IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO;	)	
RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, PETER KHOURY, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;	)	Civil Division Docket No. 2013-2082
PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University;	)	
WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and	)	
ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,	)	
Plaintiffs,	)	
v.	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),	)	
MARK EMMERT, individually and as President of the NCAA, and	)	
EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,	)	
Defendants.	)	

APPENDIX TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS

APPENDIX

TABLE OF UNREPORTED CASES*

*This appendix does not include cases already provided in defendants' addendum of unpublished cases.

IN THE 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 Argued: June 19, 2013

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION BY
JUDGE COVEY

FILED: September 4, 2013

Defendant, the National Collegiate Athletic Association (NCAA) preliminarily objects to the Second Amended Complaint filed by Plaintiffs, Senator Jake Corman (Senator Corman) and Treasurer Robert McCord (Treasurer McCord) (collectively, Plaintiffs), in this Court's original jurisdiction seeking injunctive and declaratory relief against the NCAA. Senator Corman represents the 34th Senatorial District of Pennsylvania in the General Assembly, and is Chair of the Senate Appropriations Committee. Plaintiffs' Second Amended Complaint at ¶2. Treasurer

McCord is Treasurer of the Commonwealth, a constitutionally-established elected office. Plaintiffs' Second Amended Complaint at ¶3. The NCAA is an unincorporated association headquartered in Indianapolis, Indiana, which has members throughout the United States (U.S.) and the Commonwealth. Plaintiffs' Second Amended Complaint at ¶5.

Pennsylvania State University (PSU) is a "state-related institution"[1] originally established as a "land grant" university under the federal Morrill Act of 1862[2] for purposes of teaching agriculture and mechanical arts. The General Assembly accepted the land grant pursuant to the act entitled "An Act Donating Lands to the Several States and Territories which may Provide Colleges for the Benefit of Agriculture and the Mechanic Arts" (1863 Act).[3]

On July 2, 2012, the Governor of Pennsylvania signed into law 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) as a supplement to the 1863 Act.[4] Pursuant to Act 10A, the Pennsylvania General Assembly appropriated $214,110,000.00 to PSU for general financial support for the fiscal year July 1, 2012 through June 30, 2013. Plaintiffs' Second Amended Complaint at ¶44. Section 5 of Act 10A grants the General Assembly the right to "full, complete and accurate

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[1] "Although an instrumentality of the Commonwealth, a state-related institution, as opposed to a state university within the State System of Higher Education, is only partially controlled by government representatives." *Bagwell v. Pennsylvania Dep't of Educ.*, __ A.3d __ (Pa. Cmwlth. No. 1916 C.D. 2012, filed July 19, 2013).

[2] 7 U.S.C. §§ 301-309.

[3] Act of April 1, 1863, P.L. 213, 24 P.S. §§ 2571-2584.

[4] 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.

information as may be required" concerning PSU and its agents' expenditures. Plaintiffs' Second Amended Complaint, Ex. E at 3.

On July 12, 2012, Louis J. Freeh issued a report (Freeh Report) finding that PSU's former President, various staff members of PSU's athletic department and other senior PSU officials deliberately ignored multiple credible child sexual abuse allegations beginning in the 1990s against former PSU assistant football coach Gerald A. Sandusky. Plaintiffs' Second Amended Complaint at ¶¶6-9. On July 23, 2012, under threat of being excluded from participation in NCAA programs, PSU executed a Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by the Pennsylvania State University (Consent Decree) with the NCAA that required PSU, *inter alia*, to pay a $60 million fine in $12 million minimum annual installments beginning in 2012 over five years "into an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse." Plaintiffs' Second Amended Complaint at ¶14 (quoting Ex. A at 5).

The NCAA established its Child Sexual Abuse Endowment Task Force (Task Force) for the purpose of developing standards for the expenditure of the fine. Plaintiffs' Second Amended Complaint at ¶18. At the end of 2012, the Task Force had not yet established its endowment, thus, the NCAA requested PSU to set aside the initial $12 million fine due in 2012. March 1, 2013 Declaration of Kathleen T. McNeely in Support of the Defendants' Application for Relief (McNeely Declaration),[5] Plaintiffs' Br., Ex. C at ¶5. PSU placed the $12 million into a money market account on December 20, 2012. *Id.*

On January 4, 2013, Senator Corman filed a complaint with this Court against the NCAA and Timothy P. White (White), in his official capacity as the Task Force Chair. Senator Corman also filed an application for preliminary injunction

[5] Kathleen T. McNeely is "the Vice President of Administration and Chief Financial Officer for the [NCAA]." McNeely Declaration, Plaintiffs' Br., Ex. C at ¶2.

requesting that the NCAA and White be enjoined from disbursing any of PSU's initial $12 million payment. Based upon a Joint Stipulation wherein the NCAA stated that it did not immediately intend to disburse the fine, and agreed not to do so without 60 days' prior notice, this Court on January 16, 2013, ordered the preliminary injunction application stayed. The NCAA and White filed preliminary objections to Senator Corman's complaint.

On February 20, 2013, the Institution of Higher Education Monetary Penalty Endowment Act (Endowment Act)[6] was signed into law and became effective immediately. Section 3 of the Endowment Act requires that "[i]f an institution of higher education pays a monetary penalty [of $10 million or more] pursuant to an agreement entered into with a governing body,"[7] said penalty shall be paid into the Institution of Higher Education Monetary Endowment Trust Fund (Fund) maintained as a separate trust fund in the State Treasury. 24 P.S. § 7503(a), (b)(1). The Commonwealth's Treasurer is the sole custodian of all monies deposited into the Fund. 24 P.S. § 7503(b)(1). The Endowment Act further mandates that unless otherwise stated in the agreement, the Fund may only be used within the Commonwealth to benefit Commonwealth residents. 24 P.S. § 7503(b)(4).

Also on February 20, 2013, Senator Corman filed an amended complaint against the NCAA and White, wherein he renewed his application for preliminary injunctive relief to compel the NCAA to pay the first installment of the $60 million fine into the Fund. In response, the NCAA moved that this Court hold the preliminary injunction application in abeyance or enter a scheduling order that would permit the NCAA to file preliminary objections to the amended complaint because the NCAA did not yet have physical possession of the fine money. Senator Corman

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[6] Act of February 20, 2013, P.L. 1, 24 P.S. §§ 7501-7505.

[7] The Endowment Act defines "governing 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.

opposed the NCAA's motion. By March 13, 2013 order, this Court stayed the renewed application for a preliminary injunction and scheduled a status conference. The NCAA filed preliminary objections to the amended complaint.

On March 27, 2013, Senator Corman, joined by Treasurer McCord, filed a Second Amended Complaint against the NCAA seeking declaratory and injunctive relief on the basis that the PSU fine is subject to the Endowment Act and the NCAA must deposit it into the Fund. In Count I of the Second Amended Complaint, Plaintiffs aver that the NCAA violated the Endowment Act.[8]

The NCAA filed preliminary objections to the Second Amended Complaint. On June 19, 2013, the parties presented argument on the preliminary objections to this Court en banc. On June 20, 2013, Attorney General Kathleen G. Kane sent correspondence to Commonwealth Court President Judge Dan Pellegrini, stating in relevant part:

> As you are likely aware, [the Office of Attorney General ("OAG")] is currently handling certain criminal prosecutions arising out of the Jerry Sandusky child sexual abuse scandal. To avoid any potential conflicts, immediately prior to my taking office, the OAG and the Governor's Office of General Counsel ("OGC") agreed – pursuant to the Commonwealth Attorneys Act[9] – that the OAG would continue to handle criminal matters relating to the Sandusky scandal and that the OGC would handle any civil matters relating to the Sandusky scandal. Accordingly, the OAG did not participate in Governor Corbett's antitrust action against the NCAA in federal court. For the same reason, the OAG declined to participate in the action brought by Senator Corman and Treasurer McCord against the NCAA in Commonwealth Court. The Treasurer, using his independent authority, has historically represented his office in matters which are the subject of litigation; the Treasurer is not obligated to request the representation of

[8] While the Second Amended Complaint seeks relief under two counts, Plaintiffs withdrew Count II.

[9] Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§ 732-101 – 732-506.

> the OAG, nor is the OAG required, pursuant to the Commonwealth Attorney's [sic] Act, to provide representation on behalf of the Treasurer.

June 20, 2013 Attorney General letter (AG Letter). On June 21, 2013, this Court ordered the parties to address the standing of Treasurer McCord in light of the AG's Letter, to which they responded.[10]

The issues currently before this Court are: (1) whether Plaintiffs have standing to bring the instant action; (2) whether PSU is an indispensable party whose absence from this litigation deprives the Court of subject matter jurisdiction; (3) whether Count I of Plaintiffs' Second Amended Complaint states a claim upon which relief may be granted; and, (4) whether the Endowment Act and the proffered construction of Act 10A violate the U.S. and Pennsylvania Constitutions.

This Court's review of preliminary objections is limited to the pleadings. *Pennsylvania State Lodge, Fraternal Order of Police v. Dep't of Conservation & Natural Res.*, 909 A.2d 413 (Pa. Cmwlth. 2006), *aff'd*, 592 Pa. 304, 924 A.2d 1203 (2007).

> [This Court is] required to accept as true the well-pled averments set forth in the ... complaint, and all inferences reasonably deducible therefrom. Moreover, the [C]ourt need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections.

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[10] In addition to the briefs submitted by the parties in response to this Court's June 21, 2013 order, an amicus brief was filed on June 26, 2013 by the Department of Auditor General and the Public Utility Commission in support of Plaintiffs' position. Further, the Pennsylvania District Attorneys Association (PDAA) filed an Application for Leave to File Amicus Brief Nunc Pro Tunc and attached its brief thereto. The NCAA advised this Court that it did not object to the PDAA's submission, and the requested leave was granted.

Id. at 415-16 (citations omitted).

I. Standing

The NCAA first contends that Plaintiffs are prohibited from pursuing this action. Specifically, the NCAA argues that under Section 204(c) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(c), statutory authority to sue to collect debts and accounts owed to the Commonwealth is vested solely in the Pennsylvania Attorney General. Further, Treasurer McCord's official responsibilities as "custodian" under the Endowment Act begin when money is deposited into the Fund, and since no monies have been paid into the Fund, Treasurer McCord has no standing. Finally, the NCAA asserts that Senator Corman does not have standing because he claims standing as a legislator, but alleges no genuine impairment of his legislative powers.

Section 204(c) of the Commonwealth Attorneys Act states:

> The Attorney General shall represent the Commonwealth and all Commonwealth agencies **and upon request**, the Departments of Auditor General and **State Treasury** and the Public Utility Commission in any action brought by or against the Commonwealth or its agencies, and may intervene in any other action, including those involving charitable bequests and trusts or the constitutionality of any statute. . . . **The Attorney General shall collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth which shall be referred to and placed with the Attorney General for collection by any Commonwealth agency . . . .** The Attorney General may, upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead. . . .

71 P.S. § 732-204(c) (emphasis added).

The language of Section 204(c) of the Commonwealth Attorneys Act clearly states that the Attorney General is to represent the **Commonwealth** and **Commonwealth agencies** in actions "brought by or against the Commonwealth," and specifically excludes from that directive, *inter alia*, the State Treasury. That section further mandates that "Commonwealth agencies" refer "debts . . . due the Commonwealth" to the Attorney General for the Attorney General to collect. 71 P.S. § 732-204(c).

Section 102 of the Commonwealth Attorneys Act defines a Commonwealth agency as "[a]ny executive agency or independent agency." 71 P.S. § 732-102. "Executive agency" and "independent agency" are defined as follows:

> **"Executive Agency."** The Governor and the departments, boards, commissions, authorities and other officers and agencies of the Commonwealth government, but the term does not include any court or other officer or agency of the unified judicial system, the General Assembly and its officers and agencies, or any independent agency.
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> **"Independent Agency."** The Department of the Attorney General, the Pennsylvania Fish Commission, the Pennsylvania Game Commission, the Historical and Museum Commission, the State Civil Service Commission, the Pennsylvania Turnpike Commission, the Milk Marketing Board, the Pennsylvania Liquor Control Board, the Pennsylvania Human Relations Commission, the Pennsylvania Labor Relations Board, the State Tax Equalization Board, Pennsylvania Higher Education Assistance Agency, the Pennsylvania Crime Commission, and the State Ethics Commission. Except for the provisions of section 204(b) and (f), and for actions pursuant to 42 Pa.C.S. § 5110 (relating to limited waiver of sovereign immunity), **for the purposes of this act** the department of the Auditor General, including the Board of Claims, **State Treasury** and the Public Utility Commission **shall not be considered either executive agencies or independent agencies.**

71 P.S. § 732-102 (emphasis added). Given that Section 102 of the Commonwealth Attorneys Act explicitly excludes the State Treasury from the definitions of executive agency and independent agency, it is not a Commonwealth agency subject to the mandates of Section 204(c) of the Commonwealth Attorneys Act pertaining to Commonwealth agencies. Thus, Section 204(c) of the Commonwealth Attorneys Act does not prohibit Treasurer McCord from pursuing the instant action.

Moreover, the NCAA characterizes the $60 million fine as a "debt" to be collected by and due to the Commonwealth, however, Plaintiffs make no such assertion regarding the same.[11] Looking only to the pleadings before us and all reasonable inferences therefrom as we must, Plaintiffs do not allege that PSU or the NCAA owe the Commonwealth a "debt." Rather, the nature of Plaintiffs' action is that the first installment of the $60 million fine has been allocated and is payable but such payment over which the NCAA alleges authority to direct has not been made in accordance with the Endowment Act. In fact, the NCAA's pleadings and other documents submitted to this Court maintain that **the NCAA** is entitled to receive and control the $60 million fine. For example, the NCAA's Application for Relief in the Nature of a Request for Scheduling Order refers to the "constitutionality of a law that seizes money **the NCAA will lawfully acquire** through a private contract." NCAA App. for Relief at 4 (emphasis added). In addition, the NCAA asserts that it has a "contractual right to direct how those funds are spent." NCAA Mem. in Support of Preliminary Objections (NCAA Memo) at 39. Further, the Joint Stipulation to Stay Application for Preliminary Injunction states: "the [NCAA] has informed Plaintiff that for multiple reasons it has no intention to disburse or otherwise dissipate said funds in the immediate future; [a]nd . . . the [NCAA] has promised to notify Plaintiff

[11] "This [C]ourt has held that a demurrer cannot aver the existence of facts not apparent from the face of the challenged pleading." *Martin v. Dep't of Transp.*, 556 A.2d 969, 971 (Pa. Cmwlth. 1989).

60 days prior to any intended disbursements of said funds[.]" Joint Stip. at 1. Finally, in the NCAA's June 14, 2013 letter to this Court's Chief Clerk, it refers to "legislation . . . requiring 100% of the fine that Penn State **must pay to the NCAA** under the Consent Decree to be paid instead to the Commonwealth." NCAA June 14, 2013 letter at 1 (emphasis added). Given that the Second Amended Complaint does not demonstrate on its face that the $60 million fine is a "debt" owed to the Commonwealth, and the various NCAA documents which reflect that the NCAA considers the fine a "debt" owed to itself, and not the Commonwealth, we conclude that Section 204(c) of the Commonwealth Attorneys Act is inapplicable to the instant matter.

The NCAA further argues that the Pennsylvania Supreme Court's decision in *Casey v. Pennsylvania State University*, 463 Pa. 606, 345 A.2d 695 (1975), controls the standing issue here. Specifically, the NCAA contends that the *Casey* Court held "the Attorney General and the Department of Justice **alone** are empowered to collect debts due the Commonwealth." *Id.* at 618, 345 A.2d at 701 (emphasis added). The issue in *Casey*, as expressed by the Supreme Court, was "whether the Auditor General has the legal authority to bring suit to collect monies allegedly owed to the Commonwealth." *Id.* at 609, 345 A.2d at 697. In *Casey*, the Commonwealth appropriated monies to PSU for continuing education programs. The monies appropriated were only to fund the necessary costs of the programs. The Auditor General alleged that PSU received money in excess of the programs' costs and was seeking repayment from PSU for monies allegedly due the Commonwealth. Resolution of the issue required an interpretation of the then recently-amended Administrative Code,[12] where the authority to sue and collect indebtedness owed to the Commonwealth was placed exclusively with the Attorney General and the

[12] Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. §§ 51-732.

Department of Justice. In addressing the issue, the Pennsylvania Supreme Court expressed that "[a]lthough, resolution of these ambiguities is not as clear to us as the Commonwealth Court, nonetheless we agree with the conclusion reached by that court . . . ." *Id.* at 614-15, 345 A.2d at 700. The Supreme Court stated:

> The Commonwealth Court reasoned that the legislature's **failure to amend [Section] 903(a) by making an express exception for the Auditor General**, in the same manner that it repeatedly used to exclude the Auditor General from the provisions of the Administrative Code, set forth before, indicated a continuing legislative intent that all debts owed the Commonwealth be mandatorily referred to the Attorney General for collection.

Id. at 614, 345 A.2d at 699 (emphasis added). However, five years after the *Casey* decision, the General Assembly enacted the Commonwealth Attorneys Act, which requires no speculation about the legislative intent of the Administrative Code, and makes the *Casey* decision inapposite to the case herein. Moreover, as discussed above, the Commonwealth Attorneys Act specifically excludes the Auditor General, the **State Treasury** and the Public Utility Commission from its definition of executive agencies or independent agencies. 71 P.S. § 732-101.

The NCAA also relies on this Court's decision in *Knoll v. Butler*, 675 A.2d 1308 (Pa. Cmwlth. 1996), *aff'd*, 548 Pa. 18, 693 A.2d 198 (1997), to support its position that the Treasurer lacks standing. The NCAA asserts that the *Knoll* Court sustained preliminary objections in the form of a demurrer on the basis that the Treasurer could not maintain her role as custodian of certain funds because the Treasurer was not yet in possession of the funds. The *Knoll* decision, although written after the Commonwealth Attorneys Act was enacted, did not involve that statute. Rather, the issue in that case was whether the Treasurer was entitled to possession of an escrow account where the conditions of the escrow had not yet been met. Specifically, as expressed by this Court, the issue was "whether the escrowed

monies are funds in the possession of [the State Workers' Insurance Board] SWIB, and/or whether SWIB has legal title over them for purposes of Section 301 of [The Fiscal] Code[13] and Section 4 of the [Worker's Compensation] Act."[14] *Id.* at 1311. The *Knoll* Court held that until certain escrow conditions were satisfied, title to liquidated bank proceeds remained with the depositor, not SWIB, and thus was not subject to a custodial claim by the Treasurer. *Id.* The reasoning was the Treasurer could not become custodian of the funds until the conditions were met, and the money was released to SWIB. Here, Plaintiffs allege, and we must accept as true, that there are no conditions precedent prior to the monies being deposited into the Fund because PSU has already paid the 2012 installment. Plaintiffs' Second Amended Complaint at ¶61. Accordingly, we conclude that the *Knoll* case is inapposite.

Next, the NCAA asserts that because no monies have been deposited into the Fund, Treasurer McCord has not been harmed. The Endowment Act applies to "all monetary penalties paid or payable under agreements between institutions of higher education and governing bodies regardless of the payment date." 24 P.S. § 7505. This Court has held:

> Something that is 'payable' has been defined as something '[c]apable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable.' BLACK'S LAW DICTIONARY 1128 (6th ed. 1990). Furthermore, the definition of 'payable' goes on to indicate that 'payable' can refer to future obligations 'but, when used without qualification, [the] term normally means that the debt is payable at once . . . .' *Id.* [15]

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[13] Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. § 301.

[14] Act of June 2, 1915, P.L. 762, *as amended, formerly*, 77 P.S. § 223, repealed by the Act of June 24, 1996, P.L. 350.

[15] The Pennsylvania Supreme Court has held:

Chrzan v. Workers' Comp. Appeal Bd. (Allied Corp.), 805 A.2d 42, 46 (Pa. Cmwlth. 2002) (emphasis and footnotes omitted).

Treasurer McCord maintains that he has standing as the statutorily-designated sole custodian of all funds deposited into the Fund created by the Endowment Act. Plaintiffs' Second Amended Complaint at ¶3. Section 3(b)(1) of the Endowment Act states: "The endowment shall be established as a separate trust fund in the State Treasury and the State Treasurer shall be **custodian thereof.**" 24 P.S. § 7503(b)(1) (emphasis added). The General Assembly has designated that:

> The State Treasurer may, if requested to do so, **receive and act** as custodian for any moneys or securities which may be contributed to or deposited with the Commonwealth, or any officer, department, board or commission of the Commonwealth, by the United States, or any agency thereof, or by any other person, persons, organization or corporation, for any designated special purpose.

Section 1 of the Act of December 27, 1933, Sp. Sess., P.L. 113, 72 P.S. § 3832 (emphasis added).

Given the State Treasurer's responsibility as custodian of the Fund, and the allegation that the money has been "paid" and is merely awaiting direction as to its proper location, and the remainder of the fine is "payable" thereby making it

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> The Statutory Construction Act is clear: the objective of all interpretation and construction of statutes is to ascertain and effectuate the intention of the legislature. 1 Pa.C.S.[] § 1921(a). Further, the best indication of the General Assembly's intent is the plain language of the statute. When the words of a statute are clear and unambiguous, there is no need to look beyond the plain meaning of the statute 'under the pretext of pursuing its spirit.' 1 Pa.C.S.[] § 1921(b). Consequently, only when the words of a statute are ambiguous should a court seek to ascertain the intent of the General Assembly through consideration of the various factors found in Section 1921(c) [of the Statutory Construction Act].

Bayada Nurses, Inc. v. Dep't of Labor & Indus., 607 Pa. 527, 552, 8 A.3d 866, 880-81 (2010) (citations omitted).

subject to the Treasurer's custodial claim, we hold that Treasurer McCord currently has the authority to implement his statutory obligations. *See Pennsylvania Game Comm'n v. Dep't of Envtl. Res.*, 521 Pa. 121, 555 A.2d 812 (1989). Consequently, Treasurer McCord has standing.

The NCAA contends that Senator Corman lacks standing because:

> [T]he Second Amended Complaint does not allege any genuine interference with Senator Corman's *legislative* functions. Neither the Endowment Act or Act 10A confers upon Senator Corman any personal interest in this matter that is different from the stake that each citizen has in seeing the law observed.

NCAA Memo at 20 (quotation marks omitted). Senator Corman rejoins that under Section 4(b)(1) of the Endowment Act, the Pennsylvania Commission on Crime and Delinquency (Commission) is required to provide him as the Chair of the Senate Appropriations Committee "notice of any proposed expenditure of money from the endowment . . . for review and comment." 24 P.S. § 7504(b)(1). That section further provides that "[n]o proposed expenditure of money from the endowment may occur until 30 days after the date of the notice for the proposed expenditure." *Id.* The Commission is also required to provide him "an annual report itemizing all approved expenditures of money from the endowment . . . [which] include[s] the name of each organization receiving an expenditure from the endowment, the amount received by each organization and summary information aggregating expenditures by expenditure category pursuant to [S]ection 3(b)(4) [of the Endowment Act]." 24 P.S. § 7504(b)(2).

This Court has held that "once . . . votes which [legislators] are entitled to make have been cast and duly counted, their interest as legislators ceases. Some other nexus must then be found . . . ." *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Cmwlth. 1976).

Our Pennsylvania Supreme Court recognized that:

> The concept of **'standing'** in its accurate legal sense, is concerned only with the question of ***who* is entitled to make a legal challenge** to the matter involved. . . . Although our law of standing is generally articulated in terms of whether a would-be litigant has a 'substantial interest' in the controverted matter, and whether he has been 'aggrieved' or 'adversely affected' by the action in question, we must remain mindful that the purpose of the 'standing' requirement is to insure that a legal challenge is by a proper party . . . . The terms 'substantial interest', 'aggrieved' and 'adversely affected' are the general, usual guides in that regard, but they are not the only ones. For example, **when the legislature statutorily invests an agency with certain functions, duties and responsibilities, the agency has a legislatively conferred interest in such matters. From this it must follow that, unless the legislature has provided otherwise, such an agency has an implicit power to be a litigant in matters touching upon its concerns. In such circumstances the legislature has implicitly ordained that such an agency is a proper party litigant, *i.e.*, that it has 'standing.'**

Pennsylvania Game Comm'n., 521 Pa. at 127-28, 555 A.2d at 815 (emphasis added). *See also Commonwealth v. E. Brunswick Twp.*, 956 A.2d 1100 (Pa. Cmwlth. 2008); *Pennsylvania Game Comm'n v. Pennsylvania Pub. Util. Comm'n*, 651 A.2d 596 (Pa. Cmwlth. 1994).

We find *Pennsylvania Game Commission v. Department of Environmental Resources* controlling in the instant matter. Here, the legislature statutorily vested certain specifically-identified individuals, including Senator Corman, with the right to 30 days advance notice of proposed expenditures from the Fund in order to review and comment upon the proposed expenditures. *See* 24 P.S. § 7504(b)(1). We must interpret and construe statutes to effectuate the intent of the legislature. *See* Section 1921(a) of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1921(a). A reasonable reading of the statute requires such advance notice to permit

those specified individuals an opportunity to be heard regarding proposed expenditures. 1 Pa.C.S. § 1921(a). In essence, the legislature invested those named individuals with oversight responsibility and authority regarding the monies subject to the Endowment Act. Therefore, Senator Corman has more responsibility under the Endowment Act beyond his legislative function because he has specific statutory obligations. *See Zemprelli v. Thornburgh,* 407 A.2d 102 (Pa. Cmwlth. 1979). Clearly, Senator Corman's statutory duties for overseeing Fund expenditures is a "matter[] touching upon [his] concerns." *Pennsylvania Game Comm'n,* 521 Pa. at 128, 555 A.2d at 815. As such, "the legislature has implicitly ordained that [Senator Corman, as Chair of the Senate Appropriations Committee,] is a proper party litigant, *i.e.,* that [he] has 'standing.'" *Id.* Accordingly, we conclude that Senator Corman has standing.[16] Because we hold that both Treasurer McCord and Senator Corman have standing, we overrule the NCAA's first preliminary objection.

