



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

GRAHAM B. SPANIER,

Plaintiff-Counterdefendant,

v.

THE PENNSYLVANIA STATE
UNIVERSITY,

Defendant-Counterplaintiff.

)Docket No. 2016-0571
)
)Type of Pleading: RESPONSE TO
)PRELIMINARY OBJECTIONS TO SECOND
)AMENDED COUNTERCLAIMS
)
)**RESPONSE TO PRELIMINARY**
)**OBJECTIONS TO SECOND AMENDED**
)**COUNTERCLAIMS**
)
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)University
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**RESPONSE TO PRELIMINARY OBJECTIONS
TO SECOND AMENDED COUNTERCLAIMS**

The Pennsylvania State University (“Penn State” or “the University”), by its undersigned counsel, respectfully files the following response to Plaintiff’s preliminary objections to the University’s Second Amended Counterclaims.

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Denied as stated. Answering further, Penn State incorporates paragraphs 24-34 of its Second Amended Counterclaim (“2d. Am. CC.”) by reference herein
6. Denied as stated. The termination of the Employment Agreement did not take effect until the Separation Agreement took effect by its terms.¹ As alleged in paragraph 34 of the

¹ Capitalized terms herein shall have the meaning given to them in the Second Amended Counterclaims.

Second Amended Counterclaims, the Separation Agreement did not take effect until November 22, 2011.

7. Admitted, with the qualification that rescission and of the Separation Agreement and disgorgement of all amounts paid to, or benefits conferred upon, Dr. Spanier since November 9, 2011, are among the relief that Penn State seeks in the Second Amended Counterclaims.

8. Denied. Answering further, Penn State responds that each of its Counterclaims allege facts that, if true, are sufficient to state a claim against Dr. Spanier.

9. Denied. Plaintiff's preliminary objections should be overruled.

**RESPONSE TO FIRST PRELIMINARY OBJECTION TO FIRST COUNTERCLAIM
PURSUANT TO PA. R. CIV. P. 1028(a)(4)**

10. Admitted, with the qualification the First Counterclaim *does* allege a breach of Dr. Spanier's Employment Agreement.

11. Admitted.

12. Admitted.

13. Penn State admits that Dr. Spanier's position as president was terminated on November 9, 2011, but denies that "the Employment Agreement was terminated as of November 9, 2011. Answering further, the termination of the Employment Agreement did not take effect until November 22, 2011. 2d Am. CC, ¶ 34.

14. Denied. The termination of Dr. Spanier's Employment Agreement did not take effect until November 22, 2011. *Id.*

15. Penn State admits that, absent tolling, the statute of limitations for breach of contract claims in Pennsylvania is four years. Penn State denies that it was “required to assert any claim for breach of the Employment Agreement no later than November 9, 2015.”

16. Denied.

17. Denied. Answering further, Penn State states that the parties entered into a tolling agreement in November 2015. *See* 2d Am. CC, Exhibit 6.

18. Penn State denies that the quoted passage appears in this Court’s September 27, 2016 opinion in *Spanier v. Freeh*, C.C.P. Centre Cty. No. 2013-2707. Answering further, Penn State admits that courts have, on occasion, considered statute of limitations arguments on preliminary objections, but denies that this is the ordinary course, and denies that it would be either appropriate or efficient for the Court to do so here.

19. Admitted, with the qualification that the information Dr. Spanier failed to disclose to Penn State is identified in, *inter alia*, ¶¶ 14, 59 and 62 of the Second Amended Counterclaims.

20. Penn State denies each and every allegation of paragraph 20.

21. Penn State denies each and every allegation of paragraph 21. Answering further, Penn State alleged that Dr. Spanier remained a tenured member of its faculty continuously from November 9, 2011, to the present, and further alleged that HR91 applied to Dr. Spanier at all relevant times, including during the period November 9, 2011 through November 22, 2011. *See, e.g.*, 2d Am. CC, ¶¶ 35-38.

22. Denied.

23. Denied. The Court should overrule this preliminary objection.

**RESPONSE TO SECOND PRELIMINARY OBJECTION TO FIRST COUNTERCLAIM
PURSUANT TO PA. R. CIV. P. 1028(a)(4)**

24. Admitted, with the qualification that the First Counterclaim *does* state a claim against Dr. Spanier for breach of the Employment Agreement.

25. Admitted.

26. Admitted.

27. To the extent paragraph 27 purports to state a conclusion of law, no response is required. Penn State denies that it was required to mediate before bringing its breach of contract claim in this Court.

