19-6991

IN THE SUPREME COURT OF THE UNITED STATES

LEI KE

(Petitioner)

v.

DREXEL UNIVERSITY

(Respondent)

On Petition for Writ of Certiorari

Respondents' Appendix

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RESPONDENTS' APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEI KE,

Plaintiff,

v.

DREXEL UNIVERSITY, et al.,

Defendant.

CIVIL ACTION
NO. 11-6708

OPINION

Slomsky, J. **September 4, 2015**

TABLE OF CONTENTS

I. INTRODUCTION

Before the Court is pro se Plaintiff Lei Ke's Motion for Summary Judgment (Doc. No. 632), and the Cross-Motion for Summary Judgment of Defendants Drexel University, Dr. Anthony Sahar, Dr. Samuel Parrish, Dr. Amy Fuchs, Dr. Jennifer Hamilton, and Dr. Richard Homan (Doc. No. 634). Plaintiff was a student at Drexel University College of Medicine ("DUCOM") from the fall of 2007 to the spring of 2011 when he was dismissed because of his poor academic performance. Plaintiff disputes this reason for dismissal. He contends that it was due to discrimination on the basis of his Chinese race and national origin and in retaliation for an incident that occurred during his third year Family Medicine clerkship.[1] He therefore filed the instant lawsuit.

Plaintiff initiated this action on October 26, 2011, when he filed an application to proceed in forma pauperis. (Doc. No. 1.) The application was granted (Doc. No. 3) and after a period of motion practice, on May 22, 2012, the Second Amended Complaint ("SAC"), in which Plaintiff's claims are asserted, was filed (Doc. No. 29). The allegations in the SAC (Doc. No. 29) that remain are as follows: (1) Count I—Intentional Discrimination in violation of 42 U.S.C. § 1981 against all Defendants; (2) Count II—Willful Retaliation in violation of 42 U.S.C. § 1981 against all Defendants; (3) Count III—Hostile Educational Environment in violation of 42 U.S.C. § 1981 against Dr. Sahar, Dr. Parrish, and Drexel University; (4) Count IV—Intentional Discrimination in violation of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, against Drexel University; (5) Count V—Willful Retaliation in violation of Title VI of the Civil Rights Act, 42

[1] A medical school clerkship is an internship in which the student obtains hands-on experience in a clinical environment. At the end of the clinical rotation, the student takes the National Board of Medical Examiners ("NBME") examination, also known as a "shelf exam," that covers the subject matter of the clerkship. (Doc. No. 29 at n.1.)

U.S.C. § 2000d against Drexel University; (6) Count VI—Conspiracy in violation of 42 U.S.C. § 1985 against Sahar, Parrish, and Hamilton; and (7) Count VII—Racially Motivated Breach of Contract in violation of 42 U.S.C. § 1981(b) against all Defendants.[2]

On February 16, 2015, Plaintiff filed a Motion for Summary Judgment.[3] (Doc No. 632.) On February 17, 2015, Defendants filed a Cross-Motion for Summary Judgment. (Doc. No. 632.) Responses and Replies thereafter were filed by the parties. (Doc. Nos. 640, 647, 652, 653.) After considering the Motions for Summary Judgment and for reasons that follow, the Court will grant Defendants' Cross-Motion for Summary Judgment and deny Plaintiff's Motion.

II. FACTUAL BACKGROUND

A. Plaintiff is Dismissed from DUCOM and then Conditionally Readmitted

In the fall of 2007, Plaintiff began medical school at Drexel University College of Medicine ("DUCOM"). Plaintiff initially had difficulty with his studies, receiving a grade of Marginal Unsatisfactory in Behavioral Science and a grade of Unsatisfactory[4] in Immunology.

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[2] This cause of action was added after the Court granted Plaintiff's Third Motion to Amend the Complaint in part. (Doc. No. 127.)

[3] The docket in this case contains 682 entries. They were entered during the three years and ten months that the case was open. During this period, a considerable amount of case management was required as a result of the numerous filings.

[4] At DUCOM, transcript grades are listed as follows:

> Honors (H), Highly Satisfactory (HS), Satisfactory (S), and Unsatisfactory (U). An interim, unofficial grade of Marginal Unsatisfactory (MU) indicates a course in which remedial work (repeat examination, other supplemental laboratory or clinical work) is required. If remedial work is successful, the grade is recorded as Satisfactory and may be no higher than Satisfactory. If remedial work is not successful, the transcript grade is recorded as Unsatisfactory, and the course . . . must be repeated.

(Doc. No. 633, Ex. 7.)

(Doc. No. 634-1 at 3.) During his second academic year in 2008 and 2009, Plaintiff received a grade of Unsatisfactory in four courses, including: Introduction to Clinical Medicine, Medical Microbiology, Pathology and Laboratory Medicine, and Medical Pharmacology. (Id.) As a result, the Student Promotions Committee[5] voted to dismiss Plaintiff from DUCOM on May 11, 2009.[6] (Doc. No. 29-4 at 45.)

Plaintiff appealed the decision of the Promotions Committee to Dr. Richard Homan, the Dean of DUCOM. On July 21, 2009, Dean Homan reversed the decision of the Promotions Committee and readmitted Plaintiff to DUCOM on the following conditions:

1. You will retake all courses in which your grade was Unsatisfactory and Marginal Unsatisfactory.
2. Any grade below Satisfactory will be considered grounds for dismissal from the College of Medicine.

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[5] Student Promotions Committees at DUCOM are separated into the Preclinical Student Promotions Committee for students in the first two years of the curriculum, and the Clinical Student Promotions Committee for students in the final two years of the curriculum. "The Student Promotions Committees are standing committees of the Faculty. They make decisions about student progress and advise the Dean on matters related to student academic and professional progress." In addition to commenting on a student's academic deficiencies, the Committee also addresses "breaches of professional and ethical behavior." (Doc. No. 633, Ex. 16-17.)

[6] The DUCOM student handbook states that:

> The year-appropriate Student Promotions Committee reviews the entire record of a student with one or more grades of Marginal Unsatisfactory or Unsatisfactory in order to determine if that student is demonstrating a level of academic performance sufficient to remain in medical school; and if so, to review individual departmental recommendations, especially when a student needs remediation in multiple courses.

(Doc. No. 633, Ex. 18.) Here, because Plaintiff had received a grade of Marginal Unsatisfactory and Unsatisfactory in his first year, and then four grades of Unsatisfactory in his second year, the Promotions Committee was bound to "review[] the entire record of [Plaintiff] . . . in order to determine if [Plaintiff] [was] demonstrating a level of academic performance sufficient to remain in medical school." (Id.)

3. You must meet with Dr. Janet Moore prior to the beginning of classes, August 11, 2009. You will work with Dr. Moore and focus on test taking skills, time management, and study skills.
4. You will meet with a designated faculty advisor at least monthly throughout the remainder of time in medical school.
5. The receipt of any grade lower than Satisfactory during your clinical training will be considered as grounds for dismissal from the College of Medicine.

. . . . I strongly encourage you to utilize all personal and academic support services in the College of Medicine.

(Doc. No. 634, Ex. F.)

Upon Plaintiff's return to DUCOM during the academic years 2009 and 2010, he was required to retake the four second-year courses he had failed. Plaintiff, in violation of the terms of his re-enrollment, received a grade of Marginal Unsatisfactory in Medical Microbiology. (Doc. No. 634, Ex. B.) Nevertheless, he was not dismissed from DUCOM but permitted to remediate his grade by sitting for the National Board of Medical Examiners ("NBME") Microbiology Subject Exam. (Id.) After passing the exam, his grade in Microbiology was changed to Satisfactory. (Id.)

B. Plaintiff Takes the Step 1 Exam and Begins his Third Year Clerkship Requirements

After completing his second year in May 2010,[7] Plaintiff deferred taking the required Step 1 United States Medical Licensing Examination ("USMLE") until September 27, 2010.

[7] DUCOM's medical school curriculum is designed as a four-year program. The first two years of school focus on medical education including basic science and clinical medicine. After completing coursework in the second year, students must successfully pass a "Step 1" exam administered by the United States Medical Licensure Examination ("USMLE"). Students cannot progress to the third year curriculum until they have passed Step 1, except when they are awaiting results when their clerkships begin. Students must pass Step 1 within 18 months after successfully completing their second year curriculum, or they may be dismissed from DUCOM. (Doc. No. 633, Ex. 20.)

In the third year, DUCOM students take required clinical clerkship rotations in Medicine,

(Doc. No. 29 ¶ 13; Doc. No. 634, Ex. I.) The next day, September 28, 2010, before he received the results of the Step 1 exam, Plaintiff began a required Family Medicine rotation at AM Sahar—a private family medical practice owned by Defendant Dr. Anthony Sahar. (Doc. No. 29 ¶¶ 13, 14.) AM Sahar was affiliated with the Monmouth Medical Center in Long Branch, New Jersey, which is a regional medical campus of DUCOM. (Id. ¶ 14.)

Plaintiff's internship at AM Sahar lasted six weeks. (Doc. No. 29 ¶ 25.) During Dr. Sahar's first interaction with Plaintiff, Dr. Sahar asked Plaintiff "where [he] came from." When Plaintiff responded that he was from Canada, Dr. Sahar said "that [response] was not good enough because [Plaintiff] was not a white Canadian and kept asking where [Plaintiff] came from." (Id. ¶ 15.) Plaintiff informed Dr. Sahar that he was born in China and immigrated to Canada when he was a child. (Id.) According to Plaintiff, Dr. Sahar thereafter became arrogant and condescending with Plaintiff. (Id.)

Because Dr. Sahar's brother had died, he left the United States after the first week of Plaintiff's clerkship. Dr. Sahar was not present at AM Sahar for the next four weeks of Plaintiff's internship, from October 6, 2010 to October 28, 2010. (Id. ¶ 16; Doc. No. 29 at Ex. 6.) During this hiatus, Plaintiff and another student were supervised by Dr. John Dalton. (Id. ¶ 17.) On October 25, 2010, Dr. Dalton completed a mid-internship evaluation of Plaintiff. In relevant part, Dr. Dalton gave Ke four out of five points on "Medical Knowledge," four out of five points on "Interpersonal/ Communication Skills," and five out of five points on "Professionalism." (Id.)

Surgery, Pediatrics, Family Medicine, Psychiatry, and Obstetrics and Gynecology. By October 31 of their fourth year, DUCOM students must successfully pass the USMLE "Step 2" exam in clinical skills ("CS"), and clinical knowledge ("CK"). In the fourth year, students take both required courses and electives. (Doc. No. 633, Exs. 7-22.)

During Plaintiff's final week of the internship, Dr. Sahar had returned. Plaintiff attended to a prostate cancer survivor. Initially, he was alone with the patient. (Doc. No. 29 ¶ 19.) The patient spoke to Plaintiff about the expense and frequency of injections he was receiving. (Id.) Plaintiff asked the patient if he understood how his medications worked, and the patient responded that he did not. (Id.) Soon thereafter, Dr. Sahar came into the room. (Id. ¶ 20.) Plaintiff, who had "been taught . . . not just to ask the question but to include a pertinent fact to demonstrate knowledge," asked Dr. Sahar the following in front of the patient:

> I remember that Leuprolide increases GnRH and enhances testosterone secretion. Why would a prostate cancer survivor need it? Shouldn't he be on something that suppresses testosterone?

(Doc. No. 29-4 at 41.) According to Plaintiff, Dr. Sahar appeared "shocked" that Plaintiff had forgotten that the drug decreased GnRH levels if taken continuously, and that Plaintiff had asked the question in front of a patient. (Id. ¶ 21; Doc. No. 29, Ex. 9.) Plaintiff was under the impression that it was appropriate to ask Dr. Sahar this question in the presence of the patient pursuant to the Drexel University Code of Conduct. (Doc. No. 29 ¶ 22 n.2.)

Later, when Plaintiff and Dr. Sahar were attending to a different patient, Dr. Sahar asked Plaintiff what test Plaintiff should use to test for renal insufficiency. Plaintiff answered the question incorrectly. (Doc. No. 29 ¶ 23.) At the end of the day, Plaintiff apologized to Dr. Sahar for what had occurred in front of the patient as well as for incorrectly answering his question later in the day, explaining that he was having an "off-day." (Id. ¶ 24.) Dr. Sahar said he would give Plaintiff the benefit of the doubt, and acknowledged it had been an "off-day" for Plaintiff.

On Plaintiff's last day, Dr. Sahar was out of the office. Dr. Dalton gave Plaintiff an oral evaluation. (Doc. No. 29 at ¶ 25.) He told Plaintiff that he had improved during the internship and "had done a good job." (Id. ¶ 26.) However, Dr. Dalton emphasized that Plaintiff should

not "ask many questions in the presence of a patient." (Id.) Dr. Dalton informed Plaintiff that Dr. Sahar would complete Plaintiff's final written evaluation. (Id.)

C. Plaintiff Prepares to Retake the Step 1 Exam and to Take the Family Medicine Shelf Exam

Meanwhile, four weeks into his Family Medicine internship, Plaintiff learned that he had failed the Step 1 exam. (Doc. No. 29, Ex. 14a at 1.) Dr. Amy Fuchs, Associate Dean of Student Affairs, sent Plaintiff an email on October 20, 2010 noting:

> As you probably know, you did not pass the USMLE Step 1 Exam. As per school policy, you will be allowed to complete your current 6-week Family Medicine Clerkship. However, after that you will be pulled from clinical rotations to study for and retake Step 1. You cannot resume clinical rotations until you have taken the exam again. While we spoke last week about various possibilities, now that we have your score, I would like to talk with [you] in more detail about your schedule and a plan for study.

(Doc. No. 634, Ex. K.) When Plaintiff and Dr. Fuchs did speak, she advised Plaintiff to retake the Step 1 exam within six weeks. Plaintiff had only failed the Step 1 exam by two points. While Plaintiff could have taken more time to take the Step 1 exam since the student, not DUCOM, schedules the examination, Dr. Fuchs believed that he would need only six weeks to improve his score in order to pass. (Doc. No. 29, Ex. 14a at 7; Doc. No. 29, Ex. 15 at 2.) Plaintiff ultimately scheduled to retake the Step 1 exam on December 27, 2010, which would afford him over two months to study. Ultimately, Plaintiff was unable to take the exam on December 27, 2010 because of a snowstorm. (Doc. No. 29, Ex. 14a at 2; Doc No. 29, Ex. 15 at 1.)

While studying to retake the Step 1 exam, Plaintiff was also preparing for the NBME shelf exam in Family Medicine.[8] In an email to Dr. Fuchs on November 1, 2010, Plaintiff wrote

[8] The NBME shelf examination covers a specific subject matter and is the final examination in a clinical rotation. If a student does not take the shelf exam during the final exam period, the

the following:

> After substantial thought, I am seriously considering not taking the Family Medicine shelf exam this Friday to focus more on Step 1. If I do this, will this missed exam be considered a failed shelf? I understand that students cannot fail a shelf exam twice and that after failing a shelf, they can only receive a satisfactory grade. Can you elaborate on the details? My letter from Dean Homan stated that I cannot fail a course so that does concern me.

(Doc. No. 634, Ex. K.) In light of Plaintiff's concerns about Step 1, Dr. Fuchs permitted Plaintiff to delay taking the Family Medicine shelf exam until the make-up period over winter break. (Id.) Plaintiff took the Family Medicine shelf exam on December 29, 2010. (Id., Ex. L.)

D. Plaintiff Fails the Family Medicine Clerkship and Retakes the Step 1 Exam

On January 3, 2011, Dr. Jennifer Hamilton, the director of the Family Medicine clerkship at DUCOM, informed Plaintiff that he had failed both the clinical rotation at AM Sahar and the Family Medicine shelf exam. (Doc. No. 29 ¶ 29.) Dr. Sahar had written the final evaluation in which he graded Plaintiff as "Unsatisfactory" in Family Medicine. The failures were particularly troubling to Plaintiff because of the terms of his readmission after he had failed courses during his second year. Plaintiff believed that Dr. Sahar had failed him "just because he had asked him a question in front of a patient." (Id. ¶ 39.) Dr. Hamilton advised Plaintiff on January 4, 2011 that he would have to retake the Family Medicine clerkship pursuant to the DUCOM student manual. (Id.) Plaintiff disputed the failure, citing his positive mid-block oral evaluations made by Dr. Dalton. (Id. ¶ 31.) On January 6, 2011, Hamilton advised Plaintiff that he could appeal the grade. (Id. ¶ 40; Doc. 29-4, Ex. 6.)

While in the process of reviewing Plaintiff's appeal, Dr. Hamilton spoke with Dr. Sahar and Dr. Dalton. Dr. Sahar explained to Dr. Hamilton that Plaintiff had performed well during the

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student may take the shelf exam during the make-up period over winter break or immediately before beginning the fourth school year. (Doc. No. 634, Ex. D at 6.)

beginning of his internship, which is why he had received a positive mid-block evaluation. (Id. at ¶ 42.) By the end of the clerkship, however, Dr. Sahar rated Plaintiff's work as less than satisfactory in "Medical Knowledge," "Professionalism," and "Interpersonal/ Communication Skills." (Id. ¶ 41.) Additionally, Dr. Sahar noted in his feedback that:

> [Ke] had issues with professionalism and interpersonal skills. In one patient encounter, he took exception to a treatment strategy in front of a patient, rather than discussing his concerns outside of the patient room. This incident of questioning treatment in the presence of patient was unacceptable. He also had poor interactions with office staff, often aloof and non-interactive.

(Doc. No. 29-4 at 14.)[9]

Plaintiff appealed the Unsatisfactory grade to Hamilton. With respect to Dr. Sahar's evaluation, Hamilton agreed to modify the Professionalism score from a 1 out of 5, to a 2 out of 5. (Doc. No. 29-4, Ex. 6.) Hamilton was unwilling, however, to modify the interpersonal and communication skills and medical knowledge scores, noting, "[a]side from concerns of any challenge to the instructor, what would the patient think of the suggestion that the treatment he was receiving would actually worsen his disease." (Id.) Moreover, Hamilton stressed that had Plaintiff passed the shelf exam for Family Medicine, she would consider modifying his grade from Unsatisfactory to Marginal Unsatisfactory, but his failure on the shelf exam, coupled with the "less-than-satisfactory" clinical skills, resulted in an overall grade of Unsatisfactory. (Id.) Hamilton informed Plaintiff that if he wished to appeal her findings, he would have to contact Dr. Eugene Hong, Chairman of the Family Medicine Department of DUCOM. (Id.)

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[9] Dr. Sahar was apparently so distressed by Plaintiff's performance that he called Dr. Parrish, the Dean of Student Affairs at DUCOM, to speak about Plaintiff's future as a doctor. Dr. Parrish later told Plaintiff that Dr. Sahar spoke with him for nearly two hours, saying, "this student should not be a doctor. He does not belong in medicine. He was inappropriate to patients. He was inappropriate in my presence, and he upset people." (Doc. No. 29, Ex. 14a at 1.)

On February 2, 2011, Dr. Hong declined to amend Plaintiff's grade, and advised Plaintiff that if he wished to appeal his decision, Plaintiff could appeal to Dr. Barbara Schindler, the Vice Dean for Academic Affairs at DUCOM. (Id. ¶ 45.) On February 8, 2011, Plaintiff emailed an appeal to Schindler. Plaintiff again criticized what he considered the "two harshest comments"[10] on Dr. Sahar's final evaluation as being "related to that incident." (Id. ¶ 40.) Furthermore, Plaintiff related that he "performed poorly on the last day he was with [Sahar] before the end of the rotation[,] leaving [Sahar] with a bad impression." (Id. ¶ 41.) Plaintiff did not seek a Satisfactory grade in the appeal; rather, he sought a Marginal Unsatisfactory grade so that he could retake the shelf exam in Family Medicine. (Id.)

While the above described events were occurring, Plaintiff was also studying to retake the Step 1 exam that he had failed that fall and was unable to retake in December 2011. Plaintiff admits that appealing his grade in Family Medicine "tapped his energy and time [that] he ought to have devoted" to preparing for the exam. (Doc. No. 29 ¶ 44.) It was necessary that Plaintiff retake the exam quickly because he was unable to begin another clerkship until he retook this exam. Dr. Fuchs had noted this restriction in her email to Plaintiff on October 20, 2010. On February 10, 2011, Plaintiff took the Step 1 exam once again. (Id.)

On February 11, 2011, the day after Plaintiff retook the Step 1 exam, Plaintiff met with Dr. Schindler. (Doc. No. 29 ¶ 46.) Plaintiff recounted to Schindler that he believed Dr. Sahar's failing grade was retaliatory for asking a question. (Id.) According to Plaintiff, Schindler did not comment on the alleged retaliation, but only said that she agreed with the other professors

[10] In the letter, Plaintiff does not specifically state which of Sahar's comments were the two harshest. (Doc. No. 29-4 at 40.)

who had reviewed Plaintiff's case and refused to alter his grade. (Id.) Schindler advised Plaintiff to retake the Family Medicine clerkship. (Id.)

Later in the day on February 11, 2011, the Clinical Promotions Committee met to review Plaintiff's grade of Unsatisfactory in the Family Medicine clerkship in order to determine whether it was grounds for dismissal from DUCOM. In a letter dated February 14, 2011, the Clinical Promotions Committee made the following decision with respect to Plaintiff's Unsatisfactory grade in Family Medicine:

> The Clinical Promotions Committee met Friday to discuss your Unsatisfactory grade in the Family Medicine Clerkship. As you know, when readmitted to the College of Medicine in July of 2009, one of the conditions stipulated by Dean Homan was the following: "The receipt of any grade lower than Satisfactory during your clinical training will be considered as grounds for dismissal from the College of Medicine." The Committee reviewed the mid-rotation feedback, your final evaluation, and the decisions made to uphold the Unsatisfactory grade in your appeals to both Drs. Hong and Schindler. Although previous communications from the College provided clear warning that an additional failing grade could lead to your dismissal, the Committee decided that issues regarding the delivery of your mid-rotation feedback warranted leniency.
>
> The Committee has made the following decisions:
>
> 1. You are allowed to remain enrolled in the College of Medicine.
> 2. You will do the remainder of your Clerkships in the Philadelphia area.[11]
> 3. You are required to repeat the 6-week Family Medicine Clerkship.
> 4. The receipt of any additional grade of less than Satisfactory (including Unsatisfactory or Marginal Unsatisfactory) will be considered grounds for dismissal from the College of Medicine.[12]

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[11] With respect to the condition that Plaintiff completes his clerkships in the Philadelphia area, it is the practice of DUCOM to "bring back" students to Philadelphia who have had clinical failures in order to provide them with better supervision and support. (Doc. No. 29, Ex. 14a at 2.) During discovery, Defendants provided Plaintiff with a list of seven other students who were required to return to Philadelphia to complete their clerkships due to shelf exam failures and/or professionalism issues. (Doc. No. 457.)