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[16] The Dissent maintains that Senator Corman is merely

> one of the numerous members of the General Assembly listed in Section 4(b)(1) and (2) of the Endowment Act, 24 P.S. §7504(b)(1) and (2), **that compose *a panel* that is entitled to notice** of the Pennsylvania Commission on Crime and Delinquency's proposed disbursements from the Endowment Fund and to receive the Commission's annual report of all such expenditures. . . . However, **the panel, of which Senator Corman is a member,** does not have the substantial, direct or immediate interest to support legislative standing with respect to the instant action involving the deposit of the penalty funds in the State Treasury under the Endowment Act because it only has review and comment powers of the Commission's actions under Section 4(b)(1) and (2) to propose corrective legislative action. . . . Even if **the panel** would have the requisite interest, **Senator Corman is merely a member of that panel and one member of the body does not have standing to enforce.**

Dissenting Op. at 7-8 n.5 (emphasis added). Contrary to the Dissent's assertions, there is no "panel." The word "panel" does not exist in the Endowment Act and, therefore, the identified individuals are not members of a panel, nor does the Endowment Act in any manner provide that the review and comment powers are to "propose corrective legislative action." Specifically, the Endowment Act expressly names 10 General Assembly leaders from different political parties and requires that the individuals holding these legislatively-identified positions be given an opportunity

II. Indispensable Party

The NCAA next argues that PSU is an indispensable party. It specifically contends that PSU's performance under the Consent Decree, its relationship to the Commonwealth, the terms by which it may contract with third parties, and the conditions upon which it receives state-appropriated funds are unavoidably at issue in this action. Consequently, because PSU is not a party to this action, the NCAA maintains that this Court does not have subject matter jurisdiction.

It is well established that "[t]he failure to join an indispensable party to a lawsuit deprives the court of subject matter jurisdiction." *HYK Constr. Co., Inc. v.*

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to review all proposed expenditures and the power to be heard concerning the same. Not every legislator possesses this right; rather, the General Assembly conferred this interest only upon the legislators holding the enumerated leadership positions.

Pennsylvania courts have recognized:

> Standing may be had through a variety of ways. **The legislature may grant it explicitly to an** agency or **individual by statute**; the legislature may grant it implicitly to an agency by investing it with certain functions, duties and responsibilities; or it may be permitted under common law where the status of the petitioner is that of an aggrieved party.

In re: Hickson, 765 A.2d 372, 376 (Pa. Super. 2000) (emphasis added; quotation marks omitted). Senator Corman's interest is not as a mere panel member, because no panel exists. Instead, he has standing as a legislatively-designated **individual**.

Finally, the Dissent points to *Fumo v. City of Philadelphia*, 601 Pa. 322, 972 A.2d 487 (2009), to support its conclusion that Senator Corman's interests are no different than those shared by all citizens, and are insufficient to confer standing. Dissenting Op. at 7-8 n.5. In *Fumo*, the Supreme Court granted standing to state legislators to pursue a claim asserting that the legislators' authority as members of the General Assembly had been usurped. However, the Supreme Court denied those same legislators standing to bring a claim asserting "only a generalized grievance about the conduct of government that all citizens share." *Fumo*, 601 Pa. at 347, 972 A.2d at 502. As discussed above, Senator Corman's interests far exceed those of the general population because, in his role as Chair of the Appropriations Committee, he has been conferred statutorily-mandated oversight responsibilities.

Smithfield Twp., 8 A.3d 1009, 1015 (Pa. Cmwlth. 2010). The Pennsylvania Supreme Court has held:

> [A] party is 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.[17] [T]he basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of him or her. In undertaking this inquiry, the nature of the claim and the relief sought must be considered. Furthermore, we note the general principle that, in an action for declaratory judgment, all persons having an interest that would be affected by the declaratory relief sought ordinarily must be made parties to the action. Indeed, Section 7540(a) of the Judicial Code, 42 Pa.C.S. § 7540(a), which is part of Pennsylvania's Declaratory Judgments Act, states that, [w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.
>
> While this joinder provision is mandatory, it is subject to limiting principles. For example, where the interest involved is indirect or incidental, joinder may not be required. Additionally, where a person's official designee is already a party, the participation of such designee may alone be sufficient, as the interests of the two are identical, and thus, the participation of both would result in duplicative filings.

City of Phila. v. Commonwealth, 575 Pa. 542, 567-68, 838 A.2d 566, 581-82 (2003) (citations, footnotes and quotation marks omitted).

> The determination of an indispensable party question involves at least these considerations:

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[17] "A corollary of this principle is that a party against whom no redress is sought need not be joined. In this connection, if the merits of a case can be determined without prejudice to the rights of an absent party, the court may proceed." *Sprague v. Casey*, 520 Pa. 38, 48-49, 550 A.2d 184, 189 (1988) (citations omitted); *see also Banfield v. Cortes*, 922 A.2d 36 (Pa. Cmwlth. 2007).

> 1. Do absent parties have a right or interest related to the claim?
>
> 2. If so, what is the nature of that right or interest?
>
> 3. Is that right or interest essential to the merits of the issue?
>
> 4. Can justice be afforded without violating the due process rights of absent parties?

Mechanicsburg Area Sch. Dist. v. Kline, 494 Pa. 476, 481, 431 A.2d 953, 956 (1981).

The instant action pertains to the disposition of monies PSU has allocated pursuant to its obligations under the Consent Decree. Plaintiffs do not seek redress from PSU, but rather, from the NCAA. Under the Consent Decree, PSU is required to pay the fine:

> **into an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse**. . . . The proceeds of this fine may not be used to fund programs at the University. No current sponsored athletic team may be reduced or eliminated in order to fund this fine.

Plaintiffs' Second Amended Complaint, Ex. A at 5 (emphasis added).

Nothing in the Consent Decree permits PSU to affect the disposition of the fine being paid into the Fund. Instead, the Consent Decree merely requires PSU to deposit the funds "into an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse." Plaintiffs' Second Amended Complaint, Ex. A at 5. As reflected in the Consent Decree and as noted by Plaintiffs, "[PSU] has no role whatsoever in the disbursement, dissemination, or distribution of fine money under the Consent Decree once the funds are deposited into the endowment." Plaintiffs' Br. at 21. Thus, although PSU may have rights or an interest **related** to the claim, it does not appear that its rights and obligation to deposit monies into an endowment for the aforementioned purposes will be affected by the

outcome of this litigation, and thus PSU's rights and interest are not "essential to the merits of the issue" before this Court. *Mechanicsburg Area Sch. Dist.*, 494 Pa. at 481, 431 A.2d at 956. Further, because PSU has no authority under the Consent Decree to affect the disposition of monies paid into the endowment, and its obligations under the Consent Decree will not be affected regardless of the outcome of this litigation, at this time, it appears that justice can be "afforded without violating [its] due process rights." *Id.*

The NCAA also asserts that PSU is an indispensable party because the counts in Plaintiffs' Second Amended Complaint:

> fundamentally implicate [PSU's] autonomy, its relationship to the Commonwealth government, the terms by which it can transact business with third parties (including its participation in the NCAA), the conditions upon which it receives state-appropriated funds, and its control over the expenditures of *any* of its funds. . . . The premise of Plaintiffs' arguments, and of the Endowment Act itself, is that if [PSU] accepts any state support it has given the General Assembly a right to control or veto *all* of [PSU's] contracts or expenditures – even those that have nothing to do with state funds. . . . If correct, those arguments would radically transform [PSU's] relationship with the Commonwealth.

NCAA Memo at 25-26 (citations omitted). Contrary to the NCAA's argument, the outcome of this action will not determine the ability of the General Assembly or the Chair of the Senate Appropriations Committee to control PSU's contracts and expenditures. The Endowment Act applies in limited and clearly-delineated circumstances where an institution of higher learning pays a monetary penalty pursuant to an agreement entered into with a governing body, where the penalty is at least $10 million to be paid in installments over a time period in excess of one year, and where the agreement provides that the penalty will be used for a specific purpose. 24 P.S. § 7503. In fact, Sections 3(b)(3) and 3(b)(4) of the Endowment Act

specifically permit the disbursement provisions of the Endowment Act to be displaced by explicit language in such an agreement. *Id.*

Contrary to the Dissent's claim that the Endowment Act imposes upon PSU "the responsibility to deposit the money into the [F]und," the Endowment Act is silent as to who has the obligation to make such deposit. Dissenting Op. at 4. Section 3(a) of the Endowment Act reads, in pertinent part, as follows: "If an institution of higher education pays a monetary penalty pursuant to an agreement entered into with a governing body . . . then the monetary penalty shall be deposited into an endowment that complies with the provisions of subsection (b)." Where the legislature has not spoken we will not impose a duty. *See Bixler v. State Ethics Comm'n*, 847 A.2d 785 (Pa. Cmwlth. 2004). To impose such a duty would also preclude the parties from freely negotiating and agreeing upon their contract terms concerning payment obligations. *See Glassmere Fuel Serv., Inc. v. Clear*, 900 A.2d 398 (Pa. Super. 2006). The undisputed facts herein are that "Penn State will not be obligated to transfer the funds from its money market account into the Endowment **until directed to do so by the NCAA**." McNeely Declaration at ¶7 (emphasis added).

Moreover, the Consent Decree itself undermines the NCAA's argument that PSU is an indispensable party because PSU has waived its rights to any litigation regarding the Consent Decree. The pertinent Consent Decree language states:

> **[PSU] expressly agrees not to challenge the consent decree and waives any claim to further process,** including, without limitation, any right to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, **and any judicial process related to the subject matter of this Consent Decree.**

Plaintiffs' Second Amended Complaint, Ex. A at 2 (emphasis added). The Pennsylvania Supreme Court has held:

> A consent decree is not a legal determination by the court of the matters in controversy but is merely an agreement between the parties-a contract binding the parties thereto to the terms thereof[.] As a contract, the court, in the absence of fraud, accident or mistake, had neither the power nor the authority to modify or vary the terms set forth. . . .

Lower Frederick Twp. v. Clemmer, 518 Pa. 313, 328, 543 A.2d 502, 510 (1988) (citations and quotation marks omitted). "A waiver is the intentional relinquishment of a known right." *First Nat'l Bank of Milford v. Dep't of Banking*, 286 A.2d 480, 482 (Pa. Cmwlth. 1972*); see also Linda Coal & Supply Co. v. Tasa Coal Co.*, 416 Pa. 97, 204 A.2d 451 (1964). "If there is no constitutional or statutory mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy. . . ." *Commonwealth v. Burke*, 103 A.2d 476, 479 (Pa. Super. 1954). A party may "voluntarily relinquish his right to be heard." *Adams v. Lawrence Twp. Bd. of Supervisors*, 621 A.2d 1119, 1121 (Pa. Cmwlth. 1993). "Waivers which release liability for actions not accrued at the time of the release are generally only invalid if they involve future actions entirely different than ones contemplated by the parties at the time of the release." *Bowman v. Sunoco, Inc.*, ___ Pa. ___, 65 A.3d 901, 909 (2013). Here, PSU clearly waived its right to participate in any judicial process contemplated to arise from the Consent Decree. Absent fraud, accident or mistake, this Court may not modify or vary the parties' express contractual language. Thus, we hold that PSU is not an indispensable party, and we overrule the NCAA's second preliminary objection.[18]

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[18] However, if during the pendency of this action, an issue arises establishing that PSU is an indispensable party, this Court shall order its joinder pursuant to Pennsylvania Rule of Civil Procedure (Pa.R.C.P.) No. 2232(c). Pa.R.C.P. No. 2232(c) states:

> At any stage of an action, the court may order the joinder of any additional person who could have joined or who could have been joined in the action and may stay all proceedings until such person has been joined. The court in its discretion may proceed in the action although such person has not been made a party if jurisdiction over

In support of its conclusion that PSU is an indispensable party, the Dissent maintains that the Declaratory Judgments Act, 42 Pa.C.S. § 7540(a), mandates that PSU be joined. The pertinent provision of the Declaratory Judgments Act states: "all persons shall be made parties **who have** or **claim any interest which would be affected by the declaration.**" (Emphasis added). As discussed above, PSU has unequivocally denied any interest in and, in fact, expressly waived "any claim to further process." Plaintiffs' Second Amended Complaint, Ex. A at 2. Nor does PSU have "any interest which would be affected by the [Plaintiffs' requested] declaration[s]." 42 Pa.C.S. § 7540(a). Specifically, Plaintiffs' Prayer for Relief in Count I reads as follows:

> WHEREFORE, Plaintiffs request that this Court grant the following relief:
>
> a. A declaration that the Endowment Act is a valid and constitutional law;
>
> b. A declaration that the NCAA has violated the Endowment Act;
>
> c. A declaration that the entirety of the monetary penalty in the Consent Decree be paid to the State Treasury;
>
> d. An order compelling the NCAA to immediately pay or direct payment of the first $12 million installment to the State Treasury;
>
> e. An injunction compelling compliance by the NCAA with the Endowment Act;
>
> f. Attorneys' fees and costs; and
>
> g. Such other relief as this Court deems just and proper.

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the person cannot be obtained and the person is not an indispensable party to the action.

Plaintiffs' Second Amended Complaint at 13-14. No requested declaration impacts PSU in any manner. Further, the Dissent contends that "Senator Corman's and Treasurer McCord's own prayer for relief seeks to order PSU to pay the first installment of the penalty funds directly to the State Treasury or to order the NCAA to deposit the first installment into the State Treasury following payment by PSU." Dissenting Op. at 5. However, the prayer for relief in Plaintiffs' Second Amended Complaint Count I, quoted above, does not contain such a request.

III. State a Claim for which Relief Can be Granted

Next, the NCAA contends that Count I of Plaintiffs' Second Amended Complaint fails to state a claim for which relief can be granted. Specifically, the NCAA declared that it "will not be in a position to demand payment from [PSU] until its Task Force has established an endowment, hired a third-party administrator, and established guidelines for how the endowment's funds should be spent." NCAA Memo at 28. The NCAA avers that these steps have not yet been taken because Plaintiffs' legal maelstrom has made it impossible to proceed. The NCAA argues that until PSU actually pays the penalty to the NCAA, the NCAA has not violated the Endowment Act.

Here, the Consent Decree requires only that the fine "shall be paid . . . into an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse." Plaintiffs' Second Amended Complaint, Ex. A at 5. In their Second Amended Complaint, Plaintiffs aver: "Upon information and belief, the first $12 million installment has been set aside by [PSU], but not paid to the NCAA. But the NCAA has averred that it can direct [PSU] at any time to pay over the funds to a fund of its choosing." Plaintiffs' Second Amended Complaint at ¶15. Plaintiffs also state that "[PSU] has already paid the first fine installment into a

separate account and the NCAA has the power to command [PSU] to spend those funds as directed at any time, thus [PSU] has paid a fine under the Consent Decree," but "[s]ince the NCAA has not paid the $12 million or directed [PSU] to pay the $12 million, as the NCAA claims to have the authority to do, the NCAA stands in violation of the Endowment Act." Plaintiffs' Second Amended Complaint at ¶¶61-62.

It is undisputed that PSU is an "institution of higher education," the NCAA is a "governing body," and the Consent Decree constitutes an agreement between the two.[19] Section 5 of the Endowment Act states that it "shall apply to all monetary penalties **paid or payable** under agreements between institutions of higher education and governing bodies **regardless of payment date**." 24 P.S. § 7505 (emphasis added). The McNeely Declaration upon which Plaintiffs rely states that ". . . the NCAA requested that [PSU] set aside the first $12 million installment of the fine. To the best of my knowledge, on December 20, 2012, [PSU] placed $12 million into a money market account. . . . [PSU] will not be obligated to transfer the funds from its money market account into the Endowment until directed to do so by the NCAA. . . ." McNeely Declaration at ¶¶5, 7. Plaintiffs maintain that to the extent the fine was set aside, removed from PSU's budget and merely awaits the NCAA's further instruction, this installment has been paid or is "payable" (i.e., immediately legally enforceable). Therefore, accepting Plaintiffs' allegations as true, it not appearing "with certainty that the law will not permit recovery," and resolving all doubt in favor of the non-moving party as we must, we hold that Count I of Plaintiffs' Second Amended Complaint states a claim for which relief can be granted, and we overrule the NCAA's third preliminary objection.

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[19] Section 2 of the Endowment Act defines "[i]nstitution of higher education" as "[a] postsecondary educational institution in this Commonwealth that receives an annual appropriation from an act of the General Assembly." 24 P.S. § 7502. "[G]overning body" is defined *supra* at 4 n.7.

IV. Constitutionality

Finally, the NCAA argues that the Endowment Act and Act 10A violate the U.S. and Pennsylvania Constitutions while concurrently maintaining that "the appropriate way for the NCAA to present those constitutional issues for this Court's consideration would be as affirmative defenses in an 'Answer and New Matter,' with the opportunity for appropriate and focused briefing." NCAA Memo at 37-38. A court may entertain the merits of affirmative defenses when improperly raised in preliminary objections where "the opposing party fails to object to the procedural defect . . . ." *Wurth v. City of Phila.*, 584 A.2d 403, 405 (Pa. Cmwlth. 1990); *see also Farinacci v. Beaver Cnty. Indus. Dev. Auth.*, 510 Pa. 589, 511 A.2d 757 (1986). Since Plaintiffs did not object to the Court deciding this issue raised by the NCAA, and both parties have briefed the constitutional issues at length, we will address the NCAA's constitutional challenges. *See Patton v. Republic Steel Corp.*, 492 A.2d 411 (Pa. Super. 1985).

When considering a constitutional challenge to properly enacted legislation, we are mindful of the fact that

> [o]ur law provides a strong presumption that legislative enactments, as well as the manner in which legislation is enacted, do not violate the Constitution. A party that challenges the constitutionality of a statute bears 'a very heavy burden of persuasion' to overcome this presumption. 'Accordingly, a statute will not be declared unconstitutional unless it *clearly, palpably,* and *plainly* violates the Constitution [and a]ll doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.'

Ass'n of Settlement Cos. v. Dep't of Banking, 977 A.2d 1257, 1261 (Pa. Cmwlth. 2009) (citations omitted).

The NCAA specifically contends that the Endowment Act violates the Takings Clauses of the U.S. and Pennsylvania Constitutions by seeking to confiscate funds from a private entity without just compensation. The U.S. Constitution provides: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Article I, Section 1 of the Pennsylvania Constitution states: "All men . . . have certain inherent and indefeasible rights, among which are those of . . . acquiring, possessing and protecting property . . . ." Pa. Const. art. I, § 1. Article I, Section 10 of the Pennsylvania Constitution declares: "[P]rivate property [shall not] be taken or applied to public use, without authority of law and without just compensation being first made or secured." Pa. Const. art. I, § 10. Federal and state constitutional Takings Clause provisions are interpreted using the same framework and standards. *See Smith v. Cortes*, 879 A.2d 382 (Pa. Cmwlth. 2005), *aff'd*, 587 Pa. 506, 901 A.2d 980 (2006).

In the context of the Takings Clauses, "a taking occurs when [an] entity clothed with the power substantially deprives an owner of the use and enjoyment of his property. A taking may also occur if a regulation enacted for a public purpose under the government's police powers prevents the [property] owner from using his [property]." *People United to Save Homes v. Dep't of Envtl. Prot.*, 789 A.2d 319, 326 (Pa. Cmwlth. 2001) (citation omitted). However, as a threshold matter, to establish that a compensable taking has occurred, the property owner must establish that a valid property right has been affected. *Id.*

As previously stated, it is well settled that a consent decree is "in essence a contract binding the parties thereto." *Commonwealth v. U.S. Steel Corp.*, 325 A.2d 324, 328 (Pa. Cmwlth. 1974) (quoting *Commonwealth v. Rozman*, 309 A.2d 197, 199 (Pa. Cmwlth. 1973)). It is also recognized that "[v]alid contracts are property." *Lynch v. United States*, 292 U.S. 571, 579 (1934). Analogous to a

contract, a valid consent decree "requires a mutual understanding of . . . the parties." *U.S. Steel Corp.*, 325 A.2d at 328 (quoting *Rozman*, 309 A.2d at 199). The parties herein acquiesced to the Consent Decree. Notably void from the Consent Decree is any language that suggests the $60 million fine ever becomes the NCAA's property. Instead, the Consent Decree unambiguously mandates that the fine be paid "into an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse." Plaintiffs' Second Amended Complaint, Ex. A at 5. The Consent Decree does not contain a scintilla of language that suggests the NCAA will have ownership of or control over the fine paid by PSU. To endorse the NCAA's argument would require this Court to speculate as to the intentions of the parties, which is not its role. "The Court's inquiry should focus on what the agreement itself expressed and not on what the parties may have silently intended." *Bean v. Dep't of State, State Bd. of Funeral Dirs.*, 855 A.2d 148, 155 (Pa. Cmwlth. 2004) (quoting *Empire Sanitary Landfill, Inc. v. Riverside Sch. Dist.*, 739 A.2d 651, 654 (Pa. Cmwlth. 1999)). Accordingly, the NCAA has failed to establish a cognizable property interest that is affected.

The NCAA's assertion that it has a property interest in a "contractual right to direct how th[e] funds are spent" is equally unpersuasive. NCAA Memo at 39. The Consent Decree contains no language that suggests the NCAA has such a property interest. Because the Consent Decree lacks any language evidencing that ownership of the fine transfers to the NCAA, and it is not the role of this Court to insert or alter terms of an agreement, the NCAA fails to satisfy its threshold burden of demonstrating that a valid property right has been affected and further Takings Clause analysis is unnecessary. *See, e.g., Tri-State Transfer Co. Inc., v. Dep't of Envtl. Prot. Tinicum Twp.*, 722 A.2d 1129 (Pa. Cmwlth. 1999). Thus, we conclude the Endowment Act does not violate the Takings Clauses of the U.S. and Pennsylvania Constitutions.

The NCAA also argues that the Endowment Act and the proffered construction of Act 10A violate the Dormant Commerce Clause of the U.S. Constitution by regulating how out-of-state private persons can spend money they have lawfully obtained. Plaintiffs respond that the Endowment Act complies with the Commerce Clause as interpreted by the U.S. Supreme Court in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007), and the market participant doctrine, and does not discriminate against interstate commerce.

Article 1, Section 8, Clause 3 of the U.S. Constitution provides that "Congress shall have the power [t]o regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3.

> While the Commerce Clause expressly speaks only to the ability of Congress to regulate interstate commerce, it has been interpreted to contain an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce. This limitation has been sometimes coined the negative or dormant Commerce Clause. . . . The dormant Commerce Clause prohibits economic protectionism-that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

Office of Disciplinary Counsel v. Marcone, 579 Pa. 1, 20, 855 A.2d 654, 666 (2004) (citation and quotation marks omitted). This Court has pointed out:

> Supreme Court Commerce Clause precedent is abundant, but there is no bright-line test to determine whether a statute violates the Commerce Clause. Modern Commerce Clause jurisprudence, therefore, involves a case-by-case examination of whether the statute discriminates against interstate commerce. Thus, we are admonished by the Supreme Court to examine the provisions of the [Endowment] Act at issue here with both deference to Commerce Clause precedent and sensitivity to the unique factual circumstances surrounding the [Endowment] Act.

Indianapolis Power & Light Co. v. Pennsylvania Pub. Util. Comm'n, 711 A.2d 1071, 1075 (Pa. Cmwlth. 1998) (citations and footnote omitted). The U.S. Supreme Court has held:

> To determine whether a law violates this so-called dormant aspect of the Commerce Clause, **we first ask whether it discriminates on its face against interstate commerce**. In this context, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Discriminatory laws motivated by simple economic protectionism are subject to a virtually *per se* rule of invalidity, which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose[.]

United Haulers Ass'n, Inc., 550 U.S. at 338-39 (citations and quotation marks omitted; emphasis added).

Section 3(b)(4) of the Endowment Act expressly provides that "**[u]nless otherwise expressly stated in the agreement**, the funds may only be used within this Commonwealth for the benefit of the residents of this Commonwealth . . . ." 24 P.S. § 7503(b)(4) (emphasis added). Thus, the Endowment Act requires that the monetary penalty be expended in the Commonwealth **only if** an agreement subject to the Endowment Act does not specify that the funds are to be spent elsewhere. Therefore, the NCAA or any other governing body subject to the Endowment Act, and a Pennsylvania institution of higher education may agree that the monetary penalty be used outside the Commonwealth. Moreover, nothing in the Endowment Act prohibits out-of-state entities from applying for and receiving monies from the Fund, as is required by any in-state entity. In addition, there are no allegations that the Fund has any impact on out-of-state economic interests, let alone burdens any out-of-state economic interest.

Act 10A designates that PSU must apply the monies appropriated to it from the General Assembly "only for such purposes as are permitted in this act . . . ."

Plaintiffs' Second Amended Complaint, Ex. E. The parties do not cite any provision in Act 10A that expressly restricts where PSU's expenditures may be made. In their Second Amended Complaint, Plaintiffs state merely that "[n]othing in Act 10A of 2012 grants any person or organization the right to divert the funds for national causes." Plaintiffs' Second Amended Complaint at ¶49. However, neither Act 10A's express language nor Plaintiffs' interpretation implicate the Commerce Clause. Because neither the Endowment Act, nor Act 10A, on their face or in their practical operation discriminate against interstate commerce, they do not violate the Commerce Clause of the U.S. Constitution.

The NCAA further maintains that the Endowment Act and the proffered construction of Act 10A violate the Contracts Clauses of the U.S. and Pennsylvania Constitutions by impairing obligations under lawful contracts.

> The Contract Clause of the United States Constitution provides, in relevant part, that '[n]o state shall enter into any . . . Law impairing the Obligation of Contracts.' U.S. Const. art. I, § 10. The Contract Clause of the Pennsylvania Constitution similarly provides that '[n]o . . . law impairing the obligation of contracts . . . shall be passed.' Pa. Const. art. I, § 17. Our Pennsylvania Supreme Court has held that the Contract Clause of the Pennsylvania Constitution is generally to be applied in the same manner as its federal counterpart.

Workers' Comp. Judges Prof'l Ass'n v. Exec. Bd. of Commonwealth, 39 A.3d 486, 493 (Pa. Cmwlth. 2012), *aff'd,* __ Pa. __, 66 A.3d 765 (2013). The U.S. Court of Appeals for the Third Circuit has explained:

> In order to prove a violation of this constitutional provision, a plaintiff must demonstrate that a change in state law has operated as a substantial impairment of a contractual relationship. Thus, Contract Clause analysis requires three threshold inquiries: (1) whether there is a contractual relationship; (2) whether a change in a law has impaired that contractual relationship; and (3) whether the impairment is substantial. If it is determined that a

> substantial impairment of a contractual relationship has occurred, the court must further inquire whether the law at issue has a legitimate and important public purpose and whether the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in light of that purpose. If the impaired contractual relationship is between private parties, the court will defer to the legislative judgment concerning the importance of the public purpose and the manner in which that purpose is being pursued.

Transp. Workers Union of Am., Local 290 v. S.E. Pa. Transp. Auth., 145 F.3d 619, 621 (3d Cir. 1998) (citations and quotation marks omitted).

The Consent Decree is dated July 23, 2012. The Endowment Act became effective on February 20, 2013. Although it is clear that "there is a contractual relationship" by virtue of the Consent Decree, we must consider whether the change in the law has "impaired that contractual relationship." *Transp. Workers Union of Am., Local 290*, 145 F.3d at 621.

This Court has recognized:

> Although the Contract Clause appears to proscribe any impairment, the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. [L]iteralism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self protection.

