

FILED IN OFFICE
CLERK OF SUPERIOR COURT
HABERSHAM COUNTY, GEORGIA

18CV0454

RUSSELL W. SMITH
AUG 20, 2018 05:44 PM



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO.
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

**COMPLAINT FOR DAMAGES CONCERNING BREACH OF CONTRACT AND
BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING**

COMES NOW Dr. Robert H. Wainberg, Plaintiff in the captioned action, and brings this Complaint against Defendant Piedmont College, and shows this Honorable Court as follows:

INTRODUCTION

Dr. Wainberg faithfully served Piedmont College for thirty years and successfully built the science department from the ground up as one of the original founders. When he began standing up to the administration in regards to corruption, he became targeted, his good name and professional reputation sullied with slanderous lies. In retaliation against Dr. Wainberg, a pillar of the institution and beloved professor who helped grow the institution for three decades, President Mellichamp unlawfully robbed him of his job and illegally deprived him of a fair hearing that he was contractually entitled to as a tenured professor.

Worse, President Mellichamp's tyrannical actions have harmed the Piedmont College fulltime faculty of the tenure protections that they were legally and contractually originally promised. He has used the threat of termination without tenure to quash dissent and silence academic freedom of expression. He has subjected those like Dr. Wainberg who have spoken out to bully tactics and terrorizing threats. He has put a chill on academic freedom of the institution.

He has demoralized faculty and harmed retention. He currently poses a grave risk not only to the men and women who have devoted their entire professional lives to Piedmont College, but to the academic integrity and welfare of the institution as a whole.

CLAIMS, JURISDICTION, AND VENUE

1.

This action is brought seeking damages pursuant to the laws of the State of Georgia for breach of contract and violation of the implied duty of good faith and fair dealing. It also seeks an award of punitive damages and attorney fees.

2.

This Honorable Court has subject matter jurisdiction over Dr. Wainberg's claims.

3.

Venue is proper before this Honorable Court in that it is brought in the County where the Piedmont College resides.

4.

Dr. Wainberg has satisfied all conditions precedent for bringing this action.

PARTIES

5.

Dr. Robert H. Wainberg, Plaintiff herein, resides in Jackson County, Georgia. He has been an employee of Defendant, Piedmont College, at all times relevant to this complaint.

6.

Piedmont College is a comprehensive liberal arts institution and also offers a variety of career-oriented majors in the arts and sciences, business, education, and nursing. The main campus and principal place of business is located in Demorest, Georgia. Its registered agent for

service is President James Mellichamp.

FACTS GIVING RISE TO THE COMPLAINT

7.

Dr. Wainberg (or “Dr. Rob” as he is fondly known as), was hired as a tenure-track Assistant Professor of Biology in September 1988. He is one of the original founding members of the Department of Biological Sciences. Dr. Wainberg, a tenured Biology professor, has been part of the Piedmont College community since leaving his cancer research in 1988. In his thirty-year tenure at Piedmont College, Dr. Wainberg has been a well-loved professor who has taught and mentored a multitude of students from many areas of studies. His former students read like a list of Who’s Who and include many prominent politicians, government officials, judges, and CEO’s throughout the state of Georgia. This includes the current Mayor of Demorest (and former member of Georgia House of Representatives) Dr. Rick Austin who became his fellow colleague and currently serves as Associate Professor within the Science Department at Piedmont College.

8.

Dr. Rob Wainberg was the recipient of the 1991 Sears-Roebuck Foundation Award for Teaching Excellence and Campus Leadership and the 2001 Piedmont College Advisor of the Year Award. Dr. Wainberg was also listed in Who's Who in Science and Engineering from 1994 - 2006 and Who's Who in the World from 1995 -2006. This past December, he was honored by the Peach State Federal Credit Union with a \$50,000 gift for the newly established Dr. Robert H. Wainberg Undergraduate Science Research Scholarship to provide funds to assist the research of future Biology, Chemistry, Geology, and Environmental Science students.

9.

Dr. Wainberg was granted tenure effective for the academic year 1993-94. Dr. Wainberg was also promoted to Associate Professor effective that academic year.

10.

During his tenure at Piedmont College, Dr. Wainberg has received significant honors, has been selected to serve on numerous committees, has been awarded prestigious grants, and otherwise had a distinguished career, serving Piedmont College, its faculty, administration, and its students with dignity, diligence, and professionalism.

11.

During his career at Piedmont College, biology professor Dr. Wainberg became actively opposed to Mar-Jac (a powerful corporation that is a producer and processor of poultry in Georgia) building a feed mill in the area because of the environmental hazards it posed. As a result of his opposition, he would uncover that Mar Jac had been owned by a group founded by a wealthy and prominent Saudi Arabian family that would later become under scrutiny by the United States government regarding potential links to radical terrorism. Dr. Wainberg began working with the federal government to aid in exposing the ties funding radical Islamic terrorism at 555 Grove Street in Herndon, Virginia where most if not all of Mar-Jac's beneficial owners maintained offices and where the federal government would execute search warrants leading to one of the largest raids of those suspected by the U.S. government of funding terrorism.¹

12.

In response to his work with the federal government and his opposition to Mar-Jac, Dr. Wainberg experienced threats, including but not limited to such things as a strange men driving

¹ <https://www.nytimes.com/2002/03/21/us/a-nation-challenged-the-money-trail-raids-seek-evidence-of-money-laundering.html>

up to him in a Mar-Jac truck stating: "I know who you are I know where you live...we are watching."

13.

a. In response to him standing up for what he believed was right, Dr. Wainberg also suffered threats to his employment at Piedmont College. Dr. Wainberg was informed that the Chairman of the Board Gus Arrendale was not happy with his opposition to Mar-Jac's feed mill and that as a result then Piedmont College President Ray Cleere ordered Dr. Rick Austin (current Mayor of Demorest) to write a bad review against Dr. Wainberg so that he would not get his promotion.

b. Mayor Rick Austin, an ethical leader who had just written his former professor now colleague Dr. Wainberg (who had just won his second award at Piedmont College) a glowing letter, refused to do so.

c. Since that time period, Gus Arrendale has remained as Chairman of the Board at Piedmont College to date, for a total of nearly 18 years despite this being in violation of Board policy which prohibits a Board member from serving in the same office for more than four years.

d. Since that time, Dr. Wainberg has continued to be targeted for standing up to the administration.

14.

Despite Dr. Austin refusing to act unethically by writing a letter against Dr. Wainberg as the President requested him to do, the administration still denied Dr. Wainberg his promotion as a result of him standing up for what he believed to be illegal and dangerous activity. In response, Dr. Wainberg filed a grievance before the Grievance Committee. Dr. Wainberg was told by the administration of Piedmont College that the Grievance Committee denied his grievance but he

would later learn from the Chair of the Grievance Committee, Dr. Stephanie Almagno, that this was false, that the Committee had actually voted in favor of Dr. Wainberg's promotion even though the top two members of the Piedmont College administration (Dr. Cleere and Dr. Mellichamp) would lie to Dr. Wainberg in President Cleere's office and tell him that it did not.

15.

The administration of Piedmont College continued to threaten those who spoke out for what they believed to be illegal or unethical activity. Dr. Wainberg was considered by the administration to be one of those faculty members who would speak up against wrongs done by the administration.

16..

Throughout Dr. Wainberg's career, the administration of Piedmont College sought to chill free speech, expression, and academic freedom of the faculty by violating the academic principles of tenure. Even though Piedmont College had hired many faculty promising them tenure and had a policy for tenure, it began violating its policy on tenure by taking steps to see that no additional faculty member was appointed tenure in clear breach of faculty's contractual rights pursuant to contracts and/or the faculty handbook. This is significant because in fascist countries with tyrannical dictators, academic freedom within universities is usually the first thing to be attacked. Throughout the 20th century we saw the persecution of academics across Europe: The Bolshevik Revolution in Russia and the Nazi Third Reich in Germany and other fascist dictatorships in Italy, Spain, Greece and beyond led to purges.² Thus, it is no surprise that in the case of Piedmont College, that when the administration took on tyrannical qualities, it started with the attack on tenure and academic freedom in an effort to silence and quash dissent.

² <https://www.futurelearn.com/courses/academic-freedom/1/steps/268318>

17.

The purpose of tenure is to protect professors' academic freedom so they will freely speak and seek out the truth first and foremost, in their research, their teaching, and in their scholarly practice. For example, tenure protects professors' academic freedoms to teach and discuss; to carry out research and publish the results and make them known; to freely express opinions about the academic institution or system in which one works; to participate in professional or representative academic bodies; and to freely speak out without being censored or retaliated.

18.

Tenure does not protect bad teachers from being fired, rather protects good teachers from being unfairly targeted or retaliated against. It also attracts high quality professors who will devote their lives to an academic institution and promotes retention of good teachers who do not simply use Piedmont College as a stepping stone in their career. In sum, the best faculty seek work at institutions which offer tenure. In order for a college to remain competitive, it needs to provide tenure to attract and keep the best talent. Once Piedmont College stopped honoring their promises to faculty to provide tenure, it became hard to keep and attract the best faculty, thus harming the institution as a whole.

19.

In 2013, Chairman Gus Arrendale appointed Dr. James Mellichamp to be President of Piedmont College. Dr. Mellichamp was the progeny of the previous president and was a part of the long-term administration. Like his predecessor, Dr. Mellichamp openly went after those who spoke truth to power, threatening to take away Piedmont College employees' jobs if they challenged what they saw to be unethical actions on the part of his administration.

20.

Dr. Wainberg was very concerned as to what he believed to be was unethical corruption by President Mellichamp and was opposed to it. For example, in the past two recent years, Dr. Wainberg actively challenged what he believed to be the administration and President Mellichamp's actions which compromised academic integrity concerning athletes.

21.

In response to Dr. Wainberg challenging the administration of Piedmont College, the administration sought to target him in retaliation in an effort to take away his job.

22.

Upon information and belief, President Mellichamp encouraged his good friend and faculty member to write a letter against Dr. Wainberg. This friend and faculty member had been upset with Dr. Wainberg because her daughter had dropped his class because she was failing it. The letter contained defamatory information.

23.

The administration also encouraged a disgruntled student to file a complaint against Dr. Wainberg. This male student "R.A." was angry at Dr. Wainberg for getting a bad grade. The student's classmates admitted that this student was out to get Dr. Wainberg because he was angry at him for this bad grade.

24.

The administration absurdly claims that Dr. Wainberg has committed a "Title 9" violation. Title 9 refers to a sexual harassment claim. Dr. Wainberg has never sexually harassed anyone.

25.

Dr. Wainberg is a biology professor. In his classes, he has to teach about sexual reproduction or human biological processes. Oftentimes, in order to keep the class engaged in learning, he will tell funny anecdotes. If Dr. Wainberg, a heterosexual male, ever uses a student as an example in class, he will only use one of his male advisees that he has a good, comfortable relationship with. "R.A." was one of those advisees. Dr. Wainberg had an excellent relationship with "R.A." his advisee until "R.A." became very upset with him about a poor grade and made sure his classmates knew he was going to go after Dr. Wainberg because of it.

26.

a. Dr. Wainberg never has sexually harassed anyone. What "R.A." complained of was an anecdotal story that Dr. Wainberg used as a teaching tool that was not intended to embarrass or upset "R.A." Rather, it was simply an illustration used to teach about how energy molecules are converted into emergency enzymes, pyruvate, and lactate.

b. Dr. Wainberg simply used "R.A." his advisee whom he thought he had a good rapport and relationship to attempt to illustrate a story of what would happen to two athletes—one who was chasing the other for trying to cheat on his girlfriend—in terms to show how in a situation like that (a confrontation and subsequent physically exerting chase) energy starved skeletal muscle would anaerobically convert pyruvate from glycolysis to lactate for quick energy temporarily that would eventually cause these muscles to cramp and seize up.

c. What is ironic about this past year's generation of one or two students that complained that Dr. Wainberg had mentioned sex in a college level, biology classroom was that this came from a disgruntled student unhappy with a grade they had gotten.

27.

Dr. Wainberg, as a biology teacher, often has to teach about human biological responses, biochemistry (including glycolysis), cell biology, microbiology, physiology, genetics, sexual reproduction, and all other aspects of biology that science professors are required to teach to young adults (not children) within a college classroom. He tries to do so in a way that is entertaining and engaging with his college students and has successfully done so over the past three decades which has resulted in honors and awards. Furthermore, Dr. Wainberg has always been a tremendous advocate for students over the years and treated them with respect. In no way has he ever conducted himself in a manner that could ever be construed as sexual harassment.

28.

Nevertheless, President Mellichamp latched onto this complaint and was determined to charge Dr. Wainberg with a Title 9 violation. This was a lie. This was also hugely ironic and hypocritical coming from President Mellichamp, a gay man who had sexually harassed both women and men during his career at Piedmont College, including female students and his male subordinates. For example, President Mellichamp:

a. While as President, grabbed a subordinate male faculty member in his buttocks, patting and firmly cupping his rear buttocks while stating to him in a sexual tone: "Oh.....you are in shorts today." The male faculty member will testify under oath that this occurred.

b. Sexually harassed college students while he was their professor including sexually assaulting a female student by grabbing a female college student's buttocks. This woman will testify under oath that this occurred.

c. Purchased alcohol for minors and got college students intoxicated including drinking with those who were below the legal drinking age. Former students are willing to testify

that this occurred and there is a current, ongoing search for the photographic evidence.

d. Currently failed to have his administration investigation a complaint of genuine sexual harassment by his upper level administration. This can also be corroborated with sworn testimony.

29.

In sum, President Mellichamp's action of falsely charging Dr. Wainberg of violating Title 9 is an outrageous example of what is colloquially called "the pot calling the kettle black." And, it is motivated out of retaliation and a desire to quash academic free speech as the Piedmont College administration has targeted Dr. Wainberg for some time now, especially in regards to how he has spoken out regarding the administration's violations of academic integrity concerning student athletes.

30.

In retaliation, President Mellichamp terminated Dr. Wainberg who had faithfully served the institution for thirty years, in breach of his contract as a tenured professor.

31.

Piedmont College is contractually obligated to provide due process through a fair hearing before terminating a tenured professor pursuant to the contract and university policies set forth in the faculty handbook.

32.

Pursuant to Piedmont College Policies and Procedures, termination may only occur for a tenured professor if the faculty member's conduct is considered seriously prejudicial. Prior to termination, the faculty member must be notified in writing of the specific conduct which may result in termination and an action must not be taken without a hearing.

33.

Contrary to the Piedmont College Policies and Procedures Manual provisions on termination of faculty:

- a. Dr. Wainberg did not receive proper written notice of termination or a fair hearing.
- b. A decision to terminate occurred prior to investigating or interviewing Dr. Wainberg.
- c. Dr. Wainberg did not receive a fair hearing.
- d. Dr. Wainberg was not made aware of the investigation by Piedmont College until after President Mellichamp decided to terminate him.
- e. Dr. Wainberg was not even interviewed by investigators or afforded the opportunity to defend himself or refute the charges until after President Mellichamp made the decision to terminate him.
- f. On April 19th, "R.A." a disgruntled male student who had received a bad grade in his class and expressed wanting to go after Dr. Wainberg, made a complaint against him yet no one informed Dr. Wainberg until after the decision to terminate him was made.
- g. Piedmont College's Title 9 officer did not conduct the Title 9 investigation, instead President Mellichamp put an untrained Athletics Director and HR employee in charge of investigating a Title 9 violation, unusual as Dr. Wainberg had been making complaints regarding violations of academic integrity concerning athletes.
- h. On April 23rd and 24th, the untrained university investigators (the Athletics Director and HR employee) questioned "R.A.;" a male student named "G.C." who admitted "R.A." was out to get Dr. Wainberg because he was mad about a grade; "J.S." (an older student

who had never set foot in Dr. Wainberg's class or spoken with him but had only hearsay from her friend "R.A.") and two female students of Dr. Wainberg who went in because they were so outraged as to what "R.A." had claimed. These two female students testified in Dr. Wainberg's favor and provided exculpatory evidence, clearing Dr. Wainberg's good name.

i. President Mellichamp even before the Athletics Director and H.R. had even interviewed Dr. Wainberg as part of their investigation made up his mind to terminate Dr. Wainberg without fair due process or even allowing Dr. Wainberg the opportunity to defend himself or refute such charges. On April 27th, three days after the investigation (that did not include the investigators questioning Dr. Wainberg to give him a chance to rebut the charges), President Mellichamp verbally informed the Mayor of Demorest and Biology Professor Dr. Rick Austin that he had decided that Dr. Wainberg was not going to get his employment contract for the following year.

j. Piedmont College never informed Dr. Wainberg they were terminating him or that there was an investigation against him. Instead, Dr. Wainberg learns it through his colleagues Dr. Rick Austin and Dr. Carlos Camp. In response, Dr. Wainberg confronted President Mellichamp on May 4th. In this taped audio recording, President Mellichamp admits that he is being terminated, even though again, Dr. Wainberg has never yet been informed of the charges, questioned by investigators or had the opportunity to refute the charges against him, in violation of the implied duty of good faith and fair dealing and in breach of his contract.

k. On May 9th, Dr. Wainberg is finally interviewed by the Athletic Director and HR person and questioned about the charges for the first time, nearly two weeks after President Mellichamp already admitted to the Mayor of Demorest that he had decided Dr. Wainberg would be terminated.

l. The two individuals interviewing Dr. Wainberg take copious notes where Dr. Wainberg rebuts every allegation that has been made. They both hug him and tell him that they are very uncomfortable doing this. They also tell Dr. Wainberg that they are giving the notes they have taken rebutting all the allegations to President Mellichamp to be transcribed. They explain that their job is just fact finding.

m. This is a phony investigation since two weeks prior President Mellichamp has already made clear that the decision to terminate him was made even before Dr. Wainberg was interviewed by the investigators. Furthermore, President Mellichamp refuses to give the exculpatory notes to Dr. Wainberg prior to his hearing and fails to present any of the documentation that refutes the charges against Dr. Wainberg before the Hearing panel made up of Board members, hiding all exculpatory evidence that cleared Dr. Wainberg's good name.

n. Dr. Wainberg repeatedly requests to be given this exculpatory evidence and documentation that the investigators took down in order to prepare for his hearing. He is denied this evidence.

o. Dr. Wainberg is not given any of the evidence explaining what the specific allegations were against him or what he was supposedly even charged with in writing prior to his hearing. Rather, he is given a file of evidence from the investigators on May 24th, one night before his hearing with less than 24 hours to prepare. Notably, all the exculpatory evidence that the investigators documented in their notes from the two students that went in to testify in favor of Dr. Wainberg as well as all of Dr. Wainberg's rebuttals refuting the allegations has gone missing out of the evidentiary file.

p. At the hearing on May 25th, President Mellichamp sends Vice President Dr. Perry Rettig to present the evidence against Dr. Wainberg before the hearing panel made up of three

Board members. Not only does Dr. Perry Rettig engage in secret, ex-parte conversation with the Board members at the hearing, he fails to present any of the evidence obtained by the investigators that clear Dr. Wainberg's good name.

34.

Contrary to the Piedmont College Policies and Procedures Manual provisions on termination of faculty, Dr. Wainberg also did not receive the opportunity for a fair hearing in clear breach of his contract and a violation of the implied duty of good faith and fair dealing.

35.

Not only did Dr. Wainberg not receive any evidence less than 24 hours before his termination hearing with no time to prepare, all the evidence favorable to Dr. Wainberg was missing from the file. Dr. Wainberg had no opportunity to have this favorable evidence presented to the hearing panel.

36.

At the hearing, Dr. Perry Rettig (the Vice President who argued on behalf of Piedmont College's administration) engaged in secret, ex parte communications behind closed doors with the hearing panel outside of the presence of Dr. Wainberg. Dr. Wainberg actually had to sit outside a closed door where Dr. Perry Rettig was secretly permitted to present information to the hearing panel outside his presence, without him being permitted to hear what was being said so that he could refute any allegations made against him. This happened at the first part of the hearing as well as at the end where Dr. Perry Rettig met with the Board members behind closed doors outside the presence of Dr. Wainberg.

37.

Outrageously, Piedmont College's representative Dr. Perry Rettig presented no exculpatory evidence to the Board contained in the investigators' findings that included Dr. Wainberg's rebuttals or the two female students who came to testify on Dr. Wainberg's behalf. All of that documentary evidence went missing and to date, Piedmont College has refused to provide this evidence to Dr. Wainberg despite his repeated requests.

38.

After being terminated from his position at Piedmont College, Dr. Wainberg has diligently sought and obtained work for which he is qualified, though such work has been temporary, at less compensation, without tenure, and without the benefits provided by Piedmont College. Dr. Wainberg has been unable to obtain work on similar terms and conditions with the position he had at Piedmont College, and despite his best efforts, Dr. Wainberg is currently unemployed.

39.

a. Robbing a tenured professor who faithfully served the institution after thirty years of his income and health insurance benefits, whereas he can no longer afford expensive COBRA health insurance benefits, has not only caused significant economic harm and emotional distress, but it has placed Dr. Wainberg's health and life at risk as he suffers from hypertension and Type II Diabetes.

b. Piedmont College's actions have not only financially harmed Dr. Wainberg but emotionally harmed a dedicated thirty-year servant of the university who intended to retire in May 2025 so he could be present for the 125th anniversary of the college (as he was for the 100th and 120th festivities) and for Dr. Carlos Camp's 70th birthday party in April. Rather than

rewarding a well-loved professor who made the sacrifice of service to this institution throughout his entire professional lifetime, Piedmont College has responded with a cruelty that cuts the very fabric of this institution by demoralizing each and every faculty member who wonders if they could suffer the same fate after a lifetime of service.

**COUNT I
BREACH OF CONTRACT**

By this reference, the preceding paragraphs are hereby incorporated as if fully set forth herein.

40.

In the summer of 2017, Piedmont College and Dr. Wainberg entered into an employment contract for the academic year 2017-2018 as a tenured member of the faculty. As a tenured member of the faculty, Dr. Wainberg was contractually entitled to renewal of his annual contract of employment until his retirement or resignation unless there was adequate cause for his dismissal by Piedmont College.

41.

By terminating Dr. Wainberg, Piedmont College breached its employment contract with Dr. Wainberg and breached his tenure rights. Because of Piedmont College's failure to give Dr. Wainberg fair and due process in his case, pursuant to Piedmont College Policies and Procedures, Piedmont College did not have cause to terminate Dr. Wainberg's annual contract for the 2017-2018 academic year, nor did Piedmont College have cause to terminate Dr. Wainberg's tenure rights.

42.

Piedmont College's breach of contract damaged Dr. Wainberg.

COUNT II
VIOLATION OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

Dr. Wainberg fully incorporates Paragraphs 1-27 as if each were set forth verbatim fully herein.

43.

Piedmont College and Dr. Wainberg entered into valid binding contractual agreement, which created all correlating duties, commitments and obligations arising and flowing from the express language of the contracts.

44.

Piedmont College knowingly, willfully, and/or recklessly breached the duties, commitments, and/or obligations imposed upon Piedmont College by the express wording and implied meaning of the contracts entered into by Piedmont College and Dr. Wainberg.

45.

Piedmont College's conduct in knowingly, willfully, and/or recklessly breaching its duties pursuant to the contracts entered into by Piedmont College and Dr. Wainberg demonstrate that Piedmont College also breached the implied duty of good faith and fair dealing owed to Dr. Wainberg in executing said contracts. Georgia law recognizes this implied duty. See DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 645, 734 S.E.2d 466, 476 (2012).

46.

Piedmont College's conduct in breaching the contract and implied duty of good faith and fair dealing directly and/or proximately caused injury to Dr. Wainberg.

PUNITIVES

By this reference, the preceding paragraphs are hereby incorporated as if fully set forth herein .

47.

Dr. Wainberg is entitled to exemplary damages because Piedmont College conduct was wanton, willful, and showed a reckless disregard and deliberate indifference to the rights of the Plaintiff in violating their implied duty of good faith and fair dealing.

ATTORNEY FEES

By this reference, the preceding paragraphs are hereby incorporated as if fully set forth herein .

48.

Piedmont College breached Dr. Wainberg's contract in bad faith, has been stubbornly litigious, and has caused Dr. Wainberg unnecessary trouble and expense, entitling Dr. Wainberg to recover expenses of litigation and attorneys fees.

PRAVERS FOR RELIEF

WHEREFORE, Dr. Wainberg prays the following relief:

1. That summons issue and be served upon the Defendant in accordance with the law; further,
2. That Dr. Wainberg seeks an amount reflective of all damages, including consequential damages to compensate the injuries sustained as the result of the Defendants' actions and more specifically;
3. That Dr. Wainberg have and recover reasonable attorney fees and costs in an amount to be determined by the court;
4. That this Court enter judgment for the loss of his income as a result of the breach of contract together with prejudgment and post-judgment interest;
5. Any and all further relief that this Court deems just and proper.

6. That Dr. Wainberg will have and recover such other, further and different relief this Court deems appropriate under the circumstances.

Respectfully submitted this 20th day of August 2018,

/s/ JULIE OINONEN

Julie Oinonen

Ga. Bar No. 722018

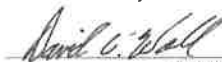
Attorney for Plaintiff

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com

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STATE OF GEORGIA**

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CIVIL ACTION NUMBER 18CV0454

Wainberg, Robert H. Dr.

PLAINTIFF

VS.

Piedmont College

DEFENDANT

SUMMONS

TO THE ABOVE NAMED DEFENDANT:

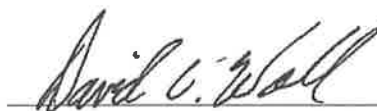
You are hereby summoned and required to file with the Clerk of said court and serve upon the Plaintiff's attorney, whose name and address is:

Julie Oinonen
Williams Oinonen LLC
44 Broad Street, NW
Suite 200
Atlanta, Georgia 30303

an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This 20th day of August, 2018.

Clerk of Superior Court



David Wall, Clerk
Habersham County, Georgia

**SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA**

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Wainberg, Robert H. Dr.

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**Julie Oinonen
Williams Oinonen LLC
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Atlanta, Georgia 30303**

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IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

PIEDMONT COLLEGE

Defendant.

)
) CIVIL ACTION
) NO.
)
)
)
)
)

PLAINTIFF'S INTERROGATORIES TO DEFENDANT

Pursuant to O.C.G.A. § 9-11-33, you are required to provide **verified** responses in writing to these interrogatories within 45 days and to supplement your responses in a timely manner.

DEFINITIONS & INSTRUCTIONS

(a) **You.** The terms "you" and "your" shall mean Defendant and all person(s), agents, and employees acting or purporting to act in any manner for Defendant's behalf. This includes the Superintendent, Chief Legal Officer, Chief Human Resources Officer, Board members, and all other employees, agents, and attorneys.

(b) The term "**document**" shall mean anything upon which information is or has been stored, recorded, or communicated that is in your custody, control, or possession of your agents, attorneys, employees, or others of which you have knowledge, including but not limited to emails, text messages, memos, paper documents, draft versions, databases, voicemail, and all electronically stored information.

(d) The term "**person**" shall mean a natural person or an artificial person including partnerships, corporations, proprietorships, unincorporated associates, governmental bodies, or any other legally cognizable entities.

(e) The term “**date**” shall mean the exact date, month, and year, if known to defendant, or, if the exact date is not known, the best available approximation.

(f) The term “**communication**” shall include any oral utterance made, heard, or overheard, whether in person or by telephone or otherwise, as well as every document and every other mode of intentionally conveyed meaning. The term “**concerning**” means referring to, describing, evidencing, or constituting.

(g) The term “**identify documents**” means to give, to the extent known: (i.) the type of document; (ii.) the general subject matter of the document; (iii.) the location of the document; (iv) the author(s) of the document; (v.) the date of the document; and (vi.) the persons to whom the document or a copy was to have been sent;.

(h) The term “**identify entities**” means to give the entity’s full name, address, and relationship to the parties.

(i.) The term “**identify persons**” means to give the person’s full name, present address, telephone number including cellular, present or last known place of employment, present or last known job title, and email address.

(j.) **Full and complete responses are required.** If a partial or incomplete answer or response is provided, the responding party shall state the reason why the answer/production is incomplete.

(k.) **Supplementation: these requests are subject to supplementation** under O.C.G.A. § 9-11-26(e).

(l) **Avoidance of disputes and delays:** If you believe that an interrogatory is confusing, vague, or ambiguous, please contact me by phone or email as soon as possible for clarification---

rather than waiting until the responses are due to object—in order to avoid discovery disputes and delays based on curable defects.

(m) **Interrogatory titles:** The below interrogatories are each preceded by a title in bold and underline. The title is not part of the interrogatory, merely used for the convenience of the Parties in identifying general subject matter.

PRIVILEGE LOG:

If you claim that any information, matter, or part thereof is privileged or otherwise exempt from disclosure, and you withhold such information or matter on that basis, you **MUST PROVIDE A PRIVILEGE LOG WHICH:**

(1) states the nature of the privilege or exemption, whether the claimed privilege or exemption extends to all or only part of the requested information, the person or persons to whom the privilege obtains, the subject matter sought to be deemed privileged, and the identity of all persons who have knowledge of the information claimed to be privileged.

(2) In addition, if the information or matter claimed to be privileged is a document, identify the document, give a brief summary of the contents or nature of the document, and identify all persons having knowledge of the document and all custodians or the document or any photocopies, facsimiles, and duplicates thereof.

INTERROGATORIES:

1. **Fact Providers:**

a. Identify each person who provided any factual information included in your response to these interrogatories and request for production of documents.

b. Identify each individual (their complete name and telephone number) who you know or believe possesses knowledge or information relevant to the subject matter of this

litigation and, with respect to each, provide a description of the knowledge or information you believe each such individual possesses. (This list should not be limited to persons who will or may testify on Defendant's behalf at trial, but necessarily includes them. It includes but is not limited to students, board members, and employees of the College.)

2. **ESI Sources:** Please identify all active sources of electronically stored information including cell phones or personal cell phones, that the President, Vice President, senior level cabinet staff, faculty, students, athletics director, other agents or employees who have relevant information concerning this lawsuit have used to communicate with each other. This includes all computers that include both locally stored and networked stored information on laptops, stationary computers, smartphones, tablet devices, webmail accounts, social media accounts, servers including file servers, exchange servers, and department file shares. For each source, please set forth: a) its total capacity in gigabytes; b) its physical location, if applicable and whose custody and control it is under; c) the total volume of active data stored on or in the source; d) whether you have created a bit for bit forensic image of the source; and e) sufficient identifying information about the source, such as the version, the manufacturer, model number, operating system, etc.

3. **Preservation Steps:** Please describe in detail all steps you have taken to preserve both electronically stored information and other non-electronic documents and things in your custody and control during the relevant period. Please identify all persons who participated in your preservation efforts.

4. **Search and Production Techniques:** Please describe the techniques that you utilized to collect your final production set of documents in response to Plaintiff's Request for

Production of Documents (“Plaintiff’s RPD”) served with this set of interrogatories. For each numbered requests in Plaintiff’s RPD set forth:

- a) the physical locations you searched for documents;
- b) the sources of electronically stored information (“ESI”) that you searched;
- c) the software that you used to search for ESI;
- d) the steps you took to prevent alteration or destruction of ESI, including metadata, during the search, review, and production processes;
- f) the search terms or other techniques that you used to search for responsive ESI; and,
- g) the persons who participated in search for responsive documents.

5. **Name of Every Student Who Allegedly Made a Complaint About Dr.**

Wainberg to Monica Schulte:

Please identify the name of every current or former student, their telephone contact information, and the nature of the complaint that Monica Schulte contends in her May 18, 2018 letter made a complaint to her about Rob Wainberg.

6. **Persons involved in the decision to terminate Plaintiff:**

Please identify all employees, board members, agents and attorneys who were involved in the decision to terminate Dr. Wainberg.

7. **Description of Affirmative Defenses:** For all affirmative defenses that you are asserting in this action, please provide a general description of the material facts which support those defenses and denials.

8. **Documents:** Identify all documents which you contend refutes Plaintiff’s claims.

9. **Documents you are withholding:**

Have you provided to us all documents? For any documents you are withholding---

(i) state the nature of the privilege or exemption, whether the claimed privilege or exemption extends to all or only part of the requested information, the person or persons to whom the privilege obtains, the subject matter sought to be deemed privileged, and the identity of all persons who have knowledge of the information claimed to be privileged.

(ii) In addition, if the information or matter claimed to be privileged is a document, identify the document, give a brief summary of the contents or nature of the document, and identify all persons having knowledge of the document and all custodians or the document or any photocopies, facsimiles, and duplicates thereof.

10. **Policies and Reasons to Terminate Plaintiff:**

- a. Please explain in detail what policies and procedures exist for non-renewing a certified, non-tenured educator.
- b. Please explain in detail all the reasons for why the Defendant terminated Dr. Wainberg and what policies were followed if any.

11. **Investigation:**

Regarding any investigation made against Dr. Wainberg:

- a. The dates of the investigation, the identity of each person who participated in the investigation(s) and a detailed description of his or her role;
- b. A complete description of all actions you took as part of any investigation, including the date on which any such actions were taken and all individuals with knowledge of the action taken;
- c. The identity of each individual who was interviewed or questioned, or from whom information was obtained in any other form;

- d. Whether any individual who provided information was asked to give a statement and, if so, whether he or she did so; and
- e. The identity of all documents concerning the investigation(s), including, without limitation, all statements, documents collected, and documents concerning any actions taken in connection with or as a result of the investigation(s). This includes any tape recordings taken from Reed Alexander or other students; in addition to all notes taken by the investigators questioning witnesses.

11. **Compensation:**

- a. Identify the type and amount of compensation Plaintiff received from Defendant for the 2013-2014 school year including all benefits (medical, dental, vision) and retirement.
- b. Identify what amount Defendant contributed each paycheck to all benefits.

12. **Expert:**

Identify each person whom you expect to call as an expert witness at trial and for each state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

13. **Statements:**

Identify all statements, affidavits, transcripts, videos or recordings you have made, obtained, or secured from any person having, or claiming to have, knowledge of facts or circumstances relevant to this litigation. Your response should include, but not be limited to:

- a. The identity of the individual from whom the statement, affidavit, transcript or recording was secured;
- b. The date the statement, affidavit, transcript or recording was made;

- c. The form of the statement, affidavit, transcript or recording (e.g., a written statement, audio recording, etc.); and
- d. A summary of the contents of the statement or recording.

Respectfully submitted this 20th day of August 2018,

/s/ JULIE OINONEN
Julie Oinonen
Ga. Bar No. 722018
Attorney for Plaintiff

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HABERSHAM COUNTY, GEORGIA
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AUG 20, 2018 05:44 PM


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO.
)	
v.)	
)	
PIEDMONT COLLEGE)	
)	
Defendant.)	

PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT

Pursuant to Georgia law, O.C.G.A. § 9-11-34, you are required to provide these responses within 45 days and to supplement your responses in a timely manner. Concerning your duty to preserve information, see the attached spoliation notice marked as Exhibit A.

DEFINITIONS & INSTRUCTIONS

(a) **You.** The terms “you” and “your” shall mean Defendant and all person(s), agents, and employees acting or purporting to act in any manner for Defendant’s behalf. This includes the Board members the President, and all other employees, agents, and attorneys. It also includes students that were used as part of the Title 9 investigation against Plaintiff.

(b) **Form of production for documents that exist in electronic form:** Any documents that exist in electronic form are specifically requested to be produced in native or near-native format and should not be converted to an imaged format (e.g. .TIFF or .PDF) unless such document must be redacted to remove privileged content or the document does not exist within your care, custody, or control in a native electronic format. Native format requires production in the same format in which the information was customarily created, used and stored by you. The table below supplies examples of the native or near native forms in which specific types of electronically stored information (ESI) should be produced:

Source ESI	Native or Near Native Form or Forms Sought
Microsoft Word Documents	.DOC, .DOCX
Microsoft Excel Spreadsheets	.XLX, .XLSX
Microsoft PowerPoint Presentations	.PPT, .PPTX
Microsoft Access Databases	.MDB
WordPerfect Documents	.WPD
Adobe Acrobat Documents	.PDF
Photographs	.JPG
Email	A forensic copy in native format in addition to a PST and OST file should be provided. Messages should be produced so as to preserve and supply the source RFC 2822 content of the communication and attachments in a fielded, electronically searchable format. For Microsoft Exchange or Outlook messaging, PST and OST format will suffice. Single message production formats like .MSG or .EML may be furnished if source foldering data is preserved and produced. If your workflow requires that attachments be extracted and produced separately from transmitting messages, attachments should be produced in their native forms with parent/child relationships to the message and containers preserved and produced.
Databases excluding email systems	Unless the entire contents of a database are responsive, extract responsive content to a fielded and electronically searchable format preserving metadata values, keys and field relationships. In doing so is infeasible, please identify the database and supply information concerning the schemae and query language of the database, along with a detailed description of its export capabilities, so as to facilitate Plaintiff's crafting a query to extract and export responsive data.
Cell phones	A forensic image of the cell phone is required. It is recommended to hire a computer forensic

	<p>technician with the training and experience to forensically image phones as they have invested in specialized tools like Cellebrite UFED, Micro Systemation XRY, Lantern or Oxygen Forensic Suite. Forensic imaging provides three levels of access to the contents of mobile devices referred to as Physical, Logical and File System access. Opposing counsel should contact us to make arrangements that insures all relevant data contained within the forensic imaging (including deleted text messages) can be obtained and exchanged between parties.</p>
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Additionally, to keep track of documents exchanged, Defendant should also provide a separate production in PDF format with Bates or hash numbers.

(c) The term “*document*” shall mean anything upon which information is or has been stored, recorded, or communicated that is in your custody, control, or possession of your agents, attorneys, employees, or others of which you have knowledge, including but not limited to emails, text messages, memos, paper documents, draft versions, databases, voicemail, and all electronically stored information.

(d) *Forms of production for documents that do not exist in electronic form.*

Documents that do not exist in a native electronic format or which require redaction of privileged content, are hereby requested to be produced in color, 300 DPI, searchable [.PDF] format with logical unitization preserved. Logical unitization entails that the document breaks and groupings found in the original document format (e.g. paper documents) will be mirrored in the PDF production. For example, if the original documents consist of a stack of paper with various multipage documents stapled or paper clipped together, then each stapled or paper clipped document shall be produced as a separate PDF file.

(e) **Medium of Production.** Production smaller than 10GB should be made using DVD recordable optical media. Productions larger than 10GB but smaller than 128 GB should be made using a flash/thumb drive or portable external hard drive.

(f) **Concerning:** The term “concerning” means referring to, describing, evidencing, or constituting.

(g) **Including:** The term “including” shall mean “including, but not limited to.” Including should not be read in a limiting sense.

(h) The term “**person**” shall mean a natural person or an artificial person including partnerships, corporations, proprietorships, unincorporated associates, governmental bodies, or any other legally cognizable entities.

(i) The term “**date**” shall mean the exact date, month, and year, if known to defendant, or, if the exact date is not known, the best available approximation.

(j) The term “**communication**” shall include any oral utterance made, heard, or overheard, whether in person or by telephone or otherwise, as well as every document and every other mode of intentionally conveyed meaning. The term “**concerning**” means referring to, describing, evidencing, or constituting.

(k.) **Full and complete responses are required.** If a partial or incomplete answer or response is provided, the responding party shall state the reason why the answer/production is incomplete.

(l.) **Supplementation: these requests are subject to supplementation** under O.C.G.A. § 9-11-26(e).

(m) **Avoidance of disputes and delays:** If you believe that a request is confusing, vague, or ambiguous, please contact me by phone or email as soon as possible for clarification---

rather than waiting until the responses are due to object—in order to avoid discovery disputes and delays based on curable defects.

PRIVILEGE LOG:

If you claim that any information, matter, or part thereof is privileged or otherwise exempt from disclosure, and you withhold such information or matter on that basis, you **MUST PROVIDE A PRIVILEGE LOG WHICH:**

(1) states the nature of the privilege or exemption, whether the claimed privilege or exemption extends to all or only part of the requested information, the person or persons to whom the privilege obtains, the subject matter sought to be deemed privileged, and the identity of all persons who have knowledge of the information claimed to be privileged.

(2) In addition, if the information or matter claimed to be privileged is a document, identify the document, give a brief summary of the contents or nature of the document, and identify all persons having knowledge of the document and all custodians or the document or any photocopies, facsimiles, and duplicates thereof.

REQUEST FOR PRODUCTION OF DOCUMENTS:

1. Please produce all statements, affidavits, transcripts, videos, and audio or tape recordings you or your agents or representatives (including students such as Reed Alexander) have made, obtained or secured from any person having, or claiming to have, knowledge of facts or circumstances relevant to this litigation.
2. Please produce all electronically stored information (“ESI”)— including that contained on the master and local databases in native format along with the electronic receipt or check sum of all documents and all files to verify that nothing has been altered. This includes information located on the exchange server, global server, and file servers, both

locally stored and network stored, including email messages (forensic copies in native format in addition to the PST and OST file), email attachments, SMS messages (commonly referred to as text messages **contained on personal cell phones and county issued cell phones**), and Microsoft Productivity documents---with a last modified or created date concerning:

- Rob Wainberg
- Investigations or complaints related to Rob Wainberg, including the Title 9 investigation and subsequent termination proceeding..
- Investigations related to any Title 9 matter in the past 5 years.
- All documents relating to Title 9 investigations, guidance, policies, procedures, and training.
- Documents concerning all policies and procedures concerning Tenure.
- Documents concerning the Board term limits.

Remember all of the above includes all emails, cell phone texts or social media messaging!

3. Please provide the documents that were provided in a native format in response to request #2, in a separate production in PDF format with Bates numbers so the parties may keep track of what has been exchanged.
4. Please produce any other documents upon which you rely to support your defenses and affirmative defenses.
5. Please provide all documents obtained as a result of releases, request for production of documents to third parties and/or subpoenas in this case.
6. Please identify any and all policies of insurance which may be used to satisfy and verdict in this matter.

7. Please provide copies of all CV's, reports, affidavits, papers, notes or writings of any expert retained by you expected to testify at the trial of this case including all documents that your expert has relied upon or consulted in forming his opinion, or created for the purpose of providing an opinion, or for the purposes of demonstration at trial.
8. All documents identified in, or which but for their production in response hereto, would have been identified in, Defendant's answers to Plaintiff's First Interrogatories to Defendant, and all documents used to refresh Defendant's recollection in answering Plaintiff's First Interrogatories to Defendant.
9. All documents identified in, relied upon in the preparation of, or used to refresh Defendant's recollection in preparing, Defendant's responses to its Initial Disclosures.
10. All documents which support, negate, or relate to any claim, defense, or affirmative defense asserted in this lawsuit.
11. All documents used by any person to refresh his or her recollection in preparation for any interview, statement, or deposition in connection with this case.
12. All documents and all records of communications, including letters, notes, memoranda, statements, facsimiles, cell phone texts, and electronic mail (including all attachments) between or among you and any person concerning or relating in any manner to Plaintiff, his employment, Title 9 investigation, claims in this lawsuit, and Defendant's defenses to those claims.
13. All documents Defendant contends rebut any of Plaintiff's claims in this case or that Defendant contends supports any of the defenses (including each and every affirmative defense) asserted by Defendant in its Answer.

14. All documents sent or received by you to any third party or non-party concerning this case.
15. All employee manuals, policies, rules, and other, similar documents issued to Plaintiff or used by Defendant concerning Title 9, tenure, or terminations.
16. All documents concerning any insurance coverage or indemnity agreements that may cover, in whole or in part, the claim(s) of Plaintiff in this lawsuit.
17. To the extent not encompassed by their personnel files, all documents which refer or relate in any way to Plaintiff's employment with Defendant, including but not limited to:
 - a. Records of wages or any other monies paid to Plaintiff;
 - b. Employee benefit plan documents and summary plan descriptions applicable to Plaintiff during her employment;
 - c. Correspondence concerning Plaintiff or related to Plaintiff's employment with Defendant, including, but not limited to, e-mail correspondence;
 - d. Plaintiff's termination or alleged job elimination.
18. All documents provided to or received from any expert witness(es) retained by you in this action.

Respectfully submitted this 20th day of August 2018,

/s/ JULIE OINONEN
Julie Oinonen
Ga. Bar No. 722018
Attorney for Plaintiff

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
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julie@goodgeorgialawyer.com

SPOILIATION NOTICE—EXHIBIT A:

WILLIAMS OINONEN LLC

THE GRANT BUILDING, SUITE 200
44 BROAD STREET, NW
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[HTTP://WWW.GOODGEORGIALAWYER.COM](http://www.goodgeorgialawyer.com)
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FAX: (404) 592-6225

August 20, 2018

Re: To All Members of the Board of Piedmont College; President Mellinchamp; Piedmont College; Senior Level Cabinet; Human Resources; Upper Level Management; and All Piedmont College Employees and Students Involved In Dr. Wainberg's Title 9 Employment Investigation and Subsequent Termination Proceedings:

Greetings, I am the attorney for Dr. Robert Wainberg. I am writing this letter for the following purposes:

- 1) To remind of your duty to preserve information regarding this case, to include electronically stored information; and
- 2) To propose a tentative plan regarding the production of ESI in this case;

This is broken into two sections; section I discusses the duty to preserve, as a reminder of Defendant's duty in relation to reasonable anticipated litigation of this case. This duty has become more relevant now as the Courts routinely fashion orders regarding the "loss" of relevant data. Consequently, we will critically examine which, if any, reasonable steps Defendants took to preserve information, once each reasonably anticipated this litigation.

SECTION I

I propose that we develop a staged approach to the collection and processing of ESI. But we cannot develop a plan if we do not fully understand your network system such as the software programs used and the manner in which Defendants generate and store data, as well the number and type of servers used by Defendants. Consequently, in the event of litigation, we must begin with a corporate deponent, for the sole purpose of testifying about ESI subject areas. For example, it is my understanding that potentially relevant information may be stored on multiple servers because different divisions use different servers or have different sources. Moreover, emails may be stored in a repository while also being stored on local hard drives or in PST/OST folders. Plus, as you know, collection of Microsoft suite documents is treated differently from the collection of emails. And we also need to agree on TIFF production, because while Defendants may need to produce TIFF images (e.g., TIFF images for the purpose of redacting privileged information), TIFF images should still be accompanied by a load file that contains

fully searchable native data. We need to resolve these type of issues—and more—prior to collecting data.

I can provide you with proposed subject areas that we will develop with our ESI vendor, relevant data technologies. Once we understand the systems at issue, we can identify key custodians such as those named in this letter, and then develop a cost-efficient method of collecting and processing ESI by using, for example, search terms, technology assisted review, sampling, deduplication (vertical or horizontal), or any number of combined methods that drive down costs, while maintaining precision with respect to locating relevant data.

SECTION II

Plaintiff demands that you preserve documents, tangible things and electronically stored information potentially relevant to the issues in this cause. As used in this document, “you” and “your” refers to all Board members of Piedmont College and all Piedmont College employees and students involved in the matter of Dr. Wainberg’s Title 9 investigation and subsequent termination hearing. It also includes each of your respective agents, attorneys, accountants, employees, partners and other persons who assist these persons such as personal assistance, secretaries, legal advisors, and chiefs of staff.

You should anticipate that much of the information subject to disclosure or responsive to discovery in this cause is stored on your current and former computer systems and other media and devices (including personal digital assistants, voice-messaging systems, online repositories and cell phones).

Electronically stored information (hereinafter “ESI”) should be afforded the broadest possible meaning and includes (*by way of example and not as an exclusive list*) potentially relevant information electronically, magnetically, optically or otherwise stored as:

- Text messaging from personal cell phones and work issued cell phones
- Digital communications (e.g., e-mail, voice mail, instant messaging);
- E-Mail Server Stores (e.g., Lotus Domino .NSF or Microsoft Exchange .EDB)
- Word processed documents (e.g., Word or WordPerfect files and drafts);
- Spreadsheets and tables (e.g., Excel or Lotus 123 worksheets);
- Accounting Application Data (e.g., QuickBooks, Money, Peachtree data);
- Image and Facsimile Files (e.g., .PDF, .TIFF, .JPG, .GIF images);
- Sound Recordings (e.g., .WAV and .MP3 files);
- Video and Animation (e.g., .AVI and .MOV files);
- Databases (e.g., Access, Oracle, SQL Server data, SAP);
- Contact and Relationship Management Data (e.g., Outlook, ACT!);
- Calendar and Diary Application Data (e.g., Outlook PST, blog entries);
- Online Access Data (e.g., Temporary Internet Files, History, Cookies);
- Presentations (e.g., PowerPoint, Corel Presentations)
- Network Access and Server Activity Logs;
- Project Management Application Data;
- Computer Aided Design/Drawing Files; and

- Backup and Archival Files (e.g., Veritas, Zip, .GHO)

ESI resides not only in areas of electronic, magnetic and optical storage media reasonably accessible to you, but also in areas you may deem *not* reasonably accessible. You are obliged to *preserve* potentially relevant evidence from *both* sources of ESI, even if you do not anticipate *producing* such ESI.

The demand that you preserve both accessible and inaccessible ESI is reasonable and necessary. Pursuant to the rules of civil procedure, you must identify all sources of ESI you decline to produce and demonstrate to the court why such sources are not reasonably accessible. For good cause shown, the court may order production of the ESI, even if it is not reasonably accessible. Accordingly, you must preserve ESI that you deem inaccessible so as not to preempt the court's authority.

Preservation Requires Immediate Intervention

You must act immediately to preserve potentially relevant ESI, including, without limitation, information with the *earlier* of a Created or Last Modified date on or after August 1, 2017 through the date of this demand and concerning:

1. The events concerning Plaintiff's termination and investigation concerning Title 9 allegations;
2. ESI you may use to support claims or defenses in this case.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must intervene to prevent loss due to routine operations or malfeasance and employ proper techniques and protocols to preserve ESI. *Booting a drive, examining its contents or running any application may irretrievably alter the evidence it contains and constitute unlawful spoliation of evidence. Preservation requires action.*

Nothing in this demand for preservation of ESI should be understood to diminish your concurrent obligation to preserve documents, tangible things and other potentially relevant evidence.

Suspension of Routine Destruction

Your obligation to place a litigation hold on information began long before this letter; as a reminder, you had, and still do have, an obligation to initiate a litigation hold for potentially relevant ESI, documents and tangible things and to act diligently and in good faith to secure and audit compliance with such litigation hold. You are further directed to immediately identify and modify or suspend features of your information systems and devices that, in routine operation, operate to cause the loss of potentially relevant ESI. Examples of such features and operations include:

- Purging the contents of e-mail repositories by age, capacity or other criteria;
- Using data or media wiping, disposal, erasure or encryption utilities or devices;
- Overwriting, erasing, destroying or discarding backup media;
- Re-assigning, re-imaging or disposing of systems, servers, devices or media;
- Running antivirus or other programs effecting wholesale metadata alteration;

- Releasing or purging online storage repositories;
- Using metadata stripper utilities;
- Disabling server, packet or local instant messaging logging; and,
- Executing drive or file defragmentation or compression programs.

Guard Against Deletion

You should anticipate that your officers, employees or others may seek to hide, destroy or alter ESI. You must act to prevent and guard against such actions. Especially where company machines were used for Internet access or personal communications, you should anticipate that users may seek to delete or destroy information they regard as personal, confidential or embarrassing, and in so doing, they may also delete or destroy potentially relevant ESI. This concern is not unique to you. It's simply conduct that occurs with such regularity that any custodian of ESI and their counsel must anticipate and guard against its occurrence.

Preservation of Backup Tapes

Although you should have preserved the following, if you have not already, you must preserve complete backup tape sets (including differentials and incrementals) containing e-mail, text messages, and ESI of the following custodians for all dates during the below-listed intervals:

- We need a forensically sound imaging to be done to each person's cell phone that was involved in the Title 9 investigation and subsequent termination proceedings of Dr. Wainberg.¹
- Email and Text messages from the Personal Cell Phones, Computers, and Work Computer Devices of all Piedmont College Board members, President Mellinchamp, and his executive staff from March of 2018 to date.
- Emails and Text messages All Piedmont College employees and students cell phones and emails that were involved in Dr. Wainberg's Title 9 investigation and subsequent termination proceedings.

Based on my understanding, there may be multiple servers for multiple divisions, thus potentially relevant information may be found on dedicated servers for the College including desktop computers, personal and work issued cell phones, and property such as fax machines and digital printers. Please, when preserving data, take into account the multiple systems on which Custodian information is both generated and stored.

There will be more custodians but these are the key custodians and offices that we would like to start with.

Act to Prevent Spoliation

You should take affirmative steps to prevent anyone with access to your data, systems and archives from seeking to modify, destroy or hide ESI on network or local hard drives and on other media or devices (such as by deleting or overwriting files, using data shredding and

¹ <https://www.nuix.com/blog/making-turn-mobile-evidence-ediscovery>

overwriting applications, defragmentation, re-imaging, damaging or replacing media, encryption, compression, steganography or the like).

System Sequestration or Forensically Sound Imaging

As an appropriate and cost-effective means of preservation, you should remove from service and securely sequester the systems, media and devices housing potentially relevant ESI of the following persons:

All ESI from each individual involved in Dr. Wainberg's Title 9 investigation and subsequent termination hearing.

In the event you deem it impractical to sequester systems, media and devices, we believe that the breadth of preservation required, coupled with the modest number of systems implicated, dictates that forensically sound imaging of the systems, media and devices of those named above is expedient and cost effective. As we anticipate the need for forensic examination of one or more of the systems and the presence of relevant evidence in forensically accessible areas of the drives, we demand that you employ forensically sound ESI preservation methods. Failure to use such methods poses a significant threat of spoliation and data loss.

"Forensically sound ESI preservation" means duplication of all data stored on the evidence media while employing a proper chain of custody and using tools and methods that make no changes to the evidence and support authentication of the duplicate as a true and complete bit-for-bit image of the original. The products of forensically sound duplication are called, *inter alia*, "bitstream images" or "clones" of the evidence media. A forensically sound preservation method guards against changes to metadata evidence and preserves all parts of the electronic evidence, including deleted evidence within "unallocated clusters" and "slack space."

Be advised that a conventional copy, backup or "Ghosting" of a hard drive does not produce a forensically sound image because it only captures active, unlocked data files and fails to preserve forensically significant data existing in, e.g., unallocated clusters and slack space.

Labeling forensically sound images

Once obtained, each such forensically sound image should be labeled to identify the date of acquisition, the person or entity acquiring the image and the system and medium from which it was obtained. Each such image should be preserved without alteration.

Preservation in Native Form

You should anticipate that certain ESI, including but not limited to spreadsheets and databases, will be sought in the form or forms in which it is ordinarily maintained (i.e., native form). Accordingly, you should preserve ESI in such native forms, and you should not employ methods to preserve ESI that remove or degrade the ability to search the ESI by electronic means or that make it difficult or burdensome to access or use the information.

You should additionally refrain from actions that shift ESI from reasonably accessible media and forms to less accessible media and forms if the effect of such actions is to make such ESI not reasonably accessible.

Metadata

You should further anticipate the need to disclose and produce system and application metadata and act to preserve it. System metadata is information describing the history and characteristics of other ESI. This information is typically associated with tracking or managing an electronic file and often includes data reflecting a file's name, size, custodian, location and dates of creation and last modification or access. Application metadata is information automatically included or embedded in electronic files, but which may not be apparent to a user, including deleted content, draft language, commentary, collaboration and distribution data and dates of creation and printing. For electronic mail, metadata includes all header routing data and Base 64 encoded attachment data, in addition to the To, From, Subject, Received Date, CC and BCC fields.

Metadata may be overwritten or corrupted by careless handling or improper preservation, including by moving, copying or examining the contents of files.

Servers

With respect to servers used to manage e-mail (e.g., Microsoft Exchange, Lotus Domino) and network storage (often called a "network share"), the complete contents of each user's network share and e-mail account should be preserved. There are several ways to preserve the contents of a server. If you are uncertain whether the preservation method you plan to employ is one that we will accept as sufficient, please immediately contact the undersigned.

Home Systems, Laptops, Online Accounts and Other ESI Venues

Though we expect that you will act swiftly to preserve data on office workstations and servers, you should also determine if any home or portable systems or devices may contain potentially relevant data. To the extent that you have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD- R/DVD-R disks and the user's PDA, smart phone, voice mailbox or other forms of ESI storage.). Similarly, if you used online or browser-based e-mail accounts or services (such as Gmail, AOL, Yahoo Mail or the like) to send or receive potentially relevant messages and attachments, the contents of these account mailboxes (including Sent, Deleted and Archived Message folders) should be preserved.

Ancillary Preservation

You must preserve documents and other tangible items that may be required to access, interpret or search potentially relevant ESI, including logs, control sheets, specifications, indices, naming protocols, file lists, network diagrams, flow charts, instruction sheets, data entry forms, abbreviation keys, user ID and password rosters and the like.

You must preserve passwords, keys and other authenticators required to access encrypted files or run applications, along with the installation disks, user manuals and license keys for applications required to access the ESI.

You must preserve cabling, drivers and hardware, other than a standard 3.5" floppy disk drive or standard CD or DVD optical disk drive, if needed to access or interpret media on which ESI is

stored. This includes tape drives, bar code readers, Zip drives and other legacy or proprietary devices.

Paper Preservation of ESI is Inadequate

As hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for, or cumulative of, electronically stored versions. If information exists in both electronic and paper forms, you should preserve both forms.

Agents, Attorneys and Third Parties

Your preservation obligation extends beyond ESI in your care, possession or custody and includes ESI in the custody of others that is subject to your direction or control. Accordingly, you must notify any current or former agent, attorney, employee, custodian and contractor in possession of potentially relevant ESI to preserve such ESI to the full extent of your obligation to do so, and you must take reasonable steps to secure their compliance.

Preservation Protocols

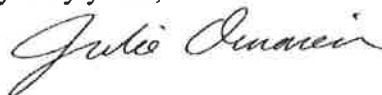
We are desirous of working with you to agree upon an acceptable protocol for forensically sound preservation and can supply a suitable protocol if you will furnish an inventory and description of the systems and media to be preserved. Alternatively, if you promptly disclose the preservation protocol you intend to employ, perhaps we can identify any points of disagreement and resolve them. A successful and compliant ESI preservation effort requires expertise. If you do not currently have such expertise at your disposal, we urge you to engage the services of an expert in electronic evidence and computer forensics. Perhaps our respective experts can work cooperatively to secure a balance between evidence preservation and burden that's fair to both sides and acceptable to the court.

Do Not Delay Preservation

I'm available to discuss reasonable preservation steps; however, *you should not defer preservation steps pending such discussions if ESI may be lost or corrupted as a consequence of delay.* Should your failure to preserve potentially relevant evidence result in the corruption, loss or delay in production of evidence to which we are entitled, such failure would constitute spoliation of evidence, and we will not hesitate to seek sanctions.

We appreciate your attention to the matter of ESI and will be happy to answer any questions or clarify anything in this letter if it is unclear.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Julie Oinonen".

JULIE J. OINONEN

Civil Action No. 18CV0454
Date Filed 8-20-18

Superior Court ☒ Magistrate Court ☐
State Court ☐ Probate Court ☐
Juvenile Court ☐
Georgia, Habersham COUNTY

Attorney's Address

Julie Dinonen
44 Broad St NW Ste 200
Atlanta GA 30303

Dr. Robert H. Wainberg
Plaintiff

VS.

Name and Address of Party to be Served.

Piedmont College % Reg. Agent
James F. Mellichamp
165 Central Ave
Dermorest GA 30535

Piedmont College
Defendant

Garnishee

SHERIFF'S ENTRY OF SERVICE

18 AUG 28 16:21:00

PERSONAL

☒ I have this day served the defendant JAMES MELLICHAMP personally with a copy of the within action and summons.

Signature [Signature]

NOTORIOUS

I have this day served the defendant _____ by leaving a copy of the action and summons at his most notorious place of abode in this County.

☐ Delivered same into hands of _____ described as follows:
age, about _____ years; weight _____ pounds; height, about _____ feet and _____ inches, domiciled at the residence of defendant.

CORPORATION

Served the defendant _____ a corporation
☐ by leaving a copy of the within action and summons with _____
in charge of the office and place of doing business of said Corporation in this County.

TACK & MAIL

☐ I have this day served the above styled affidavit and summons on the defendant(s) by posting a copy of the same to the door of the premises designated in said affidavit, and on the same day of such posting by depositing a true copy of same in the United States Mail, First Class in an envelope properly addressed to the defendant(s) at the address shown in said summons, with adequate postage affixed thereon containing notice to the defendant(s) to answer said summons at the place stated in the summons.

NON EST

☐ Diligent search made and defendant _____
not to be found in the jurisdiction of this Court.

This 29 day of August, 20 19 11 05

Location

SAME

[Signature]

DEPUTY

SHERIFF DOCKET NIN PAGE 1A

Prager

18CV0454
RUSSELL W. SMITH
SEP 27, 2018 11:31 AM



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

DEFENSES AND ANSWER OF PIEDMONT COLLEGE

COMES NOW Piedmont College, (hereinafter “Defendant”), Defendant in the above-styled civil action, and responds with these Defenses and Answer to Plaintiff’s Complaint for Damages Concerning Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing as follows:

FIRST DEFENSE

Plaintiff’s Complaint should be dismissed, in whole or in part, for failure to state a claim upon which relief can be granted. Defendant specifically incorporates herein its *Motion to Dismiss Plaintiff’s Complaint for Damages Concerning Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing* that is filed contemporaneously with this *Defenses and Answer of Piedmont College*.

SECOND DEFENSE

Plaintiff’s claims are barred because Defendant acted at all times pursuant to the contract, if any, between it and Plaintiff.

THIRD DEFENSE

Plaintiff’s claims are barred because Defendant did not breach any duty owed to Plaintiff.

FOURTH DEFENSE

Plaintiff's claims should be dismissed because Plaintiff's own conduct proximately caused his alleged damages.

FIFTH DEFENSE

Pending further investigation and discovery, the relief sought by Plaintiff's Complaint is or may be barred by the doctrine of failure of consideration.

SIXTH DEFENSE

Plaintiff's claims may be barred for failure to comply with a condition precedent to the contract and/or a condition precedent to the relief sought.

SEVENTH DEFENSE

Plaintiff's claims against Defendant may be barred by Plaintiff's failure to comply with his contract, if any, with Defendant and/or a breach of such contract.

EIGHTH DEFENSE

Plaintiff's claims against Defendant may be barred by the doctrine of waiver.

NINTH DEFENSE

Plaintiff's claims against Defendant may be barred by the doctrine of estoppel.

TENTH DEFENSE

Plaintiff's claims may be barred by the doctrine of release.

ELEVENTH DEFENSE

Plaintiff's claims for damages are barred to the extent that Plaintiff failed to exercise reasonable efforts to mitigate any damages that he may have suffered.

TWELFTH DEFENSE

Plaintiff's claim for damages should be reduced to the extent he has obtained mitigation of such damages.

THIRTEENTH DEFENSE

Plaintiff's Complaint fails to state an appropriate cause of action for the imposition of attorney's fees and/or expenses of litigation against Defendant.

FOURTEENTH DEFENSE

Defendant denies that it is subject to any award of punitive damages in this case, but shows that any award of punitive damages is limited by the cap imposed by O.C.G.A. § 51-12-5.1.

FIFTEENTH DEFENSE

Plaintiff's Complaint fails to state a cause of action for punitive damages against this Defendant and there is not evidence sufficient to create a jury issue on punitive damages against this Defendant. As a defense to Plaintiff's claims for punitive damages, however, this Defendant also states that any such claim and/or award pursuant to O.C.G.A. § 51-12-5.1 should be denied on the grounds that it would violate the guarantees of the Eighth Amendment to the United States Constitution against excessive fines and penalties and the Constitution of the State of Georgia (Article 1, Section 1, Paragraph 17), the substantive and procedural due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Georgia (Article 1, Section 1, Paragraph 1), and the equal protection guarantees of the Fourteenth Amendment of the United States Constitution and the Constitution of the State of Georgia (Article 1, Section 1, Paragraph 2) for the following reasons, among others:

1. The statute and the court decisions interpreting the statute fail to notify individuals of the nature of the offense for which they may be liable for punitive damages, and fail to limit the award of punitive damages to the degree of reprehensibility of the Defendant's misconduct;

2. The statute and the court decisions interpreting the statute fail to adequately

inform or instruct judges and juries of the nature of the offenses for which punitive damages can be awarded;

3. The statute and the court decisions interpreting the statute fail to provide any constitutional standard or means of calculating the amount of punitive damages to be awarded;

4. The statute and the court decisions interpreting the statute allow persons to repeatedly be put in jeopardy of paying for the same offense;

5. To the extent the award of punitive damages are criminal or quasi-criminal in nature, they are not awarded upon proof beyond a reasonable doubt, contrary to due process of law;

6. The statute and the court decisions interpreting the statute permit the award of excessive punitive damages without relationship to the public safety, health or welfare said to be served by punitive damages;

7. The statute and the court decisions interpreting the statute permit the trier of fact to consider the Defendant's net worth, wealth or financial condition in awarding punitive damages or in calculating such an award;

8. The statute and the court decisions interpreting the statute fail to provide adequate post-verdict processes and standards for review by the trial court and also fail to provide adequate appellate review procedures so as to adequately protect due process rights;

9. The statute and the court decisions interpreting the statute permit the award of punitive damages without reasonable relationship to the civil or criminal penalties that could be imposed for comparable misconduct in other cases;

10. The statute and the court decisions interpreting these statutes fail to limit the award of punitive damages to criminal or intentional behavior.

