UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN HARRIS	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 13-CV-3937
	:	
SAINT JOSEPH'S UNIVERSITY	:	
and	:	
JOSEPH KALIN	:	
and	:	
JANE DOE	:	
	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF OPPOSITION TO MOTION OF DEFENDANTS, SAINT JOSPEH'S UNIVERSITY AND JOSEPH KALIN, TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Plaintiff, Brian Harris, hereby submits this memorandum of law in support of his opposition to the motion of Defendants, Saint Joseph's University ("SJU") and Joseph Kalin ("Kalin") (collectively, "Moving Defendants"), to dismiss Plaintiff's Amended Complaint (the "SJU Motion") (Document 23).

I. PRELIMINARY STATEMENT

At issue is not the feigned soiled reputation of Defendant, Jane Doe ("Doe"), but of the wrongfully stigmatized Plaintiff, Brian Harris ("Harris"), who was expressly invited by Doe to her dormitory room for consensual sexual frolic. However, following a sudden, albeit, wholly unexpected and unwarranted change of version, Harris was found "guilty" of sexual assault by an ill-trained gender biased tribunal, strictly guided by SJU to uphold its flawed policies and procedures. Harris was undoubtedly victimized by a miscarriage of so called "justice," at minimum, deprived of the fundamental right to confront his accuser. The instant action is hardly an attempt to relitigate a resolved issue, shielded by what St. Joe blindly views as a sanctioned "internal administrative disciplinary process," but a legal challenge of a breached agreement (express or implied) between a student and a University, and, notably, a violation of SJU's implied duty of good faith. For the reasons set forth below, the SJU Motion must be denied.

II. COUNTERSTATEMENT OF FACTS

At all relevant times, Harris was a matriculated student at SJU, commencing his freshman year on August 25, 2012 (Amended Complaint, ¶11). Harris, as were all SJU students, was issued the 2012/2013 Hawk Year Student Handbook/Planner (the "Handbook")[1] detailing, *inter alia*, expected student standards of conduct, and policies and procedures for investigating and adjudicating student complaints (Amended Complaint, ¶44). The Handbook defines and precludes sexual offenses[2] (Amended Complaint, ¶45). Allegations of sexual misconduct between students are resolved through a Community Standards process, initiated when an

[1] A copy of the Handbook is attached to the SJU Motion as Exhibit "A."

[2] Such offenses include rape, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault and indecent exposure (Amended Complaint, ¶45).

incident report or a written complaint is submitted to the Office of Community Standards (Amended Complaint, ¶¶47-48). Claims of sexual offense are resolved by an Administrative Chair Officer or by the Community Standards Board ("CSB"), the latter, a 17-person assembly of students, faculty members and administrators which assigns a 5-member CSB panel (the "Panel") to "adjudicate" the claim (Amended Complaint, ¶¶49, 51).[3]

Following the commencement of the Fall, 2012 semester, Harris and Doe became acquainted, Harris later learning Doe "liked him" (Amended Complaint, ¶¶12, 14). During the evening hours of November 16, 2012, Harris and Doe commenced an exchange of text messages,[4] including Doe's inviting Harris to come to her dormitory room to "cuddle" [5] with her (Amended Complaint, ¶¶19-20, 26). Doe wrote she was a "good cuddler" (Amended Complaint, ¶22) and "asked Harris if he was a 'gooood cuddler,' adding o's to the word 'good' intimating great or very good" (Amended Complaint, ¶23). Doe also asked Harris to sleep in her room and arranged for Harris' entrance into Doe's dormitory building (Amended Complaint, ¶¶27-29). At Doe's solicitation, without any force, duress or intimidation on Harris' part, Doe and Harris began kissing and engaging in foreplay. They removed their clothing and freely and voluntarily, with mutual consent, had sexual intercourse (Amended Complaint, ¶¶30, 32). "At no time did Doe ask, or demand, that Harris leave her dormitory room; at no time did Doe tell Harris she did not want to engage in sexual intercourse with him" (Amended Complaint, ¶33). Following their consensual lovemaking, Doe briefly left her room to go to the

[3] A detailed explanation of the Community Standards process, including the reporting of the complaint, defining of the accused, the hearing procedure and presentation of evidence is more particularly set forth in ¶¶44 through 66 of the Amended Complaint.

[4] A copy of the transcript of the text messages is attached to the Amended Complaint as Exhibit "A."

[5] As alleged, the terms "cuddle" or "cuddling" are synonymous with, *inter alia*, "sex" or "having sex" (Amended Complaint, ¶21).

bathroom, returning, within 3 to 4 minutes later, to bed with Harris, embracing him as they slept into the morning hours of November 17, 2012 (Amended Complaint, ¶¶34-35). Upon the arrival of Doe's roommate, Harris left Doe's dormitory room without incident (Amended Complaint, ¶36).

Later that day, Harris was informed by a SJU Resident Area Manager that he (Harris) "was being investigated and, possibly, accused of non-consensual sexual relations with Doe," an accusation Harris found unfathomable under the circumstances (Amended Complaint, ¶37). Kalin was assigned by SJU to investigate Doe's claim and on November 19, 2012, Kalin met with Harris regarding same. Kalin's interviewing techniques were aggressive and accusatorial, demonstrating unwarranted personal animus towards Harris, in one instance comparing Harris to "Jerry Sandusky" and feigning concern that Harris would retaliate against him (Amended Complaint, ¶¶38-39). During the investigation Harris first learned that when Doe went to the bathroom she saw another female student, O.T.,[6] allegedly telling her that Doe "had been intimidated into having sex with a male, identified by a name other than Harris" (Amended Complaint, ¶41). Although Doe was either unwilling or disinterested in reporting the incident, O.T. insisted she do so, threatening to report the incident on Doe's behalf if Doe did not (Amended Complaint, ¶41).

An investigation report (the "report"), allegedly detailing the incident including the respective versions of both Doe and Harris, was prepared by Kalin, the report including a charge against Harris for forcible rape. The report was shown to Harris at a prehearing conference during which Harris was afforded limited time within which to review same, innocently believing his account of the incident was accurately recorded based upon his

[6] Per stipulation of counsel, the individual is identified as "O.T." in the Amended Complaint (Amended Complaint, ¶40).

interview with Kalin (Amended Complaint, ¶67). Although the Handbook reads the completed and final report was to be shown to the accused prior to the Panel hearing held on December 4, 2012,[7] a supplemental report, including additional comments from other students, was given to Harris at the hearing (Amended Complaint, ¶67). During the hearing, Doe and Harris were separately, and privately, questioned, Harris denied any opportunity to confront Doe "despite the glaring evidence contradicting Doe's baseless accusations" (Amended Complaint, ¶68).[8] Critically, the text messages, "earlier provided but purposely omitted by Kalin," were not presented to the Panel (Amended Complaint, ¶69). Following the hearing, Harris was found guilty of disrespecting another student and sexual assault, and was summarily suspended by SJU (Amended Complaint, ¶70). Harris timely filed an appeal, challenging the Panel's findings "as against a great weight of the evidence, and the Panel's failure to review the text messages which, on their face, contradicted Doe's baseless accusations of involuntary sexual conduct" (Amended Complaint, ¶71).[9] On or about January 11, 2013, the appeal board, "finding the text messages were critical to the investigation and, thus, necessary evidence, remanded the matter to the Panel for further consideration" (Amended Complaint, ¶75). On or about January 18, 2013, a second hearing was held during which the text messages were presented; both Harris and Doe, again separately, were questioned concerning same (Amended Complaint, ¶¶76-77).

---

[7] A Community Standards board hearing was held before 5 panelists, identified in ¶68 of the Amended Complaint.

[8] As discussed, *infra*, SJU and Kalin, in part, rely upon a letter dated April 4, 2011, authored by Russlynn Ali ("Ali"), Assistant Secretary for Civil Rights, United States Department of Education, commonly known as the "Dear Colleague" letter, a copy of which is attached to the SJU Motion as Exhibit "B," in support of their contention that an accused is not entitled to confront his accuser. The Dear Colleague letter is not a proper ratification of existing law. See, *amicus curiae* brief of Foundation for Individual Rights in Education ("FIRE") (the "*amicus curiae* brief") to be filed in this action.

[9] During the pendency of the appeal, Harris completed his Fall semester, went home (to New York) for the winter break, and delayed his return to SJU given the uncertainty of his status. He was subsequently permitted to commence his Spring semester, subject to onerous restrictions which were later removed, allowing Harris to return to his dormitory room, attend classes and participate in campus activities (Amended Complaint, ¶¶72-74).

Notwithstanding the clear exculpatory nature of the text messages, the Panel, influenced by SJU's gender bias, and reluctance to allow the Panel to change its position, renewed the conviction; consequently, Harris was unfairly stigmatized as a sexual offender, his scholastic record besmirched, and was immediately suspended from SJU for a year (Amended Complaint, ¶¶77-78).

Effectively denied due, or any other type of fundamental, process,[10] Harris brings the within action,[11] charging SJU with: breach of contract[12] (Count I); violation of Title IX of the Education Act Amendments of 1972 (Count II); negligence (Count III); and, violations of the Unfair Trade Practices and Consumer Protection Law (Count IV). Harris further charges SJU, Doe and Kalin with defamation (Count V); false light (Count VI); and, intentional infliction of emotional distress (Count VII). Harris separately charges Doe with intentional interference with contractual relations (Count VIII [sic, IX]).

