IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

CIVIL DIVISION

GRAHAM B. SPANIER,

Plaintiff-Counterdefendant,

v.

THE PENNSYLVANIA STATE UNIVERSITY,

Defendant-Counterplaintiff.

)Docket No. 2016-0571
)
)**MEMORANDUM OF LAW IN**
)**OPPOSITION TO PRELIMINARY**
)**OBJECTIONS TO SECOND AMENDED**
)**COUNTERCLAIMS**
)
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MEMORANDUM OF LAW IN OPPOSITION TO PRELIMINARY OBJECTIONS TO SECOND AMENDED COUNTERCLAIMS

The Pennsylvania State University ("Penn State" or "the University"), by its undersigned counsel, respectfully files the following memorandum of law in opposition to Plaintiff Graham B. Spanier's Preliminary Objections to the University's Second Amended Counterclaims.

INTRODUCTION

Dr. Spanier proffers ten reasons why this Court should sustain his preliminary objections and dismiss Penn State's Counterclaims in their entirety. Every one of his proffered rationales suffers from at least one fatal flaw. Dr. Spanier's preliminary objections, nine of which are demurrers, improperly ignore well-pleaded facts alleged in the Second Amended Counterclaims, and significantly mischaracterize the nature of the University's claims. All four of the University's Counterclaims are well-pleaded, and this Court should overrule all ten of Dr. Spanier's objections.

Dr. Spanier argues, first, that his alleged breach of his Employment Agreement is barred by Pennsylvania's four-year statute of limitations, on the theory that the Employment Agreement

was terminated effective November 9, 2011, by the terms of the Separation Agreement.[1] However, as set forth in the Separation Agreement itself, that document did not become effective until November 22, 2011. His argument also ignores the fact that the University alleges that Dr. Spanier breached the Employment Agreement each and every day between November 12 and November 15, 2011, before the Separation Agreement took effect and terminated the Employment Agreement. Dr. Spanier also ignores the fact that breaches of the Employment Agreement that occurred on or after November 12, 2011, were preserved by a tolling agreement the parties entered into in November, 2015. And, most importantly, Dr. Spanier ignores that there are disputed issues of fact as to the enforceability of the Separation Agreement, and therefore, as to the termination of certain provisions in the Employment Agreement, that cannot be resolved on preliminary objections.

Next, Dr. Spanier argues that the First Counterclaim must be dismissed because the University did not invoke the non-binding mediation provision of Section K of the Employment Agreement. However, that provision did not survive the termination of the Employment Agreement. Indeed, that the parties have no existing agreement to mediate is starkly evidenced by the fact that Dr. Spanier himself has sued for breach of the Employment Agreement's indemnification provisions, without ever seeking to mediate that dispute. And, lastly, even if the mediation clause were still operative (it is not), the Court should excuse any failure to mediate as futile. At the very least, the futility of any such effort is a disputed question of fact that cannot be resolved on preliminary objections.

Dr. Spanier also argues that all of the University's Counterclaims are barred by the integration clause and the release contained within the Separation Agreement. This argument altogether ignores the fact that the University alleges, *inter alia,* that it entered into the release

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[1] *See* footnote 1, *infra.*

(among other provisions of the Separation Agreement) in the reasonable belief that Dr. Spanier had fulfilled all of his duties, including his duties of disclosure and "utmost good faith." It also ignores that the enforceability of the Separation Agreement, and therefore the enforceability of the release contained in section 8 thereof, are the subject of factual disputes that the Court cannot resolve on a demurrer.

In several of his preliminary objections, Dr. Spanier contends that Penn State's counterclaims are barred by the two-year statute of limitations that governs claims for fraud and breach of fiduciary duty.[2] But Penn State is not asserting any such claim. To the contrary, Penn State's Counterclaims sound in breach of contract and in equity. The two-year limitations period that governs tort actions simply has no applicability whatsoever. Dr. Spanier also contends that Penn State's equitable Counterclaims fail as a matter of law because the University has a full, complete and adequate remedy at law. This argument essentially is an argument that the University could have brought (but did not bring) a claim for fraudulent inducement. However, not only is the University entitled to style its claims as it sees fit, Dr. Spanier's statute-of-limitations argument makes clear that the University would *not* have had a full, complete and adequate remedy at law if it had brought such a claim, because it would have been time-barred.

Dr. Spanier then argues that Penn State has waived its equitable claims, on a laches theory, because Penn State only asserted those claims after Dr. Spanier filed claims of his own against Penn State. Laches is an issue that is singularly ill-suited for resolution on preliminary objections. Whether, under all the circumstances, Penn State's forbearance in bringing its claims should be deemed unreasonable, and whether Dr. Spanier has suffered prejudice flowing from Penn State's decision to continue paying his salary of $600,000 while his criminal case played out, are fact-intensive issues that the Court should decline to resolve at the pleading stage.

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2 *See* footnote 1, *infra.*

Dr. Spanier also makes the astonishing argument that Penn State cannot establish that his alleged failures to disclose his role in deciding how to handle the reports of Sandusky's conduct in 2001 was the proximate cause of any injury to Penn State. Penn State has alleged, and intends to prove, that it would not have agreed to pay Dr. Spanier more than $6 million since November 2011 if he had disclosed the information he had affirmative duties to disclose. Moreover, it is nonsense for him to suggest that Penn State "and its own high-ranking officials were already aware" of what Dr. Spanier failed to disclose. The only "high-ranking" officials who were aware of the nature of Spanier's involvement in the 2001 Sandusky Incident, as documented by the emails that were discovered in 2012, were Spanier, Curley and Schultz, all three of whom either pleaded guilty to, or were found guilty of, endangering the welfare of a child by engaging in the very conduct described in those emails. In any event, Dr. Spanier's contention that his disclosure failures should be excused because "Penn State already knew" presents issues of fact that are not resolvable on a demurrer.

Lastly, Dr. Spanier argues that Penn State's claim for unjust enrichment should be dismissed because of "the existence of a valid written agreement between the parties," namely, the Separation Agreement. Again, this argument fails to recognize that the very validity and enforceability of the Separation Agreement is a matter subject to intense factual dispute, not appropriate for resolution on a demurrer.

In summary, all of Dr. Spanier's preliminary objections should be overruled, and the Court should direct him to answer Penn State's Second Amended Counterclaims.

ARGUMENT

A. The legal standard

The Court should sustain a preliminary objection "only in cases that are clear and free from doubt." *Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992); *see also Pennsylvania AFL-CIO v.*

Commonwealth, 757 A.2d 917, 920 (Pa. 2000) (same). Accordingly, "[i]f any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objection." *Richmond v. McHale,* 35 A.3d 779, 783 (Pa. Super. 2012).

Nine of Dr. Spanier's ten preliminary objections are demurrers pursuant to Pa. R. Civ. P. 1028(a)(4). In considering a demurrer, the Court must accept as true all well-pleaded allegations of fact in the pleading that is being challenged, as well as all inferences fairly deducible therefrom. *Abarbanel v. Weber,* 490 A.2d 877 (Pa. Super. 1985); *Laffey v. Lehigh Valley Dairy Co-op,* 390 A.2d 238 (Pa. Super. 1978). It is not proper for the Court to resolve a factual dispute when faced with a demurrer. *PJS v. Pennsylvania State Ethics Comm'n,* 669 A.2d 1105, 1112 (Pa. Commw. 1996).

