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:
The National Collegiate Athletic Association's Brief In Support of Motion to Compel Production of a Privilege Log from Plaintiffs

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

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PA I.D. Number: 15681

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

ESTATE of JOSEPH PATERNO, et al., Plaintiffs,	)	Civil Division
v.	)	Docket No. 2013-2082
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	)	**EXPEDITED CONSIDERATION REQUESTED**

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S BRIEF IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF A PRIVILEGE LOG FROM PLAINTIFFS

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

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

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S BRIEF IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF A PRIVILEGE LOG FROM PLAINTIFFS

The National Collegiate Athletic Association (the "NCAA"), pursuant to Pennsylvania Rule of Civil Procedure 4019(a), hereby submits this brief in support of its motion to compel Plaintiffs to produce a privilege log by March 16, 2016. The NCAA has made innumerable requests for such a log, but Plaintiffs repeatedly ignore the NCAA's communications or, worse, promise to provide one and then, without explanation, fail to do so. Discovery is coming to a close. Time for Plaintiffs to fulfill this basic discovery obligation.

On May 21, 2014—nearly two years ago—the NCAA served requests for the production of documents on Plaintiffs Jay Paterno, Bill Kenney, and the Paterno Estate (the "Estate"). *See* Sarah Gragert Decl. ("Gragert Decl.") ¶ 3 (Feb. 23, 2016). Consistent with Pennsylvania Rule of Civil Procedure No. 4009.12(b)(2), the NCAA's requests specifically instructed that documents withheld on the basis of any claim of privilege should be identified with particularity.[1] The three Plaintiffs responded, objecting to numerous document requests on privilege and attorney work product grounds. But nearly two years later, the Estate and Mr. Kenney have never produced a privilege log, and while Jay Paterno finally produced a log on November 7, 2015, that log appears incomplete on its face.

The NCAA has repeatedly—and for many months—reiterated its request for a privilege log. Among many other occasions, the NCAA raised the issue on: (1) July 10, 2015, during a meet and confer, Gragert Decl. ¶ 7; (2) July 16, 2015, via letter stating that we "look forward to receiving the [privilege] log at the earliest

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[1] *See, e.g.*, Ex. A, NCAA's First Reqs. for Produc. to Paterno, Instruction No. 4 at 5 (May 21, 2014) ("Any Document or portion of any Document withheld from production based on a claim of privilege shall be identified by (1) the type of Document, (2) the general subject matter of the Document, (3) the date of the Document, and (4) such other information as is sufficient to identify the Document including the author of the Document, the addressee(s) and any copyee(s) or other recipients of the Document, and, where not apparent, the relationship of the author and the addressee(s) and copyee(s) to each other. The nature of each claim of privilege shall be set forth.").

possible opportunity," *id.*; (3) August 4, 2015, via email, *id.*; (4) September 18, 2015, during a meet and confer, *id.* ¶ 9; (5) October 29, 2015, via letter, *id.*; (6) November 16, 2015, via letter, *id.* ¶ 11 ("We have made repeated requests for the Estate to produce a privilege log...Please confirm by the end of the week that the Estate will produce a privilege log by December 4, 2015"); (7) January 11, 2016, via letter, *id.* ¶ 12; and (8) January 23, 2016, via letter, *id.* (stating that "Plaintiffs have still not provided a date by which the NCAA can expect to see privilege logs for the Estate and Mr. Kenney and an updated log for Jay Paterno (if the first log is incomplete)."). Most recently, Plaintiffs' counsel indicated during a February 8, 2016 meet and confer call that the Estate would produce a privilege log the following day. No such production was made. When the NCAA's counsel followed up and asked Plaintiffs' counsel to confirm that a log was forthcoming, Plaintiffs' counsel never responded. *Id.* ¶ 13.

Despite these repeated requests, in the close to *two years* since the NCAA first served its requests for documents, only Jay Paterno has provided any privilege log at all. *See* Ex. B, Privilege Log for Jay Paterno's Documents (Nov. 7, 2015). That log, however, appears incomplete. It contains only 81 entries, and it appears to address only a limited number of the NCAA's requests.[2] The NCAA, on the

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[2] For example, Jay Paterno has asserted privilege and work product objections to the NCAA's request for communications with an agent regarding employment

other hand, produced a comprehensive privilege log to Plaintiffs over nine months ago.

Pennsylvania law plainly requires that any party withholding documents on the basis of a claim of privilege must support that claim with a privilege log or some other detailed description of the individual documents withheld. The party asserting an evidentiary privilege bears the burden to "produce sufficient facts to show that the privilege was properly invoked." *T.M. v. Elwyn, Inc.*, 2008 PA Super 113, ¶ 23, 950 A.2d 1050, 1063 (2008) (citation omitted). To meet that burden, the party may not rely on "bald allegation[s] that the requested documents are covered by the attorney-client privilege and/or work product doctrine." *Com. Office of Open Records v. Center Twp.*, 95 A.3d 354, 370 (Pa. Commw. Ct. 2014). Rather, the party must identify with specificity "what documents were not produced and state the basis for non-production." *US Airways, Inc. v. Fed. Express Corp.*, No. 2928 EDA 2009, 2009 WL 5164519, at *2 (Com. Pl. Nov. 23, 2009); *see also* Paul R. Rice, 1 Attorney-Client Privilege: State Law Pennsylvania § 11:6 (2015) ("When privilege is asserted for documents, the privilege proponent must be specific regarding each document, by delineating them in a privilege log and providing factual support through affidavits from witnesses with personal

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opportunities. Yet, Paterno's privilege log includes *no* entries that appear to relate to that request, even though the evidence is clear that he engaged such agents, including Colin Smeeton and Brett Senior. *See* Ex. C, Jay Paterno's Resps. to NCAA's Second Interrogs. No. 16 (Dec. 23, 2015).

knowledge establishing each element of the privilege."). Courts routinely order parties to produce privilege logs when they have failed to do so. *See, e.g.*, *Cameron v. Gedia*, No. 09-017233, 2010 WL 6588531 (Com. Pl. Oct. 15, 2010); *Harchuck Const. Co. v. Meyers*, No. G.D. 08-13201, 2010 WL 1947639 (Com. Pl. Feb. 5, 2010); *Olympus Corp. v. Canady*, No. GD-07-008748, 2007 WL 5688546 (Com. Pl. Jan. 1, 2007); *Shoatz v. Trustees of the Univ. of Pa.*, Nos. 40159, 2568, 2008 WL 2090886 , at *1 n.1 (Com. Pl. Feb. 7, 2008).

Plaintiffs continue to stand on privilege-based objections to numerous categories of documents. Many of these categories comprise documents that are central to the Plaintiffs' claims in this case. For example, central to the claim that the NCAA tortiously interfered with their employment prospects, Messrs. Paterno and Kenney have asserted privilege with respect to "Communications with a sports agent, sports agency, or other individual or company who is authorized to act on [their] behalf in securing contracts or agreements or in obtaining employment." Similarly, the Estate has asserted privilege with respect to document requests focused on Coach Joe Paterno's reputation, such as a request for "Communications involving [the Estate] or Coach Paterno and a public relations or media consultant or specialist." And all three Plaintiffs have asserted privilege with respect to documents underlying King & Spalding's publicly-released *Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno*—as well as its constituent

"independent analyses"—including any communications with the authors of those documents. But they have not logged these documents.

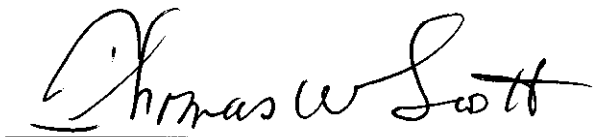
In this case, Plaintiffs have strenuously argued that the failure to produce a timely privilege log waives privilege. Ex. D, Br. for Appellees at 31, *Estate of Paterno v. NCAA*, No. 1709 MDA 2014 (Pa. Super. Ct. May 11, 2015) (arguing that Penn State had "failed to properly invoke the privilege" because it had "not provide[d] a privilege log explaining the basis for its efforts to withhold particular documents."). Similarly, 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 their privilege and work product protections by, *inter alia*, failing to produce a timely privilege log. Ex. E, Supp. Reply in Support of Mot. to Compel at 5, *Paterno v. NCAA*, No. 2014-L002963 (Ill. Cir. Ct. Jan. 20, 2015) ("Respondents waived their right to assert the common interest privilege by failing to do so expressly and in a timely way."). At the same time, Plaintiffs inexplicably delay in providing their own privilege logs.

At bottom, the Estate and Mr. Kenney have ignored entirely their clear obligation to produce a privilege log, and Mr. Paterno's log appears facially incomplete. The Estate and Mr. Kenney have declined even to inform the NCAA *when* they expect to provide a log. Their recalcitrance is prejudicing the NCAA and threatening to needlessly further delay this litigation. The NCAA has

considerable concerns about some of Plaintiffs' privilege assertions, but it cannot know the full scope of Plaintiffs' assertions or fully resolve those concerns until it has a privilege log. Nor does it make sense to address the questionable privilege assertions in Mr. Paterno's log independent of the claims by the other Plaintiffs; in the interest of efficiency, the NCAA intends to address its concerns regarding all Plaintiffs' assertions simultaneously.

In light of the rapidly approaching discovery cut-off—and to allow sufficient time for the resolution of any privilege issues subsequent to the production of Plaintiffs' privilege logs—the NCAA respectfully requests that this Court consider this Motion on an expedited basis. The NCAA therefore requests that this Court enter an order compelling Mr. Kenney and the Estate of Joseph Paterno to provide complete privilege logs and for Jay Paterno to supplement his privilege log with any other responsive, withheld documents not currently reflected on his log by **March 16, 2016**.

Respectfully submitted,



Date: February 25, 2016

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2009 WL 5164519 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania,
First Judicial District.
Civil Trial Division.
Philadelphia County

US AIRWAYS, INC,
v.
FEDERAL EXPRESS CORPORATION.

No. 1051.
November 23, 2009.

Superior Court Docket No. 2928 EDA 2009

Opinion

Howland W. Abramson, J.

JUNE TERM, 2008

This Opinion is submitted pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and the Court respectfully submits that its decision be affirmed.

Background

On June 9, 2009, Plaintiff US Airways, Inc. ("US Air") served Defendant Federal Express Corporation ("FedEx") with a Notice of Deposition and a Request for Production of Documents. The Notice required FedEx to produce a corporate representative with knowledge of FedEx's investigation into a collision that occurred between FedEx ground support equipment and a US Air aircraft. The Request required FedEx's representative to produce various documents regarding FedEx's investigation.

Although FedEx produced a representative, FedEx's counsel instructed the representative not to answer a question regarding FedEx's investigation of the brakes on the ground support vehicle. Moreover, the documents the representative produced contained redactions.

On August 18, 2009, US Air filed a Motion to Compel and the Court scheduled a discovery hearing for August 31, 2009. At that hearing, the Court granted, in-part, US Air's Motion and ordered FedEx's representative to answer the unanswered question and produce unredacted versions of the documents. FedEx's appeal from this Order followed.

Discussion

1. The Deposition

The scope of discovery does not include "disclosure of [a party's representative's] mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics." Pa R. Civ. Pro. 4003.3.

During US Air's questioning of FedEx's representative, US Air's counsel asked "so FedEx could not conclude whether the brakes were working prior to this accident on dolly 86964, is that correct?" Although, on its face, the question clearly elicits a factual response, FedEx's counsel instructed the representative not to answer. Whether FedEx could conclude whether the brakes were working does not invoke any judgment or evaluation; it is an observation of a condition in the world. Of course the answer may affect the value of the case but so does every relevant fact in a lawsuit. Thus, the Court ordered the representative to answer the question.

2. The Request for Production

Rule 4009.12(b) sets forth the parameters for answering a request for production of documents. If a party does not produce the documents requested, it must identify them "with reasonable particularity together with the basis for non-production." Pa. R. Civ. P. 4009.12(b)(2).

A party asserting privilege bears the burden of establishing the privilege. *Nationwide Mut. Ins. Co.,* 924 A.2d 1259, 1265-66 (Pa. Super 2007). "If the party asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked, then the burden never shifts to the other party, and the communication is not protected under the attorney-client privilege." *Id.* at 1266.

At the discovery hearing, FedEx attempted to produce a letter purporting to be a privilege log. The Court declined to review this non-record material. Rule 4009.12(b)(2) requires that the privilege log identify, paragraph-by-paragraph, what documents were not produced and state the basis for non-production. *See* Pa. R. Civ. Pro. 4009.12(b)(2); *see also Smokowicz v. Carpenter,* 1999 Pa. Dist. & Cnty. Dec. LEXIS 209 (Comm Pls. 1999). This log must be furnished contemporaneously with the answer to a request for production of documents. *Id.* FedEx did not comply with either of these requirements.

At the discovery hearing, this Court emphasized that the basis for its decision was the lack of an appropriate privilege log. Nevertheless, FedEx does not argue in its 1925(b) statement that its letter was, in effect, a log. The Court considers the absence of such an assertion as conceding that FedEx failed to provide a privilege log that comports with Rule 4009.12(b)(2).

Since FedEx has failed to produce a privilege log that comports with the Rules in a timely fashion, it has not demonstrated the applicability of the privilege in this instance. Thus, the privilege does not apply and the Court properly ordered that FedEx produce unredacted documents. *See Nationwide Mut. Ins. Co.,* 924 A.2d at 1266 (Pa. Super 2007).

Conclusion

For the reasons stated above, this Court respectfully requests that its Order be Affirmed.

BY THE COURT:

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Howland W. Abramson, J.

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2010 WL 6588531 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Civil Division
Allegheny County

CAMERON,
v.
GEDIA et al.

No. 09-017233.
October 15, 2010.

Order of Court

Note: Original document is handwritten. PDF image of the original document may be available.

R. Stanton Wettick, Jr., Judge.

AND NOW, to-wit, this 15 day of October, 2010, with regard to plaintiffs motion to compel AGH's response to plaintiff's 3rd request for product, the defendant shall within 60 days

1) produce a privilege log as to all documents it is not producing under paragraph 1 of the request for production

2) provide a letter to plaintiffs counsel explaining the inapplicability of the Program Letter of Agreement, paragraph 28 of the Request to the wife plaintiff's treatment.

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2010 WL 1947639 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Allegheny County

HARCHUCK CONSTRUCTION CO., INC., Plaintiff,
v.
Steve MEYERS and Bridges & Company, Inc., Defendants.

No. G.D. 08-13201.
February 5, 2010.

Civil Division

Order

R. Stanton Wettick, Jr., Judge.

AND NOW, this 5 day of Feb, 2010, upon consideration of Plaintiff's Motion to Compel Discovery, it is hereby ORDERED that the Motion is GRANTED. Defendant Bridges & Company, Inc. shall fully respond to Plaintiff's Second Set of Interrogatories and Request for Production of Documents, and produce all responsive documents and privilege logs within ten (10) days of the date of this Order.

By the Court:

<<signature>> J.

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2007 WL 5688546 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Allegheny County

OLYMPUS CORPORATION and Keymed (Medical & Industrial Equipment) Ltd., Plaintiffs,
v.
Jerome CANADY, Defendant.

No. GD-07-008748.
2007.

Order of the Court

Wettick, J., Judge.

Code: 190 Miscellaneous (Other)

AND NOW, this 5 day of Sept, 2008, upon consideration of Plaintiffs' Motion to Strike Objections, Compel Production of Documents and Deposition of Non-Party Canady Technology, LLC, And For Sanctions it is hereby ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion is GRANTED.