---

[10] SJU argues, almost incredulously, that it need not allow the confrontation of an accuser, based upon its reliance upon the "Dear Colleague" letter dated April 4, 2011 (SJU Motion, Exhibit "B"). As demonstrated by the *amicus curiae* brief to be filed by the Foundation for Individual Rights in Education ("FIRE"), the letter is not dispositive and, in fact, must be disregarded by the Court.

[11] The action was originally instituted by way of Complaint (Document 1). Harris, through counsel, granted Defendants extensions of time within which to respond to the Complaint. On August 15, 2013, Doe filed a motion to dismiss the Complaint (Document 16) and, of even date, SJU and Kalin filed a motion to dismiss to the Complaint (Document 18). On September 3, 2013, Harris filed the Amended Complaint (Document 20).

[12] Notwithstanding, and as discussed *infra*, SJU, itself, does not characterize the Handbook as a contract.

> The handbook has been prepared for all students, administrators, faculty and staff at Saint Joseph's University and others wishing to know more about University policies, procedures, programs and activities. **It is intended to be for informational purposes only, and is not a contract.**

Handbook, p. 3 (emphasis added).

III. LEGAL ARGUMENT

A. Standard of Review

A motion to dismiss under Fed.R.Civ.Pro. 12(b)(6) tests the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007)); Hall v. Raech, 2009 WL 811503, *2 (E.D.Pa., 2009). In ruling on a motion to dismiss, the Court relies upon the complaint and attached exhibits, Sands v. McCormick, 502 F.3d 263, 268 (3d Cir., 2008); Hall v. Raech, supra. The complaint is sufficient if it complies with Fed.R.Civ.Pro. 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2) does not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Twombly, 550 U.S. at 570. In determining whether a complaint is sufficient, the Court must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading, the plaintiff may be entitled to relief. Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir., 2009) (citing, Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir., 2008)). A complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. Phillips, 515 F.3d at 231.

Testing the sufficiency of a complaint requires a three-step inquiry. Santiago v. Warminster Twp., 629 F.3d 121, 130–31 (3d Cir., 2010). First, "the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.'" Id. (quoting, Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)). Second, the factual matters averred in the complaint, and any attached exhibits, should be separated from legal conclusions asserted. Fowler, 578 F.3d at 210. Third, the Court must determine whether those factual matters averred are sufficient to show that the plaintiff has a "plausible claim for relief." Id. at 211 (quoting, Iqbal, 556 U.S. at 679).

B. The Amended Complaint Sufficiently States a Claim for Breach of Contract

1. Harris has Sufficiently Pled the Existence of an Actionable Dispute Regarding SJU's Contractual Obligations and Breach Thereof

Harris has satisfied the pleading requirements with respect to his claim for breach of contract. Harris has pled the existence of an alleged contract with SJU, i.e., the Handbook. However, Harris does not necessarily contend the Handbook is the sole source of the entirety of the contractual agreements and obligations between SJU and Harris. Interestingly, the SJU Motion asserts a contract existed between SJU and Harris,[13] as the relationship between SJU and Harris is "contractual in nature,"[14] adding the contract's terms are "outlined in the Handbook."[15] However, SJU's assertion the Handbook constitutes the sole contract between SJU and Harris directly contradicts the Handbook's language, itself,[16] reading, in pertinent part:

> This Handbook has been prepared for all students, administrators, faculty and staff at Saint Joseph's University and others wishing to know more about University policies, procedures, programs and activities. It is intended to be for informational purposes only, **and is not a contract.**

(Handbook, p.3) (emphasis added).

This contradiction raises key issues, given SJU's instant characterization of the Handbook, contrasted with the Handbook's insisting it is not a contract, conjuring immediate questions of unresolved fact, whether the Handbook evidences all, some, or none of the alleged

[13] SJU Motion, p.8.

[14] SJU Motion, p.8. As will be discussed in more detail below, Harris does not contend that contract law exclusively governs the duties and obligations between SJU and Harris.

[15] SJU Motion, p.8.

[16] The Handbook is a contract of adhesion drafted solely by or on behalf of SJU, and is not a negotiated contract between SJU and Harris. Harris had no input or say in the drafting of any provision or portion of the Handbook, and was not afforded the opportunity to modify or reject any provision or portion thereof.

contractual obligations between SJU and Harris, thereby mandating the denial of Moving Defendants' motion to dismiss Harris' breach of contract claim.

The law on this issue, itself, lacks clarity. Manning v. Temple Univ., 2004 WL 3019230, *12 (E.D.Pa., 2004), the Court held that the because a university handbook which stated that the rules, regulations, and information provided therein are announcements only, and not a contract between the university and its students, a dismissed student could not establish the existence of a contract which would obligate the school or other defendants to conform to certain specific procedures before the student could be dismissed. In Gjeka v. Delaware County Community College, 2013 WL 2257727, *14 (E.D.Pa. 2013), the Court, distinguishing Manning, denied the defendant college's motion to dismiss the plaintiff's breach of contract claim because the college's harassment policy did not contain a provision similar to the handbook provision relied upon by the plaintiff (i.e., that the handbook in no way serves as a contract between the student and university). The court determined the Harassment Policy could thereby fall under one or more of the categories of documents (such as student catalogues, bulletins, circulars, and regulations) which can create a contract between a student and a school. The Gjeka court, citing, Barr v. Cmty. Coll. Of Beaver Cnty., 968 A.2d 235, 238 (Pa.Cmwlth., 2009), noted that student catalogues, bulletins, circulars and regulations can become "part of" the contract, that questions of discipline have been addressed by courts and resolved on contract matters, and that although the basic relationship between a student and private university or college is contractual in nature, courts have been reluctant to apply strict contract concepts to the unique relationship that exists between students and universities or colleges. Id.

However, in Furey v. Temple University, 730 F.Supp.2d 380, 400-01 (E.D.Pa., 2010), the Court, although determining the plaintiff's breach of contract claim was deemed moot, agreed with Temple University that the plaintiff (student), who had been expelled after an off-campus

altercation with an off-duty police officer, failed to show the creation of any contract. The Furey Court observed that the plaintiff did not point to any official materials to demonstrate the creation of a contract between himself and the university, and went on to note that "some courts have found creation of a contractual relationship in a university handbook or bulletin, but others have cautioned against finding such a contract which is unilaterally created by the university without bargaining. See, Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir., 1975) (cautioning against rigid application of contract theory in the relationship between students and universities); Fellheimer v. Middlebury College, 869 F.Supp.238 (D.Vt., 1994) (finding no legal bar to a breach of contract action where the terms of a college handbook ground the contract)." Id. at FN 17.

Yet, in Dempsey v. Bucknell University, 2012 WL 1569826, *17 (M.D.Pa., 2012), wherein the plaintiffs (a male student and his mother) asserted eighteen counts against Bucknell relating to its handling of an alleged sexual misconduct claim asserted against the male student by a female student, the Court determined the plaintiffs sufficiently pleaded the existence of a contract, i.e., the Student Handbook. One of the plaintiffs' claims alleged that a contractual relationship existed between the male student plaintiff and Bucknell, and that Bucknell's Student Handbook outlined some of the terms of that relationship. Id. The plaintiffs alleged that Bucknell breached its contract with the plaintiff male student by failing to comply with the Student Handbook. Id.

The Dempsey Court observed that to state a claim for breach of contract, a plaintiff must plead the following: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resulting damages. Id. (citation omitted). The Court further noted that the relationship between a private educational institution and an enrolled student is contractual in nature; therefore, a student can bring a cause of action against the insti-

tution for breach of contract where the institution ignores or violates portions of a written contract. Id. (quotation marks and citation omitted). The Court thereby determined that the plaintiffs had sufficiently pleaded the existence of a contract between the male student plaintiff and Bucknell, and that the Court need only determine whether plaintiffs' allegations are sufficient to support a finding that Bucknell breached the terms of the contract as contained in the Student Handbook. Id.

Accordingly, for SJU to state in its Handbook, which it alone drafted, the Handbook is **not** a contract, yet take a contrary position herein, that not only is the Handbook a contract, but constitutes the totality of the contractual obligations owed by SJU to Harris, SJU has clearly highlighted significant fact and legal issues arising from its Handbook, and in doing invites support to Harris' claim for breach of contract. SJU's concession and position demonstrate that the Handbook is significantly and materially flawed, confusing, internally inconsistent, self-contradictory, and unclear as written. Such obvious problems within the document naturally lend themselves, as Harris has alleged, to problematic implementation and execution of the purported disciplinary procedures contained therein. Accordingly, Harris' pleading is sufficient to satisfy the notice standard, and SJU's position further exemplifies existing issues of fact and law in relation to which discovery should be permitted.

