. Inc.*, 59 Pa. D. & C.4th 244, 263 (C.P. Lehigh 2002) ("delivery of [an internal] memorandum to the Pennsylvania State Police constituted a voluntary disclosure to a third party" and "a waiver of the attorney-client privilege, even if the state police agreed not to disclose the communication to anyone else"); *Miniatronics Corp. v. Buchanan Ingersoll, P.C.*, 23 Pa. D. & C.4th 1, 18–21 (C.P. Allegheny 1995) (voluntary disclosure of confidential information to gain tactical advantage sufficient to waive attorney-client privilege for all communications involving same subject matter); *Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (voluntary disclosure of communication protected by attorney-client privilege may result in waiver of privilege for all communications pertaining to the same subject).

In the face of this overwhelming authority, Penn State and Pepper Hamilton challenge whether the well-established principle of subject-matter waiver applies in Pennsylvania, relying heavily on an isolated, unsupported statement in *Bagwell v. Pennsylvania Department of Education*, 103 A.3d 409 (Pa. Commw. 2014), that "Pennsylvania courts have not adopted subject-matter waiver." *Id.* at 419. But that statement is wrong and refuted by *Bagwell*'s own citation of *Nationwide Mutual Insurance Co.*, in which the Pennsylvania Superior Court recognized that "considerations of fairness . . . preclude a party from disclosing only those

privileged materials that support its position, while simultaneously concealing as privileged those materials that are unfavorable to its position." 924 A.2d at 1265.

Penn State and Pepper Hamilton also argue that the subject-matter waiver doctrine does not apply because Penn State's disclosures were not made to achieve a tactical advantage in this litigation. Jt. Mem. 37. That is both wrong and irrelevant. It is wrong because Penn State's tactical use of the Freeh Report is at the bottom of this litigation. Penn State used the fact that the Freeh Report was independently prepared, and publicly disclosed pursuant to a waiver of all applicable privileges, to claim that it had responded responsibly to the Sandusky scandal, which in turn allowed the NCAA to point to the Report in an attempt to justify the egregious actions it took against plaintiffs. *See, e.g.*, NCAA Reply in Supp. Prelim. Objs. at 4 ("To date, absolutely nothing has come out in the public domain to shake any confidence in Judge Freeh's report."). Moreover, plaintiffs have alleged, and the evidence shows, that the NCAA conspired with the Freeh Firm. Penn State has avoided remaining a defendant in this action because it was the NCAA, not Penn State, that embraced the Freeh Report's scurrilous accusations and declared to the world that they provided a basis for imposing unprecedented sanctions.

In any event, whether Penn State's disclosures are tied to this litigation is irrelevant because the subject-matter waiver doctrine applies whenever a party attempts to use selective disclosure as an offensive weapon regardless of motive; it is not limited to the narrow situation where the disclosing party sought to obtain a tactical advantage in litigation. *See In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000) (noting that privilege can be waived when a party "made a deliberate decision to disclose privileged materials in a forum where disclosure was voluntary and calculated to benefit the disclosing party"). By selectively disclosing supposedly privileged material to impugn Coach Paterno, other plaintiffs, and other Penn State

personnel for its own strategic purposes, and then invoking the privilege to resist discovery into the Freeh Firm's investigation, Penn State runs afoul of a fundamental principle of fairness that informs the law of privilege.

Penn State's and Pepper Hamilton's refusal to acknowledge this point further underscores why their reliance on *Bagwell v. Pennsylvania Department of Education* is so misplaced. That case involved a Pennsylvania Open Records Act request for certain information related to Sandusky's crimes. Although the Commonwealth Court declined to find that Penn State's selective waivers of confidentiality resulted in a subject-matter waiver, the court took pains to emphasize that Penn State was "not using its selective disclosures as weapons to the detriment of Requester. *Unlike a party seeking waiver of the privilege in a discovery dispute or otherwise in litigation*, Requester claims no punitive effect from [Penn State's] selective disclosure." 103 A.3d at 419 (emphasis added). The court accordingly reasoned that "the 'fairness' reasons for imposing a broad subject-matter waiver" were not present in that case. *Id.*

In this case, fairness concerns point emphatically in the other direction. Indeed, if there is any case where fairness requires subject-matter waiver, it is this one. By knowingly and publicly disclosing information about the Freeh investigation and Report for its own tactical purposes and to the extreme prejudice of Coach Paterno and other plaintiffs, the Task Force waived both the attorney-client privilege and the work-product protection with respect to the subject matter of the Freeh investigation. *See, e.g.*, *In re Grand Jury Proceedings*, 219 F.3d at 184 (privilege waived "where a corporation has disseminated information to the public that reveals parts of privileged communications or relies on privileged reports"). Courts have repeatedly recognized this common-sense distinction, ordering the production of documents when entities publicly release otherwise confidential information. *See Allied Irish Banks, p.l.c. v. Bank of Am., N.A.*, 240

F.R.D. 96 (S.D.N.Y. 2007) (bank ordered to produce documents generated during internal investigation of fraudulent trading scheme by one of its traders when bank announced report of investigation at press conference and published the report to address critical public accountability concerns and restore confidence for customers and shareholders).

III. The Specific Document Categories Identified By Penn State And Pepper Hamilton Should Not Change The Court's Analysis.

The Superior Court's recent order takes no action and expresses no opinion on this Court's earlier privilege rulings. Nor did it ask this Court to revisit those rulings. Instead, it instructed the parties and the Court to establish a process by which this Court could apply its earlier rulings to particular categories of documents, so the Superior Court would be in a position, if necessary, to conduct a more fact-intensive review. In light of the Superior Court's order, it was Penn State's and Pepper Hamilton's burden to explain with specificity why this Court's earlier rulings should not apply to particular documents or categories of documents.

Penn State and Pepper Hamilton have not carried that burden. Most of their brief merely rehashes arguments this Court has already rejected by continuing to claim in sweeping fashion that all of the documents underlying the Freeh Report are privileged. Moreover, although Penn State and Pepper Hamilton have divided the documents "contained in the files" of the Freeh Firm into categories, Jt. Mem. 1, they have failed to explain why, as a factual matter, any particular category of documents is not covered by this Court's earlier rulings. Instead, the categories work to obscure the factual basis for any privilege claim and deny both plaintiffs and the Court with the information that would be needed to perform the fact-intensive inquiry the Superior Court contemplated.

A. Penn State's and Pepper Hamilton's Categories Confirm That This Court Correctly Rejected Their Blanket Objections To The Subpoena.

It is important to recall the posture of this dispute and the choices Penn State and Pepper Hamilton made when deciding how to litigate their privilege objections. When it first received plaintiffs' notice of subpoena, Penn State raised sweeping, blanket objections to the issuance of the subpoena, claiming that all documents called for under the subpoena were protected from disclosure. *See* Ex. U, Objections to Subpoena, at 3 ("Penn State objects to the production of any documents or other materials in response to the subpoena"). Similarly, when Pepper Hamilton was served with the subpoena, it took the same sweeping approach. Instead of responding to the subpoena, identifying specific documents for objection and producing a privilege log, it reasserted the same blanket, sweeping objections that Penn State had raised. *See* 2014-10-13 Pepper Hamilton Mot. For Stay, at 3 n.1

The Superior Court has now directed Penn State to submit a privilege log on the view that a "fact-intensive probing may be necessary to determine the applicability, if any, of the attorney-client privilege or work product doctrine." *Id.* With due respect to the Superior Court, however, no fact-intensive probing should be necessary. The question is not whether there is some possible argument that Penn State and Pepper Hamilton might now raise — but failed to raise before — in favor of protecting specific documents from disclosure. *Cf. Com v. Otero*, 860 A.2d 1052, 1054 (Pa. Super. 2004) (noting that issues presented for the first time in a reply brief are waived). Instead, the question is whether this Court abused its discretion in overruling Penn State's and Pepper Hamilton's blanket objections as they were presented to the Court — that is, unsupported by any attempt to identify particular documents and tie them to specific claims of privilege. On that question, there can be no doubt that the Court's earlier privilege ruling is correct, for it is well established that a "proper claim of privilege requires a specific designation

and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality." *Foster v. Berwind Corp.*, Civ. A. No. 90–0857, 1990 WL 209288, at *2 (E.D. Pa. Dec. 12, 1990); *see also T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1062 (Pa. Super. 2008) ("[I]t is impossible . . . to determine whether any privilege applies when [a party] has failed to identify or describe any such documents that may be protected.").

That Penn State and Pepper Hamilton decided to take an all-or-nothing approach to their privilege claims, and chose not to produce a privilege log or attempt to identify specific documents, should not now be recast as a purported failure of this Court to undertake the fact-intensive exercise that is often required when a party raises a proper privilege objection. Penn State and Pepper Hamilton should be held to their strategic litigation decisions. They took a blanket, all-or-nothing approach — and chose not to present any fact-intensive arguments — because it helped them to delay production of the subpoenaed documents as long as possible. *See* 2014-12-16 Resp. to Plaintiffs' Subpoena, at 3 ("Pepper Hamilton objects . . . because it would be unreasonable and unduly burdensome to impose on Pepper Hamilton the obligation to provide a log of tens of thousands of privileged and work product documents"). It also allowed them to avoid admitting that Penn State's initial objections to issuance of the subpoena were frivolous and that large quantities of documents underlying the Freeh Report could not possibly be privileged under any conceivably plausible theory.

Holding Penn State and Pepper Hamilton to their strategic litigation decisions is especially appropriate given that the parties have now conducted numerous depositions and other discovery using the documents that Penn State and Pepper Hamilton continue to claim as privileged. At this juncture, it could only cause problems, inconvenience, and even more delay to allow Penn State and Pepper Hamilton to change their litigation strategy and, based on new

categories of documents, attempt to disentangle which documents might be subject to some arguable privilege and which deposition testimony may or may not relate to allegedly privileged information.

