IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

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,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
REDACTED:
The National Collegiate Athletic Association's Reply in Support of Its Motion to Compel the Production of Documents from the Estate and Overrule the Estate's Objections to Related Third-Party Subpoena

Filed on Behalf of:
National Collegiate Athletic Association, Mark Emmert, Edward Ray

Counsel of Record for this Party:
Thomas W. Scott, Esquire
Killian & Gephart, LLP
218 Pine Street, P.O. Box 886
Harrisburg, PA 17108-0886
TEL: (717) 232-1851
FAX: (717) 238-0592
tscott@killiangephart.com
PA I.D. Number: 15681

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO, et al., Plaintiffs, v. The NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al., Defendants.	)	Civil Division Docket No. 2013-2082

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS FROM THE ESTATE AND OVERRULE THE ESTATE'S OBJECTIONS TO RELATED THIRD-PARTY SUBPOENAS[1]

[1] Pursuant to Paragraph 9 of the Protective Order entered in this case on September 11, 2014, the NCAA is filing a redacted copy of this brief to protect limited Confidential Information. *See* Protective Order ¶ 9 ("A party wishing to use any Confidential Information ... in any pleading or document filed with the Court in this action, such pleading or document shall be redacted to conceal the Confidential Information...or shall be filed under seal. The Court may under any circumstances be provided with an unredacted copy of any pleading or documents that is filed."). The NCAA will provide the Court and opposing counsel with an unredacted copy.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs' shoe is now on the other foot—and they do not find it comfortable. For two years, Plaintiffs have strenuously argued that the supporting materials behind the publicly produced Freeh Report are not privileged and must be produced. Now faced with discovery demands for the supporting materials behind the publicly disclosed *Critique,*[2] they seek to run from their own arguments. This they cannot do.

The NCAA's Opening Memorandum demonstrated why, *according to Plaintiffs' own arguments* regarding the documents underlying the Freeh Report, Plaintiffs are improperly withholding materials underlying the *Critique.* By Plaintiffs' reasoning, these materials are not privileged or work product because, *inter alia*, Plaintiffs did not have an expectation of confidentiality over them; the *Critique* is not a legal document; the materials were not prepared in anticipation of litigation; and underlying factual information is not protected by the work product doctrine. Furthermore, any protection that might have existed was eviscerated by Plaintiffs' calculated and deliberate disclosure of the *Critique* as part of a massive media campaign. Thus, based on application of Plaintiffs' own arguments, either

---

[2] The "*Critique*" refers to King & Spalding's *Critique of the Freeh Report: the Rush to Injustice Regarding Joe Paterno*, as well as the supporting reports by Dick Thornburgh, James T. Clemente, and Fred S. Berlin (the "Independent Analyses").

the materials were never privileged, or Plaintiffs waived any privilege. Either way, the result is the same: Plaintiffs must produce the materials.[3]

Plaintiffs' Opposition fails to demonstrate that these materials should be protected from disclosure. *First*, they argue that the materials are not relevant to the litigation. This argument has no bearing on whether they are privileged. It is also seriously misguided: The *Critique* purports to address two pivotal issues in this litigation: (i) whether the Freeh Report statements quoted in the Consent Decree are demonstrably false; and (ii) whether the NCAA acted with actual malice in quoting them. The NCAA thus seeks documents that go to the core of the remaining claims in this case. *Second,* Plaintiffs offer no valid reason why their public disclosure of the *Critique* does not constitute a waiver of any applicable privileges. They attempt to distinguish the *Critique* from the Freeh Report based on several self-described "nuances." But each is the proverbial "distinction without a difference." Plaintiffs' Opposition is devoid of ***any*** case law demonstrating the legal significance of these purported distinctions. *Third*, they

---

[3] Far from advocating a "radical revolution in Pennsylvania privilege law" as Plaintiffs suggest, Opp'n at 1, the NCAA is simply applying *Plaintiff's own* positions on privilege law—and the resulting holdings of this Court—to the *Critique*. As previously noted, the NCAA takes no position on the correctness or legal validity of Plaintiffs' arguments and this Court's rulings concerning Penn State's and Pepper Hamilton's privilege assertions over the Freeh documentation, but simply requests that those arguments and rulings be applied with equal force to Plaintiffs' assertions of privilege over documents related to the *Critique*.

cannot explain how, by their own logic, the documents were privileged or work product from the outset. Rather, they admit that the *Critique* is not a legal document, but argue that its underlying materials are still privileged. That position is squarely at odds with their arguments about the Freeh Firm's materials, and is unsupported by the nature of the *Critique* authors' respective engagements.

Additionally, Plaintiffs again argue that Rule 4003.5, pertaining to consulting experts, shields Fred Berlin's and James Clemente's work, which predated the litigation. But Plaintiffs ignore that there is *no legal support* for this odd position. And Plaintiffs justify their failure to provide a privilege log with the circular logic that the privilege is too apparent to require a log.

In short, Plaintiffs cannot avoid the sting of their own words: "Neither [privilege or the work product] doctrine protects information and materials gathered to prepare a publicly available report that is shared with [third-parties] outside the attorney-client relationship and used for public relations purposes as a sword to attack innocent third parties." Ex. 17, Br. for Appellees at 2, *Estate of Paterno v. NCAA*, No. 877 MDA 2015 (Pa. Super. Ct. Oct. 30, 2015). They should be compelled to produce the withheld materials.

I. THE REQUESTED MATERIALS ARE HIGHLY RELEVANT.

Plaintiffs' Opposition seeks to distinguish the materials related to the Freeh Report from materials related to the *Critique* on the incredible ground that, whether

or not they are privileged, the materials related to the *Critique* are "*not relevant* to any claim or defense in this case." Opp'n at 10-11 (emphasis added). This argument cannot be taken seriously. Discovery is not a one-way street. It is axiomatic that facts and information related to a *plaintiff's* claims, positions, and arguments are the proper subject of discovery. Pa. R. Civ. P. 4003.1(a) ("[A] party may obtain discovery regarding any matter ... [including discovery that] relates to ... the claim or defense of any other party ....").

Here, Plaintiffs' remaining claims all turn on their contentions that (1) the statements that the Consent Decree quotes verbatim from the Freeh Report are demonstrably false; and (2) the NCAA acted with actual malice (*i.e.*, it either "knew" the statements were false or acted with reckless disregard for their falsity) when it repeated and relied upon them, *see Am. Future Sys. Inc. v. Better Bus. Bureau of E. Pa.*, 592 Pa. 66, 76 n.6, 923 A.2d 389, 395 n.6 (2007).[4] The *Critique* contains more than 200 pages in which Plaintiffs, through their representatives, purport to address these exact issues. The *Critique* discusses at length Plaintiffs' position that the Freeh Report contains "glaring errors," reflects a "flawed" investigative methodology, and that its findings concerning Coach Paterno are

---

[4] "[T]he 'actual malice' standard is a constitutionally mandated safeguard" and Plaintiffs cannot prevail in this case unless they prove it "by clear and convincing evidence, the highest standard of proof for civil claims." *Lewis v. Phila. Newspapers, Inc.*, 2003 PA Super 350, ¶ 13, 833 A.2d 185, 192 (2003).

"unfounded," "unsubstantiated," "deeply flawed," and "wrong." *See generally* Ex. 1, *Critique* at i, ii, 1. The *Critique* purports to reach these conclusions, in part, based on otherwise undisclosed source information, including "interviews" of Coach Paterno and other individuals, as well as unspecified "documents" and "information [provided by] the lawyers for other Penn State administrators" (presumably Messrs. Spanier, Schultz, and/or Curley). *Id.* at ii. Far from irrelevant, the information sought by the NCAA targets Plaintiffs' own positions and knowledge of the central issues in this case.[5]

In fact, materials related to the *Critique* are far ***more*** relevant than the materials underlying the Freeh Report, which Plaintiffs have fought so hard to obtain. Plaintiffs have chosen to assert claims against *the NCAA alone* in this case, and not Freeh Sporkin & Sullivan, LLP (the "Freeh Firm") or Pennsylvania State University ("Penn State"). The documents Plaintiffs sought from Pepper Hamilton include tens of thousands of pages of the Freeh Firm's internal and client communications, interview memoranda, draft reports, and other work product. Prior to their production in this case, the NCAA never had access to those documents or the information contained therein. As such, those documents cannot

---

[5] If Plaintiffs are permitted to persist in their privilege assertions, they should not be allowed to introduce any evidence related to what Coach Paterno told counsel about his recollection of child abuse in 1998 or 2001 (or at any other time), or any other factual information supporting to the *Critique*.

have any bearing on whether the NCAA acted with actual malice when, like Penn State, it relied upon and repeated the contents of the publicly available Freeh Report.

