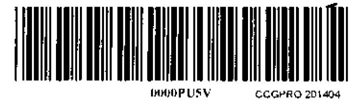
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IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

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

STATEMENT REGARDING JOINT MOTION FOR PROTECTIVE ORDER

Filed on Behalf of:
The Pennsylvania State University

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2014 JUL -3 PM 3:48

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

CIVIL DIVISION

Docket No. 2013-2082

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;

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President of the NCAA; and

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Defendants,

and

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Nominal Defendant.

2014 JUL -3 PM 3:48
PROTHONOTARY

THE PENNSYLVANIA STATE UNIVERSITY'S
STATEMENT REGARDING JOINT MOTION FOR PROTECTIVE ORDER

The Pennsylvania State University ("Penn State" or "the University"), by and through its undersigned counsel, hereby requests that the Court enter the Protective Order that is attached as Exhibit A to the parties' Joint Motion for Protective Order, and files this Statement in support of that request.

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DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY PA
FILED FOR RECORD

A. Introduction

This litigation concerns events which occurred in what was perhaps the most difficult period in the University's history. Public interest in this litigation is, and is expected to remain intense. Nevertheless, this litigation remains a judicial proceeding whose sole proper function and purpose is to resolve the legal and equitable claims and defenses that have been asserted by the parties. To that end, the University is seeking a protective order that prevents documents and information produced in pretrial discovery in this case from being used for improper purposes other than to litigate claims before this Court.

As stated in the Joint Motion for Protective Order, the parties have agreed to all terms of a protective order, except that the Plaintiffs will not agree to the following provision, which is found at paragraph 5(a) of the proposed protective order attached as Exhibit A to the Joint Motion for Protective Order:

> **(a) General Protections**. All pre-trial discovery materials in this litigation (including materials that are not designated as constituting Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information) shall be used solely for the purpose of preparing and prosecuting the Parties' respective cases, and shall not be used or disclosed for any other purpose. Nothing in this Order, however, limits: (i) the Parties' use of materials not designated as Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information that the Parties, in good faith, have made part of the judicial record in this case; or (ii) the use of information a Party legitimately obtained through public sources.

As shown below, this provision is entirely reasonable and does not infringe on any of the rights of the parties, the press or the public. Moreover, this provision is necessary and appropriate in this case because it is clear that, unless precluded from doing so by this Court, Plaintiffs do intend to use pretrial discovery for purposes other than preparing and prosecuting the claims they have asserted in this litigation.

B. The Freeh Firm Database.

As this Court is aware, as part of its investigation, the Freeh Firm generated a number of documents which the University has claimed are immune from discovery by virtue of the attorney-client privilege and/or the work product doctrine. That issue has been briefed and was argued before the Court at the hearing on May 19, 2014.

The current dispute concerns other, non-privileged University documents and information that the University may produce as part of the pretrial discovery process. Specifically, as this Court is aware, as part of its investigation, the Freeh Firm assembled an enormous electronic database of over 3.5 million University documents. Included in this database are many non-privileged emails and other documents that numerous University officials and employees generated and/or received over a multi-year period. These were emails and documents that those individuals had no idea or expectation would ever be reviewed by others, let alone become the subject of a highly sensitive investigation and, subsequently, of highly-publicized litigation related to that investigation.

As part of the discovery process in this case, the University has agreed to produce to Plaintiffs, among other things, relevant non-privileged emails and other documents that are contained in this electronic database and are properly requested by Plaintiffs. (The database also includes privileged information, but, again, privileged documents should not be produced at all and are therefore not part of this Motion). Specifically, the University has informed Plaintiffs

that they may provide the University with search terms intended to recover documents from the database that may be responsive to the Plaintiffs' discovery requests and relevant to Plaintiffs' claims in this case. The University has agreed to search the database using the search terms provided by Plaintiffs, and, if a reasonable number of documents are identified, review those documents and produce any non-privileged documents that are relevant to any of Plaintiffs' claims that may survive the Preliminary Objections.

It is likely that some of the non-privileged documents that may be identified and produced through this process will be designated as being "confidential" pursuant to the terms of a protective order on which all parties have agreed. It is also likely, however, that non-privileged relevant documents will be produced that are not designated "confidential". It is these emails and documents that are the subject of the current dispute.

C. The Plaintiffs' Intend to Conduct a Public Relations Campaign Relating to the Issues in This Litigation.

The University does not seek to interfere with the Plaintiffs' right to pursue any claims that the Court may rule they are entitled to pursue in this litigation. The University is also fully committed to the development of the factual record in accordance with the legitimate processes and purposes of this litigation and other legal proceedings.

But statements by the Plaintiffs and their Public Relations consultant,[1] together with Plaintiffs' refusal to agree to perfectly innocuous language in a protective order that says merely that the parties will not use or disclose documents and information obtained in discovery for purposes other than to prepare and prosecute their cases, make clear that Plaintiffs may either

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[1] *See*, statements cited in the NCAA's submission, which collectively suggest that this lawsuit, at least any purported claims against and attempted discovery from the University, is more about use of discovery for public relations purposes than it is about presenting a legitimate legal claim seeking a proper legal remedy.

make these private emails and other documents public themselves or provide them to others to do so for reasons outside of the legitimate purposes of the litigation.