Plaintiffs thus respectfully request that the Court reconfirm its earlier ruling that Penn State's and Pepper Hamilton's blanket privilege objections are meritless. It should also note that the fact that Penn State and Pepper Hamilton failed until now to produce any kind of privilege log or identify specific documents provides additional grounds for finding that Penn State and Pepper Hamilton failed to "provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege." *SmithKline*, 232 F.R.D. at 482 (quoting *Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993). The protective order entered by the Court has appropriately protected the documents from public disclosure, while allowing this litigation to move forward. There is no reason this late in the litigation process that either the parties or the Court should be faced with the unfair burden of considering new fact-intensive arguments that Penn State and Pepper Hamilton have until now declined to raise.

B. Penn State and Pepper Hamilton Still Have Not Properly Invoked The Privileges They Seek To Assert.

Penn State and Pepper Hamilton in any event still have not carried their burden to demonstrate that any specific document is protected under any applicable privilege. Even though the Superior Court has given them an opportunity to identify specific documents and to provide a factual basis for claiming privilege with respect to those documents, the categories that Penn State and Pepper Hamilton have created and the explanations they have provided are inadequate and do nothing to clarify the issues. Their proposed categories do not take into account this Court's earlier rulings. For example, there is no way to connect their proposed categories with the subject matters this Court identified as covered by the scope of the Task Force's express

waiver. *See, e.g.*, 2014-09-11 Order & Opinion, at 22 (identifying four subject matter categories). Nor do their proposed categories correspond with the document requests in plaintiffs' subpoena. The result is just more confusion that serves only one purpose — to impose more burdens on plaintiffs and the Court, while Penn State and Pepper Hamilton continue to fail to provide the careful analysis and detailed descriptions that the law requires. (For the Court's convenience, Exhibit W is a chart that lists many of the problems with Penn State and Pepper Hamilton's proposed categories).

1. Penn State And Pepper Hamilton Have Not Shown That Documents Relating To The Freeh Report's Findings Or Conclusions Are Privileged.

Ten of the subpoena requests call for production of documents that support certain statements in the Freeh Report, most of which appear in the Report as "Findings." Ex. D, Freeh Report 14. Those requests were designed to identify documents collected during the Freeh investigation that provide the bases for statements in the Report, including both source documents and non-source documents. ("Source documents" refers to the raw documents collected from Penn State as part of the Freeh investigation.)

Source documents. [redacted]

[redacted]

Non-source documents. [redacted]

[redacted]

In any event, many interview memoranda are referenced in endnotes to the Freeh Report as support for its findings and conclusions. Although the endnotes include only dates of interviews without the source, the substance of the referenced interview or some part of it is included in the Report. The Freeh Firm thus waived any protection applicable to the source of the interview when it publicly released its Report.

2. Penn State And Pepper Hamilton Have Not Shown That Communications Between The Freeh Firm And Penn State Are Privileged.

[redacted]

[redacted]

3. Penn State And Pepper Hamilton Have Not Shown That Communications Between The Freeh Firm And Other Third Parties Are Privileged.

Penn State (and Pepper Hamilton) contend that they have produced documents that constitute communications with third parties, but they object to producing documents that relate to those communications. [redacted] But plaintiffs requested documents that relate to communications with various third parties, "relating to the Freeh investigation or the Consent Decree," and other specific subjects, regardless of whether

they are specifically cited in the Report. Ex. V, 2015-09-15 Document Subpoena to Pepper Hamilton.

Here too, Penn State (and Pepper Hamilton) seek to belatedly assert work product protection for documents that they refused to log when they received the subpoena. Having been ordered to produce these documents as a result of their failure to properly assert work product, they are not entitled to a third attempt to convince this Court that they could have properly asserted a work product objection. In addition, because the Freeh Firm published its Report pursuant to an express waiver of all applicable privileges, there is no credible argument that the supporting information should be protected. The same rationale applies to each of the requests for communications with the NCAA, Emmert, Ray, the Mayer Brown law firm, the Big Ten Conference or any athletic governing body, that relate to the Freeh investigation or the Consent Decree. Ex. V, 2014-09-15 Document Subpoena to Pepper Hamilton (Request Nos. 4, 17, 18, 21).

4. Because The Proposed Categories Do Not Match Plaintiffs' Documents Requests, The Court Lacks Information Sufficient To Adjudicate Penn State's And Pepper Hamilton's Privilege Claims.

The six remaining requests in the subpoena call for production of documents pertaining to a variety of subjects, including the "Client File" as defined in the engagement letter between the Freeh Firm and the Task Force (Request No. 3), Coach Joseph Paterno's grand jury testimony (Request No. 11), the decision by the Penn State Board of Trustees to terminate Coach Joseph Paterno as head football coach (Request No. 15), services provided by non-Freeh Firm personnel on the investigation (Request No. 16), drafts of the Freeh Report (Request No. 22), and concerns by members of the Freeh Firm about the investigation or conclusions in the Report (Request No. 25). Penn State and Pepper Hamilton objected to all of these requests on grounds of attorney-client privilege and work product.

Most of these miscellaneous requests do not correspond to Penn State and Pepper Hamilton's proposed categories. [redacted] Moreover, in 2014, Pepper Hamilton objected that it would be unreasonable and unduly burdensome for it to have to provide a privilege log of the documents withheld on grounds of privilege. But it appears that there are only between 100-200 documents responsive to Request 22, which would not have been an unreasonable number to log.

The other four miscellaneous requests do not correspond to any of Penn State's and Pepper Hamilton's proposed categories. The problem with that approach is that it shifts the burden to plaintiffs to identify the responsive documents within Pepper Hamilton's earlier productions and then figure out which proposed category, if any, might apply. That is improper, and it confirms that Penn State and Pepper Hamilton have not carried their burden. Even if documents under one of the proposed categories might be responsive to one of plaintiffs' document requests, Penn State and Pepper Hamilton still have not created an adequate record for this Court to consider their privilege claims.

CONCLUSION

The Court should confirm its earlier rulings and find that Penn State and Pepper Hamilton have not carried their burden to prove that the documents in any proposed category are subject to any applicable privilege and that, to the extent any privilege might apply, it has been waived.

Date: June 22, 2016

By: Patricia Maher

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Exhibit A

Freeh Sporkin & Sullivan, LLP

PRIVILEGED AND CONFIDENTIAL

November 18, 2011

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

Re: Engagement to Perform Legal Services

Dear Mr. Garban and Ms. Ammerman:

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

1. Scope of Engagement. FSS has been engaged to serve as independent, external legal counsel to the ~~Special Committee~~ to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University ("PSU") personnel to report such sexual abuse to appropriate police and government authorities. The results of FSS's investigation will be provided in a written report to the ~~Special Committee~~ and other parties as so directed by the ~~Special Committee~~. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS's report also will provide recommendations to the ~~Special Committee~~ and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Account Holder: Freeh Sporkin & Sullivan, LLP

Bank:

Account No.:

ABA/Routing No.:
(For Domestic Payments)

SWIFT Code:
(For International Payments)

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

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

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

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

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

6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the ~~Special Committee~~ Task Forces under this enagagment by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges, unless appropriately waived by the parties or otherwise determined by law. In the event that FSS, or any third party working on behalf of FSS to perform services in connection with this engagement, is required to respond to a subponea or other formal request from a third party or a governmental agency for our records or other information relating to services we have performed for the ~~Special Committee~~ Task Forces, or to testify by deposition or otherwise concerning such services, to the extent permitted by law, we will provide you and the ~~Special Committee~~ Task Forces notice of such a request and give you and the ~~Special Committee~~ Task Forces a reasonable opportunity to object to such disclosure or testimony. It is understood that you will reimburse us for our time and expense incurred in responding to any such demand, including, but not limited to, time and expense incurred in search and photocopying costs, reviewing documents, appearing at depositions or hearings, and otherwise litigating issues raised by the request.

7. General Responsibilities of Attorney and Client. FSS will provide the above-described legal services for the ~~Special Committee~~ Task Forces's benefit, for which the Trustees will be billed in the manner set forth above. We will keep the ~~Special Committee~~ Task Forces

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

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

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

8. Waiver of Future Conflicts. Our agreement to represent the ~~Special Committee~~ Task Force is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to either you or an affiliate in any matters (whether involving the same substantive areas of law for which you have retained us on behalf of the ~~Special Committee~~ Task Force or some other unrelated areas, and whether involving business transactions, counseling, litigation or otherwise), which do not involve the same factual and legal issues as matters for which you have retained us on behalf of the ~~Special Committee~~ Task Force or may hereafter retain us. In this connection, you and the ~~Special Committee~~ Task Force should be aware that we provide services on a wide variety of legal subjects, to a number of clients, some of whom are or may in the future operate in the same areas of business in which you are operating or may operate. Subject to our ethical and professional obligations, we reserve the right to withdraw from representing the ~~Special Committee~~ Task Force should we determine that a conflict of interest has developed for us.

9. Engagement Limited to Identified Client. This will also confirm that, unless we otherwise agree in writing, our engagement is solely related to the ~~Special Committee~~ Task Force established by The Pennsylvania State University Board of Trustees and the specific matter described above. By entering into this engagement, we do not represent any individuals or entities not named as clients herein, nor do we represent any owner, officer, director, founder, manager, general or limited partner, employee, member, shareholder or other constituent of any entity named as a client in this letter, in their individual capacities or with respect to their individual affairs.