[12] Dr. Fuchs called Plaintiff on the afternoon of February 11, 2011 to let Plaintiff know about the condition that he complete his rotations in Philadelphia. Plaintiff was scheduled to begin a clinical rotation on Monday, February 14, 2011, so Dr. Fuchs wanted to ensure Plaintiff arrived at the correct clinical site.

(Doc. No. 634, Ex. M.)

E. Plaintiff Fails again the Step 1 Exam, Fails the OB/GYN Shelf Exam, and is Dismissed from DUCOM

On February 14, 2011, Plaintiff began an OB/GYN[13] clinical rotation at Hahnemann Hospital in Philadelphia. At some point Plaintiff learned that he had failed his second attempt at the Step 1 exam. He was permitted to take the Step 1 exam a third time. Although Plaintiff was advised not to study at the same time for both the OB/GYN shelf exam and his third and final attempt at the Step 1 exam, he apparently did so and scheduled the Step 1 exam to be retaken on May 6, 2011. (Doc. No. 29-4, Ex. 13 at 1; Doc. No. 29-4, Ex. 14A at 1.)

Ultimately, Plaintiff passed the clinical portion of his OB/GYN clerkship, but failed the NBME shelf exam in OB/GYN. (Doc. No. 634-1 at 5.) The failure of the NBME shelf exam resulted in a final grade of Marginal Unsatisfactory in the OB/GYN clerkship. (Doc. No. 634, Ex. B.) As noted in the letter of February 14, 2011 from the Clinical Promotions Committee, any grade below Satisfactory, including a Marginal Unsatisfactory or Unsatisfactory grade, would be grounds for dismissal. (Doc. No. 634, Ex. M.) Accordingly, on April 11, 2011, the Clinical Promotions Committee voted to dismiss Plaintiff from DUCOM because he had received a grade of less than Satisfactory. (Doc. No. 29 ¶ 61; Doc. No. 634, Ex. O.)

F. Plaintiff Unsuccessfully Appeals his Dismissal

Plaintiff next began the process of appealing his dismissal, which included an opportunity to appear before the Clinical Promotions Committee. (Doc. No. 29-4, Ex. 14.) Dr. Fuchs and Dr. Samuel Parrish, Dean of Student Affairs at DUCOM, assisted Plaintiff with his appeal. (Doc. No. 29 at ¶ 62-66.) The three met on April 26, 2011 and during the meeting, Plaintiff

[13] OB/GYN is an acronym for Obstetrics and Gynecology.

explained why he should be readmitted. (Id. at 1.) Specifically, Plaintiff blamed the Promotions Committee's decision to transfer his OB/GYN clinical rotation from the Monmouth Medical Center in New Jersey to the Hahnemann Hospital in Philadelphia as a reason for his OB/GYN failure. Drs. Parrish and Fuchs encouraged Plaintiff instead to take personal responsibility for his failures, rather than blame his shortcomings on external factors. Plaintiff took their advice and wrote a letter to the Promotions Committee acknowledging his failings. (Doc. No. 29 ¶ 64.)

On May 12, 2011, the three met again after Drs. Fuchs and Parrish reviewed Plaintiff's letter to the Promotions Committee. During the meeting, Dr. Parrish discussed with Plaintiff his trouble interacting with others and how it could affect Plaintiff's success in the medical profession. (Doc. No. 29-4, Ex. 14a at 5.) Dr. Parrish spoke to Plaintiff about finding Plaintiff "truly odd" at their first meeting and advised him when appearing before the Committee not to appear disinterested. (Id.) Both Doctors praised Plaintiff for accepting responsibility for his academic failures in the letter addressed to the Promotions Committee. (Id.) In the letter, Plaintiff stated the following:

> This committee is made of successful professionals who are extremely smart and knowledgeable. You probably wonder why I keep failing. The truth is that I have worked very hard from the day I entered this medical college four years ago, but obviously I am not as smart as many other students. When I repeated my second year, I lost confidence in my abilities and felt isolated and separated from my original class that continued to move forward. I was devastated and humiliated and became an outcast. I had never felt so bad in all my life.

(Doc. No. 29, Ex. 15.) On May 13, 2011, Plaintiff met with the Promotions Committee. The same day, the Committee voted not to reinstate him. Plaintiff was advised that he could appeal the decision to Dean Homan. (Doc. No. 29 ¶ 67.)

On May 16, 2011, Plaintiff again met with Drs. Parrish and Fuchs before meeting with Dean Homan and asked them to review the letter he intended to send to Dean Homan. (Id. ¶¶ 67,

68.) During this meeting, the doctors once again advised Plaintiff that his most persuasive argument for reinstatement was that he had taken on too many things at once. On May 26, 2011, Plaintiff again met with Dr. Parrish and Dr. Fuchs before meeting with Dean Homan. In view of what Dr. Parrish characterized as a "persistent pattern of academic failure," the doctors told Plaintiff again that his best chance for reinstatement would be to admit that the failures were his own. (Doc. No. 29-4, Ex. 14a at 13.) Plaintiff did not heed the doctors' advice, and in the letter to Dean Homan stated, "I humbly request you to reinstate me because I deserve to be reinstated. The truth was that it was the college that let me handle so many things beyond my capability." (Id., Ex. 17.)

Plaintiff eventually met with Dean Homan. The Dean wrote to Plaintiff on June 27, 2011 that he had decided to uphold the dismissal of Plaintiff from DUCOM. (Doc. No. 29-4, Ex. 19.) In the letter, Dean Homan also noted the following:

> In considering your appeal, I also reviewed your concerns that the Academic Policies and Academic Progress Policies in the Student Handbook were not properly followed and applied to you. My July 21, 2009 letter reinstating you after your first dismissal by the Preclinical Promotions Committee clearly stated that any grade below Satisfactory will be considered grounds for dismissal. I note that you received a grade of Unsatisfactory in your Family Medicine clerkship and a Marginal Unsatisfactory in your Obstetrics and Gynecology clerkship. Therefore, I find that the College's policies and process were properly followed and applied.

(Id.) At that point, Plaintiff had exhausted his appeals within DUCOM. (Id.) In addition, because he was no longer enrolled at a medical school, the NBME cancelled the Step 1 exam that Plaintiff was scheduled to retake in July 2011. (Doc. No. 29-5, Ex. 20.)

On June 22 and June 30, 2011, Plaintiff's parents sent letters to John Fry, the President of Drexel University, and to Dean Homan petitioning to have their son readmitted to DUCOM. (Doc. No. 29 at ¶ 73.) President Fry and Dean Homan did not respond. (Id.) On July 4 2011,

Plaintiff emailed President Fry and Dean Homan requesting that his Family Medicine clinical grade be amended, and in the event that the grade was not amended, Plaintiff requested a formal hearing pursuant to the Family Educational Rights Privacy Act ("FERPA"). Drexel's FERPA policy grants students the right to a formal hearing when the University refuses to amend a grade that the student considers to be "inaccurate, misleading, or otherwise in violation of his/her privacy or other rights." (Doc. No. 29-4, Ex. 21.) The policy does not, however, permit a student to challenge the merits of an otherwise accurately recorded grade. (Id.) President Fry, who was out of the country on July 4, 2011, responded to Plaintiff on July 5, 2011, and advised him that another Dean, David Ruth, would be in touch with a response to Plaintiff's email. (Id.) Instead, on July 7, 2011, Plaintiff received an email from Dean Homan who informed Plaintiff that he was reviewing his FERPA request. Moreover, on July 7, 2011, Plaintiff received a response from Dean Ruth confirming that Dean Homan would respond to the request. (Id.)

On July 19, 2011, Dean Homan emailed Plaintiff and told him that DUCOM would not amend his Family Medicine grade, and that Plaintiff had a right to a formal hearing. (Id.) On August 30, 2011, before the hearing took place, the Registrar's office cancelled the hearing, noting that his request to amend his Family Medicine grade was not a matter falling under FERPA's purview because Plaintiff was attempting to challenge the merits of the Unsatisfactory Family Medicine grade. In an email to Plaintiff, the Registrar wrote:

> I have considered all of the information you have provided to me and have determined that this is not a matter for which a hearing is available under the Drexel University FERPA Policy. This is because you are attempting to use the FERPA amendment process to challenge a grade and a clinical evaluation.

(Doc. No. 29-5 at 31.) The receipt of this email effectively ended Plaintiff's attempt at reinstatement under the appeal procedures at DUCOM and Drexel University.

III. PROCEDURAL HISTORY

On September 13, 2011, Plaintiff filed a complaint with the Pennsylvania Human Relations Commission to be reinstated at DUCOM. (Doc. No. 29 ¶ 76.) On September 19, 2011, Plaintiff filed a complaint with the Department of Education, Office of Civil Rights, also seeking reinstatement.

On November 18, 2011, Plaintiff filed his first Complaint (Doc. No. 4) with this Court because "[Plaintiff] realized that the agencies could not timely help him or could never help him." (Id.) On December 5, 2011, Plaintiff filed his First Amended Complaint. (Doc. No. 7.) On January 25, 2012, Defendants filed a Motion to Dismiss. (Doc. No. 12.) On May 17, 2012, Plaintiff was granted leave to file a Second Amended Complaint. (Doc. No. 29.) On June 12, 2012, Defendants filed a Motion to Partially Dismiss Plaintiff's Second Amended Complaint. (Doc. No. 31.) On March 13, 2012, the Court granted Defendants' Motion to Partially Dismiss the Second Amended Complaint. (Doc. No. 69.) In addition, on July 12, 2013, the Court granted in part Plaintiff's Third Motion to Amend his Complaint. (Doc. No. 127.)

Accordingly, before the Court are the remaining claims asserted in Plaintiff's Second Amended Complaint and an added claim which was included in Plaintiff's Third Motion to Amend his Complaint. As noted previously, these claims are: (1) Count I—Intentional Discrimination in violation of 42 U.S.C. § 1981 against all Defendants; (2) Count II—Willful Retaliation in violation of 42 U.S.C. § 1981 against all Defendants; (3) Count III—Hostile Educational Environment in violation of 42 U.S.C. § 1981 against Sahar, Parrish, and Drexel University; (4) Count IV—Intentional Discrimination in violation of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, against Drexel University; (5) Count V—Willful Retaliation in violation of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d against Drexel University; (6) Count VI—

Conspiracy in violation of 42 U.S.C. § 1985 against Sahar, Parrish, and Hamilton; and (7) Count VII—Racially Motivated Breach of Contract in violation of 42 U.S.C. § 1981(b) against all Defendants.

As noted, on February 16, 2015, Plaintiff filed a Motion for Summary Judgment (Doc. No. 632) and on February 17, 2015, Defendants filed a Cross-Motion for Summary Judgment. (Doc. No. 634.) These Motions are now ripe for disposition.

IV. STANDARD OF REVIEW

Granting summary judgment is an extraordinary remedy. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In reaching this decision, the court must determine whether "the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Favata v. Seidel, 511 F. App'x 155, 158 (3d Cir. 2013) (quoting Azur v. Chase Bank, USA, Nat'l Ass'n, 601 F.3d 212, 216 (3d Cir. 2010) (quotation omitted)). A disputed issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Kaucher v. Cnty. of Bucks, 455 F.3d 418, 423 (3d Cir. 2006) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). For a fact to be considered "material," it "must have the potential to alter the outcome of the case." Favata, 511 F. App'x at 158. Once the proponent of summary judgment "points to evidence demonstrating no issue of material fact exists, the non-moving party has the duty to set forth specific facts showing that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor." Id. (quoting Azur, 601 F.3d at 216 (internal quotation marks omitted)).

In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. (quoting Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 181 (3d Cir. 2009) (quotation omitted)). The Court's task is not to resolve disputed issues of fact, but to determine whether there exists any factual issues to be tried. Anderson, 477 U.S. at 247-249. Whenever a factual issue arises which cannot be resolved without a credibility determination, at this stage the Court must credit the non-moving party's evidence over that presented by the moving party. Id. at 255. If there is no factual issue, and if only one reasonable conclusion could arise from the record regarding the potential outcome under the governing law, summary judgment must be awarded in favor of the moving party. Id. at 250.

When the parties have filed cross-motions for summary judgment, as in this case, the summary judgment standard remains the same. Transguard Ins. Co. of Am., Inc. v. Hinchey, 464 F. Supp. 2d 425, 430 (M.D. Pa. 2006). "When confronted with cross-motions for summary judgment . . . 'the court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the summary judgment standard.'" Id. (quoting Marciniak v. Prudential Fin. Ins. Co. of Am., 184 F. App'x 266, 270 (3d Cir. 2006)). "If review of [the] cross-motions reveals no genuine issue of material fact, then judgment may be entered in favor of the party deserving of judgment in light of the law and undisputed facts." Id. (citing Iberia Foods Corp. v. Romeo, 150 F.3d 298, 302 (3d Cir. 1998)).

V. ANALYSIS

In the Cross-Motions for Summary Judgment, each party seeks summary judgment in its favor on each claim. As noted above, the remaining claims are contained in the following counts

of the SAC: (1) Count I—Intentional Discrimination in violation of 42 U.S.C. § 1981 against all Defendants; (2) Count II—Willful Retaliation in violation of 42 U.S.C. § 1981 against all Defendants; (3) Count III—Hostile Educational Environment in violation of 42 U.S.C. § 1981 against Sahar, Parrish, and Drexel University; (4) Count IV—Intentional Discrimination in violation of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, against Drexel University; (5) Count V—Willful Retaliation in violation of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d against Drexel University; (6) Count VI—Conspiracy in violation of 42 U.S.C. § 1985 against Sahar, Parrish, and Hamilton; and (7) Count VII—Racially Motivated Breach of Contract in violation of 42 U.S.C. § 1981(b) against all Defendants. Because of the overlapping nature of the claims, the Court will discuss them out of turn to avoid duplicative analysis.

A. Plaintiff Has Failed to Raise a Genuine Issue of Material Fact with Respect to His Claims of Intentional Discrimination under 42 U.S.C. § 1981 and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d

In Counts I and IV respectively, Plaintiff brings a claim of intentional discrimination pursuant to 42 U.S.C. § 1981 against all Defendants and a claim of intentional discrimination pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, against Drexel University. Although the statutes guarantee different rights, the same analysis applies to both statutes. Accordingly, the Court will discuss these claims concurrently.

42 U.S.C. § 1981 guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." "The term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Under 42 U.S.C. § 1981, a plaintiff must establish: (1) that he belongs to a racial minority; (2) an intent to discriminate on

the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in Section 1981, including the right to make and enforce contracts. Brown v. Philip Morris Inc., 250 F.3d 789, 797 (3d Cir. 2001).

Title VI of the Civil Rights Act provides, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Under Title VI, a plaintiff must show: (1) that there is racial or national origin discrimination; and (2) the entity engaging in discrimination is receiving federal financial assistance." Abdullah v. Small Bus. Banking Dept. of Bank of America, Civ. A. No. 13-0305, 2013 WL 1389755, at *2 (E.D. Pa. Apr. 5, 2013) (citing Baker v. Bd. of Regents of Kan., 991 F.2d 628, 631 (10th Cir. 1993). Plaintiff brings his Section 1981 claim against all Defendants, and his Title VI claim against Drexel University because Title VI applies only to entities. See Whitfield v. Notre Dame Middle Sch., 412 F. App'x 517, 521 (3d Cir. 2011) (noting that individual liability cannot be asserted under Title VI).

Both Title VI and Section 1981 provide a private cause of action for intentional discrimination. Pryor v. Nt'l Collegiate Athletic Ass'n, 288 F.3d 548, 562 (3d Cir. 2002). "The standard for establishing an intent to discriminate, [the second prong under Section 1981 and the first prong under Title VI] is identical in the Title VI and § 1981 contexts." Id. at 569. Accordingly, if Plaintiff is unable to prove intentional discrimination under Title VI and Section 1981, then Plaintiff's claims fails. Plaintiff offers direct and circumstantial evidence that he alleges demonstrates Defendants' discriminatory intent. The Court will review each form of evidence seriatim.

1. Plaintiff has not presented direct evidence of discrimination

Plaintiff contends that he has produced direct evidence[14] of discrimination. Direct evidence of discrimination is defined as "evidence sufficient to allow the jury to find that the decision makers placed substantial negative reliance on the plaintiff's race in reaching their decision to [dismiss] him." Fakete v. Aetna, Inc., 308 F.3d 335, 338 (3d Cir. 2002). Such evidence is overt or explicit evidence which directly reflects discriminatory bias by a decision maker. Armbruster v. Unisys Corp., 32 F.3d 768, 778-79 (3d Cir. 1994) (describing direct evidence as the proverbial "smoking gun"). This evidence must be "so revealing of discriminatory animus that it is not necessary to rely on any presumption from the prima facie case to shift the burden of production." Id. at 778.

a. Comments contained in Plaintiff's student records

Initially, Plaintiff argues that direct evidence of Defendants' discriminatory intent exists in "Communist-style hidden files" Defendants maintained on Plaintiff. (Doc. No. 632 at 35.) At the outset, the Court finds nothing to suggest that DUCOM created "hidden files." Rather, Plaintiff cites to his student files and summaries created in advance of the meetings of the Promotions Committee. Plaintiff first refers to a student profile of Plaintiff and quotes from a comment section. (Doc. No. 633-16 at 33.) The "direct evidence" of discrimination Plaintiff relies on in the comment section includes:

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[14] The Third Circuit has held that under 42 U.S.C. § 1981, if a plaintiff produces direct evidence of discrimination, the burden shifts to defendant "to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor" in accordance with the test set forth in Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989). Brown v. J. Kaz, Inc., 518 F.3d 175, 181 (3d Cir. 2009). Price Waterhouse, however, has not been applied to Title VI. As will be explained infra, because Plaintiff has failed to adduce direct evidence of discrimination, the Court will not engage in the Price Waterhouse inquiry.

> . . . Received Unprofessional Citation on Peer Evaluations[15] for Gross [sic]. . . . Odd Interactions, word choices. . . . Lack of social skills noted by Dr. Parrish (personal space issues, walking around with breast in pocket.) Seems more comfortable with research. . . . Will be required to have counseling. . . . Family Medicine site wants to give him an [Unsatisfactory] in [Family Medicine] at Monmouth. Unable to apply clinical knowledge to patients. Awkward, unprofessional, Immature [sic], lacking in knowledge. Got into altercation with attending in front of patient about not being taught something. Had difficulty interacting with office staff. . . . Dr. Fitzpatrick described his knowledge basis as 'atrocious' in ICM group for Physical Diagnosis. Biggest problem was inappropriate communication (medical jargon), would use nonmedical terms in medical communication. [Following Plaintiff's dismissal from DUCOM] Dr. Fitzpatrick cited 'horrible communication skills.' Per Dr. Fuchs, "can't see forest for [sic] trees." He often goes off on tangents in conversations.

(Doc. No. 634-16 at 33-34.)

Plaintiff also refers to school records which document a student's progress in passing the USMLE Step 1 exam. At the top of the page, Plaintiff's status is recorded as "Yet to Pass Step 1." (Doc. No. 633-16 at 35.) Plaintiff quotes from the notes recorded following his first dismissal in 2009. The school noted that Plaintiff was:

> overwhelmed by amount of material in ICM [Intro Clinical Medicine] and not knowing what was important; isolation from peers; depression. Dr. Parrish commented on his anxiety. Very introverted, socially awkward. Insists he wants to be in med school. . . . Dr. Ramchandani cites his high intelligence in his working with him on remediation exam, concerned about psychological issues. Lacks self-awareness about anxiety, perfectionism, depression.

(Doc. No. 633-16 at 36.)

Next, Plaintiff includes the minutes from a meeting of the Clinical Promotions Committee held on December 10, 2010, in which they discuss his failing the clinical portion of the Family Medicine clerkship:

> Family Medicine attendings were shocked by his knowledge base; felt he lacked knowledge; couldn't apply knowledge to patient care. Also felt that he was

[15] Pursuant to the DUCOM handbook, if a student receives a Citation for Unprofessional Behavior, it is recorded and the Associate Dean of Student Affairs is contacted. There is no inference from this notation that it was created with racial animus. (Doc. No. 633, Ex. 13.)

> awkward and immature. In front of a patient, Kei questioned attending. Kei did not interact well with staff. Attendings felt that he had strange interactions; possibly depressed. Attendings felt that he should repeat Family Med. Possible reason for behavior=Kei failed Step 1 and found out halfway through rotation. He is scheduled to take Step 1 again on 12/22/10; and is taking Family Med Shelf Exam on 12/29/10. Regardless of how he does on the Fam Med Shelf, attendings want to give him a grade of Unsatisfactory. Giving him a [grade of Unsatisfactory] may be grounds for dismissal for student. When Dean Homan readmitted him, letter stated that if he ever got a grade lower than Satisfactory, that may be grounds for dismissal. Motion: If Family Med gives him less than Satisfactory, then he will be dismissed from [DUCOM].

(Doc. No. 633-15 at 3.)

Plaintiff also selects quotes from the discussion of his dismissal by the Promotions Committee in April 2011:

> [Plaintiff] discussed loss of confidence about having to repeat Year 2, series of errors in 'trying to do too many things at same time.' Says he will see Dr. Moore and faculty to be sure he can handle stress, make sure everything is going okay. Says he needs to work on interpersonal skills and says part of the problem is that he lives at home and doesn't have the opportunity to interact as much with others.