(1) Canady Technology, LLC's objections to Requests Nos. 1-2, 4-9, 11-13, 15-20, and 22 are STRICKEN AND OVERRULED and Canady Technology, LLC shall produce all documents responsive to these Requests within ten (10) days of the date of this Order or suffer further sanctions as the Court deems necessary;

(2) Canady Technology, LLC shall produce a privilege log within ten (10) days of the date of this Order setting forth a description of each document, communication, or other information withheld on the basis of any privilege or the work product doctrine, and shall identify the privilege or doctrine that it believes applies to each, or shall suffer sanctions as the Court deems appropriate;

(3) Within ten (10) days of the date it produces documents, Canady Technology, LLC shall submit to a deposition or suffer further sanctions as the Court deems necessary; and

(4) Canady Technology shall pay all reasonable expenses, including attorney's fees, incurred by Plaintiffs because of Canady Technology, LLC's failure to comply with this Court's June 13, 2008 Order.

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Wettick, J.

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2008 WL 2090886 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania,
First Judicial District.
Civil Trial Division.
Philadelphia County

Theresa SHOATZ, Plaintiff,

v.

TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA, et al., Defendants;

Theresa Shoatz, Plaintiff,

v.

Richard Lewbart, et al., Defendants.

Nos. 4159, 2568.
February 7, 2008.

West Headnotes (1)

[1] **Appeal and Error** ⇐ Affecting Collateral Matters and Proceedings

Order imposing sanctions on defendant for failure to comply with discovery requests was not a collateral order that was immediately appealable; defendant did not show that the order involved a right that was deeply rooted in public policy going beyond the particular litigation at hand, and defendant's claims that disclosure would violate various Acts and attorney-client privilege were previously ruled on. Rules App.Proc., Rule 313, 42 Pa.C.S.A.

Cases that cite this headnote

Opinion

Attorneys for Plaintiffs, Gilda L. Kramer, Esq., 121 South Broad Street, Suite 2000, Philadelphia, PA 19107.

Attorneys for Defendants, Kathleen Kramer, Esq., 1845 Walnut Street, 18th Floor, Philadelphia, PA 19103.

Sandra Mazer Moss, J.

May TERM, 2006

LEAD

July TERM, 2006

This matter concerns granting Plaintiff's Motion for Sanctions and overruling Defendants' objections to production of documents for Defendants' failure to produce same where Our order was interlocutory and not collateral.

Facts and Procedural History

This personal injury case arises from Defendants allegedly dispensing the wrong medication to Plaintiff causing her to fall and incur serious injury. Plaintiff file her complaint September 15, 2006. Defendants, Trustees of University of Pennsylvania, filed Preliminary Objections and a Motion to Determine Preliminary Objections October 16, 2006. The above cases were consolidated under Shoatz v. University of Pennsylvania, 0605-4159, October 18.2006 by the Honorable Allan L. Tereshko.

Plaintiff answered the Preliminary Objections and also filed an n Amended Complaint November 6, 2006. The Motion to Determine Preliminary Objections was marked Moot November 9, 2006. However, Judge Tereshko sustained those Preliminary Objections November 14, 2006, but ultimately granted reconsideration vacating that Order based on an Amended Complaint December 19, 2006. Defendants filed another set along with the corresponding Motion to Plaintiff's Amended Complaint November 21, 2006.

Judge Tereshko granted Plaintiff's Motion to Compel holding Defendant shall respond to Plaintiff's Second Set of Interrogatories and Respond to Second Request for Production of Documents within twenty (20) days or suffer sanctions November 15, 2006. After Plaintiff responded to the Motion to Determine Preliminary Objections, Judge Tereshko sustained them striking Plaintiff's claims for punitive damages and the words "grossly negligent", "gross negligence", "reckless", and "recklessness" from same. Defendants answered the complaint with new matter January 12, 2007 and Plaintiff replied January 31, 2007.

On October 3, 2007 We granted Plaintiff's Motion for Sanction for failing to comply with the November 15, 2006 Order. [1] Defendants appealed November 2, 2007. We denied reconsideration November 9, 2007. The parties continued with litigation.

1 The order reads, "AND NOW, this 3rd day of October, 2007, upon consideration of Plaintiff's Motion for Sanctions for Failure to Comply with this Court's Order of November 15, 2007, it is hereby Ordered that the Motion is Granted. Defendants' objections to Plaintiff's Second Set of Interrogatories and Second Request for Production of Documents are Overruled Within ten days *of* the date of this Order. Defendants shall: *1. Produce a full and* complete privilege log, in compliance with Rule 4009.12(b)(2) for he Pennsylvania Rules of Civil Procedure, interrogatory number 35, definition number 4 in plaintiff's second request for production of documents and the definition of 'identity' in plaintiff's second set of interrogatories. 2. Produce full and complete responses to the following document requests in plaintiff's second request for production of documents: 4 (for 2002 to the present), 6, 8, 10, 11, 13-17 (limited to the pharmacy at Presbyterian Medical Center from 2002 to the present), 18 (from 2002 to the present), 19, 33, 38, 47, 48 and 49. Defendants shall produce, among other documents and things, the log book and policy manual referred to in Elizabeth Larijani's deposition, Ms. Larijani's original note, and the bottle of pills that Ms. Shoatz returned to the pharmacy in July 2004.3. Produce full and complete answers to plaintiff's interrogatories, second set, numbers 27, 29-33, and 35." Please note the Order refers to the "November 15, 2007 Order" but should read "November 15, 2006 Order."

The case was transferred to the Honorable Jacqueline F. Allen who granted Plaintiff's Motion for Extraordinary Relief and scheduled oral argument on Plaintiff's Motion to Compel Discovery and Sanctions for January 14, 2008.

Discussion

This appeal is procedurally and substantively improper as Our October 3, 2007 Order does not constitute a collateral order under Pa.R.A.P. 313. According to Pa.R.A.P. 313, a collateral order "is an order (1) separable from and collateral to the main cause of action where (2) the right involved is too important to be denied review and (3) the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost." The collateral order doctrine is to be interpreted narrowly to prevent delay as well as piecemeal review. *Brophy v. Phila. Gas Works,* 2007 Pa. Commw. LEXIS 162. An Order must satisfy all three elements to be considered collateral. *Keefer v. Keefer,* 741 A.2d 808 (Pa.Super.1999).

While the first prong is met, Defendant fails to satisfy the second. To be appealable under the second prong an order must involve a right "deeply rooted in public policy going beyond the particular litigation at hand." *Geneviva v. Frisk,* 555 Pa. 589,

725 A.2d 1209, 1214 (1999). Defendant states in its Statement of Matters Complained of on Appeal producing said documents violate the Health Insurance Portability and Accountability Act (HIPAA), the Peer Review Protection Act and the attorney-client and work product privileges. Defendant cites protected information includes, by way of example, personnel files of numerous non-party pharmacy employees who were not working when the alleged incident occurred and information about other alleged incidents and discovery in other actions relating to dispensing errors for in and outpatient pharmacies since 2002 and in some cases since 1996.

However, the matter is not "too important to be denied review." The first discovery request was properly presented before Judge Tereshko who decided it on the merits November 15, 2006. Following Defendants' non-compliance, Plaintiff properly presented a Motion for Sanctions before Us. After hearing argument from both sides, We properly ordered Defendant to produce documents and things as such was in Our discretion and not collateral.

Conclusion

Our October 3, 2007 Order should be affirmed on the merits as We did not abuse Our discretion. However, as this appeal is improper, it should be quashed since Defendants failed to satisfy the collateral order doctrine.

BY THE COURT:

<<signature>>

Sandra Mazer Moss, J.

Interested Parties

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EXHIBIT A

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; RYAN MCCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University; PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University; WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of 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

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF JOSEPH ("JAY") V. PATERNO

The National Collegiate Athletic Association (the "NCAA"), by and through its counsel, hereby requests, pursuant to Pennsylvania Rules of Civil Procedure No. 4009.11, that Plaintiff Joseph ("Jay") V. Paterno produce documents in accordance with the Instructions and Definitions set forth herein for inspection and copying at the offices of Latham & Watkins LLP,

555 11th Street NW, Suite 1000, Washington D.C. 2004, within thirty (30) days of service of this request.

DEFINITIONS

As used herein, the words and phrases set forth below shall have the broadest meaning or meanings permitted under Pennsylvania Rule of Civil Procedure. No. 4003.1. Unless defined, all words used in these Requests are to be given their plain and ordinary meaning.

1. "You" or "Your" shall mean Jay Paterno, and all other persons acting on behalf of Jay Paterno, including, but not limited to, attorneys and their associates, investigators, agents, directors, officers, employees, representatives, and others who may have obtained information for or on behalf of Jay Paterno.

2. The "NCAA" shall mean the National Collegiate Athletic Association.

3. "Defendants" shall mean the NCAA, Mark Emmert, Edward Ray, and the Pennsylvania State University.

4. "Plaintiffs" shall mean each of the individuals identified in the caption above, any representative of those individuals, and any representatives of the Estate and Family of Joseph Paterno.

5. "All" or "any" shall mean "each and every."

6. "And" and "or" shall mean either disjunctively or conjunctively as necessary to bring within the scope of discovery request all responses that might otherwise be construed outside of its scope.

7. "Document" or "Documents" is defined to include originals and copies (including all non-identical copies or photocopies) as well as all draft and final versions of, without limitation: (a) All writings of any kind (including the originals and all non-identical copies,

whether different from the originals by reason of any notation made on such copies or otherwise), including, without limitation, correspondence, notes, statements, transcripts, books, diaries, intra-office communications, notations of any sort of conversations or interviews; (b) All graphic representations of any kind, including, without limitation, photographs, charts, graphs, plans, drawings, videos, and recordings; and (c) All electronically generated and/or stored correspondence, memoranda, communications, data compilations, or records of any sort.

8. "Communication(s)" means any act, action, oral speech, written correspondence, contact, expression of words, thoughts, ideas or transmission or exchange of data or other information to another person, whether orally, person-to-person, in a group, by telephone, letter, personal delivery, telex, facsimile, or any other process, electric, electronic or otherwise.

9. "Concerning" shall mean, without limitation, comprising, containing, embodying, referring to, relating to, regarding, alluding to, responding to, in connection with, commenting on, in response to, about, announcing, explaining, discussing, showing, describing, studying, supporting, reflecting, analyzing, or constituting.

10. "Person" shall mean any natural person or any business, legal or governmental entity, or association.

11. "Amended Complaint" shall means the First Amended Complaint filed in the above-captioned matter on February 5, 2014.

12. "Penn State" shall mean The Pennsylvania State University.

13. "Sandusky" shall mean former Penn State assistant football coach, Gerald Sandusky.

14. "Coach Paterno" shall refer to Joseph Paterno, the decedent represented in this Action by George Scott Paterno, and Joseph Paterno's Estate.

15. "FSS" shall mean the firm of Freeh Sporkin & Sullivan LLP.

15. The "Freeh Report" shall mean the July 12, 2012 Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, prepared by FSS.

16. The "Consent Decree" shall mean the July 23, 2012 Binding Consent Decree Imposed by The National Collegiate Athletic Association and Accepted by The Pennsylvania State University.

17. The "Athletics Integrity Agreement" shall mean the August 2012 Athletics Integrity Agreement Between The National Collegiate Athletic Association and The Big Ten Conference, and The Pennsylvania State University.

INSTRUCTIONS

1. In accordance with the Pennsylvania Rules of Civil Procedure, in producing the requested Documents, furnish all Documents in Your actual or constructive possession, custody, or control including, without limitation, those Documents in the custody of any advisors, attorneys, investigators, agents, associates, representatives, and other person(s) or entities acting or purporting to act on Your behalf.

2. Documents shall be produced in the manner in which they are maintained in the ordinary course of business or shall be organized and labeled with a designation of the request for production to which they respond and produced along with any file folders or other bindings in which such Documents were found.

3. These Requests shall be deemed to be continuing in nature. If at any time additional responsive Documents come into Your possession, custody or control, then the responses to these requests shall be promptly supplemented.

4. Any Document or portion of any Document withheld from production based on a claim of privilege shall be identified by (1) the type of Document, (2) the general subject matter of the Document, (3) the date of the Document, and (4) such other information as is sufficient to identify the Document including the author of the Document, the addressee(s) and any copyee(s) or other recipients of the Document, and, where not apparent, the relationship of the author and the addresse(s) and copyee(s) to each other. The nature of each claim of privilege shall be set forth. Notwithstanding the assertion of any objection, any requested Document that contains non-objectionable information responsive to this request should be produced, but that portion of the Document for which the objection is asserted may be redacted, provided that the redacted portion is identified and described consistently according to the requirements listed herein.

5. Except as otherwise noted, this Request seeks the production of Documents created in, used, sent or received during the period from **January 1, 2011** through present.

6. Any request for "Communications" shall be construed to include written or tangible Communications, as well as Documents referencing or reflecting oral or person-to-person Communications.

7. Pursuant to Pennsylvania Rule of Civil Procedure No. 4009.12, You must fully respond to each Request. Objections to any part of these requests shall be stated in full with a brief statement setting forth the grounds for such objections.

8. The fact that another party produces a Document or the availability or production of similar or identical Documents from another source does not relieve You of Your obligation to produce Your copy of the same Document, even if the two Documents are identical.

9. Any Document that cannot be produced in full shall be produced to the fullest extent possible.

10. Each paragraph, subparagraph, clause and word herein should be construed independently and not by reference to any other paragraph, subparagraph, clause or word herein for purposes of limitation.

11. Except as specifically provided herein, words imparting the singular shall include the plural and vice versa, where appropriate.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All Documents Concerning the Consent Decree, including but not limited to any of the sanctions set forth in the Consent Decree, any purported attempt to seek an appeal regarding the Consent Decree, or the Athletics Integrity Agreement.

RESPONSE:

REQUEST NO. 2:

All Documents Concerning the Freeh Report.

RESPONSE:

REQUEST NO. 3:

All Documents Concerning, and Communications with, Louis Freeh, FSS, Pepper Hamilton LLP, or FSS' current or former principals, representatives and/or employees,

including, without limitation, Documents Concerning the retention of FSS by the Special Investigations Task Force of the Penn State Board of Trustees, the investigation conducted by FSS, the Freeh Report, and Penn State.

RESPONSE:

REQUEST NO. 4:

All Documents Concerning Mr. Richard Thornburgh or research and preparation for, the drafting of, or the final version of Mr. Thornburgh's February 2013 *Review of the Freeh Report Concerning Joseph Paterno*, including, without limitation, all Communications with Mr. Thornburgh, all Communications regarding the basis for drafting it, compensation, research, drafts, and the final document.

RESPONSE:

REQUEST NO. 5:

All Documents Concerning King & Spalding's February 2013 *Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno*, including, without limitation, all Documents regarding the basis for drafting it, compensation, research, drafts, and the final document.

RESPONSE:

REQUEST NO. 6:

All Documents Concerning James T. Clemente or the February 2013 *Analysis of the Special Investigative Counsel Report and the Crimes of Gerald A. Sandusky & Education Guide to the Identification and Prevention of Child Sexual Victimization* by James T. Clemente, including all Communications with James T. Clemente.

RESPONSE:

REQUEST NO. 7:

All Documents Concerning Fred S. Berlin or the February 6, 2013 letter from of the National Institute for the Study, Prevention and Treatment of Sexual Trauma to J. Sedwick Sollers, III, including all Communications with Fred S. Berlin.

RESPONSE:

REQUEST NO. 8:

From January 1, 2000 to present, All Documents Concerning Sandusky or The Second Mile.