S. Union Twp. v. Dep't of Envtl. Prot., 839 A.2d 1179, 1188 n.13 (Pa. Cmwlth. 2003) (citation omitted), *aff'd*, 578 Pa. 564, 854 A.2d 476 (2004). Under the Consent Decree's "Punitive Component", PSU is required to pay the fine:

> **into an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse**. . . . The proceeds of this fine may not be used to fund programs at the University. No current sponsored athletic team may be reduced or eliminated in order to fund this fine.

Plaintiffs' Second Amended Complaint, Ex. A at 5 (emphasis added). The Consent Decree does not specify any particular endowment that is to receive the fine proceeds or place any geographical restriction on the use of the funds. Instead, the Consent Decree describes only the purposes for which the endowment must be used. Thus, the Consent Decree's language, as negotiated by the NCAA, merely imposes a penalty upon PSU requiring PSU to pay certain monies for programs preventing child sexual abuse and/or assisting child sexual abuse victims. Despite the NCAA's contention, there is nothing in the Consent Decree which provides for or evidences any obligation that the NCAA is to create the endowment or that the NCAA is to **collect** the fine. Rather, the Endowment Act directs that the fine be paid into an endowment to be used for the exact purposes identified in the Consent Decree. Because the Consent Decree is silent as to the establishment and control of the subject endowment, and the Endowment Act does not interfere with PSU's Consent Decree obligations, or with the use of the funds for the purposes stated therein, we hold that the Endowment Act does not impair the contractual relationship between the NCAA and PSU and, consequently, does not violate the Contracts Clauses of the U.S. and Pennsylvania Constitutions.

Even if this Court concluded that the Endowment Act impaired the Consent Decree, that impairment is not substantial. As previously discussed, the Endowment Act impacts the contract in two ways: by requiring the endowment to be controlled by the Commonwealth, and by requiring that the funds be used within the Commonwealth. Given that the Consent Decree is silent as to who is to control or administer the endowment and is also silent on geographic limitations on the use of the funds, the Endowment Act's impact on the Consent Decree is not substantial.[20]

[20] Had this Court concluded that the Endowment Act substantially impaired the contract, based upon the pleadings we would overrule the preliminary objection because "the law at issue has a legitimate and important public purpose and . . . the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in light of that purpose." *Transp. Workers*

Further, the application of Act 10A to the Consent Decree does not violate the Contracts Clause. Importantly, Act 10A was signed into law by the Governor on July 2, 2012 and became effective immediately. The Consent Decree was executed on July 23, 2012. Thus, the enactment of Act 10A did not affect "a change in the law [which] impaired [the Consent Decree]," since the law was in effect at the time the Consent Decree was executed. *Transp. Workers Union of Am., Local 290,* 145 F.3d at 621. Further, even if the Consent Decree had preceded the enactment of Act 10A, the Consent Decree does not apply monies for a purpose prohibited by Act 10A.[21] Because neither the Endowment Act nor Act 10A clearly, palpably and plainly violate the U.S. and Pennsylvania Constitutions, we overrule the NCAA's fourth preliminary objection.

For all of the above reasons, the NCAA's preliminary objections to Plaintiffs' Second Amended Complaint are overruled.

ANNE E. COVEY, Judge

Judge Brobson did not participate in the decision in this case.

Union of Am., Local 290, 145 F.3d at 621. We would "defer to the legislative judgment concerning the importance of the public purpose and the manner in which that purpose is being pursued." *Id.*

[21] Notably, Act 10A does not impose any reporting mandates upon the NCAA, as Act 10A specifically references PSU as having the obligation to file required statements.

IN THE 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

ORDER

AND NOW, this 4th day of September, 2013, the National Collegiate Athletic Association's preliminary objections are overruled. The National Collegiate Athletic Association is ordered to file its answer within 20 days of this order.

ANNE E. COVEY, Judge

IN THE 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.	:	No. 1 M.D. 2013
	:	Argued: June 19, 2013
The National Collegiate Athletic Association, Defendant	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLUOGH, Judge
HONORABLE ANNE E. COVEY, Judge

DISSENTING OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: September 4, 2013

Because Section 3(a) of the Institution of Higher Education Monetary Penalty Endowment Act (Endowment Act)[1] imposes a duty upon the Pennsylvania

[1] Act of February 1, 2013, P.L. 1, 24 P.S. §7503(a). Section 3(a) states:

(Footnote continued on next page...)

State University (PSU) as the primary payor, to deposit the penalty funds into an endowment that complies with the provisions of Section 3(b) of that Act, PSU is an indispensable party because it is PSU funds in PSU's possession that are to be paid under the "Binding Consent Decree Imposed by the National Collegiate Athletic Association [(NCAA)] and Accepted by [PSU]" (Consent Decree). Because PSU is an indispensable party and has not been sued by either Senator Corman or Treasurer McCord, we lack subject matter jurisdiction and I would sustain the NCAA's preliminary objection and dismiss the Complaint.

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). The failure to join an indispensable party to a lawsuit deprives the court of subject matter jurisdiction and may be raised

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(continued...)

> **(a) 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).

at any time or by the court *sua sponte*. *Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495, 496 (Pa. Cmwlth. 2002).

The basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the party's absence. *City of Philadelphia*, 575 Pa. at 567, 838 A.2d at 581. The relevant analysis requires examination of the following factors:

> 1. Do absent parties have a right or interest related to the claim?
>
> 2. If so, what is the nature of that right or interest?
>
> 3. Is that right or interest essential to the merits of the issue?
>
> 4. Can justice be afforded without violating the due process rights of absent parties?

Id. at 567 n.11, 838 A.2d at 581 n. 11 (citation omitted); *Polydyne, Inc.*, 795 A.2d 496 n.2 (citation omitted). In undertaking this inquiry, the nature of the claim and the relief sought must be considered. *HYK Construction Co., Inc. v. Smithfield Township*, 8 A.3d 1009, 1015 (Pa. Cmwlth. 2010), *appeal denied*, 610 Pa. 623, 21 A.3d 1195 (2011). Moreover, in an action seeking declaratory relief, "all persons shall be made parties who have or claim any interest which would be affected by the declaration." Section 7540 of the Declaratory Judgments Act, 42 Pa. C.S. §7540(a).[2]

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[2] As this Court has explained:

> While the Declaratory Judgments Act's joinder provision is mandatory, it is subject to reasonable limitations. *City of*

(Footnote continued on next page...)

In this case, Senator Corman and Treasurer McCord ask this Court to declare that the Endowment Act requires that any and all of the penalty imposed by the Consent Decree be paid into the State Treasury. Under the Endowment Act, the "institution of higher education," in this case, PSU, has the responsibility to deposit the money into the fund. *See* Section 3(a) of the Endowment Act, 24 P.S. §7503(a).[3] Even if PSU pays the penalty to the NCAA under the Consent Decree, it would not

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(continued...)

> *Philadelphia.* For example, where a declaratory judgment as to the validity of a statute or ordinance is sought, it is impossible to join as parties every single person whose interests are affected by the statute or ordinance. *Id.* Requiring the joinder of all such parties would undermine the litigation process and render the litigation unmanageable. *Id.* Additionally, where a person's official designee is already a party, the participation of such designee may alone be sufficient, as the interests of the two are identical, and thus, the participation of both would result in duplicative filings. *Id.*; *see Leonard v. Thornburgh*, [467 A.2d 104, 105 (Pa. Cmwlth. 1983)] (holding that the Governor need not participate in litigation involving a constitutional attack upon a tax statute, where his designee, the Secretary of the Department of Revenue, adequately represented his interests). Where the interest involved is indirect or incidental, joinder may not be required. *See, e.g., Mid–Centre County Authority v. Township of Boggs*, [384 A.2d 1008, 1012 (Pa. Cmwlth. 1978)] (concluding that Pennsylvania's Department of Environmental Resources was not a necessary party to a declaratory judgment action where its sole interest in the dispute concerned the identity of the party who would be responsible for complying with its regulations)....

HYK Construction. Co., Inc., 8 A.3d at 1015-16.

[3] *See also* Section 5 of the Endowment Act, 24 P.S. §7505 ("[T]his act shall apply to all monetary penalties paid or payable under agreements between institutions of higher education and governing bodies regardless of the payment date.").

be relieved of that obligation under the Endowment Act, making PSU an indispensable party to the litigation.

Moreover, Senator Corman's and Treasurer McCord's own prayer for relief seeks to order PSU to pay the first installment of the penalty funds directly to the State Treasury or to order the NCAA to deposit the first installment into the State Treasury following payment by PSU. Because PSU is not a party in this proceeding, we have no authority to grant the requested relief. *See generally Hansberry v. Lee*, 311 U.S. 32, 40 (1940). ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States ... prescribe, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires.") (citations omitted).

In response to this analysis, the majority goes to great lengths to ignore PSU's contractual and statutory duty to deposit the money owed by PSU to the NCAA that makes it an indispensable party. That position comes, in part, in its characterization of the agreement between PSU and the NCAA as a "Consent Decree" and applying the law regarding true consent decrees, ones approved by a court, which seemingly accepts the NCAA's position that it is some sort of non-state governmental actor. It is just a private contract between two parties – nothing more.

That analysis allows the majority to ignore that the requested declaration does impact PSU. Under the agreement, PSU agreed that it would pay $60 million in $12 million installments over a five-year period to the NCAA to be used for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse. *See* Exhibit A to Second Amended Complaint at 5. If we were to grant the requested relief by issuing "[a]n order compelling the NCAA to ... direct payment of the first $12 million installment to the State Treasury...," PSU would be required to deposit the first $12 million payment and future $12 million payments not as provided for in the agreement, but into the Endowment Fund created under Section 3(b) of the Endowment Act, 24 P.S. §7503(b), for programs or projects preventing child sexual abuse and/or assisting the victims of child sexual abuse. Because the majority holds that the Endowment Act mandates do not unconstitutionally infringe on that agreement, PSU is bound by the mandates of the Endowment Act.

In addition, the NCAA falls within the definition of "governing body" and, as noted above, PSU falls within the definition of "institution of higher education," as those terms are defined in Section 2 of the Endowment Act, 24 P.S. §7502, and the NCAA's and PSU's obligations thereunder are an "agreement" and "monetary penalty" within the provisions of Section 3(a), 24 P.S. §7503(a). Thus, under Sections 3 and 5, 24 P.S. §§7503 7505, PSU has an independent statutory duty to deposit the funds to be paid under the Consent Decree into the Endowment Fund.

Because PSU's statutory and contractual liability with respect to funds in its possession are at the core of this case, PSU has a clear right or interest that is essential to the disposition of the issues and its interest is not currently represented by

any of the other parties. PSU must be deemed to be an indispensable party in this case and due process requires its participation before any meaningful judicial relief may be granted. *See Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379, 346 A.2d 788, 789 (1975).[4]

Accordingly, unlike the majority, I would sustain the NCAA's preliminary objection based on Senator Corman's[5] and Treasurer McCord's failure to

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[4] *See also Mains v. Fulton*, 423 Pa. 520, 523, 224 A.2d 195, 196 (1966) (holding that a declaratory judgment action brought by subdivision developers to determine whether a public utility possessed an easement across the lots in the development would not lie where all of the lot owners in the development had an interest and all of the owners were not joined in the proceeding).

[5] While I agree with the Majority's determination that Treasurer McCord has standing to obtain relief under the Second Amended Complaint, I do not believe that Senator Corman has legislative standing in this case. As the Pennsylvania Supreme Court has explained:

> An individual can demonstrate that he has been aggrieved if he can establish that he has a substantial, direct and immediate interest in the outcome of the litigation. A party has a substantial interest in the outcome of litigation if his interest surpasses that "of all citizens in procuring obedience to the law." "The interest is direct if there is a causal connection between the asserted violation and the harm complained of; it is immediate if that causal connection is not remote or speculative.

Fumo v. City of Philadelphia, 601 Pa. 322, 336-37, 972 A.2d 487, 496 (2009) (citations omitted). Senator Corman claims that he has a direct interest in the Endowment Act's enforcement and administration because, as the Senate Appropriations Committee Chair, he one of the numerous members of the General Assembly listed in Section 4(b)(1) and (2) of the Endowment Act, 24 P.S. §7504(b)(1) and (2), that compose a panel that is entitled to notice of the Pennsylvania Commission on Crime and Delinquency's proposed disbursements from the Endowment Fund and to receive the Commission's annual report of all such expenditures. (Second Amended Complaint ¶51.) Under *Fumo* and *Pennsylvania Game Commission v. Department of Environmental Resources*, 521 Pa. 121, 127-28, 555 A.2d 812, 815 (1989), the Pennsylvania Commission on Crime and Delinquency has standing in this matter as the agency the General Assembly statutorily invested with the direct duties and responsibilities in disbursing the Endowment Fund. However, the panel, of which

(Footnote continued on next page...)

join PSU as an indispensable party and I would dismiss their Complaint because this Court lacks subject matter jurisdiction.[6]

DAN PELLEGRINI, President Judge

(continued...)

Senator Corman is a member, does not have the substantial, direct or immediate interest to support legislative standing with respect to the instant action involving the deposit of the penalty funds in the State Treasury under the Endowment Act because it only has review and comment powers on the Commission's actions under Section 4(b)(1) and (2) to propose corrective legislative action. *See, e.g., Fumo*, 601 Pa. at 347, 972 A.2d at 502 ("[I]n this claim, the state legislators allege only that the City did not act properly in exercising its statutory authority to license. The claim reflects nothing more than the state legislators' disagreement with the way in which the Commerce Director interpreted and executed her duties on behalf of the City. The claim does not demonstrate any interference with or diminution in the state legislators' authority as members of the General Assembly. As such, Claim II is only a generalized grievance about the conduct of government that all citizens share. Thus, we conclude that the state legislators lack standing to pursue Claim II."). Even if the panel would have the requisite interest, Senator Corman is merely a member of that panel and one member of the body does not have standing to enforce. Accordingly, unlike the majority, I would sustain the NCAA's preliminary objection with respect to Senator Corman's standing in this matter.

[6] Because we lack subject matter jurisdiction, I would not reach the merits of the claims raised in the Complaint.

WILLIE H. DUNLAP, et al. v. PECO ENERGY CO., et al.

CIVIL ACTION NO. 96-4326

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1996 U.S. Dist. LEXIS 15922

October 23, 1996, Decided

DISPOSITION: [*1] Motion of defendants PECO Energy Co., Corbin A. McNeil, Jr., William E. Powell, Sr., William A. Texter, James F. Hunter, and Walter King to dismiss plaintiffs' amended complaint GRANTED as to Count I insofar as it states a claim under 42 U.S.C. § 1983, as to Counts II and VIII in their entirety, and as to Count VII insofar as it alleges that PECO interfered with contracts between PECO and CTS; and motion of defendants to dismiss plaintiffs' amended complaint DENIED.

COUNSEL: For WILLIE H. DUNLAP, CONTINENTAL TECHNICAL SERVICES OF GEORGIA, INC., PLAINTIFF: COURTNEY M. BILLUPS, LAW OFFICES OF COURTNEY M. BILLUPS, WASHINGTON, DC USA.

For PECO ENERGY CO., DEFENDANT: CONRAD O. KATTNER, PECO LEGAL DEPARTMENT, PHILA, PA USA. WENDY SCHERMER, PHILA, PA USA.

For CORBIN A. MCNEIL, JR., DEFENDANT: WENDY SCHERMER, PHILA, PA USA.

For WILLIAM E. POWELL, SR., DEFENDANT: WENDY SCHERMER, (See above).

For WILLIAM A. TEXTER, DEFENDANT: WENDY SCHERMER, (See above).

For JAMES F. HUNTER, DEFENDANT: WENDY SCHERMER, (See above).

For WALTER KING, DEFENDANT: WENDY SCHERMER, (See above).

For JOHN M. QUAIN, DEFENDANT: DENISE A. KUHN, OFFICE OF ATTORNEY GENERAL, PHILA, PA USA.

JUDGES: Harvey [*2] Bartle, III, J.

OPINION BY: Harvey Bartle, III

OPINION

MEMORANDUM

Bartle, J.

October 23, 1996

Plaintiffs' amended complaint asserts that PECO Energy Company ("PECO"), and certain PECO employees, discriminated against plaintiffs based upon the race of plaintiff Willie Dunlap ("Dunlap") in violation of 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986. Plaintiffs also assert pendent state law claims. Defendants [1] move to dismiss the amended complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

1 For purposes of this Memorandum, "defendants" refers to all defendants except John M. Quain, who is not a party to the motion to dismiss.

A complaint should be dismissed pursuant to Rule 12(b)(6) only where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). All well pleaded factual [*3] allegations in the complaint are assumed to be true and viewed in the light

most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969).

The pertinent facts, as pleaded in the plaintiffs' amended complaint, are as follows. Plaintiff Continental Technical Services of Georgia, Inc. ("CTS") is and was a Georgia corporation offering technical support services and personnel to utility companies. Plaintiff Dunlap, an African-American, is and was the President and CEO of CTS. In the fall of 1994, PECO sent a purchase order to CTS. CTS was to provide Quality Verification ("QV") personnel services for PECO nuclear power plants. Soon thereafter, CTS bid on another contract with PECO for the supply of Quality Assurance ("QA") personnel. In connection with the QA bid, CTS sent a resume book of qualified candidates to PECO.

CTS did not hear from PECO for some time. In January, 1995, a CTS representative drafted a letter to defendant Corbin McNeil ("McNeil"), Chief Operating Officer of PECO, expressing concern that CTS was being denied an equal opportunity to bid on the QA contract and to perform the QV contract. Some two months later, [*4] CTS attended a meeting with numerous PECO representatives. At this meeting, defendant William A. Texter ("Texter"), a manager at PECO, allegedly stated that he received CTS' QA bid but discarded it because he saw no resumes attached.

Soon thereafter, PECO placed CTS' QV contract on hold until it audited certain aspects of CTS' business. The audit was conducted on or about July 20, 1995. Approximately one month later, PECO canceled CTS' QV contract. It also became apparent that CTS was no longer a candidate for the QA contract. Plaintiffs subsequently filed suit in this court.

I. Federal Claims

Plaintiffs [2] present a claim under 42 U.S.C. § 1983. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects ... any citizen of the United states or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ....

Plaintiffs argue that defendants denied them equal protection of the laws, as guaranteed by the Fourteenth Amendment, because Dunlap [*5] is African-American. The protections of the Fourteenth Amendment only apply, however, to actions taken under the color of state law. As a threshold matter, defendants argue that any relationship PECO and PECO employees had with the plaintiffs was purely private.

> 2 A private corporation such as CTS has standing to bring suit under § 1983. *See Board of Managers of Glen Mills Schools v. West Chester Area School Dist.*, 838 F. Supp. 1035, 1040-41, *aff'd in part, rev'd in part*, No. 94-1076, slip. op. (3d Cir. Mar. 1, 1995); *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 283 (9th Cir. 1974). Defendants do not challenge CTS' standing.

The Third Circuit has recognized that PECO may be a state actor, depending upon its function. In *Goadby v. PECO*, 639 F.2d 117, 120 n.2 (3d Cir. 1981), the court noted that when PECO acts in concert with the Pennsylvania Public Utility Commission ("PUC"), state action may be present. Yet not all undertakings of a public utility such as PECO involve state [*6] action. As the Supreme Court has stated:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment ... nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974). The critical inquiry becomes "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." *Id.* at 351. *Jackson* suggests that when a utility company exercises a power "traditionally associated with sovereignty," such as eminent domain, state action may well be present. *Id.* at 352-53. However, mere business activities like "the furnishing of utility services" are not state functions. *Id.* at 353.

The PECO actions of which plaintiffs complain involved soliciting bids on a contract, negotiating a contract, and breaching a contract. These business endeavors do not evince any significant connection with the Commonwealth [*7] of Pennsylvania or any of its agencies.

Plaintiffs apparently contend that the addition of John M. Quain, a Commissioner of the PUC, as a defendant raises the specter of state action. However, plaintiffs' amended complaint nowhere alleges that Quain, acting under his authority as a PUC Commissioner, fos-

tered or encouraged any discrimination by PECO against plaintiffs. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972). At most, plaintiffs allege that Quain failed to prevent PECO's racial discrimination. Such non-intervention is not state action for purposes of the Fourteenth Amendment or § 1983. *Id.* at 177. Defendants' motion to dismiss plaintiffs' § 1983 claim will be granted.

Plaintiffs [3] have also asserted a violation of 42 U.S.C. § 1981. This statute states in pertinent part: "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens ...." It prohibits racial discrimination in the creation of private as well as public contracts. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609, 95 L. Ed. 2d [*8] 582, 107 S. Ct. 2022 (1987). In the Third Circuit, a plaintiff alleging a § 1981 violation must present evidence of discriminatory intent, not merely discriminatory impact. *Croker v. Boeing Co.*, 662 F.2d 975, 988 (3d Cir. 1981). Plaintiffs have sufficiently pleaded defendants' discriminatory intent so as to survive a Rule 12(b)(6) motion. Their amended complaint alleges that defendants conspired to deny them an equal opportunity to participate in PECO contracts because Dunlap is African-American. Defendants' motion to dismiss plaintiffs' § 1981 claim will be denied.

> 3 A private corporation, such as CTS, has standing to assert a violation of § 1981 when the alleged violations are based on the race of the corporation's president. *See Rosales v. AT&T Information Sys.*, 702 F. Supp. 1489 (D. Colo. 1988); *Kwoun v. Southeast Missouri Prof. Standards Review Org.*, 622 F. Supp. 520, 524 (E.D. Mo. 1985); *In re Russell*, 166 B.R. 901 (9th Cir. BAP 1994), *rev'd on other grounds*, 76 F.3d 242 (9th Cir. 1996).

[*9] Plaintiffs further contend that defendants violated 42 U.S.C. § 1982. That statutory provision reads: "all citizens of the United States shall have the same right ... as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Plaintiffs allege that PECO terminated its contractual relationship with CTS because of Dunlap's race, thereby depriving plaintiffs of property rights in contracts and prospective contracts.

Plaintiffs' argument fails because § 1982 does not protect contract rights. *Schirmer v. Eastman Kodak Co.*, 1987 U.S. Dist. LEXIS 2800, 1987 WL 9280 (E.D. Pa. 1987); *Rick Nolan's Auto Body Shop, Inc. v. Allstate Ins. Co.*, 711 F. Supp. 475, 477 (N.D. Ill. 1989). Although this issue has never been explicitly addressed by the Third Circuit, we agree with our brother judge in *Schirmer* that construing contract rights as "property" for purposes of § 1982 "would strain the language of Section 1982 only to duplicate the express protection of contract rights under Section 1981." *Schirmer*, 1987 U.S. Dist. LEXIS 2800, 1987 WL 9280 at *4. Plaintiffs' § 1982 claim will be dismissed.

In addition, plaintiffs allege that defendants violated 42 U.S.C. § 1985. While [*10] plaintiffs have neglected to designate a particular subsection of § 1985 for our evaluation, we assume they rely upon subsection (3), which provides in relevant part:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The first step in a § 1985(3) analysis is to determine whether an actionable "conspiracy" existed. *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 430 (3d Cir. 1988). As a general principle, no conspiracy can exist between a corporation and its officers. *Id.* at 431. In this action, plaintiffs allege that defendant John M. Quain, as an individual and as a Commissioner of the PUC, joined with PECO and PECO employees to deny plaintiffs their civil rights. By including this third party in an otherwise intracorporate endeavor, plaintiffs [*11] have pleaded an actionable "conspiracy" under § 1985(3). *Id.* It is of no consequence that Quain's role in the alleged conspiracy involves a failure to act. [4] Subsection 1985(3) further states:

> In any case of conspiracy set forth in this section, if *one or more* persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, ... the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

(Emphasis added). In other words, even if only PECO employees committed overt acts in furtherance of the

alleged conspiracy, all defendants, including Quain, may be liable.

> 4 This differs from a § 1983 analysis of Quain's role, in that § 1983 requires some affirmative action by Quain, acting under his authority as a PUC Commissioner, to fulfill the state action requirement. Unlike § 1983, § 1985(3) encompasses private action, and active intervention under the color of state law is unnecessary. *See* discussion *infra*.

[*12] As noted, plaintiffs have sued Quain both as an individual and as a Commissioner of the PUC. We emphasize that Quain could only face § 1985 liability in his individual capacity. A suit for damages against Quain in his official capacity as a Commissioner of the PUC would be construed as against the PUC itself. *See Hafer v. Melo*, 502 U.S. 21, 25, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991); *Smart v. Pennsylvania Public Util. Comm'n*, 1996 U.S. Dist. LEXIS 11379, 1996 WL 442618, *3-*4 (E.D. Pa. 1996). Such a claim cannot stand, as states and state agencies, such as the PUC, are not "persons" subject to § 1985 liability. *See Rode v. Dellarciprete*, 617 F. Supp. 721, 723 (M.D. Pa. 1985); *Santiago v. New York State Dept. of Correctional Serv.*, 725 F. Supp. 780, 783 (S.D.N.Y. 1989). It is unclear from plaintiffs' amended complaint whether they intend to implicate the PUC, via Quain, in the § 1985 conspiracy. Any such attempt would not survive a Rule 12(b)(6) motion.

The alleged conspiracy which remains -- between PECO and its employees, and Quain in his individual capacity -- does not involve "state action." However, in *Griffin v. Breckenridge*, 403 U.S. 88, 100-02, 29 L. Ed. 2d 338, 91 S. Ct. 1790 [*13] (1971), the Supreme Court determined that § 1985(3) covered some private conspiracies and that state action was not a prerequisite for all actions under this statute. The Court further noted that one type of action which quite clearly fell within § 1985(3) was "conspiratorial, racially discriminatory private action." *Id.* at 105. *Accord Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 430 n.7 (3d Cir. 1988); *Jackson v. Associated Hosp. Serv. of Philadelphia*, 414 F. Supp. 315, 322 (E.D. Pa. 1976). The purported conspiratorial actions in this case were allegedly the result of racial animus. State action is therefore no obstacle to plaintiffs' § 1985(3) action. Defendants' motion to dismiss plaintiffs' § 1985 claim will be denied.

As their final federal claim, plaintiffs have averred a violation of 42 U.S.C. § 1986. This statute makes liable "every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so ...." As a prerequisite to a § 1986 action, a complainant must indicate [*14] the existence of a § 1985 conspiracy, which the plaintiffs have done in this action. *Clark v. Clabaugh*, 20 F.3d 1290, 1295 n.5 (3d Cir. 1994). The second essential element of a colorable § 1986 claim is actual knowledge by defendants of the conspiracy. *See id.* at 1296. Plaintiffs' amended complaint alleges that defendants possessed "actual information and knowledge of PECO's unlawful and discriminatory practices ...." Plaintiffs' amended complaint at P 74. The court will deny defendants' motion to dismiss plaintiffs' § 1986 claim.

