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

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

TYPE OF MATTER:
Civil

TYPE OF PLEADING:
Brief in Opposition to Preliminary Objections

FILED ON BEHALF OF:
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GRAHAM B. SPANIER, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	:	COURT OF COMMON PLEAS OF CENTRE COUNTY No. 2016-0571

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S PRELIMINARY OBJECTIONS PURSUANT TO RULE 1028(a)(4)

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INTRODUCTION

Defendants' preliminary objections should be overruled in their entirety as Defendants have failed to meet their burden of showing that "it appears with certainty that the law permits no recovery under the allegations pleaded." *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. 1997). Plaintiff's well-pleaded Complaint sets forth in great detail factual allegations supporting all elements of Plaintiff's breach of contract claims against Defendant The Pennsylvania State University ("Penn State"). Taken as true as they must be at this stage, these facts are more than sufficient to establish Plaintiff's right to relief on his claims.

Penn State's efforts to rationalize how its numerous negative and public statements about Dr. Spanier did not breach the non-disparagement clause in Dr. Spanier's Separation Agreement with Penn State wholly fail to explain how the contract permits Dr. Spanier no right of recovery. Despite Penn State's argument to to the contrary, the Complaint sets forth in great detail why the statements that Freeh, Penn State, and Penn State's Trustees made about Dr. Spanier are entirely false. Dr. Spanier never had any knowledge that Jerry Sandusky was sexually abusing minors, and most certainly did not seek to cover up or conceal any criminal activities. Moreover, Penn State does not dispute that any of the statements at issue were "negative" within the meaning of the contract's prohibition, and Penn State does not credibly suggest — let alone demonstrate with

certainty — that any of its offending statements met the non-disparagement clause's narrow exception allowing only for ***truthful*** statements that Penn State was ***required*** to make in connection with an ***ongoing or forthcoming investigation***. Even under the most charitable view of Penn State's arguments, they do no more than dispute ***factually*** whether the statements at issue fall under this narrow exception — a factual dispute that cannot be resolved in addressing Penn State's demurrer. *See P.J.S. v. Pa. Ethics Comm'n*, 669 A.2d 1105, 1112 (Pa. Commw. Ct. 1996) (factual disputes cannot be resolved on preliminary objections in the nature of a demurrer).

Moreover, Penn State's arguments that it has not breached the contract's requirements that it provide Dr. Spanier administrative support and pay his expenses and legal fees fail in the face of the plain language of the Separation Agreement requiring that it do so, as well as Penn State's tacit admissions that it indeed has not provided Dr. Spanier the required support or reimbursed Dr. Spanier for the expenses and legal fees at issue. Penn State's arguments are based not on the language of the contract, but on the entreaty that the Court should sanction its conduct regardless of the language of the contract. Far from failing to demonstrate with certainty that Plaintiff cannot recover on these claims, Penn State has effectively admitted its liability.

Plaintiff respectfully submits that Penn State's preliminary objections should be overruled in their entirety, and this action should proceed to discovery and trial.

COUNTERSTATEMENT OF FACTS

I. The Sandusky Indictment Causes a Public Relations Crisis at Penn State.

In the fall of 2008, the Pennsylvania Attorney General's Office began investigating allegations that former Penn State assistant football coach Jerry Sandusky had sexually abused boys whom he had supervised as an employee of The Second Mile, a youth charity organization that Sandusky founded and managed. (Feb. 10, 2016 Compl. ¶ 49.) In November 2011, Sandusky was indicted on multiple charges of sexually abusing minors. (*Id.* ¶ 50.) Also indicted in November 2011 were former Penn State administrators Tim Curley and Gary Schultz, who were alleged to have failed to report a 2001 incident in which Sandusky was allegedly seen sexually abusing an underage boy in the showers at a Penn State athletic facility. (*Id.* ¶ 51.) Although the investigation into Sandusky's activities had spanned multiple years, the Attorney General found no evidence to bring charges against Dr. Spanier in 2011. (*Id.* ¶ 52.)

On November 9, 2011, Dr. Spanier resigned from his position as President of Penn State under the "termination without cause" provisions of his July 1, 2010 Employment Agreement. (*Id.* ¶¶ 53, 56-57.) The same day, the Penn State Board of Trustees fired Joe Paterno, the revered, longtime head coach of Penn State's

football team. (*Id.* ¶ 67.) The premature and haphazard firing of Coach Paterno created a full-scale media and public relations disaster for Penn State, with riots erupting on the edge of campus. (*Id.* ¶¶ 67-69.) The Penn State Board of Trustees knew that it needed to do something to address the growing media frenzy and to vindicate its hasty decision to fire Coach Paterno. (*Id.*)

II. Dr. Spanier and Penn State Enter into a Separation Agreement.

At the time of his resignation, Dr. Spanier and Penn State were parties to a July 1, 2010 Employment Agreement that set forth the terms of Dr. Spanier's employment with Penn State. (Compl. ¶ 54.) To memorialize the terms of his separation as President of Penn State, Dr. Spanier and Penn State entered into a Confidential Separation Agreement ("Separation Agreement") on November 15, 2011. (*Id.* ¶ 59.) Under the terms of the Separation Agreement, Dr. Spanier relinquished his position on the University's Board of Trustees, the presidency of the Corporation for Penn State, and other duties tied specifically to his presidency, but remained a tenured faculty member of the Penn State faculty in the Department of Human Development and Family Studies of the College of Health and Human Development, with the titles of President Emeritus, University Professor, and Professor of Human Development and Family Studies, Sociology, Demography, and Family and Community Medicine. (*Id.* ¶ 60.)

Section 4(d) of the Separation Agreement provides that during the first year following his separation from Penn State — a post-Presidency transition period — Penn State would provide Dr. Spanier with administrative support to assist him in his responsibilities, including computer access and IT support, in addition to other support referenced in Section E.6 of the Employment Agreement. (*Id.* ¶ 61.) The Separation Agreement further provides that following the post-Presidency transition, Penn State is required to provide Dr. Spanier with "administrative support commensurate with that provided 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. (*Id.*) The referenced portion of the Employment Agreement states that Penn State "shall provide Dr. Spanier with administrative support, including an office and a staff assistant to assist him with his responsibilities following the conclusion of the presidency. The terms of Section E.6 shall survive the expiration of this Agreement." (*Id.* ¶ 62.)

The Separation Agreement also provides that Penn State will reimburse Dr. Spanier for all attorneys' fees and all expenses he incurs in connection with "matters relating to the grand jury presentment and his termination from the position of President of the University." (*Id.* ¶ 63.) The Separation Agreement further provides that Penn State will continue to indemnify Dr. Spanier in

accordance with the terms of his 2010 Employment Agreement, which requires Penn State to indemnify Dr. Spanier for all legal fees, expenses, judgments, and other financial amounts incurred while serving in his capacity as President, and further provides that Dr. Spanier shall continue to be indemnified subsequent to termination of his employment as President with respect to any acts or omissions that occurred while he was serving as President. (*Id.*)

The Separation Agreement also contains a non-disparagement clause, which 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.* ¶ 64.)

The Separation Agreement contains no clause or other language allowing Penn State to terminate or breach the contract in the event that Dr. Spanier is charged with any crime. (*Id.* ¶ 66.) The Separation Agreement remains in effect to this day and Penn State is bound by the Separation Agreement. (*Id.*)

III. Penn State Hires Louis Freeh and his Law Firm.

In November 2011, the Penn State Board of Trustees began considering multiple candidates to prepare a report concerning Penn State's administrators'

supposed lack of inaction regarding allegations that Sandusky was sexually abusing young boys. (Compl. ¶¶ 69-71.) Ultimately, former FBI Director Louis J. Freeh ("Freeh") and his law firm, Freeh Sporkin & Sullivan, LLP ("FSS") were chosen specifically because the Board knew Freeh would focus on shaping the media narrative as his "#1 priority." (*Id.* ¶ 71.)

In late November 2011, Freeh and FSS entered into a retention agreement with the Penn State Board of Trustees. (*Id.* ¶ 69.) The Engagement Letter between FSS and Penn State makes clear that Freeh and FSS were directed by Penn State specifically to issue a report criticizing certain Penn State administrators for their supposed failings in responding to information regarding Sandusky's activities. Specifically, FSS was directed to publicize "findings" identifying "who had knowledge of the allegations of sexual abuse" and criticizing "how those allegations were handled" by Penn State administrators and coaches. (*Id.* ¶ 127; *see also* Nov. 18, 2011 Letter re Engagement to Perform Legal Services (attached hereto as Exhibit A).) The Engagement Letter further makes clear that FSS was to act as an agent of Penn State, its client. The Engagement Letter states that FSS was "engaged [] to represent" the Board of Trustees, that FSS was to act "under the sole direction" of the Board of Trustees, that FSS would be paid by the Board of Trustees, and that FSS would be providing its services for the Board's "benefit."

(*Id.*; *see also* Compl. ¶ 128.) Penn State would ultimately pay Freeh and FSS more than $8 million dollars for their work on this matter. (Compl. ¶ 72.)

IV. Penn State is Aware that it's Agent Intends to Disparage Dr. Spanier.

During the course of Freeh and FSS's retention by Penn State, Penn State officials were aware that Freeh intended to disparage Dr. Spanier, and repeatedly encouraged and facilitated this approach. As set forth in detail in the Complaint, Penn State secretly directed Freeh to tailor his report in a way that would placate the National Collegiate Athletics Association, which was threatening to launch an investigation of Penn State's handling of Sandusky. (Compl. ¶¶ 74-84.) Knowing that the NCAA could levy devastating sanctions on the University's football program — including the so-called "death penalty" — Penn State officials made known to Freeh that he would need to target and accuse noteworthy individuals like Dr. Spanier and Coach Paterno. (*Id.* ¶ 77-78.) At the urging of Penn State officials, Freeh agreed to tailor his report to find the "lack of institutional control" over the football program that the NCAA expected Freeh to find. (*Id.* ¶¶ 83-84.)

Before Freeh ever issued his report, he shared with Penn State the disparaging conclusions that he intended to publicize about Dr. Spanier. (*Id.* ¶¶ 87, 123, 125.) In April 2012, for example, Freeh exchanged emails with Board of Trustees members Ronald Tomalis and Kenneth Frazier in which they openly disparaged Dr. Spanier and plotted to deny him a post-presidency employment

opportunity. (*Id.* ¶ 124.) Despite Freeh and the Board's public efforts to make it appear as though Freeh was acting independently, in fact the Board was involved in Freeh's activities all along and knew the ultimate disparaging accusations that Freeh's report would contain about Dr. Spanier and others. (*Id.* ¶ 125.) Certain Board members made very clear to Freeh the kinds of accusations he was expected to level against Dr. Spanier. For example, in June 2012, Trustee Keith Masser stated in an interview with the Associated Press that Dr. Spanier was "involved in a cover-up" of Sandusky's criminal activities. (*Id.* ¶ 161.)