(Doc. No. 633-16 at 35-36.)

In addition, Plaintiff refers to the following comments from the May 13, 2011 Clinical Promotions Committee's meeting:

> Here to appeal dismissal . . . dismissed again on academic grounds. Also has communication issues; cannot multi-task. Lei feels that he needs to be able to multi-task and be able to balance different things, especially as a physician . . . needs to gain his confidence back by being successful with just one thing . . . was advised not to take a shelf exam, but took it anyway because he wanted to be successful with something – he needed confidence . . . Lei feels as though his interpersonal skills need work and improvement – he will meet with faculty and advisors . . . [and] read articles on interpersonal skills.

(Doc. No. 633-17 at 15.)

Plaintiff contends that the comments above contain racial slurs. To support this allegation, he points to the following phrases: "odd interactions, word choices," "lack of social skills, "horrible communication skills," "awkward, immature," "can't see forest for trees," "He

often goes off on tangents in conversations." (Doc. No. 632 at 129.) Plaintiff argues that "[t]hese are typical of racial profiling slurs and racially oriented language by [DUCOM] officials/administrators . . . ." (Id.) This argument, however, is unconvincing. Simply put, no inference of racial animus arises from these phrases.

When a plaintiff presents what he contends is "direct evidence" of racial discrimination, the evidence must be "overt or explicit evidence which directly reflects discriminatory bias by a decision maker." Bullock v. Children's Hosp. of Phila., 71 F. Supp. 2d 482, 484 (E.D. Pa. 1999); see also Armburster, 32 at 778-79, 782 (analogizing direct evidence to the proverbial "smoking gun"). Plaintiff here has presented race-neutral evidence that would not convince a jury that decision makers acted with discriminatory animus. In Walden v. Saint Gobain Corporation, the court analyzed whether facially race-neutral evidence could act as direct evidence of animus in a Section 1981 case involving an African-American plaintiff. 323 F. Supp. 2d 637, 643-44 (E.D. Pa. 2004). In Walden, plaintiff's supervisor told him that he preferred employees who "fit into a corporate culture," and that plaintiff did not do so, because he did not wear Dockers. Id. at 644. The court concluded that neither statement was motivated by racial animus, but rather related to the company's dress code preference, and the "ineffable qualities and conduct associated with the professional and business communities." Id. As such, plaintiff did not have any "direct evidence" of discrimination. Id.; compare Fakete, 308 F.3d at 336, 339 (finding direct evidence of animus based on age existed where supervisor stated to plaintiff that he was "looking for younger single people that will work unlimited hours," and as a consequence "[plaintiff] wouldn't be happy [at Aetna] in the future").

Here, Plaintiff has failed to adduce direct evidence of discrimination because all of the remarks are facially race-neutral and speak to concerns about Plaintiff's professionalism and the

"ineffable qualities and conduct associated with" the professionalism of a medical student. Walden, 323 F. Supp. 2d at 643-44. For example: "Received Unprofessional Citation on Peer Evaluation . . . unprofessional . . . inappropriate communication;" "awkard and immature . . . In front of patient Kei questioned attending. Kei did not interact well with staff. Attendings felt that he had strange interactions." (Doc. No. 633-16 at 3, 35-36; Doc. No. 634-16 at 33-34.) In fact, on May 13, 2011, Plaintiff even acknowledged that "his interpersonal skills need work and improvement," and that because he lives at home, he "doesn't have the opportunity to interact as much with others." (Doc. No. 633-17 at 15; Doc. No. 633-16 at 35-36.)

The comments also address Plaintiff's trouble communicating and his lack of medical knowledge: "Odd Interactions, word choices . . . . Seems more comfortable with research . . . . lacking in knowledge . . . . Dr. Fitzpatrick described his knowledge base as 'atrocious' in ICM group for Physical Diagnosis . . . would use nonmedical terms in medical communication. Dr. Fitzpatrick cited 'horrible communication skills;'" "Family Medicine attendings were shocked by his knowledge base; felt he lacked knowledge; couldn't apply knowledge to patient care." (Doc. No. 633-15 at 3; Doc. No. 634-16 at 33-34.) Comments concerning Plaintiff's medical knowledge and ability to apply it do not display racial animus, but rather focus on Plaintiff's likelihood of success as a doctor.

The comments also reflect a concern that Plaintiff may have anxiety and depression issues: "Will be required to have counseling;" "overwhelmed by amount of material in ICM and not knowing what was important; isolation from peers; depression. Dr. Parrish commented on his anxiety. Very introverted . . . . concerned about psychological issues . . . . anxiety, perfectionism, depression;" "[Plaintiff] discussed loss of confidence about having to repeat Year

2 . . . . Says he will see Dr. Moore and faculty to be sure he can handle stress." (Doc. No. 634-16 at 33-34; Doc. No. 633-16 at 35-36.)

Finally, these assessments of Plaintiff are in accord with DUCOM's student handbook which emphasizes the importance of professionalism in medical education:

> The process of medical education includes instruction in the knowledge, skills, and attitudes necessary to perform as competent physicians. While factual information and clinical skills are evaluated by examinations, and observations in the clinical setting, evaluation of behaviors, attitudes and professional development are less systematic and generally based on observed encounters, compliance with assignments, timeliness, and other less structured methods of evaluations.
>
> The professional development of medical students is an essential component of a complete medical school experience. Students and faculty have a responsibility to acknowledge incidents of exceptional professionalism as well as lapses in professionalism. It is important to recognize that in acknowledging such incidents that the actions and not the individual are being observed and noted.

(Doc. No. 633, Exs. 12-13.)

Accordingly, the above written comments made from June 2009 to May 2011 reflect Defendants' continued concern that Plaintiff lacked medical knowledge and had issues with professionalism and communicating with others. These comments are facially race-neutral and do not amount to direct evidence of a proverbial "smoking gun." Evold v. Wolf, Block, Schoor and Solis-Cohen, 983 F.2d 509, 523 (3d Cir. 1992). Plaintiff's subjective belief that these comments display direct racial animus is not sufficient to overcome a Motion for Summary Judgment challenging whether direct evidence of intentional discrimination has been shown. See Tucker v. Thomas Jefferson Univ., 484 F. App'x 710, 712 (3d Cir. 2012) (employee's failure to offer evidence other than his subjective belief that race played a part in his firing was insufficient to withstand summary judgment). Thus, Plaintiff has failed to raise a genuine issue

of material fact that the comments contained in his student files are direct evidence of racial discrimination.

b. Comments made by Dr. Sahar

Plaintiff also contends that several comments made by Dr. Sahar are direct evidence of discrimination. When Plaintiff first met Dr. Sahar, Dr. Sahar asked him where he was from. Apparently, Dr. Sahar pressed him to concede that while Plaintiff had immigrated to Canada as a child, he was born in China. Plaintiff has discussed this interaction in filings since the beginning of this case. (Doc. No. 29 ¶ 15.) Plaintiff now in his Memorandum in Support of his Motion for Summary Judgment alleges for the first time that Dr. Sahar also stated "You're Chinese and you were born in Communist China. I don't like Communist China." Also, at lunch during the first week of the rotation, Dr. Sahar asked Plaintiff if he ate American food or "gook food." And finally, Dr. Sahar told Plaintiff "You're very big and tall for a Chinaman." (Doc. No. 632-1 at 135.) Plaintiff only provides a record citation to support the final statement, "You're very big and tall for a Chinaman." To support this statement, Plaintiff cites to a portion of his deposition transcript that he has not included in his exhibits. Plaintiff does not include record citations to support the other comments set forth in his Memorandum in Support of his Motion for Summary Judgment.

First, the Court notes that with respect to the statements introduced in Plaintiff's Memorandum of Law in Support of his Motion for Summary Judgment, "self-serving deposition testimony is insufficient to raise a genuine issue of material fact." Irving v. Chester Water Auth., 439 F. App'x 125, 127 (3d Cir. 2011). Moreover, "[l]egal memoranda and oral argument are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion." Jersey Cent. Power & Light Co. v. Twp. of Lacey, 772 F.2d 1103, 1109-10

(3d Cir. 1985). Accordingly, the Court may disregard the statements that Plaintiff supports only with his own self-serving deposition testimony and in the Memorandum itself.

However, even if Dr. Sahar did make these remarks, they do not amount to direct evidence of intentional discrimination for two reasons. The first reason is that the comments do not concern the decision-making process, and they were not made at the time of the adverse decision. Where a plaintiff relies on comments made by the decision maker as direct evidence of discrimination, it is vital that the statements relate to the decisional process in order to establish that the adverse decision was made because of the plaintiff's race. Ezold, 983 F.2d at 545 (recognizing that "stray remarks by non-decision makers or by decision makers unrelated to the decision process are rarely given great weight").

For example, in Kim-Foraker v. Allstate Ins. Co., the court evaluated whether the remarks of plaintiff's supervisor amounted to direct evidence of discrimination. 834 F. Supp. 2d 267, 274 (3d Cir. 2011). There, plaintiff, a Korean-American, alleged that she was terminated from defendant Allstate Ins. Co. based on her race and national origin. As direct evidence that her termination was motivated by her race and national origin, plaintiff recalled that her supervisor said that he was taking kung fu, that Koreans always use cash, and that Koreans are hard workers, so expectations for plaintiff were greater than for other employees. Id. at 277. The court concluded that "the remarks do not amount to direct evidence of discrimination. Although the remarks were uttered by one of [plaintiff's] supervisors, none of the remarks were uttered when [defendant] made the decision to terminate her employment. The supervisor's remarks are 'stray remarks' unrelated to the decision to terminate her employment; stray remarks are not direct evidence of discrimination." Id.

Like the remarks made by plaintiff's supervisor in Kim-Foraker, the comments made by Dr. Sahar here were not made at or near the time that Plaintiff received the unfavorable evaluation by Dr. Sahar or was dismissed from DUCOM. Dr. Sahar made these alleged comments during the first week of Plaintiff's clerkship in September 2010. Then, on November 5, 2010, Dr. Sahar gave Plaintiff a poor evaluation at the end of his clerkship. (Doc. No. 29-4 at 11; Doc. No. 633, Ex. 406.) He was eventually dismissed by DUCOM in April 2011 after failing required tests and receiving the "Marginal Unsatisfactory" grade in the OB/GYN course. See Kim-Foraker, 834 F. Supp. 2d at 276 (supervisor's alleged discriminatory remarks did not demonstrate that employee's race or national origin was motivating factor in adverse employment action because none of the remarks were made when employee was fired); Ade v. KidsPeace Corp., 401 F. App'x. 697, 704 (3d Cir. 2010) (supervisor's allegedly discriminatory questions and comments made six months before employee's termination not sufficient to demonstrate discriminatory animus behind adverse employment action); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1112 (3d Cir. 1997) (decision maker's alleged discriminatory comment made approximately four to five months prior to termination was insufficient to prove that adverse action resulted from discriminatory animus).

Accordingly, the comments listed above amount to "stray remarks unrelated to the decision" to dismiss Plaintiff from DUCOM and are not direct evidence of discrimination.

The second reason that Dr. Sahar's comments do not amount to direct evidence of intentional discrimination is that Dr. Sahar was not a decision maker who had any control over Plaintiff's dismissal from DUCOM. In Plaintiff's own words, Dr. Sahar was "a businessman, [who] was only an unqualified 'volunteer' affiliate faculty member of [DUCOM], which did not pay him a single penny." (Doc. No. 632-1 at 134 n.49.) Dr. Sahar was Plaintiff's clinical

advisor for one course during the fall of his third year of coursework at DUCOM. Plaintiff was not dismissed until the following spring, after he received a Marginal Unsatisfactory grade in his OB/GYN course. Thus, Dr. Sahar was neither an employee of DUCOM, nor a decision maker for purposes of dismissing Plaintiff. His comments do not appear in any document relied on by the decision makers who dismissed Plaintiff from DUCOM. Accordingly, the alleged discriminatory comments by Dr. Sahar did not in any way influence the decision makers at DUCOM to dismiss Plaintiff. Thus, for all the above reasons, Plaintiff has failed to show that direct evidence exists to support his intentional discrimination claim.

2. Plaintiff has not presented circumstantial evidence of discrimination

Even though Plaintiff has failed to produce direct evidence of discrimination, he can still satisfy his discrimination claims under Section 1981 and Title VI with circumstantial evidence. The McDonnell Douglas[16] burden-shifting analysis governs Section 1981 and Title VI claims that rely on circumstantial evidence. See Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582 (1983); Manning v. Temple Univ., 157 F. App'x 509, 513 (3d Cir. 2005). In addition to making out a prima facie case of discrimination under McDonnell Douglas, a plaintiff must also show that the discrimination was intentional. General Bldg Contractors Ass'n, Inc. v. Pa., 458 U.S. 375, 389-91 (1982).

Under McDonnell Douglas, in an educational setting, a plaintiff must prove that: (1) he is a member of a protected class; (2) he suffered an adverse action at the hands of the defendants in his pursuit of his education; (3) he is qualified to continue his pursuit of his education; and (4) he was treated differently from similarly situated students who are not members of a protected

[16] The McDonell Douglas burden-shifting analysis refers to the test announced in the Supreme Court decision McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

class.[17] Bell v. Ohio State Univ., 351 F.3d 240, 252-53 (6th Cir. 2003). If a plaintiff is able to make a prima facie case under these four elements, the burden then shifts to the defendant, who must "articulate some legitimate non-discriminatory reason" for the adverse action. McDonnell Douglas, 411 U.S. at 802. If a defendant satisfies this standard, a plaintiff would then have to show that the legitimate non-discriminatory reason was mere "pretext" for unlawful discrimination. This requires a showing that each of the defendant's proffered non-discriminatory reasons was either a post hoc fabrication or otherwise did not actually motivate the adverse action. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

Here, neither party contests that Plaintiff is a member of a protected class or that he suffered an adverse action at the hands of Defendants. Accordingly, the Court will focus on the third and fourth prongs of the McDonnell Douglas analysis.

a. Plaintiff has failed to establish that he was qualified to continue in his pursuit of education

The third prong of the McDonnell Douglas test asks whether Plaintiff was qualified to continue in his pursuit of a medical degree at DUCOM. Bell, 351 F.3d at 252-53. Here, Plaintiff has failed to raise a genuine issue of material fact that he was qualified to continue in the medical school program.

In reviewing Plaintiff's academic history, Plaintiff failed two courses during his first year and four courses during his second year. As a result of these failures, his academic record came

[17] The Third Circuit in Manning v. Temple University acknowledged that it had not yet adopted the McDonnell Douglas test in the educational context. 157 F. App'x 509, 513 (3d Cir. 2005). However, in Manning, the court analyzed plaintiff's claims under the test, explaining that "under any rendering of the test, [plaintiff] fails to raise the required inference of discrimination as to her dismissal from Temple." Id. The same is true here. The Court will examine Plaintiff's claims under the McDonnell Douglas test to determine whether he has raised the required inference of discrimination.

under review by the Clinical Promotions Committee who voted to dismiss him. (Doc. No. 29-4 at 45; Doc. No. 29, Ex. 19.) After successfully appealing his dismissal, Plaintiff was re-enrolled under the condition that he retake his second year courses, meet with a counselor about test taking strategies and time management, meet with a faculty advisor, and maintain grades of at least Satisfactory in his courses and clinicals. (Doc. No. 634, Ex. F.) Specifically, Plaintiff was told that "[a]ny grade below Satisfactory will be considered grounds for dismissal from the College of Medicine." (Id.)

When Plaintiff repeated his second year courses, he received a grade below Satisfactory in Microbiology. (Doc. No. 634, Ex. B.) Despite violating the conditions of his re-enrollment, Plaintiff was permitted to remain enrolled at DUCOM.

Plaintiff then entered the clinical portion of his training at DUCOM and began a Family Medicine clerkship in the fall of 2010. (Id.) Plaintiff proceeded to receive a grade of Unsatisfactory in the clinical portion of the clerkship, and a grade of Unsatisfactory on the shelf exam graded by the NBME. (Id.) Even though at this point Plaintiff had twice violated the conditions of his re-enrollment, he was still permitted to continue at DUCOM under new conditions. These conditions included a condition that he complete his clinical training in Philadelphia, repeat the Family Medicine Clerkship, and receive grades of at least Satisfactory, as "[t]he receipt of any additional grade of less than Satisfactory (including Unsatisfactory or Marginal Unsatisfactory) will be considered grounds for dismissal from the College of Medicine." (Doc. No. 634, Ex. M.)

Thereafter, Plaintiff began an OB/GYN clerkship at Hahnemann Hospital. Plaintiff ultimately received a grade of Satisfactory in the clinical portion of the OB/GYN clerkship, but received a grade of Unsatisfactory on the shelf exam graded by the NBME. Because Plaintiff

had now violated the terms of his re-enrollment three times, and because per the DUCOM handbook "[s]tudents earning grades of Marginal Unsatisfactory and/or Unsatisfactory in multiple clerkships will have their entire academic record reviewed by the Clinical Promotions Committee," Plaintiff's academic record was once more scrutinized by the Promotions Committee. (Doc. No. 634, Ex. Q at 5.) Most notably, his failures in Family Medicine and OB/GYN resulted in part from the objective grading by the National Board of Medical Examiners.

Ultimately, the Clinical Promotions Committee voted to dismiss Plaintiff from DUCOM citing his pattern of academic failure over the course of his four years at DUCOM. The Court will not second guess this decision because a federal court "is not the appropriate forum in which to . . . evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." Hajjar-Nejad v. George Washington Univ., 37 F. Supp. 3d 90, 135 (D.D.C. 2014) (citing Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 226 (1985)). Accordingly, Plaintiff has not established that he was qualified to continue in the program in light of his repeated failures. Thus, Plaintiff has failed to raise a genuine issue of material fact that he was qualified to continue his medical education at DUCOM.

b. Plaintiff has failed to establish that he was treated differently from similarly situated students

Plaintiff also has not established that similarly situated students outside his protected class were treated more favorably than him. In analyzing the fourth prong of the McDonnell Douglas test, a plaintiff has the burden of establishing that similarly situated students outside of his protected class were treated differently than him. Texas Dep't of Cmty. Affairs v. Burdine,

450 U.S. 248, 257 (1981). The mere favorable treatment of one member outside of the protected class as compared to a member of the protected class may not be sufficient to infer discrimination. See Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 645 (3d Cir. 1998). "This is not to say that evidence of the more favorable treatment of a single member of a non-protected group is never relevant, but rather that the evidence cannot be viewed in a vacuum." Id. at 646. Rather, the court must review the record as a whole to answer the ultimate inquiry—whether the adverse decision was motivated by race. Id. at 645-46.

Additionally, the students a plaintiff selects to use as comparators must be "similarly situated." Lula v. Network Appliance, Inc., No. 2:03CV1066, 2006 WL 1371132, at *5 (W.D. Pa. May 17, 2006). Specifically, "[i]n order for [a student] to be deemed similarly situated, the individuals with whom a plaintiff seeks to be compared must have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the [school's] treatment of them for it." Bailey v. United Airlines, Civ. A. No. 97-5223, 2002 WL 1397476, at *9 (E.D. Pa. June 26, 2002); see also Morris v. Yale Univ. Sch. of Medicine, 477 F. Supp. 2d 450, 460 (D. Conn. 2007) (finding that plaintiff had failed to establish that identified Caucasian students were similarly situated, "i.e., having similar academic records"). Further, the proposed comparators must be similarly situated in "all relevant respects." Wilcher v. Postmaster General, 441 F. App'x 879, 881 (3d Cir. 2011); see Johnson v. NewCourtland, Inc., Civ. A. No. 13-4328, 2015 WL 894320, at *12 (E.D. Pa. Mar. 3, 2015) (explaining in employment context that "if [employees'] conduct differed in a way that would be material to an employer, they will not be considered comparators"). Accordingly, any comparator for purposes of establishing that Drexel treated similarly situated students differently must have similar

academic records to Plaintiff and have engaged in the same conduct without differentiating or mitigating circumstances.

Plaintiff's academic history is summarized as follows: (1) Plaintiff received a Marginal Unsatisfactory and an Unsatisfactory grade in his first year. He was permitted to remediate the courses over the summer; (2) Plaintiff received a grade of Unsatisfactory in four courses during his second year; (3) Plaintiff was dismissed as a result of the four failures and subsequently readmitted on the condition that any grade below Satisfactory could be grounds for dismissal; (4) Plaintiff received a Marginal Unsatisfactory grade in Microbiology during the repeat of his second year but was not dismissed. Instead, he was permitted to raise the grade to Satisfactory after passing the NBME subject exam; (5) Plaintiff was permitted to defer beginning his third year by 12 weeks in order to study for the Step 1 exam; (6) Plaintiff failed the Step 1 exam; (7) Plaintiff received an Unsatisfactory grade in the clinical portion of Family Medicine but was not dismissed; (8) Plaintiff was permitted to postpone taking the Family Medicine shelf exam in order to study for his second attempt at the Step 1 exam; (9) Plaintiff failed the Family Medicine shelf exam, thus receiving an overall grade of Unsatisfactory in Family Medicine; (10) Although Plaintiff had twice breached the terms of his conditional letter of re-enrollment, he was not dismissed, but received a new conditional letter ordering him to retake Family Medicine, complete the rest of his third year clerkships in Philadelphia so DUCOM staff could supervise him, and was again advised that any grade below Satisfactory, including Marginal Unsatisfactory, would be grounds for dismissal; (11) Plaintiff took the Step 1 exam for a second time and failed; and (12) Plaintiff passed the clinical portion of the OB/GYN clerkship, but failed the NBME shelf exam. Plaintiff thus received a grade of Marginal Unsatisfactory in OB/GYN and was dismissed.

