



GRAHAM B. SPANIER,

Plaintiff,

v.

LOUIS J. FREEH and
FREEH SPORKIN & SULLIVAN,
LLP,

Defendants.

COURT OF COMMON PLEAS
OF CENTRE COUNTY

No. 2013-2707

FILED
JAN 20 11:26 AM
CENTRE COUNTY PA

**DEFENDANTS' OBJECTIONS TO PLAINTIFF'S
NOTICE OF INTENT TO SERVE SUBPOENA ON
GOLDBERG KATZMAN P.C. PURSUANT TO RULE 4009.21**

Pursuant to Rule 4009.21(c) of the Pennsylvania Rules of Civil Procedure, Defendants Louis J. Freeh and Freeh Sporkin & Sullivan LLP ("FSS") object to the subpoena proposed by Plaintiff Graham Spanier, attached hereto as Exhibit A, for the following reasons stated herein.

PRELIMINARY STATEMENT

Plaintiff's Proposed Subpoena is directed to Goldberg Katzman P.C. ("Goldberg"), counsel for George Scott Paterno and The Estate of Joseph Paterno (the "Pateros") in a separate suit (the "NCAA Litigation") brought by the Pateros against the National Collegiate Athletic Association ("NCAA") and The Pennsylvania State University ("PSU"). The Proposed Subpoena does not seek documents created by Goldberg or otherwise obtained by Goldberg in the usual

course of business, but rather documents *produced to* Goldberg in discovery by, *inter alia*, third party Pepper Hamilton LLP (“Pepper Hamilton”) and PSU, who are adverse to Goldberg and the Paternos in the NCAA litigation. The documents sought by the Proposed Subpoena were originally in the possession, custody, or control of Pepper Hamilton and/or PSU, not Goldberg, and were turned over to Goldberg over the objections of Pepper Hamilton and PSU.

Plaintiff’s Proposed Subpoena plainly is improper. It makes no attempt to cabin its requests to documents relevant to *this* litigation, and ignores the fact that a great number of the documents purportedly requested by Plaintiff’s Proposed Subpoena are the subject of a privilege dispute pending in the Superior Court.¹ The Proposed Subpoena to Goldberg is nothing more than a blatant attempt to circumvent the objections Plaintiff would receive if he attempted to obtain these

¹ The “Pepper Hamilton Subpoena” served in the NCAA Litigation and referenced in Plaintiff’s Proposed Subpoena sought production of documents created by FSS that Pepper Hamilton and PSU argued were subject to the attorney-client privilege and/or work product protection. The Court initially overruled all privilege objections and ordered the production of those documents, and also denied a stay of his ruling pending its appeal. However, following a remand from the Superior Court for further consideration of the privilege claims, the trial court recently held, *inter alia*, that many of the documents for which Pepper Hamilton claimed protection as work product are irrelevant to the claims in the NCAA Litigation and therefore not subject to production in that action. That ruling is now back before the Superior Court. As a result, although these documents were produced in the NCAA Litigation, their status currently is pending before the Superior Court. Depending on the Superior Court’s ruling, Pepper Hamilton and PSU may be in a position to “claw back” many of the privileged documents that were produced.

documents from the appropriate custodians, rather than from an adverse party who received such documents in discovery.

Nor are these the only improprieties in Plaintiff's Proposed Subpoena. Permitting issuance of the subpoena to compel Goldberg to provide Plaintiff with documents that were produced in the NCAA Litigation would run afoul of the protective order entered in that case, which specifically provides that information designated as "Confidential" (such as the documents sought by Plaintiff) may be disclosed to "[o]ther persons" "only by written consent of the producing Party or upon order of the Court and on such conditions as may be agreed or ordered." Protective Order at 5(b)(ix), attached as Exhibit B. Were that not enough, in a provision entered by the Court in the NCAA Litigation, over the objection of the Plaintiffs therein, the protective order provides that even materials *not* designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" "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." *Id.* at 5(a). Plaintiff's Proposed Subpoena ignores the prohibition on disclosing documents obtained in discovery entered by the Court in the NCAA Litigation, and the Proposed Subpoena should be quashed on that ground as well.

Finally, Plaintiff's Proposed Subpoena improperly seeks, in a single subpoena, documents produced by multiple third parties. The Proposed Subpoena

requests documents produced not only by Pepper Hamilton, but also (i) by PSU and (ii) by “any other person or entity.” Plaintiff’s attempt to obtain documents from multiple third parties through the use of a single subpoena is improper.