28. Denied.

29. Denied. The Court should overrule this preliminary objection.

**RESPONSE TO THIRD PRELIMINARY OBJECTION TO FIRST, SECOND, THIRD,
AND FOURTH COUNTERCLAIMS PURSUANT TO PA. R. CIV. P. 1028(a)(4)**

30. Denied as stated. Answering further, Penn State responds that its First, Second, Third, and Fourth Counterclaims are based on, *inter alia*, Dr. Spanier's failure to disclose the information described in ¶¶ 14, 59 and 62 of the Second Amended Counterclaim, in violation of the Duties he owed the University. Penn State admits that it seeks, among other relief, the rescission of the Separation Agreement and the benefits Dr. Spanier received pursuant to that agreement.

31. Denied.

32. Denied as stated. Answering further, Penn State responds that the Second Amended Counterclaims are replete with allegations of duties Dr. Spanier owed the University at all relevant times, including during the negotiation of the Separation Agreement.

33. Denied as stated. Penn State admits that the Employment Agreement was one source of the Duties Dr. Spanier had to disclose the aforesaid information to the University, but answering further, states that Dr. Spanier also had comparable duties under the University's bylaws and HR91. *See, e.g.*, 2d Am. CC, ¶¶ 5-10,

34. Penn State denies each and every allegation of paragraph 34.

35. Denied as stated. Penn State admits that Dr. Spanier did not promise, warrant or represent in the Separation Agreement that had disclosed facts to the University. Answering further, Penn State responds that, independent of any such requirement in the Separation Agreement, Dr. Spanier was under numerous pre-existing duties to disclose to the University facts material to its decision-making, including with respect to its decision to enter into the Separation Agreement.

36. Penn State denies each and every allegation of paragraph 36.

37. Admitted.

38. Penn State denies each and every allegation of paragraph 38. Answering further, Penn State notes that it alleges repeatedly in the Second Amended Counterclaims that it would not have entered into the release (paragraph 8 of the Separation Agreement) but its mistaken, but reasonable, belief that Dr. Spanier had fulfilled his duties.

39. Penn State incorporates paragraph 35, *supra*, as if set forth here in full.

40. Denied. Answering further, Penn State admits that paragraph 17 of the Separation Agreement provides: "The parties hereto further understand and agree that the terms and conditions of this Agreement constitute the full and complete understandings and arrangements of the *parties with respect to the terms of Dr. Spanier's termination* from the position of

President of the University and that there are no agreements, covenants, promises or arrangements other than those set forth herein *with respect to that subject.*” (Emphasis added). Penn State denies that this, or any other provision of the Separation Agreement excused or waived any of the pre-existing Duties Dr. Spanier owed the University.

41. Penn State admits that paragraph 41 accurately quotes from paragraph 17 of the Separation Agreement.

42. Penn State denies each and every allegation of paragraph 42, including but not limited to the erroneous characterization of the scope of the integration clause set forth in paragraph 17 of the Separation Agreement and the legal effect thereof. To the extent paragraph 42 purports to state a conclusion of law, no response is required.

43. Penn State incorporates paragraph 42, *supra*, as if set forth here in full.

44. Denied.

45. Denied. The Court should overrule this preliminary objection.

**RESPONSE TO FOURTH PRELIMINARY OBJECTION TO SECOND
COUNTERCLAIM PURSUANT TO PA. R. CIV. P. 1028(a)(4)**

46. Denied as stated. Penn State admits that its Second Counterclaim is for Unilateral Mistake of Fact, and that it alleges, *inter alia*, that Penn State entered into the Separation Agreement under one or more mistakes of material fact. The information as to which Penn State alleges it was mistaken is set forth in, *inter alia*, ¶¶ 14, 59 and 62 of the Second Amended Counterclaims.

47. To the extent paragraph 47 purports to state a conclusion of law, no response is required. To the extent it makes an allegation of fact, Penn State denies it. Penn State has

adequately pleaded that “[t]he Separation Agreement did not place the risk of mistake on the University, especially in light of the University’s long-standing relationship with Dr. Spanier and the multiple sources of pre-existing duties that placed on Dr. Spanier the affirmative obligations: not to use for personal gain any non-public information he obtained as a result of service to the University that was not available to the public; to honor a strict rule of honest and fair dealings with the University; and the duty to exercise the utmost good faith in all transactions involving the University. Inherent in those duties was the duty to disclose to the University facts material to the University’s decision-making and all facts that may give rise to a conflict of interest.” 2d Am. CC, ¶ 81.

