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Rho Chapter of the Chi Phi Fraternity,	COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PA
Plaintiff/Petitioner,	CIVIL DIVISION
v.	No. C-48CV2011-10433
Lafayette College,	
Defendant/Respondent	

DEFENDANT LAFAYETTE COLLEGE'S BRIEF IN SUPPORT OF ITS PRELIMINARY OBJECTIONS TO THE COMPLAINT FOR INJUNCTIVE RELIEF

The lawsuit most recently filed by Chi Phi's Alumni Association against Lafayette College purports to seek two things: 1) to prevent the College from "taking possession" of Vallamont for the Spring Semester of 2012; and, 2) to force the College to allow students of Chi Phi's choosing to occupy Vallamont beginning in January 2012. As set forth below, neither claim is supported by the facts or the law. With respect to the first point, in contrast to the Fall 2011 semester, the College does not intend to use Vallamont in the spring of 2012 (a fact which Chi Phi knows but omitted from its Complaint). With respect to the second point, the 1909

Agreement prohibits Chi Phi from housing anyone but its student fraternity members in Vallamont (Compl. Ex. 3 ¶ 2), and because Chi Phi has not been recolonized by the College it therefore cannot use Vallamont for the only purpose permitted (i.e., the housing of "student members" of the fraternity). Therefore, neither of those claims for injunctive relief has any merit.

In essence, therefore, in order to achieve its ultimate goal of putting students of its selection in Vallamont this Spring, the Complaint for injunctive relief is a thinly veiled attempt to have the Court substitute its judgment for that of the College's Board of Trustees in determining whether to recolonize Chi Phi. It seeks to have the Court order the College to recognize Chi Phi as a local student chapter on the College campus in contravention of the October 22, 2011 decision of the College's Board of Trustees to deny Chi Phi's application to recolonize at this time pending the implementation period outlined by the Working Group on Greek Life (the "Working Group") in its recent Report. But the Board of Trustees was acting well within its discretion in deciding what organizations it will allow on campus, and that discretion is specifically memorialized in this instance by the parties in the 2010 Extension Agreement that Plaintiff entered into with the College:

> When such application for recolonization is made, the application shall be reviewed by, and may only be approved by, the College's Board of Trustees, which is the sole governing body with the authority to make such a decision. The Board will decide, in its discretion, whether to grant recolonization, *considering any and all such facts or conditions it deems proper and/or applicable,* including but not limited to the extent to which the application for recolonization may or may not advance the mission of the College, at such time. In exercising its decision-making discretion, the Board, may also elect to consider the report from the Working Group on Greek Life and Campus Community, among other materials or information, if any. *The Board also has final decision-making discretion in the determination of which factors, if*

> *any, it may consider when exercising this decision-making discretion regarding the recolonization application.*

(Compl. Ex. 5 (emphasis added).)

This statement is unambiguous, and it nullifies Chi Phi's attempt to claim that the Board was somehow limited in its decision-making role, or in any way other than as set forth in the 2010 Extension Agreement. Because Chi Phi's application for recolonization was denied without prejudice by the Board of Trustees, and because Chi Phi has no legal basis to challenge that denial, Chi Phi cannot claim that the College is required to allow it to have a local student chapter on campus, to recruit new active members, or to populate Vallamont.

Accordingly, the Court should dismiss the Complaint for failure to state a claim upon which relief can be granted.

STATEMENT OF THE COMPLAINT

This case is *not* the same case that was filed with the Court on May 17, 2011. That case involved the College's stated intent to use Vallamont for general student housing for the Fall Semester of 2011, and Chi Phi's effort to prevent it from doing so under three agreements that Chi Phi has with the College, the 1909 Agreement (Exhibit 3 to the Complaint), the 2006 Agreement (Exhibit 4) and the 2010 Extension Agreement (Exhibit 5). At that time, both the College and Chi Phi had need of the Court's intervention to determine what their respective rights were concerning such use because the College had no alternative housing for the students. The parties' rights with respect to use of the house during the Fall Semester 2011 were set forth in the Court's Order of August 11, 2011, which was agreed upon by the parties. (*See* Compl. Ex. 1 at ¶ 1.)

For the Spring Semester 2012, the College has no similar plans to use Vallamont as student housing, and Chi Phi does not and cannot allege that the College is planning to do so.