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

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

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

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

Sincerely,

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

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

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

Printed Name: Steve A. Garban

Title: Chair, Board of Trustees
The Pennsylvania State University

Date: 12/2/11

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

By: _____
an authorized signatory of The Special ~~Committee~~ Investigation Task Force established by
The Board of Trustees of The Pennsylvania State University

Printed Name: K. C. Frazier

Title: Chair, Special Investigations Task Force

Date: 12/2/11

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

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Exhibit C

PennState

Former FBI director Freeh to conduct independent investigation

November 21, 2011

Freeh to lead impartial and comprehensive assessment of University's actions, governance, protocols, decision-making and oversight
People with relevant information encouraged to call newly-established hotline
Findings and recommendations to be made public

PHILADELPHIA, Pa. – The special committee of The Pennsylvania State University Board of Trustees announced today (Nov. 21) that it has engaged former FBI Director and federal judge Louis J. Freeh to lead an independent investigative review into all aspects of the University's actions with regard to the allegations of child abuse involving a former Penn State employee contained in the recent Grand Jury report. The special committee and Freeh said that the findings and recommendations of this work, when completed, will be made available to the public. No specific timeframe has been set for completion of the review.

Ken Frazier, chairman of the special committee, said, "Each of us in the Penn State community read the Grand Jury report with the same sense of dismay and anger that has stunned and shocked our entire nation and the wider world. We are especially heartbroken that some of these unspeakable acts could have occurred on the campus of Penn State University. We care deeply for the victims and their families whose lives have been tragically affected. The board also understands how difficult this has been for the students, faculty, staff and others who are dealing with the shock and revulsion at what happened.

"The entire Board of Trustees is intent on taking all steps necessary to ensure that our institution never again has to ask whether it did the right thing, or whether or not it could have done more. We are committed to leaving no stone unturned to get to the bottom of what happened, who knew what when, and what changes we must make to ensure this doesn't happen again. Therefore, we are pleased that Judge Freeh has agreed to lead a thorough and independent investigative review of this matter," concluded Frazier.

Ron Tomalis, vice-chairman of the special committee, said, "Judge Freeh is a man of complete integrity, independence and objectivity. The scope of his work will be expansive, and he is free to take his work to whatever conclusions he deems appropriate. No one at Penn State will be exempt from this review, including the Board of Trustees itself."

Freeh commented, "I am committed to leading the investigation into this tragic and distressing series of events and making the appropriate recommendations. Our investigation will look carefully at the governance, protocols, decision-making and oversight within the University. We will cooperate fully with

the law enforcement authorities, will defer to them, and will not impede their work in any way.

"I welcome the unequivocal support the special committee and the entire board have offered for full access and cooperation. They have directed me to carry out this investigation with complete independence, and take it wherever it may lead. I will proceed with all deliberate speed, but there are no limits on the duration of the investigation. We will work expeditiously as well as thoroughly."

Freeh also announced that a confidential, toll-free hotline has been established for anyone with information that could assist in this investigation. The hotline number is 855-290-3382, which will be active starting at 5 p.m. EST today (Nov. 21). Those who wish to communicate with the investigation by email may do so at the following email address: PSUhelp@freehgroup.com.

The special committee is comprised of University Trustees, students, faculty and other individuals affiliated with the Penn State community, including:

Ken Frazier, chairman; chief executive officer and president of Merck;

Ron Tomalis, vice-chair; secretary of the Pennsylvania Department of Education;

Mark Dambly, president of Pennrose Properties LLC;

Jesse Arnelle, attorney at law;

Keith Eckel, sole proprietor and president of Fred W. Eckel Sons Farms, and board chairman, Nationwide Insurance ;

Karen Peetz, vice chairman, chief executive officer, Financial Markets and Treasury Services, Bank of New York Mellon;

Dan Hagen, chair, University Faculty Senate, professor of animal science, College of Agricultural Sciences; and

Rodney Hughes, doctoral student, higher education, Penn State University.

In addition, the Board of Trustees has appointed Guion Bluford Jr. as a member of the special committee. Bluford is an eminent engineer, retired colonel of the U.S. Air Force and former NASA astronaut who participated in four Space Shuttle missions between 1983 and 1992.

Freeh serves as senior managing partner of Freeh Sporkin & Sullivan LLP. He also is the founder and chairman of Freeh Group International Solutions, an affiliated investigative consultancy.

Freeh was born in Jersey City, N.J., and graduated Phi Beta Kappa from Rutgers University in 1971. He received his juris doctor (JD) degree from Rutgers School of Law in 1974 and his master of laws (LLM) in criminal law from New York University School of Law in 1984. Freeh joined the Federal Bureau of Investigation (FBI) as a special agent in 1975, working assignments in the New York field office and later transferring to Headquarters in Washington, D.C.

In 1981, he joined the U.S. Attorney's Office for the Southern District of New York as an assistant United States attorney. Subsequently, he held positions there as chief of the Organized Crime Unit, deputy United States attorney, and associate United States attorney.

During this time, Freeh was the lead prosecutor in the "Pizza Connection" case, one of the largest and most complex investigations ever undertaken at the time by the U.S. government. The case involved an extensive drug-trafficking operation in the United States by Sicilian organized crime members. Following the investigation, Freeh served as the federal government's principal courtroom attorney in the 14-month trial and won the conviction of 16 of 17 co-defendants. In 1990, he was appointed a special prosecutor by the attorney general to oversee the investigation into the mail-bomb murders of Federal Judge Robert Vance of Birmingham, Ala., and civil rights leader Robert Robinson of Savannah, Ga. This case became known as the VANPAC case. After extensive investigation, a suspect was apprehended, prosecuted and convicted.

In July 1991, former President George Bush appointed Freeh as U.S. District Court judge for the Southern District of New York. While serving in this position he was nominated to be the director of the FBI by President William Clinton on July 20, 1993. He was confirmed by the Senate and was sworn in as director on Sept. 1, 1993 where Freeh remained through June 2001.

The full text of the prepared remarks from today's press conference follows:

The Spoken Word Shall Prevail
Chairman Frazier:
"Good morning.
I am Ken Frazier, the Chair of the Special Committee established by the Penn State Board of Trustees, and along with Ron Tomalis, my colleague and Vice-Chairman of the Special Committee, we appreciate your joining us this morning on short notice. We are here today in response to the shocking and horrendous Grand Jury report and the charges of child sexual abuse that have been made public.

Each of us in the Penn State community read that report with the same sense of dismay and anger that has stunned and shocked our entire nation and the wider world. People from all walks of life have been deeply affected by the reports of these crimes. Society is rightly outraged about reports of innocent children being preyed upon with impunity -- and for so long. The Commonwealth of Pennsylvania is undertaking its investigation to determine criminal responsibility. At the same time, people are asking completely valid questions about why actions were not taken that might have saved any of the victims from harm.

Words alone cannot express the heartbreak and sorrow we feel for the victims, even more so because they were defenseless young children.

We are especially heartbroken that some of these unspeakable acts could have occurred on the campus of Penn State University. We care deeply for the victims and their families whose lives have been tragically affected. The Board also understands how difficult this has been for the students, faculty, staff and others who are dealing with the shock and revulsion at what happened.

We sincerely hope that, in the future, the pain and anguish suffered by the victims will serve as the starkest of reminders to all of us – it is a clear and absolute imperative for anyone ever in a position to do so to properly report and put a stop to such crimes. Any caring, responsible person must take immediate and appropriate action to end the silence that so often gives safe haven to people who would do such horrific things. What occurred must never be allowed to happen again. But for now, let me say again, and on behalf of the Board of Trustees and the entire Penn State University community, we are deeply, deeply sorry.
At the same time, as the law enforcement authorities investigate those people who should be held

criminally responsible for those acts, the Board of Trustees is intent on taking all steps necessary to ensure that our institution never again has to ask whether it did the right thing, or whether or not it could or should have done more. As a first step we are commissioning a comprehensive and independent investigation into what occurred.

We are committed to leaving no stone unturned to get to the bottom of what happened -- who knew what, when, and what changes we must make to ensure this doesn't happen again. And that means in any area of the university... not just the football program. No one, no one, is above scrutiny, including every member of the Administration, every member of the Board of Trustees, and every employee of Penn State University.

To that end, the Board of Trustees has formed a Special Committee. The composition of the committee, which includes Trustees as well as people affiliated with the Penn State community, is covered in the press release we are issuing today.

To add further outside perspective to our committee, we have appointed an independent and distinguished member – and Penn State graduate – to the Special Committee: the eminent engineer, Air Force Officer, and former Astronaut, Dr. Guion Bluford.

To lead the independent investigation, we sought a person whose personal integrity and professional background are beyond reproach. I am pleased to report that we have more than met that standard. To conduct this investigation, we have engaged an outstanding firm led by a man with unimpeachable credentials and unparalleled experience in law and criminal justice, former FBI director Louis J. Freeh.

Judge Freeh will be our Special Investigative Counsel. He has complete rein to follow any lead, look into every corner of the University to get to the bottom of what happened, and to make recommendations that will help ensure it doesn't happen again. He will conduct the investigation with complete independence. Once his work is completed, he will make his findings and recommendations public.

Judge Freeh has led some of the most sensitive and important investigations of our generation. And beyond that, he has been an active leader and Board member of the National Center for Missing and Exploited Children, the most prominent private organization in the U.S. dedicated to protecting children from sexual crimes. As FBI director, Judge Freeh permanently assigned agents to work at the Center. He has also been a member of the Board of the U.S. Naval Academy Foundation, and, as Director of the FBI, he launched the Innocent Images National Initiative to protect young children.

This is the first step in a process that will put in place effective systems and controls. We know that no one can go back in time to right the wrongs that have taken place. But the Special Committee is determined, along with Judge Freeh, to do everything in our power to prevent such heinous acts in the future.

Given the nature of Judge Freeh's work, neither he nor the Special Committee will be in a position to comment until the investigation is completed. Judge Freeh does not intend to make interim reports to the public. His work has just begun, so please understand that we will have a limited ability to respond to your questions today.

