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GRAHAM B. SPANIER,

Plaintiff,

v.

THE PENNSYLVANIA STATE UNIVERSITY,

Defendant.

COURT OF COMMON PLEAS
OF CENTRE COUNTY

No. 2016-0571

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

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INTRODUCTION

Having been called to task in this action for its numerous breaches of the November 15, 2011 Separation Agreement ("Separation Agreement") that it voluntarily entered into with Plaintiff Graham Spanier, Defendant Pennsylvania State University ("PSU") has responded by filing five Counterclaims urging this Court to not only excuse PSU's breaches of that agreement, but to invalidate the five-year-old Separation Agreement entirely and force Dr. Spanier to return to PSU all payments, benefits, and consideration provided to him pursuant to the agreement since its inception in 2011. (*See generally* Defendant's Dec. 19, 2016 Answer and New Matter to Counts I, II, III, and IV of the First Amended Complaint; *id.* at 57-77 (hereinafter, "Answer & Counterclaims").) Although PSU divides its Counterclaims into five separate causes of action, they 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the terms of his removal from the position of President of the University, the agreement should be entirely rescinded, ***despite*** the fact that Dr.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 contractual 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, and ***despite*** the fact that although PSU claims to have learned of Dr. Spanier's supposed nondisclosure way back in 2012, PSU has 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.

To be clear, PSU's claim that Dr. Spanier had and failed to disclose to PSU knowledge that Jerry Sandusky had engaged in criminal conduct with minors is ***categorically false*** and Dr. Spanier vigorously disputes it. The notion that Dr. Spanier had and failed to act on such information about Sandusky will be proven false in the context of his claims in this action. But recognizing that at this stage of the litigation PSU's well-pleaded factual allegations must be assumed to be true for purposes of review of Plaintiff's preliminary objections, Defendant's allegations are nevertheless legally insufficient to warrant the relief PSU seeks, for multiple reasons.

First, PSU's five Counterclaims are all based on the (false) 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. As a result of this alleged nondisclosure, PSU asserts that the Separation Agreement should be entirely rescinded. 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 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. Additionally, the Separation Agreement contains a full integration clause explicitly ***disclaiming*** that Dr. Spanier had 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.

Second, PSU's Counterclaims are all barred by the two-year statute of limitations for fraud claims in Pennsylvania. 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 fraudulently 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 over four years after learning of the supposed fraud.

Third, PSU's Counterclaims are all similarly barred by the statute of limitations for breach of fiduciary duty in Pennsylvania, which is also two years. Each and every Counterclaim is premised on the notions that Dr. Spanier was required to disclose information regarding Sandusky to PSU because of a fiduciary duty owed to PSU, and that Dr. Spanier violated this duty by failing to make the required disclosure to PSU. However, by PSU's own admission, it became aware of the supposed nondisclosure — and thus the supposed breach of fiduciary duty — in 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.

Fourth, PSU's Counterclaims purporting to sound in equity have also been waived by PSU's failure to assert them for over 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.

Fifth, PSU's Counterclaims are deficiently pleaded due to failure to aver allegations of fraud and mistake with particularity. Although PSU vaguely claims that Dr. Spanier withheld some information about criminal conduct by Sandusky, and that PSU learned the truth in a series of emails it discovered in 2012, PSU does not allege with particularity what the information Dr. Spanier supposedly had was, what was contained in the emails, whether any other PSU officials (and thus PSU itself) were included on those emails (and thus had the same information at the time), when the emails were sent and received, and how, if at all, the information that supposedly was not disclosed was relevant or material to PSU's decision to enter into the Separation Agreement with Dr. Spanier. Pennsylvania pleading requirements require a party alleging fraud or mistake to do much more, and as a result Plaintiff's preliminary objections must be sustained.

Sixth, 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 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 Counterclaims should be sustained and PSU's Counterclaims should be dismissed with prejudice.

