ORIGINAL

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

GEORGE SCOTT PATERNO,
as duly appointed representative of the
ESTATE and FAMILY of JOSEPH PATERNO;

RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, PETER KHOURY, and
ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;

PETER BORDI, TERRY ENGELDER,
SPENCER NILES, and JOHN O'DONNELL,
members of the faculty of Pennsylvania State University;

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO,
former football coaches at Pennsylvania State University; and

ANTHONY ADAMS, GERALD CADOGAN,
SHAMAR FINNEY, JUSTIN KURPEIKIS,
RICHARD GRDNER, JOSH GAINES, PATRICK MAUTI,
ANWAR PHILLIPS, and MICHAEL ROBINSON,
former football players of Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),

MARK EMMERT, individually and as President of the NCAA, and

EDWARD RAY, individually and as former Chairman of the Executive committee of the NCAA,

Defendants.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
ADDENDUM TO REPLY IN SUPPORT OF DEFENDANTS' PRELIMINAY OBJECTIONS

Filed on Behalf of:

National Collegiate Athletic Association, Mark Emmert, Edward Ray

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Civil Division

Docket No. 2013-2082

ADDENDUM TO
REPLY IN SUPPORT OF
DEFENDANTS' PRELIMINARY OBJECTIONS

REPLY IN SUPPORT OF DEFENDANTS' PRELIMINARY OBJECTIONS

ADDENDUM: UNPUBLISHED CASES

Ad-179	*SSN Hotel Management, LLC v. Susquehanna Bank,* No. 0296, 2012 Phila. Ct. Com. Pl. LEXIS 466 (Pa. Ct. Com. Pl. Feb. 9, 2012)

Not Reported in A.3d, 2011 WL 3338236 (Conn.Super.), 52 Conn. L. Rptr. 232
(Cite as: 2011 WL 3338236 (Conn.Super.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.
AMICA MUTUAL INSURANCE COMPANY
v.
FASSARELLA PRO PAINTING & DESIGN, LLC.

No. FSTCV106003636S.
July 8, 2011.

DAVID R. TOBIN, J.

***1** The plaintiff, Amica Mutual Insurance Company, has brought this subrogation action seeking to recover funds that it paid to its insureds following a fire on August 8, 2008, which severely damaged premises covered by a fire insurance policy issued by the plaintiff. In its complaint, the plaintiff alleges that the fire was caused by the negligence of the defendant, Fassarella Pro Painting & Design, LLC. Presently before the court is the plaintiff's motion to strike dated February 24, 2011. In that motion, the plaintiff seeks to strike the defendant's first and second special defenses and the defendant's first and second counterclaims dated February 8, 2011.

DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any [pleading] ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498 (2003). "A party wanting to contest the legal sufficiency of a special defense may do so by filing a motion to strike." *Barasso v. Rear Still Hill Road, LLC*, 64 Conn.App. 9, 13 (2001). In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency. *Connecticut National Bank v. Douglas*, 221 Conn. 530, 536, (1992). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied ... It is fundamental that in determining the sufficiency of a complaint challenged by [an opposing party's] motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted ... Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Violano v. Fernandez*, 280 Conn. 310, 318 (2006).

DEFENDANT'S PROCEDURAL OBJECTION TO MOTION TO STRIKE

In it's opposition to the plaintiff's motion to strike dated March 16, 2011, the defendant claims that the plaintiff failed to comply with Practice Book § 10–41, which requires that a motion to strike "shall separately set forth each such claim of insufficiency and shall distinctly specify the reason or reasons of such claimed insufficiency." After reviewing the plaintiff's motion to strike and the memorandum filed in support thereof, the court finds that the plaintiff's motion complies with the foregoing Practice Book requirement.

DEFENDANT'S FIRST AND SECOND SPECIAL DEFENSES

The defendant's first special defense alleges: "Plaintiff has failed to state a legally cognizable cause of action for breach of contract, negligence and/or subrogation of damages." The plaintiff claims that this special defense fails to allege any facts to support the defense. The defendant's second special defense alleges: "Plaintiff lacks standing to assert the claims in its Third Amended Complaint." The plaintiff also claims that this special defense fails to allege any facts to support the defense.

***2** Practice Book § 10–50 provides in relevant

part: "Facts which are consistent with [the plaintiff's complaint] but show, notwithstanding, that the plaintiff has no cause of action, must be specifically alleged." In its opposition to the plaintiff's motion to strike, the defendant does not address the motion as it relates to its first and second special defenses. The court agrees with the plaintiff that neither of the defendant's first two special defenses allege facts adequate to support a special defense. Accordingly, the plaintiff's motion to strike those special defenses is granted.

DEFENDANT'S FIRST COUNTER-CLAIM—SPOLIATION OF EVIDENCE

The defendant's first counterclaim alleges that the plaintiff intentionally engaged in spoliation of evidence, thereby hindering the defendant's defense of the plaintiff's claims. The plaintiff moves to strike the first counterclaim on the ground that the tort of spoliation of evidence is available only to a "first party plaintiff." In its opposition to the motion to strike, the defendant argues that there is no logical reason why a defendant who is harmed by an adversary's intentional spoliation of evidence should not be able to collect damages commensurate with the harm that resulted from the spoliation.

A cause of action for intentional spoliation of evidence was first recognized by our Supreme Court in *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225 (2006). The Court defined intentional spoliation of evidence as the "intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action." (Internal quotation marks omitted.) *Id.*, at 243. The Court held that a cause of action for intentional spoliation of evidence includes the following essential elements: "(1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages." *Id.*, at 244–45.

The Court reasoned that the cause of action is appropriate when a first-party defendant destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case. *Id.*, at 235. As the Court noted, an adverse impact on a plaintiff's case is "a critical element of the intentional spoliation tort." *Id.*, at 230, citing M.M. Koesel & T.L. Turnbull, Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation (2d Ed.2006), p. 93. The Court explained "the plaintiff's burden of proof with respect to causation and damages. To establish proximate causation, the plaintiff must prove that the defendants' intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a prima facie case in the underlying litigation." *Id.*, at 246, citing *Smith v. Atkinson*, 771 So.2d 429, 434 (Ala.2000) ("in order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment").

***3** Under the Court's reasoning, the cause of action for spoliation of evidence is a substitute for the underlying cause of action, which the plaintiff can no longer successfully pursue because of the defendant's wrongful destruction of evidence. In the present case, the defendant does not claim that the evidence allegedly destroyed by the plaintiff or the plaintiff's subrogors was essential to an underlying cause of action. Instead, it claims that the evidence was essential to its defense of the claims brought by the plaintiff. The defendant's counterclaim lacks one of the essential elements of the tort of spoliation of evidence as outlined in *Rizzuto:* the inability of a plaintiff to establish a prima facie case without the spoliated evidence.

The defendant is not without remedies if, in fact, any evidence potentially relevant to its defense was wrongfully destroyed. In *Beers v. Bayliner*

Marine Corp., 236 Conn. 769, 777–79 (1996), the Court held that "an adverse inference may be drawn against a party who has destroyed evidence only if the trier of fact is satisfied that the party who seeks the adverse inference has proven the following. First, the spoliation must have been intentional ... By this, we do not mean that there must have been an intent to perpetrate a fraud by the party or his agent who destroyed the evidence but, rather, that the evidence had been disposed of intentionally and not merely destroyed inadvertently ... Second, the destroyed evidence must be relevant to the issue or matter for which the party seeks the inference. For example, the spoliation of a machine may raise an adverse inference with respect to a claim that that particular machine was defective, but such an inference may not be drawn with respect to a claim based upon design defect when the destruction would not hinder the defense ... Third, the party who seeks the inference must have acted with due diligence with respect to the spoliated evidence. For example, the spoliator must be on notice that the evidence should be preserved ... If the spoliated evidence was necessary for inspection or testing, the party who seeks the inference must have taken all appropriate means to have the evidence produced. This may include, if necessary, an attempt to obtain a court ordered inspection ... Finally, the jury, if it is the trier of fact, must be instructed that it is not required to draw the inference that the destroyed evidence would be unfavorable but that it may do so upon being satisfied that the above conditions have been met." (Citations omitted.)

In *Rizzuto*, the Court reiterated that "the trier of fact may draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it ... To be entitled to this inference, the victim of spoliation must prove that: (1) the spoliation was intentional, in the sense that it was purposeful, and not inadvertent; (2) the destroyed evidence was relevant to the issue or matter for which the party seeks the inference; and (3) he or she acted with due diligence with respect to the spoliated evidence ... [T]he adverse inference is permissive, and not mandatory ..." (Citations omitted; internal quotation marks omitted.) *Rizzuto v. Davidson Ladders, Inc.*, *supra*, 280 Conn. at 237.

***4** Therefore, the defendant may have remedies if the plaintiff wrongfully destroyed any evidence potentially relevant to the defendant's defense. At the same time, the court finds that Connecticut does not recognize a cause of action in favor of a defendant for a plaintiff's spoliation of evidence. Accordingly, the court grants the plaintiff's motion to strike the defendant's first counterclaim.

DEFENDANT'S SECOND COUNTERCLAIM—DECLARATORY JUDGMENT

The defendant's second counterclaim alleges that prior to the date of the fire, the plaintiff had issued a fire insurance policy to Wayne Jarvis and Heather Jarvis insuring the premises located at Cat Rock Road for $1,559,000. The defendant further alleges that after the fire it was discovered that neither Wayne Jarvis nor Heather Jarvis had any interest in the premises and that title was, in fact, held in the name of Cat Rock Nominee Trust and/or Catrock Nominee Trust. The defendant alleges that after the fire the plaintiff reformed the fire insurance policy that it had issued to name Cat Rock Nominee Trust and/or Catrock Nominee Trust as insureds and to increase the coverage under the policy to $1,627,000. The defendant seeks a declaratory judgment that the policy reformation was void and that the policy in effect on the date of the fire is the controlling policy for purposes of the pending litigation.

The plaintiff moves to strike the defendant's second counterclaim on the ground that only a party to the contract or a third-party beneficiary may bring an action for contract reformation. The plaintiff thus argues that the defendant lacks standing to bring its second counterclaim. In its opposition to the motion, the defendant argues that it has standing to seek reformation of the contract, as the reformation directly affected the rights and interests of the defendant to certain defenses and also ex-

posed it to claims of subrogation that did not exist immediately after the fire.

Practice Book § 17–55 provides: "A declaratory judgment action may be maintained if all of the following conditions have been met: (1) The party seeking the declaratory judgment has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations; (2) There is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties; and (3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is of the opinion that such party should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure." Moreover, "[t]he defendant in any appropriate action may seek a declaratory judgment by a counterclaim." Practice Book § 17–56(a)(5).

In addition to the three elements mentioned above for seeking declaratory relief, the plaintiff also must have standing. "The question of standing [to pursue a declaratory judgment] is essentially one of aggrievement ... A party bringing suit must demonstrate a legal interest in the controversy that can be distinguished from the interest of the general public." (Citations omitted; internal quotation marks omitted.) *American States Ins. Corp. v. Peci,* Superior Court, judicial district of Danbury, Docket No. 319343 (July 7, 1995, Stodolink, J.) (15 Conn. L. Rptr. 97, 98); see also *Tasini v. New York Times Co.,* 184 F.Sup.2d 350, 356 (S.D.N.Y.2002) ("[t]he determination of whether a plaintiff has standing ... is antecedent to any declaratory judgment determination. A court must first satisfy itself that the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment").

***5** The party must have standing not only to seek the declaratory judgment action, but also to bring a claim on the underlying action. "Since it is the underlying cause of action of the defendant against the plaintiff that is actually litigated in a declaratory judgment action, a party bringing a declaratory judgment action must have been a proper party had the defendant brought suit on the underlying cause of action." 22A Am.Jur.2d, Declaratory Judgments § 218 (2011). Thus, in determining whether a party may bring a declaratory judgment action, the question becomes whether the party would have standing to bring suit on the underlying cause of action. This principle applies to contract cases. *Id.* ("[t]he rules with respect to standing in declaratory judgment actions have been applied to contract actions)." Accordingly, if a party lacks standing to pursue a contract cause of action, then that party cannot bring a declaratory judgment action regarding that contract.

Given that framework, it is necessary to examine fundamental principles of standing as they relate to contract law. "It is well settled that one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract ..." (Internal quotation marks omitted.) *Dow & Condon, Inc. v. Brookfield Development Corp.,* 266 Conn. 572, 579 (2003). With regard to third parties, "the ultimate test to be applied [in determining whether a person has a right of action as a third party beneficiary] is whether the *intent of the parties to the contract* was that the promisor should assume a direct obligation to the third party [beneficiary] and ... that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties." (Emphasis in original; internal quotation marks omitted.) *Grigerik v. Sharpe,* 247 Conn. 293, 311–12 (1998). "[A] third party seeking to enforce a contract must allege and prove that the *contracting parties intended* that the promisor should assume a direct obligation to the third party." (Emphasis in original; internal quotation marks omitted.) *Id.,* at 315. Accordingly, absent intent by

the contracting parties that one of the parties had an obligation to the third party, that third party lacks standing to enforce the contract.

In addition to there being specific standing rules to enforce a contract, cases have delineated standing principles for voiding or rescinding a contract. FN1 "The general rule is that only a party (actual or alleged) to a contract can challenge its validity ... Obviously, the fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract." (Citation omitted; internal quotation marks omitted.) *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 138, 655 N.W.2d 390 (2003). Thus, only parties to a contract have standing to void it.

> FN1. Connecticut cases have not addressed the question of whether a non-party to a contract has standing to void that contract or a reformation to that contract. Nevertheless, other jurisdictions have dealt with that issue.

*6 This rule extends to parties who want to void a reformation of a contract. As a preliminary matter, "[r]eformation is appropriate in cases of mutual mistake-that is where, in reducing to writing an agreement made or transaction entered into as intended by the parties thereto, through mistake, common to both parties, the written instrument fails to express the real agreement or transaction ... [R]eformation is also available in equity when the instrument does not express the true intent of the parties owing to mistake of one party coupled with fraud, actual or constructive, or inequitable conduct on the part of the other." (Citations omitted; internal quotation marks omitted.) *Harlach v. Metropolitan Property & Liability Ins. Co.*, 221 Conn. 185, 190-91 (1992). "[O]nly parties and their privies have standing to seek reformation of a contract." *American Teleconferencing Services, Ltd. v. Network Billing Systems, LLC*, 293 Ga.App. 772, 778, 668 S.E.2d 259 (2008). "Reformation is an action on a written contract and may be had only by the immediate parties thereto and by those standing in privity with them. Even a person with a substantial interest in the contract may not maintain an action for reformation if he is not a party or privy thereto." *Merrimack Mutual Fire Ins. Co. v. Allied Fairbanks Bank*, 678 S.W.2d 574, 577 (Tex.App.1984). "Reformation of a liability insurance policy may be sought only by the contracting parties, their assignees or the intended beneficiaries of the insurance contract." *International Service Ins. Co. v. Gonzales*, 194 Cal.App.3d 110, 118-19, 239 Cal.Rptr. 341 (1987). Thus, a non-party to a contract cannot seek reformation.

To the extent that only parties to a contract can seek a reformation, it follows that only parties to a contract can bring an action to void a reformation. "[I]f all the parties to a contract request reformation of the contract, an outsider has no right to oppose it. If a person not in privity to a contract has no right to maintain an action on that contract, he does not have the right to oppose an action by the parties on the contract." *Merrimack Mutual Fire Ins. Co. v. Allied Fairbanks Bank, supra*, 678 S.W.2d at 577; see also *Wright v. Sampson*, 830 N.E.2d 1022, 1026 (Ind.Ct.App.2005) (regarding reformation of property deeds, holding that "the general rule is that one must be a party to or in privity with a party to the deed to be entitled to reform a deed"). Therefore, if a party lacks standing to bring a cause of action as to a contract, that party further lacks the ability to raise any objection to a reformation of that contract.

The court finds that the defendant lacks standing to bring a declaratory judgment action with respect to the fire insurance policy issued by the plaintiff, as the defendant was not a party to that contract. Accordingly, the plaintiff's motion to strike the defendant's second counterclaim is granted.

Conn.Super.,2011.
Amica Mut. Ins. Co. v. Fassarella Pro Painting & Design, LLC
Not Reported in A.3d, 2011 WL 3338236 (Conn.Super.), 52 Conn. L. Rptr. 232

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--- F.Supp.2d ----, 2013 WL 1742449 (E.D.Pa.)
(Cite as: 2013 WL 1742449 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
Sharon BAKER–BEY, Plaintiff,
v.
DELTA SIGMA THETA SORORITY, INC., et al., Defendants.

Civil Case No. 12–1364.
April 23, 2013.

Background: Sorority alumnus brought negligence, breach of fiduciary duty, and defamation action against sorority. Sorority moved for summary judgment.

Holdings: The District Court, Baylson, J., held that:
(1) sorority's bylaws were not ambiguous;
(2) alumnus clearly violated bylaws;
(3) sorority followed its investigative and disciplinary procedures;
(4) sorority did not deny alumnus access to its appeals process; and
(5) sorority did not defame alumnus.

Motion granted.

West Headnotes

[1] Education 141E ⇐1197

141E Education
141EVI Colleges and Universities
141EVI(K) Students
141Ek1192 Extracurricular Activities
141Ek1197 k. Fraternities and Sororities. Most Cited Cases

Courts ordinarily will not interfere with the management and internal affairs of a sorority.

[2] Associations 41 ⇐13

41 Associations
41k13 k. Dealings Between Members and Association. Most Cited Cases

Under District of Columbia law, when a party comes into court for relief in a situation where an organization of which it is a member has violated its own rules, it is incumbent upon that member to show the existence of facts to justify the interference of the court.

[3] Education 141E ⇐1197

141E Education
141EVI Colleges and Universities
141EVI(K) Students
141Ek1192 Extracurricular Activities
141Ek1197 k. Fraternities and Sororities. Most Cited Cases

Sorority's definition of prohibited activities in its bylaws was not so vague that it did not give fair notice of what constituted prohibited conduct such that judicial intervention in sorority's disciplining of a sorority alumnus would be required; bylaws clearly prohibited unapproved contact with prospective members.

[4] Education 141E ⇐1197

141E Education
141EVI Colleges and Universities
141EVI(K) Students
141Ek1192 Extracurricular Activities
141Ek1197 k. Fraternities and Sororities. Most Cited Cases

Sorority alumnus' contact with prospective sorority member was unapproved and clearly violated sorority bylaws regarding intake conduct such that judicial interference with sorority's decision to sanction sorority member was not required to protect alumnus, where alumnus' e-mails to prospective students asking them to join her sorority "family" clearly violated express provision of bylaw prohibiting unapproved contact.

[5] Associations 41 ⚿10

41 Associations
41k6 Membership
41k10 k. Expulsion, Suspension, or Exclusion of Members. Most Cited Cases

The common law requirement of a fair procedure, in a voluntary association's disciplinary proceeding against a member, does not compel formal proceedings with all the embellishments of a court trial, nor adherence to a single mode of process; all that is required is one of a variety of procedures which afford a fair opportunity for an individual to present her position.

[6] Associations 41 ⚿10

41 Associations
41k6 Membership
41k10 k. Expulsion, Suspension, or Exclusion of Members. Most Cited Cases

Substantial fairness in a voluntary association's disciplinary proceeding against a member does not require the same type of process afforded by the civil and criminal justice systems.

[7] Education 141E ⚿1197

141E Education
141EVI Colleges and Universities
141EVI(K) Students
141Ek1192 Extracurricular Activities
141Ek1197 k. Fraternities and Sororities. Most Cited Cases

Judicial intervention was not required to protect sorority alumnus in sorority's sanctioning of alumnus for unapproved contact with a prospective member, where sorority followed an established, thorough investigative process, alumnus had sufficient access to a review process since she had the right to be interviewed at the third level of a three-tier appeals process, and sorority was not required to meet the exacting standard of having to eliminate the perception of unfairness from its sanctions process.

[8] Education 141E ⚿1197

141E Education
141EVI Colleges and Universities
141EVI(K) Students
141Ek1192 Extracurricular Activities
141Ek1197 k. Fraternities and Sororities. Most Cited Cases

Sorority did not deny alumnus access to the third tier of the sorority's appeals process for the imposition of sanctions such that judicial interference would be required, where alumnus never requested a third tiered appeal, there was no indication that sorority president understood an e-mail from the alumnus to be a request for a third and final appeal, president did not oversee appeals process, and card sent to president asking for "oversight" of the sanctions process was sent before alumnus' first appeal.

[9] Negligence 272 ⚿202

272 Negligence
272I In General
272k202 k. Elements in General. Most Cited Cases

Under Pennsylvania law, negligence claims require a showing of four elements: (1) the defendant had a duty to conform to a certain, (2) the defendant breached that duty; (3) such breach caused the injury in question; (4) and the plaintiff incurred actual loss or damage.

[10] Education 141E ⚿1197

141E Education
141EVI Colleges and Universities
141EVI(K) Students
141Ek1192 Extracurricular Activities
141Ek1197 k. Fraternities and Sororities. Most Cited Cases

Under Pennsylvania law, even assuming sorority owed a duty to its alumnus to follow its own disciplinary procedures, sorority followed those procedures such that it did not breach its duty to alumnus.

[11] Libel and Slander 237 ⚖54

237 Libel and Slander
237III Justification and Mitigation
237k54 k. Truth as Justification in General. Most Cited Cases

Under Pennsylvania law, truth is a well-established, absolute defense to defamation.

[12] Libel and Slander 237 ⚖54

237 Libel and Slander
237III Justification and Mitigation
237k54 k. Truth as Justification in General. Most Cited Cases

Sorority did not defame sorority alumnus by including her name on a publicized list of sorority members and alumnae that had been suspended, where alumnus had, in fact, been suspended for engaging in unapproved contact with prospective members.

Jacquie L. Jones, Jones & Associates, PC, Media, PA, for Plaintiff.

Damian Jackson, Reilly Janiczek & McDevitt, PC, Philadelphia, PA, for Defendants.

MEMORANDUM RE: DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

BAYLSON, District Judge.

I. Introduction

*1 On March 16, 2012, Plaintiff Sharon Baker–Bey filed her Complaint (ECF 1) claiming common law defamation, breach of fiduciary duty, and negligence against Defendant Delta Sigma Theta Sorority, Inc. ("Delta") and fourteen Delta officials, including the National President (collectively, "Defendants"). On October 10, 2012, Defendants filed a Motion for Summary Judgment (the "Motion") (ECF 16). On November 13, 2012, Plaintiff filed her Response (ECF 17). Defendants filed a Reply (ECF 21) on December 5, 2012. Plaintiff filed a Sur–Response (ECF 22) on February 12, 2013, to which Defendants did not reply. [FN1]

For the reasons below, Defendants' Motion is GRANTED.

II. Undisputed Facts [FN2]

Delta is a sorority that was incorporated in 1913 under the laws of the District of Columbia. (Defs.' Statement of Undisputed Facts ("Def.'s SUF") ¶ 1.) Plaintiff became a member of Delta in 1978 and is now an alumnae member. (*Id.* ¶ 2.) In accordance with its rules and regulations, Delta suspended Plaintiff's membership and fined her $500 after determining that she had violated the sorority's anti-hazing policy. (*Id.* ¶ 15; Def.'s Mot., Ex. 15.)

According to Delta's Bylaws, members "may be placed on probation, suspended ... expelled from the Sorority, [or] fined" for violating the sorority's "rules or regulations." (Bylaws, art. XII, sec. 2.A., Defs.' Mot., Ex. 14.) Delta maintains a zero-tolerance policy regarding all matters related to hazing of prospective members. (Defs.' SUF ¶ 3.) In Keeping with this policy, Delta:

1. Prohibits alumnae members from participating in its college membership intake process, unless they have been trained and specifically selected to do so (*Id.* ¶ 4.);

2. Prohibits members from "visit[ing] collegiate or alumnae chapters and participat[ing] in underground or illegal Membership Intake" (Bylaws art. XII, sec. 2.B.); and

3. Maintains a detailed list of "Improper or Unacceptable Conduct," section 5.A. of which prohibits "Pre-initiation or illegal Membership Intake and/or underground activities. ***Underground*** activities is [sic] anything in addition to or contrary to approved activities." (Code of Conduct, Defs.' Mot., Ex. 10 (emphasis in the original).)

The list of Improper or Unacceptable Conduct also sets forth sanctions and fines for violations—a first violation of the prohibition on underground activities carries a three-year suspension and a $500 fine. (*Id.*)

In the spring of 2009, Delta's chapter at Pennsylvania State University's University Park campus ("Penn State") was initiating new members. (Defs.' SUF ¶ ¶ 5, 7.) On April 11, 2009, the Chapter Primary Advisor discovered Plaintiff eavesdropping on a private ceremony for new Delta initiates. (*Id.* ¶ 8.) Plaintiff expressed a desire to speak with the new initiates, and the Advisor informed her that doing so is prohibited by Delta's rules and regulations. (*Id.*) The Advisor asked Plaintiff to leave, which she did. (*Id.*)

***2** The Advisor subsequently reported the incident to Delta's Regional Director for the Eastern Region. (*Id.* ¶ 9.) The Regional Director issued a letter to Plaintiff notifying her that, pending the completion of an investigation, she must cease and desist from all activities related to her then alleged violation of "5A. Pre-initiation or illegal Membership Intake and/or underground activities." (Defs.' Mot., Ex. 8; Defs.' SUF ¶ 10.) Delta's investigation, which included interviewing Plaintiff, revealed that Plaintiff admitted both to her presence at Penn State and that she was seeking to make contact with women participating in Delta's membership intake process, though Plaintiff maintained that she had done nothing wrong. (Defs.' SUF ¶ 11; Pl.'s Statement of Undisputed Facts ("Pl.'s SUF") ¶ 11.) During the investigation, Plaintiff produced emails establishing that she had been in contact with a prospective member of Delta regarding the membership intake process. (Defs.' SUF ¶ 13; Pl.'s SUF ¶ 13.) Plaintiff's emails also referenced her "family," and stated that she "pray[s]" that the prospective member will "join [her] chapter and sorority and hopefully, [sic] my family!" (Defs.' Mot., Ex. 9.) One of the purposes of a "family" is to provide unapproved assistance to potential members during the intake process. (*Id.*, Ex. 4.)

The Regional Director concluded that Plaintiff had violated section 5.A. of Delta's list of Improper or Unacceptable Conduct. (*Id.*, Ex. 9.) Delta's National President approved the Regional Director's determination. (*Id.*, Ex. 11.) Delta then suspended and fined Plaintiff, and posted these sanctions on its website as part of its list of suspended members. (Defs.' SUF ¶ 16.) The posting included Plaintiff's name, the chapter to which she belonged, the length of her suspension, and the amount of her fine. (Defs.' Mot., Ex. 15.) Plaintiff learned of her suspension from a fellow member who saw Plaintiff's name of the suspended list. (Pl.'s SUF ¶ 17.) [FN3]

On August 25, 2009, Plaintiff sent an email to Delta, carbon copying the National President, expressing frustration and disappointment with Delta's disciplinary process. (Defs.' Mot., Ex. 19.) In addition to being upset about the manner in which she learned of the disciplinary action taken against her, Plaintiff alleged denial of due process, defamation, breach of contract, negligence, and discrimination.

Plaintiff then availed herself of Delta's disciplinary action appeals process. (Defs.' SUF ¶ 20.) The appeals process consists of three levels. (Chapter Mgmt. Handbook: Appeals Process ("Appeals Process"), Defs.' Mot., Ex. 16.) Delta received Plaintiff's first-level appeal in September 2009, and Delta affirmed its initial decision in October 2009. (Defs.' Mot., Ex. 17.) Plaintiff then appealed to the second level in December 2009. (*Id.*, Ex. 18.)

On December 30, 2009, before disposition of her second-level appeal, Plaintiff sent an email to Delta's "Member Relations Specialist: Internal Policies and Procedures" requesting that her second-level Appeal Disposition Form contain specific information about the conduct for which she had been disciplined, including the names of the people she allegedly hazed, and the places and dates of her underground activities. (Pl.'s Sur-Resp., Ex. A.) Plaintiff's email was forwarded to the National First Vice President, who responded to Plaintiff on January 6, 2010, "assur[ing] [Plaintiff] that the appeal process ... will be adhered to, as per the Sorority's guidelines." (*Id.*)

***3** Sometime in January 2010, Delta denied

Plaintiff's second-level appeal, affirming its decision to discipline her. (*Id.*, Ex. 18; Pl.'s Sur–Resp., Ex. A.) The exact date of the disposition of Plaintiff's second-level appeal is not clear. Delta's Appeal Disposition Form shows a "Date Decision Was Forwarded" of January 20, 2010, but Plaintiff stated in an email to Delta that she received a "form Appeal Disposition letter" on February 25, 2010, which was dated January 7, 2010. (Defs.' Mot., Ex. 18; Pl.'s Sur–Resp., Ex. A.)