2. Harris has Sufficiently Pled the Existence of an Actionable Dispute Regarding SJU's Breach of the Contractually Implied Duty of Good Faith and Fair Dealing

Pennsylvania law imposes the implied duty of good faith and fair dealing in **every** contract. Excelsior Ins. Co. v. Incredibly Edible Delites, No. 09-3198, 2009 WL 5092613, at *3 (E.D.Pa. Dec. 17, 2009). "This duty arises not so much under the terms of the contract but is said to arise because of the contract and to flow from it." Gray v. Nationwide Mut. Ins. Co., 422 Pa. 500, 223 A.2d 8, 12 (1966). The Third Circuit noted that "... Pennsylvania courts have cited

Restatement (Second) of Contracts § 205 for the proposition that every contract has an implied term that the parties will perform their duties in good faith." Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 91 (3d Cir., 2000).

The breach of this duty forms part of Harris' breach of contract claim.[17] Excelsior Ins. Co., supra. Harris has sufficiently pled that SJU has failed to carry out, in good faith, its obligations and procedures set forth in the Handbook,[18] and that SJU has failed to deal fairly and in good faith with Harris in the course of initiating and implementing disciplinary proceedings and action against him.[19] The SJU Motion concedes a contractual relationship existed between SJU and Harris.[20] It thereby cannot be disputed that SJU has assumed the duty of good faith and fair dealing with respect to its performance of obligations owed to Harris arising out of the contract.[21] Harris has properly pled SJU's breach of that duty through SJU's and SJU's employees' dealings with Harris in response to Doe's complaint against him.

3. Harris Sufficiently Pleads Entitlement to Judicial Review and Examination of the Fundamental Fairness of and Due Process Afforded by SJU's Disciplinary Procedures and SJU's Implementation Thereof

Private schools are **not** exempt from adherence to principles of due process and fundamental fairness. Where "the process has been found to be biased, prejudicial or lacking in due process" courts may become involved in the internal discipline of private colleges. Boehm v.

[17] This duty would be implied whether the contract between SJU and Harris is considered express, implied, or quasi-contract.

[18] Amended Complaint ¶¶82-83.

[19] Amended Complaint ¶¶82-83.

[20] SJU Motion, p.8.

[21] No matter how that contract may ultimately be defined or described, for it remains to be seen what portions of the Handbook, if any, ultimately become, or become part of, the underlying contract between Harris and SJU.

University of Pennsylvania School of Veterinary Medicine, 392 Pa.Super. 502, 514 (1990) (citing, Schulman v. Franklin and Marshall College, 371 Pa.Super. 345, 538 A.2d 49 (Pa.Super., 1998).[22]

In Boehm, The Superior Court of Pennsylvania reversed an order preliminarily enjoining the School of Veterinary Medicine at the University of Pennsylvania (the "School") from enforcing disciplinary sanctions levied against two students accused of conduct "compatible with cheating." Id. The Court treated the School as a private school, and evaluated the School's "Code of Rights," the individual facets of the School's due process protections afforded to the accused students, and the School's implementation of them, in evaluating whether the disciplinary proceedings were "fundamentally fair." Id. at 514-19.

Notably, certain key protections were afforded by the disciplinary procedures applicable in Boehm, which were not provided by SJU to Harris, such as the right to cross-examine witnesses who testified against the accused students, and the right to call witnesses to testify on the accused students' behalf, among others.[23] These factors were significant to the Boehm Court's analysis and determination whether the School's disciplinary procedures complied with due process. Id. at 514-15.

By stark contrast, the students in Boehm received far greater and more significant due process protections than Harris for a far less grievous alleged offense. Harris was accused of

---

[22] The holding belies SJU's urging its internal disciplinary procedures are immune from judicial review of challenge. SJU Motion, p. 7.

[23] In conducting its fairness analysis of the University's disciplinary proceedings, The Boehm court considered the following factors: (1) the accused students were given notice of the charges against them; (2) the students were given notice of the evidence against them; (3) the students were present at and participated in a hearing which lasted approximately ten and one-half hours; (4) at the hearing, the students were assisted by a faculty advisor; (5) at the hearing, the students were permitted to cross-examine witnesses who testified against them; (6) at the hearing, the students were permitted to call witnesses to testify on their behalf; and, (7) after the hearing, the panel prepared a detailed decision, including findings of fact, which comprise nearly two full pages of the Boehm opinion. Id. at 514-19. Additionally, the Boehm Court observed that a review of the panel's decision (repeated at length in the Boehm opinion), compelled the conclusion that the hearing was held before an **impartial** panel, which was another significant factor in the court's fairness analysis. Id. at 518-19.

sexual misconduct towards another student, whereas the Boehm students were accused of conduct "compatible with cheating;" sexual misconduct may be punishable as a crime under Pennsylvania statutes,[24] whereas conduct "compatible with cheating" between students is not. Certainly, where the alleged offense is of a potentially criminal nature, one can and should expect to be afforded, at a minimum, the process protections afforded to students accused of conduct "compatible with cheating." Harris was not afforded these due process protections by SJU; accordingly, an examination of the fundamental fairness and due process associated with SJU's disciplinary procedures is appropriate, and this Court has the power and authority to allow for same based upon the facts as currently pled (Amended Complaint, ¶83).

Moreover, the Boehm Court held the harm, if any, to the suspended students **can** also be compensated by an award of monetary damages. Id. at 524 (following, Schulman v. Franklin & Marshall College, supra, at 350, 538 A.2d at 52). Here, Harris seeks monetary damages and equitable relief to which he is entitled, resulting from SJU's departure from due process requirements in the institution, administration, and culmination of its disciplinary proceedings against him.

SJU's attempt to rely upon Reardon v. Allegheny Coll., 926 A.2d 477 (Pa.Super., 2007), is undermined by its own subsequent citation to and lengthy quote from Psi Upsilon of Phila. v Univ. of Pa., 591 A2d. 755 (Pa.Super., 1991). In Reardon, the Superior Court upheld a dismissal of a student's breach of contract claim against Allegheny College, holding the student was merely asking the Court to "review the 'private, internal decisions' of the College – something that is forbidden by the terms of both The Compass [student handbook] and case law." Id. at 484. However, Reardon dealt merely with academic dishonesty – plagiarism by way of one

[24] See, 18 Pa. Cons. Stat. §3121 et seq.

student cheating off of another student. The instant action involves a potentially criminal charge. Under no circumstances could a disciplinary proceeding for the type of plagiarism in Reardon ever give rise to a criminal charge by the state, or for that matter, give rise to a private tort action by an allegedly injured third party. A charge of academic dishonesty is obviously simply a matter existing solely between the institution and the student.

This distinction is important, and is actually supported by Psi Upsilon, supra. SJU quotes from Psi Upsilon to support the difference between the process afforded to students at public institutions versus private ones.[25] SJU, unsurprisingly, ended its quote from Psi Upsilon where it did. However, immediately following the paragraph quoted in the SJU Motion, the court states: "The only caveat to this principle is that the disciplinary procedures established by the institution must be fundamentally fair." Psi Upsilon, 591 A.2d at 758. Harris has successfully and sufficiently alleged that the fairness protections found in Boehm were conspicuously absent in the instant case.

Furey v. Temple University, supra, further illustrates the critical need for procedural due process and fundamental fairness – most especially when dealing with a charge such as rape or physical assault, as opposed to, e.g., cheating on an exam or assignment.

In Furey, 730 F.Supp.2d at 384, the Court denied defendant Temple University's motion for summary judgment with respect to the plaintiff's claim that Temple and individual defendants violated the plaintiff's right to procedural due process in the expulsion process. Id. at 384. The plaintiff argued that his expulsion violated procedural due process in a variety of ways, amounting to a challenge to the way the university's code of conduct was applied to him. Id. at 395. The Court grouped those claims into seven categories: bias and impartiality; departures

[25] SJU Motion, p.9.

from the code of conduct; right to remain silent; no right to counsel or to cross-examination; absence of witnesses and alleged perjured testimony; consideration of evidence; and, appeal and process of decision. Id. The Court concluded that taking all of the facts in the light most favorable to the plaintiff and considering all the claims of a due process violation as a whole, the Court could not grant summary judgment to the defendants on the due process claims. Id.

In the instant action, the facts, as pled,[26] are sufficient to raise a reasonable inference that SJU's Handbook (and other express or implied contractual obligations), SJU's implementation of its disciplinary procedures, and its employees' conduct towards Harris, reveal gender bias, prejudice and the clear absence of fundamental fairness and due process associated with SJU's handling of Doe's claim against Harris. Harris has sufficiently alleged, with the necessary plain statement of a claim, how the Handbook and SJU's conduct towards Harris lacked the necessary protections and principles of due process and fundamental fairness required of private universities. All well-pled facts must be accepted as true at this stage of the proceedings, and all reasonable inferences must be drawn in Harris' favor. Hall v. Raech, supra, 2009 WL 811503, *2. Accordingly, it is appropriate for this Court to examine SJU's disciplinary proceedings; due process protections, considered significant by the Superior Court in Boehm, were not afforded to Harris, compared Harris to "Jerry Sandusky," a man found guilty of 45 charges related to child molestation and sexual assault. Despite its protestation to the contrary, SJU cannot shield itself, its disciplinary procedures or the implementation thereof from judicial scrutiny simply by virtue of its private school status. Pennsylvania law does not support such an outcome, and Harris has sufficiently satisfied the threshold pleading standards to invoke judicial challenge of

[26] Amended Complaint, ¶83.

the due process protections and fundamental fairness of SJU's disciplinary procedures and implementation thereof.

C. The Amended Complaint States a Viable Claim for Violation of Title IX[27]

1. Harris States a Claim Under the Erroneous Outcome Standard

Moving Defendants' argument that Harris' Title IX claim is deficient relies almost entirely on Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994). Not only is Yusuf is not binding upon this Court, but far more importantly, the pleading requirements SJU cites from Yusuf are no longer applicable. "District courts in the Second Circuit have recognized that the *prima facie* pleading requirements announced by *Yusef* [sic] and its progeny have been implicitly overruled by the Supreme Court's ruling in Swierkiewizc." Reagor v. Okmulgee Country Family Resource Center, Inc., 2023 WL 4105142, *5 (E. D. Okla., 2012) (citing, Swierkiewizc v. Sorema N.A., 534 U.S. 506, 512, 122 S.Co. 992, 152 L.ED. 2d 1 (2002). "A claim has facial plausibility when the pleaded facts, accepted as true, allow the Court to draw the reasonable inference that the defendant is liable for misconduct alleged. Plausibility is not a watchword for probability." Id. at *1.

Even under Yusuf's obsolete *prima facie* case pleading requirement standards, Yusuf actually supports the contention Harris properly pleaded a Title IX claim. In Yusuf, the Second Circuit held that when a plaintiff asserts a claim for gender bias based on erroneous outcome, the plaintiff must allege "particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and "particular circumstances suggesting that gender bias was a motivation factor before the erroneous finding." Yusuf, 35 F. 3d at 715.

[27] Title IX of the Education Act Amendments of 1972, 20 U.S.C. §1681 et seq.

The Yusuf Court described what satisfies a plaintiff's pleading burden regarding allegations of gender bias. The Court, looking to Title VII jurisprudence, held such allegations may include "statements by members of the disciplinary tribunal, statements by pertinent university personnel, or patterns of decision-making that also tend to show the influence of gender." Id.

In Yusuf, the Court found that the plaintiff easily satisfied the pleading requirements of a Title IX claim. There, the plaintiff's complaint alleged that a false and stale charge of sexual harassment was made against him, the accuser was on good terms with the plaintiff after the alleged sexual harassment, and various actions by the presiding official of the disciplinary tribunal prevented him from defending himself. Id. at 716.

Here, Harris also easily satisfies the pleading requirement of a Title IX claim, even under a Yusuf standard.[28] The Amended Complaint, fairly read, alleges that false charges of forcible rape were made against Harris; that Doe was on good terms with Harris, *i.e.* climbed back into bed with him and slept with him into the morning hours, after the alleged rape; and, that SJU officials prevented Harris from defending himself by, *inter alia*, not providing him a complete copy SJU's investigative report prior to the disciplinary proceeding, not permitting the Panel to consider Doe's text messages during the initial hearing, preventing Harris from cross-examining his accuser and witnesses, and preventing Harris from being represented by counsel or his parents.

Importantly, the Yusuf Court further noted the plaintiff "assert[ed] that males accused of sexual harassment at Vassar are 'historically and systematically' and invariably found guilty, regardless of the evidence, or lack thereof.'" Id. at 716. "The allegations concerning the circumstances surrounding the charge against Yusuf and the conduct of the disciplinary

[28] It should be noted the Amended Complaint includes the very allegations the Yusuf Court found satisfactory to withstand the motion to dismiss (Amended Complaint, ¶¶90-91).

proceeding sufficiently put into question the correctness of the outcome of that proceeding. The allegation that males invariably lose when charged with sexual harassment at Vassar provides a verifiable causal connection similar to the use of statistical evidence in an employment case." Id. (emphasis added). Again, and it is critical to note, in the present case, Harris also specifically alleges "[i]n virtually all cases of campus sexual misconduct, the accused student is male and the accusing student is female;" "SJU has historically and systematically rendered verdicts against males in sexual assault cases on the basis of sex in violation of Title IX;" and, "[m]ale students at SJU, such as Harris, are discriminated against solely on the bases of sex and are invariably found guilty regardless of the evidence, or lack thereof."[29] Harris therefore, clearly and unequivocally pleads a verifiable causal connection similar to the use of statistical evidence in an employment case. The allegations, alone are sufficient to defeat Moving Defendants' motion to dismiss the Title IX claim.

2. Harris States a Claim Under the Selective Enforcement Standard

SJU cites to Doe v. Univ. of the South, 687 F. Supp. 2d 744 (E.D.Tenn., 2009) to support its contention that Harris failed to allege facts supporting a claim under the "Selective Enforcement" standard of Title IX. However, that allegations pleaded by the Doe plaintiffs make Doe clearly distinguishable from the present case. In Doe, the plaintiffs' Title IX allegations were that "the University's actions in adjudicating the Complainant's claims against John Doe resulted in substantial damage and loss, including but not limited to: mental anguish; severe emotional distress; injury to reputation; past and future economic loss; deprivations of due process; loss of educational and athletic opportunities; and loss of future career prospects." Id. at 759. The Doe plaintiffs further contended that "the University's actions in the investigation and adjudication

[29] Amended Complaint, ¶¶89-91.

of the allegations against [John] Doe were wrong, willful, intentional, reckless, in clear violation of Title IX's requirements, and constituted an effort to achieve a pre-determined result: a finding that Doe had committed a Category I sexual assault." Id. at 760.

As a result, the Court held that the plaintiffs had failed to plead facts sufficient to support an "Erroneous Outcome" claim (no contentions that the University's actions were motivated by sexual bias, or that the disciplinary procedures are discriminatorily applied); and failed to plead facts sufficient to support a "Selective Enforcement" claim (failed to plead facts the University's actions against Doe were motivated by his gender and that a similarly situated woman would not have been subjected to the same disciplinary proceedings.). Id. at 760.

SJU's reliance on Doe is flawed for two reasons. First, as illustrated above, Harris' factual allegations are in no way, shape or form comparable to the generic, non-specific, and therefore faulty pleadings by the plaintiffs in Doe.

Second, SJU segues from Doe into again erroneously relying upon and quoting from Yusuf, as supporting authority for its assertions that under Doe, Harris has failed to properly state a claim. In addition, SJU strangely cites to Horner v. Ky. High Sch. Athletic Ass'n, 206 F. 3d 685 (6th Cir., 2000), presumably under a mistaken belief that it also somehow supports its argument. However, the only issue here is whether Harris has sufficiently stated a claim to overcome a motion to dismiss. In Horner, the Sixth Circuit affirmed the District Court's summary judgment to defendants in a Title IX claim.

SJU also cites to Ross v. Corp of Mercer Univ., 506 F. Supp. 2d 1325 (M.D. Ga. 2007). However, as with Horner, SJU's reliance on Ross is similarly misplaced, as in Ross, the Court granted Mercer University's motion for summary judgment, and the entire opinion dealt with issues of evidence and proof – issues not even remotely applicable or germane at this stage of the pleadings. The same holds true for SJU's reliance on Mallory v. Ohio Univ., 76 F. App'x 634

(6th Cir., 2003) wherein the Sixth Circuit affirmed the District Court's summary judgment granted to Ohio University. Obviously, the legal analysis as to whether a claim can ultimately be proven is an entirely different than whether a plaintiff has initially stated a claim. "Ultimately, Federal Rule of Civil Procedure 8 requires only that the Petition or Complaint give the defendant fair notice of the substance of plaintiff's claim and the grounds upon which it rests." Reagor, 2012 WL at *1.

In properly analyzing Harris' pleadings, Dempsey v. Bucknell University, supra. is instructive. Therein, in support of their Title IX claim, the plaintiffs alleged:

> . . . Reed was accused of sexual misconduct, that most of the people accused of sexual misconduct are males, and that the way in which Defendant Bucknell deals with sexual misconduct is unfair. Thus, Plaintiff asserts that Defendant Bucknell deprives male students of educational opportunities on the basis of their sex. . . . Plaintiffs argue that Plaintiff Reed was treated differently than K.S. [the female] by excusing her when she refused to testify, and by never charging her with disorderly conduct, harassment, or assault.

2012 WL at *20.

The Dempsey Court ruled: "Accepting as true the allegations of the complaint, Plaintiff's have failed to state a claim for gender discrimination under Title IX." Id. However, the Court did not hold that the Plaintiffs simply had no Title IX cause of action against Bucknell at all, which SJU is attempting to assert here. Instead, the Dempsey Court pointed out that those allegations were contrary to the facts pleaded in the plaintiffs' complaint. The plaintiffs alleged that K.S. was also found responsible for disorderly conduct. In addition, Plaintiff Reed was found not responsible for sexual misconduct, physical assault, harassment, or freedom of movement. Id. Accordingly, it was the internal contradictions in the plaintiffs' pleadings that formed the basis of the Court's dismissal of the Title IX claim – which, it should be noted, was without prejudice.

Accordingly, and in light of the foregoing, Moving Defendants' motion to dismiss the Title IX claim must be denied.

D. The Amended Complaint Sufficiently States a Claim for Negligence

Contracting parties **may** sue each other in tort when they allege damages beyond the scope of their agreement. Foster v. Northwestern Mutual Life, 2002 WL 31991114, *2 (E.D.Pa. 2002) (citing, Bohler-Uddeholm American, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 (3d Cir. 2001)).

Pennsylvania courts use two methods to determine whether tort claims that accompany contract claims should be allowed as freestanding causes of action: the "gist of the action" and the "economic loss doctrine" tests. Bohler-Uddeholm America, Inc. 247 F.3d at 105. Under the "gist of the action" test, "to be construed as a tort action, the [tortious] wrong ascribed to the defendant must be the gist of the action with the contract being collateral... [T]he important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus." Id. (quoting, Redevelopment Auth. of Cambria County v. International Ins. Co., 454 Pa.Super. 374, 685 A.2d 581, 590 (1996) (en banc) (quoting, Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa.Super. 221, 663 A.2d 753, 757 (1995))). In other words, a claim should be limited to a contract claim when the parties' obligations are **defined by the terms** of the contracts, and not by the larger social policies embodied in the law of torts. Foster, supra, 2002 WL at *2. (quotation marks and citations omitted) (emphasis added).

In Foster, the Court denied the defendant's Rule 12(b)(6) motion to dismiss the plaintiff's fraud and misrepresentation count, sounding in tort, while the plaintiff's breach of contract claim remained a significant part of the action. Id. at *1. There, the plaintiff sought to recover for commission payments that the defendant, his former employer, allegedly wrongfully withheld

in breach of the parties' contract. Id. The plaintiff brought claims for beach of contract, violation of statute, and fraud and misrepresentation. Id.

In analyzing the application of the "gist of the action" doctrine, in the context of a 12(b)(6) motion to dismiss, the Foster Court reasoned, "[w]ithout discovery, we do not know whether Plaintiff will be able to show that he was fraudulently induced to accept incomplete commission payments...[s]uch a showing would implicate the 'larger social policies' of a tort action (e.g., society's desire to avoid fraudulent inducement in the employment context), and would justify extending this case beyond the contractual allegations. Hence, at this early stage, we will allow Plaintiff to maintain his fraud and misrepresentation claims, though we advise the parties to be cognizant of the 'gist of the action' test as they conduct discovery." Id. at *3. The Foster Court concluded that, "[t]hough we must be wary of Plaintiff's tort claims where his losses are purely financial, we believe that Plaintiff has adequately stated a claim that Defendant intentionally and fraudulently made deductions from his commission payments, such that the parties may begin discovery on this question." Id.

The Third Circuit in Bohler-Uddeholm, supra, 247 F.3d at 104-105, held that a claim of breach of fiduciary duty could properly be maintained as a tort, separate from a breach of contract, claim. The District Court allowed the jury to consider a separate breach of fiduciary duty claim for behavior the defendant contended was covered by its contract with the plaintiff, and, thus, was subsumed in the jury charge (and verdict) for breach of contract. Id. at 103. On appeal, the defendant explained the contract was exhaustively negotiated, completely defining the parties' relationship and obligations, so that the plaintiff's alleged losses arose only from alleged breaches of the contract. Id. at 104.

The Bohler-Uddeholm Court observed that there was a fiduciary relationship between the plaintiff and the defendant, as the defendant was the majority shareholder in a joint venture

and had sole and virtually exclusive control over the object of the venture. Id. at 104. This fiduciary duty, the Court observed, imposed obligations on the defendant which "went well beyond the particular obligations contained in the Agreement itself." Id. at 105. The Court reasoned the obligations forming the basis of the fiduciary duty claim were imposed "as a matter of social policy" rather than "by mutual consensus." Id. (citing, Redevelopment Auth. of Cambria County, supra, 685 A.2d at 590). That is, the Court explained, "the larger social policies embodied in the law of torts" rather than "the terms of the contract," are what underlie the breach of fiduciary duty claim. Id. (citing, Bash v. Bell Telephone Co., 411 Pa.Super. 347, 601 A.2d 825, 830 (1992)). The Court determined that the "larger social policy" which defines the fiduciary duty claim is the policy requiring fair dealing and solicitude from a majority shareholder to minority shareholders in a joint venture. Id. (citations omitted). Consequently, the Court held the fiduciary duty claim overcame the "gist of the action" test, as that the "tort wrong" was the gist of the fiduciary duty action, while the contract between the parties was collateral. Id.

In Bayview Loan Servicing, LLC v. Law Firm of Richard M. Squire & Associates, LLC, 2010 WL 5122003, *1 (E.D.Pa. 2010), the Court denied a Rule 12(b)(6) motion to dismiss a claim for negligent supervision included with a separate claim for breach of contract. Bayview involved alleged legal malpractice, the plaintiff asserting claims for breach of fiduciary duty, negligent supervision, and breach of contract. Id. Having determined the plaintiff's breach of contract action was sufficiently pled, the Court, in denying the defendant's motion to dismiss the negligent supervision claim observed, "an employer may be held liable for its own negligent supervision irrespective of the liability of the relevant employee." Id. at *5. Restatement (Second) of Torts §317 (1965) is not the only potential authority on the liability of an employer for failing to properly supervise its employees; the Restatement (Second) of Agency §213 (1958)

has also been applied by Pennsylvania courts to impose liability on corporations for negligent supervision and hiring. Id. (citations omitted).

The Bayview Court noted that unlike Restatement (Second) of Torts §317, Restatement (Second) of Agency §213 does not require that employees act outside the scope of their employment, and it contemplates potential concurrent liability for employers under both §213 and respondeat superior. Id. (citing, Restatement (Second) of Agency §213 cmt. H (1958) ("In a given case the employer may be liable both on the ground that he was personally negligent and on the ground that the conduct was within the scope of employment.")). Importantly, the Court ruled that "an employer may be independently liable for negligent instructions and directions, irrespective of the relevant employee's liability." Id. (citations omitted), concluding that even if a negligent supervision claim requires that the relevant employees have acted outside the scope of their employment, the plaintiffs may offer alternative theories of liability. Id. at *6 (citing, Taylor v. Pathmark Stores, Inc. 177 F.3d 180, 189 (3d Cir., 1999) ("[P]laintiff may plead in the alternative, and our caselaw finds no difficulty with pairing the two claims in one complaint."); Fed.R.Civ.Pro. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."). Accordingly, the Court held that whether as an alternative or an independent theory of liability, plaintiffs pled sufficient facts to support their claim for negligent supervision, and the negligent supervision claim and breach of contract claim survived the defendant's motion to dismiss. Id.

While Harris has brought a viable breach of contract action against SJU, many factors support Harris' tort claims, as well. First, while both parties suggest a contractual relationship existed between SJU and Harris, they disagree about the scope and source(s) of that contractual relationship, and the duties and obligations owed by SJU to Harris. To be sure, the Handbook which SJU boldly contends constitutes the totality of the contract declares itself **not** to be a con-

tract at all.[30] The Handbook's ambiguity and self-contradiction, combined with the position taken by SJU in this litigation, raise at least a reasonable inference that the duties and obligations owed by SJU to Harris are not clearly and exclusively defined by the Handbook, and as a matter of social policy, SJU assumed and owed duties to Harris independent of the Handbook, the breach of which caused Harris to incur damages beyond purely financial losses.

Second, to the extent the Handbook may be viewed as forming or representing the contract, or some part thereof, the Handbook was not a negotiated contract; rather, it was a contract of adhesion to which Harris had no say, no input, and no right to modify or amend. The circumstances which might otherwise result in preclusion of tort claims between parties who freely bargain for a contract and remedies for breach do not exist in the instant case, where the parties' obligations are not so well-defined by the terms of any contract, and where one of the parties was not free to bargain for any provisions, protections, or remedies.

Third, SJU voluntarily and unilaterally assumed the duties to properly hire, train, and supervise the personnel it chose to task with the implementation of SJU's disciplinary procedures. SJU did not undertake the responsibility to fulfill these duties via any written contract with Harris; rather, SJU accepted these social duties by virtue of its voluntarily assuming the responsibilities associated with carrying out investigations and disciplinary proceedings in response to student complaints of sexual misconduct. SJU's breach of these duties, which Harris has sufficiently described, resulted in damages to Harris which are separate and apart from those caused by SJU's breach of contractual duties. Furthermore, the remedy for SJU's breach of the social obligations forming the basis for Harris' negligence claims is not found or available through the Handbook. Accordingly, Harris' claims for negligent hiring, training, and

[30] Handbook, p. 3.

supervision cannot not be dismissed under the "gist of the action" doctrine, as that doctrine has not been so applied as to completely eliminate, at this stage of the proceedings, a well-pled cause of action based in tort, even where the litigants are parties to a contract and a breach of contract claim has also been made and deemed so viable as to withstand a motion to dismiss.

E. The Amended Complaint States a Claim for Unfair Trade Practices and Consumer Protection Law

Harris has sufficiently pled a claim for damages based upon SJU's unfair and deceptive acts and practices in violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S.A. §201-1, et seq. ("UTPCPL"). In relevant part, §9.2(a) reads: "(a) Any **person** who purchases or leases goods or **services** primarily for personal, family or household purposes and thereby suffers **any ascertainable loss of money or property**, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, **may bring a private action to recover actual damages** or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorney fees." (emphasis added).