During discovery, Plaintiff requested information concerning the race and academic background of students who attended DUCOM including the time of his enrollment—from the fall of 2007 to the spring of 2011.[18] He sought this information in order to show that he was

[18] Defendants produced this information on spreadsheets in which students were identified by number in order to preserve their anonymity in accordance with the Family Educational Rights and Privacy Act ("FERPA"). DUCOM was concerned that the unauthorized release of student records could have a major impact on the school of medicine. In general, FERPA protects the anonymity of student records and provides as follows:

> (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization . . . .
>
> (2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as permitted under paragraph (1) of this subsection, unless –
>
> > (A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or
> >
> > (B) except as provided in paragraph (1)(j), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena . . .

20 U.S.C. § 1232g. Personally identifiable information includes:

> (a) the student's name;
>
> (b) the name of the student's parent or other family member;
>
> (c) the address of the student or student's family;
>
> (d) a personal identifier, such as the student's social security number, student number, or biometric record;

> (e) other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
>
> (f) other information that, along or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
>
> (g) information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3.

Plaintiff was dissatisfied with the spreadsheets and requested that Defendants identify the students by name and produce their student files. Defendants objected, arguing that production of this information would violate FERPA. On August 9, 2013 and October 18, 2013, the Court held hearings on the discovery dispute in view of the restrictive provisions of FERPA.

Following the hearings, the Court instructed Defendants to send letters to the students identified in the spreadsheets inquiring whether they objected to Defendants providing Plaintiff with their identity or student records. On November 26, 2013, the Court instructed Defendants to make changes to the letters in response to Plaintiff's objections, and then to mail the letters to the students. (Doc. Nos. 291, 308, 332.)

On December 12, 2013, Defendants mailed the form letter to 106 students. Fifty-five students responded to the letters. Fifty-one students did not respond. Of the fifty-five responses, forty-four students objected to having their identities revealed on the spreadsheets created by DUCOM. Fifty-three of the fifty-five students objected to DUCOM providing Plaintiff with a copy of their student records or other documents which contained their personally identifying information. Two students of the fifty-five had no objection to revealing their identity or turning over to Plaintiff their student records.

After receiving the responses, the Court issued an Opinion (Doc. No. 451) on whether Plaintiff should be given the information on the students who objected, did not object, or did not respond to the letters sent by DUCOM.

The Court concluded that Plaintiff would be provided with the un-redacted student files, which included identifying information, of the two students who did not object to the release of their personally identifiable information. The Court also concluded that Plaintiff would be provided with the redacted student files of the remaining 104 students. Included in the 104 student files were the files of the fifty-one students who did not respond to the letter. The Court ordered their personally identifiable information redacted from their files because "[i]n the absence of a response, their privacy rights under FERPA have not been knowingly and

treated differently from similarly situated students. Defendants produced this information in spreadsheets and identified students with a number in order to preserve their anonymity. Plaintiff used the information provided by Defendants to create his own spreadsheets to show that similarly situated DUCOM students were treated differently and more favorably than Plaintiff. The spreadsheets are categorized as follows:

1. Caucasian and African-American students in 2007-2011 who failed clerkships in their third year who were not dismissed;
2. Caucasian and African-American students in 2007-2011 who violated conditional letters who were not dismissed;
3. Caucasian and African-American students in 2007-2011 who failed courses in the first and second year who did not receive conditional letters;
4. Caucasian and African-American students in 2007-2011 who were given more than eighteen months, or more than three attempts, to pass the Step 1 exam;
5. African-American students in 2007-2011 who failed multiple courses in the first or second year who were not dismissed; and
6. Caucasian students in 2007-2011 who failed multiple courses in the first or second year who were not dismissed.

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voluntarily waived and should be respected by the Court." (Doc. No. 451 at 11.) This entire balancing process afforded Plaintiff access to academic records of 106 students, which he used in advancing his claims in this case, while protecting the privacy rights of students under FERPA.

Accordingly, the circumstantial evidence discussed in this section is based upon the spreadsheets created by Defendants, as modified by Plaintiff, and the student records provided to him. The student number identified on Defendants' spreadsheets corresponds to the number at the top of the student's redacted student file.

Plaintiff himself also compiled a list of dismissed students who attended DUCOM from 2007 to 2011 with their racial background. This supplemental list is offered by Plaintiff to support his claims.

A review of the academic records of the students referred to on the spreadsheets does not establish, however, that the students relied on by Plaintiff to support his claim of discrimination were similarly situated to him in all material respects. The Court will discuss the spreadsheets in the order that they have been identified in Plaintiff's Motion for Summary Judgment.

i. Spreadsheets with Third Year Caucasian and African-American students who failed clerkships and were not dismissed

This spreadsheet includes information about African-American and Caucasian students attending DUCOM from 2007 to 2011 who failed clerkships in their third year and were not dismissed. (Doc. No. 568.) There are thirty[19] students listed in total, of whom six are Caucasian students, four are African-American students, and three are Chinese students. The remaining eighteen are minority students with a different race from the thirteen students noted. As will be discussed below, the Caucasian and African-American students are not similarly situated to Plaintiff because none of the students had a comparable academic record to Plaintiff.

[19] As noted, this spreadsheet was created by Plaintiff from information provided by Defendants during discovery. This spreadsheet actually contains thirty-two students. One student declined to share his race. (Doc. No. 568.) Nevertheless, Plaintiff included this student on the spreadsheet limited to Caucasian and African-American students. Thus, the performance of this student is not relevant to the analysis of whether Caucasian and African-American students who failed third year clerkships and were not dismissed were treated differently from Plaintiff.

Additionally, student 418 withdrew from the medical school before DUCOM had an opportunity to decide whether dismissal was proper. Accordingly, student 418 is also irrelevant to the analysis.

The Caucasian students are identified by numbers 408, 410, 413, 36/92,[20] 33/291, and 424. Students 408 and 410 passed the clinical portions of their clerkships, but failed the shelf exam, thus receiving Marginal Unsatisfactory grades. (Doc. No. 568.) The students were permitted to retake the shelf exam to remediate their grades, at which point their grades were raised to Satisfactory. (Id.) Student 413 was also permitted to retake his shelf exam in order to raise his grade to Satisfactory. Student 36/92 was placed on academic probation after failing two clerkships, but passed the clerkships after repeating them. Student 33/291 failed two clerkships, was permitted to repeat them, but was required to complete the clerkships in Philadelphia. (Id.)

The African-American students are identified as 111, 421, 66, and 425. Student 111 passed the clinical portion of the clerkship but failed the shelf exam. The student was permitted to retake the shelf exam and passed the exam. Student 421 was dismissed after an Honor Code violation. The student was readmitted on conditions similar to those imposed on Plaintiff (i.e., no grades below Satisfactory, and completing all clerkships in Philadelphia). Student 66 failed the shelf exam and was permitted to repeat the clerkship due to family issues. Finally, student 425 failed the shelf exam and was permitted to retake the exam twice until he passed. (Doc. No. 568.)

Plaintiff argues that he was treated differently than these students because he was not permitted to retake the OB/GYN shelf exam even though he had passed the clinical portion of the OB/GYN clerkship like some of the students listed in this spreadsheet. Although this

[20] When Defendants first compiled the redacted student records and created the spreadsheets requested by Plaintiff, Defendants would at times list the same student with a different number on a different spreadsheet. When Defendants discovered this error, they began identifying students who had mistakenly been given two numbers with both numbers, such as: 36/92, 33/291.

comparison is true to the limited extent noted, Plaintiff omits the fact that the OB/GYN shelf exam failure was the last straw in a series of academic failures that resulted in his dismissal.

Specifically, at the time that Plaintiff failed the OB/GYN shelf exam, he was subject to re-enrollment conditions set forth in Dean Homan's letter which stated that a grade of less than Satisfactory would be grounds for dismissal. (Doc. No. 634, Ex. F.) Moreover, Plaintiff had breached the conditions when he received a Marginal Unsatisfactory grade during his second year, but was nevertheless permitted to remediate his grade. He then breached the conditions again when he received a grade of Unsatisfactory in the Family Medicine clerkship and a grade of Unsatisfactory on the shelf exam. Finally, when he received a grade of Unsatisfactory on the OB/GYN shelf exam, he was dismissed from DUCOM.

Similarly situated students must "have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the [school's] treatment of them for it." Bailey, 2002 WL 1397476, at *9. None of the above students "engaged in the same conduct" as Plaintiff, since none of them were subject to conditional letters or had similar academic records as Plaintiff. Accordingly, the students reflected on this spreadsheet are not similarly situated to Plaintiff and therefore no genuine issue of material fact arises from the information on these students.

ii. Spreadsheets with Caucasian and African-American students who violated conditional letters and were not dismissed

The next spreadsheet Plaintiff relies on contains information on Caucasian and African-American students who violated conditional letters but were not dismissed. (Doc. No. 632 at 49.) This spreadsheet refers to three African-American students, and five Caucasian students. (Id. at 49-51.) Unlike Plaintiff, the students on this spreadsheet did not violate the terms of the

conditional letter several times. After Plaintiff was readmitted on July 21, 2009, he proceeded to violate the terms of the conditional letter in the following ways: first, he received a grade of Marginal Unsatisfactory in Microbiology (Doc. No. 634, Ex. B); then, he received a grade of Unsatisfactory in both the clinical portion of Family Medicine and a grade of Unsatisfactory on the shelf exam (Doc. No. 29 ¶ 29; Doc. No. 634, Ex. L.); and finally, he received a grade of Unsatisfactory on OB/GYN shelf exam, resulting in an overall grade of Marginal Unsatisfactory. (Doc. No. 634, Exs. B, N.) Accordingly, while the students in this spreadsheet may have violated conditional letters, none violated conditional letters more than once.

In fact, of the students listed, only three students actually violated the conditional letters, while the others, Plaintiff asserts, "could have violated the conditional letter without being dismissed." (Doc. No. 632 at 49-50.) The three students who did violate the conditional letters only failed one course compared to Plaintiff's receipt of grades below Satisfactory in three courses. Accordingly, these students are not similarly situated to Plaintiff for purposes of showing that Drexel discriminated against him.

iii. Spreadsheets with Caucasian and African-American students who failed courses in the first and second year and who did not receive conditional letters

Plaintiff next refers to a spreadsheet containing Caucasian and African-American students who failed courses in their first and second years at DUCOM, but did not receive conditional letters. There are twelve students on this list.[21] None of these students are "similarly situated" in all material respects to Plaintiff.

[21] Plaintiff includes students 3 and 11/63 on this spreadsheet, even though both students did receive conditional letters. (Doc. No. 632 at 52; Doc. No. 647 at 17.) Accordingly, the Court will not consider these students in its analysis of this spreadsheet.

Looking first at students 1, 10, 16, and 31, Plaintiff contends that these students did not receive a conditional letter after failing courses during their first year. (Doc. No. 632 at 52.) Plaintiff apparently ignores the fact that he also did not receive a conditional letter after failing courses his first year. Therefore, these students are not similarly situated students who received more favorable treatment than Plaintiff.

Student 8 also is distinguishable in two respects. First, this student failed two courses in his first year and three in his second year. Student 8 was permitted to repeat his second year, and was ultimately dismissed when he failed two repeated courses. (Doc. No. 632 at 52.) Plaintiff by comparison failed two courses in his first year, four courses his second year, was dismissed, and then was readmitted to retake the second year courses. In comparison to student 8, Plaintiff failed an additional course his second year for a total of four courses. Moreover, student 8's appeal following his dismissal was unsuccessful, whereas Plaintiff's appeal from his first dismissal was successful and he was readmitted.

Second, student 8 had a history of medical problems that necessitated a leave of absence during the fall semester of his second year, which required him to postpone the appeal of his dismissal. (Doc. No. 457.) The medical problems are "differentiating or mitigating circumstances that would distinguish [DUCOM's] . . . treatment" of this student as compared to DUCOM's treatment of Plaintiff. Bailey, 2002 WL 1397476, at *9. Thus, because Plaintiff did not have medical problems that would justify the same treatment, and because Plaintiff failed an additional course his second year, student 8 is not similarly situated to Plaintiff.

Student 7 failed courses his first year but only one course in his second year. (Doc. No. 632 at 52.) Plaintiff by comparison failed four courses his second year. Students 20/230, 24, and 26 all passed their first year courses but failed three courses in their second year. (Id. at 53.)

Students 20/230 and 24 were permitted to repeat the three failed courses, and student 26 was permitted to remediate one course, and retake two courses. (Doc. No. 457.) Again, Plaintiff is not similarly situated to these students because he failed two courses in his first year and four courses in his second year.

Student 23 is also not comparable to Plaintiff. This student had several failures in his first year, but then passed all of his second year courses. This student, however, failed to meet the condition that he pass the Step 1 exam within eighteen months of completing the second year and was subsequently dismissed. Student 23 had one violation of a condition set by DUCOM and was dismissed. This student was treated less favorably than Plaintiff who had a worse academic record, and was dismissed only after violating the conditional letter three times. (Doc. No. 653 at 9; Doc. No. 632 at 53.)

Student 371 is the most similar to Plaintiff, as this student also failed two courses in his first year and four courses in his second year. (Doc. No. 632 at 54.) However, evidence of favorable treatment of a single member of a non-protected group "cannot be viewed in a vacuum." Simpson, 142 F.3d at 646. Looking at the record as a whole, Plaintiff fails to mention that this student had medical issues which DUCOM considered when it permitted the student to repeat the second year. This "mitigating circumstance distinguishes [the student's] conduct [and] the [school's] treatment of them for it." Bailey, 2002 WL 1397476, at *9. Thus, Plaintiff was not similarly situated to this student for purposes of inferring that DUCOM treated Plaintiff less favorably than this student because of race.

Finally, student 405 was in fact treated less favorably than Plaintiff. This student failed three courses in his first year and repeated them. Like Plaintiff, this student did not receive a conditional letter after his first year failures. Unlike Plaintiff, however, this student was

dismissed after he failed four courses during his second year and was not readmitted. Thus, this student was treated less favorably than Plaintiff, who was readmitted and allowed to repeat his second year curriculum. Accordingly, none of the students listed on this spreadsheet are similarly situated to Plaintiff for purposes of inferring racial discrimination by DUCOM.

iv. Spreadsheets with students who were given more than 18 months or more than three attempts to take the Step 1 exam

The next spreadsheet Plaintiff references includes students who were given more than 18 months, or more than three attempts, to take the Step 1 exam. This spreadsheet lists seven students. As noted by Defendants, DUCOM's requirement that students pass the Step 1 exam within 18 months of completing their second year coursework was not instituted until March 2006. (Doc. No. 647, Ex. C.) Thus, students who had begun at DUCOM before this date were not subject to this requirement. In addition, students who began at DUCOM before this date, took a leave of absence, and then resumed their studies were also not subject to this condition. Of these seven students, student "Heidi Baer," and students 428, 430, 431, and 435 were not subject to this condition. (Doc. No. 638, Ex. 311.)

Students 7 and 23, however, were subject to this condition. Student 7 took the Step 1 exam, did not pass, and failed to retake the test within 18 months. The student was then dismissed and filed an appeal with DUCOM requesting to take the test a second time. The student delayed retaking the test because of a death in the family and an appeal to the NBME for an accommodation which was ultimately denied. DUCOM, however, granted the appeal and set a new time limit to pass the Step 1 exam. When the student once again failed, he was dismissed from DUCOM. (Doc. No. 633, Ex. 334-41.) Student 23 did not pass the Step 1 exam within the

required timeframe and was dismissed. As of the date of the most recent spreadsheet provided by Defendants, this student was no longer enrolled at DUCOM. (Doc. No. 568.)

Plaintiff is not similarly situated to students 7 and 23 for two reasons. First, Plaintiff never requested an extension of time to take the Step 1 exam beyond the eighteen month deadline or after three attempts because he was dismissed from DUCOM before he reached the eighteen month point. Plaintiff finished his second year coursework in May 2010. He was dismissed approximately one year later after having taken and failed the Step 1 exam twice. At the time of his dismissal, Plaintiff still had six months remaining to take the Step 1 exam. He also had one more chance to pass the Step 1 exam. He was scheduled to retake the exam a third time in July 2011 but was not permitted to take it by the National Board of Medical Examiners when they learned that Plaintiff was no longer attending medical school. Accordingly, the fact that students 7 and 23 were granted an extension to take the Step 1 exam past the eighteen month deadline, or afforded an additional chance to pass the exam, does not make them similarly situated to Plaintiff in all material respects.

Second, Plaintiff was not dismissed because of his Step 1 failures. Rather, Plaintiff was dismissed for violating the terms of his conditioned enrollment at DUCOM concerning receipt of a grade below Satisfactory. The student information on this spreadsheet has no relevance to DUCOM's decision to dismiss Plaintiff because his Step 1 failures did not cause his dismissal. For these reasons, the student information on this spreadsheet also does not raise an inference that DUCOM dismissed Plaintiff because of his race.

v. Spreadsheets with African-American students who failed multiple courses in the first or second year and were not dismissed

The next spreadsheet Plaintiff relies on contains information on African-American students who failed courses in their first or second year at DUCOM and were not dismissed. Like the students listed in the above spreadsheets, the seven[22] students listed here are not similarly situated to Plaintiff. Student 1/111 had failures during his first year but had no failures during his second year. (Doc. No. 632 at 59.) Specifically, student 1/111 failed Physiology and Biochemistry and received a Marginal Unsatisfactory in Gross Anatomy in his first year. After repeating and passing these first year courses, student 1/111 received grades of Satisfactory in his second year courses. By comparison, Plaintiff received a grade of Unsatisfactory in Immunology and a grade of Marginal Unsatisfactory in Behavioral Science in his first year. (Doc. No. 634-1 at 3.) Plaintiff was also permitted to remediate these grades and passed. Unlike this student, however, Plaintiff proceeded to fail four courses during his second year thus warranting dismissal. Accordingly, student 1/111 is not similarly situated to Plaintiff.

Student 20 passed all first year courses but failed three courses in his second year. (Doc. No. 632 at 53.) This student was permitted to retake the three courses which he then passed. (Doc. No. 457.) By comparison, Plaintiff failed two courses his first year while student 20 failed none. Plaintiff then failed four courses his second year. Student 20 failed courses for the first time during his second year, while Plaintiff had a pattern of failure during both his first and second years. This dichotomy is a "differentiating or mitigating circumstance[]" that would

[22] Plaintiff once again misstates the number of students in this spreadsheet. Plaintiff listed nine students: 1, 3, 6, 9, 20, 23, 66, 111, and 425. In fact, there are only seven students listed. Defendants identified student 1 also as student 111: 1/111, and student 6 also as student 66: 6/66. This reduces the number of students referred to on this spreadsheet as comparators from nine to seven.

justify DUCOM's decision not to dismiss student 20 after the second year failures. Bailey, 2002 WL 1397476, at *9. Thus, Plaintiff is not similarly situated to student 20 in all material respects.

Student 23 is discussed above in the section involving students who had been granted an extension of time to take and pass the Step 1 exam. This student failed five courses in his first year and repeated these courses and passed. (Doc. No. 632 at 59.) In his second year, the student received one grade of Unsatisfactory in Bioethics which he remediated. (Doc. No. 457.) Although this student had more first year failures than Plaintiff, he had only one second year failure compared to Plaintiff's four second year failures. This student's academic performance improved while Plaintiff's worsened. Thus, student 23 is not a similarly situated student who received more favorable treatment than Plaintiff. In addition, this student was dismissed from DUCOM after failing to take the Step 1 exam within the required timeframe. Thus, this student, who violated a condition set by DUCOM only once when he did not timely take the Step 1 exam, was treated less favorably than Plaintiff who violated DUCOM's conditions several times before being dismissed.

Student 425 failed one course in his first year and three in his second year. (Id. at 60.) However, unlike Plaintiff, this student received two Highly Satisfactory grades in his second year along with the three failures. Plaintiff failed more courses both in his first and second year, and did not receive any Highly Satisfactory grades his second year. Accordingly, these grades amount to "differentiating or mitigating circumstances" that would explain why DUCOM would not dismiss this student after his second year failures. Bailey, 2002 WL 1397476, at *9. Thus, this student also is not similarly situated in all material respects to Plaintiff.

Students 3 and 6/66 are also distinguishable. Student 3 was dismissed after failing to pass repeated first year courses. (Doc. No. 653 at 7.) His appeal for reinstatement was granted

because of family issues that required the student to assist with a family member's health care. He remediated the first year coursework over the summer, passed all his second year courses except one, and remediated that course over the summer. Student 6/66 failed courses during her first year and was dismissed from DUCOM after she again repeated and failed her first year courses. Her appeal for reinstatement was granted because during the year she had repeated the courses, she had a child, a parent died, she had an ill grandparent, and went through a major financial crisis. Thereafter, the student passed all second year coursework. These two students had documented personal issues that DUCOM considered when readmitting them. Accordingly, these "mitigating circumstance[s] distinguish[] [these students'] conduct [and] the [school's] treatment of them for it." Bailey, 2002 WL 1397476, at *9. Thus, students 3 and 6/66 are not similarly situated students to Plaintiff.

Plaintiff also relies on Student 9 who had an academic history almost identical to Plaintiff's academic record. In his first year, student 9, like Plaintiff, failed two courses, and in his second year, student 9 failed the same four courses as Plaintiff. (Doc. No. 632 at 59; Doc. No. 437.) Like Plaintiff, the Promotions Committee voted to dismiss student 9 for these failures. (Doc. No. 437.) Also like Plaintiff, the Promotions Committee granted student 9's appeal and he was readmitted under almost identical conditions to Plaintiff including the condition that "[a]ny grade less than Satisfactory may be considered as grounds for dismissal from the College of Medicine." (Id.) Accordingly, this student was not treated more favorably than Plaintiff, but treated similar to Plaintiff.

vi. Spreadsheets with Caucasian students who failed multiple courses in the first or second year and were not dismissed

The final spreadsheet that Plaintiff relies on to show that similarly situated students were treated differently than Plaintiff is a spreadsheet containing information about Caucasian students who failed courses in year 1 or year 2 without being dismissed. Like the students above, none of the students here are similarly situated in all material respects to Plaintiff.

Student 8 failed two courses in his first year and three in his second year. Plaintiff by comparison failed two courses in his first year and four courses his second year. Student 8 was ultimately dismissed from DUCOM after repeating his second year and failing two courses. (Doc. No. 632 at 52.)

