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Rho Chapter of the Chi Phi Fraternity,

Plaintiff/Petitioner,

v.

Lafayette College,

Defendant/Respondent

:
: COURT OF COMMON PLEAS OF
: NORTHAMPTON COUNTY, PA

:
: CIVIL DIVISION

:
: No. C-48CV2011-10433

**RESPONSE TO PLAINTIFF'S PRELIMINARY OBJECTIONS TO
DEFENDANT LAFAYETTE COLLEGE'S PRELIMINARY OBJECTIONS**

Pursuant to Pennsylvania Rule of Civil Procedure 1028, defendant Lafayette College ("Lafayette" or the "College") hereby responds to the Preliminary Objections of plaintiff Rho Chapter of the Chi Phi Fraternity ("Plaintiff" or "Chi Phi"), and avers as follows.

1. Admitted.
2. Admitted.
3. Paragraph 3 is a conclusion of law to which no response is required, and it is deemed denied. Lafayette denies that it has "improperly insert[ed] selective and additional facts

that are not of record” Lafayette accurately averred in Paragraph 18 of its Preliminary Objections that “Chi Phi does not identify a single statement by the College that it intends to use or injure Vallamont in the Spring Semester of 2012” Lafayette’s additional statement that it does not intend to use or injure Vallamont in the Spring Semester of 2012 is not a “new fact.” To the contrary, it is a representation by Lafayette to Plaintiff and to this Court that Lafayette will comply with Plaintiff’s demand in this litigation that Lafayette not use or injure Vallamont in the Spring Semester of 2012, and plaintiff’s earlier knowledge of that representation is precisely why plaintiff was unable to allege anything to the contrary in the Complaint. There is no need for a “factual resolution” of the College’s stated intentions. Indeed, Plaintiff’s Preliminary Objections have now been essentially mooted by the parties’ agreement before this Court regarding the payment of expenses for Vallamont in spring semester 2012. Finally, Plaintiff’s Preliminary Objections do not address the central legal argument in Lafayette’s Preliminary Objections: Chi Phi has not been recolonized by the College’s Board of Trustees and therefore cannot use Vallamont for housing student members of the fraternity. This deficiency alone requires that Chi Phi’s request for injunctive relief be denied.

4. Paragraph 4 is a conclusion of law to which no response is required, and it is deemed denied. By way of further answer, Lafayette denies that the rulings in *Martin v. Commonwealth, DOT*, 556 A.2d 969 (Pa. Commw. Ct. 1989) apply to this case. In *Martin*, the plaintiff sued a county for negligence on the basis that the county had jurisdiction over an improperly maintained road. *Id.* at 970. The county filed preliminary objections contending that the roads were state highways. In support of this argument, the county attached an affidavit of a county official stating that the state owned and maintained the roads. *Id.* The facts in the affidavit formed the entire basis of the defendant’s demurrer; absent the affidavit, the defendant

had no legally adequate preliminary objection. By contrast, in *Buehl v. Horn*, 728 A.2d 973 (Pa. Commw. Ct. 1999), the plaintiff preliminarily objected to the defendant's preliminary objections on the basis that the defendant added "facts which were not of record . . . and created a 'speaking demurrer' in violation of Pa. R. Civ. P. No. 1028(a)(2)." *Id.* at 977. The court concluded that the "purported 'speaking demurrer' merely contain[ed] legal conclusions and opinions in it, and it does not appear to . . . attempt to interpolate facts not of record into the record." *Id.* Finding defendant's preliminary objections to be "legally adequate" despite the inclusion of the defendant's conclusions and opinions, the Court denied the plaintiff's preliminary objections. In this case, Lafayette's Preliminary Objections remain legally adequate regardless of Lafayette's representation. As Lafayette's Preliminary Objections explain, Chi Phi has failed to allege a single fact supporting that Lafayette intends to use or injury Vallamont in spring 2012. Moreover, Plaintiff's Preliminary Objections do not address the central legal argument in Lafayette's Preliminary Objections: that Chi Phi has not been recolonized and thus cannot use Vallamont for housing student fraternity members. Finally, Plaintiff's Preliminary Objections have now been essentially mooted by the parties' agreement regarding the payment of expenses for Vallamont in spring semester 2012.

5. Paragraph 5 is a conclusion of law to which no response is required, and it is deemed denied.

6. Paragraph 6 is a conclusion of law to which no response is required, and it is deemed denied. Lafayette specifically denies that its Preliminary Objection raise "issues of fact that are wholly inappropriate for such consideration." By way of further answer, Lafayette incorporates its response to Paragraphs 3 and 4 *supra*.