Key definitions clarify who may bring a UTPCL claim and for what conduct. The UTPCL defines "**Person**" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities" §201.2(2). "**Trade**" and "**Commerce**" include the **advertising, offering for sale, sale** or distribution **of any services** and any property, tangible or intangible, real, personal or mixed, **and any other article, commodity or**

thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth. §201-2(3) (emphasis added).

> (4) '**Unfair methods of competition**' and '**unfair or deceptive acts or practices**' mean any one or more of the following: ... (ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services; (iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another; ... (v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have; ... (vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another; ... (xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made; ... (xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding.

§201-2(4).

In Meyer v. Community College of Beaver County, 30 A.3d 587, 591-600 (Pa.Cmwlth., 2011) the Court found a Community College qualified as a "person"[31] under the UTPCPL and that students' claims under the UTPCPL against the community college related to the sale of educational services and were maintainable. In Meyer, the plaintiffs (a group of students enrolled in the College's police technology program (the "Academy")) sued the College under Pennsylvania's UTPCPL based upon representations made in its course catalog, which expressly represented the Academy to be a certified course of study. Id. at 588. The plaintiffs alleged that these express representations were made to induce, and did induce, plaintiffs to enroll in the Academy. Id. The plaintiffs further alleged they paid tuition, attended the required

[31] In Meyer, the question of whether the College was a "Person" for purposes of the UTPCPL largely related to the issue of the College's public and local agency status. In the instant case, SJU, a private university, undoubtedly meets the UTPCPL's definition of "Person."

courses, and took examinations. Plaintiffs brought a civil action after the Academy program lost its school certification. Id.

In their amended complaint, the Meyer plaintiffs alleged that the Community College violated the UTPCPL in connection with the sale of its educational services, that the College's unfair and deceptive conduct constituted untrue representations that the Academy was of a particular standard or quality, that the College failed to comply with the terms of a written guarantee or warranty, and, that its conduct constituted deceptive conduct which created a likelihood of confusion and misunderstanding, all within the meaning of Section 3 and Sections 2(4)(ii),(iii),(v)(vii),(xiv) and (xxi) of the UTPCPL. Id. at 599. In affirming the vacating of an order reversing the denial of the College's motion for summary judgment, the Court reasoned that an action under §9.2 of the UTPCPL may be brought by a person "who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss…" and that the plaintiffs' UTPCPL claim satisfied this requirement. Id.

Harris sufficiently pleads all necessary elements and facts to support his claim for recovery under the UTPCPL. Harris alleges that SJU, a private university, offered educational services for sale, which he purchased in the form of tuition and fees,[32] based upon his justifiable reliance on the various warranties and misrepresentations made by SJU in its Handbook and otherwise.[33] Specifically, Harris has pled and enumerated unfair and deceptive acts and practices,[34] an ascertainable loss (tuition and fees and costs for room and board),[35] justifiable

[32] Harris alleges that "he remitted payment [for educational services from SJU] in the form of tuition and fees." Amended Complaint, ¶108. While SJU alleges that it "seems likely" that Harris' parents, not Harris, paid for his tuition, SJU has no basis for this assertion, and Harris' allegation must be taken as true.

[33] Amended Complaint, ¶¶105-111.

[34] In addition to Amended Complaint ¶107, these are enumerated throughout the Amended Complaint and may be further developed through discovery.

[35] Amended Complaint,¶ ¶108, 111.

reliance upon SJU's wrongful conduct and misrepresentations,[36] and that such reliance caused injury.[37] Harris' suffered an ascertainable loss of money as a result of SJU's actions and inactions and exhibited in promotion of itself as an institution which espouses the "educational priorit[y]" of "the promotion of justice,"[38] and which represented that "[i]n matters involving allegations of sexual harassment, the respondent and complainant are entitled to equal process."[39] Furthermore, SJU represented that "[i]t has been and remains the policy of Saint Joseph's University . . . to prohibit discrimination which includes discrimination on the basis of sex/gender . . . ."[40]

SJU incorrectly seems to contend that Harris' statement that the Handbook is "given to each student only after the student's *acceptance* by SJU"[41] somehow means that Harris could not possibly justifiably rely on statements and provisions therein in forming his decision to *attend* SJU. Such a meritless contention cannot suffice for dismissal of Harris' UTPCPL claim. Similarly, SJU's bald assertion the representations Harris enumerates in his UTPCPL claim "were not made to induce Harris to buy anything," is irrelevant, let alone without merit and unsupported. The Handbook is a publication by and for SJU, and may reasonably be considered by others, especially potential students considering enrollment, as promotional material.[42] The

---

[36] Amended Complaint, ¶¶108-111.

[37] Amended Complaint, ¶111 ("Harris suffered losses including but not limited to the loss of tuition and fee payments and costs for room and board.")

[38] Handbook, p.8.

[39] Handbook, p.35.

[40] Handbook, p.66.

[41] Amended Complaint, ¶44 (emphasis added)

[42] Handbook, p. 3. The Handbook's outset contains SJU's "Student Life Mission Statement," including a reference for the reader to investigate SJU's internet website for student life (arguably, another promotional platform for the university).

fact that Harris alleged he justifiably relied upon statements and representations made by or on behalf of SJU in its Handbook and otherwise, is clearly sufficient to sustain a cause of action for UTPCPL beyond the motion to dismiss stage. Also, Harris' purchase of educational services from SJU clearly, as discussed in Meyer, qualify as personal services, squarely falling within the purview of the UTPCPL.

SJU improperly misconstrues and mischaracterizes Harris' basis for relief under the UTPCPL. While the consequences of many of SJU's violative (and actionable) conduct, practices, and misrepresentations came to light during or as a result of its disciplinary proceedings against Harris, and while some unfair and deceptive acts, practices and misrepresentations occurred during SJU's disciplinary procedures against Harris, SJU's alleged conduct was not so limited. For example, Harris has pled that he justifiably relied upon warranties and guarantees provided by SJU regarding, e.g., SJU's fairness and impartiality with respect to treatment of its students and its overall compliance with Title IX.[43]

SJU's reliance on Werwinski v. Ford Motor Co., 286 F.3d 661, 681 (3d Cir., 2002) is misplaced[44] and its assertion that Harris' UTPCPL claim may be barred by the economic loss doctrine is without merit, as the economic loss doctrine does not readily apply outside the context of product liability cases. See, Bohler-Uddeholm American, Inc. v. Ellwood Group, Inc., supra, 247 F.3d 79, 104 FN11 (3d Cir., 2001), cert. denied, Ellwood City Forge Co. v. Bohler-Uddeholm America, Inc., 122 S.Ct. 1173, 152 L.Ed.2d 116. Werewinski involved a product liability claim related to allegedly defective automotive transmissions. Id. at 664. The court determined that a judgment on the pleadings in favor of the manufacturer on the plaintiffs'

---

[43] Amended Complaint, ¶107.

[44] The Third Circuit in Werewinski explained, "The economic loss doctrine is designed to place a check on limitless liability for manufacturers…" Id. at 680-81.

UTPCPL claim was appropriate, applying the economic loss doctrine to the product liability action. Id. at 681. Harris makes no product liability claim in the instant action. Accordingly, Moving Defendants' motion to dismiss Harris' UTPCPL claim must be denied.

F. The Amended Complaint States a Viable Claim of Defamation as Against SJU and Kalin

1. The Amended Complaint Alleges Defamatory Communications to "Others"

Moving Defendants argue they cannot be liable for defamation because the defamatory communications were made to other members of the "SJU community."[45] This is simply not true. As SJU and Kalin concede, publication is defined as "the communication of information to at least one person other than the person defamed." (citing, Cushman v. Trans Union Corp., 115 F.3d 220, 230 (3d Cir., 1997) (emphasis added). Moving Defendants cite to no authority wherein a court held communications within a self-identified, self-defined group could not satisfy the publication requirement. Indeed, courts have held to the contrary. See, Agriss v. Roadway Express, Inc., 483 A.2d 456 (Pa.Super., 1984) (holding plaintiff could recover in libel for dissemination of his employer's warning letter to other employees). The absurd position taken by SJU and Kalin would result in a finding that the publication element of a defamation claim is never satisfied when the communications are made between, for example, members of a neighborhood watch committee, fantasy football league, or recreational softball team.

2. Harris Need Not Allege Special Harm to State A Claim for Defamation

In a two-sentence missive, Moving Defendants argue Harris' defamation claim must be dismissed for failure to allege special harm, an assertion blatantly ignoring long standing law that a plaintiff may succeed in a defamation claim absent proof of "special harm" where the

[45] SJU Motion, pp. 24-25.

spoken words constitute slander *per se*. Klimaski v. Parexel Int'l, CIV.A. 05-CV-0298, 2008 WL 2405006 (E.D.Pa., June 13, 2008) (citing, Clemente v. Espinosa, 749 F.Supp. 672, 677 E.D.Pa., 1990)). There are four categories of words that constitute slander *per se*: words that impute (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct. Id. (citing, Restatement (Second) of Torts §570 (1977)). Here, there can be little doubt Harris has pled defamation *per se*. Harris alleges SJU and Kalin referred to Harris as the perpetrator of a sexual assault on Doe,[46] and that SJU employees communicated the alleged sexual assault to Kalin and other SJU employees and students.[47] Statements implicating Harris in a sexual assault and forcible rape qualify as words that impute both a criminal offense and serious sexual misconduct such that Harris need not plead "special harm" to recover.