Finally, it makes no difference, as Plaintiffs suggest, that the *Critique* itself is inadmissible as evidence of the purported "inaccuracy" of the statements in the Freeh Report. *See* Opp'n at 11. It may well be that documents and information related to the *Critique* are admissible for other purposes, satisfy exceptions to hearsay rules, lead to the discovery of other admissible evidence, or can be used for impeachment. In any event, discovery is not confined to admissible evidence, and encompasses "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Pa. R. C. P. 4003.1(a). Indeed, the Pennsylvania Rules of Civil Procedure explicitly provide that "[i]t is not ground for objection that the information sought will be inadmissible at the trial." *Id.* at 4003.1(b).

At bottom, the NCAA's motion seeks materials that are plainly relevant to this case, and, without any viable privilege claim available, Plaintiffs should be required to produce them.

II. PLAINTIFFS' EFFORTS TO DISTINGUISH THEIR OWN WAIVER OF PRIVILEGE ARE UNPERSUASIVE AND IRRELEVANT.

By their own arguments, Plaintiffs' publication of the *Critique* and the ensuing media blitz waived any applicable privileges. *See* Op. & Order at 21-22

(Sept. 11, 2014) ("[V]oluntary disclosure waives the privilege as to remaining documents of that same subject matter." (citing authority)). The *Critique* reflected, on its face, the analysis, opinions and conclusions of the Paterno family's counsel, and was based, at least in part, on conversations between attorney and client. Opp'n at 11. All of it was repeatedly publicized in a purported effort "to educate the public" and "set the record straight." *See* Mot. at 15-18 (citations omitted).

Richard Thornburgh's recent deposition makes clear that Plaintiffs' waiver was broad and intentional: Mr. Thornburgh testified that he was retained by the Paterno family to provide a legal opinion about the Freeh Report, the entirety of his legal opinion is set forth in his report, he provided no other legal advice to the Paterno family, and the Paterno family subsequently made his report public and arranged for him to discuss his opinions on national television.[6] Ex. 29, Thornburgh Dep. 17:6-10, 17:25-18:11, 29:19-31:9 (Dec. 17, 2015). Plaintiffs now assume a sword and shield posture of the most extreme variety. But per their own arguments and this Court's prior order, Plaintiffs have engaged in textbook waiver.[7]

---

[6] There is no reason to believe that Mr. Thornburgh's testimony does not apply with equal force to the documents prepared by Messrs. Sollers, Clemente and Berlin.

[7] *See* Ex. 20, Br. for Appellees at 21, *Paterno v. NCAA*, No. 1709 MDA 2014 (Pa. Super. Ct. May 11, 2015) ("Well-established principles of privilege law, not to mention elementary notions of fairness, prevent [them] from parading" the

Rather than substantively address this fundamental issue, Plaintiffs dance around the fringes by attempting to distinguish the *Critique* from the Freeh Report based on a number of supposed "nuances." *See* Opp'n at 1. These are distinctions without a difference. Plaintiffs *provide no case law that recognizes any legal significance of such purported distinctions* and, regardless, their arguments are factually incorrect.

A. Prior Review By Counsel Before Public Disclosure Is Irrelevant.

Plaintiffs claim that publication of the *Critique* does not constitute a waiver because, purportedly in contrast to the Freeh Report, it was not "prepared and disclosed to the public independent of and without prior review by plaintiffs and their outside counsel." Opp'n at 4. Plaintiffs cite no case law hinting that such a fact, even if true, matters. Rather, Plaintiffs' argument that the *Critique* could not be disclosed unless and until the Paterno family and its counsel made the conscious decision to do so simply *magnifies* the voluntary and deliberate nature of their waiver. *See* Opp'n at 6. The Paterno family's publication of their counsel's analysis, opinions and conclusions was no mistake; it was a knowing, voluntary, and strategic choice, and, per Plaintiffs' own argument, had all the hallmarks of a waiver.

Critique's conclusions in front of the public, while depriving the NCAA "of discovery relevant to challenging the basis for it."); *see also* Op. & Order re. Stay During Appeal at 4 (Nov. 20, 2014) (holding that such conduct waives any applicable privileges).

B. Supposed "Operational Independence" Makes No Difference.

Plaintiffs also attempt to distinguish their own waiver by contending that the Freeh firm was "operationally independent" from Penn State, while the authors of the *Critique* worked at the specific direction of Plaintiffs and King & Spalding. Opp'n at 5-6. But the degree of independence with which the respective lawyers operated in doing their work has nothing to do with the issue of whether privilege is waived when the results of that work are publicly disclosed. Nor do Plaintiffs cite any authority indicating as much.

In any event, Plaintiffs significantly overplay the difference between their engagement of the *Critique* authors and Penn State's engagement of the Freeh firm. Certainly, Penn State gave the Freeh Firm a wide berth to run its investigation in an independent manner to ensure credibility of the final product. But the Freeh Firm's engagement letter makes clear that (1) the Task Force has established a specific scope of the engagement and delineated exactly what issues the Freeh Report should address; and (2) that "[i]t is understood by FSS, the Trustees and the Task Force that FSS *will act under the sole direction of the Task Force* in performing the services hereunder." Ex. B to Opp'n, Letter from the Freeh Firm to Penn State at 2 (Nov. 18, 2011) (emphasis added). [redacted]

[redacted][8]

Further, while playing up the Freeh firm's independence, Plaintiffs attempt to sweep under the rug the *Critique* authors' repeated statements about their own supposed independence.[9] Plaintiffs' attempt to now disclaim the independence of the *Critique* in order to prevail in this privilege dispute is inconsistent with the *Critique* itself. *See* Ex. 1, *Critique* at i (referring to "independent analyses" that were an "essential part" of the review); *id.* at 5 ("The Paternos gave [King & Spalding] a direct mandate to set the record straight and find the truth as to Joe Paterno's conduct, ***whether positive or negative***. (emphasis added)). The Paterno family then set out to portray that the *Critique* was independent and objective, in hopes of swaying public opinion. Now, when it is convenient to do so, they

---

8 [redacted]

9 The *Critique* trumpets the authors' supposed "independence," claims they were authorized to "go wherever the facts and theories led us," Ex. 1, *Critique* at 4, suggests that the authors of the Independent Analyses "agreed to the engagement only if [the Paternos' law firm] would accept their unvarnished, objective opinions, whatever those turned out to be." *Id; see also id.* at 4 ("[W]e did not cherry-pick from a group of possible experts to find and secure the most favorable opinions."); Ex. 1, Thornburgh Analysis at 8 (JVPE_NCAA_0000789) ("Mr. Paterno's family did not influence the scope of the review or my findings in any way.").

disclaim such independence. Such gamesmanship does nothing but undermine the *Critique's* credibility; it does not unwind Plaintiffs' massive and intentional waiver.

C. Waiver of Privilege Does Not Depend On An Express Admission Of A Waiver.

Plaintiffs also attempt to distinguish the *Critique* from the Freeh Report on the ground that, unlike Penn State, the Estate did not expressly state that it was waiving privilege when it published the *Critique*. Opp'n at 8-9. Once again, Plaintiffs have no case law holding that whether a party waived privilege turns on use of the magic words, "I waive privilege." Of course, that is not the law. Indeed, Plaintiffs themselves argued that privilege does not "attach simply because a document or party says they do." Pls.' Mem. in Supp. of Mot. to Overrule Penn State Objs. at 7 (May 9, 2014). The converse is equally true. Plaintiffs' sudden fixation on whether their waiver was express places form over substance. The true test of a waiver is whether the Paterno family "voluntarily disclosed" otherwise privileged information. Assuming that the *Critique* was ever privileged at all, the decision to release the analysis, opinions and conclusions of counsel, and to make them the subject of a media blitz, easily satisfies the waiver standard and extends to the entire subject matter.

D. Plaintiffs' Attempt to Distinguish the *Critique* By Claiming that the Freeh Firm Disclosed Privileged Information to Third Parties is False and Disingenuous.

Plaintiffs next distinguish the *Critique* from the Freeh Report by claiming—disingenuously—that unlike the *Critique* authors, the Freeh Firm disclosed confidential information to the NCAA and law enforcement. *See* Opp'n at 1, 7. This argument is a red herring. By Plaintiffs' own arguments, the disclosure of the *Critique* itself—reflecting all of counsel's purported analysis, opinions, and conclusions—*is the waiver.* Plaintiffs broke the levy and disclosed all when they released the *Critique.* Whether any information trickled out to third parties in advance of the full report does not alter that basic fact.

Moreover, Plaintiffs' contention that the Freeh Firm provided the NCAA with access to nonpublic substantive information about the Freeh investigation and its findings is simply false and, as Plaintiffs well know, has been roundly refuted by the record in this case. Plaintiffs have access to over 16,000 Pepper Hamilton documents—literally the entire file of the Freeh Firm's investigation—and the documents in no way support their contention. Indeed, every relevant witness has sworn under oath to the same effect. For example:

- **Judge Louis Freeh** testified that [redacted]

[10] Exhibits herein are numbered continuously from the NCAA's opening brief.

