CLARE LOCKE LLP
Thomas A. Clare
tom@clarelocke.com
Elizabeth M. Locke
libby@clarelocke.com
Andrew C. Phillips
andy@clarelocke.com
10 Prince Street
Alexandria, Virginia 22314
Telephone: (202) 628-7400

STEINBACHER, GOODALL & YURCHAK, P.C.
Kathleen V. Yurchak
yurchak@centrelaw.com
328 South Atherton Street
State College, PA 16801
Telephone: (814) 237-4100
Fax: (814) 237-1497

Attorneys for Plaintiff Graham B. Spanier

GRAHAM B. SPANIER,

Plaintiff,

v.

THE PENNSYLVANIA STATE UNIVERSITY,

Defendant.

COURT OF COMMON PLEAS
OF CENTRE COUNTY

No. 2016-0571

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PRELIMINARY OBJECTIONS TO DEFENDANT'S SECOND AMENDED COUNTERCLAIMS

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INTRODUCTION

This is Pennsylvania State University's ("PSU") third attempt at asserting colorable counterclaims against Dr. Spanier in an effort to convince the Court to not only excuse PSU's breaches of the five-and-a-half-year-old Separation Agreement that it entered into with Dr. Spanier, but also to force Dr. Spanier to return to PSU all payments, benefits, and consideration provided to him pursuant to the agreement since its inception. (*See generally* Mar. 30, 2017 Def.'s Second Am. Counterclaims ("2d. Am. Counterclaims").). Time and again, PSU has filed variations of the same claims, and each time Dr. Spanier has filed detailed preliminary objections conclusively demonstrating that PSU's claims are foreclosed by Pennsylvania law and must be dismissed. This third attempt fares no better than the previous attempts, because no amount of artful pleading can craft valid causes of action where those claims are conclusively defeated by the very allegations and documents that PSU relies upon.

PSU's four causes of action continue to all boil down to the same claim: That because Dr. Spanier supposedly failed to disclose to PSU his supposed knowledge of Jerry Sandusky's criminal activities before Dr. Spanier and PSU entered into the Separation Agreement memorializing the terms of his removal from the position of President of the University, the agreement should be entirely rescinded, ***despite*** the fact that Dr. Spanier was under no legal duty to disclose or

not disclose anything to PSU during an arms-length contract negotiation, ***despite*** the fact that the Separation Agreement itself releases Dr. Spanier from any claims relating to omissions by Dr. Spanier prior to the date of the agreement, ***despite*** the fact that the agreement did not require Dr. Spanier to promise that he had or had not disclosed any information to PSU and in fact disclaims the notion that he had any such duty, ***despite*** the fact that PSU's own pleading demonstrates that PSU already had knowledge of all of the information that it claims Dr. Spanier failed to disclose before and during the negotiation of the Separation Agreement, and ***despite*** the fact that although PSU learned all of these facts years ago, PSU continued to affirm the validity of the agreement for over four years and only sought its rescission when sued for its own breaches of the agreement. Defendant's Counterclaims are entirely foreclosed by Pennsylvania law and should be dismissed with prejudice, for multiple reasons.

First, PSU's claim for breach of Dr. Spanier's 2010 Employment Agreement — for which PSU confusingly seeks a remedy of rescission of Dr. Spanier's separate, later-in-time Separation Agreement — is plainly barred by the four-year statute of limitations on breach of contract claims. The plain language of the contract and PSU's own factual averments demonstrate that Dr. Spanier's supposed duty of disclosure under that contract terminated along with the end of his tenure as President of PSU on November 9, 2011, and PSU failed to bring any

claim related to this agreement before the expiration of the limitations period on November 9, 2015.

Second, PSU's First Counterclaim for breach of the 2010 Employment Agreement is foreclosed by the plain language of that contract's mediation clause, which requires that before PSU can assert a claim against Dr. Spanier in this Court, it must first provide notice of an intent to mediate, agree on the selection of a mediator, submit to mediation in University Park or State College, and bear the costs and fees associated with a mediation. PSU fails to allege that it has complied with this mediation provision prior to filing its Counterclaims because it has not.

Third, PSU's Counterclaims seeking rescission of the Separation Agreement are all based on the claim that Dr. Spanier violated a duty to disclose to PSU that while serving as President, he became aware of information regarding Jerry Sandusky's criminal conduct with children. However, PSU's counterclaims are all barred by the plain language of the Separation Agreement itself, which far from requiring Dr. Spanier to disclose or not disclose ***any*** information to PSU in connection with the negotiation of that agreement, actually includes a full ***release*** of any and all claims against Dr. Spanier based on a notion that he omitted to provide information to PSU or breached any duty to PSU before the November 22, 2011 effective date of the agreement. Additionally, the Separation Agreement contains a full integration clause explicitly ***disclaiming*** the notion that Dr. Spanier

made any agreements, promises, or covenants requiring him to provide any information to PSU as a condition of entering into the agreement. As a result, under black-letter Pennsylvania law, PSU's claims that Dr. Spanier induced PSU to enter into the contract based on misrepresentations or nondisclosures are legally deficient and must be dismissed with prejudice.

Fourth, PSU's Counterclaims are all barred by Pennsylvania's two-year statute of limitations on fraudulent inducement claims. Each and every Counterclaim is premised on the notion that by failing to disclose information to PSU despite a supposed duty to do so, Dr. Spanier induced PSU to enter into the Separation Agreement under false pretenses. Such a claim must be brought within two years, yet PSU delayed in bringing any claims for at least four years after it claims it learned of the supposed omission or misrepresentation.

Fifth, PSU's Counterclaims are all similarly barred by Pennsylvania's two-year statute of limitations on breach of fiduciary duty claims. PSU fails to identify a valid legal source of any fiduciary duty Dr. Spanier owed to PSU during the applicable time period that it claims Dr. Spanier failed to disclose information material to the Separation Agreement because its own averments demonstrate that the sources of such a duty that it relies upon were not applicable from November 9 to 15, 2011. However, even if PSU could identify a valid source of such a duty, by PSU's own admission it became aware of the supposed undisclosed information —

and thus the supposed breach of fiduciary duty — no later than 2012, but it did not file any claims regarding the supposed breach of duty until December 2016. As a result, the statute of limitations bars PSU's breach of fiduciary duty claims.

Sixth, PSU's Counterclaims purporting to sound in equity have also been waived by PSU's failure to assert them for at least four years after becoming aware of Dr. Spanier's supposed nondisclosure and by PSU's continued performance of the contract over the course of those four-plus years. Pennsylvania law does not permit a party to a contract to sleep on its rights for many years following discovery of facts supposedly giving rise to a right to rescind a contract, all the while continuing to perform and failing to notify the other party of the supposed right to rescind. Accordingly, PSU's Counterclaims are barred by PSU's delay in asserting a right to rescind the Separation Agreement.

Seventh, PSU's Counterclaims are insufficiently pled due to PSU's wholesale failure to factually allege that Dr. Spanier's supposed failure to disclose information regarding acts of abuse by Sandusky to PSU was the proximate cause of any injury to PSU. In fact, PSU cannot plausibly so plead, because PSU's own factual allegations in support of its Counterclaims demonstrate concretely that PSU and its own high-ranking officers were already aware — prior to the negotiation of the Separation Agreement — of the very information that PSU claims Dr. Spanier failed to disclose. Indeed, this Court has already conclusively so held. As a result,

PSU cannot allege that Dr. Spanier's supposed nondisclosure of information that PSU already knew caused PSU any harm at all.

Eighth, PSU's Counterclaim for "Unjust Enrichment" fails to state a valid claim because of the existence of a valid, written agreement between the parties, namely, the Employment Agreement and the Separation Agreement. The doctrine of unjust enrichment is a quasi-contract claim that has no applicability where the parties have entered into an express contract.

For the reasons set forth herein, Dr. Spanier respectfully submits that his preliminary objections to PSU's Second Amended Counterclaims should be sustained and PSU's Second Amended Counterclaims should be dismissed with prejudice.

STATEMENT OF THE QUESTIONS INVOLVED

1. Should Defendant's First through Fourth Amended Counterclaims be dismissed because Defendant's pleading indicates on its face that the Counterclaims are barred by the statute of limitations?

Suggested response: Yes.

2. Should Defendant's First Counterclaim be dismissed due to PSU's failure to comply with the Employment Agreement's mediation clause, which is a necessary condition precedent to asserting a legal claim for breach of the Employment Agreement?

Suggested response: Yes.

3. Should Defendant's First through Fourth Counterclaims be dismissed pursuant to Rule 1028(a)(4) for failure to state a claim upon which relief can be granted because they are barred by the plain language of the Separation Agreement?

Suggested response: Yes.

4. Should Defendant's Second through Fourth Counterclaims be dismissed because Defendant's pleading indicates on its face that the Counterclaims are barred by laches and waiver?

Suggested response: Yes.

5. Should Defendant's First through Fourth Counterclaims be dismissed pursuant to Rule 1028(a)(4) for failure to state a claim upon which relief can be granted because Defendant fails to plead facts demonstrating causation and harm caused by any of the claimed contractual breaches and breaches of duty?

Suggested response: Yes.

6. Should Defendant's Fourth Counterclaim for unjust enrichment be dismissed due to the admitted existence of a valid, written contract addressing the subject matter of the claim?

Suggested response: Yes.

STANDARD OF REVIEW

A preliminary objection in the nature of a demurrer challenges the sufficiency of the pleading and must be sustained where it is "clear and free from doubt that the law will not permit recovery under the alleged facts." *Africa v. Horn*, 701 A.2d 273, 274 (Pa. Commw. Ct. 1997). 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 (Pa. Super. 1997). However, the Court need consider only the pleading itself and cannot supply a fact missing from the pleading. *Binswanger v. Levy*, 457 A.2d 103, 104 (Pa. Super. 1983). Preliminary objections testing the legal sufficiency of a pleading shall be sustained if the challenged pleading indicates on its face "that [the] claim[s] cannot be sustained, and the law will not permit recovery." *Smith v. Wagner*, 588 A.2d 1308, 1311 (Pa. Super. 1991).

ARGUMENT

I. PSU's First Counterclaim, for Breach of the 2010 Employment Agreement, is Plainly Barred by the Four-Year Statute of Limitations for Breach of Contract.

PSU's First Counterclaim attempts to assert a claim against Dr. Spanier for breach of his 2010 Employment Agreement, which is attached to PSU's Second Amended Counterclaims as Exhibit 1. PSU alleges that Section B of the Employment Agreement imposed a duty of good faith and/or disclosure on Dr. Spanier and that Dr. Spanier allegedly violated this duty by failing to reveal to PSU information that Dr. Spanier supposedly learned about criminal conduct by former PSU assistant coach Jerry Sandusky during Dr. Spanier's tenure as President of PSU. (2d. Am. Counterclaims ¶¶ 6-8, 61-72.) However, PSU failed to assert this breach of contract claim within the four-year statute of limitations imposed by 42 Pa. Cons. Stat. Ann. § 5525(a). Because PSU's Counterclaims reveal on their face that this claim is time-barred, PSU's First Counterclaim must be dismissed.[1]

By PSU's own admission, Dr. Spanier's 2010 Employment Agreement with PSU, effective as of July 1, 2010, was terminated by mutual agreement of the parties on November 9, 2011. (*Id.* ¶¶ 1, 24, *id.* Ex. 1, at 1.) This admitted

[1] As this Court has noted in a prior decision in a related litigation, "[w]hile the Statute of Limitations is ordinarily considered an affirmative defense that must be pleaded as new matter, where the bar is clear on the face of a complaint, courts have recognized the efficiencies of considering such arguments on preliminary objections." Sept. 27, 2016 Op., *Spanier v. Freeh*, No. 2013-2707, (Ct. Com. Pl. Centre Cnty.) (Eby, J.) (dismissing a claim on preliminary objections based on the statute of limitations); *see also Pelagatti v. Cohen*, 536 A.2d 1337, 1346 (Pa. Super. 1987).

termination date is further confirmed by the plain language of Dr. Spanier's 2011 Separation Agreement with PSU — also attached to PSU's Second Amended Counterclaims as Exhibit 5 — which states: "By virtue of Dr. Spanier's termination from the position of President of the University, it is also understood and agreed that except as otherwise provided below, Dr. Spanier's Employment Agreement was terminated as of November 9, 2011." (*Id.* Ex. 5 ¶ 2.) Thus, because the Employment Agreement terminated as of November 9, 2011, any alleged breach of the agreement by Dr. Spanier necessarily must have occurred on or before November 9, 2011, since after that date Dr. Spanier by definition could not have breached contractual obligations that did not exist. Therefore, the latest possible date on which PSU could have asserted a claim against Dr. Spanier for breach of the Employment Agreement was within four years of its termination — November 9, 2015. *See* 42 Pa. Cons. Stat. Ann. § 5525(a) (an action for breach of contract must be brought within four years.) PSU did not bring its claim within the required four-year period, and therefore PSU's Counterclaims reveal on their face that the First Counterclaim is time-barred.[2]

[2] PSU alleges that PSU and Dr. Spanier entered into a tolling agreement on November 15, 2015. (2d. Am. Counterclaims ¶ 56.) This Agreement by its terms refers to claims arising under the 2011 Separation Agreement, not the 2010 Employment Agreement. (*Id.*) But regardless, by PSU's own admission, this agreement only tolled claims PSU may have had against Dr. Spanier as of ***November 12, 2015*** — after the expiration of the statute of limitations on PSU's First Counterclaim. Therefore, this tolling agreement does nothing to save the First Counterclaim.

PSU attempts to circumvent this clear statute of limitations bar by asserting that the good-faith duty imposed by Section B of the Employment Agreement survived the admitted termination of Dr. Spanier's presidency on November 9, 2011 because Dr. Spanier continued employment as a professor at PSU after being terminated from the presidency. (*See* 2d. Am. Counterclaims ¶¶ 6-8, 32.) Thus, PSU asserts, the contractual duties of Section B continued to apply to Dr. Spanier during the negotiation of his Separation Agreement from November 12-15, 2011, despite the termination of his presidency on November 9. (*Id.* ¶ 33.) However, this conclusory allegation — which PSU fails to support by reference to any language in either the Employment Agreement or the Separation Agreement — is in fact conclusively belied by the plain language of ***both*** of those agreements, as well as the prior rulings of this Court.

First, Section B of the Employment Agreement plainly refers to a duty of faithful performance and a duty to comply with corporate bylaws that Dr. Spanier owed ***as President*** and that he owed only ***during the term of the Employment Agreement***:

> B. Powers and Duties.
>
> ***During the Term of this Agreement***, Dr. Spanier shall serve as President and perform such duties and responsibilities that are consistent with his position as President of the University under the Corporate Charter, the Corporate Bylaws, and the Standing Orders of the Board of Trustees, as may be amended from time to time, or which may be assigned to him by or under the authority of the Board of Trustees consistent with his position as President of the University, including those duties as are set forth in the Resolution of the Board of Trustees adopted on

> June 11, 1970, as amended on November 19, 1971, May 30, 1975, and September 23, 1977, and as the same may be amended from time to time during the term of this Agreement (collectively, the "Duties."). Dr. Spanier shall devote his full business time attention, skill and efforts to the faithful performance of the Duties for the University.

(*Id.* Ex. 1 § B (emphasis added).) The capitalized "Term" of the Agreement referred to in Section B is defined in the preceding Section A as the term of Dr. Spanier's employment as ***President***, from July 1, 2010 ***until the earlier of the expiration of the contract period or his termination from the position of President***. (*Id.* §§ A, H.) PSU admits that this "Term" ended on November 9, 2011, when Dr. Spanier was terminated as President. (*Id.* ¶¶ 6, 24.) Thus, under the plain language of the Employment Agreement, Section B's requirement of faithful performance ***and*** its requirement of compliance with certain corporate bylaws and policies terminated along with the Dr. Spanier's termination from the position of President on November 9, 2011. PSU's First Counterclaim is therefore time-barred due to PSU's failure to assert a claim for breach of Section B on or before November 9, 2015.

Second, PSU's attempt to impose a post-presidency duty of disclosure on Dr. Spanier pursuant to the University's faculty policies fares no better. (*See id.* ¶¶ 6-8, 35-36.) As noted above, the plain language of Section B of the Employment Agreement makes the University's corporate bylaws applicable to Dr. Spanier ***only*** during the term of his presidency, which ended on November 9, 2011. (*Id.* Ex. 1 § B.) Moreover, the Employment Agreement specifically states that

other PSU policies, rules, and regulations applicable to other tenured faculty members are ***not*** applicable to Dr. Spanier until six years ***after*** his termination from the position of President. (*Id.* § E. 6.) Sections E. 5 and E. 6 of the Employment Agreement state that immediately following his termination as President, Dr. Spanier would enter into a one-year "post-presidency transition period" during which he would "perform scholarly activities in preparation to assume active duties as a tenured members of the University's faculty and shall also be available to assist with various University efforts (such as fundraising and recruiting) as requested by the new President.") (*Id.* § E. 5.) Following this one-year transition period, Dr. Spanier would then become a University Professor with a set compensation for five years. (*Id.* § E. 6.) Finally, with reference to the time period ***after*** both the one-year transition period ***and*** the five-year contractually guaranteed faculty position, the Employment Agreement states: "***Dr. Spanier's employment as Professor subsequent to this period***, including his eligibility for annual salary adjustments, ***shall be governed by the University's policies, rules, and regulations applicable to other tenured members of the University faculty*** and not by this Agreement." (*Id.* (emphasis added).) Thus, under the plain language of the Employment Agreement, PSU cannot plausibly claim that Dr. Spanier was subject to faculty policies applicable to other PSU professors following the termination of his presidency on November 9, 2011. PSU admits as

much in its pleading, and this is fatal to its claim. (*See id.* ¶ 31 (admitting that under the terms of the Employment Agreement the University's policies applicable to other tenured faculty members did not apply to Dr. Spanier until after the conclusion of both the one-year post-presidency transition and the subsequent five-year, contractually guaranteed salary period.)