Student 7 failed courses his first year but only one course his second year. (Id.) This student is distinguishable from Plaintiff who failed four courses his second year. Students 10, 16, and 31 failed courses in their first year but none in their second year, unlike Plaintiff who failed four courses his second year. (Doc. No. 632 at 60-61.)

Students 24 and 26 passed their first year courses but failed three courses in their second year. (Id. at 53.) Plaintiff is not similarly situated to these students because he had failed two courses his first year and four courses his second year for a total of six failed courses in two years. Students 24 and 26 failed three courses over two years. Thus, students 24 and 26 had their first course failures at the end of the second year, while Plaintiff failed courses during his first and second years of study. Accordingly, these students are not similarly situated to Plaintiff.

Student 74 was not treated more favorably than Plaintiff. This student passed all first year courses and then received three grades of Unsatisfactory in his second year and one grade of Marginal Unsatisfactory. (Doc. No. 457.) Like Plaintiff, the Clinical Promotions Committee

voted to dismiss this student after his second year failures. (Id.) Compared to Plaintiff, however, this student had a better academic record, as he had no first year failures, and received three grades of Unsatisfactory his second year, compared to Plaintiff's four. The Promotions Committee readmitted the student and imposed almost identical conditions imposed on Plaintiff, including the repeat of all courses in which he received a grade of less than Satisfactory and also that "any further grade of Marginal Unsatisfactory or Unsatisfactory will be considered grounds for dismissal from [DUCOM]." (Id.) Thus, this student was not treated more favorably than Plaintiff.

Student 371 is most similar to Plaintiff. This student also failed two courses in his first year and four courses in his second year. (Doc. No. 632 at 54.) The Court discussed this student previously when analyzing the spreadsheet containing Caucasian and African-American students who failed courses in the first or second year and did not receive conditional letters. The Court adopts that analysis here. Student 371 had medical issues which DUCOM believed justified permitting the student to repeat the second year. This student's medical issues ultimately necessitated that he withdraw from DUCOM. This "mitigating circumstance distinguishes [the student's] conduct [and] the [school's] treatment of [the student] for it." Bailey, 2002 WL 1397476, at *9. Accordingly, Plaintiff was not similarly situated to this student for purposes of inferring that DUCOM treated Plaintiff less favorably than this student because of race.

Similarly, student 11/63 also suffered from a medical condition that required a leave of absence. Like Plaintiff, this student was dismissed after receiving four grades below satisfactory in the second year. The student's appeal was granted and she was readmitted following a medical leave of absence. The student then failed additional courses after she was readmitted, and was dismissed. (Doc. No. 653 at 8.) Like Plaintiff, this student was dismissed following

poor academic performance her second year, and also like Plaintiff was readmitted. She was ultimately dismissed for a continued pattern of failures of second year courses, similar to Plaintiff. Accordingly, this student was not treated more or less favorably than Plaintiff.

Student 405 was treated less favorably than Plaintiff. This student failed three courses in his first year and repeated them. (Doc. No. 632 at 146.) Like Plaintiff, this student did not receive a conditional letter after his first year failures. Unlike Plaintiff, this student was dismissed after he failed four courses during his second year and was not readmitted. Thus, this student was treated less favorably than Plaintiff. (Id.)

Finally, student 30 was treated less favorably than Plaintiff. Student 30 was dismissed after receiving failing grades in his first and second year. Compared to Plaintiff's four grades of Unsatisfactory, student 30 only had three grades of Unsatisfactory in his second year. Thus, this student was treated more harshly than Plaintiff.

After a review of the academic performance and personal information on the above students who are referred to on the spreadsheets, it is clear that Plaintiff has failed to present facts that show similarly situated students were treated more favorably than him.

vii. Statistical evidence with respect to students dismissed from DUCOM from 2007 to 2011

Finally, Plaintiff includes a spreadsheet he created which contains students who were dismissed from 2007 to 2011 and their race. This spreadsheet is incomplete[23] and discrimination

[23] For example, Plaintiff refers to two students as "Asian" on the spreadsheet, even though in other spreadsheets they are described as Chinese. (Doc. No. 647 at 18.) The distinction is important because only Chinese students are within Plaintiff's protected class, while other students who may fall under the "Asian" umbrella would be outside of Plaintiff's protected class. Therefore, the Court cannot discern of the five "Asian" students identified on the spreadsheet, which are within Plaintiff's protected class of Chinese students and which are outside of Plaintiff's protected class.

cannot be inferred from the race of the student and the year of the student's dismissal without knowing more about the circumstances of dismissal.

The chart is based on nineteen students who were dismissed between 2007 and 2011.[24] These students include five Caucasian students, four Pakistani students, three "Asian" students, three African-American students, two Latino students, one Mexican-American student, and one Asian-Indian student. These statistics do not reflect that "Asian" students were treated less favorably than students outside of their protected class. More Caucasian students were dismissed than "Asian" students, and an equal number of African-American and Asian students were dismissed.

Most importantly, as noted by Defendants, DUCOM sometimes has no input on whether to dismiss a student, such as when a student fails Step 1 more than three times, or fails multiple NBME exams. Without more information concerning the reasons for the dismissals, the Court cannot infer from these statistics that DUCOM intentionally dismisses Chinese students because of their race.

In Koumantaros v. City University of New York, the court examined whether a Caucasian student had established that non-Caucasian students were treated more favorably than her in her claim of discriminatory dismissal. No. 03 Civ. 10170, 2007 WL 840115 (S.D.N.Y. Mar. 19, 2007). There, the student was on academic probation for violating a condition in the student handbook that students must receive a grade of "C" or above in their pre-clinical classes after failing a course. 2007 WL 840115, at *2. While on probation, the student received another

[24] There are two additional students listed on Plaintiff's spreadsheet that the Court will not consider. The first student is identified as Asian and was dismissed in 2013. This is outside the timeframe that Plaintiff was enrolled at DUCOM and therefore is not relevant to whether Defendants discriminated against him while he was a student. Additionally, another student recorded as Asian was not dismissed, but withdrew from DUCOM. (Doc. No. 647 at 18; Doc. No. 632 at 63.)

failing grade and was dismissed. Id. at *2-*3. After reviewing evidence that plaintiff was treated according to defendant's policies, and concluding that plaintiff had provided only unauthenticated rumors that she was treated worse than non-Caucasian students, the court concluded that plaintiff had not presented evidence of a single similarly situated non-Caucasian student who was treated more favorably than plaintiff. Id. at *9. The court went on to pointedly note:

> The [court] is mindful of the difficulty of providing discriminatory dismissal in an educational context. It can be difficult for a plaintiff to unearth evidence that [he] was treated differently from other students who were similarly situated to [him] "in all material respects." Education is an individualized experience-like snowflakes, no two students are exactly identical. [Defendants'] own discretionary policies recognize that what works for one student may not work for another one. But circumstantial evidence of discrimination is not impossible to uncover, and in this case, plaintiff has failed to unearth any evidence supporting her claim that she has been treated differently from similarly situated, [] students.

Id. at *10. In sum, Plaintiff has failed to present evidence of a student not in his protected class who was referred to the Promotions Committee and had a comparable academic performance record and background to Plaintiff and who was permitted to continue at DUCOM. Like the plaintiff in Koumantaros, Plaintiff has failed to present evidence that a single similarly situated non-Chinese student was treated more favorably than him.[25] Accordingly, Plaintiff has failed to raise a genuine issue of material fact that Defendants discriminated against him based on race.

c. Plaintiff has not shown that Defendants' legitimate non-discriminatory reason for his dismissal was pretextual

Even if Plaintiff could satisfy the prima facie requirement for racial discrimination, Plaintiff's claim would still fail because he has not rebutted Defendants' "legitimate non-

[25] In total, Plaintiff has attempted to show that 35 students were similarly situated to him and received more favorable treatment. To the contrary, Plaintiff has not raised a genuine issue of material fact that these students were treated more favorably by Defendants and that Defendants engaged in unlawful discrimination.

discriminatory reason" for his dismissal. McDonnell Douglas, 411 U.S. at 802. Here, Plaintiff was dismissed twice from DUCOM—once in 2009 and again in 2011. (Doc. No. 29-4 at 45, Doc. No. 29, Ex. 19.) Plaintiff was dismissed in 2009 after failing two courses in his first year, and four courses in his second year. The DUCOM's student handbook states that:

> The year-appropriate Student Promotions Committee reviews the entire record of a student with one or more grades of Marginal Unsatisfactory or Unsatisfactory in order to determine if that student is demonstrating a level of academic performance sufficient to remain in medical school . . . .

(Doc. No. 633, Ex. 18.) Accordingly, after Plaintiff received four grades of Unsatisfactory in his second year, the Student Promotions Committee reviewed his "entire record" to determine if he was "demonstrating a level of academic performance sufficient to remain in medical school." Id. After determining that Plaintiff was not adequately performing, he was dismissed. Plaintiff was readmitted after appealing the dismissal under the following conditions listed by Dean Homan:

1. You will retake all courses in which your grade was Unsatisfactory and Marginal Unsatisfactory.
2. Any grade below Satisfactory will be considered grounds for dismissal from the College of Medicine.
3. You must meet with Dr. Janet Moore prior to the beginning of classes, August 11, 2009. You will work with Dr. Moore and focus on test taking skills, time management, and study skills.
4. You will meet with a designated faculty advisor at least monthly throughout the remainder of time in medical school.
5. The receipt of any grade lower than Satisfactory during your clinical training will be considered as grounds for dismissal from the College of Medicine.

(Doc. No. 634, Ex. F.) Plaintiff proceeded to retake second year courses and received a grade below Satisfactory in Microbiology. (Doc. No. 634, Ex. B.) He was not dismissed at that point but instead was permitted to raise his grade to Satisfactory. (Id.) Plaintiff entered the third year clerkships and received a grade of Unsatisfactory in his clinical training in Family Medicine, and a failing grade on the NBME Family Medicine shelf exam. (Id.) The shelf exam, notably, was

graded by the NBME. DUCOM had no control over Plaintiff's failing shelf exam grade. (Doc. No. 653 at 18.)

At this point, even though Plaintiff had twice breached the conditions set forth in Dean Homan's letter, the Promotions Committee did not dismiss him, sympathizing that there had been miscommunication with respect to Plaintiff's mid-clerkship evaluation.[26] The Committee therefore sent a new conditional letter on February 14, 2011:

> The Committee has made the following decisions:
>
> 1. You are allowed to remain enrolled in the College of Medicine.
> 2. You will do the remainder of your Clerkships in the Philadelphia area.
> 3. You are required to repeat the 6-week Family Medicine Clerkship.
> 4. The receipt of any additional grade of less than Satisfactory (including Unsatisfactory or Marginal Unsatisfactory) will be considered grounds for dismissal from the College of Medicine.

(Doc. No. 634, Ex. M.) Plaintiff subsequently failed the NBME shelf exam in OB/GYN resulting in a grade of Marginal Unsatisfactory in the OB/GYN clerkship. (Doc. No. 634-1 at 5.) Again, this failure was graded by the NBME, not by DUCOM. In addition to considering Plaintiff's breach of the conditions in the letters of July 2010 and February 2011, the Promotions Committee was required once more to scrutinize Plaintiff's academic record pursuant to DUCOM's handbook which provides:

> Students earning grades of Marginal Unsatisfactory and/or Unsatisfactory in multiple clerkships will have their entire academic record reviewed by the

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[26] In an email from Dr. Hamilton to Dr. Fuchs, Dr. Hamilton noted:

> He did get a midblock review all right, from the same preceptor who gave him his final evaluation – but there are huge discrepancies between the two. Most notably, his professionalism on the midblock was "5" and on the final was "1"; medical knowledge similarly dropped from "4" to "2". If Lei was getting inconsistent or meaningless feedback, it's a lot harder to take his final grade at full weight.

(Doc. No. 633, Ex. 556.)

> Clinical Promotions Committee. The Promotions Committee may consider repeated failures as grounds for dismissal from the College of Medicine.

(Doc. No. 634, Ex. Q at 5.) Finally, after working with Plaintiff for several years to help him salvage a career in medicine, the Committee voted to dismiss him from the medical school.

Defendants have presented a history of academic failures recorded both by neutral third-party examiners and DUCOM. Plaintiff breached the terms of his re-enrollment at DUCOM when he received grades of Marginal Unsatisfactory in Microbiology, and the final grade of Unsatisfactory in Family Medicine. He then breached the condition of his continued enrollment when he received a grade of Marginal Unsatisfactory on his OB/GYN shelf exam. These are legitimate non-discriminatory reasons for Defendants' dismissal of Plaintiff from DUCOM. They are not pretextual.

Recognizing this fact, Plaintiff does not argue that Defendants' legitimate non-discriminatory reasons are mere pretext for unlawful discrimination. Instead, Plaintiff contends that Defendants could not have dismissed him for violating the terms of Dean Homan's letter of July 2010 and the February 2011 letter of the Promotions Committee because both letters violated DUCOM's student handbook and therefore are unenforceable. (Doc. No. 632 at 25.) The Court first notes that Plaintiff has provided no authority to support this argument. Other courts have approved re-enrollment conditions being placed on a student following dismissal. See Morris v. Yale Univ. School of Medicine, 477 F. Supp. 2d 450, 459 (D. Conn. 2007) (finding that plaintiff's breach of the condition upon re-enrollment that he pass the Step 1 exam before beginning a clerkship justified dismissal); Bell v. Ohio State Univ., 351 F.3d 240, 249 (6th Cir. 2003) (explaining that plaintiff's medical school reinstatement was subject to specific conditions, which, upon her breach, justified dismissal).

Moreover, DUCOM's student handbook—the legality of which Plaintiff does not contest—mandates that the Promotions Committee review the academic record of any student with more than one grade below Satisfactory in a given year to determine whether the student should be dismissed. Accordingly, even without the conditions imposed on Plaintiff for his continued enrollment at DUCOM, his poor academic performance could have been considered grounds for dismissal.

Upon a showing by Defendants that a legitimate non-discriminatory reason motivated the dismissal, Plaintiff is required to show that Defendants' "reason [for dismissal] was false, and that discrimination was the real reason." Jones v. Sch. Dist. of Phila., 198 F.3d 403, 412-13 (3d Cir. 1999). Plaintiff has failed to make such a showing. Accordingly, Plaintiff has not raised a genuine issue of material fact to permit the Court to disbelieve Defendants' reason for dismissing Plaintiff, or to believe that racial discrimination motivated Plaintiff's dismissal. For these reasons, Defendants' Motion for Summary Judgment on Counts I and IV which contain claims that Defendants intentionally discriminated against him in violation of 42 U.S.C. § 1981 and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, respectively, will be granted.

B. Plaintiff Has Failed to Establish a Claim for Racially Motivated Breach of Contract Under 42 U.S.C. § 1981

In addition to bringing a claim of intentional discrimination under 42 U.S.C. § 1981 as alleged in Count I, Plaintiff attempts to bring a claim under the same statute that he titles "racially motivated breach of contract" in Count VII against all Defendants. Plaintiff summarizes this claim as follows:

> [s]o [D]efendants violated § 1981(b) when they breached contracts with [P]laintiff because of their discriminatory intent, which was their racial motivation not to let [P]laintiff, a student born in "Communist China," enjoy fully the "benefits, privileges, terms, and conditions" of the student handbook, student manuals, and

> Drexel University's Code of Conduct [] and 'Academic Policies.' [sic] while treating white and [African-American] students more favorably.

(Doc. No. 632 at 32.) The problem with Plaintiff's claim, however, is that this claim is duplicative of his Count I claim and therefore summary judgment will be entered in Defendants favor on this claim.

According to Plaintiff, "racially motivated breach of contract" under Section 1981 requires a showing that Defendants breached their contract with Plaintiff because of his race. This is simply a repackaging of his intentional discrimination claim under Section 1981. As described above, in order to succeed on a claim of intentional discrimination under 42 U.S.C. § 1981, a plaintiff must show: (1) that he belongs to a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in Section 1981, including the right to make and enforce contracts. Brown, 250 F.3d at 797. Plaintiff here has attempted to create a duplicative cause of action under Section 1981 by rebranding it "racially motivated breach of contract." For the same reasons advanced in the section above, however, Plaintiff has failed to establish that discrimination influenced Defendants' decision to dismiss Plaintiff—a breach of contract according to Plaintiff. Accordingly, he has not raised a genuine issue of material fact that his Count VII discrimination claim was "racially motivated."

The cases Plaintiff relies on to support this claim all involve breach of contract claims under state law. See Nathanson v. Medical College of Pa., 925 F.2d 1368, 1387 (3d Cir. 1991) (analyzing disabled student's state law breach of contract claim under Pennsylvania law); DMP v. Fay School ex rel. Bd. of Trustees, 933 F. Supp. 2d 213, 222 (D. Mass. 2013) (analyzing student's state law breach of contract claim under Massachusetts law); Kimberg v. Univ. of Scranton, No. 3:06cv1209, 2007 WL 40971, at *3 (M.D. Pa. Feb. 2, 2007) (analyzing dismissed

student's state law breach of contract claim against university under Pennsylvania law); Morris v. Yale Univ., 63 A.3d 991 (Conn. App. Ct. 2013) (alleging state law cause of action for breach of contract).[27]

None of these cases refer to a cause of action for "racially motivated breach of contract" under 42 U.S.C. § 1981. Consequently, Plaintiff's claim for "racially motivated breach of contract" under Section 1981 fails and summary judgment will be granted in favor of Defendants on Count VII.

C. Plaintiff Has Failed to Raise a Genuine Issue of Material Fact Regarding His Claim of a Hostile Educational Environment

Plaintiff contends in Count III that he was subject to a hostile education environment in violation of 42 U.S.C. § 1981 by Drexel University, Dr. Sahar, and Dr. Parrish. The elements of this Section 1981 claim are the same as the elements of a hostile work environment under Title VII of the Civil Rights Act. McKenna v. Pac. Rail Serv., 32 F.3d 820, 826 n.3 (3d Cir. 1994). To succeed on a hostile educational environment claim, a plaintiff must prove: (1) that he is a member of a protected class; (2) that he was harassed because of race; (3) that defendant had actual knowledge of and was deliberately indifferent to the harassment; and (4) that the harassment was so severe and objectively offensive that it deprived plaintiff of access to the educational benefits or opportunities provided by the school. Daryl Releford v. Pennsylvania State Univ., No. 10-cv-1621, 2011 WL 900946, at *6 (M.D. Pa. March 14, 2011).

In examining whether an educational environment is "hostile," a court must examine the totality of the circumstances, such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

[27] On March 20, 2014, Plaintiff voluntarily dismissed his claim of breach of contract under Pennsylvania law. (Doc. No. 450.)

unreasonably interferes with [a student's] performance." Miller v. Thomas Jefferson Univ., 565 F. App'x 88, 93 (3d Cir. 2014) (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998)). Teasing, isolated incidents, and offhand remarks do not satisfy this test; rather, the conduct must be sufficiently extreme that it amounts to a change in the terms and conditions of enrollment. Id. (citing Faragher, 524 U.S. at 788). These standards serve to ensure that Title VII, and by extension Section 1981, "does not become a general civility code." Id. In support of this claim, Plaintiff presents several examples of allegedly discriminatory conduct by Dr. Sahar, Dr. Parrish, Dr. Fuchs, and Dr. Hamilton that he contends amounted to a hostile educational environment. The Court will address the allegations against each Defendant in turn.

1. Comments made by Dr. Sahar

Plaintiff identifies the following conduct of Dr. Sahar as evidence of a hostile educational environment: (1) when Plaintiff first met Dr. Sahar, he asked Plaintiff where he came from and pressed him to identify that he was born in China (Doc. No. 29 ¶ 15); (2) Dr. Sahar stated that he did not like Communist China; (3) during lunch the first week, Dr. Sahar asked Plaintiff if he ate American food or "gook food;" and (4) during the same lunch, Dr. Sahar told Plaintiff "You're very big and tall for a Chinaman" (Doc. No. 632-1 at 135).

These comments do not show that Plaintiff was subject to a hostile educational environment. First, as discussed previously, Dr. Sahar's question regarding Plaintiff's national origin does not suggest a discriminatory motive. Moreover, 42 U.S.C. § 1981 does not provide a ground for relief for national origin discrimination—only for race discrimination. Doe v. Sizewize Rentals, LLC, 530 F. App'x 171, 173 (3d Cir. 2013); see Beaubrun v. Inter Cultural Family, Civ. A. No. 05-6688, 2006 WL 1997371, at *5 (E.D. Pa. July 13, 2006) (dismissing Section 1981 claim based on national origin discrimination where defendants had allegedly made

negative and "belittling reference to [plaintiff's Haitian] nationality"); Karakozova v. Trustees of Univ. of Pa., Civ. A. No. 09-2564, 2001 WL 1754468, at *6 (E.D. Pa. May 9, 2011) (granting summary judgment against plaintiff who brought Section 1981 claim alleging that defendant had discriminated against her because she was a member of "the Russian Federation"). Thus, any comment Dr. Sahar made concerning where Plaintiff was from in an attempt to ascertain his national origin is not discriminatory conduct under 42 U.S.C. § 1981.

In addition, the comments Dr. Sahar made at lunch are unsupported outside of Plaintiff's own deposition testimony. According to the Third Circuit, as a general rule, "self-serving deposition testimony is insufficient to raise a genuine issue of material fact." Irving v. Chester Water Auth., 439 F. App'x 125, 127 (3d Cir. 2011). Here, during four years of litigation, Plaintiff has not alleged in a court filing that Dr. Sahar asked Plaintiff if he ate American food or "gook food," or stated that Plaintiff was "very big and tall for a Chinaman." (Doc. No. 632-1 at 135). Accordingly, Plaintiff's reliance on his own self-serving deposition testimony is insufficient here to raise a genuine issue of material fact that Dr. Sahar made these statements.