- **Omar McNeill**, a lead Freeh investigator, testified that he "never" gave the NCAA "any substantive information about the findings of [the] investigation" "[i]including documents [he] was finding" during telephone calls. Ex. 34, McNeill Dep. 74:2-9, *Corman v. NCAA*, No. 1 MD 2013 (Pa. Commw. Ct. Dec. 17, 2014).

- **Greg Paw,** a lead Freeh investigator, testified that [redacted]

- **Donald Remy**, Chief Legal Officer of the NCAA, testified that he does not recall any "calls or conversations with the Freeh Group when they were providing substantive information" to the NCAA. Ex. 36, Remy Dep. 18:22, *Corman*, No. 1 MD 2013 (Nov. 20, 2014).

- **Frank Guadagnino,** Penn State's counsel, stated that "FSS communicated no information, orally or in writing, that was or was intended to be attorney-client privileged and/or protected by the related 'work-product doctrine' pursuant to privileges and protections held by [Penn State], to either the NCAA or the Conference either orally or in writing." Ex. 37, Guadagnino Dep. Ex. 11, Aff. ¶ 7, *Corman*, No. 1 MD 2013 (Dec. 5, 2013).

The record is clear and Plaintiffs should stop representing otherwise to this Court.[11] Plaintiffs' argument is thus legally irrelevant and factually inaccurate, and fails to distinguish their own waiver from Penn State's supposed waiver.[12]

---

[11] In contrast to the Freeh Firm and the NCAA, Plaintiffs admit that the authors of the *Critique* ***did*** share information with third-parties. *See, e.g.*, Opp'n at 13-14 [redacted] *id.* at 13 (The *Critique* authors communicated with "lawyers for Dr. Spanier and Messrs. Curley and Schultz ...." (cition ommited)).

[12] Plaintiffs also argue that the "authors of the *Critique* were not authorized to share the results of their investigation." Opp'n at 7. As noted above, the *Critique*

III. PLAINTIFFS FAIL TO DEMONSTRATE THAT THE REQUESTED MATERIALS WERE PRIVILEGED OR WORK PRODUCT.

The NCAA's opening memorandum demonstrated that Plaintiffs' own advocacy leads to the inescapable conclusion that the *Critique* and its supporting materials were never protected by the attorney-client privilege or work product doctrine in the first place. Plaintiffs' response falls flat.

First, by Plaintiffs own argument, the materials are not privileged because the Paterno family had no expectation of confidentiality. Plaintiffs ignore this point. "[C]onfidentiality is the foundation of the attorney-client privilege." *Trib Total Media, Inc. v. Highlands Sch. Dist.*, 3 A.3d 695, 701 (Pa. Commw. Ct. 2010). Here, the record is clear that—just as with the Freeh Report—Plaintiffs intended to make the *Critique* public from the outset.[13] *See* Mot. at 15-18. As

---

suggests otherwise. *See supra* n. 11. Regardless, *authorization* to make a disclosure does not constitute a waiver; actually disclosing the information is the waiver.

[13] James Clemente confirmed in one of his many on-camera interviews that he had no expectation of confidentiality *from the start* of his review. Clemente explained that he told King & Spalding at the time of his engagement that he would "***not be silent***" about his review and that he would "***be as vocal about [his review] if I find good things about Paterno as I will if I find bad things about Paterno***. They said 'we have no problem with you doing that, we are that confident.' I said 'alright, but be advised.'" *The Truth Behind the Penn State Cover Up with Jim Clemente*, YouTube (Feb. 10, 2013), https://www.youtube.com/watch?v=PSW6aG9hWok (also stating that the "most important" reason he did the analysis was so that the "world learns" about his findings).

Plaintiffs have stated, "***That is dispositive.***" Ex. 20, Br. for Appellees at 32 (emphasis added).

Second, Plaintiffs' argument that the Freeh Firm materials are not privileged because allegedly the Freeh Report is not a legal document, and the Freeh Firm was not providing legal services, applies equally to the *Critique*. *See* Mot. at 19-21. In response, Plaintiffs ***admit*** that the *Critique* does not reflect legal advice. Opp'n at 13. But they contend that the underlying materials are still privileged. *Id.* Plaintiffs cannot square this position with their opposite stance about the Freeh Report supporting materials.[14] Plaintiffs have sought all of the supporting Freeh Report materials because, *inter alia*, the Freeh Report allegedly was "not a legal document." *See* Mot. at 19-20 (describing Plaintiffs' inconsistent argument).[15] The *Critique* is indistinguishable in this regard, and the supporting materials must be produced.

---

[14] *See, e.g.*, Ex. 17, Br. for Appellees at 3, *Estate of Paterno*, No. 877 MDA 2015 (arguing that the Freeh materials are not protected because "[t]he Report did not contain or reflect confidential legal advice. Nor did it purport to have been prepared in anticipation of litigation.").

[15] Plaintiffs also argue that the *Critique* did not release confidential information. Opp'n at 13-14. But as noted above, the *Critique* purports to rely on undisclosed source information, including witness "interviews" and "information provided by counsel for Penn State administrators." *See supra* at 5. And Mr. Thornburgh testified that his report contains the entirety of his legal opinion. *See supra* at 7.

Third, application of Plaintiffs' own arguments leads to the conclusion that the *Critique* materials are not protected by the work product doctrine. Plaintiffs offer no response to their prior argument that the work product doctrine does not protect underlying factual information, such as information learned in witness interviews, developed in a context outside of preparing for litigation. At minimum, such information underlying the *Critique* should be produced. Instead, Plaintiffs baldly assert that the *Critique* was prepared in anticipation of litigation, and suggest that any document or piece of information related to the *Critique* is therefore protected work product. Opp'n at 1-2. But Plaintiffs are again haunted by their own advocacy: "Even if it were not waived, the work-product protection would not apply either .... The Freeh Report was not created in anticipation of litigation; it was a public-relations document .... The purposes of the work-product doctrine would not be served by allowing Penn State and Pepper Hamilton to shield the information underlying the Freeh Report's very public accusations against Appellees." Ex. 17, Br. for Appellees at 19, *Paterno*, No. 1709 MDA 2014. The same is undeniably true of the *Critique*.

Further, the Paterno Family asked King & Spalding to begin the investigation that culminated with the *Critique* ***before*** the Consent Decree was

even released. *See* Ex. 24 (Paterno Family Statement, dated July 16, 2012).[16] And although Plaintiffs [redacted]'" Opp'n at 6, 12, "privilege cannot be called into existence merely by reciting magic words." Ex. 17, Br. for Appellees at 39, *Paterno*, No. 1709 MDA 2014. If what Plaintiffs have proclaimed is true, preparing documents "for public purposes" "would be an odd way to prepare for litigation." Ex. 20, Br. for Appellees at 39-40, *Paterno*, No. 1709 MDA 2014. But that is precisely the position Plaintiffs take with respect to the *Critique*.

If the materials underlying the Freeh Report are not privileged or work product, then neither are those underlying the *Critique*.

IV. RULE 4003.5 DOES NOT PROHIBIT DISCOVERY REGARDING BERLIN'S AND CLEMENTE'S PUBLICLY DISCLOSED INDEPENDENT ANALYSES.

Plaintiffs' Opposition also repeats the legally untenable theory that Berlin's and Clemente's materials—which were generated long before this litigation began and were the subject of broad public disclosure—are independently protected from disclosure by Pennsylvania Rule of Civil Procedure 4003.5. *See* Opp'n at 11-12.

---

[16] Plaintiffs argue that King & Spalding's materials should be protected because that firm is counsel of record in this litigation. Opp'n at 14-15. But the NCAA has been clear in every communication with Plaintiffs' counsel that it seeks only pre-litigation materials related to the publicly-disclosed *Critique* and its associated media campaign. The NCAA has not, and will not, seek materials beyond that.

Plaintiffs ignore the NCAA's extended discussion that no law endorses such a bizarre theory. *Compare* Mot. at 33-35 *with* Opp'n at 11-12.

The clear purpose of Rule 4003.5 is to provide parties with the opportunity to maintain the confidentiality of communications with litigation consulting experts. Assuming, *arguendo*, that Plaintiffs did hire Berlin and Clemente as litigation consulting experts in 2012,[17] Plaintiffs may well have had the option to keep their analysis confidential. **But Plaintiffs chose to do anything but keep their analysis confidential.** Instead, Plaintiffs published the "full" results of Berlin's and Clemente's analysis and then went on a media blitz in which they publically criticized the NCAA. *See* Ex. 1, *Critique* at 5. Now, three years after pointing the barrel at the NCAA, Plaintiffs are using Rule 4003.5 as a shield to block *all* discovery about these reports. This is an extreme case of sword and shield; Plaintiffs cannot disclose reports of so-called litigation consulting experts months before they ever initiated litigation, engage in a massive public-relations campaign, and then use a technical rule as a means to shield all discovery about the

---

17 [redacted] he first time Plaintiffs informed counsel for the NCAA that Berlin and Clemente were litigation consulting experts was in *July 2015—months after* previously telling counsel that Berlin and Clemente were in the process of collecting documents to produce. *See* Mot. at 9, 32.

public reports years later in litigation. Under Plaintiffs' approach, Louis Freeh could *now* be designated as a consulting expert, and suddenly all work that the Freeh Firm had done in 2012 would be shielded from discovery even in this litigation.

