



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
) Reply Brief in Support of
) Motion for Leave to File Under Seal
) And to Enforce the Court's Earlier
) Privilege Determinations Pursuant
) To the Protective Order
) Filed on Behalf of the Plaintiffs Against
) Defendant NCAA
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CENTRE COUNTY, PA

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	)	Docket No. 2013-2082
WILLIAM KENNEY and JOSEPH V. ("JAY")	)	
PATERNO,	)	
former football coaches at Pennsylvania State	)	
University,	)	Counsel of Record:
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	)	GOLDBERG KATZMAN, P.C.
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MARK EMMERT, individually and as	)	
President of the NCAA;	)	Wick Sollers (admitted <i>pro hac vice</i> )
	)	L. Joseph Loveland (admitted <i>pro hac vice</i> )
And	)	Patricia L. Maher (admitted <i>pro hac vice</i> )
	)	Ashley C. Parrish (admitted <i>pro hac vice</i> )
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**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF  
MOTION FOR LEAVE TO FILE UNDER SEAL AND TO ENFORCE  
THE COURT'S EARLIER PRIVILEGE DETERMINATIONS PURSUANT TO THE  
PROTECTIVE ORDER**

Plaintiffs respectfully submit this short reply in support of their motion to enforce the Court's earlier privilege determinations. That motion was necessary because Penn State has invoked the "claw back" provisions of the Protective Order entered in this case and requested the return or destruction of documents that it produced but continues to maintain are privileged — even though the Court has previously ruled that they are not. The night before the Court's hearing on this matter, Penn State (joined by Pepper Hamilton) filed a last-minute response to plaintiffs' motion. That response only confirms that the Protective Order's "claw back" provisions do not apply and that this Court should enforce its earlier privilege determinations.

*First*, Penn State argues that most of the documents it seeks to "claw back" (the Category A documents) have already been produced by Pepper Hamilton. But plaintiffs have no ready way of knowing if that is actually true. Nor should they be required to sift through the separate productions and undertake the burdensome task of trying to determine which of the thousands of pages of documents are exact duplicates. To the contrary, if Pepper Hamilton has already produced all of the documents, with Penn State's knowledge and approval, that only proves that Penn State's position is meritless. There is no dispute that the Category A documents are subject to the subpoena and that the only basis for seeking their return under the Protective Order is if they are in fact privileged. *See* Protective Order ¶ 14 (addressing the "inadvertent production of privileged material"). But the Court has already ruled that the documents are not protected by any privilege (which is why they have been produced by Pepper Hamilton). And there is no provision in the Protective Order that requires the return of non-privileged documents, regardless of whether they might duplicate documents produced by someone else. For that reason alone, plaintiffs' motion should be granted.

*Second*, Penn State argues that plaintiffs should be required to return or destroy the Category A documents because they are purportedly protected by the attorney work product privilege. But that cannot possibly be a basis for invoking the Protective Order's "claw back" provisions. As the Court has already ruled, the work product privilege belongs to Pepper Hamilton (not Penn State) and, as Penn State admits, the documents have already been produced by Pepper Hamilton. In any event, the work product privilege does not apply because the Freeh Report was not prepared in anticipation of litigation and manifestly not in anticipation of *this litigation*. See Pa. R. Civ. P. 4003.3; *see also Reusswig v. Erie Ins.*, 49 Pa. D. & C. 4th 338, 349 (C.C.P. 2000) ("the protection found in Rule 4003.3 is applicable only to the litigation of the claim for which the impressions, conclusions and opinions were made"). The Report was expressly prepared for public disclosure; the Freeh Firm was not engaged as counsel to Penn State in litigation; and the Freeh Report never purports to offer advice about any litigation. As this Court previously determined, "[a]t no point does the scope [of the Freeh Report] mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter." September 11, 2014 Opinion and Order, at 20.

Trying to confuse the issues, Penn State contends that the Court has not previously considered Pepper Hamilton's work product objections. In fact, all timely objections made to the production of these documents were properly considered by the Court. As the Court has previously noted, the Court "overruled the discovery objections based upon attorney-client privilege *and work-product doctrine*," and those objections are the subject of several appeals currently pending before the Superior Court. May 8, 2015 Opinion and Order at 4 (emphasis added) (rejecting Penn State's and Pepper Hamilton's "attempt to re-argue their Attorney-Client Privilege and Attorney Work Product positions"). If Penn State and Pepper Hamilton believed

that there were any timely raised objections that were not but should have been addressed by the Court in one of its many previous orders, they should have sought rehearing. Instead, they chose to appeal and have asked the Superior Court to consider their work product objections.<sup>1</sup> Indeed, even though they raised the same work product arguments in their request to stay this Court's discovery rulings, the Superior Court carefully considered and ultimately rejected their stay request (and their motion for reconsideration).

*Third*, Penn State argues that certain documents contain information that was provided to the Freeh Firm by witnesses with the understanding that the information would be maintained as confidential.<sup>2</sup> In fact, the evidence shows that witnesses were told that "information provided in [their] interview[s] would become part of the investigation record and could be reported to the Special Investigations Task Force and the University, *and potentially to third parties.*" Exhibit A. In any event, no one disputes that the materials should be maintained as "Confidential" under the terms of the Protective Order.<sup>3</sup> The "Confidential Information" designation is intended to protect "proprietary, personal, financial, and other information which qualifies for protection from public disclosure consistent with Pennsylvania Rule of Civil Procedure 4012."