RESPONSE:

REQUEST NO. 9:

All Documents from January 1, 1996 to present Concerning Sandusky's retirement, interaction or involvement with children, sexual abuse, and/or Penn State privileges and benefits.

RESPONSE:

REQUEST NO. 10:

All Communications between or among any of the Plaintiffs (including Coach Paterno and George Paterno) and one or more of the following: Sandusky, Graham Spanier, Tim Curley, Gary Schultz, former Penn State assistant coach Michael McQueary, or any other current or former Penn State Trustee.

RESPONSE:

REQUEST NO. 11:

All Communications with the Pennsylvania Attorney General's Office.

RESPONSE:

REQUEST NO. 12:

All Documents Concerning (i) institutional control over Penn State's football team, (ii) the level of deference or reverence provided to the Penn State football program, players, or coaches by Penn State students, faculty, staff, alumni, and fans, or (iii) the allegations in Paragraphs 99-101 of the Amended Complaint.

RESPONSE:

REQUEST NO. 13:

All Documents from January 1, 2000 to the present Concerning Your past and present efforts to secure employment or income as a football coach (whether as a head coach or in a subordinate role), media commentator, sports columnist, or any other position, including, without limitation, all draft and final job application materials such as cover letters and resumes, and any Communications with ESPN, CBS Sports, Fox Sports, the University of Colorado, Boston

College, the University of Connecticut, James Madison University, or any other prospective employer.

RESPONSE:

REQUEST NO. 14:

All Communications Concerning open football coaching positions or Communications with other universities or schools Concerning football coaching employment.

RESPONSE:

REQUEST NO. 15:

All Communications, contracts, and agreements with a head hunter or other individual who would receive a commission or other money if You obtained employment.

RESPONSE:

REQUEST NO. 16:

All Communications with a sports agent, sports agency, or other individual or company who is authorized to act on Your behalf in securing contracts or agreements or in obtaining employment, licensing opportunities, or other forms of income or revenue.

RESPONSE:

REQUEST NO. 17:

All Documents Concerning any efforts by a sports agent, sports agency, or other individual or company who is authorized to act on Your behalf to secure employment, licensing opportunities, or contracts, agreements, or any other arrangements that have the possibility of generating revenue or income for You.

RESPONSE:

REQUEST NO. 18:

Your Personnel file from any employment you have held from January 1, 2000 to present, including, without limitation, all reviews or evaluations of your performance as a football coach at Penn State.

RESPONSE:

REQUEST NO. 19:

All Documents Concerning your termination or departure from any employment, including from Penn State, from January 1, 2005 to present.

RESPONSE:

REQUEST NO. 20:

All Documents Concerning Your contract, salary, or benefits with or provided by Penn State from January 1, 2005 to present.

RESPONSE:

REQUEST NO. 21:

All Documents Concerning Your evaluation or consideration of whether to run for public office or withdraw from a public office election race.

RESPONSE:

REQUEST NO. 22:

All Documents Concerning any polls or surveys You conducted, were conducted on Your behalf, or pertained to You.

RESPONSE:

REQUEST NO. 23:

All Documents discussing the reputation or popularity of, or public support for, You, the Paterno family, Coach Paterno, George Scott Paterno, or Plaintiffs Al Clemens or William Kenney.

RESPONSE:

REQUEST NO. 24:

Invitations, contracts, agendas, speeches, awards, or information about payment received for any event in which You, Coach Paterno, Sue Paterno, or any other member of the Paterno family, was invited to speak or attend as a celebrity guest or honoree from January 1, 2008 to present.

RESPONSE:

REQUEST NO. 25:

All Documents Concerning Your upcoming book, Paterno Legacy, including, without limitation, all drafts, public statements, and Communications.

RESPONSE:

REQUEST NO. 26:

All Communications, commentary, or other content from Facebook, Twitter, an Internet "blog," MySpace, Instagram, or any other social media source created, sent, received, forwarded, or otherwise transmitted by You Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Coach Paterno, Sandusky, the NCAA, Edward Ray, Mark Emmert, or Rodney Erickson.

RESPONSE:

REQUEST NO. 27:

All text messages You sent or received Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Sandusky, the NCAA, Edward Ray, Mark Emmert, or Rodney Erickson.

RESPONSE:

REQUEST NO. 28:

All Communications with a public relations or media consultant or specialist.

RESPONSE:

REQUEST NO. 24:

Your pay-stubs, federal and state income tax returns, and any statement or record of other income You received from January 1, 2006 to the present.

RESPONSE:

REQUEST NO. 25:

Any other Documents Concerning Your claim of pecuniary or financial loss from January 1, 2006 to the present.

RESPONSE:

REQUEST NO. 26:

All Documents Concerning the damages You are seeking in this action from the Defendants, including all Documents Concerning Your claims for emotional distress, mental anguish, and humiliation.

RESPONSE:

REQUEST NO. 27:

All non-privileged Communications between or among any of the Plaintiffs (including Coach Paterno and George Scott Paterno) Concerning this lawsuit, or any and all facts or circumstances related to the allegations in the Amended Complaint, including the Consent Decree, the Freeh Report, the reputation of any Plaintiff (including Coach Paterno and George Scott Paterno), Coach Paterno's termination or departure from Penn State, Sandusky, or Rodney Erickson.

RESPONSE:

REQUEST NO. 28:

All Communications with any current or former Penn State football coaches or players, or Penn State staff or faculty not party to this lawsuit Concerning this litigation, the allegations contained in the Amended Complaint, the Freeh Report, the Consent Decree, the Athletics Integrity Agreement, Coach Paterno, Sandusky, or Rodney Erickson.

RESPONSE:

REQUEST NO. 29:

All Documents that You believe support, confirm, rebut, or contradict any fact or conclusion in the Amended Complaint, including all Documents referred to or relied upon in the Amended Complaint.

RESPONSE:

Respectfully submitted,

/s/ Thomas W. Scott

Thomas W. Scott (No. 15681)
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Everett C. Johnson, Jr. (admitted *Pro Hac Vice,*
DC No. 358446)
Brian E. Kowalski (*Pro Hac Vice* pending,
DC No. 500064)
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Telephone: (202) 637-2200
Email: Everett.Johnson@lw.com
Sarah.gragert@lw.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing Defendant National Collegiate Athletics Association First Requests for Documents to Plaintiff Joseph V. Paterno on the following by First Class Mail and email:

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
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Wick Sollers
L. Joseph Loveland
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Daniel I. Booker, Esquire
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Reed Smith Centre
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Pittsburgh, PA 15222
Email: dbooker@reedsmith.com

Dated: May 21, 2014

/s/Thomas W. Scott

Thomas W. Scott
KILLIAN & GEPHART, LLP
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Email: tscott@killiangephart.com

Attorney for Defendants

EXHIBIT B

Paterno v. NCAA

Privilege Log for Jay Paterno's Documents

November 7, 2015

#	Control Number Range	Author	Recipient(s)	Copying	Date	Basis for Privilege	Privilege Description
1.	JAYPRIV0000001–JAYPRIV0000001	Paul Kelly, Esq.*	Ryan McCombie	Gregg Clifton, Esq.*	8/7/2012	Attorney-Client Privilege	Email from counsel providing information related to legal advice related to the Consent Decree.
2.	JAYPRIV0000002–JAYPRIV0000005	Paul Kelly, Esq.*	Ryan McCombie	Scott Paterno; Dan McGinn; Gregg Clifton, Esq.*; Jay Paterno	8/6/2012	Attorney-Client Privilege	Email from counsel providing legal advice related to the Consent Decree.
3.	JAYPRIV0000006–JAYPRIV0000021	Paul Kelly, Esq.*	Scott Paterno; Wick Sollers, Esq.*	Dan McGinn; Alan Dial, Esq.*; Mark Jensen, Esq.*; Gregg Clifton, Esq.*	9/26/2012	Attorney-Client Privilege; Work Product Privilege	Email from counsel containing legal advice related to potential litigation and attaching draft pleading.
4.	JAYPRIV0000022–JAYPRIV0000023	Jay Paterno	Paul Kelly, Esq.*	None	2/26/2013	Attorney-Client Privilege; Work Product Privilege	Email to counsel providing information related to legal advice related to potential litigation and draft pleading.
5.	JAYPRIV0000024–JAYPRIV0000120	Paul Kelly, Esq.*	Anthony Adams; Anwar Phillips; Bill Kenney; Gerald Cadogan; Josh Gaines; Justin Kurpeikis; Jay Paterno; Patrick Mauti; Richard Gardner; Shamar Finney	None	5/30/2013	Attorney-Client Privilege: Work Product Privilege	Email from counsel providing legal advice related to complaint in litigation.
6.	JAYPRIV0000121–JAYPRIV0000121	Paul Kelly, Esq.*	Scott Paterno; Wick Sollers, Esq.*; Ryan McCombie	Dan McGinn	8/22/2012	Attorney-Client Privilege	Email from counsel providing information related to legal advice related to the Freeh Report.
7.	JAYPRIV0000122–JAYPRIV0000125	Paul Kelly, Esq.*	Scott Paterno; Wick Sollers, Esq.*	Alan Dial, Esq.*; Mark Jensen, Esq.*; Dan McGinn	8/22/2012	Attorney-Client Privilege	Email from counsel providing information related to legal advice related to the Freeh Report.
8.	JAYPRIV0000126–JAYPRIV0000144	Scott Paterno	Jay Paterno	None	1/31/2013	Attorney-Client Privilege; Work Product Privilege	Email with attached draft response to Freeh Report.
9.	JAYPRIV0000145–JAYPRIV0000290	Scott Paterno	Diana Paterno Giegerich; Mary Kay Paterno Hort; Dave J. A. Paterno; Sue Paterno; Jay Paterno	None	2/3/2013	Attorney-Client Privilege; Work Product Privilege	Email with attached draft response to Freeh Report.
10.	JAYPRIV0000291–JAYPRIV0000291	Dan McGinn	Jay Paterno	Scott Paterno; Wick Sollers, Esq.*	4/22/2013	Attorney-Client Privilege	Email from public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.
11.	JAYPRIV0000292–JAYPRIV0000292	Scott Paterno	Jay Paterno; Dan McGinn	None	4/19/2012	Attorney-Client Privilege	Email to public-relations consultant requesting input related to counsel's legal advice related to Jerry Sandusky.

The * symbol denotes an attorney.

Paterno v. NCAA

Privilege Log for Jay Paterno's Documents

November 7, 2015

#	Control Number Range	Author	Recipient(s)	Copying	Date	Basis for Privilege	Privilege Description
12.	JAYPRIV0000293–JAYPRIV0000294	Scott Paterno	Diana Paterno Giegerich; Mary Kay Paterno Hort; Jay Paterno; Dave J. A. Paterno; Sue Paterno	None	4/19/2012	Attorney-Client Privilege; Work Product Privilege	Email relaying counsel's legal advice related to Joe Paterno.
13.	JAYPRIV0000295–JAYPRIV0000295	Mary Kay Paterno Hort	Sue Paterno; Jay Paterno; Dave J. A. Paterno; Diana Paterno Giegerich	Scott Paterno	4/24/2012	Attorney-Client Privilege	Email discussing counsel's legal advice related to Penn State.
14.	JAYPRIV0000296–JAYPRIV0000296	Mary Kay Paterno Hort	Jay Paterno	None	4/24/2012	Attorney-Client Privilege	Email discussing counsel's legal advice related to Penn State.
15.	JAYPRIV0000297–JAYPRIV0000298	Mary Kay Paterno Hort	Jay Paterno	None	4/24/2012	Attorney-Client Privilege	Email discussing counsel's legal advice related to Penn State.
16.	JAYPRIV0000299–JAYPRIV0000299	Diana Paterno Giegerich	Mary Kay Paterno Hort	Sue Paterno; Jay Paterno; Dave J. A. Paterno; Scott Paterno	4/24/2012	Attorney-Client Privilege	Email discussing counsel's legal advice related to Penn State.
17.	JAYPRIV0000300–JAYPRIV0000300	Dan McGinn	Jay Paterno	Guido D'Elia; Wick Sollers, Esq.*; Diana Paterno Giegerich; Mary Kay Paterno Hort; Dave J. A. Paterno; Scott Paterno; Sue Paterno	4/25/2012	Attorney-Client Privilege	Email from public-relations consultant providing information related to legal advice related to Joe Paterno.
18.	JAYPRIV0000301–JAYPRIV0000307	Jay Paterno	Jay Paterno	None	7/9/2012	Attorney-Client Privilege; Work Product Privilege	Email attaching notes sent to counsel with input related to legal advice related to the response to the Freeh Report.
19.	JAYPRIV0000308–JAYPRIV0000308	Scott Paterno	Jay Paterno	Dan McGinn; Guido D'Elia	7/12/2012	Attorney-Client Privilege	Email to public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.
20.	JAYPRIV0000309–JAYPRIV0000313	Dan McGinn	Wick Sollers, Esq.*; Scott Paterno; Michael Clements; Jay Paterno; John Towriss; Mara Vandlik; Steve J. Harris	None	7/12/2012	Attorney-Client Privilege	Email from public-relations consultant providing information to counsel related to legal advice related to response to Freeh Report.
21.	JAYPRIV0000314–JAYPRIV0000315	Wick Sollers, Esq.*	Scott Paterno; Jay Paterno; Dan McGinn	None	7/17/2012	Attorney-Client Privilege	Email from counsel providing information related to legal advice related to the Freeh Report.
22.	JAYPRIV0000316–JAYPRIV0000317	Scott Paterno	Jay Paterno	None	8/7/2012	Attorney-Client Privilege	Email forwarding and discussing counsel's legal advice related to the Consent Decree.
23.	JAYPRIV0000318–JAYPRIV0000319	Scott Paterno	Jay Paterno	None	8/7/2012	Attorney-Client Privilege	Email forwarding and discussing counsel's legal advice related to the Consent Decree.

The * symbol denotes an attorney.

