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, 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,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

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 the NCAA Defendants' Preliminary Objections to Amended Complaint

Filed on Behalf of:
National Collegiate Athletic Association, Mark Emmert, Edward Ray

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Civil Division

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ADDENDUM TO REPLY IN SUPPORT OF THE NCAA DEFENDANTS' PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT

REPLY IN SUPPORT OF THE NCAA DEFENDANTS' PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT

ADDENDUM: UNPUBLISHED CASES

ADVANCED POWER SYSTEMS, INC. v. HI-TECH SYSTEMS, INC., et al.

Civ. No. 90-7952

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1992 U.S. Dist. LEXIS 6479

April 28, 1992, Decided
April 30, 1992, Filed

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For PINKERTON, INC., THIRD-PARTY PLAINTIFF,

CHARLES A. FITZPATRICK, III, MYLOTTE, DAVID & FITZPATRICK, 1800 JFK BLVD., 7TH FL., PHILA., PA 19103, USA, ARTHUR B. KEPPEL, MYLOTTE DAVID & FITZPATRICK, 1800 JFK BLVD., 7TH FLOOR, PHILADELPHIA, PA 19103, USA.

For WARREN HENSLEY, THIRD-PARTY DEFENDANT, LEE CHIDESTER, THIRD-PARTY DEFENDANT, CLIFFORD MOSES, THIRD-PARTY DEFENDANT, [*3] JOHN DANIELS, THIRD-PARTY DEFENDANT, BRIAN E. APPEL, KLOVSKY KUBY & HARRIS, 431 CHESTNUT STREET, PHILADELPHIA, PA 19106, USA, LEE CHIDESTER, 52 ASHLEY COURT, DOWNINGTOWN, PA 19335, USA.

JUDGES: Pollak

OPINION BY: LOUIS H. POLLAK

OPINION

MEMORANDUM

This case arises out of an alleged theft of trade secrets and confidential information from plaintiffs by defendants Hi-Tech Systems, Inc., Pinkerton's, Inc., and Pinkerton's Investigative Services, Inc. Plaintiff claims that the theft was part of a scheme among the defendants to destroy plaintiff's business. Jurisdiction is based on the existence of a federal question, namely, plaintiff's claims under the Racketeering Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* (1988). [1] Before the court is the motion of defendants Pinkerton's, Inc., and Pinkerton's Investigative Services, Inc. (hereinafter collectively described as "Pinkerton"), to dismiss various counts of plaintiff's amended complaint for failure to state a claim.

1 Plaintiff also asserts that there is complete diversity among the parties, and that jurisdiction over plaintiff's state law claims may therefore be based on diversity of citizenship. This assertion is belied by the specific allegations of the second amended complaint, which states that plaintiff and defendants Hi-Tech Systems, Inc., Robert L. Smith, and Sylvia Smith are all citizens of Pennsylvania. Diversity does exist between plaintiff and defendants Pinkerton's, Inc., and Pinkerton's Investigative Services, Inc., which, according to the allegations of the second amended complaint, are incorporated in Delaware and have their principal place of business in California. It is plain, however, that there is not complete diversity among the parties.

[*4] I. Facts and Procedural History

Plaintiff Advanced Power Systems, Inc., ("APS") was formed in 1989 by former employees of defendant Hi-Tech Systems, Inc. ("Hi-Tech"). Both APS and Hi-Tech engage in the sale of backup power systems for telecommunications and computer systems, and of primary power systems for operating heavy machinery. The two companies are direct competitors. APS alleges that in 1989 Hi-Tech and its principals, defendants Robert L. and Sylvia Smith, engaged in a series of covert activities in an attempt to undermine APS's operations and stifle its ability to compete. Specifically, APS claims that Hi-Tech engaged the services of Pinkerton, which, on the direction of Hi-Tech, first sent employees to APS's office posing as potential customers, and then burgled APS's offices to obtain confidential information.

The present action began as two separate actions. APS filed the first action in state court in Pennsylvania against defendants Hi-Tech, Robert Smith, and Sylvia Smith. On December 18, 1990, defendants removed the action to this court on the basis of the existence of a federal question. Subsequently, defendants filed a third-party complaint against Pinkerton. [*5] Meanwhile, APS filed a second action against Pinkerton, also in this court. On March 26, 1991, upon the joint request of counsel, I consolidated the two actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. Thereafter, on October 9, 1991, plaintiff filed a second amended complaint that was directed against all defendants.

APS's second amended complaint alleges eight causes of action against Pinkerton. These include misappropriation of trade secrets, negligence, theft and conversion, civil conspiracy, tortious interference with contractual business relations, tortious interference with prospective business relations, violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. §§ 5701 *et seq.*, (Purdon's 1983 & Supp. 1991) and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*(1988). Pinkerton seeks dismissal under Rule 12(b) of the counts alleging negligence, tortious interference with prospective business relations,

and RICO violations.

II. RICO

The Second Amended Complaint alleges that defendants engaged in a fraudulent scheme that included robbery, mail fraud, [*6] and wire fraud, to deprive plaintiff of its trade secrets. Based on these allegations, the Second Amended Complaint states, in Count VIII, that defendants engaged in and conspired to engage in a pattern of racketeering activity in violation of RICO. Pinkerton contends that this count fails to state a claim because APS has failed to allege an "enterprise" under § 1961(4), because APS has failed to allege "racketeering activity" under § 1961(1), because APS has failed to allege a "pattern of racketeering activity" under § 1961(5), because APS has failed to plead a conspiracy under § 1962(d) with the requisite particularity, and because APS lacks standing under § 1962(b). I address these contentions in turn.

A. Enterprise

APS alleges that defendants' conduct violated both § 1962(b) (which prohibits acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity) and § 1962(c) (which prohibits participating in the conduct of an enterprise's affairs through a pattern of racketeering activity). The existence of an enterprise is a necessary element of both subsections. For the purposes of RICO, an enterprise is defined as "any individual, partnership, [*7] corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The Second Amended Complaint proposes three enterprises involving Pinkerton within the meaning of § 1961(4): ". . . (b) Pinkerton; . . . (j) the association in fact of Pinkerton, Hi-Tech, Robert L. Smith, and Sylvia Smith; and (k) the association in fact of Pinkerton, Hi-Tech, Robert L. Smith, Sylvia Smith, and other unknown parties." [2] Second Amended Complaint P59.

> 2 The Second Amended Complaint alleges the existence of eleven RICO enterprises. Because only defendant Pinkerton has moved to dismiss, only those enterprises in which Pinkerton is alleged to have participated will be discussed here.

Pinkerton contests the naming of Pinkerton as an enterprise by arguing that a single corporation may not be both a defendant "person" within the meaning of § 1962(b) or § 1962(c) and also be the RICO enterprise. *See Banks v. Wolk,* 918 F.2d 418, 421 (3rd Cir. 1990). [*8] This is true as far as it goes, and if either Pinkerton's, Inc., or Pinkerton's Investigative Services, Inc., had been individually named as both defendant and enterprise, dismissal on this ground would be appropriate. Pinkerton's argument, however, overlooks the fact that in its Second Amended Complaint APS uses the word "Pinkerton" to apply to the combination of the parent corporation, Pinkerton's, Inc., and the subsidiary, Pinkerton's Investigative Services, Inc., which are individually named as defendants. Two corporations, individually named as defendants, may combine to form a properly pleaded RICO enterprise; this is so even if one of the corporations is a wholly-owned subsidiary of the other. *See Shearin v. E.F. Hutton Group, Inc.,* 885 F.2d 1162, 1165-66 (3rd Cir. 1989) (parent and two wholly-owned subsidiaries form a properly pleaded enterprise). The allegation of Pinkerton as an enterprise is sufficient, and does not merit dismissal of the count.

The other two alleged enterprises present a more complicated problem. Where the alleged enterprise is not a legal entity but is rather an association in fact, plaintiff must, at trial, prove the existence [*9] of three factors in order to establish the existence of an enterprise: plaintiff must show the existence of (1) an "ongoing organization" (2) whose "associates function as a continuing unit" and (3) whose existence is "separate and apart from the pattern of activity in which it engages." *UnitedStates v. Riccobene,* 709 F.2d 214, 221 (3rd Cir.) (citing *United States v. Turkette,* 452 U.S. 576, 583, 101 S. Ct. 2524, 2528-29, 69 L. Ed.2d 246 (1981)), *cert. denied,* 464 U.S. 849 (1983); *see also Federal Ins. Co. v. Ayers,* 741 F. Supp. 1179, 1183 (E.D. Pa. 1990). Plaintiff need not allege all these elements with particularity in his complaint; it is sufficient if the complaint puts defendant on notice as to what plaintiff believes are the relevant entities. *See Seville Indus. Mach. Corp. v. Southmost Mach. Corp.,* 742 F.2d 786, 790 (3rd Cir. 1984), *cert. denied,* 469 U.S. 1211 (1985). However, the complaint may be dismissed if the facts alleged in the complaint preclude proof of one of the elements. *See id.* at 790 n.5; *Federal Ins. Co.,* 741 F. Supp. at 1184. [*10]

It is well established that a RICO enterprise must have an identity separate and apart from the pattern of racketeering activity that is alleged. *See, e.g., Turkette,* 452 U.S. at 583, 101 S. Ct. at 2529; *Riccobene,* 709 F.2d

at 221. Pinkerton argues that the alleged association in fact of Pinkerton, Hi-Tech, Robert L. Smith, and Sylvia Smith [3] cannot meet this requirement, because, according to the Second Amended Complaint, the association was formed for the sole purpose of defrauding APS. According to Pinkerton's interpretation of the Second Amended Complaint, the alleged enterprise had no identity apart from the alleged pattern of racketeering activity. APS counters that the enterprise was not formed to commit the precise predicate acts that form the alleged pattern of racketeering activity, namely, mail fraud and wire fraud, [4] but rather for the broader goal of stealing APS's property.

3 This analysis, of course, also applies to the alleged association in fact of Pinkerton, Hi-Tech, Robert L. Smith, Sylvia Smith, and other unknown persons.

[*11]

4 Although the Amended Complaint lists robbery as a predicate offense, Pennsylvania law does not support treating the alleged theft from APS's offices as robbery. The theft therefore may not be a predicate offense. *See infra* at 8.

Much of the dispute between the parties turns on competing interpretations of the court's holding in *Temple University v. Salla Brothers, Inc.*, 656 F. Supp. 97 (E.D. Pa. 1986). In that case, the court held that where the complaint alleged only that defendants were associated for the purpose of defrauding the plaintiff, plaintiff would be unable at trial to establish the existence of an enterprise with an identity separate and apart from the alleged pattern of fraudulent activity. *See id.* at 102. Broadly speaking, *Temple* resembles the present case: plaintiff here alleges that defendants entered into an association for the sole purpose of stealing plaintiff's property, a plot that plaintiff labels a "fraudulent scheme." Second Amended Complaint P60. Pinkerton contends, based on this similarity, that *Temple* applies [*12] and that the RICO count should be dismissed for failure to allege an enterprise.

Despite its superficial resemblance to the present case, *Temple* should not be read too broadly. The scheme in that case involved the submission through the mail of fraudulent vouchers to obtain payments; the alleged mail fraud was therefore tied directly to the purpose of the purported enterprise. Although, to qualify as an enterprise, an association must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses," plaintiff need not allege that the association has a function wholly unrelated to the alleged racketeering activity. *Riccobene*, 709 F.2d at 223-24. In *Riccobene,* the court concluded that "overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement." *Id.* at 224. While the enterprise alleged in the present case does not appear to approach the breadth of the enterprise in *Riccobene,* it also does not appear to be as intimately tied to the alleged racketeering [*13] activity as was the alleged enterprise in *Temple.* Although this is a close case, I am unconvinced at this point that, as a matter of law, APS would be unable at trial to establish the existence of an enterprise distinct from the alleged pattern of racketeering activity. To the extent that Pinkerton seeks dismissal of Count VIII for failure to allege an enterprise within the meaning of RICO, its motion must be denied. Whether APS will be able to establish the existence of racketeering activity and a pattern of racketeering activity is a separate question, however, to which I now turn.

B. Racketeering Activity

Section 1961(1) of RICO lists a number of crimes, state and federal, that may qualify as racketeering activity. Of the listed crimes, the Second Amended Complaint alleges one state crime, robbery, and two federal crimes, mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343). Pinkerton argues that the allegations of all three crimes are deficient.

Pinkerton is clearly correct about the allegation of robbery. Under Pennsylvania law, robbery (18 Pa. C.S.A. § 3701) is a distinct crime from burglary (18 Pa. C.S.A. § 3502); whereas burglary involves entry into [*14] a building or structure, robbery involves contact with or threatened bodily injury to the physical person of another. *See Commonwealth v. Dockins,* 230 Pa. Super. 271, 326 A.2d 505, 507 (1974). From the facts alleged in the Second Amended Complaint, it is clear that the alleged theft from APS's offices would constitute burglary, not robbery, under Pennsylvania law. Since burglary is not a listed offense in § 1961(1), it cannot form the basis for a claim under RICO.

Pinkerton's argument concerning mail fraud and wire fraud is more complicated. Pinkerton makes two related arguments: first, it contends that APS has failed to plead

fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure; second, it contends that the conduct alleged in the complaint amounts to theft, not fraud, and thus cannot form the basis for mail fraud or wire fraud. Both of Pinkerton's arguments have merit.

Rule 9(b) requires that, in a complaint alleging fraud, the circumstances of the fraud be stated with particularity. The particularity requirement is not applied rigidly in this Circuit; in applying the rule, a court should not focus narrowly [*15] on the "particularity" requirement, but should keep in mind the general preference for simplicity and flexibility that underlies the Federal Rules. *See Christidis v. First Pennsylvania Mortgage Trust,* 717 F.2d 96, 100 (3rd Cir. 1983). Nevertheless, fraud must be pleaded with particularity sufficient to place defendants on notice of the precise misconduct with which they are charged, and to protect defendants from spurious charges of fraudulent behavior. *See Seville Indus.,* 742 F.2d at 791.

Although the Second Amended Complaint alleges multiple acts of mail fraud and wire fraud, it fails to set forth any particular incidents or communications that APS believes to constitute such fraud. Since mail fraud and wire fraud are the only predicate acts alleged that would bring defendants' conduct under RICO, this failure is especially troubling. It is not, in itself, fatal to the Second Amended Complaint, however. Mail fraud and wire fraud have similar elements: plaintiff must prove (1) the existence of a scheme to defraud, (2) defendant's participation in the scheme with specific intent to defraud, and (3) use of the mails or wires of the United [*16] States to further the scheme. *See, e.g., United States v. Burks,* 867 F.2d 795, 797 (3rd Cir. 1989) (stating the elements of mail fraud); *Schreiber Distrib. v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1400 (9th Cir. 1986) (setting forth the parallel elements of mail fraud and wire fraud). If APS is able to plead with sufficient particularity the existence of a scheme to defraud, which in the ordinary course of implementation would be likely to involve the use of the mails and the wires of the United States, then APS should be able to withstand a motion to dismiss for failure to state a claim.

APS alleges two separate acts that, it claims, amount to fraud. First, it claims that Pinkerton's employees committed fraud by falsely representing themselves as potential customers in order to obtain confidential information. At the very least, this claim is not pleaded with sufficient particularity. In order to state a claim for fraudulent misrepresentation, APS must allege, as one of the elements of the claim, that it suffered harm as a proximate result of the misrepresentation. *See Mann v. J.E. Baker Co.,* 733 F. Supp. 885, 889 (M.D. Pa. 1990). [*17] APS has failed to do so. Although it specifies the date and place of the alleged fraudulent act, it fails to allege with any specificity the type of confidential information that it disclosed in reliance on the Pinkerton's employees' misrepresentations. Indeed, it is not clear that APS could plead the requisite harm here, since it is difficult to imagine a scenario in which APS would disclose truly confidential information to an unknown third party who was a "potential" customer. Absent any agreement to keep the disclosed information confidential (which APS has not pleaded), any information disclosed to Pinkerton's employees would not, in fact, have been confidential; there would thus be no injury.

The second act identified by APS as part of the alleged fraudulent scheme against it is the burglary of its offices, allegedly by Pinkerton's employees. Facially, this act does not constitute fraud, nor does the planning leading up to the burglary constitute a scheme to defraud. Where the terms of the complaint clearly allege theft or conversion, the mere labelling of the act as fraudulent does not transform the theft into fraud. *Cf. Federal Ins. Co.,* 741 F. Supp. at 1185 [*18] (stating that where complaint plainly alleges theft, plaintiff need not plead with particularity even though plaintiff described the scheme behind the theft as "fraudulent").

APS seeks to transform the theft into fraud by focusing on the fact that the items stolen were confidential information and trade secrets. The attempt is unavailing. APS is correct that, in certain circumstances, theft of confidential information may constitute fraud. *See, e.g., Carpenter v. United States,* 484 U.S. 19, 27 (1987); *Formax, Inc. v. Hostert,* 841 F.2d 388, 390 (Fed. Cir. 1988). The characterization of fraud as "the deprivation of something of value by trick, deceit, chicane or overreaching," *see Carpenter,* 484 U.S. at 27 (quoting *McNally v. United States,* 483 U.S. 350, 358 (1987)), does not convert every burglary of confidential information committed under the cloak of night into fraud, however. In *Carpenter,* the Supreme Court focused on the existence of a confidential relationship between the person who misappropriated confidential information and the entity from whom he took the information, his employer. [*19] *See id.,* 484 U.S. at

27-28. Likewise, in *Formax,* the defendant was a former employee alleged to have stolen trade secrets from his former employer at the time of his termination. *See Formax,* 841 F.2d at 389. In both cases, the abuse of a confidential relationship converted what would otherwise be ordinary theft into fraud. In the present case, APS has failed to allege the existence of a confidential relationship that existed at the time of the alleged theft. In the absence of such a relationship, although the property stolen is of a type frequently subject to fraud claims, the theft does not constitute fraud.

If the burglary itself was not fraudulent, then the plot to commit the burglary, without more, could not have been a fraudulent scheme, and thus any use of the mails or phones in furtherance of the plot would not constitute mail fraud or wire fraud. For this reason, and because APS has failed to suggest any credible basis for finding fraud in the disclosure of information to Pinkerton's employees, the RICO count must be dismissed for failure to allege racketeering activity.

C. Pattern of Racketeering Activity

Both sections [*20] 1962(b) and 1962(c) require the existence, not merely of racketeering activity, but of a pattern of racketeering activity. Pinkerton urges, as an independent grounds for dismissal, that even if APS has alleged racketeering activity, it has failed to allege the necessary pattern.

The Supreme Court has written that a pattern contains two defining characteristics: relatedness and continuity. *See H.J., Inc. v. Northwestern Bell Tel. Co.,* 109 S. Ct. 2893, 2900 (1989). The parties do not appear to dispute the relatedness of the alleged predicate acts of mail fraud and wire fraud. Pinkerton does vigorously contest, however, the continuity of those acts. Continuity may be proved in several ways. If the alleged conduct is confined entirely to the past, with no threat of extension into the future, continuity may be established by proving a series of related predicate acts that extend over a substantial period of time. *See id.* at 2902. Acts that extend over only a short period of time may meet the continuity requirement if they pose a threat of long-term continuing racketeering activity. *See id.* at 2901; *Marshall-Silver Constr. Co. v. Mendel,* 894 F.2d 593, 596 (3rd Cir. 1990). [*21] This may be demonstrated by proof of the existence of a long-term association that exists for criminal purposes, or by proof that defendant committed the predicate acts as a regular way of conducting an ongoing legitimate business. *See H.J., Inc.,* 109 S. Ct. at 2902.

Plainly, at this stage of the litigation, APS does not need to prove the existence of a pattern of racketeering activity. Moreover, the Third Circuit has indicated that in most circumstances a dispute over the existence of a pattern of racketeering activity is better addressed in a motion for summary judgment than in a motion to dismiss. *See Swistock v. Jones,* 884 F.2d 755, 759 (3rd Cir. 1989). Where, however, the allegations of the complaint, taken as true, do not support the existence of either long-term criminal conduct or the threat thereof, dismissal is appropriate. *See Marshall-Silver Constr. Co.,* 894 F.2d at 598.

APS does not appear to contend that the alleged predicate acts, standing alone, extended over a sufficiently long period of time to constitute a pattern of racketeering activity in the absence of a threat that that activity would continue [*22] into the future. Even if it did, the allegations of the Second Amended Complaint fall short of the requirement in *H.J., Inc.* that predicate acts extend for a substantial period of time in the absence of a threat of future criminal conduct. [5] APS does press its belief in the existence of a threat of related future criminal behavior, however. First, APS contends that, had defendant Robert Smith not been arrested in November 1990, defendants could have continued to enter APS's offices and steal additional information as needed. This argument has two flaws. First, the argument appears, if anything, to recognize that the course of conduct complained of is in fact closed. Second, the argument fails to take into account the absence, during the period between the alleged burglary in August 1990 and Smith's arrest three months later, of any additional illegal entries into APS's offices. Under the circumstances of this case, the mere supposition that a course of conduct would have continued, with no indication that defendants had not already achieved their goals, is insufficient to defeat a motion to dismiss.

> 5 The Court wrote: "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement: Congress was concerned in RICO with long-term criminal conduct." *H.J., Inc.,* 109 S. Ct. at 2901.

[*23] Second, APS argues in its brief that "there is no telling how many other businesses defendants are

victimizing now or will victimize in the future through similar schemes and illegal methods." Plaintiff's Brief, at 10. There are, however, no allegations in the Second Amended Complaint that would support the notion that either Hi-Tech or Pinkerton is engaged in other, related wrongful activity. If I were to accept APS's argument without any support from the Second Amended Complaint, then virtually any single incident involving fraud could be converted into a pattern of racketeering activity through the use of baseless stock phrases in a pleading. I cannot believe that the Supreme Court in *H.J., Inc.* intended to define continuing criminal conduct so loosely.

Third, APS argues in its brief that defendants engage in mail fraud and wire fraud as a regular way of conducting their ongoing legitimate businesses. This contention likewise finds no support in the allegations of the Second Amended Complaint. There is no indication that any of the defendants has engaged in similar behavior either with APS on other occasions or with third parties. Again, a plaintiff should not be able [*24] to compensate for the inadequacy of its pleading through the use in its brief of bald statements that track the language of previous court decisions.

In those cases where the court has refused to grant a motion to dismiss for failure to state a pattern of racketeering activity, the allegations of a pattern of racketeering activity have either been far more extensive than those in the present case or have covered conduct extending over a longer period of time than that covered in APS's Amended Complaint. In *H.J., Inc.*, the plaintiff alleged acts of bribery over a period of more than six years, and involving numerous bribes of various kinds to five different public officials. *See H.J., Inc.*, 109 S. Ct. at 2906. In *Swistock v. Jones,* the plaintiff alleged predicate acts taking place over the course of more than a year; the complaint contained allegations that the defendant had made misrepresentations to the plaintiff in instances other than the ones at issue in the case. *See Swistock,* 884 F.2d at 759. There was thus a basis in the complaints in both cases for a belief that defendants' conduct constituted the ordinary way of conducting [*25] its business or would otherwise continue into the future.

In cases where the alleged conduct did not extend over such a substantial period of time, or did not otherwise suggest a threat of continuation, the Third Circuit has warned against attempts to convert "garden variety" fraud into RICO claims. *Banks v. Wolk,* 918 F.2d at 423 (dismissal appropriate where complaint alleges participation in one act of real estate fraud, with no indication from the facts alleged that such fraud would have continued or represented a regular way of doing business). Because of the draconian penalties available under RICO, the Third Circuit has concluded that RICO claims are only appropriate where the conduct alleged in the complaint poses a threat of significant societal harm over a significant period of time. [6] *See Banks,* 918 F.2d at 422; *Marshall-Silver Constr.,* 894 F.2d at 596-97. Nothing in APS's Amended Complaint suggests such conduct. The RICO count should therefore be dismissed for failure to allege a pattern of racketeering activity.

6 Indeed, the Third Circuit has on two occasions questioned whether relief under RICO is ever appropriate for a single scheme targeted at a single victim and threatening no future harm. *See Hindes v. Castle,* 937 F.2d 868, 875 (3rd Cir. 1991); *Marshall-Silver Constr.,* 894 F.2d at 597.

[*26] D. RICO Conspiracy

Because I have concluded that APS has properly alleged neither racketeering activity nor a pattern of racketeering activity, I decline to address Pinkerton's contention that, even if the Second Amended Complaint properly alleged a pattern of racketeering activity, it did not properly allege a conspiracy under § 1962(d). In the absence of a viable claim under § 1962(a), § 1962(b), or § 1962(c), APS has no claim for conspiracy under § 1962(d). *See Leonard v. Shearson Lehman/American Express Inc.,* 687 F. Supp. 177, 182 (E.D. Pa. 1988).

E. Standing

Section 1964(c) provides standing to sue under RICO to "any person injured in his business or property by reason of a violation of section 1962." Pinkerton contends that APS lacks standing to sue under § 1962(b) because APS has failed to allege injury resulting from the acquisition or maintenance of an interest in or control of an enterprise. APS responds that the alleged predicate acts of mail fraud and wire fraud allowed the participants to maintain their interests in and control of the de facto enterprise, and that if defendants had not used the mails and the wires to maintain control of [*27] the enterprise, APS would not have suffered any injury.

The parties raise a difficult issue, one made more

complicated by the lack of case law describing how a party may be injured by the acquisition or maintenance of an association in fact. I am somewhat puzzled by APS's reasoning -- the alleged injury appears to have resulted from the conduct of the enterprise's affairs, rather than from the maintenance of the enterprise. For the purposes of the present motion, however, I decline to address the standing question. In most circumstances, a court should dispose of a case on the standing question, if possible, rather than on the merits. However, in the present case a determination that APS lacked standing under § 1962(b) would not obviate the need to address the merits, because Pinkerton does not claim that APS lacks standing under § 1962(c), and APS's claims under § 1962(b) and 1962(c) present identical legal issues on this motion to dismiss.

III. State Claims

A. Negligence per se

Count III of the Second Amended Complaint alleges that Pinkerton was negligent in its failure to supervise its employees to ensure that its surveillance activities would be conducted according [*28] to law. APS points to Pennsylvania's Private Detective Act of 1953, 22 P.S. § 23(a) (Purdon's Supp. 1991), which states that licensed employers shall be legally responsible for the conduct of their employees and "shall be responsible for the reasonable supervision of said employees' conduct." *Id.* The Second Amended Complaint goes on to state that Pinkerton's conduct constitutes negligence *per se*.

Under Pennsylvania law, negligence *per se* is

> conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it.

White v. SEPTA, 359 Pa. Super. 123, 518 A.2d 810, 815 (1986). Pinkerton reads the Second Amended Complaint to base its claim of negligence *per se* on the existence of a statutory violation. Pinkerton argues that, because the statute itself contains a standard of reasonableness, [*29] plaintiff cannot benefit from the reduced burden of proof that accompanies negligence *per se* and has failed to plead its negligence claim properly. Pinkerton's reading of the Second Amended Complaint, though superficially appealing, is too narrow. The Second Amended Complaint alleges facts that, taken as true for the purposes of this motion, would fall within the second part of the definition of negligence *per se*. That is, plaintiff alleges that Pinkerton engaged in conduct that, viewed in a light most favorable to APS, was "so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it." *Id.* This is all that Rule 8 of the Federal Rules of Civil Procedure requires of plaintiff at this point. *Cf.* 5 C. Wright & A. Miller, *Federal Procedure and Practice* § 1249 (2d ed. 1990) (stating that "when plaintiff rests his claim for relief upon a cause of action that is predicated on a theory other than ordinary negligence . . . it is sufficient if the complaint states facts from which gradations of negligence can be inferred"). However inelegant Count III of the Second Amended [*30] Complaint may be, it is not so inadequate that it merits dismissal for failure to state a claim.

B. Tortious Interference with Prospective Business Relations

Count VII of the Amended Complaint alleges that defendants' conduct has prevented it from gaining new contracts and thus constitutes tortious interference with prospective business relations. The tort, whose basic formulation is set forth in Restatement (Second) of Torts, section 766B, [7] is well established in Pennsylvania law. *See Glenn v. Point Park College,* 441 Pa. 474, 272 A.2d 895, 897 (1971). To state a claim under this tort in Pennsylvania, the complaint must allege the following elements:

> (1) a prospective contractual relationship between the plaintiff and third parties, (2) a purpose or intent to harm the plaintiff by preventing the relationship from accruing, (3) the absence of privilege or justification on the part of the plaintiff, and (4) the occurrence of actual harm or damage to the plaintiff as a result of the defendant's conduct.

Cloverleaf Development v. Horizon Financial F.A., 347 Pa. Super. 75, 500 A.2d 163, 167 (1985). Pinkerton [*31] argues that APS has failed to allege sufficiently the existence of prospective contractual relationships that defendants' conduct disrupted. APS counters that this argument confuses what must be alleged in the complaint with what must be proved at trial. As long as a plaintiff alleges an expectation of future contracts that would have been consummated but for defendants' conduct, APS contends, it is entitled to have a finder of fact assess whether its expectation was reasonable.

> 7 Restatement (Second) of Torts, section 766B, defines the tort of tortious interference with prospective business relations as follows:
>
> > 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.

[*32] The area of prospective relationships is necessarily a murky one. No one has yet devised an accurate crystal ball that would allow a court to peer into an alternate timeline and determine with certainty what would have happened but for a defendant's conduct. For this reason, the complaint need not allege with certainty particular potential contractual relationships that would in fact have been consummated in the absence of defendant's wrongful conduct. Even at trial, a plaintiff need only prove that but for defendant's wrongful acts, it is reasonably probable that a contract would have been formed. *See SHV Coal, Inc. v. Continental Grain Co.*, 376 Pa. Super. 241, 545 A.2d 917, 921 (1988), *rev'd on other grounds*, 526 Pa. 489, 587 A.2d 702 (1991). However, even at the pleading stage, a plaintiff may not rest a claim for tortious interference with prospective contractual relations on a mere hope that additional contracts or customers would have been forthcoming but for defendant's interference. *See Glenn*, 272 A.2d at 898-99. The complaint must allege facts that, if true, would give [*33] rise to a reasonable probability that particular anticipated contracts would have been entered into. *See id.* at 898. This APS has failed to do. Instead, APS merely relies on a statement that, now that defendant Hi-Tech is in possession of APS's "quote log" and other alleged trade secrets belonging to APS, Hi-Tech will have the ability to undercut APS's bids for new and current customers. APS claims that it has experienced actual loss, but identifies no such loss. Under the standard of *Glenn*, APS fails to state a claim for tortious interference with prospective business relations. *Cf. Cloverleaf Development*, 500 A.2d at 167 (finding complaint sufficient to withstand a motion to dismiss because the complaint identified specific potential buyers and gave grounds for a reasonable belief that a transaction would have been consummated but for defendant's actions).

APS points to two cases that, it claims, demonstrate the adequacy of its pleading. Neither case, however, supports APS's contention. In *Behrend v. Bell Telephone Co.*, 242 Pa. Super. 47, 363 A.2d 1152 (1976), *rev'd on other grounds*, 473 Pa. 320, 374 A.2d 536 (1977), [*34] the Superior Court of Pennsylvania concluded that the court below had erred in refusing to grant defendants judgment n.o.v., because plaintiff had failed to establish a reasonable likelihood of prospective relationships that were lost due to defendants' conduct. *See id.*, 363 A.2d at 1160. APS relies on this case for the proposition that plaintiff need not prove the reasonable likelihood of prospective business relations until trial. This statement, while true as far as it goes, does not cure the deficiency of the Amended Complaint. As shown above, Pennsylvania courts have directly addressed the question of what a complaint must plead to state a claim for tortious interference with prospective business relations.

See Glenn, 272 A.2d at 898; *Cloverleaf Development,* 500 A.2d at 167. Although the Pennsylvania Rules of Civil Procedure do not precisely track the words of the Federal Rules, *compare* Pa. R. Civ. P. 1019 (describing the required content of pleadings) *with* Fed R. Civ. P. 8, 9 (same), the level of specificity they require is so nearly identical that the Pennsylvania cases [*35] can be considered relevant, if not binding, to a motion to dismiss under Federal Rule 12(b).

In *Posner v. Lankenau Hospital,* 645 F. Supp. 1102 (E.D. Pa. 1986), a physician sued after he was denied reappointment to the hospital's medical staff. Among the doctor's claims was a claim for tortious interference with prospective business relations: he claimed that the hospital's actions wrongfully deprived him of the opportunity to obtain additional patients. On a motion for summary judgment, the court concluded that issues of material fact existed on the doctor's claim. *See id.* at 1112. The doctor, however, did more than plaintiff here has done: he alleged the existence of referral and consultation patterns at the hospital that gave a specific foundation for his claim. *See id.* The court recognized that absent this allegation, the doctor's claim would have been inadequate, stating in a footnote: "A bare assertion that, but for defendants' actions, Posner would have been able to obtain more patients is an insufficient basis for a section 766B claim." *Id.* at 1112 n.6. Because plaintiff has failed either to identify particular [*36] potential customers or to allege the existence of a mechanism that would routinely bring it new customers, the facts of the present case more closely resemble the scenario set forth in the *Posner* court's footnote than they do the actual facts of that case. As it is currently formulated, Count VII of the Second Amended Complaint must be dismissed.

APS has submitted a "Supplemental Memorandum of Law" in which it attempts to bolster its claim for tortious interference with prospective business relations. In the supplemental memorandum, APS argues as follows:

> APS in the Second Amended Complaint alleged that one of its quote logs was stolen from its offices during the burglary by Pinkerton's and the other defendants. Included in the quote log were numerous quotes made to prospective clients seeking stationary power. Of the jobs quoted, APS, upon information and belief, asserts that Hi-Tech, one of the defendants in this action, received at least one of the contracts, the job for Avellino's quoted June 26, 1990, instead of APS. APS believes that Hi-Tech was able to win this job only because it knew what APS had quoted.

Plaintiff's Supplemental Memorandum of Law at 2. [*37] There is no reference in the Second Amended Complaint to the Avellino bid. "The proper means of raising claims that have inadvertently not been raised in the complaint is an amended complaint, not a brief in opposition to a motion to dismiss." *Sansom Committee v. Lynn,* 366 F. Supp. 1271, 1278 (E.D. Pa. 1973). Because it is not found in the Second Amended Complaint, APS's assertion that it can identify one contract that it believes it lost to Hi-Tech is not properly before this court. However, APS will be granted leave to file a third amended complaint that includes reference to the Avellino bid. [8]

> 8 Pinkerton argues that such an amendment would be futile, because allegation of a bid made approximately forty days before the quote log was stolen could not give rise to an inference that APS lost the Avellino bid as a result of the theft of the quote log. I cannot, at this point, take judicial notice that the forty-day gap indicates that APS would not have received the Avellino contract even if the theft had not occurred. Pinkerton's argument is therefore unavailing.

[*38] IV. Conclusion

For the reasons discussed above, Pinkerton's motion to dismiss the Second Amended Complaint will be granted in part and denied in part. An appropriate order follows.

ORDER

Upon consideration of the motion of Defendant Pinkerton's motion to partially dismiss, for the reasons given in the accompanying memorandum, it is hereby ORDERED and DIRECTED that:

(1) Defendant Pinkerton's motion to dismiss Count VIII of the Second Amended Complaint for failure to state a claim is GRANTED, and Count VIII is

DISMISSED insofar as it purports to state a claim against Pinkerton;

(2) Defendant Pinkerton's motion to dismiss Count VII of the Amended Complaint for failure to state a claim is GRANTED, and Count VII is DISMISSED without prejudice insofar as it purports to state a claim against Pinkerton;

(3) Plaintiff Advanced Power Systems, Inc., is granted leave to file a Third Amended Complaint so that it may incorporate into a revised Count VII the allegations stated in its Supplemental Memorandum of Law; and

(4) Defendant Pinkerton's motion to dismiss Count III of the Amended Complaint, to the extent that it alleges negligence *per se*, for failure to state a claim is [*39] DENIED.

APRIL 28, 1992

POLLAK, J

Not Reported in F.Supp.2d, 2012 WL 1154479 (S.D.Cal.)
(Cite as: 2012 WL 1154479 (S.D.Cal.))

C

Only the Westlaw citation is currently available.

United States District Court,
S.D. California.
Robert BAUM, Plaintiff,
v.
AMERICA'S SERVICING COMPANY, Quality Loan Corporation; Credit Suisse First Boston Mortgage Securities Corp., CSMC Mortgage–Backed Passthrough Certificates, Series 2007–2; and all persons unknown who may claim an interest in title to the subject property; and Does 1 through 20, inclusive, Defendant.

No. 12–CV–00310–H (BLM).
April 5, 2012.

Rick L. Raynsford, Law Offices of Robert J. Krup, Newport Beach, CA, for Plaintiff.

Lukasz I. Wozniak, Wright, Finlay & Zak, LLP, Newport Beach, CA, for Defendant.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH 30 DAYS LEAVE TO AMEND

MARILYN L. HUFF, District Judge.

*1 On February 13, 2012, Defendants filed a motion to dismiss Plaintiff Robert Baum's complaint. (Doc. No. 3.) On March 16, 2012, the Court requested Plaintiff's opposition briefing as soon as possible. (Doc. No. 4.) On March 21, 2012, the Court again requested Plaintiff's opposition by March 27, 2012. (Doc. No. 5.) The Court still has not received Plaintiff's opposition. The Court, pursuant to its discretion under Local Rule 7.1(d)(1), determines that these matters are appropriate for resolution without oral argument, submits the motion on the parties' papers, and vacates the hearing scheduled for April 9, 2012, at 10:30 a.m. For the following reasons, the Court grants Defendants' motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) and grants Plaintiff 30 days leave to amend to cure the deficiencies in the complaint.

Background

Plaintiff's complaint arises out of a nonjudicial foreclosure sale initiated by Defendants. (Doc. No. 1.) On June 30, 2006, Plaintiff executed a Deed of Trust ("DOT") to obtain a loan for $779,850 to refinance the real property located at 2290 Calle Caralene, Fallbrook, California 92028. (Doc. Nos. 1; 3, Ex. 1.) In October 2010, Plaintiff applied for a loan modification. (Doc. Nos.1, 3.) Plaintiff was subsequently denied a loan modification. (Doc. Nos.1, 3.) On April 6, 2011, the Assignment of Deed of Trust to U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSMC Mortgage–Backed Pass–Through Certificates, Series 2007–2 ("U.S.Bank") was recorded. (Doc. No. 3, Ex. 2.) On May 13, 2011, Quality Loan Service Corp. ("Quality") was substituted in as Trustee under the DOT. (Doc. Nos. 1; 3, Ex. 3.) On May 18, 2011, Quality recorded a Notice of Default. (Doc. Nos. 1; 3, Ex. 4.) On August 23, 2011, a Notice of Trustee's Sale was recorded. (Doc. Nos. 1; 3, Ex. 5.) The foreclosure sale has not yet occurred.

Plaintiff filed a complaint against Defendants on February 6, 2012, alleging that Defendants lack authority to commence the foreclosure process, causes of action one and two; alleging fraud, cause of action three; and seeking cancellation of the DOT, cause of action four. (Doc. No. 1.) Defendants filed their motion to dismiss on February 13, 2012. (Doc. No. 3.) Defendants argue that the complaint fails because Plaintiff has not tendered the outstanding loan bal-

ance. (Doc. No. 3.) In the alternative, Defendants argue that Plaintiff lacks standing to challenge the nonjudicial foreclosure, Plaintiff has failed to allege fraud with the required specificity of Federal Rule of Civil Procedure 9(b), and Plaintiff has failed to sufficiently allege reasons why the DOT should be cancelled. (Doc. No. 3.)

Discussion

I. Request for Judicial Notice

Defendants' motion to dismiss is accompanied by a request for judicial notice, in which Defendants ask the Court to take judicial notice of several documents. (Doc. No. 3–2, Ex. 1–5.) In general, the scope of review on a motion to dismiss for failure to state a claim is limited to "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP,* 476 F.3d 756, 763 (9th Cir.2007). The Court may consider additional documents under the "incorporation by reference" doctrine as long as "the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN,* 393 F.3d 1068, 1076 (9th Cir.2005).

***2** Defendants submit for judicial notice the DOT recorded in the San Diego County Recorder's Office on July 7, 2006. (Doc. No. 3–2, Ex. 1.) The Deed is a public record, and is referenced in and included as an exhibit to the complaint. (*See* Doc. No. 1, Ex. D.) Defendants also submit for judicial notice a copy of the Notice of Default and Election to Sell, recorded on May 18, 2011 in the San Diego County Recorder's Office. (Doc. No. 3–2, Ex. 4.) The Notice of Default is also a public record and is referenced and included as an exhibit to the complaint. (*See* Doc. No. 1–2, Ex. E.) Defendants submit a copy of the Assignment recorded in the San Diego County Recorder's Office on April 6, 2011. (Doc. No. 3–2, Ex. 2.) The Assignment is a public record and is referenced in the complaint. (*See* Doc. No. 1–2, ¶ 20.) Defendants submit a copy of the Substitution of Trustee, recorded on May 13, 2011 in the San Diego County Recorder's Office. (Doc. No. 3–2, Ex. 3.) It is a public record and is referenced in the complaint. (*See* Doc. No. 1–2, ¶ 22, 28–33.) Defendants also submit a copy of the Notice of Trustee Sale recorded on August 23, 2011 in the San Diego County Recorder's Office. (Doc. No. 3–2, Ex. 5.) It is a public record and is referenced in the complaint. (*See* Doc. No. 1–2, ¶ 22.) The Court grants Defendants' request to the extent the offered documents are properly subject to judicial notice.

II. Motion To Dismiss—Legal Standard

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Black,* 250 F.3d 729, 732 (9th Cir.2001). Rule 8(a)(2) requires that a pleading stating a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The function of this pleading requirement is to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Twombly,* 550 U.S. at 557). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555 (citing 5 Wright & Miller, *Federal Practice and Procedure* § 1216, 235–36 (3d ed.2004)). "All allegations of material fact are taken as true and construed in the light most favorable to plaintiff. However, conclusory al-

legations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.1996); *see also Twombly*, 550 U.S. at 555.

A. Plaintiff's General Allegations

1. Failure To Allege Tender of Outstanding Loan Balance

***3** In his complaint, Plaintiff requests an order enjoining the foreclosure sale and any eviction proceedings on his property, claiming that Defendants lacked authority to commence the nonjudicial foreclosure process. (Doc. No. 1.) Defendants argue that Plaintiff's complaint fails as a matter of law because he did not allege that he tendered or is willing to unconditionally tender the outstanding loan balance to Defendants. (Doc. No. 3.) The Court agrees.

Under California law, the tender rule requires that as a precondition of challenging a foreclosure sale, the borrower must make a valid and viable tender of payment of the secured debt. *Arnolds Mgmt. Corp.*, 158 Cal.App.3d 575, 205 Cal.Rptr. 15, 17–18 (Ct.App.1984.); *Karlsen v. Am. Sav. & Loan Ass'n*, 15 Cal.App.3d 112, 92 Cal.Rptr. 851, 854 (Ct.App .1971). Consistent with this principle, "an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security." *Arnolds*, 205 Cal.Rptr. at 17. "This rule ... is based upon the equitable maxim that a court of equity will not order a useless act performed." *FPCI RE–HAB 01 v. E & G Invs.*, Ltd., 207 Cal.App.3d 1018, 1021, 255 Cal.Rptr. 157 (Ct.App.1989).

Here, Plaintiff has not alleged a valid tender of the amount required to cure the loan's default. (*See* Doc. No. 1.) Therefore, in accordance with California law, any action by this Court would be futile and an improper exercise of the Court's power. *See Karlsen*, 92 Cal.Rptr. at 118. Accordingly, the Court grants Defendants' motion to dismiss Plaintiff's complaint with leave to amend.

2. Claim One: Defendants' Lack of Standing

In his complaint, Plaintiff alleges that Defendants lacked authority to commence foreclosure proceedings because the securitization process left Defendants with no claim to the property and because Defendants were not the holders of the note. (Doc. No. 1.) Defendants argue that Plaintiff lacks standing to challenge the foreclosure, assignments, or the PSA, and Defendants had statutory authority to commence the foreclosure process. (Doc. No. 3.) The Court agrees.

"California Civil Code sections 2924 through 2924k govern non-judicial foreclosures initiated under a deed of trust. 'California courts have consistently held that the Civil Code provisions 'cover every aspect' of the foreclosure process and are intended to be exhaustive.' " *Gardner v. Am. Home Mortg. Servicing, Inc.*, 691 F.Supp.2d 1192, 1202 (E.D.Cal.2010) (quoting *Morgera v. Countrywide Home Loans, Inc.*, 2:09–cv–01476–MCE–GGH, 2010 WL 160348, at *7 (E.D. Cal. Jan 11, 2010)); *see also Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149, 1154, 121 Cal.Rptr.3d 819 (Ct.App.2011). California Civil Code section 2924(a)(1) states that a "trustee, mortgagee, or beneficiary, or any of their agents" may initiate the foreclosure process. Cal. Civ.Code § 2924(a)(1). Because of the comprehensive nature of the statute, courts have " 'refused to read any additional requirements into the non-judicial foreclosure statute.' " *Gomes*, 192 Cal.App.4th at 1154, 121 Cal.Rptr.3d 819 (quoting *Lane v. Vitek Real Estate Indus. Grp.*, 713 F.Supp.2d 1092, 1098 (E.D.Cal.2010)). In *Gomes v. Countrywide Home Loans, Inc.*, the California Court of Appeal discussed a borrower's right to bring a court action to determine whether the owner of a note has authorized its nominee to initiate the foreclosure process. *Id.* The Court of Appeal stated that the plaintiff was "attempting to

interject the courts into this comprehensive judicial scheme ... [and] has identified no legal authority for such a lawsuit." *Id.* The court held that "[n]othing in the statutory provisions establishing the nonjudicial foreclosure process suggests that a judicial proceeding is permitted or contemplated." *Id.* Accordingly, the Court of Appeal concluded that California Civil Code section 2924(a)(1) does not permit a borrower "to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the note-holder" because it would "fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying foreclosures." *Id.* at 1155, 121 Cal.Rptr.3d 819.

*4 Even if Plaintiff's cause of action were not barred by the tender rule, Plaintiff lacks standing in this case to challenge the foreclosure process. The Court agrees with Defendants that Plaintiff is attempting to impose a judicial review of the nonjudicial foreclosure process that is not contemplated by California law. Therefore, because under California law Plaintiff has no legal authority to bring a suit to determine whether the owner of the Note has authorized its nominee to initiate the foreclosure process, Plaintiff's claim fails as a matter of law. Accordingly, the Court grants Defendants' motion to dismiss Plaintiff's first cause of action for Defendants' lack of standing with leave to amend. (*See* Doc. No. 1, 3.)

3. Claim Two: Defendants' Lack of Standing

Plaintiff alleges that Defendants have no claim against the property because the DOT was not assigned, transferred, or delivered through the purchase and sale agreement ("PSA") in a manner pursuant to Delaware law. (Doc. No. 1.) In their motion to dismiss, Defendants argue that Plaintiff does not have standing to challenge the assignments or the PSA because he is not a party to, or intended beneficiary of, these agreements. (Doc. No. 3.) The Court agrees.

Under California law, a plaintiff lacks standing to challenge a contract if he is not a party to the contract or if the principal contract "was not made expressly for the benefit of plaintiff." *Luis v. Orcutt Town Water Co.*, 204 Cal.App.2d 433, 439, 22 Cal.Rptr. 389 (Ct.App.1962); see also *Bascos v. Fed. Home Loan Mortgage Corp.*, No. CV 11–3968–JFW (JCx), 2011 WL 3157063, at *4 (C.D.Cal. July 22, 2011) ("To the extent Plaintiff challenges the securitization of his loan because Freddie Mac failed to comply with the terms of its securitization agreement, Plaintiff has no standing to challenge the validity of the securitization of the loan as he is not an investor of the loan trust.").

Even if Plaintiff's cause of action were not barred by the tender rule, Plaintiff has not pled that he was a party to the agreement through which the DOT was assigned, transferred, or delivered. (Doc. No. 1.) Additionally, he does not plead that he is a third-party beneficiary of the contract. (Doc. No. 1.) Accordingly, Plaintiff lacks standing to challenge the assignment, and the Court grants Defendants' motion to dismiss Plaintiff's second cause of action for Defendants' lack of standing with leave to amend. (*See* Doc. Nos. 1, 3.)

4. Claim Three: Fraud

Plaintiff's third cause of action is for intrinsic fraud in the foreclosure process. (Doc. No. 1.) Plaintiff alleges that Defendants committed several acts in the pending foreclosure process, including failing to strike notary acknowledgments properly, failing to comply with California Civil Code section 2935a(2)(D), and executing an invalid notice of default. (Doc. No. 1.) Defendants argue that Plaintiff's cause of action should be dismissed because Plaintiff did not allege the elements of fraud and because Plaintiff did not comply with the heightened pleading requirements for fraud. (Doc. No. 3.)

*5 Under California law, the elements of fraud are "false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages." *Moore v. Brewster*, 96 F.3d 1240, 1245 (9th Cir.1996) (quotations omitted). Under Federal Rule of Civil Proce-

dure 9, a Plaintiff must plead fraud with particularity. "Rule 9(b)'s particularity requirement applies to state-law causes of action." *Vess v. Ciba–Geigy Corp. USA,* 317 F.3d 1097, 1103 (9th Cir.2003). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id.* at 1106 (quoting *Cooper v. Pickett,* 137 F.3d 616, 627 (9th Cir.1997)). "[A] plaintiff must set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Id.* (internal citation omitted) (internal quotation marks omitted). "While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud" are not. *Moore v. Kayport Package Express, Inc.,* 885 F.2d 531, 540 (9th Cir.1989). Further, Rule 9(b) requires a plaintiff to attribute particular fraudulent statements or acts to individual defendants. *Id.*

Even if Plaintiff's cause of action were not barred by the tender rule, to the extent Plaintiff alleged fraud, his claim cannot succeed. Plaintiff fails to plead fraud with sufficient particularity. Plaintiff has presented only conclusory allegations of fraud in his complaint. These allegations fall well short of the pleading requirements of Rule 9(b). Although Plaintiff lists several actions that he regards are fraudulent, he fails to allege who perpetrated the fraudulent acts. (Doc. No. 1.) Additionally, Plaintiff fails to allege what about the acts was false or misleading and why they were false. *See Vess,* 317 F.3d at 1103. Plaintiff also fails to allege that he relied on the alleged fraudulent statements, a required element of fraud. (Doc. No. 1.) Therefore, Plaintiff has failed to adequately state a cause of action for fraud with the required particularity. *See* Fed. R. Civ. Pro. 9. Accordingly, the Court grants Defendants' motion to dismiss Plaintiff's third cause of action for fraud with leave to amend.

5. Claim Four: Cancellation of Trust Deed

Plaintiff seeks cancellation of the DOT pursuant to California Civil Code section 3412. (Doc. No. 1.) Defendants argue that Plaintiff has failed to offer any facts as to why the DOT is subject to cancellation. (Doc. No. 3.) Further, Defendants argue that Plaintiff has failed to allege that he has restored the value he received from the loan transaction. (Doc. No. 3.)

California Civil Code section 3412 states that "a written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so ajudged, and ordered to be delivered up or cancelled." Cal. Civ.Code § 3412.

***6** Even if Plaintiff's cause of action were not barred by the tender rule, Plaintiff has not sufficiently alleged a cause of action for cancellation of the trust deed. (Doc. No. 1.) Plaintiff alleges as the basis for the cancellation that the "DOT is causing serious injury to Plaintiff's property rights and right to possession of the property." (Doc. No. 1.) However, Plaintiff does not offer specific facts that support a reasonable apprehension of injury or explain why the DOT is void or voidable against Defendants. (Doc. No. 1.) Plaintiff pleads conclusory facts devoid of factual enhancement. (Doc. No. 1.) Additionally, Plaintiff fails to allege that he has restored everything of value received from the loan transaction. A cause of action requesting rescission requires such. *See Star Pac. Invs., Inc. v. Oro Hills Ranch, Inc.,* 121 Cal.App.3d 447, 457, 176 Cal.Rptr. 546 (Ct.App.1981) ("[I]n order to obtain rescission of an agreement, including rescission on the basis of inducement into the agreement by the defendant's fraudulent misrepresentation, a plaintiff must generally restore to the defendant everything of value which the plaintiff has received from defendant under the agreement."); *see also Cerecedes v. U.S. Bankcorp,* No. CV 11–219 CAS (FMOx), 2011 WL 2711071, at *5 (C.D.Cal. July 11, 2011); *Sanchez v. Mortgagelt, Inc.,* No. C 10–4146 PJH, 2011 WL 588178, at *2 (N.D.Cal. Feb.10, 2011). Therefore, Plaintiff has failed to plead facts sufficient to support a cause of action for cancellation of the

DOT. (Doc. No. 1.) Accordingly, the Court grants Defendants' motion to dismiss Plaintiff's fourth cause of action for cancellation of the DOT with leave to amend. (*See* Doc. Nos. 1, 3.)

Conclusion

For the foregoing reasons, the Court grants Defendants' motion to dismiss Plaintiff's complaint and grants 30 days leave to amend to cure the deficiencies in the complaint

IT IS SO ORDERED.

S.D.Cal.,2012.
Baum v. America's Servicing Co.
Not Reported in F.Supp.2d, 2012 WL 1154479 (S.D.Cal.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2005 WL 195588 (E.D.Pa.)
(Cite as: 2005 WL 195588 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
Thomas CASILLAS
v.
James L. GRACE, et al.

No. Civ.A. 04-2642.
Jan. 28, 2005.

Thomas Casillas, Huntingdon, PA, pro se.

John W. Goldsborough, District Attorney's Office, Phila, PA, for Defendants.

REPORT AND RECOMMENDATION

RUETER, Magistrate J.

*1 Presently before the court is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The Commonwealth filed a Supplemental Response (Doc. No. 11) and petitioner filed a Traverse (Doc. No. 16). Petitioner is presently incarcerated at the State Correctional Institution at Graterford, Pennsylvania. For the reasons stated below, this court recommends that the petition be denied.

I. *BACKGROUND*

On October 29, 1997, petitioner and a co-defendant entered negotiated guilty pleas to the charges of third-degree murder, robbery, violating the Uniform Firearms Act, and criminal conspiracy. *Commonwealth v. Casillas,* 754 A.2d 15, No. 1294 EDA 1999, slip op. at 1 (Pa.Super.Ct. Mar. 3, 2000) [FN1] With respect to the negotiated plea agreements, petitioner was represented by Tariq Karim El-Shabazz, Esquire. In exchange for their guilty pleas, the Commonwealth withdrew the charges of first-degree and second-degree murder and recommended a sentence of twenty-three to forty-six years imprisonment. The Honorable Jane C. Greenspan of the Court of Common Pleas for Philadelphia County, accepted the pleas after determining that they were voluntarily and knowingly tendered, and imposed the negotiated sentence. Just prior to sentencing, petitioner stated to the court, "I want to say that the sentence is hard, and that's it." The court responded:

> FN1. The negotiated plea agreements arose out of an incident which occurred on December 1, 1994. On that date, petitioner and a co-defendant shot and killed Joseph Gregory during a robbery. After splitting the proceeds of the robbery, both defendants fled. The co-defendant was arrested two weeks later. Petitioner, who fled to Puerto Rico with his girlfriend, was not apprehended until August, 1995. Both defendants gave signed statements to police admitting their involvement in the robbery but blaming each other for the shooting. They also confessed to other inmates while in prison.

In view of the fact that the Commonwealth has made a most generous offer, I will accept it; however, I must note that this is a horrendous offense, and that given your background, and your prior record score, you have received, Mr. Casillas, an enormous gift today, and that is the reason for my sentence.

This sentence is a gift, and I will accept it.

(N.T., 10/29/97, at 22.)

On January 21, 1998, petitioner filed a *pro se* petition for relief under Pennsylvania's Post-Conviction

Relief Act ("PCRA"), 42 Pa. Cons.Stat. Ann. § 9541 *et seq,* alleging that counsel coerced him into entering a guilty plea, and that counsel failed to file an appeal. New counsel was appointed to represent petitioner and, on June 10, 1998, filed a no-merit letter pursuant to *Commonwealth v. Finley,* 379 Pa.Super. 390, 550 A.2d 213 (Pa.Super.Ct.1998), certifying that the claims in petitioner's *pro se* petition were without merit and there were no meritorious claims that could be raised in an amended petition. On July 2, 1998, Judge Greenspan dismissed the PCRA petition.

Petitioner filed an appeal to the Superior Court of Pennsylvania arguing that PCRA counsel had been ineffective, and that the PCRA court erred by allowing PCRA counsel to withdraw without a hearing. On March 3, 2000, in an unpublished memorandum opinion, the Superior Court ruled that the no-merit letter was defective, since it did not address what had occurred off the record at the plea hearing and because it failed to address guilty plea counsel's advice to petitioner. The court remanded for appointment of new counsel. *Commonwealth v. Casillas,* 754 A.2d 15 (Pa.Super.Ct.2000) (table) (Response Ex. B).

***2** New counsel was appointed and, on October 17, 2000, filed a no-merit letter. In an Order and Opinion dated November 30, 2000, Judge Greenspan again dismissed the PCRA petition stating as follows:

For the reasons stated in the original *Finley* letter ... and the reasons stated in the second *Finley* letter ..., as well as defendant's lack of an assertion of innocence, defendant's overwhelming guilt, defendant's fully recorded guilty plea colloquy, and plea counsel's affidavit ..., petitioner's petition is again dismissed and counsel is permitted to withdraw.

Commonwealth v. Casillas, No. 0537 1/1 (C.C.P.Phila.Nov. 30, 2000).

Petitioner appealed, arguing that the PCRA court again erred in dismissing the PCRA petition without a hearing. In a memorandum dated September 19, 2001, the Superior Court of Pennsylvania vacated Judge Greenspan's dismissal order and remanded for further proceedings finding several of the bases relied upon by Judge Greenspan for dismissing the petition "to be without support in the record." *Commonwealth v. Casillas,* 788 A.2d 1026, No. 245 EDA 2001, slip op. at 4 (Pa.Super.Ct. Sept. 19, 2001) (Response Ex. C). The court remanded for appointment of new counsel, and "for an evidentiary hearing regarding Appellant's claims of unlawful inducement to enter the plea." *Id.* at 9.

On remand, newly appointed counsel filed an amended PCRA petition and memorandum of law. (Response Exs. E and F.) Petitioner raised the following issues:

1. Whether there was an absence of a knowing and voluntary waiver of the petitioner's right to a direct appeal which should result in the reinstatement of that right?

2. Whether violations of the petitioner's rights as guaranteed under the constitution of this Commonwealth and the constitution of the United States should result in the reinstatement of his appellate rights?

3. Whether guilty plea counsel unlawfully induced the petitioner's plea and, as a result, whether the petitioner should be permitted to withdraw his plea?

4. Whether violations of the petitioner's rights as guaranteed under the constitution of this Commonwealth and the constitution of the United States should result in the invalidation of his guilty plea?

5. Whether prior PCRA counsel were ineffective for failing to address the petitioner's issues in an amended PCRA petition?

(Ptr.'s Mem. Supp. Amended PCRA Petition at 3.)

By Opinion dated July 23, 2002, the PCRA court dismissed the PCRA petition. *Commonwealth. v. Casillas,* No. 537 1/1 (C.C.P. Phila. July 23, 2002) (Response, attached as part of Ex. G). Petitioner appealed to the Superior Court claiming that the PCRA court erred when it dismissed his claims. In a Memorandum Opinion dated July 9, 2003, the Superior Court affirmed the dismissal of the PCRA petition. *Commonwealth v. Casillas,* 832 A.2d 534, No.2084 EDA 2002 (Pa.Super.Ct. July 9, 2003) (Response Ex. H).

On June 11, 2004, petitioner executed the instant habeas petition raising the following three grounds for relief: (1) petitioner's right to appeal was denied; (2) petitioner's plea was induced unlawfully and made involuntarily and unknowingly; and (3) trial counsel was ineffective. (Petition at 10.) The Commonwealth asserts that petitioner's claims are without merit.

II. *DISCUSSION*

A. *Habeas Corpus Standards*

***3** Petitioner's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The provisions of the AEDPA relevant to the instant matter provide as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) and (2). With respect to Section 2254(d)(1), a federal habeas petitioner is entitled to relief under the "contrary to" clause only if "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Court in *Williams* was careful to note that most cases will not fit into this category, which is limited to direct and unequivocal contradiction of Supreme Court authority. *Id.* at 406-08. *See also Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 888 (3d Cir.) (*en banc*) (to prove entitled to relief under "contrary to" clause, "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; ... petitioner must demonstrate that Supreme Court precedent *requires* the contrary outcome") (emphasis in original), *cert. denied,* 528 U.S. 824, 120 S.Ct. 73, 145 L.Ed.2d 62 (1999).

Under the "unreasonable application" clause, a federal habeas court may not issue the writ simply because that court concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams,* 529 U.S. at 411. Relief is appropriate only where the state court decision is also objectively unreasonable. *Id. See Werts v. Vaughn,* 228 F.3d 178, 197 (3d Cir.2000) (federal habeas court should not grant the petition unless "the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent") (quoting *Matteo,* 171 F.3d at 890), *cert. denied,* 532 U.S. 980 (2001).

With respect to 28 U.S.C. § 2254(d)(2), which dictates that federal habeas relief may be granted when the state court adjudication was based on an unreasonable determination of the facts in light of the evidence presented, the petitioner must demonstrate that a reasonable fact-finder could not have reached the same conclusions given the evidence. If a reasonable basis existed for the factual findings reached in the state court, then habeas relief is not warranted. *Campbell v. Vaughn,* 209 F.3d 280, 290-91 (3d Cir.2000), *cert. denied,* 531 U.S. 1084, 121 S.Ct. 789, 148 L.Ed.2d 685 (2001). Furthermore, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. *Standard for Ineffective Assistance Claims*

***4** Petitioner's third claim alleges ineffective assistance of counsel. Before the court addresses the specifics of this claim, the court will review the standards used to evaluate an ineffective assistance claim.

In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set forth a two prong test that a petitioner must satisfy before a court will find that counsel did not provide effective assistance. Under the *Strickland* test, a petitioner must show: (1) that his attorney's representation fell well below an objective standard of reasonableness; and (2) that there exists a reasonable probability that, barring counsel's ineffectiveness, the result of the proceeding would have been different. *Id.* at 688-96. To satisfy the first prong of the *Strickland* test, a petitioner is required to show that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. In evaluating counsel's performance, a reviewing court should be "highly deferential" and must make "every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id* . (citation omitted).

To satisfy the second prong of the *Strickland* test, a petitioner must show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* It follows that counsel cannot be ineffective for failing to pursue meritless claims or objections. *United States v. Sanders,* 165 F.3d 248, 253 (3d Cir.1999); *United States v. Fulford,* 825 F.2d 3, 9 (3d Cir.1987). In such a situation, the second prong of the *Strickland* test has not been satisfied. Furthermore, counsel is not ineffective for failing to raise all possible claims of trial court error on appeal. Counsel may exercise his or her professional judgment as to which claims to pursue. *See Jones v. Barnes,* 463 U.S. 745, 750-54, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (decision of what issues to raise on appeal is charged to counsel; counsel need not assert every non-frivolous issue to guard against subsequent claim of ineffectiveness). Thus, it is not inappropriate for counsel, after consultation with his client, to override the client's wishes when exercising professional judgment regarding which issues to pursue on appeal. *Sistrunk v. Vaughn,* 96 F.3d 666, 670 (3d Cir.1996).

Where, as in the instant case, the state court has already rejected an ineffective assistance of counsel claim, a federal court must defer to the state court's decision pursuant to 28 U.S.C. § 2254(d)(1). As the Supreme Court recently stated:

***5** If a state court has already rejected an inef-

fective-assistance claim, a federal court may grant habeas relief if the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable.

Yarborough v. Gentry, 540 U.S. 1, 4, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam) (citations omitted).

C. *Petitioner's Claims*

1. *Right to Direct Appeal*

Petitioner's first claim is that his constitutional rights were violated when the state courts determined that trial counsel was not ineffective for failing to file an appeal and that petitioner was not denied his right to a direct appeal. After a careful review of the record, this court finds that the state court's factual determinations were reasonable in light of the evidence presented. Additionally, their conclusions were neither contrary to nor an unreasonable application of Supreme Court precedent.

As noted by the Commonwealth in its brief, the evidence on this issue was presented at the PCRA hearings on May 15 and 16, 2002. Mr. El-Shabazz, trial counsel, testified that he had no recollection of petitioner or any of his family members asking him to file an appeal. (N.T., 5/15/02, at 40-41.) Mr. El-Shabazz further testified that if he had been asked to file an appeal, he would have filed a *pro se* notice of appeal and asked the judge to remove him from the case. *Id.* The Superior Court, affirming dismissal of petitioner's PCRA petition, stated as follows:

In this case ... we found ample support in the record for the PCRA court's determination that Attorney El-Shabazz' testimony on the issue of filing an appeal was credible. While he could not specifically recall whether anyone spoke to him about filing an appeal, he testified,

"Again, if they spoke to me, if it was within the 30 day period I would have filed it as a *pro se* and asked the judge to make sure that they don't hold me to a briefing schedule and remove me and appoint counsel. I've done that numerous times."

PCRA hearing transcript, 5/15/02 at 41. He also stated, "I will say this, if in fact he asked me to do it, even if I wasn't paid, I would have asked the judge to remove me from the case. I would have filed it as if filing it *pro se* for him but only to keep his time." (*Id.*) Reviewing Attorney El-Shabazz' testimony together with the testimony of Appellant and his witnesses, and keeping in mind the extraordinary deference with which we review a PCRA court's credibility determinations, we found no error or abuse on the part of the PCRA court as to this issue.

Commonwealth v. Casillas, No.2084 EDA 2002, slip op. at 7 (Pa.Super.Ct. July 9, 2003).

The Superior Court also found no error or abuse of discretion on the part of the PCRA court regarding its determination of the credibility of petitioner's godmother, Ms. Williams. The Superior Court stated as follows:

***6** As the PCRA court concluded:

"It's clear to me that [appellant] on the day of the plea was advised with regard to his rights, his appellate rights.... In any event as to Ms. Williams, [appellant's godmother] even if she did try to get in touch with Mr. Shabazz [sic] without success, it's not necessarily her right to do one way or the other but in any event I easily find if she did so, she did so beyond the 30 day period anyway.

So under these circumstances I would find the credibility in favor of Mr. Shabazz [sic] and you can go on to the actual merits here."

PCRA hearing transcript, 5/16/02 at 107-108. When Attorney Rodriques questioned the court as to the basis for finding Ms. Williams attempted to contact Attorney El-Shabazz beyond the 30-day appeal period, the court responded:

"Because she said she didn't remember when she spoke to Mr. Shabazz [sic] exactly. She thinks it might have been in November, it could have been in December, but it's up to me to put together the conflicts in the testimony and to try to figure out what the actual facts are...."

Id. at 108. Finally, as the PCRA court noted with regard to appellant's direct appeal rights, "I think he's getting everything anyway. Let's get to the merits, and it is absolutely I assume, I can't imagine and I don't think you have provided Ms. Rodriques anything different he would say in a direct appeal than he is saying right, [sic] now so go ahead. (*Id.* at 108-109.)

Id. at 5-6.

Federal law is clear that a state court's credibility determinations are binding on a federal court in a subsequent habeas action, unless the petitioner rebuts those findings by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Miller v. Fenton,* 474 U.S. 104, 114, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). A federal habeas court has "no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court...." *Marshall v. Lonberger,* 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). Consequently, it is not for this court to redetermine the credibility of Mr. El-Shabazz or Ms. Williams.[FN2]

FN2. As noted in the Commonwealth's memorandum of law, contrary to petitioner's representation in his petition, *see* Petition at 9, and as set forth in the language quoted in the text above, the court did make a finding that the first time Ms. Williams asked Mr. El-Shabazz to file an appeal for petitioner, if she did so at all, was after the thirty day appeal period had expired. Thus, Ms. Williams' earlier telephone calls to counsel's office manager, during which she did not communicate that an appeal should be filed, did not have the effect of directing counsel to file an appeal. (N.T ., 5/16/02, at 78.)

The state court's determination that petitioner was not denied his right to appeal is reasonable in light of the evidence presented, and it is neither contrary to, nor an unreasonable application of clearly, established Supreme Court precedent. Petitioner's first claim should be denied.

2. *Petitioner's Guilty Plea and the Effectiveness of Counsel*

Petitioner next contends that his guilty plea was induced unlawfully and was entered into involuntarily and unknowingly. Petitioner also contends that trial counsel, Mr. El-Shabazz, unlawfully coerced petitioner into signing the guilty plea. In *Boykin v. Alabama,* 395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires that a guilty plea be entered intelligently and voluntarily. Before pleading guilty, a criminal defendant should be advised of "all of his constitutional rights and protections, including the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment, the right to trial by jury, and the right to confront one's accusers." *Hill v. Beyer,* 62 F.3d 474, 480 (3d Cir.1995) (citing *Boykin,* 395 U.S. at 243). However, in *Boykin,* "the Supreme Court did not specify a mandatory litany and the failure to advise a defendant of each right does not automatically invalidate the plea." *United States v. Stewart,* 977 F.2d 81,

84 (3d Cir.1992), *cert. denied,* 507 U.S. 979, 113 S.Ct. 1433, 122 L.Ed.2d 800 (1993). *See also Hill,* 62 F.3d at 481 ("The failure to specifically articulate *Boykin* rights, however, is not dispositive if the circumstances otherwise establish that the plea was constitutionally acceptable." (citations omitted)).

*7 Whether a guilty plea is voluntary is a question of law and not a question of fact subject to the presumption of correctness of 28 U.S .C. § 2254(e)(1). *Parry v. Rosemeyer,* 64 F.3d 110, 113 (3d Cir.1995) (citing *Marshall v. Lonberger,* 459 U.S. 422, 431, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983)), *cert. denied,* 516 U.S. 1058 (1996). Thus, this court must make a *de novo* determination as to the voluntariness of petitioner's guilty plea. *Id.*

The written guilty plea colloquy form, admittedly executed by petitioner, is sufficient proof to establish that he was advised of his *Boykin* rights prior to the entry of his guilty plea. *See Blackledge v. Allison,* 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (execution of guilty plea form, such as that executed by petitioner here, carries "a strong presumption of verity"); *Dickerson v. Ryan,* 1991 WL 255686, at *2 (E.D.Pa. Nov.27, 1991) (Under Pennsylvania law, use of a written plea colloquy form is permissible when "supplemented by some on-the-record oral examination." When petitioner said he fully understood each and every term of the written guilty plea form, the court had "no choice but to conclude that petitioner's written plea colloquy demonstrated a knowing and intelligent guilty plea.").

At the guilty plea colloquy on October 29, 1997, after counsel indicated that he had not reviewed the guilty plea form with petitioner, Judge Greenspan permitted petitioner to meet privately with his counsel and family members to discuss the guilty plea offer. (N.T., 10/29/97, at 9.) During the colloquy, Judge Greenspan explained the elements of the crimes to which petitioner was pleading guilty. *Id.* at 7. Petitioner responded "yes," when asked by the Judge if he understood the elements of the crimes to which he was pleading guilty. *Id.* Petitioner signed the guilty plea colloquy form in court and responded "no," when asked if he had any questions about the guilty plea form or the rights he was giving up. *Id.* at 10. The Judge asked petitioner's counsel whether he was satisfied that petitioner understood the guilty plea form and the rights he was giving up. *Id.* Mr. El-Shabazz responded as follows: "Yes, Your Honor. I had an opportunity to speak to him about it at the bar of the Court, and also in the back, in his presence, and in the presence of his family." *Id.* Petitioner confirmed that no one "made any force or threats" against him to induce him to plead guilty, that his actions were of his own free will, and that no other promises had been made to him. *Id.* at 11. Petitioner also confirmed that he discussed the guilty plea with his attorney and that he was satisfied with his attorney's representation. *Id.* at 12. Mr. El-Shabazz placed several additional items on the record. Counsel confirmed that petitioner would receive credit for time he already had served, and also asked the judge "to place on the commitment papers that the minimum is a definite sentence, in light of the case law, and the Mudman parole situation." [FN3] *Id.* After the factual basis for the crimes was read into the record, *id.* at 12-16, petitioner responded "yes," when asked if he understood the conduct to which he was pleading guilty. *Id.* at 15-16.

> FN3. Robert "Mudman" Simon, a violent criminal, murdered a New Jersey police officer shortly after being paroled by the Commonwealth of Pennsylvania. An investigation by Pennsylvania's Senate Judiciary Committee resulted in the enactment of changes to Pennsylvania's parole system shifting the emphasis from rehabilitation of the offender to public safety and deterrence. *See Stewart v. Pennsylvania Bd. of Probation and Parole,* 714 A.2d 502, 504 n. 1 (Pa.Commw.Ct.1998).

***8** This claim was the primary subject of the

PCRA hearings on May 15 and 16, 2002. Notwithstanding the events memorialized at the plea colloquy hearing, petitioner testified at the PCRA hearings that he had not read the form, nor was it explained to him, despite the fact that he signed the form directly under text indicating in bold, capital letters that he had read and understood the form. (N.T., 5/16/02, at 15-17, 28-30.) Petitioner further testified at the PCRA hearing that he did not "have enough education" to have read the entire form. *Id.* at 17. Petitioner acknowledged that while he told the PCRA court he had a fifth grade education, he indicated in the guilty plea form that he had completed seventh grade. Petitioner claimed that he lied on the form regarding his education. *Id.* at 18. At the guilty plea colloquy, when asked how far he went in school, petitioner responded, "Seventh grade." (N.T., 10/29/97, at 5.) Petitioner claimed that trial counsel told him to tell the judge during the plea colloquy that he could read and write English. (N.T., 5/16/02, at 19-20.) [FN4] However, petitioner later testified that counsel did not prompt him to state what grade he completed in school or whether he could read and write English. *Id.* at 27-28. Petitioner asserted that his attorney coerced him into saying that he was not coerced into pleading guilty. *Id.* at 23. In fact, petitioner testified that his attorney prompted him in all of his replies at the guilty plea colloquy. *Id.* at 23-27. At times, petitioner asserted that his counsel whispered to him the responses he should give, but later claimed that his attorney had not whispered but had "let me know" what the answer should be. *Id.* at 35-39, 63-64.

> FN4. The PCRA judge was the same judge who accepted the guilty plea, Judge Greenspan.

The Superior Court, affirming for the first time the PCRA court's dismissal of the PCRA petition, stated as follows:

At the close of testimony, the PCRA court found that Mr. El-Shabazz' testimony was credible. (PCRA hearing transcript, 5/16/02 at 119.) The court reviewed that testimony; the testimony of appellant and the witnesses who were present at [the] time appellant entered his guilty plea; the evidence, including the large, almost three inches thick binder Attorney El-Shabazz had prepared prior to trial; and statements inculpating appellant that were in the possession of the District Attorney prior to appellant's trial date, including appellant's own statement. (*Id.* at 119-121.) As the PCRA court opined, "[T]he evidence here was extremely strong and the kind of evidence that puts the jury over the edge with regard to death, I might add." (*Id.* at 120-121.) Continuing, Judge Greenspan observed, "So the choices here for [appellant] were not good ones and Mr. Shabazz [sic] did yoeman's [sic] work in getting such a reasonable sentence from the Commonwealth given the strength of the case here." (*Id.* at 121.) As to the voluntariness of appellant's plea, Judge Greenspan stated:

***9** I do find that [appellant] was in no way improperly or unlawfully induced to enter his plea; that Mr. Shabazz [sic] was effective; that there's no evidence here that he was in any way ineffective; rather, I find quite the opposite, and I would for those reasons once again deny post conviction relief.

Id. at 121-122.

Commonwealth v. Casillas, No.2084 EDA 2002, slip op. at 3-4 (Pa.Super.Ct. July 9, 2003).

The PCRA court noted that petitioner testified as follows, *inter alia,* at the PCRA hearing. Petitioner testified that he did not want to plead guilty, that trial counsel threatened him by telling him he would get life in prison or death if convicted of first-degree murder, that counsel told him he did not hire an investigator because he had not been paid enough money, and that his family members urged him to accept the plea bargain. On cross-examination, when confronted with the written guilty plea colloquy, peti-

tioner testified that he never read the questions on the form and that his oral answers at the colloquy were solely the result of prompting by counsel. *Commonwealth, v. Casillas,* No. 537 1/1, slip op. at 1-2 (C.C.P. Phila. July 23, 2002) (citations to PCRA Hearing Transcripts (N.T., 5/15/02 and 5/16/02) omitted).

At the PCRA hearing, Loretta Williams (petitioner's godmother) and Shawn Gadson (the mother of one of petitioner's children), acknowledged they were with trial counsel and petitioner when they privately discussed the merits of the plea at the plea hearing, and both testified that they urged petitioner to take the guilty plea. *Id.* at 2-3. *See also* N.T., 5/16/02, at 73-76 (Ms. Williams' testimony), 82-83 (Ms. Gadson's testimony). It is well established that when a defendant's decision to plead guilty is motivated by a desire to avoid the death penalty, that fact does not make the plea involuntary or otherwise invalid. *See Brady v. United States,* 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) ("a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty").

After considering the evidence at the hearing, the PCRA court concluded as follows:

Having reviewed all of the evidence, this Court has determined that defendant's plea was knowingly and voluntarily entered and that he was effectively represented by counsel during the plea. Moreover, this Court finds defendant's testimony unworthy of belief standing on its own in addition to the fact that the testimony was contradicted by his own relative witnesses. There is no credible evidence that defendant's plea was unlawfully induced; to the contrary, it was intelligently entered while defendant was ably represented by experienced trial counsel who was prepared to try the case. Finally, there is no credible evidence that plea counsel coerced defendant's relatives to induce defendant to enter the plea because he was neither ready nor fully paid. The reality is that the evidence against the defendant was so strong that there was a great likelihood the jury could have returned a sentence of death or life without parole. Instead defendant received a sentence of twenty three (23) to forty six (46) years so that as his family hoped he would one day be paroled to see his son.

***10** *Commonwealth v. Casillas,* No. 537 1/1, slip op. at 3 (C.C.P. Phila. July 23, 2002).

The state court's credibility determinations are binding upon this court. 28 U.S.C. § 2254(e)(1). The entire record, including the written guilty plea form, the guilty plea colloquy between petitioner, his counsel and the court on October 29, 1997, the testimony from the PCRA hearings on May 15 and 16, 2002, and the PCRA court's credibility determinations, clearly shows that petitioner was not coerced to plead guilty, but that his plea was voluntary, intelligent and knowing. Petitioner's second claim should be dismissed.

Petitioner also contends that counsel was ineffective because he unlawfully coerced petitioner into entering the guilty plea. As stated above, where the state court has already rejected an ineffective assistance of counsel claim, a federal court must defer to the state court's decision pursuant to 28 U.S.C. § 2254(d)(1). *See Yarborough v. Gentry,* 540 U.S. 1, 4, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam) (citations omitted). Here, the PCRA court, as affirmed by the Superior Court, found no evidence that petitioner's plea was unlawfully induced. The Superior Court stated as follows:

[W]e find the PCRA court's conclusion that counsel was effective fully supported by the record. The testimony presented at the PCRA hearing indicated that counsel was fully prepared to try the case on the day set for trial; that he had engaged in negotiations with the District Attorney's office over a period of weeks if not months and had rejected numerous offers, which he believed were either not bargains or

not palatable. The testimony also indicates that on the day set for trial, the Commonwealth came forward with an offer that spared appellant the likely prospect of being convicted of either first or second degree murder, with a minimum sentence of life in prison, and a death-qualified jury. (PCRA hearing transcript, 5/15/02 at 26-35; 5/16/02 at 114.) As previously noted, the PCRA court found that "evidence here was extremely strong and the kind of evidence that puts the jury over the edge with regard to death, I might add." (PCRA hearing transcript, 5/16/02 at 120-121.) In particular, the court found "impressive" appellant's statement admitting his involvement in the crime. (*Id.* at 120.)

Appellant also claims that Attorney El-Shabazz coerced his family members into pressuring appellant to accept the guilty plea; however, the family members' testimony belies that assertion. Rather, it appears as if Attorney El-Shabazz told the family members it was his opinion the Commonwealth's offer was a good one in view of the likelihood a jury would convict appellant of a crime carrying with it either life in prison or death. (PCRA hearing transcript, 5/16/02 at 70-71.) At that point, appellant's family members, including his godmother, his sister, and the mother of his son, became overwrought at the thought of appellant's never being released from jail or facing execution, and begged him to accept the plea bargain. (PCRA hearing transcript, 5/16/02 at 70-71; 79-80.)

***11** ...

The PCRA hearing testimony also indicates that because Attorney El-Shabazz informed the court he had not had an opportunity to review with appellant the maximum periods of incarceration he faced for each of the crimes with which he was charged, the court provided counsel with a few moments to review those sentences with his client before proceeding with the plea colloquy. (*Id.* at 35.) While appellant would have us believe he was not allowed adequate time to consider the plea agreement based on the brief amount of time the court gave counsel to redress this omission, we find no reversible error: we cannot conceive of any subtleties that would require prolonged consideration where appellant faced a maximum sentence of death and a minimum sentence of life in prison.

Commonwealth v. Casillas, No.2084 EDA 2002, slip op. at 9-11 (Pa.Super.Ct. July 9, 2003).

This court finds that this conclusion is reasonable in light of the evidence and that it is neither contrary to, nor an unreasonable application of, Supreme Court precedent. Furthermore, to show prejudice resulting from counsel's deficient conduct, petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Petitioner has not made this showing. Petitioner's third claim should be denied.

III. *CONCLUSION*

Accordingly, for all of the above reasons, the court makes the following

RECOMMENDATION

AND NOW, this 28th day of January, 2005, the court respectfully recommends that the petition for a writ of habeas corpus be DENIED, and that *no* certificate of appealability ("COA") be granted.[FN5]

FN5. The COA should be denied because petitioner has not shown that reasonable jurists could debate whether his petition should be resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell,* 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

E.D.Pa.,2005.
Casillas v. Grace

Not Reported in F.Supp.2d, 2005 WL 195588 (E.D.Pa.)

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Not Reported in A.3d, 2011 WL 10878246 (Pa.Cmwlth.)
(Cite as: 2011 WL 10878246 (Pa.Cmwlth.))

H

Only the Westlaw citation is currently available.

THIS IS AN UNREPORTED PANEL DECISION OF THE COMMONWEALTH COURT. AS SUCH, IT MAY BE CITED FOR ITS PERSUASIVE VALUE, BUT NOT AS BINDING PRECEDENT. SEE SECTION 414 OF THE COMMONWEALTH COURT'S INTERNAL OPERATING PROCEDURES.

Commonwealth Court of Pennsylvania.
John W. GRACEY, Appellant.
v.
CUMRU TOWNSHIP, Allen Madeira, individually and in his official capacity, Envirotech, individually and in its official capacity, Jeanne Johnston, individually and in her official capacity, Michael Setley, individually and in his official capacity, Shea Brianna Scharding, individually and in her official capacity, E. Kenneth Remp, individually and in his official capacity, Edward L. Gottschall, individually and in his official capacity, David Kalin, individually and in his official capacity, Ruth O'Leary, individually and in her official capacity, Barry E. Rohrbach, individually and in his official capacity, and Tony J. Sacco, individually and in his official capacity.

No. 2604 C.D.2010.
Submitted May 6, 2011.
Decided Dec. 27, 2011.

MEMORANDUM OPINION
PER CURIAM.

*1 John W. Gracey appeals, *pro se,* the order of the Court of Common Pleas of Berks County (trial court) sustaining the preliminary objections of Cumru Township (Township) and a number of other defendants (collectively, Defendants) [FN1] and dismissing Gracey's complaint. We now affirm.

FN1. The other defendants named in Gracey's complaint are: Allen Madeira, individually and in his official capacity; Envirotech, individually and in its official capacity; Jeanne Johnston, individually and in her official capacity; Michael Setley, individually and in his official capacity; Shea Brianna Scharding, individually and in her official capacity; E. Kenneth Remp, individually and in his official capacity; Edward L. Gottschall, individually and in his official capacity; David Kalin, individually and in his official capacity; Ruth O'Leary, individually and in her official capacity; Barry E. Rohrbach, individually and in his official capacity; and Tony J. Sacco, individually and in his official capacity.

Gracey owns a single-family house located at 1613 Meade Street in the Township.[FN2] On December 23, 2009, Remp, the Township's building inspector, inspected the house due to complaints by Gracey's tenants regarding its habitability. (Reproduced Record (R.R.) at 97a.) On December 28, 2009, Remp sent Gracey a letter warning Gracey of violations of the 2003 edition of the International Property Maintenance Code (IPMC) that were found to exist on the premises during the inspection. (R.R. at 96a–98a.) On February 18, 2010, Envirotech became the Township's code enforcement agency. (R.R. at 28a.) On March 4, 2010, Madeira, an employee of Envirotech, conducted another inspection of the house. (R.R. at 26a, 99a.) On March 16, 2010, the Township's Board of Commissioners enacted Ordinance No. 694 which adopted the 2009 edition of the IPMC. (R.R. at 88a, 89a.) On March 30, 2010, Madeira sent Gracey a notice of maintenance code violations. (R.R. at 26a, 30a–31a, 99a–100a.) The letter outlined a number of violations

of the 2009 edition of the IPMC provisions and stated that the property was condemned as unfit for occupancy. (R.R. at 26a, 99a–100a.)

> FN2. Cumru Township is a first class township. 119 The Pennsylvania Manual 6–73 (2009). Section 1502 of the First Class Township Code (Code), Act of June 24, 1931, P.L. 1206, *as amended,* 53 P.S. § 56502, vests the Township's corporate power in its board of commissioners, and it specifically empowers the Board to enact ordinances adopting the provisions of a standard or nationally recognized code or parts thereof. 53 P.S. § 56502(d). Section 1502 of the Code also empowers the Township to enact and enforce suitable ordinances to govern and regulate all housing designed or used for human habitation or occupancy. 53 P.S. § 56519. Section 1502 also empowers the Township "[t]o provide for the inspection of the construction and repair of buildings and housing, including the appointment of one or more building inspectors and housing inspectors...." 53 P.S. § 56520.

On October 4, 2010, Gracey filed a complaint in the trial court that was 16 pages in length with a number of exhibits and did not contain separately numbered paragraphs or separate counts. (R.R. at 6a–48a.) The complaint was divided into five sections: section A. provided the summary statement of the case; section B. provided an introduction to the plaintiff and the defendants; section C. provided background of the case; section D. provided the nine legal issues involved; and section E. provided the remedy and relief requested. (*Id.*)

Part I of the legal issues in section D. of the complaint related to Remp's December 28, 2009, letter and alleged an unspecified "Lack of Due Process." (R.R. at 11a.) Part II of the legal issues in section D. related to Madeira's March 30, 2010, letter and alleged: "Violation of Pennsylvania Constitution: Article 1 section 17; Ex Post Facto, Impairment of Contracts"; "Lack of authority for private individual and company to condemn property"; "[Sewer Enforcement Officer] Lacks authority to condemn property for Codes"; "Months later, Madeira became Codes Enforcement" [FN3].; "Willful misconduct to send Madeira to Gracey property"; "Malice, and Arbitrary"; "Arbitrariness and Animosity"; and "Disregard for the provision of the IPMC 2009—concerning Vacant Structures." (R.R. at 12a–20a.[FN4,FN5])

> FN3. The third, fourth, and fifth legal issues in the complaint related to the condemnation of property under the Eminent Domain Code, 26 Pa.C.S. §§ 101–1106. (R.R. at 14a.)

> FN4. There are no factual allegations in the complaint relating to Johnston, Setley, Scharding, Remp, Gottschall, Kalin, O'Leary, Rohrbach, or Sacco as individuals. (R.R. at 12a–20a.)

> FN5. Section E. of the complaint stated, in pertinent part:
>
> > John Gracey is requesting the release of his property and removal of condemnation, as well as monetary damages including the following:
> >
> > actual monetary damages; the reduction of the property's value due to the condemnation; the full financial value of the total property if the condemnation and taking is not removed; past, present, and future loss of income and earnings from the property during the condemnation; other costs and expenses; attorney fees; interest (at Pennsylvania legal rate); plus punitive damages....

(R.R. at 21a.)

On October 19, 2010, the Defendants filed preliminary objections alleging: (1) the complaint failed to conform to Rules 1022 and 1024 of the Pennsylvania Rules of Civil Procedure [FN6]; (2) the complaint was legally insufficient [FN7]; and (3) the complaint included scandalous and impertinent matter. (R.R. at 53a–60a.) Although Gracey filed a reply to the preliminary objections on November 8, 2010, (R.R. at 67a–100a.), he never sought to amend his complaint.

FN6. Rule 1022 states that "[e]very pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation." Pa.R.C.P. No. 1022. Rule 1024 provides, in pertinent part:

> (a) Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified. The signer need not aver the source of the information or expectation of ability to prove the averment or denial at the trial. A pleading may be verified upon personal knowledge as to a part and upon information or belief as to the remainder.
> * * *
>
> (c) The verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her knowledge and the reason why verification is not made by a party.
>
> Pa.R.C.P. No. 1024(a), (c).

FN7. Rule 1028 provides, in pertinent part:

> (a) Preliminary objections may be filed by an party to any pleading and are limited to the following grounds:
> * * *
>
> (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
> * * *
>
> (4) legal insufficiency of a pleading (demurrer);
> * * *
>
> (c)(1) A party may file an amended pleading as of course within twenty days after service of a copy of preliminary objections. If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot.
>
> Pa.R.C.P. No. 1028(a)(2), (4), (c)(1).

***2** On November 17, 2010, the trial court issued the instant order sustaining the preliminary objections and dismissing Gracey's complaint. Gracey filed this appeal of the trial court's order.[FN8]

FN8. This Court's scope of review of a trial court order granting preliminary objections is

> limited to determining whether the trial court committed legal error or abused its discretion. *Bell v. Township of Spring Brook,* —— A.3d ——, —— (Pa.Cmwlth., No. 2119 C.D.2010, filed September 28, 2011) (citation omitted).

In this appeal, Gracey claims [FN9]: (1) the trial court erred in sustaining the preliminary objections and dismissing the complaint; (2) the condemnation was a nullity as it was void from the start; (3) the condemnation was inappropriate because it was based on non-existent or erroneous IMPC requirements and the house was not unfit for human habitation; and (4) the condemnation violated his constitutional due process and ex post facto rights.

> FN9. We consolidate and reorder the claims raised by Gracey in this appeal in the interest of clarity.

Gracey first claims that the trial court erred in sustaining the preliminary objections and dismissing the complaint. We do not agree.

Rule 1028(a)(2) of the Rules of Civil Procedure states that preliminary objections may be filed where a complaint fails "[t]o conform to law or rule of court...." Pa.R.C.P. No. 1028(a)(2). In turn, Rule 1022 states that "[e]very pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation." Pa.R.C.P. No. 1022.

In general, the test of compliance with Rule 1022 is the difficulty or impossibility in filing an answer to the complaint. *General State Authority v. Sutter Corporation,* 24 Pa.Cmwlth. 391, 356 A.2d 377, 380 (Pa.Cmwlth.1976). The complaint in this case utterly fails to conform to the requirements of Rule 1022 as it is not divided into consecutively numbered paragraphs with each containing only one material allegation. (R.R. at 6a–22a.) The Defendants' inability to craft an appropriate answer to the instant complaint is manifest.

Rule 1024(a) states, in pertinent part, that "[e]very pleading containing an averment of fact not appearing of record in the action ... shall state that the averment ... is true upon the signer's personal knowledge or information and belief and shall be verified...." Pa.R.C.P. No. 1024(a). In addition, Rule 1024(c) provides, in pertinent part, that "[t]he verification shall be made by one or more of the parties filing the pleading...." Pa.R.C.P. No. 1024(c). The Explanatory Comment to Rule 1024 provides, in pertinent part:

> These amendments extend the concept of the verified statement to the Rules of Civil Procedure generally. The definitions of "affidavit" and "verified" in Rule 76 [FN10] have been enlarged to include two alternatives: an affidavit or verified document may contain (1) the usual oath or affirmation before a notary or other person authorized to administer oaths or (2) a statement by the signer that it is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.
>
> FN10. In turn, Rule 76 provides, in pertinent part:
>
> > "[V]erified," when used in reference to a written statement of fact by the signer, means supported by oath or affirmation or made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.
> >
> > Pa.R.C.P. No. 76.

Pa.R.C.P. No. 1024 cmt.1981.

As the Superior Court has stated:

> "[T]he requirement of a verification is not waivable because without it a pleading is mere narration, and amounts to nothing." 2 Goodrich Amram 2d § 1024(a):1. While our cases acknowledge that amendment should be liberally allowed to cure technical defects in a verification, *see, e.g., George H. Althof, Inc. v. Spartan Inns of America, Inc.*, [441 A.2d 1236 (Pa.Super.1982)]; *Monroe Contract Corp. v. Harrison Square, Inc.*, [405 A.2d 954 (Pa.Super.1979)], there is no doubt but that the verification attached to the complaint in the instant case falls so far short of the statutory mandate that the verification is wholly defective and inadequate to support entry of a ... judgment against appellants.

***3** *Atlantic Credit and Finance, Inc. v. Giuliana*, 829 A.2d 340, 344 (Pa.Super.2003), *appeal denied*, 577 Pa. 676, 843 A.2d 1236 (2004).

Likewise, the complaint in this case utterly fails to conform to the requirements of Rule 1024 as it is not verified at all. (R.R. at 6a–48a. [FN11]) The complete absence of a verification falls so far short of the requirement imposed by Rule 1024 that the instant complaint is patently insufficient. *Atlantic Credit and Finance, Inc.*, 829 A.2d at 344 ("[T]here is no doubt but that the verification attached to the complaint in the instant case falls so far short of the statutory mandate that the verification is wholly defective and inadequate to support entry of a ... judgment against appellants.").

> FN11. Although Gracey never sought to amend his complaint he inserted a defective "supplemental verification" in his reply to the preliminary objections. (R.R. at 82a.)

Finally, Rule 1028(a)(4) states that preliminary objections may be filed based on the "legal insufficiency of a pleading (demurrer) ." Pa.R.C.P. No. 1028(a)(4). In the preliminary objections, the Defendants claimed that the nine legal issues raised in Gracey's complaint failed to state claims for which relief could be granted. (R.R. 55a–57a.)

As this Court recently noted:

> [A] demurrer can only be sustained where the complaint clearly is insufficient to establish the pleader's right to relief. A preliminary objection in the nature of a demurrer admits as true all well-pled material, relevant facts and every inference fairly deducible from those facts. Conclusions or averments of law are not considered to be admitted as true by a demurrer. Since the sustaining of a demurrer results in a denial of the petitioner's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim upon which relief may be granted. If the facts as pleaded state a claim for which relief may be granted under any theory of law, there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.

Bell, —— A.3d at —— n. 7.

Rule 1019(a) states that "[t]he material facts on which a cause of action ... is based shall be stated in a concise and summary form." Pa.R.C.P. No. 1019(a). In addition, Rule 1020(a) provides, in pertinent part, that "[e]ach cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." Pa.R.C.P. No. 1020(a).

In *Steiner v. Markel*, 600 Pa. 515, 524–25 n. 11, 968 A.2d 1253, 1258–59 n. 11 (2009) (citations omitted and emphasis in original), the Supreme Court explained:

> "legal theory" and a "claim" are two different concepts. Black's Law Dictionary defines a "legal the-

ory" as "the principle under which a litigant proceeds, or on which a litigant bases its claims or defenses in a case." A "claim" is defined as "the aggregate of operative facts giving rise to a right enforceable by a court." Pennsylvania courts have recognized this distinction, holding that:

> ***4** The purpose behind the rules of pleading is to enable parties to ascertain, by using their own professional discretion, the claims and defenses in the case. This purpose would be thwarted if courts, rather than the parties, were burdened with the responsibility of deciphering the causes of action from a pleading of facts which obscurely support the claim. *While it is not necessary that the complaint identify the specific legal theory of the underlying claim, it must apprise the defendant of the claim being asserted and summarize the essential facts to support that claim.* If a plaintiff fails to properly plead a separate cause of action, the cause he did not plead is waived.

A plaintiff need not disclose a particular theory in the complaint, but the plaintiff must clearly plead a claim which can then be pursued under whatever theory the plaintiff determines is prudent.

Although Rule 1019(a) is to be liberally construed,[FN12] "[l]iberal construction does not permit unpled elements [to] be pulled from thin air and grafted onto the pleading; it does not excuse the basic requirements of pleading...." *McShea v. City of Philadelphia,* 606 Pa. 88, 98, 995 A.2d 334, 340 (2010). In addition, " '[t]he requirement of [Rule 1020(a)] that the plaintiff set forth each cause of action against each defendant in a separate count under a separate heading is mandatory and the complaint will be stricken for failing to comply with this requirement....' " *General State Authority v. Lawrie and Green,* 24 Pa.Cmwlth. 407, 356 A.2d 851, 853 (Pa.Cmwlth.1976) (citation omitted).

FN12. Rule 126 states:

> The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceedings may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Pa.R.C.P. No. 126.

The nine legal issues raised by Gracey in his complaint are not divided into separate counts for each cause of action against each defendant, are not supported by any verified facts for each element of each of those claims, and they do not each contain a separate demand for relief. (R.R. at 11a–20a.) Based on the foregoing, it is clear that the trial court did not err in granting the Defendants' preliminary objections and dismissing the complaint as it is patently insufficient to establish Gracey's right to relief.[FN13]

FN13. *See Kovalev v. Sowell,* 839 A.2d 359, 367 (Pa.Super.2003), *appeal denied,* 580 Pa. 698, 860 A.2d 124 (2004) (holding that a *pro se* litigant is not entitled to any particular advantage due to his lack of legal training because any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove to be his undoing).

Accordingly, the trial court's order is affirmed.[FN14]

FN14. Due to our disposition of this allegation of error, we need not address the remaining claims raised in this appeal.

ORDER

AND NOW, this 27th day of December, 2011, the November 17, 2010 order of the Court of Common Pleas of Berks County is affirmed.

Pa.Cmwlth.,2011.
Gracey v. Cumru Tp.
Not Reported in A.3d, 2011 WL 10878246 (Pa.Cmwlth.)

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NORELENE M. HAMLIN, Petitioner, v. DEPARTMENT OF THE ARMY, Respondent.

95-3140

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

1995 U.S. App. LEXIS 40305

April 13, 1995, DECIDED

NOTICE: [*1] RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 60 F.3d 839, 1995 U.S. App. LEXIS 40309.

PRIOR HISTORY: Merit Systems Protection Board. No. SL-0432-94-0320-I-1.

JUDGES: Before MICHEL, RADER and BRYSON, Circuit Judges.

OPINION

PER CURIAM.

DECISION

Norelene M. Hamlin appeals from the October 27, 1994 decision of the Merit Systems Protection Board (Board), No. SL-0432-94-0320-I-1, denying review of the August 5, 1994 initial decision of the Administrative Judge (AJ). Because the Board did not abuse its discretion in so denying review, we *affirm*.

DISCUSSION

On April 14, 1994, following Hamlin's failure to improve to a satisfactory level in accordance with a Performance Improvement Plan, the Department of the Army (Army) notified Hamlin of her removal. Hamlin made a timely appeal to the Board.

Prior to the scheduled hearing, Hamlin settled her case with the Army. In a telephonic conference with the AJ, Hamlin's attorney stated that the provisions of the settlement agreement had been discussed with Hamlin and that she understood them. Finding the settlement agreement lawful on its face and to have been freely reached [*2] by the parties, the AJ entered the settlement agreement into the record and dismissed Hamlin's appeal.

Hamlin subsequently filed a petition for review with the Board. Hamlin sought to have the settlement agreement set aside on the ground that it was tainted with fraud and coercion. Pursuant to 5 C.F.R. § 1201.115 (1994), the Board summarily denied Hamlin's petition for review. She timely appealed to this court.

We have held that "those who employ the judicial appellate process to attack a settlement agreement through which controversy has been sent to rest bear a properly heavy burden. " *Asberry v. United States Postal Serv.*, 692 F.2d 1378, 1380 (Fed. Cir. 1982). Thus, Hamlin has the burden of showing that the settlement agreement was, as she alleges, tainted by coercion or fraud. Moreover, we may set aside only those decisions of the Board that are shown to be arbitrary, capricious, an

abuse of discretion, unlawful, or unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1988). The controlling question is therefore whether Hamlin has shown that the settlement agreement was tainted such that the Board's refusal to vacate it constituted an abuse of discretion. *Asberry,* [*3] 692 F.2d at 1380.

Hamlin has made no such showing. No basis exists for her allegation that her execution of the settlement agreement was involuntary. In fact, the record shows that Hamlin was represented by counsel, was informed by counsel of the significance of the settlement agreement, and understood the consequences of signing the settlement agreement. Her allegation that the Army's ability to pursue a complaint against her with the state nursing board constituted coercion is without merit. It is not coercive for an agency to insist upon a legally permissive course of action and to remind an employee of the consequences thereof. *See Liebherr Crane Corp. v. United States,* 810 F.2d 1153, 1158 (Fed. Cir. 1987). It is also well settled that financial hardship does not constitute coercion: "Every loss of employment entails financial hardship. If that alone were sufficient to establish economic duress, no settlement involving it would ever be free from attack." *Asberry,* 692 F.2d at 1381. Finally, the record is bereft of any showing of fraud.

For these reasons, we conclude that the Board did not abuse its discretion by declining to set aside the settlement agreement between Hamlin [*4] and the Army.

J. STEVEN MANNING, Plaintiff, v. THOMAS T. FLANNERY, et al., Defendants.

Civil Action No. 2:10-cv-178

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2012 U.S. Dist. LEXIS 44831

March 31, 2012, Decided
March 31, 2012, Filed

SUBSEQUENT HISTORY: Reconsideration denied by Manning v. Flannery, 2012 U.S. Dist. LEXIS 82645 (W.D. Pa., June 14, 2012)
Affirmed by Manning v. Flannery, 2013 U.S. App. LEXIS 12038 (3d Cir. Pa., June 14, 2013)

PRIOR HISTORY: Manning v. Flannery, 2010 U.S. Dist. LEXIS 1091 (E.D. Pa., Jan. 6, 2010)

COUNSEL: [*1] For J. STEVEN MANNING, Plaintiff: Neil E. Jokelson, LEAD ATTORNEY, David E. Jokelson, Neil E. Jokelson & Associates, P.C., Philadelphia, PA.

For THOMAS T. FLANNERY, STACEY HOLLAND, INTERIM MANAGEMENT ASSOCIATES, LLC, doing business as BOYDEN AND/OR AS BOYDEN INTERIM MANAGEMENT, RESOURCES FOR MANAGEMENT, INC., D/B/A BOYDEN AND/OR BOYDEN GLOBAL EXECUTIVE SEARCH AND/OR BOYDEN WORLD CORPORATION, Defendants: Michael P. O'Connor, O'Connor Kimball LLP, Philadelphia, PA.

JUDGES: LISA PUPO LENIHAN, Chief United States Magistrate Judge.

OPINION BY: LISA PUPO LENIHAN

OPINION

LENIHAN, Chief Magistrate Judge

This diversity action arises from the alleged defamation of Plaintiff, tortious interference with existing and prospective contractual/business relationships, breach of fiduciary duty, and negligence by Defendants. Currently pending before the Court for disposition is Defendants' Motion for Summary Judgment (ECF No. 49). In support of this motion, Defendants argue that Plaintiff's claims are barred by the applicable statute of limitations, and even if not time barred, Plaintiff has failed to prove prima facie elements of his claims for defamation, tortious interference with existing and prospective contractual relationships, [*2] breach for fiduciary duty, and negligence. For the reasons set forth below, the Court will grant the motion for summary judgment as to all claims.

I. BACKGROUND & PROCEDURAL HISTORY

The following facts are set forth in the light most favorable to Plaintiff, the non-moving party, giving Plaintiff the benefit of all reasonable inferences. Some of these facts are disputed and are so noted.

The crux of this lawsuit centers on the search for a new Vice President of Operations for Ardex, LP ("VP Operations") conducted by Defendants Boyden [1] and its agents, Thomas Flannery and Stacey Holland. "Boyden specializes in senior executive search for a diverse client

base that includes start-up, middle-market, and Fortune 500 companies" both nationally and globally. (10/2/07 Engagement Letter at 1, Defs. Ex. 12, ECF No. 49-13 at 2; Compl. ¶3.)

1 The parties collectively refer to Defendant Resources for Management, Inc., d/b/a Boyden (a registered fictitious name) and/or Boyden Global Executive Search and/or Boyden World Corporation, and Defendant Interim Management Associates, LLC, d/b/a Boyden and/or as Boyden Interim Management, as "Boyden." The Court will do the same.

In late 2004 and January of 2005, [*3] Ardex LP retained the services of Boyden to recruit an individual for the position of President and Chief Executive Officer of Ardex LP. (Compl. ¶8.) Ardex LP (hereinafter "Ardex" or "Ardex USA") is a Pennsylvania limited partnership with its principle place of business located in Aliquippa, Pennsylvania. (Exec. Agrmt. at 1, Defs. Ex. 16, ECF No. 49-17 at 2.) As a consequence of Boyden's search, Plaintiff, J. Steven Manning, was hired by Ardex LP in January of 2005 to fill the President and CEO position, [2] and entered into a written Executive Employment Agreement with Ardex ("Executive Agreement") on January 31, 2005. Subsequently, in 2007, the Executive Agreement was amended twice by letter agreement which, among other things, extended Manning's term of employment as President and CEO through December 31, 2009. (Compl. at ¶9.)

2 Ardex also considered an inside candidate for the president and CEO position, Joe Pielert, who at the time was Vice President of Operations at Ardex. When Manning was selected for the position, Pielert remained as VP Operations, and was potentially a logical successor to Manning. (Flannery Dep. 8/27/08 at 65:18-25 - 66:1-3, Defs. Ex. 4, ECF No. 49-5 at 7-8.)

Manning [*4] reported to the Board of Directors of Ardex's general partner, Ardex Holding, Inc., and to the chief executive officer of Ardex Anlagen GmbH or Ardex Amerika Holding GmbH, at Witten Germany (collectively the "Management Companies"). (Exec. Agrmt. ¶1, Defs. Ex. 16, ECF No. 49-17 at 2.) At all relevant times, Dieter A. Gundlach was the Chairman of the Board of Management of Ardex GmbH (Gundlach Letter to Zangemeister dated 3/4/08, Defs. Ex. 5, ECF No. 49-6 at 6) and, as such, was the person to whom Manning directly reported.

Between the time of his hiring in 2005 and the fall of 2007, several disputes arose between Manning and Gundlach [3] over, inter alia: (1) Manning's alleged refusal to relocate his residence from West Chester, New York, to Pittsburgh, Pennsylvania, within the stated time frame; (2) the amount of bonus money Manning received; (3) developing the South American market; and (4) Manning's statements towards Mark Eslamlooy [4] during a telephone conference regarding Ardex's development of the South American market, which were viewed as abusive and rude by Gundlach. (Gundlach Dep. 4/12/11 at 2, Defs. Ex. 6, ECF No. 49-7 at 3.) Plaintiff admits that he had some disputes with [*5] Gundlach, but takes issue with Defendants' characterization of the South American market dispute as "refusing to comply with directives from Gundlach over the South American market," or the characterization of Manning's conduct towards Mr. Eslamlooy as rude. (Pl.'s Resp. CSMF ¶8, ECF No. 58 at 5-6.)

3 A summary of these disputes is found in Gundlach's 2/28/08 Memo (Defs. Ex. 5, ECF No. 49-6), the deposition transcripts of Gundlach dated 4/12/11 (Defs. Ex. 6, ECF No. 49-7) and Eslamlooy dated 4/12/11 (Defs. Ex. 7, ECF No. 49-8), and Gundlach's 8/30/07 Memo (Defs. Ex. 8, ECF No. 49-9).

4 Mr. Eslamlooy was the finance manager/CFO for Ardex world-wide. (Eslamlooy Dep. 4/12/11 at 3, Defs. Ex. 7, ECF No. 49-8 at 4; Gundlach Dep. 11/17/08 at 68:11-17, Defs. Ex. 10, ECF No. 49-11 at 10.)

In September of 2007, Joe Pielert, then VP Operations, left Ardex. Subsequently, Boyden was hired by Ardex to recruit a new VP Operations. The October 7, 2007 engagement letter provided, in relevant part, that Boyden was "ready to begin a search for a Vice President, Operations for Ardex/Henry[,]" and outlined the key elements of the search process. (10/2/07 Engagement Letter at 1-4, Defs. Ex. 12, ECF No. 49-13 [*6] at 2-5.) As part of the process, Boyden represented that "[d]uring the course of the assignment, we will maintain regular contact with you by e-mail or phone at a mutually agreeable interval." (*Id.* at 2.) Flannery further stated that Boyden hoped the key elements outlined in the letter would be a "continuation of the long-term partnership between Boyden and Ardex America." (*Id.* at

5.) The engagement letter was addressed to "Mr. Steve Manning -- President and CEO, Ardex America" and denoted as "Personal and Confidential." (*Id.* at 1.) Boyden maintains that its client was Ardex, the company and its shareholders. (Holland Dep. 8/26-27/08 at 79:9-25 - 80:1-19, Defs. Ex. 13, ECF No. 49-14 at 8-9; Flannery Dep. 8/27/08 at 142:12-22, Defs. Ex. 4, ECF No. 49-5 at 13.) Manning disputes this and contends that the engagement letter reflects that he was the client, not Ardex. (Pl.'s Resp. CSMF ¶11, ECF No. 58 at 7-8.)

On or about 9/24/07, Gundlach telephoned Flannery to discuss the new recruitment. During that conversation, Gundlach and Flannery agreed that Ardex needed a strong individual in the position of VP Operations who could figure in succession planning given the lack of strong management [*7] talent behind Manning. (Flannery Dep. 4/27/11 at 14:7-16, Pl.'s Ex. 4, ECF No. 59-4 at 3.) Manning contends that this conversation was "designed in part to establish a means by which Flannery and the other instant defendants would communicate to Gundlach and his surrogates (i.e., Hugh Nevin) on a 'confidential' basis information which they claim to possess concerning the plaintiff and by which means Flannery and the other instant defendants could defame and disparage the plaintiff." (Defs. CSMF ¶13 (citing Compl. at ¶29a), ECF No. 51 at 3.)

Manning's position was predicated upon the content of the 9/25/07 letter sent from Flannery to Gundlach and marked "PERSONAL AND CONFIDENTIAL". (Pl.'s Resp. CSMF ¶13, ECF No. 58 at 8.) In that letter, Flannery discussed Boyden's position regarding the search that Manning wanted to conduct for VP Operations. Flannery questioned Manning's strategy of making the new VP Operations responsible for manufacturing operations, logistics and environmental issues for both Ardex and W.W. Henry, as the person hired would not likely be a successor to Manning if Manning were to leave Ardex. This raised vulnerability issues with Flannery--the organizational structure [*8] contemplated by Manning "puts more control in his hands and appears to diminish the responsibilities of his senior management team. [Flannery was] concerned that changing the organization in the manner will make the company more vulnerable if Steve does leave and that it would give Steve too much leverage in is negotiations with you." Flannery further stated that he wished the contents of this correspondence to remain confidential and to have a further discussion with Gundlach on this matter. (Defs. Ex. 14, ECF No. 49-15.)

The contents of this letter were not communicated to Manning while he was employed at Ardex. (Flannery Dep. 4/27/11 at 14:17-25 - 16:1-3, Pl. Ex. 4, ECF No. 59-4 at 3.) When asked why he believed the contents of the letter should be kept confidential, Flannery ultimately stated that he did not want to upset the balance that existed between Gundlach and Manning. (Flannery Dep. 4/27/08 at 69:11-25 - 70:1-7, Defs. Ex. 4, ECF No. 49-5 at 11-12.) As to what he meant by "too much leverage" in his 9/25/07 letter, Flannery explained that he meant "[e]ssentially having a gun to Mr. Gundlach's head saying if I have to relocate, I will leave." (*Id.* at 68:20-22.)

On 10/12/07, [*9] Gundlach informed Manning via email that when the search produced two "final candidates" he wanted to meet the candidates personally before an employment agreement was signed. (Defs. Ex. 17, ECF No. 49-18.) Over the next several months, several outside and inside candidates were interviewed for the VP Operations position.

On 1/28/08, Flannery sent an email to Gundlach providing an update on the search for a VP Operations, which included an email from Stacey Holland dated 1/25/08. (Defs. Ex. 18, ECF No. 49-19.) Flannery indicated that Ardex was considering two outside candidates (Fuller and Brengel) whom Flannery described as strong, and one inside candidate (Masterson) who was described as "so-so." (*Id.*) Flannery further stated in this email that he was concerned that Manning would not pick the strongest candidate "because [Steve] is reluctant to bring someone into the organization that could succeed him. Steve is in a very strong position at the moment, knowing that he cannot be replaced from the inside if he leaves the company. Both Stacey and I think that if Steve leaves for any reason that there should be someone in place who could replace him, even if it would be for the short [*10] term." (*Id.*) Manning contends that Flannery's statements quoted above were intended to undermine him to Gundlach. (Defs.' CSMF ¶24 (citing Compl., ¶29d); Pl.'s Resp. CSMF ¶24.)

On 2/5/08, Gundlach emailed Manning inquiring as to whether there were any final candidates with whom he could meet during Gundlach's visit to Ardex's facilities in Pittsburgh on February 12-14, 2008. (Defs. Ex. 19, ECF No. 49-20.) Gundlach also emailed Flannery on that same date informing him that he had asked Manning whether he could meet some of their "final" candidates while in

Pittsburgh. (Defs. Ex. 20, ECF No. 49-21.) In response to Gundlach's email sent earlier that day, Manning wrote that they had interviewed a number of quality candidates through the search process and, while they were continuing the search, Jim Masterson (internal candidate) was currently the leading candidate. (Defs. Ex. 21, ECF No. 49-22.) Manning further stated that if Gundlach was interested in meeting with Masterson during his visit, Manning would set it up and forward a copy of Masterson's CV. (*Id.*) Also on 2/5/08, Holland sent Angelo an email regarding Holland's conversation with Vern Fuller informing him that he was not selected [*11] and her attempts to contact Bill Brengel and inform him he was no longer a candidate. (Defs. Ex. 45, ECF No. 61-1 at 44.)

On 2/7/08, Flannery sent an email to Gundlach informing him that Manning (via Lori Angelo [5]) instructed Holland to release all of the outside candidates and to put the search on hold. (Defs. Ex. 22, ECF No. 49-23.) Flannery further wrote that although he and Holland complied with Manning's instruction, they were "concerned that [they we]re losing an excellent candidate, Bill Brengel, who has a strong interest in the position, and that there is lack of sufficient management strength behind Steve to have a viable succession plan." (*Id.*) Flannery further stated that if Gundlach and Manning concluded that it made sense to bring Brengel back in, they would do their best to retrieve him. (*Id.*)

> 5 Lori Angelo worked for Manning and was the primary contact person with Defendants over the search for a VP Operations.

In a subsequent email from Gundlach to Manning on 2/7/08, Gundlach wrote that "our group standard for such crutial/critical (sic) positions within the recruting (sic) process is to have at least 2 up to 3 alternativ (sic) candidates. Therefore I would like to make [*12] sure to have the opportunity to meet . . . 2/3 external candidates who were already interviewed from you within the project." (Defs. Ex. 23, ECF No. 49-24.) Gundlach also forwarded this email to Flannery, without notification to Manning. (*Id.*; Pl.'s Resp. CSMF ¶30.) On 2/8/08 at 7:13 a.m., Manning sent a reply email again informing Gundlach that the outside candidates had been released and that he (Manning) wanted to move forward with Masterson. (Defs. Ex. 24, ECF No. 49-25.) Manning further wrote that the outside candidates had been notified that they were not selected, and therefore, it would "obviously be very difficult and very awkward to call the others back in again." (*Id.*) Later that same date, Gundlach responded to Manning via email reminding Manning that back in October, he asked to interview multiple candidates before a contract was signed. (Defs. Ex. 25, ECF No. 49-26.) Thereafter, at 10:32 a.m., Manning replied, repeating to Gundlach that he had already let the outside candidates go and only Masterson was available for an interview. (Defs. Ex. 26, ECF No. 49-27.) Manning further stated: "There has not been a commitment made to Jim, as we do not consider the search process [*13] fully completed. It would be a convent (sic) opportunity for you to interview Jim while you are here. Consistent with the agreement you and I made, a VP position would be filled with discussion and agreement with Germany. Hopefully this clarifies the status and will aid in the process." (*Id.*)

The parties dispute some of the events that occurred on 2/12/08. Defendants submit that when Gundlach arrived at Ardex USA on 2/12/08, Manning told him that the outside candidates "were not available." (Defs. CSMF ¶34, ECF No. 51 at 6.) Conversely, Manning describes his encounter with Gundlach as follows:

> [At] approximately 4:30 pm [Gundlach] . . . asks me to bring in VP Ops candidates for him to see. I explain that we already had the discussion, that we already notified the candidates that they were no longer in contention, and (Lori) had already instructed Boyden to release the candidates. Gundlach then said "Steve, I trust your judgement, (sic) you're doing a fine job, but the Board is requiring me to interview at least 2 candidates." I also told Gundlach that they were mostly from out of town, had jobs, and did not think it possible on such short notice. I also stated that I had an ethics issues [*14] (sic) bringing back people for interviews when we had no intention of hiring them and already told them so. He then said "Boyden is professions, (sic) have them say something, whatever they need to, to be clever. (sic) I objected again, but [Gundlach] said well try.

Manning Memo/Timeline dated 3/31/08 at Manning 1504 (Defs. Ex. 9, ECF No. 49-10 at 11). The parties agree that

when Gundlach insisted on interviewing the outside candidates, Manning instructed Lori Angelo to call Stacey Holland about the situation. (Defs. CSMF ¶35; Pl.'s Resp. CSMF ¶35.) Manning described what happened next:

> I left my office, and relayed the situation to Lori. She said something to the effect ... "what, that's crazy, we can't do that, that's just wrong." I agreed and said "I agree ... we can't do that, I have a real ethics problem with this, but ... Gundlach is insisting so we have to." I then told Lori "call Stacy, let her know what's going on, and have her handle this. I'm sure there's no way she can get them in on such short notice, plus we've already told them they weren't in the running anymore. This is real BS". Lori and I exchanged astonished words. At that point I told her to call Stacy, and to also [*15] tell Stacy not to be surprised if she gets a call from Hugh Nevin (C&G) on behalf of Gundlach. Lori left the area in front of the conference room, went to her office, and I assume called Stacy as I had asked. Lori informed me later that Stacy was not in, but she had left a message for Stacy. Day ended that way, and I had no other discussion with [Gundlach] on the topic.

Manning Memo/Timeline at Manning 1504 (Defs. Ex. 9, ECF No. 49-10 at 11).

Later on 2/12/08, two telephone calls were exchanged between Lori Angelo & Stacey Holland, which are at the heart of the Plaintiff's defamation claim. First, Holland returned Angelo's call, during which Angelo relayed the situation with Gundlach and his request to get the two outside candidates back in for him to interview while he was in Pittsburgh. Angelo then stated, "you can't call them back in after we already released them, can you?" (Manning Memo/Timeline at Manning 1504, Defs. Ex. 9, ECF No. 49-10 at 11; *see also* Angelo Dep. 8/19/08 at 239:4-9, Defs. Ex. 27, ECF No. 49-28 at 5; Holland Dep. 8/26-27/08 at 81:8-13, Defs. Ex. 13, ECF No. 49-14 at 11.) Holland told Angelo that the two outside candidates, Fuller and Brengel, could come into town [*16] for an interview, but that if they were not seriously being considered for the position, it would be unethical to ask them, and Angelo agreed with that decision. (Holland Dep. 8/26-27/08 at 82:20-25 to 83:6; Angelo Dep. 8/19/08 at 239:8-22, Defs. Ex. 27, ECF No. 49-28 at 5.) Angelo and Holland further discussed whether Holland would have a problem if Angelo and Manning told Gundlach that there was not sufficient time to get the outside candidates back in, as Angelo was uncomfortable telling Gundlach, the global CEO, that his request was inappropriate and unethical. (Angelo Dep. 8/19/08 at 240:18-25 to 241:7, 242:6-20, ECF No. 49-28 at 6-8; Angelo Dep. 4/26/11 at 64:11-20 & 65:19 to 66:1, Defs. Ex. 40, ECF No. 61-1 at 11-13.)

Angelo placed a subsequent telephone call to Holland on 2/12/08 but was only able to leave a message on Holland's voice mail. (Holland Dep. 8/26-27/08 at 88:3-10, Defs. Ex. 13, ECF No. 49-14 at 14.) Angelo testified that she was calling at the direction of Manning to tell Holland to make sure that Flannery knew why the other candidates were not being asked to come back for an interview with Gundlach, in the event Flannery gets a call from Nevin [6] or Gundlach. (Angelo [*17] Dep. 4/26/11 at 17:22 to 19:11, Pl.'s Ex. 9, ECF No. 59-9 at 4; Angelo Dep. 8/19/08 at 240:11-15, Defs. Ex. 27, ECF No. 49-28 at 6.) Conversely, Holland testified that she recalled the message left by Angelo was that Angelo would be "uncomfortable if Stacey shared the details with Tom regarding the last conversation," and that Angelo was asking her to keep the details of their conversation about it being unethical from Flannery. [7] (Holland Dep. 8/26-27/08 at 87:4-25 & 88:17-22, Defs. Ex.13, ECF No. 49-14 at 13-14; Holland Timeline at BOY 000046, Defs. Ex. 33, ECF No. 49-34 at 6.)

> 6 At all relevant times, Hugh Nevin was an attorney with the law firm of Cohen and Grigsby and served as corporate secretary of Ardex USA. (Defs. Ex. 6, Gundlach Dep. at 3, ECF No. 49-7 at 4.)
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> 7 In her timeline, Holland wrote that the voice mail message from Angelo stated: "it would be 'uncomfortable' if Stacey shared all of the details with Tom regarding the last conversation and invoked Mr. Gundlach's name and that Tom knows Hugh Nevin, etc. and all of them link to Steve Manning." (Holland Timeline at BOY 000046, Defs. Ex. 33, ECF No. 49-34 at 6.)

The next day, 2/13/08, Angelo relayed her telephone conversation [*18] with Holland to Manning. (Manning Memo/Timeline at Manning 1504, ECF No. 49-10 at 11.)

Manning recalled that: "Lori also stated that she told Stacy that she may get a call from [Gundlach] or Nevin directly. Stacy then told Lori (per Lori) that 'Tom will know how to handle that'." Manning Memo/Timeline at Manning 1504 (Defs. Ex. 9, ECF No. 49-10 at 11).

Manning also described his encounter with Gundlach later on 2/13/08:

> Late in the day [Gundlach] asked if I had gotten the candidates scheduled. I explained that they were from out of town, they had jobs, and that we had already dismissed them. [Gundlach] didn't care, and asked if I call the candidates. I told him that I asked Lori to handle that after he and I spoke the previous day. [Gundlach] then asked me if candidates were scheduled. I told him "Lori said no, they were not available." Lori later told me late that evening that Stacy called back (again) spoke to Lori and said she may be able to call Bill Bringle, as he was unemployed. I had already told [Gundlach] the situation and did not want to raise it again.

Manning Memo/Timeline at Manning 1504 (Defs. Ex. 9, ECF No. 49-10 at 11). Gundlach interviewed the internal candidate, Masterson, [*19] before he left Pittsburgh, but not the external candidates.

On 2/14/08, Gundlach sent Flannery a copy of an email sent by Manning indicating that the search was not closed and that Boyden was continuing to look for additional qualified candidates. (Defs. Ex. 29, ECF No. 49-20 at 2-3.) However, Flannery and Holland maintain that as of 2/14/08, neither Angelo nor Manning had asked Boyden to continue the search and the search was still on hold as far as they knew. (Confidential Memo from Flannery/Holland to Gundlach & Nevin 3/6/08 ("Flannery/Holland Memo 3/6/08") at 2, Defs. Ex. 35, ECF No. 49-36 at 3.)

Sometime thereafter but before 2/18/08, Gundlach left a voice mail for Flannery indicating that Manning had told him that Boyden could not be reached and this is why candidates did not get presented to Gundlach during his visit. (*Id.*) Later that same week but prior to 2/18/08, Flannery telephoned Gundlach wherein he suggested that Gundlach call Holland because, according to Gundlach, she "is concerned because during the search for the VP operational, the development was not going well, was not well or something like that." Flannery also pointed out to Gundlach that Holland "has problems [*20] in cooperation with Ardex (re: Manning)" and he advised Gundlach to contact Holland. (Compl., ¶29f.) Subsequently, Gundlach telephone Holland and during that conversation, Holland stated that she did not feel "comfortable" conveying "unpleasant and not nice information." (Gundlach Dep. 11/17/08 at 36:2-6, Defs. Ex. 10, ECF No. 49-11 at 3.) She informed Gundlach that the candidates could have been called if Ardex had a genuine interest, that Angelo had been told that numerous times, and that Angelo and Holland spoke about this issue before Gundlach was in town. (Flannery/Holland Memo 3/6/08 at 2, Defs. Ex. 35, ECF No. 49-36 at 3.) Holland also told Gundlach that Angelo had asked her not to reveal to Flannery the contents of their conversation on 2/12/08 (the "don't tell Tom" voice mail or statement). (Gundlach Dep. 11/17/08 at 37:9-14, Defs. Ex. 10, ECF No. 49-11 at 4; Holland Dep. 8/26-27/08 at 87:21-25, 88:13-22, & 89:9-15, Defs. Ex. 13, ECF No. 49-14 at 13-15.)

Angelo testified that she did not learn that Holland had communicated to Flannery, Nevin and Gundlach a different version of Angelo's voice mail message, i.e., that Angelo told Holland not to tell Flannery about their conversation [*21] on 2/12/08, until Angelo was preparing for her 8/19/08 deposition in the *Ardex* litigation. [8] (Angelo Dep. 4/26/11 at 13:1-15 & 17:5-11, Pl.'s Ex. 9, ECF No. 59-9 at 3-4.) Angelo disputes Holland's version of Angelo's voice mail message. (Angelo Dep. 4/26/11 at 12:10-25 & 17:12-21, Pl.'s Ex. 9, ECF No. 59-9 at 2 & 4.) In particular, when asked at her deposition whether she ever told Holland not to reveal the contents of their conversation on 2/12/08 to Flannery, Nevin or anyone else, Angelo replied, "No." (*Id.*) Moreover, Angelo testified that the reason for her subsequent telephone call was to make sure Flannery was aware of her earlier discussions with Holland on 2/12/08 in the event he received a call from Hugh Nevin. (*Id.* at 17:22 to 18:16, ECF No. 59-9 at 4.)

> 8 The "*Ardex* litigation" refers to the lawsuit filed by Manning against Ardex in federal court in the Eastern District of PA over his termination and Ardex's invocation of the non-compete clause in the Executive Agreement.

On 2/18/08 at 10:12 a.m., Gundlach emailed Flannery, stating that Holland informed him of Angelo's/Manning's course of action regarding the requested interviews with candidates. Gundlach commented that Angelo's [*22] statement that "an interview is not possible, is it?" was "definitely a clear interference so that a meeting should not take place." (Defs. Ex. 31 at BOY 000038, ECF No. 49-32 at 3.) With regard to Angelo's alleged instruction to Holland to not tell Flannery about this, as he may tell Nevin, who in turn would tell Gundlach, Gundlach further commented to Flannery that "[t]his approach is of course absolutely inacceptable (sic) and shows once again that Steve is disloyal towards me. That he should even use his staff (Lori) to achieve this is highly reprehensible. Should it be necessary to have a written statement regarding this occurrence can I rely on your support in this matter?" (*Id.*) Gundlach testified that he was disturbed and angry by what Holland told him. (Gundlach Dep. 11/17/08 at 39:12-13, Pl. Ex. 7, ECF No.. 59-7 at 2.)

Later that day, at 2:40 p.m., Flannery responded to Gundlach's earlier email that day to both Gundlach and Nevin, stating: "I am very disappointed in Steve's handling of this situation and I believe that [h]e has worked in his own best interests rather than those of Ardex." (Defs. Ex. 31 at BOY 000037, ECF No. 49-32 at 2.) Neither Gundlach nor Flannery ever [*23] attempted to confirm Holland's "don't tell Tom" version of the voice mail with Angelo. (Gundlach Dep. 11/17/08 at 79:4-9, Pl. Ex. 7, ECF No. 59-7 at 6; Flannery Dep. 4/27/11 at 39:23 - 40:1, Pl. Ex. 4, ECF No. 59-4 at 8.)

On 2/24/08 or 2/27/08, [9] Manning and Angelo spoke with Holland in person about continuing the search for a VP Operations. (Angelo Dep. 8/19/08 at 226:19 to 227:4, Pl. Ex. 10, ECF No. 59-10 at 2.) Manning and Angelo indicated that although they were still considering Masterson, they wanted Boyden to continue the search. (Flannery/Holland Memo 3/6/08 at 2, Defs. Ex. 49-36 at 3; Angelo Dep. 8/19/08 at 227:1-12, 228:19-24, ECF No. 59-10 at 2.) Manning stated that he wanted someone who has not yet been a VP Operation and for whom the position would be a "step up" due to the enthusiasm it would provide to the candidate. (Flannery/Holland Memo 3/6/08 at 2, Defs. Ex. 49-36 at 3; Angelo Dep. 8/19/08 at 227:17-23, ECF No. 59-10 at 2.) Also during that meeting, in response to Manning/Angelo's direct question as to whether she or Flannery were communicating with Gundlach regarding the search for the VP Operations or for any other purpose, Holland allegedly responded in the negative. [*24] Holland also allegedly stated to Manning and Angelo in response to a direct question posed to her that she knew of no difference between Manning's and Gundlach's position, specifications and/or expectations with regard to the VP Operations position. (Defs. CSMF ¶58 (citing Compl., ¶29m), ECF No. 51 at 9; Pl.'s Resp. CSMF ¶58.)

> 9 Plaintiff alleges that this conversation occurred on 2/24/08 (Compl., ¶29m), while Holland testified that this conversation took place on 2/27/08 (Holland Dep. 8/27/08 at 151:25 - 152:1-4, Defs. Ex. 13, ECF No. 49-14 at 19-20.) For purposes of the summary judgment motion, Defendants do not dispute the exact date of this conversation. (Defs. CSMF ¶57 n. 5, ECF No. 51 at 9.)

On 2/25/08, Flannery and Nevin spoke via telephone conference regarding Gundlach's 2/18/08 email (10:12 a.m.) to Flannery. (Nevin Dep. at 58:10 to 59:2, Pl.'s Ex. 11, ECF No. 59-11 at 2.) Nevin testified that he concurred with Gundlach's statement that Manning's use of his subordinate Angelo to attempt to hide Angelo & Holland's discussion from Flannery was highly reprehensible and grounds for firing Manning. (*Id.* at 59:14 to 60:2; ECF No. 59-11 at 2.) Nevin also testified that Flannery expressed [*25] a concern that Manning would not pick the strongest candidate because he was reluctant to bring someone into the organization who could succeed him. (Nevin Depo. at 36:18-23, Defs. Ex. 32, ECF No. 60-35 at 4.) From this conversation with Flannery, Nevin testified it was his impression that Flannery understood that Nevin would be discussing the situation with Gundlach. (*Id.* at 63:7-10.)

Following his conversation with Flannery, Nevin called Holland. (Nevin Dep. at 63:12-19, Defs. Ex. 32, ECF No. 60-35 at 7.) Nevin asked Holland about the VP Operations search. (Defs. CSMF ¶61; Pl.'s Resp. CSMF ¶61.) Holland reiterated her version of the voice mail message received from Angelo on 2/12/08, maintaining that Angelo told her that neither Nevin nor Gundlach should be told of the discussion between Angelo and Holland regarding bringing the candidates back in. (Nevin Dep. at 66:19-23, ECF No. 60-35 at 10.) Nevin then asked Holland to prepare a time line of events regarding the search issues. (Holland Dep. 8/26-27/08 at 50:10-23, Defs. Ex. 13, ECF No. 49-14 at 4; Holland

Timeline 3/3/08 at BOY 000045 - 000047, Defs. Ex. 33, ECF No. 49-34 at 5-7.) Nevin did not attempt to verify Holland's version [*26] of the "don't tell Tom" voice mail with Angelo because he was instructed by Gundlach not to speak with anyone at Ardex. (Nevin Dep. at 67:11-17, Defs. Ex. 32, ECF No. 60-35 at 11.)

On 2/28/08, Gundlach presented a memo to the Board of Directors in Witten, Germany proposing a resolution on the removal of Steve Manning as CEO of Ardex USA. (Defs. Ex. 5, ECF No. 49-6; Gundlach Dep. 4/12/11 at 4, Defs. Ex. 6, ECF No. 49-7 at 6.) In his 2/28/08 memo, Gundlach outlines the reasons he is requesting that Manning be terminated and requests approval by 3/3/08. (Gundlach Memo 2/28/08 at 2 & 4, Defs. Ex. 5, ECF No. 49-6 at 3 & 5.) Specifically, the grounds identified by Gundlach included: (1) lack of confidence; (2) Manning's dialogue was marked by a high degree of aggressive behavior towards the management in Witten and the employees; (3) lack of acceptance of the Ardex culture and its success factors; (4) targeted measures by Manning to achieve the termination of Peilert; (5) manipulation during the search for VP Operations; and (6) lack of support for Ardex worldwide goals (i.e., development of South American markets and employee exchange program). (*Id.* at 2-3, ECF No. 49-6 at 3-4.) The resolution [*27] was subsequently approved by the Board of Directors on 3/6/08. (*Id.* at 4, ECF No. 49-6 at 5; Gundlach Letter to Zangemeister 3/4/08, Defs. Ex. 5, ECF No. 49-6 at 6.)

Holland completed the time line requested by Nevin which was memorialized in a memo to Flannery dated 3/3/08. (Defs. Ex. 33, ECF No. 49-34 at 5-7.) Also on 3/3/08, Flannery emailed a letter to Gundlach expressing his concern about resuming the search for VP Operations when it was not clear if Manning and Gundlach were in agreement on the specifications for the position. (Defs. Ex. 34, ECF No. 49-35 at 2-7.) Flannery sought direction from Gundlach before continuing the search for VP Operations as he believed Manning would continue to reject future candidates until Masterson was selected by default. (*Id.*, ECF No. 49-35 at 4.) Flannery also expressed his disappointment in Manning's behavior over the past five months, stating:

> Our relationship with Steve has deteriorated during this most recent search engagement and I am sorry to say that I think he has not acted in the best interests of Ardex. We have provided Hugh Nevin with a timeline and details of our recent conversations and correspondence with Steve in which he has attempted [*28] to hide from you the fact that we had candidates who were prepared to meet with you. I fault both his reasoning and his actions and I cannot begin to guess why he chose to behave in such a manner.
>
> I hope that Steve will realize his obligation to do the best for the company and that he will accept the need to bring strong managers to the company, but I can also assure you that there are other people who can ably fill his role, both on an interim and permanent basis. Whatever your decision regarding Steve's future with Ardex may be, rest assured that we will continue to work with you to build and strengthen your U.S. operations.

(*Id.*, ECF No. 49-35 at 4-5.) Flannery's statement in the second paragraph quoted above suggested to Gundlach that if Gundlach were to fire Manning, Flannery could obtain personnel to fill the position of president and CEO on an interim and permanent basis. (Flannery Dep. 8/28/08 at 158:10-20, Defs. Ex. 43, ECF No. 61-1 at 29.) Flannery could not say for sure whether Boyden profited from Manning's firing, even though Gundlach eventually hired Boyden to conduct the search for Manning's replacement for a fee of $90,000, because this fee was a significant reduction [*29] from Boyden's normal fee. (*Id.* at 159:24 to 160:14, ECF No. 61-1 at 30-31.)

On 3/6/08, the Board of Directors in Germany approved Manning's termination. (Gundlach Memo 2/28/08 at 4, Defs. Ex. 5, ECF No. 49-6 at 5.) On that same date, Flannery and Holland sent a confidential memo to Gundlach and Nevin summarizing the events emanating from the search for a VP Operations for Ardex USA, in which they stated, "In our opinion, Steve Manning has acted in a manner inconsistent with his role as President of Ardex, USA. He was not responsive to us during the interview process and in the end he lied to his direct superior when he told Mr. Gundlach that Boyden could not be reached. We think that he is acting in his own best interest rather than in the best interests of Ardex and that he has been insubordinate in his behavior. We are concerned that he has damaged his credibility to the

point that he can no longer be viable as the head of Ardex, USA." (Flannery/Holland Memo 3/6/08 at 3, Defs. Ex. 35, ECF No. 49-36 at 4.)

On 3/11/08, Plaintiff's employment with Ardex USA was terminated for cause. (Defs. CSMF ¶77; Pl. Resp. CSMF ¶77.) At the time of his discharge, Manning was informed by Gundlach that [*30] Gundlach was unhappy with the handling of the search for a VP Operations and that Manning was being terminated for cause. (Jokelson Ltr. to Carson dated 3/12/08 at 1, Defs. Ex. 36, ECF No. 49-37 at 2.) On 3/12/08, Plaintiff's counsel sent a letter to counsel for Ardex requesting *inter alia* a statement of the reason(s) for Plaintiff's termination and all documents supporting the reason(s) for Plaintiff's discharge, including any documents regarding the Board of Directors approval of the termination. (*Id.* at 2, ECF No. 49-37 at 3.) On 3/19/08, counsel for Ardex provided a written response, indicating that Manning was terminated for "willfully misleading senior management about the search for someone to fill the position of Vice President Operations." (Prorok Ltr. to Jokelson dated 3/19/08 at 1, Defs. Ex. 37, ECF No. 49-38 at 2.) Ardex's counsel further informed Plaintiff's counsel that Ardex had no obligation to provide Manning with any and all documents supporting his discharge, except to the extent such documents were part of his personnel file, which they were not, and Manning already possessed the documents pertaining to his Executive Agreement. (*Id.*) Ardex's counsel further responded [*31] that Ardex was not required to disclose the specifics of Board consideration and actions to Manning. (*Id.* at 2, ECF No. 49-38 at 3.)

Subsequently, on 3/31/08, in response to a 3/30/08 letter from Plaintiff's counsel, counsel for Ardex further elucidated upon the reason for Plaintiff's termination: "Mr. Manning represented to Ardex as ongoing the search for a Vice President, Operations at a time when William (sic) Masterson, his preferred personal choice, was the only candidate under consideration. The recruiter for the Vice President, Operations position had been instructed to discontinue efforts with regard to other identified candidates." (Prorok Ltr. to Jokelson 3/31/08, Defs. Ex. 38, ECF No. 49-39 at 2.)

On 3/31/08, Plaintiff prepared his own timeline of the events that occurred leading up to his termination. (Defs. Ex. 9, ECF No. 49-10.) In that memo/timeline, Manning wrote:

> On 3-7-08 Flannery provided DG with a letter providing his opinion of the VP Ops search, in which Flannery allegedly states that SM has lost external credibility, has acted in a self-serving manner, has not been available during the search, and in his opinion is not fit to run the company and should be removed. [*32] This is the document Mark Eslamlooy referred to having seen in his conversation with Lori, week o[f] 3-10-08 where he stated he saw "third party evidence" and he was "shocked".

Manning Memo/Timeline 3/31/08 at Manning 1507 (Defs. Ex. 9, ECF No. 49-10 at 14). [10] On 3/12/08, Manning noted that Angelo told him about her conversation with Eslamlooy the previous day, wherein Eslamlooy was "absolutely shocked at the document [Flannery/Holland 3/6/08 Memo] that DG showed him" which Gundlach was presenting to the Board of Directors. (Manning Memo/Timeline at Manning 1508, ECF No. 49-10 at 15.) Another entry by Manning indicates that he discussed the Flannery/Holland 3/6/08 Memo with his former secretary, Erica Daxbeck on or around 3/13/08:

> ED stated that she had information (from Brigit) that the document she (Erika) accidentally saw on her computer (left by ME) was the document that Flannery sent to DG on the 6th, and that was the "third party evidence" that DG showed to Sengenmeister on Friday 7th to get his approval to terminate SM.

(*Id.* at Manning 1509, ECF No. 49-10 at 16.) [11]

10 "DG" refers to Dieter Gundlach; "SM" refers to Steve Manning.

11 "ME" [*33] refers to Mark Eslamlooy, CFO of Ardex worldwide.

In addition, Manning noted:

> SM - I am very concerned and suspect that Flannery fabricated and/or misrepresented information for the purpose of allowing DG to fire me, and in return, be awarded the CEO search. I

> believe that this was a complete set up and fabrication. Why would Flannery want, need, or be given emails between me and DG? Why conference calls on the topic days after my termination? What do my emails to DG have relevance to Flannery . . . after the fact? Are they trying to get their stories straight in the event I challenge? . . . I do not understand how Flannery has any first hand information about any of this, let alone be able to write a document involving conversations where people were 2 and 3 times removed. This sounds like the classic case of pronouncing the guilty verdict, and then scrambling and twisting and fabricating things to create substantiating "facts". I believe that Sengenmeister was intentionally given bogus/misleading information, and he then made a decision based on the bogus "facts" created/presented by DG[.]

Id. at Manning 1509-1510 (Defs. Ex. 9, ECF No. 49-10 at 16-17). Finally, in his summary, Manning [*34] concluded that as of 3/31/08, Gundlach had used Flannery to "fabricate a damning story to use as 'evidence' to present to the [board of directors] as justification for the alleged 'cause'[.]" (*Id.* at Manning 1511, ECF No. 49-10 at 18; Manning Dep. 10/28/10 at 129:9 to 130:19, Defs. Ex. 28, ECF No. 49-29 at 8-9.)

After his termination, Manning "applied for several thousand positions through a 'job boards', mailings to executive recruiters, direct letters to potential employ[ers,] . . . and the posting of his resume on various internet sites" as delineated in his Answers to Defendants' Interrogatories, ¶21. (Pl.'s Resp. CSMF ¶100, ECF No. 58 at 70 (citing Pl. Ex. 2, ECF No. 59-2 at 12-13).) Manning claims that because of his termination by Ardex and Defendants' conduct as outlined in paragraphs 1 through 33 of his Complaint, no one will hire him. (Defs. CSMF ¶90; Pl. Resp. CSFM ¶90.) Although Manning had 15 to 16 interviews with potential employers (Manning Dep. 10/28/10 at 169:13-16, Pl. Ex. 5, ECF No. 59-5 at 7), he only had a couple of second interviews and neither progressed to a discussion of terms and conditions of a potential employment contract (*Id.* at 194-96, Defs. Ex. 28, ECF [*35] No. 49-29 at 11-13).

Thereafter, Manning filed suit against Ardex in federal court in the Eastern District of Pennsylvania over his termination for cause and Ardex's invocation of the non-compete clause in his Executive Agreement. [12] During discovery in that case, Manning claims he learned for the first time of Holland's version of Angelo's voice mail message communicated to Flannery, Nevin and Gundlach, when Ardex produced the document Bates-stamped ARDEX 000336 in August of 2008. [13] (Pl.'s Aff. ¶2, Pl. Ex. 1, ECF No. 59-1 at 2.) Manning further maintains that he never saw any written communications between Flannery, Holland, Gundlach and/or Nevin until he received those documents during discovery in the *Ardex* litigation in August of 2008. [14] (*Id.* at ¶1.)

> 12 The parties eventually reached a settlement in the *Ardex* litigation.
>
> 13 The evidence cited by Defendants in support of their Reply CSMF ¶95 does not support their position that Manning was fully aware of Holland's version of the Angelo voice mail message to her. (ECF No. 62 at 47.)
>
> 14 Defendants admit that while Manning may not have seen the documents until August of 2008, he nonetheless was aware of the contents of the Flannery/Holland [*36] 3/6/08 Memo. (Defs. Reply CSMF ¶94, ECF No. 62 at 45-46.)

On July 17, 2009, Manning instituted the present action against Flannery, Holland and Boyden in the Eastern District of Pennsylvania, alleging various state common law claims including intentional interference with existing contractual and business relationships, intentional interference with prospective business relationships, defamation, breach of fiduciary duty, and negligence. This instant litigation was subsequently transferred to this District on 2/08/10. After the close of discovery, Defendants filed a Motion for Summary Judgment (ECF No. 49). The motion has been fully briefed and responded to, and thus, is ripe for disposition.

II. STANDARD OF REVIEW

Summary judgment is appropriate if, drawing all inferences in favor of the nonmoving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). Summary judgment may be granted

against a party who fails to adduce facts sufficient to establish the existence of any element essential [*37] to that party's case, and for which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

More specifically, the moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial" or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting FED.R.CIV.P. 56(e)) (emphasis added by *Matsushita* Court). An issue is genuine only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

III.DISCUSSION

Defendants move for summary judgment on several issues--(1) whether Plaintiff's defamation claim is barred by the one-year statute of limitations applicable to such claims; (2) whether the one-year statute of limitations for defamation claims also applies to Plaintiffs' claims for intentional interference with existing [*38] and prospective contractual/business relationships and for negligence; and, if these claims are not time-barred, (3) whether Plaintiff has adduced evidence to establish prima facie elements of these claims and his claim for breach of fiduciary duty, or at least raise an issue of fact as to those elements. The Court will address each argument in turn.

A.Statute of Limitations

1. Defamation Claim

In Pennsylvania, the statute of limitations for bringing defamation claims is one year. 42 Pa. Cons. Stat. Ann. § 5523(1) (West 1981). Pursuant to the Judicial Code, the statute of limitations begins to run at the time the cause of action accrues. *Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850, 857 (Pa. 2005) (citing 42 Pa. Cons. Stat. Ann. §5502(a)). The Pennsylvania Supreme Court has construed this to mean that the "statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Id.* (citing *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 468 A.2d 468, 471 (Pa. 1983)). Generally, in a defamation action, the cause of action accrues at the time the alleged defamatory remark is uttered. *Brown v. DaVita Inc.*, Civ. A. No. 09-3892, 2011 U.S. Dist. LEXIS 130933, 2011 WL 5523823, *2 (E.D.Pa. Nov. 14, 2011) (citing [*39] *Spain v. Vicente*, 315 Pa. Super. 135, 461 A.2d 833, 837 (Pa. Super. Ct. 1983); *Smith v. IMG Worldwide, Inc.*, 437 F.Supp. 2d 297, 305-06 (E.D.Pa. 2006)). "Mistake, misunderstanding, or lack of knowledge in themselves do not toll the running of the statute." *Id.*

The discovery rule and the doctrine of fraudulent concealment provide two exceptions which act to toll the running of the limitations period. *Id.* at 858. In essence, the discovery rule has been applied in situations where the injured party is unable, despite the exercise of reasonable diligence, to know that he is injured and by what cause. *Id.* (citing *Pocono Int'l*, 468 A.2d at 471). In determining whether "reasonable diligence" was exercised, the supreme court has set forth the following standard:

> [R]easonable diligence is not an absolute standard, but is what is expected from a party who has been given reason to inform himself of the facts upon which his right to recovery is premised. As we have stated: "'[T]here are [very] few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence.'" *Crouse v. Cyclops Industries*, 560 Pa. 394, 745 A.2d 606, 611 (2000) [*40] (quoting *Deemer v. Weaver*, 324 Pa. 85, 187 A. 215, 217 (1936) (citation omitted)). Put another way, "[t]he question in any given case is not, what did the plaintiff know of the injury done him? [B]ut, what might he have known, by the use of the means of information within his reach, with the vigilance the law requires of him?" *Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.*, 167 Pa. 136, 31 A. 484, 485, 36 Week. Notes Cas. 185 (1895). While reasonable diligence is an objective test, "[i]t is sufficiently flexible...to take into account the difference[s] between

> persons and their capacity to meet certain situations and the circumstances confronting them at the time in question." *Crouse*, 745 A.2d at 611 (quotation omitted). Under this test, a party's actions are evaluated to determine whether he exhibited "those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interest and the interest of others." *Id.*

Thus, when the Court is faced with the argument that the discovery rule should be applied to toll the running of the statute of limitations, it must address the ability of the injured party, exercising reasonable diligence, [*41] to ascertain that he has been injured and by what cause. *Id.* (citation omitted). Although this question usually involves a factual issue for the jury to decide, where reasonable minds would not differ in concluding that a party knew or should have known of his injury and its cause upon the exercise of reasonable diligence, the Court may find that the discovery rule does not apply as a matter of law. *Id.* at 858-59 (citing *Pocono Int'l*, 468 A.2d at 471) (other citations omitted). The party seeking to invoke the discovery rule maintains the burden of proving that despite the exercise of reasonable diligence, he was unable to discover his injury. *Gatling v. Eaton Corp.*, 2002 PA Super 276, 807 A.2d 283, 289 (Pa. Super. Ct. 2002)(citing *Dalrymple v. Brown*, 549 Pa. 217, 701 A.2d 164, 167 (Pa. 1997)).

Of particular relevance to the case at bar, the *Fine* court further held that "[w]hen the discovery rule applies, the statute of limitations does not commence to run at the instant that the right to institute suit arises, i.e., when the injury occurs[, but r]ather, the statute is tolled, and does not begin to run until the injured party discovers or reasonably should discover that he has been injured and that his injury has been [*42] caused by another party's conduct." *Id.* at 859 (internal citations omitted). In so holding, the supreme court in *Fine* noted that several justices had taken divergent views in its decisions in *Saavedra* and *Baumgart* as to whether application of the discovery rule should be further restricted based on whether the statute of limitations period had expired prior to discovery of the injury and its cause. *Id.* (citing concurring and dissenting opinions in *Murphy v. Saavedra*, 560 Pa. 423, 746 A.2d 92, 93-95, 98-101 (Pa. 2000), and *Baumgart v. Keene Bldg. Prods. Corp.*, 542 Pa. 194, 666 A.2d 238, 239-45 (Pa. 1995)). The *Fine* court laid to rest these diverging views and held that "it is not relevant to the discovery rules application whether or not the prescribed period has expired; the discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause *at the time his right to institute suit arises*." *Id.* (emphasis added). [15]

> 15 Defendants rely on Judge Ambrose's opinion in *Bradley v. Conner*, Civ. A. No. 07-1347, 2007 U.S. Dist. LEXIS 87722, 2007 WL 4241846, *4 (W.D.Pa. Nov. 29, 2007), to support their argument that because Plaintiff learned of the alleged defamatory [*43] statements within the statutory period--one year from his claimed damage (termination)--the discovery rule does not apply. Defendants reliance on *Bradley* is misplaced as the Pennsylvania Supreme Court in *Fine* clearly rejected this argument.

In addition to the discovery rule, the doctrine of fraudulent concealment may also be invoked to toll the statute of limitations. Based on an estoppel theory, the doctrine of fraudulent concealment "provides that the defendant may not invoke the statute of limitations, if through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts." *Fine*, 870 A.2d at 860 (citation omitted); *see also Nesbitt v. Erie Coach Co.*, 416 Pa. 89, 204 A.2d 473, 475 (Pa. 1964) (citations omitted). The degree of fraud required is not strictly limited to intentional conduct, but rather, is viewed in the broadest sense to include unintentional deception. *Id.* Plaintiff bears the burden of demonstrating fraudulent concealment by "clear, precise, and convincing evidence." *Id.* (citing *Molineux v. Reed*, 516 Pa. 398, 532 A.2d 792, 794 (Pa. 1987)). The court may determine as a matter of law whether an estoppel results from established facts; [*44] however, the jury must decide whether the remarks that are alleged to constitute the fraud or concealment were made. *Id.* (citation omitted). The same reasonable diligence standard applies to determining whether the statute of limitations should be tolled based on the doctrine of fraudulent concealment. *Id.* at 861. Accordingly, where fraudulent concealment has been shown, the limitations period begins to run when the injured party knows or reasonably should know of his injury and its cause. *Id.*

Plaintiff relies on both of these exceptions to avoid application of the statute of limitations bar to his defamation claim. With regard to the discovery rule, the Court finds that Plaintiff has met his burden of showing that the discovery rule should be applied to his defamation claim. As a preliminary matter, the Court notes that Manning now makes clear, in his opposition to summary judgment, that the alleged defamatory statements are limited to Holland's communication of Angelo's "don't tell Tom" voice mail to Flannery, and Holland and Flannery's communication of same to Gundlach and Nevin. *See* Pl.'s Mem. of Law Opp'n at 3, ECF No. 57 at 3. With this in mind, the Court turns to the evidence [*45] of record.

Plaintiff's entries on 3/7/08, 3/12/08 and 3/13/08 in his Memo/Timeline show that as of 3/31/08, he suspected and/or had reason to know that Defendants had made derogatory statements to Gundlach about him in order to provide Gundlach with a basis for terminating his Executive Agreement. [16] However, Plaintiff's suspicions were based on oral third-party accounts of *opinions* expressed by Defendants, not actual misstatements of fact. (Pl. Resp. CSMF ¶¶86-87, ECF No. 58 at 66-67.) Moreover, although Plaintiff was aware of the contents of the Flannery/Holland 3/6/08 Memo, all of the parties here agree that none of the statements contained therein constitute defamation. At best, Plaintiff's suspicions and/or knowledge as of 3/31/08 were sufficient to put him on notice of his injury and its cause vis a vis his claims for intentional interference with contractual/business relationships. However, the undisputed evidence in the summary judgment record shows that neither Angelo nor Manning knew about the allegedly defamatory statement--"don't tell Tom"--until August of 2008, shortly before Angelo's deposition on 8/19/08. In addition, none of the other evidence, i.e., oral accounts of the [*46] content of certain documents observed by Angelo and Plaintiff's former secretary which were communicated to Manning in March of 2008, are sufficient to put Manning on notice of a potential defamation claim based on the "don't tell Tom" statement.

16 Manning maintains that a jury could conclude from his entry on 3/7/08 (Defs. Ex. 9 at Manning 1507) that he was informed of this information by a third party and never actually saw the document until it was produced in discovery in the *Ardex* litigation in August of 2008. (Pl. Resp. CSMF ¶85, ECF No. 58 at 65.) Manning's argument is unavailing as the discovery rule does not require that a plaintiff possess actual physical evidence in order to start the running of the statute of limitations.

Plaintiff undertook reasonable efforts to discover this information. On 3/12/08, Plaintiff's counsel wrote to Ardex's counsel requesting information and documents regarding the events leading up to his termination. Counsel for Ardex refused to provide the requested documents because no basis existed under Pennsylvania law that required it to provide those documents. After he instituted the *Ardex* litigation, Plaintiff obtained the previously requested documents [*47] through discovery in August of 2008 and learned of the "don't tell Tom" statement around that same time. Therefore, a reasonable jury could not find that exercising reasonable diligence, Manning should have known of the defamatory statement in March of 2008.

Accordingly, the statute of limitations on Plaintiff's defamation claim did not begin to run until August of 2008 when Plaintiff first discovered Holland's "don't tell Tom" version of Angelo's voice mail. Because Plaintiff instituted this action on July 17, 2009, within one year of first discovering the allegedly defamatory statement, his defamation claim is not time-barred. As the court has determined that the discovery rule applies, there is no need to reach Plaintiff's fraudulent concealment argument.

2. Intentional Interference with Contractual and/or Business Relations

Next Defendants argue that the one year statute of limitations for defamation claims also applies to Plaintiff's intentional interference with contractual and/or business relationships claims because the intentional interference claims are predicated on the same alleged defamatory statements, citing, *inter alia, Evans v. Philadelphia Newspapers, Inc.*, 411 Pa. Super. 244, 601 A.2d 330 (Pa. Super. Ct. 1991), [*48] in support. Defendants argue that the gravamen of Plaintiff's Complaint is the alleged defamatory statements made by them which Plaintiff believes are the cause of his termination. However, Defendants submit that the "plethora of evidence" proffered in support of their summary judgment motion shows that Defendants' defamatory statements were not the cause of Plaintiff's termination.

In *Evans*, the superior court found that although a claim for tortious interference with contract may be a separate and distinct action from libel and slander, where the complaint alleges that the underlying wrong is defamation by publication of a libelous report, and the injury claimed in each count springs from the act of publication, the plaintiff should not be allowed to circumvent the statute of limitations by merely labeling the claim as tortious interference when, in essence, it is one of defamation. *Id.* axt 333. Consequently, the superior court in *Evans* looked to the gravamen of the action, not the label applied to it by plaintiffs, in determining whether to apply the one year statute of limitations to plaintiffs' tortious interference claim. *Id.* The superior court concluded that plaintiffs' "claim [*49] for tortious interference [wa]s based upon the alleged false and defamatory character of the communication complained of, and [was] indistinguishable from the claims of libel and slander," and therefore, the one year statute of limitations applied to both claims. *Id.* at 334-35.

The district court reached a similar conclusion in *Hurst v. Beck*, Civ. A. No. 91-2492, 1992 U.S. Dist. LEXIS 19536, 1992 WL 396592 (E.D.Pa. Dec. 17, 1992). In doing so, the *Hurst* court relied on *Evans*, which "instructs that the trial court must make its own independent determination, as a matter of law, whether the separate cause of action for tortious interference is separate and unique from the defamatory statements or exists entirely because of the statements." 1992 U.S. Dist. LEXIS 19536, [WL] at *5 (citing *Evans*, 601 A.2d at 335). Thus, the district court found that if it determined that the tortious interference with contract claim owed its existence solely to the defamatory statements, then it was required to apply the one year statute of limitations. *Id.*

In *Hurst*, plaintiff sued her former employer, Pennsylvania Hospital, and two of its physicians, alleging that the defendants gave a potential employer references about her that were both defamatory and predicated [*50] upon information contained in her confidential personnel file, and based on these references, the potential employer declined to hire plaintiff. 1992 U.S. Dist. LEXIS 19536, [WL] at *1. Similar to Manning, the plaintiff in *Hurst* argued that the one year statute of limitations applicable to defamation claims should not apply to her tortious interference with contracts claim because the actions of the defendant physicians, i.e., reading her personnel file, disclosing her CREOG resident's scores, and relating to the potential employer that some of the physicians did not like to work with plaintiff, constituted separate conduct beyond the defamation, and thus, constituted a separate tort. 1992 U.S. Dist. LEXIS 19536,[WL] at *5. As such, plaintiff maintained that the two year statute of limitations should be applied to the tortious interference claim. *Id.* The district court disagreed, finding that the described actions of defendant physicians arose out of the alleged defamatory statements. In so finding, the court reasoned that "[w]hile each of the foregoing actions might have had an impact on the plaintiff's business, the 'gravamen' of plaintiff's complaint is that the foregoing conduct was detrimental because of its defamatory character." *Id.* [*51] (citing *Evans*, 601 A.2d at 333).

By contrast, in *Rolite*, the district court applying Pennsylvania law held that because plaintiff's state claims were based primarily upon unfair competition as opposed to defamation, plaintiff was not claiming injury to its reputation, but rather, that the alleged misrepresentations regarding the nature of its product and that its process infringed on defendant's patent caused harm to its economic interests, and therefore, the one year statute of limitations for defamation claims did not apply to plaintiff's tortious interference claim. *Rolite, Inc. v. Wheelabrator Environmental Sys., Inc.*, 958 F.Supp. 992, 1011 (E.D.Pa. 1997). In such situations, the Pennsylvania courts have held that the one year statute of limitations for defamation claims does not apply to tortious interference claims.

In opposing the application of the one year statute of limitations to his intentional interference claims, Manning submits that *Evans* is distinguishable from the case at bar as his intentional interference claims are predicated upon opinions and statements other than the ones offered in support of his defamation claim, to prove his intentional interference claims. Specifically, [*52] Plaintiff submits that his intentional interference claims are based on a course of conduct described in the Complaint, and as set forth in Defendants' CSMF ¶52 and Plaintiff's Responsive CSMF ¶52, as well as Plaintiff's Responsive CSMF ¶¶13, 29, 34, 36, 39, 45, 46, 48, 54-55, 59-60, 67, 69-70, 72-73, 76 and 78. According to Plaintiff, this alleged conduct consisted of, *inter alia*, "the panoply of successful efforts by the [Defendants] to undermine the plaintiff and cause his firing by Ardex, L.P., by means of secret communications between [Defendants] and Gundlach/Nevin and the conveying of

toxic and unfounded opinions which were, in turn, communicated by Gundlach to members of the Board of the German parent of Ardex, L.P., its American subsidiary." Pl.'s Mem. of Law in Opp'n to Summ. J. ("Pl.'s Mem. in Opp'n") at 12, ECF No. 57 (citing Pl.'s Resp. CSMF ¶¶97-100 & Flannery/Holland communications referenced in Pl.'s Mem. in Opp'n). Moreover, Manning points out that Defendants have expressly argued that the alleged statements attributed to them were not defamatory, and as such, the intentional interference claims cannot be duplicative of the defamation claims. (*Id.* at 12-13.) Manning [*53] submits, therefore, that the two year statute of limitations set forth in 42 Pa. Cons. Stat. Ann.§5524(7) should be applied to his intentional interference claims.

Based upon the relevant authority and a review of the summary judgment record, the Court agrees with Plaintiff that the one year statute of limitations for defamation claims does not apply to his intentional interference claims. With regard to his claim of intentional interference with existing contractual relationships (Count I), Plaintiff is alleging injury to economic interests by virtue of his loss of employment and the prospect of future employment with Ardex, LP. (Compl., ¶41.) Moreover, Plaintiff's intentional interference claims are predicated upon a series of events and conduct involving various secret communications primarily between Defendants and Gundlach and Nevin, wherein Defendants expressed opinions about Manning and his loyalty to Ardex allegedly in an attempt to undermine Manning with Gundlach and provide a basis for his termination. *See, e.g.*, 1/28/08 Flannery Email to Gundlach (Defs. Ex. 18, ECF No. 49-19); 2/18/08 Flannery/Gundlach & Gundlach/Holland Tel. Conf. (Compl. ¶29f); 2/18/08 Emails between Flannery [*54] & Gundlach (Defs. Ex. 31, ECF No. 49-32); 2/25/08 Tel. Conf. between Flannery & Nevin (Pl. Ex. 11, ECF No. 59-11 at 2 & Defs. Ex. 32, ECF No. 60-35 at 4; 3/3/08 Letter from Flannery to Gundlach (Defs. Ex. 34, ECF No. 49-35 at 2-7); 3/6/08 Flannery/Holland Memo (Defs. Ex. 35, ECF No. 49-36 at 4).

Based on the above, it is clear that Plaintiff's claim of intentional interference with existing contractual relations is predicated on the derogatory opinions communicated by Defendants to Gundlach and Nevin which allegedly interfered with Plaintiff's rights under his Executive Agreement with Ardex, thus resulting in economic harm to Plaintiff. As such, the Court finds that the one-year statute of limitations applied to defamation claims does not apply to the intentional interference claim asserted in Count I. Accordingly, Plaintiff's claim for intentional interference with existing contractual relationships was brought in a timely fashion, as Plaintiff filed his Complaint on July 17, 2009, which is within two years of when his cause of action accrued.

As to Plaintiff's claim of intentional interference with existing business relationships (Count II), Plaintiff alleges that Defendants' conduct [*55] interfered with his existing business relationships with various suppliers, customers, and distributors of Ardex LP, as well as others who dealt with Plaintiff in a business context. (Compl., ¶43.) Plaintiff further alleges that "[s]uch interference arose at least in relevant part from such third parties learning that the plaintiff had been discharged by Ardex, LP and their ascribing as the reason for said discharge a conclusion that the plaintiff was either incompetent or dishonest." (*Id.*) As it does not appear that this claim is predicated upon any allegedly defamatory statements, the Court finds that the one year statute of limitations applicable to defamation claims does not apply to Plaintiff's intentional interference with existing business relationships claim. Therefore, this claim is also not time-barred.

Finally, with regard to Plaintiff's claim of intentional interference with prospective business relationships (Count III), Plaintiff alleges that as a result of Defendants' intentional conduct in, inter alia, conspiring to have Plaintiff fired for alleged disloyalty, deception and cause, Plaintiff was not hired either in the Eastern District of Pennsylvania or elsewhere. (Compl., [*56] ¶45.) Moreover, Plaintiff alleges that Defendants knew such conduct would cause future employers to refrain from hiring him and prevent him from obtaining other employment. (*Id.*) As with Count I, Plaintiff's intentional interference claim in Count III does not appear to be predicated upon any allegedly defamatory statements, but instead, allegedly arises from Defendants' communications to Gundlach and Nevin of their opinions about Plaintiff's loyalty to Ardex. In addition, Plaintiff is alleging economic harm from lost employment opportunities with prospective employers as a consequence of Defendants' intentional interference. As such, the Court finds that the one-year statute of limitations applied to defamation claims does not apply to the intentional interference claim brought in Count III. Therefore, this claim is also not time-barred.

Accordingly, since none of Plaintiff's claims are time-barred, the Court turns to Defendants' arguments on the merits of Plaintiff's claims.

B.Whether The "Don't Tell Tom" Statement Is Defamatory

Although this Court has concluded that Plaintiff's defamation claim was timely filed, that does not preclude the granting of summary judgment on other grounds. [*57] Defendants argue in the alternative that Plaintiff cannot establish a valid legal claim that the "don't tell Tom" statements were defamatory for two reasons: (1) the statements are not capable of defamatory meaning; and, (2) the statements were privileged and Defendant did not abuse the privilege, but provided either truthful statements or honest advice and opinion, reasonably based on disclosed facts. (Defs. Mem. in Supp. Summ. J. at 13, ECF No. 50 at 13.)

In Pennsylvania, a communication will be considered defamatory "if, among other things, 'it ascribes to another conduct, character or a condition that would adversely affect that person's fitness for the proper conduct of their business, trade or profession.'" *Levenson v. Oxford Global Resources, Inc.*, Civ. A. No. 05-1639, 2006 U.S. Dist. LEXIS 72137, 2007 WL 4370911, *5 (W.D.Pa. Dec. 11, 2007) (quoting *Pellegrino Food Prods. Co., Inc. v. The Valley Voice*, 2005 PA Super 191, 875 A.2d 1161, 1164 (Pa. Super. Ct. 2005)); *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. Ct. 1997) (a communication is defamatory "if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him in his business or profession.") (citing *Livingston v. Murray*, 417 Pa. Super. 202, 612 A.2d 443, 447 (Pa. Super. Ct. 1992)); [*58] *see also Thomas Merton Center v. Rockwell Int'l Corp.*, 497 Pa. 460, 442 A.2d 213, 215 (Pa. 1981) (a communication is defamatory "'if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'") (quoting *Birl v. Phila. Elec. Co.*, 402 Pa. 297, 167 A.2d 472, 475 (Pa. 1960)) (other citation omitted). "When communications tend to lower a person in the estimation of the community, deter third persons from associating with him, or adversely affect his fitness for the proper conduct of his lawful business or profession, they are deemed defamatory." *Green*, 692 A.2d at 172 (citation omitted).

Initially, the court is charged with the responsibility of determining whether the challenged publication is capable of defamatory meaning. *Id.* (citations omitted); *Thomas Merton Center*, 441 A.2d at 215. In doing so, "the court 'must view the statement 'in context' with an eye toward 'the effect [the statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.'" *Donaldson v. Informatica Corp.*, Civ. A. 08-605, 2009 U.S. Dist. LEXIS 111142, 2009 WL 4348819, at *15 n. 10 (W.D.Pa. Nov. 30, 2009) [*59] (quoting *Remick v. Manfredy*, 238 F.3d 248, 261 (3d Cir. 2001) (quoting *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399, 402 (Pa.1987); citing *Green*, 692 A.2d at 172)). If the court concludes that the communication at issue is not capable of defamatory meaning, then no basis will exist for proceeding to trial. *Thomas Merton Center*, 441 A.2d at 215-16 (citing RESTATEMENT (SECOND) OF TORTS, §614(1) (1938)) (other citations omitted).

As noted above, in his brief in opposition to summary judgment, Manning now makes clear that the alleged defamatory statements are limited to Holland's and Flannery's communications of Angelo's "don't tell Tom" voice mail to Gundlach and Nevin, which was passed along to the Board of Directors in Germany. *See* Pl.'s Mem. in Opp'n at 3, ECF No. 57 at 3. Plaintiff argues that at the very least, these allegations "clearly were intended to injure him in his business or profession, deter the Ardex parent and Ardex LP from associating with him (i.e., by causing his firing) and went to the heart of his fitness for the proper conduct of his position as President of Ardex, LP." *Id.* at 20, ECF No. 57 at 20. As such, Plaintiff submits, a jury could find those communications to [*60] be defamatory. In addition, Plaintiff argues that an issue of fact exists as to the falsity of the communications by Holland and Flannery, based on the conflicting testimony of Holland and Angelo.

Examining the "don't tell Tom" statement in context, and if indeed that statement is determined to be false (i.e., the jury believes Angelo), then Gundlach was given false information about Manning which a jury could find tarnished his business reputation as President and CEO of Ardex with Gundlach and the Board of Directors in Germany. Specifically, Gundlach testified that he was angry and disturbed by this information, and found Manning's conduct "absolutely inacceptable" and showed that he was once again disloyal to Gundlach. Gundlach further testified that he found Manning's use of his staff

(Angelo) to convey the "don't tell Tom" message to be "highly reprehensible." (Defs. Ex. 31 at BOY 000038, ECF No. 49-32 at 3.) Moreover, Manning's handling of the VP Operations search was a factor that Gundlach considered in making the decision to terminate his contract. *See* Gundlach Memo 2/28/08 at 2-3, Defs. Ex. 5, ECF No. 49-6 at 3-4. Viewing this evidence in the light most favorable to Plaintiff, [*61] a reasonable jury could view the 2/12/08 communication and Gundlach's reaction thereto as a significant factor in Gundlach's decision to terminate Plaintiff. Under these circumstances, the Court finds that whether the "don't tell Tom" communication was capable of defamatory meaning is a question for the jury.

Privilege

Defendants may nonetheless avoid liability for the alleged defamatory communications if they can show the communications were privileged. Pennsylvania recognizes two types of privilege--absolute and conditional, *Levenson*, 2006 U.S. Dist. LEXIS 72137, 2007 WL 4370911, at *9, however, only the conditional privilege applies to the case at bar. [17] A conditional privilege is recognized "when the speaker and the recipient share a common interest in the subject matter and both are entitled to know about the information." *Foster v. UPMC South Side Hosp.*, 2010 PA Super 143, 2 A.3d 655, 664 (Pa. Super. Ct. 2010) (citing *Daywalt v. Montgomery Hosp.*, 393 Pa. Super. 118, 573 A.2d 1116, 1118 (Pa. Super. Ct. 1990)). Moreover, for a conditional privilege to apply, the defendant must show that the communications were "'made on a proper occasion, from a proper motive, in a proper manner, and . . . based [ ] on reasonable cause.'" *Levenson*, 2006 U.S. Dist. LEXIS 72137, 2007 WL 4370911, at *9 [*62] (quoting *Moore v. Cobb-Nettleton*, 2005 PA Super 426, 889 A.2d 1262, 1268 (Pa. Super. Ct. 2005)); *see also* 42 Pa. Cons. Stat. Ann. § 8343(b)(2) (West 2007) (defendant's burden to prove communications were privileged).

> 17 "'Absolute privileges are granted by statute,' 'to statements made by participants in any stage of judicial or legislative proceedings,' 'to high public officials acting within the scope of their duties,' 'to employers issuing evaluations, warning letters or terminations,' 'or by consent.'" *Levenson*, 2006 U.S. Dist. LEXIS 72137, 2007 WL 4370911, at * 9 (quoting *Johnson v. Resources for Human Dev., Inc.*, 860 F.Supp. 218, 222 (E.D.Pa. 1994)). None of the recognized categories of absolute privilege are implicated in the case at bar.

Once the defendant has established that a conditional privilege applies, the defamation claims will survive only if the plaintiff can show that the privilege was abused. *Foster*, 2 A.3d at 665 (citing *Moore*, 889 A.2d at 1269); *see also* 42 Pa. Cons. Stat. Ann. §8343(a)(7) (plaintiff's burden to prove abuse of a conditional privilege). As to what constitutes abuse of privilege, the superior court opined:

> Abuse of a conditional privilege is indicated when the publication is actuated by malice or [*63] negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or included defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose.

Moore, 889 A.2d at 1269.

In the case at bar, Defendants argue that the "don't tell Tom" communication was privileged and a good faith honest belief of what Angelo stated. (Defs. Reply Mem. of Law at 3-4, ECF No. 61 at 3-4.) Even though Defendants acknowledge that the truthfulness of this communication is disputed, Defendants still maintain that Holland's communication was a reasonable statement based on what Angelo said. (Defs. Supp. Mem. at 15, ECF No. 50 at 15.) Defendants further maintain that Holland was privileged to give this information to Gundlach, as Holland was providing information regarding the VP Operations search pursuant to Gundlach's request. (*Id.* at 16.) Moreover, Defendants maintain it was their job to provide advice and opinions to Ardex executives, including Gundlach, as to the quality of the candidates who would eventually succeed Plaintiff as President and CEO and [*64] whether Plaintiff was selecting the best candidate for the position.

Much of Plaintiff's counterargument regarding privilege as a defense to defamation is combined with his argument regarding lack of privilege for purposes of his intention interference claims. However, Plaintiff fails to address Defendants' argument that Holland and Flannery were privileged to give this information to Gundlach and

Nevin, as it was done in furtherance of the ongoing search for VP Operations and pursuant to Gundlach's request for information about why the two external candidates could not be brought in for interviews while he was in Pittsburgh. Focusing only on the narrowly identified communications which Plaintiff now claims constitute defamation, the Court finds that the undisputed evidence shows that Holland and Flannery were privileged to communicate the "don't tell Tom" voice mail to Gundlach and Nevin. Plaintiff has failed to point to any evidence in the record that would suggest otherwise and the Court could find none upon its own review of the record. Clearly Holland and Flannery shared a common interest with Gundlach regarding the VP Operations search and therefore were entitled to know about [*65] the communication, even if it was untruthful. No reasonable jury would conclude otherwise. Therefore, the Court finds that Defendants have met their burden of proving that the communication of the "don't tell Tom" statement was privileged.

Thus, the only question remaining is whether Plaintiff has adduced sufficient evidence to show that, or has at least raised a triable issue of fact as to whether, Defendants abused the privilege. Defendants contend that Plaintiff has failed to meet his burden, as there is no evidence that Holland acted with malice towards Plaintiff or otherwise abused the privilege. Specifically, Defendants argue in support that there is no evidence that Holland had any intention of getting Plaintiff fired by speaking with Gundlach when she communicated the "don't tell Tom" statement. (Defs. Supp. Mem. at 17; Defs. Reply Mem. at 4.) According to Defendants, the evidence merely shows that Holland was aware of a problem with the search for VP Operations. (Defs. Supp. Mem. at 17.)

The thrust of Plaintiff's counterargument [18] is that because there is conflicting testimony between Angelo and Holland as to the content of the 2/12/08 voice mail, a jury must decide this issue. [*66] Once the issue is before the jury, Plaintiff contends the jury could then find that Holland's communication was an untrue accounting of the Angelo voice mail and, based *solely* on this finding, the jury could also find that Holland intentionally or recklessly reported a false account of her conversation with Angelo with the intent to harm Plaintiff. Even if one assumes, for purposes of Plaintiff's argument, that a jury would find that Holland's accounting was untruthful, that finding alone does not prove or lead to the conclusion that Holland acted with malice or recklessly. The question of whether a communication is false is based on entirely different facts from those determinative of whether the decision to publish the false statement was motivated by malice or recklessness. With regard to the latter element, the superior court has made clear that "reckless disregard of the truth" means that the "defendant must have made the false publication with a 'high degree of awareness of ... probable falsity,' or must have 'entertained serious doubts as to the truth of his publication....'" *Skiff re Business, Inc.*, 2010 PA Super 43, 991 A.2d 956 (quoting *Fitzpatrick v. Phila. Newspapers, Inc.*, 389 Pa. Super. 438, 567 A.2d 684, 688 (1989)). Thus, [*67] in addition to showing the communication was false, Plaintiff must show that the false communication was made intentionally or with reckless disregard for the truth. Plaintiff's argument conflates the two elements and thereby avoids his burden of showing an abuse of privilege.

18 In addition to this counterargument, Plaintiff raises several other arguments, but none of them go to the issue of abuse of privilege. For example, Plaintiff submits that the "don't tell Tom" communications materially contributed to his firing. Notwithstanding there is evidence to the contrary in the record, this argument goes to damages, not Defendants' state of mind in publishing the statements. Plaintiff also argues that Flannery's complicity in passing on the defamatory communications to Gundlach and Nevin is apparent from Flannery's 3/3/08 email to Nevin, in which he attached Holland's Timeline dated 3/3/08. (Defs. Ex. 33 at BOY 000052 & BOY 000045 - 47, ECF No. 49-34 at 2, 5-7.) However, the referenced documents show only that Flannery provided information about the search process, as collected and memorialized by Holland, to Nevin, which Flannery described as "accurate" "given Stacey's capacity for attention [*68] to detail." (*Id.* at BOY 000052.) No malice or recklessness can be gleaned from these documents.

Moreover, Plaintiff has failed to point to any evidence to show that in deciding to communicate Angelo's voice mail to Gundlach and Nevin, Defendants acted with malice or reckless disregard for the truth. Although Plaintiff argues that "abundant" facts exist which support the conclusion that the falsity of

Defendants' statements proves Holland intentionally or recklessly reported a false accounting of her conversations with the intent to harm Plaintiff, *see* Defendants' CSMF ¶52 and Plaintiff's Responsive CSMF ¶ 52 as well as ¶¶13, 29, 34, 36, 39, 45-46, 48, 54-55, 59-60, 67, 69, 70, 72-73, 76 and 78, the so-called "abundant" facts are, in actuality, statements offered in support of Plaintiff's intentional interference claims and involve different actions and conduct from that underlying his defamation claims. Plaintiff again makes the fallacious argument that the falsity of Defendants' statements, as demonstrated through the "abundant" facts, proves that Holland intentionally and recklessly reported a false accounting of her conversations with Angelo. This argument fails for the same reason [*69] articulated above.

Finally, Defendants maintain that Plaintiff has also failed to show that Flannery acted with malice in communicating the "don't tell Tom" statement to Gundlach and Nevin. In support, Defendants rely on *Skiff RE Business, Inc. v. Buckingham Ridgeview, LP*, 2010 PA Super 43, 991 A.2d 956, 965 (Pa. Super. Ct. 2010), for the proposition that failing to investigate the truth of an honestly or reasonably believed statement, without more, will not support a finding of malice. (Defs. Reply Mem. at 4.) The Court agrees with Defendants. The gist of Plaintiff's defamation claim against Flannery appears to be that he failed to confirm Holland's version of the voice mail message with Angelo and he was complicit in passing along the information to Gundlach and Nevin. However, as the superior court held in *Skiff*, "failure to investigate, without more, will not support a finding of actual malice, nor will ill will or a desire to increase profits." 991 A.2d at 965 (quoting *Fitzpatrick v. Phila. Newspapers, Inc.*, 389 Pa. Super. 438, 567 A.2d 684, 688 (Pa. Super. Ct. 1989)). As Plaintiff offers no other evidence to raise an issue of fact as to whether Flannery abused a conditional privilege, [19] Plaintiff's defamation claim [*70] against Flannery must fail.

19 *See* Note 18, *supra.*

Accordingly, the Court concludes that no reasonable jury could find, based on the record evidence, that Defendants abused a conditional privilege. Therefore, since Defendants have met their burden of proving a conditional privilege, the Court finds that Defendants are entitled to summary judgment on Plaintiff's defamation claims in Counts IV and V.

C. Intentional Interference with Existing Contractual/Business Relationships

In Pennsylvania, the Pennsylvania Supreme Court has adopted Section 766 of the RESTATEMENT (SECOND) OF TORTS, with regard to the tort of intentional interference with existing contractual relations. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1183 (Pa. 1978); *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466 (Pa. 1979). Section 766 provides: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the [*71] contract." RESTATEMENT (SECOND) OF TORTS § 766 (1979). Thus, the requisite elements of a cause of action for intentional interference with existing contractual relationships include:

> (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 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.

Foster, 2 A.3d at 665-66 (citation omitted); *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 357 F.3d 375, 384 (3d Cir. 2004) (citations omitted).

The parties' focus here is on the third element--the absence of privilege or justification. This element requires proof that the defendant's actions were improper under the circumstances presented. *Foster*, 2 A.3d at 666; *Walnut Street Assocs. v. Brokerage Concepts, Inc.*, 2009 PA Super 191, 982 A.2d 94, 98 (Pa. Super. Ct. 2009), *aff'd* 610 Pa. 371, 20 A.3d 468 (Pa. 2011). Generally, whether a defendant's conduct is improper for purposes of an intentional interference claim is determined by

considering the factors listed Section 767 of the RESTATEMENT (SECOND) OF TORTS:

> (a) [*72] 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 interference, and
>
> (g) the relations between the parties.

Walnut Street, 982 A.2d at 98 (citing RESTATEMENT (SECOND) OF TORTS §767 (1979)); *see also Skiff*, 991 A.2d at 966 (quoting *Strickland v. Univ. of Scranton*, 700 A.2d 979, 985 (Pa. Super. Ct. 1997)) (internal citation omitted). As the superior court observed in *Walnut Street*, "[c]omment b to section 767 makes clear that under certain circumstances, 'the conduct should be permitted without liability, despite its effect of harm to another,' and thus the decision 'depends upon a judgment and choice of values in each situation.'" *Walnut Street*, 982 A.2d at 98 (quoting RESTATEMENT (SECOND) OF TORTS § 767 cmt. b (1979)).

The RESTATEMENT also sets forth specific circumstances in which interference with contractual relationships is not improper and one such circumstance which has relevance [*73] to the case at bar, is set forth in Section 772:

> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
>
> (a) truthful information,
>
> or
>
> (b) honest advice within the scope of a request for the advice.

Walnut Street, 982 A.2d at 98-99 (quoting Restatement (Second) of Torts §772 (1979)). As to subsection 772(a) truthful information, comment b explains:

> There is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another. The interference in this instance is clearly not improper. This is true even though the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another. It is also true whether or not the information is requested.

RESTATEMENT (SECOND) OF TORTS § 772 cmt. b (1979). Section 772(a) was recently adopted as the law in Pennsylvania by the Pennsylvania Supreme [*74] Court in affirming the superior court's decision in *Walnut Street*. 610 Pa. 371, 20 A.3d 468, 478 (Pa. 2011).

With regard to Section 772(b), honest advice, comment c provides in relevant part:

> The rule as to honest advice applies to protect the public and private interests in freedom of communication and friendly intercourse. In some instances the rule protects the public and private interests in certain professions or businesses. Thus the lawyer, the doctor, the clergyman, the banker, the investment, marriage or other counselor, and the efficiency expert need this protection for the performance of their tasks. But the rule protects the amateur as well as the professional adviser. The only requirements for its existence are (1) that advice be requested, (2) that the advice given be within the scope of the request and (3) that the advice be honest. If these conditions are present, it is immaterial that

> the actor also profits by the advice or that he dislikes the third person and takes pleasure in the harm caused to him by the advice. If one or more of the three stated conditions are lacking, the rule stated in this Section does not apply. . . .

RESTATEMENT (SECOND) OF TORTS § 772 cmt. c (1979). Section 772(b) [*75] has also been adopted by the Pennsylvania Supreme Court. *Walnut Street*, 982 A.2d at 100 & n.5 (citing *Menefee v. Columbia Broadcasting Sys.*, 458 Pa. 46, 329 A.2d 216, 221 (Pa. 1974)).

As in *Walnut Street*, the Defendants' argument in the case at bar is focused on the special circumstances raised in Section 772 of the RESTATEMENT. Defendants submit that all of their statements were privileged, and they did not abuse that privilege as they provided truthful statements or honest advice and opinion, reasonably based on disclosed facts. In addition to relying on *Walnut Street*, Defendants cite *Skiff*, 991 A.2d at 966, for the proposition that all a defendant needs is a "good faith belief" in the likely truth of his statement or action, even if it turned out to be incorrect, or the defendant had his own selfish motive. (Defs. Mem. of Law in Supp. of Summ. J. at 12, ECF No. 50 at 12.)

In *Walnut Street*, the parties did not dispute the truthfulness of the statements and therefore the supreme court determined that the defendant was entitled to judgment at a matter of law as to the intentional interference claims based on Section 772(a) of the Restatement. In the case at bar, Plaintiff disputes the truthfulness [*76] of the statements, but in reality his challenges are to the intent of Defendants. Indeed, in his opposing memorandum, Plaintiff relies on language in *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173 (3d Cir. 1997), suggesting that to overcome a privilege defense, it is sufficient to show that defendant's conduct was improper. Plaintiff submits that the record contains evidence of Defendants' improper intent, and points to Defendants' CSMF ¶52 and Plaintiff's Responsive CSMF ¶ 52 as well as ¶¶13, 29, 34, 36, 39, 45-46, 48, 54-55, 59-60, 67, 69, 70, 72-73, 76 and 78. Plaintiff's reliance on *Kachmar* is misplaced as the court of appeals analyzed the privilege defense under the general factors set forth in Section 767 not Section 772, since Section 772 had not yet been adopted by the Pennsylvania Supreme Court.

Plaintiff further posits that although Defendants contend that their opinions were merely "honest advice," a jury could certainly determine that the advice was, in fact, not honest as illustrated, inter alia, by Gundlach's inquiry to Flannery as to whether Gundlach could count on Flannery's support in Gundlach's effort to convince the Board of Directors in Germany that Manning should [*77] be fired. Pl.'s Mem. of Law in Opp'n at 18, ECF No. 57 at 18 (citing Defs. Ex. 31 at BOY 000038). According to Plaintiff, this is but one of several instances and circumstances from which a jury could infer that Defendants had a self-serving intent motivated by their desire to cultivate additional business from Ardex entities by means of pleasing Gundlach. *Id.* This argument too must fail for several reasons. First, the Court agrees with Defendants that Plaintiff's reasoning stretches the meaning and intent behind the parties statements to absurd proportions. Plaintiff's contention that Gundlach's request for Flannery's support meant that Flannery was supposed to lie is not a reasonable interpretation, but rather an unfair and forced construction of Gundlach's request, one that no reasonable jury could make. Second, the Defendants' improper intent is not relevant to determining whether Section 772 applies. Even though the advice given may have been self-serving, so long as it is truthfully and honestly given, the interference will be deemed proper. *Skiff*, 991 A.2d at 965 (holding that ill will or a desire to increase profits do not constitute malice with regard to abuse of privilege [*78] in defamation claim) (citation omitted). The Pennsylvania Supreme Court rejected a similar argument in *Walnut Street*, opining that when the special circumstances delineated in Section 772 exist, i.e., truthful information and/or honest advice, the intentional interference claim is to be analyzed under Section 772 of the Restatement as opposed to the more general factors set forth in Section 767. *Walnut Street*, 20 A.3d at 478.

Plaintiff counters that Defendants' reliance on *Skiff* is misplaced. Plaintiff submits that a fair reading of *Skiff* does not support the proposition, advanced by Defendants that tortious interference claims fail if there is a "good faith belief" in the likely truth of their statement or action, even if it turned out to be incorrect. Rather, Plaintiff submits, *Skiff* relies on Section 767 of the RESTATEMENT (SECOND) OF TORTS which weighs seven different factors to determine whether certain conduct is improper with regard to an intentional interference claim. While Plaintiff is correct that the court in *Skiff* applied Section 767 in analyzing whether the defendant's conduct was improper, the court concluded that defendant's

interference (i.e., assertion of a lien on [*79] one of the properties) was justified because it found defendants acted in good faith and with proper means. 991 A.2d at 966. In any event, *Skiff* was decided before the Pennsylvania Supreme Court adopted Section 772 of the RESTATEMENT in *Walnut Street*, and thus, this Court is not bound to apply the more general factors listed in Section 767.

In addition, Plaintiff argues that the "defense of privilege depends upon the jury accepting the self-serving, good faith claims of the defendants." Pl.'s Sur Reply at 4, ECF No. 68 at 4. Because issues of fact exist as to these claims, Plaintiff contends that summary judgment is not appropriate. Again, Plaintiff's argument misses the mark. On summary judgment, the test is whether Plaintiff has come forward with evidence that would be admissible at trial to raise a genuine issue of material fact as to whether Defendants' opinions and advice to Gundlach were not honest or truthful. Plaintiff has failed to meet this burden.

Here the record evidence clearly establishes that the advice Defendants gave to Gundlach and Nevin was done at the request of Ardex and pursuant to their agreement regarding the search for a VP Operations. The record also establishes [*80] that advice given was within the scope of the search for a VP Operations executive, and the advice was honest. Therefore, the Court finds that no reasonable jury could conclude that Defendants' interference was not justified.

As it appears from the record evidence there are no material issues of fact with regard to whether the advice and opinions given by Holland and Flannery to Gundlach and were honest, the Court finds that Defendants are entitled to summary judgment on Plaintiff's claims of intentional interference with existing contractual/business relationships (Counts I and II).

D.Intentional Interference with Propective Contractual/Business Relationships

To maintain a cause of action for intentional interference with prospective contractual relations, a plaintiff must prove the following elements:

> (1) a prospective contractual relation;
>
> (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring;
>
> (3) the absence of privilege or justification on the part of the defendant; and
>
> (4) the occasioning of actual damage resulting from the defendant's conduct.

Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 471 (Pa. 1979) (citing *Glenn*, 272 A.2d at 898). The supreme [*81] court further explained the elements of this tort: "'the actor must act (1) for the purpose of causing this specific type of harm to the plaintiff, (2) such act must be unprivileged, and (3) the harm must actually result.'" *Id.* at 471 n. 7 (quoting *Glenn*, 272 A.2d at 898). Although the term, "prospective contractual relation" is somewhat elusive, the supreme court has provided the following working definition:

> . . . anything that is prospective in nature is necessarily uncertain. We are not here dealing with certainties, but with reasonable likelihood or probability. This must be something more than a mere hope or the innate optimism of the salesman. As the Superior Court of New Jersey has put it, " * * * the rule to be applied * * * is that the broker may recover when the jury is satisfied that but for the wrongful acts of the defendant it is reasonable probable that the plaintiff would have effected the sale of the property and received a commission." *Myers v. Arcadio, Inc.*, 73 N.J.Super. 493, 497, 180 A.2d 329, 331 (1962). This is an objective standard which of course must be supplied by adequate proof. (footnote omitted).

Glenn, 272 A.2d at 898-99.

The court of appeals for this circuit [*82] has interpreted Pennsylvania law to require a plaintiff to show "'an objectively reasonable probability that a contract will come into existence.'" *Binns v. Flaster Greenberg, P.C.*, 480 F.Supp. 2d 773, 780 (E.D.Pa. 2007) (quoting *Kachmar*, 109 F.3d at 184) (footnote omitted). "This 'reasonable probability' may result from an unenforceable express agreement, an offer, or the parties' current dealings, but not merely from prior dealings or an existing business relationship between the

parties." *Id.* at 780-81 (citation omitted). For example, courts have found the existence of a prospective business relationship when the prospective employer expressed his desire to hire the plaintiff and would have hired him but for the deliberate intervention of plaintiff's former employer. *Yaindl v. Ingersoll-Rand Co. Std. Pump-Aldrich Div.*, 281 Pa. Super. 560, 422 A.2d 611, 622 (Pa. Super. Ct. 1980), *abrogation on other grounds recognized in Yetter v. Ward Trucking Corp.*, 401 Pa. Super. 467, 585 A.2d 1022 (Pa. Super. Ct. 1991). *Cf. Moore v. United Int'l Investigative Services, Inc.*, 209 F.Supp. 2d 611, 619-20 (E.D.Va. 2002) (a prospective employer's inquiry as to the reasons for the plaintiff's termination from his prior employment did not [*83] establish an expectancy of an business relationship where there was no evidence to suggest that the prospective employer expected or intended to offer plaintiff a job).

In the case at bar, Defendants submit that Plaintiff has failed to adduce any evidence of the first element--the existence of a prospective contractual relation. In particular, Defendants submit that the record does not contain any evidence that Defendants disclosed information to prospective employers, or that Plaintiff obtained an offer, oral agreement or had actual current dealings for employment beyond preliminary discussions and interviews for positions. The Court agrees.

The evidence of record shows that Plaintiff had 15 or 16 initial interviews and only two second interviews, but neither led to discussions of terms and conditions of employment. This evidence suggests merely a hope that a contract will occur, rather than a reasonable likelihood or probability that an employment contract will come into existence. Nor does the Court find that there was a reasonable likelihood or probability that Plaintiff's Executive Agreement with Ardex would have been extended at the end of its term on 12/31/09, but for Defendants' [*84] intentional interference. The fact that Plaintiff had prior dealings with Ardex and/or an existing business relationship does not, without more, establish a "reasonable probability." *Yaindl*, 422 A.2d at 622. In addition, even though the record evidence shows that Manning had achieved some success at Ardex, Gundlach had several issues with Manning besides the handling of the VP Operations search, as testified to by Gundlach on 11/17/08 and memorialized in his Memo to the Board of Directors dated 2/28/08, e.g., relocation issue, renegotiation of his bonus, inability to adapt to German culture, dispute over South American market, inappropriate behavior towards CFO. Also, Gundlach testified that he alone made the decision to terminate Plaintiff. (Gundlach Dep. 11/17/08 at 78:6-17, Defs. Ex. 10, ECF No. 49-11 at 11.) Given the existence of these other factors, no reasonable jury could find that Defendants' alleged interference was the "but for" cause of any lost prospective business relationships.

Plaintiff argues, nonetheless, that he would be able to place evidence before the jury regarding his past successes as an executive, as well as the great success he attained as President of Ardex, [*85] and therefore, he would be able to meet the standard set forth in *Thompson Coal* that but for the wrongful acts of Defendants, the jury could conclude that it is reasonably probably that he would have obtained executive employment or been rehired by Ardex at the end of his contract. Notwithstanding the fact that evidence of his past successes as an executive does not appear in the summary judgment record, such evidence, if it actually exists, would not establish the *existence* of a prospective business relationship in the first instance. Nor does the fact that Plaintiff achieved success at Ardex establish that there was a reasonable probability that his contract would have been extended for the reasons delineated above. Moreover, Plaintiff has not and cannot point to any evidence in the record that shows that Defendants disclosed any information about Plaintiff to prospective employers. While Defendants actions may have played some part in influencing Gundlach's decision to terminate Plaintiff's Executive Agreement with Ardex, it is pure speculation to argue that Defendants did so with the intent of interfering with prospective business/employment relationships which were not even contemplated [*86] or pursued at the time of Defendants' actions, i.e., September of 2007 through early March of 2008.

Plaintiff also relies on *Kachmar* for the proposition that the indefinite nature of the prospective contractual relation should not defeat his claim. However, his reliance on *Kachmar* is misplaced. In that case, the court of appeals was reviewing the adequacy of the allegations to determine whether a claim for interference with prospective contractual relations survived a motion to dismiss. In that case, the plaintiff alleged that during discussions with the prospective employer, she learned that her former employer informed the prospective employer that she had hired an attorney and was filing a discrimination suit against her former employer. *Id.* at

184-85. The court of appeals found that Plaintiff's allegations suggested that the interaction between plaintiff and the prospective employer passed beyond the preliminary stage, and therefore, were sufficient to withstand a motion to dismiss. However, the court of appeals opined that had this matter been raised at the summary judgment stage, the plaintiff would have been required to produce evidence from sources available to her to show that [*87] her contacts had reached the reasonable likelihood or probability stage. *Id.* at 185.

Plaintiff's other arguments are equally unavailing. First, Manning posits that the series of events described above caused him to file a lawsuit against Ardex which, in turn, caused the details of his termination to be posted on the Internet for the whole world to see. That, when combined with being fired for cause and suing his employer "may well allow a jury to conclude that [he] became a *persona non grata* with respect to prospective employers of executives." (Pl.'s Mem. in Opp'n at 23, ECF No. 57 at 23.) That may very well be, but that does not explain or support the establishment of the first element of his claim--the existence of a prospective contractual relationship. [20] Nor does it account for the fact that Plaintiff, not Defendants, published this information on the Internet by filing suit. Second, Plaintiff attempts to avoid summary judgment by arguing that he intends to produce an expert who will opine that he was disabled from obtaining executive employment from third parties which he would have obtained but for the circumstances of his being fired. This is pure speculation on Plaintiff's [*88] part and again fails to point to evidence in the record to support the existence of a reasonably probable prospective contractual relationship.

> 20 To the extent Plaintiff may be suggesting that such evidence is relevant to establish improper intent, the resulting unfavorable publicity from instituting a cause of action does not create a material issue of fact as to Defendants' intent to interfere with any potential contractual relationships being pursued by Plaintiff. *Cf. Strickland v. Univ. of Scranton*, 700 A.2d 979, 985-86 (Pa. Super. Ct. 1997).

Accordingly, the Court concludes that no reasonable jury could find that a reasonable likelihood or probability of prospective employment existed based on the evidence of record. Therefore, Defendants are entitled to summary judgment on the claim of intentional interference with prospective contractual/business relationships.

E.Breach of Fiduciary Duty

Defendants also seek summary judgment on Plaintiff's claim for breach of fiduciary duty. To establish a breach of fiduciary duty claim, a plaintiff must show: "(1) the existence of a confidential relationship; (2) the defendant's failure to act in good faith and solely for the benefit of the plaintiff [*89] with respect to matters within the scope of the confidential or fiduciary relationship; and (3) an injury to the plaintiff proximately caused by the defendant's failure to act." *SieMatic Mobelwerke GmbH & Co. KG v. SieMatic Corp.*, No. 06-CV-5165, 2009 U.S. Dist. LEXIS 73683, 2009 WL 2526436, at *4 (E.D.Pa. Aug. 12, 2009) (citing *Baker v. Family Credit Counseling Corp.*, 440 F.Supp.2d 392, 414-15 (E.D.Pa.2006)). With regard to the element of a "confidential relationship," the district court explained:

> A fiduciary duty exists when there is a "special relationship," which is one "involving confidentiality, the repose of special trust or fiduciary responsibilities." *eToll, Inc., v. Elias/Savion Advertising, Inc.*, 2002 PA Super 347, 811 A.2d 10, 22 (Pa.Super.2002). A confidential relationship "generally involves a situation where by virtue of the respective strength and weakness of the parties, one has the power to take advantage of or exercise undue influence over the other." Id. In the business context, a confidential relationship is formed "only if one party surrenders substantial control over some portion of his affairs to the other." *In re Scott's Estate*, 455 Pa. 429, 316 A.2d 883, 886 (Pa.1974). A business relationship between two [*90] parties to a commercial contract dealing at arms length does not create a "special relationship" under Pennsylvania law. *Freedom Properties, L.P. v. Lansdale Warehouse Co. Inc.*, No. 06-5469, 2007 U.S. Dist. LEXIS 57116, 2007 WL 2254422, at * 6 (E.D.Pa. Aug.2, 2007).

Id.

In a business context, the taking and receiving of business advice does not generally give rise to a fiduciary relationship. 2009 U.S. Dist. LEXIS 73683, [WL] at *5 (citing *Basile v. H & R Block, Inc.*, 2001 PA Super 136, 777 A.2d 95, 102 (Pa. Super. Ct. 2001) ("recognizing that giving business advice may engender confidential relations *only* where the advisor represents himself to be an expert and the receiver 'invest[s] such a level of trust that they seek no other counsel'"); *eToll*, 811 A.2d at 23 ("holding no fiduciary duty created by a commercial contract for professional services, even where one party relies on the other party's skill or expertise")). Relying on *Basile* and *eToll*, the district court in *SieMatic* rejected the American company's argument that a confidential relationship existed between it and a related German company because the American company felt obligated to follow the advice of its German affiliate in light of the American company's weaker financial position. *Id.* The court [*91] found no evidence that the German company purported to be an expert on the American company's business affairs or that the American company sought the counsel of the German company to the exclusion of all others. *Id.*

In the case at bar, Defendants argue that the evidence shows that a confidential relationship did not exist between Boyden and Manning personally. In support, Defendants point to the fact that Boyden's contract was signed by Manning in his capacity as President and CEO of Ardex, not in his individual capacity, and to their testimony that they believed that their clients were Ardex the company, and its shareholders. (Holland Dep. 8/26-27/08 at 79:9 - 80:19, Defs. Ex. 13, ECF No. 49-14 at 8-9; Flannery Dep. 8/27/08 at 142:12-22, Defs. Ex. 4, ECF No. 49-5 at 13.) In addition, Defendants maintain that there is no evidence in the record which suggests that Manning surrendered substantial control over his affairs or relied on Boyden's trusted advice over his own opinions. Indeed, the evidence actually shows that Plaintiff refused Boyden's advice and opinion regarding the external candidates.

Plaintiff counters that a jury may conclude that he was dependent upon the Defendants [*92] to provide him as well as Ardex with accurate and full disclosures of their activities regarding the VP Operations search. Plaintiff submits full disclosure by Defendants to him of their search activities can be implied from (1) the address of the engagement letter, to wit: "Personal and Confidential, Mr. Steve Manning -- President and CEO," and (2) Defendants promise in that letter that "[d]uring the course of the assignment, we will maintain regular contact with you by e-mail or phone at a mutually agreeable interval[.]" (Pl.'s Mem. in Opp'n at 24, ECF No. 57 at 24.) Instead, Plaintiff maintains, his trust was abused by the "ex parte and vicious" communications initiated by Defendants, beginning with Flannery's 2/25/07 Letter to Gundlach (Defs. Ex. 14). (Pl.'s Mem. in Opp'n at 24-25.)

The Court agrees with Defendants. No reasonable jury could find that a confidential relationship existed between Boyden and Manning personally. It is clear that Boyden's contract was with Ardex, as Boyden was asked to conduct an executive search for the position of VP Operations *at Ardex*. Nothing in the engagement letter suggests that Boyden's responsibilities and obligations thereunder were owed to Manning [*93] personally. Plaintiff submits that because the engagement letter did not mention any other person or entity, that Manning was the sole intended beneficiary of the engagement letter. Plaintiff cites no legal authority to support his position. Clearly the letter was directed to Manning because he was the President and CEO of Ardex, and as such, had the authority to enter into contracts on behalf of the company. Nothing in the engagement letter suggests that Boyden was performing services that were intended to benefit Manning individually. To suggest otherwise defies logic.

Accordingly, because no reasonable jury could find that a confidential relationship existed between Boyden and Manning, the Court finds that summary judgment should be granted as to Plaintiff's claim for breach of fiduciary duty.

F. Negligence

Finally, Defendants seek summary judgment on Plaintiff's negligence claim on several grounds. First, Defendants submit that because the acts underlying his negligence claim rest on allegations of defamation, his negligence claim should be subject to the one year statute of limitations for defamation claims and thus is time-barred. This argument is quickly disposed of. In light of [*94] this Court's ruling above on the application of the discovery rule, Plaintiff's negligence claim is not time-barred regardless of whether the one year statute of limitations applicable to defamation claims, or the two year statute of limitations applicable to tort claims, is applied to Plaintiff's negligence claim.

Second, Defendants posit that Plaintiff's negligence claim is flawed because there is no such tort as negligent interference with a contract. Plaintiff counters that Defendants misapprehend his position--his negligence claim is not predicated upon a tort of negligent interference with contract, but rather, on Section 302A of the RESTATEMENT (SECOND) OF TORTS (1965), which states: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third party." Based on Section 302A, Plaintiff posits that a jury may find that Flannery, in failing to determine whether Holland was accurate in her recitations to him concerning the Angelo discussions and voice mail, was negligent. Plaintiff goes on to argue that if the jury finds Flannery negligent, then [*95] this negligence may in turn be found by the jury to involve an unreasonable risk of harm to Manning (i.e., his being fired) resulting from Defendants' communications with Gundlach and Nevin.

Plaintiff's argument is unavailing on two fronts. First, Plaintiff fails to provide any legal analysis to support his position. Indeed, he provides no argument regarding how his only cited case, *Suchomajcz v. Hummel Chemical Co.*, 524 F.2d 19, 24-25 (3d Cir. 1975), [21] supports his position, nor does he identify the proposition for which it is cited. Moreover, Plaintiff's argument is illogical as it puts the proverbial cart before the horse. The jury would have to find that an unreasonable risk of harm exists, among other things, before it could conclude that Defendants' conduct was negligent. But the jury does not get to decide that issue unless Plaintiff can come forward with evidence to show that a question of fact exists as to whether Defendants' conduct created an unreasonable risk of harm.

> 21 At the pinpoint cites provided, the court of appeals discusses the requirements for negligence under Section 302(b) of the RESTATEMENT, including that the risk of harm be unreasonable before an act may be [*96] found negligent, and the act of the third party be foreseeable. *Suchomajcz*, 524 F.2d at 24-25.

Here Plaintiff merely proffers Flannery's failure to determine whether Holland was accurate in her recitation of Angelo's voice mail message as evidence of an unreasonable risk of harm. However, Plaintiff fails to identify evidence in the record to suggest that Flannery had any reason to suspect that Holland's version of the Angelo voice mail may have been untrue at the time it was rendered. [22] Moreover, both Gundlach and Nevin questioned Holland about her conversations with Angelo, including the voice mail message, and her responses were consistent. In addition, Flannery spoke confidently about the accuracy of Holland's reporting of the information in her timeline, stating that "[g]iven Stacey's capacity for attention to detail, I can assure you that the information is accurate." (Defs. Ex. 33 at BOY 000052, ECF No. 49-34 at 2.) Thus, without any evidence to suggest that Holland misstated the content of her conversations with Angelo, a reasonable jury could not find that Flannery created an unreasonable risk of harm in failing to determine whether Holland's statements were accurate.

> 22 Plaintiff [*97] submits that Flannery conceded that in certain respects he knew that Holland may have misunderstood Angelo's statement. Pl.'s Sur-Reply Mem. at (citing his Responsive CSMF ¶76, ECF No. 58 at 54-58). However a review of the cited evidence belies Plaintiff's argument. Flannery is commenting on the exchange between Angelo and Holland where Angelo asks, "an interview was not possible is it?" and Gundlach's interpretation of the statement as being a"clear interference." The issue was whether Holland conveyed to Gundlach her response to Angelo's question, which explained that calling the outside candidates back in was possible unless there was no possibility that Ardex would make them an offer. Flannery attempted to explain Holland's failure to elaborate on Angelo's comment with Gundlach by stating that Holland may have misconstrued Angelo's comment. *See* ECF No. 58 at 54. Contrary to Plaintiff's assertion in his Responsive CSMF ¶76 at page 58, Flannery's comment about this *one* aspect of the several conversations between Holland and Angelo does not demonstrate or raise an inference that he had reservations about the accuracy of Holland's recounting to him of her conversations with Angelo. [*98] Nor does it provide support for Plaintiff's argument that Flannery falsely assured Nevin that "given Stacey's capacity for attention to detail, I can assure you that the information is accurate." Pl.'s Resp. CSMF ¶76 at 58, ECF No. 58 at 58.

Finally, in his sur-reply brief, Plaintiff raises a new

theory for his negligence claim, which is predicated on Boyden's alleged failure to have internal controls or procedures in place which would have attempted to determine whether Holland's version of her conversation with Angelo were accurate. Plaintiff posits that it would have been a simple matter for Flannery to have called Angelo and confirmed with her that she did in fact make the statement attributed to her by Holland. (Pl.'s Sur-Reply Mem. at 5, ECF No. 68 at 5.) This argument too is flawed. Notwithstanding the fact that Plaintiff fails to cite to any evidence in the record to support his contention that Boyden failed to have adequate internal controls in place, Plaintiff fails to provide any legal authority or analysis showing that such internal controls should have been in place in the first instance. In addition, Plaintiff ignores the fact that since neither Angelo nor Manning worked [*99] for or reported to Flannery, it would not have been up to Flannery to question Angelo or Manning about the "don't' tell Tom" voice mail. The person with that authority, Gundlach, determined that it was not appropriate or necessary to question Angelo.

In further support of his new theory, Plaintiff now argues that despite Nevin's grilling of Holland, that does not excuse Holland from any negligence in her misreporting of the Angelo conversation. This argument is completely undeveloped and lacking in any legal or factual support. As such, the Court is not required to consider it. *Massie v. U.S. Dep't of Housing & Urban Dev.*, Civ. A. No. 06-1004, 2007 U.S. Dist. LEXIS 3978, 2007 WL 184827, *3 n. 5 (W.D.Pa. Jan. 19, 2007), *vacated in part on other grounds on reconsideration*, 2007 U.S. Dist. LEXIS 14886, 2007 WL 674597 (W.D.Pa. Mar. 1, 2007) (citing *Pennsylvania v. U.S. Dep't of Health & Human Serv.*, 101 F.3d 939, 945 (3d Cir. 1996) ("stating that conclusory assertions, unaccompanied by a substantial argument, will not suffice to bring an issue before the court").

For the reasons set forth above, the Court finds no reasonable jury could find that Defendants' conduct created an unreasonable risk of harm, and therefore, Defendants are entitled to [*100] summary judgment on Plaintiff's negligence claim.

IV. CONCLUSION

For the foregoing reasons, the Court finds that no material issues of fact exist with regard to Plaintiff's claims for intentional interference with existing contractual and business relationships (Counts I and II), intentional interference with prospective business relationships (Count III), defamation (Counts IV and V), breach of fiduciary duty (Count VI), and negligence (Count VII). Because the Court has concluded that Defendants are entitled to judgment as a matter of law as to all of these claims, the Court will grant Defendants' motion for summary judgment in its entirety.

An appropriate order will follow.

Dated: March 31, 2012

BY THE COURT:

/s/ Lisa Pupo Lenihan

LISA PUPO LENIHAN

Chief United States Magistrate Judge

RAVI P. RAWAT and ELLIOTT LYONS, on behalf of themselves and others similarly situated, Plaintiffs, v. NAVISTAR INTERNATIONAL CORP., Defendant.

Case No. 08-cv-4305

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2011 U.S. Dist. LEXIS 6319

January 20, 2011, Decided
January 20, 2011, Filed

SUBSEQUENT HISTORY: Motion granted by Rawat v. Navistar Int'l Corp., 2011 U.S. Dist. LEXIS 98432 (N.D. Ill., Sept. 1, 2011)

PRIOR HISTORY: Rawat v. Navistar Int'l Corp., 2010 U.S. Dist. LEXIS 34868 (N.D. Ill., Apr. 7, 2010)

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JUDGES: JOHN W. DARRAH, United States District Court Judge.

OPINION BY: JOHN W. DARRAH

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiffs Ravi Rawat and Elliott Lyons, along with their counsel, seek certification [*2] of a class consisting of all current and former employees of Defendant Navistar International Corp. ("Navistar") whose options expired during a trading "blackout" imposed as a result of Navistar's having to restate its public financial disclosures.

Two-and-a-half years into this litigation, however, only two out of the fifty-five current and former employees whose options expired during the blackout express any interest in this case. Fifty-two of them have accepted payment from Navistar and expressly released the very claims Plaintiffs wish to assert on their behalf. In

an effort to bring these persons into this lawsuit nonetheless, Plaintiffs are seeking a declaratory judgment that those agreements -- agreements to which neither Rawat nor Lyons was a party -- are invalid. As explained below, Plaintiffs do not have standing to challenge those agreements and, thus, cannot establish the elements required for class certification.

BACKGROUND

Navistar is a publicly traded company. Its shares are listed on the New York Stock Exchange. Like many publicly traded companies, Navistar maintains stock-option plans for certain employees. Each option granted to an employee gives the holder of that option [*3] a contractual right to purchase a set number of shares at a set price (i.e., the "strike price"). The options are exercisable over time. Pursuant to the terms of the options agreements, all options expire ten years from the date of the grant or ninety days after leaving Navistar's employ, whichever comes first.

As the market price of the stock rises above the strike price of the option, the options' value increases. Employees can exercise these "in the money" options, purchase Navistar stock at the below-market strike price, and either sell it at the current market price for an immediate profit or hold it in hopes that the price climbs further upward.

On April 6, 2006, Navistar disclosed the existence of material inaccuracies in its publicly filed financial statements and the need to restate its financials for periods from 2005 and later. This disclosure triggered a "blackout period" during which employees were prohibited from exercising their stock options until Navistar completed its restatement. [1]

> 1 Plaintiffs, who have the burden of establishing the facts necessary to support their Motion for Class Certification, repeatedly attempt to do so by citing to exhibits that do not support [*4] their asserted propositions. Here is one string of examples: First, Plaintiffs assert that some class members used a "hostile tone" in expressing disappointment regarding their expiring options. *See Plaintiff Rawat and Lyons' Motion and Memorandum in Support of Class Certification* ("Pl. Mem.") at 6 (citing Exs. G-H). But the two short emails attached as exhibits demonstrate neither disappointment nor hostility. Plaintiffs' next cite is to a price chart purporting to show that Navistar's stock price rose "from the mid-20s to over $76 per share when the blackout lifted." *Id.* (citing Ex. I). But the price chart shows only a single day of trading (July 7, 2010), during which the price climbed from approximately $47.50 to just over $50 per share. Plaintiffs' next statement is, "In comparable situations, many companies simply extended the exercise period until after the blackout period ended." *Id.* (citing Ex. J). They list five companies as examples and cite a single exhibit, which consists of a variety of securities filings and press releases without any indication as to what specific portions of those documents supports that proposition; one of the companies listed does not even appear [*5] to be represented in the exhibit. In the next sentence, Plaintiffs cite to two depositions and state that numerous Navistar employees and former employees saw their stock options expire during the blackout period. *Id.* (citing Exs. C-D). The cited portions of the depositions simply do not support Plaintiffs' proposition. Plaintiffs then assert that those employees were unable to exercise their vested options because they had expired, which resulted in an aggregate loss of about $15 million to the putative class. *Id.* at 6-7. Plaintiffs cite to an untitled, unauthenticated stack of spreadsheets. *See id.* (citing Ex. K). There is no explanation as to who prepared these spreadsheets or to explain how the exhibit proves that any vested options had expired. Moreover, none of the total figures listed on the final page of that exhibit amounts to the claimed $15 million loss.
>
> Moving down a few lines in the Memorandum, Plaintiffs state, "On April 17, 2006, management argued to Navistar's Board's Compensation Committee that Navistar should simply extend the expiration date for options expiring during the blackout period until 30 days after the blackout period's end." *Id.* at 7 (citing Ex. M). The [*6] only language in Exhibit M regarding the blackout period indicates that Annette Freund presented a report regarding the impact of the restatement on Navistar's equity ownership programs and that she "discussed with the Committee various approaches to deal with outstanding in-the-money stock options that are scheduled to expire prior to the end of the

blackout." *See* Ex. M to Pl. Mem. Contrary to Plaintiffs' representations, there is no mention of any specific proposal to extend options. At best, this string of inaccuracies shows carelessness; at worst, an intent to mislead.

In January 2008, Navistar sent a letter to "Holders of Navistar International Corporation Stock Options," informing them that options may have expired or may expire in the future; that the issue would be discussed with the Board of Directors after Navistar's financials were up to date; that it was uncertain as to what, if any, action would be taken; and that Navistar would communicate with the affected individuals regardless of its ultimate decision. *See* Ex. B to Am. Compl.

On May 23, 2008, Plaintiff Rawat filed a lawsuit in this district. *See Rawat v. Navistar Int'l Corp.*, No. 08-cv-3038 (N.D. Ill.) (*Rawat I*). Shortly [*7] thereafter, on May 29, 2008, Navistar's financials were restated, ending the blackout period that began in April 2006.

On June 16, 2008, Navistar's Compensation Committee met and approved cash payments for all in-the-money stock options that expired during the blackout period. On June 20, 2008, Navistar sent a letter to all employees and former employees whose options expired during the blackout period (except Rawat, the only plaintiff in the action pending against Navistar). [2] Navistar offered to pay an amount for each expired option equal to the difference between the closing price on the day the option expired and the strike price. In exchange, each recipient was required to execute a release of all claims related to the expiration of those options, including, specifically, those claims asserted by Rawat in the pending lawsuit. Each recipient was given until August 1, 2008, to accept or reject the offer.

2 On June 18, 2008, the day Navistar's response to the complaint in *Rawat I* was due, Navistar filed an unopposed motion for an extension of time to file a response. The motion was granted, giving Navistar until July 8, 2008. Plaintiffs now contend that Navistar sought this extension [*8] "as a ruse to directly solicit class members to release their claims." Pl. Mem. 8-9. However, Plaintiffs do not explain how a two-week extension on the deadline for Navistar's motion to dismiss (which was based on a challenge to this Court's subject-matter jurisdiction) in any way enabled the settlement offers in question or why those same offers could not have been made after Navistar filed its motion to dismiss.

On June 26, 2008, Plaintiff presented an emergency motion, asking this Court to enjoin Navistar from contacting any putative class members and to void any releases submitted by putative class members. The Court heard arguments from both sides. To provide the recipients of the June 2008 letter sufficient time to evaluate their options and to address Plaintiffs' counsel's concern that the letter failed to provide appropriate information about the pending lawsuit, the Court ordered the parties to confer and prepare a supplemental notice to be sent to everyone who had received the June letter, advising them simply that a lawsuit has been filed on behalf of a putative class of which they might be members and providing Plaintiffs' attorneys' contact information. In light of Navistar's [*9] representation that four persons had signed releases, the Court also directed the parties to inform all recipients of the June letter that they could reconsider their decision prior to the August 1, 2008 deadline. A court-approved supplemental notice [3] containing this information was prepared jointly by the parties and sent to all members of the proposed class on July 1, 2008. [4]

3 A copy of the July 1 letter is attached to this Opinion as Exhibit A.

4 Contrary to Plaintiffs' blatant misrepresentation of what transpired at that hearing or the order that followed, this Court never made any finding that the letter was coercive and misleading. *See* Pl. Mem. 11.

After the hearing held on June 26, 2008, Navistar filed a motion to dismiss *Rawat I* for lack of subject-matter jurisdiction. *Rawat I*, Docket No. 20. Rawat had alleged federal jurisdiction in that case based on diversity of citizenship under the Class Action Fairness Act, *codified at* 28 U.S.C. § 1332(d), which requires, among other things, at least 100 members in the proposed plaintiff class. *Id.* Navistar asserted that there were fewer than seventy-five such persons. *Id.* On July 18, 2008, Rawat filed a parallel case in the Circuit Court [*10] of Cook County, Illinois.

On July 30, 2008 -- two days before the August 1 deadline for the acceptance of the releases approved by this Court in *Rawat I* -- Rawat apparently intended to present in the state court the same arguments previously raised in this Court and to ask the chancery judge to

enjoin Navistar from accepting any releases from putative class members. *See* Docket No. 20, at 9. [5] However, Rawat never had the chance to present that argument in state court. Because the complaint he filed in that action alleged a broader class of plaintiffs than was alleged in *Rawat I* -- consisting of *all* employees who were prevented from exercising their options during the blackout period (as opposed to only those whose options *expired* during that time), Rawat's alleged class now consisted of more than 100 members. Accordingly, Navistar removed the case to federal court on July 29, 2008. [6] The case was assigned to another judge in this district. *See Rawat v. Navistar Int'l Corp.*, 08-cv-4305 (N.D. Ill.) (*Rawat II*).

5 Unless otherwise indicated, all citations to docket entries are to those entered in the instant case.

6 After removal, Plaintiff trimmed his proposed class definition back to what it [*11] was in *Rawat I*. He now seeks to certify a class consisting only of those employees whose options *expired* during the blackout period. In their opening brief, Plaintiffs claim there are more than fifty putative members. In their reply, they state that there may only be thirty-three remaining putative members.

The day after Navistar removed the case to federal court, Rawat filed an Emergency Motion for a Temporary Restraining Order, a Motion for Preliminary Injunction, and a Motion to Certify Class. *See* Docket Nos. 9, 11, 13. The request was the same as in Rawat's Emergency Motion that had been argued and ruled upon by this Court on June 26, 2008: Rawat asked another federal judge in this district to enjoin Navistar from accepting any releases or to invalidate any releases that had been accepted. At a hearing on July 30, 2008, Judge Der-Yeghiayan, acting as emergency judge, heard arguments from both sides, denied Rawat's Motion for Temporary Restraining Order, and ordered that the issue be presented to this Court, where *Rawat I* was still pending at the time. Rawat did not do so. *Rawat II* was eventually reassigned to this Court and; on September 23, 2008, *Rawat I* [*12] was voluntarily dismissed.

On August 18, 2010, the day before its response to Plaintiffs' Motion for Class Certification was due, Navistar filed a Motion Concerning Contacts with Absent Class Members. Navistar asserted that fifty-two of the fifty-five individuals whose options expired during the blackout period accepted an offer of payment from Navistar in exchange for an express release of all claims related to the expiration of their options (including the claims asserted in this lawsuit) and that none of the individuals who were given an opportunity to rescind their release opted to do so after receiving the jointly prepared supplemental notice of July 1, 2008. Navistar intended to present that evidence to the Court. Because Plaintiffs had vehemently objected to Navistar's contacting any putative class members, however, Navistar sought the Court's permission. The Court granted the motion at a hearing on August 24, 2010. Plaintiffs then brought a motion to reconsider that decision, which was denied. [7]

7 Plaintiffs now object to the declaration of Livia Kiser, Navistar's counsel, as inadmissible hearsay. In resolving Plaintiffs' motion for class certification, the Court did not rely [*13] on Ms. Kiser's representation as to any statements made to her by putative class members; the Court relied on the declarations of those putative members themselves. Any statements in Ms. Kiser's declaration regarding statements made by additional putative members were disregarded.

Navistar presented the Court with declarations from Navistar's counsel and from twenty-one putative class members. The putative class members stated that they received Navistar's June 20 letter, as well as the Court-ordered supplemental notice; that they executed a release and received payment for their expired options; that they are satisfied with their offer; and that they have no interest in seeking rescission of the release. *See generally* Docket Nos. 161, 164.

Plaintiffs' reply brief in support of its motion for class certification was filed shortly thereafter. The issue of class certification therefore is now fully briefed and ripe for ruling.

LEGAL STANDARD

"The Federal Rules of Civil Procedure provide the federal district court with broad discretion to determine whether certification of a class-action lawsuit is appropriate." *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998) (citation and internal quotation [*14] marks omitted). In determining whether the class-action requirements are met, "a judge should make whatever

factual and legal inquiries are necessary under Rule 23." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (*Szabo*). The court should not, however, make any determination as to the underlying merits of the claims. *Id.* at 677. The party seeking class certification has the burden of demonstrating certification is appropriate. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993).

To obtain class certification, Plaintiffs must demonstrate that the proposed class satisfies all four elements of Federal Rule of Civil Procedure 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. The court must conduct a "rigorous analysis" to determine that each element of Rule 23(a) has been satisfied. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).

If Rule 23(a) is satisfied, the proposed class must also satisfy at least one of the three provisions under Rule 23(b). Here, Plaintiffs seek certification under Rule 23(b)(2) and (b)(3). A class should be certified under Rule 23(b)(2) only if Navistar "has acted or refused [*15] to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *See* Fed. R. Civ. P. 23(b)(2). A class should be certified under Rule 23(b)(3) only if the court finds the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Szabo*, 249 F.3d at 676.

ANALYSIS

Plaintiffs have asked the Court to certify the following class:

> All Navistar employees and former employees whose stock options expired during Navistar's "blackout" period (April 6, 2006 -- May 29, 2008).

Pl. Mem. 15.

As discussed above, there are only two such individuals who express any interest in joining this litigation: named Plaintiffs Ravi Rawat and Elliott Lyons. [8] More importantly, there are only three individuals (including the named Plaintiffs) who have not expressly *disclaimed* interest in this litigation. Of the fifty-three remaining employees whose options expired during the blackout period, fifty-two released the claims asserted [*16] in this action in exchange for a cash payment. *See* Ex. 17 to Def. Resp. Br. The sole remaining employee neither signed a release nor joined this litigation.

> 8 A third individual, Nick Matich, also joined this litigation as a party plaintiff but dismissed his claims after Navistar filed a counterclaim against him for violating a covenant not to sue. Matich was represented by the same counsel who represents Rawat and Lyons. Matich "agree[d] to dismiss his claims with prejudice (including his [Illinois Wage Payment and Collection Act] claim) and release[] Navistar in exchange for a cash payment and a mutual release of Navistar's counterclaim." *See* Docket No. 65. Class counsel expressly approved the dismissal. *See id.* Matich was dismissed without objection.

Plaintiffs persist in claiming that the releases should be declared invalid, arguing that the offer of payment by Navistar omitted certain material facts necessary for the recipients to make an informed decision. Many of these "material facts" concern Plaintiffs' theory that Navistar should have instead chosen to extend the options period, which would have proved more beneficial to the affected employees and, consequently, more expensive [*17] for Navistar. Plaintiffs also believe that Navistar should have informed each recipient that claims under the Illinois Wage Payment and Collection Act cannot be released. Additionally, Plaintiffs believe that Navistar should have disclosed that its Board of Directors had agreed in October 2006 to amend the Non-Employee Director Stock Option Agreement of one of its directors to extend the life of his options beyond the expiration of the blackout period. [9] Plaintiffs also argue that the agreements were signed under duress and that they are void as a matter of public policy and for lack of consideration.

> 9 Because that director is not an employee of Navistar, he is not a member of Plaintiffs' proposed class. Also, he later cancelled his options. *See* Ex. S to Pl. Mem.

However, the named Plaintiffs here do not have standing to challenge an agreement to which they were

not a party. Settlement agreements are contracts. *Newkirk v. Village of Steger*, 536 F.3d 771, 774 (7th Cir. 2008). Ordinarily, only parties to a contract have standing to challenge its validity. *In re Vic Supply Co.*, 227 F.3d 928, 930 (7th Cir. 2000). "Obviously, the fact that a third party would be better off if a contract were [*18] unenforceable does not give him standing to sue to void the contract." *Id.* at 931. Neither of the named Plaintiffs accepted Navistar's offer or signed a release. Thus, neither of the named Plaintiffs could have suffered an injury arising from those agreements; and neither has standing to challenge the validity of those agreements. *Cf. Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 551 (5th Cir. 1988) (rejecting named plaintiffs' attempt to void releases of other employees because the plaintiffs who did not sign releases lacked standing to represent those who had).

A plaintiff who lacks standing to bring a claim in his own right cannot qualify as a class representative for a class of persons able to raise that claim. *Foster v. Center Twp. of LaPorte County*, 798 F.2d 237, 244 (7th Cir. 1986) (citing *Bailey v. Patterson*, 369 U.S. 31, 32-33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962)). "It is well-settled that individuals who represent a class must allege that they personally have suffered from the injury alleged." *Midwest Cmty. Council, Inc. v. Chi. Park Dist.*, 87 F.R.D. 457, 461 (N.D. Ill. 1980).

Plaintiffs quote *Newberg on Class Actions* for the proposition that standing is not an impediment to class certification under Rule 23. [*19] *See* Pl. Mem. 5-6 (quoting Herbert B. Newberg et al., 1 *Newberg on Class Actions* § 2:7 (4th ed. 2010) ("The fact that the plaintiff now seeks to represent the rights of absent parties because the case or controversy is common to those parties does not in any way create additional constitutional standing requirements."). Plaintiffs miss the point. Newberg is discussing the fact that individual showings of standing are not required for *passive* class members (i.e., class members other than the named plaintiffs). *See id.* The treatise goes on to say that "fundamentally, the named plaintiff must have individual standing." *Id.* "Having standing which a class representative shares with the members of a class is another way of saying that the class representative is a proper party to raise a particular issue common to the class." *Id.*

Plaintiffs also argue that the release issue necessitates a merits-based determination that would be premature at the class-certification stage. As Plaintiffs note, "A court may not say something like . . . 'I'm not going to certify a class unless I think that the plaintiffs will prevail.'" *See* Pl. Mem. 14 (quoting *Szabo*, 249 F.3d at 677). However, the *Szabo* court [*20] ultimately reversed a district court's order certifying a class, stating that Rule 23 does not "prevent[] the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule." *Szabo*, 249 F.3d at 677. A court presented with a motion for class certification is not required to assume that all members of a class are similarly situated. *Id.*

Clearly, it would be improper for the Court to deny class certification on the basis that Plaintiffs are unlikely to succeed on the merits of their claims. But standing is an issue that must be addressed *before* any determination as to the merits of Plaintiffs' claims. As explained above, it is undisputed that all but three potential class members have released their claims; and no one with standing to contest those releases (i.e., no one who signed a release) has stepped forward to do so. To the extent the validity of the releases is a merits issue, it is an issue that Plaintiffs lack standing to raise.

Plaintiffs' reliance on *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, No. 00 C 5755, 2000 U.S. Dist. LEXIS 17832, 2000 WL 1774091 (N.D. Ill. Dec. 1. 2000), also is misplaced. In that case, Judge Lefkow rejected the defendants' argument [*21] that "the class size should be eleven because all but eleven signed agreements releasing their claims." 2000 U.S. Dist. LEXIS 17832, [WL] at *3 (internal quotation marks omitted). In doing so, however, she expressly acknowledged authority in which courts have denied class certification where a significant number of putative class members had signed releases. 2000 U.S. Dist. LEXIS 17832, [WL] at *3 & n.4 (citing *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 14, 207 U.S. App. D.C. 15 (D.C. Cir. 1980) (*Melong*); *Casper v. Cunard Line*, 560 F. Supp. 240, 243 (E.D. Pa. 1983)). Judge Lefkow held that the case before her was distinguishable from those cases "in that defendants' method of obtaining the releases may have intruded on the court's authority to oversee the notice to class members in the class certification process in a fair manner." 2000 U.S. Dist. LEXIS 17832, [WL] at *3. She also stated that the court was unable to "determine on the record before it how many or even if releases were signed by potential class members." 2000 U.S. Dist. LEXIS

17832, [WL] at *3 n.5.

Such concerns are not present in the instant case. First, the record contains releases signed by fifty-two of the fifty-five putative class members. Second, Plaintiffs' concerns regarding Navistar's method of obtaining releases were addressed back in [*22] 2008. After a lengthy hearing on the issue, the Court approved the parties' jointly prepared supplemental statement that went out to all putative class members. Third, Defendants have presented the Court with declarations from twenty-one of the putative class members in which they expressly disclaim any interest in this litigation.

Rule 23 does not require the Court to turn a blind eye to the fact that Rawat, Lyons, and their counsel are the only ones who want to push forward with this proposed class action. As discussed below, Plaintiffs' lack of standing to challenge the releases of their fellow employees is fatal to their ability to show that a class should be certified under Rule 23.

First, Plaintiffs cannot show that the proposed class is "so numerous that joinder of all members is impracticable" as required by Rule 23(a)(1). It is undisputed that fifty-two of the fifty-five putative class members accepted payment from Navistar and released their claims. (Plaintiffs take issue with those releases on several grounds; but, as discussed above, they lack standing to challenge their legality.) That leaves one absent putative class member. It would not be impracticable to join her as [*23] a plaintiff with Rawat and Lyons.

Moreover, the declarations of twenty-one current and former Navistar employees further demonstrate Plaintiffs' inability to establish numerosity. With full knowledge of the pendency of Plaintiffs' suit regarding the stock options, those employees expressly disclaimed any interest in this litigation. Even if a class could otherwise be certified for the remaining thirty-four individuals, the class would not be so numerous that joinder would be impracticable. "Although there is no 'bright line' test for numerosity, a class of forty is generally sufficient." *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 643 (N.D. Ill. 2002) (citations omitted). Joinder of fewer than forty persons can still be impracticable based on other factors, but Plaintiffs have not shown that any such factors are present here. All potential members are clearly identified; there is no indication that any person would risk inconsistent verdicts by pursuing their own actions; and Plaintiffs have not established that the size of individual claims or the individuals' financial resources would prevent them from litigating their claims.

Plaintiffs' lack of standing to void others' releases also [*24] prevents them from meeting Rule 23(a)(3)'s requirement that class representatives' claims must be typical of those of the class. Although Plaintiffs' substantive claims as to the expired options are typical of all employees similarly affected, fifty-two of the fifty-five employees would also have to cause the releases they signed to be declared void. Plaintiffs, who did not sign those releases, would not have to do so. Thus, Plaintiffs' claims are not typical of those of the class. *See Greeley v. KLM*, 85 F.R.D. 697, 701 (S.D.N.Y. 1980) ("Having refused to settle, plaintiff has no personal reason to be concerned with the means by which KLM induced settlements from others and therefore has no real interest in proving those settlements were wrongfully obtained. Thus his interest is not coextensive with the interests of the class members who settled, and his claim is not typical of those of the class."); *Melong*, 643 F.2d at 15 ("[T]he existence of such releases adds new and significant issues to actions brought on the underlying claims. When the purported class representative has not executed a release and need not establish that the release is defective in his individual case, serious [*25] questions are raised concerning the typicality of the class representative's claims and the adequacy of his representation of other class members.").

As *Melong* holds, because Plaintiffs here did not sign releases, questions are also raised as to their ability to adequately represent other class members who signed releases. Rule 23(a)(4) requires class representatives who can "fairly and adequately protect the interests of the class." "Adequacy" is met when the representative's interests are not antagonistic to or in conflict with those of the other class members. *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002).

Here, Plaintiffs clearly have interests that are in conflict with those of other class members. Plaintiffs argue that other putative class members would not be prejudiced if the Court found the releases to be invalid because Plaintiffs merely seek to have the releases declared "voidable" (not void). They contend that such an order from the Court would present each individual who signed the release with the option of voiding the release and joining the litigation or doing nothing, keeping the

payment, and effectively opting out of this litigation. [*26] However, it is clear that Plaintiffs are seeking to have the releases declared invalid. Their Amended Complaint specifically alleges "an actual controversy regarding whether the releases are *invalid*," asks the Court "to *nullify* any releases received" by Navistar, and prays for judgment "*[v]oiding* releases accepted by Navistar in connection with this action." Am. Compl. ¶¶ 2, 74, D (emphasis added); *see also* Pl. Mem. 7 (arguing that releases are unsupported by consideration and, thus, *void*).

Therefore, Plaintiffs' interests are at odds with the interests of persons who wish to retain the benefit of the releases they signed over two years ago. At the very least, there is a question as to Plaintiffs' ability to adequately represent other class members.

Ultimately, because Plaintiffs do not have standing to challenge the releases, they remain a class of two (or three, if the other person who did not sign the release is to be counted). Navistar offers numerous additional arguments as to why Plaintiffs cannot meet their burden of establishing the elements under Rule 23(a) and why Plaintiffs cannot demonstrate that certification is appropriate under Rule 23(b). Based on the above analysis, [*27] it is unnecessary to address them.

CONCLUSION

For the reasons discussed above, Plaintiffs' Motion for Class Certification is denied.

Date: January 20, 2011

/s/ John W. Darrah

JOHN W. DARRAH

United States District Court Judge

Exhibit A

Navistar, Inc.

4201 Winfield Road

Warrenville, IL 60555 USA

P: 630-753-3052

W: navistar.com

Annette M. Freund

Vice President,

Compensation, Benefits

and HR Support

July 1, 2008

NOTICE: THIS MAY AFFECT YOUR LEGAL RIGHTS

To all recipients of the June 20, 2008 letter from Annette Freund, Vice President, Compensation, Benefits and HR Support of Navistar International Corporation:

Dear Elliott J. Lyons:

You received a letter offering a cash payment and soliciting your release of claims relating to Navistar Stock Options.

Releases sent to the Company before August 1, 2008 will not be effective until August 1, 2008. Anyone who had previously sent releases to the Company may reconsider your release until August 1, 2008. If you choose to reconsider, you have until August 1, 2008 to deliver a revocation to Mr. Howard Kuppler, Navistar International Corporation, 4201 Winfield Road, P.O. Box 1488, Warrenville, IL 60555.

A class action case, *Rawat v. Navistar Int.'l Corp.*, 08cv3038 (N.D. [*28] Ill.), seeks to certify a class consisting of persons with vested stock options that expired during the period when trading restrictions were in place. The lawsuit claims that Navistar is obligated to compensate you for any resulting harm because of your inability to exercise your options before they expired

For any inquires regarding *Rawat v. Navistar Int'l Corp.*, you may contact the following counsel:

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You may also contact legal counsel of your choice.

LYONS 0001

Not Reported in F.Supp.2d, 2012 WL 7009007 (M.D.Pa.)
(Cite as: 2012 WL 7009007 (M.D.Pa.))

H

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 Oc-

tober 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 pre-

vented 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 axiomatic 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
Not Reported in F.Supp.2d, 2012 WL 7009007 (M.D.Pa.)

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Not Reported in A.3d, 2011 WL 10876908 (Pa.Cmwlth.)
(Cite as: 2011 WL 10876908 (Pa.Cmwlth.))

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Only the Westlaw citation is currently available.

THIS IS AN UNREPORTED PANEL DECISION OF THE COMMONWEALTH COURT. AS SUCH, IT MAY BE CITED FOR ITS PERSUASIVE VALUE, BUT NOT AS BINDING PRECEDENT. SEE SECTION 414 OF THE COMMONWEALTH COURT'S INTERNAL OPERATING PROCEDURES.

Commonwealth Court of Pennsylvania.
Janice A. WILSON, Appellant
v.
COUNTY OF MONTGOMERY.

No. 2463 C.D.2010.
Submitted Oct. 18, 2011.
Decided Nov. 17, 2011.

BEFORE: PELLEGRINI, Judge, and McCULLOUGH, Judge, and FRIEDMAN, Senior Judge.

MEMORANDUM OPINION

PELLEGRINI, Judge.

*1 Janice A. Wilson (Wilson) appeals from an order of the Court of Common Pleas of Montgomery County (trial court) granting the motion for summary judgment filed by the County of Montgomery (County) finding that Wilson was an at-will employee and could not challenge her termination. Finding no error in the trial court's opinion, we affirm.

Wilson was employed by the County from 1990 until her termination on August 30, 2007. At the time her employment was terminated, Wilson was working as the administrative assistant to the Support Conciliators of the County's Domestic Relations Section. Bernadette Grib (Grib) was also employed by the County at the front desk of the Conciliators Office and Wilson and Grib frequently interacted with each other. The working relationship between Wilson and Grib deteriorated over the last five years of Wilson's employment due to Grib's attendance issues, poor performance and Wilson's attempts to cover Grib's duties. In December of 2005, Wilson and Grib were encouraged to resolve their difficulties, but were unable to do so. Each woman's supervisor eventually became involved and on August 1, 2006, Wilson and Grib were required to attend a "mediation" to resolve their difficulties. At the conclusion of the mediation, a written agreement or memorandum (the Memorandum) was drafted covering all aspects of Wilson's employment relationship with Grib. The Memorandum stated that the women had 30 days to improve their working relationship or face termination, with "no exceptions or excuses. This is their final notice." (Memorandum at ¶ 28). Both women signed the Memorandum which stated "I agree to the terms listed in this memo and understand that any violation or incident will result in termination of my employment." (Memorandum at ¶ 28). One year later, Wilson and Grib were involved in another work incident and were subsequently called into a meeting with several supervisors and the County EEO coordinator on August 30, 2007. Both women were able to present their versions of events during this meeting, after which both Wilson and Grib's employment was terminated. The following day Wilson's medical benefits were terminated.

On September 28, 2007, Wilson filed a complaint and petition for preliminary injunction with the trial court. She filed a second amended complaint on March 10, 2008, which asserted claims for breach of express contract for employment, breach of collateral contract for employment, promissory estoppel, and equitable estoppel, and sought preliminary and permanent injunctive relief. Wilson alleged that the

Memorandum was an express contract for employment with the County because both parties bargained for and supplied consideration for the new employment agreement. She also argued that the Memorandum contained an implied for-cause termination provision covering all aspects of her working relationship with Grib. According to Wilson, she did not violate the terms of the Memorandum; rather, the County breached the employment contract by terminating her employment without cause. Wilson relied upon the Memorandum and the alleged changes in the material terms of her employment that it brought about, and the County knew or had reason to know of her reliance. Wilson alleged that she suffered physical harm and injury due to the actions of the County because her medical benefits were terminated and she was unable to continue treatment for her multiple sclerosis and cerebral meningioma.

***2** The County filed preliminary objections claiming, *inter alia,* that the second amended complaint must be dismissed because the County could not contract away an employee's at-will status, the Supreme Court of Pennsylvania had rejected equitable estoppel as an exception to the at-will employment rule, and there was no cause of action under Pennsylvania law for "breach of a collateral contract." The trial court sustained the preliminary objections as to the breach of collateral contract claim, which was dismissed with prejudice, and overruled all remaining preliminary objections. After a hearing, the trial court denied Wilson's request for a preliminary injunction. The County then filed a motion for summary judgment, which Wilson opposed.

The trial court granted the County's motion for summary judgment and dismissed the second amended complaint with prejudice. The trial court noted that in Pennsylvania, public employees were typically employees-at-will and could be dismissed for a good reason, bad reason or no reason at all, unless the legislature had explicitly conferred tenure. *See Stumpp v. Stroudsburg Municipal Authority,* 540 Pa. 391, 658 A.2d 333 (1995); *Bolduc v. Board of Supervisors of Lower Paxton Township,* 618 A.2d 1188 (Pa.Cmwlth.1992). In addition, public employers did not have the power to enter into an employment contract exempting their employees from at-will status unless this power had been specifically conferred by statute. The County had not been granted the authority to enter into such employment contracts and contract away at-will status. Therefore, the Memorandum was not a valid enforceable employment contract, Wilson was an at-will employee and she could not maintain an action for breach of contract. Even if the County had intended the Memorandum to be an employment contract, the trial court noted that it would be void and unenforceable as an *ultra vires* action. Finally, the trial court stated that promissory and equitable estoppel claims had been rejected by Pennsylvania courts as exceptions to the at-will doctrine. *See Stumpp; Paul v. Lankenau Hospital,* 524 Pa. 90, 95, 569 A.2d 346, 348 (1990). Consequently, these claims by Wilson failed as a matter of law. Wilson then appealed to this Court.[FN1]

FN1. Our review of a trial court order granting summary judgment is limited to determining whether the trial court abused its discretion or committed an error of law. *Manley v. Fitzgerald,* 997 A.2d 1235, 1238 n. 2 (Pa.Cmwlth.2010). Summary judgment may only be granted when, after examining the record in the light most favorable to the non-moving party, the record clearly demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

On appeal, Wilson first argues that under the principles of contract law, there was an implied for-cause termination provision in the Memorandum which was sufficient to remove her employment from the presumption of at-will status and which created a binding employment contract between Wilson and the County. Wilson argues that the purpose of the media-

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(Cite as: 2011 WL 10876908 (Pa.Cmwlth.))

tion session which she and Grib attended was to set up an express agreement regarding their working relationship. The Memorandum which resulted was intended to be enforceable and covered all aspects of Wilson's working relationship with Grib. According to Wilson, because she did not violate any provisions of the Memorandum, she could not be terminated for any reason relating to the workplace situation with Grib, and the County breached the contract when it terminated her without cause.

*3 Despite Wilson's assertions, the law in Pennsylvania regarding the status of public employees is clear.[FN2] As a general rule, public employees are employees-at-will and subject to summary dismissal, meaning that their employment may be terminated for any reason or no reason at all, unless the legislature has explicitly conferred tenure. *Bolduc v. Board of Supervisors of Lower Paxton Township,* 618 A.2d 1188, 1190 (Pa.Cmwlth.1992) (citing *Scott v. Philadelphia Parking Authority,* 402 Pa. 151, 166 A.2d 278 (1960)). *See also Stumpp v. Stroudsburg Municipal Authority,* 540 Pa. 391, 394–95, 658 A.2d 333, 334 (1995). "Tenure in public employment, in the sense of having a claim to employment which precludes dismissal on a summary basis is, where it exists, a matter of legislative grace." *Scott,* 402 Pa. at 154, 166 A.2d at 281. Especially pertinent is the fact that public employers such as the County are not authorized to enter into employment contracts which would exempt their employees from at-will status unless this power has been expressly conferred by statute. *Id.; Stumpp,* 540 Pa. at 395, 658 A.2d at 335; *Bolduc,* 618 A.2d at 1190.

FN2. The cases upon which Wilson bases her arguments are inapplicable because they involve professionals specifically hired to perform special services pursuant to a contract, explicit employment contracts offered by private sector employers, civil service employees or collective bargaining agreements.

In this case, Wilson failed to plead and this Court cannot find any statute or express authority which grants the County such power. Even if the Memorandum Wilson signed could be construed as an employment contract, the County acted beyond its powers by entering into such an agreement, making it void and unenforceable as an *ultra vires* act of the County. *See Clairton Slag, Inc. v. Department of General Services,* 2 A.3d 765, 782 (Pa.Cmwlth.2010); *Bolduc,* 618 A.2d at 1190. Because Wilson cannot maintain a breach of contract claim pursuant to the Memorandum, the trial court properly granted the County's motion for summary judgment.

Wilson also argues that the trial court erred in dismissing her promissory and equitable estoppel claims. However, the Supreme Court of Pennsylvania has specifically stated:

> More importantly, equitable estoppel has been affirmatively rejected by this Court as an exception to the at-will rule. In *Paul v. Lankenau Hospital,* 524 Pa. 90, 569 A.2d 346 (1990), we held that "the doctrine of equitable estoppel is not an exception to the employment at-will doctrine. An employee may be discharged with or without cause, and our law does not prohibit firing an employee for relying on an employer's promise." *Id.* at 95, 569 A.2d at 348. Thus, the issue of whether Appellee detrimentally relied on any promises of the [employer] is simply not relevant in determining whether Appellee has a protectable property interest in his employment.
>
> *Stumpp,* 540 Pa. at 397, 658 A.2d at 336.

In addition, in order to make a claim for promissory estoppel, Wilson would have to show the following: (1) that the County made a promise that it should have reasonably expected to induce action or forbearance on the part of Wilson; (2) Wilson actually took action or refrained from taking action in reliance on this promise; and (3) injustice could be avoided

only by enforcing the County's promise. *Crouse v. Cyclops Industries,* 560 Pa. 394, 403, 745 A.2d 606, 610 (2000). However, our Supreme Court has definitively stated that detrimental reliance on an employer's promise is not relevant in the context of at-will employment and that firing an employee for relying upon an employer's promise is not prohibited. Such language clearly precludes a claim for promissory estoppel because an employee cannot meet all of the required elements to establish a claim. In addition, "exceptions to [the at-will] rule have been recognized in only the most limited of circumstances where discharges of at-will employees would threaten clear mandates of public policy." *Paul,* 524 Pa. at 95, 569 A.2d at 348. Therefore, the trial court properly rejected the theory of promissory estoppel as an exception to the at-will employment rule.

***4** Accordingly, the order of the trial court is affirmed.

ORDER

AND NOW, this *17th* day of *November,* 2011, the order of the Court of Common Pleas of Montgomery County, dated October 19, 2010, is affirmed.

Pa.Cmwlth.,2011.
Wilson v. County of Montgomery
Not Reported in A.3d, 2011 WL 10876908 (Pa.Cmwlth.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing Addendum to Reply in Support of the NCAA Defendants' Preliminary Objections to Amended Complaint on the following by First Class Mail and email:

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