Today, Berlin and Clemente are undeniably *fact* witnesses to their reports, separate and apart from any purported role as consulting experts. If, as Plaintiffs told the NCAA in July 2015, they named Berlin and Clemente as litigation consultants since the publication of the *Critique*, that does not shield Berlin's and Clemente's *prior* work. Indeed, Plaintiffs allowed deposition and document discovery from Thornburgh (subject to myriad privilege objections); there is no apparent difference between him and Berlin and Clemente, with the exception that Plaintiffs are now describing Berlin and Clemente as experts under Rule 4003.5.[18]

Finally, Plaintiffs offer virtually no response to the myriad procedural faults that doom their objection, nor have Plaintiffs taken any steps to remedy these errors. *See* Mot. at 32-33 (listing failures). Plaintiffs respond that these errors did not prejudice the NCAA. Opp'n at 15. The prejudice is obvious—Plaintiffs have unilaterally blocked ***all*** discovery from Berlin and Clemente, and their improper

---

[18] Plaintiffs' sole objection to discovery from Berlin and Clemente is Rule 4003.5. Plaintiffs have ***not*** objected on privilege or work product grounds, which further suggests Berlin and Clemente were not retained as consulting experts for litigation in 2012.

delay in doing so has threatened the NCAA's ability to obtain this discovery before the close of discovery.

V. PLAINTIFFS' FAILURE TO PRODUCE A PRIVILEGE LOG WAIVES PRIVILEGE AND WORK PRODUCT PROTECTION.

As stated in the NCAA's opening papers, Plaintiffs have not properly preserved privilege or work product because they refuse to provide a privilege log. By Plaintiffs' own argument, this failure vitiates any protection. Plaintiffs argued that Penn State failed to "properly invoke the privilege, as it did not provide a privilege log explaining the basis for its efforts to withhold particular documents." *See* Ex. 20, Br. for Appellees at 31, *Paterno*, No. 1709 MDA 2014. Likewise, in enforcing a third-party subpoena in this litigation, Plaintiffs argued to an Illinois court that the Big Ten Athletic Conference and Mayer Brown (the Conference's counsel) waived privilege and work product by, *inter alia*, failing to produce a timely privilege log. Ex. 38, Suppl. Reply in Supp. of Mot. to Compel at 5-6, *Paterno v. NCAA*, No. 2014-L-002963 (Ill. Cir. Ct. Jan. 20, 2015). Plaintiffs blasted these non-parties for claiming "without any legal support—that they are not required" to produce a log, the very argument Plaintiffs now advance. Ex. 39, Suppl. Mem. in Supp. of Mot. to Compel at 4, *Paterno*, No. 2014-L-002963 (Dec. 10, 2014).

Plaintiffs' only justification is that the privilege log requirement purportedly does not apply to them because the "entire category of documents the NCAA seeks

is privileged and confidential." Opp'n at 16. This circular reasoning simply begs the question. The Pennsylvania Rules of Civil Procedure plainly require the Estate to list the documents on a log to invoke the privilege. *See* Pa. R. Civ. P. 4009.12(b)(2) (requiring parties to log all "[d]ocuments or things not produced"). Plaintiffs have themselves so stated: "[F]ew courts have been willing to accept blanket assertions of privilege with respect to an entire category of information." *See, e.g.*, Ex. 17, Br. for Appellees at 20, *Paterno*, No. 1709 MDA 2014 (Oct. 30, 2015) (citation omitted). Privilege logs serve an important function: to permit litigants to test privilege assertions of the other party to prevent an abuse of the process. But, without a privilege log, the NCAA is unable to verify on a document-by-document basis whether a privilege assertion is proper.

By Plaintiffs' own logic, their refusal to produce a log waives any protection those documents may have had.

CONCLUSION

Plaintiffs cannot refuse to produce the materials underlying the *Critique* while continuing to press for the materials underlying the Freeh Report. Under their own arguments, these materials are legally indistinguishable. Plaintiffs should be required to (i) produce all documents related to the *Critique* and its Independent Analyses; (ii) cease blocking discovery from Thornburgh; and (iii) the

Estate's purported "objection" to the Berlin and Clemente subpoenas should be overruled.

Respectfully submitted,

Date: March 1, 2016

Thomas W. Scott (No. 15681)
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Everett C. Johnson, Jr. (admitted *Pro Hac Vice,* DC No. 358446)
Brian E. Kowalski (admitted *Pro Hac Vice,* DC No. 500064)
Sarah M. Gragert (admitted *Pro Hac Vice,* DC No. 977097)
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Email: Everett.Johnson@lw.com
Brian.Kowalski@lw.com
Sarah.Gragert@lw.com

Counsel for the NCAA, Dr. Emmert, and Dr. Ray

EXHIBIT 33

ROUGH DRAFT DISCLAIMER

IMPORTANT NOTICE:
AGREEMENT OF PARTIES

We, the party working with the rough draft transcript, understand that if we choose to use the rough draft, that we are doing so with the understanding that the rough draft is a non-certified copy.

We further agree not to share, give, copy, scan, fax or in any way distribute this rough draft in any form (written or computerized) to any party. However, our own experts, co-counsel and staff may have limited internal use of same with the understanding that we agree to destroy our rough draft and/or any computerized form, if any, and replace it with the final transcript upon its completion:

Case: Paterno, et al. Vs. NCAA, et al
Date: February 25, 2016

REPORTER'S NOTE:
Since this deposition is in rough draft form, please be aware that there may be a discrepancy regarding page and line number when comparing the rough draft, rough draft disk, and the final transcript.

Also please be aware that the non-certified rough draft transcript may contain untranslated steno, reporter's notes in double parentheses, misspelled proper names, incorrect or missing Q/A symbols or punctuation, and/or nonsensical English word combinations. All such entries will be correct on the final, certified transcript.

08:51:13 Court Reporter's Name: Anita Trombetta
08:51:13
09:17:51
09:23:25

♀

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,

PENNSYLVANIA

----------X

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

Plaintiffs,

-against-

NO: 2013-2082

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.

----------X

♀

62

EXHIBIT 34

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	:	NO. 1 M.D. 2013
Plaintiffs,	:	
vs.	:	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,	:	
Defendant,	:	
vs.	:	
PENNSYLVANIA STATE UNIVERSITY,	:	
Defendant.	:	

- - -

December 17, 2014

- - -

Oral deposition of OMAR MCNEILL, taken at the offices of Proctor Heyman LLP, 300 Delaware Avenue, Wilmington, Delaware 19103, beginning at 1:00 p.m., before LINDA ROSSI RIOS, a Federally Approved RPR, CCR and Notary Public.

- - -

Job No. 88377

weeks. 14:36:14

Q. It's your testimony today that you never in these phone calls gave any substantive information about the findings of your investigation? 14:36:14 14:36:16 14:36:22 14:36:24

A. Correct. 14:36:24

Q. Including documents you were finding? 14:36:25 14:36:27

A. Correct. I'm sorry, let me step back. At some point there were discussions about e-mails that had leaked to the public, and I don't have it -- I don't have a recollection of the discussion about that. But I seem to recall that there were questions about e-mails that had been leaked through the media. 14:36:27 14:36:31 14:36:36 14:36:42 14:36:47 14:36:49 14:36:53 14:36:55

Q. But ones that were already in the public domain? 14:36:56 14:36:58

A. Correct. 14:36:59

Q. Were you informing Messrs. Remy and Barrett who you were interviewing? 14:36:59 14:37:04

A. Not beyond, again, early on a general discussion of categories of witnesses. 14:37:06 14:37:11 14:37:13

Q. Now, there came a time where 14:37:13

EXHIBIT 35

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, et al.,
Plaintiffs,

vs.

