IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; 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

PENN STATE'S REPLY TO PLAINTIFFS' RESPONSE TO COURT'S FEBRUARY 3, 2017 ORDER

Filed on Behalf of:
Non-Party The Pennsylvania State University

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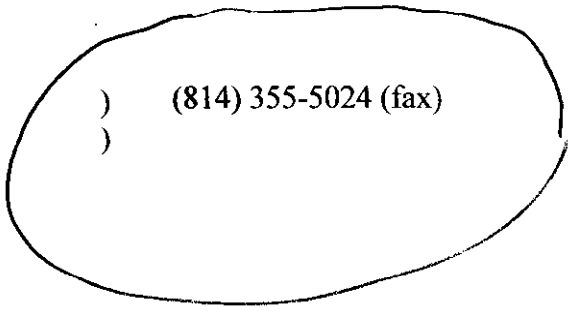
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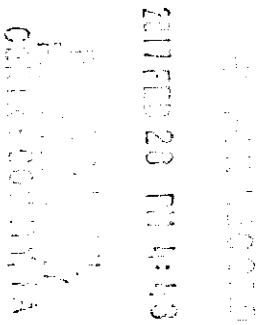

PENN STATE'S REPLY TO PLAINTIFFS' RESPONSE TO COURT'S FEBRUARY 3, 2017 ORDER

The Pennsylvania State University ("Penn State" or "the University") respectfully submits this Reply to Plaintiffs' Response to the Court's February 3, 2017, Order (the "Response"). Plaintiffs fail even to address the principal arguments Penn State made in its Motion for Reconsideration of the Court's January 27, 2017 Order.[1] As described more fully in that Motion for Reconsideration, Plaintiffs' motion to compel Penn State to produce a privilege log is an unprecedented and wholly inappropriate attempt to impose burdens on Penn State well beyond those authorized by the Pennsylvania Rules of Civil Procedure. This Court should make clear that Plaintiffs' motion to compel is denied.

[1] Rather than repeat here the arguments set forth in its Motion for Reconsideration, Penn State incorporates those arguments by reference, and addresses only the arguments that were made for the first time in Plaintiffs' Response to the February 3 Order.

First, it is telling that Plaintiffs still do not cite a single authority for the proposition that a party that has been dismissed from litigation retains the discovery requirements that applied *while it was a party.* As Penn State noted in its Motion for Reconsideration, the undersigned counsel has located no such authority. This abject lack of legal authority alone highlights the unprecedented nature of the Plaintiffs' request that the Court impose significant discovery burdens on non-party Penn State at this late juncture.

Second, Plaintiffs make no effort to explain how their motion to compel was timely-filed, given this Court's very clear recent statement that, but for certain limited victim discovery, fact discovery in this case closed in April 2016. Plaintiffs had not even *hinted* before the close of discovery that, in their view, Penn State still owed them a privilege log.

Third, Plaintiffs argue that, if non-party Penn State were not ordered to produce a privilege log now – over 18 months after being dismissed from the case, Penn State would somehow be rewarded for its alleged "dereliction" not producing a privilege log when it *was* a party. This argument is specious. Where, as here, litigation entails expansive document requests and voluminous productions in response to those requests, it is commonplace both for documents to be produced on a rolling basis and for the production of the privilege log to await the conclusion of the productions. Indeed, consistent with this reality of discovery practice, prior to mid-December 2016, Plaintiffs never once complained about Penn State's privilege log being "late." Nor did Plaintiffs' counsel – who also represented Mr. Clemens, and who filed the Praecipe for Partial Discontinuance on his behalf – even *attempt* to condition the withdrawal of Mr. Clemens' claims against the University in 2015 on the University producing a privilege log or otherwise continuing to satisfy the discovery obligations the Rules of Civil Procedure place on parties. Given the complete lack of legal authority for the notion that a party retains a continuing

obligation to respond to discovery requests after it is finally dismissed from the case, Plaintiffs' counsel should have recognized that the dismissal of Penn State from the litigation would in fact terminate all such obligations. Coming forward more than 18 months later and insisting that the Court now order Penn State to act as if it were still a party (when it plainly is not), despite having made no efforts to do so in a timely and appropriate fashion, is both disingenuous and wholly inconsistent with the Pennsylvania Rules of Civil Procedure.

Fourth, the fact that Penn State continues to press the privilege issues with respect to the subpoena Plaintiffs sent Pepper Hamilton is in no way inconsistent with the recognition that Penn State is no longer a party to this case. Penn State's continued pursuit of the privilege appeals is attributable to Penn State's status *as the Freeh Law Firm's client and the holder of the attorney-client privilege,* not its status as a former nominal defendant in this litigation.

And, *fifth,* although Plaintiffs make the conclusory assertion that, in their view, this would not be an "unreasonable" burden for the Court to impose on Penn State, they make no effort to refute Penn State's factual assertion to the contrary. As set forth in Penn State's Motion for Reconsideration, an order granting Plaintiffs' belated motion to compel would impose a substantial, and unreasonable, burden on Penn State. At the very least, if the Court were not inclined to deny the motion to compel outright, it should give Penn State sixty (60) days to produce the requested privilege log, and the Court also should direct that the expense of that endeavor be borne by the Plaintiffs.

In summary, for all of these reasons, and as further explained in Penn State's Motion for Reconsideration, the February 3 Order is sound. This Court should amend that Order only to make clear that the Court is *denying* Plaintiffs' motion to compel Penn State to produce a privilege log.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 28th day of February 2017, a true and correct copy of the foregoing PENN STATE'S REPLY TO PLAINTIFFS' RESPONSE TO FEBRUARY 3, 2017, ORDER was served upon the following counsel via United States mail, first class, postage prepaid, and via email:

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