With that, let me turn it over to Judge Freeh for some brief remarks."

Judge Freeh:
"Thank you, Chairman Frazier.

The Special Committee established by the Board of Trustees of The Pennsylvania State University has hired my firm, Freeh, Sporkin & Sullivan, to conduct a fair and independent investigation into all the facts and circumstances that have been raised by the Grand Jury report and criminal charges which have been made public. I will personally lead this investigation.

The allegations that have been raised and the charges that have been brought are extraordinarily serious. Crimes against children have a devastating impact on the victims and their families and we will be completely sensitive to this reality as we perform our work.

I am committed to ensuring that our independent investigation be conducted in a thorough, fair, comprehensive manner, leaving no stone unturned, and without any fear or favor. We will examine all the relevant records, evidence, information and circumstances. We will attempt to interview all necessary and appropriate witnesses. While doing our work, we will liaise closely with the law enforcement authorities and ensure that nothing we do interferes with or impedes their important investigations. I have spoken with the Pennsylvania Attorney-General, and have reiterated that point to her.

We will also thoroughly study, review and test all of the University's policies, procedures, compliance and internal controls relating to the identifying and reporting of such sex crimes and misconduct. This examination will include, among other things, any failures or gaps in the University's control environment, compliance programs and culture which may have enabled the alleged misconduct to occur, go undetected, and not be reported and addressed promptly and properly.
Most importantly, we will make recommendations to the Board of Trustees which will ensure that we rectify such failures of leadership and control environment at Penn State that allowed anyone to prey on children with impunity.

During the course of this independent investigation, we will immediately report any evidence of criminality to the appropriate law enforcement authorities. If our investigation identifies any additional victims of sexual crimes against, or exploitation of children, we will immediately report this to law enforcement authorities.
Our mandate is clear. We have been tasked to investigate this matter fully, fairly, and completely. We have been asked to do this with a commitment to show no favoritism toward any of the parties whose actions we will be reviewing, including the Board of Trustees itself. The Special Committee has assured us total independence so that this mandate can be fulfilled. This assurance is the main condition of my engagement.

We recognize that all concerned want timely and reliable answers about exactly what happened. The scope of our work will be broad, covering a lengthy period of time. We will also need the cooperation of the Pennsylvania State University community, as well as others. I have assembled a team of professionals with many decades of prior investigative, law enforcement, prosecutorial and judicial experience, who are completely independent of Pennsylvania State University. We have already begun our work.

We have established a toll-free hotline for people to call if they wish to provide information to us. That hotline will be live from 5pm Eastern today, and the telephone number – which is also on the screen before you -- is (855)-290-3382. We have also established an address for people to communicate with us by email at PSUhelp@freehgroup.com. We ask that anyone who has relevant information to please come forward and provide it to us.

We will treat all information and leads received with the strictest confidence and professionalism permitted by law.

At this time let me turn the podium back to Chairman Frazier."

Chairman Frazier:
"Thank you, Judge Freeh, for your remarks.

I think these comments underline the seriousness with which we take this matter. Our first thoughts are with the victims. Our thoughts are also with our students, including our student athletes, who also have been profoundly affected by these events. And with the victims at the forefront of our minds, we have established this independent investigation...we have empowered Judge Freeh to take his team's work to wherever it leads...and we are absolutely committed to doing whatever we can to ensure that any failures involving our University are not repeated.

At this time, as I said earlier, we are extremely limited in what more we can say. So with that caveat, we are now prepared to entertain just a few brief questions."

Last Updated November 29, 2011

Exhibit D

Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky

Freeh Sporkin & Sullivan, LLP

July 12, 2012

SCOPE OF REVIEW AND METHODOLOGY

Freeh Sporkin & Sullivan LLP, ("FSS"), was engaged by the Special Investigations Task Force ("Task Force") on behalf of The Pennsylvania State University's Board of Trustees ("Board" or "Trustees")[a] as Special Investigative Counsel on November 21, 2011. As Special Investigative Counsel, FSS was asked to perform an independent, full and complete investigation of:

- The alleged failure of Pennsylvania State University personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky ("Sandusky");
- The circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth.

In addition, the Special Investigative Counsel was asked to provide recommendations regarding University governance, oversight, and administrative policies and procedures that will better enable the University to prevent and more effectively respond to incidents of sexual abuse of minors in the future.

To achieve these objectives the Special Investigative Counsel developed and implemented an investigative plan to:

- Identify individuals associated with the University at any level or in any office, who knew, or should have known, of the incidents of sexual abuse of children committed by Sandusky, the substance of their knowledge, and the point at which they obtained that knowledge;
- Examine how these incidents became known to, and were handled by, University Trustees, staff, faculty, administrators, coaches or others, with

[a] The members of the Special Investigations Task Force are: Chairman, Kenneth C. Frazier, Chief Executive Officer and President, Merck & Co., Inc.; Vice Chairman, Ronald J. Tomalis, Secretary of the Pennsylvania Department of Education; H. Jesse Arnelle, Attorney; Guion S. Bluford, Jr., Ph.D., Colonel, United States Air Force (retired); Mark H. Dambly, President, Pennrose Properties, LLC; Keith W. Eckel, Sole Proprietor and President, Fred W. Eckel & Sons Farms, Inc.; Daniel R. Hagen, Ph.D., Immediate Past-Chair, The Pennsylvania State University Faculty Senate, Professor, College of Agricultural Sciences; Rodney P. Hughes, Doctoral Student, The Pennsylvania State University; Karen B. Peetz, Chairman, Board of Trustees, The Pennsylvania State University, Vice Chairman and Chief Executive Officer, Financial Markets and Treasury Services, Bank of New York Mellon.

particular regard to institutional governance, decision making, oversight and culture.

- Identify any failures and their causes on the part of individuals associated with the University at any level or in any office, or gaps in administrative processes that precluded the timely and accurate reporting of, or response to, reports of these incidents.

The Special Investigative Counsel implemented the investigative plan by:

- Conducting over 430 interviews of key University personnel and other knowledgeable individuals to include: current and former University Trustees and Emeritus Trustees; current and former University administrators, faculty, and staff, including coaches; former University student-athletes; law enforcement officials; and members of the State College community at the University Park, Behrend, Altoona, Harrisburg and Wilkes-Barre campuses, and at other locations in Delaware, Pennsylvania, New York, Maryland and the District of Columbia, and by telephone;
- Analyzing over 3.5 million pieces of pertinent electronic data and documents;
- Reviewing applicable University policies, guidelines, practices and procedures;
- Establishing a toll-free hotline and dedicated email address to receive information relevant to the investigation, and reviewing the information provided from telephone calls and emails received between November 21, 2011 and July 1, 2012;
- Cooperating with law enforcement, government and non-profit agencies, including the National Center for Missing and Exploited Children (NCMEC), and athletic program governing bodies;
- Benchmarking applicable University policies, practices and procedures against those of other large, public and private universities and youth-serving organizations; and
- Providing interim recommendations to the Board in January 2012 for the immediate protection of children.

The information in this report was gathered under the applicable attorney-client privilege and attorney work product doctrine, and with due regard for the privacy of the interviewees and the documents reviewed. All materials were handled and

maintained in a secure and confidential manner. This report sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege by the Board.

Citations in this report have been redacted to protect the identity of people who spoke with the Special Investigative Council. Citations also include references to the internal database maintained by the Special Investigative Council to collect and analyze documents and emails. The references include citation to a unique identifying number assigned to each individual piece of information and are located in the endnotes and footnotes of this report.

INDEPENDENCE OF THE INVESTIGATION

The Special Investigative Counsel's mandate was made clear in the public statement of Trustee Kenneth C. Frazier announcing this investigation. "No one is above scrutiny," Frazier said. "[Freeh] has complete rein to follow any lead, to look into every corner of the University to get to the bottom of what happened and then to make recommendations that ensure that it never happens again." Frazier assured the Special Investigative Counsel that the investigation would be expected to operate with complete independence and would be empowered to investigate University staff, senior administrators, and the Board of Trustees.

The Special Investigative Counsel operated with total independence as it conducted this investigation. Its diverse membership included men and women with extensive legal, law enforcement and child protection backgrounds who were experienced in conducting independent, complex and unbiased investigations. None of the Special Investigative Counsel's attorneys or investigators attended The Pennsylvania State University or had any past or present professional relationship with the University. The Special Investigative Counsel maintained a secure workspace that was separate from all other University offices and classrooms. The workspace was accessible to the public only when accompanied by a member of the Special Investigative Counsel team. The Special Investigative Counsel's computer systems were not connected to the University's network.

The Special Investigative Counsel had unfettered access to University staff, as well as to data and documents maintained throughout the University. The University staff provided a large volume of raw data from computer systems, individual computers and communications devices. The Special Investigative Counsel performed the forensic analysis and review of this raw data independent of the University staff. From this review and analysis, the Special Investigative Counsel discovered the most important documents in this investigation – emails among former President Graham B. Spanier, former Senior Vice President-Finance and Business Gary C. Schultz and Athletic Director Timothy M. Curley from 1998 and 2001 - relating to Sandusky's crimes. The Special Investigative Counsel immediately provided these documents to law enforcement when they were discovered.

The Special Investigative Counsel interviewed a cross-section of individuals including current and former University faculty and staff members, Trustees, and student-athletes. The interviews covered a wide range of academic, administrative and athletic topics relating to Sandusky's crimes and the allegations against Schultz and Curley; as well as the governance and oversight function of the University's administrators and Board of Trustees. The temporal scope of the interviews ranged from the late 1960s, when Sandusky first attended the University, to the present.

