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

GRAHAM B. SPANIER, **Plaintiff,**	:	**No. 2016-0571**
v.	:	
THE PENNSYLVANIA STATE UNIVERSITY **Defendant**	:	

APPEARANCES:

THOMAS CLARE, ESQ.
KATHLEEN YURCHAK, ESQ. — FOR THE PLAINTIFF

MICHAEL SCOTT, ESQ.
SANDRA DIIORIO, ESQ.
JOSEPH GREEN, ESQ. — FOR THE DEFENDANT

OPINION BY EBY, S.J., October 25, 2016

Currently pending before the Court are Preliminary Objections to Plaintiff's February 10, 2016 Complaint, which alleges the Pennsylvania State University ("Penn State") ("Defendant") breached its obligations under a November, 2011 Separation Agreement entered into by the parties in the aftermath of the Jerry Sandusky sexual abuse scandal. The Defendant challenges, by way of demurrer, all seven counts of the Complaint. For the reasons that follow, we intend to sustain Defendant's demurrers to Counts I-V and VII and overrule Defendant's demurrer to Count VI.

I. Procedural History

On February 10, 2016, Graham B. Spanier ("Plaintiff") filed a seven-count Complaint alleging Defendant's breach of a Separation Agreement executed by the parties while Plaintiff was President of Penn State. The November 15, 2011 Separation Agreement had terminated Plaintiff's presidency in the wake of criminal charges brought against Jerry Sandusky for sexual abuse of children and against Penn State officials, Tim Curley and Gary Schultz, for perjury and failure to report child abuse related to the incidents and investigation underlying the Sandusky charges.[1]

On March 31, 2016, pursuant to a scheduling stipulation negotiated by the parties and approved by the Court, the Defendant filed Preliminary Objections in the form of demurrers to all seven counts of the Complaint, along with a supporting Brief. On May 17, 2016, Plaintiff filed an Answer to Defendant's Preliminary Objections with a supporting Brief. On June 3, 2016, Defendant filed a Reply brief. The parties having appeared for Oral Argument on July 25, 2016, the matter of Defendant's Preliminary Objections is now ripe for our review and disposition.

II. Discussion

Under Pennsylvania Rule of Civil Procedure 1028(a)(4), a preliminary objection may be granted for "legal insufficiency of a pleading (demurrer)." *Id.* In reviewing preliminary objections in the nature of a demurrer, only well-pleaded facts and reasonable inferences arising from those facts are accepted as true. *Wiernik v. PHH U.S. Mortgage Corp.*, 736 A.2d 616, 619 (Pa. Super. 1999). The court is free to disregard "conclusions of law, unwarranted inferences from facts, opinions, or argumentative allegations." *Id.* It

[1] Plaintiff was indicted on related charges on November 1, 2012, nearly one year after the execution of the Separation Agreement. Complaint at ¶¶66,171.

"may consider only such matters as arise out of the complaint itself; it cannot supply a fact missing in the complaint." *Binsanger v. Levy*, 457 A.2d 103, 104 (Pa. Super. 1983).

Preliminary objections testing the legal sufficiency of a complaint can be sustained only if the plaintiff's complaint indicates on its face "that his claim cannot be sustained, and the law will not permit recovery." *Smith v. Wagner*, 403 Pa. Super. 316, 320-21, 588 A.2d 1308, 1311 (1991). If there is any doubt whether preliminary objections in the nature of a demurrer should be sustained, all doubt must be resolved in favor of overruling the preliminary objections. *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. 1997).

A. The Non-Disparagement Claims

Counts I through V of Plaintiff's Complaint allege a breach of what is essentially a "non-disparagement" provision found in Paragraph 13 of the Agreement. Paragraph 13 states:

> The University will not, and will use reasonable efforts to cause the members of the Board of Trustees not to, make any negative comments about Dr. Spanier to the media, to their professional colleagues or to any other members of the public, unless required by law or to comply with legal obligations and/or to provide truthful information in connection with ongoing or forthcoming investigations.

Id., Exhibit A to Complaint. Plaintiff argues Penn State violated this provision in five separate instances.

Count 1 addresses "negative comments" made by Louis Freeh in the written Freeh Report and during a July 12, 2012 press conference announcing its release. Count 2 addresses Penn State's decision to publish the Freeh Report, the Freeh press conference, and Freeh's July 12, 2012 Media Statement on the University's website. Count 3 addresses "negative comments" made by Trustees Kenneth Frazier and Karen Peetz at a July 12, 2012 press conference also attended by then-Penn State President,

Rodney Erickson. Count 4 addresses "negative comments" made by Trustee Keith Masser in an interview published by the Associated Press on June 16, 2012. Count 5 addresses "negative comments" made by 13 members of the Board of Trustees in a January, 2012 interview with the New York Times. For each of these claims, Plaintiff is required to plead facts supporting the following elements of a breach of contract claim: 1) the existence of a contract; 2) a breach of a duty imposed by the contract; and 3) damages. *CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa.Super. 1999).

i. *Count 1—Statements made by Louis Freeh in the Freeh Report and in the press conference announcing the release of the Freeh Report*

Penn State demurs to Count 1 on several bases. For purposes of our ruling today, we need consider only one: Penn State's argument that alleged "negative comments" made by a third party, Louis Freeh, in both the written Freeh Report and in the July 12, 2012 press conference, are outside the scope of the Paragraph 13 prohibition. We agree.