Indeed, in their Statement in Support of Entry of Agreed Protective Order ("Plaintiffs' Statement") filed today, the Plaintiffs themselves cite "[t]he public's interest in and right to know what really happened" and state that "the prospect of public scrutiny" is of concern to the University. (*See*, Plaintiffs' Statement, pp. 3-4). This is simply not the case. Again, the University is fully committed to the development of the factual record in accordance with the legitimate processes and purposes of this litigation and other legal proceedings. Moreover, as explained below, nothing in the protective order that the University proposes would in any way limit the discovery that Plaintiffs are able to obtain in this litigation. Nor would it in any way interfere with the public's access to any judicial records in this litigation.

By relying so heavily on the public's "interest in" and "right to know", instead of how the proposed protective order might affect the litigation, Plaintiffs' Statement confirms that Plaintiffs intend to use documents and information obtained in pretrial discovery not merely to litigate claims and defenses in this case, but also to try to influence public opinion. Such use of discovery for non-litigation purposes would be an abuse of the litigation and discovery process and, indeed, our adversarial system of justice. It is an abuse that this Court should prevent by entering the protective order that the University requests, which requires that pretrial discovery materials in this case only be used for the purposes of this litigation.

D. The Plaintiffs Have No Right to Disseminate Documents <u>and Information That They Obtain During Pretrial Discovery.</u>

Any contention by Plaintiffs that they have a legal right to disseminate and publicize documents and information that they obtain in pretrial discovery is incorrect. As the United

States Supreme Court made clear in its seminal decision on this issue, *Seattle Times Company v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L. ED.2d 17 (1984), the Plaintiffs have no First Amendment right to disseminate to the public the documents and information that they obtain in pretrial discovery. In *Seattle Times*, two newspapers which had been publishing stories about a religious organization and its spiritual leader were sued by the organization and its leader for defamation and invasion of privacy. As part of the discovery process, the newspapers sought to obtain substantial information regarding the financial affairs of the organization. In resisting the discovery, the organization argued that the newspapers had "stated their intention to continue publishing articles about the respondents and this litigation, and their intent to use information gained through discovery in future articles." 467 U.S. at 25, 104 S.Ct. at 2203, 81 L. ED.2d at 22.

The trial court ordered that the organization was required to produce the requested information, but entered a protective order prohibiting the newspapers "from publishing, disseminating, or using the information [obtained in discovery] in any way except where necessary to prepare for and try the case." 467 U.S. at 27, 104 S.Ct. at 2204, 81 L. ED.2d at 23. The newspapers appealed the entry of the protective order. They argued that the public had an interest in knowing more about the religious organization that was their adversary in the litigation, and claimed a First Amendment right to disseminate any information they obtained in pretrial discovery. 467 U.S. at 30-31, 104 S.Ct. at 2206, 81 L. ED.2d at 25.

The Supreme Court rejected the newspapers' contention that they had a right to disseminate the documents and information they obtained in discovery to the public. As the Supreme Court explained:

> As in all civil litigation, petitioners [the newspapers] gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no *First Amendment*

> right of access to information made available only for purposes of trying his suit. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) ("The right to speak and publish information does not carry with it the unrestrained right to gather information"). Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations.

467 U.S. at 32, 104 S.Ct. at 2207, 81 L. ED.2d at 26-27. (*citation omitted*)

The Supreme Court also explained that restricting the use of the pretrial discovery materials does not offend the tradition of open trials and public access to judicial proceedings:

> Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, *Gannett Co. v. DePasquale*, 443 U.S. 368, 389 (1979), and, in general, they are conducted in private as a matter of modern practice. . . . . . Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

467 U.S. at 33, 104 S.Ct. at 2207-08, 81 L. ED.2d at 27. (*citations omitted*)

Finally the Supreme Court makes clear that, given the liberal scope of discovery that is permitted in litigation, it is necessary and proper that the trial courts protect against abuse of the process:

> Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by *Rule 26(b)(1),* it is necessary for the trial court to have the authority to issue protective orders conferred by *Rule 26(c)*. It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously impact privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
>
> There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has an interest in this sort of abuse of its processes. . . . . The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders.

467 U.S. at 34-36, 104 S.Ct. at 2208-09, 81 L. ED.2d at 28-29. (*citations omitted*)

The Plaintiffs in this case are attempting to do precisely the same thing that the Supreme Court held that the newspapers in *Seattle Times* had no right to do, and held that the trial court in *Seattle Times* properly precluded them from doing. That is, Plaintiffs want to use the discovery process in this case to obtain documents and information that they could then disseminate to the public. This is an abuse of the discovery process that justifies the entry of a protective order that contains the provision the University requests restricting the use of pretrial discovery for purposes of the litigation only.