11. The statute and the court decisions interpreting the statute fail to limit the award of punitive damages to what is reasonably required to vindicate this State's legitimate interests in punishment and deterrence for conduct having an impact on the citizens of Georgia;

12. The statute and the court decisions interpreting the statute fail to ensure the award of punitive damages is both reasonable and proportional to the amount of harm to the Plaintiff and to the general damages recovered;

13. The statute and the court decisions interpreting the statute do not give cognizance to the comparability of the award to awards in other, similar cases;

14. The statute and the court decisions interpreting the statute do not provide notice of or means of ascertaining whether, or in what amount, this Defendant might be subject to a penalty of punitive damages for the conduct alleged by Plaintiff in this case, which lack of notice is compounded by the absence of any adequate or meaningful standards as to the kind of conduct that might subject this Defendant to punitive damages or as to the potential amount of such an award;

15. The statute and the court decisions interpreting the statute do not provide adequate substantive and procedural safeguards consistent with the criteria set forth in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1990); *Matthews v. Eldridge*, 424 U.S. 319 (1976), as to the imposition of a punitive award;

16. The statute and the court decisions interpreting the statute provide a risk that punitive damages will be imposed retrospectively based on conduct that was not deemed

punishable at the time the conduct occurred;

17. The statute and the court decisions interpreting the statute do not expressly prohibit an award of punitive damages, or a determination of the amount of an award of punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the residence, wealth, and corporate status of this Defendant;

18. The statute and the court decisions interpreting the statute do not adequately instruct on the limits on punitive damages imposed by the applicable principles of deterrence and punishment.

SIXTEENTH DEFENSE

Defenses asserted herein are based upon the initial theories of defense counsel. Defendant specifically reserves the right to withdraw or add any defenses to conform to the evidence presented at the time of trial.

SEVENTEENTH DEFENSE

This Defendant responds to the numbered paragraphs of Plaintiff's Complaint as follows:

INTRODUCTION

Defendant objects to the unnumbered section of Plaintiff's Complaint entitled "Introduction" on the grounds that it is immaterial, impertinent, and scandalous within the meaning of O.C.G.A. § 9-11-12(c) and does not contain any factual allegation to which a response is required. Plaintiff's Introduction is comprised of entirely irrelevant and baseless allegations, which are included solely to harm and defame Defendant, its officers, directors and employees. To the extent a response is required to Plaintiff's Introduction, this Defendant denies any averments of misconduct, express or implied, against this Defendant, its officers, directors or employees.

CLAIMS, JURISDICTION, AND VENUE

1.

Defendant denies that Plaintiff is entitled to recover the relief described in Paragraph 1 of Plaintiff's Complaint. Therefore, Defendant denies the allegations contained in Paragraph 1.

2.

The allegations contained in Paragraph 2 of the Complaint consist solely of assertions of law, unsupported by sufficient factual allegations to support the plausibility thereof, which Defendant is not required to admit or deny, and therefore stand denied.

3.

The allegations contained in Paragraph 3 of the Complaint consist solely of assertions of law, unsupported by sufficient factual allegations to support the plausibility thereof, which Defendant is not required to admit or deny, and therefore stand denied.

4.

The allegations contained in Paragraph 4 of the Complaint consist solely of assertions of law, unsupported by sufficient factual allegations to support the plausibility thereof, which Defendant is not required to admit or deny, and therefore stand denied.

PARTIES

5.

Defendant admits that Plaintiff was an employee of Piedmont College from 1988 to 2018. However, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of Plaintiff's Complaint regarding Plaintiff's current residence and, therefore, can neither admit nor deny same.

6.

Defendant admits the allegations contained in Paragraph 6 of Plaintiff's Complaint.

FACTS GIVING RISE TO THE COMPLAINT

7.

Defendant admits that it hired Plaintiff as an Assistant Professor of Biology in 1988. However, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 7 of Plaintiff's Complaint and, therefore, can neither admit nor deny same.

8.

In response to Paragraph 8 of Plaintiff's Complaint, Defendant admits that Plaintiff has received various awards and recognitions during his teaching career, but is without knowledge or information sufficient to form a belief as to the truth of the specific allegations contained in Paragraph 8 of Plaintiff's Complaint and, therefore, can neither admit nor deny same.

9.

Defendant admits the allegations contained in Paragraph 9 of Plaintiff's Complaint.

10.

In response to Paragraph 10 of Plaintiff's Complaint, Defendant admits that during his employment at Piedmont College, Plaintiff received certain honors and grants, and served on various committees. The remaining allegations contained in Paragraph 10 of Plaintiff's Complaint consist solely of self-serving and self-laudatory adjectives, rather than material factual allegations. Therefore, such statements are denied.

11.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of Plaintiff's Complaint and, therefore, can neither admit nor deny same.

12.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 12 of Plaintiff's Complaint and, therefore, can neither admit nor deny same.

13.

a. Defendant denies the allegations contained in Paragraph 13(a) of Plaintiff's Complaint.

b. This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13(b) of Plaintiff's Complaint and, therefore, can neither admit nor deny same. To the extent Plaintiff alleges or implies misconduct as to Defendant, including that Defendant ordered the Mayor of Demorest to write a bad review against Plaintiff, these allegations are denied.

c. Defendant admits that Gus Arrendale has served and continues to serve as Chairman of the Board of Piedmont College. Defendant denies the remaining allegations contained in Paragraph 13(c) of Plaintiff's Complaint.

d. Defendant denies the allegations contained in Paragraph 13(d) of Plaintiff's Complaint.

14.

Defendant denies the allegations contained in Paragraph 14 of Plaintiff's Complaint.

15.

Defendant denies the allegations contained in Paragraph 15 of Plaintiff's Complaint.

16.

Defendant denies the allegations contained in Paragraph 16 of Plaintiff's Complaint.

17.

Defendant denies that Paragraph 17 of Plaintiff's Complaint is a complete and/or accurate description of the purpose or principles of tenure. Therefore, Defendant denies the allegations contained in Paragraph 17 as worded by the Plaintiff.

18.

Defendant denies that Paragraph 18 of Plaintiff's Complaint is a complete and/or accurate description of the purpose or principles of tenure. By way of further response, Defendant expressly denies any allegations of wrongdoing, misconduct or breach of contract against it.

19.

In response to Paragraph 19 of Plaintiff's Complaint, Defendant admits that it appointed Dr. James Mellichamp to serve as President of Piedmont College in 2013. Defendant denies the remaining allegations contained in Paragraph 19 of Plaintiff's Complaint.

20.

Defendant denies the allegations contained in Paragraph 20 of Plaintiff's Complaint.

21.

Defendant denies the allegations contained in Paragraph 21 of Plaintiff's Complaint.

22.

Defendant denies the allegations contained in Paragraph 22 of Plaintiff's Complaint.

23.

Defendant denies the allegations contained in Paragraph 23 of Plaintiff's Complaint.

24.

In response to Paragraph 24 of Plaintiff's Complaint, Defendant admits that it received multiple complaints from students alleging violations of Title IX of the Education Amendments Act of 1972 by Plaintiff. Defendant denies the remaining allegations contained in Paragraph 24 of Plaintiff's Complaint.

25.

In response to Paragraph 25 of Plaintiff's Complaint, Defendant admits that Plaintiff is a biology professor who teaches sexual reproduction and human biological processes in his classes. Defendant also admits that Plaintiff uses students as examples in his classroom anecdotes related to sexual issues, and that Plaintiff acknowledged doing so. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 25 of Plaintiff's Complaint. Defendant further avers that Plaintiff's sexual orientation is wholly immaterial and irrelevant to any alleged claim in his Complaint.

26.

a. In response to Paragraph 26(a) of Plaintiff's Complaint, Defendant admits that it received complaints from students regarding Plaintiff's using students as examples in his classroom anecdotes related to sexual issues, and that Plaintiff acknowledged doing so. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 26(a) of Plaintiff's Complaint. Therefore, they stand denied.

b. In response to Paragraph 26(b) of Plaintiff's Complaint, Defendant admits that it received complaints from students regarding Plaintiff's using students as examples in his classroom anecdotes related to sexual issues, and that Plaintiff acknowledged doing so. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 26(b) of Plaintiff's Complaint. Therefore, they stand denied.

c. In response to Paragraph 26(c) of Plaintiff's Complaint, Defendant admits that it received complaints from students regarding Plaintiff's using students as examples in his classroom anecdotes related to sexual issues, and that Plaintiff acknowledged doing so. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 26(c) of Plaintiff's Complaint. Therefore, they stand denied.

27.

In response to Paragraph 27 of Plaintiff's Complaint, Defendant admits that Plaintiff is a biology teacher who teaches human biology, biochemistry, cell biology, microbiology, physiology, genetics, sexual reproduction and other aspects of biology. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 27 of Plaintiff's Complaint, but avers that Plaintiff's effort to be entertaining does not excuse his inappropriate references to students in hypothetical sexual scenarios. The remaining allegations in Paragraph 27 of Plaintiff's Complaint not specifically addressed herein stand denied.

28.

In response to the allegations contained in Paragraph 28 of Plaintiff's Complaint,

Defendant avers that such allegations are wholly immaterial, impertinent, and scandalous and have no relevance to Plaintiff's alleged breach of contract claim or other alleged claims.

Defendant denies and moves to strike the allegations in Paragraph 28 of Plaintiff's Complaint pursuant to O.C.G.A. § 9-11-12(c).

29.

Defendant denies the allegations contained in Paragraph 29 of Plaintiff's Complaint.

30.

Defendant denies the allegations contained in Paragraph 30 of Plaintiff's Complaint.

31.

Defendant denies the allegations contained in Paragraph 31 of Plaintiff's Complaint.

32.

Defendant denies the allegations contained in Paragraph 32 of Plaintiff's Complaint.

33.

Defendant denies the allegations contained in Paragraph 33 of Plaintiff's Complaint, including subparagraphs a. through p.

34.

Defendant denies the allegations contained in Paragraph 34 of Plaintiff's Complaint.

35.

Defendant denies the allegations contained in Paragraph 35 of Plaintiff's Complaint.

36.

Defendant denies the allegations contained in Paragraph 36 of Plaintiff's Complaint.

37.

Defendant denies the allegations contained in Paragraph 37 of Plaintiff's Complaint.

38.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 38 of Plaintiff's Complaint and, therefore, can neither admit nor deny same.

39.

With respect to the allegations contained Paragraph 39 of Plaintiff's Complaint, this Defendant denies any allegation(s) of wrongdoing, misconduct, or breach of contract against it and further denies that it is liable to Plaintiff for any amount whatsoever. Therefore, Defendant denies all allegations contained in Paragraph 39 of Plaintiff's Complaint, including subparagraphs a. and b. as worded by the Plaintiff.

COUNT I

BREACH OF CONTRACT

By this reference, Defendant hereby incorporates by reference its responses to each of the individually enumerated paragraphs of Plaintiff's Complaint as if fully set forth herein.

40.

In response to Paragraph 40 of Plaintiff's Complaint, Defendant admits that Plaintiff was employed by Defendant. However, Defendant denies that the allegations contained in Paragraph 40 of Plaintiff's Complaint are a complete and/or accurate description of Plaintiff's employment arrangement with Defendant. Therefore, this Defendant denies the remaining allegations contained in Paragraph 40 of Plaintiff's Complaint as pled.

41.

Defendant denies the allegations contained in Paragraph 41 of Plaintiff's Complaint.

42.

Defendant denies the allegations contained in Paragraph 42 of Plaintiff's Complaint.

COUNT II

VIOALATION OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

By this reference, Defendant hereby incorporates by reference its responses to each of the individually enumerated paragraphs of Plaintiff's Complaint as if fully set forth herein.

43.

In response to the allegations contained in Paragraph 43 of Plaintiff's Complaint, Defendant admits that Defendant and Plaintiff entered into a contract, but denies that Plaintiff's Complaint attaches such contract or identifies any relevant terms thereof.

44.

Defendant denies the allegations contained in Paragraph 44 of Plaintiff's Complaint.

45.

Defendant denies the allegations contained in Paragraph 45 of Plaintiff's Complaint.

46.

Defendant denies the allegations contained in Paragraph 46 of Plaintiff's Complaint.

PUNITIVES

By this reference, Defendant hereby incorporates by reference its responses to each of the individually enumerated paragraphs of Plaintiff's Complaint as if fully set forth herein.

47.

Defendant denies the allegations contained in Paragraph 47 of Plaintiff's Complaint.

ATTORNEY FEES

By this reference, Defendant hereby incorporates by reference its responses to each of the

individually enumerated paragraphs of Plaintiff's Complaint as if fully set forth herein.

48.

Defendant denies the allegations contained in Paragraph 48 of Plaintiff's Complaint.

PRAYERS FOR RELIEF

49.

With respect to the allegations contained in the last paragraph of Plaintiff's Complaint immediately following the word "Wherefore," including subparts 1 through 6, Defendant denies any allegation(s) of wrongdoing, misconduct, or breach of conduct and further denies that it is liable to Plaintiff for any amount whatsoever.

50.

Any allegations of Plaintiff's Complaint not heretofore responded to are denied.

WHEREFORE, having fully answered, Defendant prays for judgment in its favor.

**THIS DEFENDANT DEMANDS TRIAL BY TWELVE PERSON JURY IN THE
EVENT THAT ANY ISSUES REQUIRE JURY DETERMINATION.**

Respectfully submitted this 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

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E-mail: sjacobs@deflaw.com

Attorneys for Defendant Piedmont College

8173442/1

00120-134334

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Defendant, and that I have this day filed the forgoing *DEFENSES AND ANSWER OF PIEDMONT COLLEGE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marshalk
Barbara A. Marschalk, **GA Bar No. 324498**

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Attorneys for Defendant Piedmont College
8173442/1
00120-134334

18CV0454
RUSSELL W. SMITH
SEP 27, 2018 11:31 AM

**IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA**

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV454



David Wall, Clerk
Habersham County, Georgia

DEFENDANT PIEDMONT COLLEGE'S MOTION TO STAY DISCOVERY

COMES NOW Piedmont College ("Defendant"), Defendant in the above-styled civil action, and pursuant to O.C.G.A. § 9-11-12, respectfully moves this Court to stay discovery in the above litigation, showing this Court as follows:

1.

On August 20, 2018, Plaintiff filed its Complaint for Damages Concerning Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing in the above-styled matter.

2.

Defendant timely filed its Answer and Defenses to Plaintiff's Complaint on September 28, 2018, and contemporaneously therewith, filed its Motion to Dismiss Plaintiff's Complaint pursuant to O.C.G.A. § 9-11-12(b)(6).

3.

Pursuant to O.C.G.A. § 9-11-12(j)(1), "discovery shall be stayed for 90 days after the filing of [Defendant's Motion to Dismiss] or until the ruling of the court on such motion, whichever is sooner."

4.

Accordingly, Defendant respectfully moves this Court to stay discovery in this action for 90 days or until the Court rules on Defendant's Motion to Dismiss, whichever is sooner. A

proposed order is attached hereto as Exhibit “A” for the Court’s consideration.

5.

Should the Court exercise its discretion and lift the stay before ruling on the Motion to Dismiss, Defendant respectfully requests that the Court enter an Order lifting the discovery stay.

Respectfully submitted this 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

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Attorneys for Defendant Piedmont College

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed *DEFENDANT'S MOTION TO STAY DISCOVERY* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk
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DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV454

ORDER STAYING ALL DISCOVERY

Upon review of Defendant Piedmont College's Motion to Stay Discovery:

It is hereby ORDERED that Defendant's Motion to Stay Discovery is hereby GRANTED. All discovery in this action shall be stayed during the pendency of Defendant's Motion to Dismiss Plaintiff's Complaint.

SO ORDERED, this _____ day of _____, 2018.

The Honorable Russell W. Smith
Judge, Superior Court of Habersham County

ORDER PREPARED BY:
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DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV454


David Wall, Clerk
Habersham County, Georgia

**PIEDMONT COLLEGE’S BRIEF IN SUPPORT OF
ITS MOTION TO DISMISS PLAINTIFF’S COMPLAINT
FOR DAMAGES CONCERNING BREACH OF CONTRACT AND
BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING**

COMES NOW Piedmont College, Defendant in the above styled action and, pursuant to O.C.G.A. 9-11-12, respectfully moves this Court to dismiss *Plaintiff’s Complaint for Damages Concerning Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing* (“Plaintiff’s Complaint” or “Complaint”) for failure to state a claim upon which relief may be granted, showing this Court as follows:

I. INTRODUCTION

This lawsuit arises out of Plaintiff’s termination for cause by Piedmont College. Plaintiff’s Complaint alleges that Piedmont College breached its employment contract with him by failing to follow the termination procedures specified in the college’s Policies and Procedures Manual. Plaintiff has asserted claims against Piedmont College for breach of contract, breach of the implied duty of good faith and fair dealing, punitive damages, and attorney’s fees. All four of these claims fail as a matter of law.

First, Plaintiff’s Complaint fails to identify any contract that existed between himself and Piedmont College at the time of his termination or set forth the terms of any such contract. Accordingly, there is no set of provable facts within the framework alleged by the Complaint that

would result in Piedmont College's liability to Plaintiff for breach of contract. As such, Plaintiff's claim should be dismissed.

Because Plaintiff's claim for breach of the covenant of good faith and fair dealing is dependent on Plaintiff's breach of contract claim, it must also be dismissed, as Georgia does not recognize such a claim as an independent, stand-alone cause of action. Similarly, Plaintiff's claim for attorney's fees should be dismissed because it is also dependent on Plaintiff's contract claim.

Finally, even if the facts alleged in Plaintiff's Complaint could be construed to support a contract claim, Plaintiff's claim for punitive damages must be dismissed, as it is well established that punitive damages are not recoverable in actions for breach of contract.

II. STATEMENT OF FACTS

Defendant Piedmont College is a Georgia non-profit corporation and a private university. Plaintiff was hired by Piedmont College in September 1988 to serve as Assistant Professor of Biology. (Plaintiff's Compl., ¶ 7) In 1993, Plaintiff was promoted to Associate Professor and granted tenure for the 1993-1994 academic year. (*Id.* at ¶ 9)

In April 2018, Piedmont College received multiple grievances from students, asserting that Plaintiff had committed a Title IX violation. (*Id.* at ¶¶ 24 and 33(f)) Specifically, the complaining students alleged that Plaintiff was consistently referencing them in sexual anecdotes that Plaintiff used to teach his classes. (*Id.* at ¶ 26) Piedmont College conducted an investigation of the students' allegations. (Plaintiff's Compl., ¶ 33) Plaintiff admitted that he did, in fact, use students in his sexual anecdotes, which Plaintiff describes as "teaching tools." (*Id.* at ¶ 25) After concluding its investigation, Piedmont College terminated Plaintiff. (*Id.* at ¶ 38) Following Plaintiff's termination, a hearing was conducted by members of the Board.

Plaintiff's termination was upheld at the conclusion of that hearing. (*Id.* at ¶¶ 33(p) and 38)
 Plaintiff filed this lawsuit shortly thereafter.

III. ARGUMENT AND CITATION OF AUTHORITY

A motion to dismiss for failure to state a claim upon which relief may be granted should be sustained where “(1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.” *Anderson v. Flake*, 267 Ga. 4998, 501, 480 S.E.2d 10, 12 (1997). While a trial court is required to take the factual allegations in the complaint as true when considering a motion to dismiss, “in the absence of any specifically pled facts to support what [amounts] to a legal conclusion construed as fact, the trial court [is] not required to accept this conclusion as true.” *Novare Group, Inc. v. Sarif*, 290 Ga. 186, 191, 718 S.E.2d 304, 309 (2011).

Here, Plaintiff's Complaint fails to specifically plead any alleged facts that would support his breach of contract claim. His conclusory allegations that Piedmont College is liable for breach of contract because it terminated him are not, in and of themselves, sufficient to support a claim for breach of contract.

A. Plaintiff's Complaint Fails to State A Claim For Breach Of Contract.

To state a claim for breach of contract, Plaintiff's Complaint must generally allege a factual framework showing (1) parties able to contract, (2) a consideration moving to the contract, (3) the assent of the parties to the terms of the contract, and (4) a subject matter upon which the contract can operate. *See Weathers v. Dieniahmar Music, LLC*, 337 Ga. App. 816, 822, 788 S.E.2d 852, 858 (2016). “Each of these four essential terms must be certain. In order that it may allege an agreement, a petition must set forth a contract of such certainty and

completeness that either party may have a right of action upon it.” *Grady Memorial Hospital Corp. v. Hayes*, 341 Ga. App. 455, 457, 801 S.E.2d 55, 57 (2017). “When a complaint does not allege facts showing the existence of a contractual relationship between the plaintiff and the defendant, dismissal is proper because ‘there is no set of provable facts within the framework alleged by the complaint that would result in [liability] for breach of contract.’” *Id.*

Aside from generally alleging in his Complaint that Piedmont College breached its employment contract with Plaintiff by terminating him, Plaintiff offers absolutely no facts showing the existence, let alone the allegedly relevant terms, of such a contract. (*See generally*, Plaintiff’s Compl.) Plaintiff does not attach a copy of any contract between himself and Piedmont College to his Complaint, nor does he identify in his Complaint what terms of the contract Piedmont College is alleged to have breached. (*Id.*) Although Plaintiff sets forth quite a dramatic narrative in his Complaint, including a multitude of self-aggrandizing remarks and elaborate comparisons of Piedmont College to tyrannical and fascist dictatorships along the lines of the Bolshevik Revolution and the Nazi Third Reich, the only actual allegation asserted by Plaintiff in support of his breach of contract claim is “[b]ecause of Piedmont College’ failure to give Dr. Wainberg fair and due process in his case, pursuant to Piedmont College Policies and Procedures[,] Piedmont College did not have cause to terminate Dr. Wainberg’s annual contract for the 2017-2018 academic year, nor did Piedmont College have cause to terminate Dr. Wainberg’s tenure rights.” (*Id.*)

Plaintiff failed to allege any facts describing the requirements of the Piedmont College Policies and Procedures. He also failed to make any factual allegation establishing that Dr. Wainberg held contractual rights based upon such policies. Further, even assuming *arguendo* that he held such contract rights, he has not identified the specific policy provisions that

Piedmont College allegedly breached in terminating his employment. In short, while Plaintiff's Complaint is laden with immaterial, impertinent, and scandalous narrative¹ on a wide variety of subjects, it fails to include "a short and plain statement" of his contract claim "showing that he is entitled to relief." O.C.G.A. § 9-11-8(a)(2)(A).

Given the absence of allegations of fact supporting the existence of a contract between Plaintiff and Piedmont College or the alleged terms thereof, Plaintiff's Complaint reveals with certainty that he would not be entitled to relief under any state of provable facts on his breach of contract claim, and as such, his claim should be dismissed.

B. Because Plaintiff Cannot Establish a Claim for Breach of Contract, His Claim for Breach of an Implied Duty of Good Faith and Fair Dealing Should Also Be Dismissed.

As Plaintiff has failed to state a claim for breach of contract, his claim for breach of the covenant of good faith and fair dealing also fails as a matter of law. Georgia law does not recognize such a claim as an independent, stand-alone cause of action. *See Stuart Enterprises Int'l, Inc. v. Peykan, Inc.*, 252 Ga. App. 231, 555 S.E.2d 881 (2001) ("claim of a breach of the covenant of good faith and fair dealing is not an independent cause of action which could be asserted separately from the claim for breach of contract"); *Morrell v. Wellstar Health Sys.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006) ("[T]here is no independent cause of action for violation of the covenant apart from breach of an express term of the contract.").

¹ For the reasons set forth herein, Defendant asserts that Plaintiff's Complaint should be dismissed in its entirety. However, in the event that this Court does not grant the instant motion, Defendant respectfully asks that the Court consider O.C.G.A. § 9-11-12(f), which provides "upon the court's own initiative at any time, the court may order stricken from any pleading any ... redundant, immaterial, impertinent, or scandalous matter." Even a cursory review of Plaintiff's Complaint readily reveals that it is almost wholly comprised of a wide range of entirely irrelevant and baseless allegations. Since, as discussed herein, they do not relate to or support an actual cause of action, it is clear that the allegations are included solely to harm and defame several of the College's officers, directors, and employees. Complaints are not intended to provide vehicles for litigants to satiate their desire to smear others with impunity. If the Plaintiff cannot explain how his allegations support any essential element of his attempted causes of action, Defendant respectfully asks that the Court strike such allegations as Rule 12(f) authorizes.

Even if it were an independent cause of action, the allegations of Plaintiff's Complaint fail to state a claim for breach of the implied duty of good faith and fair dealing. In support of his claim, Plaintiff simply restates that Piedmont College breached its contract with Plaintiff (which contract Plaintiff again neither identifies nor sets forth the terms thereof), adding that such breach was done "knowingly, willfully and/or recklessly." (Plaintiff's Compl., ¶¶ 44 and 45) Such an allegation obviously has no other basis than the alleged facts relating to the breach of contract claim, which again are not contained within the framework alleged by the Complaint. *See Servicemaster Company, LP v. Martin*, 252 Ga. App. 751 (2001) (finding that party only had contractual claim, even where it alleged that other party breached contract in "bad faith").

C. Plaintiff's Claims for Punitive Damages Should Be Dismissed Because He Has Failed to Allege a Cause of Action to Support Such Damages.

Plaintiff has also failed to allege facts that give rise to a claim for punitive damages. "Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1. Punitive damages are not available in actions for breach of contract. *See* O.C.G.A. §§ 13-6-10; *Trust Co. Bank of Middle Georgia, N.A. v. Stubbs*, 203 Ga. App. 557, 563, 417 S.E.2d 373, 378 (1992) (where investors sued borrower in both tort and contract, the court found that punitive damages could not be awarded in purely contractual cases, where all of the investors' tort claims had previously been dismissed.).

Plaintiff asserts only contractual causes of action in his Complaint. Thus, his claim for punitive damages should be dismissed.

D. Plaintiff's Claim for Attorney's Fees Also Fail and Should Be Dismissed.

Plaintiff's claim for attorney's fees is dependent on his breach of contract claim. Because Plaintiff cannot establish a claim for breach of contract, he cannot recover attorney's fees and expenses of litigation against Piedmont College. As such, his claim for attorney's fees should be dismissed.

IV. CONCLUSION

Based on the foregoing, Piedmont College respectfully submits that the claims asserted against it in Plaintiff's Complaint should be dismissed pursuant to O.C.G.A. 9-11-12(b)(6) for failure to state a claim upon which relief may be granted.

Respectfully submitted this 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

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Attorneys for Defendant Piedmont College

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION

NO. 18CV454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT PIEDMONT COLLEGE'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DAMAGES CONCERNING BREACH OF CONTRACT AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marshalk
Barbara A. Marschalk, **GA Bar No. 324498**

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Attorneys for Defendant Piedmont College
8221887/1/00120-134334

FILED IN OFFICE
CLERK OF SUPERIOR COURT
HABERSHAM COUNTY, GEORGIA
18CV0454
RUSSELL W. SMITH
SEP 27, 2018 11:31 AM

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV454


David Wall, Clerk
Habersham County, Georgia

**PIEDMONT COLLEGE'S MOTION TO DISMISS PLAINTIFF'S
COMPLAINT FOR DAMAGES CONCERNING BREACH OF CONTRACT
AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING**

COMES NOW Piedmont College, Defendant in the above styled action, and pursuant to O.C.G.A. 9-11-12, respectfully moves this Court to dismiss *Plaintiff's Complaint for Damages Concerning Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing* ("Plaintiff's Complaint" or "Complaint") for failure to state a claim upon which relief may be granted. In support of this Motion, Defendant relies upon all matters of record, including its *Brief in Support* filed contemporaneously herewith.

WHEREFORE, Defendant respectfully requests that this Court grant this motion and enter an Order dismissing Plaintiff's claims.

Respectfully submitted this 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk
Joseph C. Chancey, **GA Bar No. 120520**
Barbara A. Marschalk, **GA Bar No. 324498**
Sonya T. Jacobs, **GA Bar No. 380006**

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Attorneys for Defendant Piedmont College

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION

NO. 18CV454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed *PIEDMONT COLLEGE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DAMAGES CONCERNING BREACH OF CONTRACT AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

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Attorney for Defendant Piedmont College
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00120-134334

18CV0454
RUSSELL W. SMITH
SEP 27, 2018 11:31 AM



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Habersham County, Georgia

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STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV454

DEFENDANT'S REQUEST FOR ORAL ARGUMENT ON MOTION TO DISMISS

COMES NOW Defendant Piedmont College, and, pursuant to Uniform Superior Court Rule 6.3, respectfully requests that its Motion to Dismiss Plaintiff's Complaint be set down for an oral argument.

Respectfully submitted this 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

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Barbara A. Marschalk, **GA Bar No. 324498**

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Attorneys for Defendant Piedmont College

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Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV454

CERTIFICATE OF SERVICE

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Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 27th day of September, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marshalk

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FILED IN OFFICE
CLERK OF SUPERIOR COURT
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18CV0454
RUSSELL W. SMITH
OCT 03, 2018 02:21 PM

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV454



David Wall, Clerk
Habersham County, Georgia

NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant Piedmont will bring its *Motion to Dismiss Plaintiff's Complaint* on for hearing before the Honorable Russell W. Smith, or other presiding Judge of the above Court, on Tuesday, December 11, 2018 at 9:00 a.m., or as soon thereafter as counsel may be heard, at the Habersham County Courthouse, 295 Llewellyn Street, Clarkesville, Georgia.

Respectfully submitted this 3rd day of October, 2018.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

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Attorneys for Defendant Piedmont College

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day electronically filed this *Notice of Hearing* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, which will electronically serve the following parties of record:

Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 3rd day of October, 2018.

DREW ECKL & FARNHAM, LLP

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18CV0454
RUSSELL W. SMITH
OCT 29, 2018 07:37 PM


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO. 18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

PLAINTIFF'S RESPONSE TO PIEDMONT COLLEGE'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT FOR DAMAGES CONCERNING BREACH OF
CONTRACT AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR
DEALING

COMES NOW Plaintiff (Dr. Wainberg) and hereby submits this response to *Piedmont College's Motion To Dismiss* showing the Court that Defendant misconstrues both the law and facts in its motion to dismiss. As such, Defendant's motion to dismiss should be denied.

FACTS:

Dr. Wainberg faithfully served Piedmont College for thirty years and successfully built the science department from the ground up as one of the original founders. (Compl. Intro.) When he began standing up to the administration in regards to corruption, he became targeted, his good name and professional reputation slandered. (Compl. Intro.) In retaliation against Dr. Wainberg, a pillar of the institution and beloved professor who helped grow the institution for three decades, was robbed of his job and unlawfully deprived of a fair hearing that he was contractually entitled to as a tenured professor. (Compl. Intro.) Dr. Wainberg was wrongly charged by the College President, Dr. James Mellinchamp, with a Title 9 violation, despite the fact that Dr. Wainberg has never conducted himself in a manner that could ever be construed as

sexual harassment. (Compl. ¶24.) All the while Dr. Wainberg has stood up to Dr. Mellinchamp, a President who failed to properly address sexual harassment at the College and sexually harassed both females and males, faculty and students during his career at Piedmont College, for example, grabbing a male faculty member in his buttocks and firmly cupping them while making a sexual innuendo. (Compl. ¶28.)

Contrary to the Piedmont College Policies and Procedures: Dr. Wainberg did not receive proper written notice of termination or a fair hearing; the Defendant decided to terminate prior to the investigators interviewing Dr. Wainberg; Dr. Wainberg did not receive a fair hearing; Dr. Wainberg was not made aware of the investigation by Piedmont College until after President Mellinchamp decided to terminate him; Dr. Wainberg was not even questioned or afforded the opportunity to defend himself or refute the charges until after President Mellinchamp made the decision to terminate him; the college's Title 9 officer did not conduct the Title 9 investigation; exculpatory evidence that included female students who voluntarily came forward to testify in Dr. Wainberg's favor to clear his good name was not provided; Dr. Wainberg requested to be given exculpatory evidence and documentation that the investigators took down in order to prepare for his hearing but is denied this evidence; the Board hearing panel was denied this evidence; Dr. Wainberg was not given proper notice--just a folder file one night prior to his hearing with less than 24 hours to prepare that was missing exculpatory evidence; at the hearing Defendant engaged in secret, ex-parte/closed door conversation with the Board members at the hearing, failed to present any of the evidence obtained by the investigators that cleared Dr. Wainberg's good name, and made Dr. Wainberg sit outside a closed door where Defendant presented information to the hearing panel outside his presence without him being permitted to

hear what was being said so that he could refute any allegations made against him. (Compl. ¶¶33-36.) To date, exculpatory evidence in the investigator's file is still missing and Defendant has refused to provide this evidence to Dr. Wainberg despite his repeated requests. (Compl. ¶37.)

Robbing a tenured professor who faithfully served the institution after thirty years of his income and health insurance benefits, where he can no longer afford expensive COBRA health insurance benefits, has not only caused significant economic harm and emotional distress, but it has placed Dr. Wainberg's health and life at risk as he suffers from serious illness. (Compl. ¶39.) Dr. Wainberg seeks damages for breach of contract and violation of the implied duty of good faith and fair dealing, punitive damages and attorney fees.

ARGUMENT:

1. Under the Controlling Standard of Law, Plaintiff Has Made Valid Claims Against Defendant:

A. The Legal Standard:

Foremost, and the following is seriously significant: "it is *the rare case* in which a motion to dismiss for failure to state a claim...will provide an appropriate procedural device for securing summary adjudication of the issues raised in a complaint...." Radio Perry, Inc. v. Cox Commc'ns, Inc., 323 Ga. App. 604, 611, 746 S.E.2d 670, 676 (2013.) That's because, at the motion-to-dismiss stage, Plaintiff's well-pled allegations "are to be taken *as true*, and all allegations of the moving party which have been denied are taken *as false*." Shreve v. World Championship Wrestling, Inc., 216 Ga. App. 387, 388, 454 S.E.2d 555, 556 (1995). In fact, "all doubts" regarding well pled allegations "must be resolved in the filing party's favor." Lord v. Lowe, 318 Ga. App. 222, 223, 741 S.E.2d 155, 156 (2012); see also Charles H. Wesley Educ. Found., Inc. v. State Election Bd., 282 Ga. 707, 714, 654 S.E.2d 127, 132 (2007) (stating that "a

court must assume the factual allegations of the complaint are true, *even if* they are doubtful in fact.”) With that in mind, a party moving to dismiss a complaint “must show that the plaintiff could *not* possibly introduce evidence within the framework of his complaint sufficient to sustain a grant of the requested relief.” Radio Perry, Inc. *supra*.

Indeed, “a complaint will not be dismissed under O.C.G.A. § 9–11–12(b)(6) for requesting the wrong form of relief, or no relief at all, as long as the complainant is entitled to some legal remedy under the facts pled,” because in state court, the Defendant is only entitled to “fair notice.” *Id.*; see Bush v. Bank of New York Mellon, 313 Ga. App. 84, 91, 720 S.E.2d 370, 375 (2011) (stating that “the pleading standards in a Georgia court and in a federal court may not be identical [a] complaint filed in either court must contain “a short and plain statement” of the claim and must give the defendant *fair notice* of the nature of the claims against which he must defend.”)

Consequently, under the legal standard for Georgia law, Defendant’s Motion to Dismiss should be denied because Plaintiff Dr. Wainberg met the *notice pleading* requirement in Georgia. Forsh v. Williams, 321 Ga. App. 556, 557, 740 S.E.2d 297, 299 (2013). “Under this ‘notice’ theory of pleading it is immaterial whether a pleading states ‘conclusions’ or ‘facts’ as long as fair notice is given, and the statement of claim is short and plain. The true test is whether the pleading gives fair notice and states the elements of the claim plainly and succinctly, and not whether as an abstract matter it states ‘conclusions’ or ‘facts.’” Forsh v. Williams at 557.

Importantly, the Court has held: “**There are no prohibitions in the rules against pleading conclusions and, if pleaded, they may be considered in determining whether a complaint sufficiently states a claim for relief.** It is immaterial whether an allegation is one of fact or conclusion if the complaint effectively states a claim for relief.” *Id.*

B. Defendant Misconstrues the Law

As such, concerning the above legal standard, Defendant misses the mark by making specious arguments such as claiming Plaintiff failed to “specifically plead” (Def. p. 3) and made “conclusory allegations” that did not present enough considered-true facts which demonstrate that Plaintiff could “*possibly* introduce evidence within the framework of his complaint sufficient to sustain...” his breach of contract claim. Simply put, Defendant misconstrues the law in the state of Georgia. As the Court made very clear: “The Civil Practice Act abolished ‘issue pleading,’ substituted in lieu thereof ‘notice pleading,’ authorized the pleading of conclusions, and directed that ‘all pleadings shall be construed so as to do substantial justice.’” Moore v. Goldome Credit Corp., 187 Ga. App. 594, 596, 370 S.E.2d 843, 846 (1988). As such, “[a] plaintiff is not required to plead in the complaint facts sufficient to set out each element of a cause of action so long as it puts the opposing party on reasonable notice of the issues that must be defended against. *If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.*” Forsh v. Williams at 557-58.

As well-established law has recognized for decades “under the concept of notice pleading [as] used in Georgia practice, a complaint will be sustained against a motion to dismiss for failure to state a claim so long as the complaint admits of any conceivable set of facts which would support a recovery.” Summer-Minter & Assocs., Inc. v. Giordano, 231 Ga. 601, 605, 203 S.E.2d 173, 176 (1974).

Importantly, as the Court has reiterated time and time again to date, that because: “[t]he Georgia Civil Practice Act requires only notice pleading... under the Act, pleadings are to be construed liberally and reasonably to achieve substantial justice consistent with the statutory

requirement of the Act. Pleadings serve only the purpose of giving notice to the opposing party of the general nature of the contentions of the pleader, and thus general allegations are sufficient to support a plaintiff's claim for relief...[A] complaint is not required to set forth a cause of action, but need only set forth a claim for relief." Mullis v. Welch, 346 Ga. App. 795, 815 S.E.2d 282, 284–85 (2018), reconsideration denied (July 12, 2018) Citing *Wright v. Waterberg Big Game Hunting Lodge Otjahewita (Pty), Ltd.*, 330 Ga. App. 508, 510 (1), 767 S.E.2d 513 (2014) (citation and punctuation omitted) and *One Bluff Drive, LLC v. K. A. P., Inc.*, 330 Ga. App. 45, 48 (1), 766 S.E.2d 508 (2014).

C. Defendant Misconstrues the Facts as Applied to the Law Concerning Breach of Contract, Implied Duty of Good Faith and Fair Dealing, Attorney Fees and Punitive Damages:

Defendant not only misconstrues the law by arguing for a heightened pleading standard that does not apply, Defendant also misconstrues the facts by making repeated outlandish claims regarding Plaintiff's well pled allegations concerning breach of contract, implied duty of good faith and fair dealing, attorney fees, and punitive damages.

i. Breach of contract.

Dr. Wainberg clearly alleged throughout his complaint the existence of a contractual breach. For example, he spelled out how in the summer of 2017, he and Piedmont College actually entered into a tenure employment contract for the academic year 2017-2018 as a tenured member of the faculty. (Compl. ¶40.) He explained that as a tenured member of the faculty, he was contractually entitled to renewal of his annual contract of employment until his retirement or resignation unless there was adequate cause for his dismissal by Piedmont College. (Compl. ¶40.) He provided fair notice to the Defendant that "by terminating Dr. Wainberg on May 11,

2018, Piedmont College breached its employment contract with Dr. Wainberg and breached his tenure rights. Because of Piedmont College's failure to give Dr. Wainberg fair and due process in his case, pursuant to Piedmont College Policies and Procedures. Piedmont College did not have cause to terminate Dr. Wainberg's annual contract for the 2017-2018 academic year, nor did Piedmont College have cause to terminate Dr. Wainberg's tenure rights." (Compl. ¶41).

Certainly as required by Georgia law, Dr. Wainberg's pleadings served the purpose of giving Defendant notice "of the general contentions" and the "general allegations" as required and as construed liberally with the statutory requirement that a "complaint is not required to set forth a cause of action, but need only set forth a claim for relief." Mullis v. Welch, 346 Ga. App. 795, 796-797, 815 S.E.2d 282, 285 (2018), reconsideration denied (July 12, 2018.)

Relevantly, Dr. Wainberg's pleadings allege that he had tenure as denoted in his annual tenure contract for employment with the Defendant. (Compl. ¶¶ 40-41.) "The term "tenure" means, among other things, a status granted after a trial period to a teacher that gives protection from summary dismissal" and is also defined as "a status afforded to a teacher or professor as a protection against summary dismissal without sufficient cause. This status has long been considered a cornerstone of academic freedom. More generally, the legal protection of a long-term relationship, such as employment¹." Wilson v. Clark Atlanta Univ., Inc., 339 Ga. App. 814,

From the Georgia Court of Appeals:

"This case concerns "tenure," and it is therefore important to understand what is meant by that term. In education circles generally, and especially at the collegiate level, it denotes a commitment by the school, as a direct or implied part of its faculty employment agreement, that, upon a determination that the faculty member has satisfied the conditions established by the school, the member's employment will be continuous, subject to termination only for adequate cause. Tenure is said to be "awarded" when, in accordance with its policies and procedures, the school determines that the conditions have been satisfied and the faculty member is entitled to the protected status.

Well over 90% of American colleges and universities, public and private, have a tenure system. It is a core part of the college-faculty relationship. Although most tenure systems are based, to some extent, on the 1940 Statement of Principles and Interpretive Comments developed by the Association of American Colleges and the American Association of University Professors, there is no uniform tenure system. There appears, rather, to be a significant variety in the particular plans used in the nation's colleges. As noted in Faculty Tenure, a Report and Recommendations by the Commission on Academic Tenure in Higher

826–27, 794 S.E.2d 422, 432 (2016), reconsideration denied (Dec. 13, 2016), cert. denied (Aug. 14, 2017.)

Dr. Wainberg’s pleadings also allege that he had an annual tenure contract of employment with the Defendant and that this contract afforded him rights as a tenured professor as established within the Faculty Handbook policies which formed part of his contract of employment. (Compl. ¶¶ 16, 31, 40-41.) Under Georgia law, the Court has held: “It is the accepted law of this state that an additional compensation plan offered by an employer and impliedly accepted by an employee, by remaining in employment, constitutes a contract between them...” Moffie v. Oglethorpe Univ., Inc., 186 Ga. App. 328, 329, 367 S.E.2d 112, 113 (1988.) And thus, “we conclude that those portions of the Faculty Handbook dealing with consideration for appointment with tenure and of which plaintiff was aware, form a part of plaintiff’s contract of employment.” Moffie v. Oglethorpe Univ., Inc., 186 Ga. App. 328, 329, 367 S.E.2d 112, 113 (1988.)

Moreover, Dr. Wainberg’s pleading alleged that the Defendant breached its employment contract with Dr. Wainberg by terminating him in direct violation of his contractual tenure rights. Moffie, supra. (Compl. ¶¶ 16, 31, 40-41.) These tenure rights—a condition of Dr. Wainberg’s

Education (1973), the 1940 statement was a statement of principles, “not a prescription of substantive institutional practice.” Id. at 2–3. The authors observe:

“On every aspect of tenure, institutional policies and practices vary: definition of tenure; its legal basis; criteria for appointment, reappointment, and award of tenure; length of probationary period; categories of personnel eligible for tenure; relationship between tenure and rank; procedures for recommending appointments and awarding tenure; procedures for appeal from adverse decisions; procedures to be followed in dismissal cases; role of faculty, administration, students, and governing board in personnel actions; methods of evaluating teaching, scholarship, and public service; and retirement arrangements. In all these and many more, the range of variation among the 2600 institutions of higher education (and sometimes even within institutions—from division to division or even from department to department) is enormous.” “Tenure may be afforded in a number of ways—by law, by contract, by moral commitment under an accepted academic code, or simply “by courtesy, kindness, timidity, or inertia.” HANDBOOK OF COLLEGE AND UNIVERSITY ADMINISTRATION (ACADEMIC) 6-64 (Asa S. Knowles, ed., 1970). When provided by contract, its terms are usually stated in by-laws adopted by the school and published in a handbook. (Citations omitted.) Wilson v. Clark Atlanta Univ., Inc., 339 Ga. App. 814, 827–28, 794 S.E.2d 422, 432–33 (2016), reconsideration denied (Dec. 13, 2016), cert. denied (Aug. 14, 2017)

contract as spelled out in the Complaint--are denoted College's policies and procedures as described in the faculty handbook. (Compl. ¶¶ 16, 31, 40-41.) Importantly, the Court has made clear that the policies in a faculty handbook define the scope of protection granted to faculty members as provided in the tenure contract. Wilson v. Clark Atlanta Univ., Inc. at 828-829. Thus, by violating college policies and procedures that outlined the termination of tenured faculty in addition to violating the actual employment agreement that established him as a 'tenured' professor with a continued expectation of re-employment until he retired or resigned, Defendant breached Dr. Wainberg's contract.

In sum, Dr. Wainberg's well-pled factual allegations sufficiently support his claim of a breached contract and certainly go beyond that what is required. And all that is required is merely a "short and plain statement of the claim that will give the defendant fair notice of what the claim is and a general indication of the type of litigation involved; the discovery process bears the burden of filling in details." Dillingham v. Doctors Clinic, P. A., 236 Ga. 302, 303, 223 S.E.2d 625, 626 (1976.) Defendant's motion to dismiss therefore fails under the weight of the controlling standard, at this litigation stage.

ii. Implied duty of good faith and fair dealing: Not only did Dr. Wainberg put Defendant on fair notice that it is being sued for breach of contract, Dr. Wainberg also put Defendant on fair notice that Piedmont College breached the implied duty of good faith and fair dealing owed to him in executing said contract. Georgia law recognizes this implied duty. See DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 645, 734 S.E.2d 466, 476 (2012).

The Georgia Supreme Court has held that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. Brack v. Brownlee, 246 Ga. 818, 820, 273 S.E.2d 390, 392 (1980). And since, the Court of Appeals has stated:

“[w]ith rare exception...the Supreme Court and our Court have since that time consistently applied this overarching principle in construing contracts governed by Georgia law...specifically, we have held that “[t]his implied duty requires both parties to a contract to perform their promises and provide such cooperation as is required for the other party's performance. And, *where the manner of performance is left more or less to the discretion of one of the parties to the contract, he is bound to the exercise of good faith....*What constitutes good faith is a question for the finder of fact.”

Hunting Aircraft, Inc. v. Peachtree City Airport Auth., 281 Ga. App. 450, 451–52, 636 S.E.2d 139, 141 (2006)

Here, Dr. Wainberg’s allegations are replete throughout the entire Complaint placing Defendant on fair notice describing the lack of good faith and fair dealing that resulted in destroying his career and reputation after devoting thirty years of his entire professional career into building the science department. These facts which provide notice include but are not limited to Defendant conducting a phony investigation against him where the decision to terminate him is made even before he is even afforded the chance to refute the charges, defend himself, or be properly interviewed by the investigators; Defendant’s failure to provide him the exculpatory evidence prior to the hearing; Defendant’s failure to present any of the exculpatory evidence that clears him to the Board hearing panel; to Defendant’s conduct in holding secret, ex parte conversations behind closed doors with the hearing panel outside of the presence of Plaintiff without him being permitted to hear what was being said so that he could refute any allegations made against him. (Compl. ¶¶ 33m-p; 43-46.)

Irrefutably, Dr. Wainberg has placed the Defendant on fair notice of the nature of his claim to the Defendant and as such, under the controlling standard, the motion to dismiss must be denied. Bush v. Bank of New York Mellon, 313 Ga. App. 84, 90, 720 S.E.2d 370, 374 (2011.)

iii. Attorney fees: Incorporating all the preceding allegations cited in the Complaint, Dr. Wainberg has placed Defendant on notice that he seeks attorney fees as the College’s actions against him were in bad faith, stubbornly litigious, and caused him unnecessary trouble and

expense, entitling him to expenses and fees. (Compl. ¶¶ 48.) Attorney fees pursuant to OCGA § 13-6-11 may be recovered where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense and questions concerning these issues are generally questions for the jury to decide. Steel Magnolias Realty, LLC v. Bleakley, 276 Ga. App. 155, 156, 622 S.E.2d 481, 482 (2005.) Because Dr. Wainberg has provided a short and plain statement giving fair notice to the Defendant that he intends to seek this claim for relief, the motion for dismissal must be denied. Bush at 90.

iv. Punitive Damages: Defendant states that the claim for punitive damages should be dismissed because plaintiff “failed to allege a cause of action to support such damages.” (Def. p. 6.) But again, Defendant is wrong on the law. “[A] complaint is not required to set forth a cause of action, but need only set forth a claim for relief.” Mullis v. Welch at 797.

Dr. Wainberg has set forth a claim for relief, placing Defendant on fair notice that he is entitled to exemplary damages because Piedmont College’s conduct was wanton, willful, and showed a reckless disregard and deliberate indifference to the rights of the Plaintiff in violating their implied duty of good faith and fair dealing. (Compl. ¶¶ 47.)

Under Georgia law, although a duty of good faith and fair dealing is implied in every contract and does not ordinarily give rise to tort liability it can “if in addition to violating a contract obligation, [Defendant] also violated a duty independent of contract to avoid harming him. A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law.” ServiceMaster Co., L.P. v. Martin, 252 Ga. App. 751, 754, 556 S.E.2d 517, 521 (2001). And when this happens, where the defendant breaches an independent duty imposed by law, an affected employee may

seek and recover punitive damages from a corporate entity as a result. Se. Sec. Ins. Co. v. Hotle, 222 Ga. App. 161, 163, 473 S.E.2d 256, 260 (1996).

Examples of tort claims that establish an independent duty imposed by law may include intentional infliction of emotional distress, assault and/or battery, negligent hiring and/or retention, and tortious interference with employment rights. E.g. Southeastern Security Ins. Co. v. Hotle, 222 Ga. App. 161, 473 S.E.2d 256 (1996) (intentional infliction of emotional distress, negligent retention); Trimble v. Circuit City Stores, Inc., 220 Ga. App. 498, 469 S.E.2d 776 (1996) (intentional infliction of emotional distress, negligent retention); Rogers v. Carmike Cinemas, Inc., 211 Ga. App. 427, 439 S.E.2d 663 (1993) (intentional infliction of emotional distress, negligent hiring/retention); Coleman v. Housing Auth. of Americus, Inc., 191 Ga. App. 166, 381 S.E.2d 303 (1989) (intentional infliction of emotional distress, negligent hiring/retention); Newsome v. Cooper-Wiss, Inc., 179 Ga. App. 670, 347 S.E.2d 619 (1986) (battery, tortious interference with employment rights).

Additionally, where the employer knows or has reason to know of an employee's propensities and where the company's actions regarding hiring, investigation, and retention evidence a complete disregard for the consequences of its agent's actions toward the affected employee, the company itself may be liable for punitive damages. Southeastern Security Ins. Co. v. Hotle, 222 Ga. App. 161, 473 S.E.2d 256 (1996); Trimble v. Circuit City Stores, Inc., 220 Ga. App. 498, 469 S.E.2d 776 (1996); Rogers v. Carmike Cinemas, Inc., 211 Ga. App. 427, 439 S.E.2d 663 (1993). This is particularly relevant as Plaintiff anticipates that the discovery process may reveal Defendant's knowledge or reason to know President Mellinchamp's propensities in failing to properly address sexual harassment and his pattern/practice of sexual inappropriate

conduct towards others including but not limited to grabbing a female student's buttocks and a male faculty member's buttocks, actions which can be deemed sexual assault.² (Compl. ¶¶ 28.)

Here, Dr. Wainberg is entitled to punitive damages because the Defendant breached an implied duty of good faith and fair dealing giving rise to tort liability because Defendant also violated an independent duty imposed by law by violating policies and procedures required by law. ServiceMaster Co., L.P. v. Martin, 252 Ga. App. 751, 754, 556 S.E.2d 517, 521 (2001). For example, the college charged Dr. Wainberg with violating Title IX, 20 U.S.C.A. § 1681 and Defendant had such an 'independent duty imposed by law' duty to adopt "grievance procedures providing for prompt and equitable resolution" concerning the complaint made against Dr. Wainberg. See 65 Fed. Reg. 52867; 34 C.F.R. § 106.8; 20 U.S.C.A. § 1681. Defendant failed to adopt a procedure that provided an "equitable resolution." In breach of Defendant's implied duty of good faith and fair dealing and in violation of an independent duty imposed by law, Defendant failed to provide him proper notice, failed to provide a fair and impartial investigation, failed to allow Dr. Wainberg to present witnesses, failed to allow Dr. Wainberg to cross examine his accusers, failed to allow him to hear the evidence presented against him during the ex parte communications that took place, conducted a phony investigation against him where the decision to terminate him was made even before he was properly interviewed by the investigators, failed to provide him the exculpatory evidence at any point to date, failed to present any of the exculpatory evidence that cleared him to the hearing panel, and failed to allow him access to the secret, ex parte information Defendant presented about Dr. Wainberg to the hearing panel

² Dr. Wainberg objects and denies in full Defendant's Footnote 1 which improperly asks the Court to strike the pleading implying that scandalous matter was alleged in order to harm or defame employees. What is scandalous is the harm President Mellinchamp caused to Plaintiff by falsely alleging that he violated Title IX, all the while ignoring and participating in true sexual harassment himself as College President, including but not limited to his propensity to grab buttocks.

outside of his presence as he sat outside the door without him being permitted to hear what was being said so that he could refute any allegations made against him. (Compl. ¶¶ 33-37.)

Importantly however, Dr. Wainberg is not obligated to prove this in his complaint. Defendant is not obligated to allege a cause of action. “[A] complaint is not required to set forth a cause of action, but need only set forth a claim for relief.” Mullis v. Welch at 797. All Dr. Wainberg is required to do is to provide Defendant fair notice that he intends to seek punitive damages and it is **“the discovery process that bears the burden of filling in the details.”** Dillingham v. Doctors Clinic, P. A., 236 Ga. 302, 303, 223 S.E.2d 625, 626 (1976.)

CONCLUSION:

In conclusion, Defendant misconstrues both the facts and the law by thoroughly applying the wrong standard for dismissal. The Courts have made clear that, under Georgia law, a motion to dismiss for failure to state a claim should never be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. Harper v. DeFreitas, 117 Ga. App. 236, 160 S.E.2d 260 (1968); DeKalb County v. Georgia Paperstock Co., 226 Ga. 369, 174 S.E.2d 884 (1970). Rather, all that is required is “a short and plain statement of the claim that will give the defendant fair notice of what the claim is and a general indication of the type of litigation involved; **the discovery process bears the burden of filling in details.**” Dillingham v. Doctors Clinic, P. A., 236 Ga. 302, 303, 223 S.E.2d 625, 626 (1976) (trial court granted motion to dismiss, the Court of Appeals affirmed, and the Supreme Court reversed).

Dr. Wainberg respectfully asserts that “trial court must construe the complaint in favor of the pleader in a motion to dismiss for failure to state a claim upon which relief may be granted. It is error to dismiss unless it appears to a certainty that the plaintiff would not be entitled to relief

under any state of facts which could be proven in support of his claim. If it is theoretically possible for the plaintiff to introduce evidence within the framework of the complaint which would entitle him to recover on his claim or would sustain a grant of relief to him, the complaint is sufficient to withstand a motion to dismiss.” § 9:5. Motion to ‘dismiss for failure to state a claim; stay of discovery, Ga. Practice & Procedure § 9:5 (2017-2018 ed.)³

Therefore, Dr. Wainberg respectfully requests this Court deny the Defendant’s Motion to Dismiss and allow discovery to move forward so it may, as the Georgia Supreme Court held, bear its “burden of filling in details.” Dillingham at 223.

Respectfully submitted this 29th day of October 2018,

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³ Bourn v. Herring, 225 Ga. 67, 67(3), 166 S.E.2d 89 (1969); Residential Developments, Inc. v. Mann, 225 Ga. 393, 397, 169 S.E.2d 305 (1969); Clear Vision CATV Services, Inc. v. Mayor of Jesup, 225 Ga. 757, 760, 171 S.E.2d 505 (1969); Stevens v. Stevens, 227 Ga. 410, 410(1), 181 S.E.2d 34 (1971); Gill v. Myrick, 228 Ga. 253, 185 S.E.2d 72 (1971); Crowder v. Department of State Parks, 228 Ga. 436, 185 S.E.2d 908 (1971); Richter v. D. & M. Associates, Inc., 228 Ga. 599, 604, 187 S.E.2d 253 (1972); Garrett v. Garrett, 231 Ga. 754, 204 S.E.2d 140 (1974); Murrey v. Specialty Underwriters, Inc., 233 Ga. 804, 213 S.E.2d 668 (1975); Cochran v. McCollum, 233 Ga. 104, 210 S.E.2d 13 (1974); Leitzke v. Leitzke, 239 Ga. 17, 235 S.E.2d 500 (1977); Branton v. Gulf Life Employees' Federal Credit Union, 244 Ga. 528, 529, 260 S.E.2d 905 (1979); Harper v. DeFreitas, 117 Ga. App. 236, 236(1), 160 S.E.2d 260 (1968); Poole v. City of Atlanta, 117 Ga. App. 432, 434, 160 S.E.2d 874 (1968); Byrd v. Ford Motor Co., 118 Ga. App. 333, 333(2), 163 S.E.2d 327 (1968); Hunter v. A-1 Bonding Service, Inc., 118 Ga. App. 498, 164 S.E.2d 246 (1968); Rossville Federal Sav. & Loan Ass'n v. Insurance Co. of North America, 121 Ga. App. 435, 437, 174 S.E.2d 204 (1970); Feldman v. Whipkey's Drug Shop, 121 Ga. App. 580, 174 S.E.2d 474 (1970); Woods v. Canady, 126 Ga. App. 389, 190 S.E.2d 920 (1972); Tahamtan v. Dixie Ornamental Iron Co., 143 Ga. App. 561, 239 S.E.2d 217 (1977).

CERTIFICATE OF SERVICE

This is to certify that the foregoing PLAINTIFF'S RESPONSE TO PIEDMONT COLLEGE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DAMAGES has this day been served with the Clerk of Court using the PeachCourt e-filing system and upon opposing counsel by depositing a true and correct copy of the same via U.S. Mail addressed to:

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OCT 29, 2018 08:13 PM



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO. 18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

**PLAINTIFF'S RESPONSE TO PIEDMONT COLLEGE'S MOTION TO STAY
DISCOVERY**

COMES NOW Plaintiff (Dr. Wainberg) and hereby submits this response to *Piedmont College's Motion To Stay Discovery*. This motion expended time and resources unnecessarily. No order is needed. Both parties' counsel are in agreement on what the Civil Practices Act states and also on the interpretation of such law. The law is very clear. Pursuant to O.C.G.A. § 9-11-12(j)(1), "discovery shall be stayed for 90 days after the filing of [Defendant's Motion to Dismiss] or until the ruling of the court on such motion, whichever is sooner." Defendant's Motion and Proposed Order does not comport with such.

The Plaintiff objects to the portion of the Defendant's motion that explicitly requests that the Court must lift the stay of discovery prior to ruling on a motion to dismiss. (Def. p. 2.) That does not comport with the law which states that discover is only stayed for 90 days after the filing. Id. Although the statute requires the Court to decide the motion to dismiss within 90 days, there are times in civil litigation where this does not occur. When it does not, discovery must commence in keeping with the Civil Practices Act on the 91st day after the filing of the motion to dismiss.

Furthermore, the Plaintiff objects to the Proposed Order which likewise does not comport with the Civil Practices Act because again, it states that “All discovery in this action shall be stayed during the pendency of Defendant’s Motion to Dismiss Plaintiff’s Complaint” rather than the actual requirement of the statute which is “discovery shall be stayed for 90 days after the filing of [Defendant’s Motion to Dismiss] or until the ruling of the court on such motion, whichever is sooner.” O.C.G.A. § 9-11-12(j)(1).

In sum, the motion should be denied. The law is very clear. Under the Georgia Civil Practices Act, discovery should begin on the 91st day after the filing of the Motion to Dismiss or until the ruling of the Court, whichever is sooner. Id. An Order stating what the law states is unnecessary. The motion frivolously expends unnecessary time and resources. Finally, the technical wording of both the Defendant’s Motion and Proposed Order as stands is objectionable, does not comport with Georgia law, and should be denied.

Respectfully submitted this 29th day of October 2018,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing PLAINTIFF'S RESPONSE TO PIEDMONT COLLEGE'S MOTION TO STAY DISCOVERY has this day been served with the Clerk of Court using the PeachCourt e-filing system and upon opposing counsel by depositing a true and correct copy of the same via U.S. Mail addressed to:

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David C. Wall

David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

PIEDMONT COLLEGE,

Defendant.

)
) CIVIL ACTION
) NO. 18CV454
)
)
)
)
)
)

NOTICE OF LEAVE OF ABSENCE

COMES NOW Julie Oinonen and respectfully notifies this Honorable Court that she will be on leave pursuant to Georgia Uniform Court Rule 16. The period of leave during which time Applicant will be away from the practice of law is: December 17, 2018 to January 11, 2018 for the purpose of family vacation. All affected judges and opposing counsel shall have ten (10) days from the date of this Notice to object to it. If no objections are filed, the leave shall be granted.

Respectfully submitted, this 15th day of November, 2018.

/s/ JULIE OINONEN
Julie Oinonen (GA 722018)
Attorney for Plaintiff

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing NOTICE OF LEAVE OF ABSENCE upon attorneys for the other parties by filing and serving this via the PeachCourt efile system and mailing it to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
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Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Attorneys for Defendant Piedmont College

Respectfully submitted, this 15th day of November, 2018.

/s/ JULIE OINONEN
Julie Oinonen (GA 722018)
Attorney for Plaintiff

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julie@goodgeorgialawyer.com


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT’S REPLY TO PLAINTIFF’S RESPONSE TO PIEDMONT COLLEGE’S
MOTION TO DISMISS PLAINTIFF’S COMPLAINT FOR DAMAGES CONCERNING
BREACH OF CONTRACT AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND
FAIR DEALING**

COMES NOW Defendant Piedmont College (hereinafter “Defendant”), by and through its undersigned counsel, and replies to *Plaintiff’s Response to Piedmont College’s Motion to Dismiss Plaintiff’s Complaint for Damages Concerning Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing* (Plaintiff’s “Response”), showing this Court as follows:

I. INTRODUCTION

Plaintiff’s Response only further demonstrates that his Complaint fails to meet Georgia’s notice pleading requirement. In fact, based on the arguments put forth by Plaintiff in his Response, it appears Plaintiff himself is struggling to identify the nature of his claims against Defendant. Not only does Plaintiff further muddy the allegations of his Complaint by vaguely implying (for the first time) that he may have an as yet unidentified tort claim against Defendant to support his punitive damages claim, but he also confirms that his breach of contract and breach of implied duty of good faith and fair dealing claims fail as a matter of law, admitting that Defendant abided by the very terms of the contract on which those claims rely. As Plaintiff’s

Complaint fails to state a claim as a matter of law, it should be dismissed.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiff's Complaint Fails to Provide Fair Notice of The Nature of His Claims

Georgia law is clear that a complaint must contain “[a] short and plain statement of the claims showing that the pleader is entitled to relief.” O.C.G.A. § 9-11-8(a)(2)(A). “[T]his short and plain statement must include enough detail to afford the defendant fair notice of the nature of the claim and a fair opportunity to frame a responsive pleading. *Bush v. Bank of New York Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Plaintiff's Complaint in this case is not a “short and plain statement” of claims, but rather bears the distinct markings of a “shotgun pleading,”¹ comprised of paragraph upon paragraph of entirely irrelevant and baseless allegations. By way of example, Plaintiff dedicates a large portion of his Complaint to aggrandizing awards he received over a decade ago, discussing the Mar-Jac corporation's poultry business and “potential links to radical terrorism,” conveying his personal opinions on academic freedom of expression and tenure, addressing the history of the Bolshevik Revolution and the Nazi Third Reich, and perpetuating offensive stereotypes with respect to President Mellichamp's sexuality. (Compl., ¶¶ 7, 8, 10, 11, 12, 16, 17, 18, 28).