However, even if Dr. Sahar did make these comments, along with the question concerning Plaintiff's national origin, Plaintiff still has failed to show that Dr. Sahar created a hostile educational environment. As Plaintiff has pointed out several times, Dr. Sahar was absent from the Family Medicine clerkship for the majority of Plaintiff's clerkship at AM Sahar. (Doc. No. 29 at Ex. 6.) Dr. Sahar was only present during the first and last week of the clerkship for a total of ten days. (Id.; Doc. No. 633, Ex. 698.) The alleged discriminatory comments described above were made on Plaintiff's first day, and during lunch in the first week, of the clerkship. These two instances of alleged discriminatory statements do not satisfy the severity or frequency of discriminatory conduct necessary to "unreasonably interfere with [Plaintiff's]

performance" because for four weeks out of the six week clerkship, Plaintiff was not subject to any discriminatory conduct. See Ocasio v. Lehigh Valley Family Health Cent., 92 F. App'x 876, 880 (3d Cir. 2004) ("Isolated incidents over a long period of time do not constitute a hostile work environment."); cf Drinkwater v. Union Carbide Corp., 904 F.2d 853, 863 (3d Cir. 1990) (finding that two sexually stereotyped discriminatory comments did not constitute continuous, pervasive discrimination). Accordingly, Plaintiff has failed to raise a genuine issue of material fact that Dr. Sahar's comments created a hostile educational environment.

2. Comments made by Dr. Parrish

Plaintiff also alleges that Dr. Parrish made comments that created a hostile educational environment. When analyzing whether a comment is motivated by racial animus in a hostile educational environment claim, "there are no talismanic expressions which must be invoked as a condition-precedent . . . so long as the words could be seen as conveying the message that members of a particular race are disfavored and . . . are, therefore, not full and equal members of the [school]." Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996). Absent evidence that raises an inference of illegal racial animus, disrespectful comments with no overt discriminatory aspect do not amount to harassment because of race. See Kovoor v. Sch. Dist. of Phila., 211 F. Supp. 2d 614, 627 (E.D. Pa. 2002) (granting defendant's motion to dismiss on plaintiff's hostile work environment claim where plaintiff had failed to demonstrate any connection between the rude and abrupt comments made by his boss and plaintiff's race).

Even if a plaintiff can show that an otherwise benign comment is motivated by race, the comments must still be severe or pervasive enough to alter the conditions of the educational environment. By analogy, the Third Circuit in Sherrod v. Philadelphia examined whether

plaintiff was subject to a hostile work environment under Title VII.[28] 57 F. App'x 68 (3d Cir. 2003). In Sherrod, plaintiff, an African-American, was told by her supervisor that "he didn't like the way [two African-American employees plaintiff supervised] were eating at their desks, it must be their culture." Id. at 71. The supervisor then told Plaintiff that if the two employees "don't do their work, I'm going to sit at their desks with a whip." Id. Plaintiff's supervisor also told a clerk in the department "don't do nothing [plaintiff] tells you to do." Id. Plaintiff was also told not to attend a meeting even though her presentation was on the agenda and later, another manager "snub[bed] her." Id. at 76. Generally, plaintiff averred that other members of the management team "would scream at her and treat her badly." Id.

The court in Sherrod determined that for purposes of raising an issue of material fact, the comments concerning the African-American employees' "culture" and the threat to "sit at their desks with a whip" coupled with the facially neutral mistreatment of plaintiff by management could raise an inference of racial discrimination. Id. at 76. The court determined, however, that plaintiff had failed to establish that the above behavior was severe or pervasive enough to satisfy the hostile work environment test. In analyzing whether these statements amounted to severe or pervasive conduct, the court recognized that "there is no evidence that anyone ever referred to [plaintiff] using racial slurs. The statements which [plaintiff] considered offensive were subject to non-racial interpretation and were not physically threatening or humiliating." Id. at 77. The court therefore affirmed the dismissal of plaintiff's hostile work environment claim.

Here, Plaintiff is unable to show that Dr. Parrish made any harassing comments based on Plaintiff's race or that the comments were severe or pervasive enough to alter the conditions of

[28] Although Sherrod discusses a hostile work environment under Title VII, the analysis is the same under Section 1981. See McKenna, 32 F.3d at 826 n.3.

his educational environment. Again, viewing the evidence in the light most favorable to Plaintiff, which the Court is required to do at the summary judgment stage, Plaintiff first describes an incident in the fall of 2007 when Plaintiff asked Dr. Parrish about the size of DUCOM's endowment. (Doc. No. 632 at 112.) Dr. Parrish allegedly responded to Plaintiff that "knowing the size of endowment [sic] for possible comparison purposes was 'shower room penis measuring.'" (Id.) While this comment may have been inappropriate, it does not relate to Plaintiff's race, nor does Plaintiff argue as much.

Next, Plaintiff describes four meetings with Dr. Parrish on April 26, 2011,[29] May 12, 2011, May 16, 2011[30], and May 26, 2011, where alleged discriminatory comments were made. (Doc. No. 632 at 113.) On May 12, 2011, Dr. Parrish told Plaintiff, "go[ing] back to your first year of medical school . . . you were the weirdest guy I've ever met. You were weird, strange, truly odd, you scared people." (Doc. No. 633, Ex. 279.) Dr. Parrish also asked if he was working with someone, or seeing a counselor. (Id.) Plaintiff also notes that Parrish would criticize Plaintiff for being "awkward and immature." (Doc. No. 632 at 114.)[31]

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[29] Plaintiff contends that during the meeting on April 26, 2011, Parrish suggested that Plaintiff had a problem which warranted him being brought back to Philadelphia to complete his third-year clerkships. (Id.) Plaintiff cites to an email from Dana Farabaugh to Sandra Saldan on February 11, 2011, which states that "[W]e just inherited another problem student so maybe 7 total Lei Ke will be coming from Monmouth." (Doc. No. 633 at 31.) The Court will not attempt to ascertain what relevance this email between two non-parties has to Plaintiff's allegation that Dr. Parrish told him he had a problem. Thus, Plaintiff has not raised a genuine issue of material fact that a racially harassing comment was made on that date.

[30] Despite listing this date as one on which harassing comments were made, Plaintiff does not describe what comments were made on May 6, 2011. Plaintiff has submitted more than seven hundred pages of exhibits with the Motion for Summary Judgment and has not directed the Court to any comments made by Parrish on May 6, 2011.

[31] Plaintiff also describes an incident in the fall of 2008 when Plaintiff asked Parrish for additional time to take tests due to a problem with his vision. Apparently, Parrish responded

On May 26, 2011, Dr. Parrish stated that Plaintiff had a "persistent pattern of academic failure." (Doc. No. 633, Ex. 286-87.) Dr. Parrish also advised Plaintiff that in his final appeal, he should not place blame on others. (Id. at Ex. 287.) Specifically, Plaintiff had drafted a letter in which he stated that he had been "put in this situation," and that he "wish[ed] that the committee ordered [him] to have two clerkships off [to] spend more time studying for the second attempt at step 1." (Id.) Dr. Parrish told Plaintiff that if Dean Homan saw the letter, he would be so shocked that he would call Dr. Fuchs, or Dr. Parrish, and they would report that Plaintiff was delusional. Dr. Parrish stated that as the letter was currently drafted, Dean Homan would "throw you out immediately." (Id.)

In examining these comments, Plaintiff has failed to raise a genuine issue of material fact that the comments were racially motivated. While there is no "talismanic expression[]" that need be invoked to qualify as a racially harassing comment, the words must "convey[] the message that members of a particular race are disfavored." Aman, 85 F.3d at 1083. Here, no reading of these comments would suggest that they were motivated by race. Tellingly, Plaintiff does not argue that the comments were motivated by race. Rather, he argues that Dr. Parrish's comment that Plaintiff had a pattern of academic failure was unfair considering Caucasian and African-American students also failed tests. (Doc. No. 632 at 113-14.) A comment made by a school official involved in a student's performance about a student's own poor academic record, however, does not become discriminatory because other students with poor academic records were not mentioned in the conversation. Accordingly, the comments described above are not discriminatory and Plaintiff has failed to adduce any evidence to infer that these comments were racially motivated. Moreover, Plaintiff's subjective belief that race played a role in these

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that "anybody who asked for accommodation would be punished." (Doc. No. 632.) This comment is unrelated to Plaintiff's claim that Parrish discriminated against him based on race.

comments is not sufficient to establish an inference of discrimination. Groeber v. Friedman and Schuman, P.C., 555 F. App'x 133, 135 (3d Cir. 2014).

Additionally, Plaintiff has failed to establish that Dr. Parrish's comments were severe or pervasive enough to alter the conditions of his enrollment at DUCOM. As explained by the court in Sherrod in its analysis of whether the comments were severe or pervasive, "there is no evidence that anyone ever referred to [plaintiff] using racial slurs. The statements which [plaintiff] considered offensive were subject to non-racial interpretation and were not physically threatening." Sherrod, 57 F. App'x at 77. The same is true of the comments Plaintiff has identified here. Dr. Parrish's comments concerning Plaintiff's academic performance and professionalism are not severe or pervasive enough to affect the terms of his enrollment at DUCOM.

Finally, the Court notes that almost every comment of Dr. Parrish relied on by Plaintiff occurred during Plaintiff's appeal process after Plaintiff had been dismissed from DUCOM on April 11, 2011. Therefore, many comments by Dr. Parrish could not have affected the terms of Plaintiff's enrollment at DUCOM. For all these reasons, Plaintiff has failed to establish through the comments of Dr. Parrish that a genuine issue of material fact of a hostile educational environment existed.

3. Other comments

In support of his hostile educational environment claim, Plaintiff also relies on other comments and information in student records as evidence of harassing behavior, including: (1) alleged "hidden files" on Plaintiff; (2) comments made before the Promotions Committee; (3) comments Dr. Sahar made in the course of the litigation; and (4) Dr. Fuchs' summary of Plaintiff's academic record in 2009 and 2011.

First, Plaintiff argues that DUCOM had created "hidden files" on Plaintiff. The Court has already addressed the notes contained in Plaintiff's student file in the section concerning Plaintiff's "direct evidence" of intentional discrimination. They will be repeated here because Plaintiff's argument relies upon their content. These notes include:

> . . . Received Unprofessional Citation on Peer Evaluations for Gross [sic]. . . . Odd Interactions, word choices. . . . Lack of social skills noted by Dr. Parrish (personal space issues, walking around with breast in pocket.) Seems more comfortable with research. . . . Will be required to have counseling. . . . Family Medicine site wants to give him an [Unsatisfactory] in [Family Medicine] at Monmouth. Unable to apply clinical knowledge to patients. Awkward, unprofessional, Immature [sic], lacking in knowledge. Got into altercation with attending in front of patient about not being taught something. Had difficulty interacting with office staff. . . . Dr. Fitzpatrick described his knowledge basis as 'atrocious' in ICM group for Physical Diagnosis. Biggest problem was inappropriate communication (medical jargon), would use nonmedical terms in medical communication. [Following Plaintiff's dismissal from DUCOM] Dr. Fitzpatrick cited 'horrible communication skills.' Per Dr. Fuchs, "can't see forest for [sic] trees." He often goes off on tangents in conversations.

(Doc. No. 634-16 at 33-34.) Plaintiff also quotes from the notes recorded following his first dismissal in 2009:

> overwhelmed by amount of material in ICM [Intro Clinical Medicine] and not knowing what was important; isolation from peers; depression. Dr. Parrish commented on his anxiety. Very introverted, socially awkward. Insists he wants to be in med school. . . . Dr. Ramchandani cites his high intelligence in his working with him on remediation exam, concerned about psychological issues. Lacks self-awareness about anxiety, perfectionism, depression.

(Doc. No. 633-16 at 36.)

Next, Plaintiff includes the minutes from the Clinical Promotions Committee held on December 10, 2010 discussing his failing the clinical portion of the Family Medicine clerkship:

> Family Medicine attendings were shocked by his knowledge base; felt he lacked knowledge; couldn't apply knowledge to patient care. Also felt that he was awkward and immature. In front of a patient, Kei questioned attending. Kei did not interact well with staff. Attendings felt that he had strange interactions; possibly depressed. Attendings felt that he should repeat Family Med. Possible reason for behavior=Kei failed Step 1 and found out halfway through rotation. He

> is scheduled to take Step 1 again on 12/22/10; and is taking Family Med Shelf Exam on 12/29/10. Regardless of how he does on the Fam Med Shelf, attendings want to give him a grade of Unsatisfactory. Giving him a [grade of Unsatisfactory] may be grounds for dismissal for student. When Dean Homan readmitted him, letter stated that if he ever got a grade lower than Satisfactory, that may be grounds for dismissal. Motion: If Family Med gives him less than Satisfactory, then he will be dismissed from [DUCOM].

(Doc. No. 633-15 at 3.)

Plaintiff also selects quotes from the discussion of his dismissal by the Promotions Committee in April 2011:

> [Plaintiff] discussed loss of confidence about having to repeat Year 2, series of errors in 'trying to do too many things at same time.' Says he will see Dr. Moore and faculty to be sure he can handle stress, make sure everything is going okay. Says he needs to work on interpersonal skills and says part of the problem is that he lives at home and doesn't have the opportunity to interact as much with others.

(Doc. No. 633-16 at 35-36.)

Plaintiff also refers to the following comments from the May 13, 2011 Clinical Promotions Committee's meeting:

> Here to appeal dismissal . . . dismissed again on academic grounds. Also has communication issues; cannot multi-task. Lei feels that he needs to be able to multi-task and be able to balance different things, especially as a physician . . . needs to gain his confidence back by being successful with just one thing . . . was advised not to take a shelf exam, but took it anyway because he wanted to be successful with something – he needed confidence . . . Lei feels as though his interpersonal skills need work and improvement – he will meet with faculty and advisors . . . [and] read articles on interpersonal skills.

(Doc. No. 633-17 at 15.) As noted previously, none of the comments are racially motivated.

The fact these files were allegedly "hidden" means that Plaintiff was not aware of their existence. In the employment context, an "employee who is totally unaware of harassing behavior cannot subjectively perceive such conduct to be hostile or abusive." Howard v. Blalock Elec. Service, Inc., 742 F. Supp. 2d 681, 694 (W.D. Pa. 2010). "An employee must have some awareness of harassing behavior in order to perceive it as hostile or abusive." McGinness v.

Nazareth Borough, Civ. A. No. 13-7087, 2015 WL 1511051, at *5 (E.D. Pa. Apr. 2, 2015). It follows then that because Plaintiff was "totally unaware" of the allegedly harassing comments contained in these files, Plaintiff could not have perceived the comments to be hostile or abusive so as to alter the conditions of his enrollment at DUCOM.

The same is true for the remaining allegations with respect to the comments made during the meetings of the Promotions Committee, Dr. Sahar's comments, and Dr. Fuchs' summary of Plaintiff's academic record. Plaintiff points to the Promotions Committee's meeting minutes from December 10, 2010 where the following was recorded, "Family Medicine attendings . . . felt that he was awkward and immature . . . felt that he had strange interactions; possibly depressed." (Doc. No. 632 at 119.) Plaintiff alleges that this comment represents "racial profiling." (Id.) Plaintiff was "totally unaware" that these comments were made at the time he was a student at DUCOM. Thus, the comments could not have been part of any perception by Plaintiff that he was in a hostile educational environment.

Plaintiff also alleges that a conversation between Dr. Sahar and Dr. Hamilton shows evidence of a hostile educational environment. (Doc. No. 632 at 120.) In the conversation, Dr. Sahar stated that he wondered whether Plaintiff "suffer[ed] from Asparagus' [sic] Syndrome." (Id.) Again, Plaintiff was not made aware until this litigation that Dr. Sahar thought that Plaintiff may be on the autism spectrum.

Finally, Plaintiff argues that the summaries drafted by Dr. Fuchs for Dean Homan contained "malicious misrepresentations." Plaintiff, however, was unaware of the content of these summaries until this litigation. Consequently, for all these reasons, Plaintiff has failed to raise a genuine issue of material fact that the conduct he relies on created a hostile educational environment.

D. Plaintiff Has Failed to Raise a Genuine Issue of Material Fact that He Engaged in Protected Activity in Order to Sustain a Claim of Retaliation Under 42 U.S.C. § 1981 and Title VI, 42 U.S.C. § 2000d

In Count II and V respectively, Plaintiff alleges a claim of retaliation in violation of 42 U.S.C. § 1981 and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, against Drs. Sahar, Hamilton, Fuchs, Parrish, Dean Homan, and Drexel University. To establish retaliation under Title VI, a plaintiff must show: (1) he was engaged in protected activity; (2) the funded entity subjected him to an adverse action after or contemporaneously with the protected activity; and (3) there is a causal link between the adverse action and the protected activity. Whitfield v. Notre Dame Middle Sch., 412 F. App'x 517, 522 (3d Cir. 2011) (citing Peters v. Jenney, 327 F.3d 307, 320 (4th Cir. 2003)). The retaliation claim under 42 U.S.C. § 1981 is the same as the Title VI claim except that Title VI applies only to "funded entit[ies]." Miller, 908 F. Supp. at 648. Because Title VI applies only to entities, Plaintiff brings his Section 1981 retaliation claim against all Defendants and his Title VI retaliation claim against Drexel University only. See Whitfield, 412 F. App'x at 521 (noting that individual liability cannot be asserted under Title VI).

To satisfy the first element of a retaliation claim, Plaintiff must establish that he engaged in "protected activity" that relates to discrimination. See Jimmy v. Elwyn, Inc., Civ. A. No. 11-7858, 2014 WL 630605, at *10 (E.D. Pa. Feb. 18, 2014). Protected activity includes "formal charges of discrimination as well as informal protests of discriminatory [educational] practices, including making complaints to management." Barber v. CSX Distrib. Servs., 68 F.3d 694, 701-02 (3d Cir. 1995). But "if no reasonable person could have believed that the underlying incident complained about constituted unlawful discrimination, then the complaint is not protected." Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 322 (3d Cir. 2008). For

example, the filing of a facially invalid or frivolous EEOC complaint does not constitute protected activity for purposes of making out a retaliation claim. McGhee v. Thomas Jefferson Univ. Hosp., Civ. A. No. 12-2919, 2013 WL 4663541, at *4 (E.D. Pa. Aug. 29, 2013).

Here, Plaintiff alleges that he engaged in protected activity in three ways: (1) with respect to Dr. Sahar, by asking him a question in front a patient; (2) with respect to Drexel University, by requesting a hearing following his dismissal from DUCOM; and (3) with respect to Drs. Fuchs, Parrish, and Homan, by telling them about the Sahar question incident, and about Sahar's retaliation and "racial animus" toward Plaintiff. (Doc. No. 632 at 159.)

Regarding Plaintiff's retaliation claim against Drexel under Title VI, Plaintiff did not engage in "protected activity" under the statute, and accordingly summary judgment in favor of Defendants will be granted on this claim. Under Title VI, to satisfy the first element, a plaintiff must show that he had a reasonable good faith belief that the practice he opposed was unlawful under Title VI. Chandamuri v. Georgetown Univ., 274 F. Supp. 2d 71, 84 (D.D.C. 2003). Plaintiff does not contend here that he engaged in protected activity by voicing concerns over discriminatory policies or discriminatory treatment based on race. Rather, Plaintiff claims that he engaged in protected activity when he "petitioned [] John Fry, president of Drexel University, on July 4, 2011, for a formal hearing" and when his parents sent a letter to President Fry about his dismissal.[32] (Doc. No. 632.) According to Plaintiff, a formal hearing was available under

[32] Plaintiff argues that a letter his parents sent to President Fry on June 30, 2011 was also protected activity. The letter in relevant part reads:

> Lei had earlier appealed his [F]amily [M]edicine "U" grade because the failure of the clinical part of the grade was manifestly unfair, given the fact that the private doctor the college placed Lei under retaliated against him after he inadvertently exercised his First Amendment rights by asking the doctor a question in front of a patient. The doctor thought Lei had challenged his

DUCOM's "Academic Policies."[33] Whether or not Plaintiff was entitled to a formal hearing, Plaintiff's request for a hearing is not a "protected activity" for purposes of a retaliation claim

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> authority [] and, despite Lei's profound apology, retaliated by failing him without warning.

(Doc. No. 633, Ex. 701.) Nothing in this letter suggests that Plaintiff was retaliated against based on his participation in "protected activity" under Title VI. Rather, Plaintiff's parents contend that he was retaliated against for asking a question in front of a patient. As described above, this is not "protected activity" as the term is used in Section 1981 or Title VI.

Plaintiff also contends that his father's letter to the school amounts to participation by Plaintiff in protected activity because "Plaintiff authorized his parent (father) to represent him regarding his student affairs at [DUCOM], and so his father has legal standing in [P]laintiff's matter." (Doc. No. 632 at 102 n.37.) Plaintiff cites to a FERPA authorization form provided by DUCOM that authorizes DUCOM to discuss a student's academic record with someone other than the student. Nowhere on the FERPA authorization form does it purport to allow the named individual to act on behalf of the student. (Doc. No. 633, Ex. 706.) In addition, Plaintiff does not provide legal support for this argument. For all these reasons, the letter to President Fry from Plaintiff's father did not amount to protected activity under Section 1981 or Title VI.

[33] In support of this statement, Plaintiff cites to a series of emails between himself, Dean Homan, and President Fry in July 2011. In these emails, Plaintiff requests a hearing in order to have his Family Medicine grade amended pursuant to the University's Family Educational Rights and Privacy ("FERPA") Policy. The Policy states:

> The University provides a student with an opportunity to request amendment to the contents of an Education Record which he/she considers to be inaccurate, misleading, or otherwise in violation of his/her privacy or other rights. A School Official who receives such a request will coordinate with the University Registrar and they will decide within a reasonable period of time whether corrective action consistent with the student's request will be taken. The student must be notified of the decision. If the decision is in agreement with the student's request, the appropriate record(s) must be amended. A student who is not provided full relief sought by his/her challenge must be informed by the appropriate School Official, in writing, of the decision and his/her right to a formal hearing on the matter.