On March 10, 2010, Plaintiff emailed the National President, forwarding to her Plaintiff's December 30, 2009 email regarding the information she wanted Delta to include in her second-level Appeal Disposition Form, as well as the National First Vice President's January 6, 2010 response to that email. (Pl.'s Sur–Resp., Ex. A.) In addition to forwarding these prior emails, Plaintiff wrote a message to the National President, which began "[t]his is a request for your oversight of my situation" and reminded the National President of a July 2009 card in which Plaintiff "ask[ed] for [her] help." Plaintiff went on to complain that her first—and second-level appeals had not been fair. Among other things, she asserted that Delta had not followed its "guidelines" by failing to provide her with "an explanation at the fact finding level" and "the facts regarding the allegations and findings." The message concluded with a threat of legal action if Delta did not provide a *"meaningful* " response by April 23, 2010. (emphasis in the original).

The National President responded to Plaintiff's March 10, 2010 email the same day. (*Id.*, Ex. B.) The National President informed Plaintiff that she had been "attempting to obtain any additional information that I could for you to be sure you had all the facts concerning your appeal and the process. However, since you have engaged the services of an attorney, I need to forward this to the appropriate persons(s)."

There is no record of Plaintiff replying to the National President's email, or of any other subsequent communication between Plaintiff and Delta. Plaintiff did not request a third-level appeal.[FN4] (Defs.' SUF ¶ 21.)

III. Legal Standard

A district court should grant a motion for summary judgment if the movant can show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual dispute is "material" if it "might affect the outcome of the suit under the governing law." *Id.*

Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by showing the district court that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The party opposing summary judgment must rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. 2548. The district court may grant summary judgment "[i]f the evidence is merely colorable, or is not significantly probative." *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505 (citations omitted). Under Rule 56, the Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in favor of the non-movant. *Id.* at 255, 106 S.Ct. 2505 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)).

IV. Discussion

***4** Plaintiff claims that Defendants are liable to her for breach of fiduciary duty, negligence, and defamation, because they improperly disciplined her. Plaintiff's breach of fiduciary duty claim is really a request that the Court interfere with Delta's decision to discipline her.[FN5] For the reasons be-

low, the Court finds no basis for such interference. Furthermore, having determined that the decision should stand, the Court finds that Plaintiff's claims for negligence and defamation must fail, because she cannot point to any duty that Defendants breached, and Delta's publication of her discipline was irrefutably true.

A. Applicable Law

Because the Court sits in Pennsylvania, it must apply Pennsylvania's conflict of law principles. *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 179 n. 10 (3d Cir.2005). Regarding Plaintiff's breach of fiduciary duty claim, Pennsylvania has a statute adopting the "internal affairs doctrine," which dictates "that courts look to the law of the state of incorporation to resolve issues involving the internal affairs of a corporation." *Id.* (citing 15 Pa. Cons.Stat. § 4145(a); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–93, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987); *First Nat'l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 621, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983); *In re Estate of Hall*, 731 A.2d 617, 622 (Pa.Super.Ct.1999)). Accordingly, the Court will apply District of Columbia law to Plaintiff's breach of fiduciary duty claim. *Id.* (affirming application of the "internal affairs doctrine" to a breach of fiduciary duty claim).

The parties have not pointed to, and the Court is not aware of, any "relevant differences between" Pennsylvania law and District of Columbia law regarding defamation and negligence "that would affect the disposition of the litigation." *Taylor v. Mooney Aircraft Corp.*, 265 Fed.Appx. 87, 90 (3d Cir.2008). Accordingly, the Court will " 'refer to [Pennsylvania and District of Columbia] law interchangeably' " when discussing Plaintiff's defamation and negligence claims. *Id.* (quoting *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 229 (3d Cir.2007)).

B. Plaintiff Provided Insufficient Evidence to Warrant Judicial Interference with Delta's Decision to Discipline Her.

[1][2] Pursuant to established District of Columbia law, " 'courts ordinarily will not interfere with the management and internal affairs of a [sorority].' " *Jolevare v. Alpha Kappa Alpha Sorority, Inc.*, 521 F.Supp.2d 1, 9 (D.D.C.2007) (quoting *Levant v. Whitley*, 755 A.2d 1036, 1043 (D.C.2000) (quoting *Avin v. Verta*, 106 A.2d 145, 147 (D.C.1954) and citing *NAACP v. Golding*, 342 Md. 663, 679 A.2d 554, 558 (1996) ("as a general rule, courts will not interfere in the internal affairs of a voluntary membership organization"))); *accord Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 730 (D.C.2011). However, the District of Columbia Court of Appeals has suggested that such interference may be appropriate if the sorority "failed to follow its own rules," *Daley*, 26 A.3d at 730–31, or to protect sorority members from fundamentally unfair procedures and officials acting arbitrarily, fraudulently, or in bad faith, *Levant*, 755 A.2d at 1043 n. 11, 1044–46. " '[W]hen a party comes into court for relief [in such situations] it is incumbent upon [her] to show the existence of facts to justify the interference of the court.' " *Jolevare*, 521 F.Supp.2d at 9 (alterations in the original) (quoting *United States ex rel. De Yturbide v. Metro. Club*, No. 652, 1897 WL 17732, at *13 (D.C. June 9, 1897)); *accord Blodgett v. Univ. Club*, 930 A.2d 210, 230 (D.C.2007).

***5** Plaintiff contends that judicial interference is warranted in this case because:

1. Delta's definition of prohibited membership intake activities is too vague to give fair notice of what constitutes prohibited conduct;

2. Delta's determination that her conduct was sanctionable is so clearly erroneous that it evinces a failure to properly carry out the required investigation;

3. The disciplinary process is inherently fundamentally unfair; and

4. Delta improperly prevented her from participating fully in the appeals process.

While Plaintiff's complaints, if true, may have warranted this Court's interference in Delta's internal affairs, none of them withstand scrutiny.

1. Delta's Definition of Prohibited Membership Intake Activities Is clear and Unambiguous.

[3] Delta's Code of Conduct defines prohibited membership intake activities as *"anything* that is in addition to or contrary to approved activities." (Defs.' Mot., Ex. 10 (emphasis added)). While this definition is broad, it is not vague: Delta prohibits its members from any and all interaction with prospective members regarding intake that has not been approved by the sorority.

Plaintiff also argues that Delta failed to provide a clear definition of what constitutes "approved" activities. Absent a showing that Delta promulgated a relevant, ambiguous description of what constitutes an approved intake activity, there can be no confusion as to whether Plaintiff's conduct was "approved." Plaintiff has made no such showing. FN6

2. Delta's Determination that Plaintiff Violated Its Prohibition on Unapproved Membership Intake Conduct Was Not Erroneous.

[4] Plaintiff argues that her conduct is not sanctionable because Delta's Bylaws prohibit only "visit[ing] collegiate or alumnae chapters *and* participat [ing] in underground or illegal Membership Intake." (Bylaws, art. XII, sec. 2.B. (emphasis added).) According to Plaintiff, this means that Delta may sanction her only if she actually engaged in prohibited conduct. (Pl.'s Sur–Resp. at 4.) This reading of Delta's Bylaws would make Plaintiff's conduct at Penn State innocent, because she never took part in the intake activity on which she was eavesdropping, and other Delta members prevented her from making any contact whatsoever with prospective members. (*Id.*)

Plaintiff also maintains that the emails she provided to Delta during its investigation exonerate her, because they establish that she was unfamiliar with the particulars of Delta's then ongoing intake process. According to Plaintiff, this proves that she was not involved in intake activities of any kind. (*Id.*)

Plaintiff's position ignores the provisions of Delta's Bylaws and Code of Conduct that expressly prohibit members from having any unapproved contact with prospective members regarding the intake process. FN7 Plaintiff also appears to fundamentally misunderstand the reason Delta sanctioned her. Delta did not sanction her for participating in the intake activities at Penn State, which were apparently approved activities, FN8 or for her participation in any similar activities. Rather, Delta sanctioned Plaintiff because of the emails she produced, FN9 which:

> ***6** 1. Established that she had made unapproved contact with a prospective member about Delta's intake process; and
>
> 2. Referenced her participation in a "family"—one of the purposes of a "family" is to provide unapproved assistance to prospective members. FN10

3. Delta's Disciplinary Process Is Not Inherently Unfair.

[5][6] It is well established that " '[t]he common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial, nor adherence to a single mode of process.' " *Jolevare,* 521 F.Supp.2d at 10–11 (quoting *Blodgett,* 930 A.2d at 230). All that is required is " 'one of a variety of procedures which afford a fair opportunity for [an individual] to present [her] position.' " *Id.* at 11 (alterations in the original) (quoting *Blodgett,* 930 A.2d at 230). Some courts examine whether the procedures are " 'substantial[ly] fair[ ].' ... '[providing] at least rudimentary procedural protections, such as notice and an opportunity to be heard.' " *Id.* (quoting *Levant,* 755 A.2d at 1045–46 and *Golding,* 679 A.2d at 561); *accord Blodgett,* 930 A.2d at 227. Substantial fairness does not, however, require "the same type of process afforded by our civil and criminal justice

systems." *Jolevare*, 521 F.Supp.2d at 11 (citing *NCAA v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988)); *accord Blodgett*, 930 A.2d at 227.

[7] Delta disciplines its members only after conducting an investigation according to its Chapter Management Handbook, Investigative Procedure for Disciplinary Actions.[FN11] (Defs.' Mot., Ex. 13.) Members facing disciplinary action must receive written charges setting forth material information about the allegations against them, such as dates, times, names, and places. (*Id.* ¶ 2.) Investigations proceed according to the "standardized Investigative Procedure and Profile," (*Id.* ¶ 1) which requires, among other things, a statement of the alleged violative conduct, identification of the sources of the complaint about the conduct, statements from the individuals under investigation, and any other relevant statements and documents. Based on the procedures as applied to Plaintiff, Delta provides members not only with an opportunity to make statements, but also to submit other evidence.

If members are dissatisfied with Delta's decision to discipline them, they may avail themselves of a three-level appeals process. At the first two levels, appellants are not entitled to be heard.[FN12] However, at the third level, the five-member appeals panel *"shall ... interview the appellant,* witnesses and others whose testimony they feel is vital to the case." (Appeals Process, Procedures, Level III, para. A. (emphasis added).) The final decision is made by "vote or resolution by the Grand Chapter," (*Id.* paras. A., B.) which involves hundreds of members. (Walker Decl. ¶ 10, Dec. 5, 2012, Defs.' Reply, Ex. 1.)

Plaintiff contends that the process is inherently unfair because appellants have no opportunity to be heard during the appeals process, and the National President can unfairly influence the outcome of appeals, because she has the power to appoint the hearing officers for the second—and third-level appeals and occupies a position of general influence within Delta.

*7 Plaintiff's first contention is simply wrong. While appellants are not entitled to be heard at the first two levels of appeal, they must be interviewed again at the third level.

Plaintiff's second contention is equally unavailing, though for a different reason. Plaintiff has provided no authority for the proposition that a private organization's disciplinary process must eliminate even the perception of unfairness, and the Court can divine no justification for imposing a standard of impartiality that is analogous to the appearance of bias standard for the recusal of federal judges. *See Blodgett*, 930 A.2d at 228 ("Members of a voluntary association cannot always expect to find, and more importantly are not entitled to, the type of neutral and disinterested arbiters provided for in judicial proceedings."); *Karim-Panahi v. U.S. Congress, Senate and House of Representatives*, 105 Fed.Appx. 270 (D.C.Cir.2004) ("a judge must recuse herself only if there 'is a showing of an *appearance of bias or prejudice* sufficient to permit the average citizen reasonably to question a judge's impartiality' " (emphasis added) (quoting *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C.Cir.1981))).[FN13]

Delta's disciplinary procedures provide members with substantial procedural safeguards, including notice of the charges against them, standardized investigations according to written procedures, more than one opportunity to present their cases, and the right to organization-wide review of their cases. Accordingly, Plaintiff has failed to show deficiencies in Delta's procedures that warrant judicial interference. *See Jolevare*, 521 F.Supp.2d at 11 (suggesting approval of a similar disciplinary process); *Blodgett*, 930 A.2d at 230 ("[W]e will not attempt to fix a rigid procedure that must invariably be observed. In some cases, for example, it may be adequate to provide an opportunity for a mere written response; in other circumstances, a personal appearance by the adversely affected individual and a more extensive hearing [may be] required." (second

alteration in the original; quotations and citations omitted)).

4. Delta Did Not Refuse Plaintiff Her Third–Level Appeal.[FN14]

[8] Plaintiff contends that Delta refused her a third-level appeal because she retained counsel. Plaintiff's contention is wholly unsupported by the record. To the contrary, the record establishes that Plaintiff never requested a third-level appeal and, therefore, voluntarily relinquished that right.

Plaintiff relies on three emails to establish that she requested and was denied a third-level appeal. The first was Plaintiff's August 25, 2009 to Delta, carbon copying the National President. (Defs.' Mot., Ex. 19.) Delta received Plaintiff's *first-level appeal* in September 2009, and the Appeal Disposition Form shows a "Date Decision Was Forwarded" of October 31, 2009. (*Id.*, Ex. 17.) Therefore, Plaintiff's email in August 2009 cannot have been a request for a third-level appeal.

***8** Plaintiff also claims that she requested a third-level appeal in her March 10, 2010 email to the National President, and that the National President's response denied her request. (Pl.'s Sur–Resp., Exs. A, B.) However, neither email explicitly references a third-level appeal. Furthermore, Plaintiff's email cannot reasonably be read as a request for a third-level appeal, and the National President's response cannot reasonably be read as a denial of such a request.

The subject line of Plaintiff's March 10, 2010 email to the National President was "FWD: APPEAL--Level 2 Request for Review." (*Id.*, Ex. A.) The body of the email began with Plaintiff "request[ing] ... your [the National President's] oversight or review of my situation" and refers the National President to a "card" Plaintiff had sent her "in July 2009, asking for [her] help." Plaintiff also reminded the National President that her card had expressed "hope[that] the beauracracy [sic] had not overwhelmed the Grand Chapter of our Sorority, and that you would have time for the serious individual matters of the membership."

Plaintiff's request for the National President's "oversight or review" cannot reasonably be read as a request for a third-level appeal, because the National President does not oversee or review third-level appeals. Rather, the National President has to wait until "the next National Convention," at which time she appoints five hearing officers to manage the appeal. (Appeals Process, Procedures, Level III, para. A.) The final decision on Plaintiff's third-level appeal would have been made by "vote or resolution by the Grand Chapter," (*id.* para. B.) which involves hundreds of members. (Walker Decl. ¶ 10.)

Additionally, Plaintiff's July 2009 card was sent before Delta even finalized its decision to discipline her,[FN15] and, therefore, it would be unreasonable to read Plaintiff's renewal of that entreaty as a request for a third-level appeal.

Neither can anything in the balance of Plaintiff's March 10, 2010 email reasonably be read as a request for a third-level appeal, because Plaintiff merely:

1. Elaborated her reasons for believing that her first- and second-level appeals were unfair;

2. Threatened to refer the matter to an attorney unless she received *"meaningful* communication from the Sorority by April 23, 2010," which "indicat [es] a willingness to, indeed 'adhere to the sorority's guidelines' and to show some level of sisterhood and fairness[ ] in this matter" (emphasis in the original); and

3. Provided the National President with the email chain from late December 2009 and early January 2010 regarding Plaintiff's request that Delta include certain information in her second-level Appeal Disposition Form.

The "meaningful" response Plaintiff demanded by April 23, 2010 must have been something other than a third-level appeal, because the date of that appeal would have been dictated by the date of

Delta's next National Convention. (Appeals Process, Procedures, Level III.)

***9** Regarding the National President's response, it does not even intimate that she understood Plaintiff to be requesting a third-level appeal. To the contrary, she responded as if Plaintiff had requested her personal assistance regarding perceived issues with the fairness of the appeals process—"I was attempting to obtain any additional information that I could for you to be sure that you had all the facts concerning your appeal and the process." (Pl.'s Sur–Resp., Ex. B.) The National President's decision that she could no longer assist Plaintiff after Plaintiff threatened legal action cannot reasonably be read as a refusal to provide Plaintiff with a third-level appeal.

5. Summary of the Court's Findings

By way of summary, the Court finds the following undisputed facts:

1. Delta's definition of prohibited conduct regarding membership intake—anything not approved by Delta—is clear;

2. Delta's determination that Plaintiff engaged in prohibited conduct—by both exchanging emails with a prospective member regarding the intake process and participating in a "family"—was not erroneous; and

3. Plaintiff failed to show deficiencies in Delta's disciplinary procedures—inherent or as applied to her case—that warrant judicial intervention.

Under these circumstances, there is no basis for the Court to interfere with Delta's decision to sanction Plaintiff and, therefore, her breach of fiduciary duty claim fails.

C. Plaintiff Provided No Evidence that Defendants Were Negligent.

[9][10] Negligence claims "require[ ] a showing of four elements":

1. "[T]he defendant had a duty to conform to a certain standard of conduct;"

2. "[T]he defendant breached that duty;"

3. "[S]uch breach caused the injury in question; and"

4. "[T]he plaintiff incurred actual loss or damage."

Pyeritz v. Commonwealth of Pennsylvania, 613 Pa. 80, 32 A.3d 687, 692 (2011) (citing *Krentz v. Consol. Rail Corp.*, 589 Pa. 576, 910 A.2d 20, 27 (2006)). Plaintiff asserts that "Delta has a general duty of care to [its] members to not place them at risk of harm, both mental and physical," and that "Delta breached [this] duty ... by failing to follow through with their own internal procedures ... and by prematurely posting Plaintiff's suspension on their website," i.e. before she had completed the appeals process. (Pl.'s Sur–Resp. at 10.)

Even assuming the existence of such a duty, Plaintiff cannot establish that Defendants breached it. As discussed above, Delta did, in fact, follow its procedures when disciplining Plaintiff, and Plaintiff provided no basis for judicial interference in that process. Furthermore, while Plaintiff may believe that Delta should allow its members to complete the appeals process before posting suspensions to its website, she provided nothing but her personal preference as the basis for such a requirement,[FN16] and it would be unreasonable for the Court to impose such a requirement in this case, because Delta disciplines its members only after investigations that provide them with an opportunity to present their cases.

D. Plaintiff Cannot Establish that Defendants Defamed Her Because Their Publication Was True.

***10** [11] Truth is a well-established, "absolute defense to defamation." *Knit With v. Knitting Fever, Inc.*, Civil Action Nos. 08–4221, 08–4775, 2012 WL 3235108, at *7 (E.D.Pa. Aug. 8, 2012) (Buckwalter, J.) (citing *Fanelle v. LoJack Corp.*, 79

F.Supp.2d 558, 562 (E.D.Pa.2000) (Reed, J.) (citing *Schnabel v. Meredith*, 378 Pa. 609, 107 A.2d 860 (1954))); *accord Edmond v. Am. Educ. Servs.*, 823 F.Supp.2d 28, 35 (D.D.C.2011), *aff'd*, 483 Fed.Appx. 576 (D.C.Cir.2012).

[12] The truth of the publication in this case, that Delta suspended and fined Plaintiff, cannot be gainsaid. Plaintiff does not contest that she engaged in the conduct for which Delta disciplined her, Plaintiff's discipline was carried out in accordance with Delta's procedures, and Plaintiff failed to show any basis for judicial interference in that process.

V. Conclusion

Defendants' Motion for Summary Judgment is GRANTED. An appropriate order follows.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

AND NOW, this 22nd day of April 2013, upon consideration of Defendants' Motion for Summary Judgment (ECF 16, 20), Plaintiff's Response (ECF 17, 24), Defendants' Reply (ECF 21), and Plaintiff's Sur–Reponse (ECF 22), and for the reasons stated in a Memorandum of Law to follow on this day, it is hereby ORDERED as follows:

1. Defendant's Motion for Summary Judgment (ECF 16) is GRANTED.

2. Plaintiff's Motion that Summary Judgment Be Denied (ECF 17) is DENIED.

3. Plaintiff's Complaint is DISMISSED.

4. Judgment is ENTERED in favor of Defendant and against Plaintiff.

5. The Clerk shall close this case.

FN1. Defendants did not file their Statement of Undisputed Facts (ECF 20) until November 26, 2012. Plaintiff did not file her Statement of Undisputed Facts (ECF 24) until March 14, 2013, after the Court ordered her to do so (ECF 23.)

FN2. The material facts in this case are entirely undisputed. Plaintiff admitted all but four of the twenty-one paragraphs in Defendants Statement of Undisputed Facts. The facts Plaintiff denies are immaterial to the disposition of Defendants' Motion.

FN3. Defendants contend that they notified Plaintiff of her suspension. (Defs.' SUF ¶ 17.) However, the evidence they cite does not support their contention. The Court adopts Plaintiff's account of how she learned of her suspension, because it is immaterial to the disposition of

FN4. Plaintiff contends that her March 10, 2010 email to the National President was a request for a third-level appeal, and the National President's response was a denial of that request. For the reasons set forth in Section IV.B.4, *infra*, Plaintiff's proposed interpretation of these emails is unreasonable.

FN5. For reasons explained in below, District of Columbia law applies to Plaintiff's breach of fiduciary duty claim. In order to prove her claim under District of Columbia law, Plaintiff must establish, among other things, "a breach of the duties associated with the fiduciary relationship." *Armenian Genocide Museum and Memorial, Inc. v. Cafesjian Family Found. Inc.*, 607 F.Supp.2d 185, 190–91 (D.D.C.2009) (citing *Paul v. Judicial Watch, Inc.*, 543 F.Supp.2d 1, 5–6 (D.D.C.2008)). Plaintiff claims that Defendants breached their fiduciary duty failing to abide by Delta's disciplinary procedures. (Compl. ¶¶ 29–30 ("Defendants ... had a duty to ... abide by [Delta's] Constitution and Bylaw and other governing documents.... [D]efendants breached [this] duty....").) Therefore, her breach of fiduciary duty claim is, at bot-

tom, a request for judicial oversight of those procedures and their application to her case.

FN6. In her Sur–Response, Plaintiff asserts, without any supporting evidence, that because of her former role as co-chairperson of the Scholarship Committee of Delta's Philadelphia Alumnae Chapter, she was "assigned several scholar students to mentor," one of whom was the prospective member Plaintiff had emailed regarding the membership intake process. (Pl.'s Sur–Resp. at 1.) Even assuming these assertions are true, they could not create a relevant, ambiguous description of what constitutes an approved intake activity. Whatever it means for Plaintiff to have been "assigned ... students to mentor," she never argued that her status as a mentor included responsibilities related to Delta's intake process.

FN7. The Bylaws permit sanctions for "violation of [Delta's] rules or regulations," and the Code of Conduct expressly states that it is a "[m]embership [i]ntake [v]iolation[ ]" for "any" member to engage in "anything" that is not a Delta-approved activity. (Bylaws, art. XII, sec. 2.A. 1.; Defs.' Mot., Ex. 10.)

FN8. On the day that Plaintiff was at Penn State, Delta was conducting "Jewel Day activities." (Incident Summary Report, Background, para. 2, Defs.' Mot., Ex. 4.)

FN9. Delta's "Incident Summary Report," which reviewed the investigation of Plaintiff's conduct, concluded that Plaintiff should be sanctioned because her emails to a prospective member violated "the sorority's code of conduct." (Defs.' Mot., Ex. 4.) The report did discuss Plaintiff's conduct at Penn State, but the "SUMMARY/CONCLUSIONS" section does not refer to the Penn Sate conduct as a basis for Plaintiff's Code of Conduct violation, it refers only to Plaintiff's emails. (*Id.*)

> Even assuming that Delta sanctioned Plaintiff, in part, for her activities at Penn State, the Court could not deem that determination erroneous. Plaintiff admitted that she had been attempting to engage in prohibited contact with prospective members—though Plaintiff believed that such conduct was innocent. It would be unreasonable for the Court to conclude that because Delta thwarted Plaintiff's attempted transgression, there was no basis for disciplining her.

FN10. In Plaintiff's Response and Sur–Response, she argued that "Defendants erroneously relied on their own interpretation of Plaintiff's emails when conducting their investigation." (Pl.'s Resp. at 4; Pl.'s Sur–Resp. at 4.) However, Plaintiff never specifically denied having participated in a "family," despite Defendants' arguing in their Motion that Plaintiff's use of the word "family" and related language is "typical [ ]" of "members participating in underground activities." (Defs.' Mot. at 7.) Even if Delta's understanding of Plaintiff's emails is incorrect on this point, Plaintiff's unapproved contact with a prospective member regarding Delta's intake process would still amount to a violation of Delta's Code of Conduct.

FN11. In her Complaint, Plaintiff made the general allegation that Delta "applied faulty investigative procedures ... and failed to comply with [its] policies and/or requirements throughout the entire investigative and disciplinary process as applied to Plaintiff." (*Id.* ¶ 26.) She also alleged that she requested, but did not receive, "copies of ... forms detailing [her] alleged

violation," including "a copy of all allegations and the date ... [Delta] received the reported allegations," as well as "copies of the forms [Delta's] investigators made [her] complete that related to the matter." (*Id.* ¶¶ 12–13.) However, neither Plaintiff's Response nor Sur–Response argued that Delta's decision to discipline her should be rejected because Delta failed to abide by its investigation procedures.

FN12. Under certain circumstances, appellants may request in-person hearings for their second-level appeals and have fellow members act as representatives. (*Id.*)

FN13. Absent such a principle, Plaintiff must provide more than her uncorroborated conjecture that the National President skewed the appeals process against her because of her August 25, 2009 email complaining about Delta's disciplinary process and criticizing, among others, the National President. *See Blodgett,* 930 A.2d at 227–29; *Waris v. HCR Manor Care,* Civil Action No. 07–3344, 2009 WL 330990, at *1 n. 2 (E.D.Pa. Feb. 10, 2009) (Baylson, J.), *aff'd,* 365 Fed.Appx. 402 (3d Cir.2010) (" 'courts do not weigh evidence or determine credibility questions at the summary judgment stage....' " [Nevertheless a] party opposing summary judgment must do more than just 'rest upon mere allegations, general denials, or ... vague statements' " (quoting *Hill v. City of Scranton,* 411 F.3d 118, 131 (3d Cir.2005); *Big Apple BMW, Inc. v. BMW of N. Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir.1992); and *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.,* 311 F.3d 226, 233 (3d Cir.2002) ("When opposing a motion for summary judgment, the party bearing the burden of persuasion in the litigation is obligated to identify those facts of record which would contradict the facts identified by the movant." (quotation omitted))).

FN14. In her Complaint, Plaintiff also alleged that she was never "provide[d] ... written reasons for [her disciplinary action], in violation of Article XII Section 5 of Delta['s] ... Constitution and Bylaws." (Compl. ¶ 27.) However, Plaintiff did not argue that this failure was material, or even relevant, to the outcome of her appeals, and the Court will not treat what apparently amounts to a technical mistake on Delta's part as a basis for judicial interference in its internal disciplinary process.

FN15. Delta's Disciplinary Action Form for Plaintiff shows that the National President did not approve Plaintiff's suspension until August 8, 2009. (Defs.' Mot., Ex. 11.)

FN16. Delta's disciplinary procedures specifically provide that during the appeals process, "the decision made/action taken by elected/appointed officials of Delta ... against the appellant will stand." (Appeals Process, Policy, para. 3.)

E.D.Pa.,2013.
Baker-Bey v. Delta Sigma Theta Sorority, Inc.
--- F.Supp.2d ----, 2013 WL 1742449 (E.D.Pa.)

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Not Reported in F.Supp.2d, 2006 WL 1312471 (E.D.Ky.)
(Cite as: 2006 WL 1312471 (E.D.Ky.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Kentucky,
Lexington.
Claude L. BASSETT, Plaintiff,
v.
The NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.

Civil Action No. 5:04-425-JMH.
May 11, 2006.

Gregory A. Keyser, Rasheed A. Simmonds, Robert R. Furnier, Suraj J. Bhakta, Furnier & Flagel, LLC, Cincinnati, OH, Joseph Edward Conley, Jr., Buechel & Conley, Crestview Hills, KY, for Plaintiff.

Edward H. Stopher, Matthew Bowman Gay, Scott Allen Davidson, Boehl, Stopher & Graves, Louisville, KY, Douglas L. McSwain, Sarah Charles Wright, Stephen Lewis Barker, Kevin G. Henry, Sturgill, Turner, Barker & Moloney PLLC, Lexington, KY, for Defendants.

MEMORANDUM OPINION & ORDER

JOSEPH M. HOOD, District Judge.