> In interpreting a contract, the ultimate goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement. When construing agreements involving clear and unambiguous terms, this Court need only examine the writing itself to give effect to the parties' understanding. This Court must construe the contract only as written and may not modify the plain meaning under the guise of interpretation.

Nevyas v. Morgan, 921 A.2d 8, 15, 2007 Pa. Super. 66 (2007) In the instant case, the clear language of Paragraph 13 proscribes only two sources of potentially actionable "negative comments"—comments made by the University itself or potentially, in the event the University does not use reasonable efforts to curtail such comments, comments made by members of the Board of Trustees. While Plaintiff asserts that Penn State is liable under a theory of agency for the written and oral statements associated with the Freeh

Report, Plaintiff's position is not persuasive in light of the specific language of the Separation Agreement.[2] Notably missing from Paragraph 13 is any reference to "negative comments" made by attorneys, agents, or other third parties, and we find this omission particularly significant in light of references to attorneys and agents in other sections of the Separation Agreement. *See*, e.g., Separation Agreement at §7. Had the parties intended to include "negative comments" by attorneys, agents, and other third parties within the paragraph 13 prohibition, they could/would have included those terms, as they did in Section 7 of the Agreement.[3]

The plain meaning of Paragraph 13, as indicated by the words the parties deliberately chose to include and the words they chose not to include, suggests the parties did not intend to include attorneys, agents, and other unspecified third parties within the non-disparagement provision. We cannot and will not add or infer additional terms—terms with which the parties certainly were familiar—to the clear and unambiguous language of Paragraph 13. Because the specified statements by Freeh and FSS made in the Freeh Report and in conjunction with the press conference announcing the release of the Freeh Report cannot legally constitute a breach of the Separation

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[2] We also do not agree with Plaintiff that the attorney-client relationship falls within the general jurisprudence of agency. *See MckCarthy v. Recodex Serv., Inc.*, 80 F.3d 842, 853 (3d Cir. 1996) (applying PA law and noting that attorneys exercise "exclusive control of the manner of performing their work"); *Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co.*, 963 F. Supp. 452, 455 (M.D. Pa. 1997) ("PA recognizes the importance of an attorney's independence in handling a matter on behalf of his or her client."); *Sanders v State Farm*, 47 Pa. D. & C. 4th 129, 146 (Pa.Com. Pl. 2000) ("Under Pennsylvania law, an attorney in private practice who is retained to handle particular matters acts on behalf of his client in the capacity of an independent contractor and *not an employee and as such, the client cannot be held responsible for the attorney's conduct.")(emphasis added).* The case of *Reutzel v. Douglas*, 870 A.2d 787, 791-792 (Pa. 2005), cited by Plaintiff for the principle that an attorney is the agent of his client is completely inapposite.

[3] The parties agreed at Oral Argument that both Plaintiff and Defendant were represented by counsel and had ample time and opportunity to both contribute content to and review the Agreement.

Agreement between Plaintiff and Penn State, we intend to grant Defendant's demurrer to Count 1.

ii. *Count II— Penn State's publication of the Freeh Report, the Freeh press conference, and Freeh's July 12, 2012 Media Statement made in conjunction with the press conference on the University's website.*

Count II alleges a breach of the non-disparagement clause of the Separation Agreement on the basis of Penn State's public disclosure of the Freeh Report, the Freeh press conference, and Freeh's July 12, 2012 Media Statement through links on the University's website. Plaintiff argues Penn State should not have provided this information on its website without first excising all negative references to Dr. Spanier. Plaintiff further argues that, by electronically publishing the disparaging comments of Freeh against Spanier on the University website, Penn State itself made prohibited negative comments against Plaintiff.

In support of his position that Penn State's electronic publication of the Freeh Report and related documents on the University website violated Paragraph 13 of the Separation Agreement, Plaintiff cites the case of *Garcia v. Scientifix*, LLC, No. 15-2392, 2016 WL 374 at 3 (E.D. Pa. Feb. 1, 2016). In *Garcia*, the plaintiff was a former employee of the defendant, Scientifix, and had brought a previous action against her employer for breach of contract and for violations of the Pennsylvania Wage Payment Collection Law. The parties in that prior action reached a settlement and memorialized its terms in a Separation Agreement and Release, which included the following terms:

> Non-Disparagement. Garcia agrees that she will not communicate, publish or release, indirectly or directly, in any medium or format, negative or disparaging comments or information about Scientifix, Lynch, Stewart and Foresta. Scientifix,

> Lynch, Stewart and Foresta agree that they will not communicate, publish or release, indirectly or directly, in any medium or format, any negative or disparaging comment or information about Garcia.

Id. at *1. Several years later, Plaintiff was employed elsewhere in the educational institution laboratory construction industry and solicited bids for a project potentially involving her former employer. Responding to that email, using both his Scientifix email account and including a Scientifix logo, was George Lynch. Lynch, who was specifically named in the non-disparagement provision of the Separation Agreement and Release, forwarded to both a project manager of Plaintiff's new employer and a longstanding business contact of Plaintiff's an email which stated, "Scientifix cannot and will not supply you with any pricing if Deirdre Garcia is involved in the project. I do not trust her ethics, she has shared our pricing with competitors in the past." *Id.* at *2. The District Court denied Scientifix's Motion to Dismiss under Fed.R.Civ. P. 12(b)(6), explaining that the defendant's email "clearly qualifie(d) as a negative or disparaging comment about plaintiff under the unambiguous terms of the non-disparagement clause, thereby constituting a breach of the non-disparagement clause of the Agreement." *Id.* at 3.