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<sup>1</sup> Pepper Hamilton raised its work product objections in its request for a stay and protective order. The Court denied that request in its November 20, 2014 order, noting that Pepper Hamilton had not responded to the subpoena. Instead of seeking rehearing, Pepper Hamilton appealed the Court's order, but it has since dismissed that appeal, thus forgoing any challenge to the Court's ruling.

<sup>2</sup> At the recent hearing, Penn State's counsel argued that certain Penn State employees could be concerned about something they said in "candor" about their employer or supervisor when being interviewed by the Freeh Firm. But their employer, Penn State, has already had access to the interviews, so the argument makes no sense.

<sup>3</sup> As the Court is aware, plaintiffs are separately objecting to Penn State's and Pepper Hamilton's attempt to designate most of the documents they have produced since July—some 157,000 pages, including approximately 20,000 pages produced by Pepper Hamilton two days after the September 9, 2015 hearing—as "Highly Confidential" under the Protective Order. They have not justified that blanket designation and they should not be allowed to shift the burden to plaintiffs to do the work that under the Protective Order they are required to do when deciding which documents (if any) should be subject to review only by attorneys.

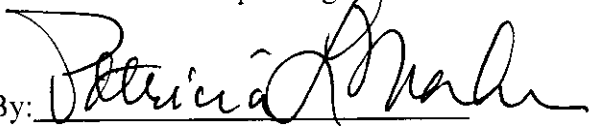
Confidentiality concerns provide no basis for Penn State's request for the return of documents. The only issue relevant to this motion is whether the documents are privileged. The Court has already ruled that they are not, and the Superior Court has declined to stay those rulings.

*Fourth*, Penn State contends for the first time that certain documents (Category B) are privileged, not discoverable, and not covered by the Court's earlier privilege rulings. But Penn State conceded at the recent argument that many of the documents in this category are in fact not privileged (just as the documents in Category A are not). Instead, its main objection appears to be relevance. But the Protective Order does not require the return of documents that a party "inadvertently" produces and then unilaterally deems to be irrelevant. To the extent that any documents in this narrow category are privileged, the correct approach is for Penn State to identify the documents that it believes are privileged, prepare a privilege log explaining why each of those documents is privileged (and not covered by the Court's earlier privilege rulings), and then request the return of those specific documents. That is Penn State's burden and it should not be shifted to plaintiffs. There is no reason Penn State should be allowed to avoid its discovery obligations with blanket, open-ended objections.

**CONCLUSION**

The Court should grant plaintiffs' motion and enforce its earlier privilege determinations.

Date: September 18, 2015

By: 

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# EXHIBIT A



**THE PENNSYLVANIA STATE UNIVERSITY**  
Board of Trustees - Special Investigations Task Force  
Interview Report of Special Investigative Counsel Freeh, Sporkin & Sullivan LLP

Interviewee: REDACTED  
Title: REDACTED  
Office: REDACTED

Date/Time: Wednesday, March 14, 3:00 PM  
Attendees: REDACTED  
Location: Henderson South

These notes are prepared at the specific direction of legal counsel as part of an internal investigation for The Pennsylvania State University Board of Trustees, Special Investigations Task Force. The notes are not intended as a verbatim transcription of the meeting, but rather as a capture of major ideas discussed. Quotes reflect an effort to capture words used during the meeting, but are not intended as verbatim transcription. These notes also contain mental impressions and observations of legal counsel to the Special Investigations Task Force. These notes discuss how the discussion during the meeting may impact other open legal issues for the Special Investigations Task Force. These notes also may be shared with the members of the Special Investigations Task Force to aid in execution of their functions and responsibilities, and as such are a communication between legal counsel and client. These notes are privileged as both an attorney-client communication and as attorney work product.

As prearranged, REDACTED appeared at Henderson South. The investigators identified themselves, and explained that we are working on behalf of the Special Investigations Task Force of the Board of Trustees of The Pennsylvania State University to investigate sexual abuse allegations related to Jerry Sandusky, a former employee of the University. The investigators explained that we represent that Special Investigations Task Force, and not REDACTED We explained that information provided in this interview would become part of the investigation record and could be reported to the Special Investigations Task Force and the University, and potentially to third parties. We explained that the meeting would be protected by the attorney-client privilege, but that the privilege belongs solely to the Special Investigations Task Force. The Special Investigations Task Force, in its sole discretion and without notice, could decide to waive the attorney-client privilege and reveal the discussion to third parties, including federal or state agencies. Finally, we explained that the meeting must be kept in confidence and not discussed with anyone else (except legal counsel), including other employees or anyone outside of the University.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR JUDGMENT ON THE PLEADINGS was served this 17th day of September, 2015 by first class mail and email to the following:

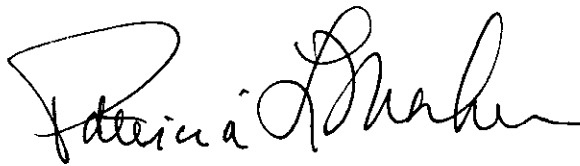
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