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,

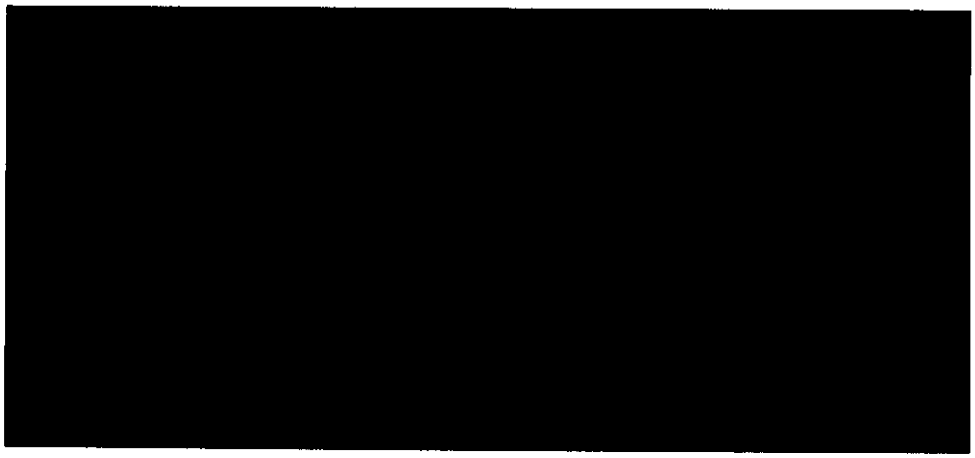
and

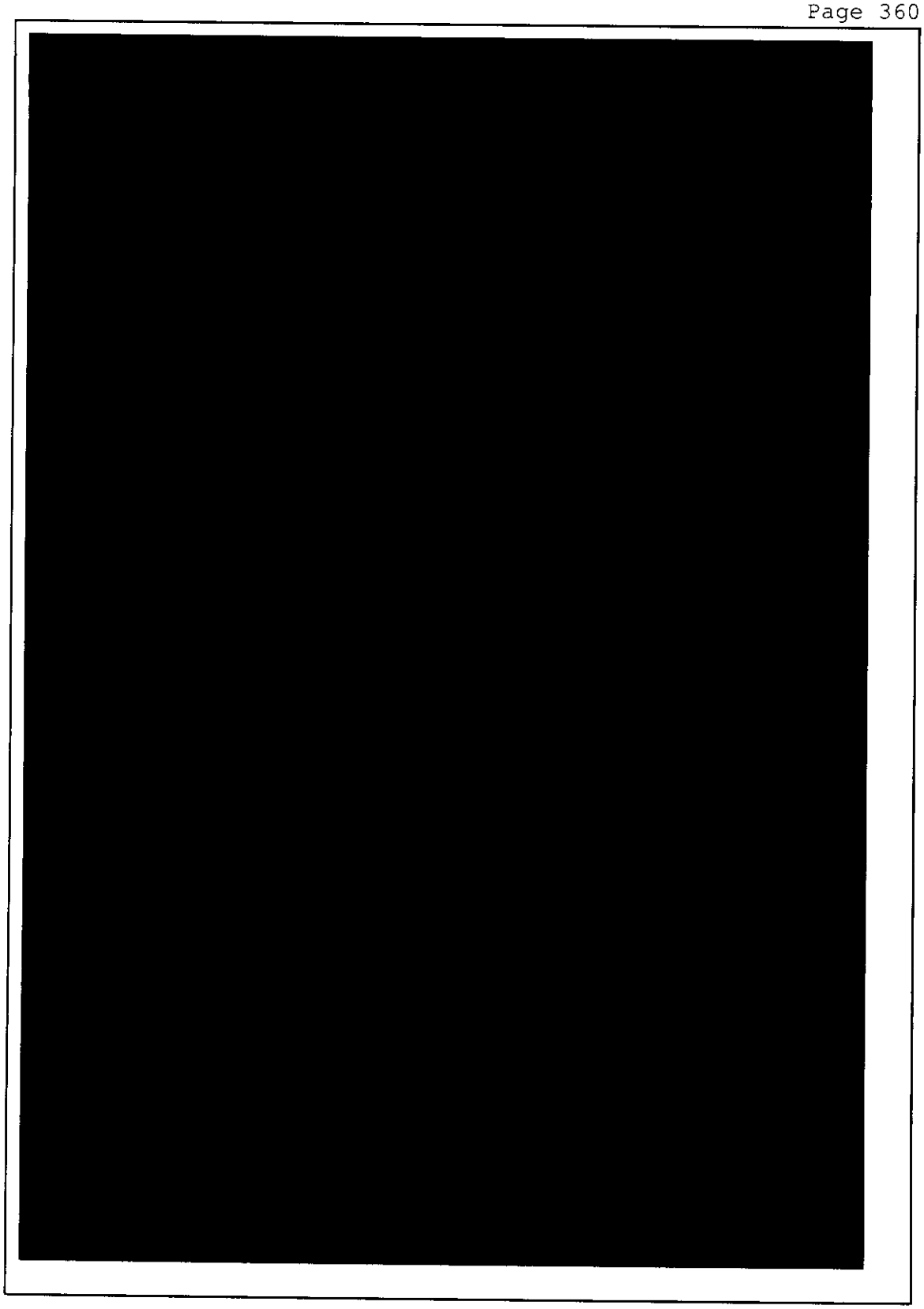
THE PENNSYLVANIA STATE UNIVERSITY,
Nominal Defendant.

NO. 2013-2082

- - - - -

Tuesday, February 16, 2016





06:04:43
06:04:46
06:04:48
06:04:52
06:05:00
06:05:02
06:05:05
06:05:06
06:05:08
06:05:13
06:05:16
06:05:18
06:05:21
06:05:22
06:05:26
06:05:28
06:05:32
06:05:34
06:05:36
06:05:39
06:05:44
06:05:49
06:05:51
06:05:54
06:06:03

EXHIBIT 36

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1 M.D. 2013

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,

Plaintiffs,

v.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant.

v.

PENNSYLVANIA STATE UNIVERSITY,

Defendant.

X

** REVISED **

Thursday, November 20, 2014

9:01 a.m.

Deposition of Donald Remy

Job No: 86979

Reported by: Randi Garcia

Committee on Infractions. They since evolved, whereas today they -- they don't provide anything in the way of direction or suggestions about outcome of cases, but they do provide what's more like a bench memo today to really just frame the issues for the committee so that they understand all the material before them, whereas in the past, they would just give them the big binders and say, "Here's the material. Here's the date. This is when you're supposed to show up. Please read the material and then afterwards deliberate," provide the material, tell them how to draft the infractions report, and then they provide a draft and work with the committee on getting that out in the format that the association's used to. 09:13:20 09:13:23 09:13:26 09:13:29 09:13:32 09:13:35 09:13:37 09:13:39 09:13:42 09:13:44 09:13:46 09:13:48 09:13:49 09:13:53 09:13:57 09:13:59

Q This is more curiosity than anything. When did that evolution of the office staff occur, where they -- where they moved into doing more like, as you've noted, a bench brief? 09:14:01 09:14:03 09:14:07 09:14:09

A Oh, recently. I think that -- that's in -- I suppose it was the middle of 2012. There was a new managing director that was hired in that unit, Joel McGormley. And he was charged with the responsibility of bringing some 09:14:12 09:14:14 09:14:18 09:14:23 09:14:26

EXHIBIT 37

OFFICE OF OPEN RECORDS,
COMMONWEALTH OF PENNSYLVANIA

RYAN BAGWELL, Requester,	:	Appeal Docket #AP 2013-1753
v.	:	
	:	Appeals Officer J. Chadwick Schnee
THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION,	:	
Respondant.	:	*Electronically Filed*

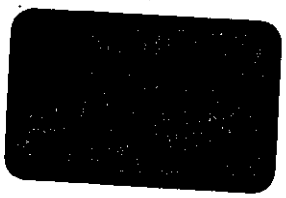
SUPPLEMENTAL AFFIDAVIT OF FRANK T. GUADAGNINO

The undersigned, Frank T. Guadagnino, having been duly sworn according to law, hereby states that the following is true and correct to the best of his knowledge and information.

1. I am a practicing attorney and a partner in the law firm of Reed Smith, LLP, 225 Fifth Avenue, Pittsburgh, PA 15222.

2. Since November 7, 2011, I have been engaged by The Pennsylvania State University ("Penn State") to represent Penn State as legal counsel on a variety of matters, including among other things, corporate governance issues and issues arising out of the allegations against former assistant football coach Gerald Sandusky.

3. In that capacity, I have provided and continue to provide legal advice



to the University through its Board of Trustees (the "Board"), officers and other senior administrators.

4. In November 2011, Freeh Sporkin & Sullivan LLP ("Freeh") was engaged as counsel to the Board and the Special Investigative Task Force of the Board (the "Task Force"). A redacted copy of the engagement letter creating the attorney client relationship between the Board (acting on behalf of the University) and Freeh was attached as Exhibit 4 to my previous affidavit in this matter dated October 11, 2013. Requester Ryan Bagwell also attached a copy of the same document to his letter to Appeals Officer J. Chadwick Schnee dated November 22, 2013.

5. Section 6 of the Freeh engagement letter expressly provides that the work and advice which is provided to the Task Force under the engagement, and any third party working on behalf of Freeh to perform services in connection with the 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 as otherwise determined by law.

6. As set forth in the Freeh engagement letter, the Board asked Judge Freeh 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 governmental authorities". The engagement letter further provided that the results of this investigation would be provided in a report that would contain Freeh'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 the allegations were handled by the Trustees, PSU administrators, coaches and other staff". In addition, the Board asked for recommendations to attempt to ensure that those and similar failures do not occur again.