The witnesses interviewed in this investigation, with few exceptions, were cooperative and forthright. Very few individuals declined to be interviewed, including some who declined on the advice of counsel (i.e., Sandusky, Schultz, Curley and former University outside legal counsel Wendell Courtney). At the request of the Pennsylvania Attorney General, the Special Investigative Counsel did not interview former Pennsylvania State University Director of Public Safety Thomas Harmon or former coach Michael McQueary, among others. Although the information these individuals could have provided would have been pertinent to the investigation, the findings contained in this report represent a fair, objective and comprehensive analysis of facts. Moreover, the extensive contemporaneous documentation that the Special Investigative Counsel collected provided important insights, even into the actions of those who declined to be interviewed.

No party interfered with, or attempted to influence, the findings in this report. The Special Investigative Counsel revealed this report and the findings herein to the Board of Trustees and the general public at the same time. No advance copy was provided to the Board or to any other person outside of the Special Investigative Counsel's team, and the work product was not shared with anyone who was not part of the Special Investigative Counsel's team.

selected Trustees Kenneth C. Frazier and Ronald J. Tomalis to lead its efforts. On November 21, 2011 the Task Force engaged the law firm of Freeh Sporkin & Sullivan, LLP ("FSS") as Special Investigative Counsel, to conduct an investigation into the circumstances surrounding the criminal charges of sexual abuse of minors in or on Penn State facilities by Sandusky; the circumstances leading to the criminal charges of failure to report possible incidents of sexual abuse of minors; and the response of University administrators and staff to the allegations and subsequent Grand Jury investigations of Sandusky. In addition, the Special Investigative Counsel was asked to provide recommendations regarding University governance, oversight and administrative procedures that will better enable the University to effectively prevent and respond to incidents of sexual abuse of minors in the future.

The Pennsylvania State University is an outstanding institution nationally renowned for its excellence in academics and research. There is a strong spirit of community support and loyalty among its students, faculty and staff. Therefore it is easy to understand how the University community was devastated by the events that occurred.

FINDINGS

The most saddening finding by the Special Investigative Counsel is the total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims. As the Grand Jury similarly noted in its presentment,[1] there was no "attempt to investigate, to identify Victim 2, or to protect that child or any others from similar conduct except as related to preventing its re-occurrence on University property."

Four of the most powerful people at The Pennsylvania State University – President Graham B. Spanier, Senior Vice President-Finance and Business Gary C. Schultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno – failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky's activities from the Board of Trustees, the University community and authorities. They exhibited a striking lack of empathy for Sandusky's victims by failing to inquire as to their safety and well-being, especially by not attempting to determine the identity of the child who Sandusky assaulted in the Lasch Building in 2001. Further, they exposed this child to additional harm by alerting

Exhibit I

FOR IMMEDIATE RELEASE

REMARKS OF LOUIS FREEH IN CONJUNCTION WITH ANNOUNCEMENT OF PUBLICATION OF REPORT REGARDING THE PENNSYLVANIA STATE UNIVERSITY

Philadelphia, PA, July 12, 2012 – Louis Freeh today issued prepared remarks in conjunction with today's publication of his report of the investigation into the facts and circumstances of the actions of The Pennsylvania State University surrounding the child abuse committed by a former employee, Gerald A. Sandusky. Mr. Freeh will summarize these remarks during his press conference at 10 a.m. today.

Mr. Freeh and his law firm, Freeh Sporkin & Sullivan, LLP, were retained in November 2011 on behalf of the Special Investigations Task Force of the Board of Trustees of The Pennsylvania State University to conduct the independent investigation.

The full text of the remarks follows:

I. Introduction

Good Morning.

We are here today because a terrible tragedy was allowed to occur over many years at Penn State University, one in which many children were repeatedly victimized and gravely harmed. Our hearts and prayers are with the many children – now young men – who were the victims of a now convicted serial pedophile.

I want to remind everyone here, and those watching this press conference, of the need to report child sexual abuse to the authorities. In Pennsylvania you can report child sexual abuse to the Department of Public Welfare's ChildLine. That number – which is on the screen before you – is **(800) 932-0313**. It is our hope that this report and subsequent actions by Penn State will help to bring every victim some relief and support.

Penn State University is an outstanding educational institution, which is rightly proud of its students, alumni, faculty and staff, who, in turn, hold the institution in very high esteem. We understand and respect their support and loyalty, and the spirit of community surrounding the University, which we witnessed first-hand during our seven and one half months of work on the Penn State campus. We also fully appreciate the strong emotions which surround these tragic matters and our work.

All of us here today understand that it is the duty of adults to protect children and to immediately report any suspected child sexual abuse to law enforcement authorities. Our team was reminded of this on a daily basis because Henderson South, our base at Penn State, was the former Child Care Center at State College, with some of the children's art work still in the space.

On November 21, 2011, the Special Investigations Task Force established by the Board of Trustees of The Pennsylvania State University retained my firm, Freeh Sporkin & Sullivan, to conduct a full, fair and completely independent investigation into the facts and circumstances raised by the Grand Jury report and the criminal charges against former Assistant Coach Gerald Sandusky.

I commend Ken Frazier, Chairman of the Task Force, and Ron Tomalis, Vice Chairman of the Task Force, and their colleagues for the steps they took to ensure the independence and thoroughness of our investigation. We would also like to acknowledge, in particular, the three Task Force members who are not members of the Board of Trustees – a faculty member, a student and a distinguished alumnus.

To conduct this independent investigation, we assembled an outstanding team of former law enforcement, lawyers (one of whom is a former Navy SEAL) and officials, including former prosecutors, FBI Agents and Pennsylvania and Delaware State Police Officers, with many decades of experience conducting sensitive investigations. I am pleased to be joined this morning by some members of our team.

Working exceptionally hard in a very short amount of time for an investigation of this magnitude, my team conducted over 430 interviews of various individuals that included current and former University employees from various departments across the University, as well as current and past Trustees, former coaches, athletes and others in the community. We also analyzed over 3.5 million emails and other documents. The evidence found by our investigators included critical, contemporaneous correspondence from the times of these events. Our investigative team made independent discovery of critical 1998 and 2001 emails – the most important evidence in this investigation. We also confirmed, through our separate forensic review, that the correct year of the Sandusky sexual assault witnessed by Michael McQueary was 2001, and not 2002 as set forth in the original Grand Jury presentment.

In performing this work, we adhered faithfully to our original mandate: to investigate this matter fully, fairly, and completely, without fear or favor. We have shown no favoritism toward any of the parties, including the Board of Trustees itself, our client. I can tell you that at all times we felt that our demand for total independence – the primary condition of our engagement – was respected.

We took the unusual step of not providing any draft of the report to the Board of Trustees or to the Task Force prior to its posting this morning. They are seeing it at the same time and in the same manner as everyone else, namely by accessing the independent website we established for this purpose, www.TheFreehReportonPSU.com. To be absolutely clear, this public release is the first time anyone outside of our investigative team has seen this report.

In our investigation, we sought to clarify what occurred, including who knew what and when events happened, and to examine the University's policies, procedures, compliance and internal controls relating to identifying and reporting sexual abuse of children. Specifically, we worked to identify any failures or gaps in the University's

control environment, compliance programs and culture which may have enabled these crimes against children to occur on the Penn State campus, and go undetected and unreported for at least these past 14 years. As you will read in our report, Penn State failed to implement the provisions of the Clery Act, a 1990 federal law that requires the collecting and reporting of the crimes such as Sandusky committed on campus in 2001. Indeed, on the day Sandusky was arrested, Penn State's Clery Act implementation plan was still in draft form. Mr. Spanier said that he and the Board never even had a discussion about the Clery Act until November 2011.

While independent, our work was done in parallel with several other active investigations by agencies and governmental authorities, including the Pennsylvania Attorney General, Pennsylvania State Police, United States Attorney, Federal Bureau of Investigation, and U.S. Department of Education. We continuously interfaced and cooperated with those agencies and authorities. We also received assistance from the National Center for Missing & Exploited Children (NCMEC). As promised, we immediately turned over any relevant evidence we found to these authorities, such as the critical February 27, 2001 emails between Messrs. Spanier, Schultz and Curley. The complete emails are now available on our website.

Unfortunately, portions of these emails have been leaked to the media. We strongly condemn and deplore those leaks. Let me assure you that none of these leaks came from the Special Investigative Counsel team. As you will see by reading our report this morning, not one conclusion, phrase, or any content of our report has been published or quoted prior to today.

Last month Sandusky was found guilty after trial on 45 of 48 counts. He awaits sentencing. We were exceedingly careful not to do anything that would have impeded that investigation and trial. Criminal proceedings are still pending against Mr. Schultz and Mr. Curley. We respect the criminal justice process and their rights to a fair trial.

Some individuals declined to be interviewed. For example, on the advice of counsel, both Mr. Curley and Mr. Schultz declined to be interviewed. Also, the Pennsylvania Attorney General requested that we not interview certain potential witnesses. We honored those requests. Mr. Paterno passed away before we had the opportunity to speak with him, although we did speak with some of his representatives. We believe that he was willing to speak with us and would have done so, but for his serious, deteriorating health. We were able to review and evaluate his grand jury testimony, his public statements, and notes and papers from his files that were provided to us by his attorney.

II. Findings

Our most saddening and sobering finding is the total disregard for the safety and welfare of Sandusky's child victims by the most senior leaders at Penn State. The most powerful men at Penn State failed to take any steps for 14 years to protect the children who Sandusky victimized. Messrs. Spanier, Schultz, Paterno and Curley never demonstrated, through actions or words, any concern for the safety and well-being of Sandusky's victims until after Sandusky's arrest.