Despite ***admitting*** that under the Employment Agreement PSU's faculty policies did not apply to Dr. Spanier until six years after his termination from the position of President, PSU nevertheless makes the conclusory allegation that Dr. Spanier's alleged failure to disclose information regarding Sandusky to PSU in November 2011 constituted a breach of PSU policy "HR91," and that this in turn constituted a breach of his Employment Agreement (2d. Am. Counterclaims ¶ 9; *id.* at Ex. 3.) The problem for PSU is that it wholly fails to identify any contractual provision or any other legal basis for claiming that this unilateral PSU document was in any way binding on Dr. Spanier during the relevant time period. PSU cannot do so, because PSU admits that both the Employment Agreement and the Separation Agreement specifically state that faculty policies such as HR91 are ***not*** binding on Dr. Spanier until six years after his termination from the office of President. (2d. Am. Counterclaims ¶¶ 30-31.) Thus, PSU's conclusory assertion that this policy was binding on Dr. Spanier from November 12-15, 2011 is not

supported by any well-pleaded facts, and the Employment Agreement itself contradicts PSU's conclusory assertion.

Finally, in addition to the fact that the Employment Agreement itself specifically disavows the notion that Dr. Spanier was subject to any post-contractual, continuing duty of disclosure or fiduciary duty following the termination of his presidency on November 9, 2011, the 2011 Separation Agreement between Dr. Spanier and PSU also specifically disclaims any such post-Employment Agreement duty. Not only does the Separation Agreement ***not*** incorporate the provisions of Section B upon which PSU relies, it explicitly states that the Employment Agreement terminated as of November 9 and that all provisions not explicitly incorporated in the Separation Agreement were of no continuing effect after that date. (*Id.* Ex. 5 ¶¶ 1-2.) The Separation Agreement then incorporates ***only*** Sections E and J of the Employment Agreement — not Section B — and it in fact confirms, incorporates, and reiterates the provision of the Employment Agreement stating that the University policies applicable to other tenured faculty members do ***not*** become applicable to Dr. Spanier until after the one-year post-presidency transition and five-year guaranteed faculty position expire. (*Id.* ¶ 3(e).)[3]

[3] As this Court has held in a previous opinion in this case, the incorporation of only certain specific elements of the 2010 Employment Agreement into the Separation Agreement — together with its integration clause and the confirmation that the Employment Agreement was

Thus, the plain language of the Employment Agreement, along with PSU's own admissions, renders the following conclusions inescapable: (1) Section B of the Employment Agreement, and the duties imposed therein, terminated as of November 9, 2011 when Dr. Spanier's term as President ended; (2) Dr. Spanier could not have breached the Employment Agreement, specifically section B thereof, after November 9, 2011; and (3) PSU failed to bring a claim for breach of Section B of the Employment Agreement within the required four-year limitations period expiring November 9, 2015. Furthermore, it is indisputable that during the time period of November 12-15, 2011, when the parties were negotiating the Separation Agreement and during the time period PSU alleges Dr. Spanier failed to disclose information regarding Sandusky to PSU: (1) Dr. Spanier had begun his one-year post-presidency transition period; (2) PSU has not identified ***any*** contractual duty of disclosure or fiduciary duty imposed on Dr. Spanier during this post-presidency transition period; and (3) PSU admits that both the Employment Agreement and the Separation Agreement explicitly disclaim the notion that general faculty policies such as HR91 were applicable to Dr. Spanier during the post-presidency transition period. As a result of the foregoing, PSU's First

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terminated — renders any other non-incorporated provisions of that terminated agreement moot. (Oct. 25, 2016 Op. at 17, *Spanier v. PSU,* No. 2016-0571 (Ct. Com. Pl. Centre Cnty.) (Eby, J.) (holding that non-incorporated provisions of the 2010 Employment Agreement were superseded by the Separation Agreement and specifically quoting the integration clause of the Separation Agreement).

Counterclaim for breach of the 2010 Employment Agreement is plainly time-barred and must be dismissed.[4]

II. PSU's First Counterclaim, for Breach of the 2010 Employment Agreement, is Barred by the Agreement's Mediation Clause.

Even if PSU's First Counterclaim was not plainly barred by the statute of limitations (it is), PSU's claim for breach of the 2010 Employment Agreement also fails due to PSU's failure to comply with a necessary prerequisite to bringing such a claim. Section K of the 2010 Employment Agreement states that "any controversy or claim that either party may have against the other arising out of or relating to the construction, application, or enforcement of this Agreement," including a claim for an "alleged breach" of the Employment Agreement, "shall" first be submitted to non-binding mediation. (2d Am. Counterclaims at Ex. 1 § K.) Under the plain terms of Section K, in order to bring a claim for breach of the 2010 Employment Agreement, PSU is required to first (1) deliver a written notice of request for mediation to Dr. Spanier; (2) agree to submit the dispute to a chosen mediator within 15 days; (3) submit to a mediation in University Park or State College, Pennsylvania; and (4) bear the costs and fees associated with the mediation. (*Id.*)

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[4] As explained in Argument Section VII, *infra*, PSU has failed to plead facts supporting application of the discovery rule to this alleged breach or any other alleged breach of duty set forth in its Amended Counterclaims because the University was, by its own admission, aware of the relevant facts it claims gave rise to a cause of action before November 9, 2011.

Mediation clauses such as this one are strictly enforced in Pennsylvania, and failure to comply with a mediation clause prior to instituting a lawsuit requires dismissal. *A.T. Chadwick Co., Inc. v. PFI Const. Corp.*, No. 01998 SEPT.TERM 2003, CONTROL 011431, CONTROL 031986, 2004 WL 2451372, at *3-4 (Ct. Com. Pl. Phila. Cnty. July 27, 2004) (dismissing case due to failure to comply with contractual mediation clause); *see also Provenzano v. Ohio Valley General Hosp.*, 121 A.3d 1085, 1095-1096 (Pa. Super. 2015) (Pennsylvania law strongly favors enforcement of alternative dispute resolution agreements.) In its Second Amended Counterclaims, PSU fails to allege generally that it has complied with all conditions precedent to bringing a claim for breach of the 2010 Employment Agreement and, more importantly, fails to specifically allege that it has complied with the mediation clause of the contract. (*See generally* 2d Am. Counterclaims.) PSU cannot do so in a verified pleading, because it has never made a demand for mediation prior to bringing its First Counterclaim. Thus, PSU's First Counterclaim is legally insufficient and Dr. Spanier's preliminary objections must be sustained.

III. PSU's Counterclaims are Barred by the Plain Language of the Separation Agreement.

Though they are styled as different causes of action, all of PSU's four Counterclaims are based on the same supposed occurrence — Dr. Spanier's alleged failure, during his time as University President and when he was negotiating his separation from PSU — to inform the University of information

that he supposedly knew about former PSU employee Jerry Sandusky's criminal activities. (*See* 2d. Am. Counterclaims ¶¶ 60-106.) PSU argues that this omission by Dr. Spanier caused PSU to enter into the Separation Agreement under false pretenses. (*Id.*) As a remedy for its claims based on this supposed omission, PSU argues that the Court should tear up and rescind the Separation Agreement entirely. (*Id.*) The problem for PSU is that the language of the Separation Agreement itself entirely forecloses all of PSU's claims, and therefore PSU fails to state a cause of action on any of its Counterclaims. Not only does the Separation Agreement itself ***disclaim*** any duty or warranty by Dr. Spanier to provide or not provide information to PSU, the agreement itself also unequivocally ***releases*** any and all claims PSU may have had against Dr. Spanier relating to a supposed omission to provide information to the University prior to the execution of the Separation Agreement. The integration clause and release in the Separation Agreement entirely foreclose PSU's Counterclaims as a matter of law. Accordingly, Plaintiff's preliminary objections must be sustained, and PSU's Second Amended Counterclaims should be dismissed with prejudice.

In its First Counterclaim, PSU alleges that at the time he was negotiating the Separation Agreement with PSU, Dr. Spanier breached the prior, terminated 2010 Employment Agreement by failing to "accurately and fully disclose to the University everything he knew about his, or the University's, awareness and

handling of reports of [Jerry] Sandusky's conduct with minors while a University employee and/or while on the University's property, including the information contained in the 2012 Discovered Emails..." (*Id.* ¶¶ 62-63.) PSU then argues that this supposed breach of the 2010 Employment Agreement should result in rescission of the separate ***Separation Agreement.*** (*Id.* ¶ 67.) As PSU acknowledges, the 2010 Employment Agreement was effective from July 1, 2010 through November 9, 2011, when Dr. Spanier was removed from his position as President of the University pursuant to the termination without cause provision of the 2010 Employment Agreement. (*Id.* ¶¶ 1, 24; *id.* Ex. 1 § A.) The Separation Agreement itself clearly states that "Dr. Spanier's [2010] Employment Agreement was terminated as of November 9, 2011." (*Id.* Ex. 5 ¶ 2.) Thus, by definition, the claimed breach of the 2010 Employment Agreement — Dr. Spanier's supposed omission of failing to inform PSU of certain information regarding Sandusky — necessarily would have to have taken place on or before November 9, 2011, while Dr. Spanier was President of the University, and while the 2010 Employment Agreement was in effect.

In its Second Counterclaim, PSU alleges that it entered into the Separation Agreement under a mistake of fact because it wrongly believed that Dr. Spanier "had fully disclosed to the University everything he knew about his, or the University's, awareness, and handling, of reports of Sandusky's conduct with

minors . . . ." (*Id.* ¶ 76.) PSU then asserts that it is entitled to rescission of the Separation Agreement or excusal from continued performance based on Dr. Spanier's supposed failure to inform PSU of everything that he supposedly knew about Sandusky's conduct. (*Id.* ¶¶ 82-83.) Similarly, PSU's Third Counterclaim also seeks rescission of the Separation Agreement based on Dr. Spanier's supposed omission of failing to inform PSU of his full knowledge of Sandusky's criminal conduct and claims that PSU entered into the Separation Agreement "in justifiable reliance on Dr. Spanier having fulfilled those Duties." (*Id.* ¶¶ 92-93.) PSU argues that rescission of the Separation Agreement is warranted because "Penn State would not have agreed to the provisions of the Separation Agreement" if it had been aware of the information that Dr. Spanier supposedly failed to disclose. (*Id.* ¶¶ 95.)

Finally, in its Fourth Counterclaim, PSU alleges that Dr. Spanier has been unjustly enriched, again because Dr. Spanier supposedly failed to disclose facts regarding Sandusky to PSU. (*See id.* ¶ 103.) PSU claims that Dr. Spanier should therefore be required to disgorge all sums of money and benefits he has received from PSU since November 9, 2011. (*Id.* ¶ 104.)

Thus, each of PSU's Counterclaims is based on the notion that Dr. Spanier had an affirmative duty to disclose to PSU information regarding Sandusky that he was aware of before Dr. Spanier and PSU entered into the Separation Agreement,

and on Dr. Spanier's supposed act or omission of failing to inform PSU of this information. PSU claims that Dr. Spanier's acts and omissions, and breach of a supposed duty to inform PSU of facts regarding Sandusky, were so fundamental to the negotiation of, and decision to enter into, the Separation Agreement that total rescission of that contract is warranted as relief. The fatal flaw in each of PSU's Counterclaims is that not only has PSU wholly failed to identify a legal basis for any such duty of disclosure, but the Separation Agreement itself bars PSU from asserting any and all claims relating precisely to such alleged acts or omissions, and it further disclaims the notion that Dr. Spanier had a duty to inform PSU of any facts material to the negotiation of the Separation Agreement or to warrant that he had done so. As a result, Plaintiff's preliminary objections to PSU's counterclaims must be sustained, and all of the Second Amended Counterclaims must be dismissed with prejudice.

Attached as Exhibit 5 to PSU's Second Amended Counterclaims is the Separation Agreement between PSU and Dr. Spanier, effective as of November 22, 2011.[5] Paragraph 8 of the Separation Agreement states:

> The University, on behalf of itself and the Board of Trustees, does hereby irrevocably and unconditionally remise, release and forever discharge Dr. Spanier from any and all claims, known and unknown, that the University has or may

[5] Dr. Spanier executed the Separation Agreement on November 15, 2011, but Paragraph 16 of the Separation Agreement provides that it does not become effective or enforceable until seven calendar days after Dr. Spanier's execution of the Separation Agreement. (2d. Am. Counterclaims, Ex. 5 ¶ 16.)

> have against Dr. Spanier for any acts, omissions, practices or events up to and including the effective date of this Agreement and the continuing effects thereof, to the extent such acts or omissions relate to his position as President of the University, it being the intention of the University to effect a general release of all such claims.

(*Id.* Ex. 5 ¶ 8.) Additionally, the Separation Agreement contains an integration clause affirming that the Separation Agreement itself constitutes the full agreement of the parties with respect to their rights and duties under the agreement, and it affirms that there are no other agreements or covenants that are applicable to the terms of Dr. Spanier's separation from the position of President of the University:

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

(*Id.* ¶ 17.)

Both the release and the integration clause in the Separation Agreement plainly bar all of PSU's Counterclaims — and PSU's demand that the Separation Agreement be rescinded — as a matter of law. PSU's First Counterclaim indisputably asserts a claim against Dr. Spanier for breach of his 2010 Employment Agreement based on a supposed act or omission relating to his position as President of the University, namely, his supposed failure to inform the University of information that he supposedly learned, while President, regarding Sandusky's criminal conduct with minors. (*Id.* ¶¶ 60-74.) The 2010 Employment Agreement was terminated as of November 9, 2011, and thus the alleged breach

could only have occurred on and/or before that date. (*Id.* ¶ 24; *id.* Ex. 1 § A; *id.* Ex. 5 ¶ 2.) The release in the Separation Agreement, effective November 22, 2011, unequivocally states that PSU has irrevocably and unconditionally released and discharged any such claim against Dr. Spanier for conduct occurring prior to November 22, 2011, as well as "the continuing effects thereof." (*Id.* Ex. 5 ¶ 8.) Similarly, all of PSU's remaining Counterclaims assert claims based on the same alleged act or omission. (*See id.* ¶¶ 75-106 (alleging that the Second, Third, and Fourth Counterclaims are all based on Dr. Spanier's act or omission of failing to inform PSU of information he learned about Sandusky while Dr. Spanier was President of the University).) Because the Separation Agreement plainly bars PSU from asserting any claims against Dr. Spanier that are based on any "acts, omissions, practices or events up to and including the effective date of this Agreement [November 22, 2011] and the continuing effects thereof," PSU's various claims asserting that Dr. Spanier failed to inform PSU of information he learned while he was President of the University have been unequivocally and irrevocably released and discharged. (*Id.* Ex. 5 ¶ 8.) They, therefore, must be dismissed with prejudice.

The broad release in the Separation Agreement also highlights a fatal flaw in Defendant's Second Counterclaim, alleging "Unilateral Mistake of Fact" based on PSU's supposedly mistaken belief at the time of contracting that Dr. Spanier had

disclosed to PSU all knowledge he supposedly had of Sandusky's criminal activities. (*Id.* ¶¶ 75-89.) PSU fails to state a claim because it fails to adequately plead a required element of a claim of unilateral mistake: in order to state a valid claim, PSU is required to allege facts demonstrating that it did not bear the risk of such a mistake. *Schrack v. Eisenhower*, No. 115-93, 1995 WL 610260, 23 Pa. D. & C. 4th 289, 298 (Ct. Com. Pl. Clinton Cnty. Mar. 24, 1995) (citing Restatement (Second) of Contracts § 153). PSU makes only the conclusory allegation that it did not bear the risk of mistake, but it fails to support this assertion with reference to any material facts — namely, the language of the Separation agreement. This is because the very language of the release itself ***assumes*** the potential existence of "known and unknown" claims PSU may have against Dr. Spanier for "acts, omissions, practices or events" prior to the date of the agreement relating to Dr. Spanier's position as President of the University, and it places the risk of the existence of any such acts or omissions squarely on PSU by releasing and discharging Dr. Spanier from any and all claims PSU could assert regarding those potential acts or omissions. (2d. Am. Counterclaims Ex. 5 ¶ 8.) It is thus beyond dispute that the Separation Agreement places on PSU the risk that Dr. Spanier may have omitted to disclose certain information to PSU prior to the effective date of the contract by acknowledging the existence of potential claims regarding such an omission and by releasing such claims.

Similarly, the Separation Agreement's integration clause roundly disclaims the notion that Dr. Spanier had ***any*** duty or agreement to disclose ***any*** information to PSU in connection with the negotiation of, the decision to enter into, and the validity of the Separation Agreement. Each of PSU's Counterclaims seeks rescission of the Separation Agreement and/or disgorgement of any payments to Dr. Spanier pursuant to the Separation Agreement. Each is based on the assertion that Dr. Spanier's willful failure to disclose information regarding Sandusky to PSU so frustrated the purposes of the Separation Agreement that it should be entirely rescinded and all payments to Dr. Spanier disgorged. (*Id.* ¶¶ 60-106.) But nowhere does the Separation Agreement state that Dr. Spanier was required to make a disclosure of any such information to PSU as a condition precedent to the agreement, and it does not state that Dr. Spanier was required to warrant or covenant that he had done so. Instead, it says precisely the opposite. The Separation Agreement itself ***releases*** Dr. Spanier from any claims based on prior omissions, states that the parties agree that the entire agreement of the parties with respect to Dr. Spanier's separation from the position of President of the University is contained within the Separation Agreement, and states that "there are no agreements, covenants, promises or arrangements other than those set forth herein with respect to that subject." (*Id.* Ex. 5 ¶ 17.)

PSU cannot graft onto the Separation Agreement a non-existent precondition or warranty that "Dr. Spanier promises that he has disclosed all information regarding Sandusky to PSU" by referencing a supposed outside duty to do so where such a duty is plainly released and disclaimed by the Separation Agreement. (*See id.* ¶¶ 60-106 (averring in support of every single counterclaim that Dr. Spanier's failure to disclose information regarding Sandusky breached a duty to PSU that should result in rescission of the Separation Agreement). By PSU's own admission, the only supposed source of such a duty of disclosure was ***not*** the terms of the Separation Agreement, but rather Dr. Spanier's ***prior*** 2010 Employment Agreement, which was terminated on November 9, 2011, before the parties even began to engage in negotiations concerning the Separation Agreement that PSU asks the Court to rescind. (*See* Part I, *infra*; *see also* 2d. Am. Counterclaims ¶¶ 1, 24.) Notably, while the Separation Agreement incorporated certain limited, specific aspects of that prior 2010 Employment Agreement into the Separation Agreement (regarding post-presidency payments owed to Dr. Spanier), nowhere does it incorporate any supposed duty of disclosure or fiduciary duty from the 2010 Employment Agreement. (*See generally* 2d. Am. Counterclaims Ex. 3.) Thus, the ***only*** possible contractual source for this supposed, undefined duty to disclose was terminated before the negotiation of the Separation Agreement, and the Separation Agreement does not impose a duty of disclosure going forward — much less as a

precondition to the negotiation, validity, and enforceability of the Separation Agreement.