3. SJU and Kalin's Communications Were Not Privileged

Moving Defendants argue three privileges preclude Harris' defamation claim – truth, the common interest privilege, and the quasi-judicial privilege.[48] As explained below none of these privileges are applicable to Harris' claims.

Truth is a defense to a defamation claim. 42 Pa.C.S.A. § 8343. Moving Defendants erroneously conclude that because Harris' Complaint refers to the encounter between him and Doe as "an alleged sexual assault," they cannot be liable for defamation as it was true that Doe accused Harris of sexual assault. This argument ignores Harris' allegation that Moving Defendants referred to Harris as the perpetrator of a sexual assault on Doe. Moreover, under the common law republication rule, one who repeats a defamatory statement is as liable as the original defamer. Friedman v. Israel Labour Party, 957 F. Supp. 701, 708-09 (E.D.Pa., 1997). This

[46] Amended Complaint, ¶114.

[47] Amended Complaint, ¶122.

[48] SJU Motion, pp. 25-26.

rule is based on the legal fiction that the republisher adopts the defamatory statement as his or her own. Id. Thus, for truth to be a defense for Moving Defendants, truth of the underlying defamation, i.e. Harris sexually assault of Doe, must be proven. See, Lal v. CBS, Inc., 551 F. Supp. 356, 361 (E.D.Pa., 1982) aff'd, 726 F.2d 97 (3d Cir., 1984). Based on the allegations in the Amended Complaint, which must be taken as true at this stage in the litigation, Moving Defendants cannot establish truth as a defense.

The common interest privilege may apply where the circumstances lead those having a common interest in a particular subject matter reasonably to believe that facts exist which another sharing such common interest is entitled to know. Aydin Corp. v. RGB Sales, Civ. A. No. 89-8084, 1991 WL 152465, *10 (E.D.Pa., Aug. 5, 1991). To fall within the ambit of the privilege, the defamatory communication must be made on a proper occasion, with a proper motive, in a proper manner, and based upon reasonable cause. Id. Even where a defamatory statement is deemed conditionally privileged, a plaintiff is entitled to recover if that privilege is abused. See, Patton v. Pasqualini, Civ.A. 09-4893, 2011 WL 3803505 (E.D.Pa., Aug. 25, 2011), defining an abuse of privilege:

> the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or included defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose. Finally, cases which have held that a conditional privilege can be lost by negligence are restricted to matters which are not of a public concern.

Id. (quoting, Moore v. Cobb-Nettleton, 2005 PA Super 426, 889 A.2d 1262, 1269 (2005)).

As set forth in the Amended Complaint, the facts of which must be taken as true, defamatory statements by SJU employees, including Kalin, were based upon a cursory, biased and superficial "investigation." Harris' "guilt" was determined in an arbitrary and funda-

mentally flawed hearing, the result of which was predestined to be adverse to Harris. Thus, Moving Defendants' defamatory statements were made without reasonable belief the facts, i.e. Harris sexual assault of Doe, existed. Thus, the statements were actuated by negligence at best, and more likely by malice. Further, Moving Defendants do not explain how members of the "SJU Community" have an interest in the sexual encounter between Harris and Doe or were entitled to know of same. The SJU Motion neglects to explain, for example, A.I.'s interest in the encounter between Harris and Doe. Thus, any privilege arguably afforded SJU's and Kalin's defamatory statements has been abused.

Finally, Moving Defendants' contention they are shielded by the judicial immunity privilege was specifically rejected in Overall v. University of Pennsylvania, 412 F.3d 492 (3d Cir., 2005) wherein the Third Circuit held that quasi-judicial status requires more than simply applying facts to law. Instead, government involvement is a necessary predicate to quasi-judicial status. Id. at 497. See also, Milliner v. Enck, 709 A.2d 417 (Pa. Super., 1998) (wherein the Superior Court cited thirteen (13) cases discussing quasi-judicial entities, each of which involved a proceeding before a government entity or private entity operating pursuant to a state or federal statute).

In addition to the lack of government participation, the Overall Court relied upon the absence of sworn testimony and lack of a transcript or record of the proceedings in determining internal grievance proceedings are not quasi-judicial. Id. 415 F.3d, at 498. The absolute privilege in judicial and quasi-judicial proceedings "exists because the courts have other internal sanctions against defamatory statements, such as perjury or contempt proceedings." Binder v. Triangle Publ'ns, Inc., 275 A.2d 53, 56 (Pa., 1971). Without the important safeguards provided by sworn testimony and procedural due process, private internal grievance proceedings simply do not qualify as quasi-judicial proceedings such that absolute immunity applies.

Moreover, applying the absolute privilege and affording quasi-judicial status to private internal grievance proceedings does not promote the purpose of the privilege. "The purpose of the privilege is 'to afford [parties] freedom of access to the courts,' to 'encourage [witnesses'] complete and unintimidated testimony in court,' and 'to enable [counsel] to best represent his client's interests.'" Schanne, 898 F.Supp.2d at 757 (citing, Binder v. Publ'ns, Inc., 275 A.2d 53, 56 (Pa., 1971)) (emphasis added). Here, access to, and testimony in, court is not at issue. To the contrary, witnesses, including complainants, in private internal grievance proceedings do not provide sworn testimony and no record or transcript of the proceeding is maintained. This key distinction is what differentiates quasi-judicial proceedings from SJU's disciplinary process. In a quasi-judicial proceeding, other sanctions protect against defamatory statements such as perjury and contempt proceedings. These safeguards, as well as fundamental procedural due process protections, exist in quasi-judicial proceeding but are utterly lacking in private internal grievance proceedings such that claims for defamation must remain viable.

In light of the foregoing, Moving Defendants' motion to dismiss Harris' defamation must be denied.

G. The Amended Complaint States a Claim For False Light

Moving Defendants argue Harris failed to plead "publicity."[49] "[A] 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." Herron v. Mortgage NOW Inc., CIV. 12-3605, 2013 WL 867177 (E.D.Pa., Mar. 7, 2013). While Pennsylvania law does not precisely define the "level" of publicity, communication to as little as seventeen people is actionable publication as a matter of law. Harris by Harris v. Easton Pub. Co., 483 A.2d 1377,

[49] SJU Motion, pp. 26-27.

1385-86 (1984). Moreover, the Third Circuit has cautioned dismissal is not appropriate at the pleadings stage where a plaintiff alleges publication broadly. See, Vurimindi v. Fuqua Sch. of Bus., 435 F. App'x 129, 135 (3d Cir., 2011) (holding that plaintiff's allegation that defendant disseminated information to the student body and businesses near campus was sufficient to survive a motion to dismiss.)

Here, Harris has alleged the statements which placed him in a false light were communicated to at least eight (8) people, and likely more. Indeed, any number of SJU employees or students may have received the communications considering SJU's policies require the Vice-President of Student Life, Associate Provost, or their designee review the matter to make an interim suspension determination and determine the admissibility of non-institutional evidence.[50] Further, while it is unclear at this early stage in the litigation, presumably Doe was accompanied at the CSB hearing or assisted in preparing for same by a Community Standards Advisor.[51] Moreover,, the Handbook reads, in part, "Community Standards violations and sanctions . . . shall become part of the student's educational record."[52] Any institute of higher learning to which Harris subsequently applies or matriculates will be privy to Harris' SJU educational record, thus, furthering the publication. Finally, and perhaps most importantly, Harris has alleged SJU and Kalin made "public statements about Harris that placed him in a false light."[53] This allegation enjoys the presumption of truth and, with all reasonable inferences construed in Harris' favor, it is premature, at this early pleading stage, to dismiss Harris' false light claim for wont of publicity.

---

[50] Amended Complaint, ¶¶ 54, 55.

[51] Amended Complaint, ¶ 59.

[52] SJU Motion, Exhibit A, p. 40.

[53] Amended Complaint, ¶ 132.

H. The Amended Complaint States a Claim for Intentional Infliction of Emotional Distress

The Amended Complaint alleges that Moving Defendants humiliated, embarrassed, shocked and scarred Harris by extreme, outrageous, intentional, willful, malicious and reckless conduct.[54] As a result, Harris alleges that he suffered severe emotional distress, mental anguish, embarrassment, and humiliation, all of which may be permanent in nature.[55]

To state a claim for IIED under Pennsylvania law, a plaintiff must plead facts that demonstrate: (1) the conduct of the defendant was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress; and (4) the distress was severe. Hall v. Raech, supra.[56] A plaintiff must allege that a defendant engaged in "conduct … so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Dempsey v. Bucknell, 2012 WL at *23 (citation omitted).