Moreover, as a presumptive matter, an argument that a claim is barred by a statute of limitations is generally not appropriate for resolution on preliminary objections; rather, those arguments should be raised as new matter in a responsive pleading pursuant to Pa. R. Civ. P. 1030.[3] Pa.R.Civ.P. 1028, Note.

B. The Court should overrule the first preliminary objection because the First Counterclaim (Breach of the Employment Agreement) was timely-filed. [4]

Dr. Spanier contends that the First Counterclaim, alleging a breach of the Employment Agreement, is untimely because the Employment Agreement was terminated on November 9,

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[3] Penn State has filed, contemporaneously herewith, Preliminary Objections to Dr. Spanier's First, Fifth, and Sixth Counterclaims, each of which asserts that all or some of Penn State's Counterclaims are barred by a statute of limitations. As expressly noted in the Note to Pa. R. Civ. P. 1028, the defense that a claim is barred by a statute of limitations must be raised in new matter, not via a preliminary objection. Although courts will, on rare occasions, entertain a statute of limitations styled as a demurrer, it is not appropriate for the Court to do so here. Nevertheless, and without waiver of or prejudice to its position that the Court should grant its Preliminary Objections to Dr. Spanier's Preliminary Objections, and exclusively out of considerations of judicial economy, Penn State sets forth here its substantive responses to Dr. Spanier's First, Fifth and Sixth Preliminary Objections.

[4] *See* footnote 1, *supra.*

2011, meaning that the University needed to file a breach of contract claim on or before November 9, 2015. Far from illustrating why the First Counterclaim must be dismissed, Dr. Spanier's argument actually illustrates why courts rarely decide statute of limitations arguments on preliminary objections, and why it would be singularly inappropriate for this Court to do so here.[5]

In an effort to support his argument that the law compels the dismissal of the First Counterclaim, Dr. Spanier improperly ignores many of the facts alleged in the Second Amended Counterclaims — facts that preclude the dismissal of the University's breach of contract claim on a demurrer. *First,* Dr. Spanier altogether ignores that the University has pleaded that: (a) the Employment Agreement was partially terminated by the Separation Agreement; but (b) the Separation Agreement did not take effect until November 22, 2011. Second Amended Counterclaims ("2d Am. CC"), Exhibit 5, section 16 ("For a period of seven calendar days following Dr. Spanier's execution of this Agreement [on November 15], he may revoke it by delivery of a written notice of revocation . . . . *This Agreement shall not become effective or enforceable before the seven-day revocation period has expired.*") (emphasis added), 2d Am. CC, ¶ 34 ("[p]ursuant to section 16 thereof, the Separation Agreement did not become effective or enforceable until November 22, 2011").

In other words, it was not until November 22, 2011, that the provision of paragraph 2 of the Separation Agreement, in which it was "understood and agreed" that except in certain enumerated respects, the Employment Agreement "was terminated as of November 9, 2011," became "effective" or "enforceable." Prior to November 22, 2011, the Employment Agreement remained in effect.

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[5] *See Devine v. Hutt,* 863 A.2d 1160, 1167 (Pa. Super. 2004) (an affirmative defense of a statute of limitation is not properly raised in a preliminary objection in the nature of a demurrer).

Far from admitting that Dr. Spanier owed the University no contractual duties after November 9, 2011 (as Dr. Spanier argues in his brief), the University expressly alleges that "Dr. Spanier continued to owe the University the duties set forth in the 2010 Employment Agreement, including but not limited to the duties set forth in Section B thereof . . . up to and including November 22, 2011." *Id.*, ¶ 35. The University also alleged (in ¶ 32) that Dr. Spanier's contractual duty of good faith survived even the termination of most provisions of the Employment Agreement because:

> [t]he contractual right to a post-presidency transition period and the contractual right to continue serving as a tenured member of the University's faculty for five years at a guaranteed salary were subject to the contractual duties set forth in the 2010 Employment Agreement, including the duties set forth in Section B thereof. As such, the duties set forth in section B of the 2010 Employment Agreement survived the execution of the Separation Agreement.

Second, Dr. Spanier also improperly attempts to downplay the tolling agreement the parties entered into on November 12, 2015. *See* 2d Am. CC, ¶ 56 & Exhibit 6 ("Any claim which is not time-barred as of November 12, 2015 will not become time-barred after November 12 and while this Agreement is in effect."). *Third,* Dr. Spanier improperly ignores the fact that the University has expressly pleaded that he breached his contractual duties under the Employment Agreement each and every day between November 12, 2011 and November 15, 2011 (the day the University signed the Separation Agreement). *See, e.g., id.*, ¶¶ 62, 63. Those allegations of fact, which the Court must take as true for purposes of ruling on Dr. Spanier's demurrer, taken together with the tolling agreement, which renders timely any claim for a breach of contract that occurred on or after November 12, 2011, preclude the Court from concluding that the University's breach of contract claim is untimely.[6] A court may address an affirmative

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[6] Penn State denies that these allegations are "conclusory," as Dr. Spanier contends (Plaintiff's Memorandum in Support of Preliminary Objections to Defendant's Second Amended

defense, like the statute of limitations at issue here, only if it is apparent on the face of the pleadings. *Scavo v. Old Forge Borough,* 978 A.2d 1078 (Pa. Commw. 2009). Here, at the very least, the parties have a factual dispute over the date on which the Employment Agreement was effectively terminated, rendering Dr. Spanier's statute of limitations argument wholly inappropriate for resolution on preliminary objections. *See* Pa. R. Civ. P. 1028(a)(4), Note ("The defense of a . . . statute of limitations can be asserted only in a responsive pleading as new matter under Rule 1030.").

Dr. Spanier also argues that, as a matter of law, he owed the University no duties, contractual or otherwise, after November 9, 2011, and that this, too, warrants the dismissal of the First Counterclaim on a demurrer. The University vigorously disputes this position, including Dr. Spanier's construction of sections E.5 and E.6 of the Employment Agreement (which is attached to the Second Amended Complaint as Exhibit 1). Section E.5 provides that the post-presidency transition period shall commence "immediately upon the completion of the Term, or the effective date of termination if this Agreement is terminated without Cause." As explained *supra,* however, the University has amply pleaded that the termination of the Employment Agreement was not effective until November 22, 2011.

Next, section E.6 of the Employment Agreement provides that "[f]ollowing his service as President, Dr. Spanier shall have the title of President Emeritus. In addition, *Dr. Spanier shall*

Counterclaim ("Spanier Mem.") p. 11). To the contrary, these allegations are well-grounded in the facts, including the express language of the Separation Agreement, which expressly provides its own effective date, and, by necessary implication, the date on which the Employment Agreement terminated.

Pen State also disputes Dr. Spanier's suggestion that the tolling agreement only tolled a claim for a breach of the Separation Agreement, not a claim for a breach of the Employment Agreement (Spanier Mem. p. 10 n.2). The tolling agreement broadly encompasses "any time limitations . . . on claims which Penn State may assert against Dr. Spanier in the future . . . relating to his performance as Penn State's President, the adoption, validity or enforceability of his Separation Agreement dated November 15, 2011, payments made thereunder, and/or his performance of his obligations thereunder."

continue to hold a tenured faculty position as a Professor . . . ." *Id.* (emphasis added). Accordingly, and consistent with the language of section E.6 of the Employment Agreement, the Second Amended Counterclaim expressly alleges that:

> Dr. Spanier has remained as a tenured University faculty member following his termination from the Presidency. At no time between 1995 and the present has Dr. Spanier experienced a break in his position as a salaried member of the University's faculty. Accordingly, the provisions of HR91 have applied to him at all relevant times.