Plaintiff should be compelled to seek any documents relevant to this litigation from the rightful possessors of those documents, rather than bypassing proper procedure by seeking a wholesale discovery production from an adverse party in an unrelated litigation.

**GENERAL OBJECTIONS TO
PLAINTIFF’S PROPOSED SUBPOENA**

1. Defendants object to the Proposed Subpoena, including the Definitions and Instructions, to the extent it seeks to impose obligations upon third parties beyond those imposed by the Pennsylvania Rules of Civil Procedure or other applicable law.

2. Defendants object to the Proposed Subpoena because it seeks, in a single subpoena, documents produced from multiple different third parties.

3. Defendants object to the Proposed Subpoena, including the Definitions and Instructions, to the extent it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

4. Defendants object to the Proposed Subpoena, including the Definitions and Instructions, to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or

any other applicable privilege, exemption, or immunity. Defendants do not waive, and expressly reserve, all such privileges.

5. Defendants object to the Proposed Subpoena to the extent it seeks information that is subject to federal or state statutes, court orders, rules, or regulations prohibiting or restricting disclosure, including but not limited to the protective order entered in the NCAA Litigation.

6. Defendants object to the Proposed Subpoena to the extent that it seeks production of documents that have already been provided to Plaintiff or are otherwise already in Plaintiff's possession, custody, or control, or that are publicly available or equally available to Plaintiff.

7. Defendants object to the Proposed Subpoena, including the Definitions and Instructions, to the extent it is vague, ambiguous, and fails to specify with reasonable particularity the documents sought.

8. Defendants object to the defined term "Pepper Hamilton" as vague, ambiguous, and overbroad to the extent that it includes "agents, employees, representatives, and attorneys, and any other person acting, or authorized to act, or purporting to act on behalf of Pepper Hamilton."

9. Defendants object to the defined term "PSU" as vague, ambiguous, and overbroad to the extent that it includes "agents, employees, representatives,

and attorneys, and any other person acting, or authorized to act, or purporting to act on behalf of PSU.”

**SPECIFIC OBJECTIONS TO
PLAINTIFF’S PROPOSED SUBPOENA**

The following responses are subject to and without waiver of the foregoing General Objections, and such General Objections are incorporated into each response as if fully set forth therein.

REQUEST FOR PRODUCTION NO. 1

Please produce all documents and communications produced by Pepper Hamilton in response to the Pepper Hamilton Subpoena and/or in response to any court order regarding the enforcement of the Pepper Hamilton Subpoena.

RESPONSE:

Defendants object to Request No. 1 on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, because it fails even to attempt to confine the requested documents to those that are relevant to this case. Defendants also object to Request No. 1 because it seeks documents protected by the attorney-client privilege, work product doctrine, or other applicable privilege or immunity from discovery. Defendants further object to Request No. 1 because it improperly seeks the production of documents produced in discovery in a different litigation and

subject to a protective order prohibiting their disclosure, rather than seeking those documents from the original custodian to whom they rightfully belong.

REQUEST FOR PRODUCTION NO. 2

Please produce all documents and communications produced by PSU in response to the Pepper Hamilton Subpoena and/or in response to any court order regarding the enforcement of the Pepper Hamilton Subpoena.

RESPONSE:

Defendants object to Request No. 2 on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, because it fails to even attempt to confine the requested documents to those that are relevant to this case. Defendants object to Request No. 2 because it seeks documents protected by the attorney-client privilege, work product doctrine, or other applicable privilege or immunity from discovery. Defendants further object to Request No. 2 because it improperly seeks the production of documents produced in discovery in a different litigation and subject to a protective order prohibiting their disclosure, rather than seeking those documents from the original custodian to whom they rightfully belong.

REQUEST FOR PRODUCTION NO. 3

Please produce all documents and communications produced by any other person or entity in response to the Pepper Hamilton Subpoena and/or in response to any court order regarding the enforcement of the Pepper Hamilton Subpoena.

RESPONSE:

Defendants object to Request No. 3 on the grounds that it overly broad and unduly burdensome, and seeks documents that are not relevant to any claim or defense in the case, because it fails to even attempt to confine the requested documents to those that are relevant to this case. Defendants further object to Request No. 3 because it seeks documents protected by the attorney-client privilege, work product doctrine, or other applicable privilege or immunity from discovery. Defendants further object to Request No. 3 because it improperly seeks the production of documents produced in discovery in a different litigation and subject to a protective order prohibiting their disclosure, rather than seeking those documents from the original custodian to whom they rightfully belong.