STATEMENT OF THE QUESTIONS INVOLVED

1. Should Defendant's First through Fifth 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.

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

Suggested response: Yes.

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

Suggested response: Yes.

4. Should Defendant's First through Fifth Counterclaims be dismissed pursuant to Rule 1019(b) and Rule 1028(a)(3) for failure to plead allegations of fraud and mistake with particularity?

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 Counterclaims Are Barred By The Plain Language Of The Separation Agreement.

Though they are styled as different causes of action, all of PSU's five 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* Answer & Counterclaims ¶¶ 357-391.) PSU argues that this omission by Dr. Spanier breached Dr. Spanier's 2010 Employment Agreement, breached a fiduciary duty owed to PSU, and caused PSU to enter into the Separation Agreement under a mistake of fact. (*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 to PSU's Counterclaims must be sustained and Defendant's 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 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, including the information contained in the 2012 Discovered Emails." (*Id.* ¶¶ 360-361.) PSU then argues that this supposed breach of the 2010 Employment Agreement should result in rescission of the separate ***Separation Agreement***. (*Id.* ¶ 365.) 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.* ¶¶ 46, 287, 302-303; *Id.* at Ex. 1 ¶ A.) The Separation Agreement itself clearly states that "Dr. Spanier's [2010] Employment Agreement was terminated as of November 9, 2011." (*Id.* at Ex. 3 ¶ 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. (*See id.* ¶¶ 287, 291, 362.)

In its Second Counterclaim, PSU alleges that Dr. Spanier owed PSU a fiduciary duty prior to and during the negotiation of the Separation Agreement, and that Dr. Spanier breached this duty by failing to inform PSU of everything that he

knew about "Sandusky's conduct with minors." (*Id.* ¶¶ 367-370.) According to PSU, this supposed fiduciary duty was imposed on Dr. Spanier by his 2010 Employment Agreement, which incorporated University bylaws stating that Dr. Spanier was to deal honestly and fairly with the University and inform it of any known conflicts of interest that arose during his tenure as President. (*Id.* ¶¶ 290-293.) Again, as PSU's own pleading acknowledges, the 2010 Employment Agreement was terminated as of November 9, 2011. (*Id.* ¶¶ 46, 287, 302-303; *id.* at Ex. 3 ¶ 2.) PSU claims that Dr. Spanier's supposed breach of this fiduciary duty should result in the rescission of the Separation Agreement. (*Id.* ¶ 373.)

In its Third 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.* ¶ 375.) PSU then asserts that it is entitled to rescission of the Separation Agreement based on Dr. Spanier's supposed failure to inform PSU of everything that he supposedly knew about Sandusky's conduct. (*Id.* ¶¶ 377-379.) Similarly, PSU's Fourth 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. ¶¶ 381-282.) 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.* ¶ 385.)

Finally, in its Fifth Counterclaim, PSU alleges that Dr. Spanier has been unjustly enriched by the Separation Agreement, again because Dr. Spanier supposedly failed to disclose facts regarding Sandusky to PSU. (*See id.* ¶¶ 390-391.) 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.*)

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 prior to the time that 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 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 Counterclaims must be dismissed with prejudice.

Attached as Exhibit 3 to PSU's Answer & Counterclaims is the Separation Agreement between PSU and Dr. Spanier, effective as of November 15, 2011. 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 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.* at Ex. 3 ¶ 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.* at Ex. 3 ¶ 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.* ¶¶ 358-361.) The 2010 Employment Agreement was terminated as of November 9, 2011, and thus the alleged breach could only have occurred on and/or prior to that date. (*Id.* ¶¶ 46, 287, 302-303; *id.* at Ex. 3 ¶ 2.) The release in the Separation Agreement, dated November 15, 2011, unequivocally states that PSU has irrevocably and unconditionally released and discharged any such claim against Dr. Spanier. (*Id.* at Ex. 3 ¶ 8.) Similarly, all of PSU's remaining Counterclaims assert claims based on the same alleged act or omission. (*See id.* ¶¶ 367-370, 375-378, 381-384, 390 (alleging that the Second, Third, Fourth, and Fifth 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 leading up to and including the effective date of this Agreement 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. They, therefore, must be dismissed with prejudice.

