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GRAHAM B. SPANIER,

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY,

Defendant.

:
: COURT OF COMMON PLEAS
: OF CENTRE COUNTY

:
: No. 2016-0571

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**PLAINTIFF'S PRELIMINARY OBJECTIONS TO DEFENDANT'S
COUNTERCLAIMS**

Plaintiff Graham B. Spanier, by and through his undersigned attorneys, hereby submits these Preliminary Objections to the Counterclaims filed by Defendant The Pennsylvania State University (“PSU”), and in support of same avers as follows:

1. Plaintiff filed the instant action on February 10, 2016 and thereafter filed a First Amended Complaint on November 14, 2016.

2. On December 19, 2016, PSU filed its Answer and New Matter to Counts I, II, III, and IV of the First Amended Complaint; Counterclaims (hereinafter, “Answer & Counterclaims”.)

3. Plaintiff is the former President of PSU. From 2010 until the time that he left the position as President on November 9, 2011, Plaintiff’s employment relationship was governed by a 2010 Employment Agreement between Plaintiff and PSU. (Answer & Counterclaims ¶¶ 287, 291, 302-304; *id.* at Ex. 1.)

4. On and effective November 9, 2011, Plaintiff and PSU mutually agreed to terminate Dr. Spanier’s 2010 Employment Agreement and to terminate Dr. Spanier without cause from the position of President of the University. (*Id.* ¶¶ 302-303; *id.* at Ex. 3 ¶¶ 1-2.)

5. Thereafter, Plaintiff and PSU proceeded to negotiate the terms of Dr. Spanier’s separation from the position of President of the University. (*Id.* ¶¶ 302-303.)

6. On November 15, 2011, Plaintiff and PSU entered into a Separation Agreement governing the terms of Dr. Spanier's separation from the office of President of the University and the relationship, rights, and duties of the parties going forward. (*Id.* at Ex. 3.)

7. The Separation Agreement is a valid, enforceable contract. (*Id.* at Ex. 3.)

8. The Separation Agreement provides, *inter alia*, that Dr. Spanier would be provided a lump sum payment equal to his then-current base salary for a period of eighteen months, a Retirement Plan Equivalency Payment in the gross amount of \$1,248,204.60 payable in two installments, continuing contributions by PSU to a retirement plan for Dr. Spanier for the duration of his employment by PSU, a one-year post-presidency transition period during which Dr. Spanier would be paid his then-current annual salary of \$700,000, and a following five-year period during which Dr. Spanier could continue as a tenured member of the PSU faculty with an annual salary of \$600,000. (*Id.* ¶ 305; *id.* at Ex. 3 ¶ 3.)

9. The Separation Agreement contains a release provision, which 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.)

10. The Separation Agreement contains an integration clause, which states: “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.” (Answer & Counterclaims Ex. 3 at ¶ 17.)

11. On December 19, 2017, PSU filed its Answer & Counterclaims, asserting five Counterclaims against Dr. Spanier seeking rescission of the Separation Agreement and disgorgement of all monies and benefits that PSU has provided to Dr. Spanier pursuant thereto.

12. PSU’s claims that Dr. Spanier breached the 2010 Employment Agreement, that Dr. Spanier breached a fiduciary duty to PSU, that the Separation Agreement is a product of unilateral mistake of fact, that the Separation Agreement should be rescinded, and that Dr. Spanier has been unjustly enriched are barred by the plain language of the Separation Agreement, by the statute of limitations, by

laches and waiver, by PSU's failure to aver fraud and mistake with particularity, and by PSU's failure to state a claim for unjust enrichment.

13. PSU fails to set forth facts that, even if true, would be sufficient to state a valid counterclaim against Dr. Spanier, and therefore PSU's Counterclaims should be dismissed pursuant to Pennsylvania Rule of Civil Procedure 1028(a).

14. Plaintiff's preliminary objections should be sustained and PSU's Counterclaims should be dismissed with prejudice.

**First Preliminary Objection to First, Second, Third, Fourth, and Fifth
Counterclaims
Pursuant to Pa. R. Civ. P. 1028(a)(4)**

15. PSU's First, Second, Third, Fourth, and Fifth Counterclaims are all based on the claims that Dr. Spanier learned during his tenure as President of the University that Sandusky had engaged in unspecified "conduct with minors," that Dr. Spanier had a duty to inform PSU of this knowledge during the negotiation of the Separation Agreement, that Dr. Spanier failed to do so, and that the Separation Agreement should therefore be rescinded and Dr. Spanier's benefits obtained thereunder disgorged. (Answer & Counterclaims ¶¶ 357-391.)