Respectfully submitted,

Dated: December 28, 2016



Robert C. Heim (Pa. 15758)
Michael L. Kichline (Pa. 62293)
DECHERT LLP
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2929 Arch Street
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(215) 994-4000 (phone)
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David S. Gaines, Jr. (Pa. 308932)
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*Attorneys for Defendants Louis J.
Freeh and Freeh Sporkin & Sullivan,
LLP*

EXHIBIT A

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

GRAHAM B. SPANIER,

Plaintiff,

v.

LOUIS J. FREEH and
FREEH SPORKIN & SULLIVAN, LLP,

Defendants.

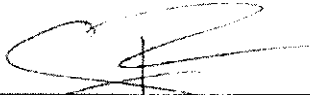
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: COURT OF COMMON PLEAS OF
: CENTRE COUNTY

:
: No. 2013-2707

**PLAINTIFF'S NOTICE OF INTENT TO SERVE SUBPOENA ON GOLDBERG
KATZMAN, P.C. TO PRODUCE DOCUMENTS AND THINGS FOR DISCOVERY
PURSUANT TO RULE 4009.21**

The Plaintiff, Graham B. Spanier, intends to serve a subpoena identical to the one that is attached to this Notice. You have twenty (20) days from the date listed below in which to file of record and serve upon the undersigned an objection to the subpoena. If no objection is made, the subpoena will be served.

Dated December 8, 2016

By: 
Thomas A. Clare (pro hac vice)
(VA Bar 39299)
Elizabeth M. Locke (pro hac vice)
(VA Bar 71784)
Andrew C. Phillips (pro hac vice)
(VA Bar 88880)
CLARE LOCKE LLP
902 Prince Street
Alexandria, Virginia 22314
Telephone: (202) 628-7400

Kathleen V. Yurchak
(Pa. 55948)
Steinbacher, Goodall & Yurchak
328 South Atherton Street
State College, PA 16801
Telephone: (814) 237-4100
Fax: (814) 237-1497

Attorneys for Plaintiff Graham B. Spanier

CERTIFICATE OF SERVICE

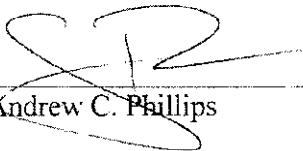
I hereby certify that a true and correct copy of the foregoing was served on the below
counsel of record on December 8, 2016.

David S. Gaines, Jr. (Pa. 308932)
MILLER, KISTLER & CAMPBELL
720 South Atherton Street, Suite 201
State College, PA 16801-4669
(814) 234-1500 (phone)
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Robert C. Heim (Pa. 15758)
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DECHERT LLP
Cira Centre
Philadelphia, PA 19104-2808
(215) 994-4000 (phone)
(215) 994-2222 (facsimile)

Dated: December 8, 2016

By:


Andrew C. Phillips

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

GRAHAM B. SPANIER, :
 :
 Plaintiff, :
 :
 v. : No. 2013-2707
 :
 LOUIS J. FREEH and :
 FREEH SPORKIN & SULLIVAN, LLP, :
 :
 Defendants. :

**SUBPOENA TO PRODUCE DOCUMENTS OR
THINGS FOR DISCOVERY PURSUANT TO RULE 4009.22**

TO: Goldberg Katzman, P.C., 4250 Crums Mill Road, Suite 301, P.O. Box 6991, Harrisburg,
PA 17112

Within twenty (20) days after service of this subpoena, you are ordered by the court to produce the following documents or things: See descriptive schedule of documents to be produced, attached hereto as Exhibit A.

These documents shall be produced at: Steinbacher Goodall & Yurchak, 328 South Atherton Street, State College, PA 16801.