48. Denied.

49. Denied.

50. Denied.

51. Denied. The Court should overrule this preliminary objection.

RESPONSE TO FIFTH PRELIMINARY OBJECTION TO FIRST, SECOND, THIRD, AND FOURTH COUNTERCLAIMS PURSUANT TO PA. R. CIV. P. 1028(a)(4)

52. Penn State admits that its Counterclaims are based on the assertion that Dr. Spanier failed to disclose certain information to the University, in violation of his Duties. Penn State denies that it alleges that any such failure to disclose was “intentional,” and therefore denies each and every remaining allegation of paragraph 52.

53. To the extent paragraph 53 purports to state a conclusion of law, no response is required. To the extent it makes an allegation of fact, Penn State denies it.

54. Paragraph 54 purports to state a conclusion of law. No response is required.

55. Penn State admits that it discovered that Dr. Spanier had failed to disclose the information at issue when the e-mails attached as Exhibit 4 to the Second Amended Counterclaims were discovered in 2012.

56. Penn State admits that it filed its original Counterclaims on December 19, 2016. Penn State denies each and every remaining allegation of paragraph 56, including the allegation that Penn State has asserted claims for “fraudulent inducement.”

57. Denied.

58. Denied.

59. Denied. The Court should overrule this preliminary objection.

RESPONSE TO SIXTH PRELIMINARY OBJECTION TO FIRST, SECOND, THIRD, AND FOURTH COUNTERCLAIMS PURSUANT TO PA. R. CIV. P. 1028(a)(4)

60. Penn State admits that its Counterclaims are based on allegations that Dr. Spanier failed to disclose certain information to the University, in violation of his Duties.

61. Denied as stated. Penn State admits that it alleges that HR91 imposed on Dr. Spanier, at all relevant times, including during the negotiation of the Separation Agreement, the duties to “exercise the utmost good faith in all transactions touching upon [his] duties to the University and its property,” and held him to a “strict rule of honest and fair dealings” with the University, and that Dr. Spanier breached those duties.

62. Paragraph 62 purports to state a conclusion of law. No response is required.

63. Penn State admits that it discovered that Dr. Spanier had failed to disclose the information at issue when the e-mails attached as Exhibit 4 to the Second Amended Counterclaims were discovered in 2012.

64. Penn State admits that it filed its original Counterclaims on December 19, 2016, and that those original Counterclaims included a claim for breach of fiduciary duty. Penn State denies that the Second Amended Counterclaims include a claim for breach of fiduciary duty.

65. Denied.

66. Denied. The Court should overrule this preliminary objection.

RESPONSE TO SEVENTH PRELIMINARY OBJECTION TO SECOND, THIRD, AND FOURTH COUNTERCLAIMS PURSUANT TO PA. R. CIV. P. 1028(a)(8)

67. Admitted, with the qualification that those Counterclaims do in fact assert equitable claims for Unilateral Mistake of Fact, Rescission, and Unjust Enrichment.

68. Admitted.

69. Admitted.

70. To the extent paragraph 70 asserts a conclusion of law, no response is required.

Penn State denies that the Second Amended Counterclaim contains a claim for fraudulent inducement or fraudulent concealment.

71. Paragraph 71 purports to state a conclusion of law. No response is required.

72. Denied.

73. Denied. The Court should overrule this preliminary objection.

RESPONSE TO EIGHTH PRELIMINARY OBJECTION TO FIRST, SECOND, THIRD, AND FOURTH COUNTERCLAIMS PURSUANT TO PA. R. CIV. P. 1028(a)(4)

74. Denied as stated. Penn State admits that its First, Second, Third, and Fourth Counterclaims seek, among other relief, rescission of the Separation Agreement and the disgorgement of all benefits Dr. Spanier received thereunder.

75. Paragraph 75 purports to state a conclusion of law. No response is required.

76. Penn State admits that it alleges that it discovered that Dr. Spanier had failed to disclose the information at issue when the e-mails attached as Exhibit 4 to the Second Amended Counterclaims were discovered in 2012.

77. Admitted.

78. Paragraph 78 purports to state a conclusion of law. No response is required.

79. Admitted. Answering further, Penn State states that it alleges in the Second Amended Complaint that the financial benefits Penn State has conferred on Dr. Spanier can be returned in connection with restoring the parties to the status quo.