7. The University requested that FSS provide periodic updates on the status of the investigation to the representatives of the National Collegiate Athletic Association ("NCAA") and the Big Ten Conference ("Conference"). Based on discussions that I have had with Omar McNeill, Esq., then a partner of FSS, it is my understanding that FSS provided such updates on a periodic basis throughout the course of the investigation, that such updates related primarily to the process and progress of the investigation and discussions of publicly available information, and that FSS communicated no information, orally or in writing, that was or was intended to be attorney-client privileged and/or protected by the related "work product doctrine" pursuant to privileges and protections held by the University, to either the NCAA or the Conference either orally or in writing.

12/5/13
DATE

FRANK T. GUADAGNINO

COMMONWEALTH OF PENNSYLVANIA }
} ss.
COUNTY OF CENTRE }

On this 5th day of December, 2013, before me, the undersigned notary public, FRANK T. GUADAGNINO personally appeared, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Notary Public
[SEAL]

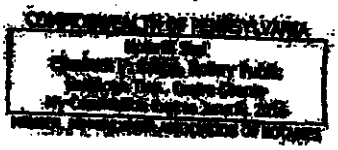


EXHIBIT 38

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO, et al.	)	
	)	**Case No. 2014-L-002963**
Plaintiffs,	)	
v.	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.	)	
Defendants.	)	

SUPPLEMENTAL REPLY IN SUPPORT OF MOTION TO COMPEL

The Estate of Joseph Paterno ("the Estate"), by and through its counsel, submits this Supplemental Reply in support of its motion to compel the Big Ten Athletic Conference and Mayer Brown (collectively, "Respondents") to comply fully with subpoenas served in March, 2014, and to produce documents being withheld on grounds of "common interest privilege." Respondents have forfeited their right to assert the common interest privilege by failing to assert that privilege expressly and in a timely manner. Moreover, Respondents have not satisfied their burden to invoke the common interest privilege. In the alternative, if the Court concludes that Respondents can timely assert new privileges for the first time eight months after responding to the subpoenas, the Estate respectfully requests that the Court direct Respondents to provide a detailed privilege log of all documents withheld on grounds of privilege.

BACKGROUND

The sequence of events leading up to the Estate's Supplemental Motion to Compel are set forth in the original motion and in subsequent submissions through which the Estate has sought compliance with a straightforward document subpoena. Yet, Respondents continue to delay and deny discovery, now raising arguments that would have been meritless even if they had been raised at the appropriate time, *over nine months ago*. Specifically, the Estate served subpoenas *duces tecum* on Respondents on March 19, 2014, to which they responded with Objections on April 8, 2014. Although Respondents asserted extensive objections, including attorney-client and work product privileges, they did not raise the common interest privilege—either in their Objections or in any other communication with the Estate or submission to this Court.

After a series of hearings related to the Estate's Motion to Compel, on December 5, 2014 this Court ordered Respondents to produce responsive documents that day, and if they withheld documents, to advise counsel for the Estate by December 9, 2014 of their basis for doing so. *See* Hr'g Tr. 24:14–27:10, Dec. 5, 2014, Ex. A. Respondents produced documents on December 5, as ordered. On December 9, Respondents notified the Estate for the first time that "the Firm has withheld approximately 70 documents pursuant to the common interest/joint defense privilege between the NCAA[] and the Big Ten[]. As you presumably know, the NCAA already has asserted the *exact same privilege* in Pennsylvania as to those communications." Opp. 2 (emphasis added). This is the latest example of Respondents' ongoing efforts to avoid compliance with the document subpoenas. Their belated claim of common interest, which they raised only after the NCAA raised it in another case, is another instance of their obstructionist tactics, which the Court should not permit.

ARGUMENT

The common interest doctrine allows the assertion of attorney-client privilege to protect statements made in confidence not to one's own lawyer, but to an attorney for another for a common purpose related to the defense of both. *See United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997) (quoting *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985)). The joint defense/common interest privilege protects communications between an individual and an attorney for another when the communications are part of an ongoing and joint effort to pursue a common defense strategy. "[T]o establish the existence of a joint defense privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived." *See United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989) (quoting *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986)). As with any privilege, the party asserting it has the burden of showing that the conditions are satisfied. *Id.* Respondents have not satisfied their burden.

I. Respondents Have Forfeited Any Right To Assert A Common Interest Privilege.

Respondents have forfeited their right to assert a common interest privilege because they did not assert that privilege until *after* the Court ordered them to produce documents and account for documents withheld. *See* Ex. A. As courts have long held, a party cannot belatedly raise new privilege claims after their discovery responses are due. *See, e.g., E.E.O.C. v. Parker Drilling Co.*, No. 3:13–cv–00181–SLG, 2014 WL 5410661, at *6 (D. Alaska Oct. 22, 2014) ("[T]he Court f[ound] that the . . . [plaintiff] waived the attorney-client and government deliberative process privileges for the document Bates numbered 000095 by failing to raise th[o]se privileges when its discovery response was due"); *Bruker v. City of New York*, No.

93CIV.3848(MGC)(HBP), 2002 WL 484843, at *6 (S.D.N.Y. Mar. 29, 2002) ("Since th[e] supplemental [privilege] index was not provided in accordance with the schedule established in . . . [the court's] June 2001 Order, . . . [the court] conclude[d] that the new claims and assertions made therein ha[d] been waived.").

Respondents contend that they were not in a position to determine the applicable privileges until after they had gathered and reviewed the documents responsive to the requests, which took months to complete. Opp. 7. But that excuse is at odds with their statement of the purported common legal interest in regulating Penn State's football program. The subpoenas issued to the Big Ten and Mayer Brown clearly called for communications between them relating to the Freeh investigation of Penn State's football program. Those requests themselves would have implicated their alleged common interest. *See* Exs. B, C.

> **Subpoena to the Big Ten:**
>
> Request No. 2: Please produce all documents that evidence, reflect or relate to collaboration on gathering information on gathering and sharing information between the Big Ten and the NCAA with respect to the NCAA investigation or the Freeh investigation.
>
> **Subpoena to Mayer Brown**
>
> Request No. 1: Please produce all documents that evidence, reflect or relate to collaboration on gathering and sharing information between Mayer Brown and the NCAA, including all notes or records of telephone calls, memos, emails, letter, or other forms of communication, relating to the NCAA investigation or the Freeh investigation.

Respondents also contend their general "objections on grounds of privilege" and reservations of rights to assert any and all privileges amounted to a timely assertion of the common interest privilege. Opp. 6–7. But such vague statements do not comply with Rule 201(n), which provides that party asserting a privilege must do so "expressly" and such assertions must be "supported by a description of the nature of the documents, communications

or things not produced or disclosed and *the exact privilege which is being claimed.*" Ill. Sup. Ct. R. 201(n) (emphasis added); *see also, e.g., Pietro v. Marriott Senior Living Servs., Inc.*, 348 Ill. App. 3d 541, 550 (2004) (quoting Ill. Sup. Ct. R. 201(n)) ("Supreme Court Rule 201(n) . . . requires that the privilege log describe 'the nature of the documents . . . not produced or disclosed' and 'the exact privilege which is being claimed.'").

The Estate contends that Respondents waived their right to assert the common interest privilege by failing to do so expressly and in a timely way, not that they took some action to waive the privilege. *See* Supp. Mem. at 4 ("Respondents have waived their opportunity to assert common interest/joint defense privilege"); Hr'g Tr. 4:21–6:19, Dec. 12, 2014 (same), Ex I. Thus, their reliance on *DeFilippis v. Gardner*, 368 Ill. App. 3d 1092 (2006), is inapposite. That case involved the physician-patient privilege, which is not a jointly held privilege comparable to the common interest privilege. As the court in *DeFilippis* stated, "[t]he privilege is for the patient's benefit, not the physician's." *Id.* at 1095 (citing *People v. Bickham*, 89 Ill. 2d 1, 6 (1982)). The privilege did not belong to the physician defendants in *DeFilippis*, and thus the court refused to sanction the patients for the defendants' failure to make timely discovery responses. Here, by contrast, Respondents—the purported holders of the privilege at issue—responded to subpoenas and expressly asserted certain specific privileges, including attorney-client and work product. They did not, however, expressly assert the common interest privilege until they were under a court order, and thereby forfeited their right to do so.

In short, although Respondents argue that they raised "claims of privilege," they cannot contend that they expressly asserted the common interest privilege as Rule 201(n) requires until December 9, 2014, after they had produced documents as directed by the Court on December 5. Because they did not timely and expressly assert this privilege, Respondents have forfeited their

right to assert the common interest privilege as a basis for withholding responsive documents.