II. State Law Claims

Plaintiffs' first state law claim alleges breach of contract by PECO. As a preliminary matter, we note that plaintiffs fail to specify which contract -- the QV or the QA -- defendants allegedly breached. They only speak of "the contract." We assume that the QV contract is at issue, as plaintiffs' amended complaint nowhere avers that PECO accepted CTS' bid on the QA contract. Acceptance is a prerequisite to contract formation. Restatement (Second) Contracts § 50 (1981). Therefore, as a matter of law, plaintiffs only had one contract with PECO which could have been breached: the QV contract.

The contract issue is clouded [*15] by federal regulations which apparently require CTS to pass an audit before it may provide either QV or QA personnel to a nuclear power plant. *See* 10 C.F.R. Part 50, Appendix B. CTS underwent such an audit, and plaintiffs allege that: (1) the audit met federal and PECO specifications; (2) any non-conformances arising from the audit were corrected by CTS; and (3) PECO's auditor agreed, after these corrections, that CTS' procedures were satisfactory. These allegations suggest that CTS created, and was statutorily permitted to perform, the QV contract. Accordingly, plaintiffs' breach of contract claim will remain in the case.

Plaintiffs further assert that defendant PECO violated the implied covenant of good faith and fair dealing which attaches to certain contracts. *See* Restatement (Second) Contracts § 205 (1981). Pennsylvania courts have cited § 205 with approval. *See Greater New York Mut. Ins. Co. v. North River Ins. Co.*, 872 F. Supp. 1403, 1407 (E.D. Pa. 1995), *aff'd*, 85 F.3d 1088 (3d Cir. 1996). "The nature and extent of any duty [of good faith] necessarily depends on the circumstances involved ...." *Id.* at 1408. At the pleading stage, we cannot say as a [*16] matter of law that PECO did not breach an implied duty to act in good faith. We will deny defendants' motion to dismiss this claim.

Plaintiffs next claim that defendant PECO tortiously interfered with plaintiffs' contractual relations. No such claim may be maintained between the parties to the con-

tract in question. *See Michelson v. Exxon Research and Eng. Co.*, 808 F.2d 1005, 1008 (3d Cir. 1987). To the degree plaintiffs assert that PECO interfered with any PECO-CTS contract, their claim will be dismissed.

Plaintiffs also contend, however, that PECO has interfered with their *prospective* contractual relations. *See* Restatement (Second) Torts § 766B (1979). To survive a 12(b)(6) motion, four elements must appear in the complaint:

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

Atlantic Paper Box Co. v. Whitman's Chocolates, 844 F. Supp. 1038, 1047 (E.D. Pa. 1994). Each element appears in the plaintiffs' amended [*17] complaint, although the prospective contractual relation alleged, "a business expectancy in contracts ... to the energy industry," is relatively vague. Plaintiffs' amended complaint at P 86. Yet "prospective contractual relationships are by definition more difficult to identify precisely." *Centennial Sch. Dist. v. Independence Blue Cross*, 885 F. Supp. 683, 688 (E.D. Pa. 1994). Therefore, we find that plaintiffs have sufficiently pleaded this element, and the remaining elements of tortious interference with prospective contractual relations, so as to survive a Rule 12(b)(6) motion.

Finally, plaintiff Willie Dunlap brings a claim for intentional infliction of emotional distress. It is unclear from plaintiffs' amended complaint whether this count stems from the alleged contractual breach or the alleged racial discrimination. It appears from plaintiffs' brief that Dunlap seeks relief for both alleged acts.

Four elements comprise the tort of intentional infliction of emotional distress:

> (1) the conduct must be extreme and outrageous;
>
> (2) the conduct must be intentional or reckless;
>
> (3) it must cause emotional distress; and
>
> (4) the distress must be severe.

Chuy [*18] *v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir. 1979). The conduct at issue must be "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 community." Restatement (Second) of Torts § 46(1), cmt. d at 73 (1965).

Pennsylvania has placed substantial restrictions on this cause of action and has consistently refused to extend the tort to anything other than the most extreme and outrageous conduct. The conduct complained of by plaintiffs -- breach of contract and racial discrimination -- does not approach the requisite level of outrageousness. Any remotely sophisticated business party entering into a contract understands that the contract could be breached. While undesirable, breach of a commercial agreement, even where the financial loss is great, rarely constitutes the type of outrageous conduct envisioned by the Restatement and Pennsylvania case law. *Price v. Blyth Eastman Paine Webber, Inc.*, 576 F. Supp. 431, 435 (W.D. Pa. 1983). Moreover, "racial discrimination alone ... does not state a claim for intentional infliction of emotional distress." [*19] *EEOC v. Chestnut Hill Hospital*, 874 F. Supp. 92, 96 (E.D. Pa. 1995). We do not believe that the combination here of racial discrimination and breach of contract -- two actions which individually fail to state a claim for intentional infliction of emotional distress -- somehow combine to create a colorable claim. Plaintiffs' intentional infliction of emotional distress count fails.

ORDER

AND NOW, this 23rd day of October, 1996, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendants PECO Energy Co., Corbin A. McNeil, Jr., William E. Powell, Sr., William A. Texter, James F. Hunter, and Walter King to dismiss plaintiffs' amended complaint is GRANTED as to Count I insofar as it states a claim under 42 U.S.C. § 1983, as to Counts II and VIII in their entirety, and as to Count VII insofar as it alleges that PECO interfered with contracts between PECO and CTS; and

(2) the motion of defendants to dismiss plaintiffs' amended complaint is otherwise DENIED.

BY THE COURT:

Harvey Bartle, III

J.

Not Reported in F.Supp.2d, 2001 WL 74630 (E.D.Pa.)
(Cite as: 2001 WL 74630 (E.D.Pa.))

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
John HAYMOND, Haymond Napoli Diamond, P.C.
v.
Marvin Lundy
v.
John HAYMOND, Scott Diamond, Robert Hochberg, Haymond Napoli Diamond, P.C.

No. CIV.A. 99-5048.
Jan. 29, 2001.

MEMORANDUM AND ORDER

SHAPIRO.

***1** This action arises from the dissolution of Haymond & Lundy, LLP, a personal injury law firm.[FN1] Cross-motions to dismiss were granted in part, and denied in part; prior to trial both parties submitted motions for summary judgment. In a Memorandum Opinion and Order dated January 5, 2001, Marvin Lundy's ("Lundy") motion for summary judgment was granted, in part, and denied, in part, and John Haymond's ("Haymond") motion for summary judgment was denied, in part. The court retained under advisement the portion of Haymond's motion for summary judgment addressing count III of Lundy's counterclaims for civil conspiracy. The court now will grant summary judgment in favor of Haymond on the civil conspiracy count.

> FN1. The facts and procedural history of this action are set forth in two of the court's previous opinions. *See Haymond v. Lundy,* No. 99-5015 & 99-5048, 2000 U.S. Dist. LEXIS 8585 (E.D. Pa. June 22, 2000); *Haymond v. Lundy,* No. 99-5015 & 99-5048, 2000 U.S. Dist. LEXIS 17879 (E. D.Pa. Dec. 12, 2000).

I. Standard on Summary Judgment

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the plaintiff's claim. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party meets its burden, the opposing party must introduce specific, affirmative evidence manifesting a genuine issue of material fact requiring a trial. *See id.* "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585-86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court has a duty to grant summary judgment when the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation. *See Barnes Foundation v. Township of Lower Merion,* 982 F.Supp. 970, 982 (E.D.Pa.1997).

II. Haymond's Motion for Summary Judgment on the Civil Conspiracy Counterclaim:

Lundy alleges that Haymond, Hochberg and Diamond conspired "to deprive Mr. Lundy of his name, reputation, law practice, client base, cases, fee entitlements, assets and/or property." Ans. ¶

135. Haymond, moving for summary judgment, argues Lundy failed to offer sufficient evidence to sustain the claim.

*2 Each element of a civil conspiracy must be proved by full, clear and convincing evidence. *See Fife v. Great Atlantic & Pacific Tea Co.*, 356 Pa. 265, 52 A.2d 24, 27 (Pa.1947). The court must take this heightened evidentiary standard into account in determining whether to grant a motion for summary judgment. *See Anderson*, 477 U.S., at 254.

To establish a civil conspiracy, plaintiff must prove:

(1) an agreement by two or more persons to perform an unlawful act or perform an otherwise lawful act by unlawful means; (2) an overt act accomplished in pursuit of that common purpose; and (3) actual legal damage. *See Smith v. Wagner*, 588 A.3d 1308, 1311-12 (Pa.Super.Ct.1991). Each conspirator must be possessed of the intent to do the unlawful act and be aware of such intent by his co-conspirators. *Fife*, 52 A.2d, at 27. In addition, plaintiff must prove a separate underlying tort as a predicate for civil conspiracy liability. *See Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 407 (3d Cir.2000).

In *Boyanowski*, the Court of Appeals reversed a jury verdict on a civil conspiracy claim in favor of the plaintiff because the jury had found in favor of the defendant on the underlying tort. *See id.* at 405-07. The court held that a civil conspiracy claim may not be used to make actionable conduct that, on its own, is not actionable. *See id.* A civil conspiracy claim merely serves to connect the actions of other defendants with the actionable tort of one defendant. *See In re Orthopedic Bone Screw Products Liability Litigation*, 193 F.3d 781, 789 (E.D.Pa.1999). It is "a means of establishing vicarious liability for the underlying tort." *See Boyanowski*, 215 F.3d, at 407 (citations omitted).

Under *Boyanowski*, to survive summary judgment on a claim for civil conspiracy the plaintiff must maintain a sufficiently viable claim for an underlying unlawful act or unlawful means in another count. It is the trial judge's duty to screen out claims at the motion to dismiss or summary judgment stage if an alleged civil conspiracy is unconnected to an assertable claim for an underlying tort. *See id.* at 406.

In his pleading, Lundy asserts, "the vehicle for the [civil conspiracy claim] is the unauthorized practice of law by Hochberg." Ans. ¶ 134. Lundy alleges that "with knowledge and specific intent, Hochberg engaged in unauthorized practice of law, as encouraged, facilitated and secreted by Haymond and Diamond, in order to take over the reputation and practice of Lundy." Ans. ¶ 134. The court understands the counterclaim to assert that Haymond and Diamond conspired to conceal Hochberg's status so that he could maintain his position as Managing Partner.

In its Memorandum Opinion and Order dated December 12, 2000, the court held Lundy could not maintain a claim against Haymond and Diamond for conspiracy to facilitate Hochberg's unauthorized practice; the Pennsylvania Supreme Court has exclusive jurisdiction over such a claim because Haymond and Diamond, the alleged conspirators, are members of the bar of Pennsylvania. *See Haymond v. Lundy*, No. 99-5015 & 99-5048, 2000 U.S. Dist. LEXIS 17879, at * 6 (E. D.Pa. Dec. 12, 2000). The court's decision effectively dismissed the civil conspiracy claim of Lundy's counterclaims,[FN2] although the court retained jurisdiction over the underlying claim against Hochberg, who is not a member of the Pennsylvania bar, for unauthorized practice of law.

> FN2. Even after the court's decision of December 12, 2000, Lundy has continued to state the conspiracy in these terms. At oral argument on the Summary Judgment motions, Lundy's counsel, asked specifically to describe the purpose of the conspiracy, stated that the defendants conspired "to keep Mr. Hochberg managing the firm

> in the appearance of the lawyer ... [so that] when the three years [suspension] was up and he automatically is reinstated, no harm, no foul, no one would have found out." *Tr. 12/13/00 Hr'g,* at 136.

***3** Lundy now attempts to revive his civil conspiracy claim by alleging new underlying torts: unfair competition, breach of fiduciary duty, and intentional and negligent misrepresentation. At oral argument and in his final pretrial memo, Lundy argued that these torts were always implicit in his civil conspiracy pleading and that he should be permitted to amend his counterclaims to assert them as additional counts to make the pleadings conform to the evidence. Pretrial Mem. of Countercl. Pl. Marvin Lundy, at 6.

Rule 15(b) of the Federal Rules of Civil Procedure permits a party to amend pleadings to conform to the evidence, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties." The evidence in question had not yet been presented to a jury; Rule 15(b) is inapplicable.

Rule 15(a) states, "leave [to amend a pleading] shall be freely given when justice so requires," but courts are free to deny leave when permitting the amendment would prejudice the opposing party, cause undue delay, or be futile. *See In re Burlington Coat Factory Secs. Litig.,* 114 F.3d 1410, 1434 (3d Cir.1997) (citations omitted). The amendment was proposed in Lundy's final pretrial memorandum, submitted to the court on the eve of trial, and a proposed amended pleading was not attached. To have permitted Lundy leave to assert amorphous additional counterclaims at that late date would have prejudiced the plaintiff and caused undue delay, as the trial would have had to be postponed. *See, e.g., Spring Ford Indus. v. Aetna U.S. Healthcare,* No. 98-3555, 2000 U.S. Dist. LEXIS 7650, * 3-4 (E.D.Pa. May 25, 2000). Lundy's request for leave to amend his answer was denied.

Even if Lundy were permitted to proceed on the conspiracy counterclaim on merely the allegation of an underlying tort, without a separate tort counterclaim, the facts, taken in the light most favorable to defendant Lundy, do not demonstrate a tort on which the conspiracy can be based, nor clear and convincing evidence of a conspiracy.[FN3] The evidence Lundy asserts to support his newly-constructed allegation of civil conspiracy is: (1) Haymond and Hochberg contacted other attorneys named "Lundy" to affiliate with one of them and form a new firm named "Haymond & Lundy;" the new firm would benefit unfairly from the prior advertising of Haymond & Lundy, LLP; (2) Haymond chose the name Haymond Napoli Diamond, P.C. as the pseudonym for his Pennsylvania and New Jersey offices post-dissolution; and (3) Diamond registered the domain name *www.marvinlundy.com* to prevent Lundy from using the site to advertise. *See* Ans. of Lundy to Mot. for Summ.J., at 24.

> FN3. Lundy's counsel has offered varied descriptions and theories of the conspiracy claim at varying times, but the court will decide the motion for summary judgment on the counterclaim presented in the Answer and Counterclaims of Marvin Lundy and the written submissions on Counterclaim Defendants' Motion for Summary Judgment.

The first two underlying acts do not constitute tortious conduct. Haymond and Hochberg contacted other attorneys named "Lundy," but they did not actually enter a contract with any other "Lundy," and their contacting other Lundys did not cause Marvin Lundy legal damage. Lundy maintains that this act by Haymond and Hochberg breached the fiduciary duty or duty of loyalty to the partnership.

***4** Preparing to compete with one's partners or partnership prior to leaving or dissolving the partnership violates neither a fiduciary duty nor a duty of good faith. *See, e.g., Meehan v. Shaughnessy,* 404 Mass. 419, 535 N.E.2d 1255, 1264 (Mass.1989)("[F]iduciaries may plan to compete with the entity to which they owe allegiance,

provided that in the course of such arrangements they do not otherwise act in violation of their duties."); *see also* Restatement (Second) of Agency § 393 cmt. e (1958)("Even before the termination of the agency, [an employee] is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein."); *Midland-Ross Corp. v. Yokana,* 293 F.2d 411, 413 (3d Cir.1961). Lundy has offered no evidence that the alleged conspirators failed to perform their duties to the firm while they were negotiating with other Lundys, or that the partnership was harmed by Haymond and Hochberg seeking out other Lundys. The actual use of Lundy's name by another law firm after the dissolution of Haymond & Lundy might have been tortious, but neither Haymond, Hochberg nor Diamond ever associated with any other Lundy or otherwise followed through on this plan.

Similarly, choosing the pseudonym Haymond Napoli Diamond, P.C. for the new law firm was not tortious. Haymond had permission from Napoli and Diamond to use their names. *See* P.Mot.Summ.J., Ex. 47.

The third alleged underlying act, Diamond's purchase of the domain name *www.marvinlundy.com* is arguably tortious,[FN4] but there is no evidence, and certainly not clear and convincing evidence, that Haymond or Hochberg had a common purpose to commit this tort with Diamond. The evidence presented on this issue suggests Haymond and Hochberg did not know of Diamond's action in advance. *See* Diamond dep. 486-88. None of the underlying torts alleged to support the conspiracy in Lundy's response to the motion for summary judgment would survive an independent motion for summary judgment, so Lundy cannot assert a civil conspiracy claim based upon their allegation.

> FN4. Such actions are now generally brought under the Anticybersquatting Consumer Protection Act of 1999, an amendment to the Lanham Act provisions on misleading advertising. *See* 15 U.S.C. § 1125(d). Lundy has not alleged a breach of this provision.

Pennsylvania law suggests there may be a cause of action for a civil conspiracy to breach a contract. *See, e.g. Fife v. Great Atlantic & Pacific Tea Co.,* 356 Pa. 265, 52 A.2d 24, 27 (Pa.1947). Lundy has never pled a civil conspiracy based on breach of contract, nor does his final pretrial memorandum suggest it. Moreover, Lundy has not offered evidence by which a reasonable jury could conclude by clear and convincing evidence that Hochberg, Diamond and Haymond conspired to breach the Haymond & Lundy Partnership Agreement.

Lundy has offered no direct evidence that Hochberg, Haymond and Diamond specifically agreed or planned to breach the partnership agreement. The evidence, taken in the light most favorable to Lundy, that suggests such an agreement is: (1) Haymond and Diamond admit to knowing of Hochberg's indictment, disbarment, and suspension; (2) Haymond and Hochberg admit they did not inform Lundy of the existence or terms of the agreement by which Hochberg transferred his partnership interest in Haymond & Lundy to Haymond, although they deny knowing that the other did not inform Lundy or that they agreed not to inform Lundy; and (3) Hochberg continued to manage the law firm. Such evidence might permit inference of a by the preponderance of the evidence, but it is insufficient as a matter of law under the applicable clear and convincing standard.

***5** The evidence, taken in the light most favorable to Lundy, fails to support Lundy's counterclaim for civil conspiracy. Summary judgment will be granted in favor of counterclaim defendants on count III of Lundy's counterclaims.

ORDER

AND NOW this 29th day of January, 2001, in consideration of plaintiffs' motion for summary judgment (# 149), and defendant's answer thereto (#

151), it is ORDERED that summary judgment is GRANTED in favor of the counterclaim defendants on count III of Lundy's counterclaims.

E.D.Pa.,2001.
Haymond v. Haymond
Not Reported in F.Supp.2d, 2001 WL 74630 (E.D.Pa.)

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(Not Selected for publication in the Federal Reporter)
(Cite as: 2009 WL 297713 (C.A.3 (Pa.)))

H

United States Court of Appeals,
Third Circuit.

Terry M. MARIER; Elizabeth D. Marier, Appellants
v.
LANCE, INC.

No. 07-4284.
Submitted Pursuant to Third Circuit LAR 34.1(a) Oct. 1, 2008.
Filed Feb. 9, 2009.

On Appeal from the United States District Court for the District of Western Pennsylvania, Civil No. 06-cv-01298, District Judge: Honorable Donetta W. Ambrose.

Mark J. Bushnell, Esq., Pittsburgh, PA, for Appellants.

Ronald W. Crouch, Esq., McGuirewoods, Pittsburgh, PA, Bruce M. Steen, Esq., Miranda M. Zolot, Esq., McGuirewoods, Charlotte, NC, for Lance, Inc.

Before FISHER, CHAGARES, and HARDIMAN, Circuit Judges.

OPINION OF THE COURT

CHAGARES, Circuit Judge.

*1 Terry Marier and his wife, Elizabeth D. Marier, sued his former employer, Lance Inc., for defamation. The District Court granted summary judgment in favor Lance, finding that substantial truth was a defense to some of the alleged defamatory statements and that others were non-actionable opinion. The Mariers then appealed. We will affirm.

I.

Because we write solely for the benefit of the parties, we will only briefly summarize the essential facts. Terry Marier ("Marier") was employed by Lance as a salesman from 1974 until June, 2006. Edwin Allman was his district manager. The heart of this case concerns a June 5, 2006 altercation between Allman and Marier. On that date, Allman allegedly informed Marier that he was recommending that Marier be terminated because Marier had supposedly cursed at another manager. Allman then told other Lance employees who were present to take all of the Lance inventory out of Marier's truck. Marier wanted inventory to be taken of all of the goods in the truck because he was worried that Allman might claim there was a shortage of goods if an inventory was not taken.

A dispute then arose between Allman and Marier during which Allman asked Marier to leave, and Marier reiterated that he wanted an inventory taken of the goods. The police were eventually called by another Lance employee. Elizabeth Marier arrived at the scene before the police arrived. Eventually, Allman assured Marier that he would not be held responsible for any shortages, and the Mariers left.

The Mariers allege that Lance employees, including Allman and Deb Smith, Lance's Human Resources Director for the Eastern Region, told other people at Lance that the Mariers had to be escorted off of Lance property by the police. The Mariers also

claim that Allman told various people at Lance that Marier was "stalking him." Appellants' Br. at 11. This allegation arises out of an incident where Allman thought that he had seen Elizabeth Marier's car parked outside of his home. The Mariers also claim that Allman spoke with Smith, who told Jerry Estes, the Corporate Human Resources Director for Sales, that "Marier assaulted Allman, threatened to 'F--- me [Allman] up,' that Mrs. Marier threatened to kill Allman and her kids, and that Allman had to call the police on account of the Mariers' assault." *Id.*

II.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. We have jurisdiction pursuant to 28 U.S.C. § 1291. This Court reviews the grant of summary judgment de novo. *Gonzales v. AMR*, 549 F.3d 219, 223 (3d Cir.2008). "Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted); *see also* Fed.R.Civ.P. 56(c). When analyzing a summary judgment claim, "we must view the facts in the light most favorable to the non-moving party, and draw all reasonable inferences therefrom in that party's favor." *New Jersey Transit Corp. v. Harsco Corp.*, 497 F.3d 323, 325 (3d Cir.2007) (citation omitted).

III.

***2** The Mariers make three arguments: (1) that the defense of substantial truth should not apply to the statement that the Mariers were escorted by the police off of Lance property; (2) that the District Court erred when it found that the allegation that Marier "stalked" and "assaulted" Allman was non-actionable opinion; and (3) that the District Court erred when it found that the statements that Marier threatened to " 'F--- [Allman] up' " and that Elizabeth Marier threatened to kill Allman, herself, and her children were not defamatory.

The Mariers first contend that the District Court erred when it found that substantial truth was a defense to the claim that the police had to be called to escort the Mariers off of Lance property on the day of the incident. [FN1] A plaintiff in a defamation action must prove the following under Pennsylvania law:

> FN1. In their brief, the Mariers' argument heading for this section states:
>
> > Substantial truth is not a defense because the published libel that the Mariers had assaulted Allman and that the police had to be called to escort the Mariers off of Lance property differs from the pleaded truth that not only did the Mariers leave of their own accord, but the police officer actually gave Marier his card and told him he would vouch for him.
>
> Appellants' Br. at 27. However, in this section, they do not discuss the issue of whether or not Marier was accused of "assaulting" Allman and its relationship to substantial truth, so this opinion will not address it.

(1) The defamatory character of the communication. (2) Its publication by the defendant. (3) Its application to the plaintiff. (4) The understanding by the recipient of its defamatory meaning. (5) The understanding by the recipient of it as intended to be applied to the plaintiff. (6) Special harm resulting to the plaintiff from its publication. (7) Abuse of a conditionally privileged occasion.
42 Pa. Cons.Stat. § 8343. However, "[t]ruth is an absolute defense to a claim for defamation in Pennsylvania." *Bobb v. Kraybill*, 511 A.2d 1379, 1379 n. 1 (Pa.Super.Ct.1986) (citation omitted). "Truth" encompasses the defense of substantial truth. *See* 42 Pa. Cons.Stat. § 8342; *see also Dunlap v. Phila. Newspapers, Inc.*, 448 A.2d 6, 15 (Pa.Super.Ct.1982) (citing Robert D. Sack, *Libel,*

> *Slander, and Related Problems* 50-51, 137-38 (1980)) (noting "The literal 'truth' of a publication need not be established, only that the statement is 'substantially true.' The proof of 'truth' must go to the 'gist' or 'sting' of the defamation. The test is 'whether the [alleged] libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' ").

Here, the "sting" of the statement that the Mariers were escorted off the property by the police is not literally whether or not they were actually escorted off of the property by the police. Instead, the "sting" of the statement is that the police had to get involved in a dispute between the Mariers and Lance employees that day. It is undisputed that the police were called, and that they had interaction with the Mariers that day. We therefore agree with the District Court that this statement was substantially true.

The Mariers next argue that the District Court erred when it found that the statement that Marier "stalked" Allman was non-actionable opinion. In general, opinions do not provide a basis for a defamation action; however, if an opinion is based on undisclosed defamatory facts, there may be a cause of action for defamation. *See* Green v. Mizner, 692 A.2d 169, 174 (Pa.Super.Ct .1997). Whether or not a statement is an opinion is a question of law. *Id.* But, "in cases where a plausible innocent interpretation of the communication coexists with an alternative defamatory interpretation, the issue must proceed to a jury." *Id*. (citation omitted).

***3** The Court in *Green* explained that Pennsylvania has adopted the approach of the Second Restatement of Torts in determining whether a statement is an opinion:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently.

Id. (citing Restatement (Second) of Torts § 566 cmt. c).

The District Court found that the statements at issue here were non-actionable opinion. The Court explained that there was no evidence that Allman ever used the word "stalk," and thus that the claim must fail on that basis. However, the Court went on to find that even if Allman *did* use the word "stalk," that the plaintiffs had not "refuted Allman's and Smith's testimony that Allman explained that a red car that he 'thought' or 'believed' belonged to Marier's wife, and that he 'thought' was driven by Marier, parked outside his house briefly." Appendix (App.) 10 (District Court opinion). We agree with the District Court's finding on this issue.

First, Allman's statement about the car was an opinion, as he explained that he wasn't "100 percent sure" that it was Marier's car, and only asserted to others that he "thought" it was Marier's car. *See* App. 97-100 (Allman Dep.). Second, the statement was not based on undisclosed defamatory facts, as the facts underlying his opinion were disclosed. In addition, at least with regard to Smith, the basis for Allman's opinion had already been disclosed by the time that he made the statements. *See* Appellee's Br. at 17.[FN2]

> FN2. While it is unclear whether the Appellants are also basing their claim on Allman's alleged statement that Marier had "assaulted him," we find that that statement is also non-actionable opinion.

The third and fourth statements at issue in this appeal are whether or not the statements that Marier

allegedly said that he was going to " 'F--- [Allman] up' " and that Elizabeth Marier threatened to kill herself, Allman, and her children were defamatory in nature. Appellants' Br. at 34. The District Court found that they were not.

To qualify as defamatory, a communication must "tend[ ] to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Goralski v. Pizzimenti*, 540 A.2d 595, 597-98 (Pa.Commw.Ct.1988) (citations omitted). Statements which "are capable of conveying to the average reader imputations of involvement in or actual guilt of crimes involving moral turpitude" may be "capable of defamatory meaning." *Corabi v. Curtis Pub. Co.*, 273 A.2d 899, 907 (Pa.1971). Furthermore, "[a] communication is also defamatory if it ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his proper business, trade or profession." *Maier v. Maretti*, 671 A.2d 701, 704 (Pa.Super.Ct.1995). In analyzing whether or not a statement is defamatory, Pennsylvania courts have held that "[t]he nature of the audience seeing or hearing the remarks is ... a critical factor in determining whether the communication is capable of a defamatory meaning." *Goralski*, 540 A.2d at 598 (citation omitted).