V. Acting on Behalf of Penn State, Freeh and FSS Publish a Report Disparaging Dr. Spanier.

On July 12, 2012 Freeh and FSS issued their "Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky" ("Freeh Report" or "the Report"). (Compl. ¶ 73.) The Freeh Report contained numerous disparaging statements concerning Dr. Spanier, including the false claims that Dr. Spanier ignored allegations of sexual abuse against Sandusky in 1998 and 2001, and that Dr. Spanier engaged in an ongoing effort to cover up Sandusky's crimes in order to protect Penn State's reputation. (*Id.* ¶¶ 89-120.) These incredibly negative and disparaging allegations set off a media firestorm, and innumerable media outlets around the country reprinted them, compounding the harm to Dr. Spanier. (*Id.* ¶¶ 140-141.)

Penn State commissioned, encouraged, and facilitated this disparaging Report. (*Id.* ¶ 120, 160.) The day it was released, Penn State issued a press statement underscoring the disparaging statements in FSS's Report and indicating Penn State's acceptance of, agreement with, and approval of its agent's conclusions. (*Id.* ¶ 164.) Penn State itself also publicly published this disparaging Report on its own website. (*Id.* ¶¶ 162, 189-190.)

Also on July 12, 2012, Penn State's then-President Rodney Erickson held a press conference following the release of the Freeh Report, in which he appeared alongside Trustees Karen Peetz and Kenneth Frazier. (*Id.* ¶ 165.) During the press conference, Penn State permitted Peetz and Frazier to make numerous disparaging comments about Dr. Spanier. (*See* Compl. ¶ 165.) Peetz and Frazier accused Dr. Spanier of, among other things, failing to protect children from a sexual predator and providing inaccurate and misleading information to the Board of Trustees. (*Id.*) The following day, Penn State allowed Peetz and Frazier to hold yet another press conference in which they made further disparaging statements about Dr. Spanier, including stating that Dr. Spanier "concealed the criminal acts of Jerry Sandusky" in order to "avoid bad publicity." (*Id.* ¶ 166.)

VI. Penn State Brazenly Breaches Other Provisions of the Separation Agreement.

As set forth in the Complaint, in addition to repeated breaches of the non-disparagement clause, Penn State has also repeatedly breached the Separation

Agreement's other provisions. Despite the fact that Dr. Spanier is a University Professor and Penn State is contractually required to provide Dr. Spanier administrative support commensurate with that received by other tenured faculty members, Penn State has not done so. (*Id.* ¶ 167.) Penn State has refused to allow Dr. Spanier to teach courses and has suspended him from all teaching duties. (*Id.* ¶ 168.) Penn State has also refused to assign Dr. Spanier an office location and refused to allow him to hire a secretary. (*Id.*) Penn State has also cut off Dr. Spanier's access to the University's network and IT support. (*Id.* ¶ 169.) Penn State has also refused to reimburse Dr. Spanier for expenses and legal fees incurred in connection with alleged errors and omissions that occurred during his tenure as President, in violation of the Separation Agreement. (*Id.* ¶¶ 171-173.)

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

Has Penn State established with certainty that the law permits no recovery for any of Plaintiff's breach of contract claims under the allegations pleaded in Plaintiff's Complaint?

Suggested response: No.

STANDARD OF REVIEW

On review of preliminary objections, the Court must regard the allegations in the complaint as true and accord the plaintiff all the inferences reasonably deduced therefrom. *Green v. Mizner*, 692 A.2d 169, 172 (Super. Ct. 1997). Preliminary objections testing the legal sufficiency of a complaint can only be sustained 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*. 588 A.2d 1308, 1311 (Super. Ct. 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*, 692 A.2d at 172.

ARGUMENT

I. Penn State's Acts of Sponsoring and Publishing the Freeh Report Breached the Separation Agreement's Non-Disparagement Clause.

Counts I and II of Plaintiff's Complaint allege breaches of the Separation Agreement's non-disparagement clause for negative statements about Dr. Spanier in the University-sponsored Freeh Report, as well as for Penn State's act of publishing the Freeh Report and related disparaging materials on its own website. (*See generally* Compl. at Counts I-III.) Penn State's retention, encouragement, and facilitation of Freeh and his Report, as well as Penn State's separate, deliberate action in publishing the Report, breached the Separation Agreement's requirement that "[t]he University will not, and will use reasonable efforts to cause the members of the Board of Trustees not to, make any negative statements 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." (Compl. ¶ 64; *see also* Separation Agreement (Compl. at Ex. A) ¶ 13.) Penn State attempts to argue that the Freeh Report did not breach the Separation Agreement because it is not responsible for Freeh's statements, and that Penn State's publication of the Freeh Report was a truthful statement in connection with a required "investigation" under the terms of the Separation Agreement. (*See* Def.'s Mem. at 9-15.) Neither argument has merit.

A. The Complaint Amply Alleges that the Statements About Dr. Spanier in the Freeh Report were not "Truthful."

First, with respect to Penn State's sponsoring and publication of the Freeh Report, Penn State inexplicably argues that the Complaint does not allege that the statements in the Freeh Report are not "truthful." (Def.'s Mem. at 8.) As explained below, the true-false distinction does not absolve Penn State of liability regardless of whether the statements were true or false, as the Separation Agreement plainly bars the publication of even ***truthful*** "negative comments," unless the statements at issue were required to be made for certain limited purposes:

> 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***.

(Separation Agreement (Compl. at Ex. A) ¶ 13 (emphasis added).) Because none of Penn State's statements at issue were required to be made in order to provide information in connection with ongoing or forthcoming investigations, all of the negative statements identified in Counts I-V breached the Separation Agreement.

But even if the truthfulness of the Freeh Report is a relevant question in terms of Penn State's liability to Dr. Spanier for sponsoring it and publishing it, Penn State's argument that the Complaint does not allege the falsity of the Freeh Report is baffling. The Complaint in fact squarely alleges that the statements

about Dr. Spanier in the Freeh Report were false. (Compl. ¶ 144.) The Complaint pleads facts explaining how Penn State and Freeh were determined to scapegoat Dr. Spanier for the Sandusky scandal, and how the Board and Freeh coordinated their efforts to do so. (*Id.* ¶¶ 74-87, 121-134.) It further describes in great detail how and why the Freeh Report's claims that Dr. Spanier knew of, and covered up, Sandusky's sexual abuse in 1998 and 2001 are completely false. (*Id.* ¶¶ 89-120.) It explains that after the Freeh Report was released, Dr. Spanier again provided written information to Penn State's General Counsel and Board of Trustees specifically rebutting and contradicting Freeh's false claims about Dr. Spanier, which Penn State ignored. (*Id.* ¶ 88.) Finally, the Complaint even alleges facts showing that ***Penn State itself*** has since admitted that the Freeh Report was "inaccurate and unfortunate," that it has "significant problems," that it is not a "complete record" because Freeh failed to interview crucial witnesses, and that the "the limitations of the Freeh Report prevent it from being the basis of any decision facing Penn State." (*Id.* ¶¶ 137-138.)

The Complaint explains in minute detail how and why the negative statements about Dr. Spanier in the Freeh Report are false, and Penn State's assertion to the contrary is wholly without merit. This fact alone requires that the preliminary objections to Counts I and II be overruled, as Penn State does not even

argue that the Separation Agreement permitted it to make untruthful negative comments about Dr. Spanier under any circumstances relevant to claims I and II.

B. Penn State Cannot do Through an Agent what it is Contractually Prohibited from Doing Itself.

Next, Penn State argues that it cannot be liable for the disparagement of Dr. Spanier in the Freeh Report because "it is clear that the non-disparagement language, as written, covers only statements made by the University itself, and not statements by a third party such as Judge Freeh." (Def.'s Mem. at 10.) Penn State then proceeds to take issue with the myriad factual allegations in the Complaint demonstrating that Penn State directed Freeh to disparage Dr. Spanier, asserting that the Report was "independent." (*Id.* at 11-14.) Penn State's arguments miss the mark, for two reasons. First, because there can be no dispute that Freeh was retained by Penn State, and that the Freeh Report was prepared on behalf of Penn State, Penn State is liable for the acts of its agent that breached the Separation Agreement. Second, even if this were not the case, the Complaint amply alleges that Penn State directed its contents, and Penn State cannot dispute these factual allegations at this stage.

First, Penn State incorrectly argues that it is not responsible for the contents of the Freeh Report because it contains only the disparaging statements of a "third party." (Def.'s Mem. at 10.) But Penn State's argument ignores the black-letter law, and common sense proposition, that "[o]ne cannot do through an agent that

which one cannot do directly." 2A C.J.S. Agency § 141 (2016); *see also* 3 Am. Jur. 2d Agency § 64 (2016) ("An agent can be authorized to do any act the principal may do. However, a principal cannot do an act through an agent which the principal could not do directly.") Dr. Spanier's Complaint squarely alleges that Penn State retained an agent — Freeh and FSS — to perform an act on Penn State's behalf — disparaging Dr. Spanier — that Penn State was contractually prohibited from doing.

As set forth above and in Plaintiff's Complaint, it was Penn State that retained Freeh and FSS to publish the Freeh Report. (Compl. ¶¶ 7, 9.) The retention of Freeh and FSS specifically contemplated that they would prepare a written report and that it would be disseminated to the media and public. (*Id.* ¶¶ 14, 69-71.) The terms of the November 2011 Engagement Letter between the Penn State Board of Trustees and FSS state that FSS was "engaged [] to represent" the Board of Trustees, that FSS was to act "under the sole direction" of the Board of Trustees, that FSS would be paid by the Board of Trustees, that Penn State agreed to indemnify FSS, and that FSS would be providing its services for the Board's "benefit." (Engagement Letter *(Ex. A); see also* Compl. ¶ 128.) The Engagement Letter also purported to establish an attorney-client relationship between the Board and FSS. *(Ex. A); see also Reutzel v. Douglas*, 870 A.2d 787, 791-792 (Pa. 2005) (noting that an attorney is an agent of his client).

The Complaint further alleges that Penn State specifically instructed its agent, Freeh and FSS, to issue a public report blaming Penn State administrators (including Dr. Spanier) for the Sandusky scandal. FSS was directed to publicize "findings" identifying "who had knowledge of the allegations of sexual abuse" and criticizing "how those allegations were handled" by Penn State administrators and coaches. ((Ex. A); Compl. ¶ 127.) Freeh regularly briefed Penn State Trustees regarding his work, and Penn State knew before the Freeh Report was published that it would disparage Dr. Spanier. (Compl. ¶¶ 121-125.) Penn State also held two press conferences trumpeting the release of the Freeh Report, and published the Report on Penn State's website. (*Id.* ¶¶ 162-166.) In short, the Complaint contains many factual allegations demonstrating that "Penn State not only acquiesced in Freeh's disparagement of Dr. Spanier, but in fact hired him to do so, and provided material support, encouragement, and facilitation of Freeh's actions towards Dr. Spanier." (*Id.* ¶ 160.)