*1 Before the Court are Defendant National Collegiate Athletic Association's ("NCAA") motions for summary judgment [Record No. 95] and for a protective order [Record No. 86]. Plaintiff Claude Bassett has responded to these motions [Record Nos. 106 & 92, respectively]. The NCAA has replied to Plaintiff's response to its summary judgment motion [Record No. 110]. Also pending before the Court is Plaintiff's motion to strike certain exhibits submitted by the NCAA in support of its dispositive motion [Record No. 111], to which the NCAA has responded [Record No. 116]. The Court being sufficiently advised, this matter is ripe for review.

BACKGROUND

On November 19, 2000, Plaintiff resigned from his position as assistant coach of the University of Kentucky's ("UK") football team. Earlier that day, UK's Athletic Director, Larry Ivy, confronted Plaintiff with allegations of impropriety. At the end of their meeting, Ivy presented Plaintiff with a choice of two options: (1) resign and, in exchange, no further action would be taken on the allegations made against him, or (2) face an investigation, potential criminal prosecution, and sure dismissal. Plaintiff chose to resign and now claims that if he had known UK would initiate an inquiry into his conduct, he never would have made that choice. FN1

FN1. The Court's Memorandum Opinions and Orders of May 3, 2005, and April 18, 2006, provide more detailed summaries of the facts surrounding Plaintiff's resignation and UK' s investigation into his actions.

On January 4 and 5, 2001, UK Compliance Officer Sandy Bell, UK General Counsel Dick Plymale, Southeastern Conference ("SEC") Commissioner Roy Kramer, and SEC investigator Bill Seviers interviewed Plaintiff as part of UK's internal investigation of NCAA rules violations. UK submitted the results of this investigation to the NCAA enforcement staff on February 28, 2001. NCAA enforcement staff issued letters of official inquiry to Plaintiff, UK, and former head football coach Hal Mumme. In response to the allegations contained in the official inquiry, Plaintiff's counsel sent a letter to the NCAA on October 12, 2001. Plaintiff explained that he would be unable to attend the hearing on the infractions and that the letter would be "his only response to the allegations." In the letter, Plaintiff stated that he declined to be interviewed by the NCAA because the NCAA would not agree to limit the scope of the interview to pending allegations and would not agree to a telephone interview. The NCAA released its Infractions Report on January 31, 2002. The NCAA found that due to

Plaintiff's involvement in certain violations of NCAA rules, if he seeks employment at any NCAA member school between January 31, 2002 and January 30, 2010, both he and the member institution shall be requested to appear before the NCAA's infractions committee to consider whether the institution should be subject to the NCAA's show cause procedures. According to Plaintiff, this show cause order "render[ed him] unemployable as a college coach even beyond the ban." (Compl.¶ 1.)

On September 17, 2004, Plaintiff filed a complaint against the NCAA, the SEC, and the University of Kentucky Athletic Association ("UKAA") alleging antitrust violations, fraud, civil conspiracy, and tortious interference with prospective contractual relations. On May 3, 2005, the Court dismissed all of Plaintiff's claims against the SEC and held that only two of his claims survived the UKAA's and the NCAA's motions to dismiss: Plaintiff's fraud claim against the UKAA and Plaintiff's tortious interference with prospective contractual relations claim against the NCAA.[FN2] Recently, on April 18, 2006, the Court granted the UKAA's motion for summary judgment on Plaintiff's fraud claim.

> FN2. Dismissal of Plaintiff's antitrust claims eliminated federal question jurisdiction under 28 U.S.C. § 1331. Because complete diversity exists between Plaintiff, a citizen and resident of Texas, and Defendant, a citizen of Indiana for diversity purposes, and the amount in controversy requirement has been met, jurisdiction is proper under 28 U.S.C § 1332.

STANDARD OF REVIEW

*2 Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden is met by showing the court that there is an absence of evidence on a material fact on which the nonmoving party has the ultimate burden of proof at trial. *Id.* at 325. A fact is material if its resolution will affect the outcome of the lawsuit. *Waters v. City of Morristown*, 242 F.3d 353, 358 (6th Cir.2001); *see Pharakhone v. Nissan N. Am., Inc.*, 324 F.3d 405, 407 (6th Cir.2003) ("If, under the governing law, the outcome would be the same regardless of how a factual dispute is resolved, the dispute is no bar to summary judgment."). Once the moving party satisfies its burden, the burden then shifts to the nonmoving party to "come forward with some probative evidence to support its claim." *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir.1994). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

When determining the merits of a summary judgment motion, "the evidence, all facts, and any inferences that may be drawn from the facts must be viewed in the light most favorable to the nonmoving party." *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622 (6th Cir.2000); *see Multimedia 2000, Inc. v. Attard*, 374 F.3d 377, 380 (6th Cir.2004). The Court must not weigh the evidence, but must decide whether there are genuine issues for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Id.* at 252. Although the disputed issue need not be "resolved conclusively in favor of the nonmoving party," Plaintiff, as the nonmoving party in this case, "must present significant probative evidence that makes it necessary to resolve the parties' differing versions of the dispute at trial." *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir.1987) (citation omitted). In this

diversity case, the Court applies state substantive law to Plaintiff's tortious interference with prospective contractual relations claim. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

DISCUSSION

A. The NCAA's Motion for a Protective Order

The NCAA has moved the Court for a protective order to block Plaintiff's deposition of its president, Myles Brand. The NCAA states that "Mr. Brand did not become President of the NCAA until January 1, 2003," after the NCAA had completed its investigation into Plaintiff's conduct, after the NCAA had issued its Public Infractions Report, and "after the Infractions Appeals Committee upheld the show cause penalty." According to the NCAA, Mr. Brand "had no involvement whatsoever in any aspect of the investigation of UK and Bassett." In his response, and for the first time in this litigation, Plaintiff claims that there is a "connection" between criminal prosecutions in Memphis, Tennessee, which were carried out during Mr. Brand's tenure, and Plaintiff's NCAA enforcement proceedings.

*3 Plaintiff concedes that "NCAA executives normally do not participate in the rules enforcement process," and he deposed five NCAA representatives-James Elworth, David Price, Thomas Yeager, Josephine Potuto, and Jerry Parkinson-who actually participated in the rules enforcement process that led to his show cause order. Given that Mr. Brand is a high level executive who did not participate in the investigation of Plaintiff's conduct or in the issuance of the penalty against him, it does not appear that the deposition of Mr. Brand is reasonably calculated to lead to the discovery of admissible evidence as to Plaintiff's remaining claim, tortious interference with prospective contractual relations for imposing a show cause order on January 31, 2002-nearly one year before Mr. Brand began his tenure as NCAA president.[FN3] As the Court will grant the NCAA's motion for summary judgment, the pending motion for a protective order is denied as moot.

FN3. *See Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir.1989) (deferring to the district court's "broad discretion" to manage its case and finding that the court did not abuse its discretion by granting a motion for a protective order based, in part, on the moving party's representation that the proposed deponent "had no knowledge as to facts pertinent to plaintiffs' action").

B. The NCAA's Motion for Summary Judgment

Plaintiff contends that the NCAA has intentionally and improperly interfered with his prospective contractual relations by issuing an eight-year show cause order which effectively forbids its members to hire him. According to Plaintiff, UK's investigation and subsequent self-report to the NCAA was based upon evidence gathered through deceit. Because Plaintiff was not afforded due process during UK' s investigation, the NCAA' s reliance upon UK's self-report led to an unjust punishment.

Kentucky has adopted the tort of tortious interference with prospective contractual relations from Restatement (Second) of Torts § 766B, which provides:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Restatement (Second) of Torts § 766B (1979); *see Nat'l Collegiate Athletic Ass'n v. Hornung*, 754 S.W.2d 855, 857 (Ky.1988). "[A] party may not recover under [this tort] in the absence of proof that

the opposing party 'improperly' interfered with his prospective contractual relation." *Hornung*, 754 S.W.2d at 858. To determine whether an actor's interference is improper, Kentucky courts employ several factors:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

***4** *E. Ky. Res. v. Arnett*, 892 S.W.2d 617, 619 (Ky.Ct.App.1995) (quoting Restatement (Second) of Torts § 767 (1979)); *see also Cullen v. S.E. Coal Co.*, 685 S.W.2d 187, 190 (Ky.Ct.App.1983) (considering several criteria, including the actor's motive, "the interest that it is trying to advance or protect, the nature of its conduct, the means used to interfere, and whether or not the interference was based upon malice," before reaching its conclusion on improper interference). The Hornung court held that in order to prevail, "a party seeking recovery must show malice or some significantly wrongful conduct" and noted that "malice may be inferred in an interference action by proof of lack of justification ." *Hornung*, 754 S.W.2d at 859.

The NCAA issued a show cause order that Plaintiff claims effectively prohibits its members from employing him as a college football coach. To resolve this motion for summary judgment, the Court must decide if a genuine issue of material fact exists over whether the NCAA acted improperly in issuing this show cause order. Again, Plaintiff's primary argument rests upon his theory that because the NCAA relied upon UK's tainted investigation and report and failed to listen to the recordings of the January 2001 UK/SEC interview, the NCAA improperly issued a show cause order.

Several courts have recognized the NCAA's role in college athletics.[FN4] The NCAA argues that its issuance of a show cause order was entirely proper because, in order to uphold the purposes of its association, it must be allowed to enforce its rules by penalizing violators. Both UK and Plaintiff had agreed to abide by the NCAA' s regulations and to report any possible violations to the NCAA. Defending its decision, the NCAA explains that Plaintiff's admissions that he violated numerous NCAA rules, not any impropriety on the part of its association, led to the issuance of the show cause order. The NCAA notes that Plaintiff refused to attend the hearing on his infractions and refused to submit to an interview unless the NCAA agreed to his conditions. Plaintiff responded to the NCAA's official inquiry in an October 12, 2001, letter in which he admitted many of the violations levied against him. In his November 15, 2001, letter supplementing that response, Plaintiff claimed that UK's investigation of Plaintiff was carried out without due process and he requested that the NCAA take into account the manner in which the evidence of his misconduct was obtained when making its determination. Fully aware of Plaintiff's objections to UK's investigation, the NCAA issued its show cause order. The NCAA defends this order and contends that its determinations as to Plaintiff's misconduct are entitled to "a presumption of correctness-particularly when they stem from conceded violations of NCAA regulations." *Lasege*, 53 S.W.3d at 85. Stating that Plaintiff has not presented any evidence that the NCAA's actions were improper or unjustified, the NCAA asks that summary judgment be granted in its favor.

> FN4. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 183 (1988) ("[The NCAA has] adopted rules, which it calls 'legislation,' governing the conduct of the intercollegiate athletic programs of its members. This NCAA legislation applies to a variety of issues, such as academic standards for eligibility, admissions, financial aid, and the recruiting of student athletes." (citation omitted)); *Nat'l Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77,

85 (Ky.2001) ("The NCAA unquestionably has an interest in enforcing its regulations and preserving the amateur nature of intercollegiate athletics."); *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 85 (Tex.1999) ("The NCAA is a voluntary, unincorporated association of colleges and universities created for the stated purpose of preserving the proper balance between athletics and scholarship in intercollegiate sports.").

***5** In his response, Plaintiff chastises the NCAA for structuring its enforcement program to "encourage schools to push all blame upon [their] employees for rules violations" and for allowing UK to "railroad the coach through its self-investigation." Plaintiff claims that because the NCAA rewards institutions that voluntarily disclose violations, an institution could improve its chances of receiving a lesser penalty if it blames the violations on "a clandestine, single employee." By not listening to the tapes of his January 2001 interview, Plaintiff argues, the NCAA only heard UK's explanation of the interview and not Plaintiff's. Acknowledging that his letters to the NCAA apprised the association of UK's mistreatment of him, Plaintiff faults the NCAA because it "could have taken steps to rectify the harm done by UK's investigation." Plaintiff refers the Court to his earlier response to the UKAA's motion for summary judgment for "details of the lies and other deceptions" perpetrated by UK in its investigation.

Viewing the evidence presented and drawing all reasonable inferences in favor of Plaintiff, the Court cannot conclude that he has raised a genuine issue of material fact as to the impropriety of the NCAA' s action. To thoroughly assess the NCAA' s conduct, the Court will consider several of the factors listed by Restatement (Second) of Torts § 767 and cited with approval by Kentucky courts.

1. The nature of the actor's conduct. It is undisputed that the NCAA has the right to enforce its rules among its member institutions. Plaintiff agreed to comply with NCAA rules when he signed his yearly employment contract. In his deposition, David Price, Vice President of the NCAA's Enforcement Services, explained why the NCAA requires its member institutions to self-report rules infractions: "[W]e want an environment where the institutions try to do the right thing.... I believe the institutions are very concerned about their integrity, and this is one area where their integrity can be tested." (Price Dep. Jan. 18, 2006, 22:12-21.) Josephine Potuto, Professor of Law at the University of Nebraska College of Law and a member of the NCAA' s Committee on Infractions, conceding that there is no specific NCAA bylaw that requires university officials to be evenhanded and fair in the way they conduct investigations, explained that the NCAA's "cooperative principle" in Bylaw 19 requires member institutions and staff members to cooperate with the NCAA and to provide information to the Committee. (Potuto Dep. Jan. 19, 2006, 27:17-23.) Professor Potuto stated that although the Committee is concerned about whether member institutions are truthful in their self-reports, self-policing is an important part of the enforcement process because the NCAA "is a private association created and comprised of the institutions, and the institutions bear the first and probably the heaviest burden to get things right on campus and do things appropriately." *(Id.* 31:10-13.) Knowing Plaintiff's concerns about the way in which UK investigated his actions and sharing those concerns about truthfulness in self-policing, the NCAA nonetheless chose to rely upon the findings in UK' s report over Plaintiff's stated objections. Plaintiff ignores the fact that the NCAA conducted its own interviews as part of its own investigation into Plaintiff's and UK's conduct, which resulted in penalties for UK as well. Plaintiff does not provide any evidence that the NCAA acted improperly by following its established procedure of relying upon a member institution to self-report violations of NCAA rules.

***6** *2. The actor's motive.* The Texas Supreme Court offered this description of what motivates the NCAA's actions in general: "Among other things,

the NCAA promulgates rules and regulations to prevent any member institution from gaining an unfair competitive advantage in an athletic program." Jones, 1 S.W.3d at 85. The NCAA issued the show cause order to penalize Plaintiff for violating its rules. In fact, Plaintiff's October 12, 2001, letter to the NCAA reveals that he knew why the NCAA was taking action against him: "[Plaintiff] understands and accepts that the Committee on Infractions has no choice but to punish him for his actions." Plaintiff has offered no evidence that the NCAA's decision was motivated by an illicit or improper motive.

3. The interests of the other with which the actor's conduct interferes. Plaintiff claims that the show cause order forbids NCAA member institutions from hiring him. Although Plaintiff has stated several times that he knew his career in college football had ended when he publicized his activities, the Court acknowledges the severity of the show cause order. The Court also notes, however, Plaintiff's efforts to defend his interests. Well aware of the sanctions that the NCAA could impose upon him, Plaintiff admits that he chose to protect his interests by lying to UK and SEC investigators, admitting to several violations, and denying others. When given the opportunity to argue in favor of his interests through an NCAA hearing and an interview, however, Plaintiff chose not to participate. Plaintiff's failure to take advantage of these opportunities weighs against him.

4. The interests sought to be advanced by the actor. The NCAA is a voluntary association of over 1200 public and private colleges and universities that enacts legislation to govern college athletics. As noted, the NCAA enforces its rules to advance its legitimate interest in regulating athletics at its member institutions. The show cause order serves to penalize Plaintiff for his rules infractions by making it more difficult, if not impossible according to Plaintiff, to obtain employment at a member institution. Such an order also advances the NCAA's interests by serving as a deterrent to other individuals who may consider violating NCAA regulations.

5. The social interests in protecting the freedom of action of the actor and the contractual interests of the other. One of the NCAA' s stated purposes evidences society's interest in allowing it to enforce its rules: "A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." (NCAA Constitution, Art. 1.3.) The NCAA's bylaws on recruiting inducements, academic fraud, and ethical conduct, for example, clearly reflect society's general interests in promoting fairness, honesty, and morality. The Court cannot envision how society would be served by allowing an individual who admittedly violated numerous NCAA rules to re-enter the college coaching field.

*7 *6. The relations between the parties.* As a seasoned college coach, Plaintiff knew of UK's obligation and his own obligation to self-report violations to the NCAA and knew that the NCAA could issue penalties in response to those violations. Plaintiff agreed to abide by the NCAA's rules as an assistant coach at UK. His employment contract clearly states that he could have been terminated for "violations of NCAA and/or SEC rules." In his deposition, Plaintiff testified that he attended programs that apprised him of rule changes. In sum, Plaintiff, with his years of experience coaching at two NCAA member institutions, was intimately aware of the NCAA's rules and the consequences of breaking them.

Taking all of these factors into account, the Court finds that Plaintiff has not shown that the NCAA acted improperly when it issued its show cause order. After Plaintiff conceded that he violated the NCAA's rules on recruiting inducements, impermissible tryouts, falsification of recruiting records, and unethical conduct, the NCAA was justi-

fied in enforcing those rules through a show cause order. Plaintiff had agreed to comply with those rules, and the NCAA exercised its right to enforce its rules by sanctioning him. Throughout this litigation, Plaintiff has blamed others for his misfortune and never acknowledged how evidence of his own impropriety, including his admissions that he violated NCAA regulations, influenced the NCAA's decision. To prevail, Plaintiff must show that the NCAA's actions were improper; Plaintiff has failed to do so and the NCAA has offered substantial evidence that it was justified in issuing the show cause order.

C. Plaintiff's Motion to Strike

Finally, Plaintiff requests that the Court strike Exhibits C-D and F-J to the NCAA's motion for summary judgment.[FN5] Essentially, Plaintiff's motion asks the Court to ignore these exhibits when deciding the NCAA' s dispositive motion because they do not meet the requirements of Federal Rule of Civil Procedure 56(e). Plaintiff claims that these exhibits are unauthenticated and replete with hearsay. *See* Fed.R.Civ.P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence...."); *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 927 (6th Cir.1999) ("Hearsay evidence may not be considered on summary judgment."). In response, the NCAA contends that the Exhibits could be authenticated at trial by UK, SEC, and NCAA witnesses and that these exhibits would be admissible under the business records exception, Fed.R.Evid. 803(6).

> FN5. Plaintiff objects to the following exhibits: Exhibit C, University of Kentucky Internal Investigation and Self-Report to NCAA; Exhibit D, Appendix, Case Chronology from NCAA's Public Infractions Report; Exhibit F, January 31, 2002 NCAA Public Infractions Report; Exhibit G, September 1, 2002, Report of the NCAA Division I Infractions Appeals Committee; Exhibit H, Transcript of August 17, 2002 Claude Bassett Appeal Hearing before the NCAA Infractions Appeals Committee; Exhibit I, Seven (7) CDs containing a recording of the January 4-5, 2001 Interview of Claude Bassett; and Exhibit J, June 24, 2002 Response to Appeal of Claude Bassett on behalf of the NCAA Division I Committee on Infractions.

But the Court need not address the parties' dispute over the exhibits because even if the Court were to ignore these exhibits, the NCAA would still meet its burden of establishing that there is an absence of evidence on a material fact on which Plaintiff has the ultimate burden of proof at trial. In his deposition testimony and his letter in response to the NCAA' s official inquiry, exhibits to which Plaintiff offers no objection, Plaintiff admitted to violating several NCAA rules while serving as UK's assistant football coach. Plaintiff's burden in responding to the NCAA's summary judgment motion is to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial. As detailed in Section B, *supra,* however, Plaintiff has failed to meet that burden. Excluding the disputed exhibits would have no effect on the Court's conclusion; therefore, the Court will deny Plaintiff's motion to strike as moot.

CONCLUSION

***8** Accordingly, and for the foregoing reasons, **IT IS ORDERED:**

(1) That the NCAA's motion for summary judgment [Record No. 95] be, and the same hereby is, **GRANTED;**

(2) That the NCAA's motion for a protective order [Record No. 86] be, and the same hereby is, **DENIED AS MOOT;** and

(3) That Plaintiff's motion to strike [Record No. 111] be, and the same hereby is, **DENIED AS MOOT.**

E.D.Ky.,2006.
Bassett v. National Collegiate Athletic Ass'n
Not Reported in F.Supp.2d, 2006 WL 1312471
(E.D.Ky.)

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Not Reported in F.Supp., 1994 WL 444725 (E.D.Pa.)
(Cite as: 1994 WL 444725 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.

BROOKS POWER SYSTEMS, INC.
v.
ZIFF COMMUNICATIONS, INC.

No. CIV.A. 93-3954.
Aug. 17, 1994.

MEMORANDUM AND ORDER

SHAPIRO.

***1** Plaintiff, a seller of surge suppressors [FN1], brought this action for commercial disparagement against defendant, publisher of *PC Magazine*. Jurisdiction is based on diversity of citizenship. Before the court is defendant's Motion for Summary Judgment.

I. Background

This action arises from an article in the April 13, 1993 issue of *PC Magazine*, "Cutting Surges Down to Size" ("the article".) *PC Magazine* contacted surge suppressor vendors and invited them to participate in a testing project. The article evaluated surge suppressors manufactured by thirty-two vendors; some were recommended and others were criticized. Plaintiff supplied a Brooks Power Systems Surge Stopper BN6-6 ("BPS BN6-6") for inclusion in the project; the article rated the BPS BN6-6 as "marginal." (Exh. D35).

A separate section of the article, entitled "What the Numbers Mean," explained the test procedures and interpreted the numerical data. The last paragraph of this section discussed the Perma Power RS-610, a product competitive with the BPS BN6-6. It stated that the Perma Power unit met the testing qualifications, but was rated as "failed" because of poor construction. Explaining why construction was considered poor, the authors stated:

> [i]n such cases, the line voltage would temporarily be present on the outer case (a distinct hazard to the user if the unit is not properly grounded) until the device disabled itself.... The Brooks Electronics Surge Reactor BN6-6 [FN2] and the Brooks Power Systems Surge Stopper BPS-BN6-6 are also victims of this kind of poor construction.

Plaintiff claims defendant is liable for commercial disparagement because of this article, particularly the statement regarding poor construction.[FN3]

II. Discussion

Summary judgment may be granted only if there exists "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The NON-moving party must provide evidence of record beyond the pleadings to establish an issue of material fact on "an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Unless evidence of record would permit the court as fact-finder to reach a verdict for the non-moving party, no trial issue exists. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must construe the facts and inferences therefrom in the light most favorable to the non-moving party. *See Pollock v. AT & T*, 794 F.2d 860, 864 (3d Cir.1986).

A. Elements of Commercial Disparagement

This action is for commercial disparagement, not defamation. Plaintiff initially claimed that defendant was liable for defamation, not disparagement. After defendant moved to dismiss, plaintiff moved to amend the complaint in part to add a claim for commercial disparagement. By Order of November 23, 1993, the court dismissed plaintiff's defamation claim but permitted plaintiff to proceed with the commercial disparagement claim.

***2** Defamation and commercial disparagement

are distinct torts, although both involve a false pejorative statement.

> The distinction between actions for defamation and disparagement turns on the harm toward which each is directed. An action for commercial disparagement is meant to compensate a vendor for pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability, while defamation is meant protect [sic] an entity's interest in character and reputation.

U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 924 (3d Cir.1990) (allegedly defamatory statements made in context of comparative advertising campaign were commercial speech to which First Amendment's actual malice standard did not apply) (citing with approval *Menefee v. Columbia Broadcasting System, Inc.*, 329 A.2d 216 (Pa.1974), holding disparagement action, unlike defamation, survived plaintiff's death).

In *Menefee*, the Pennsylvania Supreme Court went to great lengths to distinguish the tort of commercial disparagement from the cause of action for defamation:

> One of the most important purposes for which liability for the publication of matter derogatory to another's personal reputation is imposed is to enable the person defamed to force his accuser into open court so that the accusation, if untrue, may be branded as false by the verdict of a jury. The action for disparagement has no such purpose and cannot be used merely to vindicate one's title to or the quality of one's possessions.

Id. at 220 (quoting Restatement of Torts introductory note to Chapter 28).

A claim for commercial disparagement protects economic interests related to the marketability of goods; defamation involves the reputation of persons, not products. *See Zerpol Corp. v. DMP Corp.*, 561 F.Supp. 404, 408 (E.D.Pa.1983). A publication directed against the goods or product of a corporate vendor or manufacturer does not constitute defamation of the vendor "unless by fair construction and without the aid of extrinsic evidence it imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct in its business in relation to said goods or product." *U.S. Healthcare*, at 924 (quoting *National Ref. Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763, 771 (8th Cir.), *cert. denied*, 275 U.S. 570 (1927)).

The statement challenged by plaintiff did not impute fraud, deceit, dishonesty or reprehensible conduct to plaintiff; the statement referred to the construction of a particular product, not plaintiff's general reputation. For this reason, plaintiff's claim is for commercial disparagement, not defamation.

Under Pennsylvania law [FN4], the elements of commercial disparagement are: (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity (actual malice). *See Zerpol Corp. v. DMP Corp.*, 561 F.Supp. 404, 409 (E.D.Pa.1983); *Menefee v. Columbia Broadcasting System, Inc.*, 329 A.2d 216 (Pa.1974); *see also* Restatement (Second) of Torts, § 623A.

***3** Defendant argues that plaintiff cannot establish two elements of its *prima facie* case: pecuniary loss and actual malice.

B. Pecuniary Loss

Plaintiff must establish *direct* pecuniary loss resulting from the disparagement of the particular product. *See Menefee*, at 220 (quoting Restatement of Torts, § 632); general loss of reputation or character is insufficient for recovery. *Id.; see also U.S. Healthcare*, 898 F.2d at 924. Because commercial disparagement involves the "near impossible burden of proving special damages, plaintiffs have frequently attempted to frame their complaints to

sound in defamation rather than disparagement." *Zerpol Corp. v. DMP Corp.*, 561 F.Supp. 404 (E.D.Pa.1983); *see also Testing Systems, Inc. v. Magnaflux Corp.*, 251 F.Supp. 286 (E.D.Pa.1966). However, this effort must be resisted as inconsistent with Pennsylvania law. Plaintiff may establish direct pecuniary loss either by a general diminution in sales or specific lost sales. *See generally Menefee*, at 220–21; *see also* Restatement (Second) of Torts, § 633.

1. General Diminution in Sales

Plaintiffs claims a general diminution in sales because of the article. In *Menefee*, the Pennsylvania Supreme Court adopted the Restatement of Torts, § 633, comment f:

> The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser. In such case the impossibility of showing the identity of the particular person or persons who were dissuaded from purchasing the thing by the publication of the disparaging matter makes evidence of the owner's inability to avail himself of a ready market for the thing in question sufficient proof of the loss and often of its extent.... Thus, a tradesman whose goods are denounced as adulterated can prove not only the existence of the pecuniary loss necessary to recovery but also its extent by showing that after the dissemination of the disparaging matter the sales of his goods have fallen off *to an extent explainable only as the result of the defamatory publication.* ...

Id., at 221 (citations omitted) (emphasis added).

Under *Menefee*, plaintiff may prove pecuniary loss through a general diminution in sales of the product actually caused by its disparagement. But plaintiff admits and its financial records confirm that both general sales and sales of the BPS BN6–6 have *increased* substantially since the publication of the article in suit.

Because *total* sales volume and sales of the BPS BN6–6 increased after the article was published, plaintiff claims a general diminution in sales to "end users," the persons or businesses ultimately using the surge suppressor. This subset excludes: government customers; purchasers who primarily resell to government customers; purchasers who resell using a private label; and large commercial accounts. Plaintiff argues that government customers do not rely on evaluations in *PC Magazine* and are more concerned with cost than quality so government customers and purchasers who primarily resell to government customers are properly excluded from the commercial end user market. Plaintiff also argues that its large commercial accounts investigate products independently and do not rely on publications like *PC Magazine*, so that only small and mid-sized end users were influenced by the article. Plaintiff defends its market segment approach with an analogy to antitrust law. For purpose of this motion only, defendant accepts plaintiff's market approach.

***4** Plaintiff argues that total sales of Brooks Power Systems products to end user commercial outlets diminished from 1992 to 1993. Even within that market subset, plaintiff's sales records do not establish that BPS BN6–6 sales decreased; some of the end user consumer outlets included in plaintiff's calculations did not purchase BN units in either 1992 or 1993, and others actually increased their purchases of BN units from 1992 to 1993. (Exh. D88–D90). The BN product line includes other surge suppressors with differing features, such as a different number of outlets or special capacity for facsimile machines. (Brooks deposition, at 62). Other product lines include: a special shipboard surge suppressor for the United States Navy; the AT series, which is more expensive than the BN series and includes an extra component; and the recently-introduced HD series, selling for slightly less than the BPS BN6–6. (Brooks deposition, at 79, 111–12; Hart deposition, at 105–6). Neither the

BPS BN6–6 nor the BN product line generally accounts for the largest segment of plaintiff's sales. The VCN product line, the least expensive, is responsible for the greatest volume of plaintiff's sales. (Brooks deposition, at 113–14).