In Dempsey, the plaintiffs' claim for IIED was found to be sufficient to support a finding that Bucknell's conduct was extreme and outrageous, thereby sufficient to defeat a motion to dismiss. The plaintiff asserted a number of extreme and outrageous acts by employees of Bucknell and others including allegations that the plaintiff was arrested based upon accusations made against him by a female student that were allegedly false; and that another defendant referred to the plaintiff as a "dangerous sexual offender," "the perpetrator of a sex crime," and an "attacker" in a "sex crime," allegedly knowing the statements were false. Id. at *24.

[54] Amended Complaint, ¶138.

[55] Amended Complaint, ¶143.

[56] Although Defendants point out the Pennsylvania Supreme Court has not formally adopted the tort of IIED, the Third Circuit predicted it will. Id. (citing, Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273-74 (3d Cir. 1979).

Accepting, as it must, the plaintiff's allegations as true, the Court, denying the defendants' motion to dismiss the IIED Claim, explained, "[p]laintiffs' allegations that public safety officers arrested Plaintiff Reed knowing that the information on which they based the arrest was false, and that Defendant Voci accused him of being a sexual offender, knowing the statement to be false, are sufficient to support a finding that Defendants' conduct was extreme and outrageous." Id.

Here, the Amended Complaint alleges conduct, of a kind, nature and degree equal to that asserted in Dempsey. For example, Harris alleges that Kalin, during his interview of Harris, "appeared harsh and abusive, adopting and exhibiting personal animus towards Harris ... unnecessarily comparing Harris to 'Jerry Sandusky'... Subsequently, Kalin purposely omitted the text messages from SJU's investigation file in hopes of insuring Harris' conviction for sexual misconduct."[57] Harris further alleges Kalin purposely omitted the text messages from the record before the Panel.[58] Harris also alleges the appeal board found the text messages were critical to the investigation, thus, necessary evidence, and remanded the matter to the Panel for further consideration.[59] However, following a second hearing, the Panel upheld its earlier finding of guilt,[60] and Harris was denied further appeal.[61] Harris alleges his account of the incident was

[57] Amended Complaint, ¶39.

[58] Amended Complaint, ¶69.

[59] Amended Complaint, ¶75.

[60] SJU and Kalin's argument that, upon review, following Harris' appeal, the Panel reviewed the text messages but nonetheless affirmed the earlier "verdict" is disingenuous, at best, as, by then, the dye was cast, Harris' fate, shadowed by SJU's discriminatory policies, already sealed.

[61] Amended Complaint,¶77.

not accurately recorded by SJU and Kalin, and that SJU and Kalin intentionally and improperly did not show Harris the full report against him until the hearing itself.[62]

The cases cited by Defendants are materially distinguishable and inapplicable to the circumstances forming the basis for Harris' IIED claim in the instant case for a variety of reasons. First, Fellheimer v. Middlebury College, 869 F.Supp.238 (D.Vt., 1994) does not address pleading requirements or an analysis of the sustainability of an IIED claim at the motion to dismiss stage. Rather, the matter before the Court was Middlebury College's *unopposed* motion for summary judgment. Id. at 247. Plaintiff is not tasked, at this stage of the proceedings, with meeting the evidentiary threshold as would be necessary to prevail on his own motion for summary judgment or to defeat one filed by Defendants. Furthermore, unlike in the instant case, the Fellheimer Court did not have before it any allegations or evidence supportive of extreme or outrageous conduct on the part of Middlebury College; rather, the plaintiff had merely alleged procedural errors in the college's handling of a female student's accusation of rape. Id. Second, the Court in Reardon v. Allegheny College, 926 A.2d 477,488 (Pa.Super., 2007) dismissed the plaintiff's IIED claim because "the crux of her IIED claim is based on the premise that appellees 'intentionally and wrongly targeted and accused [appellant] of violations of the college's honor code,' despite their knowledge of the falsity of these allegations, and that Allegheny and professor Nelson acted to deprive appellant of her 'rights to a fair and impartial hearing." The Reardon Court determined that even if accepted as true, the allegations did not rise to a level that could be described as "clearly desperate and ultra extreme conduct." Id. (citation omitted). Harris has alleged facts of a true extreme and outrageous nature on the part

[62] Amended Complaint, ¶67.

of SJU and Kalin, in parity with those alleged in Dempsey and far beyond the level of severity of those asserted in Reardon.

Harris' allegations that he experiences the effects of shock, severe distress, anguish, embarrassment, and humiliation reasonably and necessarily include and encompass such physical manifestations and injuries such as headaches, anxiety, and sleeplessness. These allegations, as pled,[63] are sufficient to withstand a motion to dismiss, especially in light of the extreme and outrageous nature of SJU's and Kalin's conduct as respects Harris and their dealings with him in response to Doe's complaint.

I. The Amended Complaint Sufficiently Alleges Claims against Kalin, Individually

Harris has brought individual claims against SJU's Public Safety Officer, Kalin, for defamation (Count V), false light (Count VI) and IIED (Count VII).[64] Harris' allegations describing and relating to Kalin's actionable conduct are found throughout the Amended Complaint. With respect to Kalin's individual liability, certain key allegations include, without limitation, that Kalin referred to Harris as the perpetrator of a sexual assault on Doe, even though he knew or certainly should have known, the allegation was false, and did so with reckless indifference to the truth or falsity of the allegations;[65] that Kalin stated Harris was a danger to either Doe or to the SJU community;[66] that Kalin read but disregarded the text messages provided by Harris, purposely omitting them from SJU's investigation file in hopes of insuring Harris' conviction for sexual misconduct; that Kalin prevented the text messages from being

[63] Or, at most, with minor clarification.

[64] The SJU Motion (p.29) references an additional claim against Kalin, individually, for negligent infliction of emotional distress (Count VIII); however, that claim, initially in the original Complaint, is not included in the Amended Complaint.

[65] Amended Complaint, ¶¶114, 122.

[66] Amended Complaint, ¶133.

reviewed and considered by the Panel; that Kalin appeared harsh and abusive, adopting and exhibiting personal animus towards Harris, unnecessarily and egregiously comparing Harris to "Jerry Sandusky;"[67] and, that Kalin inaccurately recorded and/or reported Harris' account of events and failed to disclose the full investigation report to Harris.[68] In summary, Moving Defendants seem to ignore Harris' allegations which clearly establish that Kalin actively and independently committed acts of misfeasance, displaying personal animus towards Harris.

SJU concedes an agency relationship with Kalin,[69] and that it is liable for Kalin's acts pursuant to *respondeat superior*.[70] However, the SJU Motion cites to no case or legal authority to support the contention that there "is no basis or reason for Kalin to be a separately named party in this civil action."[71]

The nature of Kalin's conduct, i.e., whether within or outside the scope of his employment or agency relationship with SJU, is a question of fact, and it would be improper for this Court, at this juncture, to make such a determination. See, Allison v. Chesapeake Energy Corp., Slip Copy, 2013 WL 787257, *11 (W.D.Pa., 2013) ("it is far from clear, and it would be improper for this Court to determine, the 'scope of his [individual Defendant's] agency relationship,' if any, and whether Mr. Niedbala acted outside of it. Those are matters going to the merits of a

---

[67] Amended Complaint, ¶39.

[68] Amended Complaint ¶67.

[69] SJU Motion, p.29.

[70] "**Respondeat Superior**. Let the master answer. This doctrine or maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." Black's Law Dictionary 1311-1312 (6th ed. 1990). "Under this doctrine master is responsible for want of care on servant's part toward those whom master owes duty to use care, provided failure of servant to use such care occurred in course of his employment." Id. at 1312. "[The] [D]octrine is inapplicable where injury occurs while employee is acting outside legitimate scope of authority." Id.

[71] SJU Motion, p.29.

defense, and resolving those matters will involve intense factual investigation beyond the limited scope of the fraudulent joinder inquiry.")

To the extent Kalin's conduct or any portion thereof may be found to have been intentionally tortious and outside the scope of his employment, and for which he may be held individually liable, Kalin is certainly appropriately individually named in this action. To the extent his conduct or any portion thereof may be found to have been in the scope of his employment, "under Pennsylvania's 'participation' theory, a corporate officer, employee, or agent may in fact be held liable for his or her own tortious conduct committed in the scope of employment." Id. at *11 (citing, Greenberg v. Macy's, 2011 WL 4336674, *4 (E.D.Pa., 2011) (quoting, *inter alia,* Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86, 89–90 (Pa., 1983). See also, Boyer, 913 F.2d at 112 ("Under Pennsylvania law there is a cause of action against employees whose fraud and misrepresentations contributed to plaintiff's damages, even if these actions were taken in the course of their employment")). Accordingly, Kalin has appropriately been named in his individual capacity as a defendant in this action, and no legitimate grounds have been raised by Moving Defendants which would justify dismissing him at this stage of the proceedings.

IV. CONCLUSION

For all of the foregoing reasons, the SJU Motion must be denied and Moving Defendants compelled to answer the Amended Complaint.

Respectfully submitted,

THE CHARTWELL LAW OFFICES, LLP

BY: /s/KMD3842

KENNETH M. DUBROW, ESQUIRE
I.D. No. 34665
1735 Market Street, 29th Floor
Philadelphia, PA 19013
(215) 972-7006
kdubrow@chartwelllaw.com

Counsel for Plaintiff,
Brian Harris

Harris (44982)/Pleadings/Rsp to SJU MTD Amended Cpl