(Doc. No. 633, Ex. 46.) After Plaintiff's request to amend his Family Medicine grade was denied, a hearing was scheduled. As noted above, the Office of the Registrar, however, cancelled the meeting after determining that Plaintiff was "attempting to use the FERPA amendment process to challenge a grade and a clinical evaluation," rather than to contend that it was inaccurately recorded. (Doc. No. 29-5 at 31.) Thus, Plaintiff was not denied a FERPA

under Title VI because it does not relate to discrimination or any activity protected by Title VI. Compare Rubio v. Turner Unified School Dist. No. 202, 523 F. Supp. 2d 1242, 1252-56 (D. Kan. 2007) (denying school's motion for summary judgment on student's Title VI retaliation claim where student alleged that after he filed present lawsuit claiming national origin and race discrimination he subsequently received an increase in discipline referrals).

The balance of Plaintiff's claims against Drs. Sahar, Parrish, Hamilton, and Dean Homan all fall under Section 1981. The Third Circuit has held that in "a retaliation case a plaintiff must demonstrate that there had been an underlying § 1981 violation." Est. of Oliva ex rel. McHugh v. N.J., 604 F.3d 788, 798 (3d Cir. 2010). Previously, the Court found that Plaintiff failed to raise a genuine issue of material fact that Defendants violated Section 1981 when it dismissed Plaintiff. Thus, pursuant to Oliva, because Plaintiff has not demonstrated an underlying § 1981 violation, his retaliation claim fails.

Plaintiff's Section 1981 claim against the individual Defendants also fails because he has not demonstrated that he engaged in protected activity. As explained above in the Title VI context, "protected activity" under Section 1981 must relate to discrimination prohibited by Section 1981. See Jimmy, 2014 WL 630605, at *10. Plaintiff contends that when he asked Dr. Sahar a question in front a patient, it was "protected" by Drexel University's Code of Conduct and DUCOM's student manual. (Doc. No. 632 at 73-74.) While asking this question may have conformed to the policies set forth in the Code of Conduct and DUCOM's student manual, this activity does not amount to "formal charges of discrimination [or] informal protests of

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hearing as a retaliatory action by Drexel, but rather because he was not entitled to a FERPA hearing in the first place.

discriminatory [] practices." Barber, 68 F.3d 695 at 701-702. Thus, Plaintiff did not engage in "protected" activity under Section 1981 when he asked Dr. Sahar a question during his clinical.

Plaintiff also contends that he engaged in protected activity by "protesting" to Jennifer Hamilton, Amy Fuchs, Samuel Parrish, and Dean Homan of "Dr. Sahar's retaliation and racial animus." (Doc. No. 632 at 79-80, 82-83, 91-92.) This allegation is only contained in his Memorandum of Law in Support of his Motion for Summary Judgment with only one reference to the record. In his Motion for Summary Judgment, the following statements are made:

> On January 3, 2011, Hamilton called Ke to tell him that Sahar had failed his rotation . . . . Plaintiff immediately protested and complained about Sahar's retaliation and racial animus.
>
> ***
>
> In January 2011, after Hamilton failed his [F]amily [M]edicine clerkship, Ke complained to Parrish about Sahar's retaliation and racial animus against him.
>
> ***
>
> On June 21, 2011, plaintiff met with Homan in his office and complained about Sahar's retaliation and racial animus against plaintiff. (Plaintiff's Exhibits 455, 477.)

(Doc. No. 632 at 79-80, 92, 97.)

The only citation to the record is in support of the third statement. Reference is made to Plaintiff's Exhibits 455 and 477. Plaintiff's Exhibit 455 is a copy of Dean Homan's daily calendar which shows that on June 21, 2011 at 11:00 a.m. he had an appointment with Lei Ke. (Doc. No. 633, Ex. 455.) Plaintiff's Exhibit 477 appears to be a document Plaintiff created in advance of his meeting with Dean Homan. The document contains points that Plaintiff wished to raise with Dean Homan. With respect to Dr. Sahar's alleged retaliation, Plaintiff wrote the following:

> Dr. Sarhar's [sic] retaliation (I was very professional) and my appeal negatively impacted my second try at Step-1.
>
> His retaliation caused the promotions committee to sanction me, although I was repeatedly told that the [F]amily [M]edicine was not held against me.

(Doc. No. 633, Ex. 477.) Tellingly, in the notes Plaintiff drafted in preparation for his meeting with Dean Homan containing all the reasons he should be readmitted to DUCOM, he never mentions that Dr. Sahar acted out of racial animus.

Plaintiff has produced no evidence that he told any of the above Defendants about "racial animus" in any of the multiple emails and letters exchanged between Plaintiff and Defendants, or in any minutes of meeting. Plaintiff, who otherwise consistently cites to over seven hundred pages of exhibits to support factual statements alleged in his Motion for Summary Judgment, does not provide a reference to documentary evidence or deposition testimony to support the claim about "racial animus."

"At summary judgment, a plaintiff cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial." Jones v. United Parcel Service, 214 F.3d 402, 407 (3d Cir. 2000); see also Jersey Cent. Power & Light Co. v. Twp. of Lacey, 772 F.2d 1103, 1109-10 (3d Cir. 1985) ("Legal memoranda and oral argument are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion."). Because Plaintiff's allegation that he complained of Dr. Sahar's "racial animus" is unsupported by evidence, Plaintiff has failed to raise a genuine issue of material fact that he engaged in protected activity, and his retaliation claim fails. See Street v. Steel Valley OIC, Civ. Action No. 06-1705, 2008 WL 682496, at *4 (W.D. Pa. March 7, 2008) (granting summary judgment on retaliation claim where plaintiff had not "provid[ed] any document evidence in support of any suggestion that he actually complained of unequal pay or opportunities [based on race]").

E. Plaintiff Has Failed to Raise a Genuine Issue of Material Fact that Defendants Conspired Against Him in Violation of 42 U.S.C. § 1985(3)

Finally, in Count VI, Plaintiff brings a claim against all Defendants for conspiring to interfere with his civil rights in violation of 42 U.S.C. § 1985. Section 1985(3) imposes civil liability "[i]f two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws[.]" 42 U.S.C. § 1985(3). The Supreme Court in Brown v. Philip Morris Inc. noted the remedies available to a plaintiff under Section 1985(3) in relevant part as follows:

> In general, the conspiracy provision of [S]ection 1985(3) provides a cause of action under rather limited circumstances against both private and state actors. In order successfully to bring an action under § 1985(3) for private conspiracy, a plaintiff must show, inter alia, '(a) that a racial or other class-based invidious discriminatory animus lay behind the coconspirators' actions, (b) that the coconspirators intended to deprive the victim of a right guaranteed by the Constitution against private impairment, and (c) that the right was consciously targeted and not just incidentally affected.' Spencer v. Casavilla, 44 F.3d 74, 77 (2d Cir. 1994) (citation omitted). . . . In order to prevent the use of § 1985(3) as a general federal tort law, courts have been careful to limit causes of action thereunder to conspiracies that deprive persons of constitutionally protected rights, privileges and immunities 'that are protected against private as well as official encroachment.' Libertad v. Welch, 53 F.3d 428, 446-50 (1st Cir. 1995).
>
> It is well established that § 1985(3) does not itself create any substantive rights; rather, it serves only as a vehicle for vindicating federal rights and privileges which have been defined elsewhere. See Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979). Moreover, in the context of actions brought against private conspirators, the Supreme Court has thus far recognized only two rights protected under § 1985(3): the right to be free from involuntary servitude and the right to interstate travel. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993); Caswell v. The Morning Call, Inc., No. Civ. A. 95-7081, 1996 WL 560355, at *6 (E.D. Pa. Sept. 30, 1996); Welch v. Board of Dirs. of Wildwood Golf Club, 877 F. Supp. 955, 959 (W.D. Pa. 1995).

Brown, 250 F.3d at 805.

In McArdle v. Hunagel, the Third Circuit affirmed the dismissal of a plaintiff's § 1985(3) claim where the plaintiff had alleged that private conspirators had "conspired to injure his ability to earn a living practicing law, to prevent him from having a normal life, and to cause him other damages." 588 F. App'x 118, 120 (3d Cir. 2014). In dismissing plaintiff's claim, the court cited the Supreme Court's decision in Brown and concluded that "[w]e know of no authority to extend § 1985(3) to protect earning a living through the practice of law or to having a 'normal life.' Thus, the District Court correctly dismissed [plaintiff's] § 1985 claim." Id.

Here, Plaintiff alleges that private Defendants conspired to deprive him of his civil rights. Specifically, Plaintiff states the following with respect to the object of the alleged conspiracy:

> Because of [D]efendants' retaliatory conspiracy against Ke for carrying out a statutory protected activity allowed by Drexel University's Code of Conduct and the student manuals under § 1981(b) and because of their further conspiracy to harm his civil rights, Ke was finally expelled from [DUCOM] on June 27, 2011 when Homan issued his official dismissal letter [], with his career that he had started building since high school in Toronto's Mount Sinai Hospital torpedoed abruptly. The reality in America is that if one is dismissed from a medical school, one can never transfer to another to continue one's studies. So Ke's career was destroyed, and that was an irreparable injury. A dismissed medical student cannot even apply for medical school again. Additionally, he has suffered a huge financial loss in the proximity of $200,000 [D]efendants took in tuition and fees to unjustly enrich themselves.

Doc. No. 632-1 at 221. Although it is not entirely clear which "civil rights" Plaintiff alleges Defendants conspired to deprive him of, the above statement suggests that Defendants conspired to deprive him of his right to attend medical school at DUCOM, his tuition money, and his ability to attend a different medical school. Similar to the plaintiff in McArdle, Plaintiff here has not alleged that Defendants conspired to deprive him of his right to be free from involuntary servitude or his right to interstate travel. Rather, Plaintiff alleges that Defendants conspired to deprive him of a medical school education, and also caused him financial harm. Like the plaintiff in McArdle, Plaintiff has failed to cite to any authority that would expand Section

1985(3) to cover these alleged deprivations. Moreover, Plaintiff has not established any violation of his civil rights by one or more of these Defendants, and therefore no violation has been shown about which Defendants conspired against Plaintiff. Accordingly, Plaintiff's conspiracy claim is also without merit because no genuine issue of material fact has been raised by Plaintiff.[34]

VI. CONCLUSION

For all the foregoing reasons, the Cross-Motions for Summary Judgment reveal no genuine issue of material fact regarding the sustainability of Plaintiff's claims against Defendants. Accordingly, Defendant's Motion for Summary Judgment will be granted and Plaintiff's Motion will be denied. An appropriate Order follows.

[34] Plaintiff's claim also fails to the extent that it alleges that members of DUCOM's staff conspired with one another to deprive Plaintiff of his civil rights. As discussed by the Third Circuit in Carter v. Delaware State University, 65 F. App'x 397, 400 (3d Cir. 2003), where each defendant co-conspirator is a member of the same institution a conspiracy claim fails. "This is in accord with the familiar rule that a person cannot conspire with himself and therefore for the agents of a single corporation to conspire among themselves and not with outsiders does not state a cause of action under 1985(3)." Johnson v. Univ. of Pittsburgh, 435 F. Supp. 1328, 1370 (W.D. Pa. 1977).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEI KE,

Plaintiff,

v.

DREXEL UNIVERSITY, et al.,

Defendants.

CIVIL ACTION
NO. 11-6708

ORDER

AND NOW, this 4th day of September 2015, upon consideration of Plaintiff's Motion for Summary Judgment (Doc. No. 632), Defendants' Cross-Motion for Summary Judgment (Doc. No. 634), Plaintiff's Response to Defendants' Cross-Motion (Doc. No. 640), Defendants' Response to Plaintiff's Motion (Doc. No. 647), Plaintiff's Reply to Defendants' Response (Doc. No. 652), Defendants' Reply to Plaintiff's Response (Doc. No. 653), all related exhibits and filings, and in accordance with the Opinion of the Court issued this day, it is **ORDERED** as follows:

1. Defendants' Motion for Summary Judgment (Doc. No. 634) on all remaining claims is **GRANTED**;
2. Plaintiff's Motion for Summary Judgment (Doc. No. 632) on all remaining claims is **DENIED**;
3. Any outstanding motions are **DENIED AS MOOT**;
4. The Clerk of Court shall close this case for statistical purposes.

BY THE COURT:

/s/ Joel H. Slomsky
JOEL H. SLOMSKY, J.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-3377

LEI KE,
Appellant

v.

DREXEL UNIVERSITY; JOHN FRY;
RICHARD HOMAN; SAMUEL PARRISH;
AMY FUCHS; JENNIFER HAMILTON;
ANTHONY SAHAR

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-11-cv-06708)
District Judge: Honorable Joel H. Slomsky

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 16, 2016
Before: FUENTES, VANASKIE and SCIRICA, Circuit Judges

(Opinion filed: March 22, 2016)

OPINION*

PER CURIAM

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Lei Ke appeals from an order of the United States District Court for the Eastern District of Pennsylvania, which denied his summary judgment motion and granted the Defendants' cross-motion for summary judgment. We will affirm the District Court's judgment.

Writing primarily for the parties who are familiar with the extensive record in this case, we review only those facts that are especially pertinent to our analysis. Ke, who was a medical student at Drexel University College of Medicine ("DUCOM"), was dismissed from DUCOM after his second year for poor academic performance,[1] but was conditionally readmitted on appeal to the Dean. One of the readmission conditions was that "[a]ny grade below Satisfactory will be considered grounds for dismissal from the College of Medicine." When Ke retook the four classes he had failed during his second year, he received an "MU" in one of them. Nevertheless, he was not dismissed, but was allowed to remediate the grade by passing the National Board of Medical Examiners ("NBME") Microbiology Subject Exam.[2]

Ke then began a Family Medicine internship with a practice owned by Dr. Anthony Sahar. Ke ultimately received a "U" for the clerkship. DUCOM's Clinical Promotions Committee met to determine whether the "U" constituted grounds to dismiss Ke. The Committee decided that because Ke had received positive mid-rotation feedback

[1] Ke received one "Marginal Unsatisfactory" ("MU"), and one "Unsatisfactory" ("U") during his first year, and four "U"s in his second year.

[2] These required subject matter exams are referred to as "shelf exams."

from another doctor at Sahar's practice, leniency was warranted. The Committee allowed Ke to remain enrolled, but stipulated that his remaining clerkships would be in the Philadelphia area to allow closer supervision, that he would be required to repeat the Family Medicine Clerkship, and that "[t]he receipt of any additional grade of less than Satisfactory (including Unsatisfactory or Marginal Unsatisfactory) will be considered grounds for dismissal from the College of Medicine."

Ke then began an OB/GYN clinical rotation. He passed the clinical portion of the rotation, but failed the NBME shelf exam and thus received an "MU" for the clerkship. The Promotions Committee voted to dismiss Ke, and his appeals were unsuccessful.

Ke filed a complaint in the District Court against Drexel University and several individual defendants, raising a number of causes of action, based on his belief that he was dismissed from DUCOM because of his race or ethnicity (Ke is Chinese). Following discovery and protracted litigation, including motions to amend the complaint and a motion to dismiss the complaint in part, seven claims remained at the time of summary judgment:

> (1) Count I—Intentional Discrimination in violation of 42 U.S.C. § 1981 against all Defendants; (2) Count II—Willful Retaliation in violation of 42 U.S.C. § 1981 against all Defendants; (3) Count III—Hostile Educational Environment in violation of 42 U.S.C. § 1981 against Sahar, Parrish, and Drexel University; (4) Count IV—Intentional Discrimination in violation of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, against Drexel University; (5) Count V—Willful Retaliation in violation of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d against Drexel University;[3] (6) Count

[3] Counts IV and V were brought only against Drexel, which receives federal funding.

> VI—Conspiracy in violation of 42 U.S.C. § 1985 against Sahar, Parrish, and Hamilton; and (7) Count VII—Racially Motivated Breach of Contract in violation of 42 U.S.C. § 1981(b) against all Defendants.

Dist. Ct. Mem., Dkt. #683 at 16-17. The District Court denied Ke's Motion for Summary Judgment as to all seven counts, and granted the Defendants' Cross-Motion for Summary Judgment as to all counts. Ke appealed.

I. Scope of Appeal and Standard of Review

Ke's notice of appeal references only the District Court's summary judgment order, but two weeks after his opening brief was filed, he filed a "Motion to Appeal the District Court's Prior Orders." As Appellees note in response to the motion, Federal Rule of Appellate Procedure 3(c) requires an Appellant to "designate the judgment, order, or part thereof being appealed." In his reply, Ke correctly counters that this Court has "a policy of liberal construction of notices of appeal," particularly where the Appellant is proceeding pro se. Nationwide Mut. Ins. Co. v. Cosenza, 258 F.3d 197, 202 n.1 (3d Cir. 2001); see also Gov't of the Virgin Islands v. Mills, 634 F.3d 746, 751 (3d Cir. 2011). But Ke also correctly cites United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2015), for the proposition that an argument not raised in an opening brief is waived. See also Bailey v. United Airlines, 279 F.3d 194, 204 (3d Cir. 2002) (issue is waived on appeal when

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See 42 U.S.C. § 2000d ("No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

identified in the statement of issues but not argued in the brief).[4] Even if we were to construe Ke's notice of appeal as challenging the District Court's prior orders, since he did not challenge those orders in his opening brief, we will not address them any further.[5]

We review the District Court's order granting summary judgment de novo and review the facts in the light most favorable to the nonmoving party. See Burns v. Pa. Dep't of Corr., 642 F.3d 163, 170 (3d Cir. 2011). We will affirm summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

II. The Merits

A. Section 1981 and Title VI Claims

We agree with the District Court's thorough analysis of these claims. Ke has not raised a genuine issue of material fact with respect to intentional discrimination.[6] While

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[4] Ke argues that he mentioned the prior orders in his "Concise Summary of the Case," which he indicates he filed pursuant to 3d Cir. LAR 33.3. That Rule does not apply to pro se cases, but in any event, Ke has waived review of the prior orders by not discussing them in his opening brief.

[5] We have considered whether "extraordinary circumstances" warrant our review of the earlier orders, despite the waiver. See United States v. Albertson, 645 F.3d 191, 195 (3d Cir. 2011). We do not find any such circumstances here, and we find that Ke's attempt to raise the issues by way of motion is an attempt to circumvent the Clerk's order that his brief not exceed 16,500 words. Ke's "Motion to Appeal the District Court's Prior Orders" is thus denied. We note, in any event, that we find no reversible error in the District Court's prior orders.

[6] Ke's statement that Defendants expressed in the District Court that "Caucasian [students] are smarter than minority students" is frivolous and fallacious. What Defendants said was that they "**do not** contend that Caucasians are smarter than minority

it is undisputed that Ke belongs to a racial minority, no direct or indirect evidence suggests that he was dismissed from DUCOM because of his race. The *only* evidence that could be construed as evincing racial animus are comments that were allegedly made by Dr. Sahar during Ke's clinical rotation.[7] But Dr. Sahar was not involved in making the decision to dismiss Ke, and the "U" that Dr. Sahar gave Ke for his clerkship was not a factor in Ke's dismissal. See Dkt. #634-17 (Exh. M); 634-19 (Exh. O). See Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992) ("Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision.").

We have "recognized that individuals who violate the law based on discriminatory motives sometimes do not leave a trail of direct evidence, but instead 'cover their tracks' by providing alternate explanations for their actions, [and] we have [thus] found that a plaintiff may establish a prima facie factual foundation of discrimination by drawing reasonable inferences from certain objective facts that are generally not in dispute." Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 275 (3d Cir. 2014), cert. denied sub

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students." Dkt. #647-1 at 14, ¶ 39 (emphasis added).

[7] Dr. Sahar allegedly pressed Ke to determine where he was from, and when he learned that Ke was from Communist China, he said he did not like Communist China. He also allegedly asked Ke if he ate American food or "gook food," and stated that Ke was "very big and tall for a Chinaman." Ke was not able to depose Dr. Sahar, as he was sick with cancer, and later died while the complaint was pending.

nom. Allston v. Lower Merion Sch. Dist., 135 S. Ct. 1738 (2015). The District Court painstakingly examined all of the evidence regarding students who received "U"s or "MU"s, who did not pass shelf exams or clinical rotations, and who were allegedly treated more favorably than Ke. The District Court, examining "all of the surrounding facts and circumstances," see id. at 276, found no evidence that would lead to an inference that Ke was dismissed because of his race. See Dkt. #683 at 33-54. After examining the record, we similarly find no such evidence.

B. Racially-motivated Breach of Contract

As noted, we agree with the District Court that the record presents no evidence, direct or circumstantial, of discrimination. Thus, Ke's claims of a "racially-motivated breach of contract," and his claim that he endured a hostile education environment must fail. As for the contract claim, Ke argues that the Student Handbook allowed him to remediate a grade of "MU," and thus he should not have been dismissed for the "MU" in his OB/GYN clerkship. But Ke's contract with DUCOM had been modified by the conditions imposed by the Dean on his initial re-enrollment, and the conditions imposed by the Promotion Committee after receiving a "U" in the Family Medicine clinical. Ke accepted those conditions each time by re-enrolling or continuing his enrollment in DUCOM. Thus, Ke was subject to the more stringent condition that an "MU" was sufficient for his dismissal. And we do not find any evidence in the record that racial animus, either direct or circumstantial, motivated the imposition of those conditions.

As for the hostile environment claim, we agree with the District Court that most of the comments Ke referenced do not in any way suggest a discriminatory motive.[8] And the comments by Dr. Sahar, see supra note 7, were limited in scope, and were not "sufficiently severe or pervasive to alter the conditions [of the clerkship] and create an abusive working environment." See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (analyzing a hostile work environment in the Title VII context).[9]

C. Retaliation Claim

We agree with the District Court that Ke's retaliation claims under Title VI and § 1981 fail because he did not allege that he engaged in protected activity. In other words, Ke does not claim that he was retaliated against because he complained of racial discrimination. See Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183 (2005) (holding in Title IX context that "retaliation against individuals because they complain of sex discrimination is intentional conduct that violates the clear terms of the statute" (quotation marks omitted)). While protected activity "includes not only an employee's filing of formal charges of discrimination against an employer but also informal protests of discriminatory employment practices, including making complaints to management," see Daniels v. Sch. Dist. of Phila., 776 F.3d 181, 193 (3d Cir. 2015) (quotation marks

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[8] For example, Ke complains that he was labeled as "awkward and immature," "the weirdest guy I've ever met," and "introverted." None of these phrases implies racial animus.