In the instant case, Plaintiff attempts to analogize *Garcia's* facts to those currently at issue before this Court, describing *Garcia's* holding as "company's electronic communication questioning former employee's ethics 'clearly qualifies as a negative or disparaging comment about plaintiff under the unambiguous terms of the non-disparagement clause.'" Plaintiff then argues Penn State similarly "indisputably made prohibited negative statements about Dr. Spanier" by "electronically publishing the disparaging Report..." Plaintiff's Brief in Opposition at 19-20.

We find Plaintiff's attempts to analogize *Garcia* to the instant case unpersuasive, even at first glance. The negative comments at issue in *Garcia* were made by Lynch, who was specifically named as a prohibited speaker in the *Garcia* non-disparagement clause. More significantly, we find that *Garcia* actually weakens Plaintiff's position, as it highlights, by way of comparison of the two separation agreements, glaring omissions in the Spanier/Penn State Agreement.

The language of the *Garcia* Agreement was both extremely specific and broadly inclusive. The *Garcia* parties agreed they would not "communicate, publish or release, indirectly or directly, in any medium or format, any negative or disparaging comment or information about" one another. The language of the Spanier/Penn State Agreement, vetted and tweaked by experienced counsel for both parties, stands in stark contrast. Rather than prohibiting the "communicat[ion], public[ation] or release, indirectly or directly, in any medium or format, any negative or disparaging comment or information about" Plaintiff, the Spanier/Penn State Agreement proscribes only the "making" of "negative comments about Dr. Spanier" by the University and requires the University to "use reasonable efforts to cause the members of the Board of Trustees" to also refrain from such comments. The Spanier/Penn State Agreement does not proscribe the expansive activities of "communication," "publication," or "release." It does not use the all-inclusive adverbs "directly or indirectly", the phrase "in any medium or format," or the catch-all direct object phrase "information about." Had it done so, Penn State's demurrer would clearly be on shakier ground.[4]

[4] Penn State argues that under the particular circumstances of the instant case, an Agreement with express language similar to that of *Garcia* would actually be void for public policy, as the Plaintiff's suggested

In light of the distinctions explained above, we agree with Defendant's characterization of the information made available on the University website. Penn State, which had already publicly announced an intention to commission an independent investigation with publicly disclosed results prior to the formation of the Separation Agreement with Spanier, did not "make" prohibited "negative comments" in publishing links to the Freeh Report, the Freeh Press Conference, or the Freeh Media Statement of July 12, 2012. Its publication of those links was nothing more than an implied statement: "Here is the Freeh Report." While that Report, as well as the press conference and the Media Statement, arguably contained negative comments about Plaintiff, an implied statement of "Here is the Freeh Report" is not negative and therefore not prohibited by the Separation Agreement.

If Spanier had sought to prohibit Penn State from publishing the negative comments of others or from indirectly communicating them to the public as in *Garcia*, he should have contracted specifically for those prohibitions. We will not rewrite the contract to insert or imply those terms, and therefore we intend to grant the Defendant's objection to Count II. *See Williams v. Nationwide Mutual Ins. Co.*, 750 A.2d 881, 884-86 (Pa.Super. 2000) (affirming order sustaining preliminary objections to breach of contract claim where plaintiffs "neither pled sufficient material facts nor cited to pertinent contractual language" to support their theory and noting that the court cannot "rewrite an insurance contract or

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interpretation should be. Penn State, a public university which had already publicly announced an intention to commission an independent investigation with publicly disclosed results, could not legally contract to cover up the results.

construe the language of a clear insurance contract provision to mean something not established by the plain meaning of the words used").

iii. Count III—Statements by Trustees Kenneth Frazier and Karen Peetz at Penn State organized and sponsored press conferences on July 12 and July 13, 2012

Count III of Plaintiff's Complaint addresses statements made by Board of Trustees members Kenneth Frazier and Karen Peetz at University-organized and sponsored press conferences held in conjunction with the release of the Freeh Report. As enumerated by the Complaint, these statements include:

- "Judge Freeh's Report is both sad and sobering...Our administrative leadership also failed. Judge Freeh's report concludes that (sic) the moment of truth, people who are in a position to protect children, and to confront a predator—including people at the highest levels of responsibility in the University—specifically, Graham Spanier, ... did not put the welfare of children first." (Frazier)

- In response to a question about whether the Board felt misled by Dr. Spanier: "I would say that we feel concerned and misled in the entire situation. Though we're taking responsibility... And so each of the individuals I would say have let us down significantly." (Peetz)

- In response to questioning about what Frazier wishes he had asked Spanier: "I can't answer that question because I don't think it was a question of asking the wrong questions. I think it was a reticence about sharing the information. It's not a question of, if we'd asked a magic question, these folks would have said, 'Ok, we're not going to conceal what's going on, now that you asked it that way we'll answer it in a different way.'" (Frazier)

- In response to questioning about why the board didn't rally behind attempts to get more information from Dr. Spanier: "I'll make the point again for everybody to understand. In retrospect, we wish that we had pressed upon someone we had complete trust in. The questions were asked, the answers were given, they were not complete, thorough answers. We could have asked more questions but again I want to say its (sic) not simply a question of us finding a magic formulation of the question. We asked enough questions that if someone wanted to share what was going on they could have shared what was going on. Am I clear?" (Frazier)

> • In response to a question about whether the board had too much trust in Spanier, Frazier said: "There is a distinction between board oversight and management. The president of the school has an obligation to make sure that the school is run in an appropriate way and before this issue arose I think Graham Spanier was one of the most respected college presidents in the United States. I would say that we were delighted as a Board to have Graham Spanier as our president. We trusted him based on all external appearances, we believed what we were being told was accurate. In retrospect, we were not told what was being accurate [sic]."
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> • ..."I think the Report shows that there was a breakdown or gap in terms of some of our oversight as a Board. I think it also says that some people, in a particular instance, because they wanted to avoid bad publicity, might have concealed the criminal acts of Jerry Sandusky." (Frazier)

Plaintiff's Complaint at ¶199.