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to product the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

THIS SUBPOENA WAS ISSUED AT THE REQUEST OF THE FOLLOWING PERSON:

Name: Kathleen V. Yurchak, Esquire
Address: Steinbacher Goodall & Yurchak
328 South Atherton Street
State College PA 16801
Telephone: (814) 237-4100
ID#: 55948
Attorney For: Plaintiff Graham B. Spanier

BY THE COURT:

DATE: _____

Seal of the Court

(Prothonotary/Clerk, Civil Division)

EXHIBIT A

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under Pa. R.C.P. No. 4009-21-27. As used in these Requests, the following terms are to be interpreted in accordance with these definitions:

DEFINITIONS

1. “You,” “your”, or “yours” shall refer to Goldberg Katzman, P.C., the entity to whom these Requests are addressed, and all of that entity’s agents, representatives, and attorneys, including but not limited to Thomas J. Weber.
2. “Pepper Hamilton” shall refer to the law firm Pepper Hamilton LLP, and all of that firm’s agents, representatives, and attorneys, and any other person acting, or authorized to act, or purporting to act on behalf of Pepper Hamilton.
3. “PSU” shall refer to The Pennsylvania State University, and all of its agents, employees, representatives, and attorneys, and any other person acting, or authorized to act, or purporting to act on behalf of PSU.
4. “Pepper Hamilton Subpoena” shall refer to the March 19, 2014 Subpoena to Produce Documents or Things for Discovery Pursuant to Rule 4009.22 issued to Pepper Hamilton LLP by Thomas J. Weber of Goldberg Katzman on behalf of George Scott Paterno, as duly appointed representative of the Estate and Family of Joseph Paterno, in civil action number 2013-2082, pending in the Centre County Court of Common Pleas.
5. “Communication” means the transmittal of information by any means, and shall mean and be deemed to refer to any writing or oral conversation, including, but not limited to, telephone conversations, conversations in meetings, letters, memoranda, notes, or electronic communications.

6. “Document” is an all-inclusive term with the broadest possible meaning accorded to it under case law and the Pennsylvania Rules of Civil Procedure, and means the original (or a true and accurate copy if the original is not available) and each non-identical copy (which is non-identical because of alterations, attachments, blanks, comments, notes, underlining, or otherwise) of any writing or record (whether in tangible, electronic, or any other form) in Your actual or constructive possession, custody, or control, including all documents You have provided to Your counsel. “Document” shall include, but is not limited to, an electronic or computerized data compilation (including email and other computer-readable files), whether or not printed, stored, or displayed, and any preliminary versions, drafts, or revisions thereof, ESI, Communication, memorandum, letter, correspondence, electronic mail, blog post, Internet post, report, note, message slip, telephone log or record, diary, journal, calendar, electronic organizer entry, writing, drawing, spreadsheet, presentation, ledger, minutes, financial report or record, draft, facsimile, contract, invoice, record of purchase or sale, graph, chart, photograph, video or audio recording, transcript, index, directory, or any other written, printed, typed, punched, taped, filmed, or graphic matter however produced, stored, or reproduced. “Document” also includes the file, folder tabs, and labels appended to or containing any Documents, as well as any metadata applicable to any Document.

7. The terms “Relating To” and/or “Reflecting” mean relating to, reflecting, concerning, referring to, constituting, embodying, connected to, in connection with, comprising, regarding, evidencing, describing, identifying, stating, analyzing, containing information concerning, and/or in any way pertaining to the subject matter of this action.

INSTRUCTIONS

The following instructions are applicable throughout these Requests and are incorporated into each individual Request.

1. These instructions and definitions should be construed to require responses based upon the knowledge of, and information available to, the person to whom these Requests are addressed, as well as all agents, representatives, and, unless privileged, attorneys and accountants, of that person.

2. These Requests are continuing in character, so as to require that supplemental responses be served promptly if additional or different information is obtained with respect to any Request.

3. No part of any Request should be left unanswered merely because an objection is interposed to another part of a Request. If a partial or complete response is provided, the responding party shall state that the response is partial or incomplete.

4. All objections shall be set forth with specificity and include a brief statement of the grounds for such objection.

5. Each Request shall be read to be inclusive rather than exclusive. Accordingly, the words "and" as well as "or" shall be construed disjunctively or conjunctively as necessary, in order to bring within the scope of each Request all information that might otherwise be construed to be outside its scope. "Including" shall be construed to mean "including, without any limitation." The word "all" includes "any" and vice versa. The past tense shall include the present tense so as to make the request inclusive rather than exclusive. The singular shall include the plural and vice versa. The masculine includes the feminine and vice versa.

6. Where a claim of privilege is asserted in objecting to any Request or part thereof, and documents or information is not provided on the basis of such assertion: (A) In asserting the privilege, you shall, in objection to the Request, or part thereof, identify with specificity the nature of the privilege (including work product) that is being claimed; and (B) The following information should be provided in the objection, if known or reasonably available, unless

divulging such information would cause disclosure of the allegedly privileged information: (1) For documents: (a) the type of document, (b) the general subject matter of the document, (c) the date of the document; and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

7. If, in responding to these Requests, you encounter any ambiguity when construing a Request, instruction, or definition, your response shall set forth the matter deemed ambiguous and the construction used in answering.