16. PSU fails to state a valid claim for relief because its Counterclaims are barred by the plain language of the 2010 Employment Agreement and November 15, 2011 Separation Agreement attached as Exhibits 1 and 3 to PSU's Answer & Counterclaims, respectively.

17. PSU fails to adequately plead the existence of any duty on the part of Dr. Spanier to make any disclosure of fact to PSU during the negotiation of, or as a condition precedent to the validity and enforceability of, the Separation Agreement.

18. The only source of such a duty identified by PSU is a fiduciary duty imposed by Dr. Spanier's 2010 Employment Agreement; however, that contract was mutually terminated on November 9, 2011 — before the negotiation and execution of the November 15, 2011 Separation Agreement. (Answer & Counterclaims ¶¶ 45-46, 287, 302-303; *id.* at Ex. 1 ¶ A.)

19. The Separation Agreement does not, and did not, require Dr. Spanier to make any disclosure of facts regarding Sandusky (or any other matter) to PSU as a condition precedent to the validity and enforceability of the Separation Agreement, nor does it require Dr. Spanier to promise, warrant, or represent that he had fully disclosed any facts — whether material to the agreement or not — to PSU. (*See generally* Answer & Counterclaims at Ex. 3.)

20. Rather, the Separation Agreement itself presumes the potential existence of prior acts or omissions by Dr. Spanier relating to his position as President of the University, and it unconditionally releases Dr. Spanier of all claims regarding such omissions and bars PSU from asserting claims against Dr. Spanier based on any such omissions.

21. 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.”

22. The release in Paragraph 8 of the Separation Agreement bars all of PSU’s Counterclaims because all of PSU’s Counterclaims are based on a theory that, prior to the effective date of the Separation Agreement, Dr. Spanier omitted to inform PSU of the supposed knowledge that Dr. Spanier learned of Sandusky’s conduct while Dr. Spanier was President of the University. PSU has unconditionally released and discharged Dr. Spanier from all such claims.

23. The Separation Agreement does not, and did not, require Dr. Spanier to make any disclosure of facts regarding Sandusky (or any other matter) to PSU as a condition precedent to the validity and enforceability of the Separation Agreement, nor does it require Dr. Spanier to promise, warrant, or represent that he had fully disclosed any facts — whether material to the agreement or not — to PSU. (*See generally* Answer & Counterclaims at Ex. 3.)

24. Rather, the Separation Agreement contains an integration clause which disclaims the existence of any such condition precedent or promise by Dr. Spanier.

25. Paragraph 13 of the Separation Agreement states: “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.”

26. Because the Separation Agreement contains an integration clause affirmatively stating that it represents the parties’ entire agreement and that there are no other applicable agreements, covenants, promises, or arrangements, Pennsylvania law prohibits PSU from challenging the validity of the Separation Agreement based on the claim that Dr. Spanier violated a duty not reflected explicitly in the parties’ written agreement. *Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 498-501 (2004); *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1300 (3d Cir. 1996); *HCB Contractors v. Liberty Place Hotel Assocs.*, 539 Pa. 395, 399-400 (1995); *Blumenstock v. Gibson*, 811 A.2d 1029, 1035-1036 (Pa. Super. 2002).

27. Because the Separation Agreement contains an integration clause affirmatively stating that it represents the parties' entire agreement and there are no other applicable agreements, covenants, promises, or arrangements, and because the Separation Agreement nowhere required Dr. Spanier to make any disclosure or to warrant that he had fully disclosed any information, Pennsylvania law prohibits PSU from seeking rescission of the contract based on the claim that Dr. Spanier's nondisclosure of information fraudulently induced PSU to enter into the Separation Agreement under false pretenses. *HCB Contractors*, 539 Pa. at 399; *Bray v. DeWese*, No. 07-4011, 2008 WL 623824, *2 (E.D. Pa. Mar. 6, 2008); *Hart v. Arnold*, 884 A.2d 316, 340 (Pa. Super. 2005); *Youndt v. First Nat'l Bank of Port Allegany*, 868 A.2d 539, 546 (Pa. Super. 2005).

28. Thus, PSU's pleading is legally insufficient and fails to plead facts that, even if true, could state a valid claim for relief on any of PSU's Counterclaims.