Paterno v. NCAA

Privilege Log for Jay Paterno's Documents

November 7, 2015

#	Control Number Range	Author	Recipient(s)	Copying	Date	Basis for Privilege	Privilege Description
24.	JAYPRIV0000320–JAYPRIV0000320	Paul Kelly, Esq.*	Jay Paterno; Scott Paterno; Gregg Clifton, Esq.*	None	8/8/2012	Attorney-Client Privilege	Email from counsel providing information related to legal advice related to the Consent Decree.
25.	JAYPRIV0000321–JAYPRIV0000323	Paul Kelly, Esq.*	Scott Paterno; Dan McGinn; Jay Paterno	None	8/10/2012	Attorney-Client Privilege	Email from counsel providing information related to legal advice related to the Consent Decree.
26.	JAYPRIV0000324–JAYPRIV0000327	Ben Bouma	Paul Kelly, Esq.*	Scott Paterno; Dan McGinn; Jay Paterno	8/10/2012	Work Product Privilege	Email from potential plaintiff in this case to counsel providing information and input related to legal advice related to the Consent Decree.
27.	JAYPRIV0000328–JAYPRIV0000331	Scott Paterno	Paul Kelly, Esq.*	Dan McGinn; Jay Paterno	8/10/2012	Attorney-Client Privilege	Email to counsel seeking legal advice related to the Consent Decree.
28.	JAYPRIV0000332–JAYPRIV0000335	Paul Kelly, Esq.*	Scott Paterno	Dan McGinn; Jay Paterno	8/10/2012	Attorney-Client Privilege	Email from counsel providing legal advice related to the Consent Decree.
29.	JAYPRIV0000336–JAYPRIV0000338	Richard Caputo, Esq.*	Scott Paterno; Jay Paterno	None	8/13/2012	Attorney-Client Privilege	Email from counsel providing legal advice related to the Consent Decree.
30.	JAYPRIV0000339–JAYPRIV0000341	Paul Kelly, Esq.*	Ryan McCombie	Jay Paterno; Anthony Lubrano	8/14/2012	Attorney-Client Privilege	Email from counsel providing legal advice related to the Consent Decree.
31.	JAYPRIV0000342–JAYPRIV0000342	Anthony Lubrano	Paul Kelly, Esq.*; Ryan McCombie	None	8/14/2012	Attorney-Client Privilege	Email to counsel discussing counsel's legal related to about the Consent Decree
32.	JAYPRIV0000343–JAYPRIV0000344	Paul Kelly, Esq.*	Wick Sollers, Esq.*; Scott Paterno; Dan McGinn; Ryan McCombie	Gregg Clifton, Esq.*; Jay Paterno; Mark Jensen; Alan Dial, Esq.*	8/16/2012	Attorney-Client Privilege	Email from counsel providing legal advice related to the Consent Decree.
33.	JAYPRIV0000345–JAYPRIV0000347	Ben Bouma	Paul Kelly, Esq.*; Jay Paterno	None	8/16/2012	Work Product Privilege	Email from potential plaintiff in this case to counsel providing input related to legal advice related to the Consent Decree.
34.	JAYPRIV0000348–JAYPRIV0000354	Paul Kelly, Esq.*	Anthony Lubrano	Ryan McCombie; Gregg Clifton, Esq.*; Jeffrey Toppel, Esq.*	9/1/2012	Attorney-Client Privilege	Email from counsel providing legal advice related to the Consent Decree.
35.	JAYPRIV0000355–JAYPRIV0000356	Scott Paterno	Paul Kelly, Esq.*	Wick Sollers, Esq.*; Mark Jensen, Esq.*; Alan Dial, Esq.*; Dan McGinn; Gregg Clifton, Esq.*; Douglas Smith, Esq.*; Jay Paterno	10/9/2012	Attorney-Client Privilege; Work Product Privilege	Email to counsel providing information and input related to legal advice related to potential litigation and draft pleading.
36.	JAYPRIV0000357–JAYPRIV0000377	Paul Kelly, Esq.*	Wick Sollers, Esq.*; Scott Paterno; Mark Jensen, Esq.*; Alan Dial, Esq.*; Dan McGinn	Gregg Clifton, Esq.*; Douglas Smith, Esq.*; Jay Paterno	10/9/2012	Attorney-Client Privilege; Work Product Privilege	Email from counsel containing legal advice related to potential litigation and attaching draft pleading.

The * symbol denotes an attorney.

Paterno v. NCAA

Privilege Log for Jay Paterno's Documents

November 7, 2015

#	Control Number Range	Author	Recipient(s)	Copying	Date	Basis for Privilege	Privilege Description
37.	JAYPRIV0000378–JAYPRIV0000379	Scott Paterno	Paul Kelly, Esq.*	Wick Sollers, Esq.*; Mark Jensen, Esq.*; Alan Dial, Esq.*; Dan McGinn; Gregg Clifton, Esq.*; Douglas Smith, Esq.*; Jay Paterno	10/9/2012	Attorney-Client Privilege; Work Product Privilege	Email to counsel providing information and input related to legal advice related to potential litigation and draft pleading.
38.	JAYPRIV0000380–JAYPRIV0000380	Justin Kurpeikis	Jay Paterno	None	11/5/2012	Work Product Privilege	Email discussing potential litigation.
39.	JAYPRIV0000381–JAYPRIV0000381	Paul Kelly, Esq.*	Scott Paterno; Wick Sollers, Esq.*; Dan McGinn	Gregg Clifton, Esq.*; Jay Paterno; Ryan McCombie; Anthony Lubrano	11/16/2012	Attorney-Client Privilege; Work Product Privilege	Email from counsel containing legal advice related to the Consent Decree.
40.	JAYPRIV0000382–JAYPRIV0000382	Anthony Lubrano	Paul Kelly, Esq.*	Scott Paterno; Wick Sollers, Esq.*; Dan McGinn; Gregg Clifton, Esq.*; Jay Paterno; Ryan McCombie	11/16/2012	Attorney-Client Privilege	Email to counsel providing information related to counsel's legal advice related to litigation.
41.	JAYPRIV0000383–JAYPRIV0000528	Scott Paterno	Jay Paterno	None	2/3/2013	Attorney-Client Privilege; Work Product Privilege	Email with attached draft response to Freeh Report.
42.	JAYPRIV0000529–JAYPRIV0000759	Scott Paterno	Jay Paterno	None	2/8/2013	Attorney-Client Privilege; Work Product Privilege	Email with attached draft response to Freeh Report.
43.	JAYPRIV0000760–JAYPRIV0000762	John Towriss	Dan McGinn; Wick Sollers, Esq.*; Scott Paterno; Jay Paterno	None	2/10/2013	Attorney-Client Privilege	Email from public-relations consultant to counsel providing input related to counsel's legal advice related to the response to the Freeh Report.
44.	JAYPRIV0000763–JAYPRIV0000766	Scott Paterno	Jay Paterno	John Towriss; Wick Sollers, Esq.*	2/10/2013	Attorney-Client Privilege	Email with public-relations consultant and counsel discussing counsel's legal advice related to the response to the Freeh Report.
45.	JAYPRIV0000767–JAYPRIV0000768	Ryan McCombie	Sue Paterno; Scott Paterno; Jay Paterno	Anthony Lubrano; Dan McGinn; Wick Sollers, Esq.*; Paul Kelly, Esq.*; Al Clemens; Don Cotner; Adam Taliaferro	2/24/2013	Attorney-Client Privilege; Work Product Privilege	Email to counsel and others providing information and input related to legal advice related to the Freeh Report.
46.	JAYPRIV0000769–JAYPRIV0000769	Paul Kelly, Esq.*	Jay Paterno	None	2/26/2013	Attorney-Client Privilege; Work Product Privilege	Email from counsel containing legal advice related to potential litigation and draft pleading.
47.	JAYPRIV0000770–JAYPRIV0000771	Paul Kelly, Esq.*	Jay Paterno	None	2/26/2013	Attorney-Client Privilege; Work Product Privilege	Email from counsel containing legal advice related to potential litigation and draft pleading.

The * symbol denotes an attorney.

Paterno v. NCAA

Privilege Log for Jay Paterno's Documents

November 7, 2015

#	Control Number Range	Author	Recipient(s)	Copying	Date	Basis for Privilege	Privilege Description
48.	JAYPRIV0000772–JAYPRIV0000772	Mara Vandlik	Scott Paterno; Jay Paterno; Dan McGinn	Wick Sollers, Esq.*; Drew Crawford, Esq.*; Allan Dial, Esq.*; Mark Jensen, Esq.*	3/12/2013	Attorney-Client Privilege	Email from public-relations consultant to counsel providing information and input related to counsel's legal advice related to the Freeh Report.
49.	JAYPRIV0000773–JAYPRIV0000773	Scott Paterno	Mara Vandlik	Jay Paterno; Dan McGinn; Wick Sollers, Esq.*; Drew Crawford, Esq.; Allan Dial, Esq.*; Mark Jensen, Esq.*	3/12/2013	Attorney-Client Privilege	Email to public-relations consultant and counsel discussing counsel's legal advice related to the Freeh Report.
50.	JAYPRIV0000774–JAYPRIV0000775	Mara Vandlik	Scott Paterno	Jay Paterno; Dan McGinn; Wick Sollers, Esq.*; Drew Crawford, Esq.*; Allan Dial, Esq.*; Mark Jensen, Esq.*	3/12/2013	Attorney-Client Privilege	Email from public-relations consultant to counsel providing information and input related to legal advice related to the Freeh Report.
51.	JAYPRIV0000776–JAYPRIV0000818	Paul Kelly, Esq.*	Jay Paterno	None	5/25/2013	Attorney-Client Privilege; Work Product Privilege	Email from counsel containing legal advice related to potential litigation and attaching draft pleading.
52.	JAYPRIV0000819–JAYPRIV0000819	Jay Paterno	Mary Kay Paterno Hort	None	4/24/2012	Attorney-Client Privilege	Email discussing counsel's legal advice related to Penn State.
53.	JAYPRIV0000820–JAYPRIV0000821	Jay Paterno	Mary Kay Paterno Hort	None	4/24/2012	Attorney-Client Privilege	Email discussing counsel's legal advice related to Penn State.
54.	JAYPRIV0000822–JAYPRIV0000822	Jay Paterno	Scott Paterno; Dan McGinn; Guido D'Elia	None	7/12/2012	Attorney-Client Privilege	Email to public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.
55.	JAYPRIV0000823–JAYPRIV0000823	Jay Paterno	Scott Paterno; Dan McGinn	None	7/15/2012	Attorney-Client Privilege	Email to public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.
56.	JAYPRIV0000824–JAYPRIV0000825	Jay Paterno	Scott Paterno; Dan McGinn	None	7/16/2012	Attorney-Client Privilege; Work Product Privilege	Email to public-relations consultant related to counsel's legal advice related to the Freeh Report.
57.	JAYPRIV0000826–JAYPRIV0000830	Jay Paterno	Scott Paterno; Dan McGinn	None	7/16/2012	Attorney-Client Privilege	Email to public-relations consultant providing input related to counsel's legal advice related to the Freeh Report.
58.	JAYPRIV0000831–JAYPRIV0000833	Jay Paterno	Scott Paterno; Dan McGinn	None	7/23/2012	Attorney-Client Privilege	Email to public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.

The * symbol denotes an attorney.

Paterno v. NCAA

Privilege Log for Jay Paterno's Documents

November 7, 2015

#	Control Number Range	Author	Recipient(s)	Copying	Date	Basis for Privilege	Privilege Description
59.	JAYPRIV0000834–JAYPRIV0000835	Jay Paterno	Scott Paterno; Wick Sollers, Esq.*; Dan McGinn	None	7/27/2012	Attorney-Client Privilege	Email to counsel and public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.
60.	JAYPRIV0000836–JAYPRIV0000836	Jay Paterno	Dan McGinn; Wick Sollers, Esq.*; Scott Paterno; Guido D'Elia	None	7/31/2012	Attorney-Client Privilege	Email to counsel and public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.
61.	JAYPRIV0000837–JAYPRIV0000837	Jay Paterno	Mara Vandlik; Dan McGinn; Scott Paterno; Wick Sollers, Esq.*	None	8/3/2012	Attorney-Client Privilege	Email to counsel and public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.
62.	JAYPRIV0000838–JAYPRIV0000843	Jay Paterno	Scott Paterno	None	8/7/2012	Attorney-Client Privilege	Email discussing counsel's legal advice related to the Consent Decree.
63.	JAYPRIV0000844–JAYPRIV0000845	Jay Paterno	Scott Paterno	None	8/7/2012	Attorney-Client Privilege	Email discussing counsel's legal advice related to the Consent Decree.
64.	JAYPRIV0000846–JAYPRIV0000846	Jay Paterno	Scott Paterno; Guido D'Elia; Dan McGinn	None	9/17/2012	Attorney-Client Privilege	Email to public-relations consultant providing information related to counsel's legal advice related to the Consent Decree.
65.	JAYPRIV0000847–JAYPRIV0000858	Jay Paterno	Scott Paterno; Paul Kelly, Esq.*; Wick Sollers, Esq.*; Dan McGinn	None	9/29/2012	Attorney-Client Privilege	Email to counsel and public-relations consultant providing information and input regarding legal advice related to Penn State.
66.	JAYPRIV0000859–JAYPRIV0000866	Jay Paterno	Scott Paterno	None	9/29/2012	Attorney-Client Privilege	Email forwarding and discussing email to counsel and public-relations consultant providing information and input regarding legal strategy related to Penn State.
67.	JAYPRIV0000867–JAYPRIV0000867	Jay Paterno	Dan McGinn; Wick Sollers, Esq.*; Scott Paterno	None	11/21/2012	Attorney-Client Privilege	Email to counsel and public-relations consultant providing information related to counsel's legal advice related to Penn State.
68.	JAYPRIV0000868–JAYPRIV0000870	Jay Paterno	John Towriss	Dan McGinn; Wick Sollers, Esq.*; Scott Paterno	2/10/2013	Attorney-Client Privilege	Email to counsel and public-relations consultant discussing counsel's legal advice related to the response to the Freeh Report.
69.	JAYPRIV0000871–JAYPRIV0000871	Jay Paterno	Scott Paterno	None	2/10/2013	Attorney-Client Privilege	Email discussing counsel's legal advice related to the response to the Freeh Report.
70.	JAYPRIV0000872–JAYPRIV0000872	Jay Paterno	Scott Paterno; Dan McGinn; Wick Sollers, Esq.*	None	4/22/2013	Attorney-Client Privilege	Email to public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.

The * symbol denotes an attorney.

Paterno v. NCAA

Privilege Log for Jay Paterno's Documents

November 7, 2015

#	Control Number Range	Author	Recipient(s)	Copying	Date	Basis for Privilege	Privilege Description
71.	JAYPRIV0000873–JAYPRIV0000879	Jay Paterno	None	None	January 2013–February 2013	Attorney-Client Privilege; Work Product Privilege	Notes from meeting with public-relations consultant reflecting legal strategy and response to the Freeh Report.
72.	JAYPRIV0000880–JAYPRIV0000880	Bill Kenney	Jay Paterno	None	10/7/2012	Work Product Privilege	Message discussing litigation strategy.
73.	JAYPRIV0000881–JAYPRIV0000881	Jay Paterno	Patrick Mauti	None	8/15/2012	Work Product Privilege	Message discussing potential litigation.
74.	JAYPRIV0000882–JAYPRIV0000882	Jay Paterno	Dan McGinn	None	8/12/2012	Attorney-Client Privilege	Message to public-relations consultant related to counsel's legal advice related to Consent Decree.
75.	JAYPRIV0000883–JAYPRIV0000883	Jay Paterno	Wick Sollers, Esq.*	None	8/12/2012	Attorney-Client Privilege	Message to counsel providing information related to legal advice related to the Consent Decree.
76.	JAYPRIV0000884–JAYPRIV0000884	Jay Paterno	Scott Paterno	None	8/12/2012	Work Product Privilege	Message discussing strategy for potential litigation.
77.	JAYPRIV0000885–JAYPRIV0000885	Jay Paterno	Scott Paterno	None	7/26/2012	Attorney-Client Privilege; Work Product Privilege	Message discussing litigation strategy and legal advice from counsel related to potential litigation.
78.	JAYPRIV0000886–JAYPRIV0000886	Scott Paterno	Jay Paterno	None	7/26/2012	Work Product Privilege	Message discussing litigation strategy.
79.	JAYPRIV0000887–JAYPRIV0000887	Jay Paterno	Scott Paterno	None	7/17/2012	Attorney-Client Privilege	Message discussing legal advice from counsel related to the Freeh Report.
80.	JAYPRIV0000888–JAYPRIV0000888	Jay Paterno	Dan McGinn	None	7/7/2012	Attorney-Client Privilege	Message to public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.
81.	JAYPRIV0000889–JAYPRIV0000889	Jay Paterno	Dan McGinn	None	7/7/2012	Attorney-Client Privilege	Message to public-relations consultant providing information related to counsel's legal advice related to the Freeh Report.