Moreover, where a contract contains an integration clause, as the Separation Agreement does, Pennsylvania law simply does not permit a party to void the contract based on a claim that the other party violated some other duty, agreement, covenant, or warranty not specifically required by the contract itself. *See, e.g., Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 498-501 (2004) (sustaining preliminary objections and invoking the parol evidence rule to dismiss breach of contract claims based on a duty supposedly imposed by a separate document where such duty was not enumerated in the contract and the contract contained an integration clause); *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1300 (3d Cir. 1996) (noting that the Supreme Court of Pennsylvania has held that the parol evidence rule bars consideration of supposed prior representations concerning matters covered in the written contract); *HCB Contractors v. Liberty Place Hotel Associates*, 539 Pa. 395, 399-400 (1995) (affirming sustaining of preliminary objections and dismissal of claims where party claimed existence of representations outside of a contract that contained an integration clause); *Blumenstock v. Gibson*, 811 A.2d 1029, 1035-1036 (Pa. Super. 2002) (holding that an integration clause bars the admission of parol evidence regarding supposed representations outside of the written agreement, because "the case law clearly

holds that a party cannot justifiably rely upon prior oral representations yet sign a contract denying the existence of those representations."). This is ***precisely*** what PSU seeks to do here by asking the Court to find that Dr. Spanier was required to make a disclosure of facts regarding Sandusky as a precondition to the validity of the Separation Agreement despite the fact that the Separation Agreement says the opposite. Pennsylvania law does not allow it.

Finally, PSU cannot avoid the plain language of the integration clause by claiming that Dr. Spanier's supposed withholding of information induced PSU to enter into a contract it would not otherwise have entered into. (*See* 2d. Am. Counterclaims ¶¶ 78-79, 95 (alleging in support of the Counterclaims for unilateral mistake of fact and rescission that PSU would not have entered into the Separation Agreement if Dr. Spanier had disclosed the information he supposedly had regarding Sandusky.) Instead, Pennsylvania law flatly forecloses such a claim and holds that the existence of an integration clause stating that there are no other agreements or covenants other than those set forth in the written contract prohibits a party to that contract from asserting claims based on a theory that the other party's misrepresentations induced it to enter into the contract under false pretenses. *See, e.g., HCB Contractors,* 539 Pa. at 399 (holding that the parol evidence rule bars a claim for fraudulent inducement based on supposed misrepresentations where the contract contains an integration clause, unless it is

alleged that such representations were intended to be included in the contract but were fraudulently omitted in the drafting); *Bray v. Dewese*, No. 07-4011, 2008 WL 623824, at *2-3 (E.D. Pa. Mar. 6, 2008) (granting motion to dismiss defendant's contract counterclaims that were based on a theory that the defendant was fraudulently induced to enter into the contract by plaintiff's failure to disclose information where the contract contained an integration clause); *Interwave Tech., Inc. v. Rockwell Automation, Inc.*, No. Civ. A. 05-398, 2005 WL 3605272, at *18 (E.D. Pa. Dec. 30, 2005) (noting that "[i]ntegration clauses and contract terms that specifically cover the subject matter of the alleged fraudulent inducement frequently result in dismissal of fraudulent inducement claims in the Third Circuit," because "'Pennsylvania law prohibits recovery on a claim of fraud in the inducement where the contract represents a fully integrated written agreement.'"); *Hart v. Arnold*, 884 A.2d 316, 340 (Pa. Super. 2005) ("Likewise, fraud-in-the-inducement claims are commonly barred if the contract at issue is fully integrated."); *Youndt v. First Nat'l Bank of Port Allegany*, 868 A.2d 539, 546 (Pa. Super. 2005) ("Thus, in a case of fraud in the inducement, parol evidence is inadmissible where the contract contains terms that deny the existence of representations regarding the subject matter of the alleged fraud.").

At bottom, all of Defendant's Counterclaims must be dismissed with prejudice, because they are barred by the plain language of the Separation

Agreement. The Separation Agreement itself explicitly anticipates the situation presented here. It disclaims the existence of any such duty of disclosure as a precondition to the validity of the agreement, and it prohibits PSU from asserting legal claims against Dr. Spanier based on a theory that prior to the execution of the Separation Agreement, Dr. Spanier omitted, concealed, or failed to disclose to PSU information that he learned about Sandusky while serving as President of PSU. Because all of PSU's Counterclaims are plainly based on just such a theory, they fail as a matter of law.

IV. PSU's Counterclaims Alleging Fraudulent Conduct are Barred by the Statute of Limitations.

PSU's Counterclaims must also be dismissed because they are all plainly based on a claim of fraudulent inducement, and, as such, they are subject to Pennsylvania's two-year statute of limitations for fraud claims. Because PSU waited well over four years to assert these claims following its supposed discovery of Dr. Spanier's supposed wrongful nondisclosure, PSU's claims are barred by the statute of limitations.

The gist of each of PSU's Counterclaims against Plaintiff, and of PSU's request for rescission of the Separation Agreement and disgorgement of payments made thereunder, is the claim that Dr. Spanier knowingly concealed from — and failed to disclose to — PSU his state of knowledge regarding Sandusky's activities at the time that Dr. Spanier and PSU negotiated and entered into the Separation

Agreement. PSU claims that this intentional omission in the face of a supposed duty to disclose caused PSU to enter into the Separation Agreement under false pretenses. (*See* 2d. Am. Counterclaims ¶¶ 63-67 (First Counterclaim, alleging that Dr. Spanier failed to disclose knowledge of Sandusky's criminal activities to PSU at the time the parties were negotiating the Separation Agreement and that this affected PSU's decision to enter into the Separation Agreement), *id.* ¶¶ 77-78 (Second Counterclaim, alleging that PSU would not have entered into the Separation Agreement if Dr. Spanier had disclosed his supposed knowledge of Sandusky's conduct with minors), *id.* ¶¶ 94-95 (Third Counterclaim, alleging that PSU relied on a belief that Dr. Spanier had disclosed his knowledge regarding Sandusky and that PSU would not have entered into the Separation Agreement if Dr. Spanier had disclosed that information), *id.* ¶¶ 103-104 (Fourth Counterclaim, asserting that Dr. Spanier should be required to disgorge all sums paid under the Separation Agreement due to his supposed failure to disclose to PSU his knowledge of Sandusky). Specifically, PSU claims that Dr. Spanier failed to disclose the information about his supposed knowledge of investigations of Sandusky's activities that PSU later learned in what Defendant calls the "2012 Discovered Emails." (*Id.* ¶¶ 14-15.) As the naming convention suggests, PSU further alleges that it first learned of the information Dr. Spanier supposedly

withheld in 2012, when these emails were supposedly discovered by a company retained by PSU to investigate PSU's handling of Sandusky. (*Id.* ¶ 15.)

Although PSU gives this claim several different names and attempts to couch some of the claims in equitable terms, PSU's claim is essentially one for fraudulent inducement, an action at law. *See Gibbs v. Ernst*, 538 Pa. 193 (Pa. 1994). A claim that a party to a contract failed to disclose information in the face of a duty to do so — and thereby induced another to enter into a contract under false pretenses — is a fraudulent inducement claim. *See Guidotti v. Prince*, No. GD 09-008835, 2012 WL 7070494 (Ct. Com. Pl. Allegheny Cnty. Mar. 5, 2012); *Smith v. Renaut*, 564 A.2d 188, 192 (Pa. Super. 1989) ("Thus, fraud arises where the misrepresentation is knowingly false, where there is an intentional concealment calculated to deceive, or where there is a nonprivileged failure to disclose" in the face of a duty to disclose). This is an allegation that sounds in tortious conduct and is, therefore, subject to the two-year statute of limitations applicable to claims alleging fraud. *See* 42 Pa. Cons. Stat. Ann. § 5524(7) (a two-year statute of limitations applies to an "action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct ***or any other action or proceeding sounding in trespass, including deceit or fraud*** . . . .") (emphasis added); *Aubrey v. Santora*, No. 09-20164, 2013 WL 9770380 (Ct. Com. Pl. Butler Cnty. Aug. 12, 2013) (a claim that the defendant's

misrepresentation induced plaintiff to enter into a contract with defendant is subject to a two-year statute of limitations). Moreover, the remedy that PSU seeks for Dr. Spanier's supposed withholding of information relevant to PSU's decision to enter into the Separation Agreement — rescission of the contract and repayment of all monies and benefits conferred on Dr. Spanier pursuant to the Separation Agreement — is the same remedy available in an action for fraud in the inducement. *Eigen v. Textron Lycoming Reciprocating Engine Div.*, 874 A.2d 1179, 1184 (Pa. Super. 2005); *Neuman v. Corn Exch. Nat'l Bank & Trust Co.*, 356 Pa. 442, 451-455 (1947) (permitting an action at law to recover as damages the monies paid pursuant to a contract induced by a fraudulent nondisclosure by the other party). PSU cannot simply take what is clearly a claim for fraudulent inducement and repackage it with different names purportedly sounding in equity to avoid a clear statute of limitations bar based on PSU's own delay in enforcing its rights. *See Sixsmith v. Martsolf*, 413 Pa. 150, 153 (1964) (Pennsylvania jurisprudence prohibits an action in equity on a contract when an adequate remedy at law exists for the supposed conduct); *Myshko v. Galanti*, 453 Pa. 412, 414 (1973) (affirming *sua sponte* dismissal of equitable claims on a contract where an adequate remedy at law existed); *Davis v. Davis*, 23 Pa. D. & C.2d 52, No. 2478, 1961 WL 6238, at *5 (Ct. Com. Pl. Allegheny Cnty. April 4, 1960) ("Where a

party has a full, complete and adequate remedy at law, equity does not have jurisdiction.")

Because the gist of all of PSU's Counterclaims is fraudulent inducement by Dr. Spanier, and because PSU acknowledges that it became aware of the information that Dr. Spanier supposedly withheld in 2012, PSU's Counterclaims are barred by the two-year statute of limitations.[6] PSU's Counterclaims here are remarkably similar to the claims made in the case of *Albarqawi v. 7-Eleven, Inc.*, No. 12-3506, 2014 WL 616975 (E.D. Pa. Feb. 18, 2014). In *Albarqawi*, the Plaintiff, a 7-Eleven franchisee, claimed that when he entered into his franchise agreement with 7-Eleven, he relied on the company's representations that the store he was franchising did not have any problems with crime. *Id.* at *1. Shortly after he began operating the store, the franchisee learned that the store did in fact have preexisting issues with criminal activity. *Id.* Three years later, he first brought claims alleging that 7-Eleven's misrepresentations regarding the non-existence of criminal activity at the store location had induced him to enter into the contract under false pretenses. *Id.* The Court, applying Pennsylvania law, held that the

[6] As explained in Argument Section VII, *infra*, PSU's own factual averments demonstrate that it was aware of the existence and contents of the emails in 2001, and therefore PSU fails to plead facts supporting the application of the discovery rule or any tolling of its claims. But even if the Court accepts the counterfactual claim that PSU only learned of the emails in 2012, PSU's claims are still plainly barred by the two-year statute of limitations.

franchisee's claims that "the defendants misrepresented to [Plaintiff] that the Store was safe and had no problems with crime," and that "he relied on those misrepresentations when entering into the Franchise Agreement," were subject to the two-year statute of limitations in 42 Pa. C.S.A. § 5524(7). *Id.* at *4. Because the franchisee learned of the misrepresentations within the first week that he operated the store but failed to assert his claims until three years later, the two-year statute of limitations barred his claims. *Id.*

Here, each of PSU's Counterclaims, regardless of the label given to them, is a different variant of the claim that Dr. Spanier intentionally failed to inform PSU of his true state of knowledge regarding Sandusky's activities at the time that Dr. Spanier and PSU were negotiating the Separation Agreement, despite a supposed duty to inform PSU, and that this omission induced PSU to enter into the Separation Agreement under the supposedly false belief that Dr. Spanier did not have prior knowledge of Sandusky's activities. Additionally, PSU avers that it became aware of Dr. Spanier's supposed misrepresentations in 2012, when it learned of the information in the 2012 Discovered Emails. (2d. Am. Counterclaims ¶ 15.) However, PSU did not assert claims regarding this supposed nondisclosure until December 19, 2016, more than four years after PSU admits it became aware of Dr. Spanier's supposed failure to inform PSU of his knowledge regarding Sandusky. As in *Albarqawi*, these claims are subject to a two-year

statute of limitations and therefore must be dismissed based on PSU's failure to assert them within the required time period. *Albarqawi*, 2014 WL 616975, at *4; *see also Aubrey,* 2013 WL 9770380; *In re Global Indus. Technologies., Inc.*, 333 B.R. 251, 259-260 (W.D. Pa. 2005) (Pennsylvania's two-year statute of limitations applies to a claim that one party fraudulently induced another to enter into a contract through misrepresentation).

V. PSU's Counterclaims that Dr. Spanier Breached a Fiduciary Duty are Barred by the Statute of Limitations.

Additionally, all of PSU's Counterclaims that rely on a supposed breach by Dr. Spanier of a fiduciary duty to PSU cannot survive, because it is apparent from the face of the Second Amended Counterclaims that such claims are barred by the applicable statute of limitations. Although PSU has dropped its prior Second Counterclaim expressly alleging a breach of fiduciary duty — almost certainly due to a recognition that such a claim is plainly barred by the statute of limitations, as Dr. Spanier argued in his original preliminary objections — each of Defendant's Second Amended Counterclaims is also based on Dr. Spanier's supposed breach of a fiduciary duty to disclose to PSU the information that PSU alleges it learned in 2012 when it discovered the emails. (*See, e.g.,* 2d. Am. Counterclaims ¶ 2 (alleging that Dr. Spanier had "fiduciary duties" to disclose information to PSU), ¶ 81 (alleging that Dr. Spanier's breached duties of "honest and fair dealings" and to "exercise the utmost good faith in all transactions involving the University"), *id.* ¶

94 (alleging that Dr. Spanier committed a "misuse of the confidential relationship he had with the University"). As noted, although under the plain terms of his Employment Agreement Dr. Spanier was not subject to PSU faculty policies, all of PSU's claims also nevertheless rely on a supposed breach of a PSU policy making faculty fiduciaries in their dealings with the University. (*See id.* ¶¶ 61, 76, 81, 91-92, 103.)

In Pennsylvania, an action based on a breach of a fiduciary duty must commence within two years. 42 Pa. Cons. Stat. Ann. § 5524(7); *Aquilino v. Phila. Catholic Archdiocese*, 884 A.2d 1269, 1275 (Pa. Super. 2005) (explaining that the two-year statute of limitations in 42 Pa. C. S. § 5524 applies to claims for breach of fiduciary duty). The statute of limitations begins to run as soon as the right to institute and maintain a suit arises. *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 84 (1983). Even allowing for PSU's implausible allegations as to when it discovered the information contained in the 2012 Discovered Emails, the two-year statute of limitations began to run on Dr. Spanier's supposed breach of fiduciary duty no later than December 31, 2012. PSU did not assert its (original) Counterclaims until December 19, 2016 — four years later. Therefore, PSU's Counterclaims, all of which expressly rely on the theory that Dr. Spanier had and breached a duty owed to PSU by failing to disclose the information PSU claims it learned in 2012, are barred by the statute of limitations and must be dismissed with

prejudice. *See Hanaway v. Parkesburg Grp., LP*, 132 A.3d 461, 472 (Pa. Super. 2015) (a cause of action seeking a remedy for a breach of fiduciary duty is grounded in tort and subject to the two-year statute of limitations).

VI. PSU's Counterclaims are Barred Due to Waiver.

Alternatively, to the extent that the Court finds that PSU's Second, Third, and Fourth Counterclaims — "Unilateral Mistake of Fact," "Rescission," and "Unjust Enrichment," — are properly labeled as equitable claims rather than legal ones, these claims are barred by laches, by PSU's unreasonable and unexplained delay in asserting its demand for rescission of the Separation Agreement, and by PSU's decision to continue performing under the contract for years after supposedly discovering misrepresentations by Dr. Spanier. As with the statute of limitations, a defense of laches may be asserted and decided on preliminary objections if it is clear from the face of the complaint. *Holiday Lounge, Inc. v. Shaler Enterprises Corp.*, 441 Pa. 201, 204 (1971) ("It is settled that laches may be raised and determined by preliminary objection if laches clearly appears in the complaint."). Because PSU waited nearly four years after its claimed discovery of Dr. Spanier's supposed withholding of knowledge of Sandusky's criminal activities to bring claims against Dr. Spanier and to seek rescission of the Separation Agreement, PSU's Counterclaims cannot proceed, and PSU has waived its right to seek rescission of the contract.

As noted, PSU seeks the relief of rescission of the Separation Agreement or excusal from continued performance as a remedy for its Counterclaims against Dr. Spanier. (*See* 2d. Am. Counterclaims ¶¶ 60-106.) But it is black-letter law in Pennsylvania that a party seeking to rescind a contract must do so ***promptly*** upon discovery of facts warranting rescission, and the failure to do so waives the right to rescind:

> When a party discovers facts which warrant rescission of his contract, it is his duty to act promptly, and, in case he elects to rescind, to notify the other party without delay, or within a reasonable time. If possible, the rescission should be made while the parties can still be restored to their original positions. Failure to rescind within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract.