However, in order to create the impression that this case is similar to that which Chi Phi filed in May, 2011, the Complaint states that Chi Phi "must restrain the College from any injurious action toward Vallamont (Compl. ¶ 73)," that it must obtain an injunction to prevent the College from "continuing its possession of or injuring Vallamont" (*id.* ¶ 86), and that it must obtain an injunction to force the College to "return possession of Vallamont to Chi Phi upon the expiration of its temporary use of Vallamont pursuant to the Order on January 1, 2012." (*Id.* ¶ 87.) Chi Phi further states that "[t]he harm caused by the college's threatened action against Chi Phi will be irreparable because it interferes with the fraternity's ability to attract new students to continue as a viable living group option and, if the house is destroyed, it cannot be replaced." (Compl. ¶ 88).

The essential missing factual allegation is that the College made any threat to use Vallamont in the Spring Semester 2012 at all. It did not, and Chi Phi knows that it did not. Thus, the allegations are baseless, and they are exposed as pretext for the real reason for Chi Phi's complaint.

Further examination of the Complaint reveals that it is not about the College's use of Vallamont, but rather *Chi Phi's* use of Vallamont in Spring 2012 and beyond. The injunctive relief that Chi Phi is seeking is that Chi Phi be permitted to repopulate Vallamont with students of its own choosing, presumably members of a recolonized Chi Phi Rho local chapter. (*See, e.g.*, Compl. ¶¶ 74, 84, 86, 88, 90, 93(a), (d).)[1] Thus, Chi Phi is essentially asking the Court to overturn the College Board of Trustees' recent decision at its meeting on October 22, 2011 to

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[1] Chi Phi must ask the Court to order the College to recognize a recolonized local student chapter whose members can occupy the house, because the 1909 Agreement clearly states that Chi Phi can only "occupy the said house for purposes of a Fraternity House" (Compl. Ex. 3 at ¶ 1), and that the building "shall be used exclusively as a Fraternity House, not to be occupied or used by other persons that a member of the Fraternity or for any other purpose without the consent of the College first had and obtained." (*Id.* at ¶ 2.)

accept the recommendation of the Committee on Student Life and deny Chi Phi's petition for recolonization without prejudice, while the recommendations of the Working Group on Greek Life are being implemented and evaluated. (*See* Compl. Ex. 14.)

The reason that Chi Phi tries to posture the Complaint as more about the use of Vallamont than the Board's decision denying its recolonization application is that, as explained herein, the Board's decision was well within the Board's discretion, memorialized in the 2010 Extension Agreement that representatives of Chi Phi signed in July of 2010. Because of that discretion, Chi Phi has absolutely no contractual basis upon which to challenge the Board's decision, and its Complaint must be dismissed.

ARGUMENT

I. Legal Standards

Preliminary Objections may be filed on the ground of the legal insufficiency of a pleading, also called a demurrer. Pa. R. Civ. P. 1028(a)(4). As a general matter, preliminary objections in the nature of a demurrer allege that the pleading is legally insufficient. Nationwide Mut. Ins. Co. v. Wickett, 763 A.2d 813, 817 (Pa. Super. 2000). A preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, and every inference fairly deducible from those facts, but not considerations of law, argumentative allegations, or unjustified inferences, with all doubts resolved against the moving party. 5 Standard Pa. Practice 2d § 25.76 at 197-8 (West 2009). Courts reviewing preliminary objections may consider not only the facts pleaded in the complaint, but also documents or exhibits attached to the complaint, and based upon the averments and documentary support may address challenges to the legal sufficiency of the complaint. See Diess v. Pa. Dept. of Transp., 935 A.2d 895, 903 (Pa. Commw. 2007). Thus, a complaint that consists of argumentative conclusions, as opposed to properly

pleaded statements of fact, cannot withstand demurrer for failure to set forth a claim for which relief can be granted. Giordano v. Ridge, 737 A.2d 350, 352 (Pa. Commw. 1999), aff'd, 559 Pa. 283, 739 A.2d 1052 (1999).

Plaintiff's Complaint seeks preliminary and permanent injunctive relief. Preliminary objections in the nature of a demurrer are appropriate where a Complaint clearly fails to state a sufficient basis for a right to a preliminary or permanent injunction. Yount v. Pa. Dept of Corrections, 886 A.2d 1163, 1167 (Pa. Commw. 2005). In evaluating whether the Complaint here demonstrates a sufficient basis for relief, it is instructive to consider the burden of proof that the plaintiff will bear in any hearing or trial on this matter.

With respect to Chi Phi's demand for a prohibitory injunction (i.e. an injunction preventing the College's supposed use or destruction of Vallamont in Spring 2012), such an injunction is to be awarded only where the rights of the plaintiff are clear and free from doubt. John G. Bryant Co., Inc. v. Sling Testing and Repair, Inc., 471 Pa. 1, 7, 369 A.2d 1164, 1167 (1977). Further, an injunction will not be granted except upon clear and convincing evidence of an intended or threatened injury. Richman v. Mosites, 704 A.2d 655, 659 (Pa. Super. 1997). "Injunctive relief is not available to eliminate a possible remote future injury or invasion of rights." Id. (quoting Jamal v. Pa. Dept of Corrections, 549 A.2d 1369, 1371 (Pa. Commw. 1988). Nor will the Court enjoin conduct unless it is reasonably certain to occur. Id. (citing Curil v. Dairyman's cooperative Sales Assn., 389 Pa. 216, 132 A.2d 271 (1957)). When a preliminary injunction is sought, additional facts must be pleaded showing the immediacy of the danger. See also, McMullan v. Wohlgemuth, 444 Pa. 563, 281 A.2d 836 (1971); Clinton Twp. V. Carmat, Inc., 432 A.2d 238, 239 (Pa. Super. 1981).

With respect to Chi Phi's demand for a mandatory injunction (forcing the College to recolonize Chi Phi Rho, to treat it as an active fraternity on campus, and to provide lists of students and alumni to Chi Phi Rho to assist it in recolonization) the requirement that Plaintiff have a clear right to relief is especially true. Mazzie v. Comm., 495 Pa. 128, 134, 432 A.2d 985, 988 (1981). The Pennsylvania Supreme Court has stated that mandatory preliminary injunctions should be issued more sparingly than injunctions that are merely prohibitory. Id. See also Overland Enterprise, Inc. v. Gladstone Partners, L.P., 950 A.2d 1015, 1019-20 (Pa. Super. 1988).

II. The Action For A Prohibitory Injunction Must Be Dismissed Because Plaintiff Has Failed to Plead Facts Alleging That The College Has Threatened to "Take" Or Attempt To Harm Vallamont In Any Way During the Spring Semester of 2012 and, Alternatively, Because the Claim is Without Legal Foundation

Plaintiff's Complaint states that it "seeks to enjoin the proposed unauthorized taking by the College of Chi Phi's Chapter House known as 'Vallamont.' That unauthorized taking would violate many covenants the College has made to Chi Phi." To prevent this supposed "taking" after January 1, 2012, Chi Phi has asked for preliminary and permanent injunctive relief, and an immediate trial date for the week of December 12, 2011.[2]

However, the College has not proposed to use Vallamont during the Spring Semester 2012, much less "take" that property, and the Complaint (in contrast to the May 2011 Complaint) never alleges that it has. The most that Chi Phi can muster is the recycling of the claim that the College stated its intent to use Vallamont in the Fall of 2011. (Compl. ¶ 60.) That is irrelevant, as the Fall semester of 2011 is coming to a close, and the College has not similarly stated its intent to use Vallamont in the Spring. Moreover, there is absolutely no allegation that the

[2] Despite its request for an immediate trial date, Chi Phi has also propounded 28 document requests on the College seeking virtually every document that deals with Chi Phi, the Working Group on Greek Life, an virtually every other fraternity at the College in its history. The responses to those requests are due on December 5, 2011.

College has threatened to take any action to cause injury to Vallamont. The very thought that the College would consider doing so is absurd.

Thus, there is no basis for Chi Phi to claim a "taking" in any sense of the word, or to show any threatened or intended injury (much less imminent injury). Accordingly, the Complaint for an injunction against the College's supposed "taking" of Vallamont must be dismissed.