Under these circumstances, Penn State cannot escape liability for the egregiously disparaging statements in the Freeh Report by baldly claiming that the Separation Agreement does not cover statements by a "third party." (*See* Def.'s Mem. at 10.) The contract squarely prohibits Penn State from making negative statements about Dr. Spanier to the media and public, and the law does not permit Penn State to evade that prohibition simply by hiring an agent to disparage Dr.

Spanier on its behalf. Penn State's preliminary objections to Count I must therefore be overruled.

C. Penn State's Act of Voluntarily Publishing Disparaging Statements About Dr. Spanier Breached the Separation Agreement.

Penn State rests on even shakier ground in arguing that it cannot be liable for breach of contract for its act of publicly publishing the Freeh Report, as well as related disparaging materials, on its own website. (*See* Def.'s Mem. at 14-15.) In an attempt to argue that its own act of publishing this highly disparaging document to a worldwide audience did not breach the Separation Agreement's non-disparagement clause, Penn State again claims that it was merely publishing Freeh's words and not its own, and argues that it's publication of the Report was a permissible act of providing "truthful information in connection with ongoing or forthcoming investigations." This argument fails for at least four reasons.

First, as explained above, Penn State is liable for the statements of its agent and cannot be heard to claim that it was merely publishing the words of someone else. By electronically publishing the disparaging Report that Freeh ***prepared for Penn State***, and which accused Dr. Spanier of intentionally covering up the crimes of a child molester in order to avoid bad publicity, Penn State indisputably made prohibited negative statements about Dr. Spanier. *See Garcia v. Scientifix, LLC*, No. 15-2392, 2016 WL 374724, at *3 (E.D. Pa. Feb. 1, 2016) (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, thereby constituting a breach of the non-disparagement clause of the Agreement.").[1]

Similarly, Penn State cannot claim that Freeh's "investigation" was an "ongoing or forthcoming investigation" within the meaning of the Separation Agreement provision allowing Penn State to provide truthful information in connection with ongoing or forthcoming investigations, because it was ***Penn State itself*** that initiated the Freeh retention and Report. By Penn State's logic, it would be permitted to make any public, disparaging statements about Dr. Spanier it wanted to, as long as it ***unilaterally*** labeled those statements as being in connection with a ***Penn State-created*** "investigation" that was not in the contemplation of the parties at the time of contracting.[2] Such an interpretation would lead to an absurd result that renders the non-disparagement clause completely meaningless. *See Laudig v. Laudig*, 624 A.2d 651, 654 (Pa. Super. 1993) ("Before a court will interpret a provision in ... a contract in such a way as to lead to an absurdity or make the ... contract ineffective to accomplish its purpose, it will endeavor to find an interpretation which will effectuate the reasonable result intended.") (quoting *Pocono Manor Ass'n v. Allen*, 12 A.2d 32, 35 (Pa. 1940).).

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[1] Copies of al nonpublished cases cited herein are attached as Exhibit B.

[2] As noted above, Penn State did not even retain Freeh and FSS until more than a week after it entered into the Separation Agreement with Dr. Spanier. (Compl. ¶ 69.)

The plain intent of this provision was to allow Penn State to cooperate with the then-ongoing and forthcoming criminal investigations into the conduct of Sandusky and other Penn State administrators, not to grant Penn State license to evade the non-disparagement clause by claiming that any negative statements Penn State should make to the media about Dr. Spanier were somehow connected to its own self-labeled "investigations." Given Dr. Spanier's allegations that Penn State retained Freeh as its agent, and that Penn State encouraged, facilitated, and sponsored Freeh's disparaging statements of Dr. Spanier, the Complaint more than sufficiently alleges that the Freeh retention and Report are not immune from liability solely because Penn State unilaterally labeled it an "investigation." *See McClimans v. Barrett*, 419 A.2d 598, 600 (Pa. Super. 1980) (a breach of contract claim may only be dismissed on a demurrer where the interpretation of the contract and the parties' intent is "clear and free from doubt.").

Third, even if Penn State's unilateral decision to retain Freeh and FSS as its agents and counsel could be considered an "investigation" within the meaning of the Separation Agreement, Penn State does not, and cannot, argue that it was "required" to produce the Freeh Report, let alone publish it. The only exceptions to the Separation Agreement's blanket non-disparagement clause allow for Penn State to make negative comments about Dr. Spanier only when ***required*** (1) by law; (2) to comply with legal obligations; and/or (3) to provide truthful information

in connection with ongoing or forthcoming investigations. (Compl. ¶ 62; Separation Agreement (Compl. at Ex. A) ¶ 13.) Penn State does not, and cannot argue that it was under any obligation whatsoever to retain Freeh and pay him $8 million to produce the Freeh Report. Rather, Penn State voluntarily chose to retain Freeh and FSS as part of a public relations, damage control effort to quash the media frenzy following the indictment of Sandusky. (Compl. ¶¶ 68-71.)

And finally, even if Freeh and FSS's voluntary retention by Penn State constituted an "investigation" within the meaning of the Separation Agreement, and even if this investigation was somehow "required" within the meaning of the Separation Agreement, Penn State ***still*** cannot show that its publication of the Freeh Report constituted a statement in connection with an "ongoing or forthcoming" investigation. (*See* Separation Agreement (Compl. at Ex. A) at ¶ 13.) Penn State's retention of Freeh, which occurred more than a week ***after*** the execution of the Separation Agreement, was not ongoing ***or*** forthcoming at the time the parties entered into the contract. And the publication of the Freeh Report itself, more than six months after the execution of the Separation Agreement, was not "required ... to provide truthful information in connection with an ***ongoing or forthcoming investigation***." (*Id.*) (emphasis added). Even if Freeh's retention and work constituted an "investigation" within the meaning of the Separation Agreement, the subsequent, public dissemination of the Freeh Report was plainly

the publication of a (disparaging) ***summary*** of an already ***completed*** "investigation," as the Complaint confirms. (*See* Compl. ¶ 73 (noting that Freeh himself declared his work "completed" as of July 12, 2012).) Penn State may consider its actions in publishing the disparaging Report that followed the completion of the University-sponsored and initiated Freeh retention to have been the "honorabl[e] and responsibl[e]" thing to do, (*see* Def.'s Mem. at 15), but that does not absolve Penn State of contractual liability for knowingly publishing negative statements about Dr. Spanier. The act of publishing the disparaging and negative Freeh Report categorically cannot be described as providing truthful information in connection with an ***ongoing or forthcoming*** investigation, and therefore Penn State's actions violated the plain language of the contract.

II. Penn State Fails to Show that Certain Disparaging Trustee Statements Were Required to be Made in Connection with an Ongoing or Forthcoming Investigation.

Similarly, Penn State fails to show that Counts III-V of the Complaint do not sufficiently allege breaches of the Separation Agreement's non-disparagement clause. Count III alleges that Penn State breached the non-disparagement clause by permitting Trustees Karen Peetz and Kenneth Frazier to hold press conferences on July 12, 2012 and July 13, 2012 — accompanied by then-Penn State President Erickson — in which they made numerous negative comments about Dr. Spanier, including the statements that Dr. Spanier failed to "confront a predator," and failed

to "put the welfare of children first," that he "misled" the Board, and that he "conceal[ed]" Sandusky's sexual abuse from the Board. (Compl.¶¶ 193-203.) Count IV alleges that Penn State failed to use reasonable efforts to prevent Trustee Keith Masser from telling the Associated Press that Dr. Spanier was "involved in a cover-up" of Sandusky's crimes. (*Id.* ¶¶ 205-251.) Count V alleges that Penn State failed to use reasonable efforts to prevent 13 members of the Board of Trustees from participating in a pre-planned, joint interview with the *New York Times*, in which they stated, among other things, that Dr. Spanier failed in his professional duty to keep the Board informed of Sandusky's activities, and that Dr. Spanier chose not to keep the Board informed. (*Id.* ¶¶ 216-226.)

Penn State again attempts to argue that all of these statements were permissible "negative" comments because they were required to be made "to comply with legal obligations and/or to provide truthful information in connection with ongoing or forthcoming legal obligations." (*See* Def.'s Mem. at 16-21.) But Penn State fails to demonstrate that any of the statements at issue meet these criteria. As explained above, Penn State cannot escape liability for the negative public comments of Trustees Frazier and Peetz on the grounds that they were merely providing truthful information that they were required to provide in connection with an ongoing or forthcoming investigation. (*See* Def.'s Mem. at 16.) Penn State's hiring and encouragement of Freeh and FSS to disparage Dr.

Spanier does not absolve Penn State of liability for breach of contract when Penn State itself was prohibited from making such statements. 3 Am. Jur. 2d Agency § 64 (2016) ("a principal cannot do an act through an agent which the principal could not do directly.") Because Penn State could not legally hire an agent to breach the contract on its behalf, of course Penn State cannot then escape liability for its own public statements that doubled-down on the disparaging statements its own agent made about Dr. Spanier.

Moreover, Penn State fails to demonstrate that Peetz and Frazier's statements were required because, as the Complaint alleges, it was Penn State that voluntarily chose to hold the press conference. (Compl. ¶¶ 165-166.) Nor does Penn State point to any facts suggesting that these statements were made in connection with any ***ongoing*** or ***forthcoming*** investigation. In fact, Penn State concedes that the statements at issue in Count III were made ***after*** the conclusion of Freeh's "investigation." (Def.'s Mem. at 16.)

With respect to Count V, Penn State makes the wholly unsupported argument that by convening a group interview with the *New York Times* and making negative comments about Dr. Spanier in January 2012, 13 Penn State Trustees were merely "complying with their legal obligations" and thus did not breach the Separation Agreement's non-disparagement clause. (*See* Def.'s Mem. at 20.) But Penn State fails to identify any "legal obligation" whatsoever that

required the Trustees to give an interview to the *New York Times*, or to make the negative statements they made about Dr. Spanier.

Finally, Penn State similarly fails to explain how Trustee Keith Masser's statement to the Associated Press that Dr. Spanier was "involved in a cover-up" of Sandusky's sexual abuse was not a flagrant breach of the Separation Agreement. (*See* Compl. ¶¶ 130-131, 205-215.) Penn State does not explain how this press interview could possibly have been for the purpose of "provid[ing] truthful information in connection with an ongoing or forthcoming investigation." (Separation Agreement (Compl. at Ex. A) ¶ 13.) In fact, in attempting to explain away this statement, Penn State contravenes its own argument, admitting that Masser was merely sharing an "expression" of what he "personally perceived" regarding Dr. Spanier's conduct. (Def.'s Mem. at 18.) By Penn State's own admission, this statement was not made for the purpose of providing any truthful information in connection with any investigation; rather, Masser made this statement for the purpose of expressing his negative views about Dr. Spanier. (*Id.*) This is a per se breach of the non-disparagement clause of the Separation Agreement, and Penn State's argument that Masser believed his statements to be true is irrelevant under the terms of the contract.