E. The Press and the Public Have No Right of Access to <u>Pretrial Discovery Materials that Are Not Made Part of the Judicial Record.</u>

Any contention by the Plaintiffs that, because this case is of interest to the public, the press and the public have a right to see the documents and information produced in discovery is similarly mistaken. Just as litigants have no right to abuse the discovery process by voluntarily and intentionally disseminating pretrial discovery materials for purposes other than pursing their claims and defenses in the litigation, it is also settled that neither the press nor the public have a right to access pretrial discovery materials. For example, in *Stenger v. Lehigh Valley Hosp. Ctr.*, 382 Pa. Super. 75, 86, 89, 554 A.2d 954, 959, 961 (1989), the Pennsylvania Superior Court, following *Seattle Times*, held that a newspaper had no right to intervene in a case of public interest in order to obtain pretrial discovery materials:

> Discovery in Pennsylvania rarely takes place in public. Depositions are usually scheduled in private quarters, at times and places most convenient for those involved. Interrogatories are also privately answered. Thus the privacy concerns regarding the scope and manner of discovery articulated by the Supreme Court in *Seattle Times* are clearly present at bar.
>
> . . .
>
> private documents collected during discovery are not judicial records. ... For the reasons articulated in the constitutional section of this opinion, discovery is essentially a private process. . . . . Accordingly, in the case at bar, the

> [newspaper] does not have a common law right of access to discovered information. (*citations omitted*)

Similarly, in *Hutchison by Hutchison v. Luddy,* 417 Pa. Super. 93, 114, 611 A.2d 1280, 1291 (1992), the Pennysl vania Superior Court, while affirming the unsealing of some records in that case, clearly held that pretrial discovery was not subject to public access:

> However, we note that while we affirm Judge Grine's decision to open the record in this case, our decision extends only to the judicial records. Any aspect of Judge Grine's decision that could be interpreted as opening up the pretrial depositions and interrogatories for public inspection is hereby reversed as the pretrial depositions and interrogatories are not judicial records. *See Seattle Times Co. v. Rhinehart, supra, Hutchinson v. Luddy, supra,* 389 Pa. Superior Ct. at 509-512, 581 A.2d at 581; *Stenger v Lehigh Valley Hosp. Center, supra.*

F. The Proposed Protective Order Will Not Restrict Public Access to Judicial Records.

It is important to note that the language in paragraph 5(a) of the protective order that the University proposes will not in any way interfere with or inhibit the press's and the public's traditional access to judicial records in this litigation. Indeed, in drafting paragraph 5(a), the University has taken special precaution to ensure that nothing in the protective order be used to inhibit public or press access to judicial records in this case.[2] The language in paragraph 5(a) of the protective order that the University proposes expressly states:[3]

> Nothing in this Order, however, limits: (i) the Parties' use of materials not designated as Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information that the Parties, in good faith, have made part of the judicial record in this case; or (ii) the use of information a Party legitimately obtained through public sources.

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[2] In *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157 (3rd Cir. 1993) the Court of Appeals for the Third Circuit further extended the protection afforded pretrial discovery materials by holding that judicial records did not include attachments to motions filed with the court relating to pretrial discovery.

[3] The "good faith" exception is necessary because it would not be appropriate to make non-confidential discovery materials part of the judicial record of this case solely for the purpose of taking advantage of the language in paragraph 5(a) that provides there is no restriction on the use of non-confidential discovery materials that have been part of the judicial record.

G. **Conclusion**

In conclusion, the law is settled and clear that the protective order that the University requests in no way infringes on the Plaintiffs' rights, or on the public's rights, with respect to documents and information that are produced in discovery in this case. Furthermore, the order that the University requests will not in any way interfere with or inhibit Plaintiffs' ability to prosecute the claims that they have asserted in this litigation or to seek discovery in support of any such claim.

Thus, the University's request that the Court order that documents and information obtained in pretrial discovery is this case be used by the parties only for the purposes of pursuing their claims and defenses in the litigation is entirely reasonable. Moreover, Plaintiffs' public statements, and their refusal to agree to only use pretrial discovery documents and information for purposes of this litigation, show that the protective order that the University seeks is, in fact, necessary and appropriate to protect against discovery abuse.

For these reasons, the University requests that the Court enter the protective order attached as Exhibit A to the parties' Joint Motion for Protective Order.

Respectfully submitted,

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Dated: July 3, 2014

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 3rd day of July, 2014, a true and correct copy of the foregoing Statement Regarding Joint Motion for Protective Order was served upon the following counsel via email and United States mail, first class, postage prepaid:

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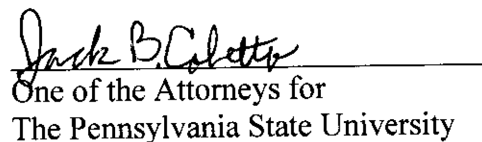

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