In critical written correspondence that we uncovered on March 20th of this year, we see evidence of their proposed plan of action in February 2001 that included reporting allegations about Sandusky to the authorities. After Mr. Curley consulted with Mr. Paterno, however, they changed the plan and decided not to make a report to the authorities. Their failure to protect the February 9, 2001 child victim, or make attempts to identify him, created a dangerous situation for other unknown, unsuspecting young boys who were lured to the Penn State campus and football games by Sandusky and victimized repeatedly by him.

Further, they exposed this child to additional harm by alerting Sandusky, who was the only one who knew the child's identity, about what McQueary saw in the shower on the night of February 9, 2001.

The stated reasons by Messrs. Spanier, Schultz, Paterno and Curley for not taking action to identify the victim and for not reporting Sandusky to the police or Child Welfare are:

(1) Through counsel, Messrs. Curley and Schultz have stated that the "humane" thing to do in 2001 was to carefully and responsibly assess the best way to handle vague but troubling allegations.

(2) Mr. Paterno said that "I didn't know exactly how to handle it and I was afraid to do something that might jeopardize what the university procedure was. So I backed away and turned it over to some other people, people I thought would have a little more expertise than I did. It didn't work out that way."

(3) Mr. Spanier told the Special Investigative Counsel that he was never told by anyone that the February 2001 incident in the shower involved the sexual abuse of a child but only "horsing around." He further stated that he never asked what "horsing around" by Sandusky entailed.

Taking into account the available witness statements and evidence, it is more reasonable to conclude that, in order to avoid the consequences of bad publicity, the most powerful leaders at Penn State University – Messrs. Spanier, Schultz, Paterno and Curley – repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the Board of Trustees, Penn State community, and the public at large. Although concern to treat the child abuser humanely was expressly stated, no such sentiments were ever expressed by them for Sandusky's victims.

The evidence shows that these four men also knew about a 1998 criminal investigation of Sandusky relating to suspected sexual misconduct with a young boy in a Penn State football locker room shower. Again, they showed no concern about that victim. The evidence shows that Mr. Paterno was made aware of the 1998 investigation of Sandusky, followed it closely, but failed to take any action, even though Sandusky had been a key member of his coaching staff for almost 30 years, and had an office just steps away from Mr. Paterno's. At the very least, Mr. Paterno could have alerted the entire football staff, in order to prevent Sandusky from bringing another child into the Lasch Building. Messrs. Spanier, Schultz, Paterno and Curley also failed to alert the Board of Trustees about the 1998 investigation or take any further action against Mr. Sandusky. None of them even spoke to Sandusky about his conduct. In short, nothing was done and Sandusky was allowed to continue with impunity.

Based on the evidence, the only known, intervening factor between the decision made on February 25, 2001 by Messrs. Spanier, Curley and Schulz to report the incident to the Department of Public Welfare, and then agreeing not to do so on February 27th, was Mr. Paterno's February 26th conversation with Mr. Curley.

We never had the opportunity to talk with Mr. Paterno, but he did say what he told McQueary on February 10, 2011 when McQueary reported what he saw Sandusky doing in the shower the night before: "You did what you had to do. It is my job now to figure out what we want to do." Why would anyone have to figure out what had to be done in these circumstances? We also know that he delayed reporting Sandusky's sexual conduct because Mr. Paterno did not "want to interfere" with people's weekend. To his credit, Mr. Paterno stated on November 9, 2011, "With the benefit of hindsight, I wish I had done more."

Their callous and shocking disregard for child victims was underscored by the Grand Jury, which noted in its November 4, 2011 presentment that there was no "attempt to investigate, to identify Victim 2 or to protect that child or others from similar conduct, except as related to preventing its reoccurrence on University property."

None of these four men took any responsible action after February 2001 other than Mr. Curley informing the Second Mile that Mr. Sandusky had showered with a boy. Even though they all knew about the 1998 incident, the best they could muster to protect Sandusky's victims was to ask Sandusky not to bring his "guests" into the Penn State facilities.

Although we found no evidence that the Penn State Board of Trustees was aware of the allegations regarding Sandusky in 1998 and 2001, that does not shield the Board from criticism. In this matter, the Board – despite its duties of care and oversight of the University and its Officers – failed to create an environment which held the University's most senior leaders accountable to it. Mr. Spanier resisted the Board's attempt to have more transparency. In fact, around the time that Mr. Sandusky, Mr. Curley and Mr. Schultz were arrested, Mr. Spanier was unwilling to give the Board any more information about what was going on than what he was providing to the public.

After a media report on March 31, 2011, the Board was put on notice about serious allegations that Sandusky was sexually assaulting children on the Penn State campus. The Board failed in its duty to make reasonable inquiry into these serious matters and to demand action by the President.

The President, a Senior Vice President, and General Counsel did not perform their duty to make timely, thorough and forthright reports of these 1998 and 2001 allegations to the Board. This was a failure of governance for which the Board must also bear responsibility.

We also found that:

- The Board did not have regular reporting procedures or committee structures to ensure disclosure of major risks to the University;
- Some Trustees felt their meetings were a "rubber stamp" process for Mr. Spanier's actions;
- The Board did not independently ask for more information or assess the underreporting by Spanier about the Sandusky investigation after May 2011 and thereby failed to oversee properly his executive management of the worst crisis in Penn State's history;
- The Board was over-confident in Spanier's abilities to handle crises and was unprepared to deal with:
    - the filing of criminal charges against senior University leaders and a prominent former football coach in November, 2011; and,
    - the firing of Coach Paterno.

From 1998–2011, Penn State's "Tone at the Top" for transparency, compliance, police reporting and child protection was completely wrong, as shown by the inaction and concealment on the part of its most senior leaders, and followed by those at the bottom of the University's pyramid of power. This is best reflected by the janitors' decision not to report Sandusky's horrific 2000 sexual assault of a young boy in the Lasch Building shower. The janitors were afraid of being fired for reporting a powerful football coach.

III. Recommendations

The other important part of our charge was to make recommendations to prevent such catastrophic failures to report from ever again occurring at Penn State. The Board of Trustees had requested recommendations as soon as possible, in order to improve policies and procedures regarding the protection of children on its campuses. Just this summer alone, over 20,000 non-student minors are participating in sports camps on the University Park campus. To ensure that these children would be better protected, we

gave the Board of Trustees 14 of our preliminary recommendations in January, almost all of which have now been implemented.

Further, we suggested some longer term changes, including the creation of a comprehensive and stringent Compliance Program, including Board oversight through a Compliance Committee. That committee would have oversight responsibility for all regulatory obligations, including the Clery Act, and the Chief Compliance Officer would have a direct reporting line to the committee. The University has commenced a national search for a highly qualified Chief Compliance Officer and adopted two new policies for the protection of children: one provides for annual training on child abuse and mandatory reporting for all employees; the other revises and strengthens the University's background check process.

In addition to our interim recommendations, we have added 119 recommendations set forth in today's report. One of the most important of our recommendations is for Penn State itself to study, evaluate and make any needed additional changes. The goal should be to create a more open and compliant culture, which protects children and not adults who abuse them.

IV. Conclusion

With the presentation of this Report to the Special Investigations Task Force and the Board of Trustees, our work is largely completed. We will make ourselves available to the Task Force and Board to answer any questions they may have, but we will not have an ongoing role with the University. We will also make ourselves available to the students, faculty and staff of the University at the appropriate time at State College. We hope such an interaction might assist the Penn State community in moving forward.

The release of our report today marks the beginning of a process for Penn State, and not the end. It is critical that Old Main, the Board and the Penn State community never forget these failures and commit themselves to strengthening an open, compliant and victim sensitive environment – where everyone has the duty to "blow the whistle" on anyone who breaks this trust, no matter how powerful or prominent they may appear to be.

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Contacts:
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TheFreehReportonPSU@kekst.com

Exhibit J

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JAKE CORMAN, in his official capacity as Senator from the 34th Senatorial District of Pennsylvania and Chair of the Senate Committee on Appropriations; and ROBERT M. McCORD, in his official capacity as Treasurer of the Commonwealth of Pennsylvania,	)	Case No. 1 M.D. 2013
Plaintiffs,	)	
vs.	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,	)	
Defendant,	)	
vs.	)	
PENNSYLVANIA STATE UNIVERSITY,	)	
Defendant.	)	

VIDEOTAPED DEPOSITION OF DR. MARK EMMERT
Indianapolis, Indiana
Tuesday, December 2, 2014

Reported by:
DEBORAH HABIAN, CSR, RMR, CLR, CRR
JOB NO. 87828

on the call?
A. No, I don't remember.
Q. Do you remember having any conversations with Cynthia -- with Cynthia Baldwin around this time period? 11:53
A. No, I don't -- I don't remember that I ever had a conversation with Cynthia, Miss Baldwin. I shouldn't call her by her first name. I've never met her.
Q. So other than President Erickson, do you remember having any conversations with anyone from Penn State around this time period? 11:53
A. No, I believe all my communications were with President Erickson.
Q. On this call with President Erickson, do you remember discussing the possibility of reaching out to other individuals? 11:53
A. I'm not sure what you're asking.
Q. Ron Tomalis?
A. I don't know who Ron Tomalis is. 11:53
Q. Ken Frazier?
A. Oh, on the board?
Q. Yes.
A. Yes, I did in fact talk to Ken Frazier, um-hum, by telephone. 11:54