II. Respondents Have Failed To Satisfy The Requirements For Invoking A Common Interest Privilege Under Illinois Law.

Even if Respondents had timely and expressly invoked a common interest privilege, their objections should be overruled because they have not carried their burden to show that the privilege applies here. Respondents contend that they have a common legal interest with the NCAA because the Big Ten and the NCAA have shared legal interests in regulating Penn State University's football program, and that their claim of common interest privilege is the counterpart of the common interest privilege asserted by the NCAA in *Corman v. NCAA*, No. 1 M.D. 2013 (Pa. Commw. Ct.). *See* Opp. 10.[1] But the NCAA's privilege claims in *Corman* do not correspond to Respondents' claims. In this case, Respondents have withheld approximately 70 documents reflecting communications with the NCAA between November 2011 and January 2013 regarding the conduct of Penn State's football program. In contrast, the NCAA submitted detailed privilege logs in *Corman* listing hundreds of documents covering the same time period—November 2011 through January 2013—that it withheld on grounds of privilege, but only *three* as to which it asserts the common interest privilege with Respondents. This gross disparity between the number of documents as to which the privilege is claimed by the parties that allegedly share a common interest shows that Respondents are asserting claims of privilege as to which the NCAA did *not*.[2]

---

[1] The *Corman* case has been resolved since Respondents submitted their response, but before the Commonwealth Court ruled on the NCAA's claims of privilege that were under review in camera in that case. *See* Ex. D. As a result, no ruling on the NCAA's claims of common interest privilege is forthcoming in that case.

[2] At the time of the NCAA General Counsel's November 2014 deposition in *Corman*, the NCAA, in its revised privilege log, had asserted the common interest privilege with respect to two documents that contained communications between the NCAA and Respondents. *See* NCAA

Respondents nonetheless contend that they are entitled to claim protection under the common interest doctrine because a waiver of common interest requires consent of both parties, and neither they nor the NCAA has done so. They base their position on the unsupported assertion that the NCAA has not produced any documents protected by the common interest privilege. Opp. 6. Respondents offer no support for that bald assertion about the scope of the NCAA's production. In fact, the NCAA *has* produced documents reflecting communications between counsel for the Big Ten and counsel for the NCAA, including emails between Jon Barrett of Mayer Brown and Donald Remy of the NCAA.[3] Thus, Respondents cannot credibly represent that the NCAA has withheld from production all the documents as to which Respondents would assert common interest protection.

III. Respondents Should Be Ordered To Produce A Privilege Log.

A more direct comparison of Respondents' claims of common interest privilege with the NCAA's is impossible because Respondents have failed to provide an appropriate privilege log. Rather than comply with that basic obligation, Respondents have chosen instead to devote extensive efforts to arguing about the burden of preparing a log.

To justify their position, the Responds have focused on a limited portion of *Thomas v. Page*, 361 Ill. App. 3d 484 (2005), a case that the Estate cited as authority that Respondents are

---

Revised Privilege and Redaction Log, Oct. 16, 2014, Ex. E at 1–2; Remy Dep. 71:11–19, Nov. 20, 2014, Ex. F. Subsequently, the NCAA asserted common interest privilege with Respondents with respect to two more documents listed on its ten-page supplemental privilege log. *See* NCAA Supplemental Privilege Log, Dec. 1, 2014, Ex. G at 1–2. The NCAA withdrew its claim of common interest privilege on the eve of submitting the documents to the Court for *in camera* inspection, because the subject of the communication did not relate to the NCAA and Big Ten's common legal defense, but to their public relations strategies. *See* July 11, 2012 email from D. Remy to J. Barrett and B. Williams, Ex. H at 6–7.

[3] The NCAA has produced such documents, but has designated them "Confidential" under the Pennsylvania Protective Order. The Estate will have a copy available at the hearing for the Court's inspection.

not exempt from the requirements of Rule 201(n). Ignoring the rationale underlying the court's ruling, however, the Respondents have excerpted one of the case's conclusions, which was that certain documents did not require a document-by-document privilege log. Opp. at 12. That conclusion in *Thomas* is meaningful only in conjunction with its underlying rationale, that "[t]he purpose of . . . [R]ule [201(n)] is to enable the court to evaluate the applicability of the asserted privilege and determine the need for an *in camera* inspection of the documents, and also to minimize any disputes between the parties regarding those matters." *See Thomas*, 361 Ill. App. 3d at 497 (*citing FMC Corp. v. Trimac Bulk Transp. Servs., Inc.*, No. 98 C 5894, 2000 WL 1745179, at *1 (N.D. Ill. Nov. 27, 2000)). As to some, but not all, of the documents at issue in *Thomas*, the court concluded that a document-by-document privilege log was unnecessary because it was apparent from the requests that the judicial deliberation privilege would apply. *See Thomas*, 361 Ill. App. 3d at 497–98.

Respondents contend that the court in *Thomas* held that a description by category is sufficient to comply with Rule 201(n). In fact, the court ruled that such a description could be sufficient, but only "*[i]f* the . . . [the parties claiming a privilege] disclose the persons who authored, sent or received the withheld documents *and* are able to describe the nature of the documents by category sufficient to enable the trial court to determine whether the documents fall within the scope of the claimed privilege and are protected from disclosure." *Thomas*, 361 Ill. App. 3d at 498 (emphases added).

Here, Respondents have failed to meet their obligations, and have ignored the Court's instructions from the last hearing on this matter. At that time, the Court stated that "what I would require is a Bate stamp of each of the documents with a log explaining what privilege it is that you're claiming." Hr'g Tr. 10:2–4, Dec. 12, 2014, Ex. I. Instead of complying with the

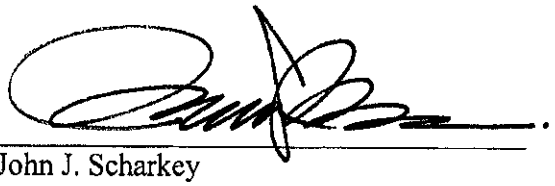
standard format for a privilege log, Respondents have proffered a woefully inadequate and conclusory list of five categories of documents withheld. Four of the five categories list common interest as the applicable privilege. In two of the categories, the withheld documents span a nine-month period, in another, a seven-month period. The chart does not indicate how many documents Respondents have withheld in each category. Most importantly, the generic descriptions of the subject matter of the emails do not enable the court to determine that they were communications made in furtherance of a common legal interest with the NCAA. In light of the NCAA's very limited invocation of common interest privilege that does not correspond to Respondents' much broader claim of privilege for documents that *both* would be expected to withhold if privileged, the information Respondents have offered is not sufficient to determine that the communications were made in pursuit of a common legal interest with the NCAA. *See supra* note 3.

Moreover, the record in *Corman* reflects the NCAA's withdrawal of its claim of common interest privilege with respect to one of the documents as to which it was originally asserted. Ex. H. That document was a July 11, 2012 email between Jon Barrett of Mayer Brown and Donald Remy of the NCAA, with a copy to Bob Williams, an NCAA's communications official. Under three of the four common interest categories on Respondents' chart, Remy and Barrett are parties to the communications. The subject matter of the email was "Freeh Report." The NCAA ultimately withdrew its claim of privilege and produced it because the content of the email pertained to their public relations messages rather than to common legal issues. Ex. H at 6. A more detailed description of the content of the email communications withheld, and the identity of anyone who was sent a copy, should be included for the Court to assess the claim of common interest privilege.

CONCLUSION

For the foregoing reason, as well as the reasons set forth in support of the Estate's Supplemental Memorandum in Support of Motion to Compel, the Estate respectfully requests that Court rule that Respondents forfeited the right to assert the common interest privilege, and any documents withheld on that basis must be produced. In the alternative, the Estate requests the Court direct Respondents to provide the Estate with a detailed privilege log that complies with Rule 201(n).

Dated: January 20, 2015



John J. Scharkey
NEAL, GERBER & EISENBERG LLP
Two North LaSalle Street
Chicago, Illinois 60602
Telephone: (312) 269-5656
Firm No. 13739

Wick Sollers
L. Joseph Loveland
Patricia L. Maher (Cook County Atty. No. 58283)
Samuel Doran
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500

Counsel for Plaintiff George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno

EXHIBIT 39

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO, et al.	)	
	)	**Case No. 2014-L-002963**
Plaintiffs,	)	
v.	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.	)	
Defendants.	)	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

The Estate of Joseph Paterno ("the Estate"), by and through its counsel, supplements its Motion to Compel pursuant to Illinois Supreme Court Rules 201 and 214, for an order enforcing subpoenas duces tecum that were served on third-parties Mayer Brown LLP ("Mayer Brown") and the Big Ten Conference, Inc., (the "Big Ten") (collectively, "Respondents") on March 19, 2014. Pursuant to the Court's December 5, 2014 Order, Respondents produced responsive documents, but their productions are far from complete.[1] The productions by Mayer Brown included documents reflecting communications with a representative of the National Collegiate Athletic Association ("NCAA"), that have been extensively redacted.