***4** This Court must decide whether or not the statements are " 'capable of a defamatory meaning.' " *Corabi*, 273 A.2d at 905 (citation omitted). If this Court decides that it is possible for the statements to have a defamatory meaning, then it is up to the jury to decide whether or not they actually did. *Id.*

Here, the District Court held that the statements were not defamatory because while they may have "embarrassed and annoy[ed]" the Mariers, they were made in the "limited forum" of Lance's human resources department, and did not "lower Plaintiffs' estimation in the community or deter third persons from associating with them." App. 12 (District Court opinion). The Mariers assert, however, that these statements implied that the Mariers committed a crime and that they could affect Marier's business reputation.

We agree with the District Court that the limited audience saves the statements from being defamatory as the communications took place within the context of the Lance Human Resources Department, and not the general community. *See Maier*, 671 A.2d at 705-06 (finding that a statement was made by "appellee to the branch manager and personnel director of Sears. The statement was not intended for a large audience; therefore, there was no harm to appellant's reputation in the community" and thus the statement was not defamatory). Thus, we will affirm the District Court's finding on this issue.

IV.

Accordingly, we will affirm the judgment of the District Court.

C.A.3 (Pa.),2009.
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Pennsylvania Court of Common Pleas.
Richard G. PHILLIPS and Richard G. Phillips Associates, P.C.
v.
Allen H. "Bud" SELIG, etal.

No. 1550, CONTROL NO. 50500, CONTROL NO. 51083, CONTROL NO. 51448, CONTROL NO. 51760.
Sept. 19, 2001.

OPINION

SHEPPARD, J.

***1** The plaintiffs are an attorney and his law firm. They allege that the defendants interfered with their relationship with their client, a labor union, and defamed them by calling them incompetent, dishonest and unethical. At issue are Preliminary Objections to the Complaint. One of the objections is that the National Labor Relations Act preempts the plaintiffs' claims. The court overrules that objection. The court sustains, in part, the other objections.

BACKGROUND

For present purposes, the court accepts as true the facts alleged in the Complaint. *Smith v. Wagner*, 403 Pa.Super. 316, 588 A.2d 1308, 1310 (1991). The plaintiffs are attorney Richard Phillips and his firm, Richard G. Phillips Associates P.C. Since 1979, they have been counsel to the Major League Umpires Association (MLUA), the union for baseball umpires. The plaintiffs signed a retainer agreement with the MLUA which was due to expire in April 2003. Under that agreement, the plaintiffs were the exclusive counsel for the MLUA in return for an annual retainer fee and other compensation.

Defendant Allan "Bud" Selig is the Commissioner of Major League Baseball. Defendants Robert Manfred, Richard "Sandy" Alderson and Francis X. Coonelly are employees of the defendant Office of the Commissioner of Baseball. Defendants National League of Professional Baseball Clubs and American League of Professional Baseball Clubs employ the umpires. This opinion refers to these seven defendants as the MLB defendants.

In 1999, there was unrest between the umpires and the MLB defendants. The umpires' collective bargaining agreement was set to expire at the end of the year. Some MLUA members called for a strike. Phillips and the president of the MLUA suggested an alternative to a strike: a mass resignation. The umpires agreed on this plan at a July 14, 1999 meeting. All umpires submitted written notices of their intent to resign effective September 2, 1999.

Some umpires did not like this strategy and did not like Phillips. Defendants Joseph Brinkman, John Hirschbeck, David Phillips and Timothy Welke were among the dissenters, and they wanted to get rid of Phillips. These umpire defendants and their attorney, defendant Ronald Shapiro,[FN1] allied themselves with the MLB defendants to sever the plaintiffs' relationship with the umpires by getting rid of the MLUA. The umpire defendants and Shapiro carried out their part of the plan by attacking the resignation strategy and publicly accusing Phillips of incompetence, dishonesty and ethical breaches. The umpire defendants and Shapiro convinced the other umpires to rescind their resignations. By July 27, 1999, all of the umpires had rescinded their resignations. The MLB defendants took back all but twenty-two umpires, and hired replacement umpires for those twenty-two.

FN1. The Complaint alleges that, at all times,

> Shapiro acted for his two firms, defendants Shapiro & Olander and Shapiro Negotiations Institute. This Opinion refers to Shapiro and his firms collectively as Shapiro.

As part of the plot to get rid of the plaintiffs, the umpire defendants formed a rival union, defendant World Umpire Association (WUA), to replace the MLUA as the umpires' union. On February 24, 2000, the umpires voted to decertify the MLUA and to certify the WUA as their new union. The plaintiffs allege that the vote resulted from the defendants' negative statements about the plaintiffs. Defendant Shapiro now represents the WUA. The MLUA, now member less, is apparently defunct and effectively no longer the plaintiffs' client.

***2** The plaintiffs filed this action on January 2, 2001 alleging tortious interference and conspiracy against all defendants (Counts I, II and VIII); defamation, false light invasion of privacy, commercial disparagement and injurious falsehood against the WUA, the umpire defendants and Shapiro (Counts III, IV, V and VII); and fraudulent conveyance, unjust enrichment and breach of contract against the WUA (Counts VI, IX and X).

On January 24, 2001, the Shapiro defendants removed the action to federal district court. The plaintiffs filed a petition for remand. On March 28, 2001, the district court granted the petition and remanded to this court. In its memorandum opinion, the district court rejected the defendants' argument that the plaintiffs' claims arose under § 301 of the Labor Management Relations Act. 29 U.S.C. § 185; [FN2] *Phillips v. Selig,* No. 01-CV-363, slip op. at 6 (E.D.Pa. Mar. 29, 2001).

> FN2. Section 301(a) provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any District Court of the United States having jurisdiction over the parties". 29 U.S.C. § 185(a). In addition to conferring jurisdiction on federal courts, § 301 authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. *Beidleman v. Stroh Brewery Co.,* 182 F.3d 225, 231-32 (3d Cir.1999). Because of the need for uniform interpretation of agreements governed by § 301, § 301 completely preempts state law claims for violation of these agreements. *Id.*

After remand, all defendants filed preliminary objections to the Complaint arguing that the National Labor Relations Act preempted the claims. In addition, the umpire defendants, the WUA and Shapiro argue that the claims are legally insufficient and insufficiently specific. [FN3]

> FN3. The plaintiffs filed Preliminary Objections to those Preliminary Objections, arguing that the Preliminary Objections were untimely. The court has overruled plaintiffs' Preliminary Objections to the Preliminary Objections by separate Order.

DISCUSSION

The court sustains, in part, the defendants' Preliminary Objections. The NLRA does *not* preempt any of the plaintiffs' claims. However, the plaintiffs' fraudulent conveyance, unjust enrichment and contract claims against the WUA are legally insufficient and will be dismissed.

I. THE NATIONAL LABOR RELATIONS ACT DOES NOT PREEMPT THE PLAINTIFFS' CLAIMS.

All defendants argue that the National Labor Relations Act preempts the plaintiffs' claims. 29 U.S.C. § 151 *et seq.* The court disagrees.

Under the *Garmon* preemption doctrine, the NLRA presumptively preempts a state-law claim if the claim concerns conduct that NLRA § 7 actually or arguably protects, or that NLRA § 8 actually or arguably prohibits. [FN4] *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-45 (1959), *explained in Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99 (1983); 29 U.S.C. §§ 157, 158. Section 7 of the NLRA protects employees' rights, among other things, to organize, choose their bargaining agents and engage in concerted activities. 29 U.S.C. § 157. Section 8(a) of the NLRA prohibits employers from, among other things, restraining or coercing employees in the exercise of their § 7 rights, encouraging or discouraging membership in a union by discriminating in the terms of employment, and refusing to bargain collectively with employees' chosen bargaining agents. 29 U.S.C. § 158(a).

> FN4. A second NLRA preemption doctrine, the *Machinists* doctrine, bars state law regulations and claims concerning conduct that Congress intended to be left unregulated and to remain as part of the self-help remedies left to the combatants in labor disputes. *Local 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147-148 (1976). The *Machinists* doctrine is not applicable here.

There are two exceptions to *Garmon*. The NLRA does not preempt a claim if the conduct (1) is of only "peripheral concern" to the NLRA or (2) "touches interests deeply rooted in local feeling and responsibility." *Belknap*, 463 U.S. at 498. In such cases, the court must balance the state's interest in regulating the conduct against the interference with the Board's ability to adjudicate controversies committed to it by the NLRA and the risk that the state will sanction conduct that the NLRA protects. *Id.* at 498-99.

***3** The plaintiffs' claims concern conduct that the NLRA arguably protects and prohibits. The plaintiffs allege that the defendants interfered with their relationship with the umpires by causing the umpires to switch unions. They accomplished this by defaming the plaintiffs. The claims implicate § 7, which protects the employees' right to choose their union. 29 U.S.C. § 157. They also implicate § 8, which prohibits employers and unions from coercing employees in exercising that choice, prohibits employers from encouraging or discouraging membership in a union by discriminating in the terms of employment, and prohibits unions from causing such discrimination by the employers. 29 U.S.C. §§ 158(a)(1), 158(a)(3) *and* 158(b)(1) and (3).

Here, the NLRA does not preempt the plaintiffs' claims, however, because the claims fall within the two exceptions to *Garmon*. In *Belknap*, the Supreme Court discussed the *Garmon* exceptions:

> [A] critical inquiry in applying the *Garmon* rules, where the conduct at issue in the state litigation is said to be arguably prohibited by the Act and hence within the exclusive jurisdiction of the NLRB, is whether the controversy presented to the state court is identical with that which could be presented to the Board.

Belknap, 463 U.S. at 510, citing *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978). Where the controversy is not identical to that which could be presented to the NLRB, the claims are not preempted. *Belknap*, 463 U.S. at 510. Here, the plaintiffs' claims allege conduct that is only a peripheral concern of the NLRA because the controversy presented to the court is not the same as any controversy that could be presented to the NLRB. *Belknap*, 463 U.S. at 510. The plaintiffs are neither an employer nor a union. They are not parties to the collective bargaining agreement. They are not subject to the NLRA's protections. Since

they cannot bring a claim before the NLRB, their claims in this action cannot be identical to any claim before the NLRB.

The MLUA or the umpires-but not the plaintiffs-could possibly bring claims before the NLRB based on the same conduct. If so, the NLRB would focus on the rights of the umpires to choose their union, whether the defendants interfered with those rights, and whether the defendants committed unfair labor practices. In analyzing the plaintiffs' state law claims, the court will focus on the rights of third party attorneys to protect their reputations and their economic relationships with a client. The court can consider whether the defendants' conduct was tortious without encroaching on the NLRB's jurisdiction to determine whether that conduct was an unfair labor practice.[FN5] The remedies sought by the plaintiffs, damages, would not overlap with any remedy available to them before the NLRB, because there is simply no remedy available to them before the NLRB. *See* Belknap, 463 U.S. at 510. Whether the defendants' conduct also violated the NLRA will not be relevant.

FN5. The Complaint is full of allegations of unfair labor practices and violations of the umpires' collective bargaining agreement. These allegations are not relevant to the plaintiffs' state law claims.

***4** In spite of their extensive analyses of *Garmon* protection, none of the defendants have cited a decision holding that *Garmon* preempted a claim by a third party plaintiff not subject to the NLRA's protections.[FN6] Citing *Belknap,* some courts have indicated that the NLRA does not preempt such claims. *See* Young v. Caterpillar, Inc., 629 N.E.2d 830, 834 (Ill.App.Ct.1994); Beaman v. Yakima Valley Disposal, Inc., 807 P.2d 849, 856 (Wash.1991)(en banc). *See also* Anderson v. Ford Motor Co., 803 F.2d 953, 960 (8th Cir.1986) (Bright, J. dissenting).

FN6. The defendants cite two decisions where claims *against* third party defendants were preempted by the NLRA. *Lumber Production Indus. Workers v. West Coast Indus. Rel'ns Ass'n,* 775 F .2d 1042, 1048-49 (9th Cir.1985); *Richardson v. Krucchko & Fries,* 966 F.2d 153, 156-57 (4th Cir.1992).

Though the claims in this action may concern conduct that is arguably protected or prohibited by the NLRA, that conduct is only a peripheral concern to the NLRA. Moreover, the state's interest in providing redress for tortious conduct and breaches of contracts is one that "touches interests deeply rooted in local feeling and responsibility." [FN7] The plaintiffs are not parties to the collective bargaining agreement, are outside of the scope of the NLRA's protection and have no redress for this conduct outside of state law. In such a case, the state's interest in providing relief outweighs any risk that the state will sanction conduct that the NLRA protects. The NLRA does not preempt the claims.[FN8] The court overrules these objections.

FN7.

> The relationship between a lawyer and his client is a serious, vital and solemn one. No third person may interfere with the relationship any more than he may with propriety intervene between a doctor and his patient. A claimant or patient may, of course, disengage himself from a professional relationship provided he has met all obligations owing to his legal or medical counsellor, but if that disassociation is the result of coercion or misrepresentation practiced by others, the intervenors are answerable in law as anyone else would be liable for causing the rupture of a binding contract.

Richette v. Solomon, 410 Pa. 6, 187 A.2d

910, 912 (1963).

FN8. The NLRA does not preempt defamation claims arising from labor disputes if the plaintiff shows that the defendant made the statements "with knowledge of their falsity or with reckless disregard of whether they were false" and that the statements actually injured him. *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 65-66 (1966) (adopting standard for defamation of public figures of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). *See so Meyer v. Joint Council 53 Int'l Brotherhood of Teamsters*, 416 Pa. 401, 206 A.2d 382, 389 (1965) (holding that *Garmon* does not preempt libel claims). The purpose of this higher burden for defamation claims is to guard against abuse of libel actions in labor disputes and to prevent such actions from intruding upon the free debate that the NLRA envisions. *Linn*, 383 U.S. at 65. This court need not decide if the more stringent standard applies to claims by persons like the plaintiffs who are third parties not subject to the NLRA. If it does apply, the plaintiffs have satisfied it. They allege that the defendants made their defamatory statements "with malice, with specific knowledge of the falsity of the statements and with reckless disregard for the truth of their statements" and that the statements caused actual damage. Complaint ¶¶ 115-16, 128.

II. THE COURT OVERRULES THE OBJECTION BASED ON THE *NOERR-PENNINGTON* DOCTRINE.

The WUA, the umpire defendants and Shapiro argue that *Noerr-Pennington* immunity bars the plaintiffs' tortious interference, conspiracy and fraudulent conveyance claims.[FN9] *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Because immunity raises fact issues, a court cannot sustain a preliminary objection asserting immunity unless immunity is clear from the face of the pleadings. *Logan v. Lillie*, 728 A.2d 995, 998 (1999); Pa.R.C.P. 1030(a) (immunity is an affirmative defense that the defendant shall plead as new matter in the answer). *Noerr-Pennington* immunity is not clear from the face of the pleadings. The court overrules the objections.

FN9. Under this doctrine, "[t]hose who petition government for redress are generally immune from antitrust ity." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993). Under the sham exception to the *Noerr-Pennington* doctrine, however, there is no immunity if the effort to influence or obtain government action is in fact only an attempt to interfere with the business relationships of a competitor. *Id.* Some courts have extended the *Noerr-Pennington* doctrine to immunity from tort claims. *See Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir.1988).

III. THE COURT OVERRULES THE OBJECTION TO THE TORTIOUS INTERFERENCE CLAIMS (COUNTS I & II).

Court I alleges tortious interference with existing contractual relations against all defendants. Count II alleges tortious interference with prospective contractual relations against all defendants. The WUA, the umpire defendants and Shapiro argue that the claims are legally insufficient. The court disagrees.

The elements of a claim for tortious interference with existing or prospective contractual relations are:

(1) the existence of a contractual, or prospective contractual relation between the complainant and a

third party;

(2) purposeful action on the part of defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;

***5** (3) the absence of privilege or justification on the part of the defendant; and

(4) the occasioning of actual legal damage as a result of the defendant's conduct.

Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa.Super.Ct.1997) (citations omitted), *quoted in Flynn Corp. v. Cytometrics*, June 2000, No. 2102, op. at 11 (C.P.Phila.Nov. 17, 2000) (Sheppard, J.). "Absence of privilege or justification" means that the defendant's conduct was "improper." *Cloverleaf Dev., Inc. v. Horizon Fin., F.A.*, 347 Pa.Super. 75, 500 A.2d 163, 167 (1985).

The plaintiffs allege these elements. They allege that there was an existing and prospective [FN10] contractual relationship between them [FN11] and a third party, the MLUA. They allege that the WUA, the umpire defendants and the Shapiro defendants purposefully acted for the specific purpose of harming that relationship.[FN12] Since they allege that these defendants maliciously defamed them, the plaintiffs sufficiently allege that the defendants acted improperly.[FN13] *See Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472, 474-75 (1960) (allegation that defendant made false statements to plaintiff's employer with purpose and result of inducing employer to terminate plaintiff employee stated legally sufficient claim of intentional interference with contract); *Evans v. Philadelphia Newspapers, Inc.*, 411 Pa.Super. 244, 601 A.2d 330, 333 (1991) (stating that plaintiff may base claim of intentional interference on a variety of torts, including defamation). They allege that the defendants caused them actual legal damage: the loss of fees that the plaintiffs would have earned under the retainer agreement and future retainer agreements. The court overrules the objections to Counts I and II. [FN14]

FN10. Contrary to the defendants' arguments, the plaintiffs sufficiently allege a prospective relationship between the plaintiffs and the MLUA. *See Cloverleaf Dev.*, 500 A.2d at 167 (stating that averment of interference with a prospective relation be "sufficient to allege a reasonable likelihood or probability that an anticipated business arrangement would have been consummated.").

FN11. The retainer agreement is between Phillips Associates and the MLUA. Since no defendant has argued that Richard Phillips has failed to allege the existence of a contract between him and the MLUA, the court does not address the issue.

FN12. The defendants allegedly caused the union members to sever their relationship with the MLUA, which interfered with the relationship between the MLUA and the plaintiffs. Though the alleged interference was indirect, the claim is legally sufficient because the plaintiffs allege that the defendants acted for the specific purpose of interfering with the plaintiffs' contract with the MLUA. *See* Restatement (Second) of Torts § 766, cmt. p. ("[I]f A induces B to break a contract with C, persons other than C who may be harmed by the action as, for example, his employees or suppliers, are not within the scope of the protection afforded by this rule, *unless A intends to affect them.* Even then they may not be able to recover unless A acted for the purpose of interfering with their contracts.")

FN13. The defendants argue that their conduct is privileged because the umpires were exercising their right to choose a labor union. The court disagrees. The NLRA does not grant one the privilege to defame another maliciously. *See* *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, (1966) (holding that the NLRA does not preempt state law malicious libel claims). Moreover, privilege in this case raises fact issues that the court cannot determine by preliminary objection. *See* *Small v. Juniata College*, 452 Pa.Super. 410, 682 A.2d 350, 354 (1996) (citing six factors in Restatement (Second) of Torts § 767 that a court must weigh in determining whether an interference was privileged).

FN14. The Complaint does not allege that the MLB defendants defamed them, and it is not clear how the MLB defendants acted improperly. The plaintiffs cannot base any claim of impropriety on the NLRA. But, the MLB defendants have not objected on any grounds except preemption.

IV. THE COURT OVERRULES THE OBJECTION TO THE DEFAMATION CLAIM (COUNT III).

Count III alleges defamation against the WUA, the umpire defendants and Shapiro. Only Shapiro objects to this claim. He argues that the defamation claim against him is legally insufficient and is insufficiently specific. The court disagrees.

A claim for defamation must generally allege: " '1) the defamatory character of the communication; 2) publication; 3) that the communication refers to the plaintiff; 4) the third party's understanding of the communication's defamatory character; and 5) injury." ' *Walder v. Lobel*, 339 Pa.Super. 203, 448 A.2d 622, 627 (1985), quoting *Raneri v. DePolo*, 65 Pa.Commw. 183, 441 A.2d 1373, 1375 (1982); 42 Pa.C.S.A. 8343(a).

The plaintiffs allege a legally sufficient defamation claim based on two sets of defamatory statements that the WUA, the umpire defendants and Shapiro published about the plaintiffs. First, the plaintiffs allege that Brinkman, Hirschbeck and Shapiro, publicly attacked Phillips as "incompetent." Complaint ¶ 78. Second, plaintiffs allege that Hirschbeck, Brinkman, Phillips, Welke and Shapiro "made various false, misleading and defamatory statements and communications to members of the MLUA and generally to the radio, television and print media concerning plaintiff R. Phillips' reputation for honesty, reputation for the ethical discharge of his professional obligations, and his professional competence, including accusations of dishonesty, failing to communicate material information to MLUA members, utilizing funds of a corporation owned by plaintiff R. Phillips to provide financial services and benefits to MLUA Board Members in exchange for support of plaintiff R. Phillips, and other similar improper or unethical activities." Complaint ¶ 100. [FN15] These statements are capable of defamatory meaning because they attack Phillips' competence in the legal profession and his honesty. *Agriss v. Roadway Express, Inc.*, 334 Pa.Super. 295, 483 A.2d 456, 461 (1984) ("A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him in his business or profession."); Restatement (Second) of Torts § 573 ("Slanderous Imputations Affecting Business, Trade, Profession or Office).[FN16]

FN15. The Complaint sets forth allegations of false statements that are too vague to support a defamation claim. *See* Complaint ¶¶ 42, 48-52, 68, 101. Furthermore, the defendants' alleged statements that the resignation plan was doomed and flawed and that Phillips had caused umpire dissension are mere opinion and are not actionable. Complaint ¶ 78. *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399, 402 (1987) (

> "[O]pinion without more does not create a cause of action in libel [unless] the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion.")

> FN16. The court does not decide whether the *Linn* standard for labor dispute defamation applies, because the plaintiffs have alleged malice and actual harm.

***6** These allegations are sufficiently specific. A defamation claim must allege with particularity, among other things, the content of the defamatory statements, the identity of the persons making such statements, and the identity of the persons to whom the statements were made. *Itri v. Lewis*, 281 Pa.Super. 521, 422 A.2d 591, 592 (1980). The plaintiffs identify the makers of the statements, including Shapiro. They identify the recipients: the public, the MLUA membership and the media. And they identify the contents of the statements. *Itri*, 422 A.2d at 592 ("In an action for slander the complaint is sufficient if it contains the substance of the spoken words."). The court overrules the objection to Count III.

V. THE COURT OVERRULES THE OBJECTIONS TO THE FALSE LIGHT CLAIMS (COUNT IV).

Count IV alleges false light invasion of privacy against the WUA, the umpire defendants and Shapiro. The plaintiffs base these claims on the statements accusing them of dishonesty, incompetence and unethical conduct. The defendants argue that the claim is legally insufficient and insufficiently specific. The court disagrees.

The elements of false light invasion of privacy are as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E, *quoted in Curran v. Children's Serv. Ctr. of Wyoming County*, 396 Pa.Super. 29, 578 A.2d 8, 12 (1989).

Publicity "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." [FN17] Restatement (Second) of Torts § 652E, cmt e, *quoted in Curran*, 578 A.2d at 12. To be highly offensive to a reasonable person, "a major misrepresentation of a person's character, history, activities or beliefs is made that could reasonably be expected to cause a reasonable man to take serious offense." Restatement (Second) of Torts § 652E, cmt c, *quoted in Curran*, 578 A.2d at 13.

> FN17. Publicity differs from publication, an element of defamation. *Curran*, 578 A.2d at 13. "[P]ublication occurs whenever a defamatory statement is communicated to another person." *Flaxman v. Burnett*, 393 Pa.Super. 520, 574 A.2d 1061, 1066 (1990).

The false light claim is sufficiently specific. The plaintiffs allege the makers, the recipients and the contents of the statements. The claim is legally sufficient. The plaintiffs allege that these defendants publicly accused them of dishonesty and incompetence, with knowledge that the accusations were untrue, and with knowledge that the statements would place the

plaintiffs in a false light before the union membership. The court overrules the objections to Count IV.

VI. THE COURT OVERRULES THE OBJECTIONS TO THE COMMERCIAL DISPARAGEMENT AND INJURIOUS FALSEHOOD CLAIMS (COUNTS V & VII).

*7 Count V alleges commercial disparagement against the WUA, the umpire defendants and the Shapiro defendants. Count VII alleges injurious falsehood against those defendants. As commercial disparagement is a type of injurious falsehood, these counts appear to allege the same thing. *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 761 A.2d 553, 555-56 (Pa.Super.Ct.2000), *appeal granted*, 775 A.2d 808 (Pa.2001). The defendants argue that the claims are legally insufficient and insufficiently specific. The court disagrees.

To state a claim for commercial disparagement, a plaintiff must allege that (1) the defendant published a disparaging statement concerning the business of the plaintiff, (2) the statement was false, (3) the defendant intended that the publication cause pecuniary loss or reasonably should have recognized that publication would result in pecuniary loss, (4) the publication caused actual pecuniary loss, and (5) the publisher knew the statement was false or acted in reckless disregard of its truth or falsity. *Id.*, citing Restatement (Second) of Torts § 623A ("Liability for Publication of Injurious Falsehood"). *See also* Restatement (Second) of Torts § 626 ("Disparagement of Quality-Trade Libel").

The plaintiffs allege these elements. They allege that the defendants published disparaging statements about the quality of legal services that they provide. They allege that the statements were false and that the defendants knew that they were false. He alleges that the defendants published the statements with the intent to damage the plaintiffs' pecuniary relationship with the MLUA and that the publications did in fact cause the plaintiffs to lose the pecuniary value of their relationship with the MLUA. The court overrules the objections to Counts V and VII.

VII. THE COURT SUSTAINS THE OBJECTION TO THE FRAUDULENT CONVEYANCE CLAIM (COUNT VI).

Count VI alleges fraudulent conveyance [FN18] against the WUA. The WUA argues that the claim is legally insufficient, and the court agrees.

> FN18. The UFTA replaced the Uniform Fraudulent Conveyances Act, 39 P .S. § 351 *et seq.*, in 1994.

The Uniform Fraudulent Transfer Act allows creditors to avoid certain transfers by debtors. 12 Pa.C.S.A. §§ 5104, 5105. To see why the Philips claim is faulty, one can look at the definitions section of the UFTA. The UFTA defines transfer as "[e]very mode ... of disposing of or parting with an asset or an interest in an asset." 12 Pa.C.S.A. § 5101. An asset is "[p]roperty of a debtor." *Id.* A debtor is a "person who is liable on a claim." *Id.* A claim is a "right to payment." *Id.* A creditor is a "person who has a claim." *Id.*

These provisions, read together, show that the transferred asset must be the property of the transferor, i.e., the debtor. Though the Complaint does not clearly identify the debtor and the asset transferred, the plaintiffs' brief does. The plaintiffs explain that the asset was their contractual right to be the umpires' attorney and that the WUA fraudulently transferred that right to Shapiro. As the UFTA grants remedies only to creditors, the plaintiffs, who seek a remedy, are presumably the creditors. 12 Pa.C.S.A. § 5107.