2d Am. CC, ¶ 36. There is no basis for the Court to disregard this well-pleaded allegation of fact; to the contrary, the Court must credit it as true at this stage of the proceedings. Indeed, it is striking that, in his own verified pleadings, Dr. Spanier himself readily acknowledges that he "remained a tenured member of the Penn State faculty" after he "relinquished his position" as President on November 9, 2011. *See, e.g.,* Spanier's Third Amended Complaint, ¶ 54.

Dr. Spanier attempts to glide past the well-pleaded allegations of fact in the University's Second Amended Counterclaims by pointing to the language in section E.6 of the Employment Agreement, which sets his compensation as a faculty member at $600,000 for five years, and then notes that, following that five-year period, his "eligibility for annual salary adjustments, shall be governed by the University's policies, rules and regulations applicable to other tenured members of the University faculty and not by this Agreement." Dr. Spanier argues, remarkably, that this language means that *none* of the University's policies, rules or regulations, including but not limited to HR91, apply to him during the five-year period when the University is paying him $600,000 per year – that he is at liberty to do as he pleases during this period, unrestricted by any University requirements. *See* Spanier Mem. p. 13 (arguing that "under the plain language of the Employment Agreement, PSU cannot plausibly claim that Dr. Spanier was subject to faculty

policies applicable to other PSU professors following the termination of his presidency on November 9, 2011").

This plainly is not the natural reading of section E.6 of the Employment Agreement, and the University vigorously contests Dr. Spanier's construction of it.[7] All section E.6 was designed to accomplish was to make clear that the "guaranteed" $600,000 annual salary established by the Employment Agreement would no longer apply after five years. Nothing more.

Moreover, Dr. Spanier's contention (Mem. pp. 13-14) that Penn State "admits" that his construction of section E.6 is correct is nonsense. In the paragraph of the Second Amended Counterclaim that he cites, the University does nothing more than quote the operative language of section E.6. Indeed, far from agreeing with Dr. Spanier's construction, the Second Amended Counterclaim is replete with allegations that Dr. Spanier did in fact owe the University duties, including duties under HR91, at all operative times, including after November 9, 2011. *See, e.g.*, 2d Am. CC, ¶ 38 ("Dr. Spanier continued to owe the University the Duties described *supra*, including the duties imposed by HR91, at all relevant times during the negotiation of the Separation Agreement, including during the period November 12-15, 2011."). In short, this aspect of Dr. Spanier's argument, like the others, plainly raises disputed questions of fact, providing further reason why this preliminary objection is meritless.

For any and all of these reasons, the Court should overrule Dr. Spanier's first preliminary objection.

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[7] Moreover, although Dr. Spanier repeatedly mischaracterizes HR91 as a "faculty policy," HR91, by its terms, actually applies to all "[f]aculty and staff members." 2d Am. CC, Exhibit 3.

C. The Court should overrule the second preliminary objection because the University was not required to engage a mediation process before suing for breach of the Employment Agreement.

In his second preliminary objection, Dr. Spanier contends that the First Counterclaim must be dismissed because the University did not seek mediation before suing for breach of the Employment Agreement. This objection is without merit for several reasons as well. Although Dr. Spanier disagrees with the University as to *when* the termination of the Employment Agreement occurred, he acknowledges, as he must, that, with limited exceptions that are expressly noted in the Separation Agreement, the relevant provisions of the Employment Agreement *have in fact terminated.* Section K of the Employment Agreement, which sets forth a non-binding mediation process, is nowhere identified in the Separation Agreement as one of the provisions that survived.

Indeed, it is telling in this regard that Dr. Spanier himself did not invoke section K of the Employment Agreement, instead coming directly to this Court with his allegations that Penn State breached the Employment Agreement. *See, e.g.,* Third Amended Complaint, ¶¶ 275, 276 (alleging that Penn State breached the Employment Agreement by failing to honor its contractual indemnification obligations). As such, Dr. Spanier's second preliminary objection fails as a matter of law because no agreement to mediate exists.

Even if the Section K of the Employment Agreement were still effective, the alleged "failure" of Penn State to initiate the mediation process does not compel dismissal of its breach of contract claim, for several reasons. First, unlike Dr. Spanier's cited case, *A.T. Chadwick Co., Inc. v. BFI Constr. Corp.,* 2004 WL 2451372 (C.C.P. Phila. Cty. July 27, 2004), Section K of Dr. Spanier's Employment Agreement does not expressly make mediation a condition precedent to litigation. *Compare A.T. Chadwick Co.,* 2004 WL 2451372 *3 (the mediation clause at issue

there provided, "only after all avenues of negotiation and mediation have been exhausted shall any party be entitled to initiate litigation").[8]

Second, Dr. Spanier has waived any right he may have had to invoke section K by filing his breach of contract claim without first engaging the mediation process. *See A.T. Chadwick,* 2004 Wl 2451372 *3 ("a party may waive its right to have a dispute settled by nonjudicial means by availing itself of the judicial process to resolve the dispute"); *Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assoc. Ltd. Partnership,* 610 A.2d 499 (Pa. Super. 1992) (a waiver of the right to alternative dispute resolution may be inferred from the party's conduct).

And, third, there is every indication that any attempt by the University to engage the non-binding mediation process described in section K of the Employment Agreement would have been wholly futile. As reflected by his own factual allegations, Dr. Spanier steadfastly denies, for example, that he failed to be forthcoming to the University in any way. *See, e.g.,* Third Amended Complaint, ¶¶ 80-86 (denying any knowledge of the 1998 Sandusky Incident), ¶¶ 96-99 (minimizing his role in the handling of the 2001 Sandusky Incident). And, most critically, he contends that he:

> did not mislead the Board in any way, he was not reticent about providing information regarding Sandusky to the Board, he did not conceal information he possessed about Sandusky from the Board, and he did not provide inaccurate information to the Board.

Id., ¶ 139. And, lastly, it would be counter to notions of judicial efficiency for the Court to dismiss Penn State's First Counterclaim based on the (expired) mediation provision. The University's other three counterclaims, which rest on the same operative facts are not now, and

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[8] Dr. Spanier's other cited case, *Provenzano v. Ohio Valley General Hosp.,* 121 A.3d 1085, 1095-96 (Pa. Super. 2015), is distinguishable as involving an agreement to submit disputes to binding arbitration.

were never, subject to any agreement to mediate, and will remain before the Court even if the Court dismisses the breach of contract claim.

For any and all of these reasons, the Court should overrule Dr. Spanier's second preliminary objection.

D. The Court should overrule the third preliminary objection because the University adequately pleaded the existence of, and the breach of, multiple duties at all relevant times.

Dr. Spanier's third preliminary objection consists of a hodge-podge of arguments, and its reasoning is difficult to follow. Each of his subsidiary arguments are, however, without merit.