Fichera v. Gording, 424 Pa. 404, 406 (1967) (quoting 8 Pa. Law Encyclopedia § 258, pp. 280-81). In *Fichera*, the Supreme Court affirmed a judgment on the pleadings barring a claim for rescission of a contract for the sale of a home where the plaintiff-buyer claimed that before the sale, the defendant-seller misrepresented the zoning of the property, fraudulently inducing the seller to purchase the home under false pretenses. *Id.* at 404. Noting that the plaintiff waited five years after discovery of the supposed misrepresentation to institute a suit seeking rescission of the sale, the Court affirmed the holding of the Court of Common Pleas that the suit seeking rescission of the contract was barred by the plaintiff-buyer's delay. *Id.* at 406. In *Schwartz v. Rockey*, 593 Pa. 536, 550-553 (2007), the Supreme Court affirmed the holding of the Court of Common Pleas that a buyer's three-year delay

in seeking rescission of a contract based on the other party's alleged non-disclosure and concealment was unreasonable and barred a claim for rescission of the contract. In a footnote, the Court noted that it had previously held the remedy of rescission to be unavailable to plaintiffs that waited 25-months and seven months, respectively, to institute a suit for rescission of a contract after learning of alleged fraud by the other party. *Id.* at 547 n.7 (citing *Sixsmith v. Martsolf*, 413 Pa. 150, 152 (1964) (an action for rescission instituted twenty-five months after the sale does not meet the requirement of prompt action) and *Muehlhof v. Boltz*, 215 Pa. 124, 129 (1906) (remedy of rescission unavailable where operator of a mill waited seven months after becoming aware of alleged fraud to institute a suit).) Similarly, in *Albarqawi*, a 7-Eleven franchisee sought rescission of his franchise agreement with 7-Eleven based on the claim that he was induced into entering into the agreement by the corporation's false representation that the store he was purchasing did not have any history of issues with crime. *Albarqawi*, 2014 WL 616975, at *1. The United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, held that the franchisee's claim for rescission was barred because he waited over two years from the discovery of the alleged misrepresentation to make the claim. *Id.* at *2 ("The Court finds that the rescission remedy is not available to the plaintiff because the plaintiff failed to act promptly on his potential claim for rescission."). Noting that "[p]rompt action is a

prerequisite to the remedy of rescission" under Pennsylvania law, the court held that the franchisee's failure to seek rescission of the contract for over two years, during which time the franchisee continued to perform on the contract, barred his claim. *Id.* at *2-3.

Similarly, Pennsylvania courts and federal courts applying Pennsylvania law routinely hold that where a party to a contract elects to continue performance of a contract rather than immediately seeking relief after becoming aware of grounds for rescission or termination of the contract, the ability to seek those remedies is waived. *Id.* at *3 (plaintiff could not rescind the contract where he continued to perform for over two years after learning of the supposed misrepresentation that he claimed justified rescission); *Surgical Laser Technologies., Inc. v. Heraeus Lasersonics, Inc.*, No. CIV.A. 90-7965, 1995 WL 70535, at *2 (E.D. Pa. Feb. 15, 1995) (collecting Pennsylvania cases holding the same); *McAlpine v. AAMCO Automatic Transmissions, Inc.*, 461 F. Supp. 1232, 1250-51 (E.D. Mich. 1978) ("[a] party who continues to work under a Pennsylvania contract after the other party has breached thereby waives the right to rescind"); *Gray v. Md. Credit Fin. Corp.*, 25 A.2d 104, 106-107 (Pa. Super. 1942) (plaintiff who continued to make payments under contract rather than seek rescission affirmed the validity of the contract and waived the right to seek rescission). In *Fuller Co. v. Brown Minneapolis Tank & Fabricating Co.*, 678 F. Supp. 506 (E.D. Pa. 1987), the court

addressed a claim similar to PSU's. There, the defendant in a breach of contract action argued that it was entitled to rescind the agreement based on the claim that the defendant was fraudulently induced to enter into the contract by the plaintiff's misrepresentations. *Id.* at 509. Noting that the defendant had not promptly sought rescission of the agreement, but rather continued to perform — only choosing to seek rescission after being sued for breaching the agreement — the court held that the defendant's demand for rescission was barred by its continued performance and that its only remedy would have been to seek damages for breach of contract:

> [Defendant] ignores the fact that when presented with the design changes made by [Plaintiff], it did not cease performance and sue for damages, but rather, it continued to perform, and has, in fact, completed all work requested by [Plaintiff]. By electing to proceed with its performance, [Defendant] waived whatever right it may have had to rescind the contract on the grounds that [Plaintiff] had fraudulently induced it into entering into the agreement . . . . [A]s with a party's failure to seek rescission of a contract upon discovery of fraud in its inducement, a party cannot continue to perform under the contract and later be heard to say that the other party breached the agreement prior to continued performance, and therefore, no contract existed. By electing to continue its performance, [Defendant] remains bound by the terms of the contract. Its only remedy for [Plaintiff's] alleged breaches of the contract is a claim for monetary damages.

Id. at 509-510. It is thus indisputable that Pennsylvania law requires that a party claiming entitlement to rescission based on an alleged fraudulent inducement or nondisclosure waives the right to seek rescission if he fails to promptly seek rescission and/or if he continues to perform and, thereby, affirms the existence and validity of the contract.

The facts as pleaded by PSU in its Second Amended Counterclaims demonstrate on their face that PSU has waived the right to seek rescission of the

Separation Agreement. As set forth in Section VII, *infra*, PSU was aware of all the relevant facts that it claims justifies rescission long before the negotiation of the Separation Agreement. But by PSU's own admission, it became aware of the true facts supposedly misrepresented by Dr. Spanier during the negotiation of the Separation Agreement at least as of 2012, but it failed to seek rescission of the Separation Agreement until December 2016, some four years later. (2d. Am. Counterclaims ¶¶ 42-44.) PSU further acknowledges that since the supposed discovery of these emails in 2012, PSU has continued for years to provide the salary, payments, and benefits to Dr. Spanier that it is required to make under the terms of the Separation Agreement. (*Id.* ¶ 40). Moreover, PSU's delay in seeking rescission and/or disgorgement has plainly prejudiced Dr. Spanier, as PSU seeks disgorgement of all salary and health care benefits that were provided to Dr. Spanier over the course of years pursuant to the contract, whereas Dr. Spanier has continued to be bound by and to perform his duties under the Separation Agreement since November 2011.

Finally, PSU's pleading shows that it would be impossible to return the parties to their original position at the time of the agreement due to PSU's delay. Although PSU makes the conclusory allegations that "[t]he parties can be restored to the status quo ex ante," and "Dr. Spanier has not been unfairly prejudiced by the University's request for rescission of the Separation Agreement," PSU fails to

allege any facts supporting these facially absurd averments. (*See id.* ¶¶ 68-72.) PSU acknowledges that the purpose of the Separation Agreement was to memorialize and determine the terms of Dr. Spanier's separation from the position of President of the University in 2011, and that the terms of the Separation Agreement and the benefits, payments, duties, and responsibilities imposed thereby have been performed in whole or in part for four years since PSU claims it learned of grounds for rescinding the agreement. Does PSU propose to make Dr. Spanier President of the University again? Does PSU propose to scrap the Separation Agreement but continue to be bound by the Employment Agreement which requires the same payments PSU seeks disgorgement of? PSU cannot plausibly allege that after over four years of inaction on its part, the Separation Agreement can simply be rescinded as if it never existed without great prejudice to Dr. Spanier. Thus, on the face of PSU's Second Amended Counterclaims, PSU has waived any ability to seek to rescind the Separation Agreement or to seek equitable disgorgement of all payments made pursuant to the agreement.

VII. PSU Fails to Plead Facts Supporting Causation and Injury.

Additionally, each of PSU's Counterclaims fails for the fundamental reason that PSU has failed to allege facts demonstrating that it has been harmed in any way by Dr. Spanier's supposed breaches and failures to disclose, or to allege facts demonstrating a causal connection between Dr. Spanier's supposed failure to

disclose and any harm that PSU claims. Simply put, the facts as pled by PSU aver that numerous ***other*** PSU employees and officials (and thus PSU itself) were aware of the so-called "2012 Discovered Emails" and all of the material information contained therein in 2001, and certainly no later than November 5, 2011 — prior to Dr. Spanier's termination as President, and prior to the negotiation and execution of the Separation Agreement. Because PSU's own pleading alleges that even if PSU's allegations regarding Dr. Spanier's knowledge of criminal activity by Sandusky and the grand jury investigation of Sandusky were true (and they are not), PSU was already independently aware of all of the same information that Dr. Spanier supposedly failed to disclose to PSU, and therefore PSU fails to allege how Dr. Spanier's supposed failure to disclose could have harmed PSU in any way.

Although PSU's Second Amended Counterclaims are extraordinarily vague with respect to exactly what information PSU claims that Dr. Spanier failed to disclose during the time period in November 2011 when the parties were negotiating his Separation Agreement, PSU alleges that "Dr. Spanier was aware, not later than April 2011, that a Pennsylvania grand jury was investigating allegations that Jerry Sandusky had engaged in criminal misconduct involving one or more children, including conduct that allegedly took place on the University's premises." (*Id.* ¶ 11.) PSU then alleges that Dr. Spanier failed to disclose to PSU:

> [T]he contents of emails either sent to or received by him regarding: (1) a 1998 allegation of misconduct by Sandusky with a child on University property, into which government officials and University police had conducted an investigation ("the 1998 incident"); and (2) Sandusky having been observed showering with a minor boy on Penn State property (the "2001 incident").

(*Id.* ¶ 14.) PSU alleges that Dr. Spanier violated an undefined duty to disclose to PSU his knowledge of the grand jury investigation and the information contained in these "2012 Discovered Emails" during the negotiation of his Separation Agreement on or about November 12-15, 2011, and seeks rescission of the Separation Agreement due to Dr. Spanier's alleged failure to disclose this information. (*Id.* ¶¶ 12-14, 23, 41-43, 60-101.)

The fatal flaw in each of PSU's Counterclaims is that PSU fails to allege facts demonstrating that it was not independently aware of the very information that Dr. Spanier supposedly failed to disclose, while the facts that PSU ***does*** allege demonstrate convincingly, as a matter of law, that PSU was independently aware of this information prior to the negotiation of Dr. Spanier's Separation Agreement. One need look no further than the so-called "2012 Discovered Emails" themselves, which PSU attached as Exhibit 4 to its Second Amended Counterclaims. The emails purport to reflect communications in 2001 between Dr. Spanier and Gary C. Schultz, identified therein as the "Senior Vice President for Finance & Business/Treasurer" of Penn State University, and Tim Curley, the then-Director of Athletics for PSU. (*Id.* Ex. 4.) PSU itself describes these two individuals as "high-ranking University officials." (*Id.* ¶¶ 21-23.) Because it is axiomatic that a

corporate entity such as PSU can only acquire knowledge through its own agents and employees, the fact that ***PSU acknowledges that two other "high-ranking University officials" were party to — and thus necessarily aware of the existence and contents of — the very same emails that PSU claims Dr. Spanier failed to disclose to PSU***, PSU's own factual averments demonstrate conclusively that PSU itself was aware of the existence and contents of the "2012 Discovered Emails" as far back as 2001.[7] *A. Schulman, Inc. v. Baer Co.*, 197 Pa. Super. 429, 434 (1962) ("The corporation can acquire knowledge or notice only through its officers or agents . . . ."); *Commw. Dep't of Transp. v. Michael Moraiti, Upper Darby Auto Ctr., Inc.*, 34 Pa. Cmwlth. 27, 30 n.2 (1978) ("In accordance with a well established rule of the law of agency, a corporation is bound by the knowledge acquired by, or notice given to, its officer or agents . . . ."); *Commw. v. One 1978 Porsche Coupe*, 23 Pa. D. & C.3d 268, 271 (Ct. Com. Pl. 1981) ("A corporation cannot see or know anything except by the eyes of intelligence of its officers . . . Knowledge of the proper corporate agent must be regarded in legal effect, as the knowledge of the corporation."); *Gray v. Green Lincoln Mercury Mazda, Inc.*, No. 1556, 1998 WL 582746, 16 Phila. Co. Rptr. 411, 417 (Ct. Com. Pl. Phila. Cnty. Oct. 13, 1987) ("A corporation can act only through its agents; as the principal [the

[7] In fact, Exhibit 4 reflects that Dr. Spanier was only a party to ***two*** of the ***six*** emails PSU claims Dr. Spanier failed to disclose to PSU. Thus, far from demonstrating that Dr. Spanier had and failed to disclose knowledge that PSU did not have, the emails conclusively demonstrate that PSU had ***greater*** knowledge of the Exhibit 5 emails than Dr. Spanier had individually.

corporation] cannot disavow or disclaim knowledge and information acquired by its agents in the course of its business."); *Phila. v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962) (holding that knowledge acquired by "high ranking officials" was chargeable to the corporation because "[a] corporation acquires knowledge through its officers and agents and is charged with knowledge of all material facts of which they acquire knowledge" during the course of their employment (internal quotations omitted).)

PSU further doubles down on this irrefutable evidence in its own pleading, averring that Schultz and Curley, the former high-ranking PSU officials, recently testified under oath about their contemporaneous knowledge of the 1998 incident, the 2001 incident, and the so-called "2012 Discovered Emails." (2d. Am. Counterclaims ¶¶ 50-53.) In light of these admissions, PSU simply cannot plausibly claim that, as a corporate entity, it did not have knowledge of the 1998 incident, the 2001 incident, and the "2012 Discovered Emails." In fact, this Court has already held, with respect to these same incidents, that Gary Schultz was at the time an "officer" of PSU and that his knowledge of the 1998 and 2001 incidents is therefore legally imputed to PSU. (*See* May 4, 2016 Op., *Pa. State Univ. v. Pa. Mfrs.' Ass'n Ins. Co.*, Nos. 03195, 15111053, 15111034, 15111035, 2016 WL 2737438, at *6-8 (Ct. Com. Pl. Phila. Cnty. May 4, 2016) (Glazer, J.) (attached as Exhibit 1). This indisputable fact is fatal to PSU's ability to plead that it was in

any way harmed or misled by any supposed failure of Dr. Spanier to disclose the existence and contents of these emails to PSU, and requires dismissal of all of PSU's Counterclaims.[8]

Similarly, in addition to the fact that PSU alleges that two high-ranking officials of the University (and thus PSU itself) were aware of the existence and contents of the so-called "2012 Discovered Emails" in 2001 — ten years before PSU claims Dr. Spanier failed to disclose their existence to PSU — Exhibit 4 also alleges that the emails between Dr. Spanier and two other high-ranking officials of PSU were sent and received on the PSU email network using those individuals' PSU email addresses. (*See* 2d. Am. Counterclaims Ex. 4, purporting to show email sent and received on Tim Curley's PSU email (TMC3@psu.edu), Gary Schultz's PSU email (gcs2@psu.edu), and Joan Coble's PSU email (jlc9@psu.edu).) Just as it cannot claim that it did not have knowledge that its own high-ranking officials possessed, PSU cannot claim that it did not have knowledge of, and the ability to locate, emails that it alleges were in its own possession since 2001. *See Carr-Consol. Biscuit Co. v. Moore*, 125 F. Supp. 423, 432 (M.D. Pa. 1954) (a

[8] In fact, Judge Glazer's holding that PSU as an entity was necessarily aware of the 1998 and 2001 incidents due to its officer Gary Schultz's knowledge bars PSU from claiming otherwise in this proceeding, which is fatal to all of PSU's Counterclaims. All of the elements of collateral estoppel, or "issue preclusion," are met here because the identical issue — whether PSU was aware of the 1998 and 2001 incidents at the time — was previously litigated in this Court, was necessary to Judge Glazer's decision on the merits, and PSU was a party to that action. *See Balent v. City of Wilkes-Barre*, 542 Pa. 555, 564 (1995) (setting forth the elements for application of collateral estoppel).

corporation is charged with knowledge of information known to its officers and appearing in its own records).

Moreover, PSU cannot plead causation or injury due to an alleged failure of Dr. Spanier to disclose information regarding the 1998 and 2001 Sandusky incidents during the negotiation of the Separation Agreement on November 12-15, 2011, because the facts as pled by PSU aver that PSU was fully aware of the public allegations regarding Sandusky no later than November 5, 2011. In its Second Amended Counterclaims, PSU alleges that the information Dr. Spanier supposedly failed to disclose during the negotiation of the Separation Agreement was: "(1) a 1998 allegation of misconduct by Sandusky with a child on University property, into which government officials and University police had conducted an investigation ("the 1998 incident"); and (2) Sandusky having been observed showering with a minor boy on Penn State property (the "2001 incident")." (2d. Am. Counterclaims ¶ 14.) The problem for PSU is that it admits in its pleading that it was in fact on notice of all of this information a week before PSU and Dr. Spanier entered into negotiation of the Separation Agreement.

In paragraphs 20-22 of its Second Amended Counterclaims, PSU alleges:

> On November 5, 2011 members of the Thirty-Third Statewide Investigating Grand Jury of the Commonwealth of Pennsylvania issued a presentment against Sandusky that described multiple instances of criminal sexual conduct involving minor boys (the "Presentment"), and that recommended that Sandusky be criminally charged with multiple counts of involuntary deviate sexual intercourse, and endangering the welfare of minors. ***Several of the offenses were alleged to have been committed on the University's premises***, at a time when Sandusky was

> either an employee of the University or had emeritus status that permitted him to have unrestricted access to the University's facilities. ***The Presentment also recommended criminal charges against Tim Curley and Gary Schultz for failing to report allegations that Sandusky had engaged in child abuse on the University's premises to law enforcement or child protection authorities*** and for committing perjury during their grand jury testimony about those allegations. On the recommendation of the Presentment, criminal complaints were lodged against Sandusky, Schultz, and Curley.

(*Id.* ¶¶ 20-22 (emphasis added).) The November 5, 2011 Presentment (attached hereto as Ex. 2) contains allegations that go into great detail regarding what PSU calls "the 1998 incident" and "the 2001 incident." (*See id.* ¶ 14.) The Presentment alleges that in 1998, an allegation of potential child abuse was lodged against Sandusky for conduct occurring in a PSU locker room, that the ***University Police*** investigated the allegation, that high-ranking PSU officials Curley and Schultz were aware of the investigation at the time, that PSU's then-outside counsel was aware of the investigation at the time, and that the University Police, the State College Police Department, the Department of Public Welfare, and the Centre County District Attorneys' Office ultimately concluded after an investigation that no criminal charges would be brought based on the incident. (Ex. 2, Grand Jury Presentment at 9-10, 18-20.) The Presentment also goes into great detail regarding what PSU calls "the 2001 incident," describing allegations that a PSU employee allegedly witnessed inappropriate conduct by Sandusky with a youth in a PSU facility, and alleging that a report of the incident was made to Schultz, Curley, and PSU football Coach Joseph Paterno. (*Id.* at 6-11.) The Presentment alleges that,

"***The University***, by its senior staff, Gary Schultz, Senior Vice President for Finance and Business and Tim Curley, Athletic Director, ***was notified by two different Penn State employees of the alleged sexual exploitation of that youth***." (*Id.* at 12 (emphasis added).) The Presentment even references Dr. Spanier's own testimony before the Grand Jury in which he relayed that Schultz and Curley reported to him an incident involving Sandusky witnessed by a staff member that made the employee uncomfortable. (*Id.*)[9] In short, PSU's own factual allegations plainly demonstrate that no later than November 5, 2011 — a week before PSU entered into negotiations with Dr. Spanier regarding the Separation Agreement — PSU was on notice of the detailed, public allegations regarding Sandusky and the 1998 and 2001 incidents, as well as allegations that those incidents occurred on PSU property and allegations that high-ranking officials of PSU were made aware of those incidents. PSU cannot plausibly allege otherwise.