Moreover, Chi Phi's assertion that Lafayette's continuing use of Vallamont "would violate many covenants the College has made to Chi Phi" (Compl. ¶ 3.), lacks legal foundation. To the contrary, under the explicit terms of 1909 Agreement (Compl. Ex. 3 at ¶ 5), the College has the right to use Vallamont until the local chapter Chi Phi is "revived" and Chi Phi is thereby able once again to use Vallamont "as a Fraternity House" for "students of the College" who are "member[s] of the Fraternity." (*See* Compl. Ex. 3 at ¶¶ 1-2, 4.) That is the only use of the House permitted to Chi Phi. (*Id.* at ¶ 2.) Thus, the College's (at this point theoretical rather than actual) use of Vallamont would violate no covenants between the College and Chi Phi.[3]

III. The Action For a Mandatory Injunction Must Be Dismissed Because Chi Phi Has Articulated No Factual Basis For Its Claimed Relief, Much Less A Compelling Basis

A simple look at the Prayer for Relief in Chi Phi's latest Complaint shows how unsupported its requests for relief are. We have already addressed the prayer for the College to cease "continuing its possession or injuring Vallamont" because there are no facts pleaded that the College will do either in the Spring Semester of 2012.

[3] Chi Phi also requests that the College not make "pronouncements" on the status of Chi Phi, but it fails to state that the making of any such statements breaches any agreement between the College and Chi Phi, or is otherwise forbidden by law. That claim must be dismissed.

Chi Phi also requests a mandatory injunction that the College give to Chi Phi lists of students that might populate a recolonized Chi Phi (Compl. ¶ 90), but fails to identify *any* obligation the College has to Chi Phi on which that duty might be based. Chi Phi likewise requests lists of its alumni from the College (*id.* ¶ 91) but, again, fails to identify anything that would legally obligate the College to comply with that request. Apparently, Chi Phi wants the Court to exercise its equitable power to force the College to do something simply because Chi Phi wants it to be done. That is not a serious basis upon which to request an injunction.

The essential mandatory relief requested by Chi Phi, however, is that the Court issue an injunction enjoining the College "from interfering with Chi Phi's activities by which new students may be attracted to its fraternal organization *and its continuing operations with new members.*" (¶ 93(a) (emphasis added)). Chi Phi also requests a declaration "that pursuant to the 1909 and 2006 Agreements, Chi Phi is authorized to resume its possession of Vallamont and *repopulate its active Chapter of Chi Phi with new members pursuant to its Plan of Return.*" (Compl. ¶93(d) (emphasis added)). Although Plaintiff cleverly tries to characterize this as a prohibitory injunction – prohibiting the College from refusing to recognize a recolonized Chi Phi – it is in fact the model of a grossly intrusive mandatory injunction, one that forces the College to permit recolonization of an undergraduate fraternal organization that its Board of Trustees, pursuant to its powers and in its discretion, has chosen not to permit at this time. This would require the Court to substitute its judgment for that of the College's Board of Trustees on whether, when, and what conditions Chi Phi (or any Greek or other organization) may be allowed on Lafayette College's campus.

Such a request is unprecedented in the history of the College, and completely beyond what the Court is empowered to do. The Pennsylvania Supreme Court has clearly said that,

where the discretion to decide issues is placed in the hands of a college's governing body, a court "has no jurisdiction to review the factual determinations of a College's governing body unless it can be clearly demonstrated that the body violated its own procedures." Baker v. Lafayette College, 516 Pa. 291, 298, 532 A.2d 399, 403 (1987). The Court has since reaffirmed that if a contract or policy places the power to decide an issue in the hands of a College body, the plaintiff is not entitled to litigate the merits of the resulting decision. Murphy v. Duquesne University of the Holy Ghost, 565 Pa. 571, 777 A.2d 418 (2001)

Chi Phi has articulated absolutely no basis to question that the discretion to approve or disapprove of the application for recolonization was in the hands of the College's Board of Trustees. Chi Phi's *only* asserted basis for its argument is its statement that paragraph 12 of the 2006 Agreement required the Board to follow the 1993 Guidelines in its decision on whether to approve Chi Phi's recolonization. (*See* Compl. ¶¶ 12-20; 42-45, 49-52). But the 2006 Agreement never mentions the Board's discretion in reviewing Chi Phi's application, much less limits that discretion. It merely says that "the recolonization shall be guided by the fraternity/sorority recolonization guidelines adopted by the trustee on athletics and student affairs on June 21, 1993." (Compl. Ex. 5) The 1993 Guidelines themselves (Compl. Ex.10) state only that a fraternity/sorority "may be *considered* for recolonization by demonstrating its ability to satisfy and comply with the following guidelines." (*Id.* (emphasis added).) The guidelines (and the 2006 Agreement) therefore pertain to the contents of Chi Phi's application. They do *not even address* the discretion of the Board of Trustees in considering and acting upon such an application.

The Board of Trustees' discretion in ruling upon an application for recolonization is instead memorialized conclusively in the 2010 Extension Agreement. (Compl. Ex. 5.) Plaintiff

downplays the 2010 Extension Agreement by saying that it "did not delete or alter the contractual standard of review by the Board of Trustees." (Compl. ¶ 51; *see also id.* ¶ 49.) Of course, this is wordplay, as the 2006 Agreement never established (or even addressed) a "contractual standard of review" by the Board of Trustees. Furthermore, while Plaintiff claims that the 2010 Extension Agreement "simply stated the Board of Trustees may have considered, if available, many materials in exercising its discretion to see if Chi Phi has been correctly guided by the 1993 Guidelines" (Compl. ¶ 51), that is, again, wordplay as the 2010 Extension Agreement says nothing of the sort. It does not mention the 1993 Guidelines much less state that they constrain the Board's discretion. To the contrary, it says that the Board may consider "any and all such facts or conditions it deems proper and/or applicable." The allegation in Paragraph 51 of the Complaint is simply an argumentative conclusion that is contradicted by the 2010 Extension Agreement.

Furthermore, lest there be any doubt, the 2010 Agreement says that "[t]o the extent that any term of this Letter Agreement is in conflict with any provisions or terms of the 2006 Agreement, this Letter Agreement shall control." Because the 2010 Extension Agreement deals almost exclusively with articulating the broad discretion of the Board, the only part of the 2006 Agreement that could possibly conflict with it is a reading that limits the discretion of the Board, as Plaintiff seeks to advance here. The 2010 Agreement by its terms prevents the Board's discretion described therein to be limited by the 2006 Agreement.

The 2010 Extension Agreement states unambiguously that the "Board will decide, in its discretion, whether to grant recolonization, *considering any and all such facts or conditions it deems proper and/or applicable,* including but not limited to the extent to which the application for recolonization may or may not advance the mission of the College, at such time." (Compl.

Ex. 5 (emphasis added).) The 2010 Agreement specifically included consideration of the Working Group Report as among the unlimited items that the Board could consider, and it gave the Board discretion to decide what other materials the Board may choose to rely upon in deciding whether to approve or deny the application. (*Id.*) The 2010 Extension Agreement is dispositive of the issue of whether Chi Phi has any basis on which to challenge the decision of the Board. It may not. Plaintiff's statements in its Complaint that it satisfies the College's Mission (Compl. ¶ 20) or that it can meet all of the Working Group's objectives (Compl. ¶ 84), are just a futile attempt to have the Court revisit the merits of its application over the discretion of the Board of Trustees, precisely to what was forbidden in Baker and Murphy.

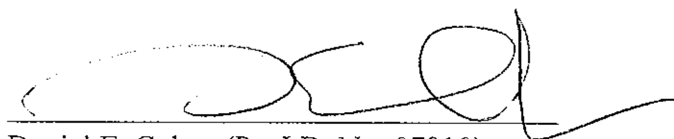
The Board, using the discretion that it had, made the determination not to colonize or recolonize any fraternities or sororities while the implementation and evaluation period (expected to take three years) in the Working Group's report was underway, and that decision included Chi Phi. (Compl. Ex. 14.) There is simply no basis (contractual or otherwise) on which Chi Phi can force the College to act in contravention of the Board's directive. Accordingly, the Complaint must be dismissed.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, defendant Lafayette College respectfully requests that the Court sustain its Preliminary Objections and dismiss the Complaint for Injunctive Relief.

Dated: November 22, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Daniel E. Cohen, hereby certify that a true and correct copy of the foregoing Preliminary Objections and the accompanying Brief in Support was filed with the Court and served upon the following counsel pursuant to the Pennsylvania Rules of Civil Procedure by first class mail, postage prepaid, on the date indicated below.

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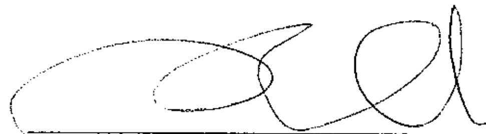

Daniel E. Cohen

Dated: November 22, 2011