The burden of clearly identifying the claims alleged in a case does not lie with the defendant or the courts, but rather with the plaintiff, who has an obligation under the Civil Practice Act to make a “short and plain statement” of his claim. *Bush*, 313 Ga. App. at 91. Plaintiff's Complaint does not contain a single allegation identifying any specific contract

¹ “Although the concept of a shotgun pleading is not one susceptible of a terse definition, the Eleventh Circuit has identified several characteristics that typically mark such pleadings. A shotgun complaint, for instance, often ‘contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts ... contain irrelevant factual allegations and legal conclusions,’ *Strategic Income Fund v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295(II) (11th Cir. 2002), combines ‘multiple claims together in one count,’ *Ledford v. Peebles*, 568 F.3d 1258, 1278(II)(B)(1) (11th Cir. 2009), and buries material allegations ‘beneath innumerable pages of rambling irrelevancies.’” *Magluta v. Samples*, 256 F.3d 1282, 1284(IV) (11th Cir. 2001).

provision that Defendant breached. Instead, Plaintiff's Complaint only generally alleges that "Piedmont College and Dr. Wainberg entered into an employment contract for the academic year 2017-2018 as a tenured member of the faculty" and then conclusorily asserts that "by terminating Dr. Wainberg, Piedmont College breached its employment contract with Dr. Wainberg and breached his tenure rights" and "damaged Dr. Wainberg." (Compl., ¶¶ 40, 41, 42). This formulaic, conclusory recitation of the elements of the cause of action for breach of contract does not provide Defendant or the Court with fair notice of the claim and the grounds upon which the claim rests. O.C.G.A. § 9-11-8; *Charles H. Wesley Educ. Foundation, Inc. v. State Election Bd.*, 282 Ga. 707, 714, 654 S.E.2d 127, 132 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). Thus, Plaintiff's breach of contract allegations fail to provide Defendant with fair notice of the bases of the claim, and should be dismissed for failure to meet the pleading requirements of O.C.G.A. § 9-11-8. *See Teamsters Local 237 Additional Sec. Ben. Fund v. McCarthy*, No. 2011-CV-197841, 2011 WL 4836230 (Superior Court of Fulton County, Ga. Sept. 16, 2011).

B. Taking the Allegations of Plaintiff's Complaint as True, Plaintiff Has Failed to State a Claim for Breach of Contract

Plaintiff asserts in his Complaint that "[b]y terminating Dr. Wainberg, Piedmont College breached its employment contract with Dr. Wainberg and breached his tenure rights...[b]ecause of Piedmont College's failure to give Dr. Wainberg fair and due process in this case, pursuant to Piedmont College Policies and Procedures." (Compl., ¶¶ 40, 41). As a tenured professor at a private university, Plaintiff was not entitled to constitutional procedural due process when he was terminated. *See Madon v. Long Island Univ. C. W. Post Center*, 518 F. Supp. 246 (E.D.N.Y. 1981). Thus, any due process rights he had at the time of his termination would have to be contractual rather than constitutional or statutory.

The only contract that Plaintiff references as providing Plaintiff with any due process rights with respect to his termination is Defendant's Policies and Procedures, which Plaintiff argues in his Response is incorporated into and made part of his employment contract with Defendant. The Policies and Procedures that Plaintiff claims were breached in this matter include that "termination may only occur for a tenured professor if the faculty member's conduct is considered seriously prejudicial," "that prior to termination, the faculty member must be notified in writing of the specific conduct which may result in termination," and that "action must not be taken without a hearing." However, Plaintiff's Complaint affirmatively establishes that Defendant complied with each of those Policies and Procedures with respect to Plaintiff's termination.

Plaintiff admits in his Complaint that in April 2018, Piedmont College received multiple grievances from students, asserting that Plaintiff had committed a Title IX violation. (Compl., ¶¶ 24 and 33(f)). Specifically, the complaining students alleged that Plaintiff was consistently referencing them in sexual anecdotes that Plaintiff used to teach his classes. (*Id.* at ¶ 26). Defendant, obviously considering such conduct seriously prejudicial, conducted an investigation of the student's allegations. (Compl., ¶ 33). Plaintiff admits that he did, in fact, use students in his sexual anecdotes, which he describes as "teaching tools." (*Id.* at ¶ 25). After concluding its investigation into Plaintiff's conduct (which again Plaintiff admits), Defendant terminated Plaintiff. (*Id.* at ¶ 38). Following Plaintiff's termination, a hearing was conducted by members of Defendant's Board, at the conclusion of which Plaintiff's termination was upheld. (*Id.* at ¶¶ 33(p) and 38).

Defendant's Policies and Procedures is the only document Plaintiff identifies in his Response and Complaint as providing Plaintiff with any due process rights with respect to his

termination, and taking Plaintiff's allegations to be true, Piedmont College complied with the terms of that document. Thus, Plaintiff's Complaint fails to demonstrate a right to relief for breach of contract.

C. Plaintiff Fails to State a Claim for Breach of The Implied Duty of Good Faith and Fair Dealing

As Plaintiff has failed to state a claim for breach of contract, his claim for breach of the covenant of good faith and fair dealing also fails as a matter of law. Georgia law does not recognize such a claim as an independent, stand-alone cause of action. *See Stuart Enterprises Int'l, Inc. v. Peykan, Inc.*, 252 Ga. App. 231, 555 S.E.2d 881 (2001); *Morrell v. Wellstar Health Sys.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006). Thus, Plaintiff's claim should be dismissed.

D. Plaintiff's Claim for Attorney's Fees Also Fail and Should Be Dismissed.

Likewise, Plaintiff's claim for attorney's fees should be dismissed because it is dependent on his breach of contract claim, and Plaintiff has failed to state a claim for breach of contract.

E. Plaintiff's Claim for Punitive Damages Fails As A Matter of Law

It is well settled that punitive damages are not available in breach of contract claims. *See* O.C.G.A. §§ 13-6-10; *Trust Co. Bank v. C & S Trust Co.*, 260 Ga. 124, 126, 390 S.E.2d 589 (1990); *McDuffie v. Argroves*, 230 Ga. App. 723, 726, 497 S.E.2d 5 (1998). Plaintiff argues (for the first time) in his Response that he "is entitled to punitive damages because the Defendant breached an implied duty of good faith and fair dealing giving rise to tort liability because Defendant also violated an independent duty imposed by law by violating policies and procedures required by law." However, the allegations of Plaintiff's Complaint make clear that Defendant's implied duty of good faith and fair dealing was imposed solely by written contract, and not by any recognized independent duty under tort or other provision of law:

COUNT II
VIOLATION OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

Dr. Wainberg fully incorporates Paragraphs 1-27 as if each were set forth verbatim fully herein.

43.

Piedmont College and Dr. Wainberg entered into valid binding contractual agreement, which created all correlating duties, commitments and obligations arising and flowing from the express language of the contracts.

44.

Piedmont College knowingly, willfully, and/or recklessly breached the duties, commitments, and/or obligations imposed upon Piedmont College by the express wording and implied meaning of the contracts entered into by Piedmont College and Dr. Wainberg.

45.

Piedmont College's conduct in knowingly, willfully, and/or recklessly breaching its duties pursuant to the contracts entered into by Piedmont College and Dr. Wainberg demonstrate that Piedmont College also breached the implied duty of good faith and fair dealing owed to Dr. Wainberg in executing said contracts. Georgia law recognizes this implied duty. See DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 645, 734 S.E.2d 466, 476 (2012).

46.

Piedmont College's conduct in breaching the contract and implied duty of good faith and fair dealing directly and/or proximately caused injury to Dr. Wainberg.

Although a duty of good faith and fair dealing is implied in every contract, the mere failure to perform a contract does not constitute a tort. *ServiceMaster Co., L.P. v. Martin*, 252 Ga. App. 751, 754, 556 S.E.2d 517, 523 (2001). "This is true even in situations where the contract is breached in bad faith, where the courts have consistently held that punitive damages are not available because there has been no tort." *Id.* While Defendant could be held liable in tort if, in addition to violating a contract obligation, it also violated a duty, independent of

contract, Plaintiff does not allege **any** facts in his Complaint which would support a finding that Defendant owed him any duty independent of those created by his alleged employment contract.

To the extent that Defendant violated a duty of good faith and fair dealing (which it denies), the allegations of Plaintiff's Complaint make clear that such duty was imposed solely by written contract, and not by any recognized independent duty under tort or other provision of law. Thus, the allegations of Plaintiff's Complaint do not authorize a remedy over and above that to which Plaintiff would be entitled as a result of the breach of contract, which would not include punitive damages. *ServiceMaster*, 252 Ga. App. at 756.

F. Judicial Deference Should Be Afforded to Defendant's Personnel Decisions

No matter how Plaintiff tries to characterize it, the heart of Plaintiff's argument under any of his legal theories is his disagreement with Defendant's decision to terminate him for his conduct towards students. He asks this Court to substitute its judgment on his behavior for that of Piedmont College and its Board. However, courts across the country have long recognized the principle of deference generally accorded institutions of higher education, where academic administrators are presumed to have exercised professional judgment under procedures established by agreement. *See, e.g. Odem v. Pace Academy*, 235 Ga. App. 648, 510 S.E.2d 326 (1998) (ruling private school had contractual authority to terminate teacher for insubordination and unsatisfactory professional performance under terms of employment contract based on complaints from parents and students); *Iz v. University of Baltimore*, 123 Md. App. 135, 178, 716 A.2d 1107, 1128 (1997), *cert. denied*, 351 Md. 663 (1998) (in tenure case, "it is not the function of the courts to second-guess judgment calls made by those [University officials] vested with the ultimate authority and responsibility..."); *Murphy v. Duquesne University of the Holy Ghost*, 565 Pa. 571, 596, 777 A.2d 418, 433 (2001) (in tenure removal case, "[a]ll of these

decisions involved subjective judgments of a teacher's professional and personal qualities, and his potential for either advancing or impeding the University's mission"); *Yackshaw v. John Carroll Univ. Ed. of Trustees*, 89 Ohio App. 3d 237, 242, 624 N.E. 2d 225, 229 (1993) (professor terminated pursuant to faculty handbook procedures not entitled to *de novo* judicial review); *Ferrer v. Trustees of the Univ. of Pennsylvania*, 573 Pa. 310, 340, 825 A. 2d 591, 609 (2002) ("[a professor] is not free to demand that a jury re-consider and re-decide the merits of his termination"); *Riggin v. Ed. of Trustees of Ball State University*, 489 N.E. 2d 616, 625 (Ind. App. 1986) ("The court may not substitute its own opinions for that of the Trustees, but must give deference to its expertise"); *Getler v. Goodgold*, 487 N.Y.S.2d 565, 568 (N.Y. App. 1985) ("[S]ince academic and administrative decisions of educational institutions involve the exercise of subjective professional judgment, public policy compels a restraint which removes such determinations from judicial scrutiny").

Sound policy reasons support the doctrine that a court should not substitute its judgment on the merits of personnel decisions for the judgments of institutional decision makers to whom those decisions are entrusted under institutional processes. Here, the allegations of Plaintiff's Complaint demonstrate that Defendant abided by its Policies and Procedures when it terminated Plaintiff, a tenured professor, as a result of his sexually harassing conduct toward students. The fact that Plaintiff feels strongly that the decision was wrong does not provide a basis for a cognizable cause of action.

III. CONCLUSION

Based on the foregoing, Piedmont College respectfully submits that the claims asserted against it in Plaintiff's Complaint should be dismissed pursuant to O.C.G.A. 9-11-12(b)(6) for failure to state a claim upon which relief may be granted.

Dr. Robert H. Wainberg v. Piedmont College

Superior Court of Habersham County; Civil Action File No. 18CV454

*DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO PIEDMONT COLLEGE'S MOTION
TO DISMISS PLAINTIFF'S COMPLAINT FOR DAMAGES CONCERNING BREACH OF
CONTRACT AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING*

Respectfully submitted this 29th day of November, 2018.

DREW ECKL & FARNHAM, LLP

/s/Barbara A. Marschalk

Joseph C. Chancey

State Bar of Georgia No. 120520

Barbara A. Marschalk

State Bar of Georgia No. 324498

Sonya T. Jacobs

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Attorneys for Defendant Piedmont College

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO PIEDMONT COLLEGE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DAMAGES CONCERNING BREACH OF CONTRACT AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 29th day of November, 2018.

DREW ECKL & FARNHAM, LLP

/s/Barbara A. Marschalk

Barbara A. Marschalk

State Bar of Georgia No. 324498

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Facsimile: (404) 876-0992
E-mail: bmarschalk@deflaw.com
Attorneys for Defendant Piedmont College



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

RULE 5.2 CERTIFICATE OF SERVICE OF DISCOVERY

I HEREBY CERTIFY that I am counsel for Defendant in the above-styled matter and
that I have this day served a copy of the foregoing:

- 1) *Defendant Piedmont College's Objections and Responses to Plaintiff's First Interrogatories to Defendant; and*
- 2) *Defendant Piedmont College's Objections and Responses to Plaintiff's Requests for Production of Documents to Defendant*

on all parties to this matter by placing a true and correct copy of same in the United States mail,
proper postage affixed thereto, addressed to counsel of record as follows:

Julie Oinonen
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 11th day of January, 2019.

/s/ Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

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Attorneys for Defendant

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18CV0454
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JAN 11, 2019 05:39 PM

David C. Wall

David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

NOTICE OF FILING PRIVILEGED DOCUMENTS LOG

COMES NOW Defendant Piedmont College and files the attached *Privileged Documents*

Log.

This 11th day of January, 2019.

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

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Attorneys for Defendant

8492920/1

00120-134334

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Defendant, and that I have this day served a copy of the forgoing *NOTICE OF FILING PRIVILEGED DOCUMENTS LOG* upon all parties to this matter by filing with PeachCourt, which will automatically e-mail notification of same to the following counsel of record:

Julie Oinonen
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 11th day of January, 2019.

/s/ Barbara A. Marschalk

Barbara A. Marschalk

Georgia Bar No.324498

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Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

PRIVILEGED DOCUMENTS LOG

Document Description	#Pages	Privilege Type
Memo from Patrick W. McKee, Esq. to Gus Arrendale RE: hearing before the Special Committee of the Board of Trustees	2	Attorney/client communication, work product, opinion work product
Timeline Prepared by Ann Sutton Regarding Title IX Investigation of Student Complaint Against Plaintiff in Preparation for Meeting With Counsel Concerning Lawsuit	2	Attorney/client communication, work product

This 11th day of January, 2019.

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

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Attorneys for Defendant

8264372/1
07005-134316



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

RULE 5.2 CERTIFICATE OF SERVICE OF DISCOVERY

I HEREBY CERTIFY that I am counsel for Defendant in the above-styled matter and that I have this day served a copy of the foregoing:

- 1) *Defendant Piedmont College's First Request for Admissions to Plaintiff;*
- 2) *Defendant Piedmont College's First Interrogatories to Plaintiff; and*
- 3) *Defendant Piedmont College's First Request for Production of Documents and Notice to Produce Originals at Trial to Plaintiff*

on all parties to this matter by placing a true and correct copy of same in the United States mail, proper postage affixed thereto, addressed to counsel of record as follows:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 4th day of February, 2019.

/s/ Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

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Attorneys for Defendant

8548320/1
00120-134334

NOTICE OF LEAVE OF ABSENCE

TO: All Judges, Clerks of Court and Counsel of Record
FROM: Barbara A. Marschalk
RE: **Notice of Leave of Absence**
DATE: February 12, 2019


David Wall, Clerk
Habersham County, Georgia

COMES NOW Barbara A. Marschalk and respectfully notifies all Judges before whom she has cases pending, all affected Clerks of Court and all opposing counsel, that she will be on leave pursuant to Uniform State Court Rule 16.1.

The period of leave during which time Applicant will be away from the practice of law is as follows:

- February 18, 2019 through February 22, 2019;
- March 28, 2019;
- April 1, 2019 through April 5, 2019;
- April 29, 2019 through May 1, 2019;
- November 21, 2019 through December 3, 2019; and
- December 20, 2019 through January 6, 2020.

The purpose for the leave is for business trips and personal vacation.

All affected Judges and opposing counsel shall have ten (10) days from the date of this Notice to object to it. If no objections are filed, then leave shall be granted.

Respectfully submitted this 12th day of February, 2019.

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk
Barbara A. Marschalk
State Bar of Georgia No. 324498

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00120-134334

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Notice of Leave of Absence upon all Judges, Clerks and opposing counsel listed on the attached Exhibit “A” upon all parties by PeachCourt, which will deliver electronic notification of same.

This 12th day of February, 2019.

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk

Barbara A. Marschalk

State Bar of Georgia No. 324498

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00120-134334

EXHIBIT A**SUPERIOR COURT OF HABERSHAM COUNTY**

<u>Style</u>	<u>Judge/Clerk</u>	<u>Opposing Counsel/Co-Counsel</u>
<i>Dr. Robert H. Wainberg v. Piedmont College</i> Superior Court of Habersham County; Civil Action File No. 18CV0454	The Honorable Russell W. Smith P.O. Box 758 Toccoa, Georgia 30577 Clerk, Superior Court of Habersham County 295 Llewellyn Street, Suite 110 Clarksville, Georgia 30523	Julie Oinonen, Esq. Williams Oinonen LLC 44 Broad Street, NW, Suite 200 Atlanta, GA 30303

FILED IN OFFICE
CLERK OF SUPERIOR COURT
HABERSHAM COUNTY, GEORGIA

18CV0454
RUSSELL W. SMITH
FEB 28, 2019 03:33 PM

David C. Wall

David Wall, Clerk
Habersham County, Georgia

**IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA**

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

PIEDMONT COLLEGE,

Defendant.

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CIVIL ACTION

FILE NO. 18CV0454RS

ORDER ON DEFENDANT'S MOTION TO DISMISS

This case is before the Court on the Defendant's Motion to Dismiss the Plaintiff's Complaint. Defendant contends that the Plaintiff's Complaint is subject to dismissal pursuant to O.C.G.A. § 9-11-12 as having failed to state a claim upon which relief may be granted. Defendant also challenges Plaintiff's claims for punitive damages and attorneys' fees. Alternatively, Defendant requests that the Court strike those allegations contained in the Complaint which it deems to be irrelevant or scandalous.

Having considered the arguments and citations of authority submitted by the parties, the Court does not find the complaint to be subject to dismissal and likewise denies the motion to dismiss Plaintiffs' claim for attorneys' fees. The claim for punitive damages, however, is dismissed without prejudice as there is no claim plead which would support such damages. As to the Motion to Strike, the Court finds that proper consideration of the motion would require that the Defendant

**Dr. Robert H. Wainberg v. Piedmont College
Habersham County Superior Court
Civil Action File No. 18CV0454RS
Order on Defendant's Motion to Dismiss**

identify specifically the items alleged to be objectionable and the grounds for objection and that motion is, therefore, denied.

Factual and Procedural Background

Plaintiff filed this action on August 20, 2018. The Defendant filed its answer and defensive pleadings on September 27, 2018. On the same date, Defendant also filed its Motion to dismiss. Plaintiff timely filed a response to the motion and the Court heard oral argument on December 11, 2018.

The Plaintiff, Dr. Robert H. Wainberg, was employed as a Biology Professor at the Defendant College in September, 1988. He was granted tenure in 1993-1994. His employment was terminated in May, 2018, following a complaint by a student of a "Title IX" violation (sexual harassment).

The Complaint consists of a statement of facts followed by numbered counts I (Breach of Contract) and II (Violation of the Implied duty of good Faith and Fair Dealing). Following the numbered paragraphs of the Complaint, claims for punitive damages and attorneys' fees are each set out separately.

MOTION TO DISMISS

Breach of Contract

Defendant contends that this action should be dismissed because the complaint fails to identify the contract alleged to have been breached; because the Complaint fails to identify the specific terms of the contract which are alleged to have been breached; because there is not (Defendant argues) an independent cause

of action for breach of duty of good faith and fair dealing; and because punitive damages are not recoverable in actions for breach of contract. Plaintiff responds that the contract is a contract for employment and the allegations of the Complaint sufficiently set forth his claim that the termination of his employment violated his contractual tenure rights.

“[A] motion to dismiss should only be granted if the allegations of the complaint, construed most favorably to the plaintiff, disclose with certainty that the Plaintiff would not be entitled to relief under any provable facts. Stated somewhat differently, a motion to dismiss should not be granted unless the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.” Weathers v. Dieniahmar Music, LLC, 337 Ga. App. 816, 823 (2016). With regards to a claim for breach of contract, the complaint must allege “parties able to contract, a consideration moving to the contract, the assent of the parties to the contract, and a subject matter upon which the contract can operate.” Id.

Defendant does not dispute that prior to his dismissal, Plaintiff was employed as a tenured professor. The Complaint alleges that Plaintiff was not subject to termination on the basis claimed by the Defendant in that there was not just cause for his dismissal and that the process afforded to him did not comport with the requirements of the Defendant’s Policies and Procedures Manual.

The Complaint alleges in detail the Plaintiff's contentions as to the deficiencies in the process afforded him, but does not reference the specific provisions of the Policies and Procedures Manual which he alleges were violated. The Court finds, however, that the Complaint sufficiently alleges that the existence of a contractual relationship and that the termination of Plaintiff's employment constituted a breach of contract. This satisfies the minimal requirements necessary to provide notice of a claim under Georgia law. Defendant's Motion to Dismiss Plaintiff's Complaint for breach of contract is, therefore, **DENIED**.

Breach of Implied Covenant of Good Faith and Fair Dealing

Defendant further contends that count II of the Complaint, "Violation of the Implied Duty of good Faith and Fair Dealing," is not an independent cause of action as plead in the Complaint. Plaintiff cites to the cases of Stuart Enterprises Int'l v. Peykan, Inc., 252 Ga. App. 231 (2001) and Morrell v. Wellstar Health Sys., 280 Ga. App. 1 (2006). Defendant is correct. Under Georgia law the duty of good-faith and fair dealing "...does not create an independent cause of action disconnected from the contract from which it arises." Pace v. Citimortgage, Inc., 2013 WL 55825 (M.D. Ga. Jan. 3, 2013); Stuart Enterprises, supra. The cases cited by Plaintiff do not hold otherwise.

"[T]he 'covenant' is not an independent contract term. It is a doctrine that modifies the meaning of all explicit terms in a contract, preventing a breach of those explicit terms de facto when performance is maintained de jure. But it is not an

undertaking that can be breached apart from those terms.” Alan’s of Atlanta v. Minolta Corp., 903 F. 2d. 1414 (U.S. Ct. App. 11th Cir.) (Applying Georgia law).

“...the implied covenant of good faith and fair dealing attaches to existing contractual obligations; it does not add new contractual duties, may not be invoked to create rights and duties not otherwise provided for in the contractual relationship, and cannot overrule or modify the express terms of a contract.” 17A Am. Jur. 2d. Contracts § 362.

The above principles of law notwithstanding, so long as a claim for breach of contract is alleged, a separate count for breach of good faith covenant is not subject to a 12 (b) (6) motion to dismiss. “Plaintiffs’ cause of action for breach of the implied covenant is separate and distinct from their breach of contract claim and may be plead simultaneously.” Deotare v. Wells Fargo Bank, 2018 WL 1470897 (U.S. Dist. Ct. N.D. Ga.), citing Techbios v. Champagne, 301 Ga. App. 592,595 (2009).¹ Therefore, the motion to dismiss as to Count II of the Complaint is **DENIED**.

Punitive Damages

Defendant further contends that the Plaintiff’s claim for punitive damages should be dismissed because such damages are not recoverable in breach of contract

¹ Some authorities have noted the confusion resulting from holding that the covenant does not create an independent cause of action, but may be plead as such. See, e.g. LOOKING FOR LAW IN ALL THE WRONG PLACES: PROBLEMS IN APPLYING THE COVENANT OF GOOD FAITH PERFORMANCE, 37 U.S.F.L.Rev. 257 (2003). That article specifically examines “...whether a breach of the covenant of good faith gives rise to an independent cause of action or is merely a tool of contract interpretation.”

actions. “[A] party is not entitled to punitive damages if the party fails to set out a cause of action in tort.” Stieffel v. Schick, 260 Ga. 638, 639 (1990), citing Glynn County Federal Employees Credit Union v. Peagler, 256 Ga. 342 (1986). Plaintiff cites in the response numerous cases which are inapposite because in each there had been alleged an underlying tort.

It is not proper to dismiss an action “because an improper measure of damages has been plead or because it appears that some of the damages sought are not recoverable.” Wallace v. Bleakman, 131 Ga. App. 856 (1974). However, the courts considering this issue have held that where punitive damages are improperly plead as a cause of action, without any underlying action which would support such damages, that claim is subject to dismissal without prejudice. Edelen v. Campbell Soup Company, 2008 WL 11324064 (U.S. Dist. Ct. N.D. Ga. 2008); Moretta v. Miami-Dade County, 2007 WL 701009 (U.S. Dist. Ct. S.D. Fla. 2007).

It is, therefore, ORDERED, that the Defendant’s motion to dismiss as to the Plaintiff’s claim for punitive damages is hereby **GRANTED**. That claim is hereby **DISMISSED** without prejudice.

Attorneys’ Fees

Defendant’s contention that Plaintiff’s claim for attorneys’ fees should be dismissed is premised on Defendant’s argument that Plaintiff has failed to state a claim for breach of contract. The Court having rejected this argument, the

Defendant's motion to dismiss as to Plaintiff's claim for attorneys' fees is hereby **DENIED.**

MOTION TO STRIKE

Defendant, by reference in a footnote in its motion, as well as in oral argument, requested that the Court, pursuant to O.C.G.A. § 9-11-12 (f), strike those allegations of the complaint as may be authorized by the statute as being redundant, immaterial, impertinent or scandalous. Defendant accurately characterizes the Complaint as containing "...a multitude of self-aggrandizing remarks and elaborate comparisons of Piedmont College to tyrannical and fascist dictatorships along the lines of the Bolshevik Revolution and the Nazi Third Reich." Essentially, Plaintiff's response is that the complaint is well-plead.

Defendant contended in argument that the Complaint is unusual. The complaint does contain references that might, colloquially speaking, be characterized as "name-dropping." At various points the Defendant's President is characterized as tyrannical, bullying terrorizing, unethical, corrupt, and dishonest. The Plaintiff is alleged to be faithful, "a pillar of the institution," "well-loved," dignified, diligent, professional, "a tremendous advocate," "entertaining," and "engaging."

O.C.G.A. § 9-11-8 (a) (2) provides that a complaint shall contain "A short and plain statement of the claims showing that the pleader is entitled to relief." Subsection (e) of that code section requires that "Each averment of a pleading shall be simple, concise and direct."

Where courts have dismissed complaints as being violative of these rules, the pleadings at issue have been so lengthy and rambling as to interfere with the ability of the courts to read and understand them. See, e.g. Peabody v. Griggs, 2009 WL 3200686 (U.S. Dist. Ct. R.I.) (Complaint consisted of 97 pages and 538 paragraphs); Sconiers v. California Dep't of Social Services, 2008 WL 5245988 (U.S. Dist. Ct. E.D. Cal.) (Complaint consisted of 200 page text and 628 pages of exhibits). Whether or not it qualifies as a “shotgun pleading,” the complaint in this case is not so lengthy or confusing as to defeat comprehension. Bush v. Bank of New York Mellon, 313 Ga. App 84 (2011).

Motions to strike are disfavored. Medlin v. Carpenter, 174 Ga. App. 50 (1985) and “should not be granted unless it is clear that the matter sought to be stricken can have no possible bearing on the subject matter of the litigation.” Ortho Sport and Spine Physicians Savannah, LLC v. Chappius, 344 Ga. App. 233 (2017).

The Court is not able to determine at this time whether any specific allegations contained in the Complaint have “no possible bearing on the subject matter of the litigation” such that it would be appropriate to strike them. Therefore, a Motion to Strike is premature as there should be filed, prior to the consideration of such a motion a particularized pleading identifying the specific provisions as to which objection is made. Defendant’s Motion to Strike is, therefore, **DENIED**.

SO ORDERED this 28th day of February, 2019.

A handwritten signature in blue ink, appearing to read 'Russell W. Smith', is written over a horizontal line.

Russell W. Smith, Chief Judge
Superior Courts
Mountain Judicial Circuit

OR: Clerk, Habersham County Superior Court
CC: Julie Oinonen, Attorney for Plaintiff
Barbara A. Marschalk, Attorney for Defendant


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

RULE 5.2 CERTIFICATE

This is to certify that the documents listed below have this day been served upon
opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to
Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs, DREW ECKL & FARNHAM,
LLP, 303 Peachtree St. NE, Suite 3500, Atlanta, Georgia 30308.

1. *Notice of Deposition of Dale Van Canfort*
2. *Notice to Produce to Dale Van Canfort*
3. *Notice of Deposition of Carlos Camp*
4. *Notice to Produce to Carlos Camp*
5. *Notice of Deposition of Rick Austin*
6. *Notice to Produce to Rick Austin*
7. *Notice of Deposition of Jessica Wooten Eagle*
8. *Notice to Produce to Jessica Wooten Eagle*
9. *Notice of Deposition of Stephanie Almango*
10. *Notice to Produce to Stephanie Almango*
11. *Notice of Deposition of Elaine Bailey*
12. *Notice to Produce to Elaine Bailey*

13. *Notice of Deposition of Emily Bewick*

14. *Notice to Produce* to Emily Bewick

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing RULE 5.2 CERTIFICATE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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Counsel for Plaintiff

18CV0454
RUSSELL W. SMITH
MAR 05, 2019 04:20 PM

David C. Wall

David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO. 18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

PLAINTIFF'S MOTION TO EXTEND DISCOVERY DEADLINE

Plaintiff and Defendant through their respective counsel came to a stipulated agreement to file a Consent Motion to Extend Discovery Deadline and Proposed Order by four months (to November 6, 2019) as a result of the large number of witnesses and volume of electronically stored information identified to date, Defendant's counsel drafting the motion which informed the Court "the parties anticipate that additional time is needed to complete discovery." See Exhibit One. Defendant's counsel also shared with Plaintiff's counsel that they required an extension due to their busy upcoming trial calendar.

Consequently, Plaintiff and Defendant through their counsel agreed to a consent motion to extend the discovery by four months to November 6, 2019.

Moreover, Plaintiff originally asked Defendant for March deposition dates on February 4th, 2019 and did not receive dates until February 27th, whereupon Defendant's counsel sent a copy of the Consent Motion to Extend Discovery and available March dates.

Sonya T. Jacobs

Wed, Feb 27, 4:42 PM (6
days ago)

to me, Chris, Communication, Joseph, Linda, Barbara

Julie,

As discussed at our meeting, please find attached a draft Consent Motion to Extend Discovery and Proposed Order for your review. Please let us know if you have any comments or revisions.

Also, we currently have March 11, 13 (but only until 4pm), 15, and 29 available for depositions. Please confirm if these dates work for you and we'll lock them down on our calendar.

Thanks for your assistance.

Kind regards,
Sonya

Today, March 5th, Plaintiff's counsel inquired as to why Defendant had not filed the motion as agreed upon whereupon Defendant's counsel informed Plaintiff's counsel that because of the recent Court's Order denying Defendant's Motion to Dismiss, it would not:

Sonya T. Jacobs

2:17 PM (1
hour ago)

to me, Chris, Communication, Joseph, Linda, Barbara

Julie,

Per our call this morning, given the court's ruling on the Motion to Dismiss on Friday, our client will not authorize us to sign off on the discovery extension except pursuant to a Case Management Order entered by the Court.

Sonya T. Jacobs
Senior Associate

Thus, Plaintiff unilaterally files this motion respectfully seeking an Order from the Court granting an extension to the discovery deadline because of the large number of witnesses and volume of electronically stored information identified to date in addition to making an effort to avoid any obstructionist tactics by any party for the purposes of delay.¹

¹ E.g. Defendant has improperly represented that it will file Motion for Protective Orders to the Court despite already stipulating to agreement and notice of counsel to depose the respective deponents next week.

Plaintiff respectfully incorporates Exhibit One into this motion and requests the Court grant an extension to the discovery deadline as a result of the described necessity within this motion and proposed order that was drafted by Defendant's counsel. See Exhibit One.

Respectfully submitted this 5th day of MARCH 2019,

/s/ JULIE OINONEN

Julie Oinonen

Ga. Bar No.: 722018

Counsel for Plaintiff

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

Telephone (404) 654-0288

Facsimile (404) 592-6225

julie@goodgeorgialawyer.com

CERTIFICATE OF SERVICE

This is to certify that the foregoing PLAINTIFF'S MOTION TO EXTEND DISCOVERY DEADLINE has this day been served with the Clerk of Court using the PeachCourt e-filing system and upon opposing counsel by depositing a true and correct copy of the same via U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Attorneys for Defendant Piedmont College

Respectfully submitted this 5TH DAY OF MARCH 2019,

/s/ JULIE OINONEN
Julie Oinonen
Ga. Bar No.: 722018
Counsel for Plaintiff

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
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julie@goodgeorgialawyer.com

EXHIBIT ONE

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CONSENT MOTION TO EXTEND DISCOVERY

COME NOW Plaintiff and Defendant (hereinafter “Parties”), by and through their undersigned counsel of record and file their Consent Motion to Extend Discovery showing the Court as follows:

1.

Discovery in this matter is currently set to expire on June 26, 2019.

2.

The parties have worked together with respect to serving and responding to written discovery, including Interrogatories and Requests for Production of Documents.

3.

The parties are currently in the process of scheduling the depositions of the Parties and numerous other fact witnesses identified in the course of discovery.

4.

Due to the large number of witnesses and volume of electronically stored information identified to date, the parties anticipate that additional time is needed to complete discovery.

5.

On February 18, 2019, counsel for the Parties met in person to discuss a workable timetable for depositions and an acceptable protocol for the discovery of ESI, which the Parties are currently in the process of finalizing.

6.

The parties have not yet engaged in expert discovery and, should it be necessary, will need additional time to do so.

7.

Based on the foregoing, the parties jointly request that the Court extend the discovery deadline for through and including November 1, 2019.

8.

This Court has the discretion to extend the time period during which the parties may conduct discovery. Rule 5.1 of the Uniform Superior Court Rules states that: “In order for a party to utilize the Court’s compulsory process to compel discovery, any desired discovery procedures must be first commenced promptly, pursued diligently and completely without unnecessary delay and within six (6) months after the filing of the answer. At any time, the court, in its discretion, may extend, reopen or shorten the time to utilize the court’s compulsory process to compel discovery.” *Id.*

WHEREFORE, the parties request that discovery be extended through and including **November 1, 2019**.

Respectfully submitted, this ____ day of February, 2019.

Dr. Robert H. Wainberg v. Piedmont College
Superior Court of Habersham County; Civil Action File No. 18CV0454
Consent Motion to Extend Discovery

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree Street NE, Suite 3500

Atlanta, Georgia 30308

Telephone: (404) 885-1400

Email: jchancey@deflaw.com

Email: bmarschalk@deflaw.com

Email: sjacobs@deflaw.com

Attorneys for Defendant Piedmont College

WILLIAMS OINONEN LLC

/s/ Julie Oinonen

Julie Oinonen

Georgia Bar No. 722018

[signed with express permission by Barbara A. Marschalk]

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

Telephone: (404) 654-0288

Email: Julie@goodgeorgialawyer.com

Attorney for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that I am counsel for the Defendant Piedmont College, and that I have this date served a copy of ***CONSENT MOTION TO EXTEND DISCOVERY*** with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen

Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This ____ day of February, 2019.

/s/ Barbara A. Marschalk
Barbara A. Marschalk
Georgia Bar No. 324498

Drew, Eckl & Farnham, LLP
303 Peachtree St., NE, Suite 3500
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E-mail: bmarschalk@deflaw.com
Attorney for Defendant Piedmont College
8370818/1
07449-132955

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CONSENT ORDER EXTENDING DISCOVERY PERIOD

WHEREAS, it appearing that counsel for all parties have agreed that discovery be extended and for good cause shown;

IT IS HEREBY ORDERED that the time in which discovery may be conducted in this case is hereby extended through and including **November 1, 2019**.

SO ORDERED, this ____ day of _____, 2019.

Honorable Russell W. Smith
Judge, Superior Court of Habersham County

ORDER PREPARED BY:
DREW ECKL & FARNHAM, LLP
303 Peachtree St., NE, Suite 3500
Atlanta, Georgia 30308
Telephone: (404) 885-1400
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Attorney for Defendant Piedmont College

18CV0454
RUSSELL W. SMITH
MAR 05, 2019 05:26 PM



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

DEFENDANT'S EMERGENCY MOTION TO QUASH
AND FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT THEREOF

COMES NOW Defendant Piedmont College (hereinafter "College" or "Defendant"), and files this *Emergency Motion to Quash and for Protective Order and Brief in Support Thereof*, specifically requesting this Court to enter a protective order prohibiting the depositions of Dale Van Cantfort, Carlos Camp, Rick Austin, Jessica Wooten Eagle, Stephanie Almango and Emily Bewick and/or enter an order quashing the same, showing the Court as follows:

INTRODUCTION

On March 4, 2019, Plaintiff Noticed the depositions of seven faculty members employed by Defendant Piedmont College – only one of whom has any personal knowledge of the incident giving rise to Plaintiff's Complaint. None of the other six individuals noticed were involved in the Title IX investigation resulting in Plaintiff's termination for cause or the College's decision and process to terminate Plaintiff, which Plaintiff asserts in his Complaint is the basis of his claims in this matter. Rather, their very limited knowledge (if any) of the events giving rise to Plaintiff's Complaint are derivative of other persons whose deposition testimony would provide Plaintiff with the information he seeks. Moreover, any documents they may have access to that may be responsive to Plaintiff's Notices to Produce are the property of Defendant, and within

Defendant's possession, custody and control.

FACTS

This lawsuit arises out of Plaintiff's termination for cause by Piedmont College. Plaintiff's Complaint alleges that Piedmont College breached its employment contract with Plaintiff by failing to follow the termination procedures specified in the College's Policies and Procedures Manual. (Compl., ¶¶ 40, 41). Plaintiff has asserted claims against Piedmont College for breach of contract, breach of the implied duty of good faith and fair dealing, punitive damages, and attorney's fees.

On September 27, 2018, Defendant filed its Motion to Dismiss Plaintiff's Complaint, asserting that there is no set of provable facts within the framework alleged by Plaintiff's Complaint that would result in Piedmont College's liability to Plaintiff. On February 28, 2019, this Court entered its Order on Defendant's Motion to Dismiss, upholding Plaintiff's claims for breach of contract, breach of the implied duty of good faith and fair dealing, and attorney's fees, but dismissing Plaintiff's claim for punitive damages. *See* February 28, 2019 Order on Defendant's Motion to Dismiss.

To date, Plaintiff has served extensive written discovery on Defendant, including overly broad and unduly burdensome requests for production of irrelevant electronically stored information from individuals that have no knowledge regarding the Title IX investigation giving rise to Plaintiff's termination for cause or the College's decision and process to terminate Plaintiff. Plaintiff's counsel has further advised that she intends to notice the deposition of "30 plus" individuals in this case, which is ridiculously excessive for a simple breach of contract case.

Respectfully, Defendant has tried to limit the breadth of discovery that Plaintiff is

pursuing and the ongoing discovery disputes that have arisen out of the amount of discovery that Plaintiff seeks. On February 18, 2019, counsel for the Parties met in person to discuss an acceptable protocol for the discovery of ESI and a workable timetable for taking depositions of witnesses with knowledge of the events giving rise to Plaintiff's claims. Following the meeting, counsel for the Parties exchanged available dates for depositions in March, and Plaintiff's counsel advised she would review the terms of Defendant's proposed ESI Protocol and provide comments. To date, Plaintiff has refused to agree to a reasonable ESI Protocol.

On March 4, 2019, Plaintiff's counsel noticed the depositions of seven faculty members of the College, six of whom were never involved in, or have any personal knowledge of, the facts giving rise to Plaintiff's Complaint, namely, the Title IX Complaint against Plaintiff, the College's investigation of that Complaint, or the termination of Plaintiff's employment by the College. *See* Plaintiff's Notice to Take Deposition of Dale Van Cantfort, Carlos Camp, Rick Austin, Jessica Wooten Eagle, Stephanie Almango, and Emily Bewick, attached hereto as Exhibit "A". Plaintiff served Notices to Produce on those seven faculty members, requiring production by those individuals of ESI owned by, and within the possession, custody and control of, the College. *See* Notices to Produce to Dale Van Cantfort, Carlos Camp, Rick Austin, Jessica Wooten Eagle, Stephanie Almango, Elaine Bailey and Emily Bewick, attached hereto as Exhibit "B".

Defendant respectfully requests the Court enter a protective order and quash the depositions of Dale Van Cantfort, Carlos Camp, Rick Austin, Jessica Wooten Eagle, Stephanie Almango, and Emily Bewick, as well as any of the other "30 plus" other individuals whose depositions Plaintiff seeks to notice that were neither involved in the Title IX investigation of the Complaint filed against Plaintiff or the College's decision and process to terminate Plaintiff.

Defendant further requests that the Court quash Plaintiff's Notices to Produce to Dale Van Cantfort, Carlos Camp, Rick Austin, Jessica Wooten Eagle, Stephanie Almango, Elaine Bailey and Emily Bewick as untimely and to the extent they seek production of documents which are the property of Defendant, and within Defendant's possession, custody and control.

ARGUMENT AND CITATION OF AUTHORITY

"Under O.C.G.A. § 9-11-26(b)(1), a party may obtain only discovery 'which is relevant to the subject matter involved in the pending action' and 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 812 (2001). "A trial court has wide discretion in entering orders to prevent the use of discovery directed to irrelevant or immaterial matter." *Id.*; *see also Henson v. Am. Family. Corp.*, 171 Ga. App. 724, 732 (1984) ("holding that [t]he trial court has a wide latitude in determining what is and what is not germane to the issues; and in exercising this discretion, it may consider such factors as the relevancy of the information being sought and the likelihood that the discovery efforts in question are being made for purposes of harassment and intimidation rather than for bona fide discovery purposes"). In accordance with its "wide latitude", this Court has "power under O.C.G.A. § 9-11-26(c) and 9-11-30(d) to control the details of time, place, scope and financing for the protection of the deponents and parties". *Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897 (1984), *citing* 4 Moore's, § 26.69, p. 26-494.

O.C.G.A. §9-11-26(c) provides as follows:

"Upon motion by a party or by the person from whom discovery is sought and for good cause shown, the court in which the action is pending or, alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

. . . .

Id., *emphasis added*.

With regard to depositions, “the trial court has authority to exercise its discretion under O.C.G.A. § 9-11-26 (c) in deciding whether [a party] is entitled to a protective order.”

Warehouse Home Furnishings Distributors, Inc. v. Davenport, 261 Ga. 853, 854, 413 S.E.2d 195 (1992). This discretion will be reversed only by an abuse of discretion. *Global Van Lines, Inc. v. Daniel Moving & Storage, Inc.*, 159 Ga. App. 124, 283 S.E.2d 56 (1981).

This Court should utilize its broad discretion to control the details of depositions and keep “tight reigns” on discovery in this case by entering an appropriate Protective Order and quashing Plaintiff’s Notices of Depositions and Notices to Produce as set forth below and as outlined in Defendant’s Objections and Responses to Plaintiff’s Notices of Depositions and Notices to Produce, attached hereto as Exhibit “C”.

1. Plaintiff’s Notices of Deposition and Notices to Produce Are Procedurally Deficient

Plaintiff’s Notices to Produce command Dale Van Cantfort, Carlos Camp, Rick Austin, Jessica Wooten Eagle, Stephanie Almango, Elaine Bailey and Emily Bewick to bring documents to their deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff’s Notices to Produce pursuant to O.C.G.A. §24-13-27 are improper and inapt in the present circumstances and appear to be an attempt by Plaintiff to

circumvent the discovery process. These individuals are not a parties to the lawsuit and cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which these individuals are not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides that the party upon whom the request is served shall serve a written response **within 30 days after the service of the request.**

Having failed to comply with this statutory procedure, Plaintiff has failed to give reasonable notice in writing of the action of these depositions in violation of O.C.G.A. § 9-11-30(b)(1). *See Siegel v. Golden Fleece Jewelry, Ann Gotthelf & the Estate of Lee Gotthelf*, 2015 Ga. State LEXIS 2 (refusing to give effect to a subpoena where the plaintiff failed to provide sufficient time and unduly burdened deponents as a matter of law).

It cannot be reasonably disputed that Plaintiff failed to give timely notice of his requests to produce, given that there were only seven days between service of the notices of deposition and notices to produce and the scheduled date of the first deposition. Moreover, two of those days fall on the weekend of Spring Break for faculty members, which is a heavy travel day for the noticed individuals. Thus, Plaintiff has practically afforded **a maximum of five business days' notice** to identify, gather, and produce any responsive records. The rapidly shortened timeframe for production of documents contemplated by Plaintiff is patently unreasonable and his requests are overly burdensome and inconvenient, and thus the notices dated March 4, 2019 are procedurally invalid. *Bicknell*, 171 Ga. App. at 899.

2. **Plaintiff's Notices to Produce Seek Production of Documents Which are the Property of Defendant**

Plaintiff's Notices to Produce command Dale Van Cantfort, Carlos Camp, Rick Austin, Jessica Wooten Eagle, Stephanie Almango, Elaine Bailey and Emily Bewick to bring with them:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

As set forth in Defendant's Objections and Responses to Plaintiff's Notices of Depositions, the Notices to Produce command these individuals to bring with them documents which are not in their personal possession, custody and control. The Notices to Produce request documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notices to Produce violate O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of the Noticed individuals.

Plaintiff's Notices to Produce are an improper attempt by Plaintiff to circumvent the discovery process and should be quashed.

3. **A Protective Order or Order Quashing these Depositions is Appropriate Because Plaintiff Has Demonstrated His Intent to Conduct a Prohibited "Fishing Expedition".**

"The issuance of a protective order is a recognition of the fact that in some circumstances the interest in gathering information must yield to the interest in protecting 'a party or person from annoyance, embarrassment, oppression, or undue burden.'" *Borenstein v. Blumfeld*, 151 Ga. App. 420, 420 (1979) (quoting O.C.G.A. § 9-11-26(c)). "Otherwise, the discovery process would become a device for the unscrupulous litigant to squeeze concessions from the opposing

side in cases where such concessions were totally unwarranted. This sort of abuse simply cannot be tolerated in an ordered system of justice.” *Id.*

Federal courts interpreting the Federal Rules of Civil Procedure, which is instructive to our state courts, have expressed a desire to limit discovery where the plaintiffs “not only want to conduct a fishing expedition, they want to conduct discovery in order to locate the lake in which to conduct the fishing expedition.” *Mills v. State of Maine*, 118 F.3d 37, 50 (1st Cir. 1997). The United States Supreme Court has similarly emphasized that the liberal discovery provided under the Federal Rules “is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes”. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984).

However, the Court went on to emphasize the need for continuing oversight:

Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse.

Id., at 34-35.

A “fishing expedition” is precisely what Plaintiff is attempting in this case. His decision to notice the depositions of any individual who strikes his fancy, whilst completely ignoring Defendant’s pleas to work with him to set a mutually agreeable discovery strategy, decisively demonstrates his commitment to harassing and bullying Defendant into doing anything he wishes. Plaintiff has neither afforded Defendant the basic courtesy of providing a list of topics about which he intends to depose these faculty members, nor identified a single reason for why he believes these individuals in particular should be deposed. *See RMR by PAL v. Muscogee County School Dist.*, 165 F.3d 812 (11th Cir., Ga., 1999). “Pre-trial discovery is time-consuming and expensive; it protracts and complicates litigation; and judges are to be commended rather

than criticized for keeping tight reins on it.” *Olivieri v. Rodriquez*, 122 F.3d 406 (7th Cir. 1997).

Dale Van Cantfort, Carlos Camp, Rick Austin, Jessica Wooten Eagle, Stephanie Almango, and Emily Bewick do not have any unique, superior, or personal knowledge of the events giving rise to Plaintiff’s claims. Any knowledge related to the events at issue in this case by these individuals would have been acquired from counsel, and thereby privileged. Even then, their very limited and privileged knowledge about any of the issues in this suit is entirely derivative of other employees who have more relevant information. Thus, unless and until Plaintiff can make the proper showing of why such depositions are necessary, the Notices should be quashed.

These individuals’ sole connection to this matter is that they serve as faculty at Piedmont College. They are not involved in the day-to-day operations of the College, personnel decisions of the College, or Title IX investigations for the College. Plaintiff has alleged that these individuals may have knowledge of Plaintiff’s “character”. Even if Plaintiff’s “character” were relevant to his claims in his matter (which Defendant strongly disputes), these individuals were not present during any of the lectures where Plaintiff was purportedly using students in his sexual anecdotes, which was the basis of the Title IX Complaint filed against him. They were also not involved in any way in the Title IX investigation that concluded with Plaintiff’s termination for cause, or the process that the College followed in terminating Plaintiff. Thus, they have no unique or superior knowledge on the issues that are the subject of this proceeding. Rather, the faculty members and representatives who are directly knowledgeable of the facts giving rise to Plaintiff’s claims are Dr. James Mellichamp, Ann Sutton, Rose Mariee Allison, Perry Rettig, James Peeples, Dr. Steve Nimmo, Monika Schulte, Elaine Bailey, Dock Sisk, Martha Cantrell, Sandra Borrow, and Gus Arrendale III.

As the other individuals' knowledge, if any, is based solely upon the reporting of others who are better sources of this discovery, their depositions should not go forward. This Court should therefore grant Defendant's Motion for a Protective Order Quashing the Notices to Take Depositions and Notices to Produce.

4. The Court Should Enter a Protective Order Limiting the Scope of Plaintiff's Notices of Depositions

Dale Van Cantfort, Carlos Camp, Rick Austin, Jessica Wooten Eagle, Stephanie Almango, and Emily Bewick are not appropriately subject to deposition because they have no unique knowledge of the issues in this case and their very limited knowledge of the case is cumulative of other persons. However, in the alternative, the Court should require that any deposition of these faculty members be strictly limited.

Any depositions of current or former faculty members or staff of Defendant should be strictly limited to only those matters that are within their personal knowledge. *See Canal Ins. Co. v. Savannah Bank & Trust Co.*, 181 Ga. App. 520, (1987) (“[t]he testimony of a corporate officer *must* be based on his own personal knowledge.”). The individuals who are the subject of this motion have no personal knowledge of the issues involved in this suit.

Furthermore, Defendant believes Plaintiff intends to seek information on prior or subsequent Title IX investigations by the College that are neither relevant nor reasonably likely to lead to the discovery of admissible evidence. *Whidby v. Columbine Carrier, Inc.*, 182 Ga. App. 638 (1987); *Sparks v. Pine Forest Enter., Inc.*, 174 Ga. App. 598 (1985); *Smith v. Greene*, 144 Ga. App. 739 (1978) (evidence of subsequent incidents held inadmissible). If this is the case, the information sought will not be probative of the issues at hand, but merely prejudicial. O.C.G.A. §§ 24-4-404; 9-11-26(b)(1). Evidence as to what may have occurred between one

party and a third party with reference to a thoroughly distinct incident is irrelevant, and questions regarding same should be prohibited. *Whidby*, 182 Ga. App. 638 (1987).

CONCLUSION

Wherefore, Defendant respectfully requests that the Court GRANT this motion, enter a protective order and quash Plaintiff's Notices of Deposition and Notices to Produce.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

/s/Barbara A. Marschalk

Joseph C. Chancey

State Bar of Georgia No. 120520

Barbara A. Marschalk

State Bar of Georgia No. 324498

Sonya T. Jacobs

State Bar of Georgia No. 380006

303 Peachtree St. NE, Suite 3500

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E-mail: sjacobs@deflaw.com

Attorneys for Defendant Piedmont College

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

PIEDMONT COLLEGE,

Defendant.

Civil Action File No: 18CV0454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S EMERGENCY MOTION TO QUASH AND FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT THEREOF* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

/s/Barbara A. Marschalk

Barbara A. Marschalk

State Bar of Georgia No. 324498

303 Peachtree St. NE, Suite 3500
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Facsimile: (404) 876-0992
E-mail: bmarschalk@deflaw.com
Attorneys for Defendant Piedmont College

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF DALE VAN CANFORT

To: DALE VAN CANFORT
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Monday, March 11, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of DALE VAN CANFORT. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF DALE VAN CANFORT has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF CARLOS CAMP

To: CARLOS CAMP
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Monday, March 11, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of CARLOS CAMP. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF CARLOS CAMP has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
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julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF RICK AUSTIN

To: RICK AUSTIN
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Wednesday, March 13, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of RICK AUSTIN. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF RICK AUSTIN has
this day been served upon opposing counsel by depositing a true and correct copy of the same in
the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF JESSICA WOOTEN EAGLE

To: JESSICA WOOTEN EAGLE
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Wednesday, March 13, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of JESSICA WOOTEN EAGLE. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF JESSICA WOOTEN EAGLE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
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julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF STEPHANIE ALMANGO

To: STEPHANIE ALMANGO
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Friday, March 15, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of STEPHANIE ALMANGO. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF STEPHANIE ALMANGO has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF EMILY BEWICK

To: EMILY BEWICK
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Friday, March 15, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of EMILY BEWICK. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF EMILY BEWICK has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

EXHIBIT “B”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: DALE VAN CANFORT
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Monday, March 11, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
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Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: CARLOS CAMP
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Monday, March 11, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: RICK AUSTIN
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Wednesday, March 13, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: JESSICA WOOTEN EAGLE
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Wednesday, March 13, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: STEPHANIE ALMANGO
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Friday, March 15, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: ELAINE BAILEY
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Friday, March 15, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: EMILY BEWICK
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Friday, March 15, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

EXHIBIT “C”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT'S OBJECTION TO PLAINTIFF'S
NOTICE TO PRODUCE TO ELAINE BAILEY**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff's Notice to Produce to Elaine Bailey on the grounds that the Notice is improper and violates the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition of Elaine Bailey and a Notice to Produce upon Elaine Bailey c/o the undersigned counsel for Defendant¹. Plaintiff served the Notice to Produce under O.C.G.A. §24-13-27, which does not compel Elaine Bailey to produce responsive documents in the present circumstances.

Elaine Bailey is an Associate Professor of Chemistry and Chair of Department of Natural Sciences at Piedmont College. While Elaine Bailey is a current employee of Defendant, Elaine Bailey is not a party to this action. The undersigned counsel has not yet consulted with Ms. Bailey to secure her agreement to appear voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Elaine

¹ True and correct copies of the Notice of Deposition of Elaine Bailey and Notice to Produce are attached hereto as Exhibit A.

Bailey for March 15, 2017. Plaintiff did not serve Elaine Bailey with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Elaine Bailey cannot be compelled to appear for her deposition on March 15, 2017. Defendant is not objecting to Elaine Bailey's deposition going forward on March 15, 2017 if Ms. Bailey is in agreement with appearing. Defendant is, however, for the reasons set forth below, objecting to the Notice to Produce.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Elaine Bailey c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Elaine Bailey to bring documents to her March 15, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Ms. Bailey is not a party to the lawsuit and Ms. Bailey cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Ms. Bailey is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Ms.

Bailey to produce documents on March 15, 2017. The Notice to Produce, which requires production within 9 business days of Ms. Bailey's deposition, is untimely.

Plaintiff's Notice to Produce commands Elaine Bailey to bring with her:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Ms. Bailey to bring with her documents which are not in her possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Elaine Bailey.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

Atlanta, Georgia 30308

Telephone: (404) 885-1400

Facsimile: (404) 876-0992

E-mail: jchancey@deflaw.com

E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8173747/5

00120-134334

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE TO PRODUCE TO ELAINE BAILEY* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 3030

This 5th day of March, 2019.

s/Barbara A. Marschalk
Joseph C. Chancey, **GA Bar No. 120520**
Barbara A. Marschalk, **GA Bar No. 324498**
Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
Telephone: (404) 885-1400
Facsimile: (404) 876-0992
E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com
Attorneys for Defendant
8626361/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF ELAINE BAILEY

To: ELAINE BAILEY
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Friday, March 15, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of ELAINE BAILEY. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF ELAINE BAILEY has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: ELAINE BAILEY
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Friday, March 15, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT’S OBJECTION TO PLAINTIFF’S NOTICE OF DEPOSITION OF
CARLOS CAMP AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff’s Notice of Deposition to Carlos Camp and Notice to Produce (collectively, the “Notices”) on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Carlos Camp c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Carlos Camp is a senior member of the Biology faculty at Piedmont College. While Carlos Camp is a current employee of Defendant, Carlos Camp is not a party to this action. The undersigned counsel has not yet consulted with Mr. Camp to secure his agreement to appear

¹ True and correct copies of the Notice of Deposition of Carlos Camp and Notice to Produce are attached hereto as Exhibit A.

voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Carlos Camp for March 11, 2017. Plaintiff did not serve Carlos Camp with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Carlos Camp cannot be compelled to appear for his deposition on March 11, 2017. Defendant objects to the Notice of Deposition of Carlos Camp on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Carlos Camp c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Carlos Camp to bring documents to his March 11, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Mr. Camp is not a party to the lawsuit and Mr. Camp cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Mr. Camp is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides

that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Mr. Camp to produce documents on March 11, 2017. The Notice to Produce, which requires production within 5 business days of Mr. Camp's deposition, is untimely.

Plaintiff's Notice to Produce commands Carlos Camp to bring with him:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Mr. Camp to bring with him documents which are not in his possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Carlos Camp.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

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Facsimile: (404) 876-0992

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E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF CARLOS CAMP AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 3030

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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Telephone: (404) 885-1400
Facsimile: (404) 876-0992
E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8624687/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF CARLOS CAMP

To: CARLOS CAMP
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Monday, March 11, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of CARLOS CAMP. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF CARLOS CAMP has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: CARLOS CAMP
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Monday, March 11, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT’S OBJECTION TO PLAINTIFF’S NOTICE OF DEPOSITION
OF DALE VAN CANFORT AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff’s Notice of Deposition to Dale Van Canfort and Notice to Produce (collectively, the “Notices”) on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Dale Van Canfort c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Dale Van Canfort is a Professor at Piedmont College. While Dale Van Canfort is a current employee of Defendant, Dale Van Canfort is not a party to this action. The undersigned counsel has not yet consulted with Mr. Van Canfort to secure his agreement to appear voluntarily

¹ True and correct copies of the Notice of Deposition of Dale Van Canfort and Notice to Produce are attached hereto as Exhibit A.

for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Dale Van Canfort for March 11, 2017. Plaintiff did not serve Dale Van Canfort with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Dale Van Canfort cannot be compelled to appear for his deposition on March 11, 2017. Defendant objects to the Notice of Deposition of Dale Van Canfort on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Dale Van Canfort c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Dale Van Canfort to bring documents to his March 11, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Mr. Van Canfort is not a party to the lawsuit and Mr. Van Canfort cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Mr. Van Canfort is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2)

provides that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Mr. Van Canfort to produce documents on March 11, 2017. The Notice to Produce, which requires production within 5 business days of Mr. Van Canfort's deposition, is untimely.

Plaintiff's Notice to Produce commands Dale Van Canfort to bring with him:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Mr. Van Canfort to bring with him documents which are not in his possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Dale Van Canfort.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

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E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF DALE VAN CANFORT AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626712/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF DALE VAN CANFORT

To: DALE VAN CANFORT
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Monday, March 11, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of DALE VAN CANFORT. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF DALE VAN CANFORT has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: DALE VAN CANFORT
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Monday, March 11, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT’S OBJECTION TO PLAINTIFF’S NOTICE OF DEPOSITION OF
EMILY BEWICK AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff’s Notice of Deposition to Emily Bewick and Notice to Produce (collectively, the “Notices”) on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Emily Bewick c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Emily Bewick is a member of the Biology faculty at Piedmont College. While Emily Bewick is a current employee of Defendant, Emily Bewick is not a party to this action. The undersigned counsel has not yet consulted with Ms. Bewick to secure her agreement to appear

¹ True and correct copies of the Notice of Deposition of Emily Bewick and Notice to Produce are attached hereto as Exhibit A.

voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Emily Bewick for March 15, 2017. Plaintiff did not serve Emily Bewick with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Emily Bewick cannot be compelled to appear for her deposition on March 15, 2017. Defendant objects to the Notice of Deposition of Emily Bewick on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Emily Bewick to bring documents to her March 15, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Ms. Bewick is not a party to the lawsuit and Ms. Bewick cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Ms. Bewick is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides that the party upon whom the request is served shall serve a written response within 30 days after

the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Ms. Bewick to produce documents on March 15, 2017. The Notice to Produce, which requires production within 9 business days of Ms. Bewick's deposition, is untimely.

Plaintiff's Notice to Produce commands Emily Bewick to bring with her:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Ms. Bewick to bring with her documents which are not in her possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Emily Bewick.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

Atlanta, Georgia 30308

Telephone: (404) 885-1400

Facsimile: (404) 876-0992

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E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF EMILY BEWICK AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626804/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF EMILY BEWICK

To: EMILY BEWICK
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Friday, March 15, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of EMILY BEWICK. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF EMILY BEWICK has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: EMILY BEWICK
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Friday, March 15, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT’S OBJECTION TO PLAINTIFF’S NOTICE OF DEPOSITION OF
JESSICA WOOTEN EAGLE AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff’s Notice of Deposition to Jessica Wooten Eagle and Notice to Produce (collectively, the “Notices”) on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Jessica Wooten Eagle c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Jessica Wooten Eagle is a member of the Biology faculty at Piedmont College. While Jessica Wooten Eagle is a current employee of Defendant, Jessica Wooten Eagle is not a party to this action. The undersigned counsel has not yet consulted with Ms. Wooten Eagle to secure her

¹ True and correct copies of the Notice of Deposition of Jessica Wooten Eagle and Notice to Produce are attached hereto as Exhibit A.

agreement to appear voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Jessica Wooten Eagle for March 13, 2017. Plaintiff did not serve Jessica Wooten Eagle with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Jessica Wooten Eagle cannot be compelled to appear for her deposition on March 13, 2017. Defendant objects to the Notice of Deposition of Jessica Wooten Eagle on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Jessica Wooten Eagle c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Jessica Wooten Eagle to bring documents to her March 13, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Ms. Wooten Eagle is not a party to the lawsuit and Ms. Wooten Eagle cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Ms. Wooten Eagle is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2)

provides that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Ms. Wooten Eagle to produce documents on March 13, 2017. The Notice to Produce, which requires production within 8 business days of Ms. Wooten Eagle's deposition, is untimely.

Plaintiff's Notice to Produce commands Jessica Wooten Eagle to bring with her:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Ms. Wooten Eagle to bring with her documents which are not in her possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Jessica Wooten Eagle.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

Atlanta, Georgia 30308

Telephone: (404) 885-1400

Facsimile: (404) 876-0992

E-mail: jchancey@deflaw.com

E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF JESSICA WOOTEN EAGLE AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626649/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF JESSICA WOOTEN EAGLE

To: JESSICA WOOTEN EAGLE
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Wednesday, March 13, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of JESSICA WOOTEN EAGLE. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF JESSICA WOOTEN EAGLE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: JESSICA WOOTEN EAGLE
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Wednesday, March 13, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT’S OBJECTION TO PLAINTIFF’S NOTICE OF DEPOSITION
OF RICK AUSTIN AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff’s Notice of Deposition to Rick Austin and Notice to Produce (collectively, the “Notices”) on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Rick Austin c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Rick Austin is a Professor of Biology at Piedmont College. While Rick Austin is a current employee of Defendant, Rick Austin is not a party to this action. The undersigned counsel has not yet consulted with Mr. Austin to secure his agreement to appear voluntarily for

¹ True and correct copies of the Notice of Deposition of Rick Austin and Notice to Produce are attached hereto as Exhibit A.

deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Rick Austin for March 13, 2017. Plaintiff did not serve Rick Austin with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Rick Austin cannot be compelled to appear for his deposition on March 13, 2017. Defendant objects to the Notice of Deposition of Rick Austin on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Rick Austin c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Rick Austin to bring documents to his March 13, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Mr. Austin is not a party to the lawsuit and Mr. Austin cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Mr. Austin is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides

that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Mr. Austin to produce documents on March 13, 2017. The Notice to Produce, which requires production within 7 business days of Mr. Austin's deposition, is untimely.