***8** The plaintiffs' theory of fraudulent transfer fails as a matter of law because, as they admit in their brief, the transferred asset was not the property of debtor, the WUA, but of the alleged creditors, the plaintiffs. The UFTA does not apply to such a situation. The court sustains the demurrer to the fraudulent

conveyance claim and dismisses Count VI.

VIII. THE COURT OVERRULES THE OBJECTION TO THE CONSPIRACY CLAIM (COUNT VIII).

Count VIII alleges civil conspiracy against all defendants. The WUA, the umpire defendants and Shapiro argue that the claim is legally insufficient. The court disagrees.

To state a claim for conspiracy, the 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).

The plaintiffs allege these elements. First, they allege that the defendants combined with a common purpose to defame the plaintiffs and to interfere with their relationship with the MLUA. Second, they allege actual overt acts-the making of defamatory statements-done in furtherance of the conspiracy. Third, they allege actual legal damage: the loss of the value of the retainer agreements. The court overrules the objections to Count VIII.

IX. THE COURT SUSTAINS THE OBJECTION TO THE UNJUST ENRICHMENT CLAIM (COUNT IX).

In Count IX, the plaintiffs allege that the WUA is liable for unjust enrichment. The WUA argues that the claim is legally insufficient, and the court agrees. To state a claim for unjust enrichment, the plaintiffs must allege that they conferred a benefit on the WUA, that the WUA appreciated the benefit, and that the WUA accepted and retained the benefit under circumstances that would make it inequitable for the WUA to retain the benefit without payment for ue. *BurgettstownSmith Twp. Joint Sewage Auth. v. Langeloth Townsite Co.*, 403 Pa.Super. 84, 588 A.2d 43, 45 (1991). The plaintiffs do not allege these elements. They allege that they conferred a benefit, legal services, on the MLUA, not on the WUA. They do not allege that the MLUA failed to pay for those benefits. Maybe the WUA has appreciated the value of these benefits, but any cause of action for unjust enrichment would then belong to the MLUA, not to the plaintiffs. The court sustains the demurrer to the unjust enrichment claim and dismisses Count IX.

X. THE COURT SUSTAINS THE OBJECTION TO THE CONTRACT CLAIM (COUNT X).

In Count X, plaintiffs allege that WUA is the successor to the MLUA's obligations and the WUA has breached the MLUA's retainer agreement with the plaintiffs. The WUA argues that the claim is legally insufficient, and the court agrees.

In the February 20, 1999 retainer agreement, the MLUA agreed that Phillips Associates would be the MLUA's exclusive representative for all matters until April 10, 2003. The WUA was not a party to the retainer agreement. The plaintiffs argue that the WUA succeeded to MLUA's rights and obligations under the retainer agreement when it replaced the MLUA as the umpire's bargaining agent. The plaintiffs argue that, by employing Shapiro as its counsel, the WUA breached the retainer agreement.

***9** The WUA is not a party to the retainer agreement between Phillips Associates and the MLUA. The plaintiffs have not cited any case where a court imposed liability on a labor union for its predecessor's contractual obligations to a third party.[FN19] Even if a labor union could be held liable for its predecessor's contractual obligations, the plaintiffs have not pleaded any facts that would support imposing successor liability in this case. *See Sehl v. Vista Linen Rental Serv., Inc.*, 763 A.2d 858, 863-64 (Pa.Super.Ct.2000) (stating that, though a successor corporation usually does not acquire the liabilities of its predecessor, a successor corporation is liable for its predecessor's debts if the successor is merely a continuation of the predecessor, the two corporations

fraudulently entered into the transaction to escape liability, or the transfer was for inadequate consideration without provisions for the predecessor's creditors.); *Granthum v. Textile Machine Works*, 230 Pa.Super. 199, 326 A.2d 449, 451 (1974) (applying successor liability to a contract claim). The court sustains the demurrer to the contract claim and dismisses Count X

> FN19. Under the NLRA, the NLRB may impose liability on a union for its predecessor's unfair labor practice if there is "substantial continuity" between the two ions. *Local Union No. 5741, United Mine Workers of Am. v. N.L.R.B.*, 865 F.2d 733, 736-37 (6th Cir.1989). Labor law successor liability, which courts derived to further the NLRA policy of preventing labor unrest, *Id.* at 736, is not applicable in determining whether a union may be held liable for another union's debts outside the labor law context.

CONCLUSION

For the reasons stated, the court will enter a contemporaneous Order sustaining the WUA's Preliminary Objections to the plaintiffs' fraudulent conveyance, unjust enrichment and contract claims. But, all other Preliminary Objections will be overruled.

ORDER

AND NOW, this 19th day of September 2001, upon consideration of the defendants' Preliminary Objections to the Complaint and the plaintiffs' responses, it is ORDERED that

(1) The Preliminary Objections to the fraudulent conveyance claim (Count VI), the unjust enrichment claim (Count IX) and the contract claim (Count X) are Sustained and those claims are Dismissed;

(2) All other Preliminary Objections are Overruled; and

(3) The defendants shall answer the Complaint within twenty-two (22) days after entry of this Order.

Pa.Com.Pl.,2001.
Phillips v. Selig
Not Reported in A.2d, 2001 WL 1807951 (Pa.Com.Pl.)

END OF DOCUMENT

Cited
As of: Sep 05, 2013

PT GROUP ACQUISITION, LLC D/B/A THE PT GROUP; VISSMAN THERAPEUTICS, INC.; DALE J. CORDIAL; AND SHANNON VISSMAN, PLAINTIFFS, VS. LINDA J. SCHMAC; PREMIER COMP SOLUTIONS, LLC; PENNSYLVANIA SELF-INSURERS' ASSOCIATION; AND CHARLES S. KATZ, JR., DEFENDANTS,

NO. 5044 OF 2008

COMMON PLEAS COURT OF WESTMORELAND COUNTY, PENNSYLVANIA, CIVIL DIVISION

2008 Pa. Dist. & Cnty. Dec. LEXIS 221

November 12, 2008, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants, a medical bill repricer and its president, filed preliminary objections to a complaint filed by plaintiff, arising from a seminar presentation. The preliminary objections alleged that venue was improper under Pa.R.C.P. No. 1028(a)(1) and that claims were not sufficiently pled. The matter involved claims of defamation, commercial disparagement, and interference with existing and prospective contractual relationships.

OVERVIEW: The court reviewed the various venue rules applicable to the parties herein. It found that as to the president, venue was proper in two counties pursuant to where she resided and where the seminar was given under Pa.R.C.P. No. 1006(a)(1). However, venue was proper in any county where it could be laid against either defendant. As to the repricer, venue was controlled by Pa.R.C.P. No. 2179. The court reviewed the circumstances and determined that it "regularly conducted business" within the county where suit was brought. Although it owned no business there, it had clients within the county. The repricer's actions within the county were sufficiently continuous to be deemed habitual. The claim for commercial disparagement was sufficiently pled, as the facts showed actual pecuniary loss. The defamation claim was also sufficiently pled, as the statements were capable of a defamatory meaning and the person allegedly defamed was ascertainable. The allegations were not sufficient for a claim of tortious interference with existing contractual relationships, although they were sufficient for interference with prospective contractual relationships.

OUTCOME: The court sustained the preliminary objection relating to tortious interference with existing contractual relationships, and it overruled all of the other preliminary objections.

LexisNexis(R) Headnotes

Civil Procedure > Venue > Individual Defendants
[HN1] See Pa.R.C.P. No. 1006(a)(1).

Civil Procedure > Venue > Corporations
[HN2] Under Pa.R.C.P. No. 1006(b), venue for actions against "corporations and similar entities" is governed by Pa.R.C.P. No. 2179. Rule 2179 provides that an action against a corporation or similar entity may be brought in and only in: 1) The county where its registered office or principle place of business is located; 2) A county where it regularly conducts business; 3) The county where the cause of action arose; 4) A county where a transaction or occurrence took place out of which the cause of action arose, or 5) A county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.

Civil Procedure > Venue > Corporations
[HN3] Pa.R.C.P. No. 1006(b) provides that venue against unincorporated associations is governed by Pa.R.C.P. No. 2156.

Civil Procedure > Venue > Corporations
[HN4] See Pa.R.C.P. No. 2156(a).

Civil Procedure > Venue > Multiparty Litigation
[HN5] In an action against multiple defendants, venue is proper in any county in which venue may be laid against any one of the defendants. Pa.R.C.P. No. 1006(c)(1).

Civil Procedure > Venue > Corporations
[HN6] For purposes of Pa.R.C.P. No. 2179, a business may regularly conduct business in a county even though the acts of conducting business make up a small part of its total activities. A court must engage in a quality-quantity analysis to determine if a business is regularly conducting business in a particular county.

Civil Procedure > Venue > Corporations
[HN7] In order to determine the quality of the acts performed by a defendant in a county for purposes of Pa.R.C.P. No. 2179, a court must determine if such acts further the interests of a defendant's business. If the acts of the defendant are merely incidental to the interests of the business, then they would not be of sufficient quality to allow venue to be proper. Quantity of acts means acts sufficiently continuous so as to be considered habitual. A business may perform an act regularly in a county even though the acts make up only a small part of its total activities.

Torts > Intentional Torts > Defamation > Elements > General Overview
[HN8] Defamatory words, in order to be actionable, must refer to some ascertained or ascertainable person, and that person must be the plaintiff. However, the fact that the plaintiff is not specifically named is not controlling. A party defamed need not be specifically named, if pointed to by description or circumstances tending to identify him. If a defamatory comment can reasonably be interpreted as referring to a particular complainant, then the fact that the person is not named specifically will be of no moment. At the very least, whether or not such a reasonable interpretation can be made should be left to the finder of fact.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Torts > Business Torts > Commercial Interference > Contracts > Elements
[HN9] In order to state a claim for tortious interference with an existing contract, a plaintiff must plead an existing contractual relationship between the plaintiff and a third-party.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Torts > Business Torts > Commercial Interference > Contracts > Elements
Torts > Business Torts > Commercial Interference > Prospective Advantage > Elements
[HN10] The allegations in a cause of action for interference with prospective contractual relations need not be as precise as those for tortious interference with an existing contract. This is because prospective contractual relations are, by definition, not as susceptible of definite, exacting identification as in the case with an existing contract with a specific person or entity.

JUDGES: [*1] Gary P. Caruso.

OPINION BY: Gary P. Caruso

OPINION

DECISION AND ORDER

This matter is before the Court as the result of Preliminary Objections filed on behalf of the defendants, Linda J. Schmac (hereinafter "Schmac") and Premier Comp Solutions, LLC (hereinafter "Premier"). The defendants first contend, by way of Preliminary Objection pursuant to 1028(a)(1), that this matter should be transferred to Allegheny County because venue is not proper in Westmoreland County.

Pa. R.Civ.P. 1006(a)(1) provides that [HN1] "Except as otherwise provided by subdivision (b) and (c) of this rule, an action against an individual may be brought in and only in a county in which (1) the individual may be served or in which the cause of action arose or in any other county authorized by law...." [HN2] Under Rule 1006(b), venue for actions against "corporations and similar entities" is governed by Rule 2179. Pa. Rule 2179 provides that an action against a corporation or similar entity may be brought in and only in:

> 1. The county where its registered office or principle place of business is located;
>
> 2. A county where it regularly conducts business;
>
> 3. The county where the cause of action arose;
>
> 4. A county where a transaction or occurrence took place [*2] out of which the cause of action arose, or
>
> 5. A county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.

[HN3] Rule 1006(b) provides that venue against unincorporated associations is governed by Rule 2156, which provides that [HN4] "an action against an association may be brought in and only in a county where the association regularly conducts business or any association activity, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of actions arose." Pa. R.Civ. P. 2156(a).

[HN5] In an action against multiple defendants, venue is proper in any county in which venue may be laid against any one of the defendants. Pa. R.Civ.P. 1006(c)(1). Linda J. Schmac is an individual. Therefore, under Rule 1006(a)(1), venue is proper as to Schmac in either the county in which Schmac may be served or the county in which the cause of action arose or where the transaction or occurrence took place out of which the cause of action arose. The plaintiff has pled that Schmac resides and may be served in Allegheny County. The transaction [*3] or occurrence giving rise to the Plaintiffs claim was a seminar presentation by Schmac in Harrisburg, Dauphin County, Pennsylvania. Thus, with regard to Schmac, venue would only be proper in Allegheny County or Dauphin County.

Since venue would be proper in any county in which venue may be laid against any one of the defendants, the question becomes whether venue in Westmoreland County Pennsylvania is proper for the suit against Premier. Because Premier is a Limited Liability Company venue would be governed by Pa. R.C.P. 2179.

Just as with Schmac, the occurrence out of which the cause of action arose occurred in Dauphin County. Thus, the only part of Rule 2179 that this Court must consider is whether Premier "regularly conducts business" in Westmorland County. In this regard it should be remembered that [HN6] a business may regularly conduct business in a county even though the acts of conducting business make up a small part of its total activities. A Court must engage in a quality-quantity analysis to determine if a business is regularly conducting business in a particular county. *Zampana-Barry v. Donaghue*, 2007 PA Super 60, 921 A.2d 500 (Pa. Super. 2007).

[HN7] In order to determine the quality of the acts performed [*4] by the defendant in the county the court must determine if such acts further the interests of the defendant's business. If the acts of the defendant are merely incidental to the interests of the business then they would not be of sufficient quality to allow venue to be proper. Quantity of acts means acts sufficiently continuous so as to be considered habitual. And, as stated previously a business may perform an act regularly in a

county even though the acts make up only a small part of its total activities.

With regard to the question of proper Venue for an action against Premier the Court will consider the testimony of Linda J. Schmac, the president and owner of Premier, given at the evidentiary hearing held on the preliminary objections on October 24, 2008. Schmac testified that Premier has been in business a little over six years, having an address of 100 high Tower Blvd. Pittsburgh, Allegheny County, PA 15205. Premier does not have a business address in Westmoreland County. Premier does not have an ownership interest in any Westmoreland County-based business or healthcare practice.

There are essentially two parts to the business of Premier. One is a repricing business and the other [*5] is a discount, physical therapy panel network business. The total percentage of the business of Premier associated with repricing of medical bills is 14%. The percentage of business related to the discount physical therapy panel network is 86%. Premier does the remaining 1% of its work in consulting. Premier does not do any consulting work in Westmoreland County.

The entities that use Premiere for the repricing of medical bills are workers compensation insurance companies, third party administrators, and self insured employers. Premier has only one repricing client in Westmoreland County. The percentage of repricing business that comes from the entity located in Westmoreland County is 1.5%. Essentially, the work of a repricing business is that it creates an explanation of benefits forms. This form sets forth the amount charged by the medical provider, the amount reimbursed by insurance, and the amount, if any, owed by the patient. This form is created in the Pittsburgh office of Premier with information received from medical providers and insurance companies.

There are a number of Westmoreland County-based employers that utilize Premier. Premier creates medical provider panels from which [*6] an injured employer may select a medical provider. Premier currently manages a 7,444 employer panels statewide. One percent (1%) of that total represents the percentage of panels that are related to employers in Westmoreland County. Therefore approximately 74 panels have been developed for Westmoreland County employers. In the year 2006 there were 23 employers in Westmoreland County using this service. In the year 2007 there were 29 employers in Westmoreland County using this service. In 2008 as of October 24, 2008, there were 34 employers in Westmoreland County using this service. The percentage of income derived from these employers was such that in 2006 1.7% of Premier's income (approximately $ 67,600) was derived from Westmoreland County employers. In 2007 2% of its income (approximately $ 101,000) was derived from Westmoreland County employers and in 2008 1.7% of its income (approximately $ 81,000), as of October 24, 2008 was derived from Westmoreland County employers. This income is derived by referring employees of Westmoreland County employers to healthcare providers listed on the panels created by Premier. These referrals are made from the office located in Pittsburgh, Allegheny [*7] County, Pennsylvania.

Premier also has contractual relationships with approximately 5 physical therapy groups in Westmoreland County. Premier makes referrals to these physical therapy groups, and it derives income as a result of those referrals.

This Court finds that the acts performed by and on behalf of Premier in Westmoreland County are directly related to, and advance the interests of, Premier. Furthermore, the acts performed by and on behalf of Premier in Westmoreland County are sufficiently continuous to be deemed a habitual. Therefore, even though the acts conducted by and on behalf of Premier in Westmoreland County make up a relatively small percentage of its business, they are sufficient to satisfy both the quality and quantity tests set forth in *Zampana-Barry v. Donaghue*, 2007 PA Super 60, 921 A.2d 500 (Pa. Super. 2007).

Therefore, the preliminary objection in the nature of improper venue is overruled.

In their second preliminary objection to plaintiffs contend that the plaintiff fails to state any claim for commercial disparagement because they have failed to sufficiently plead facts showing actual pecuniary loss. It appears from this Court's review of the complaint filed in this matter and that [*8] each required element of a claim for commercial disparagement has been alleged. Thus, the complaint is a sufficiently specific to give the defendants notice of the type of damage is being claimed by the plaintiffs. In the present case, the type of damages being requested our general, ordinary damages that would naturally flow from statements such as those alleged to

have been made by Schmac. Therefore, the pleadings are sufficient in this regard and this preliminary objection is overruled.

The third preliminary objection of the these defendants is that the plaintiffs' defamation claim should be dismissed for legal insufficiency because the statements alleged are opinions and therefore not actionable as a matter of law. This Court finds, after a reading of the statements attributable to Schmac, that the words attributed to her are capable of a defamatory meaning and not an expression of opinion. At this stage of the pleadings, the plaintiff has sufficiently alleged each element of an action for defamation in order to survive these pulmonary objections. This Court finds that the statements attributed to Schmac are capable of a defamatory meaning and therefore this preliminary objection [*9] is overruled.

In the fourth preliminary objection of these defendants they contend that the plaintiffs, Dale Cordial and Shannon Vissman fail to state a claim for defamation. These defendants contend that the allegations of the complaint fail to set forth any comment or statement by Schmac pertaining directly to either Dale Cordial or Shannon Vissman individually. It is true that [HN8] defamatory words, in order to be actionable, must refer to some ascertained or ascertainable person, and that person must be the plaintiff.' 22 P.L.E. Libel and Slander, s 17 (1959). However, the fact that the plaintiff is not specifically named is not controlling. A party defamed need not be specifically named, if pointed to by description or circumstances tending to identify him. *Cosgrove Studio & Camera Shop, Inc.*, 408 Pa. 314, 182 A.2d 751 (Pa. 1962). If a defamatory comment can reasonably be interpreted as referring to a particular complainant, then the fact that the person is not named specifically will be of no moment. *Farrell v. Triangle Publications. Inc.* 399 Pa. 102, 159 A.2d 734 (Pa. 1960). At the very least whether or not such a reasonable interpretation can be made should be left to the finder of fact. *Farrell*, supra. Therefore, [*10] since it is a matter for the fact finder, this preliminary objection is overruled.

The fifth and final preliminary objection of the defendants is that the plaintiffs have failed to sufficiently plead a cause of action for tortious interference with existing and prospective contractual relationships. These defendants contend that the complaint fails in this regard because it does not specifically identify the purported existing or prospective contracts with which the defendants allegedly interfered. [HN9] In order to state a claim for tortuous interference with an existing contract, a plaintiff must plead an existing contractual relationship between the plaintiff and a third-party. In as much as the plaintiff has included a claim of intentional interference with existing contracts it is necessary for the plaintiff to plead the facts upon which this cause of action is based. Therefore, the plaintiff should be more specific about the existing contractual relationship with which the defendants interfered. However, this same measure is not applied to the cause of action alleging interference with prospective contractual relations. [HN10] The allegations in such a cause of action and need not be as precise. [*11] This is because prospective contractual relations are, by definition, not as susceptible of definite, exacting identification as in the case with an existing contract with a specific person or entity. Therefore this preliminary objection will be sustained in part and overruled in part.

ORDER

And now this 12th day of November, 2008, in accordance with the foregoing Decision, it is hereby Ordered and Decreed as follows:

1. Preliminary Objections A,B,C, and D are overruled; and

2. The portion of preliminary objection E in the nature of a request for a more specific pleading of the cause of action for interference with prospective contractual relationships is overruled; and

3. The portion of preliminary objection E in the nature of a request for a more specific pleading of the cause of action for interference with existing contractual relationships is sustained and the Plaintiffs are granted twenty days from the receipt of this order to file a more specific pleading of this cause of action. In the event the plaintiffs fail to do so, on motion of these defendants said cause of action will be dismissed.

By the Court:

/s/ Gary P. Caruso

Not Reported in A.2d, 2000 WL 33711060 (Pa.Com.Pl.)
(Cite as: 2000 WL 33711060 (Pa.Com.Pl.))

Only the Westlaw citation is currently available.

Pennsylvania Court of Common Pleas.
RESOURCE PROPERTIES XLIV, INC., Plaintiff
v.
PHILADELPHIA AUTHORITY FOR INDUSTRIAL DEVELOPMENT, etal. Defendants
RESOURCE PROPERTIES XLIV, INC., Plaintiff
v.
GROWTH PROPERTIES, LTD., etal. Defendants

No. 1265 NOV.TERM 1999, 3750 MARCH.TERM 2000, CONTROL 090558.
Nov. 7, 2000.

OPINION

SHEPPARD, J.

***1** Defendants, LLOT, Inc. ("LLOT") and Growth Properties, Ltd.-LLOT General Partnership ("G-L") (together "Movants"), have filed Preliminary Objections ("Objections") to the Amended Complaint of plaintiff, Resource Properties XLIV, Inc. ("Resource"). For the reasons set forth in this Opinion, this court is entering a contemporaneous Order overruling the Objections.

BACKGROUND

On October 11, 1984, the Philadelphia Authority for Industrial Development ("PAID") executed three notes and mortgages in favor of CoreStates Bank ("CoreStates"), then known as The Philadelphia National Bank.[FN1] The Mortgages were secured by property located at 125-37 South Ninth Street ("Property").

FN1. The principal under the "First Note and Mortgage" was $3,000,000. The principal under the "Second Note and Mortgage" was $2,000,000. The principal under the "Third Note and Mortgage" was $1,000,000.

That same day two other events occurred. First, PAID sold the Property to LLOT, G-L, Growth Properties, Ltd. ("Growth") and Sheridan Associates ("Sheridan") (collectively, "Borrowers") pursuant to an Installment Sale Agreement. The obligations of the Borrowers under the Installment Sale Agreement were coextensive with the obligations of PAID under the Notes and Mortgages.

Second, pursuant to a Letter Agreement, Radnor Financial Group, Inc. ("Radnor") agreed to purchase the Second and Third Notes and Mortgages from CoreStates upon default by the Borrowers. The Letter Agreement was subsequently modified by a Modification Agreement, dated December 31, 1991, under which Radnor agreed to secure its purchase obligations with a $2.2 million cash collateral ("Collateral"). Shortly after the Modification Agreement was signed, Radnor posted the Collateral.

In December 1994, the Borrowers defaulted on their obligations under the Installment Sale Agreement. CoreStates notified Radnor in a letter dated January 5, 1995 that it had liquidated the Collateral and applied the proceeds to the purchase price for the Second and Third Notes and Mortgages. CoreStates subsequently brought suit against Radnor seeking to enforce Radnor's purchase obligations under the Letter Agreement and the Modification Agreement ("CoreStates-Radnor Litigation").[FN2] Radnor, in turn, filed a counterclaim alleging that CoreStates had improperly liquidated the Collateral. In addition, CoreStates filed a second action against ten defendants, including PAID and the Movants, on February 27, 1995, to foreclose on the First and Second Mortgages ("Foreclosure Action").[FN3]

FN2. *CoreStates Bank v. Radnor Financial Corp.*, February Term 1995, No. 2943 (C.P.Phila.).

FN3. *CoreStates Bank v. Philadelphia Auth. for Indus. Dev.*, February Term 1995, No. 3110 (C.P.Phila.).

On April 22, 1998, CoreStates and Radnor agreed to settle the CoreStates-Radnor Litigation. In connection with this settlement, CoreStates and Radnor executed an Agreement of Sale,[FN4] under which CoreStates sold all of its interest in the Notes and Mortgages to Resource. CoreStates also executed an Assignment and Allonge of Mortgages, Promissory Notes and Other Rights in favor of Resource. In addition, Radnor assigned its rights to the Second and Third Mortgages and Notes to Resource under an Absolute Assignment.[FN5]

> FN4. The Agreement of Sale is dated as of December 31, 1997.
>
> FN5. The Agreement of Sale, the Assignment and Allonge of Mortgages, Promissory Notes and Other Rights and the Absolute Assignment are referred to collectively as the "Settlement Documents."

In accordance with the Settlement Documents, Resource succeeded to CoreStates' interest in the Foreclosure Action. In that Foreclosure Action, Growth, LLOT and G-L argued that the Collateral was used to pay down debts owed by the Borrowers under the Second and Third Notes and Mortgages. The trial court accepted this argument.[FN6] Resource has argued that this conclusion allows Resource, as successor in interest to Radnor, to demand from the Borrowers the amount of the Collateral applied to reduce indebtedness on the Notes and Mortgages.

> FN6. Paragraph 28 of the Trial Court's Findings of Facts, as cited in the Complaint, states that "CoreStates applied $1,216,579.52 from the Cash Collateral to reduce the principal balance of the second note and mortgage and $4,158.63 to reduce the accrued interest on the second note and mortgage." Resource states that it has filed an appeal with regard to this determination.

*2 Resource confessed judgment against LLOT, L-G, Growth and PAID for amounts owed on the Third Note ("Confession Complaint") on November 9, 1999.[FN7] On March 30, 2000, Resource filed the Complaint against the Borrowers, setting forth counts for equitable subrogation and unjust enrichment/quantum meruit.[FN8]

> FN7. *Resource Properties XLIV, Inc. v. Philadelphia Auth. for Indus. Dev.*, November Term 1999, No. 1265 (C.P.Phila.) ("Confession of Judgment Action").
>
> FN8. The two cases were consolidated on October 12, 2000.

Movants filed preliminary objections ("First Set") to the Complaint. The Court granted the Movants' demurrer to the Count I and allowed Resource to file an amended complaint.[FN9]

> FN9. The remaining Preliminary Objections (First Set) were overruled.

Subsequently, Resource filed the Amended Complaint. Movants have now filed these Objections to the Amended Complaint.

DISCUSSION

These Preliminary Objections are without merit. Parenthetically, the court notes that it had overruled previously three objections, namely: failure to join a necessary party, lack of specificity and failure to set forth all material facts.