Defendant argues that these statements are nothing more than objective statements about the contents of the Freeh Report and the Board's expression of its own "feelings" regarding those findings. We do not agree. While some of the statements are prefaced by limiting language, such as "Judge Freeh's report concludes" and "I think the Report shows", not all of the statements have such prefatory remarks. Moreover, we are not convinced that such language, as a matter of law, inoculates the statements from being considered "negative comments" as proscribed by the Separation Agreement.

Nonetheless, we do not believe Plaintiff's Complaint, as written, adequately pleads a breach of the non-disparagement provision. While the comments of Frazer and Peetz listed in Paragraph 199 of the Complaint could, at the Preliminary Objections stage, be construed as "negative," Plaintiff has a burden to prove more than the fact that "negative comments" were made about Plaintiff. Under the non-disparagement clause of the Separation Agreement, Plaintiff is required to prove that the University failed to "... use

reasonable efforts to cause the members of the Board of Trustees not to, make any negative comments about Dr. Spanier ... *unless required by law or to comply with legal obligations and/or to provide truthful information in connection with ongoing or forthcoming investigations.*" Although Plaintiff's averments in Count III would appear to suggest otherwise, the Separation Agreement provides for no blanket prohibition of negative comments. Rather, from its prohibition of negative comments, the Separation Agreement specifically excepts the making of negative statements which are "required by law" OR "to comply with legal obligations" AND/OR "to provide truthful information in connection with ongoing or forthcoming investigations." Therefore, any statement made by the Trustees "in connection with ongoing or forthcoming investigations" is outside the scope of the Agreement's non-disparagement language, unless it is both negative and untrue.[5]

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[5] In both his brief and at Oral Argument, Plaintiff has urged a different construction of the exceptions clause of the non-disparagement provision. Plaintiff argues that the word "required" applies to all of the phrases following it, such that the exceptions clause should be read as "unless *required* by law, *required* to comply with legal obligations and/or *required* to provide truthful information in connection with ongoing or forthcoming investigations." N.T. July 25, 2016 at 37-39; Plaintiff's Brief in Opposition at 14. First, we note the actual language of the clause does NOT repeat the word "required" before each of the three exception phrases. Nor does the formatting of the exceptions clause suggest that "required" applies to all three phrases (e.g., "unless required 1) by law, 2) to comply with legal obligations and/or 3) to provide truthful information in connection with ongoing or forthcoming investigations.") Moreover, the construction urged by Plaintiff is nonsensical. Adding "required" to the second exceptions phrase, "to comply with legal obligations", is redundant. A legal obligation, by virtue of the definition of the noun, "obligation", is already something that is required. Another redundancy is created if we apply the term "required" to the third exception, the provision of truthful information in connection with ongoing or forthcoming investigations. The only way the provision of "truthful information in connection with ongoing or forthcoming investigations" is "required" is through subpoena or contractual obligation. In those circumstances, the provision of information is already "required by law" and necessary "to comply with legal obligations." Thus, the construction urged by Plaintiff would make the third exception phrase completely unnecessary. *See PBS Coals, Inc. v. Barnham Coal Co.*, 384 Pa.Super. 323, 328, 558 A.2d 562, 564 (1989) (holding that "[t]he paramount goal of contractual interpretation is to ascertain and give effect to the intent of the parties. In determining the intent of parties to a written agreement, the court looks to what they have clearly expressed, for the law does not assume that the language of the contract was chosen carelessly"); *Mowry v. McWherter*, 74 A.2d 154, 158, 365 Pa. 232, 239–40 (Pa. 1950) (holding that individual clauses and particular words must be construed in connection with the rest of the agreement, and all parts of the writing, and every word of it, if possible, will be given effect); *Windber Const. Co. v. Coleman*, 139 A.2d 675, 678, 185 Pa.Super. 649, 653 (Pa.Super 1958) (holding that "[a]n interpretation will not be given to a contract which will produce absurd results.")

In none of the 245 paragraphs of Plaintiff's 82-page Complaint can we find an allegation that the specific statements by Peetz and Frazier on July 12 and 13 of 2012 do not meet the requirements of the third exception of the non-disparagement clause, specifically that they were not, as Defendant alleges them to be, truthful information offered in connection with ongoing or forthcoming investigations.[6] Because Plaintiff's Complaint fails to even allege that the comments made by Peetz and Frazier were not "truthful information" in connection with an ongoing or forthcoming investigation, Plaintiff has failed to plead a breach of the SA, and we intend to sustain, without prejudice, Defendant's demurrer to Count III.

iv. Count IV—Statement by Trustee Keith Masser in June 12 of 2012 to the Associated Press