Plaintiff's Notice to Produce commands Rick Austin to bring with him:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Mr. Austin to bring with him documents which are not in his possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Rick Austin.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500
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E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com
Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF RICK AUSTIN AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

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E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626769/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF RICK AUSTIN

To: RICK AUSTIN
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Wednesday, March 13, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of RICK AUSTIN. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF RICK AUSTIN has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: RICK AUSTIN
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Wednesday, March 13, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT’S OBJECTION TO PLAINTIFF’S NOTICE OF DEPOSITION OF
STEPHANIE ALMANGO AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff’s Notice of Deposition to Stephanie Almango and Notice to Produce (collectively, the “Notices”) on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Stephanie Almango c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Stephanie Almango is a Professor of English and the current Associate Vice President of Academic Affairs at Piedmont College. While Stephanie Almango is a current employee of Defendant, Stephanie Almango is not a party to this action. The undersigned counsel has not yet

¹ True and correct copies of the Notice of Deposition of Stephanie Almango and Notice to Produce are attached hereto as Exhibit A.

consulted with Ms. Almango to secure her agreement to appear voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Stephanie Almango for March 15, 2017. Plaintiff did not serve Stephanie Almango with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Stephanie Almango cannot be compelled to appear for her deposition on March 15, 2017. Defendant objects to the Notice of Deposition of Stephanie Almango on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Stephanie Almango c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Stephanie Almango to bring documents to her March 15, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Ms. Almango is not a party to the lawsuit and Ms. Almango cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Ms. Almango is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the

deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Ms. Almango to produce documents on March 15, 2017. The Notice to Produce, which requires production within 9 business days of Ms. Almango's deposition, is untimely.

Plaintiff's Notice to Produce commands Stephanie Almango to bring with her:

“all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices.”

Defendant further objects to the Notice to Produce because it commands Ms. Almango to bring with her documents which are not in her possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Stephanie Almango.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

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Telephone: (404) 885-1400

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E-mail: jchancey@deflaw.com

E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF STEPHANIE ALMANGO AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
Telephone: (404) 885-1400
Facsimile: (404) 876-0992
E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626743/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF STEPHANIE ALMANGO

To: STEPHANIE ALMANGO
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Friday, March 15, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of STEPHANIE ALMANGO. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF STEPHANIE ALMANGO has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: STEPHANIE ALMANGO
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Friday, March 15, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT'S MOTION FOR EXPEDITED
STATUS CONFERENCE, CASE MANAGEMENT ORDER AND ESI PROTOCOL**

COMES NOW Piedmont College (hereinafter "Defendant"), Defendant in the above-styled civil action and respectfully moves this Court for an Expedited Status Conference pursuant to Uniform Superior Court Rule 5.4 and O.C.G.A. § 9-11-16. The primary purpose of this Status Conference will be to attempt to resolve various discovery disputes between the Parties in this matter, including, but not limited to, the issues addressed in Defendant's Motion to Quash and for Protective Order, filed contemporaneously herewith.

Furthermore, the Status Conference is necessary to discuss the scope of discovery that Plaintiff seeks to conduct in this matter, including, but not limited to, taking the depositions of more than 30 witnesses and seeking production of large amounts of electronically stored information. Defendant respectfully requests a formal Case Management Order and ESI Protocol, which would set specific deadlines and parameters so that any and all discovery may be completed in an efficient and orderly fashion. Moreover, the Status Conference will allow the Parties to consider, narrow and simplify the issues, and determine what issues are currently pending before this Court.

WHEREFORE, Defendant respectfully requests an expedited status conference be scheduled on or before March 8, 2019; and further requests that all depositions noticed in this

case be postponed until such status conference can be held and a Case Management Order and ESI Protocol put in place.

Respectfully submitted this 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/ Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

Atlanta, Georgia 30308

Telephone: (404) 885-1400

Facsimile: (404) 876-0992

E-mail: jchancey@deflaw.com

E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

PIEDMONT COLLEGE,

Defendant.

Civil Action File No: 18CV0454

CERTIFICATE OF SERVICE

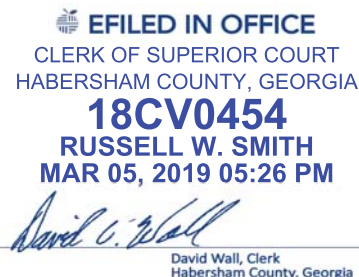
I HEREBY CERTIFY that I am counsel for Defendant, and that I have this day served *DEFENDANT'S MOTION FOR EXPEDITED STATUS CONFERENCE* on opposing counsel electronically per agreement and by placing a true and correct copy of same in the United States Mail, proper postage affixed thereto, addressed to the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW
Suite 200
Atlanta, Georgia 30303
Julie@goodgeorgialawyer.com

This 5th day of March, 2019.

s/ Barbara A. Marschalk
Joseph C. Chancey, **GA Bar No. 120520**
Barbara A. Marschalk, **GA Bar No. 324498**
Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com
Attorneys for Defendant
8626769/1
00120-134334



IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF
CARLOS CAMP AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff's Notice of Deposition to Carlos Camp and Notice to Produce (collectively, the "Notices") on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Carlos Camp c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Carlos Camp is a senior member of the Biology faculty at Piedmont College. While Carlos Camp is a current employee of Defendant, Carlos Camp is not a party to this action. The undersigned counsel has not yet consulted with Mr. Camp to secure his agreement to appear

¹ True and correct copies of the Notice of Deposition of Carlos Camp and Notice to Produce are attached hereto as Exhibit A.

voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Carlos Camp for March 11, 2017. Plaintiff did not serve Carlos Camp with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Carlos Camp cannot be compelled to appear for his deposition on March 11, 2017. Defendant objects to the Notice of Deposition of Carlos Camp on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Carlos Camp c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Carlos Camp to bring documents to his March 11, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Mr. Camp is not a party to the lawsuit and Mr. Camp cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Mr. Camp is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides

that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Mr. Camp to produce documents on March 11, 2017. The Notice to Produce, which requires production within 5 business days of Mr. Camp's deposition, is untimely.

Plaintiff's Notice to Produce commands Carlos Camp to bring with him:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Mr. Camp to bring with him documents which are not in his possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Carlos Camp.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

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E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com
Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF CARLOS CAMP AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 3030

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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Telephone: (404) 885-1400
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E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8624687/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF CARLOS CAMP

To: CARLOS CAMP
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Monday, March 11, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of CARLOS CAMP. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF CARLOS CAMP has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: CARLOS CAMP
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Monday, March 11, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

FILED IN OFFICE
CLERK OF SUPERIOR COURT
HABERSHAM COUNTY, GEORGIA
18CV0454
RUSSELL W. SMITH
MAR 05, 2019 05:26 PM

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.



David Wall, Clerk
Habersham County, Georgia

**DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION
OF DALE VAN CANFORT AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff's Notice of Deposition to Dale Van Canfort and Notice to Produce (collectively, the "Notices") on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Dale Van Canfort c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Dale Van Canfort is a Professor at Piedmont College. While Dale Van Canfort is a current employee of Defendant, Dale Van Canfort is not a party to this action. The undersigned counsel has not yet consulted with Mr. Van Canfort to secure his agreement to appear voluntarily

¹ True and correct copies of the Notice of Deposition of Dale Van Canfort and Notice to Produce are attached hereto as Exhibit A.

for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Dale Van Canfort for March 11, 2017. Plaintiff did not serve Dale Van Canfort with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Dale Van Canfort cannot be compelled to appear for his deposition on March 11, 2017. Defendant objects to the Notice of Deposition of Dale Van Canfort on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Dale Van Canfort c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Dale Van Canfort to bring documents to his March 11, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Mr. Van Canfort is not a party to the lawsuit and Mr. Van Canfort cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Mr. Van Canfort is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2)

provides that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Mr. Van Canfort to produce documents on March 11, 2017. The Notice to Produce, which requires production within 5 business days of Mr. Van Canfort's deposition, is untimely.

Plaintiff's Notice to Produce commands Dale Van Canfort to bring with him:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Mr. Van Canfort to bring with him documents which are not in his possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Dale Van Canfort.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

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Telephone: (404) 885-1400

Facsimile: (404) 876-0992

E-mail: jchancey@deflaw.com

E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF DALE VAN CANFORT AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
Telephone: (404) 885-1400
Facsimile: (404) 876-0992
E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626712/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF DALE VAN CANFORT

To: DALE VAN CANFORT
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Monday, March 11, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of DALE VAN CANFORT. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF DALE VAN CANFORT has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: DALE VAN CANFORT
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Monday, March 11, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF
EMILY BEWICK AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff's Notice of Deposition to Emily Bewick and Notice to Produce (collectively, the "Notices") on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Emily Bewick c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Emily Bewick is a member of the Biology faculty at Piedmont College. While Emily Bewick is a current employee of Defendant, Emily Bewick is not a party to this action. The undersigned counsel has not yet consulted with Ms. Bewick to secure her agreement to appear

¹ True and correct copies of the Notice of Deposition of Emily Bewick and Notice to Produce are attached hereto as Exhibit A.

voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Emily Bewick for March 15, 2017. Plaintiff did not serve Emily Bewick with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Emily Bewick cannot be compelled to appear for her deposition on March 15, 2017. Defendant objects to the Notice of Deposition of Emily Bewick on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Emily Bewick to bring documents to her March 15, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Ms. Bewick is not a party to the lawsuit and Ms. Bewick cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Ms. Bewick is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides that the party upon whom the request is served shall serve a written response within 30 days after

the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Ms. Bewick to produce documents on March 15, 2017. The Notice to Produce, which requires production within 9 business days of Ms. Bewick's deposition, is untimely.

Plaintiff's Notice to Produce commands Emily Bewick to bring with her:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Ms. Bewick to bring with her documents which are not in her possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Emily Bewick.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500
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E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com
Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF EMILY BEWICK AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626804/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF EMILY BEWICK

To: EMILY BEWICK
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Friday, March 15, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of EMILY BEWICK. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF EMILY BEWICK has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: EMILY BEWICK
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Friday, March 15, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF
JESSICA WOOTEN EAGLE AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff's Notice of Deposition to Jessica Wooten Eagle and Notice to Produce (collectively, the "Notices") on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Jessica Wooten Eagle c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Jessica Wooten Eagle is a member of the Biology faculty at Piedmont College. While Jessica Wooten Eagle is a current employee of Defendant, Jessica Wooten Eagle is not a party to this action. The undersigned counsel has not yet consulted with Ms. Wooten Eagle to secure her

¹ True and correct copies of the Notice of Deposition of Jessica Wooten Eagle and Notice to Produce are attached hereto as Exhibit A.

agreement to appear voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Jessica Wooten Eagle for March 13, 2017. Plaintiff did not serve Jessica Wooten Eagle with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Jessica Wooten Eagle cannot be compelled to appear for her deposition on March 13, 2017. Defendant objects to the Notice of Deposition of Jessica Wooten Eagle on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Jessica Wooten Eagle c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Jessica Wooten Eagle to bring documents to her March 13, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Ms. Wooten Eagle is not a party to the lawsuit and Ms. Wooten Eagle cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Ms. Wooten Eagle is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2)

provides that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Ms. Wooten Eagle to produce documents on March 13, 2017. The Notice to Produce, which requires production within 8 business days of Ms. Wooten Eagle's deposition, is untimely.

Plaintiff's Notice to Produce commands Jessica Wooten Eagle to bring with her:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Ms. Wooten Eagle to bring with her documents which are not in her possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Jessica Wooten Eagle.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

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Facsimile: (404) 876-0992

E-mail: jchancey@deflaw.com

E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF JESSICA WOOTEN EAGLE AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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Telephone: (404) 885-1400
Facsimile: (404) 876-0992
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E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626649/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF JESSICA WOOTEN EAGLE

To: JESSICA WOOTEN EAGLE
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Wednesday, March 13, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of JESSICA WOOTEN EAGLE. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF JESSICA WOOTEN EAGLE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: JESSICA WOOTEN EAGLE
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Wednesday, March 13, 2019 at 3:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION
OF RICK AUSTIN AND NOTICE TO PRODUCE

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff's Notice of Deposition to Rick Austin and Notice to Produce (collectively, the "Notices") on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Rick Austin c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Rick Austin is a Professor of Biology at Piedmont College. While Rick Austin is a current employee of Defendant, Rick Austin is not a party to this action. The undersigned counsel has not yet consulted with Mr. Austin to secure his agreement to appear voluntarily for

¹ True and correct copies of the Notice of Deposition of Rick Austin and Notice to Produce are attached hereto as Exhibit A.

deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Rick Austin for March 13, 2017. Plaintiff did not serve Rick Austin with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Rick Austin cannot be compelled to appear for his deposition on March 13, 2017. Defendant objects to the Notice of Deposition of Rick Austin on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Rick Austin c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Rick Austin to bring documents to his March 13, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Mr. Austin is not a party to the lawsuit and Mr. Austin cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Mr. Austin is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides

that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Mr. Austin to produce documents on March 13, 2017. The Notice to Produce, which requires production within 7 business days of Mr. Austin's deposition, is untimely.

Plaintiff's Notice to Produce commands Rick Austin to bring with him:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Mr. Austin to bring with him documents which are not in his possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Rick Austin.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

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E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF RICK AUSTIN AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626769/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF RICK AUSTIN

To: RICK AUSTIN
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Wednesday, March 13, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of RICK AUSTIN. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF RICK AUSTIN has
this day been served upon opposing counsel by depositing a true and correct copy of the same in
the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: RICK AUSTIN
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Wednesday, March 13, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF
STEPHANIE ALMANGO AND NOTICE TO PRODUCE**

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff's Notice of Deposition to Stephanie Almango and Notice to Produce (collectively, the "Notices") on the grounds that the Notices are improper and violate the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition and Notice to Produce upon Stephanie Almango c/o the undersigned counsel for Defendant¹. Plaintiff purportedly served the Notice of Deposition pursuant to O.C.G.A. §9-11-30 and served the Notice to Produce under O.C.G.A. §24-13-27, neither of which compel appearance or responsive documents in the present circumstances.

Stephanie Almango is a Professor of English and the current Associate Vice President of Academic Affairs at Piedmont College. While Stephanie Almango is a current employee of Defendant, Stephanie Almango is not a party to this action. The undersigned counsel has not yet

¹ True and correct copies of the Notice of Deposition of Stephanie Almango and Notice to Produce are attached hereto as Exhibit A.

consulted with Ms. Almango to secure her agreement to appear voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Stephanie Almango for March 15, 2017. Plaintiff did not serve Stephanie Almango with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Stephanie Almango cannot be compelled to appear for her deposition on March 15, 2017. Defendant objects to the Notice of Deposition of Stephanie Almango on the grounds that it does not properly secure the attendance of the witness and on the grounds more particularly set forth in Defendant's Motion for Protective Order filed contemporaneously herewith and incorporated herein by reference.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Stephanie Almango c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Stephanie Almango to bring documents to her March 15, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Ms. Almango is not a party to the lawsuit and Ms. Almango cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Ms. Almango is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the

deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Ms. Almango to produce documents on March 15, 2017. The Notice to Produce, which requires production within 9 business days of Ms. Almango's deposition, is untimely.

Plaintiff's Notice to Produce commands Stephanie Almango to bring with her:

“all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices.”

Defendant further objects to the Notice to Produce because it commands Ms. Almango to bring with her documents which are not in her possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Stephanie Almango.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

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Telephone: (404) 885-1400

Facsimile: (404) 876-0992

E-mail: jchancey@deflaw.com

E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSITION OF STEPHANIE ALMANGO AND NOTICE TO PRODUCE* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

This 5th day of March, 2019.

s/Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**

Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
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E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8626743/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF STEPHANIE ALMANGO

To: STEPHANIE ALMANGO
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Friday, March 15, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of STEPHANIE ALMANGO. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF STEPHANIE ALMANGO has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE TO PRODUCE

To: STEPHANIE ALMANGO
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Friday, March 15, 2019 at 10:00 a.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

DEFENDANT'S OBJECTION TO PLAINTIFF'S
NOTICE TO PRODUCE TO ELAINE BAILEY

COMES NOW PIEDMONT COLLEGE, Defendant in the above-styled civil action and, pursuant to O.C.G.A. § 9-11-30, §9-11-34 and §24-13-27, files this Objection to Plaintiff's Notice to Produce to Elaine Bailey on the grounds that the Notice is improper and violates the Civil Practice Act, more specifically showing this honorable Court as follows:

Plaintiff, a former faculty member of Piedmont College, asserts a claim for breach of employment contract. On March 4, 2019, Plaintiff served a Notice of Deposition of Elaine Bailey and a Notice to Produce upon Elaine Bailey c/o the undersigned counsel for Defendant¹. Plaintiff served the Notice to Produce under O.C.G.A. §24-13-27, which does not compel Elaine Bailey to produce responsive documents in the present circumstances.

Elaine Bailey is an Associate Professor of Chemistry and Chair of Department of Natural Sciences at Piedmont College. While Elaine Bailey is a current employee of Defendant, Elaine Bailey is not a party to this action. The undersigned counsel has not yet consulted with Ms. Bailey to secure her agreement to appear voluntarily for deposition on any date. Nevertheless, on March 4, 2019, Plaintiff served upon Defendant's counsel a Notice of Deposition of Elaine

¹ True and correct copies of the Notice of Deposition of Elaine Bailey and Notice to Produce are attached hereto as Exhibit A.

Bailey for March 15, 2017. Plaintiff did not serve Elaine Bailey with a subpoena to appear for deposition. Pursuant to OCGA 9-11-30(a), the attendance of a non-party witness may only be compelled by subpoena as provided in O.C.G.A. §9-11-45. Therefore, Elaine Bailey cannot be compelled to appear for her deposition on March 15, 2017. Defendant is not objecting to Elaine Bailey's deposition going forward on March 15, 2017 if Ms. Bailey is in agreement with appearing. Defendant is, however, for the reasons set forth below, objecting to the Notice to Produce.

On March 4, 2019, separately but contemporaneously, Plaintiff served a Notice to Produce to Elaine Bailey c/o the undersigned counsel for Defendant. Plaintiff's Notice to Produce commands Elaine Bailey to bring documents to her March 15, 2019 deposition pursuant to O.C.G.A. §24-13-27. O.C.G.A. §24-13-27 relates to compelling production of evidence in the possession, custody, or control of another party in lieu of serving a subpoena. Therefore, Plaintiff's Notice to Produce pursuant to O.C.G.A. §24-13-27 is improper and inapt in the present circumstances and appears to be an attempt by Plaintiff to circumvent the discovery process. Ms. Bailey is not a party to the lawsuit and Ms. Bailey cannot be compelled to produce documents at deposition pursuant to O.C.G.A. §24-13-27.

O.C.G.A. §9-11-34 relates to requests for production of documents upon parties (which Ms. Bailey is not) and applies to non-parties under paragraph (c). Pursuant to O.C.G.A. §9-11-30(b)(5), a notice of deposition may be accompanied by a request made for compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition and the procedure set forth in 9-11-34 shall apply. O.C.G.A. §9-11-34(b)(2) provides that the party upon whom the request is served shall serve a written response within 30 days after the service of the request. Plaintiff's Notice to Produce is dated March 4, 2017 and requires Ms.

Bailey to produce documents on March 15, 2017. The Notice to Produce, which requires production within 9 business days of Ms. Bailey's deposition, is untimely.

Plaintiff's Notice to Produce commands Elaine Bailey to bring with her:

"all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on our personal or work issued cell phones; personal or work issued computers; or other electronic devices."

Defendant further objects to the Notice to Produce because it commands Ms. Bailey to bring with her documents which are not in her possession, custody and control. The Notice to Produce requests documents which are the property of Piedmont College and, as such, are in the Defendant's possession, custody, or control. Therefore, the Notice to Produce violates O.C.G.A. §9-11-34(a)(1) by requesting documents which are not in the possession, custody, or control of Elaine Bailey.

The nonparty or any party may file an objection to a Notice to Produce as provided in subsection (b) of O.C.G.A. §9-11-34. Therefore, pursuant to O.C.G.A. §9-11-34(b), Defendant hereby objects to the Notice to Produce on the grounds that it is untimely and seeks production of documents which are the property of Defendant and, as such, are not in the possession, custody and control of the witness. Defendant further objects to the Notice to Produce on the

grounds that it is improper and inapt in the present circumstances and is an attempt by Plaintiff to circumvent the discovery process.

This 5th day of March, 2019.

DREW ECKL & FARNHAM, LLP

s/Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

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E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant

8173747/5

00120-134334

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed the forgoing *DEFENDANT'S OBJECTION TO PLAINTIFF'S NOTICE TO PRODUCE TO ELAINE BAILEY* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 3030

This 5th day of March, 2019.

s/Barbara A. Marschalk
Joseph C. Chancey, **GA Bar No. 120520**
Barbara A. Marschalk, **GA Bar No. 324498**
Sonya T. Jacobs, **GA Bar No. 380006**

303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
Telephone: (404) 885-1400
Facsimile: (404) 876-0992
E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com
Attorneys for Defendant
8626361/1
00120-134334

EXHIBIT “A”

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

NOTICE OF DEPOSITION OF ELAINE BAILEY

To: ELAINE BAILEY
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

YOU ARE HEREBY NOTIFIED that beginning on Friday, March 15, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523, the undersigned will proceed to take the deposition of ELAINE BAILEY. Said deposition will be taken pursuant to the Georgia Civil Practices Act for all purposes permitted under law. The deposition will be taken before a court reporter, or other officer duly authorized by law to take and administer oaths, and may also be videotaped. The deposition will continue from day to day until completed.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF DEPOSITION OF ELAINE BAILEY has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

V.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION NO.
18CV454

NOTICE TO PRODUCE

To: ELAINE BAILEY
c/o Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Pursuant to O.C.G.A. § 24-13-27 ("Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party;") you are hereby commanded to bring all documents, emails, text messages regarding Dr. Robert Wainberg, his lawsuit, the circumstances surrounding his termination, any student complaints that were made concerning Dr. Wainberg, any statements that were made by faculty, administration or board members relating to Dr. Wainberg, and documentation concerning any Title IX complaint made to Piedmont College against any individual within the last five years. This includes any emails or text messages that were exchanged on your personal or work issued cell phones; personal or work issued computers; or other electronic devices.

You are hereby commanded to produce these documents at the deposition on Friday, March 15, 2019 at 1:00 p.m. in the offices of Douglas L Henry, Attorney at Law, 695 Washington St, Clarkesville, GA 30523.

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX

julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE TO PRODUCE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 4th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

RULE 5.2 CERTIFICATE

This is to certify that the documents listed below have this day been served upon
opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to
Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs, DREW ECKL & FARNHAM,
LLP, 303 Peachtree St. NE, Suite 3500, Atlanta, Georgia 30308.

1. *Subpoena to Piedmont College*
2. *Plaintiff's Response to Defendant's First Interrogatories*
3. *Plaintiff's Response to Defendant's First Request for Production of Documents*
4. *Plaintiff's Response to Defendant's First Request for Admissions*

Respectfully submitted this 6th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing RULE 5.2 CERTIFICATE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 6th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

RULE 5.2 CERTIFICATE

This is to certify that the documents listed below have this day been served upon
opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to
Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs, DREW ECKL & FARNHAM,
LLP, 303 Peachtree St. NE, Suite 3500, Atlanta, Georgia 30308.

1. *Subpoena* to Dale Van Canfort
2. *Subpoena* to Carlos Camp
3. *Subpoena* to Rick Austin
4. *Subpoena* to Jessica Wooten Eagle
5. *Subpoena* to Stephanie Almango
6. *Subpoena* to Elaine Bailey
7. *Subpoena* to Emily Bewick

Respectfully submitted this 7th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing RULE 5.2 CERTIFICATE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 7th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO. 18CV454
)	
v.)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PROTECTIVE
ORDERS AND PLAINTIFF'S COUNTER-MOTION TO ENJOIN DEFENDANT FROM
OBSTRUCTING DISCOVERY**

COMES NOW Plaintiff, Dr. Robert Wainberg and states that Defendant's motions and accompanying briefs are both obstructionist and misleading and thus moves the Court to enjoin Defendant from obstructing discovery any further:

1. The Notices of Deposition were sent out based on the dates provided to Plaintiff by Defendant's counsel for those employee witnesses.
2. It took Plaintiff nearly a month to extract deposition dates from Defendant's counsel: Defendant's counsel represented they would accept notices of deposition on behalf of the employee witnesses and also represented that they would check their availability.¹
3. They did not check on availability as promised in mid-February. Ex. 2. Plaintiff's counsel learned that Defendant's counsel did not even inform witnesses of their deposition until yesterday, March 6th and sent out an email that attempted to dissuade them from attending their deposition. Deponents are all relevant fact witness employees for the Plaintiff who have shown

¹ Plaintiff requested deposition dates for the month of March from Defendant's counsel on February 4th, 2019 but didn't get them until February 27th, 2019. Cf. Ex. 1; Ex. 5. Ten days later on February 14th, Defendant's counsel responded stating "please advise who you would like to depose so we can check their availability." Ex. 2. On February 17th, Plaintiff through counsel responded: "As explained in my Feb 4th email, we are needing deposition dates from you guys for the month of March. We would like to depose Dale Van Canfort, Jessica Wooten Eagle, Rick Austin, Steph Almango, Carolos Camp, Elaine Bailey, Emily Bewick and to start out." Ex. 3. On February 20th, Plaintiff's counsel again reached out to get deposition dates. Ex. 4. Nearly a month after Plaintiff asked for them, on February 27th, Defendant's counsel finally sent over dates to select from stating: "Please confirm if these dates work for you and we'll lock them down on our calendar." Ex. 5. On March 1st Plaintiff's counsel then responded to her letting her know which dates out of those she was available and would notice. Ex. 6. On March 3rd, Plaintiff's counsel again responded to her with the times each deponent would be deposed for each day. Ex. 7. And on Monday, March 4th the notices went out to Defense counsel who had represented they would accept notices on behalf of the employee witnesses. See Declaration of Plaintiff's Counsel.

no grounds for a protective order. This is a baseless attempt by their employer to obstruct discovery.

4. Once Defendant learned that the Court's Order had come out denying their Motion to Dismiss, Defendant's counsel informed Plaintiff's counsel that due to her "marching orders" from her client that she was not able to file the Consent Motion to Extend Discovery (that Defendant's counsel had drafted and stipulated in agreement with Plaintiff) and that she would be filing a Motion for Protective Order. See Declaration of Plaintiff's Counsel.

5. Defendant's conduct in failing to produce responsive discovery, take 30 days to provide discovery dates, go back on stipulated agreements (Consent Motion), attempt to go back on confirmed agreed upon dates for depositions but then to fail to notify deponents of these dates until yesterday, and try to back out last minute by filing protective orders are simply an obstructionist, Hail Mary Pass. It is prompted by a Defendant who just learned of the Court's Order and is now desperate that the testimony of these upcoming deponents be kept from the Piedmont College Board that it answers to.

Defendant Has Failed to Meet the Standard for a Motion for Protective Order:

Georgia law holds that protective orders should not be entered where the effect is to be simply obstructionist by frustrating and preventing legitimate discovery. *Snead v. Pay-Less Rentals, Inc.*, 134 Ga. App. 325, 327 (1975). The Courts have routinely held:

"We are ever mindful of the rule that the extent of discovery and use of protective orders is generally within the discretion of the trial judge. However, this must be a sound and legal discretion based on evidence and a showing of good cause. Protective orders 'should not be entered when the effect is to frustrate and prevent legitimate discovery.'" *Int'l Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140, 144 (1973)

The Court of Appeals further reversed a trial judge's granting of a protective order "where motion for protective order was not verified. No affidavit was submitted in its support nor was any evidence taken or heard in its connection. The motion was granted solely on the unverified allegations contained in the motion itself." *Int'l Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140, 142 (1973). Similarly, Piedmont College has failed to provide any verified affidavits, declarations, or provide any true evidence in support that a motion for protective order should be granted. Moreover, Piedmont College even failed to provide a certification as required under Ga. Unif. Sup. Ct. Rule 6.4.

Rather, what Piedmont College has provided are unsubstantiated, false misrepresentations to the Court unsupported by any affidavit, declaration, or evidence of any kind; for example:

1. Defendant wrongly argues that Plaintiff’s noticed witnesses have no personal knowledge: E.g. Defendant argued: “Plaintiff noticed the depositions of seven faculty members employed by Defendant Piedmont College – only one of whom has any personal knowledge of the incident giving rise to Plaintiff’s Complaint” and they “do not have any unique, superior or personal knowledge of the events giving rise to Plaintiff’s claims. Any knowledge related to the events at issue in this case by these individuals would have been acquired by counsel, and therefore privileged.” (Def. Brief p. 1 and 9.) This is a blanket inaccurate and untruthful statement. First, Plaintiff is not sure how Defendant’s counsel could even write such a statement in its brief as Plaintiff understands that Defendant’s counsel has never even previously spoken to the majority (if not all) of these individuals to know what any of them do know *until after the filing of their brief* by making a first attempt to have these witnesses contact their law firm yesterday on March 6th. See Declaration of Plaintiff’s counsel. Second and most importantly, Plaintiff (having spoken to each of these witnesses) is certain that each deponent has relevant, discoverable knowledge concerning the circumstances surrounding the Complaint. See Declaration of Plaintiff’s Counsel. [An example of this would be the President of the College speaking with one of the deponents about his plan to terminate Plaintiff even before Plaintiff was interviewed by Title 9 investigators or put on notice of any complaint.]

The reality is that each of these deponents have relevant knowledge, helpful to the Plaintiff and thus these emergency motions are a Hail Mary Pass prompted by a Defendant who just learned of the Court’s Order and has now given his attorneys “marching orders” desperate

that the testimony of these upcoming deponents be kept hidden from the Piedmont College Board that it answers to. An example of this is that Defendant has the audacity to argue to the Court that none of Plaintiff's witnesses have relevant knowledge (p. 1) but argues that the only witnesses with relevant knowledge that Plaintiff should be allowed to be deposed are those who just so happen to be all hostile witnesses to the Plaintiff and favorable to the Defendant. (Def. Brief p. 9.)

Importantly, the law states that discovery is not limited to matters that are admissible in evidence but rather information sought that "appears reasonably calculated to lead to the discovery of admissible evidence...this procedure is to be given a liberal construction in favor of supplying a party with the facts underlying his opponent's case, and this without reference to whether the facts sought on discovery are admissible upon the trial of the action." Id.

Defendant is obstructing discovery by taking a month to provide deposition dates; by claiming it will notify the deponent witnesses regarding availability around February 14th and then failing to do so by not notifying them of their deposition that is just a few days away until March 6th; by claiming Plaintiff is not agreeing to a reasonable ESI protocol (untrue); and by failing to produce discovery. Consequently, Plaintiff moves this Court to enjoin Defendant from committing further obstructionist tactics and to participate in good faith with discovery.

2. Defendant wrongly objects to Plaintiff's Notices to Produce and Notices to Appear: Defendant's counsel argues that the witnesses should not be compelled to appear or produce evidence to a Noticed Deposition because no one served them directly with a subpoena. (Def. p. 2 of the Objection). This is rather ironic as it was Defendant's counsel who agreed to accept service on these deponents' behalf. See Declaration of Plaintiff's Counsel. Because of this, service on the Defendant's counsel was indeed proper pursuant to O.C.G.A. §24-13-27.

Second, Defendant's state that these deponents should not be compelled to appear because they are not a party to the suit. However, that is just silly for someone who regularly practices employment litigation in the representation of employers and employees: "Employees of a company, though not technically parties, may be so closely aligned with their company that they may be viewed as "party witnesses." see, e.g., *Merial Ltd. v. Intervet, Inc.*, 2010 WL 942294, at *2 (M.D.Ga. Mar. 11, 2010) (Land, J.); *Ramsey*, 323 F.Supp.2d at 1354–56; *Gundle Lining Const. Corp. v. Fireman's Fund Ins. Co.*, 844 F.Supp. 1163, 1166 (S.D.Tex.1994) (Crone, M.J.); *Carroll v. Texas Instruments, Inc.*, 910 F. Supp. 2d 1331, 1335 (M.D. Ala. 2012.) See also *Scuotto v. Lakeland Tours, LLC*, 2015 WL 12861142, at *2–4 (M.D. Fla. Jan. 6, 2015.)

Defense counsel of employers routinely accept service of both subpoenas and/or notices to produce and notices to appear for Defendant's **current** employees. Moreover, pursuant to the Georgia Rules of Evidence, most of the testimony of these employee deponents will come in under O.C.G.A. § 24-8-801 as an actual Admission by party opponent "An admission is a statement offered against a party which is: statement by the party's agent or employee, but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship." O.C.G.A. § 24-8-801d2(d).

Third, it is important to understand why Plaintiff served these notices to produce out of a concern that has been now troublingly confirmed: that in fact the Defendant (who thus far has failed to produce all the responsive discovery concerning text messages, emails, and other responsive documents related to Plaintiff's discovery requests) did not comply with their legal duty to place their employees on notice to preserve such documents in the possession of their employees concerning the Plaintiff's claims and would not have even made an attempt to obtain

such information. Sadly, Plaintiff's worst fears came true in learning that first, faculty & staff employees of Piedmont College were only notified for the first time that they were to preserve such responsive texts, emails, and documents for the first time on Monday, March 4th and that second, no one had ever asked them to produce such documents before until yesterday March 6th despite Defendant's responsive discovery deadlines having come and gone. See Declaration of Plaintiff's counsel.

It is a routine practice of Plaintiff's counsel in deposing employee witnesses to serve a Notice to Produce to the Defendant's counsel and this is because, even with the best intentions, there are often relevant documents that are within the possession of individual employee witnesses that never are identified or produced except in depositions. While these witnesses are not the actual defendant, they are agents and employees of the party Defendant employer. As such it is not only normal, routine, best practice to serve such notices to the Defendant Employer's counsel, but it is proper to do in the case where Defendant agreed to accept service on its current employees' behalf as this Defendant's counsel did. See Declaration of Plaintiff's Counsel. Because Defendant makes the argument that a subpoena rather than a notice should be served, thus Plaintiff have supplied Defendant's counsel with subpoenas in addition to the Notices to Produce that compel witnesses both to "appear" and produce such evidence. Again, because Defendant agreed to accept service on behalf of its current employees it does not get to change its mind because it wishes to obstruct certain testimony or evidence from being produced.

3. Defendant Improperly Seeks an ESI Conference Pre-Maturely Making False Statement That Plaintiff Refuses a Reasonable ESI Protocol: Plaintiff has in fact responded to Defendant's proposed ESI protocol, identifying all that is specifically objectionable and in violation of routine best practices concerning ESI discovery. See Exhibit 9. Plaintiff is still

awaiting a response from Defendant. Plaintiff has received none and will have to file a Motion to Compel if this cannot be resolved quickly.

Nevertheless, the Court should not have to deal with working out an ESI protocol with both parties. Rather the Court should instruct Defendant's Counsel to respond to Plaintiff's Counsel and to meet and confer with their mutually appropriate ESI team to work out a fair agreement concerning ESI discovery. To date, Defendant has failed to respond to Plaintiff's letter. See Exhibit 9. Defendant's representations before this Court concerning ESI protocol are therefore unfair, misrepresentative of reality, and pre-mature.

WHEREFORE, Plaintiff Dr. Robert Wainberg, who devoted his entire life and professional career of 30 years to the Defendant, respectfully requests the Court Order:

1. That Defendant be enjoined from further obstructionist tactics concerning discovery;
2. That Defendant cooperate in good faith with its discovery obligations and produce all outstanding responsive documents forthwith;
3. That the depositions move forward for next week at the preference of the Plaintiff;
4. That the Counsel for both parties are instructed to meet and confer to resolve any disputes concerning ESI e-discovery.

Respectfully submitted this 7th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR PROTECTIVE ORDERS AND PLAINTIFF'S COUNTER-MOTION TO
ENJOIN DEFENDANT FROM OBSTRUCTING DISCOVERY including Exhibits 1-9**

has this day been served with the Clerk of Court using the PeachCourt e-filing system and upon opposing counsel by depositing a true and correct copy of the same via U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
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Attorneys for Defendant Piedmont College

Respectfully submitted this 7th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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44 Broad Street, NW, Suite 200
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(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

Exhibit 1

Julie Oinonen <julie@goodgeorgialawyer.com>

Mon, Feb 4,
11:47 AM

to Linda, Sonya, Barbara, Chris, Communication, Joseph

Hello Everyone,

I would like to make sure we have a professional courtesy agreement to email all filings and discovery requests real time as filed with the Court so we are guaranteed that we don't lose anything in the mail.

I just saw that you file a Rule 5.2 but I did not receive anything. Please email what you are mailing me.

Thank you in advance.

Last, Kindly let us know what dates you have available in March as we will begin scheduling depositions.

Exhibit 2

Best regards,

Julie Oinonen

Sonya T. Jacobs

Feb 14, 2019,
9:51 AM

to Linda, Barbara, Chris, Communication, Joseph, me

Julie,

Circling back on your email below, please advise who you would like to depose so we can check their availability. Also, do you have some time next week to discuss putting in place an agreed upon ESI protocol?

Thanks.

Kind regards,

Sonya

Exhibit 3

Julie Oinonen <julie@goodgeorgialawyer.com>

Feb 17, 2019,
8:47 PM

to Sonya, Linda, Barbara, Chris, Communication, Joseph

Hi Sonya,

Thanks for getting back to me. As explained in my Feb 4th email, we are needing deposition dates from you guys for the month of March. We would like to depose Dale Van Canfort, Jessica Wooten Eagle, Rick Austin, Steph Almango, Carolos Camp, Elaine Bailey, Emily Bewick and to start out. We have a very deposition intensive discovery (30 plus) so I would definitely appreciate dates that you all are free in advance rather than just unilaterally noticing.

Also, I would agree to a consent motion to extend discovery if in the event it looks like that is necessary.

Finally, I would like to meet with you all face to face (you are welcome to come to my office) or I can come to your office this week to discuss as you mentioned the ESI protocol, i.e. a Ga. Supt. Ct Rule 5.4 conference/Fed R. 26f as well as to have a good faith meet and confer concerning our objections to your discovery responses to make an effort to resolve them in an effort to avoid a motion to compel.

Please let me know what days you are available this week. Again I can come up to your place or your welcome to come to mine. We are in downtown Atlanta (down the street from the state bar) and we have valet parking/validate tickets.

Best regards,
Julie

Exhibit 4

Julie Oinonen <julie@goodgeorgialawyer.com>

Feb 20, 2019,
10:39 AM

to Barbara, Chris, Communication, Joseph, Linda, Sonya

Dear Sonya, Barbara, and Linda: It was good to meet with you yesterday.

I will review the materials you sent to me and get with you shortly. Please give me as many dates that you are available for March. We would like to have at least five days ideally. We are also happy to sign a consent order as discussed extending the discovery period so we are not as rushed with depositions.

I am available currently on March 5, 6, 7, 8, 11, 12, 13, 18, 22, 15, and 26.

I will be sending out notices and let you know who we want to depose immediately (and the approximate length) but please let me know your available dates ASAP per my original request on February 4th.

Thank you,
Julie

Exhibit 5

Sonya T. Jacobs

Feb 27, 2019, 4:42 PM (8
days ago)

to me, Chris, Communication, Joseph, Linda, Barbara

Julie,

As discussed at our meeting, please find attached a draft Consent Motion to Extend Discovery and Proposed Order for your review. Please let us know if you have any comments or revisions.

Also, we currently have March 11, 13 (but only until 4pm), 15, and 29 available for depositions. Please confirm if these dates work for you and we'll lock them down on our calendar.

Thanks for your assistance.

Kind regards,
Sonya

Exhibit 6

Julie Oinonen <julie@goodgeorgialawyer.com>

Fri, Mar 1, 10:21 AM (6
days ago)

to Sonya, Chris, Communication, Joseph, Linda, Barbara

Sonya,

I am sorry for the delay I've been slammed with back to back all day depositions that have run late into the evening at times.

1. Let's do **March 11, March 13, and March 15 for our depositions** based on the dates you gave me. I will follow up with notices regarding who I want and then we can reschedule folks around if we have to.

2. I consent to you filing the joint consent motion to extend discovery, you have permission to sign my name.

3. Getting back to you guys on other matters we discussed soon.

Thanks for your patience, talk soon,
Julie

Exhibit 7

Julie Oinonen <julie@goodgeorgialawyer.com>

Mar 3, 2019, 2:40 PM (4
days ago)

to Sonya, Chris, Communication, Joseph, Linda, Barbara, bcc: Rob

All:

Here is a list of Proposed dates: Let's do Monday March 11th 10 a.m. Dale Van Canfort and 1 p.m. Carlos Camp on Monday

Wednesday March 13th let's do Rick Austin 10 a.m. 3 p.m. Jessica Wooten Eagle,

Friday March 15th : 10 a.m. Steph Almango, 1 p.m. Elaine Bailey, 3 p.m. Emily Bewick

Michele please get these notices out on Monday to Defense counsel. Defense counsel, we will then move stuff around if we have to regarding dates. They are on spring break that week.

We have ordered subpoenas from the Court and those should also be on the way concerning the student information we are seeking.

Best,
Julie

Exhibit 8

Michele Dobbs

Mar 4, 2019, 2:45 PM (3
days ago)

to me, Sonya, Chris, Joseph, Linda, Barbara

Good afternoon all,

Attached please find the Notices in this matter.

Kind regards,
Michele Dobbs
Paralegal
Williams Oinonen LLC

WILLIAMS OINONEN LLC

THE GRANT BUILDING, SUITE 200
44 BROAD STREET, NW
ATLANTA, GA 30303
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Exhibit 9

March 5, 2019

Drew Eckl Farnham
c/o Ms. Sonya T. Jacobs
303 Peachtree St. NE, Suite 3500
Atlanta, GA 30308

Dear Ms. Jacobs:

This is to follow up regarding our discussions involving ESI Protocol and also written pursuant to Rule 6.4b. In response to your proposed ESI protocol regarding the production of ESI, Plaintiff's RPD's specifically requested the following format:

(b) ***Form of production for documents that exist in electronic form:*** Any documents that exist in electronic form are specifically requested to be produced in native or near-native format and should not be converted to an imaged format (e.g. .TIFF or .PDF) unless such document must be redacted to remove privileged content or the document does not exist within your care, custody, or control in a native electronic format. Native format requires production in the same format in which the information was customarily created, used and stored by you. The table below supplies examples of the native or near native forms in which specific types of electronically stored information (ESI) should be produced:

Source ESI	Native or Near Native Form or Forms Sought
Microsoft Word Documents	.DOC, .DOCX
Microsoft Excel Spreadsheets	.XLX, .XLSX
Microsoft PowerPoint Presentations	.PPT, .PPTX
Microsoft Access Databases	.MDB
WordPerfect Documents	.WPD
Adobe Acrobat Documents	.PDF
Photographs	.JPG
Email	A forensic copy in native format in addition to a PST and OST file should be provided. Messages should be produced so as to preserve and supply the source RFC

	2822 content of the communication and attachments in a fielded, electronically searchable format. For Microsoft Exchange or Outlook messaging, PST and OST format will suffice. Single message production formats like .MSG or .EML may be furnished if source foldering data is preserved and produced. If your workflow requires that attachments be extracted and produced separately from transmitting messages, attachments should be produced in their native forms with parent/child relationships to the message and containers preserved and produced.
Databases excluding email systems	Unless the entire contents of a database are responsive, extract responsive content to a fielded and electronically searchable format preserving metadata values, keys and field relationships. In doing so is infeasible, please identify the database and supply information concerning the schemae and query language of the database, along with a detailed description of its export capabilities, so as to facilitate Plaintiff's crafting a query to extract and export responsive data.
Cell phones	A forensic image of the cell phone is required. It is recommended to hire a computer forensic technician with the training and experience to forensically image phones as they have invested in specialized tools like Cellebrite UFED, Micro Systemation XRY, Lantern or Oxygen Forensic Suite. Forensic imaging provides three levels of access to the contents of mobile devices referred to as Physical, Logical and File System access. Opposing counsel should contact us to make arrangements that insures all relevant data contained within the forensic imaging (including deleted text messages) can be obtained and exchanged between parties.

Additionally, to keep track of documents exchanged, Defendant should also provide a separate production in PDF format with Bates or hash numbers.

Throughout your proposed ESI protocol, you suggest **"ESI shall be produced in tagged image format (TIFF or .TIF files) with links to natives."** We object to such type of production. In the article, "Why TIFF Files Should Be Banned In E-Discovery," expert Jeff Kerr explains:

"TIFF files generally appear in e-discovery not because they existed prior to the case but because they were *created*. Lawyers and litigation professionals take existing computer files, such as emails, Word documents, Excel spreadsheets, digital photographs, or PDFs and *convert* these files to a TIFF format. This conversion process strips all of the rich data from the original files — such as comment bubbles, formulas, geolocation data, searchable text, etc. — and replaces it with a static image. As such, TIFFs themselves cannot be searched unless you have a separate database of text or can perform optical character recognition (OCR) on them. A TIFF (which stands for Tagged Image File Format) is a so-called "raster" image, meaning there is nothing in it other than pixels. You can simulate creating a TIFF by printing a document and then scanning it back in as a JPG, GIF, PNG, or other raster image format. Compared with the original file, the end result a downgraded copy of the original.

Worse, TIFF files are generally limited to one page per file. This means a single Word or PDF file could result in dozens or even hundreds of TIFF files from the conversion process. Keeping track

of the fact that files 1 through 92 of a 1000-page production of TIFF are actually the pages of a single document is both difficult and obnoxious for the requesting party.

Many files also expand in size when they are converted to TIFF. You may have noticed that image files are generally larger than text files on your computer. This is because storing textual data in a raster image format is extremely inefficient: you can store a character of text in just a few bits (generally 8 or 16), but storing the configuration of pixels for just a single character of text takes much more space. As an example, the following image of the letter "A" takes up approximately 1,400 times as much space as a textual representation of the same character:

In summary, TIFF files are bad news because:

1. They lack important data (often constituting *evidence*) that is present in the original, native files;
2. They waste valuable space on your computer;
3. They are difficult to manage because a single file can be converted to hundreds of separate TIFF files; and
4. On their own, they can't be searched.

Keeping TIFFs Out of Your Case

Given these numerous problems with TIFFs, you should take steps to ensure your opponent doesn't saddle you with them in discovery responses. The first step in avoiding TIFFs is simple and obvious:

Notify your opponent, in writing and at the earliest possible juncture, that you will not accept TIFF files.

This demand should appear in all of your document requests and be clear in your discovery correspondence.

The second step is to talk (or "meet and confer") with your opponent about the issue and, if needed, take it before the court. Make your case and do your best to persuade your adversary. If your adversary insists on using TIFF files, you should strongly consider taking the issue before the court. TIFFs are such an absurdly bad practice that you should be able to convince the court to not allow them — particularly if you highlight the ways that TIFFs obstruct the goal of resolving cases in a "just, speedy, and inexpensive" manner.

So fight the good fight to keep TIFFs out of your case. Hopefully TIFFs will go "the way of the dodo" and the next generation of lawyers will look back on the practice of exchanging them as quaint and strange as wearing wooden shoes or hooped dresses.

Source: <https://www.casefleet.com/blog/lets-ban-tiffs-in-e-discovery>

As explained in our original RPD's, productions should not be converted to TIFF. Specifically, we are requesting documents be "produced in native or near-native format and should not be converted to an imaged format (e.g. .TIFF..)" Additionally, Defendants are requested to provide a separate production of documents in a PDF format unitized with Bates numbers so we can keep track of what each side sends.

Finally, you suggested that each side produce ESI with metadata fields in a format which is compatible with the industry standard Concordance DAT file format for loading into a review platform. That too, is referring to TIFF's. We are going to hire an expert who will forensically collect and analyze Mr. Wainberg's electronic devices and produce responsive documents that exist in native format.

Again, pursuant to Rule 6.4b, we ask that you produce the documents as they were requested and as Mr. Wainberg is entitled to have "in native or near native format" alongside respective PDF's.

Proposed ESI Protocol--Regarding the “Scope of Production” we object to the following:

1. **The subject matter.** Contrary to what you propose, the subject matter includes other topics other than just breach of contract and implied duty of good faith. The subject matter includes the allegations concerning Title 9 violations made against Dr. Wainberg and as such, we have the duty and the right to delve into the Title 9 processes and “other similar incidents” concerning Title 9 violations to show that Piedmont College’s actions against Dr. Wainberg were not equitable, fair, in compliance with the College’s standard procedures for dealing with Title 9 or done in good faith.
2. **Relevant Data Range:** Contrary to what you propose, the relevant data range that you propose of one year is objectionable to us because we are actually asking for “Investigations related to any Title 9 matter in the past 5 years.”
3. **“Key Custodians”** that you propose is objectionable to us because it does not include the emails and text messages of the key fact witnesses that you list out as being actual key fact witnesses with having knowledge, this includes the Chairman Gus Arrendale and all the other board members you include as key fact witnesses. This is objectionable and as Board members of the College, this must be provided. Additionally, the very students who made such complaints (Jessica Smith) who had never even sat in my client’s class before or attended his lectures as a student in addition to Reed Alexander (the disgruntled student who expressed his unhappiness about a grade) are key custodians with information that must be produced.
4. **“Search terms”** are objectionable to us in part because a standard e-discovery forensic collection and analysis should encompass more than just search terms but should also include such things as Boolean Logic, fuzzy searches, wild cards and the like.¹ In sum, if we are simply only relying on search terms, it will harm our case. <http://www.neworleansbar.org/news/committees/relying-on-keyword-search-for-e-discovery-it-may-harm-your-case>
5. Thus, because you have a good forensic e-discovery service, we expect yours as well as ours to properly look for emails and texts that are responsive to all discovery requests relating to Rob Wainberg, his termination, and the issues of Title 9 sexual harassment claims not just involving him but “other similar incidents” concerning Title 9 violations to show that Piedmont College’s actions against Dr. Wainberg were not equitable, fair, in compliance with the College’s standard procedures for dealing with Title 9 or done in good faith.

In sum, please produce the requested information that includes documents as they were requested and as Mr. Wainberg is entitled to have “in native or near native format” alongside respective PDF’s in addition to making sure you collect information from the appropriate key custodians which include **all the relevant fact witnesses that you answered as having relevant information.**

Regarding our specific 6.4 b issues with your current responses to our discovery requests, these stand as such:

INTERROGATORIES:

Interrogatory 1:

Fact Providers:

- a. Identify each person who provided any factual information included in your response to these interrogatories and request for production of documents.
- b. Identify each individual (their complete name and telephone number) who you know or believe possesses knowledge or information relevant to the subject matter of this litigation and, with respect to each, provide a description of the knowledge or information you believe each such individual possesses. (This list should not be limited to persons who will or may testify on Defendant’s behalf at trial, but necessarily includes them. It includes but is not limited to students, board members, and employees of the College.)

Defendant’s Response:

Defendant objects and responds to subsections (a) and (b) of Plaintiff’s Interrogatory No.1 as follows:

¹ <https://www.edrm.net/resources/project-guides/edrm-search-guide/search-guide-glossary/>;
<https://www.edrm.net/resources/project-guides/edrm-search-guide/search-methodologies/>;

a. Defendant specifically incorporates herein its General Objections No. 1, 2, and 3. Defendant objects to providing trial preparation or other work product information. The identity of who prepared discovery responses is not discoverable. Subject to and without waiving said objections, Defendant responds that this is the corporate response of Piedmont College. The answers have been prepared with the assistance of the representatives of Piedmont College and the undersigned counsel. This Defendant will supplement these responses with an appropriate verification.

b. Defendant specifically incorporates herein its General Objections No. 1, 2, and 3. This Interrogatory is not limited to witnesses, but includes Defendant's attorneys, investigators, and consulting experts. Defendant further objects to this Interrogatory as overly broad and unduly burdensome because it would be impossible for this Defendant to determine every individual that has or claims to have "knowledge" or "information" relevant to this case, and to provide a description of that knowledge and information. To secure the information requested, Defendant would have to determine from each person everything they know. A party cannot be compelled to prepare the opposing party's case. Defendant also objects to this Interrogatory to the extent it seeks disclosure of student records and/or information protected by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C.A. § 1232g, which precludes Defendant from producing any personally identifiable information in education records absent a judicial order or lawfully issued subpoena, and upon notification to parents and students of such orders or subpoenas in advance of production. Subject to and without waiving these objections, Defendant identifies the following individuals who may have knowledge or information concerning Plaintiffs claims:

Gus Arrendale:

Executive Committee Member / Chairman of Board of Trustees for Piedmont College. Mr. Arrendale may only be contacted through undersigned counsel.

Dr. James Mellichamp:

President of Piedmont College. Dr. Mellichamp may only be contacted through undersigned counsel.

Ann Sutton:

Assistant to the VP for Administration and Finance and Title IX Coordinator for Piedmont College Ms. Sutton may only be contacted through undersigned counsel.

Rose Mariee Allison:

Director of Human Resources for Piedmont College Ms. Allison may only be contacted through undersigned counsel.

Pen-y Rettig:

Vice President of Student Enrollment for Piedmont College (formerly Vice President of Academic Affairs) Mr. Rettig may only be contacted through undersigned counsel.

James Peebles:

Director of Intercollegiate Athletics for Piedmont College Mr. Peebles may only be contacted through undersigned counsel.

Dr. Steve Nimmo:

Dean of Arts and Sciences and Professor of Mathematics for Piedmont College Dr. Nimmo may only be contacted through undersigned counsel.

Monika Schulte:

International Office Coordinator and Associate Professor of German for Piedmont College Ms. Schulte may only be contacted through undersigned counsel.

Dr. Rick Austin:

Professor of Biology for Piedmont College Dr. Austin may only be contacted through undersigned counsel.

Dwight Evans:

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Executive Committee Member I Board of Trustees for Piedmont College Mr. Evans may only be contacted through undersigned counsel.

Tom Hensley:

Executive Committee Member/ Board of Trustees for Piedmont College Mr. Hensley may only be contacted through undersigned counsel.

Eddy Ariail:

Executive Committee Member I Board of Trustees for Piedmont College
Ms. Ariail may only be contacted through undersigned counsel.

Mylle Mangum:

Executive Committee Member/ Board of Trustees for Piedmont College Mr. Mangum may only be contacted through undersigned counsel.

Sandy Borrow:

Special Committee Member / Board of Trustees for Piedmont College Ms. Borrow may only be contacted through undersigned counsel.

Susan Wade:

Executive Assistant to Gus Arrendale Ms. Wade may only be contacted through undersigned counsel.

Elaine Bailey:

Associate Professor of Chemistry for Piedmont College / Chair of Department of Natural Sciences Ms. Bailey may only be contacted through undersigned counsel.

Martha Cantrell:

Special Committee Member/ Board of Trustees for Piedmont College Ms. Cantrell may only be contacted through undersigned counsel.

Dock Sisk:

Executive Committee Member and Special Committee Member/ Board of Trustees for Piedmont College. Mr. Sisk may only be contacted through undersigned counsel.

Stewart Swanson

Executive Committee Member/ Board of Trustees for Piedmont College. Mr. Swanson may only be contacted through undersigned counsel.

Defendant further responds that this matter is under continued discovery and investigation. Defendant's response to Interrogatory No. 1 will be supplemented in accordance with the Georgia Civil Practice Act.

Plaintiff's Reply:

1. These are missing the telephone numbers of each individual.
2. This requested each individual identified that possesses knowledge of the subject matter of this litigation. None of the many student names who possess such information as relevant fact witnesses have been provided.

Interrogatory 2:

ESI Sources: Please identify all active sources of electronically stored information including cell phones or personal cell phones, that the President, Vice President, senior level cabinet staff, faculty, students, athletics director, other agents or employees who have relevant information concerning this lawsuit have used to communicate with each other. This includes all computers that include both locally stored and networked stored information on laptops, stationary computers, smartphones, tablet devices, webmail accounts, social media accounts, servers including file servers, exchange servers, and department file shares. For each source, please set forth: a) its total capacity in

gigabytes; b) its physical location, if applicable and whose custody and control it is under; c) the total volume of active data stored on or in the source; d) whether you have created a bit for bit forensic image of the source; and e) sufficient identifying information about the source, such as the version, the manufacturer, model number, operating system, etc.

Defendant's Response:

Defendant incorporates herein its General Objections 1, 2, 3, 4, 5, 6, 7, 8, and 9. Defendant also objects to Interrogatory No. 2 on the grounds that it is overly broad, vague, ambiguous, unduly burdensome, exceeds the scope of discovery, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this Interrogatory to the extent it seeks the disclosure of student records and/or information protected by FERPA, 20 U.S.C.A. § 1232g, which precludes Defendant from producing any personally identifiable information in education records absent a judicial order or lawfully issued subpoena, and upon notification to parents and students of such orders or subpoenas in advance of production.

Subject to and without waiving said objections, Defendant identifies the following sources within Defendant's possession, custody and control that may contain non-privileged relevant ESI material:

- iPhone purchased and paid for by Defendant for use by Dr. James Mellichamp;
- Desktop computer purchased and paid for by Defendant for use by Rose Mariee Allison;
- Desktop computer purchased and paid for by Defendant for use by Ann Sutton;
- Desktop computer purchased and paid for by Defendant for use by Perry Rettig;
- Desktop computer purchased and paid for by Defendant for use by James Peeples;
- Desktop computer purchased and paid for by Defendant for use by Steve Nimmo;
- Desktop computer purchased and paid for by Defendant for use by Monica Schulte;
- Desktop computer purchased and paid for by Defendant for use by Rick Austin;
- Desktop computer purchased and paid for by Defendant for use by Dr. James Mellichamp;
- Desktop computer purchased and paid for by Defendant for use by Robert Wainberg;
- Desktop computer purchased and paid for by Defendant for use by Elaine Bailey;
- Desktop computer purchased and paid for by Defendant for use by Carlos Camp;
- Microsoft 365/Outlook email accounts for those Piedmont College faculty members identified in

Defendant's objections and response to Plaintiffs Interrogatory No. 1;

- Microsoft 365/Outlook email accounts for those students potentially having relevant information to the subject matter of Plaintiffs Complaint; and
- Online evaluation system through CourseEval, through which Defendant's students can anonymously submit evaluations for courses in which they are enrolled.

Defendant further states that this matter is under continued discovery and investigation. Defendant reserves the right to supplement its response to Interrogatory No. 2 in accordance with the Georgia Civil Practice Act.

Plaintiff's Reply:

These responses fail to include electronic devices such as personal laptops or smartphones that are frequently used by Defendant's employees in the course and scope of their employment. It also does not include the personal email accounts such as gmail, including that used by President James Mellichamp. It also does not include any of the ESI devices that may have relevant information held by board members who use such devices in the course and scope of their official capacity as board members.

Interrogatory 4:

Search and Production Techniques: Please describe the techniques that you utilized to collect your final production set of documents in response to Plaintiff's Request for Production of Documents ("Plaintiff's RPD") served with this set of interrogatories. For each numbered requests in Plaintiff's RPD set forth:

- a) the physical locations you searched for documents;
- b) the sources of electronically stored information ("ESI") that you searched;
- c) the software that you used to search for ESI;
- d) the steps you took to prevent alteration or destruction of ESI, including metadata, during the search, review, and production processes;
- f) the search terms or other techniques that you used to search for responsive ESI; and,
- g) the persons who participated in search for responsive documents.

Defendant's Response:

Defendant specifically incorporates herein General Objections 1, 2 and 3. Defendant further objects to this Interrogatory to the extent it calls for the disclosure of information prepared in anticipation of litigation and protected by the attorney-client and work-product privileges. Subject to and without waiving said objections, Defendant will supplement its response to this Interrogatory upon the parties' agreement to an appropriate ESI protocol and production timetable.

Plaintiff's Reply:

Defendant has failed to respond to this interrogatory in its entirety. It has come to the attention of the Plaintiff that fact witnesses who include faculty and staff of Piedmont College were not even instructed to preserve their email and text messages and other responsive documents related to this lawsuit until Monday March 4, 2019.

Interrogatory 5:

Name of Every Student Who Allegedly Made a Complaint About Dr. Wainberg to Monica Schulte: Please identify the name of every current or former student, their telephone contact information, and the nature of the complaint that Monica Schulte contends in her May 18, 2018 letter made a complaint to her about Rob Wainberg.

Defendant's Response:

Defendant specifically incorporates herein General Objection Nos. 1, 2, 3, 5, 7, and 9. Defendant also objects to Interrogatory No. 5 on the grounds that it is vague, ambiguous, and seeks the disclosure of student records and/or information protected by FERPA, 20 U.S.C.A. § 1232g, which precludes Defendant from producing any personally identifiable information in education records absent a judicial order or lawfully issued subpoena, and upon notification to parents and students of such orders or subpoenas in advance of production.

Plaintiff's Reply:

Defendant has failed to respond to this request in its entirety. Defendant can certainly produce such information pursuant to their requirements and legal obligations under the law.

Interrogatory 7:

Description of Affirmative Defenses: For all affirmative defenses that you are asserting in this action, please provide a general description of the material facts which support those defenses and denials.

Defendant's Response:

Defendant specifically incorporates herein General Objection Nos. 1, 2, 3, 4, 7, 8, and 9. This Interrogatory calls for the legal conclusions and attorney work product of Defendant's counsel about what facts may or may not support a particular defense, and is thus an improper attempt to invade the trial preparation activities of Defendant's counsel. This Interrogatory is also overly broad, burdensome and would require Defendant to respond at its peril since the entire factual basis for "all affirmative defenses" cannot be set out in response to an interrogatory such as this. Subject to and without waiving such objections, Defendant states generally that it intends to rely upon facts and documents that have been produced or generated in discovery in this case, including facts and documents developed during depositions.

Plaintiff's Reply:

Defendant must provide a general description of the facts which support such affirmative defenses.

Interrogatory 9:

Documents you are withholding:

Have you provided to us all documents? For any documents you are withholding---

(i) state the nature of the privilege or exemption, whether the claimed privilege or exemption extends to all or only part of the requested information, the person or persons to whom the privilege obtains, the subject matter sought to be deemed privileged, and the identity of all persons who have knowledge of the information claimed to be privileged.

(ii) In addition, if the information or matter claimed to be privileged is a document, identify the document, give a brief summary of the contents or nature of the document, and identify all persons having knowledge of the

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document and all custodians or the document or any photocopies, facsimiles, and duplicates thereof.

Defendant's Response:

Defendant incorporates herein its General Objections 1, 2, 3, 4, 7, 8, and 9. Defendant also objects to Interrogatory No. 9 on the grounds that it is unduly burdensome, exceeds the scope of discovery, and requests detailed descriptions of documents and communications prepared in anticipation of litigation and protected by the attorney-client and work product privileges.

Subject to and without waiving said objections, Defendant will produce a privilege log meeting the parameters of Fed. R. Civ. Pro. 26(b)(5)(A).

Plaintiff's Reply:

Not responsive. This includes impeachment evidence. Please respond to this request in its entirety outside of what was produced in Defendant's privilege log.

REQUEST FOR PRODUCTION OF DOCUMENTS:

Request 2:

Please produce all electronically stored information ("ESI")— including that contained on the master and local databases in native format along with the electronic receipt or check sum of all documents and all files to verify that nothing has been altered. This includes information located on the exchange server, global server, and file servers, both locally stored and network stored, including email messages (forensic copies in native format in addition to the PST and OST file), email attachments, SMS messages (commonly referred to as text messages contained on personal cell phones and county issued cell phones), and Microsoft Productivity documents---with a last modified or created date concerning:

- Rob Wainberg
- Investigations or complaints related to Rob Wainberg, including the Title 9 investigation and subsequent termination proceeding..
- Investigations related to any Title 9 matter in the past 5 years.
- All documents relating to Title 9 investigations, guidance, policies, procedures, and training.
- Documents concerning all policies and procedures concerning Tenure.
- Documents concerning the Board term limits.

Remember all of the above includes all emails, cell phone texts or social media messaging!

Defendant's Response:

Defendant incorporates herein its General Objections I, 2, 3, 4, 5, 6, 7, 8, and 9. Defendant also objects to Request No. 2 on the grounds that it exceeds the scope of discovery, seeks documents prepared in anticipation of litigation and protected by the attorney-client privilege and the work product privilege, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's Request seeks information concerning investigations, complaints and individuals that are totally unrelated to the subject matter of this lawsuit. Evidence as to what may have occurred between one party and a third party with reference to a thoroughly distinct incident is irrelevant. It is not probative, but highly prejudicial. Defendant also objects to this Request on the grounds that it is unlimited in time and scope, and as such, is overly broad, oppressive and unduly burdensome. Further, Defendant objects to this Request to the extent it seeks documents or materials not in the possession, custody or control of this Defendant.

Subject to and without waiving said objections, Defendant will produce all non-privileged responsive materials contained in Defendant's ESI upon the parties' agreement to an appropriate ESI protocol and production timetable.