I. Demurrer to Claim for Equitable Subrogation

For the purposes of 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). When presented with preliminary objections which, if granted, would result in dismissal of an action, a court should sustain the objections 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. Kazaras,* 746 A.2d 642, 643 (Pa.Super.Ct.2000) (citation omitted). Furthermore,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.
>
> *Bailey v. Storlazzi,* 729 A.2d 1206, 1211 (Pa.Super.Ct.1999).

Pennsylvania law recognizes the doctrine of subrogation and defines it as "the substitution of one entity in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities." *Public Serv. Mut. Ins. Co. v. Kidder-Friedman,* 743 A.2d 485, 488 (Pa.Super.Ct.1999) (quoting *Molitoris v. Woods,* 422 Pa.Super. 1, 9, 618 A.2d 985, 989 (1992)). The doctrine is "a means of placing the ultimate burden of a debt upon the one who in good conscience ought to pay it, and is generally applicable when one pays out of his own funds a debt or obligation that is primarily payable from the funds of another." *High-Tech-Enterprises, Inc. v. General Accident Ins. Co.,* 430 Pa.Super. 605, 609, 430 A.2d 639, 642 (1993) (citation omitted).

The Movants demur to Resource's equitable subrogation claim based on three grounds. First, they argue that Pennsylvania does not allow an independent cause of action titled "equitable subrogation." Second, they urge that the facts alleged do not meet the requirements for relief based on the doctrine of equitable subrogation. Third, the Movants claim that Resource has adequate remedies available at law that prevent the Court from exercising equity jurisdiction.

A. No Independent Action

***3** According to the Movants, equitable subrogation is a mere doctrine and there is no independent cause of action for equitable subrogation under Pennsylvania law. As a result, they contend that Count I of the Amended Complaint should be dismissed. This claim is without merit.

Pennsylvania does not require a pleader to identify a particular cause of action. *See Krajsa v. Keypunch, Inc.,* 424 Pa.Super. 230, 235, 622 A.2d 355, 357 (1993) ("[i]t is not necessary that the plaintiff identify the specific legal theory underlying the complaint"). Rather, "[i]t is the duty of the court to discover from the facts alleged in a complaint the cause of action, if any, stated therein." *Burnside v. Abbott Laboratories,* 351 Pa.Super. 264, 277, 505 A.2d 973, 980 (1985).[FN10] If the title of a count misidentifies a claim, it is the allegations in the count that must guide the court and not the title. *Miltenberg & Samton, Inc. v. Assicurazioni Generali, S.p.A.,* January 2000, No. 3633, slip op. at 5 n. 12 (C.P. Phila. October 11, 2000) (Herron, J.) (citations omitted).[FN11] Thus, if a complaint alleges facts that would entitle a plaintiff to relief on any theory, a demurrer must be overruled, regardless of the title of the count at issue.

> FN10. This principle is set forth in a number of Pennsylvania cases. *See, e.g., Kelly by Kelly v. Ickes,* 427 Pa.Super. 542, 549, 629 A.2d 1002, 1005 (1993) ("it is always incumbent upon the trial judge to determine whether the facts pled in the complaint state any theory upon which plaintiff may recover"); *Manor Junior College v.. Kaller's Inc.,* 352 Pa.Super. 310, 319, 507 A.2d 1245, 1250 (1986) ("[i]t is the duty of the trial court to discover the cause or causes of action which are supported by the facts alleged"); *Bartanus v. Lis,* 332 Pa.Super. 48, 56, 480 A.2d 1178, 1182 (1984) ("[t]he duty to discover the cause or causes of action rests with the trial court").
>
> FN11. Available at ht-

tp://courts.phila.gov/cptcvcomp.htm.

Here, the fact that Resource has titled the first Count as a claim for "equitable subrogation" is irrelevant. So long as the allegations in the Amended Complaint provide a basis for recovery based on that doctrine, the Amended Complaint should not be dismissed. Thus, the Movants' assertion that equitable subrogation is not a valid claim is immaterial.[FN12] Rather, this Court must examine the Amended Complaint to see if the facts alleged entitle Resource to relief.

> FN12. Even if this were not so, in at least one case, a Pennsylvania court has allowed a plaintiff to proceed on a count of equitable subrogation. *See Judge v. Allentown and Sacred Heart Hosp. Center,* 90 Pa. Commw. 520, 496 A.2d 92 (1985) (overruling demurrer to count for equitable subrogation).

B. Inadequate Facts for Equitable Subrogation Claim

In order to sustain a claim based on equitable subrogation, a claimant must satisfy five prerequisites:

1. The claimant paid the creditor to protect his own interests;

2. The claimant did not act as a volunteer;

3. The claimant was not primarily liable for the debt;

4. The entire debt has been satisfied; and

5. Allowing subrogation will not cause injustice to the rights of others.[FN13]

> FN13. For discussion on the application of this element, *see infra* .

Tudor Development Group, Inc. v. United States Fidelity & Guaranty Co., 968 F.2d 357, 362 (3rd Cir.1992) (citing *United States Fidelity & Guaranty Co. v. United Penn Bank,* 362 Pa.Super. 440, 524 A.2d 958 (1987)).[FN14]

> FN14. A careful examination of the Superior Court's opinion in *United States Fidelity* reveals no evidence that the Third Circuit took the five-element *Tudor* test from that case. In addition, no Pennsylvania court has explicitly adopted this test. However, both parties rely on the *Tudor* test in their briefs.

The Movants assert that the Amended Complaint does not allege the elements required. This court disagrees.

1. Own Interests and Not a Volunteer

Generally, a party may not invoke the doctrine of subrogation if the party has acted as a volunteer. *Dominski v. Garrett,* 276 Pa.Super. 18, 25, 419 A.2d 73, 77 (1980). Specifically,

> [I]t is only in cases where the person paying the debt of another will be liable in the event of default or is compelled to pay in order to protect his own interests, or by virtue of legal process, that equity substitutes him in the place of the creditor without any agreement to that effect; in other cases the debt is absolutely extinguished.

*4 *Kaiser v. Old Republic Ins. Co.,* 741 A.2d 748, 754 (Pa.Super.Ct.1999) (citation omitted).

Here, Radnor, Resource's predecessor in interest, incurred liability solely due to the default by the Borrowers. Moreover, the Collateral was liquidated allegedly without Radnor's consent to secure its compliance with the Letter Agreement and to protect it interests thereunder. This satisfies the requirement that Resource, as Radnor's successor, act in its own interests and not as a volunteer.

2. No Primary Liability

Second, a subrogee must show that it does not have primary liability for the debt that has been satisfied. *High-Tech-Enterprises,* 430 Pa.Super. at 609, 430 A.2d at 642; *Dominski,* 276 Pa.Super. at

25, 419 A.2d at 779. Nowhere in the Amended Complaint does Resource allege explicitly that it had no primary liability for the Notes and Mortgages. However, in Paragraph 34, Resource alleges that "Radnor had no liability to CoreStates under the Installment Sale Agreement or the Notes and Mortgages." Because Radnor assigned its interests in the Second and Third Notes and Mortgages to Resource,[FN15] one can infer that Resource similarly inherited Radnor's liabilities, or lack of them, under these instruments. This leads to the conclusion that Resource had no primary liability under the Notes and Mortgages.

> FN15. According to Paragraph 22 of the Amended Complaint, "Radnor assigned all of its rights in and to the Second Note and Mortgage and the Third Note and Mortgage, including all subrogation rights, to Resource."

3. Entire Debt

Pennsylvania law also holds that until the creditor is fully paid, subrogation will not be permitted. *Stofflett v. Kress,* 342 Pa. 332, 336, 21 A.2d 31, 33 (1941) ("until [the superior creditor] is fully paid subrogation cannot be allowed on any terms whatever"); *Hagans v. Constitution State Service Co.,* 455 Pa.Super. 231, 240, 687 A.2d 1145, 1149 (1997) ("subrogation presupposes an actual payment and satisfaction of a debt or claim by the entity asking to be subrogated").[FN16] Paragraph 38 of the Complaint alleges that "[t]he entire debt on the Second Note and Mortgage has been satisfied ...." Thus, the Complaint alleges full satisfaction of the debt.

> FN16. Additionally, Resource cites a Federal case that states that "whether the creditor has been paid in whole by the surety or whether part of his claim has been recovered from the debtor or the debtor's collateral" is irrelevant, so long as the entire debt is fully paid. *American Surety Co. of N.Y. v. Bethlehem Nat'l Bank of Bethlehem, Pa.,* 33 F.Supp. 722, 724 (E.D.Pa.1940), *rev'd on other grounds,* 116 F.2d 75 (3rd Cir.1940). The Movants do not contest this statement.

4. No Injustice

In reviewing requests for subrogation, "great care should be taken by the court that the subrogation will work no injustice to the rights of others." *U.S. Steel Homes Credit Corp. v. South Shore Development Corp.,* 277 Pa.Super. 308, 316, 419 A.2d 785, 790 (1980) (citation omitted). *Cf. Jacobs v. Northeastern Corp.,* 416 Pa. 417, 429, 206 A.2d 49, 55 (1965) (holding that "[r]ights of subrogation ... are created by law to avoid injustice"). However, no case requires a plaintiff to assert affirmatively in its complaint that no injustice will result from granting the relief. Indeed, while Pennsylvania case law is replete with language stating that relief will be denied when injustice will result, this appears to be a directive for the trial court and not a mandate to a plaintiff drafting its pleading.[FN17] Consequently, Resource's failure to explicitly assert that no injustice will result from granting the relief requested is not fatal.

> FN17. As stated *supra,* no Pennsylvania case has adopted the five-element *Tudor* test or requires a plaintiff to allege no resulting injustice as part of a test for equitable subrogation.

*5 The Complaint alleges all the elements of equitable subrogation. As a result, the allegations are sufficient to support granting relief based on that doctrine.

C. Entitlement to Equitable Relief

The Movants next argue that Resource was assigned Radnor's counterclaim against CoreStates in the CoreStates-Radnor Litigation. As such, they claim that Resource has an adequate remedy available at law, precluding the court from granting equitable relief. Again, this court cannot agree.

In reviewing an equitable matter, "a court of equity will not invoke its jurisdiction where there is

an adequate remedy at law and statutory remedies, if adequate, must be exhausted before equitable jurisdiction may be resorted to." *Clark v. Pennsylvania State Police,* 496 Pa. 310, 313, 436 A.2d 1383, 1385 (1981). However, "[t]he mere fact that a remedy at law exists is not sufficient to oust equitable jurisdiction; the question is whether the remedy is adequate or complete." *Hercules v. Jones,* 415 Pa.Super. 449, 453, 609 A.2d 837, 839 (1992) (citing *Peoples-Pittsburgh Trust Co. v. Saupp,* 320 Pa. 138, 182 A. 376 (1936)).

Here, Resource does not have an adequate remedy at law. According to the Complaint, the Collateral was used to reduce the amount outstanding under the Second and Third Notes. As such, the Borrowers, not CoreStates, benefitted from any payoff, and counterclaims against CoreStates in the CoreStates-Radnor Litigation are irrelevant. In addition, even if a remedy exists at law in the CoreStates-Radnor Litigation, the settlement of that litigation could preclude any recovery or at least make any available recovery inadequate. Consequently, the Objections based on other equitable relief available are overruled.

In sum, the Complaint presents facts that support a grant of relief based on the doctrine of equitable subrogation. Further, Resource does not have alternative adequate remedies available at law. As a result, the demurrer to Count I of the Amended Complaint is overruled.

II. Objections to the Amended Complaint as a Whole

In its earlier order, this court had overruled the remaining three Objections embodied in the First Set of Preliminary Objections to Count II of the Complaint. However, Movants have resubmitted these same Objections. In the interest of completeness of the record, the Court will briefly explain its reasoning for overruling those remaining Objections.

A. Failure to Join a Necessary Party

Rule 1028(a)(5) [FN18] allows preliminary objections based on nonjoinder of a necessary party, which is defined as one "whose presence, while not indispensable,[FN19] is essential if the Court is to completely resolve the controversy before it and render complete relief." *In re Bishop,* 717 A.2d 1114, 1119 (Pa.Super.Ct.1998) (citation omitted). If jurisdiction over a necessary party cannot be obtained, a court may proceed in the action even in the absence of such a party. *See* Rule 2232(c).

FN18. Pennsylvania Rules of Civil Procedure are referred to individually as "Rules."

FN19. Pennsylvania law defines an "indispensable party" as "one whose rights are so connected with the claims of the litigants that no relief can be granted without impairing or infringing upon those rights." *Hubert v. Greenwald,* 743 A.2d 977, 979-80 (Pa.Super.Ct.1999) (citation omitted). If an indispensable party has not been joined, Rule 1032(b) requires that the party be joined, that the action be transferred to a court having jurisdiction or that the action be dismissed.

***6** The Movants argue that PAID is a necessary party because it is the maker of the Second and Third Notes. However, PAID sold the Property to the Borrowers, and there is no indication that PAID has any interest or obligation under the Notes or Mortgages. In addition, the Objections do not set forth any potential claim any party would have against PAID as a result of improper use of the Collateral or through equitable subrogation. As a result, the Objections on this ground are overruled.[FN20]

FN20. The Movants' argument is further undermined by the fact that PAID is a party to the Confession of Judgment Action, which was consolidated with this matter.

B. Lack of Specificity

Pennsylvania Rule of Civil Procedure

1028(a)(3) permits preliminary objections based on insufficient specificity in a pleading. 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). *See also In re The Barnes Foundation,* 443 Pa.Super. 369, 381, 661 A.2d 889, 895 (1995) ("a pleading should formulate the issues by fully summarizing the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [the] cause of action is based").

Here, the Complaint sets forth the precise details as to when each transaction took place, the parties involved in each transaction and other disputes and settlements related to this action. As a result, the Complaint allows each of the Movants to prepare a defense. This Objection is overruled.

C. Lack of Material Facts

Under Rule 1019(a), a complaint must set forth all material facts. To comply with this Rule, a "complaint must apprise the defendant of the nature and extent of the plaintiff's claim so that the defendant has notice of what the plaintiff intends to prove at trial and may prepare to meet such proof with his own evidence." *Weiss v. Equibank,* 313 Pa.Super. 446, 453, 460 A.2d 271, 274-75 (1983) (citation omitted).[FN21] As stated above, the Complaint does not lack detail and includes all facts necessary to support each of Resource's claims. Accordingly, the Objection based on lack of material facts is overruled.

> FN21. It is often difficult to distinguish between the tests for material facts and sufficient specificity.

CONCLUSION

Each of the Objections to Count I-Equitable Subrogation and the Objections to Count II-Unjust Enrichment are without merit. Accordingly, the Objections are overruled in their entirety.

This court is issuing a contemporaneous Order overruling the Preliminary Objections.

ORDER

AND NOW, this 7th day of November 2000, upon consideration of defendants' Preliminary Objections to the Amended Complaint and plaintiff's response, and all matters of record, and in accord with the Opinion contemporaneously filed, it is hereby ORDERED that the Preliminary Objections are Overruled. The defendants shall file an answer within twenty-two (22) days of this Order.

Pa.Com.Pl.,2000.
Resource Properties XLIV, Inc. v. Philadelphia Authority for Indus. Development
Not Reported in A.2d, 2000 WL 33711060 (Pa.Com.Pl.)

END OF DOCUMENT

Not Reported in N.E.2d, 1989 WL 111447 (Ohio Com.Pl.)
(Cite as: 1989 WL 111447 (Ohio Com.Pl.))

Court of Common Pleas of Ohio, Hamilton County.
Peter E. ROSE, Plaintiff,
v.
A. Bartlett GIAMATTI, et al., Defendants.

No. A8905178.
June 26, 1989.

TEMPORARY RESTRAINING ORDER

NADEL, Judge.

***1** This cause came on to be heard on the Motion of Plaintiff Peter E. Rose ("Pete Rose") for a Temporary Restraining Order and Memorandum in Support thereof, the Complaint and Exhibits thereto, and the verifying affidavit of Robert A. Pitcairn, Jr., the statements of counsel, and evidence presented.

The Court finds based on the information that is presently before the Court, that there is a substantial likelihood of success by the Plaintiff on the merits and that Defendants and persons acting on their behalf, in association with them, or in concert with them have and are about to commit the acts set forth in the Complaint as verified by the Affidavit of Robert A. Pitcairn, Jr. and will, unless enjoined by Order of this Court, continue to do so. Further, the Court finds that Pete Rose will suffer irreparable and harm absent the relief granted herein in that he will be subjected to disciplinary proceedings before a biased, unfair tribunal, on charges that he bet on Baseball, and that in permanent and irreparable damage will be done to his career and reputation. The Court further finds that there is a substantial likelihood that any disciplinary proceedings undertaken against Plaintiff Pete Rose in which Defendant A. Bartlett Giamatti is involved or participates will be conducted with improper prejudice against Pete Rose and will be inherently unfair and in violation of the rules and contracts governing Pete Rose's participation in Major League baseball and the laws of the State of Ohio. The Court concludes that Plaintiff Pete Rose has no adequate remedy at law and that he has shown immediate and irreparable injury, loss, or damage and that as to each item of relief granted hereinafter, the injury inflicted upon Plaintiff Pete Rose by the denial of such relief would be greater than any injury that would be inflicted upon Defendants by the granting of such relief and that the granting of such relief is in the public interest. The Court therefore finds that Plaintiff Pete Rose's Motion for a Temporary Restraining Order is well taken and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants A. Bartlett Giamatti, Major League Baseball, the Cincinnati Reds, and their respective members, officers, agents, servants, employees, attorneys, and all persons in active concert or participation with Defendants are hereby restrained and enjoined for the term of this Order and any extension thereof, directly or indirectly, from:

1. Further involvement in deciding whether plaintiff Pete Rose should be disciplined, banned, suspended, expelled, or declared ineligible from participation in baseball pending resolution of this action;

2. Terminating Plaintiff Pete Rose's employment as Field Manager of the Cincinnati Reds or taking any action to interfere with Pete Rose's employment in that capacity in response to any order, declaration, pronouncement, decree, edict, or decision from Defendants A. Bartlett Giamatti or Major League Baseball, or in response to Plaintiff Pete Rose having filed this action.

***2** IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

A. Plaintiff Pete Rose shall post bond in cash or with adequate surety thereon in the sum of $5,000.00 to recompense Defendants for any damage which they may suffer by reason of the erroneous issuance of this Temporary Restraining Order.

B. This Temporary Restraining Order shall expire fourteen (14) days after its entry unless within that time, for good cause shown, the Order is extended or unless Defendants consent to an extension of the Order.

C. This Court shall conduct a hearing on Plaintiff's request for a preliminary injunction, as demanded in his Complaint, on July 6, 1989, commencing at 10:AM in Court room 519, of the Hamilton County, Ohio Courthouse.

Ohio Com.Pl.,1989.
Rose v. Giamatti
Not Reported in N.E.2d, 1989 WL 111447 (Ohio Com.Pl.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2002 WL 32351171 (E.D.Pa.)
(Cite as: 2002 WL 32351171 (E.D.Pa.))

Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
Antonio D. WATSON, Tony Tix, Inc., Gerald W. Kelly, Just Jerry's, Inc. t/a and d/b/a Scoreboard Restaurant & Tavern, and Robert Kennedy,
Plaintiffs,
v.
ABINGTON TOWNSHIP, Abington Township Police Department, William J. Kelly, Richard L. Kondon, John Parks, and Anthony Ammaturo, Defendants.

No. Civ.A. 01–5501.
Aug. 15, 2002.

George R. Szymanski, Law Offices of George R. Szymanski, Philadelphia, PA, for Plaintiff.

Joseph J. Santarone, Jr., Marshall, Dennehey, Warner, Coleman & Goggin, Norristown, PA, for Defendants.

MEMORANDUM AND ORDER

TUCKER, J.

*1 Presently before this Court is a Motion to Dismiss Plaintiffs' Complaint Pursuant to Fed.R.C.P. 12(b)(6) filed by Defendants Abington Township ("Township"), Abington Township Police Department ("Police Department"), William J. Kelly, Richard L. Kondon, John Parks, and Anthony Ammaturo (collectively, "Defendants") on December 21, 2001. For the reasons set forth below, upon consideration of the Motion to Dismiss (Document No. 3), Plaintiffs' Answer (Document No. 5), and Defendants' Supplemental Memorandum (Document No. 6), the Court grants in part and denies in part Defendants' Motion to Dismiss the Complaint in the above-captioned action.

BACKGROUND

Plaintiff Antonio Watson was the owner of Plaintiff Tony Tix, Inc ., a ticket-selling agency. Plaintiffs allege that Defendants Richard Kondon and John Parks, both police officers for Defendant Police Department, were issued a search warrant for Tony Tix that was based on an affidavit of probable cause prepared and submitted by Kondon and Parks. Plaintiffs allege that Defendants knew at the time that the affidavit contained statements that were false or that were made in reckless disregard for the truth.[FN1] Upon execution of the warrant, Defendants confiscated Plaintiff Tony Tix's receipts, records, computers, other documents, and office equipment. Defendant Kondon arrested Plaintiff Watson pursuant to an arrest warrant and charged Watson with issuing bad checks. The charges against him were eventually dropped.

FN1. Plaintiffs allege, *inter alia,* a civil conspiracy among all defendants. Accordingly, Plaintiffs refer to Defendants collectively throughout the Complaint, even when alleging specific conduct by individual defendants (i.e., "On February 11, 2000, all Defendants, through Defendants Kondon and Parks and other police officers, executed the search warrant...." Pls.' Compl. ¶ 30). The Court will refer to the parties as Plaintiffs referred to them in the Complaint.

Watson operated Tony Tix in a space owned by and leased from Plaintiff Gerald W. Kelly, the owner of Plaintiff Just Jerry's Inc., d/b/a Scoreboard Restaurant & Tavern ("Scoreboard"). Tony Tix and Scoreboard were adjacent to each other. Plaintiffs Kelly and Scoreboard allege that Defendants harassed them because of Kelly's social and professional relationship with Watson, an African American. Plaintiffs allege that Defendants began a systematic practice of sending 15 to 20 uniformed police officers, in marked police cars with flashing lights and without warrants, to Scoreboard for the alleged purpose of investigating underage drinking. During the raids, the police would not allow anyone

to enter or leave Scoreboard, and they would check the ID's of all patrons regardless of their age or appearance. There were eight such raids in the course of three years. Defendants also allegedly instructed police officers to sit outside Scoreboard in marked police cars for up to four hours without any requests or complaints from any citizens, and instructed police officers not to patronize Scoreboard while the officers were off-duty because of Scoreboard's involvement in illegal activities. Plaintiffs allege that Defendants' conduct was a substantial factor in causing Kelly's restaurant to go out of business. Plaintiffs further allege that Defendants have never performed such raids at any other drinking establishment at any time.

Plaintiff Robert Kennedy was the employee of Plaintiffs Watson and Tony Tix, Inc. Kennedy alleges that he was arrested by Defendant Anthony Ammaturo, a police officer for Defendant Police Deptartment, pursuant to an arrest warrant alleging that Kennedy made threats against Defendant Kondon. Plaintiffs allege that Ammaturo knew that Kennedy did not make such threats. While in custody, Kennedy heard one of Defendants' agents say that Kennedy "works for that nigger, Watson." Defendants allegedly told Kennedy that they would drop his charges if he would cooperate with them regarding their investigation into Watson's alleged illegal activities, but Kennedy refused to cooperate. A preliminary hearing against Kennedy was scheduled, but Defendants eventually withdrew the charges.

*2 Plaintiffs' Complaint contains four counts. In Count I, all Plaintiffs allege violations by all Defendants under 42 U.S.C. § 1983 of their Fourth, Fifth, and Fourteenth Amendment rights, and under § 1985 for civil conspiracy. In Count II, all Plaintiffs but Kennedy allege defamation, commercial disparagement, and wrongful interference with economic opportunity against all Defendants. In Count III, Watson and Kelly allege malicious prosecution by all Defendants. In Count IV, all Plaintiffs allege intentional infliction of emotional distress against all Defendants.

LEGAL STANDARD

A rule 12(b)(6) motion should be granted only if the court finds that the plaintiff cannot prove any set of facts which entitle him to relief. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). In making this determination, the court must accept as true all allegations made in the complaint and all reasonable inferences drawn therefrom, and must view these facts and inferences in the light most favorable to the plaintiff. *Rocks v. Philadelphia,* 868 F.2d 644, 645 (3d Cir.1989).

DISCUSSION

Plaintiffs' Complaint contains four counts against Defendants alleging various federal and state causes of action. The Defendants' Motion to Dismiss challenges the sufficiency of each of Plaintiffs' allegations, as well as raising the affirmative defenses of qualified and sovereign immunity. The Court will address the issues in the order they were presented in the Motion to Dismiss.

A. Count I: Deprivation of Federally Protected Rights Under § 1983

Count I of the Complaint alleges violations of 42 U.S.C. § 1983. Section 1983 provides a cause of action for any citizen who has been deprived of any federal right by a person acting under color of state law. 42 U.S.C. § 1983. To properly state a claim under § 1983, a plaintiff must allege (1) that he was deprived of a federally protected right, and (2) that the deprivation was committed by a state actor. *Lake v. Arnold,* 112 F.3d 682, 689 (3d Cir.1997).

The Court finds that Plaintiffs have sufficiently plead that all defendants were state actors in satisfaction of the second requirement of a § 1983 claim. All plaintiffs allege that they were deprived of their rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the Constitution. The Court will discuss the first element in relation to each Amendment for each of the plaintiffs.