WHEREFORE, Plaintiff respectfully requests that the Court dismiss PSU's First, Second, Third, Fourth, and Fifth Counterclaims with prejudice.

**Second Preliminary Objection to Third Counterclaim
Pursuant to Pa. R. Civ. P. 1028(a)(4)**

29. PSU's Third Counterclaim asserts a claim for "Unilateral Mistake of Fact," claiming that PSU entered into the Separation Agreement under a mistake of fact; namely, the belief that Dr. Spanier had disclosed to PSU all of the information

Dr. Spanier supposedly had regarding Sandusky's conduct with minors. (Answer & Counterclaims ¶¶ 374-379.)

30. PSU fails to plead a required element of a claim for unilateral mistake of fact, which is that the contract at issue did not place the risk of mistake on the complaining party. *See Schrack v. Eisenhower*, 23 Pa. D. & C. 4th 289, 296-97 (Com. Pl. Clinton Cnty. 1995) (citing Restatement (Second) of Contracts § 153.)

31. The facts PSU does plead plainly demonstrate that the Separation Agreement placed the risk of the mistake PSU claims squarely on PSU.

32. The Separation Agreement itself presumes the potential existence of acts or omissions by Dr. Spanier with respect to his relationship with PSU prior to, and up through, the effective date of the Separation Agreement, and it bars PSU from asserting any claims against Dr. Spanier based on such omissions. (Answer & Counterclaims at Ex. 3 ¶ 8.)

WHEREFORE, Plaintiff respectfully requests that the Court dismiss PSU's Third Counterclaim with prejudice.

**Third Preliminary Objection to First, Second, Third, Fourth, and Fifth
Counterclaims
Pursuant to Pa. R. Civ. P. 1028(a)(4)**

33. Each of PSU's Counterclaims is based explicitly on the claim that Dr. Spanier's intentional nondisclosure of information about Sandusky during the negotiation of the Separation Agreement induced PSU to enter into the Separation

Agreement under false pretenses, and that this entitles PSU to rescission of the agreement and disgorgement of monies and benefits provided to Dr. Spanier thereunder. (Answer & Counterclaims ¶¶ 306-312, 357-391.)

34. These are claims that sound in fraud. *Smith v. Renault*, 564 A.2d 188, 192 (Pa. Super. 1989); *Guidotti v. Prince*, No. GD 09 – 008835, 2012 WL 7070494 (Com. Pl. Allegheny Cnty. Mar. 5, 2012).

35. The statute of limitations on a claim alleging that one party fraudulently induced another to enter into a contract is two years. 42 Pa. Cons. Stat. Ann. § 5524(7); *Aubrey v. Santora*, No. 09-20164, 2013 WL 9770380 (Com. Pl. Butler Cnty. Aug. 12, 2013); *Albarqawi v. 7-Eleven, Inc.*, No. 12-3506, 2014 WL 616975, *4 (E.D. Pa. Feb. 18, 2014).

36. PSU alleges that it discovered Dr. Spanier's supposed nondisclosure in 2012, and thus the latest possible date on which PSU could have discovered the nondisclosure is December 31, 2012. (Answer & Counterclaims ¶¶ 307-312.)

37. PSU did not assert its claims against Dr. Spanier alleging fraudulent inducement until December 19, 2016.

38. As this Court has noted, “[w]hile the Statute of Limitations is ordinarily considered an affirmative defense that must be pleaded as a 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.); *see also Pelagatti v. Cohen*, 536 A.2d 1337, 1346 (Pa. Super. 1987).

WHEREFORE, Plaintiff respectfully requests that the Court dismiss PSU's First, Second, Third, Fourth, and Fifth Counterclaims with prejudice.

**Fourth Preliminary Objection to First, Second, Third, Fourth, and Fifth
Counterclaims
Pursuant to Pa. R. Civ. P. 1028(a)(4)**

39. Each of PSU's Counterclaims is based explicitly on the claim that Dr. Spanier had a fiduciary duty to disclose to PSU information that he was supposedly aware of regarding Sandusky's conduct with minors prior to the execution of the Separation Agreement. (Answer & Counterclaims ¶¶ 288-293, 357-391.)

40. The statute of limitations on a claim for breach of fiduciary duty is two years. 42 Pa. Cons. Stat. Ann. § 5524(7); *Aquilino v. Phila. Catholic Archdiocese*, 884 A.2d 1269, 1275 (Pa. Super. 2005).