Q. Did you talk about reaching out to Judge Freeh?
A. No.
Oh, I talked to Judge Freeh at -- at one point, but I don't remember whether we discussed it here. The -- the context of that conversation would have been that the university was asking that we -- that they not answer the questions in my letter of early in November until after the Freeh Report was concluded. 11:54
And part of the exchange -- and again, forgive me for not remembering specifically which conversations. This all arose in -- was that the team that -- that Judge Freeh put in place would -- would provide regular updates of their progress, not their substantive information but updates on the -- on the progress they were making and how far along they were in the process to -- to Donald Remy, my general counsel. 11:54 11:55
And you know, Rod may have -- may or -- may have said, well, you know, I'll have -- I'll have Judge Freeh call you or something, but I don't -- but to be honest, I don't remember, but I know that -- I remember that I do have a -- 11:55

did have a conversation with Judge Freeh about this -- the nature of his inquiry and that they were not going to be looking into whether or not there were any NCAA infractions -- that wasn't their job -- but they were going to conduct their investigation, and we agreed that that made perfect sense. 11:55
(Emmert Exhibit 8 was marked for ID.)
BY MR. SEIBERLING: 11:56
Q. I show you what is marked as Emmert Exhibit 8.
A. (Reviewing document.)
Q. This appears to be an appointment invitation for a call with Ronald Tomalis, secretary in the Department of Education, PA. 11:56
A. Um-hum.
Q. Do you remember having a call with Ronald Tomalis?
A. You know, I don't. I -- I may well have talked to him, but I -- but I don't recall talking to him. Was he at this stage on the board of Penn State? 11:56
Q. Yes.
A. Okay. 11:57

Q. You don't remember the substance of the call?
A. I'm sorry, I don't, no.
Q. Do you remember having a call with Ken Frazier -- 11:57
A. Um-hum.
Q. -- around this same time period?
A. I do, yes.
Q. Can you tell us what was discussed during that call? 11:57
A. The -- the nature of what they intended to do. At -- at this stage I don't recall whether or not they'd hired Judge Freeh or not, but they -- but he made clear that they wanted to conduct their own internal inquiry, that it would be very far reaching, that it would include everyone involved from the board on down. 11:57
He was quite adamant and very strong about the position that the university, not -- not because of NCAA issues but because of their deep concern about this matter overall for the health and well-being of the university, that they needed to understand everything that was there and that they need to make -- needed to 11:57 11:58

Exhibit O

Message

From: Remy, Donald [/O=NCAA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DREMY]
Sent: 6/30/2012 4:10:20 PM
To: Osburn, Stacey [sosburn@ncaa.org]
CC: Roe, Julie [jroe@ncaa.org]; Renfro, Wally I. [warenfro@ncaa.org]; Berst, David [dberst@ncaa.org]
Subject: Re: dennis dodd inquiry - Attorney Client/Attorney Work Product

[redacted]

Sent from my iPhone

On Jun 30, 2012, at 10:04 AM, "Osburn, Stacey" <sosburn@ncaa.org> wrote:
Thanks, Dennis. Our previous statement still stands, which I have provided below as an FYI.

"The NCAA is actively collecting information from the Penn State Special Committee Investigative Counsel during its ongoing investigation to determine our next steps. Although this information will aid in our real time review, once the counsel's work is complete the University likely will need to formally respond to the questions raised by President Emmert. While we are actively monitoring the various investigations, we will not interfere with those efforts. The NCAA will determine whether any additional action is necessary on its part at the appropriate time."

Stacey Osburn
Associate Director of Public and Media Relations
NCAA

On Jun 30, 2012, at 10:55 AM, "Dennis Dodd" <dennis.dodd@cbsinteractive.com> wrote:
Donald:

Given the CNN report re: Penn State I was going to elaborate on the relevance of Mark's letter to PSU last year re: institutional control. This is not so much letting you know I was going to write something, but more to check and make sure there has been nothing new on that end or if the NCAA has comment on latest CNN report. http://www.cnn.com/2012/06/30/justice/penn-state-emails/index.html?hpt=hp_t1

Dennis Dodd, CBSSports.com

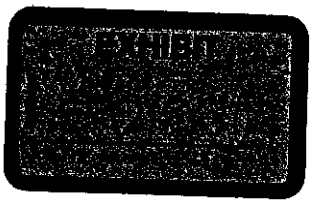

Exhibit T

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO;

RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;

PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University;

WILLIAM KENNY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and

ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President of the NCAA; and

EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendants.

CIVIL DIVISION

Docket No. 2013-2082

OPINION AND ORDER

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

Background

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

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

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

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

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

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

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

Preliminary Objections Discussion

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

NCAA: Incapacity to Bring Count I

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

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

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

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

Impertinent Material and Demurrer to Count I

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

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

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

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

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

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[1] or in this case, a Consent Decree.

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

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

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

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

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

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

Estate of Joseph Paterno

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

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

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

Al Clemens

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

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

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

NCAA: Demurrer to Count II

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

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

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

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

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

NCAA: Demurrer to Count V

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

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

NCAA: Demurrer to Count IV

NCAA alleges three reasons why this Count should be dismissed:

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

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

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

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

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

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

> [The Board of Trustees] did not perform its oversight duties...[and]...failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and my not creating an environment where senior University officials felt accountable;

and

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

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

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[2] The Court makes no determination as to whether or not any damage actually occurred, as such a determination is for a jury to decide.

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

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

NCAA: Demurrer to Count III

NCAA alleges two reasons why this Count should be dismissed:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discovery Discussion

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

[3] Source documents are the documents that the Freeh firm gathered from University servers and University custodians such as emails and other documents not created

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

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

Penn State alleges that,

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

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

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

Attorney-Client

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

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

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

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

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

> FSS has been engaged to serve as independent, external legal counsel to the Task Force to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University ("PSU") personnel to report such sexual abuse to appropriate police and government authorities. The results of FSS's investigation will be provided in a written report to the Task Force and other parties as so directed by the Task Force. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS's report also will provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

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

> For the purpose of providing legal services to the Task Force, FSS will retain Freeh Group International Solutions, LLC ("FGIS") to assist in this engagement. It should be noted that Louis J. Freeh is a partner and member in FSS and FGIS, respectively, and has a controlling interest in both. FSS is a

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

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

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

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

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

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

i) failures that occurred in the reporting process;

ii) the cause for those failures;

iii) who had knowledge of the allegations of sexual abuse; and

iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff

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

Work Product

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

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

Self-Examination

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

Relevance

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

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

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

FERPA & CHRIA Protections

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

FERPA

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

CHRIA

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

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

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

18 Pa.C.S.A. § 9103

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

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

18 Pa.C.S.A. § 9102

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

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

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

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

Criminal Investigation

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

The engagement letter instructed the Freeh Firm

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

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

Speculate as to an Opinion

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

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

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

- The Board of Trustees failed in its duties to oversee the President and senior University officials in 1998 ans 2001 by not inquiring about important University matters and by not creating an environment where senior officials felt accountable
- Joe Paterno, among others, concealed Jerry Sandusky's activities from the Penn State Board of Trustees
- Joe Paterno concealed critical facts regarding Jerry Sandusky from the authorities, the Penn State Board of Trustees, the Penn State community, and the public at large
- at the time of Jerry Sandusky's resignation from the coaching staff at Penn State, Joe Paterno suspected or believed that Sandusky was a sexual predator
- Some coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him
- Descriptions of Timothy Curley as "Joe Paterno's errand boy"
- Joe Paterno, among others, was kept informed of an investigation by Penn State Police and/or the Department of Public Welfare into a possible sexual assault by Jerry Sandusky in the Lasch Building in May 1998
- Joe Paterno knew everything that was going on at the Penn State football facilities, including but not limited to copies of interviews referenced at note 167 of the Freeh Report

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

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

Vague, Overbroad, and Unduly Burdensome

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

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

Costly, Time Consuming, and Excessively Burdensome

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

Public Domain

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

Invasive of Confidentiality Duties

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

Irrelevant in Time

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

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

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

Overbroad and Irrelevant

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

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

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

The Paterno Family

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

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

Protective Order

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

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

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

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

[4] As of July 3, 2014

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

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

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

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

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

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

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

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

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

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

Missing Letter in Request No. 3

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

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

Order

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

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

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

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

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

All filings from this point forward shall be as follows:

ESTATE of JOSEPH PATERNO;

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

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President of the NCAA; and

EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

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

13. Penn State's Preliminary Objection based on Demurrer For Failure to Allege A Breach of Contract to Count I for plaintiffs The Estate of Joe Paterno, The Family of Joe Paterno, and Al Clemens is SUSTAINED.

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

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

21. Penn State's Discovery Objection based on a current Criminal Investigation is OVERRULED.

22. Penn State's Discovery Objection based on Speculation as to an Opinion is SUSTAINED for Plaintiff's request to provide "all documents that support any conclusion or recommendation for action reached by the NCAA, Emmert, or Ray as a result of the Freeh investigation, including all notes or record of telephone calls, memos, emails, letters, or other forms of communication." The Objection is OVERRULED for all other requests.

23. Penn State's Discovery Objection based on Vague, Overbroad, and Unduly Burdensome is OVERRULED. *See* ¶19.

24. Penn State's Discovery Objection based on Costly, Time Consuming, and Excessively Burdensome is OVERRULED. *See* ¶19.

25. Penn State's Discovery Objection based on information already in the Public Domain is OVERRULED.

26. Penn State's Discovery Objection based on Invasiveness of Confidentiality Duties is OVERRULED.

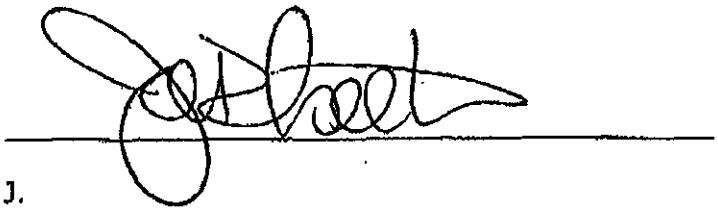
27. Penn State's Discovery Objection based on Irrelevant in Time is OVERRULED.