The * symbol denotes an attorney.

EXHIBIT C

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

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

RESPONSE OF JOSEPH V. ("JAY") PATERNO TO THE SECOND SET OF INTERROGATORIES FROM THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Plaintiff Joseph V. ("Jay") Paterno submits the following objections and responses to the Second Set of Interrogatories from Defendant National Collegiate Athletic Association (the "NCAA").

GENERAL OBJECTIONS

1. Jay Paterno objects to these Interrogatories to the extent they purport to impose obligations greater than the Pennsylvania Rules of Civil Procedure.

2. Jay Paterno objects to the interrogatories to the extent they purport to call for information protected by the attorney-client privilege or work product doctrine.

3. Jay Paterno reserves the right to supplement or amend these Objections and Responses.

INTERROGATORY NO. 13:

Identify all Persons who have paid, promised to pay, or who You anticipate will pay, any of Your or other Plaintiffs' legal fees or other litigation costs in this matter, and identify any legal, consulting, or expert witness fees that are being provided at reduced cost or for free.

RESPONSE TO INTERROGATORY NO. 13:

Jay Paterno objects to this interrogatory on grounds that it requests information that lacks relevance to any of the claims in the pending action, nor is it likely to lead to the discovery of admissible evidence.

INTERROGATORY NO. 14:

For each Person identified in your response to Interrogatory No. 13, Identify the amount paid to date, the amount promised in the future, and all terms or conditions Concerning payment or repayment.

RESPONSE TO INTERROGATORY NO. 14:

Jay Paterno objects to this interrogatory on grounds that it requests information that lacks relevance to any of the claims in the pending action, nor is it likely to lead to the discovery of admissible evidence.

INTERROGATORY NO. 15:

State all facts that demonstrate the alleged falsity of the statement that "[s]ome coaches, administrators and football program staff members ignored the red flags of Sandusky's behaviors and no one warned the public about him."

RESPONSE TO INTERROGATORY NO. 15:

Jay Paterno objects to this Interrogatory on grounds that it calls for him to list facts that would demonstrate the falsity of a fragment of a statement taken out of context. It is important that the statements contained in the Consent Decree be understood in their full and proper

context. When understood in proper context, it is clear that the statement is false. The NCAA had no valid basis for making the statements included in the Consent Decree or for imposing sanctions based on the conduct of Jay Paterno and other coaches, administrators, and staff members.

The NCAA included this statement in its Consent Decree as a basis for imposing massive sanctions on plaintiffs and Pennsylvania State University. The Consent Decree refers to this statement as part of certain conclusions reached in the Freeh Report, and as support for the NCAA's conclusion that there had been a failure of institutional control and individual integrity. The Consent Decree asserts that the "findings" of the Freeh Report, and Penn State's willingness to accept them, rendered the NCAA's "traditional investigative and administrative proceedings . . . duplicative and unnecessary." And the Consent Decree claimed that the Freeh Report established a "factual basis" from which the NCAA could conclude that "Penn State breached the standards expected by and articulated in the NCAA Constitution and Bylaws," and "permit[ted] fashioning an appropriate remedy for the violations on an expedited timetable." The Consent Decree also claimed that the NCAA fashioned its sanctions to take account of the fact that "no student-athlete [was] responsible," while specifically claiming that coaches, administrators, and football staff, among others, were responsible.

The question is not merely whether any particular statement included in the Consent Decree is, in isolation, false. The question is also whether the NCAA had any lawful or evidentiary basis for embracing the Freeh Report and telling the public that the Consent Decree's purported findings and conclusions provided a basis for imposing unprecedented sanctions. The facts show that it is demonstrably false that the NCAA had any factual or other lawful basis for

finding or concluding that there were "red flags of Sandusky's behaviors" that "[s]ome coaches, administrators and football program staff members ignored."

The evidence compiled during the investigation that led to the Freeh Report did not comply with the NCAA's own rules, which (among other things) require that (i) its enforcement staff conduct investigations related to an institution's alleged failure to comply with NCAA Bylaws; (ii) a notice of allegations be sent to the institution listing the rules allegedly violated and the details of the violation; (iii) that a notice of inquiry be sent to the president of the institution disclosing the nature and details of the investigation and the type of charges involved; (iv) if there is a suggestion that any individual was significantly involved, the individual must be notified and provided an opportunity to respond to the allegations; (v) individuals suspected of violations may be interviewed, but must be notified of the reason for the interview; (vi) interviews must be recorded or summarized, and an attempt must be made to obtain a signed affirmation of accuracy from the individual interviewed; (vii) the member institution and all involved individuals have the right to have legal counsel at all stages of the proceeding; (viii) the committee that hears the evidence may not rely on information from anonymous sources; and (ix) the decision regarding infractions must be based on evidence that is "credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs."

In this matter, the NCAA initiated an investigation but did not comply with its own rules or procedures for reaching the "findings and conclusions" included in the Consent Decree. Also, although it did not comply with its own rules, the NCAA had a significant role in the Freeh Group's investigation, including directing the Freeh Group to look into the alleged lack of institutional control at Penn State, providing specific questions to be asked of witnesses, and suggesting witnesses to be interviewed by the Freeh group. The NCAA maintained regular

communication with the Freeh investigation team throughout the course of the investigation. And the NCAA was well aware that the "findings" made by the Freeh investigation team were not based on credible, reliable evidence, but were instead crafted to respond to media pressure. Within days of the issuance of the Freeh Report, the NCAA's Executive Committee convened to consider imposition of sanctions even though the Chairman of the NCAA Executive Committee did not even read the Report until after finalizing the Consent Decree that imposed the unprecedented sanctions on Penn State. Similarly, the NCAA's Vice President for Division I did not know what was in the Freeh Report. And Penn State, which had commissioned the Freeh Report, accepted "the findings of the Freeh Report," but only "for purposes of this resolution." Neither the NCAA nor its agents took any steps to verify the factual accuracy of the statements contained in the Consent Decree, even though they knew the investigation did not comport with the NCAA's rules and procedures.

INTERROGATORY NO. 16:

Identify all Persons who are likely to have personal knowledge of any facts alleged in the Complaint, or any information that may support, confirm, rebut, or contradict any fact You allege, and describe the anticipated nature or subject matter of each such individual's personal knowledge.

RESPONSE TO INTERROGATORY NO. 16:

Ben Bouma—helped with the TV job search and in the documentary project

John Bove—Former compliance coordinator at Penn State University

Harold Bryant – CBS Sports

Bill Carr— Conducted search for new coach for James Madison University

Guido D'Elia—Adviser on documentary job

Mark Dudash—Duquesne Brewing Company

Michael Flanagan—Friend and also aware of the non-football job search activities

Jeff Greenberg—Mercer County Elections Board

Kevin Harry – Disney Institute

Jed Hughes—Korn Ferry

David Joyner –Interim Athletic Director at Penn State

Ira Lubert – Participated in interviews of candidates for Penn State head coach in 2011

John Nichols – Member of interview committee for Penn State head football coach

Daniel Parker—Parker Search involved in University of Connecticut search

Kelley Paterno – Wife

George Scott Paterno – Brother

Ed Placey—Contact at ESPN for possible TV jobs there

Sean Quinn—FBI Office in Scranton, PA

Gene Rice—Involved in a job search with the Disney Institute

Russ Rose — Member of interview committee for Penn State head football coach

Erika Runkle – Human Resources at Penn State University

Rip Scherer — Coached together at James Madison University; currently coaches at UCLA with former Penn State coach

Colin Smeeton---Agent involved in deals for both TV jobs and documentary

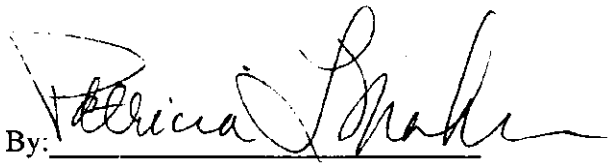
Brett Senior—Agent involved with search for coaching positions

Ben Stauber—CBS Sports

Doc Sweitzer—Political consultant

Jacob Ullman – Fox Sports

Dated: December 23, 2015

By: 

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Counsel for Plaintiffs

VERIFICATION

I hereby state that the information provided in response to the foregoing interrogatories is true and correct to the best of my knowledge, information and belief.

Joseph V. ("Jay") Paterno

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONSE OF JOSEPH V. ("JAY") PATERNO TO THE SECOND SET OF INTERROGATORIES FROM THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION** was served this 23rd day of December, 2015 by email and first class mail to the following:

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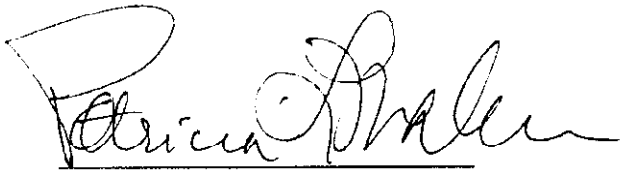

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Counsel for Plaintiffs

EXHIBIT D

In The

Superior Court of Pennsylvania

NO. 1709 MDA 2014

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University; PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University; WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,

Plaintiffs-Appellees,

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-Appellant.

Appeal from the September 11, 2014 Order of the Court of Common Pleas of Centre County, No. 2013-2082 (Leete, J., sitting by special assignment)

BRIEF FOR THE APPELLEES

(Counsel Listed on Inside Cover)

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QUESTIONS INVOLVED

1. Did the trial court abuse its discretion in concluding that Penn State waived the attorney-client privilege and work product protection where information underlying a report was shared with law enforcement authorities and other third parties; the report was never intended to be maintained in confidence; the report was released to the public, without Penn State's review, with an express waiver of any relevant privilege; and the report was used to attack other parties for public-relations purposes?

Suggested Answer. No.

2. Does the attorney-client privilege apply to materials relating to a publicly disclosed report that was prepared for public-relations purposes, was never intended to be maintained in confidence, was not reviewed by the client before being publicly disclosed, and does not reflect confidential legal advice?

Suggested Answer. No.

3. Does the attorney work product doctrine apply to materials that were prepared for public-relations purposes and not in anticipation of litigation, especially where the doctrine is not invoked by the professional who prepared the materials and where the party seeking protection has not come forward with any privilege log identifying the specific documents it claims are protected?

Suggested Answer. No.

INTRODUCTION

Penn State's appeal is an extraordinary effort to reinvent and undermine basic principles regarding the attorney-client privilege and the attorney work product doctrine. The attorney-client privilege is essential to protecting confidential information exchanged between a lawyer and his client when a lawyer is retained to provide legal advice; the work product doctrine allows attorneys to prepare confidential information in connection with litigation. Neither doctrine protects information and materials gathered to prepare a publicly available report that is shared with law enforcement and others outside the attorney-client relationship and used for public-relations purposes as a sword to attack innocent third parties.

The relevant facts in this case are easily summarized: In 2011, under pressure from the National Collegiate Athletics Association ("NCAA") and in the glare of harsh publicity, Penn State hired the firm of Freeh Sporkin & Sullivan, LLP (the "Freeh Firm"), headed by former FBI Director Louis Freeh,[1] to conduct an independent and purportedly transparent investigation into the horrific crimes committed by former assistant football coach Gerald Sandusky. The investigation's stated purpose was to look into Penn State's alleged failures to

[1] The Freeh Firm provided in its engagement letter that it would retain a separate investigative and consulting group, Freeh Group International Solutions, LLC ("Freeh Group" or "FGIS"), in which Louis Freeh was also a partner, "to assist in this engagement." R.36.

report criminal conduct to authorities and to provide public recommendations for ensuring that any failures would never occur again.

The engagement between Penn State and the Freeh Firm was no typical attorney-client relationship. From the beginning, everyone knew the report prepared by the Freeh Firm (the "Freeh Report") would be released to the public. And the engagement was structured to support Penn State's public-relations objectives. The Freeh Firm conducted its investigation independent from Penn State and expressly reserved the right to share any information gathered with law enforcement authorities, without the need for its client's consent. Moreover, throughout its investigation, the Freeh Firm coordinated and shared information with the NCAA and the Big Ten, two organizations that govern athletics at Penn State.

When the Freeh Firm released its lengthy Report, the release occurred without any advance review by Penn State. The Report did not contain or reflect confidential legal advice. Nor did it purport to have been prepared in anticipation of litigation. Instead, the Report included scandalous and baseless allegations directed at Coach Joe Paterno and other leaders of the Penn State community, which the Report announced were being disclosed under a waiver of the attorney-client privilege by Penn State. Having coordinated closely with the Freeh Firm, the NCAA then capitalized on the Report's findings to "bluff" Penn State into

accepting a Consent Decree that, in furtherance of the NCAA's own objectives, deployed the Report as a basis for imposing crushing penalties on Penn State, detracted attention from the NCAA's ongoing misconduct, and destroyed the reputations of numerous individuals.

Having used the Freeh Report as its own publicity tool and for the NCAA's benefit, Penn State now seeks to rescind its previous commitment to transparency. Arguing that it selectively waived the privilege only for the Report itself and not for any related or underlying materials, Penn State argues that the Estate of Coach Paterno and the others defamed by the Report are prohibited from examining the basis for its allegations. In doing so, Penn State is not only attempting to use the attorney-client privilege and the work product doctrine improperly as both a shield and a sword, it is also urging the Court to cast aside the principles of fair play on which our justice system depends. Having publicly released the results of the Freeh Firm's investigation, which was used by the NCAA and Penn State for their own purposes and to the severe detriment of plaintiffs-appellees, Penn State is now seeking to block any effort to understand who was involved in developing the Freeh Report, who influenced its conclusions, and what — if anything — provided the basis for its scurrilous conclusions.

The trial court did not abuse its discretion in rejecting Penn State's duplicitous position. As the court recognized, Penn State waived the attorney-

client privilege by allowing the Freeh Firm to share information about the investigation with the NCAA and the Big Ten, not to mention the underlying information that it chose to release to law enforcement during the investigation. Moreover, the court correctly concluded that Penn State's efforts to selectively waive the privilege by releasing the Report publicly resulted in a subject matter waiver; Penn State should not be permitted to wield the Freeh Report as a weapon for its own public relations purposes while simultaneously shielding the Report from scrutiny. The court also concluded that the attorney-client privilege and the work product protection do not apply because it was understood from the beginning that the Freeh Report would be publicly released. Having chosen to make the Freeh Report public before even reviewing it, and having expressly waived any privilege with regard to the matters covered by the Report, Penn State could not prevent the people attacked in the Report from defending themselves and seeking to discover the factual basis for the Report and the full nature of the investigation underlying its claims.

STATEMENT OF THE CASE

A. The Freeh Report

On November 4, 2011, the Attorney General of Pennsylvania charged Jerry Sandusky, a former assistant football coach, with horrific crimes relating to child abuse. Following a jury trial, Sandusky was convicted and, on October 9, 2012, sentenced to 30 to 60 years in prison. *See Jerry Sandusky sent to prison*, Associated Press (Nov. 1, 2012), *available at* http://espn.go.com/college-football /story/_/id/8577643/jerry-sandusky-moved-prison-death-row-inmates.

The NCAA had no authority to investigate that criminal matter. Nonetheless, the NCAA decided to leverage the situation to its own advantage. Within days of the announcement of charges against Sandusky, the NCAA notified Penn State that it would open an investigation into Penn State's exercise of institutional control over its athletic programs and that it expected Penn State's complete cooperation. Over time, the NCAA repeatedly threatened Penn State with exclusion — the "death penalty" for a college athletic program — and enormous other sanctions if the University did not come to heel.