7. Lafayette admits only the Lafayette “has certain rights arising from the referenced 1909 Agreement and the 2006 Agreement” Lafayette denies that the “applicability of those Agreements turns on issue of fact regarding the various definitional terms used in those documents,” specifically the meaning of “inactive,” “extinct,” and “revived.” To the contrary, the terms are unambiguous, and their applicability here is apparent from the Complaint. Despite Plaintiff’s bald allegations and self-declarations that Rho Chapter of Chi Phi is active, Plaintiff has admitted in its Complaint that all of Chi Phi’s student members were switched to “alumni status” because they “were not living up the standards of conduct of the fraternity (Compl. ¶¶ 39-40) and that Chi Phi has not been granted approval by Lafayette to recolonize (Compl. ¶ 85).

8. Lafayette denies that it has “inject[ed] new facts in their argument that are not of record via the Complaint filed by the Plaintiff.” By way of further answer, Lafayette incorporates its response to Paragraphs 3 and 4 *supra*.

9. Paragraph 9 is a conclusion of law to which no response is required, and it is deemed denied. Furthermore, the College’s stated intent (which even Plaintiff has accepted as true) is not “an issue of fact requiring discovery.”

10. Lafayette denies that Plaintiff has pleaded any facts raising any “legitimate concern over the future of Vallamont.” To the contrary, Plaintiff makes irrelevant allegations concerning Lafayette’s interactions with fraternities other than Chi Phi. Lafayette denies that the relationship between Lafayette and fraternities other than Chi Phi bear on this dispute between Lafayette and Plaintiff.

11. The averments in Paragraph 11 are conclusions of law to which no response is required, and are deemed denied. Further, Lafayette incorporates by reference its response to Paragraphs 3, 4 and 10 *supra*.

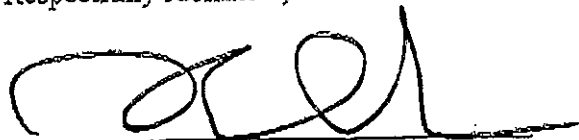
12. The averments in Paragraph 12 are conclusions of law to which no response is required, and are deemed denied. Lafayette further denies that it is “trying to foist an argument that there is no ‘case in controversy’ with regard to the future of Vallamont.” To the contrary, Lafayette makes no “case in controversy” argument in its Preliminary Objections. It merely points out that the relief that Plaintiff seeks in its Complaint—a preliminary and permanent injunction against the College with respect to its use of Vallamont in spring semester 2012 – is unnecessary. And indeed, it *is* unnecessary as the recent discussions with the Court make clear. Furthermore, Plaintiffs’ Preliminary Objections do not even address the bulk of the demurrer – Lafayette’s assertions that none of the agreements between it and Plaintiff forbid the College’s use of Vallamont or permit the Court to substitute its judgment for that of the College’s Board of Trustees with respect to Plaintiffs’ application for recolonization.

13. The averments in Paragraph 13 are conclusions of law to which no response is required, and are deemed denied.

WHEREFORE, defendant Lafayette College respectfully requests that the Court overrule Plaintiff's Preliminary Objections, sustain Lafayette's Preliminary Objections, and dismiss the Complaint.

Dated: December 30, 2011

Respectfully submitted,



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Plaintiff/Petitioner,	:	
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	:	No. C-48CV2011-10433
Lafayette College,	:	
	:	
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**MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFF'S PRELIMINARY
OBJECTIONS TO LAFAYETTE COLLEGE'S PRELIMINARY OBJECTIONS
AND
REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT LAFAYETTE COLLEGE'S PRELIMINARY OBJECTIONS**

I. MATTER BEFORE THE COURT

In response to Lafayette's Preliminary Objections, Plaintiff tries to distract the Court from its true aim in this litigation: forcing Lafayette to allow Chi Phi to recolonize.

First, Plaintiff argues that Lafayette's Preliminary Objections should be stricken because a half sentence purportedly contains facts not of record. This argument has no merit. The averment at issue – that Lafayette does not intend to use or injure Vallamont in spring semester

2012 – is merely a representation that Lafayette will comply with Plaintiff's demand that Lafayette not use or injure Vallamont in spring semester 2012, which was made known to Plaintiff before and during the time Plaintiff was filing its Complaint. That is why plaintiff was unable to make any specific averment that Lafayette had threatened to use or injure Vallamont in its Complaint, and the absence of such an averment is fatal to its claim for preliminary injunctive relief. Lafayette has now made this statement in the presence of this Court, and Plaintiff cannot dispute this point. Indeed, Plaintiff's Preliminary Objections have now essentially been mooted by the parties' agreement concerning the payment of expenses concerning Vallamont in spring semester 2012. Regardless, striking Lafayette's Preliminary Objections would be inappropriate because the half-sentence at issue is not essential to Lafayette's central argument: Chi Phi has not been recolonized and thus cannot use Vallamont to house student members of the fraternity.

The trivial Preliminary Objections to the College's Preliminary Objections aside, the rest of Plaintiff's Response to the College's Preliminary Objections misses the point entirely. Plaintiff fails to identify any contractual provision that mandates that Lafayette's Board of Trustees allow Chi Phi's recolonization. Indeed, Plaintiff essentially ignores that the 2010 Letter Agreement between the parties makes explicit that the College's Board of Trustees has discretion in determining whether to permit recolonization. Since the Board exercised its discretion in declining to permit Chi Phi's recolonization at this time, Chi Phi may not repopulate Vallamont under the 1909 Agreement.

For the reasons set forth below and in Lafayette's Opening Memorandum, the Court should ignore Plaintiff's distractions and dismiss the Complaint.

II. ARGUMENT

A. Plaintiff's Preliminary Objections Have No Merit

Plaintiff asks the Court to strike the entirety of Lafayette's thirty-paragraph Preliminary Objections on the basis that one-half sentence purportedly states a "new fact" -- Lafayette's averment that it will comply with Plaintiff's demand that Lafayette not use or injure Vallamont in spring semester 2012. Plaintiff's Preliminary Objections should be denied because this averment does not constitute a fact "not of record" and because the issue has now essentially been mooted.

In *Buehl v. Horn*, 728 A.2d 973 (Pa. Commw. 1999), the plaintiff preliminarily objected to the defendant's preliminary objections on the basis that the defendant added "facts which were not of record . . . and created a 'speaking demurrer' in violation of Pa. R. Civ. P. No. 1028(a)(2)." *Id.* at 977. The court concluded that the "purported 'speaking demurrer' merely contain[ed] legal conclusions and opinions in it, and it does not appear to . . . attempt to interpolate facts not of record into the record." *Id.* Finding defendant's preliminary objections to be "legally adequate" despite the inclusion of the defendant's conclusions and opinions, the Court denied the plaintiff's preliminary objections.

As in *Buehl*, Lafayette's averment that it will not use or injure Vallamont in spring 2012 does not attempt "to interpolate facts not of record into the record." *Id.* To the contrary, Lafayette has merely represented that it is willing to accommodate one of Plaintiff's demands in this litigation. Lafayette made this offer of concession to Plaintiff in the presence of this Court. Plaintiff cannot dispute this point. Indeed, Plaintiff's Preliminary Objections have now been essentially mooted. The parties have come to an interim agreement concerning the payment of

expenses for Vallamont in spring semester 2012, which Plaintiff claimed was necessary in the absence of the College's use of the House.

None of the cases in Plaintiff's brief support that a court may strike preliminary objections on this basis. For instance, in *Martin v. Commonwealth, DOT*, 556 A.2d 969 (Pa. Commw. 1989), the plaintiff sued a county for negligence on the basis that the county had jurisdiction over an improperly maintained road. *Id.* at 970. The county filed preliminary objections contending that the roads were state highways. In support of this argument, the county attached an affidavit of a county official stating that the state owned and maintained the roads. *Id.* The facts in the affidavit formed the entire basis of the defendant's demurrer; absent the affidavit, the defendant had no legally adequate preliminary objection.

By contrast, in this case, Lafayette's Preliminary Objections remain "legally adequate" regardless of Lafayette's representation. *See Buehl*, 728 A.2d at 977. The bottom line is that Chi Phi has failed to allege a single fact supporting that Lafayette intends to use or cause injury to Vallamont in spring 2012, and Lafayette's stated intention is the reason why it cannot do so. Moreover, Plaintiff's Preliminary Objections do not address the central legal argument in Lafayette's Preliminary Objections discussed below: that Chi Phi has not been recolonized and thus cannot use Vallamont for housing student fraternity members.¹

¹ Moreover, to the extent that the Court finds that reference to Lafayette's intentions for Vallamont in spring semester 2012 was improper under Pennsylvania Rule of Civil Procedure 1028(a), striking the entirety of Lafayette's Preliminary Objections would still be inappropriate. Instead, the Court has the discretion to: (1) ignore "surplusage" in ruling on the Preliminary Objections; or (2) strike only the "surplusage" and not the entirety of the Preliminary Objections. *See Diess v. Pa. Dep't of Trans.*, 935 A.2d 895, 909-10 (Pa. Commw. 2007) (choosing to simply ignore "surplusage" where plaintiff filed preliminary objections under Pennsylvania Rule of Civil Procedure 1028(a)(2)); *Poole Anderson Constr., LLC v. Kuber Hosp., LLC*, 2007 1 Pa. D. & C.5th 6 at 1-2 (Pa. Com. Pl. 2007) (same); *Yoder v. Blockson*, 2007 Pa. Dist & Cnty. Dec. LEXIS 14, 2-3 (Pa. Com. Pl. Jan. 5, 2007) (striking only "surplusage" and not entire pleading).

B. The College's Preliminary Objections Should Be Granted (Reply Brief)

Plaintiff's Response admits that the purpose of its lawsuit is to force Lafayette to permit Chi Phi "to repopulate its Chapter with an 'Open Bid' policy." (Resp. Br. 10.) Plaintiff speaks from both sides of its mouth; on one hand proclaiming that Chi Phi may occupy Vallamont because Chi Phi is currently active; on the other hand arguing that Lafayette must be forced to recolonize Chi Phi in order that Chi Phi may occupy Vallamont. The Complaint avers no facts to support either argument. First, the Complaint contains nothing but bald self-declarations that Chi Phi has declared itself active. Second, Plaintiff identifies no contractual provision that would force Lafayette to permit Chi Phi's recolonization. It does not and cannot dispute that the College's Board of Trustees has the discretion to determine whether to permit Chi Phi to recolonize. Likewise, it cannot be disputed that Chi Phi may not use Vallamont to house student members of the fraternity unless and until Chi Phi has been recolonized. Accordingly, Plaintiff's Complaint must be dismissed.

As explained in Lafayette's Preliminary Objections, the Complaint attaches a 2010 Letter Agreement that provides as follows:

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).)

Instead of addressing the language of the 2010 Letter Agreement, Plaintiff attempts to obfuscate the issues. First, Plaintiff argues at length that the Complaint has set forth a substantial “case in controversy” even though Lafayette’s Preliminary Objections make no argument based on the “case and controversy” doctrine. (Resp. Br. 6-15.) Next, Plaintiff repeats the bald averments in its Complaint that the Rho Chapter of Chi Phi is active based on Chi Phi’s self-proclamation that it is active. (Resp. Br. 11-13.) Plaintiff ignores that the Complaint itself avers that all Chi Phi student members were switched to “alumni status” because they “were not living up to the standards of conduct of the fraternity (Compl. ¶¶ 39-40) and that Chi Phi has not been granted approval by Lafayette to recolonize (Compl. ¶ 85).

Finally, Plaintiff declares that the College’s Board of Trustees somehow acted in bad faith, despite failing to allege any facts showing that the Board acted arbitrarily, dishonestly, or with any ill-motive. (Resp. ¶¶ 15-18.) To the contrary, the Complaint itself avers that the Board of Trustees decided that “during the three-year period of implementation and evaluation *no additional Greek organizations*, including Chi Phi, Rho Chapter, [will] be granted approval to recolonize and return to campus.” (Compl. ¶ 85 (emphasis added) (citing Ex. 14).) Further, Plaintiff admits that the

three year period is established to allow the College to gauge the performance of fraternities and sororities in four areas: 1) non-discrimination in selection of new members; 2) affording their members learning opportunities; 3) achieving academic performance in line with overall academic performance; and, 4) achieving disciplinary profiles in line with overall College disciplinary profiles.

These averments in the Complaint only serve to support that the Board’s decision was anything but arbitrary. Further, they evince that the Board’s decision applied to all fraternities: Chi Phi was not singled out.

In sum, Plaintiff's Response articulates no basis to question the Board's use of its discretion. As explained in Lafayette's Preliminary Objections, 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 Resp. 14; Compl. ¶¶ 12-20; 42-45, 49-52). But on its face the 2006 Agreement does not address much less limit the Board's 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. Plaintiff's Response simply ignores this point. (See, e.g., Resp. p. 14.)

Because the Board exercised proper discretion in declining to permit Chi Phi's recolonization at this time, Chi Phi may not repopulate Vallamont under the 1909 Agreement. That Chi Phi seeks recolonization in this litigation only serves to highlight that recolonization, not Chi Phi's self-proclamation of activity, is critical under the 1909 Agreement.

IV. RELIEF REQUESTED

WHEREFORE, defendant Lafayette College respectfully requests that the Court overrule Plaintiff's Preliminary Objections, sustain Lafayette's Preliminary Objections, and dismiss the Complaint.

Dated: December 30, 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 Responses to Plaintiff's Preliminary Objections and Memoranda of Law were 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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Dated: December 30, 2011