



IN THE COURT OF COMMON PLEAS  
OF CENTRE COUNTY, PENNSYLVANIA

The 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

**SUR-REPLY BRIEF IN  
OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
ENFORCEMENT OF  
SUBPOENA DUCES TECUM  
DIRECTED TO PEPPER  
HAMILTON LLP**

Filed on Behalf of:  
The Pennsylvania State  
University

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2015 MAR 12 PM 3:36

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 ASSOCIATION (“NCAA”);  
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 Chairman of the Executive Committee of the  
 NCAA,  
 Defendants,  
 and  
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 Nominal Defendant.

CIVIL DIVISION  
 Docket No. 2013-2082

FILED  
 2015 MAR 12 PM 3:37  
 DEPARTMENT OF COURTS  
 CENTRE COUNTY, PA

**THE PENNSYLVANIA STATE UNIVERSITY’S SUR-REPLY BRIEF  
 IN OPPOSITION TO PLAINTIFFS’ MOTION FOR ENFORCEMENT  
 OF SUBPOENA DUCES TECUM DIRECTED TO PEPPER HAMILTON LLP**

Nominal defendant The Pennsylvania State University (“Penn State” or “the University”), respectfully files this sur-reply to correct bald misstatements plaintiffs made in their “Supplemental Memorandum” in support of their Motion for Enforcement of the Subpoena *Duces Tecum* that that the plaintiffs served on Pepper Hamilton LLP (the “Motion”).

Plaintiffs’ assertions that Pepper Hamilton is somehow “brazenly continuing to violate its discovery obligations” and is “def[ying]” a court order in “direct affront to” this court’s “authority” are palpably false. Neither Pepper Hamilton nor Penn State have yet been ordered to

*do anything.* In particular, neither Pepper Hamilton nor Penn State have been ordered to produce documents for which they assert one or more privileges.

Plaintiffs' argument hinges on the demonstrably false premise that this Court already has addressed the attorney work product objection *on the merits*. However, as this Court expressly noted – *twice* -- in November 20, 2014 Opinion (p. 5), “Pepper Hamilton has not yet responded to the subpoena, and *there has been no ruling on its work product objections*” and, again: “*there has been no ruling on Pepper Hamilton’s objection . . . .*” (emphases added). In short, it is irresponsible and disingenuous for plaintiffs to claim that Penn State and Pepper Hamilton somehow are “violating” a court order.

Plaintiffs' vitriolic accusations notwithstanding, Pepper Hamilton and Penn State have done nothing more than assert *bona fide* objections to producing materials they contend are privileged, and they have asserted those objections in procedurally proper ways.

For all of the reasons set forth in Pepper Hamilton's and Penn State's principal briefs, in the event this Court does not deny the Motion as procedurally improper, this Court should deny it on the merits. Enforcing the subpoena as written – requesting, as it does, documents for which Penn State and Pepper Hamilton claim privileges -- would vitiate Penn State's and Pepper Hamilton's appeals, in sharp contrast to well-established case law holding that a privilege should not be destroyed while a litigant's appeal is pending. *See, e.g., Berkeyheiser v. A-Plus Investigations, Inc.*, 936 A.2d 1117 (Pa. Super. 2007) (concluding that an order overruling a privilege claim is immediately appealable as of right precisely because the privilege would be “irreparably lost” if immediate appellate review were denied).

Respectfully submitted,

*Daniel I. Booker*

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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on this 12<sup>th</sup> day of March, 2015, a true and correct copy of the foregoing THE PENNSYLVANIA STATE UNIVERSITY'S SUR-REPLY BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT OF SUBPOENA DUCES TECUM DIRECTED TO PEPPER HAMILTON LLP was served upon the following counsel via United States mail, first class, postage prepaid:

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