Around the same time, faced with a serious public relations problem, the Penn State Board of Trustees formed a Special Investigations Task Force. In November 2011, the Task Force engaged the Freeh Firm to conduct an "independent, full and complete investigation of the recently publicized allegations

. . . and the alleged failure" of certain Penn State personnel to respond to and report allegations against Sandusky. Specifically, Penn State retained the Freeh Firm to prepare a report that would assess and publicly disclose certain information, including "(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 those allegations were handled by the Trustees, PSU administrators, coaches and other staff." R.32, Engagement Letter. In addition, the Freeh Report would "provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again." *Id.*

From the outset, everyone understood that the Freeh Firm's investigation and its subsequent Report would be out of Penn State's control and released to the public. Penn State said so directly when it announced the hiring of the Freeh Firm. *See* Penn State Press Release, *Former FBI director Freeh to conduct independent investigation* (Nov. 21, 2011) ("PSU Press Release"), *available at* http://news.psu.edu/story/153530/2011/11/21/former-fbi-director-freeh-conduct-independent-investigation ("The special committee and Freeh said that the findings and recommendations of this work, when completed, will be made available to the public."). In announcing Penn State's decision to conduct a public investigation, Trustee and Task Force Chairman Kenneth C. Frazier emphasized that "Freeh has complete rein to follow any lead, to look into every corner of the University to get

to the bottom of what happened and then to make recommendations that ensure that it never happens again." R.99. Consistent with that mandate, and far from any normal relationship between a client and outside counsel, the Freeh Firm was allowed to operate with "total independence" from Penn State. R.99, 100. It was also authorized to share (and ultimately did share) the information it gathered and the results of its investigation with law enforcement agencies. R.99, 361.

The NCAA took advantage of this situation. Although the Freeh Firm operated independently from Penn State, the NCAA (and the Big Ten) influenced the Freeh Firm's investigation and shaped its report. It is clear that, even though Penn State is resisting discovery into the full extent of their interactions, Freeh and his team coordinated closely with both the NCAA and the Big Ten throughout the investigation. R.357.

In July 2012, Freeh published a 150 plus page Report that had never been shared with — much less studied by — the officials at Penn State who retained him. The Report boasted that it was revealed "to the Board of Trustees and the general public at the same time." R.100. Mr. Freeh held a televised press conference to discuss the Report. And the Report specifically stated that it was being publicly released "pursuant to the appropriate waiver of the attorney-client privilege by the Board." R.98.

The Report asserted that Coach Paterno and other top University officials were guilty of horrific misconduct — concealing, facilitating, and allowing over a decade of child abuse. R.102. The Report claimed, among other things, that Coach Paterno and other officials had known about Sandusky's conduct before Sandusky retired as an assistant coach in 1999 but failed to take action. R.105. According to the Report, Penn State officials, including Coach Paterno, concealed critical facts relating to Sandusky's abuse from authorities, the Penn State community, and the public at large. The Report claimed that these individuals "empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program." R.103.

The Freeh Report was a shoddy, unprofessional piece of work that has since been thoroughly discredited, including in public statements by the new President of Penn State. *See, e.g.*, *PSU prez: Not a fan of Freeh Report*, Associated Press (Jan. 29, 2015), *available at* http://espn.go.com/college-football/story/_/id/12244739 /penn-state-president-says-freeh-report-sandusky-scandal-not-useful. In its rush to judgment, the Report's authors did not interview crucial individuals with knowledge of the relevant facts. R.100. Individuals named in the Report, who were accused of being significantly involved in alleged misconduct, were not given

any opportunity to be heard or to challenge its conclusions. The Freeh Firm did not complete a proper investigation, failed to interview key witnesses, and instead of supporting the Report's conclusions with evidence, relied heavily on speculation and innuendo.

The Report also relied on unidentified, "confidential" sources and on questionable sources lacking any direct or personal knowledge of the facts or support for the opinions they provided. R.97–98. And its main conclusions were either unsupported by evidence or supported by only anonymous, hearsay information. Prominent experts have concluded that the Report was deeply flawed and that many of its key conclusions were wrong, unsubstantiated, and unfair. *See, e.g.*, Armen Kateyian, *Sandusky Prosecutors: Penn State Put School's Prestige Above Abuse*, CBS News (Sept. 3, 2013), *available at* http://www.cbsnews.com/8301-18563_162-57601201 (no evidence supported conclusion that Coach Paterno concealed Sandusky's crimes, according to the chief prosecutor in the case against Sandusky); Dick Thornburgh, *Review of the Freeh Report Concerning Joseph Paterno* at 4–5, 34 (Feb. 6, 2013), *available at* http://paterno.com/resources/docs/thornburgh_final_report_2-7-2013.pdf (the Report was a "rush to injustice" and its conclusion "that Mr. Paterno lacked empathy for the victims of Mr. Sandusky's abuse is unfounded and offensive").

Having coordinated closely with the Freeh Firm throughout the investigation, the NCAA moved quickly to capitalize on the Report as part of its own carefully crafted public relations campaign. Instead of helping to uncover the truth, the NCAA and its leadership viewed the Sandusky scandal and the Freeh Report as an opportunity: to deflect attention from mounting criticisms of the NCAA, to shore up the NCAA's faltering reputation, to broaden the NCAA's authority far beyond its defined limits, and to impose enormous monetary sanctions for its own benefit.

Although the NCAA ordinarily takes years to conduct and complete an investigation, and although the Freeh Report did not come close to satisfying the basic investigative requirements of the NCAA's own rules (and did not even purport to address any NCAA rule or regulation), the NCAA moved to sanction Penn State almost immediately after the Freeh Firm released its Report by imposing a binding Consent Decree on Penn State based on the Report's findings. The Consent Decree, with the full force of the NCAA behind it, claimed that certain parties (including plaintiffs) were guilty of covering up decades of horrendous child abuse. Violating its own rules, the NCAA stripped those parties of their rights to challenge the Consent Decree's conclusions. Nonetheless, NCAA President Emmert considered the Freeh Report "to be more than sufficient to impose" penalties. *See* Erin Burnett OutFront, *Interview of Mark Emmert*, CNN

(July 23, 2012), *available at* http://www.cnn.com/TRANSCRIPTS/1207/23/ebo.01.html. As the NCAA intended, the Consent Decree was extensively discussed by the national television, radio, and print media. And although it is unfair and wrong, the Consent Decree destroyed the reputations of the innocent people it blamed and whose conduct it claimed justified massive penalties.

B. This Litigation

Plaintiffs-Appellees brought this lawsuit to redress the enormous damage that the NCAA's wrongful actions have inflicted on their reputations and the Penn State community, and to shine a light on the truth that the NCAA, working with the Freeh Firm, has tried to distort and conceal. *See* Second Amended Complaint ¶¶ 1, 87–88.

To defend themselves against the unfair and defamatory conclusions published in the NCAA-imposed Consent Decree, and to prove their claims of commercial disparagement, defamation, interference with contract, and conspiracy, plaintiffs sought discovery into the Freeh Report. In particular, plaintiffs wish to learn who was involved in preparing the Report, who influenced its reckless conclusions, and what facts (if any) provided a basis for those conclusions. Plaintiffs thus sought communications between the Freeh Firm or the Freeh Group and the NCAA regarding Joe Paterno or the other plaintiffs, *see* R.25, communications between the Freeh Firm or the Freeh Group and Penn State, *see*

R.26, documents maintained in the Freeh Firm's files, *see id.*, and documents relating to the basis for the Freeh Report's conclusion that Coach Paterno, among others, "failed to protect against a child sexual predator harming children for over a decade," *id.* Plaintiffs began that process more than a year ago, in February 2014, by serving a notice of intent to issue a subpoena on Pepper Hamilton LLP (the law firm that Freeh and other members of the Freeh Firm joined after issuing the Report). R.15.

Faced with the prospect that the plaintiffs might look behind the scandalous statements in the Consent Decree, Penn State's earlier commitment to transparency and public disclosure evaporated. Under pressure from the NCAA, which even in this litigation has continued to threaten Penn State with the death penalty, and desperate to prevent any inquiry into the Freeh Report, Penn State asserted extensive objections, including the attorney-client privilege and attorney work product protection. Notably, Penn State asserted those objections wholesale, making no effort to produce a privilege log or to identify any particular documents that it claimed were privileged or protected. R.382. In short, having used the Report for its own public-relations reasons, and having allowed the NCAA to use the Report as a basis for publicly skewering Coach Paterno and other former leaders of the University, Penn State sought to drop an Iron Curtain around the

Freeh Firm's work, invoking the privilege as a wholesale shield to prevent any meaningful examination of the Report's contents.

Recognizing Penn State's gambit, the trial court overruled nearly all of Penn State's objections. It first held that Penn State had waived the attorney-client privilege. The court observed "that the Freeh Firm was communicating with third parties during the investigation — specifically, the Big Ten Athletic Conference and the NCAA," and that "[i]t is unquestioned that . . . with respect to all documents — source and non-source — that were shared with the Big Ten or NCAA, the attorney-client privilege (if it ever existed) was waived." PSU Br., Ex. A, at 21–22. The court also held that "voluntary disclosure waives the privilege as to remaining documents of that same subject matter." *Id.* Even if Penn State had not waived the privilege, the trial court held that the attorney-client privilege did not apply in the first place because Penn State had not engaged the Freeh Firm to provide legal services. *Id.* at 20. The trial court rejected Penn State's assertion of work product protection because the work product doctrine must be asserted by the professional and because the Freeh Report was not prepared in anticipation of litigation. *Id.* at 22–23. Penn State appealed the trial court's ruling to this Court, and filed a statement of matters complained of on appeal in the trial court. PSU Br., Ex. B.

After the trial court's ruling, plaintiffs promptly served the subpoena on Pepper Hamilton. R.430. Pepper Hamilton refused to comply and instead moved for a stay pending a ruling on Penn State's appeal. R.415. In its request for a stay, Pepper Hamilton purported to raise a work product objection, even though it had not served a response to the subpoena in which it could assert that objection. *See* R.422, Mot. for Stay Pending Appeal and for Protective Order. Consistent with Penn State's blanket approach, Pepper Hamilton made no effort to log the specific documents that it contended qualified as work product.

On November 20, 2014, the trial court denied Pepper Hamilton's request for a stay. R.440. In another opinion two weeks later, the trial court explained that "[b]ecause Pepper Hamilton did not attempt to assert their work product doctrine privilege until after the instant appeal was filed, this Court has not had the opportunity to consider the issue, rule upon it correctly, and obviate the need for appeal." PSU Br., Ex. C, at 4. Pepper Hamilton appealed the trial court's ruling, but neither Pepper Hamilton nor Penn State requested a stay from this Court. Nevertheless, after its stay motion was denied, Pepper Hamilton continued to refuse to comply with the subpoena. On December 16, 2014 — three months after service of the subpoena, two months after the extended return date, and a month after the trial court denied Pepper Hamilton's motion for a stay — Pepper Hamilton filed an untimely written response objecting to the subpoena.

Meanwhile, in connection with the resolution of another lawsuit involving the NCAA and Penn State, the Consent Decree that incorporated the findings of the Freeh Report was repealed. That resolution, however, did not repudiate the Freeh Report or criticize any aspect of it. Nor did it apologize or provide any remedy for the NCAA's egregious and unlawful misconduct. Although the sanctions on Penn State have been lifted going forward, the NCAA made sure that the substantial harms inflicted on the plaintiffs remain unaddressed. In fact, on April 29, 2015, in its filing of a New Matter in this case below, the NCAA asserted that the statements in the Consent Decree based on the Freeh Report were true or substantially true.

SUMMARY OF ARGUMENT

The trial court's decision should be affirmed and the subpoena enforced because Penn State deliberately and strategically waived any privilege or protection that might once have applied. The Freeh Report expressly states that it was released to the public because Penn State waived the attorney-client privilege. And Penn State authorized the Freeh Firm to disclose information to law enforcement authorities, which Freeh did. If that were not enough to establish waiver, the Freeh Firm also shared information about the investigation with the NCAA and the Big Ten, which were not its clients. Penn State allowed those disclosures because they served the institution's public relations interests, including kowtowing to the NCAA, portraying itself as undergoing a period of self-reflection, and scapegoating others (including plaintiffs in this case).

Having expressly waived the attorney-client privilege and the work product protection for its own advantage, Penn State is now trying to prevent those unjustly maligned from challenging the bases for the Freeh Report, which served as the justification for the NCAA's unlawful Consent Decree. But if one principle of privilege law is clear, it is that the attorney-client privilege may not be used as both a sword and a shield. When a party elects to disclose *some* privileged information in order to launch attacks on another party, elementary notions of fairness demand that the party must disclose all communications regarding the subject-matter of

what was disclosed. It is outrageous for Penn State to attempt to prevent plaintiffs from defending themselves.

Even if Penn State had not waived the attorney-client privilege and the work product protection, neither would apply in the circumstances of this case. The attorney-client privilege protects only *confidential* communications, and the Engagement Letter and the Freeh Report both make clear that Penn State always intended to release the Report and its findings to the public. Moreover, Penn State did not engage the Freeh Firm for the purpose of securing legal advice; it hired the Freeh Firm to investigate failures in the University's reporting processes, to make independent findings, and to propose the Freeh Firm's independent recommendations for preventing those failures from happening again. Neither the attorney-client privilege nor the work product doctrine is relevant to that arrangement.

Even if Penn State had not waived it, the work product protection would not apply either, and certainly does not provide a blanket basis for withholding the information sought. The Freeh Report was not created in anticipation of litigation; it was a public relations document designed to placate the NCAA and to demonstrate to the public that Penn State was doing something about Sandusky's crimes. And neither Penn State nor Pepper Hamilton has made any effort to demonstrate which documents, if any, subject to the subpoena could possibly

constitute proper "work product." In Pennsylvania, moreover, the documents must be created in anticipation of the same litigation in which they are sought, and there is no suggestion that the Freeh Firm generated its Report in anticipation of *this* litigation. Finally, Penn State cannot assert the work product protection because that protection belongs to the professional, not to the client.

STANDARD OF REVIEW

The "question of '[w]hether attorney-client privilege protects a particular communication from disclosure is a question of law.'" *Carbis Walker, LLP v. Hill, Barth & King, LLC*, 930 A.2d 573, 581 (Pa. Super. 2007) (citations omitted). But where, as here, a party has not filed a privilege log or claimed protection for any particular communication or document, but is instead seeking a blanket protection for an entire category of documents, the trial court's discretion to control the discovery process should be respected. *See generally Schenck v. Twp. of Ctr., Butler Cty*, 975 A.2d 591, 597 (Pa. 2009) (Saylor, J., dissenting from dismissal of appeal as improvidently granted) ("few courts have been willing to accept blanket assertions of privilege with respect to an entire category of information"); *see also* Pa. R. Civ. P. 4009.12(b)(2). "Generally, in reviewing the propriety of a discovery order, [this Court's] standard of review is whether the trial court committed an abuse of discretion." *Gallo v. Conemaugh Health Sys., Inc.*, ___ A.3d ___, 2015 WL 1743117, at *2 (Pa. Super. Apr. 17, 2015) (internal quotation marks omitted); *see also Commonwealth v. Melvin*, 103 A.3d 1, 35 (Pa. Super. 2014).

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion In Concluding That Penn State Waived the Attorney-Client Privilege and Work Product Protection.