On June 16, 2012, the Associated Press released an article on the Sandusky criminal trial which attributed several quotes to Trustee, Keith Masser. Complaint, Exhibit C. Plaintiff's Complaint asserts that Masser, in a June 2012 interview for that article, stated that "Dr. Spanier was 'involved in a cover-up' of Sandusky's criminal activities." *Id.* at ¶212. This statement, Plaintiff asserts, constituted a breach of the non-disparagement clause. Penn State demurs, as it did to Count III, on the basis that Count IV fails to plead that Masser's statement was not "truthful information in connection with an ongoing or forthcoming investigation." For the reasons discussed at length in our discussion of Count III, we agree and will sustain Defendant's demurrer to Count IV. [7]

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[6] At Oral Argument, Counsel for Plaintiff rejected this characterization of the Complaint, arguing that the Complaint alleged the falsity of the Frazier and Peetz statements at numerous places, and Plaintiff's Counsel would provide the Court with citations after Argument. *See* Transcript of Oral Argument, July 25, 2016, at 73. To date, no list of citations has been filed with the Centre County Prothonotary or otherwise provided to the undersigned jurist.

[7] We do not find persuasive Penn State's argument that Masser was speaking only for himself and giving his personal opinion regarding Plaintiff. The giving of personal opinions by the Trustees seems to be precisely what is covered by the language of the Separation Agreement. The Agreement prohibits "negative comments," with no language limiting that prohibition to comments made on behalf of or the official position of the University.

v. Count V—Statements made by the Trustees in a January 18, 2012 group interview with the New York Times

Count V of Plaintiff's Complaint alleges breach of Paragraph 13 of the Separation Agreement on the basis of several arguably negative statements Trustees made to the New York Times when they gave a pre-planned group interview on January 18, 2012. The resulting article published by the Times included the following statements identified by Paragraph 223 of Plaintiff's Complaint:

> • "The trustees, over three hours, described how they had felt blindsided by Spanier's failure to keep them informed of the nature and scope of the Pennsylvania attorney general's investigation of Sandusky, along with the investigation of university officials."
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> • "The trustees on [a Saturday, November 5, 2011 conference call] who had read the details of the charges against Sandusky and the two senior university officials felt a distinct lack of urgency by the university. Many were irked that Spanier had released a statement in full support of Curley and Schultz, who were indicted for perjury. The trustees were floored, they said, that Spanier did not seem to recognize the severity of the situation."
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> • "The trustees quickly realized that Spanier had chosen not to keep them informed."
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> • "The trustees said this week that they were disappointed that Spanier, who was legally allowed to speak about his grand jury testimony, did not brief the board on the nature of the questions by the grand jury about the 2002 episode. 'He should have told us a lot more,' [Trustee] Lubert said. 'He should have let us know much more of the background. He was able to legally share his testimony and I think that he had an obligation to do that with the board so we could get more engaged with the problem.'"
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> • "Part of being a leader at this level is to be a risk manager and to think through what might happen,' (sic) the trustee Karen B. Peetz, an executive with Bank of New York Mellon, said of Spanier."
>
> • "The Sunday meeting ended with the trustees eager to issue a news release, expressing a commitment to a full internal investigation and sympathy for any

> victims. In the interviews this week, they accused Spanier of having altered the release."

Id. Penn State again demurs, as it did to Counts III and IV, on the basis that Count V of the Complaint fails to allege that any of the above statements were not made pursuant to their obligations as trustees or under the truthful information in connection with an ongoing or forthcoming investigation.[8] For the reasons explained in our discussion of Count III, we agree Plaintiff has failed to adequately plead this element of a breach of the Separation Agreement and will therefore sustain Defendant's demurrer to Count V.

B. Failure to Provide Administrative Support

Count VI of the Complaint alleges that Penn State has breached the Separation Agreement by refusing to provide Plaintiff with computer access, IT support, administrative support commensurate with that provided to other tenured faculty members, an office, and a staff assistant, all of which were promised by the Separation Agreement. The salient, applicable portions of the Separation Agreement include the following:

> 1. Effective November 9, 2011, Dr. Spanier was terminated from the position of President of the University **without cause pursuant to Section H.2 of his Employment Agreement** dated July 1, 2010.
>
> ...
>
> 2. By virtue of Dr. Spanier's termination from the position of President of the University, it is also understood and agreed that except as otherwise provided

[8] Penn State also argues that these statements cannot be understood to be negative comments, but rather "honest" statements about how the trustees "felt" about the way they learned of the investigation of Sandusky's crimes. Defendant's Memorandum at 19. As we noted previously in our discussion of Count III, we do not find this argument persuasive.

below, Dr. Spanier's Employment Agreement was terminated as of November 9, 2011. Dr. Spanier may remain employed by the University, however, as a tenured member of the faculty in the the department of Human Development and Family Studies of the College of Health and Human Development, ...

3. Pursuant to the Employment Agreement and in return for Dr. Spanier agreeing to the terms of this Agreement, Dr. Spanier shall be provided with the following:

...

(d) Pursuant to Section E(6) of the Employment Agreement, a paid one-year post-presidency transition period during which Dr. Spanier will ...receive the benefits described in sections E(1) through E(4)[9] of the Employment Agreement....

(e) **Following completion of the one-year post-presidency transition period, Dr. Spanier may continue as a tenured member of the faculty, ... for a period of five years, with all provisions of Section E(6) of the Employment Agreement being applicable.** Thereafter, Dr. Spanier's employment and compensation as a tenured faculty member shall be governed by the University's policies, rules and regulations applicable to other members of the University.

...

4. In exchange for Dr. Spanier waiving the 90-day notice period described in Section H(2) of the Employment Agreement, the University shall provide the following to Dr. Spanier:

...