The bottom line is that Penn State has not explained how any of the negative statements at issue in Counts I-V fall under any of the narrow exceptions to the

Separation Agreement's expansive non-disparagement clause. Penn State attempts to dispute factually (and incredibly) whether the statements at issue were truthful, whether Freeh and FSS were acting as agents of Penn State, and whether statements it voluntarily made in press conferences and to media outlets were somehow required for the purposes of cooperating with ongoing or forthcoming investigations. But even if Penn State's factual quibbles had merit, and they do not, they are not appropriate for consideration in resolving Penn State's demurrer. *See P.J.S.*, 669 A.2d at 1112. Accordingly, Penn State's preliminary objections to Counts I-V must be overruled.

III. Penn State Does Not Dispute that it has Failed to Provide Administrative Support and to Pay Legal Expenses.

Finally, Penn State fails to offer any valid reason as to why Plaintiff has not stated a valid claim for breach of the Separation Agreement due to Penn State's failure to provide contractually required administrative support to Dr. Spanier, as well as Penn State's failure to pay his expenses and legal fees as required by the Separation Agreement. Penn State's arguments contravene both the plain language of the contract and the allegations set forth in the Complaint, which is impermissible at the preliminary objections stage. *Twp. of Derry v. Pa. Dep't of Labor & Indus.*, 940 A.2d 1265, 1268 (Pa. Commw. Ct. 2008) (in reviewing preliminary objections, the Court must treat as true all well-pleaded allegations in a complaint). Accordingly, Defendants' preliminary objections should be overruled.

First, Count VI of the Complaint concerns Section 4(d) of the Separation Agreement, which requires Penn State to provide Plaintiff with post-Presidency administrative support:

> (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.

(Compl. ¶ 61, Count VI; *see also* Separation Agreement (Compl. at Ex. A) at 4(d).) The last paragraph of Section E.6 of the 2010 Employment Agreement states: "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 the presidency. The terms of Section E.6 shall survive the expiration of this Agreement." (Compl. ¶ 62; *see also* Employment Agreement (Def.'s Mem. at Ex. D) at E.6.) The Separation Agreement does not in any way provide or suggest that the Agreement shall be terminated or cease to operate in the event that Dr. Spanier is criminally charged. (Compl. ¶ 66; *see generally* Separation Agreement (Compl. at Ex. A).)

Penn State has not provided Dr. Spanier with the specific administrative support identified in the Separation Agreement, nor has it provided Dr. Spanier

administrative support commensurate with that received by other tenured faculty members and University Professors. (Compl. ¶¶ 167-170.) The Complaint alleges that despite Dr. Spanier's requests, Penn State has not provided Dr. Spanier with an office or assistant. (*Id.* ¶¶ 150, 168, 170.) The Complaint further alleges that Penn State has refused to allow Dr. Spanier to teach a course at the University. (*Id.* ¶ 168.) The Complaint further alleges that Penn State revoked Dr. Spanier's network access, confiscated his desktop computer, laptop, iPad, and all associated electronics, and has refused to provide Dr. Spanier with IT support. (*Id.* ¶ 169.) These allegations are more than sufficient to allege a breach of the Separation Agreement. *See Hess v. Sexchick Poultry Servs., Inc.*, No. CI-03-10667, 2006 WL 5004100, at *295 (Pa. Ct. Comm. Pl. Aug. 23, 2006) ("In a breach of contract action, a plaintiff must allege facts supporting three elements: '(1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) damages.'") (quoting *Sullivan v. Chartwell Invest. Partners LP*, 873 A.2d 710, 716 (Pa. Super. 2005).)

In response, Penn State does not deny or dispute that it has failed to provide administrative support to Dr. Spanier as required by the Separation Agreement. (*See* Def.'s Mem. at 21-24.) In fact, Penn State admits that it has not provided such support. (*Id.*) Penn State's only argument in response is to claim that its actions were warranted by the fact that Dr. Spanier was criminally charged in

November 2012, nearly a year after the parties entered into the Separation Agreement. (*Id.* at 21-22.) The problem for Penn State, however, is that the plain language of the Separation Agreement provides no support for Penn State's supposed unilateral decision to breach the contract based on Dr. Spanier's criminal indictment.[3]

Penn State inexplicably argues that "[t]he Complaint does not cite to any provision in the [Separation Agreement] that allegedly prevents the University, in the case of a post-contract indictment, from taking this action." (*Id.* at 22.) But Dr. Spanier has done just that. Paragraph 4(d) of the Separation Agreement requires Penn State to provide Dr. Spanier with an office, an assistant, and administrative support for the duration of the contract, ***without condition or qualification***. As noted specifically in the Complaint, there is no provision that conditions Penn State's duty to perform on whether or not Dr. Spanier is faced with criminal charges during the lifetime of the contract. (Compl. ¶ 66.) Penn State's argument amounts to no more than an implicit acknowledgment that it has breached the Separation Agreement and that it can identify no provision of the contract or Pennsylvania law that excuses its breach.

[3] Notably, despite the fact that most of the charges against Dr. Spanier have since been quashed, Penn State still has not resumed compliance with the Separation Agreement.

Moreover, Penn State then proceeds to undermine its own argument by referencing a provision in Dr. Spanier's ***prior*** Employment Agreement that did excuse Penn State from performing certain aspects of ***that contract*** in the event that Dr. Spanier was "formally indicted in a court of law of any felony." (Def.'s Mem. at 23, citing Employment Agreement (Def.'s Mem. at Ex. D) at 12.) Despite noting that certain portions of the Employment Agreement were incorporated in the Separation Agreement, (*see* Def.'s Mem. at 23), Penn State pointedly does not argue that ***this*** provision of the Employment Agreement was incorporated in the Separation Agreement, because it was not. (*See generally* Separation Agreement (Compl. at Ex. A) (stating that the prior 2010 Employment Agreement was "terminated as of November 9, 2011," incorporating only select, specified portions of that Employment Agreement, and stating that "the terms and conditions of this [Separation] 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."). Penn State's attempt to rely on this provision from a superseded contract only serves to highlight that (1) at the time it entered into the Separation Agreement, Penn State was fully aware of how to include a clause excusing performance in the event of Dr. Spanier's criminal indictment; and (2) at the time

in entered into the Separation Agreement, Penn State was fully aware that Dr. Spanier's previous Employment Agreement included such a clause, but that (3) the parties chose not to include such a clause in the Separation Agreement. Because Penn State does not contest that it has taken actions that breach the plain language of the Separation Agreement, its preliminary objections should be overruled.

Finally, Penn State argues that Dr. Spanier does not state a claim for reimbursement of expenses and attorneys' fees that Dr. Spanier has incurred with respect to the grand jury presentment and his termination from the position of President of Penn State. (*See* Def.'s Mem. at 24-26.) Notably, Penn State acknowledges that the Separation Agreement provides for an ongoing duty of indemnification with respect to expenses arising out of any alleged acts or omissions that occurred while Dr. Spanier was serving as President, as well as for reimbursement attorney's fees and expenses he has incurred in relation to "the grand jury presentment and his termination from the position of President of the University." (*Id.* at 24.) Penn State argues only that Dr. Spanier's alleged expenses are not reimbursable under the contract.

First, Penn State argues that it is not required to reimburse Dr. Spanier for the cost of hiring a public relations firm to mitigate the unfathomable reputational harm caused by the disparaging statements that Penn State made in breach the Separation Agreement. (*Id.* at 25; *see also* Compl. ¶¶ 171-172, 242, 244.) Penn

State argues that Dr. Spanier is not entitled to reimbursement for these "public relations" expenses, but does not dispute that the relevant provisions of the Separation Agreement are ***not*** limited to reimbursement of legal fees. Nor does Penn State address Dr. Spanier's factual allegations stating that these expenses were incurred as a direct result of Penn State's prohibited, disparaging statements, which accused Dr. Spanier of supposed acts or omissions that occurred while Dr. Spanier was President of Penn State.

Under the plain terms of the Separation Agreement, Dr. Spanier's efforts to repair the egregious harm to his reputation were "expenses" which he "incurred in connection with matters relating to ... his termination from the position of President of the University," (Separation Agreement (Compl. at Ex. A) at ¶ 4(f)), as well as "expenses" that he "incurred" "subsequent to termination of employment as President with respect to acts or omissions occurring while he was serving as President." (*See Id.* at ¶ 6 (incorporating Employment Agreement (Def.'s Mem. at Ex. D) at ¶ J).) The Separation Agreement thus requires Penn State to reimburse Dr. Spanier for these expenses, and Penn State does not dispute that it has not done so.

Next, Penn State disputes that it is required to reimburse Dr. Spanier for the cost of a lawsuit that Dr. Spanier had to file against Penn State in order to obtain access to his own emails that Penn State provided to Freeh and FSS, but refused to

provide to Dr. Spanier. (*See* Def.'s Mem. at 25; Compl. ¶ 173.) Dr. Spanier specifically requested that he be granted access to his own emails in order to ensure the accuracy of the University-sponsored Freeh's Report and to prepare for his own interview with Freeh. (Compl. ¶ 173.) Penn State argues that the Separation Agreement does not provide for reimbursement for fees Dr. Spanier "unilaterally chose to incur," and that Dr. Spanier does not allege that he requested, and was refused, reimbursement for the cost of this lawsuit. (Def.'s Mem. at 25.) Penn State is wrong in both respects.

First, the the Separation Agreement does not condition reimbursement of legal fees on whether the fees were incurred in an offensive or defensive legal action; rather, the determining factor is whether the fees were incurred in relation to Dr. Spanier's termination or to alleged acts or omissions that occurred while Dr. Spanier was serving as President of Penn State. (Separation Agreement (Compl. at Ex. A) at ¶¶ 4(f), 6.) Dr. Spanier alleges not only that the entire purpose of this suit was to prepare for and defend himself against the University-sponsored Freeh Report — which indisputably accused Dr. Spanier of multiple improper acts and omissions during his time as President – but also that it was Penn State's own legal counsel that suggested he file the suit in order to gain access to his emails. (Compl. ¶ 173.) Second, Dr. Spanier also specifically alleges in the Complaint that "Penn State refused to reimburse [him] for any of the legal bills associated with

this suit."[4] (Compl. ¶ 173; *see also id.* ¶ 242.) Penn State's argument to the contrary is an improper attempt to dispute the facts asserted in the Complaint. *See Twp. of Derry,* 940 A.2d at 1268.