The broad release in the Separation Agreement also highlights a fatal flaw in Defendant's Third 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 had of Sandusky's criminal activities. (*Id.* ¶¶ 374-379.) PSU fails to state a claim because it fails to properly plead a required element of a claim of unilateral mistake; in order to state a valid claim, PSU is required to allege that it did not bear the risk of such a mistake. *Schrack v. Eisenhower*, 23 Pa. D. & C. 4th 289, 298 (Com. Pl. Clinton Cnty. Mar. 24, 1995) (citing Restatement (Second) of Contracts § 153). PSU fails to allege that it did not bear the risk of this mistake of fact because it cannot. 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, but 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. (Answer & Counterclaims at Ex. 3 ¶ 8.)

Similarly, the Separation Agreement's integration clause roundly disclaims any notion that Dr. Spanier had a duty or agreement to disclose ***any*** information to PSU in connection with the negotiation of, and decision to enter into, 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.* ¶¶ 361-365, 369-373, 376-379, 382-388, 390-391.) 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 for all 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.* at Ex. 3 ¶ 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 fiduciary duty to do so where such a duty is plainly released and disclaimed by the Separation Agreement. (*See id.* ¶¶ 358-361, 367-370, 375-378, 381-385, 390 (averring in support of every single counterclaim that Dr. Spanier's failure to disclose information regarding Sandusky breached a fiduciary duty to PSU that should result in rescission of the Separation Agreement). By PSU's own admission, that supposed fiduciary duty was imposed not by the terms of the Separation Agreement, but by 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 November 15, 2011 Separation Agreement that PSU seeks to have rescinded. (*Id.* ¶¶ 302-303.) Notably, while the Separation Agreement incorporated certain limited, specific aspects of that prior 2010 Employment Agreement into the Separation Agreement, nowhere does it incorporate any supposed fiduciary duty from the 2010 Employment Agreement — and PSU pointedly does not allege that it does so. (*See generally id.* at Ex. 3.) As this Court has noted 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 the integration clause and the confirmation that the Employment Agreement was terminated — renders any other non-incorporated provisions of that terminated agreement moot and not a part of the Separation Agreement. (Oct. 25, 2016 Opinion at 17 (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); *id.* at 21-22 (holding that "the Separation Agreement superseded the Employment Agreement, except for those provisions specifically referenced and incorporated.")) Thus, the only contractual source for this supposed fiduciary duty was terminated prior to 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 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 on the basis 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 Assocs.*, 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.

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* Answer & Counterclaims ¶¶ 375-378, 382-385 (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, *2 (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, *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. 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 anticipates the situation presented here and 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 indisputably based on the theory that Dr. Spanier wrongfully failed to disclose such information to PSU, Plaintiff's preliminary objections must be sustained. The Separation Agreement further contains an integration clause stating unequivocally

that the Separation Agreement itself contains all promises, agreements, and covenants of the parties relating to Dr. Spanier's separation from the position of President of the University. PSU is thus prohibited from asserting claims based on a theory that the Separation Agreement should be voided based on a supposed failure by Dr. Spanier to disclose information, because the Separation Agreement itself contains no promise by Dr. Spanier to do so and did not require him to do so as a precondition to the validity and enforceability of the agreement.

II. 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. [1]

[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 Opinion, *Spanier v. Freeh,* No. 2013-2707, (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).