1. *Fourth Amendment*

To properly state a claim under the Fourth Amendment, a plaintiff must allege that (1) defendant's conduct constituted a search or seizure, and (2) that such conduct was unreasonable. *Brower v. County of Inyo,* 489 U.S. 593, 599, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989).

a. *Search or Seizure*

In support of the first element of a Fourth Amendment claim, Plaintiff Tony Tix alleges that it was searched by Defendants Kondon and Parks and that, during the search, various items were seized. Pls.' Compl. ¶ 30. Plaintiffs Watson and Kennedy allege that they were arrested by Defendants. *Id.* ¶ 32. Plaintiff Scoreboard alleges that Defendants entered Scoreboard for the alleged purpose of investigating underage drinking. *Id.* ¶ 54. Plaintiff Kelly alleges that during these investigations, no one was allowed to enter or leave Scoreboard. *Id.* ¶ 55. Furthermore, Defendants do not argue that their conduct did not constitute a search or seizure of each plaintiff, but that the searches and/or seizures were reasonable. The Court finds that Plaintiffs have sufficiently plead that each plaintiff, except for Plaintiff Kelly, was either searched or seized. The Court also finds that an inference may be drawn that Plaintiff Kelly was present in Scoreboard during one or more of the police investigations of Scoreboard, and Kelly was not allowed to leave Scoreboard during such raids. Therefore, the Court concludes that Plaintiff Kelly was seized for purposes of the Fourth Amendment.

b. *Unreasonableness*

***3** In support of the second element of a Fourth Amendment claim, Plaintiffs argue that the above-mentioned searches and seizures were unreasonable. Plaintiffs Watson, Tony Tix, and Kennedy argue that the warrants used against them were invalid. Plaintiffs Kelly and Scoreboard also argue that the searches of Scoreboard and seizure of Kelly were performed without warrants. Defendants argue that the searches or seizures conducted against each plaintiff were reasonable because the police acted pursuant to valid search and arrest warrants or, in the absence of such warrants, that the police acted in accordance with a recognized exception to the warrant requirement.

i. *Plaintiffs Watson, Tony Tix, and Kennedy: Invalid Warrants*

Plaintiffs allege that Defendants either knowingly made false statements when submitting their warrant affidavits or that Defendants acted in reckless disregard as to the truth of those statements. Plaintiffs cite *Lippay v. Christos,* 996 F.2d 1490 (3d Cir.1993), for the proposition that the subject of a search conducted pursuant to such a tainted search warrant may recover damages under § 1983. FN2 Plaintiffs state only half of the rule, however, which is that to successfully challenge the validity of a warrant, a plaintiff must show (1) that the affiant knowingly or with reckless disregard for the truth made false statements in the warrant affidavit, and (2) that such statements are necessary to the finding of probable cause. *Sherwood v. Mulvihill,* 113 F.3d 396, 399 (3d Cir.1997) (citing *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)).

> FN2. In *Lippay,* arrestee filed a § 1983 suit against a narcotics agent following his arrest on drug charges. The district court denied agent's motion for judgment as a matter of law, and the jury found in favor of arrestee on his Fourth Amendment unreasonable seizure claim, which challenged the warrant affidavits prepared by the agent leading to the arrest. On appeal, the Third Circuit reversed and remanded, finding that some of the evidence admitted by the district court was hearsay. In addressing whether to reverse the denial of agent's motion for judgment as a matter of law, the court noted that "[i]n order to prevail on this claim, Lippay needed to satisfy the test enunciated in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) which requires a showing that the

> maker of the affidavit either stated a deliberate falsehood or acted with a reckless disregard for the truth." *Lippay,* 996 F.2d at 1501. The *Lippay* court did not state the second part of the *Franks* test (*see infra* discussion of *Sherwood v. Mulvihill,* 113 F.3d 396, 399 (3d Cir.1997) in text following this note) because that issue was not raised on appeal.

Plaintiffs Watson and Tony Tix allege that Defendants Kondon and Parks, at the time they submitted their affidavit of probable cause to search Plaintiff Tony Tix, knew that statements in the affidavit were false or were made in reckless disregard for the truth. Pls.' Compl. ¶ 28. Plaintiff Watson alleges that the warrant for his arrest was based in part on the same statements submitted in the above-mentioned search warrant for Tony Tix. *Id.* ¶ 32. Plaintiff Kennedy alleges that Defendant Ammaturo, in obtaining a warrant to arrest Kennedy for making threats against Defendant Kondon, made false statements about the alleged threats or was reckless in determining whether such threats were actually made. *Id.* ¶ 81. Therefore, the Court concludes that Plaintiffs Watson, Tony Tix, and Kennedy have met the first element of the *Franks* test.

Plaintiffs, however, have failed to allege that the false statements were necessary for the issuance of the warrants. In other words, Plaintiffs do not allege that the warrant affidavits, minus the false statements, would not support a finding of probable cause. On the other hand, although it is not entirely clear from the Complaint, Plaintiffs seem to allege that *all* of the statements in the warrant affidavits were false or were made in reckless disregard for the truth. An inference may be drawn that if all of the false statements in the affidavits must be disregarded, and all of the statements were in fact false, then there would be nothing left in the affidavits and there could be no probable cause. The Court must view all inferences in favor of the Plaintiffs. *Rocks,* 868 F.2d at 645. Therefore, the Court will not dismiss the Fourth Amendment claims of Plaintiffs Watson, Tony Tix, and Kennedy.

ii. *Plaintiffs Kelly and Scoreboard: Warrantless Search and Seizure*

*4 Plaintiffs Kelly and Scoreboard allege that the search of Scoreboard was unreasonable because Defendants entered Scoreboard without a warrant. Pls.' Compl. ¶ 54. The Supreme Court, however, has held that warrantless searches of commercial property are not per se unreasonable. *New York v. Burger,* 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). In *Burger,* the Supreme Court recognized that the necessity for a warrant to search commercial premises is lower than the necessity for a warrant to search one's home because one has a lower expectation of privacy in commercial premises. *Id.* at 700. The Court held that one's expectation of privacy, and the corresponding necessity for a search warrant, is lower still when commercial property is employed in a closely-regulated industry such as the alcohol-serving industry. *Id.* FN3

> FN3. Additionally, the Supreme Court has established a three-part test for determining the reasonableness of a regulatory scheme that allows such warrantless searches. *Burger,* 482 U.S. at 702–703. However, Plaintiffs in the instant matter do not challenge the regulatory scheme in question and therefore the Court will not address the elements of that test.

Here, Defendants argue that the searches of Scoreboard were conducted at the direction of the Liquor Control Board ("LCB"), and the searches were reasonable. In Pennsylvania, the LCB "may inspect the entire licensee's premises during business hours, and cite a licensee for any violation of the Liquor Code or any law of the Commonwealth." *In re Catering Club Liquor License Issued to Fulton Post, Inc.,* 63 Pa.Cmwlth. 313, 438 A.2d 662, 663 (Pa.Cmmw.1981). Furthermore, "the uniqueness of the liquor industry, the pervasiveness of government regulation found in this industry,

and the broad powers granted to states to regulate the industry under the U.S. Constitution justify warrantless searches of premises serving alcohol." *Id.* at 664.

Plaintiffs in the instant case do not challenge the reasonableness of the regulatory scheme permitting the LCB to conduct warrantless searches. Plaintiffs do not allege that Defendants lacked probable cause to search Scoreboard or that their seizure of its patrons was unreasonable. All that Plaintiffs allege is that Defendants searched Scoreboard without a warrant, which, by itself, is not enough to establish an unreasonable search in these circumstances. Therefore, the Court finds that Plaintiffs Kelly and Scoreboard have not alleged sufficient facts, which if proved, would establish an unlawful search or seizure. Accordingly, the Court will dismiss the Fourth Amendment claims of Plaintiffs Kelly and Scoreboard.

2. *Fifth Amendment*

Plaintiffs' Complaint does not specify under which clause of the Fifth Amendment they are seeking relief, although they assert in their Answer to Defendants' Motion to Dismiss that they are claiming a violation of the Takings Clause. In response, Defendants filed a Supplemental Memorandum of Law in Support of Their Motion to Dismiss arguing that Count I of Plaintiffs' Complaint does not allege a Takings Clause violation. Defendants further argue that any property seized by Defendants was a direct result of a criminal investigation and pursuant to valid search warrants.

The Court finds little case law and none in the Third Circuit addressing whether the seizure of property pursuant to a criminal investigation is considered a "taking" for Fifth Amendment purposes. The Fifth Circuit has held that the "[Fifth] [A]mendment's prohibition against the confiscation of property by the government without just compensation is not implicated by the legal seizure of property pursuant to a criminal investigation." *Dickens v. Lewis,* 750 F.2d 1251, 1255 (5th Cir.1984) (citing no authority in support of the stated proposition). Such a rule does not address Plaintiffs' contention that the confiscation of property from Tony Tix was an illegal seizure because the search warrants that permitted the seizure were invalid. The United States Claims Court, however, has held that:

> *5 A taking within the meaning of the Fifth Amendment occurs when the rightful property, contract or regulatory powers of the government are employed to control rights or property which have not been purchased. No taking claim arises when rights or property have been impaired through unlawful government action. A seizure without probable cause would not be a proper exercise of the government's regulatory power. Therefore, if the DEA did not have probable cause for the seizure, plaintiffs could not sustain a Fifth Amendment taking claim.

Golder v. U.S., 15 Cl.Ct. 513 (Cl.Ct.1988). Under this rule, whether Defendants conduct was lawful or not, Plaintiffs do not have a claim under the Takings Clause. Finally, the Takings Clause itself reads, "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Plaintiffs do not allege that Defendants took Plaintiffs' property for public use. Therefore, the Court will dismiss all Plaintiffs' claims under the Fifth Amendment.

3. *Fourteenth Amendment*

Plaintiffs final claim under § 1983 is that, by allegedly approving and enforcing a policy of depriving Plaintiffs of their civil rights, Defendants Township, Police Department, and Police Chief William Kelly (collectively, "policy-making Defendants") violated the Fourteenth Amendment's guarantee that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV, § 1. A cause of action exists for municipal liability when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's of-

ficers." *Monell v. Department of Social Services,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Moreover, "local governments ... may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690–691. In other words, in order to state a claim for municipal liability under the Fourteenth Amendment, Plaintiffs must allege that the policy-making Defendants adopted and enforced a policy or custom, and that the police violated Plaintiffs' rights while acting pursuant to that policy or custom.

Defendants reassert that Plaintiffs have not suffered any constitutional injuries, and as a result, there can be no municipal liability. In the alternative, Defendants argue that neither the Township nor the Police Department possessed any policy authorizing the violation of constitutional rights by police officers, and that Plaintiffs have failed to allege any particular practice or policy that condones such behavior. On the other hand, Plaintiffs allege that there was an unspoken custom or policy within the Township or Police Department of depriving Plaintiffs of their rights. Plaintiffs assert that the existence of custom may be established by proving that a policy-maker acquiesced to the unlawful conduct of his employees, and the Court agrees. *Fletcher v. O'Donnell,* 867 F.2d 791, 793 (3d Cir.1989). In order for a municipality to acquiesce or approve of a police practice, they must first have actual or constructive knowledge of the practice. *Colburn v. Upper Darby Township,* 838 F.2d 663, 672 (3d Cir.1988).

*6 Here, Plaintiffs allege that prior to 1998, all Defendants began a systematic practice of discriminating against African–American citizens. Pls.' Compl. ¶ 20. To support this allegation, Plaintiffs allege that Plaintiff Watson was the only African–American operating a business in the Township during the alleged events. *Id.* ¶ 22. Plaintiff Kelly alleges that prior to the time he began leasing space to Plaintiff Watson, Scoreboard was raided by the police once, and that after Plaintiff Watson began operating Tony Tix in that space, the Scoreboard was allegedly raided eight times in three years. *Id.* ¶ 59. Plaintiffs also allege that Defendants have never raided any other establishment at any time in the Township. *Id.* ¶ 61. Finally, Plaintiffs allege that Defendants have never stationed marked cop cars directly outside of any other establishment in the Township, unless requested to do so by citizens. *Id.* ¶ 65. Plaintiffs assert that the police officers' unconstitutional conduct was so widespread and ongoing that it could not have been carried out without the knowledge and tacit approval of the policy-making Defendants.

The Court finds that Plaintiffs have sufficiently plead that the policy-making defendants adopted and enforced a policy or custom of discriminating against African Americans, and that Plaintiffs properly alleged that their rights were violated by police officers acting pursuant to that policy or custom. Therefore, the Court will not dismiss Plaintiffs' Fourteenth Amendment claims.

B. Count I: Civil Conspiracy Under § 1985

Plaintiffs also allege in Count I that all Defendants took part in a civil conspiracy to deprive Plaintiffs of their rights in violation of § 1985(3). In order to state a valid claim under this section, a plaintiff must allege "(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive ... any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to the person ... or the deprivation of any right or privilege of a citizen of the United States." *Lake v. Arnold,* 112 F.3d 682, 685 (3d Cir.1997). In Defendants' Motion to Dismiss, they only assert that Plaintiffs have failed to properly allege a class-based animus. The Court finds that Defendants have conceded that Plaintiffs sufficiently plead the remaining elements and the Court will not address them.

Here, Plaintiff Watson alleges that all Defend-

ants conspired to deprive him of his rights because of his race, and that the policy-making defendants approved and enforced a policy that deprived Watson, Kelly, and Kennedy of their rights. Defendants argue, however, that Plaintiffs Kelly and Kennedy are white and they are not members of a protected class entitled to relief under § 1985. Defendants argue that for Kelly and Kennedy to have a cause of action under § 1985, they must allege that there was a conspiracy motivated by animus towards a class of persons of which Kelly and Kennedy are members.

*7 Section 1985(3) provides relief for anyone "injured in his person or property, or deprived of ... any right or privilege" by someone acting in furtherance of a proscribed conspiracy. If the conspiracy is proscribed, i.e. is motivated by a class-based discriminatory animus, then anyone injured by that conspiracy, whether a member of the class or not, may bring a suit under § 1985(3). *Novotny v. Great American Federal Savings & Loan Association,* 584 F.2d 1235, 1245 (3d Cir.1978), *vacated on other grounds,* 442 U.S. 366, 995 S.Ct. 2345, 60 L.Ed.2d 957 (1979). The Court finds that Plaintiffs Watson, Kelly, and Kennedy have sufficiently plead that there was a conspiracy that deprived them of their civil rights, and that the conspiracy was motivated by animus towards African Americans. Therefore, the Court will not dismiss the § 1985(3) claims of Plaintiffs Watson, Kelly, and Kennedy.

C. Affirmative Defense: Qualified Immunity

Defendants raise the affirmative defense of qualified immunity in their Motion to Dismiss. Government officials, including the police, are immune from being sued "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *McLaughlin v. Watson,* 271 F.3d 566, 570 (3d Cir.2001) (quoting *Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). At the motion to dismiss stage, a plaintiff must allege, in order to defeat a defendant's assertion of qualified immunity, that the official violated a clearly established right. *Id.* At 570–571. The first step is to determine whether the plaintiff asserted a violation of a constitutional right, and the second step is to examine whether that right was clearly established. *Id.* at 571. Importantly, "the essential inquiry is whether a reasonable official in the defendant's position at the relevant time could have believed, in light of clearly established law, that his conduct comported with established legal standards." *Id.*

Defendants do not address either element of this two-step test in their Motion to Dismiss. Instead they argue that their conduct was reasonable because they were acting pursuant to lawfully-obtained warrants. Plaintiffs argue that the allegations in the Complaint satisfy the *McLaughlin* standard. The Court has found that Plaintiffs Watson, Tony Tix, and Kennedy sufficiently alleged violations of their constitutional rights under the Fourth Amendment, and that all plaintiffs alleged violations of their Fourteenth Amendment rights. Furthermore, Plaintiffs have a clearly established right to be free from unlawful searches and seizures. A police officer would not have believed that falsifying a warrant affidavit, as Plaintiffs allege all Defendants were involved with in the instant case, comported with established legal standards. The same holds true of Defendants Township's and Police Department's alleged institution of and/or acquiescence to a policy of racial discrimination. Therefore, the Court finds that Plaintiffs have met the *McLaughlin* standard for rebutting the Defendants' assertion of qualified immunity at this stage of the proceedings. Thus, the Court will not dismiss Plaintiffs' claims against Defendants on the grounds that Defendants have qualified immunity.

D. Count II: Defamation, Commercial Disparagement, and Wrongful Interference with Economic Opportunity

***8** In Plaintiffs' Answer to Defendants' Motion to Dismiss, Plaintiffs concede that their defamation claim is barred by the statute of limitations, but they renew their remaining causes of action under

Count II of the Complaint.[FN4] To state a claim of commercial disparagement, Plaintiffs must allege that: (1) Defendants published a false and disparaging statement concerning Plaintiffs' businesses, (2) Defendants' intent was to cause Plaintiffs pecuniary loss, or that Defendants reasonably should have known that publication would cause Plaintiffs pecuniary loss, (3) actual pecuniary loss by Plaintiffs, and (4) that Defendants knew that the statement was false or acted in reckless disregard to its truth. *Pro Golf Manufacturing, Inc. v. Tribune Review Newspaper Co.* ., 761 A.2d 553, 555–56 (Pa.Super.2000).

> FN4. The Court will dismiss Plaintiffs' defamation claim. The remaining two causes of action in Count II, commercial disparagement and wrongful interference with economic opportunity, are the same cause of action called by two different names. *See Pro Golf Manufacturing, Inc. v. Tribune Review Newspaper Co.*, 761 A.2d 553, 555 (Pa.Super.2000). The Court will treat the two claims as one.

Defendants only argument is that the alleged statements made by Defendants were not false, and that Plaintiffs have not demonstrated that Defendants intended to cause pecuniary loss or reasonably should have recognized that pecuniary loss would result. The truth or falsity of the statements and the intent of the Defendants, however, are factual issues. When deciding a 12(b)(6) motion, the Court must accept as true all factual allegations made in the complaint. *Rocks v. Philadelphia,* 868 F.2d 644, 645 (3d Cir.1989).

Plaintiffs allege that the statements made by Defendants Kondon, Parks, and Ammaturo in their warrant affidavits were false. Pl.'s Compl. ¶ 28. Plaintiffs also allege that Defendant Police Department falsely communicated to its police officers that the Scoreboard was involved in illegal activities, and that the Township's officers should not patronize Scoreboard while off-duty. *Id.* ¶ 69. Plaintiffs further allege that Defendants knew that all of these statements were false but made them anyway with the intent to harm Plaintiffs, and that the Defendants knew that the false statements would result in pecuniary loss to the Plaintiffs. *Id.* ¶ 115. Viewed in a light most favorable to the Plaintiffs, the Court finds that Plaintiffs have sufficiently plead that all defendants wrongfully interfered with their economic opportunity. Therefore, Plaintiffs' claim of commercial disparagement against all defendants will not be dismissed.

E. Count III: Malicious Prosecution

Plaintiffs Kennedy and Watson allege that they were the subjects of malicious prosecution at the hands of all Defendants. To state a claim for malicious prosecution, a plaintiff must allege that (1) the defendant instituted proceedings against the plaintiff, (2) without probable cause, (3) with malice, and (4) the proceedings must have terminated in the plaintiff's favor. *McKibben v. Schmotzer,* 700 A.2d 484, 492 (Pa.Super.1997).

Defendants cite *Montgomery v. DeSimone,* 159 F.3d 120 (3d Cir.1998), for the proposition that police officers are generally not liable for malicious prosecution because they do not actually prosecute criminal cases. This Court does not agree with Defendants' interpretation of *Montgomery* that police officers are generally immune from malicious prosecution claims. The Third Circuit did not state or allude to that proposition in its *Montgomery* decision, but the Court held instead that an overturned municipal conviction does not presumptively establish probable cause in a malicious prosecution case.[FN5]

> FN5. In *Montgomery,* defendant arrested plaintiff for driving while intoxicated. The municipal court judge found that defendant had probable cause for the stop and the arrest and found plaintiff guilty. Plaintiff appealed and a trial was held *de novo* in the Superior Court of New Jersey. The court reversed plaintiff's conviction, and plaintiff subsequently filed a malicious prosecution claim against defendant. The district court

> granted summary judgment to defendant, and held that plaintiff's malicious prosecution claim was barred as a matter of law because the municipal judge had reasonably determined that probable cause existed for the arrest. The Third Circuit reversed and held that an overturned municipal conviction does not presumptively establish probable cause. *Montgomery,* 159 F.3d at 125–126 The court remanded the case to district court with instructions that the issue of probable cause was a question for the jury.

***9** Here, Plaintiffs Watson and Kelly allege that Defendants instituted proceedings against them when Defendants arrested Watson and Kelly and charged them with various crimes. Pl.'s Compl. ¶¶ 33–35, 86–87. Plaintiffs also allege that Defendants did not have probable cause and that Defendants acted with malice. *Id.* ¶¶ 28, 81, 118. Furthermore, Plaintiffs allege that all charges against them were eventually dropped. *Id.* ¶¶ 36, 89. The Court finds that Plaintiffs Watson and Kelly have sufficiently alleged a cause of action for malicious prosecution and the Court will not dismiss the claim.

F. Count IV: Intentional Infliction of Emotional Distress

Defendants initially argue that the tort of intentional infliction of emotional distress is not recognized in Pennsylvania, citing *Taylor v. Albert Einstein Medical Center,* 562 Pa. 176, 754 A.2d 650, 652 (Pa.2000) ("we have never expressly recognized a cause of action for intentional infliction of emotional distress ..."). Plaintiffs counter argument is that the Pennsylvania Supreme Court in *Taylor,* after acknowledging that they had never expressly recognized the tort of intentional infliction of emotional distress, held that, "[W]e have cited the [Restatement (Second) of Torts] section [46(2)] as setting forth the minimum elements necessary to sustain such a cause of action." *Taylor,* 754 A.2d at 652. Furthermore, "the third circuit has confronted this question ... and has repeatedly held that Pennsylvania does recognize the tort, in spite of 'speculation' to the contrary." *Weinstein v. Bullick,* 827 F.Supp. 1193, 1203 (E.D.Pa.1993) (citing *Silver v. Mendel,* 894 F.2d 598, 606 (3d Cir.1990)). To state a claim for intentional infliction of emotional distress, a plaintiff must allege (1) extreme and outrageous conduct by the defendant, (2) that is intentional or reckless, (3) that causes emotional distress, and (4) that the emotional distress is severe. *Id.* The Court finds that Plaintiffs have sufficiently alleged a cause of action for intentional infliction of emotional distress.[FN6]

> FN6. Plaintiffs alleged each of the necessary elements to establish a cause of action for intentional infliction of emotional distress in their Complaint. *See* Pls.' Compl. ¶¶ 121–126.

G. Affirmative Defense: Sovereign Immunity

Defendants argue in the alternative that Plaintiffs' claim for intentional infliction of emotional distress, along with their other state law claims, are barred by Pennsylvania's sovereign immunity statute. Plaintiffs' response is that Defendants lost their immunity because their actions amounted to willful misconduct.

Pennsylvania law states: "Except 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 ..." 42 Pa.C.S. § 8541. Under § 8541, Defendants Township and Police Department are shielded from liability unless one of the exceptions listed in § 8542 applies .[FN7] As for Defendants Kelly, Kondon, Parks, and Ammaturo, § 8545 states that "an employee of a local agency is liable for ... any injury ... caused by acts of the employee ... only to the same extent as his employing agency and subject to the limitations imposed by this subchapter." Under this statute, the Defendants Kelly, Kondon, Parks, and Ammaturo are liable only to the extent that the Police Department is liable. However, § 8550 creates an exception to § 8545 when the act of the employee that

caused the injury "constituted a crime, actual fraud, actual malice, or willful misconduct." Plaintiffs argue that Defendants Kelly, Kondon, Parks, and Ammaturo are not immune from any of Plaintiffs' state law claims because each of those claims, including intentional infliction of emotional distress, involves allegations that Defendants acted willfully or with malice.

> FN7. Section 8542 imposes liability on a local agency for damages arising from injuries caused by any of eight enumerated acts, none of which are implicated in the instant matter.

***10** The Court finds that Plaintiffs have sufficiently raised the issue of Defendants' intent. Therefore, Defendants Kelly, Kondon, Parks, and Ammaturo are within the § 8550 exception to sovereign immunity. Thus, Plaintiffs' claim for intentional infliction of emotional distress, along with their other state law claims against Defendants Kelly, Kondon, Parks, and Ammaturo will not be dismissed. However, all of Plaintiffs' state law claims are barred against the Township and Police Department by § 8541. Therefore, the Court will dismiss all state law claims against Defendants Township and Police Department.[FN8]

> FN8. Plaintiffs' state law claims include commercial disparagement, malicious prosecution, and intentional infliction of emotional distress.

H. Punitive Damages

Defendants also argue that Plaintiffs' request for punitive damages should be dismissed. In a § 1983 suit, punitive damages may not be awarded against a municipality, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), or against an officer of a municipality being sued in his official capacity. *Gregory v. Chehi*, 843 F.2d 111, 120 (3d Cir.1988). Therefore, the Court will dismiss Plaintiffs' request for punitive damages related to their § 1983 claims against Defendants Township and Police Department, as well as Defendants Kelly, Kondon, Parks, and Ammaturo in their official capacities as police officers. However, the Court will not dismiss Plaintiffs' request for punitive damages against the officers in their individual capacities.

CONCLUSION

For the reasons stated above, the Court will grant Defendants' Motion to Dismiss Plaintiffs', Kelly and Scoreboard, Fourth Amendment claims, all Plaintiffs' Fifth Amendment claims, all Plaintiffs' defamation claims, all Plaintiffs' state law claims against Defendants Township and Police Department, and all Plaintiffs' request for punitive damages in their § 1983 claims against Defendants Township, Police Department, Kelly, Kondon, Parks, and Ammaturo in their official capacities. The Court will deny Defendants' Motion to Dismiss as to all other claims.[FN9]

> FN9. The remaining claims are all plaintiffs' Fourteenth Amendment claims against all defendants, the Fourth Amendment claims of Plaintiffs Watson, Tony Tix, and Kennedy against all defendants, and all plaintiffs' state law claims (see *supra* note 8) against Defendants Kelly, Kondon, Parks, and Ammaturo.

ORDER

AND NOW, this 12th day of August 2002, upon consideration of Defendants' Motion to Dismiss (Doc. 3) and Plaintiff's Response thereto (Doc. 5), IT IS HEREBY ORDERED and DECREED that Defendants' Motion is GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that:

1. Defendants' Motion to Dismiss Plaintiffs', Kelly and Scoreboard, Fourth Amendment claims is GRANTED.

2. Defendants' Motion to Dismiss Plaintiffs' Fifth Amendment claims is GRANTED.

3. Defendants' Motion to Dismiss Plaintiffs' De-

famation Claims is GRANTED.

4. Defendants', Abington Township and Abington Police Department, Motion to Dismiss Plaintiffs' State law claims, Commercial Disparagement, Malicious Prosecution, and Intentional Infliction of Emotional Distress, is GRANTED.

5. Defendants' Motion to Dismiss Plaintiffs' Request for Punitive Damages in their Section 1983 claims against Defendants, Abington Township, Abington Police Department, William J. Kelly, Richard L. Kondon, John Parks, and Anthony Ammaturo, in their official capacities is GRANTED. Plaintiffs' Request for Punitive Damages in their Section 1983 claims remains against Defendants, William J. Kelly, Richard L. Kondon, John Parks, and Anthony Ammaturo in their individual capacities.

*11 6. Defendants' Motion to Dismiss Plaintiffs' Fourteenth Amendment claims is DENIED.

7. Defendants' Motion to Dismiss Plaintiffs', Antonio D. Watson, Tony Tix, Inc., and Robert Kennedy, Fourth Amendment claims is DENIED.

8. Defendants', William J. Kelly, Richard L. Kondon, John Parks, and Anthony Ammaturo Motion to Dismiss Plaintiffs' State law claims, Commercial Disparagement, Malicious Prosecution, and Intentional Infliction of Emotional Distress, is DENIED.

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Not Reported in F.Supp.2d, 2002 WL 32351171 (E.D.Pa.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has on this date been forwarded to the individuals listed below as addressed, by first class mail:

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