28. Penn State's Discovery Objection based on Overbroad and Irrelevant is OVERRULED.

29. Penn State's Discovery Objection based on The Paterno Family's standing is SUSTAINED. *See* ¶ 11.

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

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



J.

Exhibit U

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO;

RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;

PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University;

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and

ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President of the NCAA; and

EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

CIVIL DIVISION

Docket No. 2013-2082

OBJECTIONS TO SUBPOENA PURSUANT TO RULE 4009.21

Filed on Behalf of Defendant:
The Pennsylvania State University

Counsel of record for this party:

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IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

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

OBJECTIONS TO SUBPOENA PURSUANT TO RULE 4009.21

Pursuant to Rule 4009.21(c) of the Pennsylvania Rules of Civil Procedure, Defendant The Pennsylvania State University ("Penn State" or the "University"), by its counsel, objects to the subpoena proposed by Plaintiff George Scott Paterno as duly appointed representative of the

forth below, Penn State objects to the production of any documents or other materials in response to the subpoena attached hereto as Exhibit A.

Also, in order to ensure that it obtained any documents and information that might have any conceivable relevance to its Investigation, the Freeh Firm collected a vast amount of Electronically Stored Information ("ESI") and other materials from many individuals and other sources within the University. Only a very small percentage of that ESI and other material have any relevance to the issues discussed in the Freeh Report. Penn State objects to the production of that ESI and other material on the grounds that it has no relevance whatsoever to any of the issues in this lawsuit and is not reasonably calculated to lead to the discovery of admissible evidence.

In addition, in the conduct of its Investigation, the Freeh Firm may have gained access to documents and records protected from disclosure and dissemination pursuant to the Family Educational Rights and Privacy Act ("FERPA") and the Criminal History Record Information Act ("CHRIA"). Penn States objects to production of any documents covered by FERPA and CHRIA.

Some of the requested documents may relate to ongoing criminal investigations. Penn State accordingly objects to the production of any such documents without prior notice to and approval from appropriate law enforcement officials.

In addition, to the extent the Requests seek documents in the possession, custody or control of the University that may "support" or "relate to" an opinion or conclusion expressed by the Freeh Firm, the Requests call for the University to speculate as to the bases of opinions held by others, and are objectionable for that reason as well.

Further, to the extent that the Requests seek all documents that "evidence, reflect, or relate to" various subjects, they are vague, overbroad and unduly burdensome.

Exhibit V

COMMONWEALTH OF PENNSYLVANIA
CENTRE COUNTY

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

Plaintiff

Court of Common Pleas

Civil Division

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

Defendant

No. 2013-2082

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

TO: Pepper Hamilton LLP
(Name of Person or Entity)

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

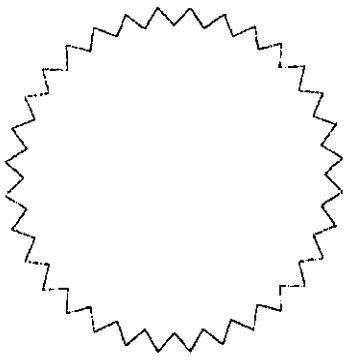
at Goldberg Katzman, P.C., 4250 Crums Mill Road, Suite 301, P.O. Box 6991, Harrisburg, PA 17112
(Address)

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

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

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

Date: March 19, 2014



Name: Thomas J. Weber
Address: 4250 Crums Mill Road, Suite 301, P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161
Supreme Court ID#: 58853
Attorney for: ~~representative of the Estate and Family of Joseph Paterno~~ George Scott Paterno, as duly appointed

BY THE COURT:

COMMONWEALTH OF PENNSYLVANIA
CENTRE COUNTY

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; et al.,	Court of Common Pleas
vs.	Civil Division
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); et al.,	No. 2013-2082

TO: Pepper Hamilton LLP
(Person Served with Subpoena)

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

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

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

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

certify to the best of my knowledge, information and belief that all documents or things required to be produced pursuant to the subpoena issued on March 19, 2014 *(Date of Subpoena)* have been produced.

Date: _____

_____
(Signature of Person Served with Subpoena)

EXHIBIT A

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

DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INSTRUCTIONS

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

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

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

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

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

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

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

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

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

(1) For documents:

a. the type of document;

b. the general subject matter of the document;

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

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

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

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

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

DOCUMENT REQUESTS

Request No. 1:

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

Request No. 2:

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

Request No. 3:

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

Request No. 4:

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

Request No. 5:

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

Request No. 6:

Please produce all documents that evidence, reflect, or relate in any way to the basis for statements in the Freeh Report that the Board of Trustees "did not perform its oversight duties" and "failed in its duties to oversee the President and senior University officials in 1998 and 2001 by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable."

Request No. 7:

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

Request No. 8:

Please produce all documents that evidence, reflect, or relate in any way to whether Joe Paterno concealed critical facts regarding Jerry Sandusky from the authorities, the Penn State Board of Trustees, the Penn State community, and the public at large.

Request No. 9:

Please produce all documents that evidence or reflect that, at the time of Jerry Sandusky's resignation from the coaching staff at Penn State, Joe Paterno suspected or believed that Sandusky was a sexual predator.

Request No. 10:

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

Request No. 11:

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

Request No. 12:

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

Request No. 13:

Please produce all documents that evidence, reflect, or relate in any way to the finding of the Freeh Report that Joe Paterno, among others, was kept informed of an investigation by Penn State Police and/or the Department of Public Welfare into a possible sexual assault by Jerry Sandusky in the Lasch Building in May 1998.

Request No. 14:

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

Request No. 15:

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

Request No. 16:

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

Request No. 17:

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

Request No. 18:

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

Request No. 19:

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

Request No. 20:

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

Request No. 21:

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

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

Request No. 22:

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

Request No. 23:

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

Request No. 24:

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

Request No. 25:

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

EXHIBIT 1

Freeh Sporkin & Sullivan, LLP

PRIVILEGED AND CONFIDENTIAL

November 18, 2011

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

Re: Engagement to Perform Legal Services

Dear Mr. Garban and Ms. Ammerman:

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

1. Scope of Engagement. FSS has been engaged to serve as independent, external legal counsel to the Special Committee to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University ("PSU") personnel to report such sexual abuse to appropriate police and government authorities. The results of FSS's investigation will be provided in a written report to the Special Committee and other parties as so directed by the Special Committee. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS's report also will provide recommendations to the Special Committee and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Account Holder: Freeh Sporkin & Sullivan, LLP

Bank:

Account No.:

ABA/Routing No.:
(For Domestic Payments)

SWIFT Code:
(For International Payments)

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

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

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

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

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

6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the ~~Special Committee~~ Task Forces under this enagagment by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges, unless appropriately waived by the parties or otherwise determined by law. In the event that FSS, or any third party working on behalf of FSS to perform services in connection with this engagement, is required to respond to a subpoena or other formal request from a third party or a governmental agency for our records or other information relating to services we have performed for the ~~Special Committee~~ Task Forces, or to testify by deposition or otherwise concerning such services, to the extent permitted by law, we will provide you and the ~~Special Committee~~ Task Forces notice of such a request and give you and the ~~Special Committee~~ Task Forces a reasonable opportunity to object to such disclosure or testimony. It is understood that you will reimburse us for our time and expense incurred in responding to any such demand, including, but not limited to, time and expense incurred in search and photocopying costs, reviewing documents, appearing at depositions or hearings, and otherwise litigating issues raised by the request.

7. General Responsibilities of Attorney and Client. FSS will provide the above-described legal services for the ~~Special Committee~~ Task Forces's benefit, for which the Trustees will be billed in the manner set forth above. We will keep the ~~Special Committee~~ Task Forces

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

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

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

8. Waiver of Future Conflicts. Our agreement to represent the ~~Special Committee~~ Task Force is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to either you or an affiliate in any matters (whether involving the same substantive areas of law for which you have retained us on behalf of the ~~Special Committee~~ Task Force or some other unrelated areas, and whether involving business transactions, counseling, litigation or otherwise), which do not involve the same factual and legal issues as matters for which you have retained us on behalf of the ~~Special Committee~~ Task Force or may hereafter retain us. In this connection, you and the ~~Special Committee~~ Task Force should be aware that we provide services on a wide variety of legal subjects, to a number of clients, some of whom are or may in the future operate in the same areas of business in which you are operating or may operate. Subject to our ethical and professional obligations, we reserve the right to withdraw from representing the ~~Special Committee~~ Task Force should we determine that a conflict of interest has developed for us.

9. Engagement Limited to Identified Client. This will also confirm that, unless we otherwise agree in writing, our engagement is solely related to the ~~Special Committee~~ Task Force established by The Pennsylvania State University Board of Trustees and the specific matter described above. By entering into this engagement, we do not represent any individuals or entities not named as clients herein, nor do we represent any owner, officer, director, founder, manager, general or limited partner, employee, member, shareholder or other constituent of any entity named as a client in this letter, in their individual capacities or with respect to their individual affairs.

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

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

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

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

Sincerely,

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

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

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

Printed Name: Steve A. Garban

Title: Chair, Board of Trustees
The Pennsylvania State University

Date: 12/2/11

Investigations Task Force

APPROVED AND AGREED TO ON BEHALF OF
The Special ~~Committee~~ established by
The Board of Trustees of The Pennsylvania State University:

By: _____
an authorized signatory of The Special ~~Committee~~ Investigations Task Force established by
The Board of Trustees of The Pennsylvania State University

Printed Name: K.C. Frazier

Title: Chair, Special Investigations Task Force

Date: 12/2/11

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PLAINTIFFS' RESPONSE TO PENN STATE'S AND PEPPER HAMILTON'S JOINT MEMORANDUM OF LAW IN SUPPORT OF PRIVILEGE CLAIMS was served this 22nd day of June, 2016 by first class mail and email to the following:

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