The gist of each of PSU's Counterclaims against Plaintiff, and of PSU's request for rescission of the Separation Agreement, 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 entered into the Separation Agreement — and that this intentional omission in the face of a duty to disclose caused PSU to enter into the Separation Agreement under false pretenses. (*See* Answer & Counterclaims ¶¶ 360-365 (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), ¶¶ 368-373 (Second Counterclaim, same), ¶¶ 375-379 (Third Counterclaim, same), ¶¶ 381-388 (Fourth Counterclaim, same), ¶¶ 390 (Fifth Counterclaim, same). 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.* ¶ 368.) 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.* ¶¶ 307-312.)

Although PSU gives this claim several different names and attempts to couch some of the claims in equity 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, is a fraudulent inducement claim. *See Guidotti v. Prince*, No. GD 09 – 008835, 2012 WL 7070494 (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 (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 Exchange Nat. 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 fraud 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); *Davis v. Davis*, No. 2478, 1961 WL 6238, *5 (Com. Pl. Allegheny Cnty. April 4, 1960) ("Where a party has a full, complete and adequate remedy at law, equity does not have jurisdiction."); *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.)

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.[2] 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, and he 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 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

[2] News reports place the supposed discovery of these emails in March of 2012, and their supposed discovery is referenced in the Freeh Report published in July 2012. Although PSU neglected to include the specific date in 2012 on which the emails were discovered in its New Matter, even assuming for the sake of these preliminary objections that the emails were discovered as late as December 31, 2012, all of Defendants' claims are still plainly barred by the statute of limitations.

assert his claims until three years later, his claims were barred by the two-year statute of limitations. *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. (Answer & Counterclaims ¶¶ 307-312.) However, PSU did not assert claims regarding this supposed nondisclosure until December 19, 2016, more than four years after PSU 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. Techs., 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).

III. 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 Answer and Counterclaims that such claims are barred by the applicable statute of limitations. PSU's Second Counterclaim is an express claim for "Breach of Fiduciary Duty," based on Dr. Spanier's supposed failure to disclose to PSU information that he learned about Sandusky's criminal activities while Dr. Spanier was President of the University. (Answer & Counterclaims ¶¶ 366-373.) Similarly, Defendant's First, Third, Fourth, and Fifth Counterclaims are all also based on Dr. Spanier's supposed breach of a fiduciary duty to disclose to PSU the information that PSU learned in 2012 when it discovered the emails. (*See id.* ¶¶ 358-362 (alleging that Dr. Spanier's breach of his fiduciary duty to disclose the information in the 2012 Discovered Emails breached his 2010 Employment Agreement), ¶¶ 375-379 (seeking rescission of the Separation Agreement for mistake of fact because PSU wrongly assumed that Dr. Spanier had complied with his fiduciary duty to disclose the information in the 2012 Discovered Emails), ¶¶ 381-388 (seeking rescission of the Separation Agreement based on Dr. Spanier's breach of his fiduciary duty to disclose the information contained in the 2012

Discovered Emails), ¶ 390 (seeking disgorgement of payments to Dr. Spanier under the Separation Agreement because of Dr. Spanier's supposed breach of his fiduciary duty to PSU).)

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 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, but PSU did not assert its Counterclaims until December 19, 2016 — four years later. Therefore, all of PSU's Counterclaims, all of which expressly rely on the theory that Dr. Spanier had and breached a fiduciary duty to PSU by failing to disclose the information PSU learned in 2012, are barred by the statute of limitations and must be dismissed with prejudice. *See Hanaway v. Parkesburg Group, 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).