Although Penn State does not bother to address the issue until the last three pages of its brief, the key issue in this appeal is Penn State's knowing and deliberate waiver of the attorney-client privilege and the work product protection. By hiring a firm to conduct an "independent" investigation that it committed would become public, and then by making multiple, voluntary disclosures for its own benefit, Penn State repeatedly and deliberately waived any privilege that might arguably have protected the documents and information assembled in connection with the Freeh Report. Well-established principles of privilege law, not to mention elementary notions of fairness, prevent Penn State from parading the Freeh Report's defamatory conclusions in front of the trial court and the public while depriving those unfairly maligned by the Report of discovery relevant to challenging the basis for it.

A. Penn State Repeatedly and Deliberately Waived the Attorney-Client Privilege and Work Product Protection.

"A privilege can be waived," *Commissioner v. T.J.W.*, __ A.3d __, 2015 WL 1874596, at *4 (Pa. Super. Apr. 24, 2015), and there is no doubt that it was waived here. The Freeh Report expressly states that it "sets forth the essential findings of the investigation, *pursuant to the appropriate waiver of the attorney-client privilege by the Board.*" R.98 (emphasis added). The Report also discloses that Penn State authorized the Freeh Firm to turn over "any discovered evidence of criminality to the appropriate law enforcement authorities" without any advance review from Penn State. R.33, Engagement Letter. Acting under that authority, the Freeh Firm did not hesitate to disclose e-mails from senior University officials to law enforcement. R.99, Freeh Report.

The widely disseminated Consent Decree imposed by the NCAA recognizes that Penn State waived the attorney-client privilege. Lauding Penn State's cooperation, it says that "[t]he University has never before had NCAA major violations, accepted these penalties and corrective actions, has removed all of the individual offenders identified by [the Freeh Firm] from their past senior leadership roles, has itself commissioned the [Freeh Firm] investigation and provided unprecedented access and openness, in some instances, *even agreed to waive attorney-client privilege*, and already has implemented many corrective actions." Consent Decree at 4 (July 23, 2012), *available at* http://s3.amazon

aws.com/ncaa/files/20120723/21207236PDF.pdf (emphasis added). Penn State has nothing to say in response to any of these waivers.

The Freeh Firm also shared information about the investigation with non-clients, including law enforcement officials, the NCAA, and the Big Ten. The Freeh Firm's engagement letter reserved to the firm, and the firm alone, the right to disclose any information that it thought would be relevant to law enforcement. R.33. And although Penn State insists that the record contains no evidence that the Freeh Firm "shared *even one* otherwise privileged document with either the NCAA or the Big Ten," PSU Br. 36, that is an extraordinary and implausible claim. A letter from Big Ten Commissioner James E. Delaney to Penn State's President refers to "an agreeable process of collaboration on *gathering and sharing information*" between the NCAA and the Freeh Group, and notes the Big Ten's expectation that it "will be accorded the same treatment as the NCAA in this collaborative process." R.357, Ltr. from Comm. J. Delany to R. Erickson (Dec. 8, 2011). Moreover, Penn State has failed to identify any "otherwise privileged document" that it contends existed, asserting instead that "[t]he Requests in the subpoena [to Pepper Hamilton] all seek, to some extent, the production of documents that are protected from discovery by virtue of the attorney-client privilege and the work product doctrine." R.45.

Penn State and the Freeh Firm's repeated disclosures waived both the attorney-client privilege and work product protection. "[O]nce the attorney-client communications have been disclosed to a third party, the privilege is deemed waived." *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Commw. 2001); *see also Commonwealth v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005) ("the work-product doctrine is not absolute but, rather, is a qualified privilege that may be waived"). For these reasons, the trial court was correct that "[a] client disclosing protected communications to a third party has long been considered inconsistent with an assertion of the privilege." PSU Br., Ex. A, at 21.

B. Subject-Matter Waiver is Appropriate Because Penn State Cannot Use The Privilege As Both a Sword and a Shield.

As the trial court recognized, Penn State's selective disclosures were part of a deliberate and carefully planned strategy. In "one of the most difficult periods in the University's history," PSU Br. 3–4, and in an effort to placate the NCAA and others, Penn State sought to highlight the independence of the Freeh Firm's investigation and its review of allegations of child abuse on the University campus. Any effort to limit or control what the Freeh Firm could share — a step that would have been taken if the report had been prepared for litigation purposes — would have undermined that strategy. Instead, the broad scope of the Freeh Firm's mandate was made clear in the public statement of Trustee Kenneth C. Frazier announcing the investigation: "'No one is above scrutiny,' Frazier said," and he

"assured the Special Investigative Counsel that the investigation would be expected to operate with *complete independence* and would be empowered to investigate University staff, senior administrators, and the Board of Trustees." R.99, Freeh Report (emphasis added). The "independent" Freeh Report became the basis for the NCAA-imposed Consent Decree, which announced to the world that it was pinning the blame for Sandusky's crimes on Coach Paterno and others in the Penn State community.

In a cruelly ironic twist, Penn State's commitment to transparency — which served the University's and the NCAA's purposes for almost three years — has now disappeared. Having used the Freeh Firm's work to try, convict, and sentence Coach Paterno and others in absentia "without subpoena power, without identifying accusers, without guidance from sexual abuse experts, without putting anyone under oath and without testimony from Joe Paterno or anyone speaking in his defense," *see* Joe Posnanski, *What's in a Name? Joe Paterno's family won't quit the fight to restore his legacy*, NBC Sports (Apr. 21, 2015), *available at* http://sportsworld.nbcsports.com/joe-paterno-family-fight-after-penn-state-scandal/, Penn State now seeks to block any review of the Report's factual basis.

But Penn State cannot avoid the consequences of its strategic decision to publicize the Freeh Report and use it as a sword for its own public-relations purposes. "A litigant attempting to use attorney-client privilege as an offensive

weapon by selective disclosure of favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse." *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1265 (Pa. Super. 2007). The trial court therefore did not abuse its discretion in holding that "the scope of an attorney-client privilege waiver applies to the subject-matter of the privileged documents disclosed" and that "voluntary disclosure waives the privilege as to remaining documents of that same subject matter." PSU Br., Ex. A, at 21–22.

That principle is fundamental to our legal system. While the attorney-client privilege is "deeply rooted in our common law" and "the most revered of our common law privileges," *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013) (internal quotation marks omitted), the waiver doctrine is just as well entrenched. When a party selectively discloses privileged information in an effort to obtain a tactical advantage, fairness requires giving the injured party access to the information. *See, e.g., Adhesive Specialists, Inc. v. Concept Scis. Inc.*, 59 Pa. D. & C. 4th 244, 263 (C.C.P. 2002) ("delivery of [an internal] memorandum to the Pennsylvania State Police constituted a voluntary disclosure to a third party" and "a waiver of the attorney-client privilege, even if the state police agreed not to disclose the communication to anyone else"); *Miniatronics Corp. v. Buchanan Ingersoll, P.C.*, 23 Pa. D. & C. 4th 1, 18–21 (C.C.P. 1995) (voluntary disclosure of

confidential information to gain tactical advantage sufficient to waive attorney-client privilege for all communications involving same subject matter); *Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (voluntary disclosure of communication protected by attorney-client privilege may result in waiver of privilege for all communications pertaining to the same subject).

The federal courts of appeals unanimously agree with Pennsylvania on this basic principle of privilege law. In *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, for example, the Sixth Circuit held that "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality as to others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." 293 F.3d 289, 303 (6th Cir. 2002) (internal quotation marks omitted); *see also Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) ("Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option."); *United States v. Mass. Inst. of Tech*, 129 F.3d 681, 686 (1st Cir. 1997) (rejecting selective waiver because "[a]nyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage"); *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (noting that disclosure to a third party

usually waives privilege); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (holding that waiver or privilege as to one party serves to waive as to others); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371–74 (D.C. Cir. 1984) (holding that disclosure to the government waives attorney-client privilege and extending the waiver to the work-product doctrine).

In the face of this overwhelming authority, Penn State argues that the subject-matter waiver doctrine does not apply because the Estate has purportedly failed to show that the selective disclosures were made "to achieve a tactical advantage in any litigation." PSU Br. 37. That is both wrong and irrelevant.

It is wrong because Penn State has relied on the Freeh Report as a principal defense *in this litigation*; acting in concert, the NCAA, Penn State, and other defendants have used the Report to justify the egregious actions taken against plaintiffs. *See, e.g.*, NCAA Reply in Supp. Prelim. Objs. at 4 ("To date, absolutely nothing has come out in the public domain to shake any confidence in Judge Freeh's report."). Moreover, to avoid liability and to keep the litigation focused on the NCAA, Penn State has refused to take any position on the factual validity of the Freeh Report's findings, asserting "that it accepted the Freeh Report for the purposes of the Consent Decree only and agreed to the Consent Decree to avoid harsher sanctions [imposed by the NCAA], including a possible 'death penalty' . . . ." PSU Answer ¶ 70.

It is irrelevant because the subject-matter waiver doctrine applies whenever a party attempts to use selective disclosure as an offensive weapon; it is not limited to the narrow situation where the disclosing party sought to obtain a tactical advantage in litigation. *See In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000) (noting that privilege can be waived when a party "made a deliberate decision to disclose privileged materials in a forum where disclosure was voluntary and calculated to benefit the disclosing party"). By asserting the privilege as a weapon against Coach Paterno for its own public-relations purposes and as a shield to resist discovery into the Freeh investigation, Penn State runs afoul of one of the most fundamental principles of fairness that informs the law of privilege. *See* R.441, Opinion and Order Regarding Stay During Appeal ("Because Penn State is attempting to invoke the Attorney-Client privilege as both a shield and sword, *Murray [v. Gemplus Int'l]* is applicable[.]").

Penn State's refusal to acknowledge this point underscores why its reliance on *Bagwell v. Pennsylvania Department of Education* is so misplaced. That case involved a Pennsylvania Open Records Act request for certain information related to Sandusky's crimes. Although the Commonwealth Court declined to find that Penn State's selective waivers of confidentiality resulted in a subject-matter waiver, the court took pains to emphasize that there Penn State was "not using its selective disclosures as weapons to the detriment of Requester. Unlike a party

seeking waiver of the privilege in a discovery dispute or otherwise in litigation, Requester claims no punitive effect from [Penn State's] selective disclosure." 103 A.3d 409, 419 (Pa. Commw. 2014). The court accordingly reasoned that "the 'fairness' reasons for imposing a broad subject-matter waiver do not exist here." *Id.*

In this case, fairness concerns point emphatically in the other direction. Indeed, if there is any case where fairness requires subject-matter waiver, it is this one. By knowingly and publicly disclosing information about the Freeh investigation and Report for its own tactical purposes and to the extreme prejudice of Coach Paterno and other plaintiffs, Penn State waived both the attorney-client privilege and the work product protection with respect to the subject-matter of the Freeh investigation. *See, e.g., In re Grand Jury Proceedings*, 219 F.3d at 184 (privilege waived "where a corporation has disseminated information to the public that reveals parts of privileged communications or relies on privileged reports"). Courts have repeatedly recognized this common sense distinction, ordering the production of documents when entities publicly release otherwise confidential information and declining to order production when they do not. *Compare Allied Irish Banks, p.l.c. v Bank of Am., N.A.*, 240 F.R.D. 96 (S.D.N.Y. 2007) (bank ordered to produce documents generated during internal investigation of fraudulent trading scheme by one of its traders when bank announced report of investigation

at press conference and published the report to address critical public accountability concerns and restore confidence for customers and shareholders), *with In re General Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2015 WL 221057 (S.D.N.Y. Jan. 15, 2015) (materials related to internal investigation into company's product defect and recall are privileged when report was presented confidentially to GM Board of Directors and not used affirmatively ("as a sword"), even though the report ultimately had to be disclosed in federal investigation and later in civil litigation).

II. Even if Penn State Had Not Waived the Privilege, the Attorney-Client Privilege Does Not Apply.

Because Penn State waived any privilege, there is no need to inquire into whether the attorney-client privilege applies in the first place. But even if an inquiry were appropriate, it is clear that the privilege does not apply. 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. R.382; *see T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1063 (Pa. Super. 2008) (party invoking the privilege has the burden to "produce sufficient facts to show that the privilege was properly invoked") (internal quotation marks omitted). Moreover, as discussed below, the Freeh Report was never intended to be confidential and the Freeh Firm was not retained to provide confidential legal advice.

A. The Freeh Report Was Not Intended to Be Confidential.

Penn State's efforts to cover up the factual bases for the Freeh Report run afoul of the basic principle that the attorney-client privilege protects only *confidential* communications. "[I]n Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect *confidential* client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice." *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011) (emphasis added). "Application of the privilege requires *confidential* communications made in connection with providing legal services." *Joe*, 782 A.2d at 31 (emphasis added); *see also Commonwealth v. Boyd*, 580 A.2d 393, 394 (Pa. Super. 1990) (per curiam) ("the attorney-client privilege is confined to confidential communications").

Penn State's opening brief makes no effort to dispute that Penn State always intended to reveal the Freeh Report and its findings to the general public. That is dispositive. The point of the Report was to prove to the world that Penn State was engaged in a transparent process of self-review and reflection. The process was *so* public, in fact, that the Freeh Firm emphasized that it "revealed this report and the findings herein to the Board of Trustees and the general public at the same time," R.100, and noted that the Freeh Firm "operated with total independence as it conducted this investigation." R.99. Penn State never had any say about what

would go into the Report, and it was understood that Freeh could investigate whatever he wished and disclose whatever he investigated.

That theme of transparency and public disclosure — and the concomitant lack of confidentiality — was consistent throughout the investigation. On November 21, 2011, Penn State issued a press release announcing that the Board of Trustees had engaged "Louis J. Freeh to lead an *independent* investigative review into all aspects of the University's actions. . . . The Special Committee and [Judge] Freeh said that the findings and recommendations of this work, when completed, *will be made available to the public.*" PSU Press Release. Six months later, the Chairman of the Task Force reiterated Penn State's intention to disclose the "full findings and recommendations" in the Report to the public. R.361–62. Having boasted repeatedly about commissioning a public report that was outside Penn State's power to control, Penn State cannot now insist on confidentiality.

For this reason, *amicus* Association of Corporate Counsel's concern that the trial court's decision will threaten "the ability of organizations — including universities, corporations, non-profit associations, *etc.* — to conduct internal investigations into alleged misconduct" is wildly mistaken. *Amicus* Br. 1. One is forced to wonder if the Association even bothered to read the trial court's opinion or the Freeh Report itself before submitting its amicus brief. Confidential internal investigations are not typically undertaken for public-relations purposes or to

publicly target defenseless third parties. Organizations that conduct proper internal investigations do not authorize the investigators to release their findings publicly and to law enforcement officials without any client review. Nor do they allow other interested parties access to or input into the process.

Certainly, companies commissioning proper internal investigations do not selectively waive the privilege to pin blame on third parties, and then assert the same privilege as a defense when those third parties try to defend themselves. *See In re Columbia/HCA*, 293 F.3d at 303–05 (recognizing the decision to waive attorney-client privilege or attorney work product as tactical decisions, and rejecting the need for selective waivers to encourage corporate self-policing and cooperative exchanges of information with the Government). The unique circumstances of this case pose no threat to the ability of "organizations and their employees" to "communicate fully and candidly with their attorneys." *Amicus* Br. 8. The trial court's decision recognizes simply that if an organization chooses to retain a firm to prepare a non-confidential report that is publicly released, neither the report nor the facts allegedly supporting it are privileged.