Plaintiff's Reply:

No responsive documents have been given. All documents related to any Title 9 investigation in the past 5 years must be included in addition to all emails, text and other electronic documents. Defendant's answer was non responsive.

Request 3:

Please provide the documents that were provided in a native format in response to request #2, in a separate

production in PDF format with Bates numbers so the parties may keep track of what has been exchanged.

Defendant's Response:

Defendant specifically incorporates herein and refers Plaintiff to Defendant's objections and response to Request No. 2.

Plaintiff's Reply:

No documents were produced.

Request 12:

All documents and all records of communications, including letters, notes, memoranda, statements, facsimiles, cell phone texts, and electronic mail (including all attachments) between or among you and any person concerning or relating in any manner to Plaintiff, his employment, Title 9 investigation, claims in this lawsuit, and Defendant's defenses to those claims.

Defendant's Response:

Defendant incorporates herein its General Objections 1, 2, 3, 4, 5, 6, 7, 8 and 9. Defendant also objects to Request No. 12 on the grounds that it is overly broad, vague, ambiguous, and seeks documents prepared in anticipation of litigation and protected by the attorney-client and work product privileges. Defendant further objects to this request to the extent it seeks materials that are not in the possession, custody or control of this Defendant, and information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Defendant also objects to this request to the extent it seeks disclosure of student records and/or information protected by FERPA, 20 U.S.C.A. § 1232g, which precludes Defendant from producing any personally identifiable information in education records absent a judicial order or lawfully issued subpoena, and upon notification to parents and students of such orders or subpoenas in advance of production.

Subject to and without waiving said objections, Defendant is producing herewith its Policies and Procedures Manual that was in effect at the time of Plaintiff's termination [Bates No. Wainberg-D-00000196 through 00000340]; Defendant's 2018-2019 Student Handbook [Bates No. Wainberg-D-00000341 through 00000411]; Plaintiff's Course Evaluation Comments from 2014 to 2018 [Bates No. Wainberg-D-00000412 through 00000429]; Summary of Plaintiff's Course Evaluations Prior to 2018 Concerning Inappropriate Language/Conduct by Plaintiff [Bates No. Wainberg-D-00000430]; Defendant's May 1, 2017 Employment Letter to Plaintiff for August 1, 2017 through May 31, 2018 Academic Year [Bates No. Wainberg-D- 00000431 through 00000432]; Dean Nimmo's Notes from his January 8, 2015 Meeting With Plaintiff Concerning Plaintiff's Course Evaluations From Fall 2014 (Bates No. Wainberg-D- 00000433); Dean Nimmo's Notes From His and Perry Rettig's April 16, 2018 Meeting with Plaintiff [Bates No. Wainberg-D-00000434]; Ann Sutton's handwritten notes from interview of Jessica Smith [Bates No. Wainberg-D-00000571]; Morgen Schulte's April 21, 2018 Statement [Bates No. Wainberg-D-00000435]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Griffin Caracciolo [Bates No. Wainberg-D-00000436 through 00000439]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Reed Alexander [Bates No. Wainberg- D-00000440 through 00000442]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Cayla Simmons [Bates No. Wainberg-D-00000443 through 00000445]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Jessica Smith [Bates No. Wainberg-D-00000446 through 00000447]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Tristan Rowell [Bates No. Wainberg-D-00000448 through 00000449]; Dean Nimmo's May 3, 2018 Letter to Plaintiff Regarding Plaintiff's 2017 Faculty Evaluation [Bates No. Wainberg-D- 00000450 through 00000451]; Synopsis of Dean Nimmo's Interview [Bates No. Wainberg-D- 00000452]; Synopsis of Elaine Bailey's Interview (Bates No. Wainberg-D-00000453 through 00000454); Elaine Bailey's Response to Synopsis of Her Interview [Bates No. Wainberg-D- 00000455 through 00000456]; Synopsis from Ann Sutton's Interview of Morgen Schulte [Bates No. Wainberg-D-00000457]; Synopsis from Rose Mariee Allison's and Jim Peeples' Interview of Plaintiff [Bates No. Wainberg-D-00000570]; Plaintiff's Counsel's May 9, 2018 Letter to College [Bates No. Wainberg-D-00000458 through 00000459]; Documents shown to Plaintiff at his May 9, 2018 Interview with Rose Mariee Allison and Jim Peeples [Bates No. Wainberg-D- 00000460 through 00000477]; Rose Mariee Allison's Notes from Plaintiff's May 9, 2018 Interview [Bates No. Wainberg-D-00000478 through 00000496]; Defendant's May 11, 2018 Notice of Termination to Plaintiff [Bates No. Wainberg-D-00000497 through 00000500]; Meeting Minutes from Plaintiff's May 11, 2018 meeting with Dr. James Mellichamp and Perry Rettig regarding Plaintiff's termination [Bates No. Wainberg-D-00000193 through 00000194]; Monika Schulte's May 18, 2018 Letter to Dr. Mellichamp (Bates No. Wainberg-D-00000501); Plaintiff's counsel May 18, 2018 Letter

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to College Requesting Appeal of Plaintiffs Termination [Bates No. Wainberg-D-00000502 through 00000503]; Patrick McKee's May 21, 2018 Letter to Plaintiffs Counsel Regarding Plaintiffs Request for Hearing [Bates No. Wainberg-D-00000504 through 00000506]; all documents provided by the College to the Special Committee and to Dr. Wainberg Prior to the Hearing on Plaintiffs Appeal [Bates No. Wainberg-D-00000507 through 00000552]; Perry Rettig's Handwritten Notes From May 25, 2018 Appeal Hearing [Bates No. Wainberg-D-00000553 through 00000555]; Perry Rettig's Typed Script For May 25, 2018 Appeal Hearing (Bates No. Wainberg-D-00000556 through 00000563); a copy of Defendant's May 28, 2018 correspondence to Plaintiff advising of the Special Committee's unanimous finding that the charges in Defendant's May 11, 2018 Notice of Termination to Plaintiff were proved [Bates No. Wainberg-D-00000195]; Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Griffin Caracciolo [Bates No. Wainberg-D-00001025]; Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Reed Alexander (Bates No. Wainberg-D-00001027); Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Cayla Simmons [Bates No. Wainberg-D-00001024]; Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Jessica Smith [Bates No. Wainberg-D-00001026]; and Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Tristan Rowell [Bates No. Wainberg-D-00001028]. Defendant further states that there may be non-privileged responsive materials contained in Defendant's ESI, which Defendant will produce pursuant to an appropriate ESI protocol and production timetable.

Plaintiff's Reply:

Documents are missing that must be obtained from students.

Thank you and I remain,

Very truly yours,

A handwritten signature in cursive script, appearing to read "Julie Oinonen".

JULIE J. OINONEN

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO. 18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

DECLARATION OF JULIE OINONEN

I, Julie Oinonen, declare pursuant 28 U.S.C. § 1746 under penalty of perjury that the following is true and correct:

1.

I am over 18 years of age, a citizen of the United States, and not blood related to the parties herein. The statements made are true and correct and are based upon my personal knowledge, as the Attorney for Plaintiff.

2.

On Thursday, March 6th, deponent/employee witness Dr. Stephanie Allmagno contacted me to inform me out of concern that Defendant's counsel had only just today (Thursday March 6th) emailed the deponents their notices of deposition and production along with Defendant's objections and motion for a protective order in an email by Defendant's counsel that was written in such a way to seem as to discourage them (the employee witnesses who are being deposed) from attending next week.

3.

I also learned that this would be the first time that Defendant's counsel had reached out to attempt to meet with the employee witnesses/deponents in an effort to learn what knowledge and information they may have.

4.

Dr. Allmagno informed me that she would likely be on vacation that week but could attend if need be. She also informed me that she was likely going to retain legal counsel, Doug Henry.

5.

I was gravely concerned to learn that no preservation letter/spoliation notice had ever gone out to Piedmont College faculty and staff directing them to preserve their emails and texts concerning Dr. Rob Wainberg until Monday, March 4th, nearly seven months after the lawsuit was filed.

6.

Plaintiff is extremely concerned since Defendant still has not produced discovery responses by the requisite deadlines that include documents that would be in the possession of Piedmont College employees and students.

7.

On Monday, March 4th Defendant's counsel informed me that because of the recent Order this past Friday denying Defendant's motion to dismiss, she simply had to "follow marching orders" and would now have to file a motion for protective order and could not file the consent motion to extend discovery that she had already drafted and stipulated to such agreement.

8.

Based on my investigation, research, as well as interviews of the majority of these witnesses, upon information and belief, these deponents have relevant, discoverable knowledge concerning the matters set forth in Plaintiff's complaint.

9.

In addition to confirming the dates for Plaintiff's counsel, Defendant's counsel represented to Plaintiff in mid-February that it would contact the deponents to check their availability; and Plaintiff's counsel and Defendant's counsel agreed that we would then move deponents' times around if necessary on the dates selected and confirmed by attorneys for both parties. Furthermore, Defendant's counsel had agreed to accept service on behalf of these witness employees.

FURTHER DECLARANT JULIE OINONEN SAYETH NOT

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of March 2019.

A handwritten signature in cursive script, appearing to read "Julie Oinonen".

Julie Oinonen

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

18CV0454
RUSSELL W. SMITH
MAR 08, 2019 11:26 AM

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO. 18CV454
v.)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

David C. Wall
David Wall, Clerk
Habersham County, Georgia

PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO PRODUCE DISCOVERY

Comes Now, ROBERT WAINBERG, through their counsel of record and shows this Court as follows:

Plaintiffs submitted interrogatories and requests for production of documents, the responses which were due on January 11, 2019, nearly two months ago. To date, there remain outstanding responses. Good faith efforts to resolve has been made. Consequently, Plaintiff files this motion to compel which will be withdrawn in full or in part if Defendant can produce that which Plaintiff needs and is legally entitled to obtain:

1. Defendant produced pages and pages of redactions with no information identifying such on the privilege log.¹
2. Absolutely no native format has been provided as Plaintiff seeks and is legally entitled to receive as part of the ESI to examine meta data on documents.
3. A spoliation notice and proposed ESI plan was submitted on August 20, 2018. See

¹ "When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party shall:

a. Expressly make the claim; and

b. Describe the nature of the documents, communications, or tangible things not produced or disclosed and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess such claim.

(2) Information produced. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. The producing party shall preserve the information until the claim is resolved. After being notified, a party:

a. Shall promptly return, sequester, or destroy the specified information and any copies thereof;

b. Shall not use or disclose the information until the claim is resolved;

c. Shall take reasonable steps to retrieve the information if the party disclosed it before being notified; and

d. May promptly present the information to the court for in camera review for determination of the claim."

Ga. Unif. Super. Ct. R. 5.5

Exhibit 1. Defendant has a duty to utilize best practices², and Defendant also had a duty under Georgia law to preserve all relevant evidence one on notice of foreseeable litigation or they will be held liable for all spoliation. Phillips v. Harmon, 297 Ga. 386, 397, 774 S.E.2d 596, 605 (2015).

Consequently, Defendant's attorneys should have immediately sent notice to all employees to preserve such information and upon information and belief, no one did until seven months after the lawsuit was filed. See Declaration of Plaintiff's counsel as attached to the Plaintiff's Response to Motion for Protective Order and Counter-Motion to Enjoin Defendant's from Obstructing Discovery which has been filed earlier with this Court on March 7, 2019. Defendant has agreed to conduct forensic examination and analysis of President Mellinchamp's phone but to date this issue still remains outstanding and no such ESI has been produced concerning the Board, President, high level management, or students.

These requests for ESI on cell phones is standard, routine practice particularly in employment litigation, E.g. see recent Order obtained by the Undersigned where Defendants applied for Interlocutory Appeal but were denied by the Georgia Court of Appeals where the Court ordered every single individual Board member of the employer defendant to turn over their **personal** cell phone for computer forensic examination and analysis to obtain all text messages concerning the Plaintiff as well as any racially derogatory messages about Black people. Because the Court of Appeals denied this Petition for Certiorari, this Order stands. *See Dr. Lana Foster v. Echols County Schools; Mr. Rocky Crosby Board Chair in his Individual Capacity; Ms. Florence Staten Board Vice Chair in Her Individual Capacity; Ms. Patricia Gray in Her Individual Capacity; Mr. Bo Corbett in His Individual Capacity; Mr. Mitchell Church In His Individual Capacity; and Mr. Lance Heard, Superintendent in his Individual Capacity*, No. 2018-CV-197841, 2018 WL (Superior Court of Echols County, GA. Oct. 31, 2018); *Echols County Schools et al. v. Lana Foster*, (Denying Application for Interlocutory Appeal) Ga. App. Case No. **A19I0107** (Dec. 11, 2018.)

4. Concerning the ESI native format, we specifically requested:

(b) ***Form of production for documents that exist in electronic form:*** Any documents that exist in electronic form are specifically requested to be produced in native or near-native format and should not be converted to an imaged format (e.g. .TIFF or .PDF) unless such document must be redacted to remove privileged content or the document does not exist within your care, custody, or control in a native electronic format. Native format requires production in the same format in which the information was customarily created, used and stored by you. The

² E.g. The Sedona Conference, *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 15 Sedona Conf. J. 217-263 (2014); *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 15 Sedona Conf. J. 265-304 (2014); Managing E-Discovery and ESI From Pre-Litigation Through Trial, 441 (Michael D. Berman, Courtney Ingrassia Barton, and Paul W. Grimm, eds., 2011); *United States v. O'Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008); *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331 (D.D.C 2008); *Victor Stanley, Inc. v. Creative Pip, Inc.*, 250 F.R.D. 251, 262 (D.Md. 2008) (Compliance with the Sedona Conference Best Practices for use of search and information retrieval will go a long way towards convincing the court that the method chosen was reasonable and reliable.) Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 262 (D. Md. 2008.)

table below supplies examples of the native or near native forms in which specific types of electronically stored information (ESI) should be produced:

Source ESI	Native or Near Native Form or Forms Sought
Microsoft Word Documents	.DOC, .DOCX
Microsoft Excel Spreadsheets	.XLX, .XLSX
Microsoft PowerPoint Presentations	.PPT, .PPTX
Microsoft Access Databases	.MDB
WordPerfect Documents	.WPD
Adobe Acrobat Documents	.PDF
Photographs	.JPG
Email	A forensic copy in native format in addition to a PST and OST file should be provided. Messages should be produced so as to preserve and supply the source RFC 2822 content of the communication and attachments in a fielded, electronically searchable format. For Microsoft Exchange or Outlook messaging, PST and OST format will suffice. Single message production formats like .MSG or .EML may be furnished if source foldering data is preserved and produced. If your workflow requires that attachments be extracted and produced separately from transmitting messages, attachments should be produced in their native forms with parent/child relationships to the message and containers preserved and produced.
Databases excluding email systems	Unless the entire contents of a database are responsive, extract responsive content to a fielded and electronically searchable format preserving metadata values, keys and field relationships. In doing so is infeasible, please identify the database and supply information concerning the schemae and query language of the database, along with a detailed description of its export capabilities, so as to facilitate Plaintiff's crafting a query to extract

Cell phones	and export responsive data. A forensic image of the cell phone is required. It is recommended to hire a computer forensic technician with the training and experience to forensically image phones as they have invested in specialized tools like Cellebrite UFED, Micro Systemation XRY, Lantern or Oxygen Forensic Suite. Forensic imaging provides three levels of access to the contents of mobile devices referred to as Physical, Logical and File System access. Opposing counsel should contact us to make arrangements that insures all relevant data contained within the forensic imaging (including deleted text messages) can be obtained and exchanged between parties.
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As explained in our original RPD's, productions should not be converted to TIFF. Specifically, we are requesting documents be "produced in native or near-native format and should not be converted to an imaged format (e.g. .TIFF..)" We object to such type of production and explained why in the article, "Why TIFF Files Should Be Banned In E-Discovery," written by expert Jeff Kerr. **Source:** <https://www.casefleet.com/blog/lets-ban-tiffs-in-e-discovery> Additionally, Defendants are requested to provide a separate production of documents in a PDF format unitized with Bates numbers so we can keep track of what each side sends.

The Relevant Data Range: Concerning Title 9 matters should be in the past five years, concerning Rob Wainberg it should be throughout the last school year he worked.

"Key Custodians" Emails and text messages must include actual key fact witnesses with having knowledge, this includes the Chairman Gus Arrendale, board members, and other students Defendant includes as key fact witnesses.

"Search terms" need to be fairly agreed upon but should encompass more than just search terms but should also include full analysis. <http://www.neworleansbar.org/news/committees/relying-on-keyword-search-for-e-discovery-it-may-harm-your-case>

5. **Defendant also fails to provide full and complete responses to the following and Plaintiff's Counsel submitted the following requests in a 6.4b letter whereby no response to date has been provided:**

INTERROGATORIES:

Interrogatory 1:

Fact Providers:

- a. Identify each person who provided any factual information included in your response to these interrogatories and request for production of documents.
- b. Identify each individual (their complete name and telephone number) who you know or

believe possesses knowledge or information relevant to the subject matter of this litigation and, with respect to each, provide a description of the knowledge or information you believe each such individual possesses. (This list should not be limited to persons who will or may testify on Defendant's behalf at trial, but necessarily includes them. It includes but is not limited to students, board members, and employees of the College.)

Defendant's Response:

Defendant objects and responds to subsections (a) and (b) of Plaintiff's Interrogatory No.1 as follows:

a. Defendant specifically incorporates herein its General Objections No. 1, 2, and 3. Defendant objects to providing trial preparation or other work product information. The identity of who prepared discovery responses is not discoverable. Subject to and without waiving said objections, Defendant responds that this is the corporate response of Piedmont College. The answers have been prepared with the assistance of the representatives of Piedmont College and the undersigned counsel. This Defendant will supplement these responses with an appropriate verification.

b. Defendant specifically incorporates herein its General Objections No. 1, 2, and 3. This Interrogatory is not limited to witnesses, but includes Defendant's attorneys, investigators, and consulting experts. Defendant further objects to this Interrogatory as overly broad and unduly burdensome because it would be impossible for this Defendant to determine every individual that has or claims to have "knowledge" or "information" relevant to this case, and to provide a description of that knowledge and information. To secure the information requested, Defendant would have to determine from each person everything they know. A party cannot be compelled to prepare the opposing party's case. Defendant also objects to this Interrogatory to the extent it seeks disclosure of student records and/or information protected by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C.A. § 1232g, which precludes Defendant from producing any personally identifiable information in education records absent a judicial order or lawfully issued subpoena, and upon notification to parents and students of such orders or subpoenas in advance of production. Subject to and without waiving these objections, Defendant identifies the following individuals who may have knowledge or information concerning Plaintiffs claims:

Gus Arrendale:

Executive Committee Member / Chairman of Board of Trustees for Piedmont College. Mr. Arrendale may only be contacted through undersigned counsel.

Dr. James Mellichamp:

President of Piedmont College. Dr. Mellichamp may only be contacted through undersigned counsel.

Ann Sutton:

Assistant to the VP for Administration and Finance and Title IX Coordinator for Piedmont College Ms. Sutton may only be contacted through undersigned counsel.

Rose Mariee Allison:

Director of Human Resources for Piedmont College Ms. Allison may only be contacted through

undersigned counsel.

Pen-y Rettig:

Vice President of Student Enrollment for Piedmont College (formerly Vice President of Academic Affairs) Mr. Rettig may only be contacted through undersigned counsel.

James Peebles:

Director of Intercollegiate Athletics for Piedmont College Mr. Peebles may only be contacted through undersigned counsel.

Dr. Steve Nimmo:

Dean of Arts and Sciences and Professor of Mathematics for Piedmont College Dr. Nimmo may only be contacted through undersigned counsel.

Monika Schulte:

International Office Coordinator and Associate Professor of German for Piedmont College Ms. Schulte may only be contacted through undersigned counsel.

Dr. Rick Austin:

Professor of Biology for Piedmont College Dr. Austin may only be contacted through undersigned counsel.

Dwight Evans:

Executive Committee Member I Board of Trustees for Piedmont College Mr. Evans may only be contacted through undersigned counsel.

Tom Hensley:

Executive Committee Member/ Board of Trustees for Piedmont College Mr. Hensley may only be contacted through undersigned counsel.

Eddy Ariail:

Executive Committee Member I Board of Trustees for Piedmont College
Ms. Ariail may only be contacted through undersigned
counsel.

Mylle Mangum:

Executive Committee Member/ Board of Trustees for Piedmont College Mr. Mangum may only be contacted through undersigned counsel.

Sandy Borrow:

Special Committee Member / Board of Trustees for Piedmont College Ms. Borrow may only be contacted through undersigned counsel.

Susan Wade:

Executive Assistant to Gus Arrendale Ms. Wade may only be contacted through undersigned counsel.

Elaine Bailey:

Associate Professor of Chemistry for Piedmont College / Chair of Department of Natural Sciences Ms. Bailey may only be contacted through undersigned counsel.

Martha Cantrell:

Special Committee Member/ Board of Trustees for Piedmont College Ms. Cantrell may only be contacted through undersigned counsel.

Dock Sisk:

Executive Committee Member and Special Committee Member/ Board of Trustees for Piedmont College. Mr. Sisk may only be contacted through undersigned counsel.

Stewart Swanson

Executive Committee Member/ Board of Trustees for Piedmont College. Mr. Swanson may only be contacted through undersigned counsel.

Defendant further responds that this matter is under continued discovery and investigation. Defendant's response to Interrogatory No. 1 will be supplemented in accordance with the Georgia Civil Practice Act.

Plaintiff's Reply:

1. These are missing the telephone numbers of each individual.
2. This requested each individual identified that possesses knowledge of the subject matter of this litigation. None of the many student names who possess such information as relevant fact witnesses have been provided, for example those that were a part of the Title 9 investigation.
3. A subpoena has already been provided and sent to Defendant's counsel, to date no acknowledgement or response has been given to Plaintiff's counsel after having that subpoena sent.

Interrogatory 2:

ESI Sources: Please identify all active sources of electronically stored information including cell phones or personal cell phones, that the President, Vice President, senior level cabinet staff, faculty, students, athletics director, other agents or employees who have relevant information concerning this lawsuit have used to communicate with each other. This includes all computers that include both locally stored and networked stored information on laptops, stationary computers, smartphones, tablet devices, webmail accounts, social media accounts, servers including file servers, exchange servers, and department file shares. For each source, please set forth: a) its total capacity in gigabytes; b) its physical location, if applicable and whose custody and control it is under; c) the total volume of active data stored on or in the source; d) whether you have created a bit for bit forensic image of the source; and e) sufficient identifying information about the source, such as the version, the manufacturer, model number, operating system, etc.

Defendant's Response:

Defendant incorporates herein its General Objections 1, 2, 3, 4, 5, 6, 7, 8, and 9. Defendant also objects to Interrogatory No. 2 on the grounds that it is overly broad, vague, ambiguous, unduly burdensome, exceeds the scope of discovery, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this Interrogatory to the extent it seeks the disclosure of student records and/or information protected by FERPA, 20 U.S.C.A. § 1232g, which precludes Defendant from producing any personally identifiable information in education records absent a judicial order or lawfully issued subpoena, and upon notification to parents and students of such orders or subpoenas in advance of production.

Subject to and without waiving said objections, Defendant identifies the following sources within Defendant's possession, custody and control that may contain non-privileged relevant ESI material:

- iPhone purchased and paid for by Defendant for use by Dr. James Mellichamp;
- Desktop computer purchased and paid for by Defendant for use by Rose Mariee Allison;
- Desktop computer purchased and paid for by Defendant for use by Ann Sutton;
- Desktop computer purchased and paid for by Defendant for use by Perry Rettig;
- Desktop computer purchased and paid for by Defendant for use by James Peeples;
- Desktop computer purchased and paid for by Defendant for use by Steve Nimmo;
- Desktop computer purchased and paid for by Defendant for use by Monica Schulte;
- Desktop computer purchased and paid for by Defendant for use by Rick Austin;
- Desktop computer purchased and paid for by Defendant for use by Dr. James Mellichamp;
- Desktop computer purchased and paid for by Defendant for use by Robert Wainberg;
- Desktop computer purchased and paid for by Defendant for use by Elaine Bailey;
- Desktop computer purchased and paid for by Defendant for use by Carlos Camp;
- Microsoft 365/Outlook email accounts for those Piedmont College faculty members identified in Defendant's objections and response to Plaintiffs Interrogatory No. 1;
- Microsoft 365/Outlook email accounts for those students potentially having relevant information to the subject matter of Plaintiffs Complaint; and
- Online evaluation system through CourseEval, through which Defendant's students can anonymously submit evaluations for courses in which they are enrolled.

Defendant further states that this matter is under continued discovery and investigation. Defendant reserves the right to supplement its response to Interrogatory No. 2 in accordance with the Georgia Civil Practice Act.

Plaintiff's Reply:

These responses fail to include electronic devices such as personal laptops or smartphones that are frequently used by Defendant's employees in the course and scope of their employment. It also does not include the personal email accounts such as gmail, including that used by President James Mellichamp. It also does not include any of the ESI devices that may have relevant information held by board members who use such devices in the course and scope of their official capacity as board members or students who were involved in making the Title 9 complaint against Plaintiff.

Interrogatory 4:

Search and Production Techniques: Please describe the techniques that you utilized to collect your final production set of documents in response to Plaintiff's Request for Production of Documents ("Plaintiff's RPD") served with this set of interrogatories. For each numbered requests in Plaintiff's RPD set forth:

- a) the physical locations you searched for documents;
- b) the sources of electronically stored information ("ESI") that you searched;
- c) the software that you used to search for ESI;
- d) the steps you took to prevent alteration or destruction of ESI, including metadata, during the search, review, and production processes;
- f) the search terms or other techniques that you used to search for responsive ESI; and,
- g) the persons who participated in search for responsive documents.

Defendant's Response:

Defendant specifically incorporates herein General Objections 1, 2 and 3. Defendant further objects to this Interrogatory to the extent it calls for the disclosure of information prepared in anticipation of litigation and protected by the attorney-client and work-product privileges. Subject to and without waiving said objections, Defendant will supplement its response to this Interrogatory upon the parties' agreement to an appropriate ESI protocol and production timetable.

Plaintiff's Reply:

Defendant has failed to respond to this interrogatory in its entirety. It has come to the attention of the Plaintiff that fact witnesses who include faculty and staff of Piedmont College were not even instructed to preserve their email and text messages and other responsive documents related to this lawsuit until Monday March 4, 2019.

Interrogatory 5:

Name of Every Student Who Allegedly Made a Complaint About Dr. Wainberg to Monica Schulte: Please identify the name of every current or former student, their telephone contact information, and the nature of the complaint that Monica Schulte contends in her May 18, 2018 letter made a complaint to her about Rob Wainberg.

Defendant's Response:

Defendant specifically incorporates herein General Objection Nos. 1, 2, 3, 5, 7, and 9. Defendant also objects to Interrogatory No. 5 on the grounds that it is vague, ambiguous, and seeks the disclosure of student records and/or information protected by FERPA, 20 U.S.C.A. § 1232g, which precludes Defendant from producing any personally identifiable information in education records absent a judicial order or lawfully issued subpoena, and upon notification to parents and students of such orders or subpoenas in advance of production.

Plaintiff's Reply:

Defendant has failed to respond to this request in its entirety. Defendant can certainly produce such information pursuant to their requirements and legal obligations under the law as it now has a subpoena but to date no response or even acknowledgement has been given to Plaintiff after receiving such subpoena.

Interrogatory 7:

Description of Affirmative Defenses: For all affirmative defenses that you are asserting in this action, please provide a general description of the material facts which support those defenses and denials.

Defendant's Response:

Defendant specifically incorporates herein General Objection Nos. 1, 2, 3, 4, 7, 8, and 9. This Interrogatory calls for the legal conclusions and attorney work product of Defendant's counsel about what facts may or may not support a particular defense, and is thus an improper attempt to invade the trial preparation activities of Defendant's counsel. This Interrogatory is also overly broad, burdensome and would require Defendant to respond at its peril since the entire factual basis for "all affirmative defenses" cannot be set out in response to an interrogatory such as this. Subject to and without waiving such objections, Defendant states generally that it intends to rely upon facts and documents that have been produced or generated in discovery in this case, including facts and documents developed during depositions.

Plaintiff's Reply:

Defendant must provide a general description of the facts which support such affirmative defenses.

Interrogatory 9:

Documents you are withholding:

Have you provided to us all documents? For any documents you are withholding---

(i) state the nature of the privilege or exemption, whether the claimed privilege or exemption extends to all or only part of the requested information, the person or persons to whom the privilege obtains, the subject matter sought to be deemed privileged, and the identity of all persons who have knowledge of the information claimed to be privileged.

(ii) In addition, if the information or matter claimed to be privileged is a document, identify the document, give a brief summary of the contents or nature of the document, and identify all persons having knowledge of the document and all custodians of the document or any photocopies, facsimiles, and duplicates thereof.

Defendant's Response:

Defendant incorporates herein its General Objections 1, 2, 3, 4, 7, 8, and 9. Defendant also objects to Interrogatory No. 9 on the grounds that it is unduly burdensome, exceeds the scope of discovery, and requests detailed descriptions of documents and communications prepared in anticipation of litigation and protected by the attorney-client and work product privileges. Subject to and without waiving said objections, Defendant will produce a privilege log meeting the parameters of Fed. R. Civ. Pro. 26(b)(5)(A).

Plaintiff's Reply:

Not responsive. This includes impeachment evidence. Please respond to this request in its entirety outside of what was produced in Defendant's privilege log.

REQUEST FOR PRODUCTION OF DOCUMENTS:

Request 2:

Please produce all electronically stored information (“ESI”)— including that contained on the master and local databases in native format along with the electronic receipt or check sum of all documents and all files to verify that nothing has been altered. This includes information located on the exchange server, global server, and file servers, both locally stored and network stored, including email messages (forensic copies in native format in addition to the PST and OST file), email attachments, SMS messages (commonly referred to as text messages contained on personal cell phones and county issued cell phones), and Microsoft Productivity documents---with a last modified or created date concerning:

- Rob Wainberg
- Investigations or complaints related to Rob Wainberg, including the Title 9 investigation and subsequent termination proceeding..
- Investigations related to any Title 9 matter in the past 5 years.
- All documents relating to Title 9 investigations, guidance, policies, procedures, and training.
- Documents concerning all policies and procedures concerning Tenure.
- Documents concerning the Board term limits.

Remember all of the above includes all emails, cell phone texts or social media messaging!

Defendant’s Response:

Defendant incorporates herein its General Objections I, 2, 3, 4, 5, 6, 7, 8, and 9. Defendant also objects to Request No. 2 on the grounds that it exceeds the scope of discovery, seeks documents prepared in anticipation of litigation and protected by the attorney-client privilege and the work product privilege, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Plaintiff’s Request seeks information concerning investigations, complaints and individuals that are totally unrelated to the subject matter of this lawsuit. Evidence as to what may have occurred between one party and a third party with reference to a thoroughly distinct incident is irrelevant. It is not probative, but highly prejudicial. Defendant also objects to this Request on the grounds that it is unlimited in time and scope, and as such, is overly broad, oppressive and unduly burdensome. Further, Defendant objects to this Request to the extent it seeks documents or materials not in the possession, custody or control of this Defendant.

Subject to and without waiving said objections, Defendant will produce all non-privileged responsive materials contained in Defendant’s ESI upon the parties’ agreement to an appropriate ESI protocol and production timetable.

Plaintiff’s Reply:

No responsive documents have been given. All documents related to any Title 9 investigation in the past 5 years must be included in addition to all emails, text and other electronic documents. Defendant’s answer was non responsive.

There are other Title 9 sexual harassment complaints and allegations that have been made which show how inequitable the treatment of Plaintiff was in using an entirely different process and outcome. These must be provided.

Not all of the recordings or notes or documents, particularly exculpatory evidence from the Rob Wainberg investigation has ever been provided to him as promised. It is still missing from the

file. Where is it?

Request 3:

Please provide the documents that were provided in a native format in response to request #2, in a separate production in PDF format with Bates numbers so the parties may keep track of what has been exchanged.

Defendant's Response:

Defendant specifically incorporates herein and refers Plaintiff to Defendant's objections and response to Request No. 2.

Plaintiff's Reply:

No documents were produced.

Request 12:

All documents and all records of communications, including letters, notes, memoranda, statements, facsimiles, cell phone texts, and electronic mail (including all attachments) between or among you and any person concerning or relating in any manner to Plaintiff, his employment, Title 9 investigation, claims in this lawsuit, and Defendant's defenses to those claims.

Defendant's Response:

Defendant incorporates herein its General Objections 1, 2, 3, 4, 5, 6, 7, 8 and 9. Defendant also objects to Request No. 12 on the grounds that it is overly broad, vague, ambiguous, and seeks documents prepared in anticipation of litigation and protected by the attorney-client and work product privileges. Defendant further objects to this request to the extent it seeks materials that are not in the possession, custody or control of this Defendant, and information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Defendant also objects to this request to the extent it seeks disclosure of student records and/or information protected by FERPA, 20 U.S.C.A. § 1232g, which precludes Defendant from producing any personally identifiable information in education records absent a judicial order or lawfully issued subpoena, and upon notification to parents and students of such orders or subpoenas in advance of production.

Subject to and without waiving said objections, Defendant is producing herewith its Policies and Procedures Manual that was in effect at the time of Plaintiffs termination [Bates No. Wainberg-D-00000196 through 00000340]; Defendant's 2018-2019 Student Handbook [Bates No. Wainberg-D-00000341 through 00000411]; Plaintiffs Course Evaluation Comments from 2014 to 2018 [Bates No. Wainberg-D-00000412 through 00000429]; Summary of Plaintiffs Course Evaluations Prior to 2018 Concerning Inappropriate Language/Conduct by Plaintiff [Bates No. Wainberg-D-00000430]; Defendant's May 1, 2017 Employment Letter to Plaintiff for August 1, 2017 through May 31, 2018 Academic Year [Bates No. Wainberg-D- 00000431 through 00000432]; Dean Nimmo's Notes from his January 8, 2015 Meeting With Plaintiff Concerning Plaintiffs Course Evaluations From Fall 2014 (Bates No. Wainberg-D- 00000433); Dean Nimmo's Notes From His and Perry Rettig's April 16, 2018 Meeting with Plaintiff [Bates No. Wainberg-D-00000434]; Ann Sutton's handwritten notes from interview of Jessica Smith [Bates No. Wainberg-D-00000571; Morgen Schulte's April 21, 2018 Statement [Bates No. Wainberg-D-00000435]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Griffin

Caracciolo [Bates No. Wainberg-D-00000436 through 00000439]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Reed Alexander [Bates No. Wainberg- D-00000440 through 00000442]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Cayla Simmons [Bates No. Wainberg-D-00000443 through 00000445]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Jessica Smith [Bates No. Wainberg-D-00000446 through 00000447]; Synopsis from Rose Mariee Allison and Jim Peeples' Interview of Tristan Rowell [Bates No. Wainberg-D-00000448 through 00000449]; Dean Nimmo's May 3, 2018 Letter to Plaintiff Regarding Plaintiffs 2017 Faculty Evaluation [Bates No. Wainberg-D- 00000450 through 00000451]; Synopsis of Dean Nimmo's Interview [Bates No. Wainberg-D- 00000452]; Synopsis of Elaine Bailey's Interview (Bates No. Wainberg-D-00000453 through 00000454); Elaine Bailey's Response to Synopsis of Her Interview [Bates No. Wainberg-D- 00000455 through 00000456]; Synopsis from Ann Sutton's Interview of Morgen Schulte [Bates No. Wainberg-D-00000457]; Synopsis from Rose Mariee Allison's and Jim Peeples' Interview of Plaintiff [Bates No. Wainberg-D-00000570]; Plaintiffs Counsel's May 9, 2018 Letter to College [Bates No. Wainberg-D-00000458 through 00000459]; Documents shown to Plaintiff at his May 9, 2018 Interview with Rose Mariee Allison and Jim Peeples [Bates No. Wainberg-D- 00000460 through 00000477]; Rose Mariee Allison's Notes from Plaintiffs May 9, 2018 Interview [Bates No. Wainberg-D-00000478 through 00000496]; Defendant's May 11, 2018 Notice of Termination to Plaintiff [Bates No. Wainberg-D-00000497 through 00000500]; Meeting Minutes from Plaintiffs May 11, 2018 meeting with Dr. James Mellichamp and Perry Rettig regarding Plaintiff's termination [Bates No. Wainberg-D-00000193 through 00000194]; Monika Schulte's May 18, 2018 Letter to Dr. Mellichamp (Bates No. Wainberg-D-00000501); Plaintiff's counsel May 18, 2018 Letter to College Requesting Appeal of Plaintiffs Termination [Bates No. Wainberg-D-00000502 through 00000503]; Patrick McKee's May 21, 2018 Letter to Plaintiffs Counsel Regarding Plaintiffs Request for Hearing [Bates No. Wainberg-D-00000504 through 00000506]; all documents provided by the College to the Special Committee and to Dr. Wainberg Prior to the Hearing on Plaintiffs Appeal [Bates No. Wainberg-D-00000507 through 00000552]; Perry Rettig's Handwritten Notes From May 25, 2018 Appeal Hearing [Bates No. Wainberg-D-00000553 through 00000555]; Perry Rettig's Typed Script For May 25, 2018 Appeal Hearing (Bates No. Wainberg-D-00000556 through 00000563); a copy of Defendant's May 28, 2018 correspondence to Plaintiff advising of the Special Committee's unanimous finding that the charges in Defendant's May 11, 2018 Notice of Termination to Plaintiff were proved [Bates No. Wainberg-D-00000195]; Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Griffin Caracciolo [Bates No. Wainberg-D-00001025]; Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Reed Alexander (Bates No. Wainberg-D-00001027); Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Cayla Simmons [Bates No. Wainberg-D-00001024]; Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Jessica Smith [Bates No. Wainberg-D-00001026]; and Audio Recording from Rose Mariee Allison and Jim Peeples' Interview of Tristan Rowell [Bates No. Wainberg-D-00001028]. Defendant further states that there may be non-privileged responsive materials contained in Defendant's ESI, which Defendant will produce pursuant to an appropriate ESI protocol and production timetable.

Plaintiff's Reply:

Documents are missing that must be obtained from students. Tons of documents had redactions on it that specifically had to do with Plaintiff and the Title 9 investigation. Defendant is in receipt

of the subpoena they claimed they needed. To date there hasn't even been an email reply acknowledging receipt.

ARGUMENT:

Plaintiffs' requests call for Electronically Searchable Information, also known as ESI. As is the commonplace best practice in e-discovery when electronically searchable information is sought, a Defendant employer should not simply rely on an honesty policy which depends on potential 'bad actors' to produce potentially self-damning disclosures; rather, the parties utilize ESI vendors, electronic tools, and electronic search protocols and methodologies that will solely extract relevant, key word search terms from both personal computer and cell phone devices while maintaining the owner's privacy. E.g. The Sedona Conference, *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 15 Sedona Conf. J. 217-263 (2014); *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 15 Sedona Conf. J. 265-304 (2014); Managing E-Discovery and ESI From Pre-Litigation Through Trial 441 (Michael D. Berman, Courtney Ingrassia Barton, and Paul W. Grimm, eds., 2011); *United States v. O'Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008); *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331 (D.D.C. 2008); *Victor Stanley, Inc. v. Creative Pip, Inc.*, 250 F.R.D. 251, 262 (D.Md. 2008) (Compliance with the Sedona Conference Best Practices for use of search and information retrieval will go a long way towards convincing the court that the method chosen was reasonable and reliable.) Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 262 (D. Md. 2008.)

This demand for text and electronic messages is an ordinary, very common civil litigation discovery tool utilized in suits against employers. Where employers refuse to comply with discovery requests in civil litigation, the Courts may and should order Defendant to produce cell phone devices to undergo a forensic mobile imprint. See Exhibit 2.

An e-discovery company would extract such relevant information and would identify what if any information was deleted subsequent to the spoliation notice which was submitted to the Defendants. See Exhibit 1. Then, before such information is produced to Plaintiff's Counsel, it would produce the documents to Defendants' counsel for review and if a privilege exception is claimed, the documents would be submitted to the Court for an in camera inspection. E.g. See exhibit 2, p. 3. Utilizing a third-party company is not a privacy violation but a standard best practice within e-discovery which establishes that "devising a defensible electronic search protocol...that includes quality checks and that is well supervised are central to a well-constructed search methodology, especially in the absence of cooperation with or by opposing counsel. Close supervision of the whole process is crucial."³ Moreover, one of the important suggestions by the Sedona Conference, a non-profit group made up of judges and lawyers whose principles form the most authoritative guidelines for e-discovery to date, is that "independent testing by third party professionals" be done in order to be sure that data such as emails and text messages were "successfully extracted." *Id.* The aim of such a strategy is "not only to be prepared to defend the reasonableness of a search protocol" but "to assure quality control and quality assurance in the e-discovery context" because "the practical consequences of failing to institute quality checks on the process can be severe" where the Courts have sanctioned parties and waived privilege "based on a party's failure to institute quality control sampling." *Id.* at 476.

Defendants have violated the very basic in best practices by failing to response to interrogatories which requested ESI information. Defendants also failed to respond to all requests for production of ESI documents.

³ Managing E-Discovery and ESI From Pre-Litigation Through Trial 474-475 (Michael D. Berman, Courtney Ingrassia Barton, and Paul W. Grimm, eds., 2011) citing *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 15 Sedona Conf. J. 265-304 (2014).

In sum, Defendants must cooperate with an electronic discovery search protocol to assure quality control and assurance as complies with best practices and principles for addressing electronic document production.

Every party is entitled to discover *all* relevant, non-privileged information in the possession or control of any person, including a corporate defendant. O.C.G.A. §9-11-26. “Relevance,” in the context of discovery, is a far less stringent burden than “admissibility” at trial. See id. (“Relevant” includes all evidence that “appears reasonably calculated to lead to the discovery of admissible evidence.”); Bullard v. Ewing; 158 Ga. App. 287, 291, 279 S.E.2d 737, 740 (1981) (“The discovery procedure is to be given a liberal construction in favor of supplying a party with the facts without reference to whether the facts sought are admissible upon the trial of the case.”).

CONCLUSION

For all of the foregoing reasons, Plaintiff moves the Court:

- 1) To grant their motion to compel;
- 2) To respond fully, completely, and without objection to Plaintiffs Requests for Interrogatories and Requests for Production of Documents;
- 3) To make available Defendants’ key witnesses personal cell phone devices and electronic devices for ESI forensic examination and analysis from ESI sources. Defendants will assume the cost of this retrieval;
- 4) To work out a ESI protocol that conducts full forensic collection and analysis of all key witnesses along with appropriate date range (five years for Title 9 or sexual harassment complaints and the last year of employment of Plaintiff concerning Plaintiff);
- 5) To grant all reasonable expenses and attorney fees of this motion;

- 6) To order that any documents withheld by Defendants or their Counsel, including such records produced by the E-discovery company that are withheld on grounds of a claimed work product/attorney-client privilege, must be submitted for *in camera* inspection:

CERTIFICATION OF GOOD FAITH EFFORT TO RESOLVE DISPUTES:

The undersigned counsel for PLAINTIFFS hereby certifies in accordance with Uniform Superior Court [State Court] Rule 6.4(B) that she has conferred with counsel for DEFENDANTS in a good faith effort to resolve by agreement the issues raised by Plaintiff's Motion to Compel and that said efforts have failed thus far as Defendant has not produced such information or responded to such follow up such as Plaintiff providing a subpoena for the students.

This 8th of MARCH, 2019

Respectfully Submitted:

By: /S/JULIE J. OINONEN
Julie Oinonen (Ga 722018)
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julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing PLAINTIFF'S
MOTION TO COMPEL AND GOOD FAITH CERTIFICATE using the Peachcourt system,
along with sending paper and e-mail notification of such filing to all counsel of record:

Respectfully submitted this 8th of MARCH 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga 722018)

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Atlanta, Georgia 30303
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Counsel for Plaintiff

SPOILIATION NOTICE—EXHIBIT 1:

WILLIAMS OINONEN LLC

THE GRANT BUILDING, SUITE 200
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[HTTP://WWW.GOODGEORGIALAWYER.COM](http://www.goodgeorgialawyer.com)
TEL.: (404) 654-0288
FAX: (404) 592-6225

August 20, 2018

Re: To All Members of the Board of Piedmont College; President Mellinchamp; Piedmont College; Senior Level Cabinet; Human Resources; Upper Level Management; and All Piedmont College Employees and Students Involved In Dr. Wainberg's Title 9 Employment Investigation and Subsequent Termination Proceedings:

Greetings, I am the attorney for Dr. Robert Wainberg. I am writing this letter for the following purposes:

- 1) To remind of your duty to preserve information regarding this case, to include electronically stored information; and
- 2) To propose a tentative plan regarding the production of ESI in this case;

This is broken into two sections; section I discusses the duty to preserve, as a reminder of Defendant's duty in relation to reasonable anticipated litigation of this case. This duty has become more relevant now as the Courts routinely fashion orders regarding the "loss" of relevant data. Consequently, we will critically examine which, if any, reasonable steps Defendants took to preserve information, once each reasonably anticipated this litigation.

SECTION I

I propose that we develop a staged approach to the collection and processing of ESI. But we cannot develop a plan if we do not fully understand your network system such as the software programs used and the manner in which Defendants generate and store data, as well the number and type of servers used by Defendants. Consequently, in the event of litigation, we must begin with a corporate deponent, for the sole purpose of testifying about ESI subject areas. For example, it is my understanding that potentially relevant information may be stored on multiple servers because different divisions use different servers or have different sources. Moreover, emails may be stored in a repository while also being stored on local hard drives or in PST/OST folders. Plus, as you know, collection of Microsoft suite documents is treated differently from the collection of emails. And we also need to agree on TIFF production, because while Defendants may need to produce TIFF images (e.g., TIFF images for the purpose of redacting privileged information), TIFF images should still be accompanied by a load file that contains

fully searchable native data. We need to resolve these type of issues—and more—prior to collecting data.

I can provide you with proposed subject areas that we will develop with our ESI vendor, relevant data technologies. Once we understand the systems at issue, we can identify key custodians such as those named in this letter, and then develop a cost-efficient method of collecting and processing ESI by using, for example, search terms, technology assisted review, sampling, deduplication (vertical or horizontal), or any number of combined methods that drive down costs, while maintaining precision with respect to locating relevant data.

SECTION II

Plaintiff demands that you preserve documents, tangible things and electronically stored information potentially relevant to the issues in this cause. As used in this document, “you” and “your” refers to all Board members of Piedmont College and all Piedmont College employees and students involved in the matter of Dr. Wainberg’s Title 9 investigation and subsequent termination hearing. It also includes each of your respective agents, attorneys, accountants, employees, partners and other persons who assist these persons such as personal assistance, secretaries, legal advisors, and chiefs of staff.

You should anticipate that much of the information subject to disclosure or responsive to discovery in this cause is stored on your current and former computer systems and other media and devices (including personal digital assistants, voice-messaging systems, online repositories and cell phones).

Electronically stored information (hereinafter “ESI”) should be afforded the broadest possible meaning and includes (*by way of example and not as an exclusive list*) potentially relevant information electronically, magnetically, optically or otherwise stored as:

- Text messaging from personal cell phones and work issued cell phones
- Digital communications (e.g., e-mail, voice mail, instant messaging);
- E-Mail Server Stores (e.g., Lotus Domino .NSF or Microsoft Exchange .EDB)
- Word processed documents (e.g., Word or WordPerfect files and drafts);
- Spreadsheets and tables (e.g., Excel or Lotus 123 worksheets);
- Accounting Application Data (e.g., QuickBooks, Money, Peachtree data);
- Image and Facsimile Files (e.g., .PDF, .TIFF, .JPG, .GIF images);
- Sound Recordings (e.g., .WAV and .MP3 files);
- Video and Animation (e.g., .AVI and .MOV files);
- Databases (e.g., Access, Oracle, SQL Server data, SAP);
- Contact and Relationship Management Data (e.g., Outlook, ACT!);
- Calendar and Diary Application Data (e.g., Outlook PST, blog entries);
- Online Access Data (e.g., Temporary Internet Files, History, Cookies);
- Presentations (e.g., PowerPoint, Corel Presentations)
- Network Access and Server Activity Logs;
- Project Management Application Data;
- Computer Aided Design/Drawing Files; and

- Backup and Archival Files (e.g., Veritas, Zip, .GHO)

ESI resides not only in areas of electronic, magnetic and optical storage media reasonably accessible to you, but also in areas you may deem *not* reasonably accessible. You are obliged to *preserve* potentially relevant evidence from *both* sources of ESI, even if you do not anticipate *producing* such ESI.

The demand that you preserve both accessible and inaccessible ESI is reasonable and necessary. Pursuant to the rules of civil procedure, you must identify all sources of ESI you decline to produce and demonstrate to the court why such sources are not reasonably accessible. For good cause shown, the court may order production of the ESI, even if it is not reasonably accessible. Accordingly, you must preserve ESI that you deem inaccessible so as not to preempt the court's authority.

Preservation Requires Immediate Intervention

You must act immediately to preserve potentially relevant ESI, including, without limitation, information with the *earlier* of a Created or Last Modified date on or after August 1, 2017 through the date of this demand and concerning:

1. The events concerning Plaintiff's termination and investigation concerning Title 9 allegations;
2. ESI you may use to support claims or defenses in this case.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must intervene to prevent loss due to routine operations or malfeasance and employ proper techniques and protocols to preserve ESI. *Booting a drive, examining its contents or running any application may irretrievably alter the evidence it contains and constitute unlawful spoliation of evidence. Preservation requires action.*

Nothing in this demand for preservation of ESI should be understood to diminish your concurrent obligation to preserve documents, tangible things and other potentially relevant evidence.

Suspension of Routine Destruction

Your obligation to place a litigation hold on information began long before this letter; as a reminder, you had, and still do have, an obligation to initiate a litigation hold for potentially relevant ESI, documents and tangible things and to act diligently and in good faith to secure and audit compliance with such litigation hold. You are further directed to immediately identify and modify or suspend features of your information systems and devices that, in routine operation, operate to cause the loss of potentially relevant ESI. Examples of such features and operations include:

- Purging the contents of e-mail repositories by age, capacity or other criteria;
- Using data or media wiping, disposal, erasure or encryption utilities or devices;
- Overwriting, erasing, destroying or discarding backup media;
- Re-assigning, re-imaging or disposing of systems, servers, devices or media;
- Running antivirus or other programs effecting wholesale metadata alteration;

- Releasing or purging online storage repositories;
- Using metadata stripper utilities;
- Disabling server, packet or local instant messaging logging; and,
- Executing drive or file defragmentation or compression programs.

Guard Against Deletion

You should anticipate that your officers, employees or others may seek to hide, destroy or alter ESI. You must act to prevent and guard against such actions. Especially where company machines were used for Internet access or personal communications, you should anticipate that users may seek to delete or destroy information they regard as personal, confidential or embarrassing, and in so doing, they may also delete or destroy potentially relevant ESI. This concern is not unique to you. It's simply conduct that occurs with such regularity that any custodian of ESI and their counsel must anticipate and guard against its occurrence.

Preservation of Backup Tapes

Although you should have preserved the following, if you have not already, you must preserve complete backup tape sets (including differentials and incrementals) containing e-mail, text messages, and ESI of the following custodians for all dates during the below-listed intervals:

- We need a forensically sound imaging to be done to each person's cell phone that was involved in the Title 9 investigation and subsequent termination proceedings of Dr. Wainberg.¹
- Email and Text messages from the Personal Cell Phones, Computers, and Work Computer Devices of all Piedmont College Board members, President Mellinchamp, and his executive staff from March of 2018 to date.
- Emails and Text messages All Piedmont College employees and students cell phones and emails that were involved in Dr. Wainberg's Title 9 investigation and subsequent termination proceedings.

Based on my understanding, there may be multiple servers for multiple divisions, thus potentially relevant information may be found on dedicated servers for the College including desktop computers, personal and work issued cell phones, and property such as fax machines and digital printers. Please, when preserving data, take into account the multiple systems on which Custodian information is both generated and stored.

There will be more custodians but these are the key custodians and offices that we would like to start with.

Act to Prevent Spoliation

You should take affirmative steps to prevent anyone with access to your data, systems and archives from seeking to modify, destroy or hide ESI on network or local hard drives and on other media or devices (such as by deleting or overwriting files, using data shredding and

¹ <https://www.nuix.com/blog/making-turn-mobile-evidence-ediscovery>

overwriting applications, defragmentation, re-imaging, damaging or replacing media, encryption, compression, steganography or the like).

System Sequestration or Forensically Sound Imaging

As an appropriate and cost-effective means of preservation, you should remove from service and securely sequester the systems, media and devices housing potentially relevant ESI of the following persons:

All ESI from each individual involved in Dr. Wainberg's Title 9 investigation and subsequent termination hearing.

In the event you deem it impractical to sequester systems, media and devices, we believe that the breadth of preservation required, coupled with the modest number of systems implicated, dictates that forensically sound imaging of the systems, media and devices of those named above is expedient and cost effective. As we anticipate the need for forensic examination of one or more of the systems and the presence of relevant evidence in forensically accessible areas of the drives, we demand that you employ forensically sound ESI preservation methods. Failure to use such methods poses a significant threat of spoliation and data loss.

"Forensically sound ESI preservation" means duplication of all data stored on the evidence media while employing a proper chain of custody and using tools and methods that make no changes to the evidence and support authentication of the duplicate as a true and complete bit-for-bit image of the original. The products of forensically sound duplication are called, *inter alia*, "bitstream images" or "clones" of the evidence media. A forensically sound preservation method guards against changes to metadata evidence and preserves all parts of the electronic evidence, including deleted evidence within "unallocated clusters" and "slack space."

Be advised that a conventional copy, backup or "Ghosting" of a hard drive does not produce a forensically sound image because it only captures active, unlocked data files and fails to preserve forensically significant data existing in, e.g., unallocated clusters and slack space.

Labeling forensically sound images

Once obtained, each such forensically sound image should be labeled to identify the date of acquisition, the person or entity acquiring the image and the system and medium from which it was obtained. Each such image should be preserved without alteration.

Preservation in Native Form

You should anticipate that certain ESI, including but not limited to spreadsheets and databases, will be sought in the form or forms in which it is ordinarily maintained (i.e., native form). Accordingly, you should preserve ESI in such native forms, and you should not employ methods to preserve ESI that remove or degrade the ability to search the ESI by electronic means or that make it difficult or burdensome to access or use the information.

You should additionally refrain from actions that shift ESI from reasonably accessible media and forms to less accessible media and forms if the effect of such actions is to make such ESI not reasonably accessible.

Metadata

You should further anticipate the need to disclose and produce system and application metadata and act to preserve it. System metadata is information describing the history and characteristics of other ESI. This information is typically associated with tracking or managing an electronic file and often includes data reflecting a file's name, size, custodian, location and dates of creation and last modification or access. Application metadata is information automatically included or embedded in electronic files, but which may not be apparent to a user, including deleted content, draft language, commentary, collaboration and distribution data and dates of creation and printing. For electronic mail, metadata includes all header routing data and Base 64 encoded attachment data, in addition to the To, From, Subject, Received Date, CC and BCC fields.

Metadata may be overwritten or corrupted by careless handling or improper preservation, including by moving, copying or examining the contents of files.

Servers

With respect to servers used to manage e-mail (e.g., Microsoft Exchange, Lotus Domino) and network storage (often called a "network share"), the complete contents of each user's network share and e-mail account should be preserved. There are several ways to preserve the contents of a server. If you are uncertain whether the preservation method you plan to employ is one that we will accept as sufficient, please immediately contact the undersigned.

Home Systems, Laptops, Online Accounts and Other ESI Venues

Though we expect that you will act swiftly to preserve data on office workstations and servers, you should also determine if any home or portable systems or devices may contain potentially relevant data. To the extent that you have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD- R/DVD-R disks and the user's PDA, smart phone, voice mailbox or other forms of ESI storage.). Similarly, if you used online or browser-based e-mail accounts or services (such as Gmail, AOL, Yahoo Mail or the like) to send or receive potentially relevant messages and attachments, the contents of these account mailboxes (including Sent, Deleted and Archived Message folders) should be preserved.

Ancillary Preservation

You must preserve documents and other tangible items that may be required to access, interpret or search potentially relevant ESI, including logs, control sheets, specifications, indices, naming protocols, file lists, network diagrams, flow charts, instruction sheets, data entry forms, abbreviation keys, user ID and password rosters and the like.

You must preserve passwords, keys and other authenticators required to access encrypted files or run applications, along with the installation disks, user manuals and license keys for applications required to access the ESI.

You must preserve cabling, drivers and hardware, other than a standard 3.5" floppy disk drive or standard CD or DVD optical disk drive, if needed to access or interpret media on which ESI is

stored. This includes tape drives, bar code readers, Zip drives and other legacy or proprietary devices.

Paper Preservation of ESI is Inadequate

As hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for, or cumulative of, electronically stored versions. If information exists in both electronic and paper forms, you should preserve both forms.

Agents, Attorneys and Third Parties

Your preservation obligation extends beyond ESI in your care, possession or custody and includes ESI in the custody of others that is subject to your direction or control. Accordingly, you must notify any current or former agent, attorney, employee, custodian and contractor in possession of potentially relevant ESI to preserve such ESI to the full extent of your obligation to do so, and you must take reasonable steps to secure their compliance.

Preservation Protocols

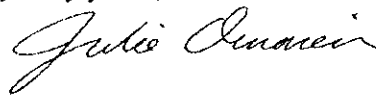
We are desirous of working with you to agree upon an acceptable protocol for forensically sound preservation and can supply a suitable protocol if you will furnish an inventory and description of the systems and media to be preserved. Alternatively, if you promptly disclose the preservation protocol you intend to employ, perhaps we can identify any points of disagreement and resolve them. A successful and compliant ESI preservation effort requires expertise. If you do not currently have such expertise at your disposal, we urge you to engage the services of an expert in electronic evidence and computer forensics. Perhaps our respective experts can work cooperatively to secure a balance between evidence preservation and burden that's fair to both sides and acceptable to the court.

Do Not Delay Preservation

I'm available to discuss reasonable preservation steps; however, *you should not defer preservation steps pending such discussions if ESI may be lost or corrupted as a consequence of delay.* Should your failure to preserve potentially relevant evidence result in the corruption, loss or delay in production of evidence to which we are entitled, such failure would constitute spoliation of evidence, and we will not hesitate to seek sanctions.

We appreciate your attention to the matter of ESI and will be happy to answer any questions or clarify anything in this letter if it is unclear.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Julie Oinonen".

JULIE J. OINONEN

Court of Appeals of the State of Georgia

Exhibit Two

ATLANTA, December 11, 2018

The Court of Appeals hereby passes the following order

A19I0107. ECHOLS COUNTY SCHOOLS, et al. v. LANA FOSTER.

Upon consideration of the Application for Interlocutory Appeal, it is ordered that it be hereby DENIED.

LC NUMBERS:

2018CV24



Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, December 11, 2018.

*I certify that the above is a true extract from the minutes
of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court hereto
affixed the day and year last above written.*

Stephen E. Castle, Clerk.

FILED IN OFFICE
CLERK OF SUPERIOR COURT
ECHOLS COUNTY, GEORGIA

18CV00024

OCT 31, 2018 10:15 AM

IN THE SUPERIOR COURT OF ECHOLS COUNTY

STATE OF GEORGIA

Nora L. Rogers
Nora L. Rogers, Clerk
Echols County, Georgia

DR. LANA FOSTER

Petitioner Plaintiff,

v.

CIVIL ACTION

NO. 2018cv24

ECHOLS COUNTY SCHOOLS;
MR. ROCKY CROSBY, BOARD CHAIR IN
HIS INDIVIDUAL CAPACITY; MS
FLORENCE STATEN, VICE BOARD CHAIR
IN HER INDIVIDUAL CAPACITY; MS.
PATRICIA GRAY IN HER INDIVIDUAL
CAPACITY; MR. BO CORBETT IN HIS
INDIVIDUAL CAPACITY; AND MR.
MITCHELL CHURCH IN HIS INDIVIDUAL
CAPACITY; SUPERINTENDENT MR.
LANCE HEARD IN HIS INDIVIDUAL and
OFFICIAL CAPACITY;

Respondents/Defendants.

ORDER CONCERNING OPEN RECORDS ACT VIOLATION

Plaintiff filed suit, one of the counts of her complaint filed pursuant to O.C.G.A. §§ 50-18-70 et seq., the Georgia Open Records Act and a hearing was held. Concerning the Open Records Act violation, Plaintiff seeks an order 1) finding Defendants in violation of the Act; 2) enjoining Defendants from continued violations of the Act; 3) compelling disclosure of all

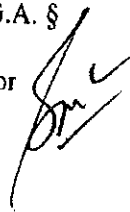
[Signature]

requested records, in particular the text messages from cell phones. The Court having carefully reviewed the record and having held a hearing enters this Order.

Plaintiff's initial Open Records Act request was sent on June 28, 2018. As of the date the lawsuit was filed on July 19th, 2018, no responsive records had been produced in response to the Georgia Open Records Act request or an explanation for the delay provided. (Petition ¶ 48.) Additionally, Plaintiff sought a second Open Records Request on July 13th and as of the date of the lawsuit filing, Defendants had failed to respond, produce the records, or even acknowledge the request. (Petition ¶ 49.)

Based on the foregoing, the Court finds that the Defendant failed to make a timely response in compliance with O.C.G.A. § 50-18-70 and was without substantial justification in doing so. The intent of the General Assembly in enacting the Open Records Act was to encourage public access to information in order to promote confidence in government and to allow the public to evaluate the function of its institutions. *See Wallace v. Greene County*, 274 Ga. App. 776, 782 (2005). The Act is to be strictly construed with narrow construction of all its exemptions. *City of Brunswick v. Atlanta Journal & Constitution*, 214 Ga. App. 150, 152(1) (1994). "Compliance with the Act is not discretionary, but mandatory." *Griffin Indus., Inc. v. Georgia Dep't of Agric.*, 313 Ga. App. 69, 72, 720 S.E.2d 212, 215 (2011).

Under Georgia law, a "'public record' means all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material prepared and maintained or received by an agency or by a private person or entity in the performance of a service or function for or on behalf of an agency or when such documents have been transferred to a private person or entity by an agency for storage or future governmental use." O.C.G.A. § 50-18-70. This includes electronic records such as text messages. O.C.G.A. § 50-18-71. During the hearing, the Superintendent admitted under oath that one of the major



ways that he, Echols County School Board, and Echols County administrators communicated with one another is through text messages on their cell phones. (T-85: 6-14.) Based on the foregoing, the Court finds the Plaintiff entitled to open records that also includes text messages as she requested. (Petition, Exhibit C.)

Accordingly,

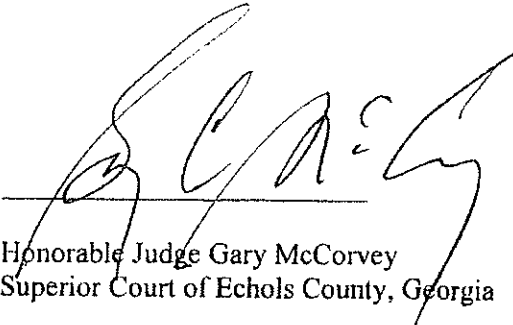
IT IS HEREBY ORDERED that Defendants provide Plaintiff with access to all requested records immediately that to date have not been produced;

IT IS FURTHER ORDERED that Defendants is enjoined from withholding requested records;

IT IS FURTHER ORDERED that Defendants make available to an E-discovery company that will obtain forensic digital imprints of their cell phones. Defendant will assume the cost of this retrieval. The E-discovery company should extract and produce all information contained on them about Plaintiff Dr. Lana Foster or her termination, as well as any electronic messages that speak derogatorily about race or African Americans, or use racially derogatory terms or slurs. Additionally, the E-Discovery company should produce analytic information showing what electronic messages were deleted from the phone subsequent to the Georgia Open Records request and spoliation notice being submitted by Dr. Foster on June 28, 2018. (Petition, Exhibit C.) After such applicable information is extracted it will first be produced to Defendants' counsel for review before it is then provided to Plaintiff's counsel.