Dr. Spanier contends, *first,* that the First, Second, Third, and Fourth Counterclaims must be dismissed because Penn State allegedly failed to plead the existence of any duty on his part to disclose the operative facts during the negotiation of the Separation Agreement. This argument is untenable, ignoring as it does many well-pleaded allegations of the Second Amended Counterclaims. *See, e.g.,* 2d Am. CC, ¶¶ 3-10. And, as explained *supra,* pp. 6-7, Dr. Spanier's argument that he had no contractual duty to disclose the operative facts during the negotiation of the Separation Agreement because his Employment Agreement terminated on November 9, 2011, improperly ignores well-pleaded allegations that the termination of the Employment Agreement did not take effect until November 22, 2011. Similarly, his argument that HR 91 no longer applied to him after November 9, 2011, also runs directly counter to the well-pleaded allegations of the Second Amended Counterclaims.

Second, Dr. Spanier argues that the First, Second, Third, and Fourth Counterclaims all fail because the Separation Agreement contains a release and a partial integration clause. This argument rests on misapprehensions of Pennsylvania law. As a threshold matter, Dr. Spanier overstates the breadth of the integration clause. Section 17 of the Separation Agreement provides:

> The parties hereto further understand and agree that the terms and conditions of this Agreement constitute the full and complete understandings and arrangements of the parties *with respect to the terms of Dr. Spanier's termination from the position of President* of the University and that there are no agreements, covenants, promises or arrangements other than those set forth herein *with respect to that subject*.

See 2d Am CC, Exhibit 5 (emphasis added). The scope of this integration clause is limited to "*the terms of* Dr. Spanier's termination" from the presidency, and does not include, or even make any reference to, the facts and circumstances that led the University to terminate him from the presidency in the first place.

Moreover, even if it were read more broadly, the integration clause does not bar the University's Counterclaims because, unlike the cases Dr. Spanier cites, the University is not seeking to use evidence outside the four corners of the Separation Agreement to vary the terms of the Separation Agreement. Instead, the University asserts that it would not have entered into the Separation Agreement at all but for Dr. Spanier's failure to disclose the information contained in the 2012 Discovered Emails. *E.g.*, 2d Am. CC, ¶¶ 77, 78, 95. Penn State also alleges that it made a unilateral mistake of fact when it entered into the Separation Agreement based on the reasonable, but mistaken, belief that Dr. Spanier had honored his Duties to, *inter alia*, behave with scrupulous good faith in his dealings with the University.

In Pennsylvania, the "general rule" is that, where the alleged oral representation or omission concerns a subject that "is specifically addressed in the written contract, *and* the written contract covers or purports to cover the entire agreement of the parties," then mere allegations of falsity "will not make parol evidence admissible." *Blumenstock v. Gibson,* 811 A.2d 1029, 1036 (Pa. Super. 2002) (emphasis added), *citing Bardwell v. Willis Co.,* 100 A.2d 102, 104 (Pa. 1953), and *HCB Contractors v. Liberty Place Hotel Assoc.,* 652 A.2d 1278, 1279 (Pa. 1995). In this regard, "Pennsylvania case law makes a distinction between barring parol evidence to vary the

terms of the agreement and admitting parol evidence to prove fraud in the inducement." *Blumenstock,* 811 A.2d at 1036. In the latter situation, the theory holds that since fraud induced the agreement, no valid agreement came into being and parol evidence is admissible to show that the alleged agreement is void. *Id. See also Youndt v. First Nat'l Bank of Port Allegany*, 868 A.2d 539, 546 (Pa. Super. 2005).

Although the University is not alleging fraud, the same general principle applies to each of its counterclaims: notwithstanding the presence of the narrow integration clause in the Separation Agreement, the Court may consider extrinsic evidence if the alleged oral representation or omission concerns a subject that is not specifically addressed in the contract. *Youndt*, 868 A.2d at 546; *Blumenstock,* 811 A.2d at 1036. That is precisely the case here: (1) the Separation Agreement itself does not contain any representations by Dr. Spanier regarding what he knew or did not know about Sandusky's conduct; (2) the Separation Agreement does not contain any provision whereby the University *disclaimed* reliance on any such representations; and (3) the integration clause in the Separation Agreement is not broad enough to bar the University from pointing to extra-contractual representations and omissions.

Dr. Spanier's cited cases are distinguishable because the alleged misrepresentations or omissions at issue in those cases related to subjects that were specifically addressed in the written contract:

- In *Yocca v Pittsburgh Steelers Sports, Inc.,* 854 A.2d 425, 437-38 (Pa. 2004), the plaintiffs alleged that they had been promised seats in a stadium based on diagrams in a brochure they had been given prior to entering into the written contract, but that the seats they ultimately received were in a different location than they expected. The court concluded that the diagrams and the brochure did not become part of the final contract, which detailed a specific number of seats in a specific section, and precluded the plaintiffs from introducing evidence to vary the terms of the written contract.

- In *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1300 (3d Cir. 1996), the plaintiff alleged that the defendant misrepresented the scope of the contract's termination clause during pre-contractual negotiations, and told plaintiff that it meant one thing, but then invoked that clause to terminate the contract for a different reason. The court concluded that the termination clause was clear on its face and that plaintiff could not offer evidence of pre-contractual representations to vary the terms of the written contract.

- In *HCB Contractors v. Liberty Place Hotel Associates,* 652 A.2d 1278, 1279-80 (Pa. 1995), a general contractor brought claims for mechanics liens, which the defendant owners sought to have dismissed based on waiver of lien provisions in the operative contracts. The contractor argued, among other things, that the owners had a duty to disclose, but failed to disclose, that they had already transferred substantial ownership interests to third parties, and that, had the contractor known that, it would not have agreed to the waiver of lien provision. The court concluded that the contracts contained express waiver of lien provisions that specifically contemplated that the owners could transfer their interests, thereby negating the contractor's claims.

- In *Blumenstock v. Gibson,*, 811 A.2d 1029 (Pa. Super. 2002), the court concluded that purchasers of real estate could not introduce evidence of an alleged pre-contractual oral representation made by the seller because, *inter alia,* the agreement of sale contained a provision that specifically stated that any representations made by the seller were not part of the contract unless expressly incorporated.

- In *Hart v. Arnold,* 884 A.2d 316, 340 (Pa. Super. 2005), the court concluded that the defendant's claim that he relied on plaintiff's representation that there would be no problem obtaining the required government approval for the project at issue "arguably conflict[ed] with" the contract, which was "fundamentally contingent" on obtaining government approval.[9]

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[9] The two federal court cases Dr. Spanier cites (Mem. p. 31), *Bray v. Dewese*, 2008 WL 623824 (E.D. Pa. Mar. 6, 2008), and *Interwave Tech. Inc. v. Rockwell Automation*, 2005 WL 3605272 (E.D. Pa. Dec. 30, 2005), both concluded that the parol evidence rule barred introduction of prior alleged misrepresentations or omissions based on the presence of an integration clause in the operative contract even though the contracts at issue did not contain any provisions specifically addressing the facts alleged to have been misrepresented or omitted. More recent federal court cases, however, have rightly concluded that this "integration-only requirement is not directly supported by any recent Pennsylvania Supreme Court case." *Cabot Oil & Gas Corp. v. Jordan*, 698 F. Supp. 2d 474, 478 (E.D. Pa. 2010) (noting that the general rule "continues to involve a twofold inquiry, i.e, whether the contract is fully integrated *and whether the subject of the alleged misrepresentation is a subject covered in the contract*") (emphasis added); *Palermo Gelato, LLC v. Pino Gelato, Inc.*, 2013 WL 3147312, *4 (W.D. Pa. June 19, 2013) (concluding that this view is "more in line with Pennsylvania Supreme Court pronouncements, namely, "the parol evidence rule has two requirements: (1) that the written agreement *contains terms which directly deal with the subject matter of the alleged oral*

In sum, both the limited scope of the integration clause and the absence of references in the Separation Agreement about Dr. Spanier's "knowledge, or lack thereof, of the 1998 and 2001 Sandusky incidents preclude the Court from relying on the integration clause to dismiss the University's Counterclaims.