B. Penn State Did Not Hire the Freeh Firm to Provide Legal Advice.

Even if Penn State had intended to keep the Freeh Report confidential, it was not the kind of legal advice that is protected by the attorney-client privilege. Although the Report asserts that information "was gathered under the applicable

attorney-client privilege and attorney work product doctrine," R.97, those privileges do not apply merely because information is gathered by a law firm conducting an investigation. Nor do they attach simply because a document or party says they do.

The attorney-client privilege extends only to confidential communications between a client and her attorney in connection with providing legal services or advice. 42 Pa. C.S.A. § 5928; *see also Nationwide Mut. Ins. Co.*, 924 A.2d at 1264. The party asserting the privilege has the initial burden to prove that it is properly invoked. *Joyner v. Se. Pa. Transp. Auth.*, 736 A.2d 35, 38 n.3 (Pa. Commw. 1999). Moreover, the privilege protects only disclosure of communications, not the disclosure of underlying facts. *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382, 392 (W.D. Pa. 2005).

Penn State has not come close to satisfying its burden. The Report was not a legal document in the slightest; it was an effort to satisfy the NCAA and the public by providing a public mea culpa and by scapegoating Coach Paterno and other senior University officials. The investigation Penn State commissioned the Freeh Firm to do, and the recommendations the Freeh Firm made, could just as easily have been performed by former law enforcement officials, educators, and other non-lawyers. Both the Engagement Letter and the Report itself make this clear.

Although Penn State emphasizes that the Engagement Letter sprinkles references to "legal services" throughout, *see* PSU Br. 32, the Scope of Engagement Section belies that characterization:

> [The Freeh Firm] has been engaged to serve as independent, external legal counsel to the Task Force 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 government authorities. The results of [The Freeh Firm's] investigation will be provided in a written report to the Task Force and other parties as so directed by the Task Force. . . . The report will contain [The Freeh Firm]'s findings concerning: i) failures that occurred in the reporting process; ii) the causes for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. [The Freeh Firm]'s report also will provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not happen again.

R.32. As the trial court aptly observed, "[a]t no point does the scope mention a purpose of securing either an opinion of law, legal services, or assistance in a legal matter." PSU Br., Ex. A, at 20.[2]

The Freeh Report itself is in accord. It declares that Penn State hired the Freeh Firm to investigate past conduct and make recommendations for reforms. In a section entitled "Scope of Review and Methodology," the Report explains that

[2] Penn State contends that the trial court's conclusion that the Freeh Group was providing legal services to Penn State is an "inaccurate assumption." PSU Br. 34. But that conclusion is based directly on the language of the engagement letter: "*For the purpose of providing legal services to the Task Force*, [the Freeh Firm] will retain Freeh Group International Solutions, LLC (FGIS") to assist in this engagement." PSU Br., Ex. A, at 20 (emphasis added).

the Freeh Firm "was asked to perform an independent, full and complete investigation of: The alleged failure of Pennsylvania State University personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky ("Sandusky"); [and] [t]he circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth." R.96. The Report made its recommendations public. *See* R.215–32, Freeh Report Ch. 10 ("Recommendations for University Governance, Administration, and the Protection of Children in University Facilities and Programs."). And nothing in the Report suggests that Penn State hired the Freeh Firm to provide confidential legal advice.

III. Even if Penn State Had Not Waived the Protection, The Work Product Protection Does Not Apply.

Penn State also claims sweeping protection under the attorney work product doctrine. Penn State's waiver of any work product protection aside, the work product doctrine would not apply in any event (and certainly not as a wholesale excuse not to produce the documents and materials subject to the subpoena). The Freeh Firm's work and files encompass far more than "work product"; moreover, the Freeh Report was not prepared in anticipation of litigation and manifestly not in anticipation of *this litigation*, where the information is especially relevant. Finally, under Pennsylvania law, Penn State does not have the right to assert the privilege on Pepper Hamilton's behalf.

A. The Freeh Firm's Files Are Not Work Product Prepared in Anticipation of Litigation.

In Pennsylvania, "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa. R. Civ. P. 4003.3. The work product protection is narrow: "work product is discoverable, with the exception of the mental impressions and opinions of the party's attorney and other representatives." *Dominick v. Hanson*, 753 A.2d 824, 826 (Pa. Super. 2000). "Documents, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file. The Rule is carefully drawn and means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more." Pa. R. Civ. P. 4003.3, Explanatory Note.

Given this narrow protection, there is little doubt that the vast majority of what the Estate seeks is not attorney work product. The Report describes its methodology as including over 430 interviews; review of 3.5 million pieces of electronic data and documents; review of applicable Penn State policies, guidelines, practices and procedures; and the establishment of a hotline to receive information relevant to the investigation. R.97. In particular, the Estate is entitled at least to the production of factual information that supports statements in the Report, as well as any signed witness statements in the Freeh Firm's files and any

other information that the Freeh Firm obtained from witnesses. Similarly, work product protection would not extend to the communications between the Freeh Firm, the NCAA, the Big Ten, Penn State, or others. "The 'protective cloak' of the qualified work product privilege 'does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.'" *Commonwealth v. Harrell*, 65 A.3d 420, 431 (Pa. Super. 2013) (quoting *Commonwealth v. Brinkley*, 480 A.2d 980, 941 (Pa. 1984)); *see also Brinkley*, 480 A.2d at 983 (affirming a trial court's order to disclose "substantially verbatim statements of the witnesses.").

Nor does anything else mentioned in the Freeh Report qualify as attorney work product. The Report was an independent investigation that was to be used for public purposes. The Freeh Firm is not counsel to Penn State in any litigation, and did not purport to offer advice in the Report about any litigation. "[T]he work product doctrine seeks to promote the adversary system . . . 'by protecting the confidentiality of papers prepared by or on behalf of attorneys *in anticipation of litigation.*'" *Commonwealth v. Williams*, 86 A.3d 771, 782 n.7 (Pa. 2014) (quoting *In re Ford Motor Co.*, 110 F.3d 954, 962 (3d Cir. 1997) (emphasis added). "The underlying purpose of the work product doctrine is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case." *Levy*, 94 A.3d at 443 (internal quotation marks omitted).

"Rule 4003.3, on its overall terms, manifests a particular concern with matters arising in anticipation of litigation." *Gillard*, 15 A.3d at 59 n.16.

Penn State's principal response is that the work product doctrine applies because the Engagement Letter says it does. PSU Br. 21. If that were the rule, a party could shield anything from disclosure. But the question is not what a party unilaterally decrees, it is whether the work product protection applies in substance. Penn State struggles mightily to connect the Freeh Report to anticipated litigation, but it cannot escape the inconvenient fact that the Report was prepared for public consumption. It had nothing to do with strategy, tactics, or with "prepar[ing] [Penn State's] case" in anticipation of litigation. Indeed, publicly disclosing such a report would be an odd way to prepare for litigation. The engagement letter contains *no* reference to litigation. None of the circumstances cited by Penn State as evidence of the threat of litigation, *see* PSU Br. 26, is mentioned in the engagement letter, which provides that the Freeh Firm's "services are limited at this time to the specific matter described herein." R.32. And, in any event, this Court has held that materials that "pre-dated any litigation . . . fall outside any reasonable definition of the phrase 'acquired or developed in anticipation of litigation.'" *Katz v. St. Mary Hosp.*, 816 A.2d 1125, 1127 (Pa. Super. 2003) (citing *Neal by Neal v. Lu*, 530 A.2d 103, 108 (Pa. Super. 1987)).

Although Penn State is correct that the anticipation of litigation requirement is not a hard-and-fast rule, it is also forced to acknowledge that "the attorney work product doctrine is *especially protective* of material prepared by an attorney in anticipation of litigation." PSU Br. 25. Penn State's own cases, moreover, make clear that "the line between what work product is discoverable and what work product is protected is" drawn at matters involving "'value,' 'merit,' 'strategy,' or 'tactics,'" which "are protected unless they have evidentiary value." *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C. 4th 23, 30 (C.C.P. 1996). Penn State cannot reasonably contend that the Freeh Firm was strategically gathering information in order to defend Penn State against litigation, or that the Freeh Firm's files as a whole meet the stringent test. As the Report and Penn State have repeatedly declared, the point of the investigation and the Freeh Firm's work was to conduct an independent review into failures relating to Sandusky that would be disclosed in a public report.

B. The Work Product Protection Applies Only in the Litigation For Which the Materials Were Prepared And Must be Invoked by the Professional.

In Pennsylvania, "the protection found in Rule 4003.3 is applicable only to the litigation of the claim for which the impressions, conclusions and opinions were made." *Reusswig v. Erie Ins.*, 49 Pa. D. & C. 4th 338, 349 (C.C.P. 2000); *see also Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C. 5th 242, 249 (C.C.P. 2007)

(the "protections [recognized under Pennsylvania law] apply only to the litigation of the claims for which the impressions, conclusions, and opinions were made"); *Yohe v. Mut. Life Ins. Co.*, 7 Pa. D. & C. 4th 300, 303–04 (C.C.P. 1990); *Little v. Allstate Ins. Co.*, 16 Pa. D. & C.3d 110, 112 (C.C.P. 1980). Even if Penn State foresaw litigation on the horizon generally, that would still not provide a basis to resist disclosure in *this* case.

Moreover, "the work-product privilege is not absolute and items may be deemed discoverable if the 'product' sought becomes a relevant issue in the action." *Gocial v. Indep. Blue Cross*, 827 A.2d 1216, 1222 (Pa. Super. 2003). It may also give way where the requesting party needs the requested material. *Lane v. Hartford Acci. & Indem. Co.*, 5 Pa. D. & C. 4th 32, 41–42 (C.C.P. 1990). "[W]ork product is discoverable where the legal opinion of an attorney or another representative is a relevant issue in an action . . . If legal opinions, conclusions, memoranda, notes or summaries, legal research or legal theories are specifically relevant to issues in a case, the requesting party is not even required to show undue hardship to obtain discovery elsewhere." *Executive Risk Indem. Inc. v. Cigna Corp.*, 81 Pa. D. & C. 4th 410, 425–26 (C.C.P. 2006).

Here, the extensive scope of the investigation was cited as support for the authoritative nature of the Freeh Report. R.97–100. Plaintiffs-Appellees could not reasonably duplicate that effort in trying to determine the basis for statements in

the Report. Accordingly, for documents or information responsive to the subpoena that might arguably constitute work product, the protection should give way to the plaintiffs-appellees' substantial need for the requested information.

Finally, Penn State may not assert the work product privilege on Pepper Hamilton's behalf. In Pennsylvania, "the protection stemming from the work product doctrine belongs to the professional, rather than the client." *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 866 (3d Cir. 1994). Penn State tries to distinguish *Rhone-Poulenc* on the grounds that there "the privilege was not the client's to *waive*." PSU Br. 24. But it would make no sense to hold that an assertion from both the attorney and the client is required to *waive* the protection, but an assertion by either alone is enough to *invoke* the protection. When it comes to a privilege or a protection, the party or parties who may waive it are the same as the party or parties who may invoke it.

Penn State claims that "this Court *regularly* entertains appeals from discovery ruling [sic] which a client-litigant — not the attorney — is asserting the attorney work product doctrine." PSU Br. 23 (emphasis in original). But none of those cases holds that the client may assert the work product protection in the absence of an assertion by the professional. Although Pepper Hamilton has now belatedly asserted work product on its own behalf and filed its own appeal to this Court, its claim for protection suffers from the same flaws as Penn State's. Indeed,

like Penn State, Pepper Hamilton has never identified or logged the specific documents that it claims warrant protection.

* * * *

Accepting Penn State's arguments and overruling the trial court in this case would not further the important policies that underlie the attorney-client privilege or the attorney work product doctrine. Those protections apply, as they should, in cases where parties undertake confidential investigations or retain outside counsel to provide legal advice in anticipation of litigation. But the only way to protect those privileges is to ensure that they are not abused or stretched to a breaking point in cases where they do not apply.

In this case, Penn State retained the Freeh Firm to undertake an independent investigation over which Penn State relinquished control and to publish the results of that investigation in a public report that Penn State never reviewed and was subject to an express waiver of all applicable privileges. The Freeh Firm shared the results of its investigation with law enforcement authorities and with third parties, including the NCAA, and no one ever intended that the report would remain confidential. Moreover, Penn State has used that report for its own advantage and as a public relations document to appease the NCAA and to take blame away from the University as a whole by pinning it on Coach Paterno and other plaintiffs. In these circumstances, for all the reasons set forth above and as

the trial court correctly determined, Coach Paterno and the other plaintiffs are entitled to discovery into the Freeh Report and the bases for its outrageous conclusions.

CONCLUSION

The trial court's decision should be affirmed.

Respectfully Submitted,

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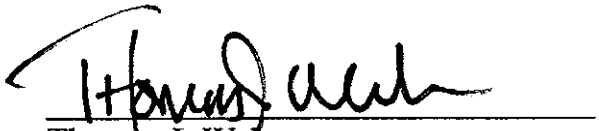
CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App. P. 2135(d), I hereby certify that the foregoing Brief complies with the 14,000 word limit prescribed by Pa. R. App. P. 2135(a)(1).



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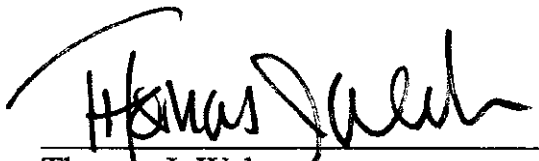

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IN THE

Superior Court of Pennsylvania

No. 1709 MDA 2014

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-Appellees,

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,

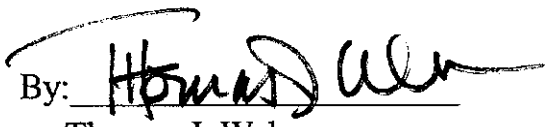
Defendant-Appellant.

APPELLEES' DESIGNATION OF RECORD EXCERPTS

Pursuant to Pennsylvania Rule of Appellate Procedure 2154, Plaintiffs-Appellees hereby designate the following materials for inclusion in the reproduced record:

1. Excerpts of Transcripts of 5/19/14 Hearing (pp. 111-122) ;
2. Plaintiffs' Response to Motion for Stay Pending Appeal, Exhibits C - I (10/23/2014);
3. Opinion and Order on Plaintiffs' Motion for Enforcement of Subpoena (May 8, 2015).

Respectfully submitted,

By: 

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Dated: May 11, 2015

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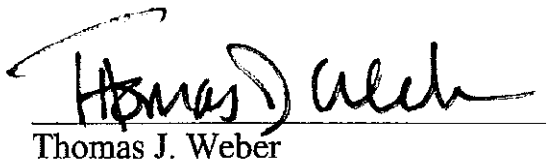

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EXHIBIT E

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.

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.

Defendants.

Case No. 2014-L-002963

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]

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[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

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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

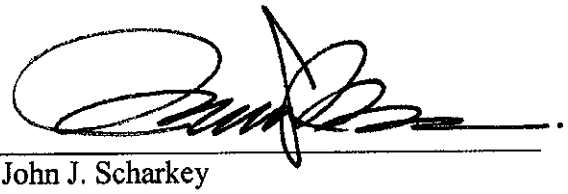
standard format for a privilege log, Respondents have proffered a woefully inadequate and conclusory list of five categories of documents withheld. Four of the five categories list common interest as the applicable privilege. In two of the categories, the withheld documents span a nine-month period, 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



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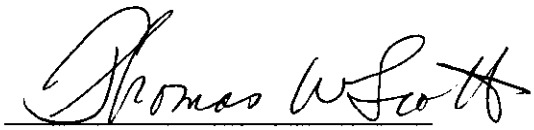

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