Due to its admission that it was aware of these public allegations on November 5, 2011, in addition to the fact that PSU's pleading demonstrates that it was aware of the existence and contents of the "2012 Discovered Emails" in 2001, PSU simply cannot, and does not, allege any ***facts*** demonstrating that it was in any way harmed or duped by any supposed failure by Dr. Spanier to disclose this

[9] The Presentment also alleges a separate, additional incident in 2000 in which multiple PSU employees (not including Dr. Spanier) allegedly witnessed an alleged sexual assault on a youth by Sandusky in the showers at a PSU facility. (*Id.* at 21-23.)

information to PSU during the time period of November 12-15, 2011 when Dr. Spanier and PSU negotiated the Separation Agreement. PSU's total failure to plausibly plead facts showing causation and harm due to Dr. Spanier's supposed nondisclosure renders PSU's pleading insufficient and requires dismissal of all of PSU's Counterclaims pursuant to Pennsylvania Rule 1028(a)(4).

In addition to conclusively defeating all of PSU's Counterclaims due to a total failure to show that Dr. Spanier's supposed nondisclosure caused any harm to PSU, the fact that PSU had knowledge and possession of the information in the so-called "2012 Discovered Emails" prior to November 12-15, 2011 also defeats any effort by PSU to apply the discovery rule to extend the limitations period on any of its claims. Under black-letter Pennsylvania law, the statute of limitations begins to run as soon as a right to maintain a suit a rises, and lack of knowledge or mistake do not toll the running of a statute of limitations. *Pocono Int'l Raceway*, 503 Pa. at 84-85. An injured party can ***only*** claim the benefit of the discovery rule if it did not know of its injury, and could not have known despite the exercise of due diligence. *Id.* PSU's own pleading on its face alleges that PSU was aware of the existence and contents of the Exhibit 4 emails no later than 2001, that PSU has been in possession of those emails since 2001, and that PSU was further on notice of all of the detailed, salient allegations regarding Sandusky and the University's alleged response to Sandusky no later than November 5, 2011. It is thus

unsurprising that PSU fails to plead that it was not aware of its supposed injuries due to Dr. Spanier's supposed nondisclosures, or that it could not have discovered emails in its own possession through the exercise of due diligence. (*See generally* 2d. Am. Counterclaims). Because PSU does not plead, and cannot plead, any facts entitling it to the benefit of the discovery rule with respect to its claims, PSU has no basis to claim a tolling of the statute of limitations on any of its claims.

VIII. PSU's Claim for Unjust Enrichment is Barred by the Existence of a Valid, Written Contract.

Finally, PSU's Fourth Counterclaim asserting a claim for "Unjust Enrichment," (*see id.* ¶¶ 102-106), must be dismissed because PSU has failed to allege facts or valid legal claims casting doubt on the validity and enforcement of the 2010 Employment Agreement and the 2011 Separation Agreement. It is well settled that a claim for unjust enrichment is a quasi-contract claim that cannot be maintained where the party's rights and responsibilities were governed by a valid, written contract. *See Wilson Area Sch. Dist. v. Skepton*, 586 Pa. 513, 520 (2006) ("[I]t has long been held in this Commonwealth that the doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded upon a written agreement or express contract, regardless of how 'harsh the provisions of such contracts may seem in the light of subsequent happenings.'") (quoting *Third Nat'l & Trust Co. of Scranton v. Lehigh Valley Coal Co.*, 353 Pa. 185 (1945).)

Here, PSU's claims that Dr. Spanier has been unjustly enriched and its demand that Dr. Spanier disgorge all sums paid by PSU to Dr. Spanier since November 9, 2011 are legally insufficient because PSU fails to state a claim that casts doubt on the validity of the Separation Agreement. Even more fundamentally, PSU's own pleading demonstrates that the matter of compensation owed by PSU to Dr. Spanier is controlled not only by the terms of Dr. Spanier's Separation Agreement, but also by the terms of Dr. Spanier's 2010 Employment that explicitly survived the termination of that agreement. Notably, PSU nowhere challenges the validity or enforceability of the 2010 Employment Agreement, which sets forth the payments owed to Dr. Spanier over a six-year period following his termination from the position of President of PSU and expressly states that those obligations survive the termination of the agreement. (*See* 2d. Am. Counterclaims Ex. 1, at §§ E(5)-E(6).) In fact, PSU ***affirms*** the validity of the Employment Agreement by attempting to assert a claim against Dr. Spanier for breaching it. *See McShea v. Phila.*, 995 A.2d 334, 340 (Pa. 2010) (an essential element of a claim for breach of contract is the existence of a valid contract). By failing to challenge the validity and enforceability of the 2010 Employment Agreement, PSU cannot dispute that a valid, written contract governs PSU's obligation to continue to make payments to Dr. Spanier following his tenure as

President. Plaintiff's preliminary objection to Defendant's Fourth Counterclaim for unjust enrichment should therefore be sustained.

CONCLUSION

For all of the reasons set forth above, Plaintiff requests that the Court sustain Plaintiff's preliminary objections to Defendant's Second Amended Counterclaims and dismiss Defendant's Second Amended Counterclaims with prejudice.

Dated: April 19, 2017 By: _____

Thomas A. Clare (pro hac vice)
Elizabeth M. Locke (pro hac vice)
Andrew C. Phillips (pro hac vice)
CLARE LOCKE LLP
10 Prince Street
Alexandria, Virginia 22314
Telephone: (202) 628-7400

Kathleen Yurchak (PA 55948)
STEINBACHER, GOODALL & YURCHAK, P.C.
yurchak@centrelaw.com
328 South Atherton Street
State College, PA 16801
Telephone: (814) 237-4100
Fax: (814) 237-1497

ATTORNEYS FOR PLAINTIFF GRAHAM B. SPANIER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the below counsel of record on April 19, 2017.

Daniel I. Booker (PA 10319)
Donna M. Doblick (PA 75394)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
(412) 288-3063 (facsimile)
dbooker@reedsmith.com
ddoblick@reedsmith.com

Michael T. Scott (PA 23882)
REED SMITH LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103
(215) 851-8100
(215) 851-1420 (facsimile)
mscott@reedsmith.com

Joseph P. Green (PA 19238)
LEE, GREEN & REITER, INC.
115 East High Street
P.O. Box 179
Bellafonte, PA 16823
(814) 355-4769
(814) 355-5024 (facsimile)
jgreen@lmgrlaw.com

Attorneys for Defendant

Steinbacher, Goodall & Yurchak, P.C.

Dated: April 19, 2017

By: _____

Kathleen Yurchak, Esq.
(PA 55948)
328 South Atherton Street
State College, PA 16801
Telephone: (814) 237-4100
Fax: (814) 237-1497

Exhibit 1

2016 WL 2737438 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
First Judicial District
Trial Division - Civil
Philadelphia County

THE PENNSYLVANIA STATE UNIVERSITY, Plaintiff,
v.
PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE CO., Defendant.

Nos. 03195, 15111033, 15111034, 15111035.
May 4, 2016.

Opinion

Gary S. Glazer, Judge.

*1 This case arises out of a series of heinous crimes perpetrated against a multitude of children over a 40 year period by the now convicted, serial sexual predator, Gerald A. Sandusky, who is currently incarcerated. Most of his victims, who opted to seek damages from, the entities for which Sandusky worked, have been paid in settlement of their claims. The claims made in this litigation are focused solely on the question whether Sandusky's employer, Penn State University ("PSU"), should pay its portion of the settlement amounts itself, or if its commercial general liability ("CGL") insurer, Pennsylvania Manufacturers' Association Insurance Company ("PMA") should cover some or all of those settlement costs. Since this is obviously not a criminal matter, this court is not governed by the higher standards of proof required in criminal prosecutions; instead this court must apply the general civil rules of contract construction and interpretation.

PSU requests indemnification from PMA based on CGL policies issued for the period spanning from 1969 until 2011, when Sandusky was employed by PSU (the "Insuring Period"). The terms of the policies existing from 1976 through 2001, when Sandusky committed acts of child molestacion for which there is some evidence of record, are of particular relevance here. Even more specifically, the court must examine the policies for the years 1976, 1987, 1988, 1998, and 2001, when PSU agents allegedly learned of Sandusky's abusive acts ("Potential Notice Incidents"). The form of the PMA policies changed over time, and different definitions and exclusions applied throughout the Insuring Period. Of course, the facts of each Potential Notice Incident are different too.

I. The 1976, 1987, and 1988 Potential Notice Incidents and Applicable Policy Provisions.

Sandusky was employed by PSU as an Assistant Football Coach and Assistant Professor of Physical Education from 1969 until his retirement in 1999.[1] PMA claims Sandusky committed several acts of molestation early in his career at PSU; in 1976, a child allegedly reported to PSU's Head Football Coach Joseph Paterno, that he (the child) was sexually molested by Sandusky; in 1987, a PSU Assistant Coach is alleged to have witnessed inappropriate contact between Sandusky and a child at a PSU facility; in 1988, another PSU Assistant Coach reportedly witnessed sexual contact between Sandusky and a child; and also

in 1988, a child's report of his molestation by Sandusky was allegedly referred to PSU's Athletic Director. [2] There is no evidence that reports of these incidents ever went further up the chain of command at PSU.

*2 During this time period, PSU's Commercial General Liability policies contained the following provisions:

> The company will pay on behalf of the insured all suras which the insured shall become legally obligated to pay as damages because of ... bodily injury... to which this insurance applies, caused by an occurrence..." [3]

"bodily injury" means "bodily injury, death, humiliation, mental injury, mental anguish, shock, sickness, disease or disability sustained by any person." [4]

"occurrence" means an accident, [5] including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected, nor intended from the standpoint of the insured;" [6]

Each of the following is an "insured" under this insurance... if the named insured is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director [7] or stockholder thereof while acting within the scope of his duties as such; [8]

As respects bodily injury ... under the provision 'Persons Insured' the following are added as insureds... Any employee (other than executive officers) of the named insured while acting within the scope of his duties as such ... [9]

Clearly, Sandusky's victims suffered "bodily injuries" as that term is used in the policies. As alleged in the actions filed against PSU by Sandusky's victims, such bodily injuries were caused by "an accident," namely PSU's negligent hiring, supervision, and retention of Sandusky.

The question is whether PSU was more than negligent, *i.e.*, did it expect or intend such bodily injuries to occur. PSU is defined to include only its officers, trustees and stockholders. The PSU employees with knowledge of these incidents, Paterno, the Assistant Coaches, and the Athletic Director, are not officers, trustees, or stockholders.

*3 Under the additional insured provisions of the policies, Paterno and the Assistant Coaches could, if sued by the victims, be potentially covered insureds. However, coverage for their lapses is not at issue here. Since such employees are additional persons insured and are not included in the definition of the corporate insured PSU, their knowledge, expectations, and intentions are not imputed to PSU to bar coverage for PSU. [10]

In other words, coverage is afforded to 'the insured" PSU unless the bodily injury was expected or intended by the same insuted, PSU, its officers, directors and stockholders, and not by another insured, such as its employees. [11] Since there is no evidence that any such officers, directors, or stockholders knew of Sandusky's molestations in 1976, 1987 and 1988, they could not have expected or intended such abuses, and the resulting bodily injury to the victims, to occur. Therefore, PSU may be covered under the policies in place at the time those acts of abuse took place.

The policies also contained a notice provision requiring PSU to notify PMA of any occurrence that; could result in coverage under the policies:

In the event of an occurrence, notice containing particulars sufficient to identify the insured also reasonably obtainable information with respect to the time, place, and circumstances thereof, and the names and addresses of the injured and available witnesses shall be given by or for the insured to [PMA] or any of its authorized agents as soon as practicable after knowledge of same is had by the insured, if an individual, or by an executive officer, if a corporation.

It is further agreed that knowledge of an occurrence by the agent, servant or employee of the insured shall not in itself constitute knowledge of the insured unless the risk manager shall have received such notice from his agents, servant and employee. [12]

Under the last of these provision, PSU did not have a duty to report an occurrence of child molestation to PMA unless one of its executive officers, or the Risk Manager, knew about it Head Coach Paterno, the Assistant Coaches, and the Athletic Director were not executive officers, nor were they Risk Managers with a duty to report incidents to PMA. Since they apparently neglected to inform their superiors, including the Risk Manager, of the 1976, 1987 and 1988 incidents involving Sandusky, PSU cannot be charged with knowledge of Sandusky's molestations sufficient to require it to have notified its insurer, PMA.

II. The Abuse or Molestation Exclusion in the 1992-1999 Policies.

*4 There is evidence of record that, during the 1990s, Sandusky abused at least four children in the PSU locker rooms, football buildings, and the pool, as well as at the PSU Rose Bowl game in California. [13] From March 1, 1992 through March 1, 1999, [14] a specific Abuse or Molestation Exclusion (the "AME") was included in the policies. The parties have asked the court to interpret and apply that exclusion to Sandusky's predatory practices. The AME provides that "[t]his insurance does not apply to 'bodily injury'... arising out of:"

a.) The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or

b.) The negligent employment, investigation, supervision, reporting to the proper authorities, or failure to so report, or retention of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by paragraph (a) above. [15]

"Insured" is defined to include PSU's employees, "but only for acts within the scope of their employment by [PSU]" [16] "or while performing duties related to the conduct of [PSU's] business." [17]

Clearly, Sandusky fits the definition of "anyone" as used in Section (a), and he was convicted of committing "actual abuse or molestation," Furthermore, the children were in Sandusky's care, custody and control when he abused them. [18] The question then is whether he was also an "insured" at the time that he abused them.

From 1992-1999, Sandusky was employed as an Assistant Coach and Assistant Professor at PSU, so he was an "employee" of PSU's. When he brought the children on campus and abused them in the locker room, or took them with him to PSU football games and abused them in motel rooms, he was simultaneously enjoying the privileges and perquisites of his position as a PSU Assistant Coach. His concurrent, non-abusive, acts

on campus and at games were "acts within the scope of his employment by [PSU]" or "duties related to the conduct of [PSU's] business."

Sandusky's acts of abuse were obviously not part of his job. To use an employee's job description, to protect the insured from application of the AME would render the exclusion meaningless in every instance of abuse. The court will not do so. [19]

The next question is whether his abusive acts that occurred off-campus and away from PSU football games also fall within the purview of the AME. When he abused children in his own home or at Second Mile events, [20] he was still a PSU Assistant Coach and Professor, and clothed in the glory associated with those titles, particularly in the eyes of impressionable children. [21] By cloaking him with a title that enabled him to perpetrate his crimes, PSU must assume some responsibility for what he did both on and off campus. [22]

*5 As alleged in the underlying complaints filed by Sandusky's victims, PSU could be liable to those children for its negligent employment, investigation, and retention of Sandusky. Since the bodily injury suffered by all his victims arose out of such negligence by PSU, Section (b) of the AME bars insurance coverage for those claims. As a result, PSU has no coverage under the 1992-1999 Policies that contain the AME with respect to the injuries Sandusky inflicted on children during that time period.

III. The 1998 and 2001 Potential Notice Incidents and Applicable Policy Provisions.

In May, 1998, the mother of an 11 year old boy filed a PSU police report against Sandusky alleging he assaulted her son in a PSU shower on May 3rd. The campus police opened an investigation, contacted the County Children and Youth Services and the District Attorney's Office. [23] According to the Freeh Report, PSU's Senior Vice President-Finance and Business, Gary C. Schultz, [24] "was immediately informed of the investigation" and. he in turn notified Graham B. Spanier, PSU's President. [25] Sandusky admitted to merely hugging his victim in the shower and the investigation was closed. The Special Investigative Counsel found no evidence that PSU's Office of Risk Management was alerted nor that it conducted any review. [26] In addition,

[n]othing in the record indicates that Spanier, Schultz, Paterno or Curley spoke directly to Sandusky about the allegation, monitored his activities, contacted the Office of Human Resources for guidance, or took, or documented, any personnel actions concerning this incident in any official University file. [27]

In 1999, Sandusky formally retired [28] but was granted emeritus rank, [29] which allowed him to continue using PSU locker rooms and other facilities. [30] Sandusky assaulted at least two more victims in 1999 and 2000; one in the PSU team hotel at the Alamo Bowl and one in the PSU showers. [31] In the Fall of 2000, two different PSU janitors saw Sandusky engage in inappropriate conduct with children in PSU's showers, but failed to report it. [32]

On February 9, 2001, Michael McQueary, a graduate assistant, witnessed Sandusky molesting a child in the shower room at PSU and he claims to have reported it to Paterno. [33] Paterno then apparently reported the assault to Curley and VP Schuitz, who met with President Spanier regarding it. [34] They debated informing the Department of Public Welfare, but ultimately decided just to tell Sandusky not to bring children to PSU's

athletic facilities and to inform the executive director of the Second Mile of the incident. [35] In response to this plan,

Spanier noted in an email that the "only downside for us is if the message isn't 'heard' and acted upon, and we then become vulnerable for not having reported it, But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed." [36]

***6** In August 2001, Sandusky assaulted another victim in PSU's shower and he molested yet another child in December, 2001. [37]

In both 1998 and 2001, Schultz and Spanier apparently took no steps to prevent Sandusky from committing additional bad acts in the future, nor did they report what they knew to PSU's Risk Manager, nor to PMA. The question is whether their knowledge of Sandusky's crimes and criminal proclivities could bar PSU from recovering under the PMA CGL polices from that point forward.