(d) During the post-Presidency transition period referred to in Section E.5 of the Employment Agreement, the University will provide Dr. Spanier with administrative support to assist him with his responsibilities, including computer access and IT support, in the manner previously provided to past presidents of the University, in addition to all support referred to in the last paragraph of Section E.6 of the Employment Agreement. **Following the post-Presidency transition, the University will provide Dr. Spanier with administrative support commensurate with that provided with other tenured faculty members and University Professors, and will continue to provide the administrative support referred to in the last paragraph of Section E.6 of the Employment Agreement.**

[9] Sections E.1-E.4 describe "Standard Benefits" (employee benefit plans), "Supplemental Life Insurance", "Supplemental Health Insurance", and "Disability Coverage" respectively.

Id. (emphasis added)

The above-referenced portions of the Employment Agreement of July 1, 2010, which is otherwise superseded[10] by the Separation Agreement, are:

> E. Benefits and Reimbursements.
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> 5. Professional Development and Post-Presidency Transition. Upon the completion of the Term of this Agreement (June 30, 2015) or if this Agreement is terminated without Cause, Dr. Spanier shall be entitled to a paid one year professional development and post-presidency transition period at the level of his then presidential Base Salary plus the benefits provided in Sections E.1, E.2, E.3 and E.4 of this Agreement. 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. During said period, Dr. Spanier shall perform scholarly activities in preparation to assume active duties as a tenured member of the University's faculty and shall also be available to assist with various University efforts (such as fundraising and recruiting) as required by the new President. As a condition of his eligibility for compensation and benefits under this Section E.5, Dr. Spanier shall refrain from performing any type of professional services for any other institution of higher education that will conflict with his duties with Penn State University. Notwithstanding the foregoing, any professional services performed by Dr. Spanier for a non-profit entity, government service, or for-profit boards that do not materially detract from his University responsibilities shall not be considered a conflict with his duties for the University. The Base Salary and benefits that Dr. Spanier receives under this Section E.5 shall not be reduced by the amounts he receives from other earnings. The terms of this Section E.5 shall survive the expiration of this Agreement.
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> 6. Post-Presidency Faculty Position. Following his service as President, Dr. Spanier shall have the title of President Emeritus. In addition, Dr. Spanier shall continue to hold a tenured faculty position as a Professor in the Department of Human Development and Family Studies of the College of Health and Human Development of the University. He may continue to use his current academic title of Professor of Human Development and Family Studies, Sociology, Demography, and Family and Community Medicine. Upon the conclusion of Dr. Spanier's service as President, he may, at his

[10] *See* Separation Agreement at ¶17: "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 there are no agreements, covenants, promises or arrangements other than those set forth herein with respect to that subject."

option, elect to assume the title of University Professor. Dr. Spanier's Base Salary following his services as President shall be paid on a twelve month basis and shall be $600,000 annually. Dr. Spanier's compensation at this level shall be limited to five (5) years following the conclusion of his professional development transition period subsequent to the termination of his presidency on June 30, 2015 or the earlier termination of his presidency without Cause. Dr. Spanier's employment as Professor subsequent to this period, including 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's office location, academic responsibilities, and salary after the five year post-presidency period shall be determined in consultation with the Provost of the University.

The University shall provide Dr. Spanier with administrative support, including an office and a staff assistant to assist him with his responsibilities following the conclusion of his presidency. The terms of this Section E.6 shall survive the expiration of this Agreement.

...

H. Termination

...

2. Termination Without Cause.[11] The University may terminate this Agreement without Cause upon a majority vote by the Board of Trustees at any time for the convenience of the University upon ninety (90) calendar days prior written notice to the President....

Id. (emphasis added)

[11] *Compare with* Employment Agreement at H.1, which describes "Termination *With* Cause" (emphasis added) ("The University may terminate this Agreement at any time for cause upon written notice to Dr. Spanier as provided in this Section H.1. For purposes of this Agreement, the term "Cause" shall mean conduct reasonably determined by a two-thirds majority of the Board of Trustees to be: (a)gross negligence or willful malfeasance by Dr. Spanier in the performance of his duties that materially harm the University; (b) actions or omissions by Dr. Spanier that are undertaken or omitted knowingly and are criminal or fraudulent and involve material dishonesty or moral turpitude; or (c) *Dr. Spanier being formally indicted in a court of law of any felony,* or any other crime involving misuse or misappropriation of University funds. In the event the President is terminated for Cause, Dr. Spanier's employment as President shall cease immediately, and he shall not be entitled to any compensation or benefits as President, except as set forth in the University's various benefit plains 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.")(emphasis added)

Our reading of the Separation Agreement, in conjunction with incorporated portions of the July, 2010 Employment Agreement, suggests that the parties contemplated three distinct periods following Plaintiff's effective termination on November 9, 2011:

> 1) a one-year post-presidency transition period to be used for professional development and transition, in which the University agreed to provide "computer access and IT support, in the manner previously provided to past presidents of the University, in addition to all support referred to in the last paragraph of Section E.6 of the Employment Agreement ("an office and a staff assistant to assist him with his responsibilities following the conclusion of his presidency"). Separation Agreement at ¶ 4(d); Employment Agreement at ¶ E.6. Under the applicable terms of both Agreements, we determine that this one year post-presidency transition period would have commenced on November 9, 2011 and concluded on November 9, 2012;
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> 2) A five- year intermediary period commencing at the conclusion of the one year post-presidency transition during which Plaintiff would hold a tenured Professor position, for which the University agreed to provide "administrative support commensurate with that provided with other tenured faculty members and University Professors," ***as well as*** "the administrative support referred to in the last paragraph of Section E.6 of the Employment Agreement" (an office and a staff assistant to assist him with his responsibilities following the conclusion of his presidency".) Separation Agreement at ¶ 4(d); Employment Agreement at ¶ E.6. By extrapolation, we calculate this intermediary period to begin on November 9, 2012 and conclude on November 9, 2017; and
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> 3) A third period commencing on November 9, 2017 and continuing indefinitely, "governed by the University's policies, rules and regulations applicable to other tenured members of the University faculty and not by [the Separation] Agreement," ***as well as*** "the administrative support referred to in the last paragraph of Section E.6 of the Employment Agreement" ("an office and a staff assistant to assist him with his responsibilities following the conclusion of his presidency"). Separation Agreement at ¶ 4(d); Employment Agreement at ¶ E.6.

Plaintiff's Complaint avers that the breach of ¶4(d) of the Separation Agreement began sometime after May of 2012, when President Erickson and Acting Provost Pangborn did not respond to Spanier's email requests regarding the establishment of an

office location or the hiring of a secretary. Further, when the Spring [2013] course list was posted, Plaintiff's name was not on it. On November 2, 2012, Provost Pangborn sent Plaintiff a letter notifying Dr. Spanier that he was being placed on an indefinite suspension from any and all teaching duties. Complaint at ¶168. As averred, these actions occurred during the one-year post-presidency transition period, in which the University agreed to provide "computer access and IT support, in the manner previously provided to past presidents of the University," as well as "an office and a staff assistant to assist him with his responsibilities following the conclusion of his presidency", as required by E.6 of the Employment Agreement as incorporated into the Separation Agreement.

Paragraph 169 of the Complaint alleges that, "[o]n November 14, 2012, Penn State sent individuals to Dr. Spanier's home to confiscate and remove his desktop computer, laptop, ipad, and all associated electronics and means of accessing the Penn State nework. IT support personnel were directed to have no contract (sic) with Dr. Spanier." *Id.* Further, "[d]espite the fact the Separation Agreement expressly requires that Dr. Spanier be provided with the same administrative support as other faculty members, as well as an office on campus and a staff assistant, Penn State has breached the Separation Agreement by knowingly and intentionally failing to so provide." Complaint at ¶170. As averred, these actions occurred during the five-year intermediary period, during which Plaintiff was to hold a tenured Professor position, for which the University agreed to provide "administrative support commensurate with that provided with other tenured faculty members and University Professors," as well as the Section E.6 perks of an office and a staff assistant.

Defendant demurs, focusing upon the withdrawal of administrative support in November of 2012. Defendant argues this withdrawal was justified because Plaintiff was indicted on November 1, 2012 on charges of failure to report child abuse, child endangerment, and perjury. Defendant argues Plaintiff's claim to administrative support is founded directly on the terms of the July 1, 2010 Employment Agreement, and that Agreement explicitly contemplated that Plaintiff would forfeit all entitlement to administrative support or other benefits if charged with one or more felonies. We do not agree and intend to deny Defendant's demurrer to Count VI for several reasons.

First, Defendant's demurrer fails to address the University's alleged failure to provide the agreed upon office and administrative assistant in May of 2012 during the one-year, post-presidency transition period. Defendant's indictment came six months after that alleged failure. Second, Defendant's reliance upon the November 1, 2012 indictment, at the Preliminary Objections stage, is misplaced. There is no limiting provision in the Separation Agreement for indictment. While the July 10, 2010 *Employment Agreement* between the parties contemplated the loss of benefits for criminal indictment, the Separation Agreement superseded the Employment Agreement, except for those provisions specifically referenced and incorporated. *See* Separation Agreement, at ¶17 ("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 there are no agreements, covenants, promises or arrangements other than those set forth herein with respect to that subject.") The criminal indictment provisions of the Employment Agreement, which are covered in

the H.1 "Termination With Cause" section of that Agreement, are not among those provisions specifically incorporated into the Separation Agreement. To the contrary, the Separation Agreement specifically articulates that Dr. Spanier has been terminated "without cause" pursuant to Section H.2 of the Employment Agreement, which includes no discussion of or provision for criminal indictment. Separation Agreement at ¶1. For these reasons, we are unable to say, as a matter of law based upon the contract language at issue and the Plaintiff's averments regarding its breach, that Plaintiff's claim cannot be sustained, and the law will not permit recovery. Therefore, we intend to overrule Defendant's demurrer to Count VI.

C. Failure to Pay Legal and other Expenses

Count VII of the Complaint alleges that Penn State has breached the Separation Agreement by refusing to reimburse Plaintiff for legal fees and public relations consultant fees incurred in connection with matters relating to the grand jury presentment and his termination from the position of President of the University. Specifically, the Complaint avers: "Penn State breached the Separation Agreement by failing to reimburse Dr. Spanier for his law firm's expenses for consultant services to defend Dr. Spanier's reputation and address the damage caused by Penn State, Freeh, and FSS, and the cost of having to initiate a federal lawsuit to gain access to his email in order to properly defend himself against the damaging statements made by Penn State, Freeh, and FSS. Dr. Spanier's damages continue to increase as Penn State refuses to reimburse him for ongoing fees and expenses." Complaint at ¶242.