[1] Respondents refer in their motion to this as their "second round of productions." It is undisputed that the only documents Respondents produced earlier were copies of news articles and similar publicly availably documents.

On December 9, 2014, also pursuant to the Court's December 5, 2014 Order, Respondents advised counsel for the Estate that Mayer Brown has withheld "approximately 70 documents" purportedly on the basis of a common interest/joint defense privilege between the NCAA and the Big Ten. (*See* December 9, 2014 letter from Andrew S. Rosenman to Patricia L. Maher, Ex. A.).[2] Contrary to Illinois Rule 201(n), however, Respondents failed to provide the Estate with a privilege log, describing the nature of the documents, communications, or things not produced or disclosed. Respondents are not exempt from compliance with Rule 201(n).

ARGUMENT

Respondents have withheld at least 70 documents, and redacted the content of other documents they produced, based on assertion of a privilege that they raised for the first time on December 9, eight months after they responded to the subpoenas at issue. Respondents have waived their opportunity to assert common interest as an objection to the subpoenas by failing to assert it in a timely fashion. *See* Ill. Sup. Ct., R 214 (respondents must comply or object with the reasonable amount of time specified in the document requests); *R.M. Lucas Co. v. Peoples Gas Light & Coke Co.*, 963 N.E.2d 274, 279 (Ill. App. Ct. 1st Dist. 2011) (failure to respond to discovery requests can result in entry of judgment and sanctions); *Rosen v. Larkin Ctr., Inc.*, Ill. App. 2d 120589 (Ill. App. Ct. 2d Dist. 2012) (same). *See also Ott v. City of Milwaukee*, 682 F.3d 552, 558 (7th Cir. 2012) (recipient of a subpoena must raise all objections at once, rather than in staggered batches, so that discovery does not become a game.); *FTC v. Trudeau*, 2013 U.S. Dist. LEXIS 30106 (N.D. Ill. Mar. 6, 2013)(finding that where "none of the subpoenaed parties raised this argument in their responses or objections, the argument is technically waived").

---

[2] Pursuant to the Court's December 5 Order, the Estate has responded in less than 24 hours to an objection raised for the first time in Respondent's December 9 letter, and reserves the right to more fully brief the issues addressed, if necessary.

Not only did Respondents assert common interest with the NCAA for the first time on December 9, for months they took a contrary position and resisted producing any responsive documents on grounds that the document requested could be obtained from the parties, such as the NCAA (*See* Respondents' Opp. to Mot. to Compel at 12), and Respondents were disinterested third parties to the Estate's underlying action pending in Centre County, Pennsylvania against the NCAA and others. Respondents argued that the Estate should complete discovery from parties to the underlying Pennsylvania action before seeking discovery from them, third parties that had no interest in the underlying dispute, let alone a common interest with one of the defendants in that action.[3]

Respondents' December 9 letter refers to the assertion of the same privilege by the NCAA in Pennsylvania, but that is not in the Estate's underlying action. Instead, Respondents have belatedly raised this privilege as an accommodation to the NCAA in a different action pending in the Commonwealth Court of Pennsylvania, *Corman v. NCAA*, No. 1 M.D. 2013. In *Corman*, the NCAA asserted common interest/joint defense privilege as an objection to questions asked of the NCAA's general counsel during a deposition on November 20, 2014.[4] Although there is no basis for the assertion of such a privilege based on the underlying facts of this case, this Court need not even reach the merits of the asserted privilege because Respondents never raised it until after the NCAA raised it for the first time three weeks ago in the *Corman* case in Pennsylvania. Indeed, Respondents took a position inconsistent with having a "common

---

[3] If Respondents' belated assertion of the common interest/joint defense with the NCAA were recognized, the Estate could not get the documents from either Respondents or the NCAA, as Respondents have contended for months.

[4] The plaintiffs in the *Corman* case have challenged the NCAA's assertion of the common interest/joint defense privilege in that case, and their Motion to Determine the Propriety of NCAA's Invocation of Privilege in Communications Between the NCAA and the Big Ten Conference is fully briefed.

interest" with the NCAA when they responded to the subpoenas, and in the months of negotiations before and after the Estate's motion to compel. Accordingly, the Estate respectfully requests that the Court rule that Respondents have waived their opportunity to assert the common interest/joint defense privilege, and order them to produce forthwith any documents withheld on that basis, and complete copies of documents they have produced in redacted form on that basis.

In the alternative, to the extent the Court concludes that Respondents' assertion of the common interest/joint defense privilege on December 9, 2014 is timely, they must still produce a log of the documents withheld, in whole or in part, on that basis, as required by Rule 201(n). Rule 201(n) is clear and unequivocal:

> When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed.

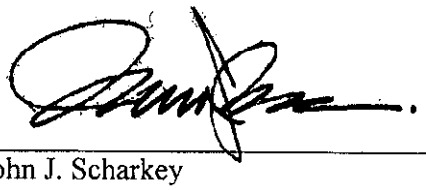
Ill. Sup. Ct., R 201(n). Respondents have failed to provide a privilege log and have asserted – without any legal support – that they are not required do so because they are non-parties. Although the language of the Rule is clear-cut and does not require explication, at least one court has affirmed that Rule 201(n) means what is says. The Illinois Court of Appeals for the Second District held in *Thomas v. Page,* 361 Ill. App. 3d 484, 496 (2005), that even the non-party justices of the Supreme Court were not exempt from compliance with Rule 201(n) in responding to third party discovery requests for any documents withheld from disclosure or discovery on grounds of common law or statutory privilege. "Nothing in the language of the rule or its history suggests that anyone is exempt from compliance by virtue of his or her office position." *Id.* Simply put, Respondents' "non-party" status is irrelevant and Rule 201(n) requires that Respondents support their privilege objections with an adequate "description of the

nature of the documents, communications, or things not produced or disclosed." Ill. Sup. Ct. R. 201(n).

CONCLUSION

WHEREFORE, the Estate respectfully requests that this Court enter an order granting its Motion to Compel, on grounds that any claim of common interest/joint defense has been waived, and Respondents must promptly produce all documents withheld in whole or in part on that basis. In the alternative, the Estate respectfully requests that the Court direct the Respondents to provide privilege logs not later than December 18, 2014. In addition, the Estate requests that the Court award its costs incurred to seek a further order with respect to the common interest/joint defense objection raised for the first time on December 9, and requiring compliance with the clear and unequivocal terms of Rule 201(n).

Dated: December 10, 2014



John J. Scharkey
NEAL, GERBER & EISENBERG LLP
Two North LaSalle Street
Chicago, Illinois 60602
Telephone: (312) 269-5656
Firm No. 13739

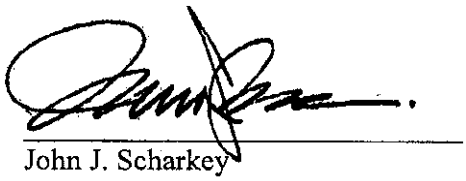
Wick Sollers
L. Joseph Loveland
Patricia L. Maher
Samuel Doran
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500

Counsel for Plaintiff George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO COMPEL** was served this 10th day of December, 2014 by first class mail and email to the following:

Andrew S. Rosenman
Lauren F. Noll
Emily M. Emerson
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
Email: arosenman@mayerbrown.com
lfnoll@mayerbrown.com
eemerson@mayerbrown.com



John J. Scharkey
Neal, Gerber & Eisenberg LLP
2 N La Salle St
Chicago, IL 60602
Telephone: (312) 269-5656

Wick Sollers
L. Joseph Loveland
Patricia L. Maher
Samuel Doran
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500

Counsel for Plaintiff George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving a copy the *REDACTED NCAA's Reply in Support of Its Motion to Compel the Production of Documents from the Estate and Overrule the Estate's Objections to Related Third-Party Subpoena* on the following by First Class Mail and email:

Thomas J. Weber, Esquire
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, Esquire
L. Joseph Loveland, Esquire
Mark A. Jensen, Esquire
Patricia L. Maher, Esquire
Ashley C. Parrish, Esquire
Alan R. Dial, Esquire
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
Email: wsollers@kslaw.com
jloveland@kslaw.com
mjensen@kslaw.com
pmaher@kslaw.com
aparrish@kslaw.com

Counsel for Plaintiffs

Via FedEx Overnight Delivery
The Honorable John B. Leete
Senior Judge, Specially Presiding
Potter County Courthouse, Room 30
One East Village Street
Coudersport, PA 16915

Dated: March 1, 2016

Thomas W. Scott
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Everett C. Johnson, Jr. (admitted *Pro Hac Vice,* DC No. 358446)
Brian E. Kowalski (admitted *Pro Hac Vice*, DC No. 500064)
Sarah M. Gragert (admitted *Pro Hac Vice,* DC No. 977097)
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, D.C. 20004-1304
Telephone: (202) 637-2200
Email: Everett.Johnson@lw.com
Brian.Kowalski@lw.com
Sarah.Gragert@lw.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray