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, et al.

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.

Defendants.

Docket No. 2013-2082

Type of Case: Commercial

Type of Pleading: Appendix to Memorandum in Opposition to Defendants' Preliminary Objections to First Amended Complaint

Filed on Behalf of: Plaintiff George Scott Paterno as Duly Appointed Representative of the Estate and Family of Joseph Paterno

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APPENDIX

TABLE OF UNREPORTED CASES

Not Reported in F.Supp., 1992 WL 97826 (E.D.Pa.)
(Cite as: 1992 WL 97826 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
ADVANCED POWER SYSTEMS, INC.
v.
HI–TECH SYSTEMS, INC., et al.

Civ. No. 90–7952.
April 30, 1992.

Francis X. Manning, Stradley, Ronon, Stevens & Young, Philadelphia, Pa., John B. Hammalian, Stephen R. Harris, Stradley, Ronon, Stevens & Young, Wayne, Pa., for Advanced Power Systems, Inc.

Roy S. Cohen, Cohen & Green, P.C., Philadelphia, Pa., Stephen N. Huntington, Franklin, Margulies & Huntington, Philadelphia, Pa., James R. Freeman, Phoenixville, Pa., for Hi–Tech Systems, Inc., Robert L. Smith and Sylvia Smith.

Charles A. Fitzpatrick, III, Arthur B. Keppel, Mylotte, David & Fitzpatrick, Philadelphia, Pa., for Pinkerton's Investigative Services, Inc.

Lee Chidester, pro se.

MEMORANDUM

LOUIS H. POLLAK, District Judge.

***1** 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). [FN1] 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.

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. 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

***2** The Second Amended Complaint alleges that defendants engaged in a fraudulent scheme that included robbery, mail fraud, 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, 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." [FN2] Second Amended Complaint ¶ 59.

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). 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.

***3** 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 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." *United*

States 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.

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 [FN3] 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,[FN4] but rather for the broader goal of stealing APS's property.

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 ¶ 60. Pinkerton contends, based on this similarity, that *Temple* applies and that the RICO count should be dismissed for failure to allege an enterprise.

***4** 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 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 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.

***5** 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 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 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). 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.

*6 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 (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. *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 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.

*7 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). 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 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.[FN5] 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.

***8** 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 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 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. [FN6] *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.

D. RICO Conspiracy

***9** 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 "[a]ny 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 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 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.

***10** *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, 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 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, [FN7] 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 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.

***11** 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 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), 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 can be considered relevant, if not binding, to a motion to dismiss under Federal Rule 12(b).

***12** 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 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. 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.[FN8]

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

***13** 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 DENIED.

FN1. 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.

FN2. 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.

FN3. 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.

FN4. 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.

FN5. 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.

FN6. 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.

FN7. 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.

FN8. 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.

E.D.Pa.,1992.
Advanced Power Systems, Inc. v. Hi-Tech Systems, Inc.
Not Reported in F.Supp., 1992 WL 97826 (E.D.Pa.)

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--- A.3d ----, 2014 WL 1382675 (Pa.Cmwlth.)
(Cite as: 2014 WL 1382675 (Pa.Cmwlth.))

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Only the Westlaw citation is currently available.

Commonwealth Court of Pennsylvania.
Jake CORMAN, in his official capacity as Senator from the 34th Senatorial District of Pennsylvania and Chair of the Senate Committee on Appropriations; and Robert M. McCord, in his official capacity as Treasurer of the Commonwealth of Pennsylvania, Plaintiffs
v.
The NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

No. 1 M.D.2013.
Submitted Dec. 13, 2013.
Decided April 9, 2014.

Matthew H. Haverstick, Philadelphia, for plaintiff Senator Jake Corman.

Thomas W. Scott, Harrisburg, for defendant.

BEFORE: DAN PELLEGRINI, President Judge, and BERNARD L. McGINLEY, Judge, and BONNIE BRIGANCE LEADBETTER, Judge, and ROBERT SIMPSON, Judge, and MARY HANNAH LEAVITT, Judge, and PATRICIA A. McCULLOUGH, Judge, and ANNE E. COVEY, Judge.

OPINION BY Judge ANNE E.COVEY.

*1 Senator Jake Corman (Senator Corman) and Treasurer Robert M. McCord (Treasurer McCord) (collectively, Plaintiffs) move this Court for judgment on the pleadings, seeking declaratory relief against the National Collegiate Athletic Association (NCAA). On January 4, 2013, Senator Corman filed a complaint with this Court against the NCAA and Timothy P. White (White), Chair of the NCAA-established Child Sexual Abuse Endowment Task Force. On February 20, 2013, Senator Corman filed an amended complaint against the NCAA and White. On March 27, 2013, Senator Corman, joined by Treasurer McCord, filed Plaintiffs' Second Amended Complaint (Plaintiffs' Second Amended Complaint) against the NCAA.

On April 23, 2013, the NCAA filed preliminary objections to Plaintiffs' Second Amended Complaint challenging Plaintiffs' standing, and contending that Pennsylvania State University (PSU) is an indispensable party whose absence deprived this Court of jurisdiction. The NCAA's preliminary objections also asserted that Count I of Plaintiffs' Second Amended Complaint failed to state a claim upon which relief can be granted and that the Institution of Higher Education Monetary Penalty Endowment Act (Endowment Act) [FN1] and the proffered construction of the act entitled "An Act to Accept Public Lands, by the United States, to the Several States, for the Endowment of Agricultural Colleges" (Act 10A) [FN2] violated the United States (U.S.) and Pennsylvania Constitutions.

FN1. Act of February 20, 2013, P.L. 1, 24 P.S. §§ 7501–7505.

FN2. Act of July 2, 2012, Supplement to Act of April 1, 1863, P.L. 213. The purpose of Act 10A is to make appropriations in order to implement the 1863 Act; to provide for a method of accounting for the funds appropriated; and to make an appropriation from a restricted account within the Agricultural College Land Scrip Fund. Plaintiffs' Second Amended Complaint, Ex. E at 1.

On September 4, 2013, this Court issued an opinion and order overruling the NCAA's preliminary objections, and requiring the NCAA to file its answer to Plaintiffs' Second Amended Complaint within 20 days. *See Corman v. Nat'l. Collegiate Athletic Ass'n.*, 74 A.3d 1149 (Pa.Cmwlth.2013) (*Corman I*). On September 24,

2013, the NCAA filed its Answer with New Matter to Plaintiffs' Second Amended Complaint (Answer and New Matter) asserting, in addition to those legal issues raised in its preliminary objections, that the Endowment Act is unconstitutional special legislation and in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. On October 7, 2013, Plaintiffs filed their reply to the NCAA's Answer and New Matter (Reply to New Matter). Also on that day, Plaintiffs filed a joint motion for judgment on the pleadings (Motion). The NCAA filed its response to the Motion on October 28, 2013.

On October 29, 2013, this Court ordered the NCAA to brief its new matter issue that the Endowment Act is unconstitutional special legislation, as well as any other matter raised in its response to Plaintiffs' Motion. On November 20, 2013, the NCAA filed its brief in compliance with the October 29, 2013 Order. On December 2, 2013, Plaintiffs filed a reply brief. Before we can dispose of Plaintiffs' Motion, we must address the NCAA's issue as to whether the Endowment Act is special legislation and violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

*2 Article III, Section 32 of the Pennsylvania Constitution prohibits the General Assembly from passing special legislation. Pa. Const. art. III, § 32. The Pennsylvania Supreme Court has explained:

> Pennsylvania's proscription against local or special laws is currently found in Article III, Section 32, and was first adopted in the Pennsylvania Constitution of 1874. Like many constitutional provisions, it was adopted in response to immediate past abuses. The main purpose behind Article III, Section 32 was to put an end to the flood of privileged legislation for particular localities and for private purposes which was common in 1873. Over the years, the underlying purpose of Article III, Section 32 has been recognized to be analogous to federal principles of equal protection under the law, *see* U.S. Const. amend. XIV, § 1, and thus, special legislation claims and equal protection claims have been reviewed under the same jurisprudential rubric. The common constitutional principle at the heart of the special legislation proscription and the equal protection clause is that like persons in like circumstances should be treated similarly by the sovereign. Nonetheless, it is settled that equal protection principles do not vitiate the Legislature's power to classify, which necessarily flows from its general power to enact regulations for the health, safety, and welfare of the community, nor do these principles prohibit differential treatment of persons having different needs. As this Court explained in *Curtis [v. Kline,* 542 Pa. 249, 666 A.2d 265 (1995)]:
>
> > The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. In other words, a classification must rest upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation.
>
> *Curtis,* [542 Pa. at 255,] 666 A.2d at 268 (citations omitted). Thus, there are a legion of cases recognizing that a legislative classification which appears to be facially discriminatory may nevertheless be deemed lawful if the classification has a rational relationship to a legitimate state purpose. Furthermore ... legislative classifications must be founded on real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. Finally, in analyzing a special legislation/equal protection challenge, a reviewing court is free to hypothesize reasons the General Assembly might have had for the classification of certain groups.
>
> *Pa. Tpk. Comm'n. v. Commonwealth,* 587 Pa.

347, 363–64, 899 A.2d 1085, 1094–95 (2006) (citations, quotation marks and footnotes omitted); *see also Robinson Twp. v. Commonwealth,* —— Pa. ——, ——, 83 A.3d 901, 987–88 (2013).

***3** The NCAA first argues that "the Endowment Act is *per se* unconstitutional because it creates an illusory class of one member that is closed or substantially closed to future membership." NCAA Memorandum in Response to the Court's October 29, 2013 Order (NCAA Memo) at 2 (quotation marks omitted). In support of its contention, the NCAA references the Endowment Act's legislative history, arguing that the Endowment Act was passed for the sole purpose of addressing the $60 million penalty the NCAA imposed upon PSU. It further asserts that because the Endowment Act, by its terms, applies only in specific limited situations [FN3] and Plaintiffs have not identified any other circumstances that would meet the Endowment Act's requirements, the applicable class is restricted to the instant case and "it is impossible to imagine that any other monetary penalty will ever qualify." NCAA Memo at 7. Finally, the NCAA contends that the Endowment Act itself creates a roadmap for a governing body and an institution of higher education to avoid its application and, therefore, it is unlikely that any such parties will voluntarily enter into an agreement with terms that will subject their agreement to the Endowment Act.

> FN3. Section 3(a) of the Endowment Act states:
>
> > General rule.—If an institution of higher education pays a monetary penalty pursuant to an agreement entered into with a governing body and:
> >
> > (1) the monetary penalty is at least $10,000,000 in installments over a time period in excess of one year; and
> >
> > (2) the agreement provides that the monetary penalty will be used for a specific purpose,
> >
> > then the monetary penalty shall be deposited into an endowment that complies with the provisions of subsection (b).
>
> 24 P.S. § 7503(a).

The law is well-established that "legislation will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution, with any doubts being resolved in favor of constitutionality." *Harristown Dev. Corp. v. Dep't. of Gen. Servs.,* 532 Pa. 45, 52, 614 A.2d 1128, 1132 (1992). "The party seeking to overcome the presumption of validity bears a heavy burden of persuasion." *W. Mifflin Area Sch. Dist. v. Zahorchak,* 607 Pa. 153, 163, 4 A.3d 1042, 1048 (2010).

Our Supreme Court has held that "a classification of one member is not unconstitutional so long as other members might come into that class." *Harristown Dev. Corp.,* 532 Pa. at 53 n. 9, 614 A.2d at 1132 n. 9. Thus, "a classification is *per se* unconstitutional when the class consists of one member and it is impossible or highly unlikely that another **can** join the class." *Harrisburg Sch. Dist. v. Hickok (Hickok),* 563 Pa. 391, 398, 761 A.2d 1132, 1136 (2000) (bold and italics added).

A class is not closed merely because possible class members may choose to avoid actions that subject them to the law. Nor does the infrequent application of a law dictate that the class is closed. The Endowment Act applies to an institution of higher education which the Endowment Act defines as "[a] post [-]secondary educational institution in this Commonwealth that receives an annual appropriation from an act of the General Assembly." Section 2 of the Endowment Act, 24 P.S. § 7502. The Commonwealth has 14 state-owned universities that the General Assembly funds through the State System of Higher Education by way of an annual general appropriations act.[FN4] In

addition, 14 Pennsylvania community colleges receive annual appropriations from the General Assembly. Further, 4 state-related universities, including PSU, receive annual appropriations from the General Assembly. These 33 post-secondary educational institutions qualify as "[i]nstitution[s] of higher education" under the Endowment Act. 24 P.S. § 7502. Although it is unknown whether in the future an institution of higher education will reach an agreement with a governing body to pay a monetary penalty of at least $10 million, payable in installments, to be used for a specific purpose-it is clear that such circumstances **could** occur. Thus, others "**can** join the class." *Hickok,* 563 Pa. at 398, 761 A.2d at 1136 (emphasis added). Accordingly, the Endowment Act does not create a one-member class or a "substantially closed class" and, therefore, it is not *per se* unconstitutional.[FN5]

FN4. Thaddeus Stevens College of Technology also receives annual funding as part of a general appropriations act.

FN5. The Dissent contends that the Endowment Act constitutes *per se* special legislation and cites to cases to support its contention that the Endowment Act " 'creat[es] a class of one member that is ... **substantially closed** to future membership....' " Dissenting Op. at 6 (quoting *W. Mifflin,* 607 Pa. at 163, 4 A.3d at 1048). Those cases are distinguishable because the classifications, effectively, could only apply to one member.

In *West Mifflin,* our Supreme Court found that Act 45 of 2007, Act of July 20, 2007, P.L. 278, No. 45 (Act 45), was *per se* special legislation. The Court recognized that only one school district met all of the criteria in the classification. Further, there were only five other school districts that could ever become class members, and they could become class members only if those school districts returned to board of control governance for five consecutive years, and eliminated their high schools without reassigning their students to other school districts. Most importantly, the benefits of Act 45 only applied if remedial action was taken within fifteen days of the act's effective date, and thus, no other school districts could benefit from Act 45.

Hickok involved a classification of one. The classification at issue applied only to " 'a school district of the second class with a history of low test performance which is coterminous with the city of the third class which contains the permanent seat of government.' " *Id.* at 397–98, 761 A.2d at 1136 (quoting Section 1707–B of the Education Empowerment Act (EEA), Act of March 10, 1949 P.L. 30, added by Act of May 10, 2000 P.L. 44, 24 P.S. § 1707–B). The Supreme Court found that the classification could **only** apply to the Harrisburg School District, rejecting the argument that the classification could apply to another school district since the capital could be relocated to another third class city at a future time.

***4** The NCAA also argues that the Endowment Act violates Article III, Section 32 of the Pennsylvania Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because the classification created by the Endowment Act is not justified by a compelling state purpose nor is it rationally related to a legitimate governmental purpose.

The Pennsylvania Supreme Court has stated:

[T]he equal protection clause and the prohibition of special legislation are substantially similar....

[u]nder a typical fourteenth amendment analysis of governmental classifications, there

> are three different types of classifications calling for three different standards of judicial review. The first type—classifications implicating neither suspect classes nor fundamental rights—will be sustained if it meets a 'rational basis' test. In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. Finally, in the third type of cases, if 'important,' though not fundamental rights are affected by the classification, or if 'sensitive' classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review. There are, in summary, three standards of review applicable to an equal protection case, and the applicability of one rather than another will depend upon the type of right which is affected by the classification.

[*James v. Se. Pennsylvania Transp. Auth.*, 505 Pa. 137, 145, 477 A.2d 1302, 1305–06 (1984).] Classifications in the area of commercial regulation are normally tested against the rational basis principle.

Likewise, our interpretations of the special legislation provision of the Pennsylvania constitution have given wide latitude to commercial regulation. In *DuFour v. Maize*, 358 Pa. 309, 56 A.2d 675 (1948), we upheld the Bituminous Coal Open Pit Mining Conservation Act [Act of May 31, 1945, P.L. 1198, 52 P.S. § 1396.1] ... against a challenge that it constituted special legislation by imposing conservation regulations on one type of coal mining and not others. The classification was held to be constitutional because it was based on real distinctions in the subjects classified. Similarly, we upheld a law requiring railroads, but not other common carriers, to adopt weekly pay periods where no collective bargaining agreement or employment contract provided otherwise[.]

....

It is not necessary that the rational basis for a classification be set forth in the statute or in the legislative history. Nor is it necessarily incumbent upon the government agency to advance the reasons for the act in defending the classification. **The burden must remain upon the person challenging the constitutionality of the legislation to demonstrate that it does not have a rational basis. Should the reviewing court detect such a basis, from whatever source, the legislation must be upheld.**

***5** *Pennsylvania Liquor Control Bd. v. Spa Athletic Club (Spa Athletic)*, 506 Pa. 364, 369–71, 485 A.2d 732, 734–35 (1984) (citations omitted; emphasis added).

The NCAA contends that the Endowment Act impairs a fundamental right-its right to freely contract-and therefore, the Endowment Act should only be upheld if the abridgement of its right to freely contract is justified by a compelling state purpose. However, more than 75 years ago, the U.S. Supreme Court recognized:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

....

> [F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses....
>
> This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day; in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages; in forbidding the payment of seamen's wages in advance; in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine; in prohibiting contracts limiting liability for injuries to employees; in limiting hours of work of employees in manufacturing establishments; and in maintaining workmen's compensation laws. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.
>
> ....
>
> [W]hen the individual health, safety, and welfare are sacrificed or neglected, the State must suffer.

W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–394 (1937) (citations, quotation marks and footnote omitted). Accordingly, we reject the NCAA's assertion that the heightened standard of judicial review is appropriate herein.

Our Supreme Court in *Spa Athletic* ruled that "[c]lassifications in the area of commercial regulation are normally tested against the rational basis principle." *Id.* at 369, 485 A.2d at 734; *see also Price v. Cohen,* 715 F.2d 87, 92 (3d. Cir.1983) ("regulations that have differing impacts on various types of commercial entities ... violate the equal protection clause only if they are not rationally related to a legitimate state interest"). In the instant matter, the Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by the Pennsylvania State University (Consent Decree) expressly acknowledges that the fine amount was based upon the monies derived from a business enterprise. The Consent Decree provides that the $60 million fine is "equivalent to the approximate average of one year's gross revenue from the [PSU] football program...." Consent Decree at 5. Thus, we review the Endowment Act's classifications under the rational basis standard.

***6** The NCAA maintains that there is little, if any, connection between the Endowment Act's classifications and its asserted goal. It also contends that the Endowment Act's classifications do not meet the rational basis standard because the classifications are not rationally related to any valid governmental purpose.

Our Supreme Court has recently stated:

> [W]here a petitioner's challenge to an act is premised upon claims that discrete provisions of the act violate the Constitution, a proper analysis begins with the application of the law to the individual provisions challenged.
>
> ....
>
> [T]he required inquiry is into the effect of the provisions challenged ... with respect to whether the admitted different treatment ... rests upon some ground of difference that is reasonable rather than arbitrary and has a fair and substantial relationship to the object of each challenged provision.

Robinson Twp., —— Pa. at ——, 83 A.3d at 988.

In support of its argument that the Endowment Act's classifications do not further the Endowment Act's purpose, the NCAA raises two points. First, the Endowment Act's alleged goal of controlling and monitoring the disposition of Commonwealth monies is contradicted by the Endowment Act's failure to limit its application to Commonwealth funds. However, the NCAA overlooks the fact that even if Commonwealth monies appropriated to an institution of higher education are not directly used to pay a monetary penalty under the Endowment Act, the monies expended to do so must be taken from the institution of higher education's budget. Consequently, the money used to pay the fine reduces the funds available to the institution for other purposes. Reality dictates that an institution of higher education's payment of a minimum $10 million penalty will burden the institution as a whole, as it would most organizations. The Endowment Act's lack of a requirement that the penalty payment come from Commonwealth funds, in no manner negates the impact of such a substantial monetary penalty on the entire institution. Accordingly, it is reasonable to conclude that the General Assembly was concerned with the burden on the Commonwealth's taxpayers resulting from such fines and, thus, drafted the Endowment Act to apply to monetary penalties paid by an institution of higher education, regardless of the source.

The NCAA's second point is that the Endowment Act's numerous and specific qualifications mirror the Consent Decree but do not, in any way, further the Endowment Act's alleged purpose. The NCAA correctly notes that Section 3(a) of the Endowment Act specifies the conditions which must be present to invoke its coverage: (1) there is an agreement; (2) between an "institution of higher education" and "a governing body"; (3) involving a monetary penalty of at least $10 million; (4) the penalty is payable in installments over more than one year; and (5) the agreement describes the specific purpose for the penalty. 24 P.S. § 7503(a). The NCAA contends that "[t]hese classifications are not only imprecise, they are so grossly underinclusive as to bear no rational nexus to the proffered government interest." NCAA Memo at 15 (quotation marks omitted).

*7 Our Supreme Court has held:

> Judicial review must determine whether any classification is founded on a real and genuine distinction rather than an artificial one. A classification, though discriminatory, is not arbitrary or in violation of the equal protection clause if any state of facts reasonably can be conceived to sustain that classification. **In undertaking its analysis, the reviewing court is free to hypothesize reasons the legislature might have had for the classification. If the court determines that the classifications are genuine, it cannot declare the classification void even if it might question the soundness or wisdom of the distinction.**

Curtis, 542 Pa. at 255–56, 666 A.2d at 268 (citations omitted; emphasis added). Accordingly, given the deference owed to the General Assembly when reviewing the challenged legislation's constitutionality, if this Court can detect any rational basis for the Endowment Act's classifications, the Endowment Act must be upheld. Importantly, "[t]he fact that a classification may be underinclusive ... does not invalidate [a] statute since the legislature is not constitutionally required to eradicate an entire problem, but may proceed on a piecemeal basis." *Ass'n. of Settlement Cos. v. Dep't. of Banking*, 977 A.2d 1257, 1275 (Pa.Cmwlth.2009) (quoting *Donato v. State Bd. of Funeral Dirs.*, 649 A.2d 207, 210 (Pa.Cmwlth.1994)).

The Endowment Act's Classifications

We will review each Endowment Act classification to determine whether it is rationally related to a legitimate state purpose.

1) An Agreement

Noting that the Endowment Act applies only to "agreements," and not to involuntarily-imposed fines, the NCAA contends that such a restriction is underinclusive in furthering the Endowment Act's purported purpose of protecting Commonwealth funds. Articles III and VIII of the Pennsylvania Constitution FN6 confer upon the General Assembly the duty to preserve Commonwealth funds. "Control of state *finances* rests with the legislature, subject only to constitutional limitations[.]" *Leahey v. Farrell,* 362 Pa. 52, 57, 66 A.2d 577, 579 (1949).

> FN6. Article III of the Pennsylvania Constitution discusses the passage of laws including revenue and appropriation bills, restrictions on the disbursement of public funds and requirements regarding state purchases. Article VIII of the Pennsylvania Constitution pertains to taxation and finance matters including appropriations and the use of surplus funds.

The United States Supreme Court has stated:

> The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.

Nebbia v. New York, 291 U.S. 502, 527–28 (1934) (footnotes omitted).

As discussed above, the "agreement" involves a monetary penalty to be paid by an institution of higher education which receives Commonwealth monies, regardless of whether the fine is paid directly or indirectly with Commonwealth monies. The legislature has a duty to oversee and safeguard the use of the taxpayers' financial resources. The "agreement" is with a non-governmental body and thus its terms are not guided by an ordinance or statute. An "agreement" presumes the parties have some negotiating ability, and the Endowment Act serves to provide direction for said negotiations. Thus, it is reasonable for the legislature to impose restrictions where "institutions of higher education" **voluntarily** enter into **agreements** concerning a monetary punishment sought to be imposed by a nongovernmental, "governing body."

2) *The Agreement is Between an "Institution of Higher Education" and a "Governing Body"*

***8** The NCAA asserts that since the Endowment Act applies only to "governing bodies" FN7 and "institutions of higher education," the restriction is underinclusive because institutions of higher education may give away funds to other entities so long as they are not governing bodies. A "governing body" is unique in that it is a non-governmental organization and it may possess the authority to impose a monetary penalty upon state-funded institutions of higher education. An institution of higher education freely giving away funds is completely different than an institution of higher education paying money to a non-governmental entity that possesses the authority to **demand** payment. Because of the governing body's power to impose a substantial fine which necessitates the institution to use its funds to pay the penalty, it is reasonable that the General Assembly, given its authority over state finances and responsibility to safeguard Commonwealth funds, drafted the Endowment Act to regulate Commonwealth post-secondary educational institutions and governing bodies in instances where the educational institutions agree to pay monetary penalties as a result of the governing body's authority to demand payment. Accordingly, we find the classification to be "founded on a real and genuine distinction ... [not] an artificial one." *Curtis,* 542 Pa. at 255, 666 A.2d at 268.

> FN7. The Endowment Act defines

> "[g]overning body" as "[a]n organization or legal entity with which an institution of higher education is associated and which body may impose a monetary penalty against the institution of higher education." 24 P.S. § 7502.

3) *The Agreement Involves a Monetary Penalty of at Least $10 Million*

The United States Supreme Court has recognized:

> [T]he legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The Legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms.

W. Coast Hotel, 300 U.S. at 400 (quotation marks omitted). The manner in which an institution of higher education expends its available funds is guided by the organization's bylaws, internal operating procedures and prudent business judgment. However, the imposition of a monetary penalty by a non-governmental body upon an institution of higher education is not controlled by the institution. Thus, it is reasonable for the Endowment Act to apply only to agreements involving monetary penalties. Moreover, application of the Endowment Act to each and every monetary penalty imposed by a governing body upon an institution of higher education, no matter how small, would be administratively burdensome and costly for the Commonwealth. In addition, a monetary penalty of at least $10 million will have a significant impact upon a post-secondary educational institution's operating budget and consequently, the Commonwealth's budget considerations in determining the level of appropriations to the institution of higher education.[FN8] We, therefore, find this classification to be reasonable.

> FN8. The NCAA penalty imposed upon PSU was six times the $10 million minimum fine necessary to trigger application of the Endowment Act.

4) *The Penalty is Payable in Installments Over More Than One Year*

*9 The NCAA maintains that the Endowment Act's applicability to agreements involving money to be paid in installments over a period of more than one year creates an underinclusive class since there is no rational reason to restrict the classification to agreements involving installment payments. The U.S. Supreme Court stated, "[t]he legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." *W. Coast Hotel,* 300 U.S. at 400 (quotation marks omitted). As we concluded above, the fact that the Endowment Act applies to a monetary penalty involving at least $10 million is reasonable. In direct correlation to the minimum $10 million penalty is the economic reality and well-established commercial practice that large debts, such as commercial mortgages, residential mortgages, car loans, and even college loans are typically paid in installments over more than one year.

In addition, this classification is consistent with the fact that the Commonwealth prepares its budget and the General Assembly makes its appropriations to the 33 Commonwealth state-owned and state-related colleges and universities annually. This requirement permits the General Assembly to assess the fiscal impact of the monetary penalty at the same time it prepares the budget and determines its annual appropriation to institutions of higher education. Moreover, the Endowment Act's applicability to penalties paid in installments over more than one year permits the General Assembly to consider annually the impact of endowment expenditures to child sexual abuse prevention and

treatment in assessing state funding needs during budget preparations. Because a minimum $10 million fine can and most likely will impact the fiscal health of an institution of higher education and would not be payable all at once, it is reasonable for the General Assembly to subject these types of agreements to the Endowment Act.

5) *The Agreement Describes the Specific Purpose for the Penalty*

The NCAA asserts that there is no rational basis for the Endowment Act's applicability only to agreements which dictate that the penalty be used for a specific purpose. The Endowment Act reads that if "the agreement provides that the monetary penalty will be used for a specific purpose, then the monetary penalty shall be deposited into an endowment that complies with the provisions of subsection (b)." 24 P.S. § 7503(a)(2). The Endowment Act's "specific purpose" requirement recognizes that the institution of higher education and governing body have agreed to use the money in a certain manner and because of the large sum involved, safeguards the use of that money by placing it in a trust. Subsection (b) delineates the endowment requirements, thereby ensuring that said monetary penalty is used for the "specified purpose."

As discussed above, the Endowment Act applies only to Commonwealth-funded colleges and universities. The General Assembly is responsible for appropriations to these post-secondary educational institutions. The majority of students that matriculate at these colleges and universities are Pennsylvania residents and therefore their tuition is paid for by Pennsylvania taxpayers. Most Pennsylvania residents receive an in-state reduced tuition which is subsidized by the Commonwealth. Where a non-governmental organization determines that a monetary penalty of at least $10 million is to be imposed on one of these Commonwealth institutions of higher education, the Commonwealth has an interest in the specific purpose for which that fine will be used. Although there are many reasons for the Commonwealth's interest, among the most important are the need to know what conduct occurred, whether it occurred on a state funded post-secondary educational institution which Pennsylvania taxpayers are financially supporting, and whether corrective measures, safeguards or other changes are to be implemented. Of critical import to the Endowment Act is the fact that the **monies** being paid are **penal in nature.** Consequently, the General Assembly must reassess its level of appropriations to that particular institution based on the conduct giving rise to the penalty in relationship to the Commonwealth's budget considerations. "Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency." *Nebbia,* 291 U.S. at 528.

***10** The NCAA argues that even if the Endowment Act is found to be constitutional, it directs the monetary penalty to the state treasury to be used by charitable organizations addressing child sexual abuse and not back to the institution of higher education in furtherance of the original appropriation. However, Section 3(b)(4) of the Endowment Act states that:

> **Unless otherwise expressly stated in the agreement,** the funds may only be used within this Commonwealth for the benefit of the residents of this Commonwealth and on any of the following:
>
> (i) Programs or projects preventing child sexual abuse and/or assisting the victims of child sexual abuse.
>
> (ii) Multidisciplinary investigative teams established under 23 Pa.C.S. (relating to domestic relations).
>
> (iii) Child advocacy centers.

> (iv) Victim service organizations that provide services to children subjected to sexual abuse.
>
> (v) Training of persons who are mandated by law to report child sexual abuse or to treat victims of child sexual abuse.

24 P.S. § 7503(b)(4) (emphasis added). Thus, the parties' agreement controls the purpose of the endowment. Where the agreement's specific purpose is not consistent with Section 3(b)(4) of the Endowment Act, the fine monies must be used for the purpose set forth in the agreement. However, where the specific purpose of the monetary penalty is consistent with the uses enumerated in Section 3(b)(4) of the Endowment Act, such as "charity" or to benefit "children," the money may only be used for the reasons listed in Section 3(b)(4) of the Endowment Act. The Commonwealth has a strong interest in preventing child sexual abuse and assisting the victims of such abuse. This governmental interest to protect the safety, health and welfare of children was further pronounced as a result of Jerry Sandusky's (Sandusky) horrific criminal acts committed against children on the premises of a state-related institution of higher education. Consequently, the General Assembly "hit[ ] the evil where it [was] most felt, [thus, the law] is not to be overthrown because there are other instances to which it might have been applied." *W. Coast Hotel,* 300 U.S. at 400. The legislature's remedial steps in furtherance of its governmental duty to protect children by directing that in specified situations monies are to be used in the prevention of and treatment for child sexual abuse is rationally related to a legitimate state interest. FN9

> FN9. The NCAA cited in its brief and attached as an exhibit thereto, a copy of the Big Ten Council of Presidents and Chancellors (COPC) Statement on Penn State University (PSU). That document recited that after consultation with the NCAA's counsel, COPC elected to use the approximately $13 million from the Big Ten Conference bowl revenues which PSU was prohibited from receiving to support "charitable organizations **in Big Ten communities** dedicated to the protection of children." Exhibits to NCAA Memo, Exhibit F (emphasis added). Therein, the COPC stated:
>
> > In December 2011, Big Ten legal counsel, along with NCAA counsel, engaged in the independent investigation undertaken by Louis Freeh and his law firm, Freeh, Sporkin, & Sullivan, LLP....
> >
> > [T]he COPC has voted to impose the following additional sanctions on [PSU], effective immediately:
> >
> > ....
> >
> > 4. Fine: Because [PSU] will be ineligible for bowl games for the next four years, it will therefore be ineligible to receive its share of Big Ten Conference bowl revenues over those same four years. That money, estimated to be **approximately $13 million,** will be **donated to** established **charitable organizations in Big Ten communities** ***dedicated to the protection of children.***
>
> *Id.* (emphasis added). Notably, the COPC acted in a similar manner as the Pennsylvania General Assembly in seeking to protect children and designating how its financial resources would be used by limiting the distribution of funds to particular communities for the specific purpose of protecting children.

As recently stated by our Supreme Court:

[A]cts passed by the General Assembly are strongly presumed to be constitutional, including the manner in which they were passed.... **If there is any doubt that a challenger has failed to**

reach this high burden, then that doubt must be resolved in favor of finding the statute constitutional.

Pa. State Ass'n. of Jury Comm'rs. v. Commonwealth, — Pa. ——, ——, 64 A.3d 611, 618 (2013) (citations and quotation marks omitted; emphasis added). "Where ... there are plausible reasons for [the legislature's] action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislation,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *Price,* 715 F.2d at 94 (quoting *U.S. R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 179 (1980) (citations omitted)). In light of the fact that the effect of each questioned qualification "is reasonable rather than arbitrary and has a fair and substantial relationship to the object of each challenged provision [,]" we must conclude that the Endowment Act is not unconstitutional special legislation. *Robinson Twp.,* — Pa. at ——, 83 A.3d at 988.[FN10]

> FN10. The Dissent disagrees with the Majority's holding for two reasons. First, "because of the pleadings in this case and **public comments by the sponsor of the bill** that it insures that the $60 million fine imposed under the Consent Decree for matters addressing child abuse can only be spent in Pennsylvania." Dissenting Op. at 7 (emphasis added). However, no bill becomes law of this Commonwealth through a single Senator. The Endowment Act became law after both the House of Representatives and Senate, collectively the Pennsylvania General Assembly, by majority vote approved it and Governor Corbett signed it into law. Second, the "Act provisions track provision by provision the Consent Decree ... which, itself, makes it 'highly unlikely' that the Endowment Act will ever apply to an[other] agreement...." Dissenting Op. at 7. This reason is not the legal standard by which the constitutionality of a statute is determined. Relying upon the controlling precedent, the Majority thoroughly analyzed the legal standard based upon the pleadings herein. The fact that legislation is enacted in response to a particular situation is well-recognized, accepted and does not change the applicable legal analysis.

***11** Having decided the special legislation issue, we now address Plaintiffs' Motion. This Court has recognized that:

> A motion for judgment on the pleadings filed in an action in this Court's original jurisdiction is in the nature of a demurrer. A motion for judgment on the pleadings may be granted only when there is no genuine issue of fact, and the moving party is entitled to judgment as a matter of law.

Pa. Soc. Servs. Union, Local 688 v. Commonwealth, 59 A.3d 1136, 1142 (Pa.Cmwlth.2012) (citation omitted). The NCAA in its Answer and New Matter, *inter alia,* denied and stated that it was without sufficient knowledge to answer the allegations, and alleged facts to which Plaintiffs denied and/or denied with strict proof demanded at trial. These allegations and denials present factual disputes relating to the NCAA's authority to impose the sanctions and the validity of the Consent Decree. In particular, the NCAA alleged:

> [PSU] gave and received valuable, bargained-for consideration as a party to the Consent Decree....
>
> ....
>
> All members of the NCAA 'accept and observe the principles set forth in the constitution and bylaws of the Association'....
>
> NCAA members agree that a member institution that commits a 'major violation' of the NCAA Constitution or Bylaws shall receive a severe

penalty, which may include, inter alia, '[p]rohibition against specified competition in [a] sport,' ... or a '[f]inancial penalty[.]'....

In part to avoid a prolonged NCAA investigation and NCAA hearings, [PSU] entered into the Consent Decree, which constitutes a binding contract between the NCAA and [PSU].

....

Plaintiffs' Second Amended Complaint should be dismissed because the NCAA was justified in entering into the Consent Decree with [PSU].

Plaintiffs' Second Amended Complaint should be dismissed because the NCAA had a privilege to enter into the Consent Decree with [PSU].

Plaintiffs' Second Amended Complaint should be dismissed because the NCAA acted in good faith.

The NCAA imposed sanctions through the Consent Decree in response ... [to] conduct [in] violation of the NCAA's Constitution and Bylaws.

Answer and New Matter, ¶¶ 96, 103–105, 137–140 (paragraph numbers omitted).

The Consent Decree expressly recognizes the NCAA's questionable involvement in and its dubious authority pertaining to a criminal action against a non-university official which involved children who were non-university student-athletes. The Consent Decree recites that "[t]he sexual abuse of children on a university campus by a **former** university **official** ... while despicable, ordinarily would **not be actionable by the** NCAA." Consent Decree at 4 (emphasis added).

The NCAA Constitution pronounces the NCAA's "Basic Purpose" as:

> The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A **basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.**

***12** NCAA Exhibits to Memo in Support of Preliminary Objections to Second Amended Complaint, Exhibit F, NCAA Constitution and Bylaws (NCAA Constitution and Bylaws), Article 1.3.1 (emphasis added).[FN11]

> FN11. NCAA Exhibits to Memo in Support of Preliminary Objections to Second Amended Complaint, Exhibit F does not include the text of Article 1.3.1 of the Constitution and Bylaws; it does however contain the table of contents and the entirety of Article 19, Enforcement. The NCAA's Constitution and Bylaws total 444 pages.

The NCAA Constitution and Bylaws further provides that where a member institution has been found to be in noncompliance with the NCAA's rules and regulations "**[t] he Association shall ... afford the institution, its staff and student-athletes fair procedures** in the consideration of an identified or alleged failure in compliance." NCAA Constitution and Bylaws, Article 2.8.2 (emphasis added). In such circumstances where a member institution fails to fulfill its obligations, Article 1.3.2 and Article 19 of the NCAA Constitution and Bylaws, state that its enforcement procedures shall govern.

The Mission of the NCAA Enforcement Program reads, in pertinent part:

> **The program is committed to fairness of procedures** and the timely and equitable resolution of infractions cases. **The achievement of these objectives is essential** to the conduct of a viable and effective enforcement program.

Further, **an important consideration in imposing penalties is to provide fairness to uninvolved studentathletes, coaches, administrators, competitors and other institutions.**

NCAA Constitution and Bylaws, Article 19.01.1 (emphasis added).

The Consent Decree pronounced:

[T]he NCAA has determined that [PSU]'s **sanctions** be designed **to** not only **penalize [PSU]** ... but **also** to **change the culture** that allowed this activity to occur.... **Moreover, the** NCAA **recognizes that in this instance no student-athlete is responsible for these events and, therefore, the NCAA has fashioned its sanctions in consideration of the potential impact on all student-athletes. To wit, after serious consideration and significant discussion, the NCAA has determined not to impose the so-called 'death penalty.'** [FN12] While **these circumstances certainly are severe,** the suspension of competition is most warranted when the institution is a repeat violator and has failed to cooperate or take corrective action. **[PSU] has never before had major NCAA violations....** [FN13]

FN12. The "**death penalty**" bans a school from competing in a sport for at least one year. NCAA Constitution and Bylaws, Article 19.5.2.1.2, entitled "**Repeat–Violator Penalties,**" states:

> A repeat violator shall be subject to enhanced major violation penalties and any or all of the following additional penalties:
>
> (a) The prohibition of some or all outside competition in the sport involved in the latest major violation for a prescribed period as deemed appropriate by the Committee on Infractions and the prohibition of all coaching staff members in that sport from involvement directly or indirectly in any coaching activities at the institution during that period;
>
> (b) The elimination of all initial grants-in-aid and all recruiting activities in the sport involved in the latest major violation in question for a prescribed period;
>
> (c) The requirement that all institutional staff members serving on the Board of Directors, Leadership Council, Legislative Council or other cabinets or committees of the Association resign those positions, it being understood that all institutional representatives shall be ineligible to serve on any NCAA committee for a prescribed period; and
>
> (d) The requirement that the institution relinquish its voting privilege in the Association for a prescribed period.

FN13. PSU has been a NCAA member since 1908. NCAA Answer and New Matter, ¶ 102.

Consent Decree at 4 (emphasis added). The Consent Decree's stated "**appropriate remedy ... which benefits current and future [PSU] students, faculty and staff[,]**" FN14 reads as follows:

FN14. Consent Decree at 1 (emphasis added).

A. ***Punitive Component***

$60 million fine. The NCAA imposes a $60 million fine, equivalent to the approximate average of one year's gross revenue from the [PSU] football program....

Four-year postseason ban. The NCAA imposes a four-year ban on participation in postseason

play in the sport of football, beginning with the 2012–2013 academic year and expiring at the conclusion of the 2015–2016 academic year. Therefore, [PSU]'s football team shall end its 2012 season and each season through 2015 with the playing of its last regularly scheduled, in-season contest and shall not be eligible to participate in any postseason competition, including a conference championship, any bowl game, or any post-season playoff competition.

*13 ***Four-year reduction of grants-in-aid.*** For a period of four years commencing with the 2013–2014 academic year and expiring at the conclusion of the 2016–2017 academic year, the NCAA imposes a limit of 15 initial grants-in-aid (from a maximum of twenty-five allowed) and for a period of four years commencing with the 2014 2015 academic year and expiring at the conclusion of the 2017–2018 academic year a limit of 65 total grants-in-aid (from a maximum of 85 allowed) for football during each of those specified years. In the event the number of total grants-in-aid drops below 65, [PSU] may award grants-in-aid to non-scholarship student-athletes who have been members of the football program as allowed under Bylaw 15.5.6.3.6.

Five years of probation. The NCAA imposes this period of probation, which will include the appointment of an on-campus, independent Integrity Monitor and periodic reporting as detailed in the Corrective Component of this Consent Decree. Failure to comply with the Consent Decree during this probationary period may result in additional, more severe sanctions.

Vacation of wins since 1998. The NCAA vacates all wins of the [PSU] football team from 1998 to 2011. The career record of Coach "Joe" Paterno will reflect the vacated records.[FN15]

FN15. The NCAA's Constitution pronounces that one of its purposes is "to **preserve** intercollegiate athletics records." NCAA Constitution and Bylaws, Article 1.2 (emphasis added).

Consent Decree at 5.

The NCAA Constitution and the Bylaws Enforcement Program mandate the NCAA in situations of alleged noncompliance to "**afford ... fair procedures** " and " **provide fairness to uninvolved student-athletes, coaches, administrators, competitors**[FN16] **and other institutions.** " NCAA Constitution and Bylaws, Article 2.8.2, Article 19.01.1 (emphasis added). The NCAA Constitution and Bylaws then delineates and diagrams the required notices of charges, investigations, hearing committees in a specified order and appeal procedures. The NCAA Enforcement Program also details the types of violations and applicable penalties therefor. It further denotes that the "death penalty" applies only to repeat violators. NCAA Constitution and Bylaws, Article 19.5.2.1.2. "[T]he by-laws constitute the contract between the stockholders and are subject to the rules governing a written contract signed by all the parties. It follows that **contracting parties cannot ignore their own contractual covenants with impunity and still seek to hold the others to the contract[.]**" *Elliott v.. Lindquist,* 356 Pa. 385, 388, 52 A.2d 180, 182 (1947) (quotation marks omitted; emphasis added). Based upon the parties' pleadings and given the many discrepancies between the Consent Decree and the NCAA Constitution and Bylaws, there exists genuine factual disputes. Accordingly, this Court must deny Plaintiffs' Motion.

FN16. The NCAA's Bylaw entitled "The Principle of Competitive Equity," reads: "The structure and programs of **the Association ... shall promote** opportunity for **equity in competition** to assure that individual **student-athletes** and institutions **will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.** " NCAA

In *Corman I,* this Court ruled that PSU was not an indispensable party to resolve the controversy then before us. At that time, the NCAA's authority was not questioned nor the validity of the Consent Decree, as neither party had raised it, and therefore, this Court held PSU was not an indispensable party, and its absence did not deprive this Court of jurisdiction. Thereafter, the NCAA filed its Answer and New Matter and alleged "material facts which are not merely denials of the averments of the preceding pleading." Pa.R.C.P. No. 1030(a). These allegations and denials thereto present factual issues directly relating to, *inter alia,* the NCAA's Constitution and Bylaws concerning its authority to impose the monetary penalty, whether the NCAA acted in accordance with its Constitution and Bylaws, the validity of the Constitution and Bylaws, Article 2.10 (emphasis added). Consent Decree and whether the NCAA acted in good faith.[FN17] Because the NCAA's Answer and New Matter expanded the scope of Plaintiffs' Second Amended Complaint, no objection having been made, PSU must be joined as a party.

> FN17. The Dissent also notes that "PSU is a non-profit corporation as well as being tax-exempt as a charitable organization, and that Boards of Directors of non-profit charitable corporations have a fiduciary duty to ensure that funds are only used for matters related to its charitable purpose-in this case, the students of PSU. *See* 15 Pa.C.S. § 5712.... *See Zampogna v. Law Enforcement Health Benefits, Inc.,* 81 A.3d 1043, 1047 (Pa.Cmwlth.2013)." Dissenting Op. at 5. Plaintiffs alleged and the NCAA stated that it was without sufficient knowledge to determine the truth and denied that "[PSU] receives ... tax benefits as a state non-profit...." Plaintiffs' Second Amended Complaint ¶ 45 and NCAA's Answer and New Matter, ¶ 45.

***14** The law of this Commonwealth is well-established: " '[J]urisdiction once acquired is not defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from attaching in the first instance.' "[FN18] *Get Set Org. v. Philadelphia Fed'n. of Teachers,* 446 Pa. 174, 181 n. 6, 286 A.2d 633, 636 n. 6 (1971) (quoting 10 Pennsylvania Law Encyclopedia, Courts, § 21 (2013)). " 'Once the jurisdiction of a court attaches, it exists for all times until the cause is fully and completely determined.' " *Id.* (quoting *Com. ex rel. Milne v. Milne,* 26 A.2d 207 (1942)); *see also J.H. France Refractories Co. v. Allstate Ins. Co.,* 521 Pa. 91, 555 A.2d 797 (1989) (holding that because all parties having claims at the time of filing were joined in the declaratory judgment action, the common pleas court had jurisdiction over the actions despite subsequent claims filed by additional claimants); *In re Estate of Moore,* 871 A.2d 196 (Pa.Super.2005) (In a dispute over the sale of estate property, after the buyer initiated the action, administratrix transferred the subject estate property to herself as an individual, and then claimed that the trial court lacked jurisdiction over the matter because buyer had failed to join her individually as an indispensable party. The Court concluded that once jurisdiction had attached, the administratrix's subsequent action did not defeat jurisdiction). In the instant matter, because this Court had jurisdiction at the time the action was initiated, it retains jurisdiction over the case until the matter has been fully and completely determined.

> FN18. The Dissent contended in *Corman I* that PSU was an indispensable party. This Court, however, found otherwise and accordingly, that it had jurisdiction. The Dissent again raises the same issue. As discussed, *infra,* the NCAA's Answer and New Matter has expanded the issues before this Court, thus, necessitating PSU's involvement.

The Dissent contends that the Consent Decree's validity is not before us, and thus we may not address it. To the contrary, the law is well-

established that allegations contained in new matter which are denied place those disputed issues before the Court. *See, e.g ., In re Estate of Kelly,* 473 Pa. 48, 373 A.2d 744 (1977); *Gallery v. Blythe Twp. Mun. Auth.,* 432 Pa. 307, 243 A.2d 385 (1968); *Dep't. of the Auditor General v. Pennsylvania State Police,* 844 A.2d 78 (Pa.Cmwlth.2004); *Holland v. Norristown State Hosp.,* 584 A.2d 1056 (Pa.Cmwlth.1990); *Hall v. Middletown Twp. Delaware Cnty. Sewer Auth.,* 461 A.2d 899 (Pa.Cmwlth.1983). The NCAA's New Matter and Plaintiffs' Reply to New Matter placed disputed issues before this Court. Plaintiffs did not file preliminary objections or otherwise attempt to strike the NCAA's Answer and New Matter. Accordingly, these factual disputes must be addressed.

The Dissent maintains that the only dispute before the Court is the "applicability of the Endowment Act to the expenditure of funds owed under that agreement." Dissenting Op. at 6. That was true before the NCAA filed its Answer and New Matter, wherein, it alleged that the Consent Decree is supported by valuable, bargained for consideration and that the Consent Decree is a binding contract. It was also true before the NCAA alleged it was justified and had a privilege to enter into the Consent Decree, that it acted in good faith and that it "imposed sanctions through a Consent Decree in response ... [to] conduct [in] violation of the NCAA's Constitution and Bylaws." Answer and New Matter, ¶ 140.

***15** The genesis for the sanctions arose from horrific conduct that occurred in this Commonwealth. It started with the unthinkable acts of Sandusky against our most innocent—children. The children harmed by Sandusky, the children's family members, the community, PSU and the Commonwealth were all seeking to uncover the truth behind these hideous crimes when although "ordinarily ... not ... actionable by the NCAA," the NCAA involved itself in one of the most disastrous events in these children's lives and that of their families as well as the history of the community, PSU and the Commonwealth. Consent Decree at 4. While acknowledging that "no student-athlete is responsible for these events," the NCAA imposed sanctions "designed to ... penalize [PSU] ... [and] change the culture" (Consent Decree at 4) "which [remedy] benefits current and future [PSU] students, faculty and staff." Consent Decree at 1. The sanctions' "Punitive Component" removed $60 million from a state-related post-secondary educational institution which the NCAA asserts it is to control. High school athletes who had no involvement in the criminal acts were prevented from obtaining a free college education. Student-athletes, trainers, coaches and support personnel who were taught and trained to be and do their best were stopped from competing and student-athletes from other colleges and universities were also precluded from competing against them by the prohibition against post-season play. Student-athletes, trainers, coaches, administrators and support personnel who had excelled in their jobs through hard work, practice, commitment, team work, sportsmanship, excellence and perseverance were told none of that mattered.

This Court will not make a legal determination which has such far reaching implications without conducting a hearing on the disputed factual issues. Therefore, pursuant to Pennsylvania Rule of Civil Procedure 2232(c), PSU is joined as a party to the instant litigation. In accordance with this Court's Order, Plaintiffs and the NCAA are directed to serve PSU with Plaintiffs' Second Amended Complaint and Reply to New Matter, and Answer and New Matter, respectively.

For all of the above reasons, this Court concludes that the Endowment Act is not special legislation, Plaintiffs' Motion is denied, and PSU is joined as a party.

ORDER

AND NOW, this 9th day of April, 2014, Pennsylvania State University (PSU) is joined as a party in this action. Senator Jake Corman and

Treasurer Robert M. McCord (Plaintiffs) are directed to serve Plaintiffs' Second Amended Complaint and Reply to Defendant the National Collegiate Athletic Association's (NCAA) New Matter upon PSU within 7 days of this Court's Order, and the NCAA is directed to serve its Answer to Plaintiffs' Second Amended Complaint and New Matter (Answer and New Matter) upon PSU within 7 days of this Court's Order. PSU is directed to enter an Appearance and file an appropriate responsive pleading to Count I of Plaintiffs' Second Amended Complaint and the NCAA's New Matter within 20 days of service of Plaintiffs' Second Amended Complaint and the NCAA's Answer and New Matter.

***16** Plaintiffs' Motion for Judgment on the Pleadings is denied.

Judge SIMPSON concurs in the result only.
Judges COHN JUBELIRER and BROBSON did not participate in the decision in this case.

DISSENTING OPINION BY President Judge DAN PELLEGRINI.

Even though it would give me pleasure to join with the majority because I share the concerns with the process by which the Consent Decree was entered, I am compelled not to do so for the reasons expressed below.

I.

This matter is presently before us on a Joint Motion for Judgment on the Pleadings filed by Plaintiffs. In their Joint Motion, Plaintiffs asked us to enter judgment on the pleadings and enter the following relief:

(1) A declaration that the Endowment Act is a valid and constitutional law;

(2) A declaration that the NCAA has violated the Endowment Act;

(3) A declaration that the entirety of the monetary penalty in the Consent Decree be paid to the State Treasury;

(4) An order compelling the NCAA to immediately pay or direct payment of the first $12 million installment to the State Treasury;

(5) An injunction compelling compliance by the NCAA with the Endowment Act; and

(6) Such other relief as this Court deems just and proper.

In its response to Plaintiffs' Joint Motion for Judgment on the Pleadings, the NCAA set forth its interpretation of our holdings in *Corman v. Nat'l. Collegiate Athletic Ass'n.*, 74 A.3d 1149 (Pa.Cmwlth.2013) (*Corman I*) and stated:

> [T]o the extent the above-holdings constitute final, settled conclusions by this Court—and not merely determinations that were preliminary or contingent on as-yet undeveloped facts then it appears the Court has already held as a matter of law (and wrongly, in the NCAA's view) that (1) the Endowment Act has been triggered under the current circumstances and (2) that the Endowment Act does not violate the U.S. or Pennsylvania Constitutions. Ultimately, this Court is in the best position to evaluate the scope and import of its prior decision. If the Court views the September 4 Order as fully resolving all outstanding issues as a matter of law, then—despite the NCAA's strong disagreement with that Order—the proceedings before this Court may well be at an end.

(NCAA's October 28, 2013 Response to Plaintiffs' Motion for Judgment on the Pleadings at 3–4).

However, because the NCAA's New Matter contained a defense that the Endowment Act was special legislation within the meaning of Article III, Section 32 of the Pennsylvania Constitution, an issue we had not previously addressed, we could not grant the Motion. Instead, we issued an order that the parties address the "issue raised in its New Matter that the Endowment Act is an

unconstitutional special law, as well as any matter raised in its Response to Plaintiffs' Motion for Judgment on the Pleadings." In response to that order, the parties addressed only two issues: that the Endowment Act was *per se* unconstitutional and that there was no rational basis for the classification created by this legislation.

*17 The majority, however, does not limit itself to issues that were addressed by the parties. On its own, it finds that we cannot grant the Motion because there is an issue of material fact concerning whether the Consent Decree is valid. In arriving at that conclusion, the majority relies on allegations made by the NCAA in its New Matter that relate to the NCAA's authority to impose the sanctions and the validity of the Consent Decree.[FN1] The paragraphs that contained those allegations were made by the NCAA in support of its defense that PSU was an indispensable party, that the Endowment Act was an unconstitutional impairment of contract, and some stray conclusions entitled "Additional Defenses." By cobbling those paragraphs together and examining the NCAA by-laws, the majority questions the validity of the Consent Decree stating that:

> FN1. NCAA's September 24, 2013 Answer with New Matter to Plaintiffs' Second Amended Complaint, ¶¶ 96, 103–105, 137–140.

> The Consent Decree expressly recognizes the NCAA's questionable involvement in and its dubious authority pertaining to a criminal action against a non-university official which involved children who were non-university student-athletes. The Consent Decree recites that "[t]he sexual abuse of children on a university campus by a former university **official** ... while despicable, ordinarily would **not be actionable by the NCAA.**" Consent Decree at 4 (emphasis added).
> *Corman v. Nat'l. Collegiate Athletic Ass'n.*, —— A.3d —— (Pa.Cmwlth., No. 1 M.D.2013, filed April 9, 2014), slip. op. at 23. Because contracting parties cannot ignore their own contractual covenants with impunity and still seek to hold others to the contract, the majority then goes on to find that a determinative issue in this case is whether the Consent Decree is legal and whether the Consent Decree should be enforced at all. It also infers that because other students and coaches were affected, the Consent Decree may have denied procedural rights guaranteed by the NCAA bylaws and they may have an interest. Because this issue contained issues of disputed fact that could not be resolved without PSU, the majority, without notice, joins PSU as a party to this action.[FN2]

> FN2. I reiterate what I stated in my dissent in *Corman I* that PSU is an indispensable party and, as a result, we lack jurisdiction. A party is generally regarded to be indispensable "when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *City of Philadelphia v. Commonwealth,* 575 Pa. 542, 567, 838 A.2d 566, 581 (2003) (citation omitted). If the issue involved is whether the Consent Decree is valid, as a party to the consent decree, PSU's rights are so connected that no decree can be issued without affecting those rights.

The majority appears to arrive at this outcome because it is bewildered, as I am, by how the Board of Trustees of PSU could have approved or allowed to be executed a "Consent Decree" involving the expenditure of $60 million of PSU funds when the Consent Decree specifically states that the matter "ordinarily would not be actionable by the NCAA." If, as the majority suggests, the NCAA did not have jurisdiction over conduct because it did not involve the regulation of athletics, then the expenditure of those funds is problematic, given that PSU is a non-profit corporation as well as being tax-exempt as a charitable organization, and that Boards of Directors of non-profit charitable corporations have

a fiduciary duty to ensure that funds are only used for matters related to its charitable purpose—in this case, the students of PSU. *See* 15 Pa.C.S. § 5712. Moreover, the majority position is understandable given the lax supervision by those responsible for insuring that nonprofit and charitable organizations operate as non-profit and charitable organizations as well as their failure to take action against Boards of Directors and Officers who use funds of a non-profit and/or charitable entity to pay funds that they are not legally obligated to pay and/or expend funds not related to their charitable purpose or who no longer act as a charity. *See Zampogna v. Law Enforcement Health Benefits, Inc.*, 81 A.3d 1043, 1047 (Pa.Cmwlth.2013).

***18** Notwithstanding all of that, I disagree with the majority that this is a matter before us. None of the parties to this case have disputed that the contract—the Consent Decree—is valid; the only dispute is applicability of the Endowment Act to the expenditure of funds owed under that agreement. Essentially, the majority spontaneously came up with that new cause of action, inferred from paragraphs in various defenses pled by the NCAA that the Consent Decree is invalid and none of the sanctions could be enforced. Because we must only address the matters before us and the causes of action pled by Plaintiffs, I respectfully dissent from that portion of the majority opinion.

II.

I also dissent from the majority's decision that the Endowment Act is not special legislation. I would hold that the Endowment Act creates a class that is substantially closed to future membership and, therefore, is *per se* unconstitutional.

Article III, Section 32 of the Pennsylvania Constitution provides, in relevant part, that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law...." PA. CONST. art. III, § 32. Over the years, the underlying purpose of Article III, Section 32 has been recognized to be analogous to federal principles of equal protection under the law. *Pennsylvania Turnpike Commission v. Commonwealth*, 587 Pa. 347, 363, 899 A.2d 1085, 1094 (2006). The common constitutional principle at the heart of the special legislation proscription and the equal protection clause is that like persons in like circumstances should be treated similarly by the sovereign. *Id.*

As our Supreme Court has held, "legislation creating a class of one member that is closed **or substantially closed** to future membership is *per se* unconstitutional." *West Mifflin Area School District v. Zahorchak*, 607 Pa. 153, 163, 4 A.3d 1042, 1048 (2010) (emphasis added). *See also Harrisburg School District v. Hickok*, 563 Pa. 391, 398, 761 A.2d 1132, 1136 (2000) ("a classification is *per se* unconstitutional when the class consists of one member and it is impossible **or highly unlikely** that another can join the class.") (Emphasis added).

The Endowment Act only applies if the following conditions are met: (1) there is an agreement; (2) between an institution of higher education; and (3) a governing body; (4) for a monetary penalty; (5) that is at least $10,000,000; (6) that is payable in installments; (7) over more than one year; and (8) the agreement states that the penalty can only be used for programs in Pennsylvania regarding child abuse and advocacy. The majority, relying on *Hickok*, holds that although it is unknown if those conditions will ever be met in the future, the fact that these circumstances could theoretically occur precludes a finding that the Endowment Act is *per se* unconstitutional.

I disagree with the majority for two reasons. First, from the facts, it is obvious that this is special legislation because of the pleadings in this case and public comments by the sponsor of the bill that it insures that the $60 million fine imposed under the Consent Decree for matters addressing child abuse can only be spent in Pennsylvania. Second, the majority ignores that the Endowment Act provisions track provision by provision the Consent Decree imposing the fine, which, itself, makes it

"highly unlikely" that the Endowment Act will ever apply to an agreement other than the Consent Decree between the NCAA and PSU. Given the Act's extremely specific conditions, it is beyond dispute that a "highly improbable convergence of events would be necessary" for the Act to apply to any subsequent agreement. *See West Mifflin School District,* 607 Pa. at 163, 4 A.3d at 1048. Therefore, the class created by the Endowment Act is, at a minimum, substantially closed to new members and is *per se* unconstitutional.

***19** Accordingly, for the foregoing reasons, I respectfully dissent.

Pa.Cmwlth.,2014.
Corman v. National Collegiate Athletic Ass'n
--- A.3d ----, 2014 WL 1382675 (Pa.Cmwlth.)

END OF DOCUMENT

Not Reported in A.2d, 2008 WL 9404638 (Pa.Cmwlth.)
(Cite as: 2008 WL 9404638 (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.
Anthony and Joni CORTESE, as husband and wife and as parents and natural guardians of James Cortese, a minor, Appellants
v.
WEST JEFFERSON HILLS SCHOOL DISTRICT, Adam Lotis, Matthews Bus Company, Inc., William Cherpak, T.J. Srsic, George Wilson, John Mitruski, John Yogan, Keith Pancoast, Frank Brettschneider, Robert Ando, Thomas Berrich, Patricia Smith, Randall Sydeski, Andy Palaggo and John Lozosky.

No. 53 C.D.2008.
Submitted Oct. 14, 2008.
Decided Dec. 9, 2008.

BEFORE: LEADBETTER, President Judge, and LEAVITT, Judge, and BUTLER, Judge.

MEMORANDUM OPINION

LEADBETTER, President Judge.

***1** Anthony and Joni Cortese, as husband and wife, and James Cortese, a minor, (collectively "Appellants") appeal from the January 9, 2007 order of the Court of Common Pleas of Allegheny County (trial court) granting Appellees' motion for summary judgment [FN1] and dismissing all claims, except as to Appellee Adam Lotis.[FN2] We affirm primarily on the basis of the trial court's attached opinion, but deem it necessary to discuss briefly the applicability of governmental immunity under Sections 8541 and 8542 of the Judicial Code [FN3] in light of the trial court's failure to do so.

FN1. When reviewing the granting of a motion for summary judgment, a trial court must "view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Flood v. Silfies,* 933 A.2d 1072, 1074 (Pa.Cmwlth.2007). Our review of the trial court's action in this regard is plenary.

FN2. On September 12, 2007, the trial court entered a judgment against Lotis in the amount of $3000 and ordered him to dismiss all claims against Appellants with prejudice within the next seven days or suffer additional sanctions. On October 4, 2007, Appellants and Lotis filed a joint praecipe to discontinue all claims between all Appellants and Lotis. Settlement of the case as to Lotis, the remaining party, rendered the prior January 9, 2007 order granting summary judgment final under Pa. R.A.P. 341. Therefore, Appellants' October 12, 2007 appeal, erroneously filed in the Superior Court but subsequently transferred to our court, was timely. *K.H. v. J.R.,* 573 Pa. 481, 826 A.2d 863 (2003).

FN3. 42 Pa.C.S. §§ 8541–8542.

In July 2002, high school student James Cortese was the victim of a hazing incident while on a school bus returning from a football camp held at Edinboro University.[FN4] On October 8, 2004, Appellants instituted an action in Allegheny County against student Adam Lotis, the bus company,[FN5] the school district and numerous district employees. The complaint included Counts of negligence (Lotis, the bus company, Coach Cherpak), intentional infliction of emotional distress (Coach

Cherpak), civil conspiracy (school district) and violation of Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681 – 1688, (district).[FN6] The gravamen of the complaint were the allegations that, although most of the football coaching staff, the acting principal and teachers became aware of the hazing incident soon after it happened, no one took any action during the regular football season either to investigate it or to discipline Lotis. Much of the complaint focuses on Coach Cherpak, who was present at the camp but did not ride the bus with the players.

> FN4. Fellow student Adam Lotis tackled Cortese in the aisle and placed his exposed genitals on Cortese's face. Other students on the bus paid Lotis about $10 for performing this act.
>
> FN5. In a November 24, 2004 order, the trial court granted the bus company's preliminary objections and dismissed Appellants' complaint against it. In their October 12, 2007 Notice of Appeal, however, Appellants appealed only from the January 9, 2007 order granting the summary judgment motion and from the February 7, 2007 order denying their request for reconsideration, the latter of which is not a reviewable order. In addition, Appellants neither addressed in their appellate brief any of the issues that the bus company raised in their preliminary objections nor served the company with the Notice of Appeal. Therefore, Appellants waived their opportunity to challenge the order granting the company's preliminary objections and any right to raise issues regarding the company on appeal. Accordingly, we strike that portion of Appellants' brief wherein they make arguments concerning the bus company.
>
> FN6. Title IX prohibits sexual discrimination in any educational program or activity receiving federal financial assistance. In *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999), the United States Supreme Court held that a private right of action against a school board could lie for student-on-student sexual harassment if the board acted with deliberate indifference to acts of such harassment which were sufficiently severe, pervasive and objectionably offensive.

As noted above, the bus company's preliminary objections were granted in 2004. Following numerous depositions, the remaining Appellees filed a motion for summary judgment in October 2006. In January 2007, the trial court granted this motion, identifying Appellants' best evidence in support of each Count and explaining why the evidence was insufficient to make out a *prima facie* case for the respective causes of action. The trial court did not, however, address governmental immunity, which Appellees pled in their New Matter.

Section 8541 of the Judicial Code provides that "[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa.C.S. § 8541. A school district is a local agency for purposes of governmental immunity. *See Petula v. Mellody*, 158 Pa.Cmwlth. 212, 631 A.2d 762 (Pa.Cmwlth.1993). Pursuant to Section 8542(a) of the Judicial Code, a party who seeks to impose liability upon a local agency must establish that: (1) a common law or statutory cause of action exists against the local agency for a negligent act of the agency or its employee acting within the scope of his employment; and (2) the negligent act falls within one of the exceptions to governmental immunity specifically enumerated in Section 8542(b) of the Judicial Code. 42 Pa.C.S. § 8542(a) and (b).

*2 The only negligence counts now before us

are those against Coach Cherpak.[FN7] In those Counts, Appellants alleged that Cherpak failed to provide adequate supervision on the bus, failed to properly instruct the team about hazing, failed to enforce the school's hazing policy and failed to notify the school and law enforcement authorities about the incident.

> FN7. As Appellees note, Appellants raise for the first time in their appellate brief an argument concerning the school district's alleged negligence. They did not, however, plead any negligence Counts against the district. Accordingly, we also strike that portion of Appellants' brief.

As an initial matter, we note that Appellants have not alleged that any of the immunity exceptions applied. Appellants argue, however, that if as Appellees contend, the football camp was not school-sanctioned, then they cannot raise the defense of immunity to Appellants' claims of negligence. If, to the contrary, the camp was school-sanctioned, then Appellants argue that Appellees' conduct constituted willful misconduct which would not be subject to immunity. Without elaboration, Appellees characterize as disingenuous Appellants' argument that the district and its employees would somehow lose local agency status and immunity if the camp was deemed *not* to be school-sanctioned.

As a local agency, the district is immune from liability under Section 8541. As a local agency employee, Cherpak would be similarly immune as long as he was acting within the scope of his office or duties. In that regard, Section 8545 of the Judicial Code provides as follows:

> An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter.

42 Pa.C.S. § 8545. An employee is defined as "[a]ny person who is acting or who has acted on behalf of a government unit whether on a permanent or temporary basis, whether compensated or not ... including [any] other person designated to act for the government unit." Section 8501 of the Judicial Code, 42 Pa.C.S. § 8501.

Here, Appellants pled that Coach Cherpak advised prospective football players at a school meeting that, if they wanted to play high school football, then he expected them all to attend the camp. They also alleged that Cherpak and other members of the football coaching staff attended and participated in camp activities. Appellants did not allege that Cherpak was acting outside the scope of his duties as a football coach while at the camp. In fact, it is obvious that he was acting in that capacity while at the camp. Indeed, it was Cherpak's status as head football coach that was the basis of Appellants' allegations that he failed to act appropriately with regard to the hazing incident. Therefore, it is clear that Cherpak was acting on behalf of the district and within the scope of his official duties as head football coach.

Nor is there any merit in Appellants' attempt, on appeal, to transform negligence claims into ones sounding in willful misconduct. In Counts V and VI, which Appellants labeled as "negligence," they alleged that Cherpak failed to provide adequate supervision, failed to properly instruct the team about hazing, failed to enforce the school's hazing policy and failed to notify the school and law enforcement authorities about the incident. These allegations do not contain any "willful" components.

***3** In addition, this court has rejected litigants' attempts to re-write their complaints on appeal in order to circumvent a party's immunity. In *Kearney v. City of Philadelphia,* 150 Pa.Cmwlth. 517, 616 A.2d 72 (Pa.Cmwlth.1992), this court addressed a plaintiff's attempt, on appeal, to recharacterize the claims in her complaint that the city had acted intentionally, recklessly and wantonly into

negligence claims. This court rejected the plaintiff's attempts, commenting that the recharacterization conflicted with the express wording of the complaint and stating that the litigant "may not take liberty to amend her complaint upon appeal in order to enhance her appellate position." *Id.* at 74. We similarly reject Appellants' attempt in the present case to transform their negligence Counts into ones alleging willful misconduct.

The remaining Counts solely against Coach Cherpak are the ones for intentional infliction of emotional distress. We note that such claims do not fall within the exceptions to immunity. Section 8550 of the Judicial Code, 42 Pa.C.S. § 8550; *Weaver v. Franklin County,* 918 A.2d 194 (Pa.Cmwlth.), *appeal denied,* 593 Pa. 751, 931 A.2d 660 (2007). Therefore, if Cherpak's conduct had risen to the requisite high level in order to establish that tort, he could have been held liable. As the trial court concluded, his conduct, though questionable, did not rise to that level. We rely upon the trial court's well-reasoned analysis in this regard.

As for James Cortese's Title IX claim against the district alleging discrimination based on sex, we also adopt the trial court's rationale. As the trial court noted, there was nothing in the voluminous deposition testimony that indicated that Cortese was the victim of student-on-student harassment *based on his gender.* In addition, we note that Appellants alleged that there is no evidence that the district played any role in the harassment itself or had any knowledge of it until after the fact. Moreover, the harassment was not pervasive; rather Lotis hazed Cortese one time, on the bus. While we certainly do not condone the incident or wish to minimize it, we agree with the trial court that the threshold for establishing a Title IX claim is high, and was not met here, even in the light most favorable to Appellants.

With respect to the two conspiracy Counts against the district, like the tort of intentional infliction of emotional distress, civil conspiracy does not fall within an immunity exception. *Weaver.* In addition, we agree with the trial court's determination that Appellants failed to state of claim for civil conspiracy, and rely on the trial court's reasoning in support of that determination.

For the foregoing reasons, and based upon the well-reasoned analysis of the Honorable W. Terrence O'Brien in the attached December 21, 2007 opinion, we affirm.

ORDER

AND NOW, this 9th day of December, 2008, the order of Court of Common Pleas of Allegheny County, No. GD 2004–012962, filed January 7, 2007, is hereby AFFIRMED.

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

*4 ANTHONY CORTESE, ET AL Plaintiffs

V.

GD 04–0I2962

WEST JEFFERSON HILLS SCHOOL DISTRICT, ET AL Defendants

OPINION

O'BRIEN, J.

Plaintiffs have appealed the granting of summary judgment to all defendants except for Matthews Bus Company, inc. and Adam Lots. In ruling on a motion for summary judgment, the court must

> determine whether the record documents a question of material fact concerning an clement of the claim or defense at issue. If no such question appears, the court must then determine whether the moving party is entitled to judgment on the basis of substantive law. Conversely, if a question of material fact is apparent, the court must defer the question for consideration of a jury and deny the motion for summary judgment.

Cassell v. Lancaster Mennonite Conference, 834 A.2d 1185, 1188 (Pa.Super.2003).

FACTUAL SUMMARY

The following factual summary comes from plaintiffs' Reply Brief to defendants' Brief in Support of Motion for Summary Judgment.

Plaintiff, James Cortese was a student at West Jefferson Hills School District and was interested in becoming a member of the football team at Thomas Jefferson, a high school within the Defendant's school district. At a meeting held at the school, he and other potential members of the football team were informed that there was to he a camp held at Edinboro University called the Camp of Champions. It was not mandatory that any student attend the camp, but it was highly encouraged that all potential football players attend the camp. At this meeting the "Athlete's Handbook" was also distributed. This booklet included a section that stated that any hazing of a fellow student would result in the dismissal from the team.

James Cortese and his parents decided to have James attend the camp. Attendance at this camp required the students to stay overnight at Edinboro University. Several members of the coaching staff including Defendant William Cherpak (head football coach) attended the camp and also stayed overnight at Edinboro University. The football players were transported to the camp on a school bus owned and operated by Matthews Bus Company and its employees. This is the same bus company that the school district utilizes to transport the students during the school year. There was no adult supervision on the bus going to or from the camp. The funds to pay for the Camp were collected by Defendant Cherpak who was paid by the camp to coach. It is believed that the bus was "donated" by the bus company to transport the students to the football camp.

While on the bus trip back from the camp on July 1 I, 2002, Co–Defendant Adam Lotis, another student at Thomas Jefferson High School and also a prospective football player, tackled James Cortese in the aisle of the school bus and placed his exposed genitals on the face of James Cortese. Adam Lotis was paid approximately $10.00 by other prospective players for performing this act.

Adam Lotis in his deposition admits to having his penis exposed, but claims that James pushed him away. Defendant Cherpak was present when both James Cortese and Adam Lotis spoke to Defendant Smith, the acting principal ...

***5** Several members, if not all of the coaching staff of the high school football team, the principal, and other teachers at the school district became aware of the incident shortly after it occurred. No action or investigation was taken against Adam Lotis when the coaching staff and other district employees became aware of the incident, despite a requirement in the "Athlete's Handbook" to dismiss him from the team. Adam Lotis was allowed to remain a member of the team and no investigation was conducted during the entire regular season.

Defendant Berrich, the head basketball coach of the school, took plaintiff James Cortese, [to] a dimly lit area of the gym of the school before school was scheduled to start that year. He asked James Cortese if certain players were involved (prospective basketball players). When Berrich was told that these specific players were not involved, Berrich told James Cortese not to tell anyone or else Defendant Cherpak (head football coach) could get in trouble. Even after James Cortese told Defendant Berrich who was involved, Berrich took no farther action. Coach Berrich had a disciplinary letter placed in his file that included language that he inappropriately intimidated James.

Plaintiffs Anthony and Joni Cortese did not become aware of the incident on the school bus until October 30, 2002. They were informed

about the incident when several teachers from the defendant school district were discussing the incident in the stands of a football game for two other high schools. Mr. and Mrs. Cortese were sitting in close proximity and had been involved in conversation with these teachers. By this point in time, the season was over and the playoffs had begun. The topic was part of a discussion about what had recently been reported in the news that a similar incident had taken place at Central Catholic High School and that team terminated the season and forfeited the playoff game.

One teacher, Deborah Markwith, stated that a similar incident had taken place at Thomas Jefferson. Mrs. Markwith, a middle school teacher in the same district, heard about the incident in August but decided she had no duty to report the incident. It was when Mrs. Cortese heard that something had happened on the bus trip home from the camp that she suspected her son was the victim of some type of hazing incident. When Mr. and Mrs. Cortese got home, they asked James if something had happened to him, he eventually told them about the incident. They promised James that they would not call the school or take any action until the season was over.

On or about October 31, 2002, Defendant Smith—the acting principal of Thomas Jefferson High School, was allegedly informed by an anonymous phone call where she was told about the incident on the school bus trip. She does admit to hearing some rumors but took no action to investigate. The school conducted an investigation the next day where Adam Lotis admitted his actions. This investigation also resulted in allegations that other members of the football team had been exposing themselves to girls in the hallways, other hazing incidents had taken place[,] as well as [that] Defendant Cherpak had also engaged in other outrageous acts by providing alcohol to students. Defendant Cherpak claims he asked a few members of the team what had happened, but they were all asleep. Cherpak chose to "believe" that no one witnessed this act on the bus even though Lotis testified that 8–10 players paid him to assault James Cortese.

***6** Adam Lotis was suspended from the team for one game and then was allowed to stand on the sidelines the next playoff game due to the decision of the coaches. He also attended the banquet and received his varsity letter. Defendant Cherpak disputes this and claims that Adam Lotis never returned to the team, but may have been at the banquet.

After the suspension of Adam Lotis there were several other incidents where members of the football team harassed Plaintiff Joni Cortese as well as James Cortese. One of these incidents involved a football player driving erratically in front of Mrs. Cortese including his jamming on his brakes.

When this incident was brought to the attention of Defendant Smith, she allegedly conducted an investigation into this incident by asking the individual involved what had transpired—She *was* told that the brakes on the car were causing a problem. Defendant Cherpak was also informed about this incident and laughed.

All Defendants other than Berrich claim they had no knowledge about this hazing incident until October 31, 2002. The depositions of Defendants Srsic, Yogan, Pancoast, Brettschneider and Ando (all football coaches) have been secured and they all deny having any knowledge of the hazing event until after they were told some time in November by Coach Cherpak. Defendant Wilson claims to have heard rumors about the incident, but took no action to investigate. Defendant Smith also heard students talking about the incident but chose not to investigate.

Thomas Sharkey, a former head basketball coach for 23 years and a teacher in the district for

> 36 years testified that he heard about the hazing incident in question the first game of the season while he was in the press box to run the clock, which he has done for about 30 years. Mr. Sharkey testified that he discussed the incident with both Defendant Smith (the principal) and Defendant Sydeski (assistant principal). Sydeski denies he even heard rumors about the incident prior to November 2002.
>
> Defendant Berrich also testified he took no further action because it was a football issue and he assumed that the football staff (Defendants) knew about the incident.
>
> The principal of the high school, Bart Rocco, was on sabbatical when the incident and investigation took place. He returned to the school in January, 2003, the semester after the season had concluded. He was in possession of the notes from the acting principal, Defendant Patrice Smith, and provided them to the counsel for the school, yet claims to have never read them. He made a decision not to investigate this incident as "I figured, what I don't know, wouldn't hurt me["] He also claims that his attorney advised him not to get involved ...

Plaintiffs' Reply Brief, pp. 2–6, deposition citations omitted.

DISCUSSION

I

As of the time I granted summary judgment, there were four categories of defendants listed in the caption: 1) the school district, 2) the student who allegedly assaulted James Cortese on the bus, 3) the company that owned the bus and 4) thirteen individual employee "school defendants," consisting of coaches, principals and teachers. Twelve of the moving defendants argued that the only individual school defendant who is the subject of any count in the Amended Complaint is Coach Cherpak. These defendants therefore requested that I dismiss them with prejudice for this reason alone. Pa. R. Civ. P. 1020 requires that each cause of action in a complaint be stated in a separate count containing a demand for relief and that each count be "preceded by a heading naming the parties to the cause of action therein set forth." The only individual school defendant named in the heading to any count is Cheroak, who is the subject of Counts V and VI of plaintiffs' Amended Complaint, which allege negligence. The allegations of negligence in each of those counts refer specifically to Cherpak only. Although Counts X and XI allege that the individual school defendants conspired "to violate the rights and safety of plaintiff James Cortese," the only defendant named in the heading to said counts is the school district. Further, the wherefore clauses ending Counts X and XI use the singular form "defendant." The only reasonable interpretation of the Amended Complaint is that Counts X and XI set forth causes of action against the school district only, based on the conduct of the individual school defendants. Moreover, plaintiffs have waived this issue by not addressing it in their reply brief. I therefore conclude that despite the fact that numerous school district employees are named in the caption of the Amended Complaint, the only individual school defendant who is the subject of any count in the Amended Complaint is Cherpak. All moving defendants also argue plaintiffs have failed to establish a prima facie case against them as to any count. These arguments will now be addressed.

II

*7 Counts 1 through IV of the Amended Complaint are not against the moving defendants. As stated above, counts V and VI allege negligence on the part of Cherpak. Plaintiffs' entire argument as to Counts V and VI is as follows:

> Defendant Cherpak knew that the bus would be transporting the football players to and from the Camp of Champions. He met with the team prior to them hoarding the bus and then drove himself to the camp without insuring there would be an adult on the bus to supervise. Defendant Cherpak was in fact paid by the Camp of Champions and

had the responsibility to make sure the bus would be safe for the students. The negligent act of not insuring there was at least one adult on the bus resulted in the hazing of Plaintiff by one of his fellow teammates.

Plaintiffs' Reply Brief, p. 15.

As a matter of law, having only one adult (the driver) on a bus transporting high school students does not constitute negligence, given the fact that children of all school ages throughout this region go to school every day on a bus with no other supervision. Moreover, this issue is also waived because plaintiffs do not develop this theory or cite any caselaw to support it.

III

Counts VII and VIII allege intentional infliction of emotional distress against Cherpak. Plaintiffs correctly summarize part of the caselaw in this area as follows:

To state a claim for Intentional Infliction of Emotional Distress, the plaintiff must show four elements: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) the conduct must cause emotional distress; and (4) the distress must be severe. *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265, 1273–1274 (3rd Cir.1979). For conduct to be deemed extreme and outrageous Plaintiff must show that the conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Buczek v. First National Bank of Mifflintown,* 366 Pa.Super. 551, 531 A.2d 1122, 1125 (Pa.Super.Ct.1987).

Plaintiffs' Reply Brief, p. 13.

Caselaw has also held that

under this standard, "[i]t has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort."

Daughen v. Fox, 372 Pa.Super. 405, 539 A.2d 858, 861 (Pa.Super.1988). For example, it has been held that even "highly provocative racial slurs and other discriminatory incidents do not amount to actionable outrageous conduct." *EEOC v. Chestnut Hill Hospital,* 874 F.Supp. 92, 96 (E.D.Pa.1995).

Plaintiffs argue that the following facts demonstrate that Cherpak's conduct meets the above standard:

In this case Defendant William Cherpak was the head football coach at Thomas Jefferson High School. As his deposition, William Cherpak claims to have not known about the incident involving Plaintiff until November 1, 2002; but despite this testimony, it is alleged that he was aware of the incident on the school bus shortly after the incident occurred. It is without question that a teacher in the middle school, Deborah Markwith, the basketball coach, Thomas Berrich and Thomas Sharkey knew about the incident and acting pincipal Patricia Smith and assistant football coach George Wilson heard rumors about the incident before any investigation took place.

*8 Thomas Berrich testified that he thought all the football coaches knew about the incident when he took James into the gym prior to the football season beginning, yet Defendant Cherpak and the other coaches claim they did not know until the 2nd game of the playoffs. Coach Wilson also told Defendant Patricia Smith that they all knew when she asked him if the other coaches knew about the incident.

It is propounded that Defendant William Cherpak was not honest in some of his answers that he provided in his deposition. It must be up

to the fact finder to determine if William Cherpak was honest when he claims to not have any knowledge of the hazing incident. Despite the alleged knowledge, Defendant Cherpak and the other coaches or school officials took no action against Defendant Lotis. Defendant Cherpak was aware or should have been aware of the stated policy of the school that any hazing incident would result in the offending player] being permanently removed from the team yet chose to allow him to remain part of the team.

When the incident was brought to Defendant Cherpak's attention on or about November 1, 2002 by the acting principal, Defendant Smith, he decided to suspend Defendant Lotis for only one game, despite the written policy to dismiss the player from the team. Defendant Cherpak falsely denied that Adam Lotis ever returned to the team in his deposition. This failure to adhere to the stated anti hazing policy further insulted the Plaintiffs and sent a message to the remaining players that hazing would in fact be tolerated by Defendant William Cherpak and the football team. Subsequent hazing / harassment incidents took place as a result of Defendant Cherpak's failure to take any action or disciplinary measures against Defendant Lotis, thus reaffirming the fact that hazing would be tolerated.

Plaintiffs' Reply Brief, 13–14.

As a matter of law, neither Cherpak's alleged failure to appropriately discipline Lotis nor his alleged lying in depositions even approaches the kind of conduct required for the tort of intentional infliction of emotional distress.[FN1] Compare the following cases, in which the conduct alleged was held sufficient to state a cause of action for intentional infliction of emotional distress: *Denton v. Silver Stream Nursing and Rehabilitation Center,* 739 A.2d 571 (Pa.Super.1999) (employer condoned employee's death threats made to whistlehlower); *Taylor v. Albert Einstein Medical Center,* 723 A.2d 1027 (Pa.Super.1999) (physician. who had limited experience performing invasive procedure, performed procedure which contributed to child's death, despite assurances to parents that highly experienced physician would do so); *Hackney v. Woodring,* 424 Pa.Super. 96, 622 A.2d 286 (Pa.Super.1993) (day care center employer sexually harassed, intimidated, threatened to kill and fired eighteen year old female employee); *Hoffman v. Memorial Osteopathic Hospital,* 342 Pa.Super. 375, 492 A.2d 1382 (Pa.Super.1985) (physician knowingly allowed partially clad, paralyzed patient to lie uncovered on cold emergency room floor for one and a half hours); and *Bartanus v. Lis,* 332 Pa.Super. 48, 480 A.2d 1178 (Pa.Super.1984) (family members, in effort to alienate minor son from father, threatened father with bodily harm, engaged in letter-writing campaign to son disparaging father, including calling father "whoremaster" and "con artist," and threatened to commit suicide unless son left father's residence).

FN1. This claim also fails because plaintiffs have pointed to no medical testimony or expert reports. *Cassell, supra,* fn. 3.

IV

*9 Count IX of the Amended Complaint alleges a violation of Title EX of the Education Amendments of 1972, 20 U.S.C. § 1618 et seq. The moving defendants make the following argument as part of their attack on plaintiffs' Title IX claim:

In *Doe v. Southeastern Greene Sch.Disi.,* 2006 U.S. Dist. LESS 12790, the Third Circuit Court (sic) adopted the Title VII elements set forth in *Bibby v. Phila. Coca Cola Bottling Co.,* 260 F.3d 257 (3d Cir.2001) for a plaintiff to prove that same-sex harassment amounts to discrimination on the basis of sex:

Thus, there are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex-the harasser was motivated by sexual desire, the harasser was expressing a general hostility to

> the presence of one sex in the workplace, or the harasser was acting to punish the victim's non-compliance with gender stereotypes ...
>
> There is absolutely no record evidence of School District liability under the standards set forth under Title IX. Accordingly, Defendant School District's motion for summary [judgment] should be granted and Plaintiff's complaint dismissed for the reasons that follow ...
>
> [I]n this case, there is absolutely no evidence in the substantial deposition testimony or the voluminous documents produced that the minor plaintiff was discriminated against on the basis of his sex or because he failed to meet his harasser's stereotyped gender expectations. In fact, there is no evidence whatsoever as to what gender expectations Defendants' (sic) maintained. There are no allegations that James was more effeminate than the other football players. There are no allegations that the [bus] incident was sexually provocative in nature. In proving any evidentiary theory, a plaintiff must prove that the conduct at issue was "not merely tinged with offensive sexual connotations" but actually amounted to discrimination based upon the plaintiff's sex. The record is void of any averments, testimony or documents that establish the alleged sexual discrimination was based upon Minor Plaintiff's sex.
>
> Brief of the moving defendants, pp. 11. 18.

Plaintiffs' entire response to this specific prong of defendants' attack on their Title IX claim is as follows:

> Defendants also attempt to claim that Plaintiff's that (sic) their conduct does not amount to discrimination based upon [James'] sex. In this case, Adam Lotis clearly attempted to harass [James] in an obscene and sexual manner.
>
> Plaintiffs' Reply Brief, p. 12. Plaintiffs have failed in their reply brief [FN2] to articulate how they have satisfied the *Bibby* criteria, *supra,* as applied by Judge Conti in *Greene, supra,* which was a same sex Title IX, student-on-student sexual harassment case. Plaintiffs cannot make out a prima facie case under Title IX because they have not even attempted to show that James was harassed because of his sex or to punish any noncompliance with a gender stereotype.

> FN2. On January 24, 2007, plaintiffs filed a motion and brief seeking reconsideration of my order granting summary judgment. As neither the motion nor the brief explained why any new arguments contained therein could not have been made in plaintiffs' original brief in opposition to the motion for summary judgment, I did not consider any such new arguments.

V

***10** As stated previously, Counts X and XI, directed against the school district, allege that various employee school defendants conspired "-to violate the rights and safety of Plaintiff James Cortese." OwSupreme Court has summarized the law of civil conspiracy as follows:

> "[I]l must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." Proof of malice, i.e., an intent to injure, is an essential part of a conspiracy cause of action; this unlawful intent must also be without justification. Furthermore, a conspiracy is not actionable until "some overt act is done in pursuance of the common purpose or design or design ... and actual legal damage results[.]"

Rutherford v. Presbyterian–University Hospital, 211 N.J.Super. 544, 512 A.2d 500 (Pa.Super.1995) (citations omitted.)

The moving defendants argue, *inter alia,* that

To establish that two or more persons acted in

concert or entered into an agreement, mere allegations that they did so are insufficient. *Petula v. Mellody,* 138 Pa.Cmwlth. 411, 588 A.2d 107 (1991). As the Pennsylvania Commonwealth court noted in *Petula,* bald assertions of conspiracy are insufficient absent factual allegations of an agreement ... In the case at bar, the record evidence does not establish that the individual School District Defendants acted in concert to not enforce the "Initiation/Hazing" policy or to violate the rights and safety of plaintiffs. Accordingly, Plaintiffs' claims for conspiracy should be dismissed.

Defendants' Brief in support of Motion for Summary Judgment, p. 25.

In meeting this argument, plaintiffs argue the following:

- "Several defendants have provided false testimony."

- "The acting principal has decided not to investigate the wrongdoing of the football coaches and other employees,"

- All or most school defendants "knew of the hazing incident on the school bus, but failed to take any action."

- Coach Berrich tried to pressure James not to pursue this matter.

- The permanent principal failed to take any action.

Plaintiffs' Reply Brief. pp. 16–19.

Regardless of whether such alleged conduct can be characterized as wrongful and whatever the defendants' motivation, concerted action simply has not been shown.

BY THE COURT

Pa.Cmwlth.,2008.

Cortese v. West Jefferson Hills School Dist.
Not Reported in A.2d, 2008 WL 9404638 (Pa.Cmwlth.)

END OF DOCUMENT

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 theory" 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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2000 WL 262580, 5 Wage & Hour Cas.2d (BNA) 1601
(Cite as: 2000 WL 262580 (W.D.Pa.))

▷

United States District Court, W.D. Pennsylvania.
KIELY
v.
UNIVERSITY OF PITTSBURGH MEDICAL CENTER, UPMC HEALTH PLAN, INC., TRI-STATE HEALTH SYSTEM, and LIEBMAN, et al.

No. 98-1536.
Jan. 20, 2000.

Vicki Kuftic Horne, Pittsburgh, Pa., for plaintiff.

William Pietragallo II (Pietragallo, Bosick & Gordon), Pittsburgh, Pa., and Edward E. McGinley, Jr., Pittsburgh, Pa., for defendants.

AMBROSE, District Judge

*1 Pending before the Court are the Motions of Defendants University of Pittsburgh Medical Center ("UPMC"), UPMC Health Plan, Inc. ("UPMC HP"), Tri-State Health System ("TSHS"), Patricia Liebman ("Liebman") and Kurt Nellis, M.D. ("Nellis") to Strike, for a More Definite Statement and to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) the Second Amended Complaint of Plaintiff Sharon Kiely, M.D., FACP ("Plaintiff" or "Dr. Kiely"). Dr. Kiely's Second Amended Complaint against the Defendants alleges that the Defendants' conduct towards her violated Title VII of the Civil Rights Act of 1964, as amended, the Pregnancy Discrimination Act, and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §2601 et seq., and gives rise to state law causes of action for defamation, fraud, misrepresentation, intentional interference with contractual and prospective contractual relations, civil conspiracy and negligence. For the reasons set forth below, the Defendants' Motion to Strike is denied, the Defendants' Motion for a More Definite Statement is denied and the Defendants' Motion to Dismiss is granted in part and denied in part.

I. *DEFENDANTS' MOTION FOR A MORE DEFINITE STATEMENT.*

Defendants move for a more definite statement with respect to the entirety of Plaintiff's Second Amended Complaint on the basis that the Second Amended Complaint sets forth multiple causes of action and names five (5) defendants but does not specifically identify which Defendants are the subject of each count and therefore, "[a]s drafted, the Defendants cannot reasonably be required to frame a responsive pleading insofar as it is impossible to ascertain which counts are being pled against which Defendants." Motion for More Definite Statement Pursuant to F.R.C.P. 12(e), ¶¶9-12. In response, Plaintiff argues:

> while the Corporate Defendants are separate legal entities and the Individual Defendants held different positions with each entity, Plaintiff believes the evidence will show they were also indiscriminate in their "changing of hats" as they engaged in activities vis-a-vis their respective positions and the respective companies. As averred by Plaintiff, because of the nature of the organization structure, management and administration by the Defendants, Plaintiff believes and therefore avers, that all causes of action apply as to all Defendants. The activities, organization and functions were so intertwined as to render the activities of each of the Defendants activities of all of the Defendants or of the Defendants working in concert with the other.

Plaintiff's Brief in Opposition to Defendants' Motion to Strike the Second Amended Complaint Pursuant to Rule 12(f), Motion for More Definite Statement Pursuant to Rule 12(e) and Motion to Dismiss Pursuant to Rule 12(b)(6) ("Plaintiff's Opposition Brief"), p. 5.

Fed.R.Civ.P. 12(e), pursuant to which the Defendants' Motion for a more Definite Statement is brought, states: "if a pleading to which a responsive pleading is permitted is so vague or

ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Fed.R.Civ.P. 12(e). After careful consideration of the submissions of the parties and the allegations contained in the Second Amended Complaint, I find that each count in the Second Amended Complaint can be read to apply to each of the five Defendants and sufficiently sets forth the conduct of each of the Defendants that gives rise to the specific claim against him, her or it. Therefore, the Second Amended Complaint is not so vague or ambiguous that the Defendants cannot reasonably be required to frame a responsive pleading to it. The Defendants' Motion for a more Definite Statement pursuant to Fed.R.Civ.P. 12(e) is denied.

II. *DEFENDANTS' MOTION TO STRIKE.*

Defendants move to strike paragraphs thirty (30) through forty-two (42), forty-five (45), forty-nine (49) and eighty-one (81) of Plaintiff's Second Amended Complaint on the basis that these paragraphs contain allegations which are immaterial, impertinent and scandalous. Motion to Strike Pursuant to F.R.C.P. 12(f), ¶ 6. "Those allegations all relate to the Defendant(s) supposedly having improperly obtained copyrighted material and their alleged efforts at suggesting that the Plaintiff use those materials in preparing the medical policies and procedures for her employer. A review of the claims made by Plaintiff, however, do not rest, nor are they based, on these allegations." Defendants' Brief in Support of Motion to Strike Plaintiff's Second Amended Complaint Pursuant to Rule 12(f), Motion for More Definite Statement Pursuant to Rule 12(e) and Motion to Dismiss Pursuant to 12(b)(6) ("Defendants' Supporting Brief"), p. 6. In response, Plaintiff argues that Defendants have not shown that the averments at issue have no bearing on the subject matter of the litigation or that the inclusion of these averments somehow prejudices the Defendants, and that, in fact, these allegations "are inextricably intertwined with the factual scenario and are part of the underlying factual circumstances that Dr. Kiely asserts gave rise to the unlawful conduct of the Defendants towards her. Plaintiff's Opposition Brief, p. 3. In particular, Plaintiff contends that the allegations which the Defendants seek to have stricken from the Second Amended Complaint provide the factual background for understanding her claims for defamation, violation of the FMLA, fraud and misrepresentation. *Id.* at p. 4.

Under Fed.R.Civ.P. 12(c), "the court may order stricken from a pleading any . . . redundant, immaterial, impertinent, or scandalous matter." Fed.R. Civ.P. 12(c). As explained by the court in *Crawford v. School Dist. Of Philadelphia,* 1998 WL 288288 (E.D. Pa. June 3, 1998): "[m]otions to strike are disfavored and will only be granted when the movant 'clearly show[s] that the challenged matter "has no bearing on the subject matter of the litigation and that its inclusion will prejudice the defendants" '."*Id.* at *2, *quoting,* 2 Moore's Federal Practice §12.37, at 12-95 (3d ed.).

After careful consideration of the submissions of the parties and the allegations contained in paragraphs thirty (30) through forty-two (42), forty-five (45), forty-nine (49) and eighty-one (81) of the Second Amended Complaint, I find that the allegations contained in these paragraphs have a bearing on the subject matter of the litigation. Accordingly, the Defendants' Motion to Strike the allegations contained in paragraphs thirty (30) through forty-two (42), forty-five (45), forty-nine (49) and eighty-one (81) of the Second Amended Complaint is denied.

III. *DEFENDANTS' MOTION TO DISMISS.*

In deciding a motion to dismiss, all factual allegations and all reasonable inferences therefrom must be accepted as true and viewed in the light most favorable to the plaintiff. *Colburn v. Upper Darby Tp.,* 838 F.2d 663, 666 (3d Cir. 1988), *cert. den'd,* 489 U.S. 1065 (1989). A court may dismiss a plaintiff's complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support

of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45 [9 FEP Cases 439] (1957). In ruling on a motion to dismiss for failure to state a claim, the court looks to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn*, 838 F.2d at 666.

A. *COUNT I-FAMILY AND MEDICAL LEAVE ACT ("FMLA") CLAIM.*

Defendants argue that Plaintiff's FMLA claim against them must be dismissed for failure to state a claim upon which relief can be granted. Defendants' Supporting Brief, pp. 9-10. In particular, Defendants argue:

***3** Plaintiff alleges that upon returning from FMLA leave on December 8, 1997, that she was reprimanded for failing to complete unassigned directives to write medical policies; that she was removed from the management team; that she had no office, security, materials or assistants; that on or about February 6, 1998, she was reassigned to report to Dr. Nellis, who immediately gave her a written warning and threatened to terminate her employment; and that her employment was terminated by Dr. Nellis on April 30, 1998.

However, Plaintiff also notes that the Defendant companies underwent a reorganization in January and February 1998, pursuant to which the staff and functions of TSHS were reassigned to UPMC HP. Amended Complaint, ¶¶7-8, 18. Plaintiff also acknowledges that she was reassigned from TSHS to UPMC HP. Amended Complaint, ¶18. The mere fact that the reorganization occurred shortly after Plaintiff's return from FMLA leave is insufficient to raise a claim of retaliation under the FMLA. . . . Plaintiff acknowledges that she received a written warning on February 6, 1998, which is two months prior to her termination. Similarly, Plaintiff acknowledges that TSHS was a start-up organization. Amended Complaint, ¶30. It is not uncommon for start-up organizations, and entities undergoing reorganizations to have their offices physically disrupted and their staff relocated or reassigned.

Plaintiff was provided with paid FMLA leave, returned to the identical position with TSHS from which she took leave, was provided a position with UPMC HP after the reorganization in January/ February 1998 and, unfortunately, was terminated for poor job performance in April 1998. Under these facts, Plaintiff has failed to state a cause of action of alleged retaliation in violation of the FMLA.

Defendants' Supporting Brief, pp. 9-10 (internal footnote omitted).

In response, Plaintiff argues that "[t]he Defendants attempt to pigeonhole the claim [for violation of the FMLA] of the Plaintiff by suggesting that the complained of conduct of the Defendants all relates to a reorganization that occurred. This is a misreading of the extensive factual allegations of the second amended complaint," and that this argument by the Defendants, while providing a possible defense to Plaintiff's FMLA claim, does not at the pleading stage vitiate Plaintiff's FMLA cause of action. Plaintiff's Opposition Brief, p. 10, *citing*, Second Amended Complaint, ¶43.

In the Second Amended Complaint, Plaintiff alleges that the Defendants engaged in the following conduct towards Plaintiff during and upon her return to work after taking a FMLA leave, all in retaliation for Plaintiff having taken the FMLA leave: (1) Defendants reprimanded Plaintiff for failing to complete certain assignments when, in fact, Plaintiff had not been given said assignments prior to taking her FMLA leave; (2) Defendants removed Plaintiff from the management team; (3) Defendants failed, until late January or early February, 1998, to provide Plaintiff with a computer, Internet access, and staff support essential for her properly completing her job; (4) Defendants failed to supply Plaintiff with the necessary equipment to perform the research

necessary for completion of certain functions of her position, such as drafting medical policies; (5) Defendants reassigned Plaintiff's office, secretary, and computer during her leave and placed her office materials in storage; (6) Defendants failed to assign Plaintiff her new office for approximately six weeks after she returned from her FMLA leave and then provided her with the office space that was a former paper storage cubicle; (7) Defendants did not have a medical expert list fundamentally in place; (8) Defendants reassigned Plaintiff to report to Dr. Nellis, her former peer; and (9) Defendants terminated Plaintiff. Second Amended Complaint, ¶43.

The FMLA requires that any eligible employee who takes leave under the FMLA shall on return from said leave either be restored to the same employment position held prior to said leave or be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. 29 U.S.C. §§2614(a)(1), 2615(a)(1). Furthermore, an employee who has taken a FMLA leave cannot be discharged or otherwise be retaliated or discriminated against for taking an FMLA leave. 29 U.S.C. §2615(a)(2); *Voorhees v. Time Warner Cable Nat. Div.*, 1999 WL 673062, *3 (E.D. Pa. Aug. 30, 1999); *Holmes v. Pizza Hut of America, Inc.*, 1998 WL 564433, *6 [4 WH Cases2d 1681] (E.D. Pa., Aug. 31, 1998); *Williams v. Shenango, Inc.*, 986 F.Supp. 309, 321 [4 WH Cases2d 237] (W.D. Pa. 1997). Viewing the facts alleged in Plaintiff's Second Amended Complaint and all reasonable inferences therefrom as true, I find that Plaintiff's Second Amended Complaint sufficiently states a cause of action against the Defendants for violation of the FMLA. Defendants' Motion to Dismiss Plaintiff's FMLA claim is denied.

B. *COUNT II-DEFAMATION CLAIM.*

Defendants also move for dismissal of Plaintiff's defamation claim against them. In support of this aspect of the Motion to Dismiss, Defendants argue that Plaintiff's defamation claim rests upon three general categories of statements, "inquiries of the Defendants' employees regarding the Plaintiff's job performance," "statements indicating that Plaintiff had not performed her job well, exercised poor judgment, delayed the performance of work, misrepresented her authority and could not be trusted as an employee," and "a general undefined accusation that the Defendants made additional undefined statements." Defendants argue that the alleged communications regarding Plaintiff's poor job performance leading to her termination are subject to either an absolute or a conditional privilege. To the extent Plaintiff is asserting that there might be additional persons to whom the Defendants could have made defamatory statements about her. Defendants contend that said assertion cannot be considered in support of Plaintiff's claim. Defendants' Supporting Brief, pp. 10-12.

In response, Plaintiff argues that: (1) Defendants' Motion ignores the plethora of communications directed at harming and undermining the professional reputation of Dr. Kiely that she has alleged occurred in paragraphs 48 through 53 of the Second Amended Complaint; (2) it is not the content of any warning letter or termination memorandum that is the basis for her defamation claim and therefore, Defendants had no absolute privilege to defame her as they did; and (3) "[i]t is not averred that any of [the communications underlying her defamation claim] occurred in a privileged context. To the extent that in some circumstances the Defense would attempt to argue that some conditional privilege may have attended some of those conversations, Plaintiff has asserted that any such privilege has been abused" in that "the individuals to whom such communications were directed do not enjoy the status that might give rise to a claim of conditional privilege. Plaintiff further argues that "the complaint references the basis for the animus that supports the abuse of a conditional privilege, [i.e.] the refusal of Dr. Kiely to attach her name and reputation to medical directive policies that had been pirated

from another organization." Plaintiff also states that there will be evidence of professional jealousy by Dr. Nellis. Plaintiff's Opposition Brief, pp. 10-12.

Concerning the Defendants' privilege argument, in *Momah v. Albert Einstein Medical Center,* 978 F.Supp. 621, 634-636 (E.D. Pa. 1997), the district court explained, in pertinent part, that under Pennsylvania law:

*5 liability for publication of a defamatory matter may be defeated by a privilege to publish it. For example, an employer has an absolute privilege to publish defamatory matters in notices of employee termination and thus public communication to a plaintiff and relevant supervisory personnel is not capable of defamatory meaning. Employers thus have a right of absolute privilege to issue warning letters, notices of termination, etc., with impunity under Pennsylvania law. The privilege is lost, however, if the information is disseminated beyond the circle of those who reasonably need to know the reason for the employee's dismissal.

Conditional privileges arise when the communication involves an interest of the publisher, the recipient, a third party or the public. . . . Once a defendant has shown that a particular communication is conditionally privileged, the burden shifts to the plaintiff to show an abuse of that privilege. Abuse is indicated when the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege was given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege.

Id. at 634-35 (internal citations omitted). Applying the above stated law on absolute and conditional privileges to the facts alleged in Plaintiff's Second Amended Complaint, I find that viewing the facts alleged in Plaintiff's Second Amended Complaint and all reasonable inferences therefrom to be true, it is not clear from these allegations that any defamatory statements allegedly made by Defendants concerning Plaintiff are subject to either an absolute or conditional privilege. Therefore, I will not at this juncture find as a matter of law that Plaintiff's defamation claim against Defendants must be dismissed based upon the Defendants being absolutely and/or conditionally privileged to make said statements about Plaintiff.

With respect to the Defendants' argument that to the extent Plaintiff is asserting that there might be additional persons to whom the Defendants could have made defamatory statements about her, and that said assertion cannot be considered in support of Plaintiff's defamation claim, let it simply be said that I have not considered said allegation in reviewing the sufficiency of Plaintiff's defamation claim.

C. *COUNT III-PLAINTIFF'S FRAUD AND MISREPRESENTATION CLAIM.*

Defendants also move to dismiss Plaintiff's claim found in Count III of the Second Amended Complaint, which is entitled "Pursuant to the Common Law for Fraud and Misrepresentation." In support of their Motion to Dismiss this claim, Defendants first argue that Count III does not actually set forth a common law claim for fraud and misrepresentation, but rather, attempts to set forth a cause of action for wrongful discharge. Defendants contend that, to the extent Count III is read to state a claim for wrongful discharge, said claim must be dismissed because under Pennsylvania law, an at-will employee like Plaintiff does not have a cause of action for wrongful termination except where the termination threatens a clear mandate of public policy and "Plaintiff has not alleged any violation of public policy." Defendants' Supporting Brief, p. 13.

Alternatively, Defendants argue that to the extent Plaintiff is attempting to state a claim for fraud and misrepresentation, said claim must fail and be dismissed for multiple reasons. First, they argue that to the extent Plaintiff claims she was told during pre-hire interviews that she would have

certain duties and that the Defendant entities had certain goals and objectives in the operation of their business, the statements regarding "professionalism," "integrity," and "focus" are statements of opinion that cannot form the basis of a fraud claim. *Id.* at p. 15, *citing, Berda v. CBS, Inc.*, 800 F.Supp. 1272 (W.D. Pa.), *aff'd*, 975 F.2d 1548 (3d Cir. 1992). Second, Defendants argue that Plaintiff's claims regarding alleged misrepresentations of her job duties, Plaintiff's responsibilities or the overall qualities of resources available to the Defendants, which the Plaintiff acknowledge to be start-up organizations, constitute mere "puffing" and therefore, are insufficient to form a basis for a cause of action for fraud or misrepresentation. *Id.*, *citing, Huddleston v. Infertility Center of America, Inc.*, 700 A.2d 453, 461 (Pa.Super. 1997); *Berda*, 800 F.Supp. at 1277. Third, Defendants argue that Plaintiff's fraud and misrepresentation claim should be dismissed because Plaintiff has not alleged any harm proximately caused by the alleged misrepresentations:

***6** [t]o the contrary, Plaintiff suffered no harm. Rather, Plaintiff accepted employment with the Defendant corporations, performed services for those corporations and was paid a salary for her services. *See,* Second Amended Complaint, ¶10. Thus, the alleged fraud and misrepresentation upon which she relied was economically beneficial to her. It was not until Plaintiff's employment was later terminated as a result of her poor job performance that Plaintiff might have sustained any actual loss. In no rational sense can Plaintiff claim to have been harmed by accepting employment for which she was paid."

Id. at p. 16. Finally, Defendants argue that to the extent Plaintiff is asserting that they perpetrated a fraud upon third persons by misrepresenting the quality of the program, she lacks standing to assert such a claim. *Id.* at 13-14, n.6.

In response, Plaintiff first argues that her Count III claim is not one for wrongful discharge but, as the count is headed, alleges a common law claim of fraud and misrepresentation:

[t]he fraud and misrepresentation claim in this case does not devolve from the termination of the Plaintiff. Rather, it follows from the fraudulent use of the professional credentials of Dr. Kiely with the goal of legitimizing a program and organization that otherwise lacked the essential elements necessary to give it marketplace credibility. It also follows from the misrepresentations made to Dr. Kiely in order to induce her to lend her credentials to the organization.

[TSHS], as set forth in the complaint, was a start-up organization for [UPMC] that had as its goal becoming an integrated delivery system of providers and hospitals. In that capacity, it had the aim of directly competing with the equivalent components in the Blue Cross/Blue Shield system. It could not effectively do that without putting into place medical policy directives. It also could not do that without having in place and undertaking effective and appropriate review of medical records of participants in the program. As a physician, Dr. Kiely provided the credentials that facilitated accomplishment of those goals. As a Member of the National Advisory Council for Health Care Policy, Research and Evaluation of the US Department of Health & Human Services, among other national organizations, Dr. Kiely provided the program with the legitimacy for the advancement of that program.

*7 As the Second Amended Complaint identifies, the Defendants attempted to appropriate and trade off of those qualifications, her professional reputation and that legitimacy. It did that in order to promote and develop a program that was based upon illegitimate, unprofessional and unqualified policies and procedures. It also sought to compel Dr. Kiely to legitimize these policies and procedures. When she refused to do that and when she refused to plagiarize copyrighted materials of another, she was subjected to a personal attack on her professional reputation and career. It is the fraud committed upon Dr. Kiely and the

misrepresentations made to her to gain her participation in the organization that is the subject of this Second Amended Complaint.

Plaintiff's Opposition Brief, pp. 14-16 (internal citations to Second Amended Complaint omitted). With respect to the Defendants' argument that Plaintiff has not alleged that she suffered any harm as a result of the alleged fraud and misrepresentation, Plaintiff argues: "plaintiff . . . has set forth how she has been damaged as a result. Through discovery Plaintiff will identify the pecuniary losses she realized, including but not limited to other business opportunities lost at the time she relied upon the false representations and the lost business opportunities that followed from the damage done to her as a result of Defendants[']fraud and misrepresentation."*Id.* at 16.

The elements of a fraudulent misrepresentation cause of action under Pennsylvania law are: (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will be induced to act or refrain from acting, (4) justifiable reliance by the recipient on the misrepresentation, and (5) damage to the recipient as the proximate result of the reliance. *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285 A.2d 451, 454 (1971), *cert. den'd*, 407 U.S. 920 (1972); *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa.Super. 90, 464 A.2d 1243, 1252 (1983); *Fort Washington Resources, Inc. v. Tannen*, 858 F.Supp. 455, 459 (E.D. Pa. 1994). Fraud can be proved by showing that the false representation was made knowingly, or in conscious ignorance of the truth or recklessly without caring whether or not the representation is true or false. *Delahanty*, 464 A.2d at 1252, *citing, Warren Balderston Co. v. Integrity Trust Co.*, 314 Pa. 58, 170 A.2d 282 (1934). Further, "false information may be communicated directly, or indirectly by the nondisclosure of material facts. The deliberate non-disclosure of a material fact is the equivalent of the affirmation of a falsity and an innocent misrepresentation is actionable if it pertains to a matter material to the transaction involved." *Fort Washington Resources*, 858 F.Supp. at 459, *citing, Delahanty*, 464 A.2d at 1252. "A false statement of intent regarding future actions can be fraudulent." *Berda*, 800 F.Supp. at 1276.

To the extent Plaintiff's fraud/misrepresentation claim "follows from the fraudulent use of the professional credentials of Dr. Kiely with the goal of legitimizing a program and organization that otherwise lacked the essential elements necessary to give it marketplace credibility," I agree with Defendants that such allegations do not give rise to a fraud/misrepresentation against Plaintiff as opposed to members of the general public who were in the market for a program such as that provided by TSHS. That aspect of Plaintiff's fraud/misrepresentation claim must be dismissed for failure to state a claim upon which relief can be granted.

Turning to that part of Plaintiff's fraud/misrepresentation claim that is premised upon "the misrepresentations made to Dr. Kiely in order to induce her to lend her credentials to the organization," I further find as follows. The statements made by Defendants to Plaintiff which underlie this aspect of Plaintiff's fraud/misrepresentation claim are as follows: (1) "[t]hat Dr. Kiely would have separate responsibilities and independent authority in the position of Medical Director of TSHS from the other Medical Director, Defendant Nellis. . . .;" (2) "[t]hat TSHS would be an academic Integrated Delivery System that would be information driven and would have the necessary resources and support for the effective functioning of the operation;" (3) "[t]hat Dr. Nellis would not be permitted to undercut the position of Dr. Kiely within the organization and that if any activity occurred in that regard, Dr. Nellis would 'just go away';" and (4) "[t]hat TSHS had an academic focus, was committed to maintaining the highest levels of academic and business professionalism, was focused on maintaining

credibility with medical professionals and among the University academic medical community and would direct its business activities to that end." Second Amended Complaint, ¶28. *See also Id.* at ¶¶67, 70, and 72. To the extent statements were made to Dr. Kiely by Defendants that she would have certain duties and responsibilities as an employee of TSHS and UPMC HP and that she would be provided the necessary resources and support to perform those duties/responsibilities, said statements do not, as Defendants argue, constitute either statements of opinion or mere "puffing" that are not actionable. To the contrary, however, to the extent Plaintiff was told "[t]hat TSHS had an academic focus, was committed to maintaining the highest levels of academic and business professionalism, was focused on maintaining credibility with medical professionals and among the University academic medical community and would direct its business activities to that end," said statements are simply opinions that cannot form the underlying factual basis for a fraud/misrepresentation claim under Pennsylvania law and Plaintiff's fraud/misrepresentation claim must be dismissed for failure to state a claim upon which relief can be granted.

Turning last to Defendants' argument that Plaintiff has not alleged any harm proximately caused by the alleged misrepresentations, I find that by alleging that she lost business opportunities as a result of the Defendants' alleged misrepresentations, Plaintiff has sufficiently alleged damage to her as the proximate result of her reliance on said alleged misrepresentations. *See* Second Amended Complaint, ¶¶73, Conclusion.

D. *COUNT IV-PLAINTIFF'S INTENTIONAL INTERFERENCE WITH CONTRACTUAL OR PROSPECTIVE CONTRACTUAL RELATIONS CLAIM.*

Defendants also argue that Plaintiff's claim for interference with existing or prospective contractual relations must fail as a matter of law because to state such a cause of action, Plaintiff must allege sufficient facts establishing (1) a prospective or existing 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, and Plaintiff's claim fails as to each of these elements. Defendants' Supporting Brief, pp. 16-17.

As explained by the United States Court of Appeals for the Third Circuit in *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998);

***9** Pennsylvania recognizes both interference with existing contractual relations and interference with prospective contractual relations as branches of the tort of interference with contract. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 925 (3d Cir. 1990). While the two branches of tortious interference are distinct, they share essentially the same elements. In order to prevail on a claim for intentional interference with contractual or prospective contractual relations, a plaintiff must prove:

> (1) the existence of a contractual, or prospective contractual relation between itself and a third party;
>
> (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent the prospective relation from occurring;
>
> (3) [t]he absence of a privilege or justification on the part of the defendant;
>
> (4) the occasioning of actual legal damages as a result of the defendants' conduct; and
>
> (5) for prospective contracts, a reasonable likelihood that the relationship would have occurred but for the interference of the defendant.

Id. at 530, *citing, Pelagatti v. Cohen*, 370

Pa.Super. 422, 536 A.2d 1337, 1343, *appl. den'd,* 519 Pa. 667, 548 A.2d 256 (1988).

A. *PLAINTIFF'S INTENTIONAL INTERFERENCE WITH EXISTING CONTRACTUAL RELATIONSHIPS CLAIM.*

More specifically, with respect to Plaintiff's intentional interference with existing contractual relations claim against them, Defendants argue that: (1) they "cannot have interfered with Plaintiff's employment contract with TSHS or UPMC HP for the simple reason that Plaintiff had no contract for employment with either TSHS or UPMC HP but rather, was an at-will employee and could have been terminated at any time for any reason or no reason;" (2) they cannot have intended to terminate an employment contract that did not exist; (3) Plaintiff has not and cannot allege the absence of privilege or justification by the Defendants because " 'Pennsylvania law recognizes that corporate officers, directors and other management personnel have a privilege to cause the corporate employer to terminate an employee.' " Since Plaintiff was an at-will employee, Plaintiff could have been terminated at any time without cause or justification; and (4) Plaintiff has failed to identify any actual damages resulting from the alleged interference but rather, has only alleged harm to her professional reputation, unspecific lost business relationships and job opportunities which are insufficient as a matter of law to support her claim for interference with contractual relations. *Id.* at pp. 17-19 (internal footnote and citations omitted).

In response, Plaintiff articulates her intentional interference with existing and prospective contractual relations claims as follows:

***10** Plaintiff has provided sufficient notice to Defendants of the nature of the allegations against them with respect to this count. Defendant's [sic] Nellis and Leibman wore a variety of hats, sometimes representing TSHS, sometimes representing UPMC HP. The complaint identifies how their conduct was directed not only among the various organizations and the employees of those organizations, as well as UPMC itself, but also to individuals and organizations outside of their immediate sphere of influence. Second Amended Complaint, paragraphs 49-52. Those paragraphs also reference conduct that would be outside of any asserted privilege by the Defendants, or as asserted, would establish an abuse of any applicable privilege. In that regard, however, it is denied that at this juncture, and as an element of the complaint, the Plaintiff has any obligation to make that assertion as an element of the fundamental cause of action.

Plaintiff's Opposition Brief, pp. 19-20.

I address first Defendants' arguments that they cannot have intentionally interfered with Plaintiff's employment contract with TSHS or UPMC HP for the simple reason that Plaintiff had no contract for employment with either TSHS or UPMC HP but rather, was an at-will employee and could have been terminated at any time for any reason or no reason. Defendants' Supporting Brief, p. 17. In *Rutherfoord v. Presbyterian-University Hosp.*, 417 Pa.Super. 316, 612 A.2d 500 (1992), the Pennsylvania Superior Court explained that in *Adler, Barish, Daniels, Levin and Creskoff v. Epstein,* 482 Pa. 416, 393 A.2d 1175 (1978), *appl. dismissed, cert. den'd,* 442 U.S. 907 (1979), the Pennsylvania Supreme Court recognized a cause of action for intentional interference with contractual and/or *business relations. Id.* at 507 (emphasis added). *See also Curran v. Children's Service Center of Wyoming County, Inc.*, 396 Pa.Super. 29, 578 A.2d 8, 13 (1990), *app'l den'd,* 526 Pa. 648, 585 A.2d 468, (1991) "[a] cause of action for intentional interference with a contractual relationship may be sustained even though the employment relationship is at-will."). Here, the Second Amended Complaint can be read to allege that Plaintiff had a business relationship with UPMC, UPMC HP and TSHS with which the Defendants intentionally interfered. *See* Second Amended Complaint, ¶10.

Having so held, I turn next to Defendants'

contention that Plaintiff has not and cannot allege the absence of privilege or justification by the Defendants because "Pennsylvania law recognizes that corporate officers, directors and other management personnel have a privilege to cause the corporate employer to terminate an employee'." The absence of privilege or justification on the part of the defendant element of an intentional interference claim "is merely another way of stating that the defendant's conduct must be improper." *Yaindl v. Ingersoll-Rand Company Standard Pump-Aldrich Div.*, 281 Pa.Super. 560, 581 n. 11, 422 A.2d 611, 622 n.11 [115 LRRM 4738] (1980). In *Rutherfoord, supra.*, the court explained: "[e]ssential to a right of recovery under this section is the existence of a contractual and/or business relationship between the plaintiff and a 'third person' other than the defendant. By definition, this cause of action requires three separate parties; parties to a contract or employment relationship cannot assert this cause of action against each other." *Rutherfoord,* 612 A.2d at 507-08. The *Rutherfoord* court continued:

***11** [i]n the present case, any alleged "contract" or business relationship was between [the plaintiff] and the Hospital as his employer. A corporation is a creature of legal fiction which can act only through its officers, directors, agents and other employees. Where employees or agents for the corporation act within the scope of their employment or agency, the employees, the agents and the corporation are one and the same; there is no third party. Accordingly, Pennsylvania law is clear that where, as here, a claim for intentional interference is based upon an alleged "contract" or business relationship with an employer, and that relationship is terminated by an agent of the employer acting within the scope of his agency, there is no third party involved and no claim will lie.

Id. at 508 (internal citations omitted). The *Rutherfoord* court went on to explain in response to the plaintiff's argument that the claims against the defendant-agent should remain viable because an agent is liable for intentional interference if he or she intentionally and improperly induces his principal to break its contract with a third person, that because "Pennsylvania law recognizes that corporate officers, directors, and other management personnel have a privilege to cause the corporate employer to terminate an employee," the agents that caused the plaintiff's termination, were as a matter of law, privileged to do so. *Rutherfoord,* 612 A.2d at 508, *citing, Menefee v. Columbia Broadcasting System, Inc.*, 458 Pa. 46, 329 A.2d 216 (1974); *Daniel Adams Associates, Inc. v. Rimbach Publishing, Inc.*, 360 Pa.Super. 72, 519 A.2d 997, *appl. den'd,* 517 Pa. 597, 535 A.2d 1056 (1987), *appl. den'd,* 517 Pa. 599, 535 A.2d 1057 (1987)

Rutherfoord did not, significantly, involve a corporate officer, director or management personnel who was alleged to have been acting not on behalf of the corporation, but rather, on his own behalf. This is significant because there are federal court decisions applying Pennsylvania law that support the legal premise that "where a plaintiff alleged that the corporate officers or directors either acted in their personal capacity or outside the scope of their authority and the acts allegedly done in either capacity were done with malice toward the plaintiff or against the corporation's best interest, an intentional interference claim may be asserted against the individuals." *Alexander v. Pennsylvania Dept. of Banking,* 1994 WL 144305, *5 (E.D. Pa. Apr. 21, 1994) (citations omitted). *See also American Trade Partners, L.P. v. A-1 Intern. Importing Enterprises, Ltd.*, 757 F.Supp. 545, 555 (E.D. Pa. 1991) (explaining that "[w]here it is alleged . . . that the corporate officer or employee was acting in a personal capacity or outside the scope of his authority, an intentional interference claim may be asserted against him.").

In her Second Amended Complaint, Plaintiff has sufficiently alleged that she had either a business relationship or a contractual relationship

with UPMC, UPMC HP, TSHS, the Agency for Health Care Policy and Research of the Department of Health and Human Services, the University of Pittsburgh Medical School and the Graduate School of Public Health. Second Amended Complaint, ¶¶10, 52, 76. Further, Plaintiff has alleged that "each of the Corporate Defendants is interrelated in its actual functions and operations and that the individual Defendants, in the conduct of the activities hereinafter set forth, at all times acted both individually and on behalf of each of the Corporate Defendants." *Id.* at ¶9. Additionally, Plaintiff alleges that the conduct underlying this claim against Defendants is that of Defendants Nellis and Leibman and the Second Amended Complaint can be read to allege that said acts were done with malice towards the Plaintiff. *Id.* at ¶¶48-52, 75-76.

With respect to Plaintiff's intentional interference claim as to her employment relationship with UPMC, UPMC HP and TSHS, based upon the allegations contained in Plaintiff's Second Amended Complaint, I find that to the extent Plaintiff has alleged that the individual defendants were acting on behalf of the corporate defendants, Plaintiff has not and cannot state a claim for tortious interference with contractual relationships as to her business relationships with Defendants UPMC, UPMC HP and TSHS because: (1) as management personnel for UPMC, UPMC HP, and TSHS, acting on behalf of these organizations, Defendants Nellis and Liebman were privileged, as a matter of law, to cause the corporate defendants to terminate Plaintiff and (2) where Nellis and Liebman acted within the scope of their employment or agency, they and the corporate Defendants are one and the same and thus, there was no third party who interfered with the Plaintiff's business relationships with the UPMC, UPMC HP or TSHS. Accordingly, Defendants' Motion to Dismiss Plaintiffs' interference with contractual relationship claim against them is granted to the extent said claim is based upon Defendants Nellis and Liebman, acting on behalf of the corporate defendants, interfering with her employment relationship with UPMC, UPMC HP and TSHS and said claim against the Defendants is dismissed with prejudice.

To the contrary, however, to the extent the Second Amended Complaint can be read to allege that Defendants Nellis and Liebman were acting in an individual capacity when they engaged in the conduct that interfered with Plaintiff's employment relationship with UPMC, UPMC HP and TSHS, rather than as agents, corporate officers or management personnel of the corporate defendants, and that said conduct was undertaken with malice towards Plaintiff, there is case law to support that an intentional interference claim may be asserted against them. Accordingly, Defendants' Motion to Dismiss this aspect of Plaintiff's intentional interference with existing contractual relations claim against Defendant Nellis and Liebman is denied.

Next, I turn to Defendants' argument that Plaintiff has failed to identify any actual damages resulting from the alleged interference but rather, has only alleged harm to her professional reputation, unspecific lost business relationships and job opportunities which are insufficient as a matter of law to support her claim for interference with contractual relations. In response, Plaintiff argues: "Plaintiff has also placed the Defendants on notice as to the types of damages that she believes were sustained as a result. See Second Amended Complaint, Paragraph 73 and the Conclusion. The challenges made by the Defendants herein go to matters that can and will be delineated through the discovery process. A Rule 12(b)(6) dismissal is inappropriate." Plaintiff's Opposition Brief, p. 20.

After a review of the allegations contained in Plaintiff's Second Amended Complaint, I find that at this stage in the proceedings, Plaintiff has sufficiently alleged the damages aspect of her claim so as to survive Defendants' motion to dismiss.

Finally, it seems necessary to emphasize that

Plaintiff's Second Amended Complaint clearly also alleges an intentional interference with existing contractual relationship claim against Defendants based upon interference with Plaintiff's existing business/contractual relationships with the Agency for Health Care Policy and Research of the Department of Health and Human Services, the University of Pittsburgh Medical School and the Graduate School of Public Health. *See* Second Amended Complaint ¶76. This is an aspect of Plaintiff's claim that Defendants' motion to dismiss does not address and therefore, clearly survives Defendants' Motion to Dismiss.

B. *PLAINTIFF'S INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS CLAIM.*

With respect to Plaintiff's claim for intentional interference with prospective contractual relations, Defendants argue that said claim must be dismissed because (1) "Plaintiff has failed to identify any *actual* prospective business relationship with which the Defendants interfered [and] to the contrary, Plaintiff only makes the bare assertion that Plaintiff 'lost valuable business relationships';" (2) "Defendants could not have intended to interfere with the Plaintiff's unidentified prospective business relations between Plaintiff and unknown third parties;" (3) Plaintiff's allegations fail to negate the existence of privilege with respect to prospective contracts in that since Defendants had an absolute right to terminate Plaintiff's at-will employment, Plaintiff's termination cannot give rise to an interference with prospective relations claim; and (4) Plaintiff has failed to identify any actual damages resulting from the alleged interference and rather, has only alleged harm to her professional reputation, unspecific lost business relationships and job opportunities which are insufficient as a matter of law to support her claim. Defendants' Supporting Brief, pp. 17-20.

After careful review of the allegations contained in Plaintiff's Second Amended Complaint, I find first that Plaintiff has sufficiently pled facts that support the existence of a prospective contractual relationship between Plaintiff and the Agency for Health Care Policy and Research of the Department of Health and Human Services, the University of Pittsburgh Medical School and the Graduate School of Public Health. *See* Second Amended Complaint, ¶¶48-52, 76-77. Second, Plaintiff has sufficiently pled facts to establish Defendants' purpose or intent to harm Plaintiff by preventing these relationships from occurring. *Id.* Third, I do not find Defendants' privilege argument to be on point given that I do not read Plaintiff's Second Amended Complaint to be alleging that it was the Defendants' termination of Plaintiff's employment that is the conduct at issue that caused the alleged interference with prospective contractual relations. Rather, the Second Amended Complaint alleges that the interference was caused by the Defendants engaging in conduct that included, but was not limited to the "[m]aking of unfounded and unsubstantiated allegations concerning her performance and capabilities, promot[ing] the suggestion that Dr. Kiely was unable to effectively perform in her occupation, . . . challeng[ing] her professionalism, integrity and honesty," and "engag[ing] in a purposeful mischaracterization of the activities of Dr. Kiely to comport with and support those misrepresentations." *Id.* at ¶¶75-76. Finally, I find that the Second Amended Complaint sufficiently alleges that Plaintiff suffered damages as a result of the Defendants' alleged interference with her potential contractual relationships with the Agency for Health Care Policy and Research of the Department of Health and Human Services, the University of Pittsburgh Medical School and the Graduate School of Public Health. *Id.* at ¶77. Defendants' motion to dismiss Plaintiff's intentional interference with prospective contractual relations claim is denied.

E. *COUNT V-PLAINTIFF'S CIVIL CONSPIRACY CLAIM.*

"To state a cause of action for civil conspiracy, the following elements are required: '(1) a

combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done on pursuance of the common purpose; and (3) actual legal damage.' Proof of malice or an intent to injure is essential to the proof of a conspiracy." *Strickland v. University of Scranton,* 7 00 A.2d 979 (Pa.Super. 1997) (internal citations omitted). Defendants also contend that Plaintiff has failed to state a cause of action for conspiracy. Defendants' Supporting Brief, p. 20. More specifically, Defendants first argue that "a single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves" to terminate another employee and here, Plaintiff has alleged that "the Defendants, individually and collectively operated as one, they cannot have conspired among themselves." *Id.* at pp. 20-22, *quoting, Rutherfoord,* 612 A.2d at 508. Second, Defendants argue that they have not performed any unlawful act in that they were privileged to cause the corporate employer to terminate Plaintiff, " 'absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy' " and under Pennsylvania law, Plaintiff does not have a cause of action for termination of her at-will employment. *Id* . at p. 22, *quoting, Nix v. Temple University of Com. System of Higher Education,* 408 Pa.Super. 369, 596 A.2d 1132, 1137 (1991) (citation omitted). Third, Defendants argue that Dr. Kiely has not alleged any actual legal damages arising out of the alleged conspiracy but instead, has only alleged damage to her reputation. *Id.* Finally, Defendants contend that Plaintiff fails to identify in what manner the Defendants acted with malice towards or an intent to injure Dr. Kiely, and that as a matter of law, the element of malice requires that the unlawful intent must be absent justification. Here the Defendants argue that their actions were privileged and that they had a legitimate business interest to protect in exercising their authority to terminate Plaintiff's at-will employment. *Id.* at p. 23.

In response, Plaintiff first argues "[w]hile it is true, as the Plaintiff asserts, that the various Defendants were interconnected in their purposes, activities and even functions, the fact remains that they are still separate legal entities. There are three separate corporations involved in this lawsuit as Defendants." Plaintiff's Opposition Brief, pp. 20-21. In a related argument, Plaintiff further contends that at this stage in the proceedings, it is simply unclear when the individual Defendants were acting on behalf of one of the corporate Defendants and when they were acting on behalf of the other corporate Defendants. *Id.* at 22-23. Plaintiff also argues that her conspiracy claim against Defendants is viable because the plaintiff can maintain a conspiracy claim between a corporation and its employees where the employees act in pursuit of their own ends and not for the benefit of the corporation and "[i]n the instant case, the individual Defendants were not always acting only on behalf of one of the Corporate defendants. . . . At times, and because of the nature of the conduct at issue, a jury could find that they were also acting in pursuit of their own ends." *Id.* at p. 22. Further, Plaintiff argues that she is not averring that the unlawful act was the termination of her at-will employment but rather, that her termination occurred in violation of the FMLA and the laws prohibiting sex and pregnancy discrimination. She is also alleging that the Defendants conspired to defame her professional reputation and character. *Id* . Finally, Plaintiff contends that the Second Amended Complaint sufficiently sets forth the nature and manner in which she was damaged and sufficiently alleges both malice and intent to injure. *Id.*

In the Second Amended Complaint, Plaintiff alleges: "Plaintiff believes and therefore avers that Defendant Nellis, individually or on behalf of either UPMC HP or TSHS, and Liebman, individually or on behalf of either UPMC HP of TSHS, combined in a concerted action with each other and/or with the separate Corporate Defendants to direct, manipulate or otherwise cause Dr. Kiely to engage

in unlawful and unprofessional conduct and in failing to accomplish that result thereafter conspired to secure her termination." Second Amended Complaint, ¶80. Plaintiff further alleges: "Plaintiff further believes that when Defendants Nellis and Liebman were unsuccessful in their efforts directed to Dr. Kiely that they thereafter engaged in concerted action with the purpose of accomplishing the termination of Plaintiff's employment and in damaging the professional reputation and character of Dr. Kiely." *Id.* at ¶82. While the law in Pennsylvania is well settled that "[a] single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves," based upon the above-quoted allegations contained in Plaintiff's Second Amended Complaint, I find that Plaintiff has sufficiently alleged that the corporate defendants were separate entities and that at times during the alleged conspiracy, Liebman and Nellis were acting on behalf of different entities.

Courts applying Pennsylvania law have also found that "a plaintiff may state a claim for conspiracy if the " 'agents or employees act outside of their roles as officers and employees of the corporation'." *Fox v. Keystone Turf Club, Inc.*, 1997 WL 793590, *2 (E.D. Pa. Dec. 4, 1997), *quoting, Doe v. Kohn Nast & Graf, P.C.*, 862 F.Supp. 1310, 1328 [3 AD Cases 879] (E.D. Pa. 1994), *citing, Denenberg v. American Family Corp. of Columbus, Ga.*, 566 F.Supp. 1242, 1253 (E.D. Pa. 1983) (denying motion to dismiss a claim of civil conspiracy under Pennsylvania law because the plaintiff alleged that the acts of the employee defendant were done both as an agent and on his own behalf). *See also Tyler v. O'Neill,* 994 F.Supp. 603, 613 (E.D. Pa. 1998), *aff'd,* 189 F.3d 465 (3d Cir. 1999) (explaining "[g]enerally under Pennsylvania law, a corporation cannot conspire with itself nor with its officers and agents when they act solely for the corporation and not on their own behalf. [A civil conspiracy claim can also] proceed where agents or employees act outside of their corporate roles. . . .") (internal citations omitted). The Second Amended Complaint can be read to allege that at times relevant to the conspiracy claim Liebman and Nellis were acting on their own behalf for personal motives.

With respect to Defendants' privilege argument and that because the individual Defendants were privileged to interfere with Dr. Kiely's at-will employment, there can be no cause of action for a conspiracy to interfere with the said employment, first, as stated with respect to Plaintiff's claim for intentional interference with contractual relations, there is precedent for the proposition that while an executive of an entity has a privilege to interfere with a plaintiff's employment relationship, said privilege is lost if the interference was done solely for personal purposes. Accordingly, because Plaintiff's Second Amended Complaint can be read to allege that Leibman and Nellis engaged in the conduct underlying the civil conspiracy claim solely for personal purposes, there does remain an underlying cause of action against them for intentional interference with contractual relations. Additionally, as stated above, there remain viable intentional interference with contractual relations (both existing and prospective) claims against all of the Defendants. Plaintiff's Second Amended Complaint can be read to be asserting that the Defendants conspired to defame Plaintiff and to terminate her in violation of the FMLA and the laws prohibiting sex and pregnancy discrimination.

Finally, concerning the remainder of Defendants' arguments, I conclude that contrary to the Defendants' position, the Second Amended Complaint sufficiently alleges that Plaintiff suffered damages as a result of the Defendants' alleged conduct that gives rise to her civil conspiracy claim and that the Defendants acted with malice towards Plaintiff and with the intent to injure Plaintiff.

Accordingly, Defendants' Motion to Dismiss Plaintiff's civil conspiracy claim against them is denied.

F. *COUNT VI-PLAINTIFF'S NEGLIGENCE CLAIM.*

Finally, Defendants move to dismiss Count VI of Plaintiff's Second Amended Complaint which is entitled "negligence." The bases for Defendants' motion to dismiss Plaintiff's negligence claim is that: (1) to the extent Plaintiff is alleging that the Defendants' negligence resulted in the loss of her employment with UPMC HP and interfered with her future professional activities, Plaintiff was an at-will employee and an employer does not owe a duty to use reasonable care in terminating an at-will employer; (2) to the extent Plaintiff is claiming that the Defendants were negligent in administering their employee evaluation system, said claim fails as a matter of law because Pennsylvania law does not recognize a cause of action for negligent evaluation; (3) "[t]he negligence of the Defendants in allegedly permitting the dissemination of false information; permitting employees to arbitrarily and capriciously convey information about Plaintiff; permitting employees to misrepresent Plaintiff's work and quality and claims for loss of business opportunities; harm to reputation and loss of income; are merely repetitive of the defamation, interference with contract and conspiracy claims set forth in Counts II, IV and V of the Amended Complaint and fail for the same reasons set forth herein as to those claims;" (4) Plaintiff's allegation that Defendants were negligent "in failing to ensure an evaluation method that did not violate [the] Family and Medical Leave Act" is duplicative of her FMLA claim found in Count I of the Amended Complaint; and (5) *assuming arguendo* that a cause of action in negligence existed for violating the FMLA (a legal premise with which Defendants disagree), the alleged state law negligence claim based upon the FMLA would clearly be pre-empted by the federal cause of action. Defendants' Supporting Brief, p. 23-24 (citations omitted).

In response, Plaintiff first argues that Count VI of the Second Amended Complaint is not for negligent termination of an at-will employment relationship, but rather, "[t]he claim of negligent supervision derives from the failure of the Corporate Defendants to properly supervise their employees/agents. Plaintiff's Opposition Brief, p. 23. "The effect [of the failure of the Corporate Defendants to properly supervise their employees/ agents] was to enable those agents to engage in defamatory conduct towards Dr. Kiely and to accomplish, willfully and maliciously, the termination of Dr. Kiely in violation of the FMLA, and the laws precluding discrimination on the basis of sex and pregnancy." *Id.* Second, Plaintiff contends that contrary to the Defendants' preemption argument, "the FMLA does not preempt the claim for negligent supervision, and particularly in the context where the claim also derives from the underlying claim of defamation."*Id.* at pp. 24.

Given Plaintiff's position that her negligence claim is premised upon a negligent supervision theory of liability and not upon theories of negligent termination or negligent evaluation, it is not necessary to substantively address Defendants' first two arguments. As to Defendants' argument that "[t]o the extent that the allegations of Count VI might be read to encompass allegedly negligent acts other than those leading to it resulting in the Plaintiff's termination, . . . the allegations of Count VI are merely redundant of claims set forth under other counts of the Amended Complaint" and therefore should be dismissed for the same reasons set forth above with respect to the defamation, interference with contract and civil conspiracy claims, I not read Plaintiff's negligent supervision claim to be repetitive of her defamation, interference with contract and civil conspiracy claims.

Finally, I turn to Defendants' preemption argument. In *English v. General Elec. Co.*, 496 U.S. 72, 110 S.Ct. 2270 [5 IER Cases 609] (1990), the United States Supreme Court explained:

***17** Our cases have established that state law is pre-empted under the Supremacy Clause. U.S. Const., Art. VI, cl. 2. in three circumstances. First, Congress can define explicitly the extent to which

its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent . . . and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

Second, in the absence of statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where . . . the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the states," congressional intent to supersede state laws must be " 'clear and manifest'."

Finally, state law is pre-empted to the extent it actually conflicts with federal law. Thus, the Court has found preemption where it is impossible for a private party to comply with both state and federal requirements . . . or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 78-79 (internal citations omitted). After careful consideration of the submissions of the parties and significant independent research, I conclude that the FMLA provides a comprehensive remedial scheme which envinces Congress' intent to preempt a state law tort claim premised upon a FMLA violation. Therefore, to the extent Plaintiff's negligence claim is premised upon actions of the Defendants violating the FMLA, said claim is preempted by the FMLA and Defendants' Motion to Dismiss said claim is granted.[FN1] *See Kilvitis v. County of Luzerne,* 52 F.Supp.[2d] 403, 418 [5 WH Cases2d 993] (M.D. Pa. 1999) (holding "that the FMLA provides a comprehensive remedial measure that envinces Congress' intent to foreclose the use of a §1983 action."); *Desrochers v. Hilton Hotels Corp.,* 28 F.Supp.2d 693, 695 (D. Ma. 1998) (holding that plaintiffs could not bring state law civil rights act cause of action for violation of plaintiffs' FMLA rights because "the comprehensive detailed enforcement provisions of the FMLA show Congress' intention that the specific remedies set forth in Section 2617 of the FMLA are the exclusive remedies for the violation of the FMLA."); *Vargo-Adams v. U.S. Postal Service,* 992 F.Supp. 939, 944 [4 WH Cases2d 663] (N.D. Ohio) (state law wrongful discharge claim dismissed because preempted by FMLA); *McClain v. Southwest Steel Co., Inc.,* 940 F.Supp. 295, 298 [3 WH Cases2d 1482] (N.D. Okla. 1996) (same). *Cf. Danfelt v. Board of County Com'rs of Washington County,* 998 F.Supp. 606, 611 [5 WH Cases2d 156] (D. Md. 1998), *citing,* 29 U.S.C. §2651(b) (holding that FMLA did not completely preempt state wrongful discharge law because Act's savings clause fails to evince an intent to pre-empt completely, and no evidence existed in case to demonstrate a conflict between FMLA and state law of wrongful discharge). Otherwise, the Defendants' Motion to Dismiss Plaintiff's negligence claim is denied.