Because Dr. Spanier has alleged sufficient facts supporting his claims that Penn State has breached the Separation Agreement by failing to provide administrative support and by failing to reimburse Dr. Spanier for his expenses and legal fees, Penn State's preliminary objections to Counts VI and VII should be overruled.

CONCLUSION

For all of the reasons set forth above, Defendant's preliminary objections should be overruled in their entirety, and Plaintiff's breach of contract claims should be permitted to proceed.

Dated: May 16, 2016

By: _____

Thomas A. Clare (pro hac vice)
Elizabeth M. Locke (pro hac vice)
Andrew C. Phillips (pro hac vice)
CLARE LOCKE LLP
(motions to participate *pro hac vice* forthcoming)
902 Prince Street
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[4] Notably, Penn State actually did initially reimburse Dr. Spanier for his public relations expenses, before it refused to continue doing so. Included among the legal bills Penn State has refused to pay are the fees for Dr. Spanier's successful appellate defense that recently resulted in most of the criminal charges against him being quashed.

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ATTORNEYS FOR PLAINTIFF GRAHAM B. SPANIER

Exhibit A

Freeh Sporkin & Sullivan, LLP

PRIVILEGED AND CONFIDENTIAL

November 18, 2011

Steve A. Garban
Chairman, Board of Trustees
and
Paula R. Ammerman
Director, Office of the Board of Trustees
The Pennsylvania State University
205 Old Main
University Park, PA 16802

Re: Engagement to Perform Legal Services

Dear Mr. Garban and Ms. Ammerman:

We are pleased that the Board of Trustees of The Pennsylvania State University ("Trustees", "you" or "your"), on behalf of the Special Committee established by the Trustees (the "Special Committee"), has engaged us to represent the Special Committee. This is a new engagement for Freeh Sporkin & Sullivan, LLP ("FSS"). Accordingly, this is to set forth the basic terms upon which FSS has been engaged to represent the Special Committee, including the anticipated scope of our services and billing policies and practices that will apply to the engagement. Although our services are limited at this time to the specific matter described herein, the general terms of this letter will apply to any other matters that FSS may hereafter undertake to handle for the Trustees or the Special Committee.

1. Scope of Engagement. FSS has been engaged to serve as independent, external legal counsel to the Special Committee to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University ("PSU") personnel to report such sexual abuse to appropriate police and government authorities. The results of FSS's investigation will be provided in a written report to the Special Committee and other parties as so directed by the Special Committee. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS's report also will provide recommendations to the Special Committee and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

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Washington, DC 20037
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It is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that FSS will act under the sole direction of the ~~Special Committee~~ Task Force in performing the services hereunder. It also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that FSS's investigation will be completed in parallel to, but indeprendent of, any other investigation that is conducted by any policy agencies, governmental authorities or agencies, or other organizations within or outside of (e.g., The Second Mile) PSU, and will not interfere with any such other investigations.

It also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that during the course of FSS's independent investigation performed hereunder, FSS will immediately report any discovered evidence of criminality to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~ Task Force. If FSS's investigation identifies any victims of sexual crimes or exploitation, FSS will immediately report such information to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~ Task Force.

FSS also will communicate regarding its independent investigation performed hereunder with media, police agencies, governmental authorities and agencies, and any other parties, as directed by the ~~Special Committee~~ Task Force. However, it also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that neither the Trustees nor the ~~Special Committee~~ Task Force will interfere with FSS's reporting of evidence of criminality or identities of any victims of sexual crimes or exploitation discovered throughout the course of FSS's independent investigation performed hereunder, as discussed in the paragraph immediately above.

The precise time frame in which FSS's services will be performed cannot presently be determined. However, FSS, the Trustees and the ~~Special Committee~~ Task Force all recognize that the investigation must be completed in a thorough manner, but also as expeditiously as possible.

2. Rates. It is anticipated that Louis J. Freeh will be the lead and billing attorney on this engagement. Other FSS, and other non-FSS professionals, will be assigned from time to time to assist in the representation. FSS will charge you for the services provided under the terms of this engagement letter based on the hourly rates of the professionals working on this matter, plus reasonable expenses as described below in the "Disbursements" section of this engagement letter. The hourly rates that will be charged in connection with this matter are as follows: Mr. Freeh -- [redacted] USD per hour; other FSS partners -- [redacted] USD per hour; investigators and FSS non-partner lawyers -- [redacted] USD per hour; and paraprofessional support staff -- [redacted] USD per hour. We reassess our hourly rates from time to time and adjustments are made when we believe such adjustments are appropriate. These adjustments may be reflected in the billing rates utilized to determine our charges to you during the course of our engagement. FSS bills in quarter of an hour increments.

3. Disbursements. In addition to fees for our services, we also charge separately for certain costs incurred on the ~~Special Committee~~ Tail Entities's behalf, such as travel related expenses. Our invoices also will include costs incurred on the ~~Special Committee~~ Tail Entities's behalf for services and materials provided by third-party vendors, including but not limited to courier and messenger service, airfreight service, outside copy service, shipping and express mail, filing fees, deposition transcripts, and court reporters. Under certain circumstances, for certain large disbursements, we may either bill you directly or ask you to advance funds outside our normal billing cycle. In addition to the third-party disbursements noted above, other charges that will be reflected on our invoices include the following:

   - International calling costs will be charged at the standard provider rates.
   - Computerized research costs will be charged at the standard provider rates.
   - Office supply costs are not passed on to a client unless a purchase is specifically required for a particular engagement.

   We make every effort to include disbursements in the invoice covering the month in which they are incurred. However, there may be occasions when disbursements may not be posted in the billing system until the following month. If the required payment of our invoices is based on the completion of a specific assignment, pursuant to any alternative timing arrangements that have been established and are described in the "Rates" section of this engagement letter, an estimate of unposted disbursements in addition to an estimate of unposted charges for services will be included in our invoice payable at completion.

4. Payment Terms. Generally, our invoices are prepared and forwarded to our clients monthly covering fees and costs incurred for the prior month. Any alternative timing arrangements for invoicing that have been established are described in the "Rates" section of this engagement letter.

   Unless stated differently in the "Rates" section of this engagement letter, our invoices for service are due and payable within thirty (30) days of receipt. Clients whose invoices are not paid within this period may have a late charge assessed on their unpaid balance at the rate of 1% per month. The intent of the late charge is to assess on an equitable basis additional costs incurred by FSS in carrying past-due balances.

   FSS requires payment at the conclusion of this engagment of all accrued and unpaid fees and disbursements to the extent invoiced, plus such additional amounts of fees and disbursements as shall constitute our reasonable estimate of fees and disbursements incurred or to be incurred by us through the conclusion of this engagement (though such estimate shall not thereafter preclude a final settling of accounts between us when final detailed billing information is available).

During this engagement, the Trustees and the ~~Special Committee~~ Task Force may request from us an estimate of fees and/or costs that we anticipate incurring on the ~~Special Committee~~ Task Force's behalf. While we may provide an estimate for your or the ~~Special Committee~~ Task Force's general planning purposes, our estimate is only a preliminary approximation based on facts that are currently available and the currently anticipated level of work required to complete the engagement. In no event is an estimate to be construed as a commitment of FSS to render services at a minimum or maximum cost.

Unless otherwise agreed, our invoice will be presented in our standard format. If this format is not sufficient for your needs, we will work with you to find one that is. FSS will review individually any requests to use a third party vendor for electronic billing. Depending on the vendor requested, we might provide alternative recommendations in order to insure that electronic billing through a third party is both practical and efficient. All charges related to using a third party vendor for this purpose, including initial start-up costs and maintenance fees, will be payable by the Trustees directly.

Where required, your billing statement may include applicable international taxes such as VAT, GST, and consumption tax, etc.

Upon request, we will forward our billing statements to a third party designated by you who is assuming payment responsibility for your or the ~~Special Committee~~ Task Force's legal expenses, e.g., an insurance carrier who holds your liability coverage. In the event that timely payment is not received from the third party, we will look to the Trustees for payment of our legal fees and costs and you agree that you are responsible for prompt payment in that event.

All payments should be sent directly to: 3711 Kennett Pike, Suit 130, Wilmington, Delaware 19807. If you choose to pay by wire transfer, wire transfer instructions are as follows:

Account Holder: Freeh Sporkin & Sullivan, LLP

Bank:

Account No.:

ABA/Routing No.:
(For Domestic Payments)

SWIFT Code:
(For International Payments)

The billing attorney assigned to this matter will review your billing statement before it is sent to you and make any adjustments he or she views as appropriate. If you have

any questions concerning any invoice item, please do not hesitate to contact the billing attorney.

5. Retention of Third Parties. We may determine that it is necessary to involve third parties to assist us in performing services in connection with this engagement. If that determination is made, we will notify the ~~Special Committee~~ Task Force promptly to discuss the proposed third parties, the expected scope of the services to be provided by the third parties and the related fees and costs expected to be charged by those third parties. FSS will consult with the ~~Special Committee~~ Task Force about any changes to the third parties' scope of services or related fees and costs that may occur throughout the course of this engagement.

   For the purpose of providing legal services to the ~~Special Committee~~ Task Force, FSS will retain Freeh Group International Solutions, LLC ("FGIS") to assist in this engagement. It should be noted that Louis J. Freeh is a partner and member in FSS and FGIS, respectively, and has a controlling interest in both. FSS is a law firm and FGIS is a separate investigative and consulting group.

   As described in the "Disbursements" section of this engagement letter, our invoices will include fees and costs incurred on the ~~Special Committee~~ Task Force's behalf for services and materials provided by third parties, unless stated otherwise in the "Rates" section of this engagement letter, or in a separate writing signed by FSS and the Trustees.

6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the ~~Special Committee~~ Task Force under this enagagment by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges, unless appropriately waived by the parties or otherwise determined by law. In the event that FSS, or any third party working on behalf of FSS to perform services in connection with this engagement, is required to respond to a subpoena or other formal request from a third party or a governmental agency for our records or other information relating to services we have performed for the ~~Special Committee~~ Task Force, or to testify by deposition or otherwise concerning such services, to the extent permitted by law, we will provide you and the ~~Special Committee~~ Task Force notice of such a request and give you and the ~~Special Committee~~ Task Force a reasonable opportunity to object to such disclosure or testimony. It is understood that you will reimburse us for our time and expense incurred in responding to any such demand, including, but not limited to, time and expense incurred in search and photocopying costs, reviewing documents, appearing at depositions or hearings, and otherwise litigating issues raised by the request.

7. General Responsibilities of Attorney and Client. FSS will provide the above-described legal services for the ~~Special Committee~~ Task Force's benefit, for which the Trustees will be billed in the manner set forth above. We will keep the ~~Special Committee~~ Task Force

apprised of developments as necessary to perform our services and will consult with the ~~Special Committee~~ Task Force as necessary to ensure the timely, effective and efficient completion of our work. However, although we will make every reasonable effort to do so, we cannot guarantee that we will be able to provide specific results and the Trustees and the ~~Special Committee~~ Task Force acknowlege that FSS does not promise any result.