Dr. Spanier's argument that the release contained in the Separation Agreement bars the University's Counterclaims fares no better. He altogether ignores the fact that the Second Amended Counterclaim expressly alleges that the release that appears in section 8 of the Separation Agreement is one of the terms of that agreement that the University would not have agreed to had Dr. Spanier honored his duties of disclosure. *See, e.g.*, 2d Am. CC, ¶47 ("[w]hen Penn State entered into the Separation Agreement, it reasonably assumed and believed, in light of its longstanding relationship with Dr. Spanier, the fact that the University had reposed significant trust and confidence in him, and his 2011 knowledge of the grand jury investigation of Sandusky, that Dr. Spanier had fulfilled his Duties to disclose, accurately and completely, the state of his knowledge about the 1998 and 2001 Incidents."), ¶ 58 ("Penn State's assumptions and beliefs in those regard[s] had a material effect on Penn State's decision to enter into the Separation Agreement, including but not limited to its decision to agree to section[ ] . . . 8 (release)"); ¶ 79 ("but for one or more of Penn State's unilateral mistakes of fact, Penn State would not have agreed to section[ ] . . . 8 (release)"); ¶ 92 ("The University entered into the Separation Agreement in justifiable reliance on Dr. Spanier having fulfilled those Duties. Fulfillment of those Duties was material to the University's decision to enter into the Separation Agreement, including but not limited to the University's decision to agree to section[ ] . . . 8 (release)"); ¶ 96 ("Dr. Spanier had reason to know that Penn State was entering into the

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representation; and (2) represents the entire contract between the parties, particularly where the written agreement also contains an integration clause") (emphasis added).

Separation Agreement, including agreeing to section[ ] . . . 8 (release), as the result of one or more of the mistaken assumptions and beliefs discussed *supra*").

In other words, if the Court finds that the Separation Agreement is not enforceable, then the release provision contained therein does not bar the University's Counterclaims. *See Lanci v. Metro. Ins. Co.*, 564 A.2d 972, 974-95 (Pa. Super. 1989) (explaining that a release is not binding where executed under fraud, duress or mistake and holding that trial court did not err in denying a motion to enforce a settlement agreement where the defendant insurance company knew or should have known that the insured accepted the settlement based on a mistaken belief that the amount of the settlement was the policy's limit when, in fact, the policy limit was significantly higher). At a minimum, accepting the allegations in the Second Amended Counterclaims as true, the enforceability of the Separation Agreement and therefore the release contained therein are the subject of factual disputes not capable of resolution on a demurrer.

In sum, for these reasons, the Court should overrule Dr. Spanier's third preliminary objection.

E. This Court should overrule the fourth preliminary objection because the Second Counterclaim adequately alleges that the Separation Agreement did not place "the risk of mistake" on Penn State.

Dr. Spanier contends that Penn State's Second Counterclaim, for Unilateral Mistake of Fact, also should be dismissed because Penn State allegedly failed to allege that the Separation Agreement did not place the "risk of mistake" on Penn State. This argument is not well-founded, as the Second Amended Counterclaim *does* adequately allege facts demonstrating that it did not bear the risk of believing, mistakenly, that Dr. Spanier had honored his duties under his Employment Agreement, the University's bylaws, and HR91. Specifically, in paragraph 81 of the Second Amended Counterclaim, Penn State alleges:

> The Separation Agreement did not place the risk of mistake on the University, especially in light of the University's long-standing relationship with Dr. Spanier and the multiple sources of pre-existing duties that placed on Dr. Spanier the affirmative obligations: not to use for personal gain any non-public information he obtained as a result of service to the University that was not available to the public; to honor a strict rule of honest and fair dealings with the University; and the duty to exercise the utmost good faith in all transactions involving the University. Inherent in those duties was the duty to disclose to the University facts material to the University's decision-making and all facts that may give rise to a conflict of interest.

And, each of *those* allegations (*e.g.*, the University's long-standing relationship with Dr. Spanier, and the source and natures of the various duties he was under) were set forth with even more specificity elsewhere throughout the Second Amended Counterclaim. *See, e.g.*, 2d Am. CC, ¶¶ 1-10. This simply was not a situation where the contracting parties were dealing with each other for the first time. To the contrary, the University has had a long relationship with Dr. Spanier, he was the University's highest-ranking official, and he had multiple duties to act with scruplous honesty and good faith when dealing with the University.

Moreover, neither the release nor the integration clause in the Separatoin Agreement somehow shifted the risk of mistake to Penn State, as Dr. Spanier seems to contend (Spanier Mem. p. 25). To the contrary, as discussed *supra,* Dr. Spanier's argument ignores that Penn State is alleging that the release contained in section 8 was one of the provisions of the Separation Agreement that the University agreed to *as the result of* its unilateral mistakes of fact.

The Court accordingly should overrule this demurrer, because the Second Counterclaim does indeed plead the requisite facts to support a claim for Unilateral Mistake of Fact.[10]

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[10] Dr. Spanier's sole cited case (Mem. p. 25), *Schrack v. Eisenhower,* 1995 WL 610260 (C.C.P. Clinton Cty. Mar. 24, 1995), does not hold, or even suggest, that a release that was the result of a unilateral mistake of fact is proof of, or even evidence of, the fact that the party alleging the unilateral mistake bore the risk of mistake.

F. This Court should dismiss the fifth preliminary objection because none of the Counterclaims sound in fraud. [11]

In his fifth preliminary objection, Dr. Spanier argues that all of the University's Counterclaims should be dismissed because they sound in fraud, which has a two-year statute of limitations. This argument completely misreads and distorts the University's claims. *Nowhere* in the Second Amended Counterclaim does the University use the word fraud.

The University's actual claims are for breach of contract (First Counterclaim), which is governed by a four-year statute of limitations, and three claims that sound in equity, namely, Unilateral Mistake of Fact (Second), Rescission (Third), and Unjust Enrichment (Fourth), each of which is governed by principles of laches, not by a statute of limitations. *See United Nat'l Ins. Co. v. J.H. France Refractories Co.,* 668 A.2d 120, 124 (Pa. 1995) ("statutes of limitations are not controlling in equity"). "The question of laches does not depend . . . upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under the circumstances of the particular case, plaintiff is chargeable with want of due diligence in failing to institute or prosecute his proceeding." *Kinter v. Commonwealth Trust Co.*, 274 Pa. 436 (1922) *(quoting Edwards v. Western Maryland Ry. Co.*, 268 Pa. 228, 230)). *See Hartford-Empire Co. v. Glenshaw Glass Co.,* 47 F. Supp. 711, 716 (W.D. Pa. 1942).

Although Dr. Spanier's state of mind will, of course, be the subject of discovery, *none* of the University's Counterclaims depends on the University proving that Dr. Spanier acted with fraudulent intent.

Dr. Spanier's reliance on *Al-Barqawi v. 7-Eleven, Inc.,* 2014 WL 616975 (E.D. Pa. Feb. 18, 2014 (Spanier Mem. pp. 35-36), is wholly misplaced. There, the federal district court *did not* hold that the franchisee's claim for equitable rescission was barred by a two-year statute

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[11] *See* footnote 1, *supra.*

of limitations. To the contrary, the court plainly applied the equitable laches doctrine to the equitable claim. *Al-Barqawi,* 2014 WL 616975, *3 ("Al-Barqawi did not act promptly on his rescission claim, but continued to perform on the contract for more than two years, and the parties cannot be restored to their pre-contract positions."). The court's discussion of the two-year statute of limitations was exclusively in the context of adjudicating the franchisee's claims of negligent misrepresentation and intentional misrepresentation (*id.*, *4-*5), *claims the University does not make here.*

Accordingly, because Dr. Spanier's fifth preliminary objection rests on the fundamentally mistaken premise that the University's claims are governed by a two-year statute of limitations, this Court should overrule it.

G. This Court should dismiss the sixth preliminary objection because the Second Amended Counterclaim does not assert a claim for breach of fiduciary duty.[12]

Dr. Spanier's sixth preliminary objection is similar to his fifth: He contends that all of Penn State's Counterclaims must be dismissed as time-barred because they assert a breach of fiduciary duty, and thus are subject to a two-year statute of limitations. Once again, Dr. Spanier patently misrepresents the nature of the University's claims. Although the University's counterclaims originally included a breach of fiduciary duty claim, the University *did not* include any such claim in the Second Amended Counterclaims. Rather, as explained *supra,* Penn State asserts a breach of contract claim (which is governed by a four-year limitations period) and equitable claims (which are governed by laches).

The fact that the University describes the contractual and extra-contractual duties Dr. Spanier was under at all operative times as being "fiduciary" in nature simply does not transform any of the University's counterclaims into counterclaims that sound in tort. All of Dr. Spanier's

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12 *See* footnote 1, *supra.*

cited cases are readily distinguishable as involving circumstances where the allegations — unlike the University's allegations here — included allegations of intentional and fraudulent conduct. *See* Spanier Mem. p. 33, citing *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994); *Guidotti v. Prince*, 2012 WL 7070494 (C.C.P. Allegheny Cty. Mar. 5, 2012); *Smith v. Renaut*, 564 A.2d 188, 192 (Pa. Super. 1989); *Aubrey v. Santora*, 2013 WL 9770380 (C.C.P. Butler Cty. Aug. 12, 2013).

Likewise, the fact that some of the *remedies* the University seeks for its breach of contract and equitable claims are *also* available for claims sounding in tort simply does not transform those claims *into* tort claims. Indeed, neither of Dr. Spanier's cited cases even remotely supports his argument in that regard.[13]

H. This Court should overrule the seventh preliminary objection both because Penn State is the master of its pleading and because Penn State does not in fact have a full and adequate remedy at law.

Dr. Spanier contends that this Court is required to dismiss Penn State's three equitable claims (the Second, Third, and Fourth Counterclaims) because Penn State has an adequate remedy at law. His argument, like the arguments he makes in support of in his fifth and sixth preliminary objections, rest on an amalgamation of different subsidiary arguments, namely: (a) "[t]his is an action for fraudulent inducement/concealment" (Spanier P.O. ¶ 70); (b) Penn State seeks the same remedies that would be available in a claim for fraudulent inducement; and (c) Pennsylvania law bar claims sounding in equity when the party has a full and adequate remedy at law. Spanier Mem. p. 34. As explained *supra*, however, Penn State has *not* alleged fraud or even intentional conduct, and the fact that some of the remedies Penn State seeks on its

[13] *Eigen v. Textron Lycoming Reciprocating Engine Div.*, 874 A.2d 1179, 1184 (Pa. Super. 2005), and *Neuman v. Com. Exch. Nat'l Bank & Trust Co.*, 356 Pa. 442, 451-55 (1947) (cited in Spanier Mem. p. 34), both discuss the damages available for a claim of fraudulent inducement of contract. Neither case holds, or even suggests, that a tort claim for fraudulent inducement is the *only* claim that a party in Penn State's position is permitted to pursue.

contract and equitable claims are also available in tort simply do not transform those claims into tort claims.

At bottom, Dr. Spanier's argument seems to be that Penn State *could have* brought a tort claim for fraudulent inducement, and if Penn State had brought and had succeeded on such a claim, it would have been entitled to many of the same remedies that it seeks in the Second Amended Counterclaim. However, this argument ignores the well-established tenets that (a) a litigant is the master of its pleading and (b) a litigant is entitled to plead in the alternative.

Moreover, Dr. Spanier's argument that the University has an adequate remedy at law that precludes it from asserting a claim in equity utterly ignores the fact that — as he acknowledges elsewhere in his brief — a tort claim, including a claim for fraud, is governed by a two-year statute of limitations. In short, the University definitely does *not* have a full and adequate remedy in a claim that sounds in tort, but nothing in the law precludes the University from asserting *other* claims that are not time-barred.

Neither of Dr. Spanier's cited cases holds to the contrary. *Sixsmith v. Martsolf*, 196 A.2d 662 (Pa. 1964) (cited in Spanier Mem. p. 34), was a case decided when trial courts in Pennsylvania were divided into "law" and equity" sections. The plaintiff brought an action in equity to reform a contract for the purchase of a business. The Supreme Court concluded, however, that an action at law was the appropriate "remedy," because the relief the plaintiff sought was damages to be set off against the balance it owed on a note given as consideration for the purchase. Ultimately, the court concluded that the case was properly dismissed, not because it was improperly styled as an action in equity, but because the complaint "fail[ed] to state a valid cause of action, even at law," failing as it did to plead loss or damage. 196 A.2d at 664. *Myshko v. Galanti*, 309 A.2d 729 (Pa. 1973) (cited in Spanier Mem. p. 34), also was decided at a

time when there were separate courts at law and at equity. The Supreme Court concluded that the trial court did not err in dismissing an action filed on the equity side of the court, because an action at law arising out of the same controversy and covering the same issues was already pending on the law side.

In summary, the University has adequately pleaded the elements of each of the claims it *did* elect to bring. Nothing more is required. There simply is no basis for Dr. Spanier's argument that those claims fail as a matter of law and must be dismissed. Accordingly, this Court should overrule the seventh preliminary objection.

I. This Court should overrule the eighth preliminary objection because this Court cannot conclude that Penn State has waived the right to rescind the Separation Agreement as a matter of law.

In his eighth preliminary objection, Dr. Spanier contends that the University has waived the right to rescind the Separation Agreement because: (a) it waited too long to bring its equitable Counterclaims; and (b) it continued to perform under that contact. In arguing that the University's equitable Counterclaims were asserted too late, Dr. Spanier's briefing conflates the concepts of laches and waiver. Under either doctrinal approach, however, he has failed to establish that his right to relief is free and clear from doubt at this early state of the case. As explained *supra,* the timeliness of an equitable claim is not evaluated by reference to a statute of limitations, but, rather, by reference to the equitable notion of laches. Indeed, it is reversible error for a court to mechanically apply a statute of limitations to an equitable claim. *E.g., Lake v. Hankin Grp.*, 79 A.3d 748, 756 (Pa. Commw. 2013) (trial court erred when it barred a plaintiff's equitable claim on statute of limitations grounds, where the trial court "made no distinction between . . . legal and equitable claims and did not conduct the required analysis or make the necessary factual determinations as to whether the Appellees established laches in regards to the . . . equitable claims"). The application of the equitable laches doctrine requires a fact-intensive

inquiry that is singularly inappropriate for resolution on preliminary objections, especially under the circumstances of this case.

The defense of laches bars relief when the litigant "is guilty of want of due diligence in failing to institute his actions to another's prejudice." *Leedom v. Thomas,* 373 A.2d 1329, 1332 (Pa. 1977). In order to prevail on a laches argument, Dr. Spanier must establish both an unreasonable delay resulting from the University's failure to exercise due diligence *and* prejudice to him resulting from the delay. *Sprague v. Casey,* 550 A.2d 184, 187 (Pa. 1988). Both inquiries are necessarily fact-intensive.

Dr. Spanier cites *Holiday Lounge, Inc. v. Shaler Enters. Corp.,* 272 A.2d 175, 177 (Pa. 1971), for the proposition that "laches may be raised and determined by preliminary objection if laches clearly appears in the complaint. Spanier Mem. p. 39. However, a more recent pronouncement from the Supreme Court of Pennsylvania makes clear that "the question of laches is factual and is determined by examining the circumstances of each case." *Sprague,* 550 A.2d at 188. Accordingly, a court can sustain a preliminary objection asserting laches only after conducting an evidentiary hearing and only if the issue is "free from doubt." *Long v. Kistler,* 457 A.2d 591, 594 (Pa. Commw. 1983).

This is so because, unlike the application of the statute of limitations, "exercise of the doctrine of laches does not depend on the mechanical passage of time." *Fulton v. Fulton,* 106 A.3d 127, 131 (Pa. Super. 2014). Moreover, "delay alone, no matter for how long, does not itself establish laches." *Jackman v. Pelusi,* 550 A.2d 199, 203 (Pa. Super. 1988); *see also Brodt v. Brown,* 172 A.2d 152, 153-54 (Pa. 1961) (allowing suit to proceed despite a seven-year delay in bringing an action to enjoin defendants from interfering with plaintiffs' use of an unopened street, because the defendant did not demonstrate prejudice); *Crunk v. Mid-State Theatres, Inc.,*

170 A.2d 858, 860 (Pa. 1961) (allowing suit to proceed despite a 16-year delay in bringing an action to compel a corporation to issue a stock certificate, due to lack of prejudice).

Instead of looking solely at the passage of time, this Court must assess, *inter alia,* the reasonableness of Penn State's actions under the circumstances and whether any alleged delay was caused by a lack of due diligence. *See Jackman,* 550 A.2d at 203 (finding no lack of due diligence where wife waited over 10 years to continue seeking enforcement of a child support order, after considering all of the surrounding circumstances).

The Court also must be satisfied that Dr. Spanier has demonstrated prejudice resulting from the lapse of time. *Leedom,* 373 A.2d at 1332. Evidence of prejudice may include "establishing that a witness has died or become unavailable, that substantiating records were lost or destroyed, or that the defendant has changed his position in anticipation that the opposing party has waived his claims." *Com. ex rel. Baldwin v. Richard,* 751 A.2d 647, 651 (Pa. 2000). In the absence of an unavailable witness or lost evidence, the Supreme Court of Pennsylvania has made it clear that "[l]aches founded on some change in the condition or relations of the parties which occurs during the period the complainant unreasonably failed to act." *Leedom, 373 A.2d at 1333. Accord Sprague,* 550 A.2d at 188 ("the sort of prejudice required to raise the defense of laches is some changed condition of the parties which occurs during the period of, and in reliance on, the delay").

Here, Penn State has pleaded that "Dr. Spanier *has not been* unfairly prejudiced by the timing of the filing of this counterclaim," and that it "is not aware of any evidence relevant to [its] counterclaims that has been lost, or witnesses with relevant knowledge who have died, between the execution of the Separation Agreement and the execution of the Tolling

Agreement."[14] 2d Am. CC, ¶¶ 87, 88 (emphasis added). Indeed, to the contrary, Penn State alleges that:

> witnesses who previously may have been unavailable to the parties, namely, Curley and Schultz, who had indicated an intent to invoke their Fifth Amendment privilege against compelled self-incrimination, are now available now that they entered into plea agreements with the Commonwealth of Pennsylvania that resolved the criminal charges against them.

Id., ¶ 89.

Dr. Spanier's laches argument does little more than assert that time has passed. Indeed, his principal legal argument consists of pointing to the time that passed in *other* cases where courts have accepted, in various procedural postures, a laches defense. *See* Spanier Mem. pp. 42-43. This mechanical approach is insufficient as a matter of law is to establish that Dr. Spanier has a clear right, free from doubt, to have the University's equitable Counterclaims dismissed at this early stage of the litigation. *See Richmond,* 35 A.3d at 783 ("[i]f any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objection").

This Court also should reject Dr. Spanier's argument that the University's equitable Counterclaims necessarily fail because it performed under the Separation Agreement before seeking to rescind it. As alleged in the Second Amended Counterclaims, the University's performance was purely financial in nature. All of those payments can be returned if the University succeeds on any or all of its equitable Counterclaims. 2d Am. CC, ¶ 85. And, for his part, Dr. Spanier *has not* been rendering any services to the University during this period. To the

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[14] Although Dr. Spanier characterizes the University's delay as one of "nearly four years" (Spanier Mem. p. 39), he once again ignores the fact that the parties entered into a tolling agreement in November 2015. Any examination of whether the University unduly delayed must be made by reference to that date, not by reference to the date on which the University first filed its Counterclaims.

contrary, in November 2012, the University advised Dr. Spanier that, in light of his recent indictment, he was being placed on paid leave of absence, and that he was not to represent the University or act in any way on its behalf, "including fulfilling or performing any functions, duties, or responsibilities." 2d Am. CC, ¶ 86. In short, this is not a situation where the parties' continued performance under a contract makes it impossible for the court to return the parties to the status quo ex ante. Dr. Spanier's argument – that, by paying him $600,000 a year to do nothing, while his criminal case proceeded, precludes the University as a matter of law from seeking to now rescind the Separation Agreement — is untenable.

For all for these reasons, Penn State submits that it would be highly inappropriate for the Court to dismiss any of its Counterclaims on a laches or waiver-of-the-right-to-rescind defense and that the Court should, instead, overrule Dr. Spanier's eighth preliminary objection. In the alternative, Penn State respectfully requests that the Court conduct an evidentiary hearing so that it can consider all of the facts and circumstances that are pertinent to the laches argument.

J. This Court should overrule the ninth preliminary objection because Penn State has pleaded, and will prove, that it was injured as the result of Dr. Spanier's failure to disclose information to the University, in violation of his duties.

In his ninth preliminary objection, Dr. Spanier asserts, somewhat incredibly, that Penn State has failed to plead either causation or injury. As a result of deciding to terminate Dr. Spanier's Employment Agreement without cause, the University committed, in the Separation Agreement, to providing Dr. Spanier with significant financial and non-financial benefits over an extended period of time. *See, e.g.*, 2d Am. CC, ¶ 40 (describing them). The financial benefits of the Separation Agreement exceed $6 million. The Second Amended Counterclaim also alleges, repeatedly, that, but for Dr. Spanier's disclosure failures, the University would not have entered into the Separation Agreement. For example:

- the University reasonably believed that Dr. Spanier "had fulfilled his Duties to disclose, accurately and completely, the state of his knowledge about the 1998 and 2001 Incidents" (*id.*, ¶ 57);

- "[b]ut for one or more of Penn State's unilateral mistakes of fact, Penn State would not have entered into the Separation Agreement" (*id.*, ¶ 78); and

- "[t]he University entered into the Separation Agreement in justifiable reliance on Dr. Spanier having fulfilled [his] Duties" (*id.*, ¶ 92).