41. PSU alleges that it discovered Dr. Spanier's supposed breach of fiduciary duty in 2012, and thus the latest possible date on which PSU could have discovered the nondisclosure is December 31, 2012. (Answer & Counterclaims ¶¶ 307-312.)

42. PSU did not assert its claims against Dr. Spanier alleging breach of fiduciary duty until December 19, 2016.

43. As this Court has noted, “[w]hile the Statute of Limitations is ordinarily considered an affirmative defense that must be pleaded as a 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.); *see also Pelagatti*, 536 A.2d at 1346.

WHEREFORE, Plaintiff respectfully requests that the Court dismiss PSU’s First, Second, Third, Fourth, and Fifth Counterclaims with prejudice.

**Fifth Preliminary Objection to Third, Fourth, and Fifth Counterclaims
Pursuant to Pa. R. Civ. P. 1028(a)(8)**

44. PSU’s Third, Fourth, and Fifth Counterclaims assert what purport to be equitable claims for “Unilateral Mistake of Fact,” “Rescission,” and “Unjust Enrichment.”

45. Each of these Counterclaims is based on the claim that because Dr. Spanier failed to disclose information to PSU despite an alleged duty to do so prior to the execution of the Separation Agreement, PSU was induced to enter into the Separation Agreement under false pretenses, and it should therefore be rescinded, and Dr. Spanier should be required to disgorge monies and benefits conferred on him pursuant to the Separation Agreement. (Answer & Counterclaims ¶¶ 374-391.)

46. This is an action for fraudulent inducement/concealment and PSU seeks the same remedies available in a claim for fraudulent inducement. See *Guidotti*, 2012 WL 707094; *Eigen v. Textron Lycoming Reciprocating Engine Div.*, 874 A.2d 1179, 1184 (Pa. Super. 2005); *Neuman v. Corn Exchange Nat'l Bank & Trust Co.*, 356 Pa. 442, 451-455 (1947).

47. Pennsylvania law bars claims sounding in equity when the party has a full and adequate remedy at law. Pa. R. Civ. P. 1028(a)(8); *Sixsmith v. Martsolf*, 413 Pa. 150 (1964); *Myshko v. Galanti*, 453 Pa. 412, 414 (1973).

WHEREFORE, Plaintiff respectfully requests that the Court dismiss PSU's Third, Fourth, and Fifth Counterclaims with prejudice.

**Sixth Preliminary Objection to First, Second, Third, Fourth, and Fifth
Counterclaims
Pursuant to Pa. R. Civ. P. 1028(a)(4)**

48. Each of PSU's Counterclaims seeks as a remedy rescission of the Separation Agreement and disgorgement of all fees paid to Dr. Spanier thereunder. (Answer & Counterclaims ¶¶ 357-391.)

49. In Pennsylvania, a party seeking to rescind a contract must do so promptly upon discovery of facts warranting rescission, or it waives the right to rescind. *Fichera v. Gording*, 424 Pa. 404, 406 (1967); *Schwartz v. Rockey*, 593 Pa. 536, 550-553 (2007); *Sixsmith*, 413 Pa. at 152; *Muehlhoff v. Boltz*, 215 Pa. 124, 129 (1906); *Albarqawi*, 2014 WL 616075 at *2.

50. PSU alleges that it discovered the supposed nondisclosure by Dr. Spanier on which it bases its request for rescission in 2012. (Answer & Counterclaims ¶¶ 307-312.)

51. PSU did not seek rescission of the Separation Agreement until December 19, 2016.

52. Similarly, a party to a contract waives the right to seek rescission if it continues to perform on the contract after discovery of facts warranting rescission of the contract. *Albarqawi*, 2014 WL 616975 at *3; *Gray v. Md. Credit Fin. Corp.*, 25 A.2d 104, 106-107 (Pa. Super. 1942); *Fuller Co. v. Brown Minneapolis Tank & Fabricating Co.*, 678 F. Supp. 506, 509-510 (E.D. Pa. 1987).

53. PSU admits that since its discovery of the facts that it alleges warrant rescission in 2012, PSU has continued to make payments and confer benefits on Dr. Spanier for four years pursuant to the terms of the Separation Agreement. (Answer & Counterclaims ¶¶ 305, 314, 340.)

54. Pennsylvania law holds that rescission is an equitable remedy, to be granted only where the parties to a contract can be placed in their former positions with regard to the subject matter of the contract. *Sullivan v. Alleghany Ford Truck Sales, Inc.*, 423 A.2d 1292, 1295-96 (Pa. Super. 1980).