FN1. Having so held, it is not necessary to address the Defendants' argument that Plaintiff's negligence claim must be dismissed because it is duplicative of Plaintiff's FMLA claim.

ORDER OF COURT

AND NOW, this **20**th day of January, 2000, for the reasons set forth in the accompanying Opinion, it is **ORDERED**that Defendants' Motion to Strike Plaintiff's Second Amended Complaint Pursuant to Rule 12(f) (Docket No 18) is **DENIED.**

It is further **ORDERED**that Defendants'

Motion for More Definite Statement Pursuant to Rule 12(e) (Docket No. 18) is **DENIED.**

It is also **ORDERED**that Defendants' Motion to Dismiss Pursuant to 12(b)(6) (Doc.: #18) is **GRANTED**in part and **DENIED**in part as set forth in the accompanying Opinion.

W.D.Pa., 2000.
Kiely v. University of Pittsburgh Medical Center
2000 WL 262580, 5 Wage & Hour Cas.2d (BNA) 1601

END OF DOCUMENT

Not Reported in A.2d, 2002 WL 372939 (Pa.Com.Pl.)
(Cite as: 2002 WL 372939 (Pa.Com.Pl.))

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Only the Westlaw citation is currently available.

Pennsylvania Court of Common Pleas.
Harry W. KOCH, Alice M. Koch, and Joyce M. Meehan, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
FIRST UNION CORPORATION, First Union National Bank of Delaware, Pennsylvania Resource Corporation, First Liberty Financial Services, Inc., and Does I-V Defendants.

Nos. CONTROL 100727, CONTROL 100746.
May Term, 2001.
Jan. 10, 2002.

ORDER

HERRON, J.

***1** AND NOW, this 10th day of January, 2002, upon consideration of the Preliminary Objections of Defendants First Union Corp. ("First Union"), First Union National Bank of Delaware ("FUNBD"), First Liberty Financial Services, Inc. ("First Liberty") and Pennsylvania Resources Corporation ("PRC") to the Amended Complaint of Harry W. Koch, et al. and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objection asserting failure to properly verify the Amended Complaint is SUSTAINED in part, and this court directs plaintiffs to file Amended Verifications to their Amended Complaint pursuant to Pa.R.C.P. 1024.

2. First Union is dismissed from the Amended Complaint because the plaintiffs have not alleged facts sufficient to pierce the corporate veil.

3. The Preliminary Objection asserting improper pleading of John Doe claims is OVERRULED.

4. The Preliminary Objection asserting legal insufficiency of a pleading of violations of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL") based upon Real Estate Settlement Procedures Act ("RESPA") violations is SUSTAINED.

5. The Preliminary Objection asserting legal insufficiency of and insufficient specificity in a pleading of breach of fiduciary duty as to PRC and First Liberty is OVERRULED.

6. The Preliminary Objection asserting legal insufficiency of and insufficient specificity in a pleading of breach of fiduciary duty as to FUNBD is SUSTAINED.

7. The Preliminary Objection asserting insufficient specificity in a pleading and legal insufficiency of a pleading in Counts I, III, IV, and V is OVERRULED.

8. The Court cannot examine the plaintiffs' class action allegation in the context of Preliminary Objections.

9. The Preliminary Objections asserting an agreement for alternative dispute resolution is OVERRULED.

10. The Preliminary Objection asserting legal insufficiency of a pleading for punitive relief is OVERRULED.

11. The Preliminary Objection asserting legal insufficiency of a pleading of an accounting, rescission, and restitution is OVERRULED.

MEMORANDUM OPINION

Defendants First Union Corporation ("First Union"), First Union National Bank of Delaware ("FUNBD"), Pennsylvania Resource Corporation ("PRC"), and First Liberty Financial Services, Inc. ("First Liberty") filed these Preliminary Objections to the Amended Complaint of Plaintiffs Harry W.

Koch, et al. For the reasons stated below, the preliminary objections are sustained in part.

BACKGROUND

The plaintiffs in the present action are homeowners. PRC is a contractor who provides home repairs and home improvement financing, through its broker First Liberty. The plaintiffs, through PRC and First Liberty, obtained home equity loans from FUNBD, a subsidiary of First Union.

The present action arises from allegations that all the defendants worked in concert to secure home equity loans on the basis of misleading "good faith cost estimates." The plaintiffs allege that these estimates were misleading in several ways. Am. Compl. ¶ 12. First, the same good faith estimates were given to all borrowers regardless of their financial status or creditworthiness. Id at ¶ 13. Second, the good faith estimates only identified closing costs totaling $470. However, the plaintiffs allege that these totals were far less then what they eventually paid. Id at ¶ 14. Third, the loan origination fee, listed in the estimate, was explained as "N/A" and therefore misleading. Id at ¶ 15. Further, the mortgage broker fee of 4-7% did not reveal what these percentages were based upon. Id. at ¶ 16. Finally, the settlement charges that the plaintiffs actually paid far exceeded the amounts specifically disclosed in the estimates. Specifically, prior to closing, the plaintiffs were given an estimated monthly repayment figure. Then, at closing, although the actual monthly figure equaled the previous estimated monthly figure, the plaintiffs allege that they had no way of knowing that the final settlement charges included in this monthly figure, would not equal the earlier good faith estimates. Id at ¶¶ 18, 19.

*2 In May 2001, the plaintiffs initiated this action, and after the case was removed to federal court, it was remanded, by stipulation of the parties, to this court. In August 2001, the plaintiffs filed an Amended Complaint asserting violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), breach of fiduciary duty, unjust enrichment, common law fraud and deceit, and civil conspiracy. The defendants timely filed these Preliminary Objections.

DISCUSSION

Preliminary objections may be brought based on insufficient specificity in a pleading. Pa.R.C.P. 1028(a)(3). Rule 1019(a) requires the plaintiff to state "[t]he material facts on which a cause of action ... is based ... in a concise and summary form." Pa .R.C.P. 1019(a). This rule requires that the complaint give notice to the defendant of an asserted claim and synopsize the essential facts to support the claim. *Krajsa v. Keypunch, Inc.*, 424 Pa.Super. 230, 235, 622 A.2d 335, 357 (1993). In addition, "[a]verments of time, place and items of special damage shall be specifically stated ." Pa.R.C.P. 1019(f). To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the facts alleged are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." *Smith v. Wagner*, 403 Pa.Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citation omitted). "In this Commonwealth, the pleadings must define the issues and thus every act or performance to that end must be set forth in the complaint." *Estate of Swift v. Northeastern Hosp. of Philadelphia*, 456 Pa.Super. 330, 337, 690 A.2d 719, 723 (1997).

Pa.R.C.P 1028(a)(4) also allows for preliminary objections based on legal insufficiency of a pleading. When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. *Tucker v. Philadelphia Daily News*, 757 A.2d 938, 941-42 (Pa.Super.Ct 2000). Preliminary objections, whose end result would be the dismissal of a cause of a cation, should be sustained only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to

establish [its] right to relief." *Bourke v. Kazara,* 746 A.2d 642, 643 (Pa.Super.Ct.2000) (citations omitted).

I. The Preliminary Objection Asserting Failure to Properly Verify Amended Complaint is Sustained in Part

The defendants argue that contrary to Pa.R.C.P.1024, the Amended Complaint averred new facts of record that were not stated in the original complaint. Defs' P.O. Mem. of Law at 3-4. Since the Amended Complaint was signed by counsel without further explanation as to why verification of these new facts were not made by one of the plaintiffs, the defendants assert that this pleading fails to conform to a rule of court. Id.

Pa.R.C.P 126 allows for the liberal construction of Pennsylvania's Rules of Civil Procedure. "[T]o secure the just, speedy, and inexpensive determination of every action or proceeding to which [these rules] are applicable," the court "may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Pa.R.C.P. 126. Here, the court liberally construes Pa.R.C.P. 1024 which, *inter alia,* reads that "every 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. 1024(a).

***3** Although the Amended Complaint does contain newly alleged facts, this court will not dismiss the entire Amended Complaint as the error does not affect the substantial rights of the parties. Here, the plaintiffs allege in their Amended Complaint that they reasonably misunderstood the term "N/A" on the "Good Faith Estimates." Am. Compl. ¶ 15. The plaintiffs argue that this is not a new fact as it originated in the Answer of defendant First Liberty to the original Complaint. Pls' Reply Mem. of Law. at 21. However, since the plaintiffs here have not attached First Liberty's Answer to the original Complaint as an exhibit evidencing such a preexisting fact of record, and in the interest of securing the just, speedy and inexpensive determination of this case, this court directs the plaintiffs to file Amended Verifications to their Amended Complaint pursuant to Pa.R.C.P. 1024.

II. First Union is Dismissed from the Complaint Because Plaintiffs Have Not Alleged Facts

Sufficient to Pierce the Corporate Veil

The plaintiffs have alleged that FUNBD, a bank, and its parent, First Union, a bank holding company, are liable to them for the high closing costs associated with the loans. First Union, however, argues that since it is not a state chartered bank, or a national bank association, it lacks the capacity to be sued with respect to these loans.[FN1] Defs' Mem. of Law at 18. Furthermore, First Union argues that the plaintiffs have failed to allege facts sufficient to pierce the corporate veil and therefore, First Union avers that it has been misjoined as a defendant.

> FN1. A bank is an institution which engages in the business of making "any loan other than a loan to an individual for personal, family, household, or charitable purposes" including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." *Board of Governors of Federal Reserve System v. Dimension Financial Corp.,* 106 S.Ct. 681, 474 U.S. 361, 88 L.Ed.2d 691 (1986) citing 12 U.S.C.A. S 1841(c). Unlike a bank, a "bank holding company" means any company which has control over any bank or over any company that is or becomes a bank holding company. 12 U.S.C.A. S 1841(a)(1).

"A parent corporation possesses a separate existence and is treated separately from a subsidiary unless there are circumstances justifying

disregard of the corporate entity," *Matter of Chrome Plate, Inc.*, 614 F.2d 990, 996 (5th Cir.), cert. denied, 449 U.S. 842, 101 S.Ct. 123, 66 L.Ed.2d 50 (1980). [FN2] Pennsylvania law allows the corporate form to be disregarded in situations where there is gross undercapitalization, failure to adhere to corporate formalities, substantial intermingling of personal and corporate affairs, and the use of the corporate form to perpetrate a fraud. *Saint Joseph Hospital v. Berks County Board of Assessments,* 709 A.2d 928 (Pa.Commw.Ct.1998) (citations omitted). "In applying this test, however, any court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception.... Care should be taken on all occasions to avoid making 'the entire theory of the corporate entity useless." ' *Wedner v. Unemployment Compensation Bd. of Rvw.*, 449 Pa. 460, 464, 296 A.2d 792, 794-95 (1972) (citation omitted). In Pennsylvania, there is a strong presumption against piercing the corporate veil. *Lumax Industries, Inc. v. Aultman,* 543 Pa. 38, 669 A.2d 893 (1995).

> FN2. Federal court decisions are not binding on Pennsylvania state courts, but they are persuasive. *Hutchinson v. Luddy,* 763 A.2d 826, 837 n. 8 (Pa.Super.Ct.2000) ; *In re Insurance Stacking Litig.*, 754 A.2d 702, 705 (Pa.Super.Ct.2000). *See also Moore v. Sims,* 442 U.S. 415, 429 (1979) (stating that "[s]tate courts are the principal expositors of state law").

In the instant matter, the plaintiffs have not alleged sufficient facts to pierce the corporate veil and proceed with their action against First Union. Here, the identified lender of the particular loans at issue is FUNBD and not First Union. Am. Compl., Exh. B. However, in their Amended Complaint, the plaintiffs merely argue that because First Union "appears to dominate FUNBD in such a manner that their separate corporate entities may be disregarded" First Union can be held liable. Am. Compl. ¶ 20. However, no where in the Amended Complaint do plaintiffs allege that First Union engaged in gross undercapitalization, failed to adhere to corporate formalities, substantially intermingled personal and corporate affairs, nor that First Union used the corporate form to perpetrate a fraud. Absent these allegations, the plaintiffs cannot proceed against First Union. Since it is clear and free from doubt from all the facts pleaded that the plaintiffs will be unable to prove facts legally sufficient to establish First Union's liability, the court sustains the preliminary objection and further dismisses all counts as to First Union.

III. The Preliminary Objections Asserting Improper John Doe Claims is Overruled.

***4** The defendants argue that this court should strike the Amended Complaint for failure to conform to Pa.R.C.P. 1018. In pertinent part, Pa.R.C.P. 1018 states, "The caption of a complaint shall set forth the form of the action and the names of all the parties...." Here, the defendants argue that the plaintiffs' attempt to join "Does I-V" should not be permitted because no allegations have been offered to identify the "Does."

The court in *Rummings v. Bd. of Probation and Parole,* 18 Pa. D. & C. 4th 278 (1992) was faced with a similar issue. In *Rummings,* the defendants argued that the plaintiff's use of the phrase "John Doe, an unidentified employee of the Board of Probation and Parole," was not a "sufficient designation" of a party defendant within the scope of Pa.R.C.P. 1018. *Rummings,* 18 Pa. D & C. 4th at 279-80. There, the "John Doe" was an employee of the Board of Probation and Parole and had allegedly acted in concert with two named individuals in committing a battery against the plaintiff. The court, based on the sparse precedent on this issue, concluded that

> [T]he evil to be prevented by this rule, as expressed by our esteemed colleague Thomas Raup, P.J., is the emersion of an individual in a lawsuit without "notice of the existence of the claim," nor an "opportunity to muster and

> preserve evidence...." *Rightmire v. Minier,* 12 Pa. D. & C.3d 234, 237 (1979); *see also Paulish v. Bakaitis,* 442 Pa. 434, 275 A.2d 318 (1971); *Boatman v. Thomas,* 320 F.Supp. 1079 (M.D.Pa.1971). Viewing the facts of the instant complaint in the light most favorable to the plaintiff, this court determines that the unnamed defendants were placed on notice of the existence of a claim and had been afforded an opportunity to muster and preserve evidence at the time of the battery perpetrated on the plaintiffs.
>
> *Rummings,* 18 Pa. D & C. 4th at 279-80.

As in *Rummings,* here the Amended Complaint does provide notice of the existence of claims and further allows for the formulation of a defense. The plaintiffs' Amended Complaint reads in pertinent part:

> Defendant Does I-V are other contractors and/or mortgage brokers that solicit home equity loans for First Union based on the same, or substantially the same, materially misleading estimates of closing costs as were submitted to the Kochs, Mrs. Meehan, and the other members of the Class.

Am. Compl. at ¶ 7. Here, it is "easily ascertainable" that the Doe defendants named are those specific contractors and/or mortgage brokers that solicited certain home equity loans from FUNBD. Moreover, the "Doe" defendants are those contractors and/or mortgage brokers who submitted the same alleged misleading estimates of closing costs. Viewing the facts of the Amended Complaint in the light most favorable to the plaintiffs, this court determines that the "Doe" defendants were placed on notice of the existence of claims and have been afforded an opportunity to formulate a defense. Therefore, this preliminary objection is overruled.

IV. The Preliminary Objections To All Counts of the Amended Complaint

*5 Here, all the defendants have filed preliminary objections asserting legal insufficiency of all pleadings and insufficient specificity in all pleadings as to all counts.[FN3]

> FN3. Having determined above that defendant First Union is dismissed from the Amended Complaint, this court need only address the remaining preliminary objections as they apply to PRC, First Liberty, and FUNBD.

A. Violations of the UTPCPL Based Upon RESPA Violations

The plaintiffs contend that the defendants did not comply with the requirements of RESPA, since the defendants failed to provide them with a "good faith estimate" of the charges they would incur when settling their mortgages. Pls' Reply Mem. of Law at 15. Conversely, the defendants argue that since RESPA contains no private right of action for the plaintiffs' claim, the plaintiffs have failed "to explain how an alleged RESPA violation gives rise to a claim under the UTPCPL." Defs' P.O. Mem of Law at 6.

"A statute must be read in accordance with its plain and common meaning when it is clear and unambiguous on its face." *Paul J. Dooling Tire Co v. City of Philadelphia,* 2001 WL 1548730 *2 (Pa.Cmwlth) (citation omitted). Moreover, the "primary source of any private right of action is in the text of the statute itself." *Brophy v. Chase Manhattan Mortgage Co.,* 947 F.Supp. 879, 881 (E.D.Pa.1996). Here, Section 2604(c) of RESPA provides that:

> Each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary.

12 U.S.C. § 2604(c). The requirements for a good faith estimate are set forth in Regulation X, 24 C.F.R. § 3500.7(c):

Content of good faith estimate. A good faith

> estimate consists of an estimate, as a dollar amount or range, of each charge which:
>
> * * * * *
>
> 2) That the borrower will normally pay or incur at or before settlement based upon common practice in the locality of the mortgaged property. Each such estimate must be made in good faith and bear a reasonable relationship to the charge a borrower is likely to be required to pay at settlement, and must be based upon experience in the locality of the mortgaged property ...

24 C.F.R. § 3500.7(c). Moreover, Section 2614 of RESPA, the only provision of the Act that provides for a private right of action, states:

> Any action pursuant to the provisions of section 2607 or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction ...

12 U.S.C.A. § 2614. Thus § 2614 allows for a private right of action for claims brought under § 2607 (prohibiting, *inter alia,* the giving or accepting of fees or kickbacks) and § 2608 (prohibiting the seller from requiring the buyer to purchase title insurance from any particular title company) but does not provide for a private right of action for claims brought under § 2604.

Here, although the plaintiffs concede in their Amended Complaint that "[§ 2604 (c)] of RESPA has been held not to provide a private cause of action in and of itself," the plaintiffs argue that the good faith estimates provided to them by the defendants were not only inadequate, but were in fact intentionally misleading, thereby violating 12 U.S.C.A. § 2604(c) of RESPA and the relevant regulation, Regulation X, 24 C.F.R. § 3500.7(c). Am. Compl. at ¶ 48. However, this court finds that the plaintiffs do not have a private cause of action based upon § 2604(c) of RESPA. Not only does the statute explicitly not provide for one, but there is significant support in extensive legislative history for not allowing a private cause of action based on § 2604(c) of RESPA. *Brophy,* 947 F.Supp at 881. "In January 1976, Congress repealed ... the private right of action against lenders who failed to comply with the advance disclosure/good faith estimate provisions. [T]he legislative history reveals that Congress was well aware that it was eliminating a private right of action" under § 2604. *Id.* 947 F.Supp. at 883 (citing H.R.Rep. No. 667, 94th Cong., 1st Sess. 2 (1975), reprinted in 1975 U.S.C.C.A.N. 2448, 2449). Since RESPA specifically contains no private cause of action for alleged violations of "good faith estimates" provisions, this court will not construe the UTPCPL to provide relief for these alleged RESPA violations. However, this does not preclude the plaintiffs from finding a private cause of action from the UTPCPL. Therefore, the court sustains this preliminary objection.

B. Violations of UTPCPL

***6** The defendants argue that since the plaintiffs have not adequately alleged all the elements of fraud, they cannot recover under any of the provisions of the UTPCPL. Defs' P.O. Mem of Law at 8-10. Specifically, the defendants argue that the plaintiffs cannot allege violations of § 201-2(4)(xxi) of the UTPCPL ("Catchall Provision") since their Amended Complaint "does not aver any 'ascertainable loss of money or property' suffered by Plaintiffs in reliance upon a misrepresentation by Defendants." [FN4] *Id* at 10. However, the plaintiffs contend that they "properly have alleged all of the requisite elements of a UTPCPL claim, including causation and damages and, to the extent it is required, reliance." Pls' Reply Mem of Law. at 16.

> FN4. The plaintiffs also allege violations of sections 201-2(4)(iii) (causing the likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification of another); § 201-2(4)(v) (representing that their financial services have characteristics which they do not

> have); and § 201-2(4)(xiv)(failure to comply with the terms of any written agreement or warranty). However, the defendants argue that none of these apply to the plaintiffs' allegations and that the only UTPCPL provision that applies is the Catchall Provision. Def's Mem of Law at 8. Since the defendants have not met their burden of showing why these remaining alleged UTPCPL violations do not apply here, the court need only focus on whether the plaintiffs have averred facts necessary for a claim pursuant to the Catchall Provision.

Certain UTPCPL claims do require that a plaintiff prove all the elements of fraud. *See Weinberg v. Sun Co.*, 777 A.d 442, (2001) (a claim brought under the false advertising provision of the UTPCPL requires traditional common law elements of reliance and causation). However, this court has held that in order to sustain a claim under the Catchall Provision a plaintiff need not plead all the elements of fraud. *Weiler v. SmithKline Beecham Corp.*, March 2001, No. 2422, slip op. at 3 (C.P. Phila October 8, 2001) (Since 201-2(4)(xxi) prohibits either fraudulent *or deceptive conduct,* this court concluded that the phrase "or deceptive" implies that either deceptive or fraudulent conduct constitutes a violation of the Catchall Provision and that deceptive conduct is not the same as fraudulent conduct. Therefore a plaintiff need not plead all the elements of fraud to sustain a claim under the Catchall Provision).

Here, however, the plaintiffs have plead all the elements of fraud.[FN5] In their Amended Complaint, the plaintiffs allege, *inter alia,* that defendants engaged in fraudulent and deceptive conduct which created a likelihood of confusion or misunderstanding. Am. Compl. at ¶ 47. Specifically, the plaintiffs have argued that they "detrimentally rel[ied]" upon the defendants' alleged misrepresentations. Id at ¶¶ 62, 63. Moreover, the plaintiffs specifically allege that they justifiably relied upon misrepresentations and non-disclosures which included:

> FN5. To plead fraud the elements of material misrepresentation of an existing fact, scienter, justifiable reliance on the misrepresentation, and damages, must be proven. *Booze v. Allstate Ins. Co.*, 750 A.2d 877, 880 (Pa.Super.Ct.1999) (citation omitted).

> (1) closing costs associated with the home equity loans in suit would be approximately $470; and (2) Class members had no reason to suspect that the actual amount of closing costs associated with the home equity loans in suit were significantly greater than estimated because the amount of their monthly payments was substantially equal to that which they had been told to expect.

Id. at ¶ 64. Finally, the plaintiffs also argue that "as a result of defendants' violations of the UTPCPL, plaintiff and members of the class have suffered an ascertainable loss of property ." Id at ¶ 50. Having determined that the plaintiffs have sufficiently alleged the elements of fraud in support of an alleged violation of the Catchall Provision of the UTPCPL, this court overrules all the preliminary objections to this count.[FN6]

> FN6. Having determined that the plaintiffs have plead all the elements of fraud, this court need not address whether, alternatively, deceptive conduct has been sufficiently pled to sustain a claim under the Catchall Provision.

C. Breach of Fiduciary Duty

*7 The defendants argue that since the Pennsylvania Mortgage Bankers and Brokers Act, 63 P.S. 456.01, et seq, imposes no fiduciary duty on mortgage brokers, the plaintiffs cannot allege that the defendants breached a fiduciary duty. Defs' P.O. Mem. of Law at 10. The plaintiffs disagree and argue that, here, a confidential relationship gave rise to a fiduciary duty which the defendants allegedly breached. Pls' Reply Mem. of Law at 25.

Our Superior Court has recognized that "[t]he concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line." *Basile v. Block,* 777 A.2d 95, 101 (Pa.Super.2001) (citing *In re Estate of Scott,* 455 Pa. 429, 316 A.2d 883, 885 (1974). "The essence of such a relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." *Id.* Therefore, "[a confidential relationship] appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed [.]" *Frowen v. Blank,* 493 Pa. 137, 425 A.2d 412, 416-17 (1981).