A disparaging statement causes financial loss if its publication is a substantial factor causing a third person not to buy "the thing disparaged." *See Menefee,* at 220. The article did not discuss any of plaintiff's products except the BPS BN6–6. Plaintiff cannot rely on overall sales of all its products or even sales of the BN product line; plaintiff must establish that it suffered pecuniary loss relating to the BPS BN6–6 surge suppressor as a result of the disparaging statement. Commercial disparagement, unlike defamation, requires stringent proof of special damages; plaintiff must prove that the attack on the quality of the BPS BN6–6 reduced its marketability, not that lost sales occasioned by a tarnished reputation resulted in general damages. *See generally U.S. Healthcare,* at 924.

Even if plaintiff established diminished BPS BN6–6 sales to the commercial end user market, that would not suffice unless the sales diminution is explainable only by the disparaging statement. *Menefee,* at 221. Plaintiff has not produced any evidence of a causal connection between the article and the decrease in sales. Nor has plaintiff eliminated other possible causes of the decline, including changes or fluctuations in the market. Roger Hart, a Brooks Power sales representative, testified that the surge suppressor market changed a great deal "in the last two years," a period commencing well before the publication of the article. Mr. Hart has discussed with his customers the general decline in the surge suppressor market, but he has no explanation for this decline. (Hart deposition, at 62–66).

An overall diminution of Brooks Power sales to the commercial end user market could have many causes other than the *PC Magazine* article. Plaintiff has offered no evidence, expert or otherwise, of the condition of the surge suppressor market in general to rule out other possible causes of a decline in plaintiff's sales. It is possible that any decline in plaintiff's sales was occasioned by a general decline in the surge suppressor market. Because surge suppressors can be used with more than one computer, the surge suppressor market might become saturated if new computer purchasers already own a surge suppressor. Without any evidence of causation, plaintiff cannot rely only on an unexplained general diminution in sales to establish pecuniary loss.

2. Specific Lost Sales

***5** Plaintiff has identified a number of customers to prove loss of specific sales [FN5]:

a) Coast Computer, allegedly a customer whose purchases decreased because of the *PC Magazine* article. Plaintiff's sales representative, Roger Hart, called John Jansen at Coast Computer about the article. Mr. Hart cannot recall whether Mr. Jansen was aware of the article prior to his telephone call. (Hart deposition, at 165). According to plaintiff's sales records, Coast Computer purchased fewer BN units in 1993 than in 1992; all BN units were purchased in the first four months of 1993. But plaintiff has produced no evidence linking reduced sales to Coast Computer to the article. Mr. Hart testified that Coast Computer purchased mostly VCN units, a different product line than BN units; Mr. Hart also testified that sales from Coast Computer began to decline in 1992, before the article was published. (Hart deposition, at 178–80). The 1993 decline in sales before and after the article and general conversations about it initiated by the plaintiff's own representative do not establish direct pecuniary loss occasioned by the article.

b) Sacramento Computer, a distributor of plaintiff's products. Mr. Hart spoke with Todd Wagner, his contact at Sacramento, regarding the article. Mr. Wagner was concerned that the article might affect sales, but was not concerned about the quality of the product. Plaintiff claims that Sacramento purchased fewer BN units in 1993 than in 1992.

Mr. Wagner told Mr. Hart that Fry Electronics stopped ordering plaintiff's products from Sacramento at some time because "volume wasn't moving." (Hart deposition, at 184–85). Mr. Wagner did not state why volume wasn't moving, and Mr. Hart didn't contact anyone at Fry Electronics to ascertain the reason. This is not competent evidence that any decline in sales to Sacramento Computer or Fry Electronics before or after the article was caused by or related to the article.

c) Joseph Mori, owner of Quipps Distributing. Approximately 20–25% of Mr. Mori's sales are to commercial end users. In the summer of 1993, Mr. Mori observed that several commercial customers stopped purchasing plaintiff's surge suppressors and purchased competing products. Mr. Mori spoke with two of these customers who informed him that they had read the *PC Magazine* article and would not purchase a product presenting a safety hazard. On the basis of these conversations, Mr. Mori believes other customers stopped buying plaintiff's products from him because of the article. (Mori Declaration). There is no averment that Mr. Mori stopped buying the BPS BN6–6 from Brooks Power because of the article or for any other reason.

Mr. Mori's declaration is not competent evidence of pecuniary loss. Mr. Mori's declaration does not refer specifically to the allegedly disparaged product, the BPS BN6–6. General allegations about lost sales cannot establish pecuniary loss. Mr. Mori's averment of unidentified customers' statements is also inadmissible hearsay, not competent evidence creating a disputed factual issue. *See Armbruster, et al. v. Unisys Corp.*, No. 93–1333, slip op. at 20 n. 16, 1994 U.S.App. LEXIS 19883 (3d Cir. August 1, 1994).

*6 d) Copy Professionals, a company that sells and installs photocopy and facsimile machines. Joseph Brooks, president of Brooks Power Systems, spoke with Gary Ralph of Copy Professionals in February and March, 1993 to solicit its business. Mr. Brooks said Mr. Ralph stated that Copy Professionals then used a competing company's surge suppressors, but would consider switching to plaintiff's products after disposing of backlogged inventory. Mr. Brooks avers that Mr. Ralph told him in August, 1993 that he would not purchase plaintiff's products, because the BN product was poorly constructed and a safety hazard. (Brooks declaration, ¶ 14).

Mr. Brooks' averment regarding comments by Mr. Ralph is also inadmissible hearsay. This evidence regarding the statements of Mr. Ralph to Mr. Brooks, even if admissible, would not establish pecuniary loss. Mr. Ralph said Copy Professionals would consider plaintiff's products in the future, not that it intended to purchase the BPS BN6–6. Even if the declaration had been attested to by Mr. Ralph, it does not appear that any sales to Copy Professionals were "reasonably certain." *See* Restatement (Second) of Torts, § 633, comment d.

e) Edward G. Beckhorn of Marco Island, Florida. Mr. Brooks avers that Mr. Beckhorn informed him in October, 1993 that he had purchased a BPS BN unit but was concerned about it because of the article. (Brooks declaration, ¶ 15). Mr. Brooks' declaration regarding Mr. Beckhorn's statement is inadmissible hearsay. In addition, Mr. Beckhorn's statement does not establish pecuniary loss, because Mr. Beckhorn had already purchased the product and there is no evidence that he sought a refund or might have made additional purchases.

f) Donald Clay Outlaw, owner of PSP Distributors. PSP Distributors sells electric power and conditioning equipment; it markets surge suppressors by featuring the products of one manufacturer or supplier but uses the products of other manufacturers to fill gaps in its surge suppressor line or provide for customers with specific needs. Mr. Outlaw started to look for a new featured supplier of surge suppressors in the spring of 1993. After discussions with Mr. Brooks in July, 1993, Mr. Outlaw agreed to feature all models of plaintiff's surge suppressors. PSP announced Brooks Power Systems as its featured surge suppressor supplier in August, 1993, several months after publication of the article

in suit. PSP's initial purchase of Brooks Power Systems products in the fall of 1993 was approximately $6,500. Mr. Outlaw planned to order additional surge suppressors on an as-needed basis. (Outlaw declaration, ¶¶ 1–9.)

PSP's sales of surge suppressors declined after it featured plaintiff's products. Mr. Outlaw asked dealers why they refused to purchase Brooks Power surge suppressors; approximately one hundred dealers told him that they knew Brooks Power surge suppressors were unsafe because of the *PC Magazine* article. Mr. Outlaw had difficulty selling Brooks Power products but sold his initial inventory in approximately nine months. (Outlaw declaration, ¶¶ 11–12.) PSP now features a different manufacturer's surge suppressor; since replacing Brooks Power as the featured supplier, PSP's sales have risen. (Outlaw declaration, ¶ 13.)

*7 Mr. Outlaw's declaration does not constitute competent evidence of pecuniary loss. There is no evidence that PSP purchased the BPS BN6–6 or even the BN product line. PSP made its $6,500 purchase of plaintiff's products after the article was published and there is no evidence it failed to pay for them; the initial purchase caused plaintiff no loss. PSP does not quantify any reasonably certain additional purchase of Brooks Power products that it might have made but for the article so there is no evidence of direct pecuniary loss. Mr. Outlaw's statement regarding his unidentified customers' reasons for not purchasing unidentified products of plaintiff is also inadmissible hearsay.

g) CopiFax, a photocopy company.[FN6] Michael Santarpio, a family acquaintance of Mr. Brooks, owns a 10% interest in CopiFax. At a trade show in 1993, Mr. Santarpio discussed the possibility of Mr. Brooks' supplying surge suppressors for copy machines. They agreed that Mr. Santarpio would use his ownership position with CopiFax "to promote a business arrangement between Mr. Brooks' company and CopiFax whereby Mr. Brooks would manufacture and sell, and CopiFax would buy, surge suppressors for photocopy equipment." Subsequently, Mr. Santarpio read the article; he did not follow through on his discussions with Mr. Brooks because of the article. (Santarpio declaration.)

Santarpio's declaration is not competent evidence of pecuniary loss. There is no evidence that Mr. Santarpio, a mere 10% owner, had authority to bind CopiFax. Even if Mr. Santarpio could bind CopiFax, plaintiff has not established that sales of the disparaged product to CopiFax were reasonably certain. The declaration also does not mention the BPS BN6–6 or the BN product line. Even if it did, in the absence of an established business relationship at the time of the article, this claim of lost future sales would be speculative.

Plaintiff also claims the cost of rehabilitating the company from the damage done by the alleged disparagement. Plaintiff includes in this category the cost of this litigation and a planned $420,000 promotional campaign. In support of its claim for rehabilitative damages, plaintiff relies on the Restatement (Second) of Torts, § 633(b). The Restatement provides that pecuniary loss includes, "the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement." Rehabilitation costs alone are not sufficient to establish pecuniary loss, because unless other pecuniary loss was occasioned by the article, the "rehabilitation" was not reasonably necessary. The need for rehabilitation derives from direct pecuniary loss; plaintiff cannot establish its *prima facie* case through expenditures on rehabilitation. To hold otherwise would permit a plaintiff to establish direct pecuniary loss simply by spending money on "rehabilitation" even if no direct damage had been done by the allegedly disparaging statement. The Third Circuit decision that a plaintiff prevailing by default judgment was entitled to recover mitigation costs was under the New Jersey law of defamation. *See Comdyne I, Inc. v. Corbin*, 908 F.2d 1142 (3d Cir.1990). Under Pennsylvania law applicable here, plaintiff cannot recover the

costs of rehabilitation as mitigation unless it can establish the direct pecuniary loss element of commercial disparagement.

***8** Because credibility determinations are not appropriate at the summary judgment stage, the court has taken care to avoid making credibility determinations in the disposition of this motion. *See Armbruster, et al. v. Unisys Corp.*, No. 93–1333, slip op. at 28, n. 21, 1994 U.S.App. LEXIS 19883 (3d Cir. August 1, 1994).

In summary, it is questionable whether plaintiff's sales of the allegedly disparaged product actually increased rather than decreased, but even accepting plaintiff's market segment approach and proffered hearsay evidence, there is no evidence of pecuniary loss specific to the allegedly disparaged product and no evidence of causation.

Plaintiff has not established pecuniary loss, an element of its *prima facie* case, so defendant's motion for summary judgment must be granted.

B. Actual Malice

Plaintiff can establish actual malice by proving defendant either knew a statement was false or published it with reckless disregard as to its falsity. To show reckless disregard, defendant must have entertained serious doubts as to the truth of the statement. *See Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 n. 30 (1984); *St. Amant v. Thompson*, 390 U.S. 727 (1968). The standard is subjective, not objective. Whether a statement has been published with reckless disregard of falsity depends on the state of mind of the publisher. It "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *See Curran v. Philadelphia Newspapers, Inc.*, 439 A.2d 652 (Pa.1981) (quoting *St. Amant*). Plaintiff has produced no direct evidence that defendant either knew the challenged statement was false or had serious doubts regarding its truth.

Plaintiff lately claims that defendant was aware of critical flaws in its testing procedures and had a hostile attitude toward plaintiff's products. [FN7] The court does not decide whether plaintiff has produced sufficient competent evidence to survive summary judgment on this element of its case because there is no evidence of direct pecuniary loss, a necessary element of a *prima facie* case for commercial disparagement.

An appropriate order follows.

ORDER

AND NOW, this day of August, 1994, it is ORDERED that:

1. Defendant's Motion for Summary Judgment is GRANTED.

2. Judgment is entered in favor of defendant Ziff Communications, Inc. and against plaintiff Brooks Power Systems, Inc.

3. All other outstanding motions are DENIED as moot.

4. The clerk is directed to mark this case closed.

FN1. Surge suppressors are electrical devices designed to protect computer equipment from high voltage power surges.

FN2. Brooks Electronics and Brooks Power Systems are separate companies; for purposes of this motion, the court assumes they are unrelated. Plaintiff manufactures the Brooks Power Systems Surge Stopper BPS–BN6–6, not the Brooks Electronics product. The statement regarding the Brooks Electronics Surge Reactor BN6–6 is not at issue in this action.

FN3. After filing its final pretrial memorandum, plaintiff changed counsel. Although discovery was closed, new plaintiff's counsel attempted to supplement

the record in several respects. Plaintiff attempted to broaden the cause of action to include allegations based on defendant's allegedly faulty test procedures. At oral argument on July 22, 1994, the court denied plaintiff's Motion for Leave to File a Third Amended Complaint, but ruled that plaintiff would be permitted to move for the pleadings to conform to the evidence at trial if summary judgment were not granted. For purpose of this motion, the court considers plaintiff's broadened allegations.

FN4. Pennsylvania law controls in this action, because jurisdiction is based on diversity of citizenship.

FN5. Although the parties refer to lost sales, plaintiff would only recover net lost profits, not gross lost sales.

FN6. At oral argument, the court closed the record for purposes of the summary judgment motion. The court received plaintiff's "Second Supplemental Response," identifying CopiFax, after oral argument; the defendant responded by letter. Because defendant had the opportunity to respond, the court did not strike plaintiff's second supplemental response.

FN7. To establish commercial disparagement, plaintiff would also have to prove the absence of a conditional privilege protecting defendant's statements. *See Menefee*, at 220; *see also U.S. Healthcare*, at 924.

E.D.Pa. 1994
Brooks Power Systems, Inc. v. Ziff Communications, Inc.
Not Reported in F.Supp., 1994 WL 444725 (E.D.Pa.)

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Not Reported in A.2d, 1964 WL 1403 (Pa.Com.Pl.), 1 Fair Empl.Prac.Cas. (BNA) 52, 1 Empl. Prac. Dec. P 9696
(Cite as: 1964 WL 1403 (Pa.Com.Pl.))

Court of Common Pleas of Pennsylvania, Dauphin County
Coxe, Plaintiff
v.
Commonwealth of Pennsylvania, et al., Defendants.

No. 386
March 24, 1964

SOHN, P. J.

*1 This case concerns a most peculiar complaint in equity in which the Court of Common Pleas of Dauphin County is requested to enjoin the defendants and each of them from entering into contracts concerning the performance whereof the recruitment and hiring of employes might be discriminatory. It likewise seeks that the defendants be enjoined, each of them, from expending public moneys for any project in the performance whereof recruitment of employes might be conducted on a discriminatory basis. It also seeks to enjoin defendants from reimbursing public moneys to any school district within the Commonwealth which might practice discriminatory educational programs. It requests this court to retain jurisdiction until the defendants award all contracts wherein recruitment was not discriminatory and wherein all educational programs were similarly conducted. The complaint, however, does not allege any present existing discriminatory practice on the part of any main defendant or of any other person.

The defendant, The General State Authority, and members thereof filed preliminary objections. The Commonwealth of Pennsylvania and other named defendants, to wit; William W. Scranton, Governor of the Commonwealth of Pennsylvania; Thomas Z. Minehart, Auditor General of the Commonwealth of Pennsylvania; Grace Sloan, Treasurer of the Commonwealth of Pennsylvania; Charles H. Boehm, Superintendent of the Department of Public Instruction; and Richard M. Hornbeck, Secretary of the Department of Property and Supplies of the Commonwealth of Pennsylvania, likewise filed preliminary objections, through the Attorney General, raising, inter alia, a question of jurisdiction; the standing of the plaintiff to sue; and the failure of the plaintiff to state a cause of action and to join indispensable parties.

Three principal questions seem to be involved in this case.

(1) Does equity have jurisdiction to grant injunctive relief where the complaint fails to state the cause of action but avers only assertions of plaintiff's beliefs as to the existence of certain conditions and his conjecture as to the happening of future events?

(2) Does the plaintiff have available a full, complete and adequate remedy at law thereby avoiding any necessity for granting equitable relief?

(3) Where plaintiff fails to qualify to maintain the action and fails to join the sole and indispensable parties to the action, is the court warranted in dismissing the complaint?

Plaintiff's complaint here is in effect a request for injunctive relief because he merely speculates that certain happenings will occur in the future which will be in violation of the anti-discrimination laws of this Commonwealth and which might result in the unlawful expenditure of public funds. The complaint fails, however, to set forth in what particulars these violations will occur or who will be the violators. Plaintiff merely voices, suspicions that discriminatory practices will take place, but fails to specify where or in what manner they will arise. Moreover, the plaintiff does not allege that there are any present violations nor does he allege any wrongdoing by any or all of the named defendants. However, he does request of this court that we enjoin the defendants from engaging in these 'practices' as well as from making any payments of

public moneys to those who might violate the laws. He finally requests the court to retain jurisdiction of this action until these conditions are met. We think that it cannot be denied that courts of equity have traditionally been concerned with those phases of the law which deal with the prevention of irreparable harm and injury by injunction. Heretofore, equity has always avoided taking jurisdiction over matters which are mere abstractions of thought and which allege conjectural claims unsupported by precise allegations of present or imminent harm or injury to the person requesting such equitable relief.

***2** In order for a complainant to be entitled to equitable relief, his right thereto must be clear and not open to conjecture or speculation or where any anticipated injury is doubtful. *United States v. Bigan*, 274 F. 2d 729 (1960); *Schuylkill Trust Co. v. Schuylkill Mining Co.*, 358 Pa. 535 (1948). These are the fundamental reasons why the plaintiff has failed to state a cause of action upon which relief can be granted and over which this court has jurisdiction.

Plaintiff's averments, beliefs or expectations that said public officials are entering or are about to enter into and enforce contracts providing for discriminatory recruitment and hiring in violation of the laws which they are sworn to uphold is a gross affront to all of the defendants which they cannot fail to resent. Plaintiff nowhere alleges that the defendants or any of them are engaged or are about to engage in any unlawful conduct regarding hiring or recruitment. The plaintiff has no basis for these allegations because the named defendants are not an employing agency or employer but solely award contracts. In all government contracts, provisions are specifically inserted to prohibit discriminatory activity in hiring and recruitment of help. See the Act of July 18, 1935, P. L. 1173, 43 P. S. 153; and the Act of March 10, 1949, P. L. 30, 24, P. S. 7-755. If such practices do occur, then it is the governmental entity, as one in privity, who can seek redress for violation of the contractual relationship. Heavy penalties are provided for a violation of these anti-discriminatory provisions.

It is necessary for us to point out in this connection that any aggrieved person can seek redress for discriminatory activities by pursuing his grievances before the administrative body which has been specifically established by the legislature to promote the policy of anti-discrimination. The Pennsylvania Human Relations Commission was established to administer and enforce the provisions of the Pennsylvania Relations Act, supra, and the Pennsylvania Fair Educational Opportunities Act, supra. Reference to these statutes will reveal the extent to which the legislature went in providing a full, complete and adequate legal remedy to any aggrieved individual. However, any complaint brought before the commission must have some specific grievance set forth therein and not contain mere conjectural statements as to the anticipated happening of future events. In addition, such a complaint before the court must have the same attributes. An examination of the pleading reveals that plaintiff has not alleged any definable irreparable harm or injury, past, present, or future, which could form the basis for equitable relief. Paradoxically, however, he has asked this court to retain jurisdiction of his action in the expectation or fear that future events will warrant intervention by a court of equity.

The plaintiff has also alleged denial of fair educational opportunities by certain unnamed school districts. School districts, as political entities of the Commonwealth, are administered by a school board whose public officers are presumed to uphold not only the Constitution but also the laws of this Commonwealth in order to insure that a thorough and efficient system of public schools be maintained. In the unlikely or unfortunate event that certain school boards are not implementing the public policy of this Commonwealth, then any aggrieved person can seek complete redress at law before the commission.

***3** It is important to reemphasize the futility of this complaint. Much mention is made that these

discriminatory practices, both in employment and education, will 'in all likelihood' result in work stoppages and demonstrations to the irreparable loss of plaintiff's tax moneys. But such activities have not occurred and there has been no expenditures of public moneys in connection with such occurrences. Equity has at times retained jurisdiction over cause of action, but only where irreparable injury and harm have been demonstrated and which will recur. Jurisdiction should not be retained over a matter which has not reached any stage of overtness. The suggested acts of violence, work stoppages and the like have not occurred, and defendants are entirely at a loss as to where the plaintiff expects them to occur or which school districts are specifically expected to engage in denying equal educational opportunities.

In the final analysis, the plaintiff here seeks to use this court as a vehicle to air his alleged dissatisfaction with anticipated practices of certain unnamed parties. He has shown no irreparable harm or injury to himself or to anyone else, and has alleged no wrongdoing by the named defendants or any of them. His fear or expectation that certain events may happen in the future does not state a cause of action over which this court has jurisdiction. Accordingly, we must dismiss said complaint.

But there is another fundamental reason why this complaint on the part of the plaintiff must be dismissed. In short the plaintiff has available to him a full, complete and adequate remedy at law which will provide the relief which he is requesting.

The Pennsylvania Human Relations Commission was established to administer and enforce the Pennsylvania Human Relations Act, supra. It is a public body which entertains and investigates complaints brought before it of a discriminatory nature much like the complaint which is sought to be circuitously raised in this case. Not only is it the administrative arm of the program which the legislature has adopted, but its jurisdiction extends to all employers, including the Commonwealth. In fact, the 'Commonwealth' is defined, in Section 4, as including 'any political subdivision or board, department, commission or school district thereof. . . .'

Likewise, the Commonwealth cannot be sued without its consent in an action in equity seeking injunctive relief. *Williamsport & Elmira Railroad Co. et al. v. Commonwealth*, 33 Pa. 288 (1859). Therefore, this court has no power or jurisdiction to restrin the Commonwealth from its activities and for this additional reason plaintiff's complaint must be dismissed. The fact that the Commonwealth can be sued in an action before the commission should conclusively demonstrate the effectiveness of the remedy at law.

What appears all the more anomalous about this action, however, is the fact that the named defendants are not an 'employer,' but solely an awarding or disbursing agency of public funds. It is clear that an appropriate remedy is available against the very people whom plaintiff alleges will engage in these discriminatory practices-the unnamed contractors, labor organizations and school districts.

***4** We must likewise point out that under the provisions of the Pennsylvania Fair Educational Opportunities Act, supra, the commission is authorized to enforce and administer that act. As a result, any school district, and not an unnamed one, can be brought before the commission in order to determine, upon complaint, that educational facilities are being discriminatorily denied to students. Not only is the remedy available to those who only is the remedy available to those who are being aggrieved but to this court. See Section 8 of the act, supra. Judicial review is likewise provided in Section 10 of the Pennsylvania Human Relations Act, supra. The plaintiff cannot come into equity and seek by indirection, what can be accomplished directly, with due process, through a procedure brought before the commission. The legislature has specifically provided a complete, full and adequate administrative remedy for the grievances which presently exist within plaintiff's mind and in connection with which the plaintiff imagines injuries might occur. From him to prematurely come into equity seeking

similar relief from an illusory malefactor would demonstrate the fallacy of this suit. If the wrongs, which plaintiff anticipates might occur, do occur, they can be redressed in accordance with the remedies provided by the cited acts.

We are likewise at a loss to discover from the pleadings any interest whatsoever which would enable the plaintiff to maintain this action. Primarily, he seeks to enjoin the unlawful expenditure of public funds and, indirectly, seeks through an economically-based cause of action, the prohibition of certain allegedly discriminatory practices.

However, any plaintiff in equity, seeking to enjoin the alleged unlawful expenditure of funds, must have the requisite qualifications to bring the action. This very court held in *Ladd et al. v. Reynolds, et al.*, 67 Dauph. 111 (1954), that a complaining taxpayer, in a suit in equity seeking injunctive relief, must allege with particularity that he is a taxpayer to the particular funds from which the alleged unlawful expenditure is to be made. See in addition *Naugle v. Vaux, Secretary of Health*, 68 D. & C. 135 (1949); *Smith v. Bloom, Secretary*, 81 Dauph. 245 (1963). In this present case the plaintiff's complaint does not contain such an allegation. There is not even an averment that his taxes will be increased by this alleged expenditure. Accordingly, for this reason also, the complaint must be dismissed.

Here the plaintiff alleges no present unlawful conduct by the defendants, but he does allege anticipated misconduct by unnamed parties. It must follow therefore that if the plaintiff is to pursue any cause of action, then the court must have before it the real parties in interest inasmuch as the ultimate remedy is directed toward their allegedly biased behaviors. For this reason, the unnamed parties are not only indispensable and necessary parties, but should be the sole parties hereto.

***5** In *Fabiankovitz et al. v. Phoenix Steel Corp.*, [48 LC ¶50,997] 81 Dauph. 216 (1963), a complaint was dismissed for failure to join a necessary and indispensable party. This court there cited *Maxson v. McElhinney*, 370 Pa. 622, 625 (1952), for a definition of necessary and indispensable parties as follows:

'. . . non-joinder is the failure to include in addition to those named, someone else who has a vital and direct interest in the controversy and whose interest cannot in law or in good conscience be severed from the parties named in the suit. . . .'

Although the objection of necessary and indispensable parties is the last one considered by us, it is by no means accorded an inferior position, especially since this objection goes to the very jurisdiction of this court to hear the controversy in question. See *Gardner v. Allegheny County*, 382 Pa. 88 (1955).

Since the plaintiff alleges that contracts are to be entered into and enforced in violation of the laws of the Commonwealth, and since performance is sought to be enjoined, it is necessary that all parties to said contract be made parties to this action. *Frushon v. Pittston Township School District*, 8 D. & C. 2d 165 (1955). Labor organizations are also included as parties under circumstances similar to those in the instant case. See *DiSanti v. Corning Glass Works*, [33 LC ¶71,099] 9 D. & C. 2d 611 (1956).

Here we can only find that the presence of the unnamed parties is not only required, but their absence is fatally defective to the plaintiff's complaint and this is an additional reason why it must be dismissed.

The complaint has also failed to set forth with sufficient clarity in what capacities and under what theories of action it is brought. The named defendants are not so designated in any particular manner nor under any circumstances which could lead them to determine in what capacity they are being sued. The complaint also contains several distinct and independent matters which have been improperly joined in one action, thereby confounding them.

The complaint, therefore, has all the earmarks of being multifarious and for this reason likewise must be dismissed. *Prudential Loan Society v. Mayer, et al.*, 25 Dist. 885 (1916).

The preliminary objections of the General State Authority raised the same identical questions as those raised in the preliminary objections filed by the other defendants. However, the General State Authority raises two additional reasons why the suit cannot be maintained against it. First, it points out that it is an instrumentality of the Commonwealth of Pennsylvania, and secondly, that being an instrumentality of the Commonwealth of Pennsylvania it is entitled to the sovereign immunity from liability to suit in this particular action. Section 3 of the act creating the General State Authority, specifically designates it as an instrumentality in the following language which is contained in Section 3, to wit:

'. . . are hereby created a body corporate and politic, constituting a public corporation and governmental instrumentality by the name of 'The General State Authority'.'

***6** In *Merner v. Department of Highways*, 375 Pa. 609 (1954), there was involved an equity action similar to the case at bar.