8. All documents that are responsive, in whole or in part, to any portion or clause of any paragraph of any Request shall be produced in their entirety.

9. Where any item containing marking(s) not appearing in the original, or drafts or altered from the original, then all such items must be considered as separate documents and identified and produced as such.

10. Unless otherwise specified in a particular request, the time periods covered by these Requests is March 19, 2014 to the present.

DOCUMENT REQUESTS

REQUEST NO. 1

Please produce all documents and communications produced by Pepper Hamilton in response to the Pepper Hamilton Subpoena and/or in response to any court order regarding the enforcement of the Pepper Hamilton Subpoena.

REQUEST FOR PRODUCTION NO. 2

Please produce all documents and communications produced by PSU in response to the Pepper Hamilton Subpoena and/or in response to any court order regarding the enforcement of the Pepper Hamilton Subpoena.

REQUEST FOR PRODUCTION NO. 3

Please produce all documents and communications produced by any other person or entity in response to the Pepper Hamilton Subpoena and/or in response to any court order regarding the enforcement of the Pepper Hamilton Subpoena.

EXHIBIT B

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, PETER KHOURY, 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

DEBRA C. IMHIEL
PROTHONOTARY
CENTRE COUNTY, PA

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STIPULATED CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER

WHEREAS, the Parties may seek discovery of documents, information, or other materials that qualify for protection from public disclosure or are otherwise required to be maintained as confidential;

WHEREAS, Rule 4012 of the Pennsylvania Rules of Civil Procedure provides for the issuance of protective orders limiting the disclosure and use of certain discovered information;

NOW, THEREFORE, the Parties to this Stipulated Confidentiality Agreement and Protective Order (the "Order") stipulate and agree to the terms of this Order as set forth herein:

1. **Scope.** All documents, the information contained therein, and all other information produced or disclosed in the course of discovery, including responses to discovery requests, deposition testimony and exhibits, and information derived directly therefrom (collectively "documents"), shall be subject to this Order and may be designated as "Confidential Information" or "Highly Confidential - Attorneys' Eyes Only - Information" pursuant to the provision set forth herein. This Order is subject to the Pennsylvania Rules of Civil Procedure on matters of discovery procedure and calculation of time periods.

2. **Confidential Information.**

(a) As used in this Order, "Confidential Information" means information or tangible things that the designating Party reasonably believes constitutes, contains or discloses non-public information that (i) is required by law or agreement or the National Collegiate Athletic Association Constitution, Operating Bylaws, or Administrative Bylaws to be maintained as confidential, or (ii) is proprietary, personal, financial, or other information which qualifies for protection from public disclosure consistent with Pennsylvania Rule of Civil Procedure 4012.

DEBRA C. IMEL
PROTHONOTARY
CENTRE COUNTY, PA

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(b) As used in this Order, "Highly Confidential - Attorneys' Eyes Only - Information" means non-public information the disclosure of which would create a substantial risk of serious irreparable injury to the designating Party or another that cannot be avoided by less restrictive means, including but not limited to non-public personally identifiable information (i.e., social security number, place of birth, or home address), confidential medical records or medical information, or other sensitive personal information. Information or documents that are otherwise available to the public may not be designated as Highly Confidential - Attorneys' Eyes Only - Information.

3. Designation.

(a) A Party may designate a document as (i) Confidential Information for protection under this Order by placing or affixing the words "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" on the document and on all copies; or as (ii) Highly Confidential Information for protection under this Order by placing or affixing the words "HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER - ATTORNEYS' EYES ONLY" on the document and on all copies. As used in this Order, "copies" includes electronic images, duplicates, extracts, summaries or descriptions that contain the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information.

(b) A non-party to the litigation that has agreed to be bound by the terms of the Agreement and Protective Order by executing Attachment A hereto may designate documents containing Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information for protection under this Order so that such information is subject to the terms of this Order and that producing non-party shall then be a producing Party under this Order.

(c) Parties may designate documents containing Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information produced by other Parties or non-parties.