We understand that the ~~Special Committee~~ Task Force will provide us with such factual information and documents as we require to perform the services, will make any business or technical decisions and determinations as are appropriate to facilitate the completion of our services, and will remit payment of our invoices when due, pursuant to the terms of this engagement letter.

Moreover in connection with any investigation, civil or criminal action, administrative proceeding or any other action arising out of this matter, the Trustees have agreed to indemnify FSS, it's partners, employees, agents and third-party vendors who have provided or are providing services in connection with this engagement, for all costs, expenses, attorney's fees (to be paid as accured and billed) and judgements, including any amounts paid in settlement of any claims. This obligation shall survive the termination of this engagement.

8. Waiver of Future Conflicts. Our agreement to represent the ~~Special Committee~~ Task Force is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to either you or an affiliate in any matters (whether involving the same substantive areas of law for which you have retained us on behalf of the ~~Special Committee~~ Task Force or some other unrelated areas, and whether involving business transactions, counseling, litigation or otherwise), which do not involve the same factual and legal issues as matters for which you have retained us on behalf of the ~~Special Committee~~ Task Force or may hereafter retain us. In this connection, you and the ~~Special Committee~~ Task Force should be aware that we provide services on a wide variety of legal subjects, to a number of clients, some of whom are or may in the future operate in the same areas of business in which you are operating or may operate. Subject to our ethical and professional obligations, we reserve the right to withdraw from representing the ~~Special Committee~~ Task Force should we determine that a conflict of interest has developed for us.

9. Engagement Limited to Identified Client. This will also confirm that, unless we otherwise agree in writing, our engagement is solely related to the ~~Special Committee~~ Task Force established by The Pennsylvania State University Board of Trustees and the specific matter described above. By entering into this engagement, we do not represent any individuals or entities not named as clients herein, nor do we represent any owner, officer, director, founder, manager, general or limited partner, employee, member, shareholder or other constituent of any entity named as a client in this letter, in their individual capacities or with respect to their individual affairs.

10. Termination. Our engagement may be terminated at any time by FSS or the ~~Special Committee~~ Task Force upon written notice and, with respect to FSS, subject to our ethical and professional obligations. In addition to other reasons, the Trustees and the ~~Special Committee~~ Task Force agree that FSS may terminate its legal sevices and withdraw from this engagement in the event our invoices are not paid in a timely manner, pursuant to the terms of this engagment letter. Upon termination, all fees and expenses due and owing shall be paid promptly. Your and the ~~Special Committee~~ Task Force's acceptance of this engagement letter constitutes your and the ~~Special Committee~~ Task Force's understanding of, and consent to, the particular terms, conditions, and disclosure herein.

11. Client Files. In the course of our representation of the ~~Special Committee~~ Task Force, we will maintain a file containing, for example, correspondence, pleadings, agreements, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary for the ~~Special Committee~~ Task Force's representation ("Client File"). We may also place in such file documents containing our attorney work product, mental impressions or notes, drafts of documents, and internal accounting records ("Work Product"). The ~~Special Committee~~ Task Force is entitled upon written request to take possession of its Client File, subject to our right to make copies of any files delivered to the ~~Special Committee~~ Task Force. The Trustees and the ~~Special Committee~~ Task Force agree that the Work Product is and shall remain our property. Under our document retention policy, we normally destroy files ten years after a matter is closed, unless other arrangements are made with the client.

FSS, of course, is delighted to be asked to provide legal services to the ~~Special Committee~~ Task Force, and we are looking forward to working with the ~~Special Committee~~ Task Force on this engagement. While ordinarily we might prefer to choose a less formal method of confirming the terms of our engagement than a written statement such as this, it has been our experience that a letter such as this is useful both to FSS and to the client. Moreover, in certain instances, FSS is required by law to memorialize these matters in writing. In any event, we would request that the Trustees and the ~~Special Committee~~ Task Force review this letter and, if it comports with your and the ~~Special Committee~~ Task Force's understanding of our respective responsibilities, so indicate by returning a signed copy to me at your earliest convenience so as not to impede the commencement of work on behalf of the ~~Special Committee~~ Task Force. If you or the ~~Special Committee~~ Task Force have any questions concerning this engagement letter, or should the ~~Special Committee~~ Task Force ever wish to discuss any matter relating to our legal representation, please do not hesitate to call me directly, or to speak to one of our other attorneys who is familiar with the engagement.

Again, we look forward to serving the ~~Special Committee~~ Task Force and thank the ~~Special Committee~~ Task Force and the Trustees for looking to FSS to assist the ~~Special Committee~~ Task Force in this matter.

Sincerely,

Louis J. Freeh*
Senior Managing Partner
Freeh Sporkin & Sullivan, LLP

APPROVED AND AGREED TO ON BEHALF OF
The Board of Trustees of The Pennsylvania State University:

By: _____
an authorized signatory of The Board of Trustees of The Pennsylvania State University

Printed Name: Steve A. Garban

Title: Chair, Board of Trustees
The Pennsylvania State University

Date: 12/2/11

Investigations Task Force

APPROVED AND AGREED TO ON BEHALF OF
The Special ~~Committee~~ established by
The Board of Trustees of The Pennsylvania State University:

By: _____
an authorized signatory of The Special ~~Committee~~ Investigations Task Force established by
The Board of Trustees of The Pennsylvania State University

Printed Name: K.C. Frazier

Title: Chair, Special Investigations Task Force

Date: 12/2/11

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Exhibit B

2016 WL 374724
Only the Westlaw citation is currently available.
United States District Court,
E.D. Pennsylvania.

Deirdre Garcia.
v.
Scientifix, LLC., George Lynch.

C.A. NO. 15-2392
|
Signed 02/01/2016

Attorneys and Law Firms

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MEMORANDUM OPINION

SCHMEHL, J.

*1 Plaintiff brought this action, claiming the defendants breached the terms of a non-disparagement clause in a settlement agreement entered into between the parties in a prior action. Plaintiff has also added claims for intentional interference with prospective contractual relations and defamation. Presently before the Court is the defendants' motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, the motion is granted in part and denied in part.

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A complaint has facial plausibility when there is enough factual content "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 55 U.S. 662, 678 (2009). A court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Phillips v. Cnty of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008). Legal conclusions and recitals of the elements of a cause of action that are supported only by mere conclusory statements are to be disregarded. Santiago v. Warminster Twp., 629 F. 3d 121, 128 (3d Cir. 2010).

The Complaint alleges that from October 2005 until March 2012, plaintiff was employed by defendant Scientifix, LLC ("Scientifix") as a sales representative. Compl ¶ 7. Defendant George Lynch ("Lynch") is a corporate officer with Scientifix. Id. ¶ 6. On July 12, 2013, plaintiff filed an action in this Court captioned Deirdre Garcia v. Scientifix, LLC, George Lynch, Scott Stewart and Brian Foresta, E.D. Pa. No. 13-4074 (the "Prior Action"), alleging violations of the Pennsylvania Wage Payment Collection Law, 43 Pa.C.S. 260.1 and breach of contract. Id. ¶¶ 8, 9. The parties reached a settlement, the terms of which were set forth in a Settlement Agreement and Release ("Agreement") executed by all parties. Id ¶ 11, Ex. A.

Paragraph 6 of the Agreement provides:

> **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.** (emphasis added).

Id. ¶ 12.

The Complaint alleges that plaintiff has over 20 years of experience in the educational institution laboratory construction industry. Id. ¶ 15. She is presently employed as Director of Business Development for Flatiron Construction Company ("Flatiron"), a full service general contractor in the Philadelphia area. Id. ¶ 16. At Flatiron, plaintiff is actively involved in preparing Requests for Proposal ("RFP") for educational institution projects, including laboratory renovations. Id. ¶ 18.

*2 In early April 2015, plaintiff circulated a RFP for laboratory work at Temple University to potential bidders, including Scientifix. Id. ¶ 19. Mott Manufacturing provides a large amount of laboratory equipment that is used in educational laboratory projects. Id. ¶ 21. Mott's exclusive designated dealer representative in eastern Pennsylvania is Scientifix. Id. ¶ 22. Plaintiff represented several Mott dealers since 1992. In fact, during her career, when the designated

eastern Pennsylvania Mott dealer changed, plaintiff worked for the new dealer, which led to her former employment with Scientifix. Id. ¶ 23.

On April 24, 2015, shortly after Scientifix received the RFP for the Temple Project, Lynch forwarded an e-mail, using his Scientifix email address and Scientifx logo, to Marc Kleiman, a project manager for Flatiron and to Mario DiFonte, Vice President of Sales and Marketing for Mott under the subject "Future Bid Work" 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. ¶ 24, Ex. B.

Plaintiff alleges that she has not shared Scientifix pricing with competitors in the past and has never exhibited any unethical conduct in her work within the educational institution laboratory construction industry. Id. ¶ 28. Plaintiff alleges that defendants portrayed her as unethical and untrustworthy to Mott for the purpose of harming her reputation in the laboratory construction industry. Id. ¶ 29.

In Count One of her Complaint, plaintiff alleges that defendants breached the non-disparagement clause of the Agreement by communicating, publishing and releasing negative and/or dispargaing comments and information about plaintiff. Id. ¶ 37.

Defendants argue in their motion to dismiss that the breach of contract claim must be dismissed because the non-disparagement clause in the Agreement is limited in scope to negative and disparaging comments arising only out of the Prior Action or made during plaintiff's employment with Scientifix. Defendants argue that the substance of Lynch's e-mail did not relate to the substance of the Prior Action and, therefore, did not violate the non-disparagement clause.

Under Pennsylvania law, the first step in interpreting a contract is to ascertain the intent of the parties. Truserve Corp.v Morgan's Tool & Supply Co., 39 A.3d 253, 260 (Pa. 2012). When the words of a contract are clear and unambiguous, the Court can determine the intent of the parties based on the common and plain meaning of the words used. Id. The Court must give effect to all of the provisions in the contract. Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 429 (Pa. 2001).

A clear and unambiguous contract is construed as a matter of law. Trizechahn Gateway, LLC v. Titus, 976 A.2d 474, 483 (Pa. 2009). If, however, the contract is ambiguous, it is for the factfinder to ascertain the parties' intent. Id. Merely because the parties interpret the contract differently does not mean that it is ambiguous. Espenshade v. Espenshade, 729 A.2d 1239, 1242 (Pa. Super. Ct. 1999). Only where the contract language is capably of being reasonably understood in more than one sense is a contract ambiguous. Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 905 A.2d 462, 468-69 (Pa. 2006). Where the alternative meaning is unreasonable, there is no ambiguity. Murphy, 777 A.2d at 430.