Under the general coverage provisions of the 1998-1999 and 2001-2002 policies, and as in prior years, PMA agreed to provide coverage to PSU for sums that PSU becomes legally obligated to pay as damages because of bodily injury caused by an accident, including continuous or repeated exposure to substantially the same general harmful conditions. [38]

The "insured" under the relevant policies includes PSU, its officers and directors, but only when performing their duties for PSU:

> If you are designated in the Declaration as ... an organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" [39] and directors are insureds but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
>
> ***
>
> Each of the following is also an insured: Your "employees", other than your "executive officers" ... but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. [40]

The 1998-99 policy also contained the AME, which is discussed above. The AME bars coverage under the 1998-1999 policy for Sandusky's abusive acts as a high profile employee of PSU. The 2001-2002 policy does not contain the AME.

The 1998-1999 policy, the 2001-2002 policy, and the policies for subsequent years contained an "Expected or Intended" exclusion ("EIE"); "This insurance does not apply to ... 'bodily injury... expected or intended from the standpoint of the insured." [41] As Vice President and President of PSU, respectively, Spanier and Schultz are "officers" of PSU. [42] They allegedly learned of the report against Sandusky in the course of "their duties as officers for [PSU]." Therefore, they qualify as part of the insured. PSU, under the policy. The court must then examine Schultz and Spanier's expectations and intentions to see if the EIE may apply.

*7 The question is whether they expected or intended Sandusky to commit bad acts in the future, once they learned that he had committed them in the past. In 1998 and 2001, it was common knowledge, unfortunately, that sexual predators are repeat offenders. The American public, of which Spanier and Schultz are members, had been exposed by the media to countless stories of priests, teachers, and others who repeatedly sexually abused many children over many years. It is highly unlikely that anyone at the turn of this current century could reasonably claim ignorance of the existence and practices of sexual predators like Sandusklty.

Once Schultz and Spanier became aware of Sandusky's inappropriate acts with children in the PSU showers, they should have contacted the authorities, obtained help for the children he abused, and otherwise acted to prevent him from having future contact with children. [43] Instead, they apparently chose to sweep the problem under the rug. To the extent they failed to take proper action, they were acting as PSU's executive officers. Therefore, their knowledge of Sandusky's molestations and of predatory practices generally, and their failure to act, are necessarily imputed to PSU.

If the insured, PSU, knew about Sandusky's abusive acts in 1998 and 2001, and it knew that sexual predators are often repeat offenders, then PSU could well have expected [44] or intended [45] him to continue to molest children in the future, which he did. [46] It is an issue for trial whether PSU and its executive officers expected or intended future bodily injury to children once they became aware of Sandusky's molestations, and thereby whether coverage under each subsequent policy containing the EIE is barred.

The 1998-1999 and 2001-2002 policies also imposed certain reporting duties on PSU and its officers such as Schultz and Spanier:

Duties in the Event of Occurrence, Offense[,] Claim or Suit.
a. You must see to it that we are notified as soon as practicable after knowledge of the same is had ... by an executive officer, if [insured is] a corporation, of an 'occurrence' which may result in a claim ...

b. It is further agreed that knowledge of an occurrence by the agent, servant or employees of the insured shall not in itself constitute knowledge of the insured unless the risk manager shall not in itself constitute knowledge of the insured unless the risk manager [sic] shall have received such notice from its agents, servants and employees. [47]

*8 As executive officers, and not mere agents, servants or employees of PSU, Spanier's and Schultz's knowledge is imputed to PSU, and PSU had a duty to notify PMA of the allegations of assault against Sandusky or risk a breach of the 1998-1999 and 2001-2002 policies.

Furthermore, the policies contained the following language regarding failure to report material facts and hazards:

> This policy may also be cancelled from inception upon discovery that the policy was obtained through fraudulent statements, omissions or concealment of facts material to the acceptance of the risk or to the hazard assumed by us. [48]

Your failure to disclose all hazards or prior "occurrences" existing as of the inception date of the policy shall not in itself prejudice the coverage otherwise afforded by this policy provided such failure to disclose all hazards or prior "occurrences" is not intentional. [49]

Failure of PSU and its officers to report to PMA that PSU had a sexual predator on staff when PSU applied for each subsequent year's policy could constitute an intentional omission by PSU of a material fact in its insurance application which renders such subsequent policies voidable at the option of PMA, at least with respect to the bodily harm caused by said sexual predator.

IV. The Trigger of Coverage Issue

Many of Sandusky's young victims were molested by him many times over the course of several years, so their claims thereby implicate multiple policies. One could argue that each act of abuse was a separate "occurrence" causing additional harm to the victim, so that PSU would be entitled to coverage under multiple policies based on its liability for repeated acts of abuse to each child. [50] However, the policies all define an insurable "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Continuous or repeated exposure to harmful conditions is most often considered in the context of environmental contamination or other similar property damage, where pollutants seep into and through the ground over multiple policy years. However, it has also been examined by our Superior Court in a coverage action involving the insured's potential liability for child sexual abuse. [51] In that case, the court found there was no coverage for the grandfather's repeated intentional acts of molestation, which are akin to Sandusky's acts, but there was some coverage for the grandmother's negligence in failing to prevent the abuse, which is akin to the allegations made against PSU in the underlying actions. The court held:

*9 The allegations of negligence of Elizabeth Allen were all directed to a failure of Mrs. Allen to prevent the abuse at the hands of her husband, Such failure persisted throughout the period of time the abuse occurred. Thus, at least as it relates to Mrs. Allen, the injury to the plaintiffs resulted from "continuous or repeated exposure to substantially the same general condition," *i.e.*, Mrs. Allen's negligent failure to prevent the sexual abuse, and, as such, was a single occurrence within the meaning of the policy. [52]

Such negligence resulting in continuous exposure to a recurring harm is a single occurrence. That single occurrence triggers coverage during the first policy year in which it manifests and only during that first policy year.

> [S]ince 1986, in Pennsylvania the first manifestation rule has served as the test for determining coverage under commercial general liability policies, with the lone exception of asbestos bodily injury claims. When [PMA and PSU] drafted the [applicable CGL] policies, it is reasonable to believe that they intended to invoke the prevailing first manifestation rule with the requirement that [bodily injury] occur during the policy period. It is unlikely that the parties would have intended or expected a single occurrence, albeit with [bodily injury] continuing past the end of the respective policy period, to trigger coverage under multiple consecutive policies. At the very least, they should have anticipated its application to the [relevant CGL] policies, and drafted around the first manifestation rule if they preferred a different trigger of coverage. Accordingly, the better position is to construe the [relevant CGL] policies as providing for coverage only under the policy or policies in effect at the time an occurrence first arises. As we explained *supra*, an occurrence first arises when bodily injury or property damage first manifests in a way that becomes reasonably apparent. [53]

Unlike environmental pollution or asbestos damage, which can remain hidden for many years before it manifests, the physical violation (bodily injury) arising from child sexual abuse is experienced immediately by the victim, although the harm often continues to be felt long thereafter.[54] To the extent that PSU's negligence enabled Sandusky to abuse his victims, such bodily injury manifested when the first abuse of each victim occurred. With respect to each victim, the policy in place at the time the first act of abuse occurred is the only one that potentially[55] provides coverage.

***10** The parties also dispute whether the claims of multiple victims that occur during the same policy year should be lumped together as one claim under the "single perpetrator" theory. Under this theory, if Sandusky began abusing 3 of his victims in the same year, their claims would be a single occurrence subject to one per occurrence policy limit of $2 million rather than three separate limits of $2 million each.[56]

The 2005-2006 policy and subsequent policies contain an express statement of the single perpetrator theory:[57]

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Further, any covered incidents related to or arising out of Sexual Molestation, sexual or physical assault, or abuse, irrespective of the number of covered incidents or injuries or the time period or area over which such covered incidents or injuries occur, shall be treated as one "Occurrence" for each perpetrator.[58]

This Single Perpetrator Exclusion ("SPE") requires that harm to all victims who were first abused by Sandusky during the 2005-2006 coverage year be treated as a single occurrence under the 2005-2006 policy. The same holds true for all subsequent policies containing the SPE.

However, with respect to the earlier polices that do not contain the SPE, the court will not imply such a provision, and multiple victims of a single abuser will not be lumped together as a single occurrence, absent language expressly requiring such a holding. Each of Sandusky's victims' claims gives rise to a separate "occurrence" under those earlier policies, as previously noted.

CONCLUSION

For all the foregoing reasons, PMA and PSU's summary judgment motions are granted in part and denied in part.

Dated: May 4, 2016

<<signature>>

Glazer, J.

Footnotes

1 Sandusky continued to be associated with PSU after his retirement From 1999 until his arrest and termination in 2011, he served as Assistant Professor and Coach Emeritus. *See* Freeh Sporkin & Sulhvan, LLP, Report of Special Investigative Counsel, pp. 59-60 (the "Freeh Report"). The Freeh Report was commissioned by PSU,

and accepted by PSU at least for purposes of the PSU-NCAA Consent Decree. However, PSU now appears to dispute its factual findings, so such facte may have to be determined at a trial in this action.

2 These events are described in a number of the victims' depositions.

3 1987-1988 policy, Section I, p.J-07.

4 1987-1988 policy, Amendatory Endorsement, p.J-17. Original definition was "'bodily injury' means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." *Id.*, Definitions Section, p.J-02.

5 "An 'accident' within accident insurance policies is an event happening without any human agency, or, if happening through such agency, an event which, under [the] circumstances, is unusual and not expected by the person to whom it happens." Black's Law Dictionary, p. 14(5th ed 1979); Black's Law Dictionary, p. 15 (6th ed 1990).

6 1987-1988 policy, Definitions Section, p. J-02.

7 In this context, *i.e.*, when mentioned in tandem with "officers" and "stockholders," the term "director" necessarily means a member of the board of the insured organization. *See Daniel Adams Associates, Inc. v. Rimbach Pub., Inc.*, 519 A.2d 997, 1000 (Pa. Super. 1987) ("A corporation is a creature of legal fiction which can 'act' only through its officers, directors and other agents.") PSU does not have a board of directors, but rather has a Board of Trustees, so the word "trustee" must be substituted for "director" in this instance.

8 1987-1988 policy, Section II, Persons Insured, p. J-07.

9 *Id.*, Broad Form CGL Endorsement, p. J-12.

10 *See* 1987-1988 policy, Definitions, J-02 ("'insured' means any person or organization qualifying as an insured in the 'Persons Insured' provision of the applicable insurance coverage. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the company's liability.")

11 *Gen. Acc. Ins. Co. of Am. v. Allen*, 708 A.2d 828 (Pa. Super. 1998)("[T]he cases here, and elsewhere, dealing with the usage of the term 'the insured' have held that for coverage to be excluded under the 'intentional act' or 'intended or expected' exclusion, the damage or injury had to be intended by the insured in question, not another insured under the policy." Court distinguishes policies that use "an insured" or "any insured" instead of "the insured.")

12 1987-1988 policy, Condition 4(a) Amendment, p. J-29.

13 Freeh Report, p. 41. *See also* discussion of 1998 incident below.

14 It is an interesting, although apparently irrelevant, coincidence that the AME ceased to be employed in the PMA policies the same year that Sandusky retired from PSU.

15 1992-1993 policy, Abuse or Molestation Exclusion, p. I.-60; 1993-1994 policy, Abuse or Molestation Exclusion, p. 1-67; 1998-1999 policy, Abuse or Molestation Exclusion, CG 21 46 10 93.

16 1992-1993 policy, Endorsement 10, p. I.-16; 1993-1994 policy, Endorsement 10, p. 1-17;

17 1998-1999 policy, Section II - Who Is An Insured, CG 00 01 01 96, p. 7.

18 When he abused children in PSU's locker room and at PSU events, those children were arguably also in the care, custody and control of the insured PSU.

19 *See Girard Trust Bank v. Life Ins. Co. of N.A.*, 364 A.2d 495, 498 (Pa. Super. 1976) ("It is true that contract terms will not be construed in such a manner so as to render them meaningless.")

20 Second Mile was a charity founded by Sandusky in 1977 to help troubled youth. PSU "work[ed] collaboratively" with Second Mile even after Sandusky retired from PSU. Freeh Report, pp. 107-108.

21 Many people, including priests, teachers, judges, and other government officials, hold positions of trust in the community and their job is indivisible from their identity in the eyes of others. Any illegal or improper act they perform outside their usual place of employment, *i.e.*, off the bench, away from the church, school, or government building, is enabled by, and thereby besmirches, the office and position of trust they hold.

22 As pointed out in the Special Investigative Counsel's Report, PSU "empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program. Indeed, that continued access provided Sandusky with the very currency that enabled him to attract his victims." Freeh Report, p. 15.

23 Freeh Report, pp. 42-43.

24 As Senior VP for Finance and Business, Schultz oversaw the University Police and Public Safety, the Office of Internal Audit, and the Office of Human Resources, among others. *Id.*, p. 33.

25 *Id.*, pp. 20, 47. Schultz apparently also talked to Athletic Director Timothy Curley about the incident, and Curley "touched base" with Paterno about it. *Id.*, p.48.

26 *Id.*, p. 51

27 *Id.*

28 He was apparently rehired on an emergency basis for the 1999 football season. *Id.*, p. 55.

29 The Special Investigative Counsel found that "[w]hile the decision to grant Sandusky emeritus rank was unusual [because the positions he had held were not normally eligible for emeritus rank], [there was] no evidence to show that the emeritus rank was related to the [1998 Incident]." *Id.*, p. 61.

30 *Id.*, p. 55.

31 *Id.*, pp. 22, 54.

32 *Id.*, p. 62.

33 *Id.*, pp. 62, 66-67.

34 *Id.*, pp. 23, 62.

35 *Id.*, pp. 73-76.

36 *Id.*, p. 75.

37 Freeh Report, p.79.

38 1998-1999 policy, Section I (A), p. 1, and Section V – Definitions, p. 10; 2001-2002 policy, Section I (A), p. 1, and Section V-Definitions, pp. 10, 12.

39 "'Executive officer' means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document." 1998-1999 policy, Section V – Definitions, p. 11; 2001-2002 policy, Section V-Definitions, p. 11.

40 1998-1999 policy, Section II – Who Is An Insured, p. 7; 2001-2002 policy, Section II - Who Is An Insured, p. 7.

41 1998-1999 policy, Section I, Coverage A (2) - Exclusions, p. 1; 2001-2002 policy, Section I, Coverage A (2) - Exclusions p. 1.

42 Curley was Director of Athletics, not a Vice President, although he did report directly to the President Freeh Report, p. 35.

43 The Freeh Report outlines these failures to act in detail.

44 "Expect" is defined as "1. a. To look forward to the probable occurrence or appearance of;... b. To consider likely or certain." American Heritage Dictionary, p. 644 (3d ed. 1992).

45 "Intend" is defined as "1. To have in mind a fixed purpose to reach a desired objective; to have as one's purpose... 2. To contemplate that the usual consequences of one's act will probably or necessarily follow from the act, whether or not those consequences are desired for their own sake." Black's Law Dictionary, p. 813 (7th Ed. 1999). Under this second definition of "intend," PSU could be said to have intended that children would be abused due to its failure to act.

46 Even courts that have read the EIE Testrictively could find PSU's failure to act on its knowledge to have expected or intended consequences. *See United Services Auto. Ass'n v. Elitzky*, 517 A.2d 982, 989 (Pa. Super. 1986) ("We hold that such a clause excludes only injury and damage of the same general type which the insured intended to cause. An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result.")

47 1998-1999 policy, Amendment of Duties in Event of Occurrence Endorsement AP 27 GL 11; 2001-2002 policy, Amendment of Duties in Event of Occurrence Endorsement AP 27 GL 11. The duplication of the clause "shall not in itself constitute knowledge of the insured unless the risk manager" is contained in the policy, but that error does not change the meaning of the policy provision.

48 1998-1999 policy, Pennsylvania Changes - Cancellation and Nonrenewal IL 02 46 09 96, p. 1; 2001-2002 policy, Pennsylvania Changes - Cancellation and Nonrenewal IL 02 46 09 00, p. 1

49 2001-2002 policy, PMA Special Broadening Endorsement PGL 0010 09 96, p. 2. The copy of the 1998-1999 policy provided to the court does not include page 2 of the PMA Special Broadening Endorsement. The court will assume it is substantially the same as the 2001-2002 version.

50 For instance, if there were 10 victims, and each of them was molested once a year from 1980-1985, there would be 50 insurable occurrences under this argument.

51 *Gen. Acc. Ins. Co. of Am. v. Allen*, 708 A.2d 828 (Pa. Super. 1998).

52 *Id.*,708 A2d at 833.

53 *Pennsylvania Nat Mut. Cas. Ins. Co. v. St. John*, 106 A.3d I, 18 (Pa. 2014) ("the trial court found that property damage to Appellants' dairy herd became reasonably apparent in April 2004, which, in retrospect, we know was caused by LPH Plumbing's negligent installation of the plumbing system and the subsequent seepage of gray water into the dairy herd's freshwater drinking system. Coverage is therefore triggered under the Perm National policy in effect from July 1, 2003 to July 1, 2004, only.")

54 This reasoning applies with respect to insurance coverage only. The court recognizes that children who suffer abuse may repress their memories, which repression is a manifestation of the immediate harm they suffer, and that they thereby may be entitled to longer statutes of limitations for their criminal and civil claims against their abusers. Such issues are not before this court.

55 "Potentially" because, as discussed previously, there may be other terms or exclusion in that policy which bar coverage for such occurrences.

56 The total recoverable for all occurrences in any given year is $3 million, so this hypothetical would not, in reality, result in a total recovery of $6 million.

57 In the 2005-2006 policy, sexual molestation was included in the definition of "personal injury" rather than "bodily injury", and coverage was precluded "when known to an Officer who did not engage in said activity but failed to report it to proper authorities when under a legal duty to do so." 2005-2006 policy, Personal Injury Redefined AP 27 GL 13.

58 *Id.*, Occurrence Definition Modified AP27 GL 12.

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Exhibit 2

INTRODUCTION

We, the members of the Thirty-Third Statewide Investigating Grand Jury, having received and reviewed evidence regarding violations of the Crimes Code occurring in Centre County, Pennsylvania, and elsewhere pursuant to Notice of Submission of Investigation No. 1, do hereby make the following findings of fact and recommendation of charges.