55. PSU fails to plead facts demonstrating that it would be possible to put the parties back into their original positions at the time of contracting, and the facts it does plead demonstrate that this would be impossible.

56. PSU fails to plead any facts to justify its unreasonable four-year delay in seeking rescission of the Separation Agreement.

WHEREFORE, Plaintiff respectfully requests that the Court dismiss PSU's First, Second, Third, Fourth, and Fifth Counterclaims with prejudice.

**Seventh Preliminary Objection to First, Second, Third, Fourth, and Fifth
Counterclaims
Pursuant to Pa. R. Civ. P. 1028(a)(3) and 1019(b)**

57. PSU's Counterclaims are all based on the claim that Dr. Spanier knowingly failed to disclose information to PSU despite an alleged duty to do so and that PSU acted in reliance on this alleged nondisclosure when entering into the Separation Agreement with Dr. Spanier. (See Answer & Counterclaims ¶¶ 357-391.)

58. This is an allegation of fraud. *Smith*, 564 A.2d at 192 (fraud arises where a party makes a knowingly false misrepresentation, where there is intentional concealment with intent to deceive, or where there is a nonprivileged failure to disclose information in the face of a duty to disclose.)

59. PSU's Third Counterclaim also asserts an explicit claim for unilateral mistake of fact. (Answer & Counterclaims ¶¶ 374-379.)

60. Pennsylvania law requires that averments of fraud and mistake be pleaded with particularity. Pa. R. Civ. P. 1019(b).

61. PSU fails to plead with particularity the alleged fraud and the alleged mistake. PSU asserts only vague allegations of Dr. Spanier being aware of unspecified allegations of misconduct by Sandusky, and claims that PSU learned the true facts regarding Dr. Spanier's knowledge at an unspecified time in 2012 when it discovered emails between Dr. Spanier and unidentified individuals. (Answer & Counterclaims ¶¶ 294, 307-312.)

62. PSU fails to plead facts regarding the specific knowledge that Dr. Spanier supposedly had and failed to disclose, the specific content of the emails, the date on which PSU discovered the emails, the date on which the emails were sent and received, the other recipients of the emails, whether any other officials at PSU were aware of the same information regardless of any supposed failure to disclose by Dr. Spanier, whether the emails were available to or in the possession of PSU prior to 2012, and how or why the information Dr. Spanier supposedly withheld was or was not material to PSU's decision to enter into the Separation Agreement. *See Youndt*, 868 A.2d at 545 (in alleging fraud, the pleader must "set forth the exact statements or actions plaintiff alleges constitute the fraudulent misrepresentations.").

WHEREFORE, Plaintiff respectfully requests that the Court dismiss PSU's First, Second, Third, Fourth, and Fifth Counterclaims with prejudice.

**Eighth Preliminary Objection to Fifth Counterclaim
Pursuant to Pa. R. Civ. P. 1028(a)(4)**

63. PSU's Fifth Counterclaim asserts a claim against Dr. Spanier for unjust enrichment. (Answer & Counterclaims ¶¶ 390-391.)

64. PSU seeks disgorgement of all monies and benefits conferred upon Dr. Spanier under the Separation Agreement and claims he has been unjustly enriched thereby. (*Id.*)


65. The Separation Agreement, a written contract between Dr. Spanier and PSU, is attached as Exhibit 3 to PSU's Answer & Counterclaims.

66. Pennsylvania law holds that unjust enrichment, a quasi-contractual doctrine, is inapplicable when the relationship between the parties is founded on an express, written contract. *Wilson Area Sch. Dist. V. Skepton*, 586 Pa. 513, 520 (2006).

WHEREFORE, Plaintiff respectfully requests that the Court dismiss PSU's Fifth Counterclaim with prejudice.

Dated: January 12, 2017

By: _____


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*ATTORNEYS FOR PLAINTIFF GRAHAM
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VERIFICATION

I verify that the statements made in the foregoing Preliminary Objections are true and correct to the best of my knowledge, information, and belief. I understand that any false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

Date: 1/9/17

Graham Spanier
Dr. 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 January 12, 2017.

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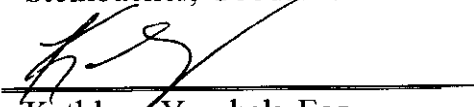
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