As a result of this confidential relationship, a fiduciary duty arises which represents "the law's expectation of conduct between the parties and the concomitant obligations of the superior party." *Basile,* 777 A.2d at 101. "[T]he party in whom the trust and confidence are reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage." *Young v.. Kaye,* 443 Pa. 335, 279 A.2d 759, 763 (1971). Furthermore, the resulting fiduciary duty may attach "wherever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest." *Basile,* 777 A.2d at 102. Moreover, those offering business advice may have created a confidential relationship "if others, by virtue of their own weakness or inability, the advisor's pretense of expertise, or a combination of both, invest such a level of trust that they seek no other counsel." *Id.* (citations omitted).

Here, the plaintiffs have sufficiently alleged the existence of a legally cognizable fiduciary duty of PRC and First Liberty. Specifically, the plaintiffs argue that a confidential relationship arose when the PRC and First Liberty acted as "the position of financial advisor and actively [sought] to inspire confidence that they will act in good faith for" the plaintiffs' interests. Am. Compl. at ¶ 23. Furthermore, the plaintiffs argue the following:

> Defendants entered the plaintiffs' homes armed with vastly superior knowledge of financing and home equity loans; sought extremely personal information from plaintiffs, including sources and debt factors; and promised to help take care of plaintiffs financial needs and desires.

***8** Pls' Reply Mem. of Law at 27. Finally, the plaintiffs allege that PRC and First Liberty breached their fiduciary duties by materially misrepresenting the closing costs associated with the home equity loans. Am. Compl. at ¶ 55. Since the plaintiffs have sufficiently alleged that a fiduciary duty has arisen from the confidential relationship between PRC, First Liberty and the plaintiffs and that this duty was allegedly breached, this court overrules the preliminary objection as to PRC and First Liberty.

However, the plaintiffs have not sufficiently alleged a fiduciary duty owed to them by FUNBD. "Under Pennsylvania law, the lender-borrower relationship ordinarily does not create a fiduciary duty ... unless a creditor 'gains substantial control over the debtor's business affairs." ' *I & S Assoc. Trusts v. LaSalle Nat'l Bank,* 2001 WL 1143319, * 6 (E.D.Pa.) (citations omitted). Although the plaintiffs do argue that there was a "frequent presence of a First Union loan officer at PRC's place of business," no where in the Amended Complaint, do the plaintiffs allege that FUNBD was involved in the actual "day-to-day management and operations" of their affairs. Id. Unlike the plaintiffs' contact and reliance upon the financial advice and counsel of PRC and First Liberty, there is no such evidence of a similar relationship with FUNBD. Instead, FUNBD was merely the lender in this matter. Since the plaintiffs have not alleged a confidential relationship between them and FUNBD, there is no resulting fiduciary duty. Therefore, all the preliminary objections to the

breach of fiduciary duty claim as to FUNBD are sustained.

D. Unjust Enrichment

The defendants allege that the plaintiffs have failed to plead a claim of unjust enrichment. Unjust enrichment is a quasi-contractual doctrine based in equity which requires the following elements: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Wiernik v. PHH U.S. Mortgage Corp.*, 736 A.2d 616, 622 (Pa.Super.Ct.1999), *appeal denied*, 561 Pa. 700, 751 A.2d 193 (2000).

Here, the plaintiffs have sufficiently plead their claim of unjust enrichment. Specifically, plaintiffs have argued that the high amounts charged to and paid by the plaintiffs were conferred on the defendants. Am. Compl. at ¶ 58. Moreover, the plaintiffs assert that the defendants "wrongfully obtained money from" the plaintiffs in the form of high closing costs. Id at ¶ 59. Finally, the plaintiffs assert that it would be inequitable for the "defendants to retain the amounts charged" because they were obtained by "false representation and omissions." Id. at ¶¶ 58, 59. All the objections to the plaintiffs' unjust enrichment claim must therefore be overruled.

E. Common Law Fraud

***9** The defendants argue that the plaintiffs' Amended Complaint "fails to fulfill the elements of common law fraud and deceit." Defs' P.O. Mem of Law at 12. Pennsylvania courts have held that to plead a claim of common law fraud, the elements of material misrepresentation of an existing fact, scienter, justifiable reliance on the misrepresentation, and damages, must be proven. *Booze v. Allstate Ins. Co.*, 750 A.2d 877, 880 (Pa.Super.Ct.1999) (citation omitted). The pleadings need only "explain the nature of the claim to the opposing party so as to permit the preparation of a defense" and "be sufficient to convince the court that the averments are not merely subterfuge." *Martin v. Lancaster Battery Co.*, 530 Pa. 11, 18, 606 A.2d 444, 448 (1992) (citing *Bata v. Central-Penn National Bank of Philadelphia*, 423 Pa. 373, 380, 224 A.2d 174, 179 (1966)). In determining whether fraud has been averred with the requisite particularity the court considers the complaint as a whole. *Commonwealth by Zimmerman v. Bell Telephone Co. of Pa.*, 121 Pa. Commw. 642, 551 A.2d 602 (1988).

This court has already determined above that the plaintiffs have sufficiently plead the elements of fraud with regards to the alleged UTPCPL violations. Therefore, this court overrules all the preliminary objections to the plaintiffs' common law fraud claim.

F. Civil Conspiracy

The defendants argue that because the Amended Complaint "fails to allege or show any facts leading to malice on the part of [the defendants]" the court should dismiss the civil conspiracy claims. Defs' P.O. Mem of Law at 13. To state a cause of action for conspiracy, plaintiffs must allege (1) a combination of two or more persons acting with a common purpose to do an unlawful act by unlawful means or for an unlawful purpose, (2) an overt act done in furtherance of the common purpose, and (3) actual legal damage. *Baker v. Rangos*, 229 Pa.Super. 333, 324 A.2d 498, 506 (1974). Malice and intent are required elements of this cause of action, however may be averred generally. *See Larsen v. Philadelphia Newspapers, Inc.*, 411 Pa.Super. 534, 602 A.2d 324, 339 (1991); Pa.R.C.P. 1019(b). Therefore, a complaint for conspiracy must either allege facts that are direct evidence of the combination and intent, or circumstantial evidence that, if proven, will support an inference of the combination and intent. *Baker*, 324 A.2d at 506.

Here, the plaintiffs have sufficiently alleged a claim of conspiracy for purposes of pleadings. Contrary to the defendants' argument, the plaintiffs

have generally alleged malice. The plaintiffs claim that the "defendants have agreed to engage in a scheme to injure plaintiffs and other class members by misrepresenting and concealing facts concerning their loans, with the intent that plaintiffs would rely thereon, which caused them to pay unreasonably high closing costs." Pls' Reply Mem. of Law at 20. Whether the plaintiffs can prove that the defendants conspired to injure it will be determined by the evidence presented. For now, however, it is enough that the factual averments of the entire complaint are legally sufficient. Therefore, the court overrules all the defendants' preliminary objections.

V. The Court Cannot Examine the Plaintiffs' Class Action Allegation in the Context of Preliminary Objections

***10** The defendants argue that since factual disparities may exist among the plaintiffs, class certification should not be granted. This argument cannot be raised in the context of preliminary objection and must be overruled.

As this court held in *Weiler,*

> Under Pennsylvania Rules of Civil Procedure ("Rules"), the class that the plaintiff claims to represent must be certified by the court. Pa.R.Civ.P. 1707. To certify a class, a court must find that the class meets the requirements of numerosity, predomination of common questions of law or fact, typicality of the named plaintiff's claims, ability of the named plaintiffs to fairly and adequately protect the interests of the class and fairness and efficiency. Pa.R.Civ.P. 1702.
>
> While these five elements are important, a court may not address question of certification "until the pleading stage is concluded, [and] attacks on the form of the complaint or demurrers to attack the substance" have already been disposed of. *Niemiec v. Allstate Ins. Co.,* 721 A.2d 807, 810 (Pa.Super.1998). This is "to ensure that the class proponent is presenting a non-frivolous claim capable of surviving preliminary objections." *Janicik v. Prudential Ins.Co. of America,* 305 Pa.Super 120, 129 (1982). Thus, a trial court reviewing preliminary objections "should not ... concern[ ] itself with the preliminary objections to the class actions allegations at all." *Sherrer v. Lamb,* 319 Pa.Super. 290, 294, 466 A.2d 163, 165 (1983). *See also* Pa.R.Civ.P. 1705 (stating that issues of fact with respect to the class action allegations are not to be raised in preliminary objections); *Niemic,* 721 A.2d at 810 (distinguishing between the certification and the pleading states by stating that "upon a motion for class action certification the court considers whether a claim may be brought by a class of plaintiffs, whereas at the earlier, preliminary stage, the court must decide whether there exists a valid claim to be brought at all, no matter who the plaintiff").[FN7]
>
> FN7. One case appears to be an isolated exception to this rule. In *Adamson v. Commonwealth,* 410 A.2d 392, 49 Pa. Commw. 54 (1980), the Superior Court thoroughly measured the proposed class against the class requirement and, based on the defendant's preliminary objections, concluded that the plaintiff's action would not benefit the class. This, however, is the only case where a Pennsylvania court has examined the class itself when reviewing preliminary objections and appears to violate the principle set forth in later cases.

Weiler, slip-op at 8-9. Here, the court must limit its current examination of those issues properly raised in preliminary objections, not at a certification hearing. Consequently, the ability of the plaintiffs to sustain this suit in a class action cannot be considered now, and the objections attacking the class allegations must be overruled.

VI. The Preliminary Objections Asserting Agreement for Alternative Dispute Resolution is Overruled

Defendant PRC argues that the plaintiffs "agreed to resolve all claims between $5,000 and

$35,000 in amount by submitting such claims to a single arbitrator for the American Arbitration Association." Defs' P.O. Mem of Law at 17. Therefore, PRC argues that "the existence of the arbitration provision divests this Court of jurisdiction." Id. The plaintiffs argue that the present action is beyond the scope of the arbitration provision, and therefore it does not apply here.

***11** The standard of review for a preliminary objection asserting an agreement for alternative dispute resolution is well established.[FN8] When there is a dispute as to whether arbitration should be compelled "judicial inquiry is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration agreement." *Midomo Company, Inc. v. Presbyterian Housing Development Co.,* 739 A.2d 180, 186 (Pa.Super.1999). *See also Santiago v. State Farm Insurance Co.,* 453 Pa.Super. 343, 683 A.2d 1216, 1217-18 (1996). Thus, when considering a preliminary objection asserting an agreement to arbitrate, a court may not consider the merits of the dispute. *Mesa v. State Farm Insurance Co.,* 433 Pa.Super. 594, 641 A.2d 1167, 1168 (1994).

> FN8. Although the instant case is in the form of a preliminary objection asserting an agreement for alternative dispute resolution, this court applies the same standard to the present case as that for a petition to compel arbitration. *Midomo Company, Inc. v. Presbyterian Housing Development Co.,* 739 A.2d 180 (Pa.Super.1999) (holding that although appellants' preliminary objections are not precisely in the form of a petition to compel arbitration, nevertheless, "the court will not exalt form over substance." *Id.* at 186.)

As the Pennsylvania Supreme Court observed, agreements to settle disputes by arbitration are not only valid but favored by state statute. *Borough of Ambridge Water Authority v. Columbia,* 458 Pa. 546, 328 A.2d 498, 500 (1974). Furthermore, interpretation of an arbitration provision is controlled by rules of contractual construction. Therefore, proper interpretation of a contract "is a question of law. [T]he ultimate goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement." *Liddle v. Scholze,* 768 A.2d 1183, 1185 (Pa.Super 2001) (citations omitted).

Applying these standards to the present case, the court submits that, first, there exists a valid arbitration clause between PRC and the plaintiffs only, and, further, the dispute involved here is beyond the scope of this clause. To begin with, there exists a valid arbitration agreement. The Work Authorization Form, which contains the arbitration agreement, was entered into between PRC and the plaintiffs only. Defs' P.O. Mem of Law, Exhibit G (containing signatures of the plaintiffs and the representative of PRC). However, there is nothing in the record which reflects a valid and binding arbitration agreement between First Liberty and the plaintiffs.

Although there exists a valid arbitration agreement between the plaintiffs and PRC, the present dispute, a consumer fraud case, is beyond the scope of the agreement. Here, the agreement is printed on a construction contract for repairs to be completed by PRC on the plaintiffs' homes. The arbitration provision provides for:

> On all claims and/or cause of actions exceeding $5000 and which do not exceed $35,000, the contractor and owner shall submit said claims before a single arbitrator for the American Arbitration Association. The party initiating the claim shall pay the initial costs subject to the decision of the arbitrator to apportion costs. All decisions by the arbitrator shall be binding and enforceable by a court of law. This contract covers and supercedes conversations and agreements, expressed or implied, between the parties, their agents or representatives.

*12 Pls' Reply Mem. of Law at 28-29. Although this arbitration provision does not explicitly exclude the current dispute,[FN9] it is clear from the intent of the parties that it was meant to cover claims arising from the actual repairs to be completed on plaintiffs homes. *Liddle,* 768 A.2d 1183 (giving effect to the intent of the parties as reasonably manifested by the language of their written agreement); *Highmark, Inc. v. Hospital Service Ass'n of Northeastern Pa,* 785 A.2d 93 (Pa.Super.2001) ("[T]he issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide.") (citation omitted). Here, the plaintiffs have no claims against PRC for the construction done pursuant to the Work Authorization Form, but instead have claims based on the alleged fraudulent lending practices of the defendants. Since the current dispute is beyond the scope of the arbitration agreement, this court is not divested of its jurisdiction and therefore overrules the preliminary objection.

> FN9. In support of their assertion that Pennsylvania courts refuse to impose a limitation of the scope of an arbitration agreement where no limitation was explicitly stated, the defendants direct this court to several cases. However, none of these are persuasive. In *Kardon v. Portare,* 466 Pa. 306, 333 A.2d 368 (1976), the court held that a controversy contractually assigned to arbitration should remain in arbitration for determination of procedural details. However, *Kardon* does not suggest that a dispute, distinct from the contract to which the arbitration clause was found, should be bound by the same arbitration agreement.
>
> Furthermore, the present arbitration provision is distinguishable from that in *Goral v. Fox Ridge, Inc.* 453 Pa.Super. 316, 683 A.2d 931 (1996), and *Anderson v. Erie Ins. Group,* 384 Pa.Super. 387, 395, 558 A.2d 886, 890 (1989). Unlike the provision before the court presently, both the arbitration provisions in those cases contained language which clearly defined the scope of the arbitration agreement. *Goral,* 683 A.2d at 931 ("Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration"); *Anderson,* 558 A.2d at 888 ("Disagreement over the legal right to recover damages or the amount of damages will be settled by arbitration ..."). Here, no such language exists. Therefore, the court must determine the scope of the agreement. *Highmark, Inc. v. Hospital Service Ass'n of Northeastern Pa,* 785 A.2d 93 (Pa. Super 2001) ("[T]he issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide.") (citation omitted).

VII. The Court Overrules the Preliminary Objection to the Demand for Punitive Damages

The plaintiffs ask for punitive damages against the defendants. However, the defendants argue that the claim is legally insufficient and insufficiently specific. The court disagrees. In their Amended Complaint, the plaintiffs concede that their punitive damages demand relate only to the tort claims of breach of fiduciary duty, common law fraud and civil conspiracy. These are claims for which the plaintiffs may recover punitive damages. *Delahanty v. First Pennsylvania Bank,* 318 Pa.Super. 90, 130, 464 A.2d 1243, 1262-63 (1983) (stating that punitive damages are available only in tort actions where defendant's conduct was willful, malicious, wanton, reckless or oppressive). Whether the plaintiffs can prove that the defendants acted outrageously, willfully, maliciously, and intentionally, will be determined by the evidence presented. For now, however, it is enough that the factual averments of the entire complaint are

legally sufficient to support a demand for punitive damages. Therefore, the preliminary objection is overruled and the plaintiffs' demand for punitive damages under Counts II, IV and V may stand.

VIII. The Court Overrules the Preliminary Objection to the Demand for an Accounting, Rescission, and Restitution

The defendants request that the plaintiffs' demands for an accounting, rescission and restitution be dismissed by this court. In requesting an accounting, a complaint "seeks to turn over to the party wrongfully deprived of possession all benefits accruing to defendant by reason if its wrongful possession." *Boyd & Mahoney v. Chevron U.S.A.*, 419 Pa.Super. 24, 35, 614 A.2d 1191, 1197 (1992). In reviewing a request for an accounting, "it is reasonable for the court to permit some latitude since often times it is not certain what claims a plaintiff may have until the accounting is completed." *In re Estate of Hall*, 517 Pa. 115, 136, 535 A.2d 47, 58 (1987). An equitable accounting is proper where a fiduciary relationship exists between the parties, where fraud or misrepresentation (of the correct amount due) is alleged, or where the accounts are mutual or complicated, and plaintiff does not possess an adequate remedy at law. *Rock v. Pyle*, 720 A.2d 137, 142 (Pa.Super.Ct.1998) (citations omitted); *See also Pittsburgh's Airport Motel, Inc. v. Airport Asphalt and Excavating Co.*, 469 A.2d 226, 229 (Pa.Super.1983); *Meier v. Maleski*, 648 A.2d 595 (Pa.Commw.Ct.1994).

***13** Here, all the elements are met to withstand a demurrer to a request for an accounting. The plaintiffs request an accounting for all monies paid to the defendants as a result of the alleged misleading closing cost estimates. Am.Compl. at ¶ 69. The plaintiffs also have alleged that a fiduciary relationship existed between themselves, PRC and First Liberty. Id. at ¶¶ 51-56. The request for an accounting may only survive if one or more of the other counts survive a demurrer as well. Since the claims of breach of fiduciary duty, common law fraud, and civil conspiracy, will withstand a demurrer, the demand for an accounting may also remain.

The plaintiffs also demand the remedies of rescission and restitution. The purpose of equitable rescission is to return the parties as nearly as possible to their original positions where warranted by the circumstances of the transaction. *Gilmore v. Northeast Dodge Co., Inc.*, 278 Pa.Super. 209, 420 A.2d 504 (1980) (citations omitted). Furthermore, if a plaintiff alleges fraud in a transaction, a right of rescission is established. *Baker v. Cambridge Chase, Inc.*, 725 A.2d 757 (Pa. Super 1999). Here, having already determined that the plaintiffs have sufficiently plead common law fraud, this court allows for the plaintiffs' demand for a rescission to be plead.

In addition to granting equitable relief, in the form of rescission, a court may also allow for the plaintiffs restitution of losses incurred. "Restitution ... is a remedy not inconsistent with rescission." *Baker*, 725 A.2d at 766 (citations omitted). Furthermore, "restitution being an equitable remedy is ... a permissible remedy under the [UTPCPL]." *Commonwealth by Corbett v. Ted Sopko Auto Sales and Locator*, 719 A.2d 1111, 1114 (Pa.Commw.1998). Moreover, the doctrine of unjust enrichment expresses the general principle that a party unjustly enriched at the expense of another should be required to make restitution for benefits received where it is just and equitable to do so and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. *Crawford's Auto Center v. Pennsylvania State Police*, 655 A.2d 1064 (Pa.Cmwlth.1995). Here, the court has already determined that the plaintiffs have sufficiently alleged claims based on violations of the UTPCPL, and unjust enrichment. Therefore, the plaintiffs may plead a demand for restitution.

CONCLUSION

For the reasons stated above, this court sustains in part the preliminary objections of the defendants.

Furthermore, this court directs plaintiffs to file Amended Verifications to their Amended Complaint pursuant to Pa.R.C.P. 1024.

Pa.Com.Pl.,2002.
Koch v. First Union Corp.
Not Reported in A.2d, 2002 WL 372939 (Pa.Com.Pl.)

END OF DOCUMENT

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

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Only the Westlaw citation is currently available.

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

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

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

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

REPORT AND RECOMMENDATION

THOMAS M. BLEWITT, United States Magistrate Judge.

I. BACKGROUND.

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

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

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

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

We now turn to discuss the Defendants' Document 6 Motion to Dismiss Plaintiff's Complaint and the documents that followed in

relation and response to this Motion (Docs. 8, 9, 12, 13, and 16).

II. STANDARD OF REVIEW.

A. MOTION TO DISMISS

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

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

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

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

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

III. ALLEGATIONS OF COMPLAINT.

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

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

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

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

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

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

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

IV. RESPONSIVE PLEADINGS.

A. MOTION TO DISMISS

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

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

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

Suggested Answer: Yes.

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

Suggested Answer: Yes.

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

Suggested Answer: Yes.

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

Suggested Answer: Yes.

(Doc. 8, p. 5).

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

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

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

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

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

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

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

C. DEFENDANTS' REPLY BRIEF

On July 13, 2012, Defendants filed a Reply in Support of their Document 6 Motion to Dismiss Plaintiff's Complaint. (Doc. 12). Defendants argue that, first of all, Plaintiff's Opposition Brief did not provide a basis for denying their Motion to Dismiss. As discussed hereinafter, we agree with Defendants that Plaintiff failed to provide a basis

for denying Defendants' Motion to Dismiss. Rather, Plaintiff, as discussed above, improperly attempted to raise new claims in her Opposition Brief, and failed to provide any factual information or arguments in response to Defendants' Motion to Dismiss or in support of her claims raised in her Complaint.

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

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

D. PLAINTIFF'S ADDENDUM TO HER OPPOSITION BRIEF

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

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

Therefore, Plaintiff is arguing that based on 28 U.S.C. § 1446(b) (1), because Defendants did not filed their Notice of Removal until June 6, 2012,

after the thirty (30) day time period had concluded, Defendants Notice of Removal and subsequent Motion to Dismiss were not timely filed and therefore should be dismissed and the case remanded back to the Court of Common Pleas of York County.

E. DEFENDANTS' RESPONSE TO PLAINTIFF'S ADDENDUM

***8** On July 20, 2012, upon an Order granting Defendants leave to respond to Plaintiff's Addendum, Defendants filed a Response to Plaintiff's Document 13 Addendum. (Doc. 16). In their response, Defendants aver that Plaintiff lost her opportunity to argue that Defendants' Notice of Removal was untimely filed because Plaintiff failed to file a Motion to Remand within thirty (30) days after Defendants filed their Notice of Removal as required by 28 U.S.C. § 1447(c). (Doc. 14–1, p. 3; Doc. 16, p. 2).

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

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

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

***9** As such, we agree with Defendants that because Plaintiff failed to timely file a motion to remand within the thirty (30) day time period after Defendants filed their Notice of Removal, and because Plaintiff's argument contesting Defendants' removal notice as untimely is based on a procedural defect, not a subject matter jurisdiction defect, and we find that this case should not be remanded to state court as Plaintiff requests. *See Ramos v. Quien,* 631 F.Supp.2d 608("A motion to remand based on an objection to a procedural defect in the

removal process is clearly waived it if is not raised within thirty days after the filing of the notice of removal.") (citations omitted). Therefore, because Plaintiff has waived her opportunity to oppose Defendants' removal of this case to the Middle District of Pennsylvania, this case should remain in federal court. Thus, we will address the merits of Defendants' Motion to Dismiss.

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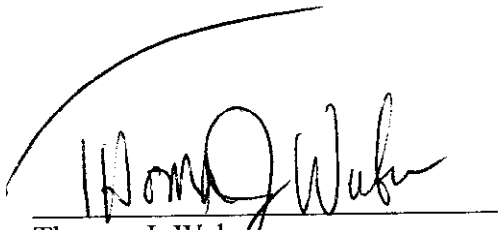

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPENDIX TO MEMORANDUM IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT** was served this 16th day of April, 2014 by first class mail and email to the following:

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