(d) For Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information produced by a non-party or a Party other than the designating Party, a Party seeking a designation of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information pursuant to the terms of this Order may do so by serving on all Parties a log containing the Bates numbers or other description of the documents or information that it seeks to designate Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information Confidential within thirty (30) days of receiving copies of the documents or information. Should any Party object to this designation, such Party shall proceed in accordance with paragraph 10 of this Order.

4. Designation of and procedure for any deposition testimony. The following procedures shall be followed if Confidential or Highly Confidential- Attorneys' Eyes Only - Information is discussed or disclosed in any deposition permitted in this proceeding.

(i) The designating Party shall have the right to exclude from attendance at the deposition, during such time the designating Party reasonably believes Confidential or Highly Confidential Information will be discussed or disclosed, any person other than the deponent, the court reporter, and persons entitled to access to the Confidential or Highly Confidential - Attorneys' Eyes Only - Information.

(ii) At any time on the record during a deposition a Party may designate any portion of the deposition and transcript thereof to contain Confidential Information or Highly Confidential- Attorneys' Eyes Only Information. If such a request is made on the recording during the

deposition, the reporter shall later indicate on the cover page of the transcript that the transcript contains Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information by affixing the words "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" or "HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER -- ATTORNEYS' EYES ONLY" and list the pages and line numbers of the transcript in which Confidential or Highly Confidential - Attorneys' Eyes Only - Information is contained.

(iii) Alternatively, a designation of deposition confidentiality may be made in writing within thirty (30) days after counsel receives a copy of the transcript of the deposition. The designation shall contain a list of the numbers of the pages and lines of the transcript that are being designated as containing Confidential Information. Such designation shall be provided in writing to all counsel of record. All counsel of record shall treat all deposition transcripts as if Confidential for the first thirty (30) days after receipt of such deposition transcripts.

5. Protection of Documents and Information.

(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.

(b) **Limited Third Party Disclosures.** The Parties and counsel for the Parties shall not disclose or permit the disclosure of any documents or information designated as Confidential Information under this Order to any third person or entity except as set forth in subparagraphs (i)-(ix). Subject to these requirements, documents or information designated as Confidential Information under this Order may be disclosed to the following categories of persons:

- (i) **Counsel.** Internal or external counsel for the Parties and employees of counsel who have responsibility for the preparation and trial of the action;
- (ii) **Parties.** Individual Parties and employees of a Party but only to the extent counsel determines in good faith that the employee's assistance is reasonably necessary to the conduct of the litigation in which the information is disclosed;
- (iii) **The Court and its personnel;**
- (iv) **Court Reporters and Videographers.** Court reporters and videographers engaged for depositions but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound;
- (v) **Contractors.** Those persons specifically engaged for the limited purpose of making copies of documents, or organizing, processing, or hosting documents but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound;
- (vi) **Consultants and Experts.** Consultants, investigators, or experts employed by the parties or counsel for the parties to assist in the preparation and trial of this action but only after such persons have completed the certification

contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound;

(vii) **Witnesses at depositions.** During their depositions, witnesses in this action to whom disclosure is reasonably necessary, but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound. If a non-party witness refuses to execute the certificate in Attachment A, the parties agree to urge the non-party witness to execute Attachment A such that examination of the witness with respect to Confidential Information may proceed. Witnesses shall not retain a copy of documents containing Confidential Information, except witnesses may receive a copy of all exhibits marked at their depositions in connection with review of the transcripts. Pages of transcribed deposition testimony or exhibits to depositions that are designated as Confidential Information pursuant to the process set out in this Order must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Order;

(viii) **Authors and Recipients.** Any person who is shown through testimony or documentary evidence to have prepared, received or reviewed the document or information; and

(ix) **Others by Consent or Order.** Other persons only by written consent of the producing Party or upon order of the Court and on such conditions as may be agreed or ordered.

(c) **Control of Documents.** Counsel for the Parties shall make reasonable efforts to prevent unauthorized or inadvertent disclosure of Confidential Information. Counsel shall

maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of three years after the termination of the case.

6. Protection of Highly Confidential - Attorneys' Eyes Only - Information.

(a) Access to documents and information designated as Highly Confidential - Attorneys' Eyes Only - Information under this Order shall be limited to the persons identified in Paragraphs 5(b)(i) and 5(b)(iii)-(ix).

(b) **Control of Documents.** Counsel for the Parties shall make reasonable efforts to prevent unauthorized or inadvertent disclosure of Highly Confidential - Attorneys' Eyes Only - Information. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of three years after the termination of the case.