IT IS FURTHER ORDERED that any such open records withheld by Defendants or their Counsel, including such records produced by the E-discovery company that are withheld on grounds of a claimed exception pursuant to O.C.G.A. §50-18-72 or work product/attorney-client privilege, must be submitted for *in camera* inspection;

SO ORDERED this 29th day of Oct, 2018



Honorable Judge Gary McCorvey
Superior Court of Echols County, Georgia

Copies to:

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Gainesville, GA 30501

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Atlanta, Georgia 30303
Telephone: 404-654-0288
Fax: 404-592-6225

Presented by: _____

Julie Oinonen, Attorney for Plaintiff, julie@goodgeorgialawyer.com

IN THE SUPERIOR COURT OF HABERSHAM COUNTY

STATE OF GEORGIA

DR. ROBERT H. WAINBERG :
 :
 Plaintiff, :
 v. : CIVIL ACTION
 :
 PIEDMONT COLLEGE, : FILE NO.: 2018-CV-0454RS
 :
 Defendant. :

TELEPHONE CONFERENCE

March 19, 2019

HABERSHAM COUNTY COURTHOUSE
Clarkesville, Georgia

BEFORE: HONORABLE RUSSELL W. SMITH
Superior Court Judge
P.O. Box 758
Toccoa, Georgia 30577

APPEARANCES:

On behalf of the Plaintiff:

Ms. Julie Oinonen
44 Broad Street NW, Suite 200
Atlanta, Georgia 30303

On behalf of the Defendant:

Ms. Barbara Marschalk
Mr. Joe Chancey
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308

Reported by:

Anita W. Moore
Certified Court Reporter
547 Eastanollee Road
Eastanollee, Georgia 30577
706-886-7525
awmooreccr@gmail.com

1 (PROCEEDING - TELEPHONE CONFERENCE)

2 THE COURT: All right, who do I have?

3 MR. CHANCEY: Judge, Joe Chancey and Barbara
4 Marcshalk here in the speaker from Drew Eckl.

5 MS. OINONEN: And hello, Judge Smith, this is Julie
6 Oinonen from Williams Oinonen on behalf of Dr. Robert
7 Wainberg.

8 THE COURT: All right, and just so you know, I have
9 my court reporter here and she left her mask in Habersham
10 because we expected be back in Habersham Monday for a
11 criminal trial, and will be back in Habersham Monday, but
12 I asked her to be here and she is recording this so I can
13 have a record of the conference. And my staff attorney is
14 here as well.

15 So, if I understand, I have, it's Mr. Chancey?

16 MR. CHANCEY: Yes, Your Honor.

17 THE COURT: Ms. Marschalk?

18 MS. MARSCHALK: Yes, sir.

19 THE COURT: And Ms. Oinonen?

20 MS. OINONEN: Yes, Judge Smith.

21 THE COURT: All right, so, I had limited -- I've been
22 out of the circuit doing a peer review of another
23 accountability court so when this came in I've tried to
24 look over as much as I can and look at the issues. My
25 understanding is that there are depositions -- the most

1 pressing issue is that there are depositions scheduled for
2 Monday, is that correct?

3 MS. OINONEN: Yes, Your Honor, Monday, Wednesday and
4 Friday.

5 THE COURT: All right, and which depositions are
6 scheduled for Monday?

7 MS. OINONEN: Carlos Camp and Dale Van Canfort
8 (phonetic).

9 THE COURT: And so what I have is I have a motion for
10 protective order, objection, there are objections to
11 notice to produce and a motion for protective order from
12 the defendants as to the depositions noticed for next
13 week, is that correct?

14 MR. CHANCEY: That is correct, Your Honor.

15 THE COURT: So the first question I have, I'm going
16 to give you an opportunity to make your motion and I'm
17 going to give Ms. Oinonen an opportunity to respond, which
18 by the way, Ms. Oinonen, are you still at the doctor's
19 office? I hate, I mean, I realize it's very difficult
20 timing perhaps?

21 MS. OINONEN: Yes, Your Honor. I'm at Emory, but
22 they are very kind and they put me in a separate
23 conference room. So I've got privacy and I'm sitting here
24 comfortably.

25 THE COURT: Well, if they need you for something you

1 need to let me know and we can stop and reconvene if we
2 have to.

3 So the one question I have is in reading this, so
4 I've got the plaintiff's -- I'm sorry, the defendant's
5 motion and the plaintiff's response and the plaintiff
6 alleges that there was an agreement of counsel, a
7 representation that these witnesses would be made
8 available without the necessity of a subpoena or subpoenas
9 served on the witnesses, and I did not see whether the
10 defendant disputed that, but I did not see that that was
11 specifically referenced in any of the emails that are
12 attached to the motion or the response.

13 So my first question before you argue is, what is the
14 defendant say? Do you admit or deny that there was a
15 representation that witnesses, employee witnesses would be
16 made available for deposition without the necessity of
17 serving a subpoena on those witnesses?

18 MR. CHANCEY: Judge, we do not dispute that we
19 discussed and agreed that we would make witnesses
20 available as far as that goes. The real issue that has
21 set things a little bit sideways is the notice to produce
22 that had not been discussed or shared in any way prior to
23 our receiving the deposition notices, and those noticed to
24 produce which have now become subpoenas include, or I
25 should say triggered several issues that really led us to

1 the feeling that we needed to have a case management
2 discussion with you--

3 THE COURT: All right, and so--

4 MR. CHANCEY: --(inaudible) the book.

5 THE COURT: And so the reason that I ask is because
6 the defendant's objections raise the fact that as an
7 objection that the, you know, that there's a notice to
8 take the deposition, which I agree is not an enforceable
9 manner of securing the attendance of a non-party witness
10 at a deposition. But if there was a representation of
11 counsel that that would not be an impediment to the taking
12 of those depositions I'm not going to consider, I mean, I
13 think we have to have some ground rules, if you know, then
14 that's not going to be a basis for me deny-- you know,
15 ruling on that issue.

16 MR. CHANCEY: Yeah, I want to be very clear and I
17 want to be fair to counsel. We did not make an issue of
18 that and if that had been the only issue we would not be
19 talking this afternoon.

20 THE COURT: All right, so what is the basis, you've
21 mentioned the notices to produce, so were the notices to
22 produce sent to the college or to the individuals?

23 MR. CHANCEY: To the college, to counsel I should
24 say.

25 THE COURT: And are the responsive documents in the

1 possession of the college or the witnesses?

2 MR. CHANCEY: All of the above. Um, and if I might,
3 Judge, can I take just one quick step back and give you a
4 little bit of landscape context?

5 THE COURT: Sure, it's your motion, and I'm going to
6 give Ms. Oinonen an opportunity to respond fully also.

7 MR. CHANCEY: Sure. So I think it's helpful for you
8 to know that both sides have exchanged written discovery
9 and written discovery responses already. Uh, we responded
10 to their interrogatories. We've responded to request for
11 production of documents. We produced over 1,000 pages of
12 documents from the college's records, including the entire
13 un-redacted Title 9 investigative file.

14 So none of that has been an issue from our
15 perspective, and by the way, counsel responded to our
16 discovery, I believe, Wednesday of this week, provided us
17 interrogatory responses, uh, provided us responses to our
18 request for production of documents. Frankly, we haven't
19 had a chance to go through that yet and we don't, so for
20 purposes of this afternoon we don't have any issues with
21 any of that. But I want you to know that a fair amount of
22 written discovery and production has already occurred,
23 okay.

24 THE COURT: All right.

25 MR. CHANCEY: Now, there are two specific issues

1 though that come up as it relates to these notices to
2 produce now subpoenas, and by the way, to clarify, you
3 asked whether the notices and perhaps subpoenas had been
4 served on the individuals or on the college. The notices
5 directed to the individuals were served on us as counsel
6 for the college. That, I want to be clear, had not been
7 discussed or agreed upon in advance, and the subpoenas
8 that have now been issued were, uh, counsel also provided
9 that to us as counsel both for the college and for the
10 individuals.

11 So that really is kind of where we run into some
12 issues that, uh, Your Honor, we respectfully suggest need
13 to be, uh, worked through before we commence depositions,
14 because they are significant issues. So let me get really
15 specific with you about a couple of concerns that we have.

16 Number one, as you would imagine, a fair amount of
17 the discovery that counsel is pursuing relates to
18 students. Student information and student records are
19 protected by the Federal Education Rights and Privacy Act.
20 They call it FERPA. We do not have the right to produce
21 individually identifiable records related to students
22 unless those records have subpoenaed and we have provided
23 the parents of those students notice of the request and
24 they have an opportunity to respond or object.

25 THE COURT: Even if the students are adults?

1 MR. CHANCEY: Well, you may be right, probably, and I
2 just don't know. But I suspect you're right. If the
3 students are 18 or under it's probably the parents, if
4 they're legal adults then it may be the students
5 themselves. But my real point is there has to be an
6 intermediary step before the production of individually
7 identifiable student information.

8 So a conference was had on February 19th. We
9 discussed, I shouldn't say we, I was not at that meeting,
10 but I understand that specific issue was discussed and
11 worked through and agreed upon, uh, our position was that
12 we needed to receive a subpoena for student records that
13 we could then provide to the parents and/or students,
14 whatever is applicable, to give them the opportunity to
15 address that before any of those records are produced.

16 Well, the notices to produce and subpoenas that we
17 just got now this week include, uh, within their scope
18 student records, and so the direction given to these
19 witnesses is to bring with them records and information
20 that we believe clearly would be within the scope of the
21 FERPA protection law. And obviously without sufficient
22 time to get appropriate notices an opportunity to respond
23 to either the students or the parents, so--

24 THE COURT: Okay, well, so help me, you're gonna have
25 to back up and help me understand, so I've got the list of

1 individuals that I have that have been identified as being
2 in dispute are Dale Van Canfort, Rick Austin, Jessica
3 Rooten Eagle, Stephanie Elmongro Elmongo, I'm not sure
4 which -- I can read my handwriting -- Emily Belwick,
5 Elaine Bailey and Carlos Camp. Are any of those the
6 students we are talking about or are these additional
7 witnesses?

8 MR. CHANCEY: No, those are all faculty members.
9 But here is my point, each of them, and if you don't mind
10 I'll just read it to you if you'll bear with me, because
11 the request that was provided for each of those witnesses
12 would include FERPA information. And if you'll bear with
13 me let me just read it to you.

14 You are hereby commanded to bring all documents,
15 emails, text messages, regarding Dr. Robert Wainberg, his
16 lawsuit, the circumstances surrounding his termination,
17 any student complaints that were made concerning Dr.
18 Wainberg, any statements that were made by faculty
19 administration or board members relating to Dr. Wainberg,
20 and documentation concerning any Title 9 complaint made to
21 Piedmont College against any individual within the last
22 five years.

23 So you can easily see that the scope of that request
24 would include a lot of information that specifically
25 relates to students and specifically students who have

1 made Title 9 complaints both against Dr. Wainberg and
2 against others in the last five years. Now, we have other
3 issues with the scope of, you know, this going beyond Dr.
4 Wainberg and his breach of contract claim.

5 But not to stray from the point, the point is that
6 that would direct these people to bring information that
7 they have access to that might be protected by FERPA and
8 sidestepping the FERPA protection.

9 The next sentence of it broadens the scop and says,
10 this includes any emails or text messages that were
11 exchanged on your personal or work-issued cell phones,
12 personal or work-issued computers, or other electronic
13 devices.

14 So these witnesses are getting notices to produce
15 that would direct them to pull the information not only
16 their personal devices, but the University's network
17 related to all of these issues. That, Your Honor, we
18 believe is a significant problem.

19 That's kind of the FERPA issue. Before I move on to
20 another issue that we have related to this, did you have
21 any questions or clarification?

22 THE COURT: Are you saying--

23 MS. OINONEN: Do you want me to respond?

24 THE COURT: Well, it might be most expeditious if you
25 do respond now. So what do you say about this FERPA

1 issue?

2 THE COURT: Okay, so the first thing I want to say is
3 I do this every day all day. I deal with universities,
4 colleges, K-12 systems all the time against defense
5 counsel all the time, whether it's the Atlanta Public
6 Schools, Dekalb Count School District, you know, all over
7 Georgia, all 179 school districts and the university
8 system. And the defense counsel I deal with are all very
9 good defense counsel, (inaudible), Greenberg Traurig, all
10 of them. The litigation, especially when you are dealing
11 with an educator plaintiff, inevitably involves student
12 records.

13 In this case students are actually at the essence and
14 issue of Dr. Wainberg's alleged wrongdoing, that they
15 accused him of, which our position is he absolutely didn't
16 do. There was a disgruntled student who said I'm gonna
17 make Dr. Wainberg pay--

18 THE COURT: Well, but you, I don't need to hear about
19 the merits of the case.

20 MS. OINONEN: But in any case, it was the student
21 that made these allegations and students were injured
22 here. So throughout discovery first thing Mr. Chancey is
23 (inaudible) incorrect when he says, oh, you know, we
24 couldn't produce student records, student information that
25 they already have produced student information. The

1 interviews of the students, the names of the students, all
2 of that falls under FERPA and they gave that to us in
3 discovery.

4 But what they didn't, and unfortunately, is discovery
5 was due two months ago and regrettably they have left
6 huge, glaringly, important, essential, crucial matters
7 that are specific to the Title 9 investigation of Dr.
8 Wainberg that are simply missing from the file,
9 exculpatory evidence, all sorts of things redacted.

10 So what I, now, I'm hoping that Ms. Marschalk, Mr.
11 Chancey and I, we're going to be able to resolve that
12 between us without having (inaudible) upon the Court. I
13 filed a plaintiff's motion to compel. I said I'm going to
14 withdraw it if the three of us can (inaudible) together
15 and get it resolved. That is my goal.

16 In the mean time when you depose employees that work
17 at a university or college there's a routine practice, you
18 either file a notice to produce. Defense counsel
19 generally always represents that they will accept service
20 on behalf of their current employee, and in that case that
21 is what I was told by defense counsel.

22 THE COURT: They don't dispute that.

23 MS. OINONEN: Right, well, what they're disputing is
24 we didn't accept notice to produce, but they expected
25 service. Now, why I did that was because I then explained

1 in my brief, number one, that that, it's urgent, because
2 even with the best intentions there are employees that
3 inevitably have some relevant piece of document, be it an
4 email on their personal email that Piedmont College didn't
5 have access to, or text message that's exceedingly
6 relevant to the case, and we have a right, we both have a
7 right to that information.

8 So because the depositions are moving forward and
9 because the defense counsel is still withholding such
10 important discovery we do that as a catch-all to make sure
11 that there's nothing out there. And the reason why we
12 were so concerned and made sure to do that is we learned
13 from all these deponents, unbelievably, that number one,
14 they had not even received a preservation notice from
15 defense counsel until this past Monday for the first time
16 seven months after suit is filed they get this letter
17 saying, oh, by the way, you have to save all emails and
18 text messages and documents related to Rob Wainberg. And
19 number two, no one, unbelievably, no one had ever even
20 asked them for such information based on the
21 representation they made to plaintiff.

22 So, again, because I don't want to have to depose
23 these folks two or three times, that's ridiculous, we want
24 to make sure that whatever they do have is out there. And
25 I have no problem if they first give it to defense counsel

1 so they can screen it for privilege.

2 Now, the way we solve the FERPA problem, again, I've
3 never had defense counsel raise this issue. What we
4 always agree upon, like last week, all last week and
5 against Nelson (inaudible)--

6 THE COURT: Listen, I am not, ma'am, I am not
7 interested in hearing any more bolstering, bragging or
8 name-dropping--

9 MS. OINONEN: I'm sorry, but (inaudible)--

10 THE COURT: Well, I'm tired of hearing from both of
11 y'all about what great lawyers y'all are and how many
12 cases you try all over the place. Let's talk about this
13 case. So I'm not interested in hearing about what you did
14 with another judge or another law firm. Let's talk about
15 this case. Go ahead.

16 MS. OINONEN: So the solution that, the solution is
17 that you simply say to defense counsel that if there is
18 student information that inevitably gets discussed, I'm
19 going to have to ask these deponents, so what student made
20 such a complaint, the name of that student; that number
21 one, we simply can have an agreement that anything that
22 gets filed with the court can be redacted for
23 confidentiality. But number two, FERPA only is an issue,
24 the simple solution to this, if you read the FERPA
25 statute, is Piedmont College is allowed to release student

1 records and student information upon order from the judge.
2 And so if the judge, if you, the Court issues an order
3 then that is going to solve their problem. They are
4 protected from any liability.

5 Those are the two options and--

6 THE COURT: But I think--

7 MS. OINONEN: --(inaudible)--

8 THE COURT: My understand is, the argument they made
9 was that they are required to notify the students and give
10 them, so that the student has the opportunity to be heard
11 or file a motion for protective order, et cetera, et
12 cetera, prior to disclosure of that -- and I'm assuming, I
13 don't know if the, an order from me obviates that or not.

14 MS. OINONEN: Your order would obviate. If there is
15 a subpoena they have to give opportunity for, you know,
16 someone to object. But that's avoided if the Court simply
17 issues an order then that solves the problem. But again--

18 MR. CHANCEY: We don't have--

19 MS. OINONEN: --you--

20 MR. CHANCEY: I'm sorry, I was just gonna say, we
21 don't have a problem with that. Let me be really clear.
22 We are not taking the position and we have never said that
23 she is not entitled to the information related to Dr.
24 Wainberg's Title 9 investigation. In fact, we have
25 produced information related to that. We are not saying

1 that she is not entitled to information that is protected
2 by FERPA. All we are saying is we've got to do it right.
3 We've got to touch the right basis, and we had talked
4 about on February 19th her issuing a subpoena so that we
5 would have, in time, an opportunity to provide the
6 subpoena and notice to students and parents.

7 So we are beyond that now. We just got that subpoena
8 this week, and we don't have an order of the Court--

9 THE COURT: All right, so help me understand, what
10 does that have to do with the depositions that are
11 scheduled for next week for these seven witnesses? So how
12 are those witnesses going to be -- I understand you read
13 the language. What information do you anticipate that
14 these witnesses are being requested, that there is a
15 request that they provide that's going to be covered by
16 FERPA, student information that's covered by FERPA?
17 Because they can't provide the student's cell phones or
18 computers, um, are student files, records, how would those
19 be implicated by the notices to produce as to these
20 witnesses?

21 MS. OINONEN: They are professors. They are
22 professors, so if a student, if they had a discussion with
23 a student concerning Dr. Wainberg, and let's say the
24 student sent them an email, that would fall under FERPA.
25 But again, it's very simple. FERPA regulations based on

1 the DOJ states that there is no requirement if the
2 disclosure is made in compliance with a judicial order.
3 So, I mean, that's all we need. We need a judicial order
4 just allowing Piedmont College, as Piedmont College
5 stated, they would release the information to us.

6 MR. CHANCEY: So, can I answer your question, Judge?

7 THE COURT: Yes.

8 MR. CHANCEY: Yeah, so these people who are scheduled
9 to be deposed next week are professors, educators. What
10 they've been asked to provide is, uh, especially the last
11 part of it, any documentation concerning any Title 9
12 complaint made to Piedmont College against any individual
13 within the last five years. So I think that goes way
14 beyond Professor Wainberg and would include FERPA
15 protected information about Title 9 complaints filed by
16 other students against other people. That's clearly
17 within FERPA.

18 And again, I, we're not taking the position that
19 FERPA is an impregnable wall that she can't get to the
20 other side of. We think she is entitled to FERPA
21 information as it relates to Dr. Wainberg's investigation,
22 but we've got to follow the process appropriately, and
23 that we had discussed, we did have an agreement upon, but
24 we didn't get a subpoena in time to provide it to students
25 and parents in a timely fashion, and we can't do that by

1 Monday, or Wednesday, or next Friday for that matter.

2 So that's our position, is quite frankly, that was
3 kind of a procedural issue that we thought we had an
4 agreement to work around, but we didn't because of the way
5 the timing played out.

6 THE COURT: Well, let me just ask this, Ms. Oinonen,
7 since the, you've got two depositions scheduled for
8 Monday. You have, I'm assuming -- are there other
9 depositions scheduled -- there are two other days next
10 week that depositions are scheduled for?

11 MS. OINONEN: Yes, Your Honor. We have seven
12 important depositions on Monday, Wednesday and Friday.
13 And we are willing to be as flexible as, you know,
14 whatever creative resolution or strategy will work. If
15 Piedmont College wants to hold the documents, review them
16 for privilege, I suspect that all seven people are not
17 going to bring any student information, to be quite frank.
18 I just had to put that out there because defendants have
19 not produced all the information requiring me to file
20 this--

21 THE COURT: I mean, so my--

22 MS. OINONEN: --(inaudible)--

23 THE COURT: So my inclination is to say that the
24 depositions would go forward, that as to any information
25 that would be privileged by, that would be protected by

1 FERPA that that would not be produced at that time, but
2 would be, certainly you can inquire as to whether it
3 exists, the existence of that information in the
4 depositions, and then as Ms. Oinonen suggested, it would
5 then be, it could be, you know, once the appropriate
6 notice has been given to any effected students then that
7 would be, could be reviewed by counsel and then supplied.
8 If there is a follow-up deposition that's necessary then,
9 and there may or may not be any such information, also as
10 she suggests.

11 MR. CHANCEY: Your Honor, if I may, here was our,
12 frankly, what we thought was a pragmatic suggestion on
13 this, because we haven't, we also have issues regarding
14 the ESI, and know you say that, uh, in the briefings as
15 well, and that is a significant issue. But here was our
16 proposal -- and by the way, we will absolutely work with
17 counsel with respect to extending discovery, cooperating
18 regarding dates and all of that.

19 This was not a hide-the-ball exercise, because we
20 don't want to. We just want the scope to be appropriate
21 as it relates to the nature of this claim, but we also
22 have significant ESI issues, which also relate to these
23 depositions.

24 So here's our, again, I think pragmatic suggestion.
25 Let's press pause, let's work through this stuff, let's

1 have a formal case management order and resolve all of
2 this stuff as it relates to all of these depositions so
3 we're, number one, not fighting about them during
4 depositions, but number two, not creating the possibility
5 that we may have to re-do any depositions.

6 Counsel has told us she intends to take over 30
7 depositions in this case, so we are really concerned, Your
8 Honor, uh, as your order made clear last Friday, this is a
9 breach of contract case. This is not, you know, a RICO
10 case, it's not an EEOC case. It's not any of that, it's a
11 breach of contract case.

12 MS. OINONEN: We have the right to amend it and we
13 likely will.

14 MR. CHANCEY: You haven't yet. We're dealing with
15 the complaint as it exists now.

16 MS. OINONEN: You've given us 19 fact witnesses with
17 relevant information and we've added 10 that we absolutely
18 know to have crucial information. So we're not making
19 this any bigger than is necessary.

20 THE COURT: Well, you know, the FRCP provides for ten
21 depositions without leave of Court.

22 MR. CHANCEY: Right.

23 THE COURT: And I may be inclined to impose something
24 like that. And if you want each one of you can take ten.
25 If you want any more than that then you're going to have

1 to come before me and have a hearing, a motion, notice
2 motion and a hearing and I will decide.

3 So I'm not saying I'm going to do that, because I do
4 understand if you disclose that these are fact witnesses,
5 you know, and there's a difference between a seven-hour
6 witness under the rules and someone who is going to
7 authenticate some documents perhaps, if that's even an
8 issue in this case, and is going to take 30 minutes. But,
9 so--

10 MR. CHANCEY: Judge, so our request would be this,
11 and fairly simply, we'd like to ask that you just press
12 pause on this. I think you see already there are some
13 significant issues here and we think it would be a case
14 that would be much more efficiently handled with a case
15 management order up front as opposed to dressing those
16 issues as they may pop up during the course of
17 depositions. That's our request.

18 THE COURT: Well--

19 MS. OINONEN: And, Your Honor, oh, I'm sorry.

20 THE COURT: No, you go, go ahead.

21 MS. OINONEN: Judge, we are asking the Court to
22 instruct both parties to meet and confer to resolve the
23 ESI protocol issues. They have two months now about
24 sending discovery. I am quite confident the parties will
25 be able to resolve those issues on our own. That is not

1 the time now to be resolving complicated ESI discovery
2 issues. We just need to move forward with these
3 depositions, um, that's what we're asking, that the Court
4 would enjoin the defendants from obstructing discovery,
5 moving forward that they cooperate in good faith and allow
6 the depositions to move forward next week and give us a
7 time line to come up with resolving our discovery dispute
8 on our own. I don't think late on a Friday when
9 depositions are about to be done on Monday is the time to
10 be dealing with complicated ESI protocol that needs to
11 involve our expert (inaudible) engaged in any discovery.
12 That is a complete side issue and we're just concerned
13 that the defendant is using it as a misnomer to obstruct
14 getting the information we need.

15 I also want to say, these deponents are going to be
16 asked about students, what the students that made the
17 complaints told them. So I have no problem if there are
18 documents that need to be reviewed for privilege, but I
19 certainly need to be able to question these professors
20 about what knowledge they have regarding the specific
21 complaints made against Dr. Wainberg.

22 MR. CHANCEY: Well, I'll just say this, I agree with
23 counsel that we shouldn't attempt to resolve all of these
24 issues on the phone this afternoon, but I do think we
25 ought to attempt to resolve them before we get into these

1 depositions. I think it's fairly obvious how it's gonna
2 be a bit of a land mine if we don't have an order in place
3 before those occur. Again, we will work with counsel with
4 respect to extending the discovery period, anything we
5 need to, so that she can get full and meaningful
6 discovery, but we just think these issues need to be
7 thoughtfully worked through before we start jumping into a
8 deposition with third party witnesses.

9 THE COURT: So are you thinking there is going to be
10 a need to extend the discovery beyond the extension that's
11 provided for under 9-11-12(J) (2)?

12 MS. OINONEN: Are you speaking of the consent motion
13 that was originally stipulated and--

14 THE COURT: No, well, the code says that the
15 discovery period and all discovery deadlines shall be
16 extended for a period equal to the duration of the stay,
17 but that's limited to 90 days. So there is an automatic
18 90-day extension that occurs as a matter of law under the
19 code. So my question is, are you saying that you need an
20 extension beyond that?

21 MS. OINONEN: Yes, Your Honor--

22 MR. CHANCEY: Yeah (inaudible)--

23 [CROSSTALK]

24 MR. CHANCEY: --we don't have a problem with that.

25 THE COURT: But, so this is my thought. Um, I'm not

1 hearing that -- it's my understanding that any issues
2 related to the production of these documents can be
3 resolved at a later date. I do not see that that is an
4 issue that is going to require the postponement of these
5 depositions. So I am going to allow the depositions to go
6 forward. If there is an issue, I am going to be in
7 Habersham County on the bench on Monday and, uh, I'm going
8 to be in the office. We had a murder trial scheduled for
9 next week and that's not going to happen. I don't think
10 I'm going to have any other trials, we'll find out on
11 Monday. So I am going to be here if there is a discovery,
12 if there is a specific dispute, as I can, notwithstanding
13 the admonishment I'm about to give you, I can foresee that
14 that might well happen.

15 But the fact that there may be some document
16 production issues that really, it appears to me, are, um,
17 tangential to the real focus of these witness, the witness
18 testimony, we can work that out later. So I am going to
19 allow the depositions to go forward.

20 As far as the ESI, you know, you are talking to
21 somebody for whom if it were up to me we would be using
22 IBM Selectric typewriters and carbon paper. So that is
23 beyond the scope of my expertise. I have a very, very
24 general understanding, I read the briefs on what his is.
25 I will do the best I can. If you can't resolve it we are

1 probably going to have to have a hearing and you're going
2 to either have to educate me, because that's not the
3 nature of the kind of work that we do in the Superior
4 Courts of the Mountain Circuit, or I'm going to have to
5 get you a Special Master who understands this stuff who
6 can, uh -- and I'd rather not do that, because I don't
7 want to increase the cost to the parties, and I want to do
8 what I perceive as doing my job, which is resolving these
9 disputes to the extent that I can.

10 I want the case to move forward. Uh, you know, the,
11 just because your clients don't like each other doesn't
12 mean that the counsel can't be professional and try and
13 get along. There is an extent to which oftentimes lawyers
14 sometimes channel, if you will, if you remember back in
15 the days if you watched Oprah or Maury Povich, they had
16 people that could channel, they seemed to channel their
17 clients. They take on the persona of their clients.

18 There is enough righteous indignation in this case to
19 go around, but it is not a game and I expect y'all to be
20 professional and work out what can be worked out and bring
21 me the issues that really can't be worked out. I saw that
22 the defendants, for example, say that some of the
23 discovery is a fishing expedition. I have a way to
24 resolve that. I haven't heard that that's the case as to
25 these witnesses that are -- and I'll give you an

1 opportunity to be heard, uh, you know, if you go on a
2 fishing expedition and you come back empty handed then
3 there are ways that the Court can deal with that.

4 You know, the plaintiff has, should be aware that,
5 you know, 30 depositions is a lot of depositions. You
6 know, I may limit the scope. You both need to be careful
7 with, you know, the extent to which you exercise these,
8 this discovery. Three days in depositions is a lot of
9 depositions. And so you can go to the well once too
10 often.

11 I had the question in looking at these documents and
12 the records I read, why y'all didn't start with the
13 witnesses who are, the more obvious witnesses and work
14 down, you know, see what they have to say. But I think
15 it's for the attorneys to control the order and timing of
16 discovery under the rules, and I'm going to let you do
17 that. But all I'm saying is, you know, you spend too many
18 days in depositions then it may be, you can get to the
19 point where, you create a situation where it becomes
20 burdensome and oppressive. It depends on the context of
21 the case.

22 But I am expecting everybody to work together and be
23 adults. I understand that this is an emotional case, um,
24 and my impression is it's more so than it needs to be.
25 And I have my own thoughts as to the reason for that.

1 But anything else from either side?

2 MR. CHANCEY: Uh, yes, Your Honor, what--

3 MS. OINONEN: I've got two-- pardon me, I just have
4 two questions, two quick questions, but Joe you can
5 certainly go first.

6 MR. CHANCEY: Well, mine was very limited. We have
7 one of the witnesses who is noticed for next Friday, is
8 Stephanie Holmogno. And in speaking with her yesterday
9 she indicated that she has a week-long vacation scheduled.
10 She is supposed to be leaving this weekend with her
11 husband. She was very upset that the deposition would
12 interfere with her vacation. So my request is that we
13 reschedule her for sometime, on one of the other dates
14 that we will be handling depositions, if that is
15 agreeable.

16 MS. OINONEN: I'm happy to do that, Joe.

17 THE COURT: Yeah, I think that's -- I'm not going to
18 keep anybody from taking a vacation.

19 MR. CHANCEY: Thank you.

20 THE COURT: Attorneys included within reason.

21 MS. OINONEN: Thank you, Judge Smith. This is Julie
22 (inaudible) and I've got two quick questions.

23 THE COURT: Sure.

24 MS. OINONEN: First, to make sure that I am clarified
25 on your directive to us. If these deponents come in hand

1 with relevant documents say from their personal cell phone
2 or their personal email accounts, what are we to do with
3 that information? Can we have that information, can
4 defense counsel screen it for privilege and then have,
5 take a look at it so we're not having--

6 THE COURT: Yeah, I think--

7 MS. OINONEN: --to(inaudible)--

8 THE COURT: --I think what you do is -- I think what
9 you do is defense counsel -- now, one of the things that I
10 was curious about there was some reference by the
11 defendants that conversations with counsel would be
12 privileged and it wasn't clear to me that defendant
13 counsel would be counsel for the individual witnesses such
14 that there would be an attorney-client privilege involved.

15 Do you understand my query there?

16 MR. OINONEN: That would be a conflict.

17 THE COURT: I don't know that it's a conflict, but,
18 you know, just because you represent the college doesn't
19 mean that you necessarily represent every employee that's
20 a witness, to my knowledge.

21 MR. CHANCEY: Your Honor, we agree with that. We
22 have a little bit of a -- frankly, we're scratching our
23 head because the brief that we received in response to our
24 motion took the position that any statement by any of
25 these individuals would constitute a party admission on

1 the part of the college, which we certainly disagree with.
2 That would also, of course, raise troubling issues about
3 ex parte communications with employees that you contend
4 can bind the employer by their statements.

5 THE COURT: But the legal effect of a statement is
6 not an issue. The question -- whether it's binding on the
7 college, the effect that that may have is something that
8 we can sort out in motions or at trial. Whether it's
9 within the scope of discovery is a completely separate
10 issue.

11 MR. CHANCEY: I agree, and I don't anticipate that it
12 is likely that any of these witnesses are going to present
13 anything that is even arguably privileged. I don't expect
14 that to happen. What I--

15 MS. OINONEN: I agree with that.

16 MR. CHANCEY: What is more likely is that they might
17 have information that is protected by FERPA that we have
18 not been given an opportunity to provide the notice on and
19 I don't want to be in a position where we are turning over
20 information protected by FERPA in violation of the
21 requirements.

22 THE COURT: Right, and what I think Ms. Oinonen said
23 is that if there, and you're going to have to educate me,
24 because I've never even heard of FERPA before. But does
25 FERPA relate to non-documentary information? So, for

1 example, does FERPA protect information that is in a
2 professor's head, or only documents that are maintained,
3 and I understand documents might mean electronic
4 information, cell phone records, text messages, emails,
5 but I mean, what are essentially under the current state
6 of the law documents, or, so, in other words, is there
7 going to be an issue if it's a documentary issue we can
8 resolve that. You can review it, we've agreed, I'm going
9 to order you can review that. If there is an objection
10 you can determine, you can give the notice, if there is an
11 objection you can determine if there should be an
12 objection and then we can work through that.

13 Um, you would need to identify, I think, the
14 information and the fact that there has been an objection
15 or, you know, whatever the FERPA process is. If there is
16 not then you can provide it. But are you saying, what I'm
17 trying to find out is, are you saying that there could be
18 a question posed and the answer, the verbal answer is
19 going to be protected by FERPA?

20 MS. OINONEN: No, it wouldn't. And I'll read you
21 what the Federal Government says right on the DOE site.
22 FERPA generally prohibits improper disclosure of
23 personally identifiable information derived from education
24 records, thus information that an official obtains through
25 personal knowledge or observation, or has heard orally

1 from others, is not protected under FERPA.

2 So I can asked Emily Bewitz, for example, a witness
3 next week at the deposition, what did Lee Alexander, the
4 student who made the complaint tell you? And that is not
5 protected under FERPA--

6 THE COURT: And that is what I'm getting at is that,
7 I think that, and let me give Mr. Chancey an opportunity
8 to be heard, but is my analysis incorrect? And when I say
9 that, you tell me if it is, because it may well be.

10 MR. CHANCEY: I can make it simple, simpler. It is
11 not our position that she is not entitled to ask and
12 receive answers regarding anything related to the
13 investigation of Dr. Wainberg, okay, so I want to be
14 clear, anything encompassed within the Title 9
15 investigation related to Dr. Wainberg we think she is
16 entitled to that information and we will not object on
17 that basis. Our concern relates to the broader scope of
18 the request for production as it relates to any other
19 Title 9 investigation or any other sexual harassment
20 allegation in the last five years.

21 MS. OINONEN: But I'm going to ask about that and
22 that is relevant. I just read you the Federal
23 Government's definition, that oral questions are not
24 protected by FERPA, and I'm allowed to compare how
25 Wainberg was treated inexatibly (phonetic), according to

1 the normal process that occurred with other Title 9
2 issues. That's within the purview of discovery, that's
3 not protected under FERPA, according Federal Government.
4 I'm happy to email you the link to that--

5 THE COURT: All right, so, no, you don't need to
6 email me the link to any Federal Government site. But
7 this is sort of what I think, which is with regards to the
8 process that Dr. Wainberg was afforded I am going to allow
9 inquiry by plaintiff's counsel, if there were other claims
10 what was the process that was employed with regards to
11 those claims. The merits of those claims at this point,
12 and I'll be glad to hear argument, but I'm not inclined to
13 say you go into the merits of those claims. But as to the
14 process, did he receive fair process? Did the college
15 utilize a uniform process? Is this the way they've
16 handled other cases; how they were handled procedurally, I
17 am going to allow.

18 I think that is within the scope of discovery.
19 Whether it turns out to be admissible at trial is a
20 separate matter. That is my inclination.

21 MS. OINONEN: Judge, we've got to be entitled to ask
22 questions pertaining to the other complaints of sexual
23 harassment in Title 9 that were done. There are incidents
24 that occurred that same year where upon information and
25 belief they were completely treated in a different fashion

1 compared to Dr. Wainberg. That is absolutely within the
2 scope of discovery regarding these types of issues.

3 THE COURT: Well, I'm not disagreeing with you.
4 You're not listening to me. I didn't say that you can't
5 ask about the procedure, how they were handled
6 procedurally. What I'm saying is that the merits of the
7 allegations, what the students claimed, what the
8 professors' defense was, the employee's defense is not
9 relevant, does not, at least facially to me doesn't appear
10 to me to be discoverable.

11 But I, you know, again, I'll let you be heard, but
12 I'm saying, yes, sure, ask, you know, there was another
13 claim, this professor, you know, this is the procedure
14 that was followed. Because you're saying the pro-- his
15 claim, as I understand it, is that the procedure was
16 defective, but the merits of whether another employee was
17 subject, whether their conduct was such that they should
18 have been dismissed or not has nothing to do with whether
19 Dr. Wainberg's conduct was such that he should have been
20 dismissed. And that is what I perceive to be the issue in
21 this case.

22 MR. CHANCEY: That is precisely our--

23 MS. OINONEN: Well, Judge, we would respectfully
24 disagree with that, Your Honor, because if, in fact,
25 Piedmont College is letting people who commit sexual

1 harassment, or sexual assault, against other individuals
2 and they are being let off the hook Scott free or not
3 dealt with that shows motivation (inaudible), and intent,
4 and the bad faith that they directed towards Dr. Wainberg,
5 who contends the allegations were completely false and
6 unsubstantiated to begin with.

7 THE COURT: I understand that. I understand what his
8 contention is, but at this point that is my ruling that
9 you can inquire as to any other claims. I think the
10 identity of the parties involved and the process that was
11 employed, but as to the merits of those claims I do not
12 find that that is within the scope of discovery.

13 So, I understand your argument, but I disagree with
14 you. And if you want to at a later point, because those
15 will be identified and you can ask about them, if you want
16 to file, you know, I'll be glad to look at any authority
17 that you have. But this is a telephone conference about
18 depositions that are taking place on, uh, next week and
19 that's the best I can do with what I've got.

20 MS. OINONEN: Yes, Judge. Thank you.

21 Can I ask Joe a quick question while we are all here
22 together?

23 THE COURT: Sure.

24 MS. OINONEN: Joe, you stated a few minutes ago that
25 you have no problem extending discovery. Your associate

1 represented to me that, um, you all wanted to extend
2 discovery for four months and you drafted a consent motion
3 and we stipulated to it, and then on Monday I was told
4 that it was no longer going to be filed so plaintiff moved
5 to extend discovery unilaterally. Would you reconsider
6 that and agree as was originally represented to the
7 consent motion that defendant's counsel, your associates
8 actually drafted.

9 THE COURT: Well, I'm not so sure that I should have
10 heard that, but I did. So go ahead.

11 MR. CHANCEY: Well, it's a pretty simple response.
12 The, as I said, we had agreements regarding a number of
13 things. The depositions notices we got on Monday, uh,
14 raised some different issues, and that was the point at
15 which we felt like we needed to do, wanted to address all
16 of this sort of holistically. Having said that, no, we do
17 not oppose an extension of discovery. We still have some
18 other issues, obviously, we need to work through hopefully
19 together, but we are not going to oppose an extension.

20 But I want it to be clear, we didn't just
21 unilaterally change the agreement. We did it when we saw
22 that you were, that the depositions notices were including
23 issues that had not previously been discussed.

24 THE COURT: Okay, so listen, look, the statute says
25 that this stay extends the discovery deadlines by 90 days,

1 by the length, but I think because I was too, it took
2 longer to rule than I should have, frankly, I will happily
3 acknowledge, that, uh, it may be, the delay, the period of
4 the stay may not, may have exceeded the length of the
5 extension of discovery, which is 90 days under the
6 statute. But you've got 90 days at least, so be aware of
7 that in calculating the time lines.

8 So let me ask you this, and I know it's early
9 interest he process, in this process, but would it be of
10 any benefit to any of these parties to have either an
11 early mediation or a judicially hosted settlement
12 conference?

13 MS. OINONEN: I think at this point our position is
14 we need to move forward with some discovery before we
15 reach that point.

16 THE COURT: I understand, I mean, that's, I respect
17 that you need to look at your case before -- what, I'm
18 likely to require that. The standing order only requires
19 the ADR in domestic relations cases, but frankly this has
20 a lot of the feel of a domestic relations case, and I
21 think it would benefit all of the parties if there was,
22 uh, ADR. And there may be, I understand that I may also
23 get dispositive motions filed. I can foresee that may be
24 coming.

25 Anything else?

1 MS. OINONEN: The motion to extend discovery
2 plaintiff and defendant through counsel agreed to a
3 consent motion last week to extend the discovery by four
4 months, and according to those calculations that was to
5 November 6th, 2019. Part of that was the trial calendar
6 that defense counsel represented to plaintiff. So we came
7 up with that date. Joe, is that a fair date to you at
8 this point? Would you agree to, consent to your original
9 consent motion that was filed last week that we intended
10 to file last week?

11 MR. CHANCEY: The answer--

12 MS. OINONEN: That was (inaudible)--

13 MR. CHANCEY: --is, the answer--

14 MS. OINONEN: --(inaudible)--

15 MR. CHANCEY: Can I answer? Or is there more to the
16 question?

17 MS. OINONEN: Please.

18 MR. CHANCEY: Yes.

19 THE COURT: Okay, so discovery will be extended at
20 least -- this is what you can do to make it simple, you
21 pick the date. Now, is that prior to a trial term that
22 we've got? Is that how it was calculated?

23 MS. OINONEN: It was calculated, Judge, in light of a
24 couple of trial calendars that counsel are on.

25 THE COURT: Oh, I see what you're saying, it's your

1 trial calendars, not my trial calendars. What I'm trying
2 to figure out is are you trying to end discovery prior to
3 a scheduled trial setting that I might have.

4 MS. OINONEN: No, Your Honor, we just calculated to
5 extend it by four months given the scope of the ESI
6 discovery and the number of depositions, we came to that
7 agreement, that four months would be appropriate to ask
8 Your Honor to extend it to the November 6th deadline.

9 THE COURT: Okay. All right, so--

10 MS. OINONEN: It was filed with the Court under
11 plaintiff's motion.

12 THE COURT: All right, well, then you can just, you
13 can go ahead and the easiest, simplest thing to do is to
14 not pick a period of time but to pick a date and then
15 there is no argument about whether four months means
16 November 13th or November 10th, it's whatever the date you
17 pick is. And you've got a date in mind, and what is that
18 date?

19 MS. OINONEN: I believe the date that plaintiff's
20 motion dated November 6th. The consent motion said, I
21 believe, November 1st. I have not problem saying November
22 1st, which was the motion (inaudible) defendant drafted,
23 defense counsel drafted said November 1st.

24 THE COURT: So what is the date you're agreeing on?

25 MS. OINONEN: I'll agree to either date, Joe,

1 whatever you prefer.

2 MR. CHANCEY: You pick one.

3 MS. OINONEN: All right, let's do November 1st.

4 That's what the original consent motion stated.

5 THE COURT: All right, is everybody gonna be on their
6 best behavior during these depositions?

7 MS. OINONEN: Yes, Your Honor.

8 MR. CHANCEY: We will. We respect your admonition
9 and direction.

10 THE COURT: Well, I understand, you know, and I see,
11 I've read the complaint and I, you know, so I understand
12 that -- is Dr. Wainberg going to be present during the
13 depositions?

14 MS. OINONEN: Yes, Judge, he is going to be present
15 for all of the depositions.

16 THE COURT: Okay, and of course he has a right to be
17 present. So I understand that, but as emotional as this
18 might be, the discovery needs to go forward and, you know,
19 as you can probably imagine, discovery disputes are not
20 the favorite purview of Superior Court Judges.

21 MR. OINONEN: Yes, Judge.

22 THE COURT: And I'm sure you've perceived that from
23 me as well, and I'm not making any bones about that, but
24 if I have to I want to help you with, I want to help you
25 resolve this dispute between your clients in a dignified

1 and productive manner. But I am going to expect you all
2 to be dignified and professional and cordial,
3 notwithstanding the fact that your clients may not feel
4 that way towards each other. That's -- lawyers have to
5 have a degree of professional detachment in order to
6 effectively do their jobs, and you can channel your
7 client.

8 You can be a zealous advocate without taking on your
9 client's persona and behaving as though you were the
10 client. And that is what I expect you to do. If you have
11 a dispute then you let me know and I'll do the best I can
12 to, as expeditiously as I can, resolve it. I apologize
13 that it took me as long as it did to rule on the motion,
14 but events occurred, as they sometimes do, in jury trials
15 and everything else, and you got it when you got it and
16 that's my fault.

17 In any event, you've got some marching orders. Does
18 anyone need to prepare an order other than the order
19 extending discovery?

20 MS. OINONEN: No, Your Honor--

21 THE COURT: Is there anything--

22 MS. OINONEN: --this is Julie Oinonen--

23 THE COURT: --that needs to be committed to writing?

24 MS. OINONEN: Pardon me.

25 THE COURT: I said is there anything that needs to be

1 memorialized in the form of an order other than the
2 extension of discovery?

3 MS. OINONEN: That, and perhaps denying the motion
4 for protective order, just that the depositions are going
5 forward, because the concerns with the emails that got
6 sent out to the witnesses, they were taken in such a
7 manner that they were being discouraged from attending,
8 you know, that their employer may have been discouraging
9 them from attending. So we just want those to show up.

10 We are happy to reschedule Stephanie Almonyo.
11 Concerning your admonition I am very confident that myself
12 and Barbara and Joe are going to be able to work out all
13 our discovery disputes between each other without having
14 to involve the Court and my objective will be to end up
15 with friends by the end of this litigation, you know, as
16 concluded.

17 THE COURT: Well, I have, I'm not going to mention
18 any names, but I have lawyers that appear in front of me
19 who cannot make an objection to relevance without
20 including a trial on the merits of their case, sometimes
21 interrupting me when I'm trying to rule in their favor on
22 that objection. So, you know, let's keep it within, let's
23 all stay in our lanes and try and be productive, you know,
24 like I said, I understand you're going to be at Mr.
25 Henry's office in Clarkesville, is that correct?

1 MS. OINONEN: Yes, Your Honor.

2 THE COURT: Now, I will say this, you know, if the,
3 the, I think that the representation is that they're going
4 to make these folks available, um, they're, you've agreed
5 to reschedule the one deposition of the professor/employee
6 who is going to be on vacation.

7 MS. OINONEN: Correct.

8 THE COURT: So let me just ask, you know, do you
9 foresee, does defense counsel foresee that there is going
10 to be difficulty securing the attendance of the other
11 witnesses that have been identified?

12 MR. CHANCEY: You know, Your Honor, we've talked to I
13 think six of the seven, um, and I believe that they all
14 will be in attendance. And in the spirit of your counsel
15 with us, and I really don't want to belabor anything,
16 believe me, at this point, but Julie made a comment, and
17 you said you've got a court reporter there, and I hate to
18 have to say it, but I consider it to be a bit of a serious
19 allegation, and that was the statement that we did or said
20 anything to any of these witnesses in writing or verbally
21 to dissuade them from appearing for their depositions, and
22 I promise you as an officer of the Court that we did no
23 such thing, and I'm happy to provide you copies of the
24 emails that we sent to them so that you can be satisfied
25 that we would never dissuade someone from appearing,

1 unless we had, of course, an order of the Court to do
2 that.

3 So, I really hope, I really don't want to hear that
4 again unless somebody has evidence to support that kind of
5 allegation because it goes to my honor. So, that's all
6 I've got to say about that.

7 THE COURT: What do you say, Ms. Oinonen?

8 MS. OINONEN: Well, I signed a sworn declaration that
9 that was represented to me by Stephanie Almonyo. Now,
10 Stephanie Almonyo received an email from, I think it was
11 Sonya Jacobs, the associate, and so I guess it's in the
12 eye of the reader and interpreter, but that's how she was
13 reading it. And certainly if the Court has any question
14 they could ask for a copy of the email, that I don't have
15 in my possession. I only communicated what I was told by
16 that deponent/witness what her concern was.

17 THE COURT: Well, I understand--

18 MS. OINONEN: (Inaudible)-- read the email.

19 THE COURT: I understand the, um, you know, of
20 course, sometimes in the course of human events matters
21 are subject to different reasonable interpretations, and
22 perhaps a witness who does not want to be present because
23 they have a scheduled family vacation that's going to be
24 interfered with might tend to read something in one way
25 and, you know, human communication being imperfect as it

1 is, so it doesn't sound -- I'm not taking that there has
2 been any lack of professionalism by anybody at this point.

3 I think that, my perception is everybody is trying to
4 represent their clients zealously. If I feel or find out
5 otherwise I assure you that you will know.

6 So I hope you have a good time, a good week next week
7 in Clarkesville. I am going to be right around the corner
8 at the Habersham County Courthouse on Monday, and if you
9 need anything please let me know.

10 MS. OINONEN: Thank you, Judge.

11 MR. CHANCEY: Thank you, Judge.

12 THE COURT: All right, y'all have a good weekend.

13 MR. CHANCEY: You too, take care.

14 MS. OINONEN: You as well. Bye now.

15 THE COURT: Good bye.

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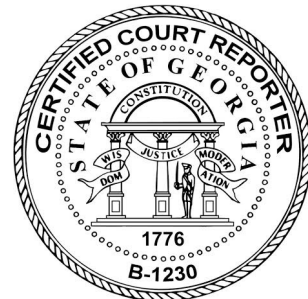
R E P O R T E R ' S C E R T I F I C A T E

I, Anita W. Moore, do hereby certify that the foregoing 44 pages are true and correct to the best of my skill and knowledge, and that they are a complete record of the above-styled matter.

I further certify that I am not of kin nor counsel to any party and have no financial interest in the outcome of the matter whatsoever.

This 30th day of April, 2019.

Anita W. Moore



1


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)
)
Plaintiff,) CIVIL ACTION
) NO. 18CV454
v.)
PIEDMONT COLLEGE,)
)
Defendant.)

**PLAINTIFF'S MOTION THAT EVIDENCE THE EMPLOYER, SUPERVISOR, OR
OTHER EMPLOYEES ENGAGED IN CONDUCT SIMILAR TO THAT WHICH WAS
THE ALLEGED BASIS FOR PLAINTIFF'S TERMINATION IS RELEVANT AND
THEREFORE A SUBJECT OF PROPER INQUIRY AT DISCOVERY DEPOSITIONS:
LETTER BRIEF AND FILED AFFIDAVIT OF DR. RICK AUSTIN ATTACHED**

COMES NOW Plaintiff, Dr. Robert Wainberg, through counsel of record, and moves this Court to allow proper inquiry during deposition into knowledge of other Title 9 sexual harassment allegations as relevant: specifically, knowledge that the Defendant's decision maker engaged in sexual harassment and covered up other acts of sexual harassment.

The Court inquired via telephone conference whether Plaintiff could not get such information in an Affidavit. Plaintiff replied affirmatively but stated that Plaintiff must be permitted to delve into these issues during deposition concerning such issues.

Plaintiff hereby provides notice that the below documents are being filed herewith in support of this motion:

1. Attached Letter Brief-Memorandum of Law, See Ex. 1.
2. Attached Affidavit of Rick Austin, See Ex. 2.

Respectfully submitted this 14th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
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Atlanta, Georgia 30303

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing respective Plaintiff's Motion has this day been served with the Clerk of Court using the PeachCourt e-filing system and upon opposing counsel by depositing a true and correct copy of the same via U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
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Attorneys for Defendant Piedmont College

Respectfully submitted this 14th day of March 2019,

/s/ JULIE OINONEN
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Exhibit 1

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March 14, 2019

***E-Filed & Emailed Letter Brief
Exhibit 1 to Plaintiff's Motion***

Habersham County Courthouse
c/o The Honorable Russell Smith
295 Llewellyn St
Clarkesville, GA 30523

Dear Judge Smith:

Thank you for the conscientiousness and time you have shown both parties in carefully deliberating on each these challenging issues, it is appreciated. Below is the letter brief you requested:

Evidence that the Employer, Supervisor, or Other Employees Engaged in Conduct Similar To That Which Was the Alleged Basis For Termination Is Relevant And A Subject Of Proper Inquiry At Discovery Depositions:

I. PRELIMINARY MATTERS

1. Plaintiff wishes to respectfully remind the Court that, at last Friday's status conference concerning Defendant's motion for protective orders, it was Plaintiff's understanding that the Court ruled that deponents could be questioned regarding what they saw and heard concerning Title 9 or sexual harassment allegations. There was also discussion, with Plaintiff's counsel reading a federal government directive, that this does not violate FERPA. Nothing during the Wednesday, March 13th deposition of Dr. Rick Austin violated the Court's directive, with Plaintiff intending to make inquiries into the sexual harassment and sexual assault incidents involving President James Mellichamp, specifically ones he had engaged in or alternatively covered up. Nevertheless, Plaintiff's Counsel called the Court, subsequent to Defendant's Counsel's request in order to make sure the Court's directives were fully complied with.
2. At the phone conference, the Court asked Plaintiff's Counsel if Plaintiff could not get such information in an Affidavit. Plaintiff replied affirmatively but stated that Plaintiff must be permitted to delve into such issues during deposition. Based on the Court's inquiry,

Plaintiff attaches as Exhibit 2, Affidavit from deponent, Dr. Rick Austin, concerning the issues that should be permitted at the deposition.

II. STANDARD

The general scope of discovery is provided for by the Civil Practice Act. Generally, a party can obtain discovery regarding any matter, not privileged, relevant to the subject matter of the pending action. O.C.G.A. § 9-11-26. Notably, Georgia courts have also held that, where relevance is doubtful, the evidence should normally be admitted and its weight left to the determination of the jury. Kalish v. King Cabinet Co., 140 Ga. App. 345, 346 (1976). Concerning discovery however, the information **sought need not be admissible at trial, only reasonably calculated to lead to the discovery of admissible evidence.** E.g. Ambassador College v. Goetzke, 244 Ga. 322, 323 (1979) (Court affirmed it was not error to compel discovery. Appellant (**a College**) arguing disclosures sought would violate its constitutional rights of free exercise and non-establishment of religion; freedom of association; privacy; and/or security in their persons, houses, paper and effects against unreasonable searches and seizures.) “Discovery is an integral and necessary element of our civil practice. **Wide latitude is given to make complete discovery possible. The broad purpose** of the discovery rules, under the Civil Practice Act, **is to enable the parties to prepare for trial** so that each party will know the issues and be fully prepared on the facts. Discovery is specifically designed to fulfill a two-fold purpose: issue formulation and factual revelation. The use of the discovery process has been held to be **broadly construed.**” § 15:2. Scope of discovery: in general, Ga. Practice & Procedure § 15:2 (2018-2019 ed.); E.g. Travis Meat & Seafood Co. v. Ashworth, 127 Ga. App. 284, 285 (1972).

III. FACTS

1. Plaintiff is suing for breach of contract, violation of the **duty of good faith and fair dealing**, and attorney fees. President Mellichamp, whose intent was to retaliate against Plaintiff for speaking out against him (Complt. ¶21) claimed that Plaintiff was terminated because he made sexual comments that constituted sexual harassment in violation to Title 9 that were “seriously prejudicial” to the College. (See Complt generally, ¶24.) Discoverable evidence will show that the comments Dr. Wainberg made in no way could be construed as sexual harassment or seriously prejudicial, or alternatively, that it is a jury fact question.
2. In determining breach of contract, a jury should look to see procedurally, whether the College violated tenured termination policy and Title 9 grievance policy, both which requires a “fair and impartial” process procedurally as well substantially, as a tenured professor may not be terminated without “cause,” and whether such actions rose to the level of “seriously prejudicial.”
3. The President was the decision maker. It will be a factual question to also determine: ***Was the decision maker President acting in good faith or is the proffered reason for termination pretext? How do we measure the standard of Dr. Wainberg’s actions as seriously prejudicial when other egregious acts of sexual assault/sexual harassment***

were being ignored or condoned? The evidence that shows the President sexually harassed others and covered up complaints of sexual harassment tends to show a motive and intent to perform both a skewed investigation and finding in order to justify Plaintiff's termination.

4. In determining whether Plaintiff's very innocuous comments rose to the standard of "seriously prejudicial" **and were the true reason for terminating him, or a pretextual ruse and reason done in bad faith in violation of good faith and fair dealing**, it is also relevant to compare how the decision maker handled other conduct involving sexual harassment, i.e. to determine what would be the standard considered "seriously prejudicial." For example, Dr. Wainberg's comments in a lecture discussing how mitochondria looks like a ribbed condom meeting a "seriously prejudicial" standard when the President/decision maker's actions in sexually harassing a faculty member or covering up his Vice President's acts did not reach this standard is evidence of pretext and a bad faith motive/intent on the part of the decision maker President. E.g. Dr. Rick Austin's testimony that President Mellichamp engaged in sexual assault and harassment as well as its cover-up stating:

"President Mellichamp accused Dr. Rob Wainberg of violating Title 9, laws that cover sexual harassment but I am confident that this was an unjustifiable mechanism to terminate him in bad faith. I am confident of this because I have firsthand knowledge that President Mellichamp does not comply with Title 9 or with properly addressing sexual harassment, either by covering it up, ignoring it, or by engaging in his own inappropriate behaviors, reflective that his reasons for terminating Dr. Wainberg are not true reasons." (See Ex. 2 ¶¶14-16.)

IV. ARGUMENT:

Evidence that the decision maker, President James Mellichamp engaged in conduct and the cover-up of conduct which was the alleged basis for termination is relevant and is the subject of proper inquiry at discovery depositions, as the information sought is reasonably calculated to lead to the discovery of admissible evidence. Respectfully, Defendant's objections are premature and belong in an evidentiary trial motion not a discoverability dispute. Plaintiff contends the evidence should be admissible at trial and certainly well within the scope of discovery.

The evidence that the Defendant's decision maker engaged in sexual harassment and covered up other acts of sexual harassment is relevant because:

1. Such evidence shows President Mellichamp's true motive and intent for firing Dr. Wainberg:

Plaintiff is suing for breach of contract and a violation of the implied duty of good faith and fair dealing. The President/decision maker's true motive and intent for terminating Dr. Wainberg will show that he did not engage in good faith and fair dealing. Rather, his motive and intent was to retaliate against Dr. Wainberg for speaking out against the President, not because Dr. Wainberg's actions rose to the level of "seriously prejudicial" to the college. "It is well settled that motive

and intent may be shown by conduct in other transactions of a similar nature to that under investigation.” Ga. Admissibility Of Evidence In Civil Cases § 22:35; Terry v. Fickett, 199 Ga. 30, 38(8), 33 S.E.2d 163; Green, Ga.Law of Evidence (3d ed.), Relevancy, § 68.

The Court has held: “Such evidence also is admissible to show malice (*Worn v. Warren*, 191 Ga.App. 448(1), 382 S.E.2d 112) and good faith or bad faith (*Tapley v. Youmans*, 95 Ga.App. 161, 175, 97 S.E.2d 365); and, it is admissible when it provides probative evidence of willful misconduct, fraud, wantonness, oppression, or a course or pattern of conduct which would raise the presumption of conscious indifference to consequences. “Evidence of other transactions or occurrences is admissible if it is relevant to the particular instance and does not place too great a danger of undue consumption of time, confusion of issues, undue prejudice or unfair surprise.” *Worn*, supra. The evidence of appellant's other allegedly fraudulent or similarly related conduct was relevant in this particular case, to show willful misconduct, motive, fraud, oppression, or conduct evidencing an entire want of care evidencing conscious indifference to consequences.” West v. Nodvin, 196 Ga. App. 825, 828–29 (1990) (Concerning a breach of contract, fraud, and punitive damages suit.)

Thus, evidence that the President engaged in sexual harassment and covered up other acts of sexual harassment is relevant to show bad faith (lack of good faith/fair dealing) in terminating Dr. Wainberg’s contract. The evidence shows that when sexual harassment is close to him he covers it up, fails to address it, or engages in it himself but when it allegedly involves somebody who spoke out against him, the President uses minor comments as a pretextual basis to terminate. It goes to show the President/decision maker’s intent and motive of bad faith in executing the contract.

2. Such evidence shows President Mellichamp’s action in firing Dr. Wainberg was done in bad faith and in violation of the implied duty of good faith and fair dealing:

“With regard to allegations of bad faith, it is frequently difficult to establish the defendant's state of mind. The defendant's state of mind may be illustrated by other acts of a similar nature that indicate a general practice or course of conduct or display intent, motive, knowledge, or bad faith.” Kilburn v. Patrick, 241 Ga. App. 214, 217 (1999) (Breach of fiduciary duty suit where: “[Plaintiff] argued that [Defendant] acted in bad faith by breaching a fiduciary duty. Accordingly, [Defendant’s] treatment of the only other minority shareholder arguably demonstrated a course of conduct. Under these circumstances, we cannot say that the trial court abused its discretion in admitting the evidence.”) Id. Again, this evidence goes to show that the Defendant’s decision maker’s state of mind, true intent and motivation for termination of Plaintiff was in bad faith, in clear violation of his duty of good faith and fair dealing.

3. Evidence of Sexual Harassment Actions of a Defendant Are Admissible To Show Intent Against The Plaintiff:

Similarly, is important to note that in employment cases in federal court, other incidents of sexual harassment by a Defendant can be considered as evidence to prove intent to discriminate and retaliate. In this case, President Mellichamp’s other acts of sexual harassment can in fact show his true intent against Plaintiff and that his actions were motivated by retaliation for him

speaking out, rather than true concern that his behavior constituted sexual harassment that rose to the level of seriously prejudicial: "Under F.R.E. 404(b), '[e]vidence of other crimes, wrongs, or acts... may... be admissible for ... purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" Demers v. Adams Homes of Northwest Florida, 321 Fed. App'x 849, 853-54 (11th Cir. 2009). The law of this Circuit permits a trier of fact to consider this type of evidence under Rule 404(b) to "prove intent to discriminate and retaliation." Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1309 (11th Cir. 2016). In Furcron, the court found the trial court abused its discretion in failing to consider evidence that another employee suffered sexually harassing acts because there was no legal basis for the exclusion. See id. In Demers, the Eleventh Circuit ruled that the trial court did not err in permitting testimony of three former employees regarding a supervisor's discriminatory acts, noting the jury could accept such similar fact circumstantial evidence to find discriminatory intent on behalf of the employer. See Demers, 321 Fed. App'x at 854 (citing Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1285 (11th Cir. 2008)).

4. The United States Supreme Court Holds That Evidence of Other Similar Incidents Are Usually Admissible To Show Pretext in Employment Discrimination Cases:

In the case at bar, we are seeking to prove that Defendant violated not just breach of contract but the implied duty of good faith and fair dealing, and that the reason is proffered for terminating Plaintiff is a pretextual ruse. In employment discrimination cases, plaintiffs can present evidence that other employees engaged in substantially similar conduct but were not terminated. E.g. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981) ("It is the plaintiff's task to demonstrate that similarly situated employees were not treated equally."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973); Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1343 (11th Cir.2011); *see e.g., Osram Sylvania, Inc. v. Teamsters Local Union 528*, 87 F.3d 1261, 1265 (11th Cir.1996) ("Disparate treatment exists when similarly situated workers are treated differently even though they have committed similar acts.") Here, the evidence shows that comparators are not fired for similar conduct. The Defendant was aware of similar conduct by others who were not fired or punished. In fact, the decision maker himself is engaged in far more egregious similar conduct, i.e. true sexual harassment and yet is not fired.

This can also include evidence of discrimination by other supervisors that have no role in the employment decision of the Plaintiff. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 388 (2008)

5. Likewise, Evidence of Other Similar Incidents Of Wrongdoing By Other Employees Is Held Admissible To Show Pretext In Breach of Employment Contract Cases:

Where evidence of employees engaging in similar conduct for which the Plaintiff was allegedly terminated under a breach of contract claim, the Court has found the evidence both relevant and discoverable. Moore v. Lender Processing Servs. Inc., 2013 WL 2447948, at *2 (M.D. Fla. June 5, 2013).

This is a case that the undersigned found with facts closest to our own. In this case, Plaintiff worked for her Defendant for over 23 years and had an employment contract at the time when

she was terminated. “Plaintiff argues the personnel files of seven of the employees are relevant to show the pretextual nature of Defendant's decision to terminate her employment. According to Plaintiff, **these employees engaged in the same or similar conduct for which Plaintiff was allegedly terminated.** Plaintiff believes a review of their files may provide insight into whether Defendant's reasons for terminating her employment were pretextual.” Moore v. Lender Processing Servs. Inc., 2013 WL 2447948, at *2 (M.D. Fla. June 5, 2013.)

Accordingly, the plaintiff filed a Motion to Compel and thus the Moore case is an Order on a plaintiff's motion to compel regarding a discovery dispute, where defendant argued that other employee incidents were not relevant as to whether it breached plaintiff's employment agreement and the other employee matters contained in employee files were confidential and not discoverable.