The applicable portions of the Separation Agreement appear to be:

> 4(f) In addition to its obligations under paragraph 6 below, the University shall reimburse Dr. Spanier for the attorneys' fees and expenses he has incurred in connection with matters relating to the grand jury presentment and his termination from the position of President of the University"; and
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> 6. The University agrees to indemnify Dr. Spanier in accordance with the terms of Section J of the Employment Agreement and with the by-laws[12] of the University.

Id. Section J of the Employment Agreement states:

> J. Indemnification. The University shall indemnify Dr. Spanier and hold him harmless against legal fees, expenses, judgments and other financial amounts incurred while serving in his capacity as President of the University to the extent permitted by law. Dr. Spanier shall continue to be indemnified subsequent to termination of employment as President with respect to acts or omissions occurring while he was serving as President. The terms of this Section J shall survive the expiration of this Agreement.

Id.

Defendant demurs to Count VII on several grounds. First, Defendant argues that public relation expenses and the legal fees for a lawsuit Plaintiff himself initiated were not contemplated within the coverage promised by the Separation Agreement. We cannot say as a matter of law at the Preliminary Objections stage that Defendant is correct.

Paragraph 4(f) of the Separation Agreement describes the items to be covered with general and inclusive phraseology: "attorneys' fees and expenses [Plaintiff] has incurred in connection with matters relating to" both the grand jury presentment and his termination as President. Paragraph 6 of the Agreement, which agrees to indemnify Plaintiff in accordance with the terms of Section J of the Employment Agreement, is even broader. It promises indemnification for "legal fees, expenses, judgments and other financial amounts incurred while serving" in the capacity of President. Critically, Section

[12] To the court's knowledge, neither party has cited an applicable portion of the University bylaws as support for its position, nor has a copy of the bylaws been made part of the record through attachment to either the Complaint or the Preliminary Objections.

J also describes a continuing indemnification of Plaintiff after the termination of employment for acts and omissions occurring while he was serving as President.[13] Further, Section J of the Employment Agreement as referenced and incorporated by the Separation Agreement specifies that the terms of Section J shall survive the termination of the Employment Agreement. As a result, given the broad, general descriptions of the items to be covered by the University's promise to indemnify, particularly the unqualified term "expenses", we cannot agree as a matter of law that public relations expenses and legal fees in a Plaintiff-initiated lawsuit related to Plaintiff's defense in collateral litigation are outside the scope of the indemnification contemplated by the Separation Agreement.

Defendant next argues that, even if these types of expenses are within the scope of the coverage contemplated by the Separation Agreement, the University's liability is limited to those expenses Plaintiff had incurred prior to the signing of the Separation Agreement. In support of this contention, Defendant focuses upon the language of Paragraph 4(f), which promises Plaintiff reimbursement for expenses "he ***has*** incurred with respect to the grand jury presentment and his termination from the position of President of the University." *Id.* (emphasis added) Were this the only language offering reimbursement to Plaintiff, we would be inclined to agree. However, Paragraph 6 of the Separation Agreement, with its incorporation of Section J of the Employment Agreement, clearly contemplates ongoing and future indemnification.

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[13] The term "indemnify" in the law, without specific limiting parameters, is a broad one. *Black's Law Dictionary (5th)* defines the term as: "to restore the victim of a loss, in whole or in part, by payment, repair, or replacement. To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. To make good; to compensate;..." *Id.* at 692.

Finally, Defendant argues the Complaint includes no allegation that Plaintiff presented a bill, made a demand, or even indicated the amounts allegedly due. Our review of the Complaint indicates that Defendant is correct. While the Complaint alleges a "failure to reimburse," it provides no details supporting a specific demand and refusal. Pa.R.Civ.P. 1019(a) requires that a complaint gives notice to the defendant of the asserted claim and synopsizes the essential facts that support the claim. *Krajsa v. Keypunch, Inc.*, 424 Pa.Super. 230, 235, 622 A.2d 335, 357 (1993). "It is not necessary that the plaintiff identify the specific legal theory underlying the complaint." *Id.* However, "[i]n this Commonwealth, the pleadings must define the issues and thus every act or performance to that end must be set forth in the complaint." *Estate of Swift v. Northeastern Hosp. of Philadelphia*, 456 Pa.Super. 330, 337, 690 A.2d 719, 723 (1997). In evaluating whether a pleading is sufficiently specific, the question is "whether the pleading is sufficiently clear to enable the defendant to prepare his defense." *Paz v. Commonwealth, Dept. of Corrections,* 135 Pa.Commw. 162, 170, 580 A.2d 452, 456 (1990). Rule 1019(f) further requires that "averments of time, place and items of special damage shall be specifically stated." *Id.*

In light of the requirements of Rule 1019, we find that Count VII fails to allege a breach of contract, and we intend to grant Defendant's Preliminary Objection, without prejudice, on that basis. Should Plaintiff choose to plead over this Count in an amended complaint, he must include details regarding the outstanding bill amounts, the dates the invoices were sent to Defendant, and the dates either Defendant refused to pay or the bills, left unpaid by Defendant, became overdue. See also *St. Hill. & Assocs., P.C. v. Capital Asset Research Corp.*, No. 5035, 2000 WL 33711023, at 2 (Pa. Com.Pl. Sept. 7,

2000) (even where plaintiff alleged he submitted invoices to the defendant for payment, the failure to allege when the invoices were sent or when payment was due was insufficient to support a breach of contract claim).

We will enter an appropriate Order.