



IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

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.

CIVIL DIVISION
Docket No. 2013-2082

2014 OCT 31 AM 8:54

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY PENDING APPEAL AND FOR PROTECTIVE ORDER BY NON-PARTY PEPPER HAMILTON LLP

Non-party Pepper Hamilton LLP ("Pepper Hamilton") hereby files this reply memorandum of law in support of its Motion for Stay Pending Appeal and for Protective Order pursuant to Rule 4012 of the Pennsylvania Rules of Civil Procedure to address three erroneous arguments made by Plaintiffs in opposition to the motion.

First, Pepper Hamilton has standing to seek a stay because the Opinion and Order impacts directly on Pepper Hamilton's obligations to respond to the subpoena served upon it. Unless the Order and Opinion is stayed pending appeal, Pepper Hamilton will be forced to disclose documents protected by the attorney-client privilege in derogation of its ethical obligations to Penn State, the client which, as Plaintiffs' concede, owns that privilege. As then-Justice Rehnquist commented in the very case cited by Plaintiffs:

As it is most commonly understood, standing embraces both constitutional and prudential limitations on a federal court's exercise of jurisdiction. So used, it normally measures the quality of the interest asserted by a private plaintiff in obtaining resolution of a particular dispute through the authority of a court. As a threshold inquiry, we have required the plaintiff to show "some threatened or actual injury resulting from the putatively illegal action." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

*Graddick v. Newman*, 453 U.S. 928, 938 (1981). The harm to Pepper Hamilton resulting from compelling it to respond to the subpoena without the benefit of a stay of the Opinion and Order is readily apparent, providing it the standing required to seek that stay.

Second, Plaintiffs mistakenly argue that no stay is needed because the Court has entered a Stipulated Confidentiality Agreement and Protective Order ("Protective Order"). As the definitions of "Confidential Information" and "Highly Confidential – Attorney's Eyes Only" make plain, the Protective Order does not deal with information protected by the attorney-client privilege or work product doctrine. Moreover, the fact that the Protective Order precludes the parties from using materials exchanged in discovery for purposes other than the litigation does not protect Pepper Hamilton or Penn State from claims by third parties – such as the media – that the production of privileged documents waives the privilege and permits third party access to those documents for purposes other than this litigation. The necessary protection against such third-party challenges can only come by way of a stay that will preclude the disclosure of

privileged documents until the Superior Court can rule on Penn State's appeal. Otherwise, the proverbial cat will have been let out of the bag, and Pepper Hamilton's ability to protect privileged information severely compromised.

Finally, Plaintiffs' argument that Pepper Hamilton's motion for protective order is premature makes no sense. Plaintiffs contend Pepper Hamilton should assert the work product doctrine in its "response to the subpoena," but nowhere do the Pennsylvania Rules of Civil Procedure provide for such a response by the subpoenaed party.<sup>1</sup> Plaintiffs' reference to the certificate of compliance as the purported "response" is unavailing; that certificate provides that "all documents or things required to be produced . . . have been produced." Pa. R. Civ. P. 4009.27. The certificate does not provide for or contemplate the assertion of privilege or any other reason to withhold documents from production. The only procedural vehicle available to a "person from whom discovery or deposition is sought" to raise objections to responding to a subpoena is to seek a protective order under Pa. R. Civ. P. 4012, which is precisely what Pepper Hamilton has done here.

For the reasons set forth above and in its opening memorandum of law, Pepper Hamilton respectfully requests the entry of an order staying the Opinion and Order to the extent it overruled Penn State's objections to the Subpoena with regard to work product and attorney-client privilege, and staying any obligation of Pepper Hamilton to produce documents within the scope of those objections, pending the resolution of Penn State's appeal, and further ordering that Pepper Hamilton shall not produce documents in response to the Subpoena that contain mental

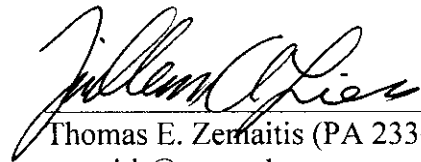
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<sup>1</sup> Plaintiffs may be confusing Pennsylvania's rules with the Federal Rules of Civil Procedure, which permit a third party receiving a subpoena to state its objections within 14 days of service of the subpoena, thereby shifting the burden to the party serving the subpoena to file a motion to compel to test those objections. Fed. R. Civ. P. 45(d)(2)(B).

impressions, conclusions, opinions, notes or summaries, legal research or legal theories of an attorney.

Respectfully submitted,

Dated: October 31, 2014



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Plaintiffs,	)	
v.	)	
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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.	)	

**CERTIFICATE OF SERVICE**

I, William A. Liess, hereby certify that on October 31, 2014 a true and correct copy of the foregoing Reply Memorandum of Law in Support of Motion for Stay Pending Appeal and for Protective Order by Non-Party Pepper Hamilton LLP was served via First Class Mail upon the following:

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Dated: October 31, 2014