Importantly, the Court disagreed with the defendant's arguments and deemed that information that other employees engaged in the same or similar conduct for which plaintiff was allegedly terminated was in fact discoverable stating:

“Rule 26(b) (1) of the Federal Rules of Civil Procedure provides that “[p]arties “may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ...” Courts construe relevancy “broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). Relevant information is discoverable even if it is not admissible at trial, “if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Rule 26(b)(1), Fed.R.Civ.P. The Federal Rules of Civil Procedure strongly favor full discovery whenever possible. *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194, 1197 (11th Cir.1991). Thus, although the undersigned is aware that the threshold for determining whether discovery is relevant is relatively low, the ‘proponent of a motion to compel discovery [still] bears the initial burden of proving that the information sought is relevant.’” *Diamond State Ins. Co. v. His House, Inc.*, No. 10–20039–CIV, 2011 WL 146837, *5 (S.D.Fla. Jan.18, 2011) (quoting *Peacock v. Merrill*, No CA 05–0377–BH–C, 2008 WL 176375, *8 (S.D.Ala. Jan.17, 2008)). **Here, Plaintiff has satisfied that burden.**” Moore v. Lender Processing Servs. Inc., No. 3:12-CV-205-J, 2013 WL 2447948, at *2 (M.D. Fla. June 5, 2013.)

Similar to the Moore case, Plaintiff should be entitled to inquire into information concerning other employees engaged in similar conduct for which the Plaintiff was allegedly terminated.

Not only is such information relevant to prove the bad faith motive and intent in Plaintiff's breach of contract and violation of the implied duty of good faith and fair dealing claims, it is relevant in Plaintiff's §13-6-11 claims. “Bad faith is not simply bad judgment or negligence, but ... [a] breach of known duty through some motive of interest or ill will.” Greenway v. Hamilton, 280 Ga. 652, 655 (2006). Because “[it] is well settled that motive and intent may be shown by conduct in other transactions of a similar nature to that under investigation,” Terry v. Fickett, 199 Ga. 30, 38(8), 33 S.E.2d 163; the Court has held: “Such evidence also is admissible to show

malice (Worn v. Warren, 191 Ga.App. 448(1), 382 S.E.2d 112) and good faith or bad faith (Tapley v. Youmans, 95 Ga.App. 161, 175, 97 S.E.2d 365.)

Consequently, this Court should find that evidence that the Defendant engaged in sexual harassment and covered up other acts of sexual harassment to be relevant evidence admissible at trial, but also find that it most certainly meets the standard for discovery under Georgia law in that it is reasonably calculated to lead to the discovery of admissible evidence, a standard that is to be given “wide latitude” and to be “broadly construed.” § 15:2. Scope of discovery: in general, Ga. Practice & Procedure § 15:2 (2018-2019 ed.); E.g. Travis Meat & Seafood Co. v. Ashworth, 127 Ga. App. 284, 285 (1972).

RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script, reading "Julie Oinonen".

JULIE J. OINONEN

Exhibit 2

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO. 18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

AFFIDAVIT OF DR. RICK AUSTIN

Personally appeared before the undersigned officer duly authorized by law to administer oaths, RICK AUSTIN, who, after being duly sworn, deposes and states the following:

1.

Affiant states that he is over 18 years of age, a citizen of the United States, and not related to the parties herein. The statements made are true and correct and are based upon my personal knowledge, as a witness in this matter.

2.

I have been a student at Piedmont College who graduated in 1990. I have also worked as a full time, faculty member for the past 22 years. During my time at Piedmont College, I have had the opportunity to interact with Dr. Mellichamp as a student and faculty member. I have worked both as Dr. Mellichamp's direct subordinate in his role as Vice President for Academic Affairs and President of the College.

3.

During my time as a student at Piedmont College, I observed Dr. Mellichamp engage in inappropriate conduct with students which included him purchasing alcohol for minors, drinking with students, at times to the point of visible intoxication, and taking students to a gay bar on a college-sanctioned trip.

4.

Additionally, I am aware that Dr. Mellinchamp engaged in behavior directed towards students that constitutes sexual harassment, specifically inappropriately touching a female student's rear end.



5.

Moreover, as a faculty member, I have personal knowledge that Dr. Mellichamp engaged in sexual harassment of a faculty member, specifically myself.

6.

Over the years, I have received unsolicited emails and/or statements that Dr. Mellichamp has made towards me that are sexual in nature, that included either sexual innuendo, sexual overture or were inappropriate in nature.

7.

There was an incident I remember in August of 2011 involving an interaction with Dr. Mellichamp that constituted sexual assault. I remember that it was my last year in the Legislature and I needed to ask the President Hollingsworth for permission to miss the first day of faculty orientation for the academic year because Governor Deal had specifically asked me to be present for a press conference. I was in President Hollingsworth's outer Office. At the time, Dr. Mellichamp was Vice President. I was talking to Debbie Zimmerman, the President's Secretary. As I waited for the President to become available for a short conversation, Dr. Mellichamp approached and grabbed my buttocks remarking "Oooh you're in shorts today" continuing to walk by into the President's inner Office. His action and language was clearly overtly sexual in nature to me.

8.

During that time, Dr. Mellichamp was my superior as the Chief Academic Officer in his role as Vice President for Academic Affairs. His action was clearly overtly sexual in nature to me I believe constituted a sexual assault and an abuse of power. I remember stating to Debbie Zimmerman "Did you see that?" and she replied, "Yes I saw that." Then I said to her "I am uncomfortable," and she replied, "I am uncomfortable too."

9.

After this incident, I made a complaint of sexual harassment to the President concerning Dr. Mellichamp's actions against me letting him know that the Vice President had grabbed my rear end and that his behavior directed towards me made me uncomfortable. I also stated to him that it was inappropriate and I did not want it to happen again. Dr. Mellichamp's behavior towards me has been both traumatic and uncomfortable because of having to hear over the years from other faculty and students "James [Dr. Mellichamp] has a thing for you."

10.

After making my complaint of sexual harassment, no one from Piedmont College ever conducted an investigation addressing this issue.

11.

I believe that Dr. Mellichamp has not just engaged in sexual harassment but has deliberately covered up unlawful acts of sexual harassment. I am aware that a couple years ago a female employee was being sexually harassed by one of Dr. Mellichamp's Vice Presidents. After she indicated that she



made a complaint against Vice President Ken Jones of sexual harassment, President Mellichamp dismissed her oral report and told her: "I just need you to sit on this for awhile."

12.

I believe that Dr. Mellichamp engaged in retaliation against me by targeting my son as a student through the excess scrutiny and discipline he has received because he is my son.

13

When my wife met with Dr. Mellichamp in a scheduled meeting to address the college's inequitable treatment towards our son, she reminded him of his own inappropriate behavior as a faculty member towards students, including but not limited to, providing alcohol to her as an underaged student. In response to this, I believe our family was subjected to further retaliation.

14.

President Mellichamp accused Dr. Rob Weinberg of violating Title 9, laws that cover sexual harassment but I am confident that this was an unjustifiable mechanism to terminate him in bad faith.

15.

I am confident of this because I have first-hand personal knowledge that President Mellichamp does not comply with Title 9 or with properly addressing sexual harassment, either by covering it up, ignoring it, or by engaging in his own inappropriate behavior.

16.

President Mellichamp, who is accusing Dr. Rob Wainberg of violating Title 9, has illustrated a blatant disregard for Title 9 through his own sexual harassing behaviors, reflective that his reasons for terminating Dr. Wainberg are not true reasons.

17.

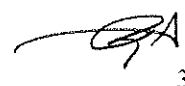
I am confident that Dr. Rob Wainberg did not violate Title 9 or sexually harass any student. I known Dr. Robert Wainberg for many years, both as a student and a colleague.

18.

I met with President Mellichamp on a Wednesday, April the 25th in my capacity as mayor of Demorest. At the end of that conversation, Dr. Mellichamp spoke to me about when Dr. Wainberg intended to retire and if I thought Dr. Wainberg would entertain being given a sabbatical. It was clear to me that the President and Piedmont College were looking for a clear exit strategy for Dr. Wainberg, a tenured professor.


19.

I am making this complaint of the sexual harassment and assault with the specific request to my employer that I be protected from retaliation as a result of my testimony. Both myself and my faculty colleagues are concerned of retaliation from the President. Prior to giving my deposition testimony, I along with my colleagues specifically requested from Piedmont College assurance on their retaliation

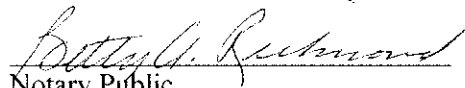


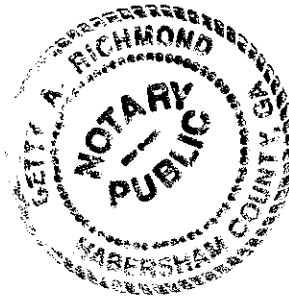
policy. During my deposition, I testified that both my colleagues and myself are fearful of retaliatory behavior by the President and/or Piedmont College.

This 13th day of MARCH 2019.


DR. RICK AUSTIN – Affiant

Sworn and subscribed before me
This 13th day of March 2019.


Notary Public
My commission expires: 1/18/2022





Joseph C. Chancey
(404) 885-6222
jchancey@deflaw.com

Barbara A. Marschalk
(404) 885-6322
bmarschalk@deflaw.com

March 15, 2019

Via U.S. Mail and Electronic Mail

The Honorable Russell W. Smith
Superior Court of Habersham County
P.O. Box 758
Toccoa, Georgia 30577

**RE: *Dr. Robert H. Wainberg v. Piedmont College*
Superior Court of Habersham County, State of Georgia
Civil Action File No. 18CV0454**

Dear Judge Smith:

Pursuant to your request, please accept this correspondence as Defendant Piedmont College's letter brief addressing whether, in an action for wrongful termination for breach of an employment contract, evidence that the employer, supervisor, or other employees engaged in like conduct to that which was the basis for the plaintiff's termination is relevant.

This is, simply, a breach of contract case between a private employer and an employee. Unfortunately, Plaintiff's Complaint, with its references to the Bolshevik revolution and the rise of the Third Reich, among other far-flung condemnations, has set the tone of plaintiff's attempted attack on the college. While Defendant recognizes that the permissible scope of discovery exceeds the limits of strict relevance, discovery should still have some logical relationship to the elements of the stated claims and defenses. The depositions conducted by Plaintiff to date demonstrate that he recognizes no bounds of relevance to his breach of contract case, even under the broader scope permitted in discovery.

As indicated in Your Honor's email, this is not a section 1983 action. Defendant is a private college, and is therefore not a "person acting under color of state law." This case does not involve the deprivation of federally protected rights by a state actor; therefore, constitutional concepts such as due process and equal protection simply do not apply. 42 U.S.C.A. § 1983. The only deprivation Plaintiff has alleged in this case is that he was denied contractual "due process" under the College's Policies and Procedures.¹ (Compl., ¶ 41).

Even if this were a § 1983 case, case law is clear that evidence of similar conduct would only be relevant to establish unlawful discrimination in violation of constitutional prohibitions. Where plaintiffs attempt to establish unlawful discrimination based on evidence of disparate

¹ As a tenured professor at a private university, Plaintiff was not entitled to constitutional procedural due process when he was terminated. *See Madon v. Long Island Univ. C. W. Post Center*, 518 F. Supp. 246 (E.D.N.Y. 1981). Any due process rights he had at the time of his termination would have to be contractual.

The Honorable Russell W. Smith

March 15, 2019

Page 2

treatment of “comparators,” such evidence is admissible only if it “show[s] that ‘all relevant aspects’ of [plaintiff’s] employment situation are ‘nearly identical’ to those of the allegedly similarly-situated persons.” *Foster v. Judnic*, 963 F.Supp.2d 735 (E.D. Mich. 2013), *citing Humenny v. Genex Corp.*, 390 F.3d 901, 906 (6th Cir. 2004). More particularly, plaintiff would have to show that the similarly-situated person “dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” *Id.*

Here, Plaintiff has not pursued, and cannot pursue, constitutional discrimination claims against Piedmont College, so evidence of alleged comparators does not relate to the elements of his cause of action. Beyond that, the testimony Plaintiff seeks to procure from Rick Austin relates to events that allegedly occurred over 20 years ago, involving different supervisors, different standards, and different conduct. Even in a § 1983 scenario, such evidence would not satisfy the similarly-situated element of a *prima facie* case of discrimination under the statute, and as such would not be relevant.

This is also not a Title VII action, where evidence of a similarly-situated comparator could be relevant to establish a *prima facie* case of discrimination based on disparate treatment due to an employee’s statutorily protected characteristics. *See Winborn v. Supreme Beverage Co. Inc.*, 572 Fed.Appx. 672, (11th Cir. 2014). Although Title VII is applicable to private employers, it is not a claim in this lawsuit. Plaintiff’s Complaint seems to allege that he was terminated based on personal animosity. But he has not alleged discrimination “with respect to his compensation, terms, conditions, or privileges of employment because of [Plaintiff’s] race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). Nor could he assert a Title VII claim now, because he did not file a charge of discrimination with the Equal Employment Opportunity Commission within ninety days of his termination and obtain a “right to sue” letter, as is required in order to pursue a Title VII discrimination claim. *See* 42 U.S.C. § 2000e-5(f)(1); *Green v. Union Foundry Co.*, 281 F.3d 1229, 1233-34 (11th Cir. 2002).

Plaintiff’s claim is simply for breach of contract. Thus, the issue of whether Piedmont College’s decision to terminate Plaintiff’s employment was “pretextual” under a § 1983 or Title VII analytical framework is not relevant. How Defendant treated other employees under other circumstances has no relevance to the only issue in this case: whether Piedmont College breached Plaintiff’s employment contract.

The elements necessary to establish a breach of a contract claim are simply: (1) the existence of a contract, (2) a material breach of that contract, and (3) damages as a result of the breach. In the instant case, Defendant contends it terminated Plaintiff’s employment for conduct found to be seriously prejudicial to the College – namely, Plaintiff’s referencing students by name in sexual anecdotes that Plaintiff used to teach his classes, which Defendant determined after investigation constituted sexual harassment in violation of Title IX. Plaintiff admits that he referenced students by name in sexual anecdotes that he used in class. (Compl., ¶ 25). Plaintiff also admits that students complained to the College’s administration of Plaintiff’s conduct (*Id.* at ¶26); that the College conducted a Title IX investigation into Plaintiff’s conduct (*Id.* at ¶33); and

The Honorable Russell W. Smith
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 Page 3

that after concluding its investigation, Defendant terminated Plaintiff. (*Id.* at ¶ 38). Defendant's termination of or conduct towards employees other than Plaintiff is wholly irrelevant to whether Defendant breached **Plaintiff's** employment contract.

Plaintiff misconstrues the district court's opinion in *Moore v. Lender Processing Servs. Inc.*, which found that similar conduct could be considered relevant in the context of resolving the interpretation of an ambiguous provision in plaintiff's employment contract. Here, Plaintiff is not seeking evidence of similar conduct to resolve an ambiguity in Plaintiff's employment contract. Rather, consistent with the content of his Complaint, Plaintiff's focus appears to be on filling the record with scandalous narrative concerning the College's administration. By way of example, Plaintiff directly ignored Your Honor's email instruction to submit a letter brief or email instead of formal briefing on this issue just so he could file Rick Austin's Affidavit in the public record, which contains unsupported and defamatory statements about the President of the College.

Plaintiff's arguments are simply asking this Court to substitute a jury's judgment for that of Piedmont College. However courts and juries do not sit "as a super-personnel department that reexamines an entity's business decisions." *See Bullington v. Jefferson Southern Corp.*, No. 4:16-CV-0245-HLM-WEJ, 2017 WL 6586120, * 17 (N.D. Ga. 09/15/2017). This is particularly true with respect to institutions of higher education, which courts across the country have long held are vested with the ultimate authority and responsibility to make their own personnel decisions. *See, e.g. Odem v. Pace Academy*, 235 Ga. App. 648, 510 S.E.2d 326 (1998) (ruling private school had contractual authority to terminate teacher for insubordination and unsatisfactory professional performance under terms of employment contract based on complaints from parents and students); *Iz v. University of Baltimore*, 123 Md. App. 135, 178, 716 A.2d 1107, 1128 (1997), *cert. denied*, 351 Md. 663 (1998) (in tenure case, "it is not the function of the courts to second-guess judgment calls made by those [University officials] vested with the ultimate authority and responsibility..."); *Murphy v. Duquesne University of the Holy Ghost*, 565 Pa. 571, 596, 777 A.2d 418, 433 (2001) (in tenure removal case, "[a]ll of these decisions involved subjective judgments of a teacher's professional and personal qualities, and his potential for either advancing or impeding the University's mission"); *Yackshaw v. John Carroll Univ. Ed. of Trustees*, 89 Ohio App. 3d 237, 242, 624 N.E. 2d 225, 229 (1993) (professor terminated pursuant to faculty handbook procedures not entitled to *de novo* judicial review); *Ferrer v. Trustees of the Univ. of Pennsylvania*, 573 Pa. 310, 340, 825 A. 2d 591, 609 (2002) ("[a professor] is not free to demand that a jury re-consider and re-decide the merits of his termination"); *Riggin v. Ed. of Trustees of Ball State University*, 489 N.E. 2d 616, 625 (Ind. App. 1986) ("The court may not substitute its own opinions for that of the Trustees, but must give deference to its expertise"); *Getler v. Goodgold*, 487 N.Y.S.2d 565, 568 (N.Y. App. 1985) ("[S]ince academic and administrative decisions of educational institutions involve the exercise of subjective professional judgment, public policy compels a restraint which removes such determinations from judicial scrutiny").

Again, this is a simple breach of contract case. However, it is clear from the depositions taken by Plaintiff to date that he is not interested in whether or not the deponents have any actual knowledge of Plaintiff's employment contract, the Title IX complaint against Plaintiff,

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March 15, 2019

Page 4

Plaintiff's complained of conduct, the Title IX investigation, or Plaintiff's termination.

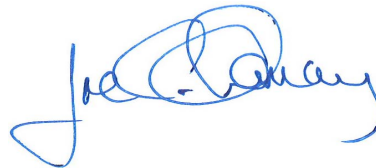
Given Plaintiff's continuing attempts to make this case a wide ranging indictment of the College's administration without limit, Defendant asks that the Court reconsider holding a case management conference in this case. Defendant further asks that this Court admonish Plaintiff and his counsel from further filling the public record with immaterial, impertinent and scandalous allegations concerning the College, its administration, faculty and students.

Thank you for your consideration.

Respectfully submitted,
DREW ECKL & FARNHAM, LLP



Barbara A. Marschalk



Joseph C. Chancey

BAM:JCC:STJ

cc: Julie Oinonen, Esq. (Via E-mail)
Sonya T. Jacobs, Esq. (Via E-mail)

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March 18, 2019

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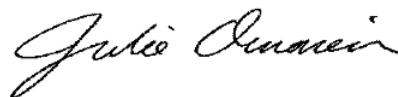
The Honorable Russell W. Smith
Superior Court of Habersham County
P.O. Box 758
Toccoa, Georgia 30577

RE: Dr. Robert H. Wainberg v. Piedmont College
Superior Court of Habersham County, State of Georgia
Civil Action File No. 18CV0454

Dear Judge Smith:

I am not sure if the Court requires a response to Defendant's March 15th email, nevertheless, because Plaintiff stated he intended to respond, Plaintiff responds as follows: Plaintiff denies Defendant's assertions that the affidavit was libelous. The Court had inquired: "Wouldn't you not be able to get an affidavit from the witness for example?" to which Ms. Oinonen replied: "I can get an affidavit from Dr. Austin, yes I can." (See Exhibit 1, portion of a "rough" from Court Reporter, depo of Dr. Rick Austin.) Plaintiff would object to any pleading being placed under seal. Plaintiff does not need to depose Dr. Rick Austin anytime soon. His counsel will be deposing the two Title 9 investigators and Title 9 coordinator in April, and these dates have been scheduled between both parties. Thank you again Judge Smith for your time and conscientiousness to this case.

Respectfully yours,



JULIE J. OINONEN

Cc: Joseph Chancey
Sonya Jacobs
Barbara Marschalk

Exhibit 1

17 Rick Austin (1)
needs to come out. If your Honor rules on it in
18 the future for a motion in limine, you know, that
19 that's a separate issue, but this is --



20 THE COURT: Well, I don't understand -- I
21 don't understand so help me -- help me understand
22 Ms. Oinonen. Let's say for example that this is
23 some evidence that you want for a -- that you
24 want to use in respect to some motion, although I
25 don't foresee how that could be, you know, that

57

1 would be the case. Wouldn't you not be able to
2 get an affidavit from the witness for example?

3 MS. OINONEN: I can get an affidavit from
4 Dr. Austin, yes, I can. But we need to be
5 entitled to question him and ask questions about
6 it and Ms. Marschalk frankly needs to be entitled
7 to cross-examine him on it. These are relevant
8 discoverable issues. This is not -- I mean this
9 is huge. This is --

10 THE COURT: Well, this case is not about --

 **FILED IN OFFICE**
CLERK OF SUPERIOR COURT
HABERSHAM COUNTY, GEORGIA
18CV0454
RUSSELL W. SMITH
MAR 18, 2019 07:35 PM

David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

RULE 5.2 CERTIFICATE OF SERVICE OF DISCOVERY

I HEREBY CERTIFY that I am counsel for Defendant in the above-styled matter and that I have this day served a copy of the foregoing:

- 1) *Defendant Piedmont College's First Supplemental Objections and Responses to Plaintiff's First Interrogatories to Defendant; and*
- 2) *Defendant Piedmont College's First Supplemental Objections and Responses to Plaintiff's Request for Production of Documents to Defendant*

on all parties to this matter by placing a true and correct copy of same in the United States mail, proper postage affixed thereto, addressed to counsel of record as follows:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 18th day of March, 2019.

/s/ Barbara A. Marschalk
Joseph C. Chancey
Georgia Bar No. 120520
Barbara A. Marschalk
Georgia Bar No. 324498
Sonya T. Jacobs
Georgia Bar No. 380006

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 **EFILED IN OFFICE**
CLERK OF SUPERIOR COURT
HABERSHAM COUNTY, GEORGIA

18CV0454
RUSSELL W. SMITH
MAR 22, 2019 01:39 PM

David C. Wall

David Wall, Clerk
Habersham County, Georgia

DR. ROBERT H. WAINBERG,

Plaintiff,

V.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION NO.
18CV454

RULE 5.2 CERTIFICATE

This is to certify that the documents listed below have this day been served upon
opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to
Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs, DREW ECKL & FARNHAM,
LLP, 303 Peachtree St. NE, Suite 3500, Atlanta, Georgia 30308.

1. *Notice of Deposition of Jim Peebles;*
2. *Notice to Produce to Jim Peebles*
3. *Notice of Deposition of Rose Mariee Allison;*
4. *Notice to Produce to Rose Mariee Allison;*
5. *Notice of Deposition of Ann Sutton; and*
6. *Notice to Produce to Ann Sutton.*

CERTIFICATE OF SERVICE

This is to certify that the foregoing RULE 5.2 CERTIFICATE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
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Counsel for Defendant Piedmont College

Respectfully submitted this 22nd day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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Counsel for Plaintiff


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

RULE 5.2 CERTIFICATE OF SERVICE OF DISCOVERY

I HEREBY CERTIFY that I am counsel for Defendant in the above-styled matter and
that I have this day served a copy of the foregoing:

- 1) *Defendant Piedmont College's Second Supplemental Objections and Responses to Plaintiff's First Interrogatories to Defendant*

on all parties to this matter by hand delivery, addressed to counsel of record as follows:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 25th day of March, 2019.

/s/ Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

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18CV0454
RUSSELL W. SMITH
MAR 28, 2019 12:28 AM

David C. Wall

David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO. 18CV454
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

FIRST AMENDED COMPLAINT FOR DAMAGES CONCERNING BREACH OF
CONTRACT AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR
DEALING, NEGLIGENT HIRING AND RETENTION, AND ATTORNEY FEES

COMES NOW Dr. Robert H. Wainberg, Plaintiff in the captioned action, and brings this Complaint against Defendant Piedmont College, and shows this Honorable Court as follows:

INTRODUCTION

Dr. Wainberg faithfully served Piedmont College for thirty years and successfully built the science department from the ground up as one of the original founders. When he began standing up to the administration in regards to corruption, he became targeted, his good name and professional reputation sullied with slanderous lies. In retaliation against Dr. Wainberg, a pillar of the institution and beloved professor who helped grow the institution for three decades, President Mellichamp unlawfully robbed him of his job and illegally deprived him of a fair hearing that he was contractually entitled to as a tenured professor.

Worse, President Mellichamp's tyrannical actions have harmed the Piedmont College fulltime faculty of the tenure protections that they were legally and contractually originally promised. He has used the threat of termination without tenure to quash dissent and silence academic freedom of expression. He has subjected those like Dr. Wainberg who have spoken out to bully tactics and threats. He has put a chill on academic freedom of the institution. He has

demoralized faculty and harmed retention. He has failed to comply with policies and procedures concerning Title IX. He currently poses a grave risk not only to the men and women who have devoted their entire professional lives to Piedmont College, but to the academic integrity and welfare of the institution as a whole.

CLAIMS, JURISDICTION, AND VENUE

1.

This action is brought seeking damages pursuant to the laws of the State of Georgia for breach of contract, violation of the implied duty of good faith and fair dealing, and negligent hiring and retention. It also seeks an award of attorney fees and will respectfully motion the Court for to allow Plaintiff to reinstate a claim for punitive damages based on this amended complaint which adds a tort claim.

2.

This Honorable Court has subject matter jurisdiction over Dr. Wainberg's claims.

3.

Venue is proper before this Honorable Court in that it is brought in the County where the Piedmont College resides.

4.

Dr. Wainberg has satisfied all conditions precedent for bringing this action.

PARTIES

5.

Dr. Robert H. Wainberg, Plaintiff herein, resides in Jackson County, Georgia. He has been an employee of Defendant, Piedmont College, at all times relevant to this complaint.

6.

Piedmont College is a comprehensive liberal arts institution and also offers a variety of career-oriented majors in the arts and sciences, business, education, and nursing. The main campus and principal place of business is located in Demorest, Georgia. Its registered agent for service is President James Mellichamp.

FACTS GIVING RISE TO THE COMPLAINT

7.

Dr. Wainberg (or “Dr. Rob” as he is fondly known as), was hired as a tenure-track Assistant Professor of Biology in September 1988. He is one of the original founding members of the Department of Biological Sciences. Dr. Wainberg, a tenured Biology professor, has been part of the Piedmont College community since leaving his cancer research in 1988. In his thirty-year tenure at Piedmont College, Dr. Wainberg has been a well-loved professor who has taught and mentored a multitude of students from many areas of studies. His former students read like a list of Who’s Who and include many prominent politicians, government officials, judges, and CEO’s throughout the state of Georgia. This includes the current Mayor of Demorest (and former member of Georgia House of Representatives) Dr. Rick Austin who became his fellow colleague and currently serves as Associate Professor within the Science Department at Piedmont College.

8.

Dr. Rob Wainberg was the recipient of the 1991 Sears-Roebuck Foundation Award for Teaching Excellence and Campus Leadership and the 2001 Piedmont College Advisor of the Year Award. Dr. Wainberg was also listed in Who's Who in Science and Engineering from 1994 - 2006 and Who's Who in the World from 1995 -2006. This past December, he was honored by

the Peach State Federal Credit Union with a \$50,000 gift for the newly established Dr. Robert H. Wainberg Undergraduate Science Research Scholarship to provide funds to assist the research of future Biology, Chemistry, Geology, and Environmental Science students.

9.

Dr. Wainberg was granted tenure effective for the academic year 1993-94. Dr. Wainberg was also promoted to Associate Professor effective that academic year.

10.

During his tenure at Piedmont College, Dr. Wainberg has received significant honors, has been selected to serve on numerous committees, has been awarded prestigious grants, and otherwise had a distinguished career, serving Piedmont College, its faculty, administration, and its students with dignity, diligence, and professionalism.

11.

During his career at Piedmont College, biology professor Dr. Wainberg became actively opposed to Mar-Jac (a powerful corporation that is a producer and processor of poultry in Georgia) building a feed mill in the area because of the environmental hazards it posed. As a result of his opposition, he would uncover that Mar Jac had been owned by a group founded by a wealthy and prominent Saudi Arabian family that would later become under scrutiny by the United States government regarding potential links to radical terrorism. Dr. Wainberg began working with the federal government to aid in exposing the ties funding radical Islamic terrorism at 555 Grove Street in Herndon, Virginia where most if not all of Mar-Jac's beneficial owners maintained offices and where the federal government would execute search warrants leading to one of the largest raids of those suspected by the U.S. government of funding terrorism.¹

¹ <https://www.nytimes.com/2002/03/21/us/a-nation-challenged-the-money-trail-raids-seek-evidence-of-money-laundering.html>

12.

In response to his work with the federal government and his opposition to Mar-Jac, Dr. Wainberg experienced threats, including but not limited to such things as a strange men driving up to him in a Mar-Jac truck stating: “I know who you are I know where you live...we are watching.”

13.

a. In response to him standing up for what he believed was right, Dr. Wainberg also suffered threats to his employment at Piedmont College. Dr. Wainberg was informed that the Chairman of the Board Gus Arrendale was not happy with his opposition to Mar-Jac’s feed mill and that as a result then Piedmont College President Ray Cleere ordered Dr. Rick Austin (current Mayor of Demorest) to write a bad review against Dr. Wainberg so that he would not get his promotion.

b. Mayor Rick Austin, an ethical leader who had just written his former professor now colleague Dr. Wainberg (who had just won his second award at Piedmont College) a glowing letter, refused to do so.

c. Since that time period, Gus Arrendale has remained as Chairman of the Board at Piedmont College to date, for a total of nearly 18 years despite this being in violation of Board policy which prohibits a Board member from serving in the same office for more than four years.

d. Since that time, Dr. Wainberg has continued to be targeted for standing up to the administration.

14.

Despite Dr. Austin refusing to act unethically by writing a letter against Dr. Wainberg as the President requested him to do, the administration still denied Dr. Wainberg his promotion as

a result of him standing up for what he believed to be illegal and dangerous activity. In response, Dr. Wainberg filed a grievance before the Grievance Committee. Dr. Wainberg was told by the administration of Piedmont College that the Grievance Committee denied his grievance but he would later learn from the Chair of the Grievance Committee, Dr. Stephanie Almagno, that this was false, that the Committee had actually voted in favor of Dr. Wainberg's promotion even though the top two members of the Piedmont College administration (Dr. Cleere and Dr. Mellichamp) would lie to Dr. Wainberg in President Cleere's office and tell him that it did not.

15.

The administration of Piedmont College continued to threaten those who spoke out for what they believed to be illegal or unethical activity. Dr. Wainberg was considered by the administration to be one of those faculty members who would speak up against wrongs done by the administration.

16.

Throughout Dr. Wainberg's career, the administration of Piedmont College sought to chill free speech, expression, and academic freedom of the faculty by violating the academic principles of tenure. Even though Piedmont College had hired many faculty promising them tenure and had a policy for tenure, it began violating its policy on tenure by taking steps to see that no additional faculty member was appointed tenure in clear breach of faculty's contractual rights pursuant to contracts and/or the faculty handbook. This is significant because in fascist countries with tyrannical dictators, academic freedom within universities is usually the first thing to be attacked. Throughout the 20th century we saw the persecution of academics across Europe: The Bolshevik Revolution in Russia and the Nazi Third Reich in Germany and other fascist

dictatorships in Italy, Spain, Greece and beyond led to purges.² Thus, it is no surprise that in the case of Piedmont College, that when the administration took on tyrannical qualities, it started with the attack on tenure and academic freedom in an effort to silence and quash dissent.

17.

The purpose of tenure is to protect professors' academic freedom so they will freely speak and seek out the truth first and foremost, in their research, their teaching, and in their scholarly practice. For example, tenure protects professors' academic freedoms to teach and discuss; to carry out research and publish the results and make them known; to freely express opinions about the academic institution or system in which one works; to participate in professional or representative academic bodies; and to freely speak out without being censored or retaliated.

18.

Tenure does not protect bad teachers from being fired, rather protects good teachers from being unfairly targeted or retaliated against. It also attracts high quality professors who will devote their lives to an academic institution and promotes retention of good teachers who do not simply use Piedmont College as a stepping stone in their career. In sum, the best faculty seek work at institutions which offer tenure. In order for a college to remain competitive, it needs to provide tenure to attract and keep the best talent. Once Piedmont College stopped honoring their promises to faculty to provide tenure, it became hard to keep and attract the best faculty, thus harming the institution as a whole.

19.

In 2013, Chairman Gus Arrendale appointed Dr. James Mellichamp to be President of Piedmont College. Dr. Mellichamp was the progeny of the previous president and was a part of

² <https://www.futurelearn.com/courses/academic-freedom/1/steps/268318>

the long-term administration. Like his predecessor, Dr. Mellichamp openly went after those who spoke truth to power, threatening to take away Piedmont College employees' jobs if they challenged what they saw to be unethical actions on the part of his administration.

20.

Dr. Wainberg was very concerned as to what he believed to be was unethical corruption by President Mellichamp and was opposed to it. For example, in the past two recent years, Dr. Wainberg actively challenged what he believed to be the administration and President Mellichamp's actions which compromised academic integrity concerning athletes.

21.

In response to Dr. Wainberg challenging the administration of Piedmont College, the administration sought to target him in retaliation in an effort to take away his job.

22.

Upon information and belief, President Mellichamp encouraged his good friend and faculty member to write a letter against Dr. Wainberg. This friend and faculty member had been upset with Dr. Wainberg because her daughter had dropped his class because she was failing it. The letter contained defamatory information.

23.

The administration also encouraged a disgruntled student to file a complaint against Dr. Wainberg. This male student "R.A." was angry at Dr. Wainberg for getting a bad grade. The student's classmates admitted that this student was out to get Dr. Wainberg because he was angry at him for this bad grade.

24.

The administration absurdly claims that Dr. Wainberg has committed a "Title 9"

violation. Title 9 refers to a sexual harassment claim. Dr. Wainberg has never sexually harassed anyone.

25.

Dr. Wainberg is a biology professor. In his classes, he has to teach about sexual reproduction or human biological processes. Oftentimes, in order to keep the class engaged in learning, he will tell funny anecdotes. If Dr. Wainberg, a heterosexual male, ever uses a student as an example in class, he will only use one of his advisees that he has a good, comfortable relationship with. “R.A.” was one of those advisees. Dr. Wainberg had an excellent relationship with “R.A.” his advisee until “R.A.” became very upset with him about a poor grade and made sure his classmates knew he was going to go after Dr. Wainberg because of it.

26.

a. Dr. Wainberg never has sexually harassed anyone. What “R.A.” complained of was an anecdotal story that Dr. Wainberg used as a teaching tool that was not intended to embarrass or upset “R.A.” Rather, it was simply an illustration used to teach about how energy molecules are converted into emergency enzymes, pyruvate, and lactate.

b. Dr. Wainberg simply used “R.A.” his advisee whom he thought he had a good rapport and relationship to attempt to illustrate a story of what would happen to two athletes—one who was chasing the other for trying to cheat on his girlfriend—in terms to show how in a situation like that (a confrontation and subsequent physically exerting chase) energy starved skeletal muscle would anaerobically convert pyruvate from glycolysis to lactate for quick energy temporarily that would eventually cause these muscles to cramp and seize up.

c. What is ironic about this past year’s generation of one or two students that complained that Dr. Wainberg had mentioned sex in a college level, biology classroom was that

this came from a disgruntled student unhappy with a grade they had gotten.

27.

Dr. Wainberg, as a biology teacher, often has to teach about human biological responses, biochemistry (including glycolysis), cell biology, microbiology, physiology, genetics, sexual reproduction, and all other aspects of biology that science professors are required to teach to young adults (not children) within a college classroom. He tries to do so in a way that is entertaining and engaging with his college students and has successfully done so over the past three decades which has resulted in honors and awards. Furthermore, Dr. Wainberg has always been a tremendous advocate for students over the years and treated them with respect. In no way has he ever conducted himself in a manner that could ever be construed as sexual harassment.

28.

Nevertheless, President Mellichamp latched onto this complaint and was determined to charge Dr. Wainberg with a Title 9 violation. This was a lie. This was also hugely ironic and hypocritical coming from President Mellichamp, a gay man who had sexually harassed both women and men during his career at Piedmont College, including female students and his male subordinates. For example, President Mellichamp:

- a. While as President, grabbed a subordinate male faculty member in his buttocks, patting and firmly cupping his rear buttocks while stating to him in a sexual tone: "Oh.....you are in shorts today." The male faculty member will testify under oath that this occurred.
- b. Sexually harassed college students while he was their professor including sexually assaulting a female student by grabbing a female college student's buttocks. This woman will testify under oath that this occurred.
- c. Purchased alcohol for minors and got college students intoxicated including

drinking with those who were below the legal drinking age. Former students are willing to testify that this occurred and there is a current, ongoing search for the photographic evidence.

d. Currently failed to have his administration investigation a complaint of genuine sexual harassment by his upper level administration. This can also be corroborated with sworn testimony.

29.

Defendant Piedmont College were placed on notice of President Mellichamp's propensity and failure to comply with Defendant's Title 9 policies which prohibit sexual harassment. A male faculty member made a complaint with the previous College President about the sexual assault and harassment of then Vice President James Mellichamp but Defendant Piedmont College failed to conduct any investigation as required by Defendant's policies and procedures under Title 9.

30.

Defendant Piedmont College had notice of President Mellichamp's propensity in failing to comply with the Piedmont College Title 9 policies but negligently chose to hire and retain him as College President despite being on notice of his incompetence concerning complying with Defendant's Title 9 policies.

31.

In sum, President Mellichamp's action of falsely charging Dr. Wainberg of violating Title 9 is an outrageous example of what is colloquially called "the pot calling the kettle black." And, it is motivated out of retaliation and a desire to quash academic free speech as the Piedmont College administration has targeted Dr. Wainberg for some time now, especially in regards to how he has spoken out regarding the administration's violations of academic integrity

concerning student athletes.

32.

In retaliation, President Mellichamp terminated Dr. Wainberg who had faithfully served the institution for thirty years, in breach of his contract as a tenured professor and in violation of Defendant Piedmont College's policies.

33.

- a. Piedmont College is obligated to conduct Title 9 grievances in a fair, impartial, and timely manner. Unsatisfied parties have a right to appeal and a right to be heard before a special committee in a fair, impartial, and timely manner. In this case, President Mellichamp made the decision to terminate Dr. Wainberg for Title 9 violations even before having him go through the Title 9 process as required by Defendant's policies and procedures.
- b. Furthermore, Piedmont College is obligated to provide due process through a fair hearing before terminating a tenured professor pursuant to the contract and university policies set forth in the faculty handbook.
- c. Neither of these policies were complied with and President Mellichamp informed Dr. Wainberg that he was being terminated for violating Title 9 even before the Title 9 investigation was fairly concluded or before the Title 9 investigators had even questioned Dr. Wainberg.
- d. This was not surprising as Defendant and President Mellichamp have previously failed to comply with Title 9 requisite policies.
- e. This was reasonably foreseeable that Plaintiff Dr. Wainberg would be harmed by President Mellichamp's failure to comply with Title 9 policies as Defendant had actual

and constructive knowledge of President Mellichamp's incompetence and unfitness for the position of President due to his failure to comply with Title 9 policies.

34.

Pursuant to Piedmont College Policies and Procedures, termination may only occur for a tenured professor if the faculty member's conduct is considered seriously prejudicial. Prior to termination, the faculty member must be notified in writing of the specific conduct which may result in termination and an action must not be taken without a hearing.

35.

Contrary to the Piedmont College Policies and Procedures Manual provisions on termination of faculty:

- a. Dr. Wainberg did not receive proper written notice of termination or a fair hearing.
- b. A decision to terminate for Title 9 violations occurred prior to the Title 9 investigators even interviewed Dr. Wainberg.
- c. Dr. Wainberg did not receive a fair hearing.
- d. Dr. Wainberg was not made aware of the investigation by Piedmont College until after President Mellichamp decided to terminate him.
- e. Dr. Wainberg was not even interviewed by the Title 9 investigators or afforded the opportunity to defend himself or refute the charges until after President Mellichamp made the decision to terminate him.
- f. On April 19th, "R.A." a disgruntled male student who had received a bad grade in his class and expressed wanting to go after Dr. Wainberg, made a complaint against him yet no one informed Dr. Wainberg until after the decision to terminate him was made.

g. Piedmont College's Title 9 officer did not conduct the Title 9 investigation, instead President Mellichamp put an untrained Athletics Director and HR employee in charge of investigating a Title 9 violation, unusual as Dr. Wainberg had been making complaints regarding violations of academic integrity concerning athletes.

h. On April 23rd and 24th, the untrained university investigators (the Athletics Director and HR employee) questioned "R.A.;" a male student named "G.C." who admitted "R.A." was out to get Dr. Wainberg because he was mad about a grade; "J.S." (an older student who had never set foot in Dr. Wainberg's class or spoken with him but had only hearsay from her friend "R.A.") and two female students of Dr. Wainberg who went in because they were so outraged as to what "R.A." had claimed. These two female students attempted to provide testimony exculpatory evidence, clearing Dr. Wainberg's good name.

i. President Mellichamp even before the Athletics Director and H.R. had even interviewed Dr. Wainberg as part of their investigation made up his mind to terminate Dr. Wainberg without fair due process or even allowing Dr. Wainberg to be questioned by the Title 9 investigators that would allow him the opportunity to defend himself or refute such charges. On April 27th, three days after the investigation (that did not include the investigators questioning Dr. Wainberg to give him a chance to rebut the charges), President Mellichamp verbally informed the Mayor of Demorest and Biology Professor Dr. Rick Austin that he had decided that Dr. Wainberg was not going to get his employment contract for the following year.

j. Piedmont College never informed Dr. Wainberg they were terminating him or that there was an investigation against him. Instead, Dr. Wainberg learned it through his colleagues Dr. Rick Austin and Dr. Carlos Camp. In response, Dr. Wainberg confronted President Mellichamp on May 4th. President Mellichamp admitted that he is being terminated for

violations of Title 9, even though again, Dr. Wainberg has never yet been informed of the charges, questioned by Title 9 investigators or had the opportunity to refute the charges against him, in violation of the implied duty of good faith and fair dealing and in breach of his contract.

k. On May 9th, Dr. Wainberg is finally interviewed by the Title 9 investigators (Athletic Director and HR person) and questioned about the charges for the first time, nearly two weeks after President Mellichamp already admitted to the Mayor of Demorest that he had decided Dr. Wainberg would be terminated.

l. The two individuals interviewing Dr. Wainberg take copious notes where Dr. Wainberg rebuts every allegation that has been made. They both hug him and tell him that they are very uncomfortable doing this. They also tell Dr. Wainberg that they are giving the notes they have taken rebutting all the allegations to President Mellichamp to be transcribed. They explain that their job is just fact finding.

m. This is a phony investigation since two weeks prior President Mellichamp has already made clear that the decision to terminate him was made even before Dr. Wainberg was interviewed by the investigators in violation of Title 9 grievance policies and Tenured Termination policies.

n. Furthermore, President Mellichamp refuses to give the exculpatory notes to Dr. Wainberg prior to his hearing and fails to present any of the documentation that refutes the charges against Dr. Wainberg before the Hearing panel made up of Board members, hiding all exculpatory evidence that cleared Dr. Wainberg's good name.

o. Dr. Wainberg repeatedly requests to be given this exculpatory evidence and documentation that the investigators took down in order to prepare for his hearing. He is denied this evidence.

p. Dr. Wainberg is not given any of the evidence explaining what the specific allegations were against him or what he was supposedly even charged with in writing prior to his hearing. Rather, he is given a file of evidence from the investigators on May 24th, one night before his hearing with less than 24 hours to prepare. Notably, all the exculpatory evidence that the investigators documented in their notes in favor of Dr. Wainberg as well as all of Dr. Wainberg's rebuttals refuting the allegations has gone missing out of the evidentiary file.

q. At the hearing on May 25th, President Mellichamp sends Vice President Dr. Perry Rettig to present the evidence against Dr. Wainberg before the hearing panel made up of three Board members. Not only does Dr. Perry Rettig engage in secret, ex-parte conversation with the Board members at the hearing, he fails to present any of the evidence obtained by the investigators that clear Dr. Wainberg's good name.

36.

Contrary to the Piedmont College Policies and Procedures Manual provisions, Dr. Wainberg also did not receive the opportunity for a fair hearing in clear breach of his contract and a violation of the implied duty of good faith and fair dealing.

37.

Not only did Dr. Wainberg not receive any evidence less than 24 hours before his termination hearing with no time to prepare, all the evidence favorable to Dr. Wainberg was missing from the file. Dr. Wainberg had no opportunity to have this favorable evidence presented to the hearing panel.

38.

At the hearing, Dr. Perry Rettig (the Vice President who argued on behalf of Piedmont College's administration) engaged in secret, ex parte communications behind closed doors with

the hearing panel outside of the presence of Dr. Wainberg. Dr. Wainberg actually had to sit outside a closed door where Dr. Perry Rettig was secretly permitted to present information to the hearing panel outside his presence, without him being permitted to hear what was being said so that he could refute any allegations made against him. This happened at the first part of the hearing as well as at the end where Dr. Perry Rettig met with the Board members behind closed doors outside the presence of Dr. Wainberg.

39.

Outrageously, Piedmont College's representative Dr. Perry Rettig presented no exculpatory evidence to the Board contained in the investigators' findings that included Dr. Wainberg's rebuttals or the two female students who came to testify on Dr. Wainberg's behalf. All of that documentary evidence went missing and to date, Piedmont College has refused to provide this evidence to Dr. Wainberg despite his repeated requests.

40.

a. Defendant and College President James Mellichamp still fail to comply with Title 9 policies and procedures. During litigation, faculty have testified under oath that they are fearful of retaliation as a result of protected activity that includes testifying about the matters involved in this lawsuit so much so that faculty have sought counsel with the Administration and sought to clarify the policy on retaliation.

b. Nevertheless, despite a faculty member who exhibited courageous leadership by stepping forward to provide truthful testimony in an affidavit concerning his own personal experience with President Mellinchamp violating Title 9 policies through sexual harassment, this individual has experienced retaliation in the form of Defendant accusing him of making "libelous" allegations that are both "unsupported" and "scandalous."

c. Retaliation against a faculty member for providing truthful testimony concerning sexual harassment by the College President is in violation of Defendant's Title 9 policy.

d. To date, the Defendant has failed also initiate a Title 9 investigation against President for the sexual harassment and sexual assault allegations that were submitted.

e. In spite of the courageous leadership of this faculty member to step forward and provide sworn testimony concerning the sexual harassment perpetrated upon him by President Mellichamp, Defendant has sought to cover up such evidence of their knowledge of the President's incompetence and unfitness for the position due to his propensity in failing to comply with Title 9 policies.

f. Defendant has sought to cover-up this information concerning the President's violations of Title 9 policies from the College Newspaper and other local news publications.

g. President Mellichamp's incompetence in failing to comply with Title 9 policies and procedures resulted in harm to the Plaintiff Dr. Wainberg.

41.

After being terminated from his position at Piedmont College, Dr. Wainberg has diligently sought to obtain work for which he is qualified. Dr. Wainberg has been unable to obtain work on similar terms and conditions with the position he had at Piedmont College, and despite his best efforts, Dr. Wainberg is currently unemployed.

42.

a. Robbing a tenured professor who faithfully served the institution after thirty years of his income and health insurance benefits, whereas he can no longer afford expensive COBRA health insurance benefits, has not only caused significant economic harm and emotional distress, but it has placed Dr. Wainberg's health and life at risk as he suffers from hypertension and Type

II Diabetes.

b. Piedmont College's actions have not only financially harmed Dr. Wainberg but emotionally harmed a dedicated thirty-year servant of the university who intended to retire in May 2025 so he could be present for the 125th anniversary of the college (as he was for the 100th and 120th festivities) and for Dr. Carlos Camp's 70th birthday party in April. Rather than rewarding a well-loved professor who made the sacrifice of service to this institution throughout his entire professional lifetime, Piedmont College has responded with a cruelty that cuts the very fabric of this institution by demoralizing each and every faculty member who wonders if they could suffer the same fate after a lifetime of service.

**COUNT I
BREACH OF CONTRACT**

By this reference, the preceding paragraphs are hereby incorporated as if fully set forth herein.

43.

In the summer of 2017, Piedmont College and Dr. Wainberg entered into an employment contract for the academic year 2017-2018 as a tenured member of the faculty. As a tenured member of the faculty, Dr. Wainberg was contractually entitled to renewal of his annual contract of employment until his retirement or resignation unless there was adequate cause for his dismissal by Piedmont College.

44.

By terminating Dr. Wainberg, Piedmont College breached its employment contract with Dr. Wainberg and breached his tenure rights. Because of Piedmont College's failure to give Dr. Wainberg fair and due process in his case, pursuant to Piedmont College Policies and Procedures concerning Tenure and concerning Title 9, Piedmont College did not have cause to terminate Dr.

Wainberg's annual contract for the 2017-2018 academic year, nor did Piedmont College have cause to terminate Dr. Wainberg's tenure rights.

45.

Piedmont College's breach of contract damaged Dr. Wainberg.

COUNT II

VIOLATION OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

Dr. Wainberg fully incorporates the preceding paragraphs as if each were set forth verbatim fully herein.

46.

Piedmont College and Dr. Wainberg entered into valid binding contractual agreement, which created all correlating duties, commitments and obligations arising and flowing from the express language of the contracts.

47.

Piedmont College knowingly, willfully, and/or recklessly breached the duties, commitments, and/or obligations imposed upon Piedmont College by the express wording and implied meaning of the contracts entered into by Piedmont College and Dr. Wainberg.

48.

Piedmont College's conduct in knowingly, willfully, and/or recklessly breaching its duties pursuant to the contracts entered into by Piedmont College and Dr. Wainberg demonstrate that Piedmont College also breached the implied duty of good faith and fair dealing owed to Dr. Wainberg in executing said contracts. Georgia law recognizes this implied duty. See DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 645, 734 S.E.2d 466, 476 (2012).

49.

Piedmont College's conduct in breaching the contract and implied duty of good faith and fair dealing directly and/or proximately caused injury to Dr. Wainberg.

**COUNT III
NEGLIGENT HIRING AND RETENTION**

By this reference, the preceding paragraphs are hereby incorporated as if fully set forth herein.

50.

Defendant had a legal duty to exercise reasonable care in the selection and retention of its College President.

51.

Defendant breached that duty because they knew that the President was incompetent or unfit for the position concerning his failure to comply with Defendant's Title 9 policies and procedures.

52.

The President's incompetence and unfitness concerning his failure to comply with Defendant's Title 9 policies and procedures proximately caused the harm done to Plaintiff Dr. Wainberg.

ATTORNEY FEES

By this reference, the preceding paragraphs are hereby incorporated as if fully set forth herein.

53.

Piedmont College breached Dr. Wainberg's contract in bad faith, has been stubbornly litigious, and has caused Dr. Wainberg unnecessary trouble and expense, entitling Dr. Wainberg

to recover expenses of litigation and attorneys fees.

PRAYERS FOR RELIEF

WHEREFORE, Dr. Wainberg prays the following relief:

1. That summons issue and be served upon the Defendant in accordance with the law; further,
2. That Dr. Wainberg seeks an amount reflective of all damages, including consequential damages to compensate the injuries sustained as the result of the Defendants' actions and more specifically;
3. That Dr. Wainberg have and recover reasonable attorney fees and costs in an amount to be determined by the court;
4. That this Court enter judgment for the loss of his income as a result of the breach of contract together with prejudgment and post-judgment interest;
5. Any and all further relief that this Court deems just and proper.
6. That Dr. Wainberg will have and recover such other, further and different relief this Court deems appropriate under the circumstances.

Respectfully submitted this 28th day of MARCH 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
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julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing **FIRST AMENDED COMPLAINT FOR DAMAGES** has this day been served with the Clerk of Court using the PeachCourt e-filing system and upon opposing counsel by depositing a true and correct copy of the same via U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
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Atlanta, Georgia 30308
jchancey@deflaw.co
bmarschalk@deflaw.com
sjacobs@deflaw.com
Attorneys for Defendant Piedmont College

Respectfully submitted this 28TH day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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Counsel for Plaintiff

 **EFILED IN OFFICE**
CLERK OF SUPERIOR COURT
HABERSHAM COUNTY, GEORGIA

18CV0454
RUSSELL W. SMITH
MAR 28, 2019 09:09 AM



David Wall, Clerk
Habersham County, Georgia

**IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA**

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

PIEDMONT COLLEGE,

Defendant.

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CIVIL ACTION

FILE NO. 18CV0454RS

DISCOVERY ORDER

As the result of an impasse reached during the deposition of Rick Austin, PhD, counsel for both parties properly requested a conference with the Court pursuant to O.C.G.A. § 9-11-30 (d) and O.C.G.A. § 9-11-26(c). The subject of the discovery dispute was that Plaintiff's counsel sought to elicit testimony from the witness regarding acts of sexual harassment or other misconduct allegedly committed by the President of the Defendant College. The Court, after hearing argument from counsel, ruled that the line of questioning was beyond the scope of discovery, and ordered that the deposition continue. Counsel for the Plaintiff stated that the issue was critical to the Plaintiff's case and elected to suspend the deposition pending reconsideration of the ruling after informal briefing on the issue by counsel. These briefs have since been presented to the Court. In its letter-brief to the Court, Defendant moved that the Plaintiff's brief and the materials with which it was filed be sealed.

Having reviewed the briefs submitted, the Court **GRANTS** the Defendant's Motion for Protective Order, reaffirming the prior ruling as to the scope of discovery, and **DENIES** the Defendant's Motion that the record be sealed or that access be limited.

The issue presented is whether evidence that the College President or other employees of Defendant committed acts of sexual harassment is within the permissible scope of discovery, that being the evidence which the Plaintiff sought to elicit in the discovery deposition at issue.

This action is a claim for breach of contract where it is additionally pled that Defendant Breach the Duty of Good Faith and Fair Dealings. Plaintiff alleges that Defendant breached the contract it had with Plaintiff when it terminated Plaintiff's employment. Plaintiff's employment was purportedly terminated following a complaint for sexual harassment.

O.C.G.A. §9-11-26 (b)(1) provides with regard to the permissible scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the

trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The standard established by Georgia law is, therefore, whether the information sought is relevant or "...appears reasonably calculated to lead to the discovery of admissible evidence. The Supreme Court of Georgia has further held that "the discovery procedure is to be liberally construed in favor of supplying the parties with the facts." Bowden v. The Medical Center, Inc., 297 Ga. 285,291 (2015). In applying this standard, there are circumstances where the information sought is not, perhaps, itself probative of any issue in controversy, but that information sought might lead to the other information which would be relevant.

In this case, it does not appear that the information sought would lead to other evidence. In other words, there is no other class of other or different information sought to be identified through the line of questioning in controversy. In this case, the inquiry is, therefore, whether the information sought is, itself, relevant.

The Court ruled in the conference call during Dr. Austin's deposition that the procedural process followed in any other instances where a formal claim of sexual harassment was made against another employee is clearly relevant to the issue of whether Plaintiff was granted sufficient process in connection with the termination of his employment. The Court further ruled, however that the merits of such claims or any claims of sexual harassment that have not been formally reported would be irrelevant.

Plaintiff makes a number of arguments in support of the claim that the evidence in issue is relevant to the issues in the case. Initially, it appears that the most persuasive argument made by Plaintiff is that such evidence is relevant to the issue of bad faith under O.C.G.A. § 13-6-11 for the purposes of determining whether Defendant would be required to pay for the expense of litigation.¹ However, this argument fails as the issue of determining bad faith by Defendant would be limited to how Defendant acted in dealings with Plaintiff only. Young v. A.L. Anthony Grading Company, Inc., 225 Ga. App. 592, 593 (1997). Under Georgia law, “bad faith” that would authorize an award of expenses of litigation relates to the transaction between the parties to the contract. Any other employees of the Defendant are not parties to the contract at issue. Hence, bad faith in the context of this case relates to the conduct of the parties with respect to the termination of the Plaintiff’s employment.

Plaintiff cites to a line of cases including Terry v. Fickett as evidence that similar transactions are admissible evidence. The cases cited include claims of fraud and all predate the current rules of evidence and therefore do not appear to be pertinent authority. Terry v. Fickett, 199 Ga. 30 (1945); see Eberhardt v. Bennett, 163 Ga. 796 (1927); see also Worn v. Warren, 191 Ga. App. 448 (1989).

Plaintiff also argues that this issue would be relevant under the claim that Defendant breach the Duty of Good Faith and Fair Dealings, but a claim of this kind

¹ This case has been brought in a Georgia court under a claim for breach of contract and on this basis Federal employment law and Florida employment law are irrelevant to this determination.

is not an independent cause of action and in this context does not have any bearing on the scope of discovery. Additionally, Plaintiff argues that such evidence could demonstrate the motive and intent for the termination of Plaintiff, but again in the context of a claim for breach of contract, what is at issue is whether a term of the contract was violated and not what motivated any particular action by a party.

Plaintiff further cites to the decision of the Middle District Court of Florida in Moore v. Lender Processing Servs., Inc., 2013 WL 2447948 (M.D. Fla. 2013). The District Court in that case held that where an employee was terminated for failure to perform her duties, the employment files of other employees who had been the subject of similar complaints would be potentially relevant to address any ambiguities in the employment contract between the parties. Here, there has been no allegation made that the contract is ambiguous, nor are the specific terms of the contract mentioned in the Plaintiff's Complaint. Moreover, as the Court has already ruled, consistent with that decision, information as to how other claims of sexual harassment were handled would be a permissible subject of inquiry.

It is, therefore, **ORDERED** that Plaintiff's motion to compel is **DENIED** and Defendant's motion for protective order is **GRANTED IN PART**. To the extent that the plaintiff is seeking information on other reported incidents of sexual harassment for the purposes of discovery of the process that was granted in such incidents, that line of inquiry that information is discoverable. However discovery of the underlying facts of such incidents or discovery of unreported incidents of sexual harassment will

not be allowed as such discovery is not relevant to the subject matter involved in this action.²

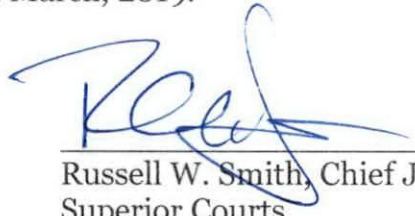
Defendant has requested that the Court order that the Plaintiff's Motion and the attached affidavit of Dr. Austin be "removed from the public record." Uniform Superior Court Rule 21 "Limitation of Access to Court Files, provides: "All court records are public and are to be available for public inspection unless public access is limited by law or by the procedure set forth below." U.S.C.R. 21.1 states: "Upon motion by any party to any civil or criminal action, or upon the court's own motion, after hearing, the court may limit access to court files respecting that action. The order of limitation shall specify the part of the file to which access is limited, the nature and duration of the limitation, and the reason for limitation." [emphasis supplied].

The uniform rules further provide: "An order limiting access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest." U.S.C.R. 21.2. Finally, U.S.C.R. 21.3 provides "Under compelling circumstances, a motion for temporary limitation of access, not to exceed 30 days, may be granted, ex parte, upon motion accompanied by supporting affidavit." [emphasis added].

² The Court received via email, immediately prior to the issuance of this order, a copy of Plaintiff's Amended Complaint. As of the issuance of this order, the amended complaint had not been filed of record. As the parties were obviously unable to address in their briefs the extent to which the amendment may affect the Court's ruling on the discovery issue addressed herein, the Court has not considered the Amended Complaint in making its ruling.

As set forth in the Uniform Rules, the necessary prerequisites to the entry of an order limiting access to the file in this case have not been satisfied and the Court has no authority to grant relief under these circumstances.

SO ORDERED this 28th day of March, 2019.



Russell W. Smith, Chief Judge
Superior Courts
Mountain Judicial Circuit

OR: Clerk, Habersham County Superior Court
CC: Julie Oinonen, Attorney for Plaintiff
Barbara A. Marschalk, Attorney for Defendant

 **EFILED IN OFFICE**
CLERK OF SUPERIOR COURT
HABERSHAM COUNTY, GEORGIA

18CV0454
RUSSELL W. SMITH
MAR 29, 2019 04:29 PM

David C. Wall

David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

V.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION NO.
18CV454

RULE 5.2 CERTIFICATE

This is to certify that the documents listed below have this day been served upon
opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to
Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs, DREW ECKL & FARNHAM,
LLP, 303 Peachtree St. NE, Suite 3500, Atlanta, Georgia 30308.

1. *Subpoena* to Rose Mariee Allison
2. *Subpoena* to Jim Peeples
3. *Subpoena* to Ann Sutton

Respectfully submitted this 29th day of March 2019,

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE


This is to certify that the foregoing RULE 5.2 CERTIFICATE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
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sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 29th day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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julie@goodgeorgialawyer.com
Counsel for Plaintiff



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

RULE 5.2 CERTIFICATE OF SERVICE OF DISCOVERY

I HEREBY CERTIFY that I am counsel for Defendant in the above-styled matter and that I have this day served a copy of the foregoing:

- 1) *Defendant Piedmont College's Request for Production of Documents to Non-Party Richard M. Austin; and*
- 2) *Defendant Piedmont College's Request for Production of Documents to Non-Party Jennifer Austin*

on all parties to this matter by placing a true and correct copy of same in the United States mail, proper postage affixed thereto, addressed to counsel of record as follows:

Julie Oinonen, Esq.
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 1st day of April, 2019.

Drew, Eckl & Farnham, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
Telephone: (404) 885-1400
Facsimile: (404) 876-0992
E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com
Attorneys for Defendant

/s/ Sonya T. Jacobs
Joseph C. Chancey, *GA Bar #120520*
Barbara A. Marschalk, *GA Bar #324498*
Sonya T. Jacobs, *GA Bar #380006*

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

PIEDMONT COLLEGE,

Defendant.

Civil Action File No: 18CV0454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Defendant, and that I have this day served Defendant's *RULE 5.2 CERTIFICATE OF SERVICE OF DISCOVERY* on opposing counsel electronically per agreement and by placing a true and correct copy of same in the United States Mail, proper postage affixed thereto, addressed to the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW
Suite 200
Atlanta, Georgia 30303
Julie@goodgeorgialawyer.com

This 1st day of April, 2019.

s/ Sonya T. Jacobs

Joseph C. Chancey, *GA Bar No. 120520*

Barbara A. Marschalk, *GA Bar No. 324498*

Sonya T. Jacobs, *GA Bar No. 380006*

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Attorneys for Defendant

8696785/1

00120-134334


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

RULE 5.2 CERTIFICATE

This is to certify that the documents listed below have this day been served upon
opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to
Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs, DREW ECKL & FARNHAM,
LLP, 303 Peachtree St. NE, Suite 3500, Atlanta, Georgia 30308.

1. *Amended Subpoena* to Rose Mariee Allison
2. *Amended Subpoena* to Jim Peebles
3. *Amended Subpoena* to Ann Sutton

Respectfully submitted this 1st day of April 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing RULE 5.2 CERTIFICATE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
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sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 1st day of April 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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Counsel for Plaintiff

18CV0454
RUSSELL W. SMITH
APR 07, 2019 09:58 PM



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION
Plaintiff,	)	NO. 18CV454
)	
v.)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

PLAINTIFF'S MOTION FOR RECONSIDERATION

COMES NOW Plaintiff, Dr. Robert Wainberg, and respectfully moves this Court to reconsider its Discovery Order denying Plaintiff's motion to compel and stating that "discovery of the underlying facts of [other reported incidents of sexual harassment] such incidents or discovery of unreported incidents of sexual harassment will not be allowed as such discovery is not relevant to the subject matter involved in this action." The Court then added a footnote, FN 2, stating that: "As of the issuance of this March 28th order, the amended complaint had not been filed of record" and that "the Court has not considered the Amended Complaint in making its ruling."

Because the Court did not consider the Amended Complaint, Plaintiff respectfully moves the Court to reconsider this Discovery Order through the lens of the Amended Complaint which was filed at 12:28 a.m. on March 28, 2019. See Exhibit 1.

Plaintiff Dr. Wainberg sues Defendant Piedmont College for the negligent hiring and retention of the College President because they were put on notice that the President was incompetent or unfit for the position concerning his failure to comply with Title 9 policies and procedures. See Amended Complaint Count III; ¶¶50-52, 28-31, 40.

Upon information and belief, Plaintiff believes there is discoverable evidence of a serial pattern of Title 9 policy violations by the Defendant as a result of the unfitness and incompetence of the College President.

