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Via ECF

The Honorable Stefan R. Underhill
United States District Judge
United States District Court
915 Lafayette Boulevard
Bridgeport, CT 06604

Re: Stephanie Biediger, et al v. Quinnipiac University
Civil Action No. 3:09-CV-00621 (SRU)

Dear Judge Underhill:

At yesterday's pretrial conference in this matter, you invited counsel to submit case citations concerning the applicability of the work product doctrine to the memorandum authored by Athletic Director Jack McDonald, which has been submitted to you for *in camera* review to determine whether Defendant will be required to disclose it.

We understand that Defendant relies primarily on *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998). *Adlman* held a memorandum authored by an accountant and lawyer evaluating the tax implications of a proposed corporate restructuring could be protected from disclosure under the work product doctrine, on the ground that it was prepared "because of" expected litigation. The court described the memorandum as follows:

> The Memorandum was a 58-page detailed legal analysis of likely IRS challenges to the reorganization and the resulting tax refund claim; it contained discussion of statutory provisions, IRS regulations, legislative history, and prior judicial and IRS rulings relevant to the claim. It proposed possible legal theories or strategies for Sequa to adopt in response, recommended preferred methods of structuring the transaction, and made predictions about the likely outcome of litigation.

134 F.3d at 1195. The court noted that "[l]itigation was virtually certain to result from the reorganization and Sequa's consequent claim of tax losses. Sequa's tax returns had been surveyed or audited annually for at least 30 years." *Id.* at 1196.

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Ultimately, the Court of Appeals remanded the matter to the District Court to determine whether "substantially the same Memorandum would have been prepared in any event – as part of the ordinary course of business of undertaking the restructuring . . . ." *Id.* at 1204.

Plaintiffs contend that application of *Adlman* to the present case requires disclosure of the disputed document. Mr. McDonald is not a lawyer. He did not consult a lawyer before preparing the memorandum. His responsibilities as Athletic Director included Title IX compliance, so he would be expected to have knowledge of the subject, and to inform his supervisors of the possible consequences – with respect to Title IX – of any reduction in funding or elimination of teams in his Department. Similarly, he would be expected to offer strategies for complying with Title IX. Of course litigation is a potential consequence of noncompliance, so he would be expected to consider the possibility of such litigation, but that fact does not transform what is fundamentally a memorandum about the business of the Athletic Department, that likely would have been prepared regardless of whether litigation was expected, into one prepared "in anticipation of litigation" – *i.e.*, "because of" litigation that was "expected." It bears noting that in connection with its NCAA Division I certification, Quinnipiac committed itself to gender equity in athletics irrespective of any potential litigation. Failure to uphold that commitment could endanger the University's Division I status.

Plaintiffs respectfully call the Court's attention to *Lagace v. New England Central Railroad,* 2007 WL 2889465 (D.Conn.) (protecting an investigative report prepared by the defendant and an investigator retained by counsel after an accident had occurred, and where there was a "strong likelihood" of litigation). The case illuminates the extent to which litigation must be expected before the work product doctrine should apply.

The Court should also consider *Koppel v. United National Insurance Co.*, 2008 WL 5111288 (E.D.N.Y.). There, noting that insurance companies are in the business of investigating claims, the court held claim reports prepared by insurance company employees unprotected by the work product doctrine. Similarly here, the University Athletics Department is "in the business" of compliance with Title IX; it cannot continue to field competitive teams in NCAA Division I unless it attends to Title IX compliance. Mr. McDonald's memorandum is analogous to the claim reports held unprotected in *Koppel.* Indeed, it is even less deserving of protection, since no actual claim had been made when Mr. McDonald prepared his memorandum.

Please let me know if the Court would like any further submission on this issue. Thank you for your attention to this matter.

Very truly yours,

Jonathan B. Orleans

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