7. Preliminary Designation of Documents Being Inspected. If a Party elects to produce documents and things for inspection, it need not label the documents and things in advance of the initial inspection. For purposes of the initial inspection, all documents within the produced files will be considered as having been designated as Highly Confidential - Attorneys' Eyes Only - Information. Thereafter, on selection of specified documents for copying by the inspecting Party, the producing Party shall mark the original documents and/or the copies of such documents with the appropriate confidentiality marking at the time the copies are produced to the inspecting Party.

8. Inadvertent Failure to Designate. Inadvertent failure to designate Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information as such may be corrected by supplemental written notice given as soon as practicable. An inadvertent failure to designate documents or information shall not constitute a waiver of a Party's right to so designate such documents or information. As soon as the receiving Party becomes aware of the

inadvertent production, the documents or information must be treated as though they had been timely designated as Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, whichever claimed, under this Order, and the receiving Party must endeavor in good faith to obtain all copies of the documents that it distributed or disclosed to persons who are not authorized by paragraph 5(b) or 6(a). If the receiving Party is unable to obtain the return of all such documents or information, it shall inform the designating Party of those to whom the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information has been disclosed, and the designating Party may undertake to obtain the return of the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information.

9. Filing of Confidential Information and Highly Confidential Information. A party wishing to use any Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, or any papers containing or making reference to such information, in any pleading or document filed with the Court in this action, such pleading or document shall be redacted to conceal the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information or shall be filed under seal. The Court may under any circumstances be provided with an unredacted copy of any pleading or documents that is filed.

10. Challenges by a Party. The designation of any information as Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information is subject to challenge by any Party. The following procedure shall apply to any such challenge.

(a) Meet and Confer. A Party challenging the designation of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information must do so in good faith and must begin the process by conferring directly with counsel for the designating Party. In conferring, the challenging party must explain the basis for its belief that the confidentiality

designation was not proper and must give the designating Party an opportunity to review the designated material, to reconsider the designation, and, if no change in designation is offered, the designating party must explain the basis for the designation.

(b) **Judicial Intervention.** A Party that elects to challenge a confidentiality designation may file and serve a motion that identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with the meet and confer requirements of this procedure. The burden of persuasion of justifying that there is good cause for the confidentiality designation will remain on the designating Party. Until the Court rules on the challenge, all Parties shall continue to treat the materials as they were designated under the terms of this Order. A party will not be obligated to challenge the propriety of a Confidential or Highly Confidential designation at the time made, and failure to do so will not preclude later challenges.

11. **Use of Confidential Documents or Information at Hearings, Pretrial Conferences, or Other Public Court Appearances.** Nothing in this Order shall be construed to affect the admissibility of any document, material, or information at any hearing, pretrial conference, or other public court appearance. Nor shall anything in this Order be construed to prejudice a party's right to use at trial or in a hearing before the Court any Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information. A Party that intends to present, or which anticipates that another Party may present, Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information at a hearing, pretrial conference, or other public court appearance shall first seek to reach an agreement with the other Parties regarding the treatment of such materials. If an agreement is not possible, the Party shall bring

that issue to the Court's attention by motion or in a pretrial memorandum without publicly disclosing the Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at a hearing, pretrial conference, or other public court appearance.

12. Confidential Information or Highly Confidential Information Subpoenaed, Ordered Produced or Requested in Other Proceedings.

(a) If a receiving Party is served with a subpoena, an order issued in other civil, criminal or administrative proceedings, or any other form of compulsory process that would compel disclosure of any material or document designated in this action as Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, the receiving Party must so notify the designating Party in writing, immediately and in no event more than seven (7) court days after receiving the subpoena, order, process or request. Such notification must include a copy of the subpoena or court order.

(b) The receiving Party also must immediately inform in writing the person or entity that caused the subpoena, order, process or request to issue that some or all of the material covered by the subpoena or order is the subject of this Order. In addition, the receiving Party must deliver a copy of this Order promptly to the person or entity that caused the subpoena, order, process or request to issue.

(c) The purpose of imposing these duties is to alert the interested persons to the existence of this Order and to afford the designating Party in this case an opportunity to seek protection of its Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information in the court or tribunal from which the subpoena or order issued. The designating

Party shall bear the burden and the expense of seeking protection in that court of its Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, and nothing in these provisions should be construed as authorizing or encouraging a receiving Party in this action to disobey a lawful directive from another court. The obligations set forth in this paragraph remain in effect while the Party has in its possession, custody or control Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information by the other Party to this case.