FINDINGS OF FACT

The Grand Jury conducted an investigation into reported sexual assaults of minor male children by Gerald A. Sandusky ("Sandusky") over a period of years, both while Sandusky was a football coach for the Pennsylvania State University ("Penn State") football team and after he retired from coaching. Widely known as Jerry Sandusky, the subject of this investigation founded The Second Mile, a charity initially devoted to helping troubled young boys. It was within The Second Mile program that Sandusky found his victims.

Sandusky was employed by Penn State for 23 years as the defensive coordinator of its Division I collegiate football program. Sandusky played football for four years at Penn State and coached a total of 32 years. While coaching, Sandusky started "The Second Mile" in State College, Pennsylvania, in 1977. It began as a group foster home dedicated to helping troubled boys. It grew into a charity dedicated to helping children with absent or dysfunctional families. It is now a statewide, three region charity and Sandusky has been its primary fundraiser.[1] The Second Mile raises millions of dollars through fundraising appeals and special events. The mission of the program is to "help children who need additional support and would benefit from positive human interaction." Through The Second Mile, Sandusky had access to hundreds of boys, many of whom were vulnerable due to their social situations.

[1] Sandusky retired from The Second Mile in September 2010.

VICTIM 1

The Grand Jury conducted an investigation into the reported sexual assault of a minor child, Victim 1, by Sandusky, when Victim 1, a Second Mile participant, was a houseguest at Sandusky's residence in College Township, Centre County, Pennsylvania. During the course of the multi-year investigation, the Grand Jury heard evidence that Sandusky indecently fondled Victim 1 on a number of occasions, performed oral sex on Victim 1 on a number of occasions and had Victim 1 perform oral sex on him on at least one occasion.

Victim 1 testified that he was 11 or 12 years old when he met Sandusky through The Second Mile program in 2005 or 2006. As with the remaining victims, Victim 1 only came to Sandusky's attention during his second year in the program, when the boy attended The Second Mile's camp on the Penn State University Park campus. During the 2007 track season, Sandusky began spending time with Victim 1 weekly, having the boy stay overnight at his residence in State College, Pennsylvania. Sandusky took Victim 1 to professional and college sporting events, such as Philadelphia Eagles games, or pre-season practices at Penn State. When Victim 1 slept at the Sandusky residence, he would sleep in a finished bedroom in the basement. Occasionally, other boys would also stay overnight at Sandusky's home but usually it was only Victim 1. Sandusky also encouraged Victim 1 to participate in The Second Mile as a volunteer. Sandusky gave Victim 1 a number of gifts, including golf clubs, a computer, gym clothes, dress clothes and cash. Sandusky took the boy to restaurants, swimming at a hotel near Sandusky's home, and to church.

Victim 1 testified that Sandusky had a practice of coming into the basement room after he told Victim 1 that it was time to go to bed. Victim 1 testified that Sandusky would "crack his back." He described this as Sandusky getting onto the bed on which Victim 1 was already lying

and rolling under the boy. With Victim 1 lying on top of him, face to face, Sandusky would run his arms up and down the boy's back and "crack" it. The back-cracking became a ritual at bedtime. Victim 1 said that after Sandusky had cracked his back a number of times, he progressed to rubbing Victim 1's backside while they lay face-to-face on the bed. Victim 1 testified that this began to occur during the summer of 2005 or 2006, before he entered sixth or seventh grade. Sandusky then began to blow on Victim 1's bare stomach. Eventually, Sandusky began to kiss Victim 1 on the mouth. Victim 1 was uncomfortable with the contact and would sometimes try to hide in the basement to avoid Sandusky. Victim 1 testified that ultimately Sandusky performed oral sex on him more than 20 times through 2007 and early 2008. Sandusky also had Victim 1 perform oral sex on him one time and also touched Victim 1's penis with his hands during the 2007-2008 time period. Victim 1 did not want to engage in sexual conduct with Sandusky and knew it was wrong. Victim 1 stopped taking Sandusky's phone calls and had his mother tell Sandusky he was not home when Sandusky called. This termination of contact with Sandusky occurred in the spring of 2008, when Victim 1 was a freshman in high school.

Before Victim 1 ceased contact with Sandusky, Sandusky routinely had contact with him at a Clinton County high school where the administration would call Victim 1 out of activity period/study hall in the late afternoon to meet with Sandusky in a conference room. No one monitored these visits. Sandusky assisted the school with coaching varsity football and had unfettered access to the school.

Victim 1 testified about an incident that occurred one evening at the high school when he and Sandusky were alone in the weight room where there was a rock climbing wall. After Victim 1 fell off the wall a few times, Sandusky lay down on top of him, face to face, and was

rolling around the floor with the boy. No one was able to see Victim 1 and Sandusky because of the configuration of the room. Sandusky was lying under Victim 1 with his eyes closed. Suddenly a wrestling coach, Joe Miller, unexpectedly entered the room and Sandusky jumped up very quickly and explained that they had just been wrestling.

Joseph Miller testified that he was head wrestling coach for the elementary wrestling program for that school district. He knew Victim 1, who had wrestled for him. Miller corroborated that one evening in 2006 or 2007, he returned to the high school to retrieve something he had forgotten. He saw a light on in the weight room which should have been turned off and when he went in, he discovered Victim 1 and Sandusky, lying on their sides, in physical contact, face to face on a mat. He said both Victim 1 and Sandusky were surprised to see him enter the room. He recalls that Sandusky jumped up and said, "Hey Coach, we're just working on wrestling moves." Sandusky was not a wrestling coach. Miller found the use of that secluded room odd for wrestling because the bigger wrestling room right outside the weight room had more room to wrestle and more mats. He had seen Victim 1 with Sandusky frequently before the weight room incident. He saw them together after school and before athletic practice time.

Steven Turchetta testified that he was an assistant principal and the head football coach at the high school attended by Victim 1. He testified that Sandusky was a volunteer assistant football coach. Sandusky also worked with children in the Second Mile program in that school district. Turchetta described the Second Mile as a very large charitable organization that helped children who are from economically underprivileged backgrounds and who may be living in single parent households. Turchetta first met Sandusky in 2002 when Sandusky attempted to assist some Second Mile members who were on Turchetta's football team. Sandusky's

involvement grew from there. In the 2008 season, Sandusky was a full-time volunteer coach. Turchetta said it was not unusual for him, as assistant principal, to call a Second Mile student out of activity period at the end of the day, at Sandusky's request, to see Sandusky. He knew of several students who were left alone with Sandusky, including Victim 1. Turchetta characterized Sandusky as very controlling within the mentoring relationships he established with Second Mile students. Sandusky would often want a greater time commitment than the teenagers were willing to give and Sandusky would have "shouting matches" with various youths, in which Turchetta would sometimes be the mediator. Turchetta would also end up being Sandusky's point of contact for a youth whom he had been unable to reach by phone the previous evening. Turchetta testified that Sandusky would be "clingy" and even "needy" when a young man broke off the relationship he had established with him and called the behavior "suspicious." Turchetta became aware of Victim 1's allegations regarding sexual assault by Sandusky when the boy's mother called the school to report it. Sandusky was barred from the school district attended by Victim 1 from that day forward and the matter was reported to authorities as mandated by law.

Office of Attorney General Narcotics Agent Anthony Sassano testified concerning phone records that establish 61 phone calls from Sandusky's home phone to Victim 1's home phone between January 2008 and July 2009. In that same time, there were 57 calls from Sandusky's cell phone to Victim 1's home phone. There were four calls made from Victim 1's home phone to Sandusky's cell phone and one call from Victim 1's mother's cell phone to Sandusky's cell phone. There were no calls made to Sandusky's home phone by Victim 1 during that time period.

Another youth, F.A., age fifteen, testified that Sandusky had taken him and Victim 1 to a Philadelphia Eagles football game and that Sandusky had driven. He witnessed Sandusky place

his right hand on Victim 1's knee; Sandusky had also done this to F.A. on more than one occasion when they were in Sandusky's car. F.A. was uncomfortable when Sandusky did this and moved his leg to try to avoid the contact. Sandusky would keep his hand on F.A.'s knee even after F.A. tried to move it. F.A. also testified that Sandusky would reach over, while driving, and lift his shirt and tickle his bare stomach. F.A. did not like this contact. F.A. also witnessed Sandusky tickling Victim 1 in similar fashion. Sandusky invited F.A. to stay over at his house but F.A. only stayed one time when he knew Victim 1 was also staying over, after returning from the Philadelphia Eagles game. F.A. confirmed that Victim 1 slept in Sandusky's basement room when F.A. stayed there. F.A. testified that he stayed away from Sandusky because he felt he didn't want to be alone with him for a long period of time, based on the tickling, knee touching and other physical contact. Victim 1 confirmed that Sandusky would drive with his hand on Victim 1's leg.

VICTIM 2

On March 1, 2002, a Penn State graduate assistant ("graduate assistant") who was then 28 years old, entered the locker room at the Lasch Football Building on the University Park Campus on a Friday night before the beginning of Spring Break. The graduate assistant, who was familiar with Sandusky, was going to put some newly purchased sneakers in his locker and get some recruiting tapes to watch. It was about 9:30 p.m. As the graduate assistant entered the locker room doors, he was surprised to find the lights and showers on. He then heard rhythmic, slapping sounds. He believed the sounds to be those of sexual activity. As the graduate assistant put the sneakers in his locker, he looked into the shower. He saw a naked boy, Victim 2, whose age he estimated to be ten years old, with his hands up against the wall, being subjected to anal

intercourse by a naked Sandusky. The graduate assistant was shocked but noticed that both Victim 2 and Sandusky saw him. The graduate assistant left immediately, distraught.

The graduate assistant went to his office and called his father, reporting to him what he had seen. His father told the graduate assistant to leave the building and come to his home. The graduate assistant and his father decided that the graduate assistant had to promptly report what he had seen to Coach Joe Paterno ("Paterno"), head football coach of Penn State. The next morning, a Saturday, the graduate assistant telephoned Paterno and went to Paterno's home, where he reported what he had seen.

Joseph V. Paterno testified to receiving the graduate assistant's report at his home on a Saturday morning. Paterno testified that the graduate assistant was very upset. Paterno called Tim Curley ("Curley"), Penn State Athletic Director and Paterno's immediate superior, to his home the very next day, a Sunday, and reported to him that the graduate assistant had seen Jerry Sandusky in the Lasch Building showers fondling or doing something of a sexual nature to a young boy.

Approximately one and a half weeks later, the graduate assistant was called to a meeting with Penn State Athletic Director Curley and Senior Vice President for Finance and Business Gary Schultz ("Schultz"). The graduate assistant reported to Curley and Schultz that he had witnessed what he believed to be Sandusky having anal sex with a boy in the Lasch Building showers. Curley and Schultz assured the graduate assistant that they would look into it and determine what further action they would take. Paterno was not present for this meeting.

The graduate assistant heard back from Curley a couple of weeks later. He was told that Sandusky's keys to the locker room were taken away and that the incident had been reported to The Second Mile. The graduate assistant was never questioned by University Police and no other

entity conducted an investigation until he testified in Grand Jury in December, 2010. The Grand Jury finds the graduate assistant's testimony to be extremely credible.

Curley testified that the graduate assistant reported to them that "inappropriate conduct" or activity that made him "uncomfortable" occurred in the Lasch Building shower in March 2002. Curley specifically denied that the graduate assistant reported anal sex or anything of a sexual nature whatsoever and termed the conduct as merely "horsing around". When asked whether the graduate assistant had reported "sexual conduct" "of any kind" by Sandusky, Curley answered, "No" twice. When asked if the graduate assistant had reported "anal sex between Jerry Sandusky and this child," Curley testified, "Absolutely not."

Curley testified that he informed Dr. Jack Raykovitz, Executive Director of the Second Mile of the conduct reported to him and met with Sandusky to advise Sandusky that he was prohibited from bringing youth onto the Penn State campus from that point forward. Curley testified that he met again with the graduate assistant and advised him that Sandusky had been directed not to use Penn State's athletic facilities with young people and "the information" had been given to director of The Second Mile. Curley testified that he also advised Penn State University President Graham Spanier of the information he had received from the graduate assistant and the steps he had taken as a result. Curley was not specific about the language he used in reporting the 2002 incident to Spanier. Spanier testified to his approval of the approach taken by Curley. Curley did not report the incident to the University Police, the police agency for the University Park campus or any other police agency.

Schultz testified that he was called to a meeting with Joe Paterno and Tim Curley, in which Paterno reported "disturbing" and "inappropriate" conduct in the shower by Sandusky upon a young boy, as reported to him by a student or graduate student. Schultz was present in a

subsequent meeting with Curley when the graduate assistant reported the incident in the shower involving Sandusky and a boy. Schultz was very unsure about what he remembered the graduate assistant telling him and Curley about the shower incident. He testified that he had the impression that Sandusky might have inappropriately grabbed the young boy's genitals while wrestling and agreed that such was inappropriate sexual conduct between a man and a boy. While equivocating on the definition of "sexual" in the context of Sandusky wrestling with and grabbing the genitals of the boy, Schultz conceded that the report the graduate assistant made was of inappropriate sexual conduct by Sandusky. However, Schultz testified that the allegations were "not that serious" and that he and Curley "had no indication that a crime had occurred." Schultz agreed that sodomy between Sandusky and a child would clearly be inappropriate sexual conduct. He denied having such conduct reported to him either by Paterno or the graduate assistant.

Schultz testified that he and Curley agreed that Sandusky was to be told not to bring any Second Mile children into the football building and he believed that he and Curley asked "the child protection agency" to look into the matter. Schultz testified that he knew about an investigation of Sandusky that occurred in 1998, that the "child protection agency" had done, and he testified that he believed this same agency was investigating the 2002 report by the graduate assistant. Schultz acknowledged that there were similarities between the 1998 and 2002 allegations, both of which involved minor boys in the football showers with Sandusky behaving in a sexually inappropriate manner. Schultz testified that the 1998 incident was reviewed by the University Police and "the child protection agency" with the blessing of then-University counsel Wendell Courtney. Courtney was then and remains counsel for The Second Mile. Schultz confirmed that University President Graham Spanier was apprised in 2002 that a report of an

incident involving Sandusky and a child in the showers on campus had been reported by an employee. Schultz testified that Spanier approved the decision to ban Sandusky from bringing children into the football locker room and the decision to advise The Second Mile of the 2002 incident.

Although Schultz oversaw the University Police as part of his position, he never reported the 2002 incident to the University Police or other police agency, never sought or reviewed a police report on the 1998 incident and never attempted to learn the identity of the child in the shower in 2002. No one from the University did so. Schultz did not ask the graduate assistant for specifics. No one ever did. Schultz expressed surprise upon learning that the 1998 investigation by University Police produced a lengthy police report. Schultz said there was never any discussion between himself and Curley about turning the 2002 incident over to any police agency. Schultz retired in June 2009 but currently holds the same position as a senior vice president with Penn State, on an interim basis.

Graham Spanier testified about his extensive responsibilities as President of Penn State and his educational background in sociology and marriage and family counseling. He confirmed Curley and Schultz's respective positions of authority with the University. He testified that Curley and Schultz came to him in 2002 to report an incident with Jerry Sandusky that made a member of Curley's staff "uncomfortable." Spanier described it as "Jerry Sandusky in the football building locker area in the shower [ ] with a younger child and that they were horsing around in the shower." Spanier testified that even in April, 2011, he did not know the identity of the staff member who had reported the behavior. Spanier denied that it was reported to him as an incident that was sexual in nature and acknowledged that Curley and Schultz had not indicated any plan to report the matter to any law enforcement authority, the Commonwealth of

Pennsylvania Department of Public Welfare or any appropriate county child protective services agency. Spanier also denied being aware of a 1998 University Police investigation of Sandusky for incidents with children in football building showers.

Department of Public Welfare and Children and Youth Services local and state records were subpoenaed by the Grand Jury; University Police records were also subpoenaed. The records reveal that the 2002 incident was never reported to any officials, in contravention of Pennsylvania law.

Sandusky holds emeritus status with Penn State. In addition to the regular privileges of a professor emeritus, he had an office and a telephone in the Lasch Building. The status allowed him access to all recreational facilities, a parking pass for a vehicle, access to a Penn State account for the internet, listing in the faculty directory, faculty discounts at the bookstore and educational privileges for himself and eligible dependents. These and other privileges were negotiated when Sandusky retired in 1999. Sandusky continued to use University facilities as per his retirement agreement. As a retired coach, Sandusky had unlimited access to the football facilities, including the locker rooms. Schultz testified that Sandusky retired when Paterno felt it was time to make a coaching change and also to take advantage of an enhanced retirement benefit under Sandusky's state pension.

Both the graduate assistant and Curley testified that Sandusky himself was not banned from any Penn State buildings and Curley admitted that the ban on bringing children to the campus was unenforceable.

The Grand Jury finds that portions of the testimony of Tim Curley and Gary Schultz are not credible.

The Grand Jury concludes that the sexual assault of a minor male in 2002 should have been reported to the Pennsylvania Department of Public Welfare and/or a law enforcement agency such as the University Police or the Pennsylvania State Police. The University, by its senior staff, Gary Schultz, Senior Vice President for Finance and Business and Tim Curley, Athletic Director, was notified by two different Penn State employees of the alleged sexual exploitation of that youth. Pennsylvania's mandatory reporting statute for suspected child abuse is located at 23 Pa.C.S. §6311 (Child Protective Services Law) and provides that when a staff member reports abuse, pursuant to statute, the person in charge of the school or institution has the responsibility and legal obligation to report or cause such a report to be made by telephone and in writing within 48 hours to the Department of Public Welfare of the Commonwealth of Pennsylvania. An oral report should have been made to Centre County Children and Youth Services but none was made. Nor was there any attempt to investigate, to identify Victim 2 or to protect that child or any others from similar conduct, except as related to preventing its re-occurrence on University property. The failure to report is a violation of the law which was graded a summary offense in 2002, pursuant to 23 Pa.C.S. §6319.[2]

The Grand Jury finds that Tim Curley made a materially false statement under oath in an official proceeding on January 12, 2011, when he testified before the 30th Statewide Investigating Grand Jury, relating to the 2002 incident, that he was not told by the graduate assistant that Sandusky was engaged in sexual conduct or anal sex with a boy in the Lasch Building showers.