Contrary to defendants' argument, the Court finds that the terms of the non-disparagement clause could not be more clear and unambiguous. Giving the words used their common and plain meaning, the Court finds that both plaintiff and defendants intended that neither will communicate or publish any negative or disparaging information about the other. Period. There is no language anywhere in the provision that would limit its scope to claims arising from or relating to plaintiff's employment with Scientifix or to only the Prior Action.

***3** An e-mail from Lynch to plaintiff's new employer, Flatiron, as well as to Mott whose dealers plaintiff has represented since 1992, stating that he does not trust plaintiff's ethics and accusing plaintiff of sharing Scientifix pricing with competitors in the past clearly qualifies 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. As a result, the Court finds that plaintiff has alleged the existence of a contract with clear and unambiguous terms, a breach of the contract and resulting damages.

In Count Two of her Complaint, plaintiff alleges that she "has prospective contractual relations with customers whom she has known and developed over the course of [her] career in the laboratory industry." Id. ¶ 40. Plaintiff alleges that "these relationships constitute prospective contractual relations." Id. ¶ 41. Plaintiff further alleges that defendants' actions in forwarding the e-mail "had the purpose and intent of harming [plaintiff] by preventing these relations from occurring." Id. ¶ 42.

Defendants argue that plaintiff herself was never a party to any contract between Flatiron and any bidder responding to an RFP and that plaintiff has failed to identify any actual contractual relation between her and any prospective customer with which defendants could have interfered.

In order to establish a claim for interference with an existing or prospective contractual relation, a plaintiff must plead: "(1) the existence of a contractual or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage as a result of the defendant's conduct." Crivelli v. General Motor Corp., 215 F.3d 386, 394 (3d Cir. 2000); see also, Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. 1997).

With regard to the first element, it is essential that plaintiff alleges a prospective contractual relationship between the actual plaintiff and a third person other than the defendant. Daniel Adams Associates, Inc. v. Rimbach Publishing, Inc., 519 A.2d 997, 1000 (Pa. Super. 1987). The Pennsylvania Supreme Court has defined a "prospective contractual relation" as "something less than a contractual right, but something more than mere hope." Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979). A plaintiff must establish a reasonable probability that but for the wrongful acts of the defendant, a contractual relationship would have been established. Thompson, 412 A.2d at 417.

Plaintiff alleges that she is employed by Flatiron, for whom she prepares Requests for Proposals for educational institution projects. Compl. ¶¶ 16-18. Plaintiff alleges that she circulated an RFP for a laboratory project at Temple University, that she sent the RFP to entities including the defendants, and that defendant Lynch responded to the RFP with the e-mail at issue. Id. ¶¶ 19, 24. Plaintiff further alleges that Lynch's conduct interfered with "contractual relations with customers whom [plaintiff] has known and developed over the course of his [sic] career in the laboratory industry." Id. ¶ 40.

Plaintiff, however, has failed to identify a specific, non-speculative prospective contract between plaintiff and another entity with which defendants have interfered. Instead, plaintiff merely alleges that defendants interfered with "[unspecified] contractual relations with [unspecified] customers whom she has known and developed" over the course of her career. Id. ¶ 40. Indeed, according to the Complaint, plaintiff herself did not enter into any actual contracts, but rather her role was limited to preparing RFPs for her current employer, Flatiron. While defendants' actions may have interfered with plaintiff's prospective business relationships, there are no allegations that they interfered with any of plaintiff's contractual relationships. As a result, plaintiff has failed to satisfy the first element of a claim for intentional interference with prospective contractual relations–the existence of a prospective contractual relation between the plaintiff and a third party.

*4 In Count Three, plaintiff alleges that the content's of Lynch's e-mail were defamatory, were published and specifically applied to plaintiff, the recipients understood that the e-mail was intended to apply to plaintiff, that plaintiff sustained special harm including impairment of reputation and standing in the community, personal humiliation and mental anguish, that the email was not made pursuant to a conditional privilege and that it was made with malice. Id. ¶¶ 46-51.

Defendants respond that the e-mail was sent to a limited audience in a strictly business context and that in any event the statement was conditionally privileged.

Under the applicable Pennsylvania statute, a plaintiff asserting a claim for defamation has the burden of proving:

> (1) The defamatory character of the communication.
>
> (2) Its publication by the defendant. (3) Its application to the plaintiff.
>
> (4) The understanding by the recipient of its defamatory meaning.
>
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
>
> (6) Special harm resulting to the plaintiff from its publication.
>
> (7) Abuse of a conditionally privileged occasion.

42 Pa. Cons. Stat. Ann.§ 8343(a). "Whether a statement can reasonably construed as defamatory is a question of law for the court to decide." Rockwell v. Health, Educ. & Research Found., 19 F.Supp. 2d 401, 404 (E.D. Pa. 1998). In determining whether a statement is defamatory under Pennsylvania law, a court must examine the effect that statement is calculated to produce and "the impression it would naturally engender in the minds of the average persons among who it is intended to circulate." Id. at 405. A statement is defamatory "if it tends to blacken a person's reputation or

expose him to public hatred, contempt or ridicule, or injure him in his business or profession" or otherwise "lower[s] a person in the estimation of the community" or "deter[s] third persons from associating with him." Mzamane v. Winfrey, 693 F. Supp. 2d 442, 477 (E.D. Pa. 2010). Courts should not dismiss defamation claims "unless...it is clear that the communication is incapable of defamatory meaning." Rapid Circuits, Inc. v. Sun Nat. Bank, No. 10-6401, 2011 WL 1666919, at *12 (E.D. Pa. May 3, 2011)(emphasis in original).

Accepting the allegations in the Complaint as true, the Court has little trouble concluding that the statements contained in the e-mail from Lynch to Flatiron and Mott, questioning plaintiff's ethics and accusing her of sharing Scientifix's pricing with competitors are capable of defamatory meaning. The defamatory communication was published by Lynch in an e-mail to representatives of Flatiron and Mott and specifically referred to plaintiff. In addition, plaintiff specifically denies that she has shared Scientifix pricing with competitors in the past Compl. ¶ 27.

Publication of a defamatory statement may nonetheless be permissible "if the publication was made subject to a privilege, and the privilege was not abused." Chicarella v. Passant, 494 A.2d 1109, 112-13 (Pa. Super. Ct. 1985). Privileged communications for the purposes of a defamation action are those "made on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause." Id. at 1113 (internal citations omitted). Occasions "giving rise to conditional privileges are: (1) when some interest of the publisher of the defamatory matter is involved; (2) when some interest of the recipient of the matter, or a third party is involved; or (3) when a recognized interest of the public is involved." Beckman v. Dunn., 419 A.2d 583, 587 (Pa. Super. Ct. 1980).

***5** Abuse of a conditional privilege results from publication: (1) driven by malice or negligence; (2) for a purpose other than that for which the privilege is given; (3) to a person not reasonably believed to be necessary to accomplishing the purpose of the privilege; or (4) including defamatory content not reasonably believed to be necessary to accomplish the purpose. Id. at 588.

While defendants may have a conditional privilege in sharing their opinion about plaintiff with a recipient/third party such as Flatiron and Mott, the plaintiff is entitled to show that defendants may have abused this privilege by showing that Lynch knew or should have known that the contents of the publication were not true. Plaintiff has alleged that defendants' e-mail was "motivated by malice and was made for a purpose other than that for which any privilege is given and was not reasonably to be necessary to the accomplishment of the purpose [of] any such privilege." Compl. ¶ 52. Therefore, this issue needs to be fleshed out in discovery. The motion to dismiss the defamation claim is denied.

All Citations

Slip Copy, 2016 WL 374724

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2006 WL 5004100 (Pa.Com.Pl.)
Court of Common Pleas of
Pennsylvania, Lancaster County.

Hess
v.
Sexchick Poultry Services Inc.

No. CI-03-10667.
|
August 23, 2006

Attorneys and Law Firms

***290** *Robert S. Cronin*, for plaintiffs.

Stephanie Carfley, for defendant Sexchick Poultry Services.

John S. Lawler, for defendant Mortensen.

Opinion

PEREZOUS, *J.*

This matter is before the court on preliminary objections filed by the defendants, Sexchick Poultry Services Inc., and Francis M. Mortensen, personal representative for the estate of Lewis L. Mortensen, against the complaint of the plaintiffs, David L. Hess and Edwin Hess, t/a Hess business Brokers. Defendants contend that plaintiffs' complaint ***291** contains several defects and/or deficiencies. Specifically, defendant Sexchick argues that the conversion claim found in Count V, and unjust enrichment claims found in Counts II and IV fail to state claims upon which relief can be granted. Defendant Mortensen avers that the breach of contract claim found in Count I and unjust enrichment claim found in Count II fail to state claims upon which relief can be granted, and also contends that the breach of contract claim is insufficiently specific. For the following reasons, the preliminary objections are overruled, in part, and sustained, in part, in accordance with this opinion.

According to the complaint, plaintiffs and defendants entered into a written business listing agreement on July 15, 2002. Pursuant to this agreement, the defendants hired plaintiffs as their sole and exclusive agent for the sale of Sexchick. Paragraph 3 of the agreement states as follows:

"The commission or fee for professional services under this contract has been negotiated as follows: in the event of a sale, transfer or exchange, in whole or in part, of the business, assets, or corporate stock of the listed business, including any contracts for personal services or consulting from one party to the other, by whomsoever made or effected, including the owner, or if company procures a purchaser ready, willing and able to buy the business at the listing price within the period of time this contract is in force, the owner agrees to pay company a commission of 10 percent of the selling price . . . ." Plaintiffs' exhibit A. This agreement was, by its terms, to expire on October 15, 2003.

Despite their best efforts, plaintiffs were unable to secure the sale of Sexchick to an independent third ***292** party. However, during the term of the agreement, defendant Lewis Mortensen allegedly negotiated and executed an amended shareholders' agreement pursuant to which his shares of Sexchick were to be sold/transferred to the corporation, itself, upon his death. On April 26, 2003, Mr. Mortensen died, and his interest in Sexchick was sold/transferred to defendant Sexchick in exchange for an amount in excess of $1,000,000. Therefore, plaintiffs aver that defendants are liable to plaintiffs for commissions equaling 10 percent of the amount that the estate of Mr. Mortensen received from defendant Sexchick for his interest in the company.

In addition to the aforementioned agreement, plaintiffs and defendant Sexchick allegedly entered into an oral corporate consulting agreement on or about October 7, 2002. Pursuant to this agreement, plaintiffs were to provide, and did provide, services including but not limited to: (a) establishing a fair market value for Sexchick; (b) evaluating the corporate minutes of Sexchick; (c) assisting Sexchick in locating and retaining an accounting firm; and (d) assisting Sexchick in locating and retaining legal services for the purposes of revising and amending Sexchick's shareholders' agreement. In exchange for these services, defendant Sexchick allegedly agreed to pay $52,500. Plaintiffs received $10,000 in October 2002, as a down payment for these services, but the balance has not been paid.