80. Paragraph 80 purports to state a conclusion of law. No response is required.

81. Penn State denies each and every allegation of paragraph 81.

82. Penn State denies each and every allegation of paragraph 82.

83. Denied.

84. Denied. The Court should overrule this preliminary objection.

RESPONSE TO NINTH PRELIMINARY OBJECTION TO FIRST, SECOND, THIRD, AND FOURTH COUNTERCLAIMS PURSUANT TO PA. R. CIV. P. 1028(a)(4)

85. Denied as stated. Penn State admits that its Counterclaims are based on allegations that Dr. Spanier failed to disclose certain information to the University, in violation of his Duties. Penn State also admits that it seeks, among other relief, the rescission of the Separation Agreement and the disgorgement of all benefits Dr. Spanier received thereunder.

86. Penn State denies each and every allegation of paragraph 86.

87. Denied as stated. Answering further, Penn State admits that the information it alleges Dr. Spanier failed to disclose is set forth in, *inter alia*, ¶¶ 14, 59 and 62 of the Second

Amended Complaint. Penn State denies that it is alleging that the information Dr. Spanier improperly failed to disclose was the “supposed existence of emails.” To the contrary, Penn State alleges that the information Dr. Spanier improperly failed to disclose was the information contained within the emails that were discovered in 2012.

88. Penn State denies each and every allegation of paragraph 88.

89. Admitted.

90. The emails attached as Exhibit 4 to the Second Amended Counterclaims are written documents that speak for themselves. Penn State denies any allegation of paragraph 90 that is different from or inconsistent with those writings.

91. Admitted, with the qualifications that: (a) Schultz gave that testimony in 2017, in Dr. Spanier’s criminal trial, and (b) as alleged in the Second Amended Counterclaims, none of the University representatives responsible for negotiating the terms of Dr. Spanier’s termination from the presidency in 2011 had knowledge of the information Dr. Spanier failed to disclose, in violation of his Duties. *See, e.g.*, 2d Am. CC, ¶ 44.

92. To the extent paragraph 92 purports to assert conclusions of law, no response is required. Answering further, Penn State incorporates ¶ 91, *supra*, as if set forth here in full.

93. Paragraph 93 purports to state conclusions of law. No response is required. To the extent a response is deemed required, Penn State denies the allegations of paragraph 93. Answering further, Penn State incorporates ¶ 91, *supra*, as if set forth here in full.

94. Denied. Answering further, to the contrary, Penn State alleges in the Second Amended Counterclaims that the information set forth in the 2012 Discovered Emails was *not* contained within the November 5, 2011 grand jury presentment. *See* 2d Am. CC, ¶ 42.

95. Penn State denies each and every allegation of paragraph 95. Answering further, Penn State has pleaded that it was injured as a result of Dr. Spanier's failures to honor the Duties he owed the University.

96. Denied.

97. Denied. The Court should overrule this preliminary objection.

**RESPONSE TO TENTH PRELIMINARY OBJECTION TO FOURTH
COUNTERCLAIM PURSUANT TO PA. R. CIV. P. 1028(a)(4)**

98. Admitted, with the qualification that Penn State's Fourth Counterclaim *does* assert a claim against Dr. Spanier for unjust enrichment.

99. Admitted.

100. Penn State admits the first sentence of paragraph 100, but denies the second sentence of paragraph 100.

101. Denied. The Employment Agreement, which is attached as Exhibit 1 to the Second Amended Counterclaim provides that Dr. Spanier would receive certain post-presidency payments only if he were terminated from the presidency without cause. If he had been terminated for cause, he would not have been "entitled to any further compensation or benefits as President, except as set forth in the University's various benefit plans with respect to vesting and rights after termination of employment, nor shall he be entitled to continuing employment as member of the University faculty, including the Post-Presidency Faculty Position set forth in Section E.6 of this Agreement." Employment Agreement § H.1.

102. Penn State admits that it does not challenge the validity of the Employment Agreement, but Penn State does challenge both the validity and the enforceability of the Separation Agreement, which terminated the Employment Agreement without cause.

103. Paragraph 103 purports to state a conclusion of law. No response is required.

104. Penn State denies each and every allegation of paragraph 104.

105. Denied.

106. Denied. The Court should overrule this preliminary objection.

WHEREFORE, for the reasons set forth herein and in the accompanying memorandum of law, Penn State respectfully requests that this Court overrule all of plaintiff's Preliminary Objections to the Second Amended Counterclaims.

DATED this the 9th day of May, 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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