IV. PSU's Counterclaims Are Barred Due To Waiver.

Alternatively, to the extent that the Court finds that PSU's Third, Fourth, and Fifth 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 Enters. 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 as a remedy for its Counterclaims against Dr. Spanier. (*See* Answers & Counterclaims ¶¶ 365, 373, 379, 388, 391.) 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 prior to 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 3-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) (where operator of a mill waited seven months after becoming aware of alleged fraud to institute a suit for rescission, the remedy was unavailable).) 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. 2014 WL 616975 at *1. The United States District Court for the Eastern District of Pennsylvania 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 he 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 supposed misrepresentation that he claimed justified rescission); *Surgical Laser Techs., Inc. v. Heraeus Lasersonics, Inc.*, No. CIV.A. 90-7965 1995 WL 70535, *2 (E.D. Pa. Feb. 15, 1995) (collecting Pennsylvania cases); *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"); 8 Pa. Law Encyclopedia § 366 at 417 (1971) ("When a party acquiesces in acts which are inconsistent with his contractual right of forfeiture, the right is waived thereby. For example, a party who continues to work under a contract after the other party has breached it thereby waives his 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 and 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 seeking rescission when it was 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 Counterclaims demonstrate on their face that PSU has waived the right to seek rescission of the Separation Agreement. By PSU's own admission, it became aware of the true facts supposedly misrepresented by Dr. Spanier during the negotiation of the Separation Agreement in 2012, but it failed to seek rescission of the Separation Agreement until December 2016, some four years later. (Answer & Counterclaims ¶¶ 307-312.) 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.* ¶¶ 305, 314, 340). 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 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. 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 and claims that it would have agreed to different terms other than those set forth in the Separation Agreement had it been aware of the information it learned in 2012. (*Id.*

at ¶¶ 302-303, 311.) However, 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. Thus, on the face of PSU's Counterclaims, PSU has waived any ability to seek to rescind the agreement or to seek equitable disgorgement of all payments made pursuant to the agreement.

V. PSU Fails To Allege Fraud And Mistake With Particularity.

Additionally, PSU's Counterclaims all fail because PSU has failed to aver mistake or fraud with particularity as required by Pennsylvania Rule of Civil Procedure 1019(b). In addition to its explicit Counterclaim for "Unilateral Mistake of Fact," each of PSU's Counterclaims relies on the claim that Dr. Spanier knowingly failed to disclose material facts to PSU despite a duty to do so, and that this wrongfully induced PSU to enter into the Separation Agreement. (*See, e.g., id.* ¶¶ 306, 360-362, 368-371.) As explained above, this is an averment of fraudulent conduct.

However, in claiming that Dr. Spanier supposedly concealed material information from PSU, PSU's New Matter makes only vague references to supposed "2012 Discovered Emails." (*Id.* ¶ 307.) Nowhere does PSU aver with any particularity the dates of these emails, among whom they were sent, their contents, how or why they were material to the negotiation of the Separation

Agreement or, more generally, what exactly PSU is claiming that Dr. Spanier withheld from the University that was revealed by these emails. (*See, e.g. id.* ¶¶ 307-310.) These factual allegations are insufficient to meet Pennsylvania's pleading requirements, which require that in a case alleging affirmative misrepresentation or fraudulent concealment, the pleader must "set forth the exact statements or actions plaintiff alleges constitute the fraudulent misrepresentations." *Youndt*, 868 A.2d at 545. PSU has wholly failed to aver with particularity what knowledge it claims that Dr. Spanier withheld from PSU, when Dr. Spanier supposedly learned of this knowledge, whether other employees or officers of PSU were or were not aware of the same information, and what steps, if any, Dr. Spanier supposedly took to conceal this information from PSU. PSU's failure to plead fraud and mistake with particularity requires that Plaintiff's preliminary objections be sustained.

VI. PSU's Claim For Unjust Enrichment Is Barred By The Existence Of A Valid, Written Contract.

Finally, PSU's Fifth Counterclaim asserting a claim for "Unjust Enrichment," (*see* Answer & Counterclaims ¶¶ 389-391), must be dismissed because PSU has failed to allege facts or valid legal claims casting doubt on the validity and enforcement of the 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 — in this case, the Separation Agreement. *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).) Plaintiff's preliminary objection to Defendant's Fifth Counterclaim 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 Counterclaims and dismiss Defendant's Counterclaims with prejudice.

Dated: January 12, 2017

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