Plaintiffs filed the complaint on March 6, 2006. It sets forth breach of contract and unjust enrichment claims against both defendants, and a conversion claim against defendant Sexchick. On March 24, 2006, defendant Sexchick filed preliminary objections to Counts II and IV of the complaint, which allege unjust enrichment ***293** relating to the business listing agreement and corporate consulting agreement, respectively. It also filed preliminary objections to Count V, which alleges a conversion claim against defendant

Sexchick. Defendant Mortensen filed preliminary objections on March 29, 2006 to Counts I and II, which allege breach of contract and unjust enrichment claims relating to the business listing agreement. The parties filed their supporting argument briefs and the matter is now ripe for review.

It is well-settled in this Commonwealth that "preliminary objections in the nature of demurrers are to be sustained only where facts averred in a complaint are clearly insufficient to establish the pleader's right to relief." *HCB Contractors Inc. v. Liberty Place Hotel Associates*, 539 Pa. 395, 397, 652 A.2d 1278, 1279 (1995). In determining whether to grant a demurrer, the court must accept as true all of the well-pleaded material facts set forth in the complaint and all of the inferences fairly deducible from those facts. *Small v. Horn*, 554 Pa. 600, 608, 722 A.2d 664, 668 (1998). When doubt exists as to whether a demurrer should be sustained, the doubt should be resolved in favor of overruling the demurrer. *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. 1997).

In the present case, defendant Mortensen contends that plaintiffs' breach of contract claim fails to state a claim upon which relief can be granted. She contends that plaintiffs were to be paid 10 percent of the listing price of Sexchick only if they were successful in presenting a buyer willing to purchase Sexchick. She points to the following language of the contract:

"If company [Hess Business Brokers] procures a purchaser ready, willing and able to buy the business at the ***294** listing price within the period of time this contract is in force, the owner agrees to pay the company a commission of 10 percent of the selling price, but in any event the commission owed to the company shall not be less than $ N/A." Plaintiffs' exhibit A.

Based upon this language, defendant Mortensen argues that the only event that triggered payment of the commission was the plaintiffs' securing a buyer to purchase Sexchick. Since plaintiffs failed to do this, defendant claims that they are not entitled to any commission.

Defendant Mortensen, however, fails to address the preceding language contained in paragraph 3 of the business listing agreement:

"The commission or fee for professional services under this contract has been negotiated as follows: in the event of a sale, transfer or exchange, in whole or in part, of the business, assets, or corporate stock of the listed business, including any contracts for personal services or consulting from one party to the other, by whomsoever made or effected, including the owner [defendants Sexchick and Mortensen] *or* if the company [Hess Business Brokers] procures a purchaser ready . . . ." Plaintiffs' exhibit A. (emphasis added)

According to this language, plaintiffs were owed a commission in the event of a transfer or exchange, in whole or in part, of the corporate stock of the listed business by whomsoever made or effected the transaction, including defendants.

According to the complaint, Mortensen negotiated and executed an amended shareholders' agreement, whereby his shares of Sexchick were to be sold/transferred to Sexchick upon his death. This transfer occurred when ***295** Mortensen died in April 2003, when the agreement was in effect. As the complaint sets forth, defendants had a duty under the express terms of the agreement to pay the commission for the amount received from this transfer, despite the fact that plaintiffs did not secure a purchaser for the company. Consequently, the court is unable to say with certainty that plaintiffs failed to state a claim upon which relief can be granted and the objection must be overruled.

Defendant Mortensen also argues that plaintiffs failed to plead the material facts to support a claim for breach of contract. Pursuant to the Rules of Civil Procedure, a plaintiff is required to state the material facts on which a cause of action is based in a concise and summary form. Pa.R.C.P. 1019(a). Rule 1028(a)(3) permits a preliminary objection for insufficient specificity in a pleading. 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, Department of Corrections*, 135 Pa. Commw. 162, 170, 580 A.2d 452, 456 (1990). In the present case, the complaint is sufficiently specific to enable the defendant to adequately prepare his defense. As such, the court must overrule the objection.

In a breach of contract action, a plaintiff must allege facts supporting three elements: "(1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) damages." *Sullivan v. Chartwell Investment Partners LP*, 873 A.2d 710, 716 (Pa. Super. 2005). As plaintiffs argue, the factual allegations pled in the complaint set forth, with the required specificity, a legal cause of action against Mortensen for breach of the business ***296** listing agreement. First,

plaintiffs alleged the essential terms of the contract, and attached the business listing agreement to the complaint. Second, plaintiffs alleged that defendant Mortensen breached the duty owed to plaintiffs by failing and refusing to pay the commissions required under the business listing agreement as a result of the April 26, 2003 transfer of Mortensen's interest in Sexchick. Finally, plaintiffs alleged damage in an amount in excess of $100,000 as a result of Mortensen's failure to abide by the terms of the business listing agreement. Therefore, plaintiffs' breach of contract claim should not be dismissed for insufficient specificity.

Both defendants also contend that the unjust enrichment claim found in Count II fails to state a claim upon which relief can be granted. In order to state a cause of action for unjust enrichment, a plaintiff must allege that (1) it conferred benefits on the defendant; (2) the defendant appreciated and accepted such benefits, and (3) it would be inequitable for the defendant to retain the benefits without payment of value. *Wiernik v. PHH U.S. Mortgage Corp.*, 736 A.2d 616, 622 (Pa. Super. 1999). In *Villoresi v. Femminella*, 856 A.2d 78 (Pa. Super. 2004), the Superior Court determined that the parties' transaction was fully delineated within the confines of the written agreement, and confined the plaintiff to his remedies under the contract. *Id.* at 84-85. Thus, the unjust enrichment was disallowed, and the Superior Court affirmed the order of the trial court granting the defendant's preliminary objections to the plaintiff's complaint.

The Superior Court stated that "[a] cause of action for unjust enrichment may arise only when a transaction of the parties not otherwise governed by an express contract ***297** confers a benefit on the defendant to the plaintiff's detriment without any corresponding exchange of value." *Id.* at 84. "Where an express contract already exists to define the parameters of the parties' respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist." *Id.* In other words, when a written agreement exists, a party's remedy is based on the terms of the agreement; quasi-contractual remedies are precluded. See *id.* at 85.

In the present case, the transaction between the parties was governed by the business listing agreement. The agreement delineated the scope of the duties owed by the parties, and called for a 10 percent commission in the event of a sale/ transfer of Sexchick. The complaint alleges that the duties owed under the contract were provided by plaintiffs, and demands an amount in excess of $100,000 pursuant to their unjust enrichment claim. The amount demanded by plaintiffs under their unjust enrichment claim equals the commission that is allegedly due under the agreement. As stated in *Villoresi*, however, "the existence of the written agreement . . . confine[s plaintiffs] to a contract remedy and preclude[s] a claim of quasi-contract." *Id.* at 85. Therefore, plaintiffs' unjust enrichment claim fails to state a claim upon which relief can be granted and the objections to Count II are sustained.

Next, defendant Sexchick contends that the unjust enrichment claim found in Count IV fails to state a claim upon which relief can be granted. In Count IV, plaintiffs allege that they provided certain services on behalf of defendant Sexchick that conferred a benefit upon it. ***298** Defendant allegedly accepted the benefit of these services, and retained the benefit of these services without paying plaintiffs fair and reasonable compensation. Plaintiffs further allege that the value of these services total $42,500 plus costs and fees.

This amount is also allegedly due plaintiffs under the terms of an alleged corporate consulting agreement, which was an oral contract according to the complaint. Unlike the business listing agreement, the validity of this agreement is not clear at this stage of the proceedings. Based upon this factor, along with Pennsylvania Rule of Civil Procedure 1020, which permits causes of action to be pled in the alternative, the court will not dismiss the unjust enrichment claim relating to the services provided pursuant to the alleged corporate consulting agreement. As such, the court overrules the objection.

Finally, defendant Sexchick contends that plaintiffs' conversion claim found in Count V fails to state a claim upon which relief can be granted. In Count V, plaintiffs assert a claim for the aforementioned $42,500 under a theory of conversion. "Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification." *Shonberger v. Oswell*, 365 Pa. Super. 481, 484, 530 A.2d 112, 114 (1987). As defendant points out, it is well-settled that failure to pay a debt is not conversion. *Francis J. Bernhardt III, P.C. v. Needleman*, 705 A.2d 875, 878 (Pa. Super. 1997). In addition, claims for conversion have been consistently disallowed where such claims are based on the same facts as the contract claim. *Pittsburgh Construction Co. v. Griffith*, 834 A.2d 572, 584 (Pa. Super. 2003). As one court stated, "if a plaintiff's ***299** rights to property are defined by a contract with a defendant, then that plaintiff may not sue that defendant in tort for conversion of that property." *Phoenix*

Four Grantor Trust #1 v. 642 North Broad Street Associates, 2000 WL 876728 *9 (E.D. Pa. 2000).

In the present case, plaintiffs' conversion claim is based upon defendant Sexchick's alleged failure to pay a debt or money that was owed under an oral agreement. Based upon the previous discussion, then, plaintiffs' conversion claim fails to state a claim upon which relief can be granted. Therefore, the court sustains the objection and Count V is dismissed. [1]

Accordingly, the court enters the following:

ORDER

And now, August 23, 2006, upon consideration of the preliminary objections filed by the defendants, Sexchick Poultry Services Inc. and Francis M. Mortensen, personal representative for the estate of Lewis L. Mortensen, against the complaint of the plaintiffs, David L. Hess and Edwin Hess, t/a Hess Business Brokers, together with the briefs and supporting papers filed by the parties, it is hereby ordered that:

(1) Defendant Mortensen's preliminary objection on the grounds that the breach of contract claim found in Count I of the complaint fails to state a claim upon which relief can be granted and should be dismissed is overruled;

***300** (2) Defendant Mortensen's preliminary objection on the grounds that the breach of contract claim found in Count I of the complaint is insufficiently specific is overruled;

(3) Defendant Mortensen's and defendant Sexchick's preliminary objections on the grounds that plaintiffs' unjust enrichment claim found in Count II of the complaint fails to state a claim upon which relief can be granted and should be dismissed are sustained;

(4) Defendant Sexchick's preliminary objection on the grounds that plaintiffs' unjust enrichment claim found in Count IV of the complaint fails to state a claim upon which relief can be granted and should be dismissed is overruled;

(5) Defendant Sexchick's preliminary objection on the grounds that plaintiffs' conversion claim found in Count V of the complaint fails to state a claim upon which relief can be granted and should be dismissed is sustained.

All Citations

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Footnotes

1 Plaintiffs' demand for punitive damages found in Count V is stricken, as well.

End of Document

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the below counsel of record on May 16, 2016.

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Dated: May 16, 2016

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