Georgia law provides that an employer will be liable for his own negligence in hiring employees. Georgia code provides that an employer “is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency.” O.C.G.A. § 34-7-20. Georgia case law has held that pursuant to the Code, “an employer must exercise ordinary care in the selection of employees, must not retain them after knowledge of incompetency....Generally, the determination of whether an employer used ordinary care in hiring an employee is a jury issue.” Piney Grove Baptist Church v. Goss, 255 Ga. App. 380, 383, 565 S.E.2d 569, 572 (2002.) In this case, Defendant Piedmont College knew that President Mellichamp was incompetent in his failure to comply with Defendant’s Title 9 policies but nevertheless hired and retained him as College President proximately causing the harm done to Plaintiff. See Amended Complaint ¶29

Under the Georgia Civil Practice Act, a party can obtain discovery regarding any matter, not privileged, relevant to the subject matter of the pending action. O.C.G.A. § 9-11-26. Notably, Georgia courts have also held that, where relevance is doubtful, the evidence should normally be admitted and its weight left to the determination of the jury. Kalish v. King Cabinet Co., 140 Ga. App. 345, 346, 232 S.E.2d 86, 87 (1976). Concerning discovery however, the information **sought need not be admissible at trial, only reasonably calculated to lead to the discovery of admissible evidence.** E.g. Ambassador College v. Goetzke, 244 Ga. 322, 323, 260 S.E.2d 27, 29 (1979) (Court affirmed it was not error to compel discovery Appellant (**a College**) arguing disclosures sought would violate its constitutional rights of free exercise and non-establishment

of religion; freedom of association; privacy; and/or security in their persons, houses, paper and effects against unreasonable searches and seizures.) “Discovery is an integral and necessary element of our civil practice. **Wide latitude is given to make complete discovery possible. The broad purpose** of the discovery rules, under the Civil Practice Act, **is to enable the parties to prepare for trial** so that each party will know the issues and be fully prepared on the facts. Discovery is specifically designed to fulfill a two-fold purpose: issue formulation and factual revelation. The use of the discovery process has been held to be **broadly construed.**” § 15:2. Scope of discovery: in general, Ga. Practice & Procedure § 15:2 (2018-2019 ed.); E.g. Travis Meat & Seafood Co. v. Ashworth, 127 Ga. App. 284, 285, 193 S.E.2d 166, 168 (1972).

Defendant might attempt to argue against the disclosure of such evidence in a motion in limine prior to trial, but Defendant should not be able to withhold such evidence from the Plaintiff in the discovery process. Consequently, Plaintiff respectfully requests this Honorable Court reconsider its Discovery Order.

RESPECTFULLY SUBMITTED:

/s/ JULIE OINONEN

Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC

44 Broad Street, NW, Suite 200

Atlanta, Georgia 30303

(404) 654-0288/ (404) 592-6225 FAX julie@goodgeorgialawyer.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing respective Plaintiff's Motion for Reconsideration has this day been served with the Clerk of Court using the PeachCourt e-filing system and upon opposing counsel by depositing a true and correct copy of the same via U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
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sjacobs@deflaw.com
Attorneys for Defendant Piedmont College

Respectfully submitted this 7th day of APRIL 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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Counsel for Plaintiff

EXHIBIT 1

PeachCourt Notifications <notifications@peachcourt.com> Thu, Mar 28, 9:07 AM (10 days ago)
to me, mdobbs

The following filing information has been accepted by the Clerk of Habersham Superior Court. We invite you to reply to this message if you have any questions.

Filing Date: 3/28/2019 at 12:28 AM
Filer: Julie Oinonen
Peach #: E-LF4CEDDJ
Case #: 18CV0454
Assigned Judge: RUSSELL W. SMITH
Case Name: DR. ROBERT H. WAINBERG VS. PIEDMONT COLLEGE

Documents

A file-stamped copy of each document is available for you to download. The download link is available for 30 days from the time this message was sent.

If the links below are not clickable, please copy and paste each link into your browser.

Complaint | EFILED DOCUMENT:AMENDED COMPLAINT
| <https://peachcourt.com/Redirect?id=HDQXRMCD>

Payment amount: \$8.58
Method of payment: CreditCard
Client Reference #: N/A

A file-stamped copy of this filing has been electronically mailed to:
bmarschalk@deflaw.com, cpope@deflaw.com, julie@goodgeorgialawyer.com, mdobbs@goodgeorgialawyer.com

Thank you for filing with PeachCourt, Georgia's eFiling and Document Access Solution. If you have any questions about the status of this filing, please call the PeachCourt Support Center at 844-GA-EFILE (844-423-3453) and refer to Peach #E-LF4CEDDJ.

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Civil Action No. 18CV4544
Date Filed 0454

Superior Court ☒ Magistrate Court ☐
State Court ☐ Probate Court ☐
Juvenile Court ☐
Georgia, Hobbs COUNTY

Attorney's Address
Williams Olinier LLC
c/o Julie Olinier
44 Broad Street NW St 200
Atlanta GA 30303

Rob Wainberg
Plaintiff

VS.

Name and Address of Party to be Served.
Ann Sutton
c/o Piedmont College
1021 Central Ave Demorest GA
30535

Piedmont College
Defendant

SHERIFF'S ENTRY OF SERVICE

I have this day served the defendant ANN SUTTON
of the within action and summons.

2019 APR - 8 PM 12: 52
HARRIS COUNTY
CLERK OF COURT
Book Page Recorded
David C. Wall
Tennishee

I have this day served the defendant _____
copy of the action and summons at his most notorious place of abode in this County.

☐ Delivered same into hands of _____ described as follows:
age, about _____ years; weight _____ pounds; height, about _____ feet and _____ inches, domiciled at the residence of
defendant.

Served the defendant _____ a corporation
☐ by leaving a copy of the within action and summons with _____
in charge of the office and place of doing business of said Corporation in this County.

☐ I have this day served the above styled affidavit and summons on the defendant(s) by posting a copy of the same to the door of the premises designated in said
affidavit, and on the same day of such posting by depositing a true copy of same in the United States Mail, First Class in an envelope properly addressed to the
defendant(s) at the address shown in said summons, with adequate postage affixed thereon containing notice to the defendant(s) to answer said summons at the
place stated in the summons.

☐ Diligent search made and defendant _____
not to be found in the jurisdiction of this Court.

This 2 day of APRIL, 20 19. @ 1055

LOCATION: SAME

[Signature]
DEPUTY

SHERIFF DOCKET _____ PAGE _____

Civil Action No. 18 CV 4594
 Date Filed 0454

Superior Court ☒ Magistrate Court ☐
 State Court ☐ Probate Court ☐
 Juvenile Court ☐
 Georgia, Habersham COUNTY

Attorney's Address Williams Simonette
Julie Simonette
44 Broad St NW Ste 200
Atlanta GA 30303

Rob Wainberg
 Plaintiff
 VS.

Name and Address of Party to be Served.
Jim Peeples
c/o Piedmont College
1021 Central Ave Demorest GA
30535

Piedmont College
 Defendant

SHERIFF'S ENTRY OF SERVICE

2019 APR - 8 PM 12:52
 Book Page Recorded
 David C. Wall
 HABERSHAM COUNTY
 CLERK OF COURT
 personally with a copy

PERSONAL

I have this day served the defendant JIM PEEPLES
 of the within action and summons.

NOTORIOUS

I have this day served the defendant _____
 copy of the action and summons at his most notorious place of abode in this County.

☐ Delivered same into hands of _____ described as follows:
 age, about _____ years; weight _____ pounds; height, about _____ feet and _____ inches, domiciled at the residence of
 defendant.

CORPORATION

Served the defendant _____ a corporation
☐ by leaving a copy of the within action and summons with _____
 in charge of the office and place of doing business of said Corporation in this County.

TACK & MAIL

☐ I have this day served the above styled affidavit and summons on the defendant(s) by posting a copy of the same to the door of the premises designated in said
 affidavit, and on the same day of such posting by depositing a true copy of same in the United States Mail, First Class in an envelope properly addressed to the
 defendant(s) at the address shown in said summons, with adequate postage affixed thereon containing notice to the defendant(s) to answer said summons at the
 place stated in the summons.

NON EST

☐ Diligent search made and defendant _____
 not to be found in the jurisdiction of this Court.

This 2 day of APRIL, 20 19. @1448

LOCATION: MOVIE THEATER PARKING LOT

171
 DEPUTY

SHERIFF DOCKET _____ PAGE _____

Civil Action No. 18cv0549
Date Filed 0454
Superior Court ☐ Magistrate Court ☐
State Court ☐ Probate Court ☐
Juvenile Court ☐
Georgia, Habersham COUNTY

Attorney's Address Williams Oinonen LLC Rob Wainberg
c/o Julie Oinonen Plaintiff
44 Broad St NW Ste 200
Atlanta GA 30303 VS.

Name and Address of Party to be Served. Piedmont College
Rose Marie Allison Defendant
c/o Piedmont College
1021 Central Ave Demorest GA
30535
Garnishee

SHERIFF'S ENTRY OF SERVICE

PERSONAL

I have this day served the defendant ROSE MARIE ALLISON
of the within action and summons.

NOTORIOUS

I have this day served the defendant _____
copy of the action and summons at his most notorious place of abode in this County.
☐ Delivered same into hands of _____ described as follows:
age, about _____ years; weight _____ pounds; height, about _____ feet and _____ inches, domiciled at the residence of
defendant.

CORPORATION

Served the defendant _____ a corporation
☐ by leaving a copy of the within action and summons with _____
in charge of the office and place of doing business of said Corporation in this County.

TACK & MAIL

☐ I have this day served the above styled affidavit and summons on the defendant(s) by posting a copy of the same to the door of the premises designated in said
affidavit, and on the same day of such posting by depositing a true copy of same in the United States Mail, First Class in an envelope properly addressed to the
defendant(s) at the address shown in said summons, with adequate postage affixed thereon containing notice to the defendant(s) to answer said summons at the
place stated in the summons.

NON EST

☐ Diligent search made and defendant _____
not to be found in the jurisdiction of this Court.

This 2 day of APRIL, 20 19 @ 10:53

LOCATION: SAME

[Signature] DEPUTY



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

STIPULATION EXTENDING TIME FOR DEFENDANT TO RESPOND TO
PLAINTIFF'S MOTION TO COMPEL

COME NOW Plaintiff and Defendant, by and through their undersigned counsel, and hereby stipulate and agree, pursuant to O.C.G.A. § 9-11-6(b), that Defendant may have until May 10, 2019 to timely respond to Plaintiff's March 8, 2019 *Motion to Compel Defendant to Produce Discovery*.

WE CONSENT AND SO STIPULATE this 10th day of April, 2019.

DREW ECKL & FARNHAM, LLP

WILLIAMS OINONEN LLC

/s/ Barbara A. Marschalk

/s/ Julie Oinonen

Joseph C. Chancey

Julie Oinonen

Georgia Bar No. 120520

Georgia Bar No. 722018

Barbara A. Marschalk

[signed with express permission by Barbara A. Marshalk]

Georgia Bar No. 324498

Sonya T. Jacobs

44 Broad Street, NW, Suite 200

Georgia Bar No. 380006

Atlanta, Georgia 30303

303 Peachtree Street NE, Suite 3500

Telephone: (404) 654-0288

Atlanta, Georgia 30308

Email: Julie@goodgeorgialawyer.com

Telephone: (404) 885-1400

Email: jchancey@deflaw.com

Attorney for Plaintiff

Email: bmarschalk@deflaw.com

Email: sjacobs@deflaw.com

Attorneys for Defendant Piedmont College

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that I am counsel for the Defendant Piedmont College, and that I have this date served a copy of ***STIPULATION EXTENDING TIME FOR DEFENDANT TO RESPOND TO PLAINTIFF'S MOTION TO COMPEL*** with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(4), a copy will be electronically served upon the following counsel of record:

Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 10th day of April, 2019.

/s/ Barbara A. Marschalk

Barbara A. Marschalk

Georgia Bar No. 324498

Drew, Eckl & Farnham, LLP
303 Peachtree St., NE, Suite 3500
Atlanta, Georgia 30308
Telephone: (404) 885-1400
Facsimile: (404) 876-0992
E-mail: bmarschalk@deflaw.com
Attorney for Defendant Piedmont College
8720037/1
00120-134334


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

RULE 5.2 CERTIFICATE

This is to certify that the documents listed below have this day been served upon
opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to
Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs, DREW ECKL & FARNHAM,
LLP, 303 Peachtree St. NE, Suite 3500, Atlanta, Georgia 30308.

1. *Second Amended Subpoena and Amended Notice of Deposition* to Rose Mariee Allison
2. *Second Amended Subpoena and Amended Notice of Deposition* to Jim Peeples
3. *Second Amended Subpoena and Amended Notice of Deposition* to Ann Sutton

Respectfully submitted this 12th day of April 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE


This is to certify that the foregoing RULE 5.2 CERTIFICATE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.com
bmarschalk@deflaw.com
sjacobs@deflaw.com
Counsel for Defendant Piedmont College

Respectfully submitted this 12th day of April 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654-0288/ (404) 592-6225 FAX
julie@goodgeorgialawyer.com
Counsel for Plaintiff

FILED IN OFFICE
CLERK OF SUPERIOR COURT
HABERSHAM COUNTY, GEORGIA
18CV0454
RUSSELL W. SMITH
APR 26, 2019 11:19 AM

David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION

NO. 18CV0454

**PIEDMONT COLLEGE’S MOTION TO DISMISS COUNT III OF
AND TO STRIKE ALLEGATIONS AND STATEMENTS
MADE IN PLAINTIFF’S FIRST AMENDED COMPLAINT**

COMES NOW Piedmont College, Defendant in the above styled action, and pursuant to O.C.G.A. 9-11-12, files its Motion to Dismiss Count III of and to Strike Allegations and Statements Made in Plaintiff’s *First Amended Complaint for Damages Concerning Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing, Negligent Hiring and Retention, and Attorneys Fees*, (“Plaintiff’s First Amended Complaint”) for failure to state a claim upon which relief may be granted. In support of this Motion, Defendant relies upon all matters of record, including its *Brief in Support* filed contemporaneously herewith.

WHEREFORE, Defendant respectfully requests that this Court grant this motion and enter an Order dismissing Count III of Plaintiff’s *First Amended Complaint* and striking specific allegations, statements and paragraphs of Plaintiff’s *First Amended Complaint*.

Respectfully submitted this 26th day of April, 2019.

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk

Joseph C. Chancey, *GA Bar No. 120520*

Barbara A. Marschalk, *GA Bar No. 324498*

Sonya T. Jacobs, *GA Bar No. 380006*

303 Peachtree St. NE, Suite 3500

Atlanta, Georgia 30308

Telephone: (404) 885-1400

Facsimile: (404) 876-0992

E-mail: jchancey@deflaw.com

E-mail: bmarschalk@deflaw.com

E-mail: sjacobs@deflaw.com

Attorneys for Defendant Piedmont College

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION

NO. 18CV0454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed *PIEDMONT COLLEGE'S MOTION TO DISMISS COUNT III OF AND TO STRIKE ALLEGATIONS AND STATEMENTS MADE IN PLAINTIFF'S FIRST AMENDED COMPLAINT* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 26th day of April, 2019.

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk
Barbara A. Marschalk, **GA Bar No. 324498**

303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
Telephone: (404) 885-1400
Facsimile: (404) 876-0992
E-mail: jchancey@deflaw.com
E-mail: bmarschalk@deflaw.com
E-mail: sjacobs@deflaw.com
Attorney for Defendant Piedmont College
8757999/1
00120-134334



David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

**DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS COUNT III OF
AND TO STRIKE ALLEGATIONS AND STATEMENTS MADE IN PLAINTIFF'S
FIRST AMENDED COMPLAINT**

COMES NOW Piedmont College (hereinafter "Defendant"), Defendant in the above-styled civil action, and files this Motion to Dismiss Count III of and to Strike Allegations and Statements Made In Plaintiff's *First Amended Complaint for Damages Concerning Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing, Negligent Hiring and Retention, and Attorneys Fees*, showing the Court as follows:

I. BACKGROUND

On August 20, 2018, Plaintiff Robert Wainberg ("Plaintiff") filed suit against Defendant Piedmont College arising out of his termination for cause by the College. In his Complaint, Plaintiff alleged that Defendant breached its employment contract with Plaintiff by failing to follow the termination procedures specified in the College's Policies and Procedures Manual. Plaintiff's initial Complaint asserted claims against Defendant for (1) breach of contract, (2) breach of the implied duty of good faith and fair dealing arising out of the alleged breach of contract, (3) punitive damages, and (4) attorney's fees. *See generally, Plaintiff's Complaint for Damages Concerning Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing.*

On September 27, 2018, Defendant filed its *Motion to Dismiss Plaintiff's Complaint*, asserting that Plaintiff's Complaint should be dismissed, in whole or in part, for failure to state a claim upon which relief can be granted. After hearing oral argument from counsel, the Court entered its *Order on Defendant's Motion to Dismiss* on February 28, 2019, denying Defendant's Motion in part as to Plaintiff's claims for breach of contract, breach of the implied duty of good faith and fair dealing arising out of the alleged breach of contract, and attorney's fees, and granting Defendant's Motion in part, thereby dismissing Plaintiff's claim for punitive damages and holding that "where punitive damages are improperly plead as a cause of action, without any underlying action which would support such damages, that claim is subject to dismissal without prejudice." *Order on Defendant's Motion to Dismiss*, p. 6.

On March 28, 2019, Plaintiff filed his *First Amended Complaint*, adding a claim for "Negligent Hiring and Retention." In support of this claim, Plaintiff alleges that a College faculty member – who is not a party to this lawsuit – had his "rear buttocks" cupped by the President of the College, and that it was reasonably foreseeable that such alleged act by the President toward that faculty member would result in Defendant's breach of Plaintiff's employment contract and harm to the Plaintiff. (Am. Compl., ¶¶ 28(a), 33(e), 40(e-g), 51, and 52).

II. ARGUMENT AND CITATION OF AUTHORITY

A motion to dismiss for failure to state a claim upon which relief may be granted should be sustained where "(1) the allegations of the complaint [or any count therein] disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the

relief sought.” *Anderson v. Flake*, 267 Ga. 4998, 501, 480 S.E.2d 10, 12 (1997). While a trial court is required to take the factual allegations in the complaint as true when considering a motion to dismiss, “in the absence of any specifically pled facts to support what [amounts] to a legal conclusion construed as fact, the trial court [is] not required to accept this conclusion as true.” *Novare Group, Inc. v. Sarif*, 290 Ga. 186, 191, 718 S.E.2d 304, 309 (2011).

Here, Plaintiff’s claim for negligent hiring and retention is without merit, as there is no underlying tort on which to base the claim. Thus, Plaintiff’s claim fails as a matter of law and should be dismissed. Defendant also respectfully asks that the Court strike all allegations in Plaintiff’s *First Amended Complaint* that are redundant, immaterial, impertinent, or scandalous, including, but not limited to, those asserted in support of Plaintiff’s negligent hiring and retention claim.

A. Count III of Plaintiff’s *First Amended Complaint* Fails As a Matter of Law and Should be Dismissed.

Plaintiff filed his *First Amended Complaint* asserting a count for Negligent Hiring and Retention thirty days after this Court entered its ruling dismissing Plaintiff’s claim for punitive damages, in which this Court found that: (1) Plaintiff’s claims were based upon breach of an employment contract; (2) Plaintiff had failed to allege a tort claim to support a derivative punitive damages claim; and (3) punitive damages are not recoverable for breach of contract claims. *Order on Defendant’s Motion to Dismiss*, pp. 5-6. Plaintiff’s purpose for filing his *First Amended Complaint* is evidently so that Plaintiff can “motion the Court for (*sic*) to allow Plaintiff to reinstate a claim for punitive damages based upon this amended complaint which adds a tort claim.” (Am. Compl., ¶ 1).

However, Plaintiff’s claim for negligent hiring and retention suffers from the same fatal deficiency as his now-dismissed punitive damages claim. It is well settled under Georgia law

that a claim for negligent hiring and retention is a derivative claim dependent upon a related tort claim. In other words, like a punitive damages claim, it is not a stand-alone claim. *See MARTA v. Mosley*, 280 Ga. App. 486, 490, 634 S.E.2d 466, 469 (2006) (Negligent hiring and retention claims are derivative and cannot survive without an underlying tort.); *Eckhardt v. Yerkes Regional Primate Ctr.*, 254 Ga. App. 38, 39, 561 S.E.2d 164, 166 (2002) (The court also did not err in dismissing the appellants' claim for negligent retention as appellants' claim for wrongful termination was found without merit. Therefore, there was no underlying tort on which to base a negligent retention claim.); *see also, Alhallaq v. Radha Soami Trading, LLC*, 484 Fed. Appx. 292 (11th Cir. 2012) (Under Georgia law, negligent hiring and retention claim which is necessarily derivative, was properly dismissed because the employee did not identify an underlying tort upon which to base the claim.) Without an underlying tort claim, Plaintiff cannot establish a claim for negligent hiring/retention under well-established black letter Georgia law.

The allegations of Plaintiff's *First Amended Complaint* make clear that Plaintiff's claim for negligent hiring and retention is premised **solely upon a breach of contract claim** – not an underlying tort. In Count III, Plaintiff specifically incorporates by reference all of the preceding paragraphs of the *First Amended Complaint* and thereby contends with respect to the negligent hiring and retention claim that “Piedmont College and Dr. Wainberg entered into valid binding contractual agreement which created all correlating duties, commitments and obligations arising and flowing from the express language of the contracts.” (Am. Compl., ¶ 46)¹. In so doing, Plaintiff acknowledges and has admitted *in judicio* that all rights and duties owed to Plaintiff by Defendant flow from the alleged contractual terms of his employment contract. *Id.*

Plaintiff contends Defendant failed to perform its contractual duties and did not provide

¹ An identical paragraph was set out in Paragraph No. 43 of Plaintiff's Complaint and this Court has already ruled that “This action is a claim for breach of contract.” *Discovery Order p. 2*

him with “due process in his case, pursuant to Piedmont College Policies and Procedures concerning Tenure and concerning Title 9.” (Am Compl. ¶ 44). At most, all that Plaintiff has alleged is a failure by Defendant to perform certain aspects of the employment contract. “It is well settled under Georgia law that mere alleged failure to perform a contract does not constitute a tort.” *ServiceMaster Co. v. Martin*, 252 Ga. App. 751, 754, 556 S.E.2d 517, 522 (2001).

Because Plaintiff has not and cannot premise his claim for negligent hiring and retention on an alleged breach of contract, Count III of his *First Amended Complaint* must be dismissed.

B. Motion to Strike Certain Allegations and Statements of Plaintiff’s *First Amended Complaint*.

O.C.G.A. § 9-11-12(f) provides that “upon motion made by a party within 30 days after the service of the pleading upon him or upon the court’s own initiative at any time, the court may order stricken from any pleading any ... redundant, immaterial, impertinent, or scandalous matter.” The Georgia Supreme Court has recently addressed how trial courts should evaluate motions to strike portions of pleadings that fall within the scope of O.C.G.A. § 9-11-12(f).

Chappuis v. Ortho Sport & Spine Physicians Savannah, LLC, No. S18G0756, 2019 WL 1006357 (Ga. March 4, 2019). In this regard, Federal Rules of Civil Procedure 12(f) and the federal decisions thereunder are illustrative in interpreting the Georgia rule. *Id.*

Typically, motions to strike are not favored by the courts, but **are appropriate** when “the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.” *Allen v. Life Ins Co. of N. A.*, 267 F.R.D. 407, 409 (N.D. Ga. 2009). Given the posture of this case, striking the requested allegations and statements from Plaintiff’s *First Amended Complaint* will significantly serve to refocus this case on the pertinent and relevant issues to be tried and will remove extraneous allegations, which only serve to confuse and inflame the issues that will be tried before a jury.

This Court should consider “each disputed allegation in the context of the entire pleading, and the entire lawsuit, taking into account the parties’ general conduct and the tone during the litigation as well as any other filings made.” *Chappuis, supra*. (citing *Carone v. Whalen*, 121 F.R.D 231,234 (M.D. Pa. 1988) in which the entire complaint was struck because the disrespect and nefarious conduct by the plaintiff was the culmination of a vengeful and vindictive temperament evident throughout the Plaintiff’s pleadings.)

This Court may also engage in “surgical strikes,” deleting certain words or phrases from otherwise relevant allegations if expressed in “repulsive language” that detracts from the dignity of the court. *Id.* (citing *Alvarado- Morales v Digital Equipment Corp.* 843 F.2d. 613619 (1st Cir. 1988) striking terms such as “concentration camp,” “brainwash,” “torture,” or other “repugnant words replete with tragic historical connotations.”)

This Court may strike matters that do not prejudice a particular party but nonetheless “impugn the dignity of the judicial process.” *Id.* (citing *Conklin v. Anthou*, Case No. 1:10-CV-02501, 2011 WL 1303299, at *1 (M.D. Pa. Apr. 5, 2011) (striking paragraphs from the complaint that were impertinent and “improperly cast a derogatory light” on the judge and other judicial officers); and *Atraqchi v. Williams*, 220 F.R.D. 1, 3 (D.D.C. 2004) (striking plaintiffs’ complaint because the court could not “allow to stand, as if it had some juridical value, a complaint that contains the wildly immaterial, delusional, and quite possibly pathological allegations” about various conspiracies claimed by plaintiffs.)

This Court can strike as “scandalous” those allegations which only have a remote connection to a claim or defense but are highly prejudicial to the opposing party and may be improperly and unnecessarily derogatory, grossly disgraceful, and defamatory. Granting a motion to strike scandalous matter “is aimed, in part, at avoiding prejudice to a party by

preventing a jury from seeing the offensive matter or giving the allegations any other unnecessary notoriety.” *Id.*

This Court can strike as “redundant” those claims that essentially repeat another claim in the same complaint. *Id.* This Court can also strike as “impertinent” or immaterial” an allegation that is neither responsive nor relevant to the issues involved in the action. *Id.*

For ease of reference for the Court, Defendant has attached hereto as Exhibit “A” a copy of the Plaintiff’s *First Amended Complaint* and has highlighted the particular allegations, statements, and paragraphs that Defendant seeks to have stricken from the Plaintiff’s *First Amended Complaint*. Defendant has also set out those provisions below:

Specifically, Defendant moves to strike all statements, allegations, and paragraphs relating to or dependent upon Plaintiff’s claim for negligent hiring and retention asserted in Count III of Plaintiff’s *First Amended Complaint*. As more fully set forth above, Count III is not a viable claim, and thus Plaintiff’s allegations relating to that claim are irrelevant to the only remaining issues in this case – namely whether Defendant breached Plaintiff’s employment contract and the implied duty of good faith and fair dealing when it terminated Plaintiff for cause. This Court already ruled in its March 28, 2019 *Discovery Order* in regard to those claims that unreported incidents of sexual harassment are irrelevant to the subject matter of this action and will not be allowed. At this point, the allegations serve no purpose other than to harm and defame the College and its President.

Thus, Defendant asks this Court to strike those allegations as follows:

Introduction – This entire section should be stricken from the pleading since it is wholly unrelated to Plaintiff’s actual legal claims and instead reads more like a tabloid magazine one would find at the grocery store checkout, full of nothing more

than self-serving (and aggrandizing) statements and containing hyperbolic phrases such as :“unlawfully robbed”, “illegally deprived” , “tyrannical”, “bully tactics and threats”, “demoralized faculty”, “harmed retention”, “poses a grave risk”, “quash dissent”, “chill on academic freedom”, etc.

Paragraph 1 – “negligent hiring and retention”, “will respectfully motion the Court to allow Plaintiff to reinstate a claim for punitive damages based on this amended complaint which adds a tort claim.” ;

Paragraph 28- in its entirety;

Paragraph 29- in its entirety;

Paragraph 30- in its entirety;

Paragraph 31- in its entirety;

Paragraph 33- subparts d and e;

Paragraph 40- in its entirety;

Count III – Negligent Hiring and Retention – in its entirety, including Paragraphs 50, 51, and 52.

Additionally, Defendant moves this Court to strike those allegations, statements, and paragraphs from Plaintiff’s *First Amended Complaint* that: are scandalous and highly prejudicial, have no relevance to the breach of contract claims, are wildly immaterial and impertinent, seek to cast Dr. Mellichamp and others at the College in a derogatory and defamed manner; and impugn the dignity of the judicial process. These provisions include:

Paragraph 11- in its entirety;

Paragraph 12- in its entirety;

Paragraph 13- in its entirety;

Paragraph 14- in its entirety;

Paragraph 15- in its entirety;

Paragraph 16- in its entirety;

Paragraph 20- in its entirety;

Paragraph 21- in its entirety;

Paragraph 22- in its entirety;

Paragraph 23- first sentence:

Paragraph 32- “In retaliation”

Paragraph 42 – in its entirety, including subparagraphs (a) and (b);

Paragraph 42 – in its entirety

Since these provisions do not relate to or support an actual cause of action, it is clear that the allegations are included solely to harm and defame several of the College’s officers, directors, and employees and to obtain some sort of perceived litigation advantage by trying this case in the court of public opinion. Complaints are not intended to provide vehicles for litigants to satiate their desire to smear others with impunity. Since the Plaintiff cannot explain how his allegations support any essential element of his attempted causes of action, Defendant respectfully asks that the Court strike such allegations as Rule 12(f) authorizes.

III. CONCLUSION

Based on the foregoing, Piedmont College respectfully submits that the claims asserted against it in Count III of Plaintiff’s *First Amended Complaint* should be dismissed pursuant to O.C.G.A. 9-11-12(b)(6) for failure to state a claim upon which relief may be granted.

Additionally, Piedmont College respectfully requests that the specific allegations and statements within Plaintiff’s *First Amended Complaint* which are relating to or dependent upon Plaintiff’s claims for negligent hiring and retention or are otherwise irrelevant to issues regarding

breach of contract, and are scandalous, redundant, impertinent, and immaterial be stricken in accordance with O.C.G.A. § 9-11-12(f).

Respectfully submitted this 26th day of April, 2019.

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk

Joseph C. Chancey

Georgia Bar No. 120520

Barbara A. Marschalk

Georgia Bar No. 324498

Sonya T. Jacobs

Georgia Bar No. 380006

303 Peachtree St. NE, Suite 3500

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E-mail: sjacobs@deflaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

Civil Action File No: 18CV0454

PIEDMONT COLLEGE,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Defendant, and that I have this day served *DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS COUNT III AND TO STRIKE ALLEGATIONS AND STATEMENTS MADE IN PLAINTIFF'S FIRST AMENDED COMPLAINT* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen, Esq.
Williams, Oinonen, LLC
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
Julie@goodgeorgialawyer.com

This 26th day of April, 2019.

/s/ Barbara A. Marschalk

Joseph C. Chancey, **GA Bar No. 120520**

Barbara A. Marschalk, **GA Bar No. 324498**


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Attorneys for Defendant

8758000/1
00120-134334

Exhibit A


David Wall, Clerk
Habersham County, Georgia

Defendant.

CIVIL ACTION
NO. 18CV454

COMES NOW Dr. Robert H. Wainberg, Plaintiff in the captioned action, and brings this Complaint against Defendant Piedmont College, and shows this Honorable Court as follows:

Dr. Wainberg faithfully served Piedmont College for thirty years and successfully built the science department from the ground up as one of the original founders. When he began standing up to the administration in regards to corruption, he became targeted, his good name and professional reputation sullied with slanderous lies. In retaliation against Dr. Wainberg, a pillar of the institution and beloved professor who helped grow the institution for three decades, President Mellichamp unlawfully robbed him of his job and illegally deprived him of a fair hearing that he was contractually entitled to as a tenured professor.

Worse, President Mellichamp's tyrannical actions have harmed the Piedmont College fulltime faculty of the tenure protections that they were legally and contractually originally promised. He has used the threat of termination without tenure to quash dissent and silence academic freedom of expression. He has subjected those like Dr. Wainberg who have spoken out to bully tactics and threats. He has put a chill on academic freedom of the institution. He has

demoralized faculty and harmed retention. He has failed to comply with policies and procedures concerning Title IX. He currently poses a grave risk not only to the men and women who have devoted their entire professional lives to Piedmont College, but to the academic integrity and welfare of the institution as a whole.

CLAIMS, JURISDICTION, AND VENUE

1.

This action is brought seeking damages pursuant to the laws of the State of Georgia for breach of contract, violation of the implied duty of good faith and fair dealing, and negligent hiring and retention. It also seeks an award of attorney fees and will respectfully motion the Court for to allow Plaintiff to reinstate a claim for punitive damages based on this amended complaint which adds a tort claim.

2.

This Honorable Court has subject matter jurisdiction over Dr. Wainberg's claims.

3.

Venue is proper before this Honorable Court in that it is brought in the County where the Piedmont College resides.

4.

Dr. Wainberg has satisfied all conditions precedent for bringing this action.

PARTIES

5.

Dr. Robert H. Wainberg, Plaintiff herein, resides in Jackson County, Georgia. He has been an employee of Defendant, Piedmont College, at all times relevant to this complaint.

6.

Piedmont College is a comprehensive liberal arts institution and also offers a variety of career-oriented majors in the arts and sciences, business, education, and nursing. The main campus and principal place of business is located in Demorest, Georgia. Its registered agent for service is President James Mellichamp.

FACTS GIVING RISE TO THE COMPLAINT

7.

Dr. Wainberg (or “Dr. Rob” as he is fondly known as), was hired as a tenure-track Assistant Professor of Biology in September 1988. He is one of the original founding members of the Department of Biological Sciences. Dr. Wainberg, a tenured Biology professor, has been part of the Piedmont College community since leaving his cancer research in 1988. In his thirty-year tenure at Piedmont College, Dr. Wainberg has been a well-loved professor who has taught and mentored a multitude of students from many areas of studies. His former students read like a list of Who’s Who and include many prominent politicians, government officials, judges, and CEO’s throughout the state of Georgia. This includes the current Mayor of Demorest (and former member of Georgia House of Representatives) Dr. Rick Austin who became his fellow colleague and currently serves as Associate Professor within the Science Department at Piedmont College.

8.

Dr. Rob Wainberg was the recipient of the 1991 Sears-Roebuck Foundation Award for Teaching Excellence and Campus Leadership and the 2001 Piedmont College Advisor of the Year Award. Dr. Wainberg was also listed in Who's Who in Science and Engineering from 1994 - 2006 and Who's Who in the World from 1995 -2006. This past December, he was honored by

the Peach State Federal Credit Union with a \$50,000 gift for the newly established Dr. Robert H. Wainberg Undergraduate Science Research Scholarship to provide funds to assist the research of future Biology, Chemistry, Geology, and Environmental Science students.

9.

Dr. Wainberg was granted tenure effective for the academic year 1993-94. Dr. Wainberg was also promoted to Associate Professor effective that academic year.

10.

During his tenure at Piedmont College, Dr. Wainberg has received significant honors, has been selected to serve on numerous committees, has been awarded prestigious grants, and otherwise had a distinguished career, serving Piedmont College, its faculty, administration, and its students with dignity, diligence, and professionalism.

11.

During his career at Piedmont College, biology professor Dr. Wainberg became actively opposed to Mar-Jac (a powerful corporation that is a producer and processor of poultry in Georgia) building a feed mill in the area because of the environmental hazards it posed. As a result of his opposition, he would uncover that Mar Jac had been owned by a group founded by a wealthy and prominent Saudi Arabian family that would later become under scrutiny by the United States government regarding potential links to radical terrorism. Dr. Wainberg began working with the federal government to aid in exposing the ties funding radical Islamic terrorism at 555 Grove Street in Herndon, Virginia where most if not all of Mar-Jac's beneficial owners maintained offices and where the federal government would execute search warrants leading to one of the largest raids of those suspected by the U.S. government of funding terrorism.¹

¹ <https://www.nytimes.com/2002/03/21/us/a-nation-challenged-the-money-trail-raids-seek-evidence-of-money-laundering.html>

12.

In response to his work with the federal government and his opposition to Mar-Jac, Dr. Wainberg experienced threats, including but not limited to such things as a strange men driving up to him in a Mar-Jac truck stating: "I know who you are I know where you live...we are watching."

13.

a. In response to him standing up for what he believed was right, Dr. Wainberg also suffered threats to his employment at Piedmont College. Dr. Wainberg was informed that the Chairman of the Board Gus Arrendale was not happy with his opposition to Mar-Jac's feed mill and that as a result then Piedmont College President Ray Cleere ordered Dr. Rick Austin (current Mayor of Demorest) to write a bad review against Dr. Wainberg so that he would not get his promotion.

b. Mayor Rick Austin, an ethical leader who had just written his former professor now colleague Dr. Wainberg (who had just won his second award at Piedmont College) a glowing letter, refused to do so.

c. Since that time period, Gus Arrendale has remained as Chairman of the Board at Piedmont College to date, for a total of nearly 18 years despite this being in violation of Board policy which prohibits a Board member from serving in the same office for more than four years.

d. Since that time, Dr. Wainberg has continued to be targeted for standing up to the administration.

14.

Despite Dr. Austin refusing to act unethically by writing a letter against Dr. Wainberg as the President requested him to do, the administration still denied Dr. Wainberg his promotion as

a result of him standing up for what he believed to be illegal and dangerous activity. In response, Dr. Wainberg filed a grievance before the Grievance Committee. Dr. Wainberg was told by the administration of Piedmont College that the Grievance Committee denied his grievance but he would later learn from the Chair of the Grievance Committee, Dr. Stephanie Almagno, that this was false, that the Committee had actually voted in favor of Dr. Wainberg's promotion even though the top two members of the Piedmont College administration (Dr. Cleere and Dr. Mellichamp) would lie to Dr. Wainberg in President Cleere's office and tell him that it did not.

15.

The administration of Piedmont College continued to threaten those who spoke out for what they believed to be illegal or unethical activity. Dr. Wainberg was considered by the administration to be one of those faculty members who would speak up against wrongs done by the administration.

16.

Throughout Dr. Wainberg's career, the administration of Piedmont College sought to chill free speech, expression, and academic freedom of the faculty by violating the academic principles of tenure. Even though Piedmont College had hired many faculty promising them tenure and had a policy for tenure, it began violating its policy on tenure by taking steps to see that no additional faculty member was appointed tenure in clear breach of faculty's contractual rights pursuant to contracts and/or the faculty handbook. This is significant because in fascist countries with tyrannical dictators, academic freedom within universities is usually the first thing to be attacked. Throughout the 20th century we saw the persecution of academics across Europe: The Bolshevik Revolution in Russia and the Nazi Third Reich in Germany and other fascist

dictatorships in Italy, Spain, Greece and beyond led to purges.² Thus, it is no surprise that in the case of Piedmont College, that when the administration took on tyrannical qualities, it started with the attack on tenure and academic freedom in an effort to silence and quash dissent.

17.

The purpose of tenure is to protect professors' academic freedom so they will freely speak and seek out the truth first and foremost, in their research, their teaching, and in their scholarly practice. For example, tenure protects professors' academic freedoms to teach and discuss; to carry out research and publish the results and make them known; to freely express opinions about the academic institution or system in which one works; to participate in professional or representative academic bodies; and to freely speak out without being censored or retaliated.

18.

Tenure does not protect bad teachers from being fired, rather protects good teachers from being unfairly targeted or retaliated against. It also attracts high quality professors who will devote their lives to an academic institution and promotes retention of good teachers who do not simply use Piedmont College as a stepping stone in their career. In sum, the best faculty seek work at institutions which offer tenure. In order for a college to remain competitive, it needs to provide tenure to attract and keep the best talent. Once Piedmont College stopped honoring their promises to faculty to provide tenure, it became hard to keep and attract the best faculty, thus harming the institution as a whole.

19.

In 2013, Chairman Gus Arrendale appointed Dr. James Mellichamp to be President of Piedmont College. Dr. Mellichamp was the progeny of the previous president and was a part of

² <https://www.futurelearn.com/courses/academic-freedom/1/steps/268318>

the long-term administration. Like his predecessor, Dr. Mellichamp openly went after those who spoke truth to power, threatening to take away Piedmont College employees' jobs if they challenged what they saw to be unethical actions on the part of his administration.

20.

Dr. Wainberg was very concerned as to what he believed to be was unethical corruption by President Mellichamp and was opposed to it. For example, in the past two recent years, Dr. Wainberg actively challenged what he believed to be the administration and President Mellichamp's actions which compromised academic integrity concerning athletes.

21.

In response to Dr. Wainberg challenging the administration of Piedmont College, the administration sought to target him in retaliation in an effort to take away his job.

22.

Upon information and belief, President Mellichamp encouraged his good friend and faculty member to write a letter against Dr. Wainberg. This friend and faculty member had been upset with Dr. Wainberg because her daughter had dropped his class because she was failing it. The letter contained defamatory information.

23.

The administration also encouraged a disgruntled student to file a complaint against Dr. Wainberg. This male student "R.A." was angry at Dr. Wainberg for getting a bad grade. The student's classmates admitted that this student was out to get Dr. Wainberg because he was angry at him for this bad grade.

24.

The administration absurdly claims that Dr. Wainberg has committed a "Title 9"

violation. Title 9 refers to a sexual harassment claim. Dr. Wainberg has never sexually harassed anyone.

25.

Dr. Wainberg is a biology professor. In his classes, he has to teach about sexual reproduction or human biological processes. Oftentimes, in order to keep the class engaged in learning, he will tell funny anecdotes. If Dr. Wainberg, a heterosexual male, ever uses a student as an example in class, he will only use one of his advisees that he has a good, comfortable relationship with. "R.A." was one of those advisees. Dr. Wainberg had an excellent relationship with "R.A." his advisee until "R.A." became very upset with him about a poor grade and made sure his classmates knew he was going to go after Dr. Wainberg because of it.

26.

a. Dr. Wainberg never has sexually harassed anyone. What "R.A." complained of was an anecdotal story that Dr. Wainberg used as a teaching tool that was not intended to embarrass or upset "R.A." Rather, it was simply an illustration used to teach about how energy molecules are converted into emergency enzymes, pyruvate, and lactate.

b. Dr. Wainberg simply used "R.A." his advisee whom he thought he had a good rapport and relationship to attempt to illustrate a story of what would happen to two athletes—one who was chasing the other for trying to cheat on his girlfriend—in terms to show how in a situation like that (a confrontation and subsequent physically exerting chase) energy starved skeletal muscle would anaerobically convert pyruvate from glycolysis to lactate for quick energy temporarily that would eventually cause these muscles to cramp and seize up.

c. What is ironic about this past year's generation of one or two students that complained that Dr. Wainberg had mentioned sex in a college level, biology classroom was that

this came from a disgruntled student unhappy with a grade they had gotten.

27.

Dr. Wainberg, as a biology teacher, often has to teach about human biological responses, biochemistry (including glycolysis), cell biology, microbiology, physiology, genetics, sexual reproduction, and all other aspects of biology that science professors are required to teach to young adults (not children) within a college classroom. He tries to do so in a way that is entertaining and engaging with his college students and has successfully done so over the past three decades which has resulted in honors and awards. Furthermore, Dr. Wainberg has always been a tremendous advocate for students over the years and treated them with respect. In no way has he ever conducted himself in a manner that could ever be construed as sexual harassment.

28.

Nevertheless, President Mellichamp latched onto this complaint and was determined to charge Dr. Wainberg with a Title 9 violation. This was a lie. This was also hugely ironic and hypocritical coming from President Mellichamp, a gay man who had sexually harassed both women and men during his career at Piedmont College, including female students and his male subordinates. For example, President Mellichamp:

a. While as President, grabbed a subordinate male faculty member in his buttocks, patting and firmly cupping his rear buttocks while stating to him in a sexual tone: "Oh.....you are in shorts today." The male faculty member will testify under oath that this occurred.

b. Sexually harassed college students while he was their professor including sexually assaulting a female student by grabbing a female college student's buttocks. This woman will testify under oath that this occurred.

c. Purchased alcohol for minors and got college students intoxicated including

drinking with those who were below the legal drinking age. Former students are willing to testify that this occurred and there is a current, ongoing search for the photographic evidence.

d. Currently failed to have his administration investigation a complaint of genuine sexual harassment by his upper level administration. This can also be corroborated with sworn testimony.

29.

Defendant Piedmont College were placed on notice of President Mellichamp's propensity and failure to comply with Defendant's Title 9 policies which prohibit sexual harassment. A male faculty member made a complaint with the previous College President about the sexual assault and harassment of then Vice President James Mellichamp but Defendant Piedmont College failed to conduct any investigation as required by Defendant's policies and procedures under Title 9.

30.

Defendant Piedmont College had notice of President Mellichamp's propensity in failing to comply with the Piedmont College Title 9 policies but negligently chose to hire and retain him as College President despite being on notice of his incompetence concerning complying with Defendant's Title 9 policies.

31.

In sum, President Mellichamp's action of falsely charging Dr. Wainberg of violating Title 9 is an outrageous example of what is colloquially called "the pot calling the kettle black." And, it is motivated out of retaliation and a desire to quash academic free speech as the Piedmont College administration has targeted Dr. Wainberg for some time now, especially in regards to how he has spoken out regarding the administration's violations of academic integrity

concerning student athletes.

32.

In retaliation, President Mellichamp terminated Dr. Wainberg who had faithfully served the institution for thirty years, in breach of his contract as a tenured professor and in violation of Defendant Piedmont College's policies.

33.

- a. Piedmont College is obligated to conduct Title 9 grievances in a fair, impartial, and timely manner. Unsatisfied parties have a right to appeal and a right to be heard before a special committee in a fair, impartial, and timely manner. In this case, President Mellichamp made the decision to terminate Dr. Wainberg for Title 9 violations even before having him go through the Title 9 process as required by Defendant's policies and procedures.
- b. Furthermore, Piedmont College is obligated to provide due process through a fair hearing before terminating a tenured professor pursuant to the contract and university policies set forth in the faculty handbook.
- c. Neither of these policies were complied with and President Mellichamp informed Dr. Wainberg that he was being terminated for violating Title 9 even before the Title 9 investigation was fairly concluded or before the Title 9 investigators had even questioned Dr. Wainberg.
- d. This was not surprising as Defendant and President Mellichamp have previously failed to comply with Title 9 requisite policies.
- e. This was reasonably foreseeable that Plaintiff Dr. Wainberg would be harmed by President Mellichamp's failure to comply with Title 9 policies as Defendant had actual

and constructive knowledge of President Mellichamp's incompetence and unfitness for the position of President due to his failure to comply with Title 9 policies.

34.

Pursuant to Piedmont College Policies and Procedures, termination may only occur for a tenured professor if the faculty member's conduct is considered seriously prejudicial. Prior to termination, the faculty member must be notified in writing of the specific conduct which may result in termination and an action must not be taken without a hearing.

35.

Contrary to the Piedmont College Policies and Procedures Manual provisions on termination of faculty:

- a. Dr. Wainberg did not receive proper written notice of termination or a fair hearing.
- b. A decision to terminate for Title 9 violations occurred prior to the Title 9 investigators even interviewed Dr. Wainberg.
- c. Dr. Wainberg did not receive a fair hearing.
- d. Dr. Wainberg was not made aware of the investigation by Piedmont College until after President Mellichamp decided to terminate him.
- e. Dr. Wainberg was not even interviewed by the Title 9 investigators or afforded the opportunity to defend himself or refute the charges until after President Mellichamp made the decision to terminate him.
- f. On April 19th, "R.A." a disgruntled male student who had received a bad grade in his class and expressed wanting to go after Dr. Wainberg, made a complaint against him yet no one informed Dr. Wainberg until after the decision to terminate him was made.

g. Piedmont College's Title 9 officer did not conduct the Title 9 investigation, instead President Mellichamp put an untrained Athletics Director and HR employee in charge of investigating a Title 9 violation, unusual as Dr. Wainberg had been making complaints regarding violations of academic integrity concerning athletes.

h. On April 23rd and 24th, the untrained university investigators (the Athletics Director and HR employee) questioned "R.A.," a male student named "G.C." who admitted "R.A." was out to get Dr. Wainberg because he was mad about a grade; "J.S." (an older student who had never set foot in Dr. Wainberg's class or spoken with him but had only hearsay from her friend "R.A.") and two female students of Dr. Wainberg who went in because they were so outraged as to what "R.A." had claimed. These two female students attempted to provide testimony exculpatory evidence, clearing Dr. Wainberg's good name.

i. President Mellichamp even before the Athletics Director and H.R. had even interviewed Dr. Wainberg as part of their investigation made up his mind to terminate Dr. Wainberg without fair due process or even allowing Dr. Wainberg to be questioned by the Title 9 investigators that would allow him the opportunity to defend himself or refute such charges. On April 27th, three days after the investigation (that did not include the investigators questioning Dr. Wainberg to give him a chance to rebut the charges), President Mellichamp verbally informed the Mayor of Demorest and Biology Professor Dr. Rick Austin that he had decided that Dr. Wainberg was not going to get his employment contract for the following year.

j. Piedmont College never informed Dr. Wainberg they were terminating him or that there was an investigation against him. Instead, Dr. Wainberg learned it through his colleagues Dr. Rick Austin and Dr. Carlos Camp. In response, Dr. Wainberg confronted President Mellichamp on May 4th. President Mellichamp admitted that he is being terminated for

violations of Title 9, even though again, Dr. Wainberg has never yet been informed of the charges, questioned by Title 9 investigators or had the opportunity to refute the charges against him, in violation of the implied duty of good faith and fair dealing and in breach of his contract.

k. On May 9th, Dr. Wainberg is finally interviewed by the Title 9 investigators (Athletic Director and HR person) and questioned about the charges for the first time, nearly two weeks after President Mellichamp already admitted to the Mayor of Demorest that he had decided Dr. Wainberg would be terminated.

l. The two individuals interviewing Dr. Wainberg take copious notes where Dr. Wainberg rebuts every allegation that has been made. They both hug him and tell him that they are very uncomfortable doing this. They also tell Dr. Wainberg that they are giving the notes they have taken rebutting all the allegations to President Mellichamp to be transcribed. They explain that their job is just fact finding.

m. This is a phony investigation since two weeks prior President Mellichamp has already made clear that the decision to terminate him was made even before Dr. Wainberg was interviewed by the investigators in violation of Title 9 grievance policies and Tenured Termination policies.

n. Furthermore, President Mellichamp refuses to give the exculpatory notes to Dr. Wainberg prior to his hearing and fails to present any of the documentation that refutes the charges against Dr. Wainberg before the Hearing panel made up of Board members, hiding all exculpatory evidence that cleared Dr. Wainberg's good name.

o. Dr. Wainberg repeatedly requests to be given this exculpatory evidence and documentation that the investigators took down in order to prepare for his hearing. He is denied this evidence.

p. Dr. Wainberg is not given any of the evidence explaining what the specific allegations were against him or what he was supposedly even charged with in writing prior to his hearing. Rather, he is given a file of evidence from the investigators on May 24th, one night before his hearing with less than 24 hours to prepare. Notably, all the exculpatory evidence that the investigators documented in their notes in favor of Dr. Wainberg as well as all of Dr. Wainberg's rebuttals refuting the allegations has gone missing out of the evidentiary file.

q. At the hearing on May 25th, President Mellichamp sends Vice President Dr. Perry Rettig to present the evidence against Dr. Wainberg before the hearing panel made up of three Board members. Not only does Dr. Perry Rettig engage in secret, ex-parte conversation with the Board members at the hearing, he fails to present any of the evidence obtained by the investigators that clear Dr. Wainberg's good name.

36.

Contrary to the Piedmont College Policies and Procedures Manual provisions, Dr. Wainberg also did not receive the opportunity for a fair hearing in clear breach of his contract and a violation of the implied duty of good faith and fair dealing.

37.

Not only did Dr. Wainberg not receive any evidence less than 24 hours before his termination hearing with no time to prepare, all the evidence favorable to Dr. Wainberg was missing from the file. Dr. Wainberg had no opportunity to have this favorable evidence presented to the hearing panel.

38.

At the hearing, Dr. Perry Rettig (the Vice President who argued on behalf of Piedmont College's administration) engaged in secret, ex parte communications behind closed doors with

the hearing panel outside of the presence of Dr. Wainberg. Dr. Wainberg actually had to sit outside a closed door where Dr. Perry Rettig was secretly permitted to present information to the hearing panel outside his presence, without him being permitted to hear what was being said so that he could refute any allegations made against him. This happened at the first part of the hearing as well as at the end where Dr. Perry Rettig met with the Board members behind closed doors outside the presence of Dr. Wainberg.

39.

Outrageously, Piedmont College's representative Dr. Perry Rettig presented no exculpatory evidence to the Board contained in the investigators' findings that included Dr. Wainberg's rebuttals or the two female students who came to testify on Dr. Wainberg's behalf. All of that documentary evidence went missing and to date, Piedmont College has refused to provide this evidence to Dr. Wainberg despite his repeated requests.

40.

a. Defendant and College President James Mellichamp still fail to comply with Title 9 policies and procedures. During litigation, faculty have testified under oath that they are fearful of retaliation as a result of protected activity that includes testifying about the matters involved in this lawsuit so much so that faculty have sought counsel with the Administration and sought to clarify the policy on retaliation.

b. Nevertheless, despite a faculty member who exhibited courageous leadership by stepping forward to provide truthful testimony in an affidavit concerning his own personal experience with President Mellinchamp violating Title 9 policies through sexual harassment, this individual has experienced retaliation in the form of Defendant accusing him of making "libelous" allegations that are both "unsupported" and "scandalous."

c. Retaliation against a faculty member for providing truthful testimony concerning sexual harassment by the College President is in violation of Defendant's Title 9 policy.

d. To date, the Defendant has failed also initiate a Title 9 investigation against President for the sexual harassment and sexual assault allegations that were submitted.

e. In spite of the courageous leadership of this faculty member to step forward and provide sworn testimony concerning the sexual harassment perpetrated upon him by President Mellichamp, Defendant has sought to cover up such evidence of their knowledge of the President's incompetence and unfitness for the position due to his propensity in failing to comply with Title 9 policies.

f. Defendant has sought to cover-up this information concerning the President's violations of Title 9 policies from the College Newspaper and other local news publications.

g. President Mellichamp's incompetence in failing to comply with Title 9 policies and procedures resulted in harm to the Plaintiff Dr. Wainberg.

41.

After being terminated from his position at Piedmont College, Dr. Wainberg has diligently sought to obtain work for which he is qualified. Dr. Wainberg has been unable to obtain work on similar terms and conditions with the position he had at Piedmont College, and despite his best efforts, Dr. Wainberg is currently unemployed.

42.

a. Robbing a tenured professor who faithfully served the institution after thirty years of his income and health insurance benefits, whereas he can no longer afford expensive COBRA health insurance benefits, has not only caused significant economic harm and emotional distress, but it has placed Dr. Wainberg's health and life at risk as he suffers from hypertension and Type

II Diabetes.

b. Piedmont College's actions have not only financially harmed Dr. Wainberg but emotionally harmed a dedicated thirty-year servant of the university who intended to retire in May 2025 so he could be present for the 125th anniversary of the college (as he was for the 100th and 120th festivities) and for Dr. Carlos Camp's 70th birthday party in April. Rather than rewarding a well-loved professor who made the sacrifice of service to this institution throughout his entire professional lifetime, Piedmont College has responded with a cruelty that cuts the very fabric of this institution by demoralizing each and every faculty member who wonders if they could suffer the same fate after a lifetime of service.

**COUNT I
BREACH OF CONTRACT**

By this reference, the preceding paragraphs are hereby incorporated as if fully set forth herein.

43.

In the summer of 2017, Piedmont College and Dr. Wainberg entered into an employment contract for the academic year 2017-2018 as a tenured member of the faculty. As a tenured member of the faculty, Dr. Wainberg was contractually entitled to renewal of his annual contract of employment until his retirement or resignation unless there was adequate cause for his dismissal by Piedmont College.

44.

By terminating Dr. Wainberg, Piedmont College breached its employment contract with Dr. Wainberg and breached his tenure rights. Because of Piedmont College's failure to give Dr. Wainberg fair and due process in his case, pursuant to Piedmont College Policies and Procedures concerning Tenure and concerning Title 9, Piedmont College did not have cause to terminate Dr.

Wainberg's annual contract for the 2017-2018 academic year, nor did Piedmont College have cause to terminate Dr. Wainberg's tenure rights.

45.

Piedmont College's breach of contract damaged Dr. Wainberg.

COUNT II

VIOLATION OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

Dr. Wainberg fully incorporates the preceding paragraphs as if each were set forth verbatim fully herein.

46.

Piedmont College and Dr. Wainberg entered into valid binding contractual agreement, which created all correlating duties, commitments and obligations arising and flowing from the express language of the contracts.

47.

Piedmont College knowingly, willfully, and/or recklessly breached the duties, commitments, and/or obligations imposed upon Piedmont College by the express wording and implied meaning of the contracts entered into by Piedmont College and Dr. Wainberg.

48.

Piedmont College's conduct in knowingly, willfully, and/or recklessly breaching its duties pursuant to the contracts entered into by Piedmont College and Dr. Wainberg demonstrate that Piedmont College also breached the implied duty of good faith and fair dealing owed to Dr. Wainberg in executing said contracts. Georgia law recognizes this implied duty. See DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 645, 734 S.E.2d 466, 476 (2012).

49.

Piedmont College's conduct in breaching the contract and implied duty of good faith and fair dealing directly and/or proximately caused injury to Dr. Wainberg.

COUNT III
NEGLIGENT HIRING AND RETENTION

By this reference, the preceding paragraphs are hereby incorporated as if fully set forth herein.

50.

Defendant had a legal duty to exercise reasonable care in the selection and retention of its College President.

51.

Defendant breached that duty because they knew that the President was incompetent or unfit for the position concerning his failure to comply with Defendant's Title 9 policies and procedures.

52.

The President's incompetence and unfitness concerning his failure to comply with Defendant's Title 9 policies and procedures proximately caused the harm done to Plaintiff Dr. Wainberg.

ATTORNEY FEES

By this reference, the preceding paragraphs are hereby incorporated as if fully set forth herein.

53.

Piedmont College breached Dr. Wainberg's contract in bad faith, has been stubbornly litigious, and has caused Dr. Wainberg unnecessary trouble and expense, entitling Dr. Wainberg

to recover expenses of litigation and attorneys fees.

PRAYERS FOR RELIEF

WHEREFORE, Dr. Wainberg prays the following relief:

1. That summons issue and be served upon the Defendant in accordance with the law; further,
2. That Dr. Wainberg seeks an amount reflective of all damages, including consequential damages to compensate the injuries sustained as the result of the Defendants' actions and more specifically;
3. That Dr. Wainberg have and recover reasonable attorney fees and costs in an amount to be determined by the court;
4. That this Court enter judgment for the loss of his income as a result of the breach of contract together with prejudgment and post-judgment interest;
5. Any and all further relief that this Court deems just and proper.
6. That Dr. Wainberg will have and recover such other, further and different relief this Court deems appropriate under the circumstances.

Respectfully submitted this 28th day of MARCH 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing **FIRST AMENDED COMPLAINT FOR DAMAGES** has this day been served with the Clerk of Court using the PeachCourt e-filing system and upon opposing counsel by depositing a true and correct copy of the same via U.S.

Mail addressed to:

Joseph C. Chancey
Barbara A. Marschalk
Sonya T. Jacobs
DREW ECKL & FARNHAM, LLP
303 Peachtree St. NE, Suite 3500
Atlanta, Georgia 30308
jchancey@deflaw.co
bmarschalk@deflaw.com
sjacobs@deflaw.com
Attorneys for Defendant Piedmont College

Respectfully submitted this 28TH day of March 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

WILLIAMS OINONEN LLC
44 Broad Street, NW, Suite 200
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Counsel for Plaintiff


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION
NO. 18CV0454

**DEFENDANT'S REQUEST FOR ORAL ARGUMENT ON MOTION TO DISMISS
COUNT III OF AND TO STRIKE ALLEGATIONS AND STATEMENTS MADE IN
PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW Defendant Piedmont College, and, pursuant to Uniform Superior Court Rule 6.3, respectfully requests that its Motion to Dismiss Count III of and to Strike Allegations and Statements Made in Plaintiff's First Amended Complaint be set down for an oral argument.

Respectfully submitted this 26th day of April, 2019.

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk

Joseph C. Chancey, *GA Bar No. 120520*

Barbara A. Marschalk, *GA Bar No. 324498*

Sonya T. Jacobs, *GA Bar No. 380006*

303 Peachtree St. NE, Suite 3500

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Attorneys for Defendant Piedmont College

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

vs.

PIEDMONT COLLEGE,

Defendant.

CIVIL ACTION

NO. 18CV0454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Piedmont College, and that I have this day filed *DEFENDANT'S REQUEST FOR ORAL ARGUMENT ON MOTION TO DISMISS COUNT III OF AND TO STRIKE ALLEGATIONS AND STATEMENTS MADE IN PLAINTIFF'S FIRST AMENDED COMPLAINT* with the Clerk of the Superior Court of Habersham County using the PeachCourt e-filing system, and that, pursuant to O.C.G.A. §9-11-5(f)(1)(B), I have electronically served a true and correct copy upon the following counsel of record:

Julie Oinonen
Julie@goodgeorgialawyer.com
Williams Oinonen LLC
44 Broad Street, NW, Suite 200
Atlanta, GA 30303

This 26th day of April, 2019.

DREW ECKL & FARNHAM, LLP

/s/ Barbara A. Marschalk
Barbara A. Marschalk, **GA Bar No. 324498**

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Attorneys for Defendant Piedmont College

CERTIFICATE OF SERVICE

This is to certify that the foregoing RULE 5.2 CERTIFICATE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

Joseph C. Chancey
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Counsel for Defendant Piedmont College

Respectfully submitted this 29th day of April 2019,

/s/ JULIE OINONEN
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Counsel for Plaintiff

HABERSHAM COUNTY
CLERK OF COURT
IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,

Plaintiff,

v.

PIEDMONT COLLEGE,

Defendant.

)
) CIVIL ACTION
) NO. 18CV454
)

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David C. Wall

RULE 5.2

This is to certify that I have this day served a copy of the within and foregoing
Non-parties Rick Austin's and Jennifer Austin's Objections and Responses to
Defendant's Request for Production of Documents upon attorneys for the other parties by
depositing a true and correct copy of the same in U.S. mail:

Joseph C. Chancey
Barbara A. Marschalk
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Attorneys for Defendant Piedmont College

WILLIAMS OINONEN LLC
c/o Julie Oinonen
44 Broad Street NW Ste 200
Atlanta, GA 30303
Attorney for Plaintiff Dr. Robert Wainberg

Respectfully submitted this 1st of May, 2019.

s/ Douglas L. Henry
DOUGLAS L. HENRY, Attorney
Ga. Bar No. 347678
695 Washington Street, PO Box 1257
Clarkesville, GA 30523
(706) 754-5395

CERTIFICATE OF SERVICE

HABERSHAM COUNTY
CLERK OF COURT

This is to certify that the foregoing RULE 5.2 has this day been served upon
opposing counsel by depositing a true and correct copy of the same via U.S. Mail and
email addressed to:

2019 MAY -1 PM 4:21

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Attorneys for Defendant Piedmont College

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Atlanta, GA 30303
Attorney for Plaintiff Dr. Robert Wainberg

Respectfully submitted this 1st day of May, 2019.

s/Douglas L. Henry

DOUGLAS L. HENRY, Attorney
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Phone: (706) 754-5395


David Wall, Clerk
Habersham County, Georgia

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

DR. ROBERT H. WAINBERG,)	
	)	CIVIL ACTION NO.
Plaintiff,	)	18CV454
)	
v.)	
)	
PIEDMONT COLLEGE,)	
)	
Defendant.)	

RULE 5.2 CERTIFICATE

This is to certify that the documents listed below have this day been served upon
opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to
Joseph C. Chancey, Barbara A. Marschalk, Sonya T. Jacobs, DREW ECKL & FARNHAM,
LLP, 303 Peachtree St. NE, Suite 3500, Atlanta, Georgia 30308.

1. PLAINTIFF'S OBJECTIONS TO DEFENDANT PIEDMONT COLLEGE'S

REQUEST FOR PRODUCTION OF DOCUMENTS TO NON-PARTIES, RICK AND

JENNIFER AUSTIN

Respectfully submitted this 1st day of May 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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Counsel for Plaintiff

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This is to certify that the foregoing RULE 5.2 CERTIFICATE has this day been served upon opposing counsel by depositing a true and correct copy of the same in the U.S. Mail addressed to:

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Counsel for Defendant Piedmont College

Respectfully submitted this 1st day of May 2019,

/s/ JULIE OINONEN
Julie Oinonen (Ga Bar No. 722018)

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