The General Rule of Law pertaining to immunity from liability of an instrumentality of the Commonwealth is clearly set forth in 52 Am. Jur. 'Torts' § 100. There the following is stated:

'The rule is well settled that the state, unless it has assumed such liability by constitutional mandate or legislative enactment, is not liable for injuries arising from the negligent or other tortious acts or conduct of any of its officers, agents, or servants committed in the performance of their duties. While there is authority to the contrary, the general rule is that the exemption of the state from liability for torts of its officers and agents does not depend upon the state's immunity from suit without its consent, but rests upon grounds of public policy and the sovereign character of the state. The rule of nonliability of the state for torts of its officers, although often stated in terms indicating it to be a rule of nonliability when the officer is exercising a governmental function, does not appear to be limited to cases where the act of the officer or agent occurred in the discharge of some purely governmental function of the state. *The rule of nonliability of the state for the torts of its officers, agents, and servants applies not only to the state itself, but to those agencies through which the state acts in the administration of the government.*' (Italics ours)

Without quoting all of the various cases in Pennsylvania which have ruled upon the subject here in question, the Supreme Court has set the question at rest once and for all by the recent decision in *Rader, Appellant, v. Pennsylvania Turnpike Commission*, 407 Pa. 609 (1962), wherein it clearly held that the Turnpike Commission is immune from liability and that the authority to 'sue and be sued,' was not intended as a general waiver of the immunity from trespass actions, but applies only to those actions necessary to carry out the business and functions of the Commission. The court on page 614 stated the following:

'Since that time the same contention has been repeatedly presented to the lower Courts of this Commonwealth and each time has been rejected: *Super v. Pennsylvania Turnpike Commission*, 19 Pa. D. & C. 2d 372, 73 Dauphin 387 (1959); *Harrell v. Porter*, 19 Pa. D. & C. 2d 385 (1958); *DiRenzo v. Trnsamerican Freight Lines, Inc.*, 10 Pa. D. & C. 2d 723 (1957); *Caputo v. Pennsylvania Turnpike Commission*, 103 P. L. J. 486 (1955); *Malpica v. Pennsylvania Turnpike Commission*, 65 Dauphin 302 (1953). Moreover, since the *House* case (supra) was decided in 1942, the legislature has passed seven acts relating to new or additional extensions of the turnpike and each contained the identical 'sue and be sued' clause. Significantly, however, the legislature has not seen fit to vary or amplify this clause in any of the above enumerated acts or to impose upon the Turnpike Commission liability for torts. If the statutory construction and the

result reached in *House* and unanimously followed in the later cases had not been in accordance with the intent of the legislature, it could easily have changed the language of the new acts to impose trespass liability. Cf. *Loeb Estate*, 400 Pa. 368, 375-376, 162 A. 2d 207; *Cali v. Philadelphia*, 406 Pa. 290, 310-311, 177 A. 2d 824. In the light of these facts and the well reasoned decisions above cited, we do not feel that this legislatively approved result should be judicially changed or modified.'

*7 In view of our detailed discussion in this opinion we now enter the following

ORDER

AND NOW, to wit; March 24, 1964, the preliminary objections of all of the defendants herein are hereby sustained, including those of the General State Authority, judgment is hereby entered in favor of all of the said defendants and against the plaintiff in this proceeding and the complaint filed against all of the defendants herein is hereby dismissed.

Pa.Com.Pl.,1964.
Coxe v. Com. of Pa.
Not Reported in A.2d, 1964 WL 1403 (Pa.Com.Pl.), 1 Fair Empl.Prac.Cas. (BNA) 52, 1 Empl. Prac. Dec. P 9696

END OF DOCUMENT

Not Reported in A.2d, 2005 WL 2140314 (Pa.Com.Pl.)
(Cite as: 2005 WL 2140314 (Pa.Com.Pl.))

C

Only the Westlaw citation is currently available.

Court of Common Pleas of Pennsylvania, Philadelphia County.
DANLIN MANAGEMENT GROUP, INC.
Plaintiff,
v.
THE SCHOOL DISTRICT OF PHILADELPHIA, Paul Vallas, Michael Harris, James Nevels, and Gina Pelligrino Defendants.

No. 4527JAN.TERM2005, CONTROL 041352.
Aug. 29, 2005.

ORDER

JONES, J.

***1** Presently before the court are the Preliminary Objections of Defendants The School District of Philadelphia (the "School District"), Paul Vallas, Michael Harris, James Nevels, and Gina Pelligrino (the latter four Defendants, collectively, the "Individual Defendants") to the Complaint of Plaintiff Devlin Management Group, Inc. For the reasons that follow, the court sustains in part and overrules in part the Preliminary Objections.

According to the Complaint, Plaintiff and the School District entered into a contract for Plaintiff to provide certain advisory and support services to the School District. Before this contract expired in February 2004, the parties agreed to the Second Contract, in which the Plaintiff would continue to provide these services and other, additional services to the School District. Plaintiff provided services under the Second Contract from February 2004 through June 2004 but did not receive payment. In addition, Plaintiff and the School District agreed upon Plaintiff's role as administrator with regards to a bond (the "Bond Contract") but the School District never allowed Plaintiff to perform its duties. The Individual Defendants were involved in the contract negotiations and also informed Plaintiff of the existence of both the Second Contract and the Bond Contract.

Plaintiff brings causes of action against all Defendants for fraud (Count IV) and negligent misrepresentation (Count V), against the School District for breach of contract (Count I), unjust enrichment (Count II), and promissory estoppel (Count III), and against the Individual Defendants for intentional interference with contract (Count VI).

DISCUSSION

Defendants' Preliminary Objections to the Complaint are in the nature of a demurrer. In this posture, the court considers all material facts set forth in the Complaint as well as all inferences reasonably deducible therefrom as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. *Moser v. Heistand*, 545 Pa. 554, 559, 681 A.2d 1322, 1325 (1996).

Defendants challenge Plaintiff's claim for negligent misrepresentation (Count V) under both the gist of the action and the economic loss doctrines. Plaintiff asserts the gist of the action defense is premature and the economic loss doctrine does not apply to the facts of this case.

Underlying both doctrines is the conceptual distinction between a breach of contract claim and a tort claim. "Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." *Etoll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 14 (Pa.Super.2002). The gist of the action doctrine bars tort claims (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the

tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. *Id.*, at 19.

***2** Plaintiff bases its negligent misrepresentation claim on the Defendants communications concerning the Second Contract and the Bond Contract. According to Plaintiff, Defendants promised Plaintiff it had both contracts and then the School District reneged on its promises. Compl., ¶¶ 56-61, 66-68. In the *ad damnum* clause, Plaintiff seeks damages based on what it would have received had it performed under the two contracts. Essentially, Plaintiff relies on the contracts, and not on any larger social policy, to support its cause of action. Thus, if Plaintiff and the School District entered into the Second Contract and/or the Bond Contract, the gist of the action doctrine would bar this claim with respect to the particular contract.

The economic loss doctrine "precludes recovery in negligence actions for injuries which are solely economic." *David Pflumm Paving & Excavating, Inc. v. Foundation Servs. Co.*, 816 A.2d 1164, 1170 (2003). An exception for claims of negligent misrepresentation that reflect Section 552 of the Restatement (Second) of Torts ("Section 552"), however, allows such claims to evade dismissal even if they assert purely economic losses. *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270, 288 (2005).

In *Bilt-Rite*, the court queried whether a contractor could bring a negligent misrepresentation claim against an architect when there was no privity of contract between the parties and the contractor suffered purely economic damages as a result of its reliance upon the architect's misrepresentations. From this starting point, the court adopted Section 552 to "clarify the elements of the tort as they apply to those in the business of supplying information to others for pecuniary gain." *Bilt-Rite*, at 280. Section 552 provides that "one who, in the course of his business, profession or employment ... supplies false information for the guidance of others in their business transactions," may be subject to liability. The *Bilt-Rite* court highlighted that this tort is "narrowly tailored, as it applies only to those businesses which provide services and/or information that they know will be relied upon by third parties in their business endeavors." *Bilt-Rite*, at 286.

A comparison of the facts presented in *Bilt-Rite* to those contained in the Complaint reveals that Section 552 is inapplicable to the current dispute. In *Bilt-Rite*, each party negotiated separately with the school district and not with each other. Here, Plaintiff and Defendants dealt directly with one another. In *Bilt-Rite*, the defendant architect provided information which the plaintiff contractor used to perform its duties. Here, Plaintiff is providing the services to Defendant School District. Indeed, Plaintiff presents no facts to identify the School District as a service provider. Thus, *Bilt-Rite* does not provide the appropriate framework for the negligent misrepresentation cause of action and the more general economic loss rule applies.

***3** Although the Complaint offers alternative factual scenarios governing the Second Contract and the Bond Contract-the presence or absence of such an agreement between Plaintiff and the School District-ultimately only one of these situations is correct. If the parties entered into an agreement, the gist of the action doctrine bars the negligent misrepresentation claim. If the parties did not form a contract, the economic loss doctrine precludes recovery. Since Count V is not viable under either alternative, Count V shall be dismissed.

Defendants contend that Plaintiff's claim for intentional interference with contract (Count VI) is legally insufficient. In Pennsylvania, a claim for intentional interference with a principal's contract cannot be based upon an agent's actions if those actions are within the scope of the agency. *Rutherfoord v. Presbyterian-University Hosp.*, 417 Pa.Super. 316, 332, 612 A.2d 500, 508 (1992). Plaintiff asserts that its failure to identify the Individual Defendants as the School District's agents in the relevant portion of the Complaint, Compl., ¶¶ 97-100, requires an inference that these individuals

were acting outside the scope of their agency when each committed this tort. Plaintiff, however, ignores paragraph 96, which expressly incorporates those sections of the Complaint highlighting the Individual Defendants' role as the School District's agents. Plaintiff's suggested amendment to the Complaint is merely an assertion and contains no facts sufficient to meet the requirements of Pa. R.C.P. 1019(a). Count VI shall be dismissed.

Defendants challenge several of the *ad damnun* clauses of the remaining counts of the Complaint, asserting that Plaintiff improperly seeks equitable relief, punitive damages, and attorney's fees and costs.

Equity lacks jurisdiction when there exists a full, complete, and adequate remedy at law. *McGill v. Southwark Realty Co.*, 828 A.2d 430, 435 (Pa.Commw.2003). A review of the Complaint shows that monetary damages can adequately make Plaintiff whole. Therefore, all references to equitable relief shall be stricken from the Complaint.

Punitive damages cannot be awarded for breach of contract because they are inconsistent with traditional contract theory. *DiGregorio v. Keystone Health Plan E.*, 840 A.2d 361, 370 (Pa.Super.2003) . As a corollary of this principle, punitive damages cannot be awarded for promissory estoppel, which creates an implied contract, *Crouse v. Cyclops Indus.*, 704 A.2d 1090, 1093 (Pa.Super.1997), or unjust enrichment that sounds in quasi-contract, *Cole v. Lawrence*, 701 A.2d 987, 989 (Pa.Super.1997). Switching to the parties, the School District is a local agency for purposes of the Political Subdivision Tort Claims Act, *Petula v. Mellody*, 158 Pa. Commw. 212, 217, 631 A.2d 762, 765 (1993), which prevents the assessment of punitive damages against this Defendant, *Marko v. City of Philadelphia*, 133 Pa. Commw. 574, 577, 576 A.2d 1193, 1194 (1990). Plaintiff's reliance on *Purdy v. Romeo*, 10 Pa. D & C.4th 242 (Com.Pl.1991), is misplaced. *Purdy* stands for the proposition that punitive damages may be assessed against the Individual Defendants, not the School District. *Id.*, at 247-48. Therefore, all references to punitive damages shall be struck from Counts I, II, and III of the Complaint and all requests for punitive damages against the School District shall be struck from the Complaint.

***4** To recover attorney's fees from an adverse party requires clear statutory authorization, clear agreement of the parties, or another established exception. *Snyder v. Snyder*, 533 Pa. 203, 212, 620 A .2d 1133, 1134 (1993). As the Complaint lacks any such allegations, all requests for attorney's fees and costs shall be struck from the Complaint.

Defendants' remaining Preliminary Objections lack merit and shall be overruled.

AND NOW, this 29TH day of August, 2005, upon consideration of the Preliminary Objections of Defendants The School District of Philadelphia, Paul Vallas, Michael Harris, James Nevels, and Gina Pelligrino to the Complaint of Plaintiff Danlin Management Group, Inc. and the response thereto, and in accordance with the attached memorandum, it is hereby ORDERED and DECREED as follows:

1) Defendants' Preliminary Objections to Counts V and VI of the Complaint are SUSTAINED and Counts V and VI are DISMISSED;

2) Defendants' Preliminary Objections to the *ad damnum* clauses of the Complaint are SUSTAINED in part and OVERRULED in part. All references to equitable relief and attorney's fees and costs shall be STRICKEN from the Complaint, all references to punitive damages in Counts I, II, and III of the Complaint shall be STRICKEN, and all references to punitive damages against Defendant The School District of Philadelphia shall be STRICKEN from the Complaint; and

3) Defendants' remaining Preliminary Objections are OVERRULED and Defendants shall file an answer to Plaintiff's Complaint within twenty (20) days of the date of this Order.

Pa.Com.Pl.,2005.
Danlin Management Group, Inc. v. School Dist. of Philadelpia
Not Reported in A.2d, 2005 WL 2140314 (Pa.Com.Pl.)

END OF DOCUMENT

Not Reported in A.2d, 2005 WL 1580049 (Pa.Com.Pl.)
(Cite as: 2005 WL 1580049 (Pa.Com.Pl.))

C

Only the Westlaw citation is currently available.

Court of Common Pleas of Pennsylvania, Philadelphia County..
ESP ENTERPRISES, LLC and Liberties West Partners, LLC
v.
John J. GARAGOZZO and Ronald Egan

No. 4218 JAN.TERM 2005, CONTROL 040566.
June 27, 2005.

Phillip D Berger, Lundy, Flitter, Beldecos & Berger, P.C., Narberth, PA, for ESP Enterprises, LLC and Liberties West Partners, LLC.

Emil L Iannelli, Southampton, PA, for John J. Garagozzo and Ronald Egan.

MEMORANDUM OPINION

ABRAMSON, J.

Background

*1 Before the Court is defendant Ronald Egan's Preliminary Objection to plaintiffs ESP Enterprises, LLC and Liberties West Partners, LLC's Complaint. Plaintiffs filed a declaratory judgment action against defendants. Defendant Egan has raised one preliminary objection to plaintiffs' Complaint, pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(5), for failure to join a necessary party. The following allegations are set forth in Plaintiff's Complaint:

On December 16, 2003, Ron Fante ("Fante"), Richard Disco ("Disco"), and defendant John Garagozzo ("Garagozzo") entered into an agreement (the "Agreement of Sale") to sell real property located at 800-806 N. Third Street, Philadelphia, Pennsylvania, to defendants John Garagozzo and Ronald Egan ("Egan"). The Agreement of Sale provided that settlement was to be held on or before March 31, 2004, and contained a "time is of the essence" clause. Settlement on the property did not occur on or before March 31, 2004. On November 23, 2004, Fante granted by deed his entire interest in the property to plaintiff ESP Enterprises, LLC ("ESP"). Additionally, on November 23, 2004, Disco granted by deed his entire interest in the property to plaintiff Liberties West Partners, LLC ("Liberties"). Plaintiffs ESP and Liberties assert that they, along with defendant Garagozzo, are the real owners of the property. In Count I of the Complaint, plaintiffs are asking for a judicial declaration that the Agreement of Sale is not enforceable because it expired naturally when there was no settlement on or before March 31, 2004. In Count II, plaintiffs are seeking a judicial declaration that plaintiffs and Garagozzo are entitled to retain all sums paid by defendants pursuant to the Agreement of Sale, including deposit monies, since defendants defaulted under the Agreement of Sale. Defendants, however, maintain that the Agreement of Sale is valid and enforceable.

I. Defendant's Preliminary Objection in the Nature of a Motion to Strike for Failure to Join a Necessary Party Pursuant to Pa. R.C.P. 1028(a)(5).

Defendant Egan asserts that Plaintiffs' Complaint should be stricken for failure to join necessary parties, specifically Fante and Disco. For the reasons set forth below, the Court sustains defendant's preliminary objection.

Pennsylvania Rule of Civil Procedure 1028(a)(5) allows preliminary objections based on nonjoinder of a necessary party. A party is considered indispensable to a lawsuit "when its rights are so connected with the claims of the litigants that no decree can be made without impairing its rights, and it must be made a party to protect such rights." *International Fiber Systems, Inc. v. City of Philadelphia,* Commerce Program, October Term 2001, No. 0968, Control No. 122034, Sheppard, J. (June 2002), *quoting Grimme Combustion, Inc. v. Mergentime Corporation,* 406 Pa.Super. 620, 629, 595 A.2d 77, 81 (1991). The following factors are used in Pennsylvania to determine whether a party is in-

dispensable:

*2 1. Do absent parties have a right or interest related to the claim?

2. If so, what is the nature of the right or interest?

3. Is that right or interest essential to the merits of the issue?

4. Can justice be afforded without violating due process rights of absent parties?

Id., citing E-Z Parks, Inc. v. Philadelphia Parking Authority, 103 Pa.Cmwlth. 627, 631, 521 A.2d 71, 73 (1987). In analyzing this issue, a court must examine the nature of the claim and the relief sought. *Hubert v. Greenwald,* 1999 Pa.Super. 328, *P9, 743 A.2d 977, 980 (1999).

Additionally, with respect to declaratory judgment actions, the failure to join an indispensable party deprives a court of subject matter jurisdiction. *Tremco, Inc. v. Pennsylvania Manufacturer's Insurance Co.,* Commerce Program, June Term 2000, No. 388, Control Nos. 040125, 04232, Sheppard, J. (June 2002), *citing Vale Chemical Co. v. Hartford Accident and Indemnity Co.,* 512 Pa. 290, 292, 516 A.2d 684, 685 (1986). There is a statutory requirement that all interested parties shall be joined before a declaratory judgment can issue. Section 7540(a) of Pennsylvania's Declaratory Judgment Act states:

General rule.-When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

Therefore, it is clear that "all parties whose interest will necessarily be affected must be present on the record." *Vale,* 512 Pa. at 296, 516 A.2d 684.

Here, in its Complaint, plaintiffs are asking the Court to declare that the Agreement of Sale contract is void. However, not all of the parties to the Agreement of Sale are parties to this litigation, namely Fante and Disco. Fante and Disco, along with Garagozzo, are the owners and the sellers of the property in the Agreement of Sale. Since the Court's determination of the enforceability of the Agreement of Sale will affect Fante's and Disco's rights and interests, they are necessary parties to the current litigation.

CONCLUSION

For all the foregoing reasons, defendant's Preliminary Objection to plaintiffs' Complaint is sustained.

ORDER

AND NOW, this 27th day of June, 2005, upon consideration of Defendant Ronald Egan's Motion to Determine Preliminary Objection, and response thereto, it is hereby ORDERED and DECREED that said Preliminary Objection is SUSTAINED.

Pa.Com.Pl.,2005.
ESP Enterprises, LLC v. Garagozzo
Not Reported in A.2d, 2005 WL 1580049 (Pa.Com.Pl.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2011 WL 3610418 (E.D.Pa.)
(Cite as: 2011 WL 3610418 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
GLOBAL ENERGY CONSULTANTS, LLC,
Plaintiff,
v.
HOLTEC INTERNATIONAL, INC., et al, Defendants.

Civil Action No. 08–5827.
Aug. 17, 2011.

Richard N. Lipow, Lipow Law Office, Malvern, PA, for Plaintiff.

MEMORANDUM

EDUARDO C. ROBRENO, District Judge.

I. INTRODUCTION

*1 On December 16, 2008, Plaintiff Global Energy Consultants LLC ("GEC" or "Plaintiff") initiated this action against Defendants Holtec Manufacturing, Inc. and Holtec Manufacturing Division, Inc. ("Holtec" or "Defendant"),[FN1] asserting claims of breach of contract arising out of Holtec's alleged breach of a non-circumvention and confidentiality agreement between the parties. Defendant brings a Partial Motion for Summary Judgment as to Plaintiff's remaining claims.[FN2] For the reasons set forth below, the Court will grant Defendant's Motion for Partial Summary Judgment.

FN1. In its Answer, Defendant noted that its proper name is "Holtec International Corporation," not Holtec Manufacturing Inc. and Holtec Manufacturing Division, Inc. On February 16, 2010, Holtec International was substituted for Holtec International, Inc. as a Defendant.

FN2. Plaintiff has moved to dismiss all claims based upon any alleged oral contracts. The Court will grant Plaintiff's Motion to Dismiss. Thus, Defendant's Motion for Partial Summary Judgment addresses all of Plaintiff's remaining claims based on the parties' written contract.

II. BACKGROUND[FN3]

FN3. As the Plaintiff is the nonmoving party, these facts are taken in the light most favorable to the Plaintiff. However, the parties do not dispute the language of their written agreement which is the basis for the Court's analysis.

In September of 2001, GEC approached Holtec with an invitation to join a team that GEC was creating to pursue spent nuclear fuel ("SNF") storage projects in Europe. (Plf.'s Part. Mot. Summ. J., Ex. 1 (Letters from GEC to Defendants).) Before learning the details of this invitation, GEC had Holtec sign confidentiality and non-circumvention agreements ("Agreement"). (Plf.'s Part. Mot. Summ. J., Ex. 2 (Letter from Defendant and GEC).) Pursuant to the contract GEC would provide information, concepts, and ideas:

> to assist the parties in their evaluation of a possible business relationship with each other related to various possible businesses, and arrangements; and during the conduct of such business resulting from said evaluations or other considerations ...

(Diehl Decl. Ex. 8.) The Agreement also included a non-circumvention clause:

> Each party acknowledges that Holtec and GEC may be in similar businesses, and are not constrained by this Agreement with respect to other business activities except solely to the extent of the express prohibitions contained herein. Each party further agrees to not circumvent the other party, or to circumvent the other party to the other party's clients without written authorization.

(*Id.* at ¶ 8.)

Following the signing of the Agreement, GEC sent to Holtec a brief overview of the proposal and an "Executive Summary" of GEC's Business Plan. (Plf.'s Part. Mot. Summ. J., Ex. 3.) Mr. Thomas Jones, President of GEC, explained to Holtec that he had developed a concept of an international SNF storage facility with an initial focus on three countries, including Ukraine and Switzerland. However, GEC's plan for an international SNF storage facility did not ultimately materialize.

GEC alleges that Holtec used the information that GEC provided, as well as GEC's contacts and efforts to obtain contracts for SNF storage within Ukraine and Switzerland. GEC alleges that these actions are a breach of their Agreement.

III. DISCUSSION

In Defendant's Partial Motion for Summary Judgment, Defendant argues that it is entitled to judgment as a matter of law because the parties' Agreement is unenforceable. (See generally Def. Part. Mot. Summ. J., Docket No. 56.) Plaintiff responds that the Agreement is enforceable because it is not ambiguous or indefinite. (See generally Plf.'s Resp., Docket No. 94.) For the reasons below, Defendant's Partial Motion for Summary Judgment will be granted because the parties' Agreement is unenforceable as a matter of law.

1. Motion for Summary Judgment under Rule 56

***2** Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir.2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A fact is "material" if proof of its existence or nonexistence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the nonmoving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." *Pignataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 268 (3d Cir.2010) (citing *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir.1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the nonmoving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250

.

2. The Non–Circumvention Provision is Indefinite And Therefore Unenforceable Under the Terms of the Agreement.

Under the terms of the Agreement, Massachusetts substantive law applies. (Diehl Decl. Ex. 1 ¶ 7.) "To state a claim for breach of contract under Massachusetts law, a plaintiff must allege, at a minimum, that there was a valid contract, that the defendant breached its duties under the contractual agreement, and that the breach caused the plaintiff damage." *Guckenberger v. Boston Univ.*, 957 F.Supp. 306, 316 (D.Mass.1997) (citing *Loranger Const. Corp. v. E.F. Hauserman, Co.*, 1 Mass.App.Ct. 801, 294 N.E.2d 453, 454 (Mass.App.Ct.1973)). "Plaintiffs have the burden of proving the existence of a contract." *Moore v. La–Z–Boy, Inc.*, 639 F.Supp.2d 136, 140 (D.Mass.2009) (citing *Canney v. New England Tel. & Tel. Co.*, 353 Mass. 158, 228 N.E.2d 723 (Mass.1967)). "Whether a purported contract contains the necessary elements for enforceability is (ordinarily) a question of law reserved for the court." Moore, 639 F.Supp.2d at 140 (quoting *Schwanbeck v. Federal–Mogul Corp.*, 412 Mass. 703, 592 N.E.2d 1289 (Mass.1992)).

"It is axiomatic that to create an enforceable contract, there must be an agreement between the

parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement." *Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 430 Mass. 875, 724 N.E.2d 699 (Mass.2000); see also Moore, 639 F.Supp.2d at 140 . "All of the essential terms of a contract must be sufficiently definite so that the nature and extent of the obligations of the parties can be ascertained. However, a contract is not to be held unenforceable 'if, when applied to the transaction and construed in the light of the attending circumstances,' the meaning can be ascertained with reasonable certainty." *Simons v. American Dry Ginger Ale Co.*, 335 Mass. 521, 140 N.E.2d 649 (Mass.1957) (quoting Cygan, 326 Mass. 732, 96 N.E.2d 702 (Mass.1951)); see also *Cape Oil Delivery, Inc. v. Hayes*, 20 Mass. L. Rep. 469 (Mass.Super.Ct.2005). Although "unspecified terms will not necessarily preclude the formation of a binding contract," Situation Mgmt., 430 Mass. 875, 724 N.E.2d 699, "[i]t is essential to the existence of a contract that its nature and the extent of its obligations be certain. This rule has been long established," *Caggiano v. Marchegiano*, 327 Mass. 574, 99 N.E.2d 861 (Mass.1951).

***3** Further, in "the leading case of [Cygan], the court said '[a] contract is not to be struck down because one of its material provisions is stated in broad and general terms if, when applied to the transaction and construed in the light of the attending circumstances, the meaning to be attributed to it can be interpreted with reasonable certainty so that the rights and obligations of the parties can be fixed and determined.' " *United Liquors, Inc. v. Carillon Importers, Ltd.*, 893 F.2d 1, 2 (1st Cir.1989) (quoting Cygan, 96 N.E.2d at 703). "While in some cases, it is appropriate for the court to supply a missing term negotiated by the parties, but mistakenly omitted from their agreement, it may do so only when the terms of the contract are otherwise unambiguous." Moore, 639 F.Supp.2d at 141 (citing *Diamond Crystal Brands, Inc. v. Backleaf, LLC*, 60 Mass.App.Ct. 502, 803 N.E.2d 744 (Mass.App.Ct.2004)).

" 'The difficulty here is that the [agreement] sued on is silent as to material matters important in its interpretation for the ascertainment of the obligations of the parties.... Many of the essential terms necessarily involved in the proposed undertaking are not set forth and without them no enforceable contract is shown.' " Moore, 639 F.Supp.2d at 141 (quoting *Geo. W. Wilcox, Inc. v. Shell E. Petroleum Prods., Inc.*, 283 Mass. 383, 186 N.E. 562 (Mass.1933)). "Construction and enforcement of the agreement without these essential terms would be futile, and [the court] cannot supply these provisions without writing a contract for the parties which they themselves did not make." Moore, 639 F.Supp.2d at 141 (quoting *Held v. Zamparelli*, 13 Mass.App.Ct. 957, 431 N.E.2d 961 (Mass.App.Ct.1982)).

"[I]nchoate language, which both anticipates a final agreement and is imperfect in material respects, fails to bind the parties." *Jones v. Consol. Rail Corp.*, 33 Mass.App.Ct. 918, 597 N.E.2d 1375 (Mass.App.Ct.1992); see *Buker v. Nat'l Mgmt. Corp.*, 16 Mass.App.Ct. 36, 448 N.E.2d 1299 (Mass.App.Ct.1983) (defendant's oral promise to "work things out" was too vague to form a contract); Moore, 639 F.Supp.2d at 141 (citing *Brookhaven Hous. Coal. v. Solomon*, 583 F.2d 584, 593–94 (2d Cir.1978) (town's promise to "provide whatever programs would be necessary" unenforceable for lack of specificity)); *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 863 N.E.2d 503 (Mass.2007) (a "contract" to purchase an unspecified amount of goods is "not a contract at all"); *PSMG Int'l, Inc. v. Nodine's Smokehouse, Inc.*, 2009 U.S. Dist. LEXIS 102296, 9–10,2009 WL 3679288 (D.Mass. Nov. 3, 2009) (finding that a "contract" to provide "all documentation necessary" was too vague to operate as a binding contract); *United Liquors, Inc. v. Carillon Importers, Ltd.*, 893 F.2d 1, 2 (1st Cir.1989) (finding that the term "longer" and "mutually agreed upon" were too indefinite to enforce a contract); but see Cygan, 96 N.E.2d at 703 (construing a contract to mean "reasonable compensation" where the terms "additional compensation" if de-

fendants "got on their feet" was too indefinite).

*4 Here, the non-circumvention clause in the Agreement between GEC and the Holtec Companies is indefinite. It states: "Each party further agrees not to circumvent the other party, or to circumvent the other party to the other party's clients without written authorization." (Diehl Decl. Exs. 8 and 11, ¶ 8.) Significantly, the term "circumvention" is not defined. Its meaning is also not clarified by the Agreement. There are no examples of what constitutes circumvention.

The term "circumvention" is as ambiguous as the word "necessary" which the the courts in Brookhaven and PSMG found to be too ambiguous to be enforceable as the parties' obligations were unclear under the contract. Brookhaven, 583 F.2d at 593–94; PSMG, 2009 U.S. Dist. LEXIS 102296 at 9–10,2009 WL 3679288. Further, a Connecticut court has considered a non-circumvention contract such as the Agreement at issue here and critically noted that the meaning of the term circumvent, without further definition, is "nebulous." *See Consumer Incentive Serv. v. Memberworks, Inc.*, CV990362655, 2003 Conn.Super. LEXIS 3381, at *15,2003 WL 23025623 (Conn.Super.Ct. Dec. 8, 2003).[FN4]

> FN4. "Circumvent means, among other things, to deceive, trick, dupe, bamboozle, hornswaggle, string along, put something over, slip one over on, pull a fast one on, betray, leave in the lurch, holding the bag, double-cross, cheat on, two-time, outmaneuver, outsmart, evade, get out of, give one the run-around, throw off the scent, outwit, outsmart, get the better of, stonewall, elude, give the slip, pull a fast one, make a fool of, make a sucker of, victimize, cut the ground from under one, tie one's hands, and clip the wings of, to keep away from avoid, bypass, dodge, duck, escape, eschew, get around shun, keep (or stay) (or steer) clear of, to pass around but not through, circumnavigate, detour, go around, skirt, to avoid fulfilling or answering completely, sidestep, to get away from (a pursuer), lose, shake off, slip, throw off, give someone the shake (something requiring an outlet) in check, choke back, hold back, hold down, hush (up), muffle, quench, repress, smother, squelch, stifle, strangle, suppress, to slight (someone) deliberately, rebuff, snub, spurn, close (or shut) the door on, give someone the cold shoulder, give someone the go-by, turn one's back." *Consumer Incentive Servs.*, LEXIS 3381 *15 n. 5 (citing Roget's International Thesaurus, 4th Edition (1977); Roget's II: The New Thesaurus, Third Edition, 1995)).

While the term "circumvention" is by itself indefinite, the parties' changing understanding of what constitutes "circumvention" further proves that the term is indefinite. *Pittsfield & N.A.R. Corp. v. Boston & A.R. Co.*, 260 Mass. 390, 398, 157 N.E. 611 (1927) (citation omitted) (finding that "there is no surer way to find out what parties meant, than to see what they have done.") Significantly, not even GEC, who drafted the Agreement, can provide a certain and constant definition of "circumvention." GEC's representatives' testimony (Diehl Decl. Ex. 2, Jones Dep. Tr. at 112:8–113:12; 132:18–135:12; 138:21–139:2; 190:25–192:25; 248:21–249:24; 295:25–296:13; 298:5–11) and interrogatory responses (*Id.* Ex. 28, ¶ 5) demonstrate that GEC considered communications or negotiations by the Holtec Companies with a third party in pursuit of SNF storage opportunities in Europe to be "circumvention." (*Id.* Ex. 29–33.) However, in response to the Holtec Companies' summary judgment motion on the statute of limitations issue (doc. no. 33), GEC changed its definition of "circumvention." According to GEC's new understanding, the "direct contacts and negotiations [by Holtec] could not be considered circumvention." (doc. no. 48 at p. 9, 157 N.E. 611.)[FN5]

> FN5. The Court points to the parties' chan-

> ging understanding of "circumvent" only to show that the term is indefinite. These understandings likely cannot be used to establish some sort of "understanding" or other agreement with the parties as the signed Agreement states "[t]his Agreement represents the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supercedes all other agreements or understandings, written or oral, between the parties with respect to the subject matter hereof." (Diehl Decl. Exs. 8 and 11, ¶ 6.)

GEC points to courts that have found non-circumvention agreements to be enforceable. However, in these cases, the meaning of circumvention and the prohibited actions were clear from the agreement. *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556 (4th Cir.1990) (finding a defendant breached the specific provision of the non-circumvention agreement by independently bidding on the Xerox program where the defendant, a potential investor of the plaintiff, signed a non-circumvention agreement which specifically required that the potential investor "not to independently purchase lease transactions" with Xerox's PAS Program "for a period equal to the term of the Purchase Agreement"); *Cura Financial Services v. Electronic Payment Exchange, Inc.*, 2001 WL 1334188, *1 (Del.) (2001) (finding that a defendant clearly violated the non-circumvention agreement where the defendant committed, through the contract, not to "deal with Cura's confidential bank sources without Cura's permission, and would not otherwise circumvent Cura in dealing with Cura's bank sources" but subsequently forged a relationship with the plaintiff's bank, without permission from or compensation to the plaintiff).[FN6]

> FN6. GEC also argues that a contract is still enforceable in the absence of a compensation term. GEC argues that Massachusetts courts have held that "[w]here the parties to a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances will be supplied by the court." *Fay, Spofford & Thorndike, Inc. v. Massachusetts Port Authority*, 7 Mass.App.Ct. 336, 387 N.E.2d 206 (Mass.App.Ct.1979) (citation omitted). When an essential term of a contract is missing the court will "interpret the contract sensibly in the light of the terms of the document taken as a whole." *Id.* However, this case is not one where a reasonable interpretation of "circumvention" can be made by the Court based on the circumstances. This case is not like *Cygan*, where a court construed "additional compensation" to mean "reasonable compensation," a rate that is ascertainable based on the market rate. Because the Court cannot sufficiently determine the meaning of "circumvent" as it was meant in the Agreement, the Court does not reach the issue of whether the absence of a compensation term in the Agreement renders it unenforceable.

***5** Therefore, because the Agreement in this case is unenforceable as a matter of law, Defendant's Partial Motion for Summary Judgment will be granted.[FN7]

> FN7. As the Court grants this motion and Plaintiff's Motion to Dismiss (doc. no. 45), Plaintiff has no claims to proceed with. Thus, judgment will be entered for Defendant and against Plaintiff on all counts.

IV. CONCLUSION

For the reasons stated above, Defendant's Motion for Partial Summary Judgment will be granted.

E.D.Pa.,2011.
Global Energy Consultants, LLC v. Holtec Intern., Inc.
Not Reported in F.Supp.2d, 2011 WL 3610418 (E.D.Pa.)

END OF DOCUMENT

Not Reported in F.Supp., 1990 WL 7429 (E.D.Pa.)
(Cite as: 1990 WL 7429 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
HEM RESEARCH, INC., Plaintiff,
v.
E.I. DU PONT DE NEMOURS & CO., Defendants.

CIV. A. No. 89-4572.
Jan. 30, 1990.

David C. Franceski, Jr., Stradley, Ronon, Stevens & Young, Philadelphia, Pa.

Jeremiah T. O'Sullivan, pro hac vice, Choate, Hall & Stewart, Michael A. Walsh, pro hac vice, Choate, Hall & Stewart, Boston, Mass., Edward H. Seksay, pro hac vice, for plaintiff.

R. Judson Scaggs, Jr., pro hac vice, William H. Sudell, Jr., pro hac vice, Jack B. Blumenfeld, pro hac vice, Mathew B. Lehr, pro hac vice, Morris, Nichols, Arsht & Tunnell, Wilmington, Del., for defendant.

Ian M. Comisky, Philadelphia, Pa., for Hahnemann University.

MEMORANDUM

NEWCOMER, District Judge.

*1 This matter comes before the court on defendant E.I. Du Pont De Nemours' (DuPont) Motion to Dismiss or Stay this action. For the reasons stated below, I shall, and hereby do, grant defendant's Motion to Dismiss. Accordingly, defendant's Motion to Stay is denied as moot.

I. *Background.*

A. *Factual.*

HEM is a biomedical company whose business focuses upon the development of a pharmaceutical compound known as Ampligen. Beginning in mid-1986, HEM contacted Du Pont and discussed HEM's work with Ampligen, which was then under evaluation for the treatment of cancer and acquired immunodeficiency syndrome ("AIDS"). Thereafter, Du Pont and HEM entered into a series of agreements related to the further development and commercial production of Ampligen. The first of these was an agreement dated May 14, 1987, by which, *inter alia,* Du Pont purchased 2,294,216 shares of HEM common stock (the "Stock Purchase Agreement"). The Stock Purchase agreement also provided that HEM and Du Pont would immediately negotiate concerning additional agreements with respect to the manufacture and commercialization of Ampligen, and specifically contemplated that HEM and Du Pont would form a joint venture for those purposes.

On or about October 30, 1987, Du Pont entered into a partnership agreement with HEM (the "Partnership Agreement"), and other related agreements. By the terms of the Partnership Agreement, Du Pont, *inter alia,* agreed to undertake certain process and product development and toxicological testing, and to fund certain payments to compensate HEM for conducting clinical studies of Ampligen. At the same time, Du Pont entered into a Second and Amendatory Stock Purchase Agreement, by which Du Pont purchased from HEM additional shares of HEM common stock (the "Supplemental Stock Purchase Agreement").

The Stock Purchase Agreement, Partnership Agreement and Supplemental Stock Purchase Agreement all provide that their interpretation shall be governed by the law of the State of Delaware (Defendant's Opening Brief in Support of Its Motion to Dismiss or Stay, "Defendant's Opening Brief", at pg. 4). In addition, the Partnership Agreement contains a forum selection clause which provides that "the courts of the state of Delaware shall have exclusive jurisdiction over any action to enforce this Agreement" (Partnership Agreement, § 10.4).[FN1]

B. *Procedural.*

On April 4, 1989, Du Pont filed suit (the "Du Pont suit") against HEM in the Court of Chancery for the State of Delaware. In that suit, Du Pont sought rescission of two of the contracts between the parties. HEM moved to dismiss the Du Pont suit due to the Chancery Court's lack of subject matter jurisdiction over Du Pont's Claim. Subsequent to the filing of the present motion, on October 13, 1989 and November 6, 1989, the Delaware Chancery Court determined that it was without subject matter jurisdiction over Du Pont's suit against HEM. Accordingly, the Delaware Chancery Court transferred the suit to the Delaware Superior Court pursuant to 10 *Del.C.* § 1902 (Defendant's Supplemental Memorandum in Support of Its Motion to Dismiss or Stay, hereafter "Defendant's Supplemental Brief" at pg. 2).

***2** More than eleven weeks after the Du Pont suit was filed in Delaware, on June 20, 1989, HEM filed this suit (the "HEM suit") against Du Pont, alleging: (1) violations by Du Pont of the Racketeering Influenced and Corrupt Organizations Act ("RICO"); (2) breach by Du Pont of certain contracts between the parties; (3) breach by Du Pont of its fiduciary obligations to HEM; and (4) the making of fraudulent misrepresentations by Du Pont to HEM.

On August 2, Du Pont filed the instant Motion to Dismiss or Stay. That motion seeks (1) dismissal of HEM's non-RICO claims based upon the forum selection clause in the Partnership Agreement; (2) dismissal of HEM's RICO claims for failure to state a claim upon which relief can be granted; or (3) alternatively, a stay of further proceedings upon HEM's RICO claims pending the adjudication of the claims asserted by Du Pont against HEM in the Delaware Chancery Court.

II. *Rule 12(b)(6) Standard.*

Fed.R.Civ.P. 12(b)(6) instructs a court to dismiss an action for failure to state a cause of action only if it appears a certainty that no relief could be granted under any set of facts which could be proved. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination of the merits at such an early stage of the plaintiff's case, the trial court "must take all well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether under any reasonable reading of the pleading, the plaintiff may be entitled to relief." *Colburn v. Upper Darby Township,* 838 F.2d 663, 665-66 (3d Cir.1988) (*quoting Estate of Baily by Oare v. County of York,* 768 F.2d 503 (3d Cir.1985)).

III. *Discussion*

A. *Forum Selection Clause: Counts III through IX.*

Counts III through IX of plaintiff's Complaint allege claims under state law related to breaches of, and fraudulent misrepresentations made in connection with, the Partnership Agreement and other related agreements between Du Pont and HEM.

Central to this case is the forum selection clause agreed to by both parties and contained in the Partnership Agreement. A forum selection clause is presumptively valid and will be enforced by the Court unless the party objecting to its enforcement establishes that: (1) the clause is the result of fraud or overreaching, (2) that enforcement of the clause would violate a strong policy of the forum, or (3) that enforcement of the clause would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable. *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.,* 709 F.2d 190, 202 (3d Cir.) , *cert. denied,* 464 U.S. 938 (1983); *Continental Bank v. Sheldon Katz,* No. 87-8135 (E.D.Pa. Oct. 14, 1988), 1988 WL 107552, 1988 LEXIS. The objecting party may also show that enforcement of the provision would be unreasonable, unfair, or unjust. *Deolatikar v. Murlas Commodities, Inc.,* 602 F.Supp. 12, 15 (E.D.Pa.1984); *Anastase Bros. v. St. Paul Fire & Marine Ins.,* 519 F.Supp. 862 (E.D.Pa.1981).

*3 Du Pont argues that Counts III through IX of HEM's complaint should be dismissed because they arise out of the Partnership Agreement between the parties which is subject to the forum selection clause. Therefore, Du Pont maintains that the proper venue for this case is in the Delaware Courts as mandated by the forum selection clause.

Plaintiff, HEM, contends in rebuttal that its action for damages against Du Pont for Du Pont's alleged breach of the Partnership Agreement is not an action to "enforce" that agreement and that, therefore, the forum selection clause does not apply (Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss or Stay, hereafter "Plaintiff's Brief", at pg. 6). Plaintiff argues that:

the litigation which HEM has commenced against Du Pont in this Court does not seek to enforce any term of the Partnership Agreement. To the contrary, in the case at bar HEM seeks a judgment for monetary damages caused by (i) Du Pont's violations of RICO; (ii) Du Pont's violations of its fiduciary obligations to HEM; (iii) Du Pont's fraudulent misrepresentations to HEM; and (iv) Du Pont's breaches of various terms of the Partnership Agreement and of a separate letter agreement simultaneously entered into by the parties.

I find however, that, plaintiff's arguments to the contrary notwithstanding, the action brought by HEM is, in essence, an action for damages for breach of contract and is, therefore, an action to enforce that contract. Pursuant to 3 *Restatement (Second) Of Contracts* § 345 Comment b (1981), "[i]n most contract cases, what is sought is enforcement of a contract. Enforcement usually takes the form of an award of a sum of money due under the contract or as damages." *Id.* As defendant points out, other authorities similarly use the term "enforce" to mean any judicial action based upon a breach of contract, including an action for money damages. *See* 5 A. Corbin, *Corbin on Contracts* § 990 (1964) (section entitled "Judicial Remedies for the Enforcement of Contracts" lists the three classes of judicial remedies as (1) damages, (2) restitution and (3) specific performance); 17A C.J.S. *Contracts* § 523(1)(b) (1963) ("where the enforcement of a contract is sought, the injured party may have an election, dependent on the circumstances of the case, to bring an action for damages or for specific performance"). HEM's Complaint repeatedly seeks damages for alleged breaches of the Partnership Agreement (Complaint ¶¶ 62, 64, 73, 78). Accordingly, I find that, despite plaintiff's highly technical argument regarding the use of the term "enforce" as set out in the Partnership Agreement, plaintiff's action, stripped down to its basic essence, is indeed one to "enforce" the Agreement. As such, the forum selection clause originally, and willingly, agreed to by both parties involved in this litigation should be respected and enforced.

In the alternative, HEM argues that the forum selection clause is unenforceable under the "reasonableness test" adopted by the Delaware courts for determining the enforceability of contractual forum selection clauses. *Brandywine Balloons, Inc. v. Custom Computer Service, Inc.*, C.A. No. 87C-JL-208 (Del.Super. June 13, 1989), 1989 WL 63968, 1989 Del.Super. LEXIS 247, 8-10. HEM contends that under this approach, "[c]ourts are allowed to enforce forum agreements between individuals in a manner designed to further judicial economy and prevent multiplicity of suits." *Id.* slip op. at 8, 1989 WL 63968, LEXIS at 10. In addition to refusing to enforce a forum selection clause where to do so would cause a multiplicity of litigation or undermine judicial economy, Delaware courts will also refuse to give effect to such a clause where to do so would " 'place any of the parties at a substantial and unjust disadvantage or otherwise deny a litigant his day in court.' " *Id.* slip op. at 7, 1989 WL 63968, LEXIS at 9 (quoting *Process & Storage Vessels, Inc. v. Tank Services, Inc.*, 541 F.Supp. 725, 733 (D.Del.1982), *aff'd*, 760 F.2d 260 (3d Cir.1985)).

*4 HEM argues that "the courts of Delaware have determined that they are without subject matter jurisdiction to entertain HEM's RICO claims

against Du Pont." (Plaintiff's Brief at pg. 9, citing *Levinson v. American Acc. Reinsurance Group,* 503 A.2d 632, 634–35 (Del. Ch.1985)). Thus, HEM maintains that, under *Levinson,* the RICO claims could not be brought in the state courts of Delaware, even if the forum selection clause in the Partnership Agreement is found to apply in this case. Moreover, HEM argues that although its RICO claims are broader in scope than its other claims against Du Pont, the proof upon HEM's RICO claims will encompass all of the evidence which will be offered in support of HEM's claims against Du Pont for breach of contractual and fiduciary obligations and for fraudulent misrepresentations (Plaintiff's Brief at pgs. 9–10).

Consequently, HEM argues that the application of the forum selection clause would have one of two possible effects, either of which, standing alone, would render that clause unenforceable under Delaware law: (1) either HEM's entire case against Du Pont would be dismissed under the forum selection clause, in which event HEM would be denied its day in court upon its RICO claims, since they could not be pursued in a Delaware state court forum; or (2) only HEM's non-RICO claims would be dismissed under the forum selection clause, leaving it to pursue its RICO claims against Du Pont in this Court and its non-RICO claims against Du Pont in the Delaware state courts. Therefore, HEM argues that the application of the clause would engender a multiplicity of litigation involving the presentation of the same evidence in separate trials in different fora, thus maximizing the expense and inconvenience of the litigation to the parties and minimizing judicial economy. Accordingly, HEM maintains that Du Pont's motion to dismiss Counts III through IX of HEM's Complaint should be denied.

HEM's argument might have some merit were it not for the recent decision of the Supreme Court in *Tafflin v. Levitt,* 493 U.S. 455, 1990 WL 2870 (U.S.), decided January 22, 1990, wherein the Supreme Court specifically held that state courts have concurrent jurisdiction over civil RICO claims. The *Tafflin* decision, decided by a unanimous Court, now squarely overrules the *Levinson* opinion of the Delaware Chancery Court upon which plaintiff relies, and significantly undermines plaintiff's argument. Plaintiff is now placed in the rather ironic situation of having its "reasonableness test" argument, as enunciated by *Brandywine,* cut directly against its own position, and provide support, instead, for defendant's motion to dismiss. In light of *Tafflin,* achieving the judicial economy which plaintiff so fervently advocates would best be effected by allowing the entire dispute to be tried in the Delaware courts which now have concurrent jurisdiction to hear the RICO claims brought by plaintiff against Du Pont as well as original jurisdiction to hear the underlying state claims. Moreover, the Delaware courts also have jurisdiction over Du Pont's pending suit against HEM, which is based on the same underlying arrangement between the two parties that is the subject of this litigation. [FN2] Allowing the entire dispute to be heard by the Delaware courts would be entirely consistent with the holding of *Brandywine,* which plaintiff has urged this Court to follow, wherein, as stated above, the Delaware Superior Court held that "[c]ourts are allowed to enforce forum agreements between individuals in a manner designed to further judicial economy and prevent multiplicity of suits." 1989 Del.Super. LEXIS 247.

***5** Plaintiff has also made the argument that its claims against Du Pont for breach of fiduciary obligations, as set forth in Counts VII and VIII of HEM's Complaint, cannot be alleged in the Delaware Superior Court because the Superior Court does not have subject matter jurisdiction over claims for breach of fiduciary obligations. I must disagree. Count VII asserts a breach of Du Pont's fiduciary duty as a partner, and seeks "purely legal relief in the form of monetary damages." (Defendant's Supplemental Brief, at pgs. 2–3). As defendant correctly notes, the Delaware Superior Court clearly has concurrent jurisdiction over a claim asserting a breach of fiduciary duty where the

remedy sought is purely legal. *In re Markel*, 254 A.2d 236, 239 (Del.Ch.1969); *Cunningham v. Nix*, No. 83C-JN-98, slip op. at 2 (Del.Super.Ct. Feb. 21, 1984) (wherein the Superior Court denied defendant's motion to dismiss and retained jurisdiction finding that "the mere fact that a fiduciary is alleged to have committed the fraudulent acts will not suffice to confer jurisdiction upon the Court of Chancery. The key consideration with respect to jurisdiction is still the remedy sought").

Count VIII asserts a breach of fiduciary duty against Du Pont as a director of HEM and also seeks purely legal relief in the form of monetary damages. (Defendant's Supplemental Brief, at pg. 3). For the same rationale as discussed above in Count VII, it is clear that the Delaware Superior Court is vested with the requisite jurisdictional authority to hear this count of plaintiff's complaint as well.

Accordingly, I find that the forum selection clause contained in the Partnership Agreement must be respected and enforced. For the reasons set forth above, I shall, and hereby do, grant defendant's motion to dismiss Counts III through IX of plaintiff's Complaint.

B. *RICO Claims: Counts I and II.*

Du Pont, in its Motion to Dismiss Counts I and II of plaintiff's Complaint, alleging violations of RICO, argues that in Counts I and II HEM has failed to allege a pattern of racketeering activity, and that in Count II HEM has failed to state a claim because the defendant and the "enterprise" are not distinct. However, this issue has now been rendered moot as a consequence of my holding that the forum selection clause contained in the Partnership Agreement shall be enforced combined with the Supreme Court's recent decision in *Tafflin*, holding that state courts have concurrent jurisdiction over civil RICO claims. Under *Tafflin*, the RICO claims brought by HEM in Counts I and II of its Complaint should more properly be resolved by the same forum that considers the claims brought by HEM in Counts III through IX. Accordingly, I shall, and hereby do, grant defendant's motion to dismiss Counts I and II of plaintiff's Complaint. [FN3]

C. *Defendant's Motion for Stay.*

Consistent with foregoing opinion granting defendant Du Pont's motion to dismiss as to Counts I through IX of plaintiff's Complaint, defendant's alternative motion for a stay of HEM's RICO claims is hereby denied as moot.

***6** An appropriate Order follows.

FN1. Both parties agree in this litigation that Delaware law is applicable to the construction and interpretation of the Partnership Agreement. (Plaintiff's Brief at pg. 5, fn. 6, citing Defendant's Brief at pg. 22).

FN2. The Court notes that on December 28, 1989, HEM moved to stay Du Pont's Delaware action pending the outcome of this "closely related case between the same two parties" (defendant HEM's Motion for Stay of All Further Proceedings, December 28, 1989, filed in the Superior Court of the State of Delaware In and For New Castle County). Consequently, the Du Pont suit is still, presumably, an active matter.

FN3. The Court is not unaware that significant progress has been achieved in this case in the way of discovery; however, the progress realized thus far in this matter may be employed equally effectively and constructively in the action in Delaware state court. In any event, the issue of progress achieved in the instant case does not rise to the level that it would, or even could, warrant the Court's reaching a conclusion other than the one reached this day.

E.D.Pa.,1990.
HEM Research, Inc. v. E.I. Dupont De Nemours & Co.

Not Reported in F.Supp., 1990 WL 7429 (E.D.Pa.)

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Slip Copy, 2012 WL 7009007 (M.D.Pa.)
(Cite as: 2012 WL 7009007 (M.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
M.D. Pennsylvania.
Lorayne E. SOUDERS, Plaintiff
v.
BANK OF AMERICA, et al., Defendants.

Civil Action No. 1:CV-12-1074.
Dec. 6, 2012.

Lorayne E. Souders, Etters, PA, pro se.

Andrew J. Soven, Reed Smith LLP, Philadelphia, PA, for Defendants.

REPORT AND RECOMMENDATION

THOMAS M. BLEWITT, United States Magistrate Judge.

I. BACKGROUND.

*1 On June 6, 2012, *pro se* Plaintiff Lorayne E. Souders' Complaint, originally filed in the Pennsylvania Court of Common Pleas, York County Civil Division under the Docket Number 2012-SU-001845-93, was removed to the United States District Court for the Middle District of Pennsylvania, by Defendants Bank of America, Bank of New York, Mellon Trustee CWABS 2007-12 Asset-Backed Certificates (hereinafter "Bank of New York, Mellon"), and MERSCORP (hereinafter "MERS") by Notice of Removal under 28 U.S.C. § 1446(d). (Doc. 1). Attached to the Notice of Removal, as required by 28 U.S.C. § 1446(a) , marked as Exhibit A is Plaintiff's Complaint. (Doc. 1, p. 2). Also, Plaintiff's Complaint had Exhibits attached to it, namely, Exhibits A to C. Defendants based their Notice of Removal on the following statutes: (1) diversity jurisdiction under 28 U.S.C. §§ 1332(a)(1) and 1441(b); and (2) federal question jurisdiction under 28 U.S.C. § 1331, as Plaintiff asserts claims for damages under two federal statutes, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.* and the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.* (Doc. 1, p. 4; Exhibit A, Complaint ¶¶ 2, 3, and 9 and Requests for Relief ¶¶ 2-4). This case was then referred to the undersigned for issuance of a Report and Recommendation.

On June 7, 2012, Disclosure Statements pursuant to Federal Rule of Civil Procedure 7.1 were provided identifying each of the three Defendants, and on June 11, 2012, Plaintiff filed a Demand for a Trial by Jury. (Docs. 2 & 5, respectively).

On June 13, 2012, Defendants filed a Motion to Dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6). **(Doc. 6).** On June 20, 2012, Defendants filed a Brief in Support of their Motion to Dismiss with an attached Exhibit and an Appendix consisting of copies of unpublished decisions. (Doc. 8). On July 2, 2012, Plaintiff filed a Brief in Opposition to Defendants' Motion to Dismiss (Doc. 9), and on July 13, 2012, Defendants responded to Plaintiff's Opposition Brief by filing a Reply Brief. (Doc. 12).

On July 16, 2012, Plaintiff then filed an Addendum to her Document 9 Brief in Opposition. (Doc. 13). On July 20, 2012, Defendants then filed an Unopposed Motion for Leave to File a Response to Plaintiff's Addendum. (Doc. 14). Defendants' Document 14 motion was granted by an Order of the Court. (Doc. 15). On July 26, 2012, Defendants filed their Response to Plaintiff's Document 13 Addendum. (Doc. 16). On August 2, 2012, Plaintiff filed an Addendum containing information being entered into the case as a matter of record. (Doc. 17). Lastly, on October 5, 2012, Plaintiff filed a Motion for Judicial Notice. (Doc. 19).

We now turn to discuss the Defendants' Document 6 Motion to Dismiss Plaintiff's Complaint and the documents that followed in relation and response to this Motion (Docs. 8, 9, 12, 13, and 16).

II. STANDARD OF REVIEW.

A. MOTION TO DISMISS

***2** In *Reisinger v. Luzerne County*, 712 F.Supp.2d 332, 343–44 (M.D.Pa.2010), in describing the motion to dismiss standard, the Court stated:

> The Third Circuit Court of Appeals recently set out the appropriate standard applicable to a motion to dismiss in light of the United States Supreme Court's decisions *Bell Atlantic Corp. v. Twombly*, 550 U.S. 433 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim that relief is plausible on its face.' " *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). The Court emphasized that "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. Moreover, it continued, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (citation omitted). *McTernan v. City of York*, 577 F.3d 521, 530 (3d Cir.2009). The Circuit Court discussed the effects of *Twombly* and *Iqbal* in detail and provided a road map for district courts presented with a motion to dismiss for failure to state a claim in a case filed just a week before *McTernan*, *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir.2009).
>
> [D]istrict courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. [*Iqbal*, 129 S .Ct. at 1949.] Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* at 1950. In other words, a complaint must do more than allege a plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. *See Philips [v. Co. of Allegheny*], 515 F.3d [224,] 234–35 [(3d Cir.2008)]. As the Supreme Court instructed in *Iqbal*, "[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.' " *Iqbal*, 129 S.Ct. at 1949. This "plausibility" determination will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. Fowler*, 578 F.3d at 210–11.
>
> The Circuit Court's guidance makes clear that legal conclusions are not entitled to the same deference as well-pled facts. In other words, "the court is 'not bound to accept as true a legal conclusion couched as a factual allegation.' " *Guirguis v. Movers Specialty Services, Inc.*, No. 09–1104, 2009 WL 3041992, at *2 (3d Cir. Sept.24, 2009) (*quoting Twombly*, 550 U.S. at 555) (not precedential).

***3** Where the parties submit exhibits with their filings, a court must determine what documents may be considered with a motion to dismiss. In reviewing a motion to dismiss filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Third Circuit Court of Appeals had held that "a court can consider certain narrowly defined types of material without converting the motion to dismiss" to one for summary judgment. *In re Rockefeller Center Properties, Inc. Securities Litigation*, 184 F.3d 280, 287 (3d Cir.1999). Specifically, a court can consider "a document integral to or explicitly relied upon in the complaint ... [and] an indisputably authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." (*Id.* (internal citations and quotation omitted)). The Circuit Court explained the rationale for these exceptions: "the primary problem raised by looking to documents outside the

complaint-lack of notice to the plaintiff-is dissipated where plaintiff has actual notice and has relied upon these documents in framing the complaint." FN11 *Id.* (internal citations and quotations omitted)). Matters of public record, including government agency records and judicial records, may be considered. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 257 n. 5 (3d Cir.2006) (citation omitted); *Pension Benefit Guarantee Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir.1993).

See also Santiago v. Warminster Tp., 629 F.3d 121, 133 (3d Cir.2010).

III. ALLEGATIONS OF COMPLAINT.

Plaintiff's Complaint was originally filed on April 30, 2012, in the Pennsylvania Court of Common Pleas, York County Civil Division, Docket No. 2012-SU-001845-93. As stated, Defendants filed a Notice of Removal on June 6, 2012, in this Court. Plaintiff's Complaint filed in the Court of Common Pleas, York County Civil Division, was attached to Defendants' Notice of Removal as Exhibit A. Defendants' Motion to Dismiss Plaintiff's Complaint will be addressed in this Report and Recommendation.

In her Complaint, Plaintiff alleges that on June 26, 2007, she executed an Adjustable Rate Note and a Mortgage refinance with Countrywide Home Loans (n/k/a Bank of America) for one hundred twenty thousand dollars ($120,000.00). (Doc. 1, Complaint, ¶ 11, and attached Exhibit "A"). However, when Plaintiff went to the York County Register of Deeds office, she discovered that on October 14, 2011, her mortgage had been assigned by MERS to Bank of New York, Mellon Trustee to CWABS 2007-12 Asset-Backed Certificates. (Complaint, ¶ 12, Exhibit "B").

Based on these facts, Plaintiff alleges Defendants are liable for fraud, misrepresentation, and deceptive and unfair trading practices. (Complaint, ¶ 8). More specifically, she states that her loan number 171186255 was verified as being listed in the Securities and Exchange Commission's website, and that once the loan was sold to investors on Wall Street, thereby secured and converted, it lost its security making the assignment of the loan from MERS to the Bank of New York, Mellon after August 1, 2007 (allegedly the cut-off date for mortgage assignments to enter the pool according to the Trust, CWABS 2007-12, prospectus page 7) invalid, improper, fraudulent, and, according to Plaintiff, in violation of "New York Law." (Complaint, ¶¶ 13-14).

***4** Plaintiff also questions the Mortgage's legitimacy based on the "law of 1871, Cannot separate the Note from the Mortgage," averring that if the Mortgage was never correctly endorsed by all parties according to the Trust's pooling and servicing agreement or if the Note was not conveyed with the Mortgage, the Mortgage becomes null and void. (Complaint, ¶ 15).

Additionally, Plaintiff states that there is no evidence that Countrywide endorsed the Note to anyone or that the Mortgage was properly assigned to the present purported holder-in-due-course Bank of New York, Mellon. She states that this alleged lack of evidence that the Note was endorsed puts the Note out of eligibility and makes the Mortgage null and void. (Complaint, ¶¶ 15-16).

Furthermore, Plaintiff alleges that Defendants fraudulently "concealed their wrongdoings and prevented Plaintiff from discovering her cause of action" and that she "has been injured by the fraud by Defendants and has remained in ignorance of it without any fault or want of diligence or care on her part." (Complaint, ¶¶ 17-18). She also states that Defendants made misleading statements "that the loan contained certain terms desirable to the consumer when it did not" and that "Defendant's use of deceit or trickery caused Plaintiff to act to her disadvantage." (Complaint, ¶¶ 19-20).

As relief, Plaintiff requests the following: (1) judgment against Defendants as jointly and severally liable for all issues in excess of one million

dollars ($1,000,000.00); (2) costs and attorneys fees pursuant to 18 U.S.C. § 1964(c) and 18 U.S.C. § 1692(k); (3) actual and statutory damages for FDCPA violations under 18 U.S.C. § 1692(k); (4) rescission of the mortgage and note amount to clear title to property with fixtures; (5) damages for "unfair and deceptive acts and practices"; (6) damages in the amount of three times the interest paid and clear title to the property stemming from "the exorbitant interest"; (7) return of down payment and other payments as well as interest on the above matter; (8) cost of litigation pursuant to 15 U.S.C. § 1601 *et. seq.*; (9) pre-judgment and post-judgment interest at the maximum rate allowable by law; (10) compensatory and punitive damages; (11) punitive damages as allowed by law; and (12) any relief the court deems just and appropriate. (Complaint, Requests for Relief ¶¶ 1–13).

IV. RESPONSIVE PLEADINGS.

A. MOTION TO DISMISS

In response to Plaintiff's Complaint, Defendants filed a Motion to Dismiss and Brief in Support. (Docs. 6 and 8, respectively). Defendants state that Plaintiff alleges she executed a Note and Mortgage in favor of the original lender, Countrywide Home Loans, n/k/a Defendant Bank of America, for one hundred twenty thousand dollars ($120,000.00), on June 26, 2007. (Doc. 8, p. 3). Defendants avers that according to Plaintiff's Complaint, Exhibit "A" shows that MERS was the named mortgagee on the Mortgage, as nominee for Lender Countrywide Home Loans, Inc. (*Id.*). Defendants then aver that on October 14, 2011, MERS assigned the Mortgage to Bank of New York, Mellon, Trustee to CWABS, 2001–12 Asset Backed Certificates. (*Id.*). On October 24, 2011, the Assignment was recorded by the York County Recorder of Deeds. (*Id.*).

*5 In their Brief, Defendants presented the following "Statement of Questions Involved":

1. Should Plaintiff's Complaint be dismissed with prejudice for lack of standing to challenge the Mortgage Assignment on which her entire claim is based?

Suggested Answer: Yes.

2. Should Plaintiff's Complaint be dismissed with prejudice for failure to state any claim upon which relief may be granted?

Suggested Answer: Yes.

3. Does Plaintiff's Complaint fail to comply with Federal Rule of Civil Procedure 8(a)?

Suggested Answer: Yes.

4. Should the lis pendens be stricken upon dismissal or in the alternative on equitable grounds?

Suggested Answer: Yes.

(Doc. 8, p. 5).

Therefore, Defendants argue that Plaintiff's Complaint should be dismissed with prejudice based on three (3) grounds: (1) lack of standing; (2) failure to state both a RICO and FDCPA claim in accordance with 12(b)(6); and (3) failure to comply with Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure. (*Id.*). Defendants also aver that because the Complaint should be dismissed with prejudice, the Lis Pendens Plaintiff filed against Defendants in state court should be stricken upon dismissal or, alternatively, on equitable grounds. (*Id.*, p. 14). As Exhibit 1 to their Brief (Doc. 8), Defendants attached a copy of the Notice of Lis Pendens Plaintiff filed against them on June 1, 2012, in the Court of Common Peals of York County. (Doc. 8–1).

B. PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

On July 2, 2012, Plaintiff filed a Brief in Opposition to Defendants' Motion to Dismiss. (Doc. 9). In this brief, Plaintiff avers that Defendants' Motion to Dismiss is untimely because Defendants received a copy of the Complaint filed with the

Court of Common Pleas of York County on May 4, 2012, but untimely filed their Notice of Removal on June 6, 2012, and their Motion to Dismiss on June 13, 2012, because both documents were filed after the thirty (30) day time period to respond to the Complaint expired. (Doc. 9, p. 1). Plaintiff also asserts that Defendants have "committed fraudulent acts upon the Plaintiff," under the following statutes: (1) mortgage fraud under 12 CFR § 1731.2; (2) forging endorsements under 18 U.S.C. § 510; (3) counterfeit endorsements under 18 U.S.C. § 473 ; (4) fraudulent destruction under 18 Pa.Cons.Stat. § 4103; (5) Article 9 of the UCC; (6) notary fraud in the State of California; and (7) a RESPA violation under 12 U.S.C. § 2605. (Doc. 9, pp. 1–2). Regarding the RESPA claim, Plaintiff argues that because Defendants failed to provide verified and certified copies and "originals" of the debt proof Plaintiff requested, Defendants were in violation of RESPA. (Doc. 9, pp. 1–2). However, because Plaintiff did not raise any of these new claims in her original Complaint, she is precluded from raising them in her Brief in Opposition, but rather would have to file a Motion to Amend her Complaint and a support brief. *See* Fed.R.Civ.P. 15.

*6 In *Commonwealth of Pennsylvania ex. rel. Zimmerman v. PepsiCo, Inc.*, the Third Circuit stated "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." 836 F.2d 178, 181 (3d Cir.1988) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1984)).

Therefore, based on the *Commonwealth of Pennsylvania ex. rel. Zimmerman* rationale, any claims Plaintiff has not raised in her Complaint, but has attempted to raise in her Brief in Opposition and subsequent Addendums to her Brief in Opposition, will not be considered by the undersigned in this Report and Recommendation.

Furthermore, in her Brief in Opposition, Plaintiff asks the Court to "sustain [ ] a Motion for Default Judgment." (Doc. 9, p. 5). We will recommend that this request be denied since Plaintiff has not complied with Rule 55 of the Federal Rules of Civil Procedure, which governs Default and Default Judgment procedure. An entry of default under Rule 55(a) of the Federal Rules of Civil Procedure must precede an entry of default judgment under Rule 55(b)(2). *See Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.*, 175 Fed. App'x 519, 521 n. 1 (3d Cir.2006). In the present case, there has not been default entered against Defendants. Thus, Plaintiff cannot request default judgment against Defendants. In the case at hand, the Clerk has not entered default against Defendants, nor has Plaintiff filed a Motion for Entry of Default with an accompanying Support Brief as required by Middle District Local Rule 7.5. While Plaintiff states that the Court must enter default judgment against Defendants based on her argument that Defendants failed to timely file their Notice of Removal and subsequent Motion to Dismiss, we find that the entry of default judgment against Defendants is not appropriate as discussed above. Also, as discussed below, Plaintiff waived her claim that Defendants did not timely remove this case from state court when she failed to timely move to remand the case to state court.

Therefore, we will recommend that Plaintiff's request for Default Judgment against Defendants be denied.

C. DEFENDANTS' REPLY BRIEF

On July 13, 2012, Defendants filed a Reply in Support of their Document 6 Motion to Dismiss Plaintiff's Complaint. (Doc. 12). Defendants argue that, first of all, Plaintiff's Opposition Brief did not provide a basis for denying their Motion to Dismiss. As discussed hereinafter, we agree with Defendants that Plaintiff failed to provide a basis for denying Defendants' Motion to Dismiss. Rather, Plaintiff, as discussed above, improperly attempted to raise new claims in her Opposition Brief, and failed to provide any factual information or arguments in response to Defendants' Motion to Dismiss or in support of her claims raised in her Complaint.

In their Reply Brief, Defendants also respond to Plaintiff's Opposition Brief argument that Defendants' Notice of Removal and subsequent filings were untimely and therefore should be dismissed. Plaintiff also states that this case should be remanded back to state court based on Defendants' untimely removal of it. Defendants state that Plaintiff waived her right to challenge the timeliness of their Removal and subsequent filings because Plaintiff did not timely file a motion to remand the case to state court within thirty days of its removal, and she did not file objections to Defendants' Notice of Removal. (Doc. 12, p. 1). We address Defendants' removal of this case from state court to federal court below regrading Plaintiff's Addendum.

*7 Furthermore, Defendants argue that Plaintiff's Opposition Brief RESPA claim is irrelevant to the issues at hand in the Motion to Dismiss because Plaintiff failed to file any such RESPA claim in her Complaint, and had not amended her pleadings to contain a RESPA claim. (Doc. 12, p. 2). Lastly, Defendants aver that in her Opposition Brief, Plaintiff has failed to properly raise a fraud claim against Defendants in an attempt to defeat their Motion to Dismiss because she has failed to state both a RICO and FDCPA claim. (*Id.*). Defendants claim that Plaintiff has failed to satisfy Rule 9(b)'s factual specificity requirements for a fraud claim, and that Plaintiff's attempt to justify her fraud claim based on a case from New Jersey is irrelevant because in that case, the plaintiff survived a 12(b) Motion to Dismiss due to specific allegations regarding a loan modification. However, Plaintiff has only alleged generalized allegations of "bad faith" in Plaintiff's Complaint and Opposition Brief without supporting her allegations with factual specificity. (Doc. 12, p. 3).

D. PLAINTIFF'S ADDENDUM TO HER OPPOSITION BRIEF

On July 16, 2012, Plaintiff filed, sans leave of court, an Addendum to her Opposition Brief. (Doc. 13). In this Addendum, Plaintiff attempted to clarify her argument that Defendants' Notice of Removal was not timely and therefore the Court should remand this case to state court. Plaintiff states that Defendants Bank of America and MERS received the Complaint on May 3, 2012, and Defendant Bank of New York, Mellon received the Complaint on May 4, 2012. Plaintiff attached Exhibits showing service on Defendants to her Doc. 13 Addendum. Plaintiff argues that in their Notice of Removal filed on June 6, 2012, Defendants incorrectly stated that they received the Complaint on May 7, 2012, and that because Defendants did not file the Notice of Removal until after the thirty (30) day responsive pleading time period had concluded, the Complaint should be remanded back to the Court of Common Pleas, York County Civil Division. (Doc. 13, p. 2). More specifically, Plaintiff refers to 28 U.S.C. § 1446(b)(1), which states the following:

> (b) Requirements; Generally.-
>
> (1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> (Doc. 13, p. 2).

Therefore, Plaintiff is arguing that based on 28 U.S.C. § 1446(b) (1), because Defendants did not filed their Notice of Removal until June 6, 2012, after the thirty (30) day time period had concluded, Defendants Notice of Removal and subsequent Motion to Dismiss were not timely filed and therefore should be dismissed and the case remanded back to the Court of Common Pleas of York County.

E. DEFENDANTS' RESPONSE TO PLAINTIFF'S ADDENDUM

***8** On July 20, 2012, upon an Order granting

Defendants leave to respond to Plaintiff's Addendum, Defendants filed a Response to Plaintiff's Document 13 Addendum. (Doc. 16). In their response, Defendants aver that Plaintiff lost her opportunity to argue that Defendants' Notice of Removal was untimely filed because Plaintiff failed to file a Motion to Remand within thirty (30) days after Defendants filed their Notice of Removal as required by 28 U.S.C. § 1447(c). (Doc. 14–1, p. 3; Doc. 16, p. 2).

We agree with Plaintiff that Defendants did not timely file their Notice of Removal. Defendants now concede (Doc. 16, p. 2, n. 2) that Plaintiff (Doc. 13) is correct with respect to her assertion that the last Defendant in this case was served on May 4, 2012, not on May 7, 2012, as Defendants previously stated, and that Defendants' Notice of Removal filed on June 6, 2012, was not timely.

However, as Defendants correctly point out (Doc. 12, p. 1), Plaintiff failed to file a motion to remand this case back to state court. Defendants contend that since Plaintiff failed to timely file a motion to remand case back to state court within thirty days of its removal, that her case had to remain in federal court even though their removal was not timely filed since this was a procedural defect and not a jurisdictional defect under *Ariel Land Owners, Inc. v. Dring*, 351 F.3d 611, 614 (3d Cir.2003). (Doc. 16, p. 2).

28 U.S.C. § 1447 addresses procedure after removal, and § 1447(c) states that "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." 28 U.S.C. § 1447(c); *see also Ramos v. Quien*, 631 F.Supp.2d 601, 606–607 (E.D.Pa.2008). Defendants point to several Third Circuit cases in which the Court refused to determine whether a defendant's notice of removal was filed more than thirty (30) days after the receipt of the complaint because, absent of any subject matter jurisdiction defects, the plaintiff had waived objection to removal by virtue of plaintiff's failure to timely file a motion to remand within the thirty (30) day time period required by 28 U.S.C. § 1447(c). (Doc. 14–1, pp. 3–4; Doc. 16, p. 2–3). *See Ariel Land Owners v. Dring*, 351 F.3d 611 (3d Cir.2003) (holding that 28 U.S.C. § 1447(c) "is clear that, if based on a defect other than [subject matter] jurisdiction, remand may only be effected by a timely motion" brought within thirty (30) days of the notice of removal filing.); *see also Farina v. Nokia, Inc.*, 625 F.3d 97 (3d Cir.2010) (The Court refused to determine whether defendant's removal notice was filed more than thirty (30) days after the Complaint's receipt because Plaintiff failed to file a Motion to Remand within the thirty (30) days after the filing of the Notice of Removal and therefore waived objection to removal); *see also McGlinchey v. Hartford Acc. & Indem. Co.*, 866 F.2d 651 (3d Cir.1989) ("In particular, it is well established that the 30–day time limit for removal in the first paragraph of 1446(b) is procedural, and that a case may not be remanded for failure to comply with the 30–day time limit absent a timely motion.").

***9** As such, we agree with Defendants that because Plaintiff failed to timely file a motion to remand within the thirty (30) day time period after Defendants filed their Notice of Removal, and because Plaintiff's argument contesting Defendants' removal notice as untimely is based on a procedural defect, not a subject matter jurisdiction defect, and we find that this case should not be remanded to state court as Plaintiff requests. *See Ramos v. Quien*, 631 F.Supp.2d 608("A motion to remand based on an objection to a procedural defect in the removal process is clearly waived it if is not raised within thirty days after the filing of the notice of removal.") (citations omitted). Therefore, because Plaintiff has waived her opportunity to oppose Defendants' removal of this case to the Middle District of Pennsylvania, this case should remain in federal court. Thus, we will address the merits of Defendants' Motion to Dismiss.

Furthermore, we note that based on the aforementioned *Zimmerman* rationale that "it is axiomat-

ic that the complaint may not be amended by the briefs in opposition to a motion to dismiss," in our analysis of Defendants' Motion to Dismiss and the subsequent briefs and addendums that Plaintiff filed, we will not be addressing the claims or relief requests that Plaintiff attempted to raise in her briefs and addendums, but had failed to raise in her Complaint. *See Ex. rel. Zimmerman, supra.* Therefore, we will respectfully recommend that the following claims and relief requests raised by Plaintiff in her Opposition Brief and Addendums, but not raised in her Complaint, be dismissed with prejudice: (1) Mortgage Fraud under 12 CFR § 1731.2; (2) Forging Endorsements under 18 U.S.C. § 510; (3) Counterfeit Endorsements under 18 U.S.C. § 473; (4) Fraudulent destruction under 18 Pa.Cons.Stat. § 4103; (5) Article 9 of the UCC; (6) Notary Fraud in the State of California; (6) a RESPA violation under 12 U.S.C. § 2605; and (7) a request for default judgment against Defendants. Furthermore, we have already addressed the timeliness of removal issue, and, therefore, we will not be addressing that issue in the discussion that follows. Instead, we will be analyzing the following issues raised by Defendants in their Motion to Dismiss and Plaintiff's direct responses to these issues, including: (1) standing; (2) failure to state both a RICO and FDCPA claim under 12(b)(6); (3) rescission of the mortgage as a remedy; and (4) violations of Rules 8(a) and 9 of the Federal Rules of Civil Procedure.

V. DISCUSSION.

A. STANDING

1. Assignment of Mortgage

As mentioned, Plaintiff essentially challenges the validity of a Mortgage Assignment. Plaintiff asserts claims under RICO and the FDCPA in connection with the Mortgage Assignment. Since we have detailed the allegations of Plaintiff's Complaint above, we do not repeat them. (*See also* Doc. 8, pp. 3–4).

First, we turn Defendants' argument that Plaintiff's Complaint alleging improper assignment of her mortgage based on an alleged assignment "cut-off date" should be dismissed because Plaintiff lacks standing to challenge the Assignment of the Mortgage in the first place. (Doc. 8, p. 7). Defendants argue that Plaintiff lacks standing because the mortgage assignment is a contract to which she is not a party or third-party beneficiary, and therefore Plaintiff is effectively barred from filing any claims challenging the validity of the mortgage assignment. (*Id.*); *see* 6 Am.Jur.2d Assignments § 1 (an assignment is a contract); *see also Ira G. Steffy & Son, Inc.*, 7 A.3d 278, 287–88 (Pa.Super.Ct.2010) (a plaintiff does not have standing to challenge alleged misconduct if a plaintiff is not a party to or third-party beneficiary of the contract that is the basis for a plaintiff's claims); *see also Shuster v. Pa. Turnpike Commonwealth*, 395 Pa. 441, 149 A.2d 447, 452 (1953) (one who is not a party to a contract lacks standing to argue that the contract is invalid).

***10** The Third Circuit has held that "[t]o satisfy the Article III case or controversy requirement, a Plaintiff must establish that he or she has suffered an 'injury in fact' that is both 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Doe ex rel. v. Lower Merion School Dist.*, 665 F.3d 524, 542 (3d Cir.2011) (citation omitted). Thus, in addressing Defendants' contention that Plaintiff does not have standing to challenge the validity of the assignment of her mortgage, initially we must determine if Plaintiff can show that she has suffered or will suffer "injury in fact." "If a borrower cannot demonstrate potential injury from the enforcement of the note and mortgage by a party acting under a defective assignment, the borrower lacks standing to raise the issue." *In re Walker*, 466 B.R. 271, 285–86 (Bkrtcy.E.D.Pa.2012) (citations omitted).

Plaintiff does not allege that she is a party to the mortgage assignment made on October 14, 2011, nor does the mortgage assignment state that

she is either a party to or third-party beneficiary of the assignment. (Complaint, Ex. "B"). In order for Plaintiff to be considered a third-party beneficiary to the mortgage assignment, the assignment would have had to explicitly state intent to name Plaintiff a third-party beneficiary to the assignment. *Ira G. Steffy & Son, Inc., supra.* However, in examining the language of the Assignment of Mortgage, Plaintiff is not a stated party of the Assignment of Mortgage nor does the Assignment of Mortgage explicitly state its intent to afford Plaintiff third-party beneficiary status. The October 14, 2011 Assignment of Mortgage document states the following:

> For Value Received, the undersigned holder of a Mortgage (herein "Assignor") whose address is **3300 S.W. 34th Avenue, Suite 101 Ocala, FL 34474** does here grant, sell, assign, transfer and convey unto **THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWABS INC., ASSET-BACKED CERTIFICATES, SERIES 2007-12** whose address is **101 BARCLAY ST-4W, NEW YORK, N.Y. 10286** all beneficial interest under that certain Mortgage described below together with the note(s) and obligations therein described and the money due and to become due thereon with interest and all rights accrued or to accrue under said Mortgage.
>
> (Complaint, Exhibit "B").

Therefore, the Assignment of Mortgage does not name Plaintiff as a party to or third-party beneficiary of the assignment, but instead states outright that all beneficial interest is bestowed upon the Bank of New York, Mellon. (*Id.*). Also, we do not find that Plaintiff can show she suffered or will suffer "injury in fact." As the Court explained in the case of *In re Walker,* 466 B.R. at 286, even if the above October 14, 2011 Assignment were defective and the original assignor still had ownership rights in the Note, Plaintiff's payments to the assignee would still satisfy her liability under the Note.

***11** Furthermore, it is well-established that a borrower (in this case, Plaintiff) does not have standing to challenge the validity of mortgage assignments, because, according to 6A C.J.S. Assignments § 132, "the only interest or right which an obligor or a claim has in the instrument of assignment is to insure him or herself that he or she will not have to pay the same claim twice." 6A C.J.S. Assignments § 132; *see also Ward v. Security Atl. Mortgage Elec. Registration Systems, Inc.,* 858 F.Supp.2d 561,568 (E.D.N.C.2012) ("Plaintiffs lack standing to challenge the validity of any such assignment [of mortgage]."); *see also Livonia Property Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC,* 717 F.Supp.2d 724, 735-37 (E.D.Mich.2010) ("hold[ing] that Borrower may not challenge the validity of assignments to which it was not a party or third-party beneficiary, where it has not been prejudiced, and the parties to the assignments do not dispute (and in fact affirm) their validity.").

Therefore, we will recommend that the Court dismiss with prejudice Plaintiff's claim that Defendants improperly and fraudulently assigned her mortgage in violation of an alleged "cutoff" date for mortgage assignment and grant Defendants' Motion to Dismiss Plaintiff's fraud claim regarding the assignment of the mortgage because Plaintiff lacks standing to raise these claims because the contract underlying her claims is the assignment of the mortgage, to which she is neither a party nor third-party beneficiary. Based on the foregoing and the cited case law, we find futility and prejudice to Defendants in allowing Plaintiff to amend her stated claims against Defendants, and we will not recommend that the Court grant Plaintiff leave to file an amended complaint regarding these claims. The Third Circuit has held that a Plaintiff whose Complaint fails to state a cognizable claim is entitled to amend his pleading unless the Court finds bad faith, undue delay, prejudice, or futility. *See Grayson v. Mayview State Hospital,* 293 F.3d 103, 111 (3d Cir.2002); *Alston v. Parker,* 363 F.3d 229, 235-236 (3d Cir.2004).

2. RICO

In their Motion to Dismiss, Defendants also assert that Plaintiff not only lacks standing to raise her claims because she is not a party to or third-party beneficiary of the mortgage assignment contract underlying her claims, but also because she has not met the standing requirements necessary to raise a RICO claim. (Doc. 8, p. 10). Defendants state that the RICO statute "confers standing upon '[a]ny person injured in his business or property by reason of a violation of section 1962 ...' 18 U.S.C. § 1964(c)." (*Id.*). Defendants also state that the "Third Circuit has construed § 1964(c) 'as requiring a RICO plaintiff to make two related but analytically distinct threshold showings ...:(1) that the plaintiff suffered an injury to business or property; and (2) that the plaintiff's injury was proximately caused by the defendant's violation of 18 U.S.C. § 1962.' *Maio v. AETNA, Inc.*, 221 F.3d 472, 482–83 (3d Cir.2000)." (Doc. 8, p. 10). We agree with Defendants. *See Clark v. Conahan*, 737 F.Supp.2d 239, 255 (M.D.Pa.2010) ("In order to have standing to bring a RICO claim pursuant to 18 U.S.C. § 1962(c), ..., Plaintiffs must plead injury to his (sic) business or property and that Defendants proximately caused such injury.") (citations omitted). The Clark Court also stated that "injury for RICO purposes requires proof of concrete financial loss, not mere injury to an intangible property interest." *Id.* (citing *Maio v. AETNA, Inc.*, 221 F.3d 472, 483 (3d Cir.2000)).

***12** Defendants argue that based on this aforementioned RICO standing requirements and case law, because Plaintiff has not alleged that she has suffered any injury to her property or business caused by any Defendant, her RICO claim should be dismissed. (*Id.*). We agree with Defendants analysis of Plaintiff's RICO claim because Plaintiff has not alleged that she has suffered an injury to her business or property. *See Maio v. AETNA, Inc., supra; Clark v. Conahan, supra.* No foreclosure action has even been initiated against Plaintiff's property. Therefore, because Plaintiff has failed to allege any injury to her property or business in accordance with the RICO requirements of § 1964(c) which are necessary to state a claim, we will recommend that Plaintiff's RICO claims be dismissed with prejudice and, Defendants' Motion to Dismiss Plaintiff's Complaint be granted with regards to Plaintiff's RICO claims due to Plaintiff's lack of standing under RICO. *See Maio v. AETNA, Inc., supra; Clark v. Conahan, supra.* Based on the foregoing, we find futility and prejudice to Defendants in allowing Plaintiff to amend her RICO claims against Defendants, and we will not recommend that the Court grant Plaintiff leave to file an amended complaint regarding these claims. *See Grayson v. Mayview State Hospital*, 293 F.3d at 111; *Alston v. Parker*, 363 F.3d at 235–236.

B. FAILURE TO STATE A CLAIM UNDER 12(b)(6)

1. RICO Claims

Even if Plaintiff has standing to raise her RICO claims against Defendants, and we find that she does not, we will recommend that Plaintiff's RICO claims be dismissed based upon her failure to adequately allege activity that satisfies requisite acts under RICO. As the Court stated in *Pagnotti Enterprises, Inc. v. Beltrami*, 787 F.Supp. 440, 444 (M.D.Pa.1992):

> A " 'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). Racketeering activity is defined as (A) certain acts chargeable under state law, (B) acts indictable under specific provisions of Title 18 of the United States Code, (C) acts indictable under specific provisions of Title 29 of the United States Code, (D) any offense involving fraud in connection with a case under Title 11, fraud in the sale of securities, or the felonious manufacture or distribution of drugs, or (E) any act indictable under the Currency and Foreign Transactions Reporting Act. 18 U.S.C. § 1961(1).

More recently, in *Morales v. Superior Living Products, LLC*, 398 Fed.Appx. 812, 814 (3d

Cir.2010), when discussing the standard for a prima facie case under RICO, the Third Circuit Court stated:

> [A] claimant must allege '(1) conduct (2) of an enterprise (3) through a pattern (4) of a racketeering activity.' *Lum. v. Bank of Am.*, 361 F.3d 217, 223 (3d Cir.2004). Because appellants present a fraud-based RICO claim, they must plead with particularity the circumstances of the alleged fraud. *Id.* They may meet this requirement by pleading the 'date, place or time' or by 'injecting precision and some measure of substantiation into their allegations.' *Id.* at 224 (citation omitted).

***13** In their Motion to Dismiss, Defendants aver the following:

> Plaintiff's allegations do not allege a period, object or any certain illegal action by any alleged Defendant [with regards to her RICO claim]. Plaintiff merely alleges that it was improper for MERS to assign the Mortgage to the Bank of New York, Mellon due to a misunderstood and mischaracterized "cut off date" relating to the Trust, that this was a violation of an unspecified New York law, and that Defendants had knowledge of same. *See supra;* see Complaint, ¶¶ 13–20. Furthermore, despite Plaintiff's theory, there is nothing criminal about securitizing a mortgage loan or assigning a Mortgage, and broad allegations like Plaintiff's should be disregarded in evaluating a RICO conspiracy claim. *See Am. Dental Ass'n. v. CIGNA Corp.*, No. 09–12033, 2010 WL 1930128, at *8 (11th Cir. May 14, 2010) ("In analyzing the [RICO] conspiracy claim ... *Iqbal* instructs us that our first task is to eliminate any allegations in Plaintiffs' complaint that are merely legal conclusions.").
>
> (Doc. 8, p. 12).

We agree with Defendants' analysis of Plaintiff's RICO claims. We find that Plaintiff's RICO claims against Defendants are vague and based on legal conclusions, completely failing to assert with factual sufficiency any particular conduct that would indicate Defendants were engaged in predicate acts of racketeering. *See id*. Plaintiff's Complaint fails to sufficiently describe the structure, purpose, function and course of conduct of the enterprise. Rather, Plaintiff relies on vague and conclusory allegations in her attempt to allege a RICO claim, which are is not sufficient enough to properly allege a RICO claim. *See Warden v. McLelland*, 288 F.3d 105, 114 (3d Cir.2002) (Court held that with respect to RICO claims, Plaintiff must allege fraud with the heightened pleading particularity required by Fed.R.Civ.P. 9(b)).

Therefore, we will recommend that the Court dismiss with prejudice Plaintiff's RICO claims against Defendants due to her failure to allege that Defendants were engaged in conduct of an enterprise acting in a pattern of racketeering, and grant Defendants' Motion to Dismiss. As discussed above, we find futility and prejudice to Defendants in allowing Plaintiff to amend her RICO claims.

2. FDCPA CLAIM

Plaintiff also asserts that Defendants violated the FDCPA when they assigned Plaintiff's mortgage. Under the FDCPA, debt collectors are restricted from using unfair collection methods and from making misleading or false representations. 15 U.S.C. §§ 1692e, 1692f.

"The primary goal of the FDCPA is to protect consumers from abusive, deceptive, and unfair debt collection practices, including threats of violence, use of obscene language, certain contacts with acquaintances of the consumer, late night phone calls, and simulated legal process." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir.1997) (citation omitted). "A basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve the right to be treated in a reasonable and civil manner." *Id.* (citation omitted). "In the most general terms, the FDCPA prohibits a debt collector from using certain enumerated collection methods ... to collect a

'debt' from a consumer." *Bass*, 111 F.3d at 1324. The FDCPA prohibits debt collectors from: engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person," 15 U.S.C. § 1692d; from using "any false, deceptive, or misleading representations or means in connection with the collection of any debt," 15 U.S.C. § 1692e; or from using unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. § 1692f.

***14** Consumers have a private cause of action against debt collectors. 15 U.S.C. § 1692k. "The FDCPA is a strict liability statute to the extent it imposes liability without proof of an intentional violation." *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir.2011). Further, the FDCPA is a "remedial statute" and courts construe the FDCPA broadly to ensure its purpose to protect all consumers, even the least sophisticated consumers, is given effect. *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453 (3d Cir.2006) (citations omitted).

In their Motion to Dismiss, Defendants argue that Plaintiff's FDCPA claim should be dismissed with prejudice because: (1) she has not alleged violation of any specific section of the FDCPA; (2) she has not alleged that any of Defendants are "debt collectors" under the FDCPA; (3) she has not alleged any abusive, confusing or otherwise improper behavior; and (4) she has not alleged that Defendants have engaged in any debt collection activity. (Doc. 8, p. 13).

While there is no question that Defendants are indeed debt collectors under the definition of a debt collector as defined by 15 U.S.C. § 1692(a)(6) of the FDCPA, Plaintiff has failed to properly allege a claim under the FDCPA because she has not alleged her claim with factual sufficiency, but rather legal conclusions. *Oppong v. First Union Mortgage Corporation*, 215 Fed. Appx. 114, 118 (3d Cir.2007) (stating that a mortgagee is a "debt collector" under the FDCPA's definition in § 1692(a)(6)). While Plaintiff has stated that Defendants were "fraudulent" and used "misrepresentations," she failed to specifically state what provision of the FDCPA Defendants allegedly violated and failed to allege any facts to support these purportedly legal conclusions that Defendants engaged in fraudulent activities and made misrepresentations. As stated above, in evaluating a Complaint in response to a Motion to Dismiss, a complaint's allegations must be supported with factual sufficiency, and not just mere legal conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 433, 455 (2007). In *Bridgenorth v. American Education Services*, 412 Fed.Appx. 433, 435 (3d Cir.2011), the Third Circuit cited to *Iqbal* and stated that "merely reciting an element of a cause of action or making a bare conclusory statement is insufficient to state a claim." We agree with Defendants and find that Plaintiff's Complaint regarding the alleged violations under the FDCPA is not sufficient under *Twombly* and *Iqbal* to state a claim.

In her Complaint, Plaintiff has failed to state what, if any, FDCPA section Defendants had allegedly violated. Nor does Plaintiff attempt to clarify, in her Brief in Opposition, what sections of the FDCPA Defendants had violated. Therefore, we will recommend that Defendants' Motion to Dismiss be granted and Plaintiff's FDCPA claims be dismissed for failure to allege any such claim with factual sufficiency required to survive a 12(b)(6) Motion to Dismiss. *See Kimmel v. Phelan Hallinan & Schmieg, PC*, 847 F.Supp.2d 753, 769–770 (E.D.Pa.2012) (Plaintiff had to "link each alleged violation of the FDCPA to the predicate factual allegations giving rise to the violation in order to state a claim under Fed.R.Civ.P.8."). However, in an abundance of caution, we will recommend that the Court dismiss without prejudice Plaintiff's FDCPA claims. Based on the foregoing and the cited case law, we find that it is not clear whether it is futile for the Court to allow Plaintiff to amend her FDCPA claims against Defendants, and we will recommend that the Court grant Plaintiff leave to file an amended complaint regarding these claims.

3. RESCISSION AS REMEDY

***15** As part of her request for relief, Plaintiff has requested that the Court rescind the Mortgage based on chain of title issues. (Complaint ¶ 15; Prayer for Relief ¶ 5). Defendants aver that because Plaintiff has not alleged any "legal or factual basis for rescission of the Mortgage, nor has she averred her ability to tender the balance owing under the Mortgage," rescission is not an available remedy "even if Plaintiff had stated any viable claim for relief ...." (Doc. 8, p. 13).

It would be futile to delve into the elements necessary to properly request rescission of Plaintiff's mortgage in this Report and Recommendation because of our recommendation that Plaintiff's Complaint be dismissed with prejudice due to lack of standing, failure to state a claim under 12(b)(6), and failure to conform to Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure. Insofar as we are recommending that Plaintiff's Complaint be dismissed with prejudice, we find that it is unnecessary to delve into the Complaint's prayer for relief. However, to the extent that Defendants contend in their Motion to Dismiss that this Court should dismiss Plaintiff's request that her mortgage be rescinded, we will recommend that the Court dismiss with prejudice Plaintiff's mortgage rescission prayer for relief and grant Defendants' Document 6 Motion to Dismiss in this regard. *See Gehman v. Argent Mortg. Co. LLC*, 726 F.Supp.2d 533, 542 n. 13 (E.D.Pa.2010) (Court held that under the Truth in Lending Act (TILA), 15 U.S.C. § 1635, rescission is not an available remedy for "residential mortgage transactions."). We also agree with Defendants that in order for Plaintiff to request rescission of the Mortgage, and for Defendants to remove the mortgage lien, Plaintiff must tender the balance owing under the Mortgage. *See American Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 820–21 (4th Cir.2007); *Valentine v. Influential Sav. & Loan Ass'n*, 572 F.Supp. 36, 40–41 (E.D.Pa.1983). Otherwise, Plaintiff would realize a windfall, *i.e.*, both a free and clear property and retention of the mortgage loan monies. As Defendants point out, Plaintiff has not averred she has the ability to tender the balance owing under the Mortgage. (Doc. 8, p. 13).

C. RULES 8(a) AND 9(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

1. RULE 8(a) VIOLATION

Rule 8(a) states that "A pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief ...." Fed.R.Civ.P. 8(a). Defendants argue that Plaintiff's Complaint is not in accordance with Rule 8(a) and therefore should be dismissed. They also aver that "the Complaint purports to bring claims against three separate Defendants, but the cause or causes of action upon which Plaintiff seeks to recover as to each or any Defendant remains unclear. *See* Complaint ¶¶ 13–20." (Doc. 8, p. 13). Paragraphs thirteen (13) through twenty (20) of Plaintiff's Complaint state the following:

> ***16** 13. The Plaintiff suspected fraud because according to the Trust, CWABS 2007–12 the prospectus on page 7 states that the cut off date for mortgage assignments to enter the pool is August 1, 2007. From the Securities and Exchange Commission's website, incorporated herein and marked Exhibit "C".
>
> 14. The Plaintiff's loan number 171186255 was verified as being listed in the Securities and Exchange Commission's website and converted into stock. It is then sold to investors on Wall Street. Once the loan was securitized and converted, it forever lost its security. MERS making the assignment to the Trustee after August 1, 2007 is a violation of New York Law.
>
> 15. The Plaintiff is questioning the legitimacy of the mortgage and if there is a break in the chain of title. If the Mortgage was never correctly endorsed by all parties according to the Trust's pooling and servicing agreement, the mortgage becomes null and void. Also, if the Mortgage is separated from the Note it becomes null and void.

Law of 1871, Cannot separate the Note from the Mortgage.

16. There is no evidence that Countrywide endorsed the Note to anyone or that the Mortgage was properly assigned to the now purported holder-in-due-course the Bank of New York, Mellon. According to New York law, the note would be put out of eligibility. *Ibanez v. Wells Fargo,* MA Jan. 7, 2011 MA Supreme Court.

17. Defendants fraudulently concealed their wrongdoings and prevented Plaintiff from discovering her cause of action.

18. Plaintiff has been injured by the fraud by Defendants and has remained in ignorance of it without any fault or want of diligence or care on her part.

19. Defendants made many misleading statements that the loan contained certain terms desirable to the consumer when it did not.

20. Defendant's use of deceit or trickery caused Plaintiff to act to her disadvantage.

(Complaint, ¶¶ 13–20).

In analyzing Defendants' argument that Paragraphs thirteen (13) through twenty (20) of Plaintiff's Complaint fail to conform to Rule 8(a), we find that even under the most liberal construction, Plaintiff's Complaint is not in conformity with Rule 8(a). It does not give Defendants fair notice of what Plaintiff's claims against them are and the grounds upon which the claims rest. Plaintiff claims that Defendants are liable for fraudulent, misrepresentative conduct, but yet fails to point to any facts or statutes to support her general allegations. *See* Complaint, ¶¶ 13–20. Clearly, Plaintiff's allegations found in paragraphs thirteen (13) through twenty (20) of her Complaint do not give Defendants fair notice as to what her claims against them are and the grounds upon which they rest. Therefore, due to Plaintiff's failure to comply with Rule 8(a), we will recommend that Plaintiff's Complaint be dismissed. However, based on our above discussions regarding Defendants' Motion to Dismiss, we will recommend that Plaintiff's Complaint be dismissed with prejudice due to futility in allowing leave to amend and, that Defendants' Motion to Dismiss be granted.

2. RULE 9(b) VIOLATION

***17** Defendants also contend that Plaintiff's Complaint is in violation of Rule 9(b) of the Federal Rules of Civil Procedure because Rule 9(b) requires specific factual averments of misrepresentation in order for a plaintiff to properly raise a claim for fraud or conspiracy. (Doc. 8, p. 13). The Third Circuit has determined that in order to comply with Rule 9(b)'s particularity requirement of a fraud claim, the following elements must be pled: (1) a specific false representation of material facts; (2) knowledge by the person who made the misrepresentation as to its falsity; (3) ignorance of its falsity by the person to whom the representation was made; (4) the intention that the representation should be acted upon; and (5) the plaintiff acted upon the false representation to his or her damage. *Christidis v. First Pennsylvania Mortgage Trust,* 717 F.2d 96, 99 (3d Cir.1983). Rule 9(b) is satisfied if a Complaint sets forth precisely what omissions or statements were made in what documents or oral statements and the manner in which they misled the plaintiff, and what benefit the defendant gained as a consequence of the fraud. *In re Theragenics Corp. Securities Litigation,* 105 F. Su pp.2d 1342, 1348 (N.D.Ga.2000) (citing *Brooks v. Blue Cross and Blue Shield of Fla., Inc.,* 116 F.3d 1364, 1371 (11th Cir.1997)). Furthermore, in accordance with 15 U.S .C. § 78u–4(b)(2), a complaint must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2). Furthermore, according to the Supreme Court, a strong inference "is more than merely plausible or reasonable-it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 314, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

In light of the specific elements that must be pled in order to successfully state a claim for fraud in accordance with Rule 9(b) and in light of the factual sufficiency case law standards provided above necessary to allege a defendant's fraudulent state of mind, we find that Plaintiff's averments against Defendants, as stated in Paragraphs thirteen (13) through twenty (20) in her Complaint, clearly lack factual sufficiency because Plaintiff has not alleged any of the five elements necessary to properly plead a claim for fraud. Furthermore, as discussed above in the section titled "Failure to State a Claim under 12(b)(6)," we find that Plaintiff has failed to state both RICO claims and FDCPA claims with the required factual sufficiency, and that Plaintiff has attempted to support her allegations with sweeping legal buzz words and conclusions.

Furthermore, in her Brief in Opposition to Defendants' Motion to Dismiss and in her Addendums, Plaintiff did not provide any more factual information to support her claims and to oppose Defendants' Motion to Dismiss argument based on violations of Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure. Therefore, because Plaintiff's Complaint does not conform to the standards of either Rule 8(a) or Rule 9(b) of the Federal Rules of Civil Procedure, and because Plaintiff did not attempt to provide sufficient facts to support her claims in her Brief in Opposition or Addendums, we will recommend that Plaintiff's Complaint be dismissed with prejudice based on violations of Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure and, that Defendants' Motion to Dismiss (Doc. 6) be granted.

D. LIS PENDENS

***18** Lastly, Defendants aver that should the Court grant Defendants' Motion to Dismiss, and that the Lis Pendens Plaintiff filed in York County Court attached to Defendants' Brief (Doc. 8-1) should be stricken. (Doc. 8, p. 14). Defendants base their argument on the Pennsylvania Superior Court case *Psaki v. Ferrari,* in which the Superior Court stated, "a party is not entitled to have his case indexed as lis pendens unless title to real estate is involved in litigation." 377 Pa.Super. 1, 546 A.2d 1127, 1128 (Pa.Super.Ct.1988). Defendants point out that presently there is not any foreclosure action pending against Plaintiff.

In the alternative, Defendants argue that even if their Motion to Dismiss is denied, the Court should still strike Plaintiff's Lis Pendens on equitable grounds because "Defendants will likely prevail on the merits of the litigation and because Plaintiff is in no way prejudiced by its removal. *See e.g., Rosen v. Rittenhouse Towers,* 334 Pa.Super. 124, 482 A.2d 1113, 1116 (Pa.Super.Ct.1984) (courts should weight the equities when deciding the propriety of a lis pendens)." (Doc. 8, p. 14). Defendants argue that Plaintiff has no likelihood of success on her Complaint and therefore "cannot claim prejudice by striking the lis pendens since Plaintiff's pursuit of more than $1,000,000.00 in monetary damages clearly outweighs the value of any purported issue affecting title that might arise from an assignment of Plaintiff's $120,000.00 Mortgage loan." (Doc. 8, pp. 14–15).

Even though we will recommend that the Court dismiss with prejudice all of Plaintiff's claims against Defendants except her FDCPA claims, we will also recommend that the Court strike Plaintiff's Lis Pendens, as Defendants request. Thus, even though we are not recommending that the Court dismiss Plaintiff's entire Complaint with prejudice, we find that based on equitable grounds, the Court should strike Plaintiff's Lis Pendens because Plaintiff's one million dollar ($1,000,000.00) prayer for relief far surpasses the amount in controversy, which is the one hundred twenty thousand dollar ($120,000.00) mortgage amount.

VI. RECOMMENDATION.

Based on the foregoing discussion, we respectfully recommend that the Court **GRANT** Defendants' **Document 6 Motion to Dismiss** and **DISMISS WITH PREJUDICE** the following:

1. Plaintiff's claim that Defendants' Notice of

Removal and Document 6 Motion to Dismiss were untimely filed.

2. Plaintiff's request for default judgment against Defendants.

3. Plaintiff's Complaint with respect to all claims except her FDCPA claims against Defendants.

We recommend that the Court **DISMISS WITHOUT PREJUDICE** Plaintiff's FDCPA claims against Defendants, and that Plaintiff be granted leave to amend only these claims.

We also recommend that Defendants' request for the Court to strike Plaintiff's Lis Pendens filed against Defendants in York County Court be **GRANTED.**

M.D.Pa.,2012.
Souders v. Bank of America
Slip Copy, 2012 WL 7009007 (M.D.Pa.)

END OF DOCUMENT

SSN HOTEL MANAGEMENT, LLC, Plaintiff, v. SUSQUEHANNA BANK, LITITZ PROPERTIES LLC, and OPTIMUM HOTEL BROKERAGE, LLC, Defendants.

No. 0296, Commerce Program Control Number 11101182 and 11100532

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION

2012 Phila. Ct. Com. Pl. LEXIS 466

February 9, 2012, Decided

SUBSEQUENT HISTORY: Summary judgment granted by, Judgment entered by SSN Hotel Mgmt., LLC v. Susquehanna Bank, 2013 Phila. Ct. Com. Pl. LEXIS 134 (2013)

JUDGES: [*1] PATRICIA A. MACINEREY, J.

OPINION BY: PATRICIA A. MACINEREY

OPINION

MEMORANDUM OPINION

This matter arises from the failed sale of a hotel. Plaintiff SSN Hotel Management, LLC ("SSN") attempted to purchase a hotel property located in York, Pennsylvania (the "Property") from defendant Lititz Properties, LLC ("Lititz"). SSN alleges that defendant Susquehanna Bank ("Susquehanna") was Lititz' agent in this sale, and that defendant Optimum Hotel Brokerage, LLC ("Optimum") was the "exclusive selling agent" for Lititz regarding the Property.

In its Complaint, SSN claims that in 2011 it negotiated and accepted an offer to purchase the Property from Lititz, who then refused to sell the Property to SSN, but sold it instead to another party for less than SSN offered. SSN brings claims for breach of contract and breach of the "duty of fair dealing and good faith" against all three defendants, as well as claims of interference with contractual relations against Susquehanna and concerted action to interfere with contractual rights against Susquehanna and Optimum. SSN demands specific performance of the contract, rendering any transfer of the Property to another party null and void and compelling Lititz to sell the Property [*2] to SSN; compensatory and punitive damages, attorney's fees, costs and interest. Lititz and Susquehanna filed preliminary objections to SSN's complaint, as Optimum did separately. SSN responded to these preliminary objections; Lititz and Susquehanna replied to their response.

I. Defendants' preliminary objections to SSN's breach of contract claim are sustained as to all Defendants.

The parties' fundamental disagreement is whether or not a valid contract existed between SSN and Lititz for sale of the Property. SSN states that it has alleged facts to support the existence of a valid contract; however, based on its allegations in the Complaint and the exhibits attached to it, the court does not agree.

"It is hornbook law that in order to form a contract, there must be an offer, an acceptance, and consideration."[1] The facts, as alleged in the complaint, are as follows: SSN transmitted a Letter of Intent to Lititz

containing an offer of $1.25 million for the Property; Lititz, through Optimum, emailed to SSN the email attached to the complaint and the "Purchase and Sale Agreement"; SSN signed this document and returned it; Lititz did not sign it and allegedly sold the Property to another buyer [*3] for $1.15 million. SSN states that it believed its signature and return of the document formed the basis of a binding contract; however, it must allege facts sufficient to indicate a contract had been formed, not merely its belief. "In determining whether there has been a meeting of the minds, the inquiry should focus not on the subjective intent of the parties, but on their outward manifestations of assent."[2] The fact that the email from Optimum asks SSN to "enter the final and best price for the fee simple interest in the property" strongly suggests that this document was not intended to be a final contract; a reasonable party would not intend to be bound by the other party's unilaterally-chosen price.

1 Yoder v. Am. Travellers Life Ins. Co., 2002 PA Super 398, 814 A.2d 229, 233 (Pa. Super. 2002).

2 GM Holdings, LLC v. mCom Fin. Solution. Inc., 2009 Phila. Ct. Com. Pl. LEXIS 272, *26 (internal citations omitted).

Further, it is well-settled in Pennsylvania that a contract for the sale of real property is unenforceable unless it is in writing and signed by all the parties.[3] "The [*4] Statute of Frauds generally renders an oral agreement for the sale of land unenforceable and bars the remedy of specific performance."[4] Specifically, the contract must be signed by the party against whom it is being asserted.[5] Such is not the case here. It is true that a contract for real estate may be taken out of the Statute of Frauds by part performance; however, a significant degree of performance must be alleged in order to enforce an agreement.[6] SSN does not allege that it has performed, only that it was "ready, willing and able to comply with the terms of the Agreement."

3 33 P.S. §1; see, e.g., Trowbridge v. McCaigue, 2010 PA Super 50, 992 A.2d 199, 201 (Pa. Super. 2010); Hostetter v. Hoover, 378 Pa. Super. 1, 7, 547 A.2d 1247, 1250 (1988); Rosen v. Rittenhouse Towers, 334 Pa. Super. 124, 130, 482 A.2d 1113-1, 334 Pa. Super. 124, 482 A.2d 1113, 1116-7 (1984).

4 Mill Run Assocs. v. Locke Prop. Co., 2003 U.S. Dist. LEXIS 18096 (internal citations omitted).

5 In re Estate of Pentrack, 486 Pa. 237, 240, 405 A.2d 879, 880 (1979).

6 Axe v. Potts, 349 Pa. 345, 349, 37 A.2d 572, 574 (1944).

SSN argues that preliminary objections are not the appropriate vehicle for fact-based defenses. While this is technically true, the Pennsylvania Supreme Court [*5] has held that "a complaint...which does not establish that the contract sued upon meets the requirements of the statute of frauds does not 'state a claim upon which relief can be granted' and is therefore demurrable."[7] Defendants have preliminarily objected in the nature of a demurrer; these demurrers are proper and are accordingly sustained.

7 Leonard v. Martling, 378 Pa. 339, 343, 106 A.2d 585, 586 (1954) (internal citations omitted).

II. Defendants' Preliminary Objections as to SSN's claim for breach of the duty of fair dealing and good faith are sustained as to all Defendants.

The duty of good faith and fair dealing is one that is imposed on parties to a contract.[8] As discussed above, no valid contract can be reasonably argued to have existed. We have previously held that the claim for breach of duty of fair dealing and good faith duplicates the breach of contract claim, and must be stricken as well. "The implied covenant of good faith does not allow for a claim separate and distinct from a breach of contract claim. Rather, a claim arising from a breach of the covenant of good faith must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain [*6] obligations into the contract itself."[9] Accordingly, no duty of good faith and fair dealing existed in this case, and Defendants' preliminary objections are sustained.

8 Bethlehem Steel Corp. v. Litton Industries, Inc., 507 Pa. 88, 125, 488 A.2d 581, 600 (1985) (internal citations omitted).

9 JHE, Inc. v. SEPTA, 2002 Phila. Ct. Com. Pl. LEXIS 78, *13; see also LSI Title Agency, Inc. v. Evaluation Servs., 2008 PA Super 126, 951 A.2d 384, 392 (Pa. Super. 2008) (determining that "that the claim for breach of the implied covenant of good faith and fair dealing is subsumed in a breach of contract claim.")

III. Defendants' Preliminary Objections to SSN's

claim for interference with contractual relations are sustained.

SSN claims that Susquehanna intentionally interfered with Lititz and Optimum to divert the sale of the Property to another buyer, thereby interfering with SSN's contract with Lititz to buy the Property, or, in the alternative, with its prospective contract.

The elements of a claim for interference with contractual relations are:

> (1) the existence of a contractual relationship between the complainant and a third party;
>
> (2) an intent on the part of the defendant to harm the plaintiff by interfering with [*7] that contractual relationship;
>
> (3) the absence of privilege or justification on the part of the defendant; and
>
> (4) the occasioning of actual damage as a result of defendant's conduct.[10]

Interference with prospective contractual relations follows the same test, except that the first element refers to a prospective contract rather than an actual one.[11]

> 10 Phillips v. Selig, 2008 PA Super 244, 959 A.2d 420, 429 (Pa. Super. 2008).
> 11 Id. at 428.

As discussed above, the question of whether a contractual relationship existed between SSN and Lilitz has not been pled adequately to withstand preliminary objection. Nor has SSN pled facts to indicate that a prospective contractual relationship existed. A prospective contractual relation must be based on a "reasonable likelihood or probability. This must be something more than ... the innate optimism of the salesman."[12] A plaintiff must show that "but for the wrongful acts of the defendant it is *reasonably probable*" that the contract would have been formed.[13] While SSN has pled facts indicating that it and Lititz engaged in negotiation and that a contract was drafted, it has not indicated a reasonable probability that the contract would have been formed but for the unspecified [*8] actions of Susquehanna.

> 12 Glenn v. Point Park College, 441 Pa. 474, 480, 272 A.2d 895, 898-9 (1971).
> 13 Id, at 480.

Second, a plaintiff must plead specific actions taken by the defendant to interfere with the contract. As mentioned above, SSN does not plead such actions, only that Susquehanna "exerted its authority" with Lititz and "diverted the sale to another buyer." This is not a sufficiently detailed recitation of facts to make out a claim for interference with contractual relations.

Further, to maintain a claim for tortious interference, a plaintiff must plead the absence of privilege or justification - that the defendant acted for the purpose of causing harm to the plaintiff, and that the conduct was not permissible despite its harmful effect. A long list of factors are relevant to determining whether behavior is justified.[14] However, SSN has not pled the absence of privilege at all. Accordingly, the preliminary objection to SSN's claim of interference with contractual relations is sustained.

> 14 Restat 2d of Torts § 767.

Because the claim for interference with prospective contractual relations falls due to insufficiency of facts alleged, the court will grant SSN 20 days in which to file [*9] an amended complaint to replead this claim.

IV. Defendants' preliminary objections to SSN's claim for concerted action to interfere with contractual rights are sustained.

Because SSN's claim for interference with contractual relations was stricken, the claim for conspiracy must fall as well.[15] "Absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act."[16] Accordingly, this preliminary objection is sustained.

> 15 Pelagatti v. Cohen, 370 Pa. Super. 422, 432, 536 A.2d 1337, 1342 (1987).
> 16 Id.

Finally, because all claims in the action are dismissed, no recovery is possible; accordingly, SSN's request for attorney's fees and punitive damages are stricken as well.

CONCLUSION

For the foregoing reasons, Defendants' preliminary objections are sustained and Plaintiffs complaint is dismissed.

BY THE COURT:

/s/ Patricia A. Macinerey

PATRICIA A. MACINEREY, J.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Addendum to Reply in Support of Defendants' Preliminary Objections has on this date been forwarded to the individuals listed below as addressed, by first class mail, postage prepaid:

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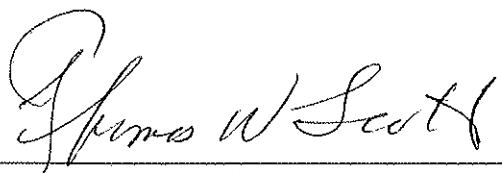

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