Furthermore, the Grand jury finds that Gary Schultz made a materially false statement under oath in an official proceeding on January 12, 2011, when he testified before the 30rd Statewide Investigating Grand Jury, relating to the 2002 incident that the allegations made by the

[2] The grading of the failure to report offense was upgraded from a summary offense to a misdemeanor of the third degree in 2006, effective May 29, 2007.

graduate assistant were "not that serious" and that he and Curley "had no indication that a crime had occurred."

VICTIM 3

Victim 3, now age 24, met Sandusky through The Second Mile in the summer of 2000, when he was between seventh and eighth grade. The boy met Sandusky during his second year in the program. Sandusky began to invite Victim 3 to go places with him. Victim 3 was invited to Sandusky's home for dinner, to hang out, walk the family dogs and to go to Penn State football games and to Holuba Hall and the gym. When Victim 3 went to the gym with Sandusky, they would exercise and then shower. He recalls feeling uncomfortable and choosing a shower at a distance from Sandusky. Sandusky then made him feel bad about showering at a distance from him, so Victim 3 moved closer. Sandusky initiated physical contact in the shower with Victim 3 by patting him, rubbing his shoulders, washing his hair and giving him bear hugs. These hugs would be both face to face and with Sandusky's chest to Victim 3's back. Victim 3 said that on at least one occasion, Sandusky had an erection when he bear hugged Victim 3 from behind. He also recalled that when he slept over at Sandusky's residence, he slept in the basement bedroom. He testified that Sandusky would come into the bedroom where he was lying down. He sometimes said he was going to give Victim 3 a shoulder rub; sometimes he would blow on Victim 3's stomach; other times he tickled Victim 3. Sandusky would rub the inside of Victim 3's thigh when he tickled him. On two occasions Victim 3 recalls that Sandusky touched Victim 3's genitals through the athletic shorts Victim 3 wore to bed. Victim 3 would roll over on his stomach to prevent Sandusky from touching his genitals.

Victim 3 knew Victim 4 to spend a great deal of time with Sandusky.

VICTIM 4

The investigation revealed the existence of Victim 4, a boy who was repeatedly subjected to Involuntary Deviate Sexual Intercourse and Indecent Assault at the hands of Sandusky. The assaults took place on the Penn State University Park campus, in the football buildings, at Toftrees Golf Resort and Conference Center ("Toftrees") in Centre County, where the football team and staff stayed prior to home football games and at bowl games to which he traveled with Sandusky. Victim 4, now age 27, was a Second Mile participant who was singled out by Sandusky at the age of 12 or 13, while he was in his second year with The Second Mile program in 1996 or 1997. He was invited to a Sandusky family picnic at which there were several other non-family members and Sandusky's adopted children. Victim 4 described that on that first outing, Sandusky had physical contact with him while swimming, which Victim 4 described as testing "how [Victim 4] would respond to even the smallest physical contact." Sandusky engaged Victim 4 in workouts or sports and then showered with him at the old East locker rooms across from Holuba Hall, the football practice building. Sandusky initiated physical contact with Victim 4 by starting a "soap battle"--throwing a handful of soap at the boy and from there, the fight turned into wrestling in the shower. Victim 4 remembers indecent contact occurring many times, both in the shower and in hotel rooms at Toftrees.

Victim 4 became a fixture in the Sandusky household, sleeping overnight and accompanying Sandusky to charity functions and Penn State football games. Victim 4 was listed, along with Sandusky's wife, as a member of Sandusky's family party for the 1998 Outback Bowl and the 1999 Alamo Bowl. He traveled to and from both bowl games with the football team and other Penn State staff, coaches and their families, sharing the same accommodations. Victim 4 would frequently stay overnight at Toftrees with Sandusky and the football team prior to home

games; Sandusky's wife was never present at Toftrees when Victim 4 stayed with Sandusky. This was where the first indecent assaults of Victim 4 occurred. Victim 4 would attend the pre-game banquet and sit with Sandusky at the coaches' table. Victim 4 also accompanied Sandusky to various charity golf outings and would share a hotel room with him on those occasions.

Victim 4 stated that Sandusky would wrestle with him and maneuver him into a position in which Sandusky's head was at Victim 4's genitals and Victim 4's head was at Sandusky's genitals. Sandusky would kiss Victim 4's inner thighs and genitals. Victim 4 described Sandusky rubbing his genitals on Victim 4's face and inserting his erect penis in Victim 4's mouth. There were occasions when this would result in Sandusky ejaculating. He testified that Sandusky also attempted to penetrate Victim 4's anus with both a finger and his penis. There was slight penetration and Victim 4 resisted these attempts. Sandusky never asked to do these things but would simply see what Victim 4 would permit him to do. Sandusky did threaten to send him home from the Alamo Bowl in Texas when Victim 4 resisted his advances. Usually the persuasion Sandusky employed was accompanied by gifts and opportunities to attend sporting and charity events. He gave Victim 4 dozens of gifts, some purchased and some obtained from various sporting goods vendors such as Nike and Airwalk. Victim 4 received clothes, a snowboard, Nike shoes, golf clubs, ice hockey equipment and lessons, passes for various sporting events, football jerseys, and registration for soccer camp. Sandusky even guaranteed Victim 4 he could be a walk-on player at Penn State. Victim 4 was in a video made about linebackers that featured Sandusky, and he appeared with him in a photo accompanying an article about Sandusky in Sports Illustrated.

The Penn State football program relocated to the Lasch Football Building in 1999 and that facility had a sauna. Victim 4 reported that after the move, most of the sexual conduct that did not occur in a hotel room occurred in the sauna, as the area is more secluded.

Victim 4 remembers Sandusky being emotionally upset after having a meeting with Joe Paterno in which Paterno told Sandusky he would not be the next head coach at Penn State and which preceded Sandusky's retirement. Sandusky told Victim 4 not to tell anyone about the meeting. That meeting occurred in May, 1999.

Eventually, Victim 4 began to intentionally distance himself from Sandusky, not taking his phone calls and at times even hiding in closets when Sandusky showed up at Victim 4's home. Victim 4 had a girlfriend, of whom Sandusky did not approve. Sandusky tried to use guilt and bribery to regain time with Victim 4. Victim 4 had begun to smoke cigarettes and had Sandusky buy them for him. Victim 4 also said that Sandusky once gave him $50 to buy marijuana at a location known to Victim 4. Sandusky drove there at Victim 4's direction and Victim 4 smoked the marijuana in Sandusky's car on the ride home. This was when Victim 4 was trying to distance himself from Sandusky because he wanted no more sexual contact with him.

VICTIM 5

Victim 5, now age 22, met Sandusky through The Second Mile in 1995 or 1996, when he was a 7 or 8 year old boy, in second or third grade. Sometime after their initial meeting at a Second Mile camp at Penn State, Sandusky called to invite the boy to a Penn State football game. Victim 5 was thrilled to attend. Sandusky picked him up at home and then Sandusky drove to pick up Victim 6. There were a couple of other kids in the car. The boys were left at Holuba Hall by Sandusky. They attended the Sandusky family tailgate and the football game. This

became a pattern for Victim 5, who attended perhaps as many as 15 football games as Sandusky's guest. Victim 5 also traveled with Sandusky to watch other college football games. Victim 5 remembers that Sandusky would often put his hand on Victim 5's left leg when they were driving in Sandusky's car, any time Victim 5 was in the front seat.

Victim 5 was taken to the Penn State football locker rooms one time by Sandusky. Sandusky put his hand on Victim 5's leg during the ride to the locker room. To the best of his recollection, this occurred when he was 8 to 10 years old, sometime during 1996-1998. The locker room was the East Area Locker rooms, next to Holuba Hall. No one was present in the locker rooms. Victim 5 was sweaty from a brief period of exercise and then Sandusky took him in the sauna and "pushed" Victim 5 "around a little bit". Looking back on it as an adult, Victim 5 says it was inappropriate. Sandusky would press his chest and body up against Victim 5's back and then push him away. All the contact was initiated by Sandusky. Then Sandusky said they needed to shower. Victim 5 was uncomfortable because he had never been naked in front of anyone who wasn't a family member. So he turned his back to Sandusky and chose a shower that was a distance away from where Sandusky was showering. Victim 5 looked back over his shoulder and saw that Sandusky was looking at him and that Sandusky had an erection. Victim 5 did not understand the significance of this at the time but still averted his gaze because he was uncomfortable. The next thing he knew, Sandusky's body touched Victim 5 from behind and Sandusky was rubbing Victim 5's arms and shoulders. Victim 5 crept forward and so did Sandusky. Victim 5 then took another step, this time to the right, and Sandusky pinned Victim 5 up against a wall in the corner. Sandusky then took Victim 5's hand and placed it on his erect penis. Victim 5 was extremely uncomfortable and pulled his hand away and slid by Sandusky.

Victim 5 walked out of the shower and dried himself off and got dressed. Sandusky never touched him again. Victim 5 thinks that he did not get invited to any football games after that.

VICTIM 6

Victim 6, who is now 24 years old, was acquainted with Victim 5 and another young boy in The Second Mile program, B.K.; their interaction with Sandusky overlapped. Victim 6 was referred to the Second Mile program by a school counselor. He met Sandusky at a Second mile picnic at Spring Creek Park when he was seven or eight years old, in 1994 or 1995. After Sandusky interacted with Victim 6 after a skit at the picnic, Sandusky telephoned to invite Victim 6 to tailgate and attend a football game with some other boys. He was picked up by Sandusky. Victim 5, B.K., and other boys were present. They went to Holuba Hall, a football practice building on the Penn State campus, and were left there by Sandusky. They threw footballs around until it was time for them to walk to the tailgate hosted by Sandusky's family and then attended the football game. Victim 6 recalls this pattern repeating many times.

Victim 6 recalls being taken into the locker room next to Holuba Hall at Penn State by Sandusky when he was 11 years old, in 1998. Sandusky picked him up at his home, telling him he was going to be working out. As they were driving to the University, Sandusky put his right hand upon Victim 6's left thigh several times. When they arrived, Sandusky showed Victim 6 the locker rooms and gave him shorts to put on, even though he was already dressed in shorts. They then lifted weights for about 15 or 20 minutes. They played "Polish bowling" or "Polish soccer", a game Sandusky had invented, using a ball made out of tape and rolling it into cups. Then Sandusky began wrestling with Victim 6, who was much smaller than Sandusky. Then Sandusky said they needed to shower, even though Victim 6 was not sweaty. Victim 6 felt awkward and tried to go to a shower some distance away from Sandusky but Sandusky called him over, saying

he had already warmed up a shower for the boy. While in the shower, Sandusky approached the boy, grabbed him around the waist and said, "I'm going to squeeze your guts out." Sandusky lathered up the boy, soaping his back because, he said, the boy would not be able to reach it. Sandusky bear-hugged the boy from behind, holding the boy's back against his chest. Then he picked him up and put him under the showerhead to rinse soap out of his hair. Victim 6 testified that the entire shower episode felt very awkward. No one else was around when this occurred. Looking back on it as an adult, Victim 6 says Sandusky's behavior towards him as an 11 year old boy was very inappropriate.

When Victim 6 was dropped off at home, his hair was wet and his mother immediately questioned him about this and was upset to learn the boy had showered with Sandusky. She reported the incident to University Police who investigated. After a lengthy investigation by University Police Detective Ronald Shreffler, the investigation was closed after then-Centre County District Attorney Ray Gricar decided there would be no criminal charges. Shreffler testified that he was told to close the investigation by the director of the campus police, Thomas Harmon. That investigation included a second child, B.K., also 11, who was subjected to nearly identical treatment in the shower as Victim 6, according to Detective Schreffler.

Detective Schreffler testified that he and State College Police Department Detective Ralph Ralston, with the consent of the mother of Victim 6, eavesdropped on two conversations the mother of Victim 6 had with Sandusky on May 13, 1998, and May 19, 1998. The mother of Victim 6 confronted Sandusky about showering with her son, the effect it had on her son, whether Sandusky had sexual feelings when he hugged her naked son in the shower and where Victim 6's buttocks were when Sandusky hugged him. Sandusky said he had showered with other boys and Victim 6's mother tried to make Sandusky promise never to shower with a boy

again but he would not. She asked him if his "private parts" touched Victim 6 when he bear-hugged him. Sandusky replied, "I don't think so...maybe." At the conclusion of the second conversation, after Sandusky was told he could not see Victim 6 anymore, Sandusky said, "I understand. I was wrong. I wish I could get forgiveness. I know I won't get it from you. I wish I were dead." Detective Ralston and the mother of Victim 6 confirm these conversations.

Jerry Lauro, an investigator with the Pennsylvania Department of Public Welfare, testified that during the 1998 investigation, Sandusky was interviewed on June 1, 1998, by Lauro and Detective Schreffler. Sandusky admitted showering naked with Victim 6, admitted to hugging Victim 6 while in the shower and admitted that it was wrong. Detective Schreffler advised Sandusky not to shower with any child again and Sandusky said that he would not.

The Grand Jury was unable to subpoena B.K. because he is in the military and is stationed outside the United States.

VICTIM 7

Victim 7, now 26 years old, met Sandusky through the Second Mile program, to which he was referred by a school counselor at about the age of 10, in 1994. When Victim 7 had been in the program for a couple of years, Sandusky contacted Victim 7's mother and invited Victim 7 to a Penn State football game. He would also attend Sandusky's son's State College High School football games with Sandusky. Victim 7 enjoyed going on the field at Penn State games, interacting with players and eating in the dining hall with the athletes. Victim 7 would stay overnight at Sandusky's home on Friday nights before the home games and then go to the games with him. Sometimes they would go out for breakfast and would attend coaches meetings. Victim 6 was also a part of this group of boys. He knew B.K. and several other boys that were in Sandusky's circle.

Victim 7 testified that Sandusky made him uncomfortable when he was a young boy. He described Sandusky putting his hand on Victim 7's left thigh when they were driving in the car or when they would pull into his garage. Victim 7 eventually reacted to this by sitting as far away from Sandusky as he could in the front seat.

He also described more than one occasion on which Sandusky put his hands down the waistband of Victim 7's pants. Sandusky never touched any private parts of Victim 7. Victim 7 would always slide away because he was very uncomfortable with Sandusky's behavior. Victim 7 described Sandusky cuddling him when he stayed at his home, lying behind him with his arm around the boy. Sandusky also bear-hugged Victim 7 and cracked his back. He also took Victim 7 to Holuba Hall to work out and then to the East Area Locker rooms to shower. Victim 7 was very uncomfortable with this shared showering. Sandusky would tell Victim 7 to shower next to him even though there were multiple other showerheads in the locker room. Victim 7 testified that he has a "blurry memory" of some contact with Sandusky in the shower but is unable to recall it clearly. Victim 7 had not had contact with Sandusky for nearly two years but was contacted by Sandusky and separately by Sandusky's wife and another Sandusky friend in the weeks prior to Victim 7's appearance before the Grand Jury. The callers left messages saying the matter was very important. Victim 7 did not return these phone calls.

VICTIM 8

In the fall of 2000, a janitor named James "Jim" Calhoun ("Jim") observed Sandusky in the showers of the Lasch Building with a young boy pinned up against the wall, performing oral sex on the boy. He immediately made known to other janitorial staff what he had just witnessed.

Fellow Office of Physical Plant employee Ronald Petrosky was also working that evening and recalls that it was football season of 2000 and it was a Thursday or Friday evening,

because the football team was away for its game. Petrosky, whose job it was to clean the showers, first heard water running in the assistant coaches' shower room. He then saw that two people were in the assistant coaches' shower room. He could only see two pairs of feet; the upper bodies were blocked. Petrosky waited for the two persons to exit the shower so he could clean it. He later saw Jerry Sandusky exit the locker room with a boy, who he described as being between the ages of 11 and 13. They were carrying gym bags and their hair was wet. Petrosky said good evening and was acknowledged by Sandusky and the boy. He noted that the hallway in the Lasch building at that point is long and that Sandusky took the boy's hand and the two of them walked out hand in hand. Petrosky began to clean the shower that Sandusky and the boy had vacated. As he worked, Jim approached him. Petrosky described Jim as being upset and crying. Jim reported that he had seen Sandusky, whose name was not known to him, holding the boy up against the wall and licking on him. Jim said he had "fought in the [Korean] war....seen people with their guts blowed out, arms dismembered...I just witnessed something in there I'll never forget." And he described Sandusky performing oral sex on the boy. Petrosky testified that Jim was shaking and he and his fellow employees feared Jim might have a heart attack. Petrosky testified that all the employees working that night except Witherite were relatively new employees. In discussions held later that shift, the employees expressed concern that if they reported what Jim had seen, they might lose their jobs. Jim's fellow employees had him tell Jay Witherite what he had seen.

Jay Witherite was Jim's immediate supervisor. Witherite testified that Jim was "very emotionally upset", "very distraught", to the point that Witherite "was afraid the man was going to have a heart attack or something the way he was acting." Jim reported to Witherite that he had observed Sandusky performing oral sex on the boy in the showers. Witherite tried to calm Jim,

who was cursing and remained upset throughout the shift. Witherite told him to whom he should report the incident, if he chose to report it.

Witherite testified that later that same evening, Jim found him and told him that the man he had seen in the shower with the young boy was sitting in the Lasch building parking lot, in a car. Witherite confirmed visually that it was Sandusky who was sitting in his car in the parking lot. Witherite says that this was between 10:00 p.m. and 12:30 a.m. Petrosky also saw Sandusky drive very slowly through the parking lot about 2 to 3 hours after the incident was reported to him by Jim, at approximately 11:30 p.m. to 12:00 a.m. Petrosky recognized Sandusky in his vehicle. Petrosky testified that Sandusky drove by another time, about two hours later, again driving by very slowly but not stopping. The second drive-by was between 2:00 and 3:00 a.m. Petrosky testified that Sandusky did not enter the building either time. The area is well lit and the coaches' cars were known to Petrosky.

Jim was a temporary employee at the Lasch Building, working there for approximately 8 months. No report was ever made by Jim Calhoun. Jim presently suffers from dementia, resides in a nursing home and is incompetent to testify. Victim 8's identity is unknown.