13. Obligations on Conclusion of Litigation.

(a) Unless otherwise agreed or ordered, this Order shall remain in force after dismissal or entry of final judgment not subject to further appeal.

(b) Unless otherwise ordered or agreed to in writing, within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all persons in receipt of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information shall use reasonable efforts to either return such materials and copies thereof to the producing Party or destroy such Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information and certify that fact. Such reasonable efforts shall not require the return or destruction of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information from (i) disaster recovery or business continuity backups, (ii) data stored in system-generated temporary folders or near-line storage, (iii) unstructured departed employee data, and/or (iv) material that is subject to legal hold obligations or commingled with other such material. Backup storage media will not be restored for purposes of returning or certifying destruction of Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, but such retained information shall continue to be treated in accordance with the Order. Counsel for the Parties shall be entitled to retain copies of court papers (and exhibits

thereto), correspondence, pleadings, deposition and trial transcripts (and exhibits thereto), legal memoranda, expert reports and attorney work product that contain or refer to Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information, provided that such counsel and employees of such counsel shall not disclose such Confidential Information or Highly Confidential - Attorneys' Eyes Only - Information to any person, except pursuant to court order. Nothing shall be interpreted in a manner that would violate any applicable canons of ethics or codes of professional responsibility.

14. Inadvertent production of privileged material. If a Party inadvertently produces or provides information subject to the attorney-client privilege, attorney work product doctrine, or other applicable privilege or immunity, the disclosure of the inadvertently disclosed information is not and will not be construed or deemed to be a general or specific waiver or forfeiture of any such privilege, immunity or work product protection that the producing Party would otherwise be entitled to assert with respect to the inadvertently disclosed information and its subject matter. Where the producing Party informs the receiving Party that privileged or other protected information has been disclosed, the receiving Party or Parties (i) must, within ten (10) business days, return or destroy the specified information and any copies thereof, (ii) must not use or disclose the information until the claim of privilege or other protection is resolved, (iii) must take reasonable steps to retrieve any such information that was disclosed or distributed before the receiving Party was notified of the claim of privilege or other protection and prevent any further dissemination of the information. Notwithstanding the above, in lieu of promptly returning or destroying the specified document or information, the receiving Party may, within five (5) business days, seek leave of Court to file the specified document or information under seal and request a determination of the claim of privilege or other protection while still

complying otherwise with paragraphs (ii) and (iii). However, the receiving Party cannot assert as a basis for the relief it seeks the fact or circumstance that such privileged documents were produced. The producing Party also must preserve the information until the claim is resolved.

15. Persons Bound. This Order shall take effect when entered and shall be binding upon all counsel of record and their law firms, the parties, and persons made subject to this Order by its terms.

16. No Admissions or Waiver of Objections. Producing, designating or receiving Confidential or Highly Confidential - Attorneys' Eyes Only - Information, or otherwise complying with the terms of this Order, shall not: (a) be construed to affect in any way the admissibility of any document, testimony, or other evidence at any hearing in or trial of the action; (b) prejudice the rights of a Party to object to the production of information or material that the Party does not consider to be within the proper scope of discovery or protected from discovery by virtue of the attorney-client privilege, the work product doctrine, or any other privilege or immunity from discovery; (c) prejudice the rights of a Party to apply to the Court for further protective orders and for additional protection for that Party's Confidential or Highly Confidential - Attorneys' Eyes Only - Information; or (d) prevent the Parties from agreeing in writing to alter or waive the provisions or protections provided for herein with respect to any particular information or material.

17. Order Subject to Modification. This Order shall be subject to modification or amendment by agreement of the Parties or by order of the Court.

18. Enforcement. A breach of the terms of this Order is subject to the full powers and jurisdiction of the Court, including but not limited to the powers of contempt and injunctive relief, and shall entitle the non-breaching Party to appropriate sanctions, including but not

limited to all attorneys' fees and other costs incurred in the enforcement of this Order.

19. **Trial.** Nothing herein shall govern the procedures to be used at trial, which will be set by the Court prior to the commencement of trial.

SO ORDERED.

Dated: 9/10/14



John B. Leete, Senior Judge
Specialty Presiding

CERTIFICATE OF SERVICE

I, David S. Gaines, Jr., hereby certify that I caused to be served on
December 28, 2016, a true and correct copy of the foregoing by first-class mail
upon the following:

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