Penn State plainly has alleged that it has been injured as the direct result of Dr. Spanier's failure to honor his obligations under his Employment Agreement, the University's bylaws, and HR91.

Dr. Spanier's argument that the University has failed as a matter of law to plead causation or injury then pivots to the argument that, because two other University officials, Curley and Schultz, also knew about Dr. Spanier's knowledge of, and involvement in, the 1998 and 2001 Incidents, this necessarily means that "the University" knew about the information contained in the 2012 Discovered Emails when it was negotiating the terms of his departure from the presidency in November 2011.

This argument is sheer sophistry, and none of Dr. Spanier's cited cases supports it. Although it is true, as a general principal, that an organization only acquires information through its agents and employees (the uncontroversial proposition for which Dr. Spanier's cases stand), the operative question is whether the particular University representatives who were involved in negotiating Dr. Spanier's Separation Agreement were aware of the information in question. They were not. Indeed, to the contrary, the University specifically pleads:

> It was not until they were discovered in 2012 that the University, *and in particular, the University representatives responsible for negotiating and approving the Separation Agreement on the University's behalf,* first learned of the information reflected in the 2012 Discovered Emails.

2d Am. CC, ¶ 44 (emphasis added). *That* is the only legally significant point, and the Court must credit that well-pleaded allegation of fact.

Dr. Spanier next argues that the University cannot establish causation because the November 5, 2011 presentment of criminal charges against Sandusky, Schultz, and Curley "contains allegations that go into great detail" about the 1998 Incident and the 2001 Incident. Spanier Mem. p. 52. However, as the Second Amended Counterclaims makes abundantly clear, the information contained in the 2012 Discovered Emails *was not included in that presentment.* 2d Am. CC, ¶ 42 ("Although the 1998 Incident and the 2001 Incident were described in the Presentment, the Presentment did not set forth the information contained in the 2012 Discovered Emails, including but not limited to information that Dr. Spanier participated in discussions and decisions regarding the handling of the 2001 Incident.").[15]

Indeed, Dr. Spanier's argument is rendered all the more preposterous when one considers the entire crux of the University's Counterclaims: *Dr. Spanier himself* had duties, from multiple sources, to provide the information in question to the University. His argument is thus the ultimate "gotcha": he is arguing that the Court must, as a matter of law, excuse his failures to disclose because the University officials who negotiated his Separation Agreement supposedly could have ferretted out that information from some other source. Not surprisingly, he cites no authority that supports this position.

His argument that the information contained in the 2012 Discovered Emails was known to the University during the negotiation of the Separation Agreement because those emails "were sent and received on the PSU email network" is particularly preposterous. Spanier Mem. p. 50. This was not a situation where Dr. Spanier put the University on any sort of notice that should

[15] Dr. Spanier also makes the curious argument that, because Curley and Schultz testified *in 2017*, in Dr. Spanier's criminal trial, about their interactions with Spanier about the 1998 and 2001 Incidents, this somehow demonstrates that the University had knowledge in 2011 about the information contained in the 2012 Discovered Emails. Spanier Mem. p. 49. This argument is nonsensical. Again, the Court must credit the University's allegation that none of the individuals who negotiated the Separation Agreement on its behalf were aware of the information contained in those emails in 2011.

have led it to conduct a further investigation into his knowledge of, or involvement in, the 1998 and 2001 Incidents before executing the Separation Agreement. To the contrary, as alleged throughout the Second Amended Complaint, Dr. Spanier made no mention whatsoever of the information contained in the 2012 Discovered Emails to anyone with responsibility for deciding the terms on which he would depart from the presidency, despite the fact that he was required to "exercise the utmost good faith in all transactions touching upon [his] duties to the University and its property," despite the fact that he was held "to a strict rule of honest and fair dealings" between himself and the University," and despite the fact that he was not permitted to use for personal gain "any information not available to the public at large and obtained as a result of service to the University." *See, e.g.*, 2d Am. CC, ¶¶ 5-10.

In sum, Dr. Spanier's ninth preliminary objection is without merit, and this Court should overrule it.

K. This Court should overrule the tenth preliminary objection because the Second Amended Counterclaim is replete with allegations that the Separation Agreement is invalid and unenforceable.

In his tenth and final preliminary objection, Dr. Spanier asserts that Penn State's claim for unjust enrichment (Fourth Counterclaim) must be dismissed because it is barred by the existence of a written contract, namely, the Employment Agreement and the Separation Agreement. Although it is true that a claim for unjust enrichment cannot be sustained where the parties' rights are governed by a valid, written contract, the entire crux of the University's Counterclaims is that the Separation Agreement is *invalid and unenforceable*. *See AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. 2001) ("A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, *but in spite of the absence of an agreement,* when one party receives unjust enrichment at the expense of another.") (emphasis added). If the Court or a jury accepts that argument, the University is well within its

rights to seek to recover the monies paid to Dr. Spanier on a theory that he would be unjustly enriched if permitted to keep them.

Dr. Spanier's theory that the existence of the Employment Agreement somehow precludes a claim for unjust enrichment fails as well. Dr. Spanier's argument that he was entitled to benefits "over a six-year period following his termination from the position of President" (Spanier Mem. p. 56) presupposes, incredibly, that, *no matter what*, he would have been terminated "without cause." However, the Court cannot accept that argument while crediting (as it must) the well-pleaded factual allegations of the Second Amended Counterclaim.

If the University had elected to terminate Dr. Spanier for cause in 2011, he would *not* have been entitled:

> *to any further compensation or benefits* as President, except as set forth in the University's various benefit plans with respect to vesting and rights after termination of employment, *nor shall he be entitled to continuing employment* as a member of the University faculty, including the Post-Presidency Faculty Position set forth in section E.6 of this Agreement.

Employment Agreement § H.1 (emphasis added). The University had a decision to make in 2011: to terminate Dr. Spanier for cause, thereby cutting off all additional remuneration; to terminate him without cause; or to negotiate his separation from the University on some other terms. The decision the University ultimately made, as embodied in the Separation Agreement, was made as a direct result of Dr. Spanier failing to disclose material facts to the pertinent University representatives. The Employment Agreement in no way precludes the University from seeking to invalidate the Separation Agreement and pursue its claim that it would be unjust under the circumstances for the Court to permit Dr. Spanier to keep the more than $6 million the University has paid him since November 2011.

L. Summary

For all of the reasons set forth herein, Penn State respectfully requests that this Court overrule all of Dr. Spanier's preliminary objections to the Second Amended Counterclaims. If the Court decides not to deny the eighth preliminary objection outright, Penn State respectfully requests that the Court hold an evidentiary hearing on the laches issue.

DATED this the 9th day of May, 2017.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for The Pennsylvania State University, hereby certify that I caused to be served a true and correct copy of the foregoing MEMORANDUM OF LAW OPPOSITION TO PRELIMINARY OBJECTIONS TO SECOND AMENDED COUNTERCLAIMS this 9th day of May, 2017, by mailing same via U.S. mail, first class, postage prepaid, upon the following counsel of record:

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