[9] We further note that Dr. Sahar was not present for much of the clerkship.

omitted), Ke pointed to no record evidence (aside from his own statements in his memorandum in support of his summary judgment motion) that would indicate that he complained to anyone at Drexel about racial discrimination. See Chavarriaga v. N.J. Dep't of Corr., 806 F.3d 210, 218 (3d Cir. 2015) (party opposing summary judgment "must point to specific factual evidence showing that there is a genuine dispute on a material issue requiring resolution at trial"). We thus need not discuss whether Ke met the other requirements of a prima facie case of retaliation. See Moore v. City of Philadelphia, 461 F.3d 331, 340-41 (3d Cir. 2006) (setting forth elements of retaliation claim in Title VII context).

D. Conspiracy Under 42 U.S.C. § 1985(3)

"[B]ecause § 1985(3) requires the intent to deprive of equal protection, or equal privileges and immunities, a claimant must allege some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action in order to state a claim." Farber v. City of Paterson, 440 F.3d 131, 135 (3d Cir. 2006). As we have noted above, there simply is no record evidence here of discriminatory animus.[10] Thus, Ke's conspiracy claim fails.[11]

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[10] Ke argues for the first time on appeal that his right to interstate travel was restricted. As Appellees correctly note, we generally do not address arguments that were not raised in the District Court. See Ziccardi v. City of Philadelphia, 288 F.3d 57, 65 (3d Cir. 2002). And we agree with Appellees, in any event, that the requirement that Ke complete his clerkships in Philadelphia did not in any unconstitutional way restrict his right to travel.

[11] Ke's motion to expand the record is denied. Although we may, in limited

For the foregoing reasons, we will affirm the District Court's judgment.[12]

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circumstances, have the equitable power to allow a party to supplement the record on appeal, see In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts, 913 F.2d 89, 96 (3d Cir. 1990), equity would not support supplementing the record here, as Ke has not explained his failure to introduce the documents in the District Court. Further, because Ke has failed to show racial animus, the three pages, which relate to Ke's argument regarding whether the actors could form a conspiracy, do not impact our decision in any way.

[12] Ke's motion to disqualify Judge Slomsky is denied as moot. We commend Judge Slomsky for his patience and diligence in guiding this case to resolution. Appellees' cross-motion for sanctions and Ke's cross-motion for sanctions are denied.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-3377

LEI KE,
Appellant

v.

DREXEL UNIVERSITY; JOHN FRY;
RICHARD HOMAN; SAMUEL PARRISH;
AMY FUCHS; JENNIFER HAMILTON;
ANTHONY SAHAR

(D.C. Civ. No. 2-11-cv-06708)

SUR PETITION FOR REHEARING

Present: McKEE, Chief Judge, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and SCIRICA*, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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* Judge Scirica's vote is limited to panel rehearing only.

BY THE COURT,

s/ Thomas I. Vanaskie
Circuit Judge

Dated: April 21, 2016
tmm/cc: Lei Ke
Peter Samson, Esq.

Lei Ke	:	IN THE COURT OF
	:	COMMON PLEAS OF PHILADELPHIA
Plaintiff,	:	COUNTY, PENNSYLVANIA
	:	
v.	:	JUNE TERM 2013 NO. 03506
	:	
Drexel University,	:	
	:	
Defendant	:	

ORDER

AND NOW, this 18th day of December, 2017, upon consideration of defendant's Motion for Summary Judgment and any response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED and the within matter is DISMISSED.

BY THE COURT

J.

Case ID: 130603506

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

LEI KE	:	JUNE TERM, 2013
	:	
v.	:	NO.: 03506
	:	
DREXEL UNIVERSITY	:	SUPERIOR COURT NO.:
	:	
	:	95 EDA 2018

OPINION OF THE TRIAL COURT

This is the appeal of *pro se* plaintiff/appellant, Lei Ke, from four (4) Orders entered by this Court granting (1) defendant/appellee's, Drexel University, Motion for Summary Judgment[1] and also denying Appellant's his (2) Motion to Strike[2], (3) Motion for Partial Summary Judgment[3], and, (4) Motion for Leave to Seek Clarification[4], all of which were entered on December 18, 2017.

On December 21, 2017, Appellant filed a Notice of Appeal to the Superior Court. On March 14, 2018, this Court issued a Revised 1925(b) Order[5] upon Appellant to file his Statement of Matters Complained of on Appeal. On March 27, 2018, Appellant timely filed his Statement of Matters Complained of on Appeal in which he asserts that this Court:

> "arbitrarily and capriciously dismiss[ed] his meritorious four-year action without any legal basis and to bluntly force him out of the Court of Common

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[1] Control Number 17103244.
[2] Control Number 17110993.
[3] Control Number 17110075.
[4] Control Number 17121730.
[5] A 1925(b) Order was originally issued on March 8, 2018, however it contained an error, as it required "defendant" and not the "plaintiff" to comply with the same, despite this being plaintiff's appeal. Given Appellant's litigious nature and repeated requests for "clarification" of this Court's Orders, in order to avoid any confusion and for clarification of the record, a Revised 1925(b) Order was issued *sua sponte*.

> Pleas of Philadelphia County, thus blatantly denying his right to due process and equal protection under the law as provided by § 1 of the Fourteenth Amendment to the United States Constitution. After all, the Court has issued only four bare orders—orders that are completely free of any opinion and that do not enable plaintiff to "readily discern the basis for the judge's decision' ..."

For the reasons set forth herein, Appellant's complaints of error are without legal or factual basis. It is requested that the ruling entered on Appellee's Motion for Summary Judgment be affirmed on appeal for the reasons set forth below. In light of this Court's ruling in dismissing Appellant's claims, if the Superior Court[6] affirms the entry of that Order, then the rulings on Appellant's three (3) Motions are to be deemed moot. Nevertheless, this Opinion will also address the denial of Appellant's respective Motions.

Factually, Appellant was admitted to Drexel University College of Medicine ["DUCOM"] on January 25, 2007 and he started his studies in August 2007. During his First Academic Year, Appellant received a "Marginal Unsatisfactory" grade in Behavioral Science and an "Unsatisfactory" grade in Immunology, both of which required remediation over the summer.

In his Second Academic Year from September 2008 to May 2009, Appellant received "Unsatisfactory" grades in all four major Year 2 courses: Introduction to Clinical Medicine, Medical Microbiology, Pathology and Laboratory Medicine and Medical Pharmacology.

According to the 2009 DUCOM Student Handbook, students who receive three or more grades of Unsatisfactory or Marginal Unsatisfactory in an Academic Year may be dismissed from

[6] The Superior Court is well acquainted with Appellant's underlying claims, as it issued a Non-Precedential Decision on June 15, 2017 affirming dismissal of Appellant's nearly identical claims brought against numerous individual employees of Drexel University, but not Drexel itself. See ***Ke v. Fry, et al***, 2587 EDA 2016 (J-S25019-17). This appeal addresses dismissal of his claims against Drexel only.

DUCOM.

The Pre-clinical Promotions Committee of DUCOM met with Appellant on May 11, 2009 and decided that should be dismissed from the School of Medicine. Appellant appealed his dismissal to the Dean of DUCOM, Richard Homan, M.D, who reversed the decision of the Pre-clinical Promotions Committee and reinstated Appellant under a number of conditions. Two of those conditions were that the receipt of a grade below "Satisfactory" in repeating his Second Academic Year, or a grade below "Satisfactory" during his clinical training would be considered grounds for dismissal from DUCOM.

During the next Academic Year (2009-2010), Appellant repeated the four major Second Year courses that he had previously failed, and received a "Marginal Unsatisfactory" grade while retaking Microbiology. While the grade of "Marginal Unsatisfactory" violated the terms of reinstatement as set forth by Dean Homan in his letter of July 21, 2009, the Pre-Clinical Promotions Committee granted leniency and did not dismiss Appellant. Rather, he was granted permission to study for and sit for the National Board of Medical Examiners ["NBME"] Shelf exam to remediate his "Marginal Unsatisfactory" grade in Microbiology, which he passed, resulting in a change of his grade in Microbiology to "Satisfactory."

Another academic requirement of DUCOM is that students are required to pass the United States Medical Licensing Step 1 exam within 18 months of completing their Second Academic Year. Appellant took the Step 1 exam on September 27, 2010 which meant that he had almost five months of time to study for that exam after completing the Second Academic Year. Around that same time, Appellant also started a Family Medicine clerkship in the practice of Anthony Sahar, M.D., on September 28, 2010. This clerkship ended on November 3, 2010, and the Shelf exam for Family Medicine was scheduled for November 5, 2010.

At some time between October 10 and October 20, 2010, Appellant had learned that he had failed the Step 1 exam. During the last week of the Family Medicine clerkship, he decided to defer taking the Family Medicine Shelf exam until December 29, 2010 and scheduled himself to take the Step 1 examination again on December 27, 2010, which was cancelled due to a snow storm. Appellant could not start another clerkship until he took the Step 1 exam again. He subsequently took the Step 1 exam on February 10, 2011, but he again failed that exam.

Additionally, Appellant received a failing grade for the clinical portion Family Medicine clerkship. He also failed the Family Medicine shelf exam, receiving a grade in the lowest 1% of students nationally. Lastly, he received an "Unsatisfactory" grade for the Family Medicine clerkship with Dr. Sahar.

Despite Appellant having failed the Family Medicine clerkship, and, therefore failed to comply with the conditions of his reinstatement at DUCOM by Dean Homan, the Clinical Promotions Committee decided that since he had received a favorable mid-clerkship evaluation, there were some ambiguities concerning communication to the Appellant and he was allowed to continue at DUCOM with the requirement being that he would repeat the Family Medicine clerkship, that he would serve the remainder of his clerkships in Philadelphia under the supervision of DUCOM active faculty members, and that the receipt of any grade below "Satisfactory" in the future would be grounds for his dismissal from the program. Appellant agreed to all of these terms and conditions as part of his continued medical education.

Thereafter, Appellant then completed a clerkship in Ob/Gyn. Though he passed the clinical portion of this clerkship, he took the NBME Shelf exam in Obstetrics and Gynecology on March 25, 2011 and failed that examination, receiving a score that placed him below the 1st percentile (bottom 1%) nationally.

Since Appellant's failure of the Obstetrics and Gynecology Shelf exam resulted in his receipt of a grade of "Marginal Unsatisfactory", the Clinical Promotions Committee met on April 8, 2011 and voted to dismiss Appellant based on his overall poor academic performance. He appealed this dismissal to the Clinical Promotions Committee which denied his appeal. He subsequently appealed to Dean Homan who also denied his appeal.

In a *pro se* capacity, Appellant[7] filed suit in the United States District Court for the Eastern District of Pennsylvania against Drexel University, John Fry, Richard Homan, Samuel Parrish, Amy Fuchs, Jennifer Hamilton, and Anthony Sahar. Appellant's original Complaint was filed on November 18, 2011. Subsequently, Appellant filed three Amended Complaints. The last (his Third Amended Complaint), filed on July 30, 2013, asserted claims of Intentional Discrimination in Violation of 42 U.S.C. §1981 against all defendants (though all claims against defendant John Fry had been dismissed), Willful Retaliation in Violation of 42 U.S.C. §1981, Hostile Educational Environment in Violation of 42 U.S.C. §1981, Intentional Discrimination in Violation of Title VI of the 1964 Civil Rights Act against Drexel University, Willful Retaliation in Violation of Title VI of the 1964 Civil Rights Act against Drexel University, Conspiracy in Violation of 42 U.S.C. §1985 against defendants Sahar, Parrish, Fuchs and Hamilton, and Racially Motivated Breach of Contract under 42 U.S.C. §1981(b).[8]

In that matter as was the case here, both Appellant and Appellees filed Motions for Summary Judgment. The Honorable Joel H. Slomsky entered Summary Judgment for all defendants on all of Appellant's claims on September 4, 2015. The United States Court of Appeals for the Third Circuit affirmed the District Court's grant of Summary Judgment on March 22, 2016.

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[7] Appellant has filed all of his lawsuits in a *pro se* capacity and Appellant also repeatedly seeks and has been granted *in forma pauperis* status.

[8] Appellee's Motion for Summary Judgment had attached as exhibits sufficient documentation to support its Motion.

On April 21, 2016, the United States Court of Appeals for the Third Circuit denied Appellant's Petition for a Rehearing. On October 31, 2016, the United States Supreme Court denied Appellant's Petition for a Writ of Certiorari, which sought review of the decisions of the Court of Appeals and the District Court. Appellant's subsequent Petition for a Rehearing to the United States Supreme Court was denied on January 9, 2017.[9]

After Judge Slomsky dismissed Appellant's claims, Appellant then initiated an action in the Court of Common Pleas for Philadelphia County relating to his dismissal from Drexel University College of Medicine by filing a summons on January 16, 2016, docketed at January Term 2016, No. 2073 (hereinafter "January 2016 action"). On March 9, 2016, Appellant filed his Complaint asserting claims under the Unfair Trade Practices Act against numerous employees of Drexel University College of Medicine, but not Drexel itself, since this instant matter against Drexel alone was pending.[10] The matters were not consolidated.

On August 10, 2016, the Honorable Arnold L. New granted Preliminary Objections of defendants and dismissed Appellant's Complaint in that action. On June 15, 2017, the Superior Court of Pennsylvania affirmed Judge New's decision.[11] On September 11, 2017, the Superior Court denied Appellant's application requesting reconsideration.

In granting Appellee's Motion for Summary Judgment and dismissing Appellant's claims against Drexel, this Court reviewed the decisions rendered by the learned judges in the other matters in which Appellant has sought or could have sought the same relief and determined that the doctrines and principles discussed therein in each warranted the entry of summary judgment

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[9] Appellant has appeared in a *pro se* capacity in both state and federal courts and at both the trial and appellate levels.

[10] This matter has languished in the court system as it was stayed for several years due to the length of the appeal process in the federal court action.

[11] See Footnote 6.

in this case.

Under Pennsylvania Rule of Civil Procedure Rule 1035.2, the standard for Summary Judgment is as follows:

> "After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." **Pa. R. Civ. P. 1035.2.**

Summary judgment is appropriately granted where the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***See Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1221 (Pa. 2002).** At the summary judgment stage, "[f]acts and reasonable derivative inferences are generally considered in the light most favorable to the non-moving party, and doubts are resolved against the moving party." ***Lance v. Wyeth*, 85 A.3d 434, 449 (Pa. 2014).** "In so doing, the trial court must resolve all doubts as to the existence of a genuine issue of material fact against the moving party, and, thus, may only grant summary judgment where the right to such judgment is clear and free from all doubt." ***Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (internal citation omitted).**

In this case, the right to the entry of judgment in Appellee's favor was clear and free from doubt, as Appellant's claims are precluded under the doctrines of *lis pendens*, *res judicata* and collateral estoppel, as correctly asserted by Appellee in support of its Motion for Summary Judgment. In reaching this conclusion, this Court analyzed the Opinions of Judges Slomsky and New, compared the current allegations to the allegations set forth by Appellant in both his federal and state court actions, and applied these well-established and long recognized doctrines to the

facts of the matter. Although these three (3) doctrines are similar in nature, they all have their distinctions under the law as well. In this instance, each doctrine provides sufficient support and basis to justify the dismissal of Appellant's claims against Drexel University.

The doctrine of *lis pendens* precludes a plaintiff from prosecuting a second lawsuit asserting the same claims as are asserted in an existing lawsuit. To apply, the second suit must be the same, the parties must be substantially the same, and the relief requested the same. ***Hillgartner v. Port Author.***, 936 A.2d 131, 137, 2007 Pa. Commw. LEXIS 516 (Pa Comwlth. 2006). ***Hillgartner*** is directly on-point as it relates to the facts of this case.

In ***Hillgartner***, two female telecommunications specialists for the Port Authority's Transit Police and Security Department filed complaints with the Pennsylvania Human Relations Commission and the Equal Opportunity Commission contending that they had both been denied promotion to the position of transit police officer due to discriminatory practices. After being granted "right to sue" letters, they filed a Federal Court complaint and alleged deprivation of their rights to equal protection under the Fourteenth Amendment and a violation of the First Amendment. Approximately a year and a half later, they filed a separate action in the Commonwealth Court reasserting their claim of gender discrimination alleging violations of their First and Fourteenth Amendment rights, violations of the Pennsylvania Human Relations Act, and violations of their Pennsylvania Constitutional rights.

In discussing the dismissal of the second claim under the doctrine of *lis pendens*, the Commonwealth Court found the parties to be sufficiently similar to meet the test. The plaintiffs were the same and the defendants were substantially the same, though two employees of the Port Authority were named in the Commonwealth Court action. These employees were "in privity" with the Port Authority.

Here, while Appellant's Amended Complaint asserts claims against individual defendants, none have been served; therefore, the only existing defendant is Drexel University.[12] Therefore, the parties are the same in both the state and federal court actions, i.e. Appellant v. Drexel University.

With respect to his Breach of Contract claim, Appellant alleges that the Drexel University College of Medicine ["DUCOM"] Student Handbook constituted his contract with Drexel, his dismissal by the Clinical Promotions Committee in April 2011 violated the Student Handbook, that the denial of his appeal by Dean Homan by letter of June 27, 2011 violated the Student Handbook, that Drexel violated its Academic Policies (also part of his alleged contract) by refusing his request for a formal hearing.

These same allegations were made in Count X of Appellant's Third Amended Complaint filed in the United States District Court for the Eastern District of Pennsylvania. While Appellant voluntarily dismissed this claim in the Federal Court action, he did prosecute a Racially Motivated Breach of Contract claim in his Federal Court action in which he alleged the same contractual violations in that pleading. Appellant's claim of violation of the Unfair Trade Practices and Consumer Protection law is also based upon the same alleged breach of contract.

In granting summary judgment in favor of defendants, Judge Slomsky found that Appellant did not establish a prima facie case of a Racially Motivated Breach of Contract and found as a matter of law that Appellant's dismissal and the denial of his requested formal hearing to contest his Unsatisfactory grade in his Family Medicine clerkship were not in breach of contract, Judge

[12] On November 2, 2017, Appellant filed a Motion for Joinder of the individual defendants that he had simply added to an Amended Complaint without prior Court permission. This Motion was denied by the Hon. John Milton Younge (C.C.P. Phila.) on December 4, 2017. Appellant did not appeal that ruling, nor has he raised its denial in his Statement of Matters, and, therefore, this issue, if raised by Appellant before the Superior Court is to be deemed waived on appeal. See Pa.R.A.P. 1925(b)(3)(iv).

Slomsky reasoned that the conditions placed on Appellant's reinstatement by the Dean in July 2009 were valid and enforceable, Appellant violated such conditions, that Appellant's dismissal was in compliance with the Student Handbook, and Appellant was "not entitled to a FERPA hearing in the first place."

In affirming Judge Slomsky's rulings, the Court of Appeals stated that as to the Appellant's breach of contract claims, "Ke argues that the Student Handbook allowed him to remediate a grade of "MU," and thus he should not have been dismissed for the "MU" in his OB/GYN clerkship. But Ke's contract with DUCOM had been modified by the conditions imposed by the Dean on his initial re-enrollment, and the conditions imposed by the Promotion Committee after receiving a "U" in the Family Medicine clinical. Ke accepted those conditions each time by re-enrolling or continuing his reenrollment in DUCOM. Thus, Ke was subject to the more stringent condition that an "MU" was sufficient for his dismissal. And we do not find any evidence in the record that racial animus, either direct or circumstantial, motivated the imposition of those conditions."

In light of the foregoing, Appellant's breach of contract claims in the instant matter are the same as previously ruled upon by Judge Slomsky and clearly *lis penden* applies. The same rational and application of the facts are also applicable to *res judicata* and collateral estoppel.

The doctrines of *res judicata* and collateral estoppel are well explained in ***Day v. Volkswagenwerk Aktiengesellschaft***, 318 Pa. Super. 225, 464 A.2d 1313 (Pa. Super 1983). The doctrine of *res judicata* holds "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of causes of action and of facts or issues thereby litigated, as to the parties, and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." ***Day***, *supra*, 318, Pa. Super. at 232, 464 A.2d at 1317 quoting ***In Re Estate of R.L.L.***, 487 Pa. 223, 228 n.7, 409 A.2d 321, 323 n.7 (1979) and

additional authorities.

For the doctrine of *res judicata* to apply there must be: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality or capacity of the parties suing or sued. ***Day***, *supra*, 318 Pa. Super. at 232-33, 464 A.2d at 1316-17.

Most importantly, "*res judicata* bars not only those issues actually raised **but also those issues which could have been litigated in the first action**." ***Day***, *supra*, 318 Pa. Super. at 236, 464 A.2d at 1318 [Emphasis added]. As a result, any claim raised in Appellant's Amended Complaint that are different from those asserted in Appellant's Federal Court action is nevertheless barred because he ***could have*** brought them in the federal court action. In fact, Appellant alleged breach of contract in his Federal Court Amended Complaint and then withdrew the claim after filing this action. There is nothing that precluded Appellant from asserting his Violation of the Unfair Practices and Consumer Protection Law or his Concerted Tortious Action claim in his Federal Court action. As a result, under the doctrine of *res judicata*, all claims remaining in this cause of action were properly dismissed as well.

Further, the doctrine of collateral estoppel "operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated finally in a court of competent jurisdiction from being re-litigated in a subsequent suit." ***Day***, *supra*, 318 Pa. Super. at 239, 464 A.2d at 1318. Identity of the parties is not required for the application of collateral estoppel "as long as the party against whom the defense is involved is the same." ***Day***, *supra*, 318 Pa. Super. at 236, 464 A.2d at 1319, quoting ***Thompson v. Karastan Rug Mills***, *228 Pa. Super. 260,265, 323 A.2d 341, 344 (1974).*

Final judgment on the merits has been entered on all Appellant's Federal Court claims

either by grant of motion to dismiss or entry of summary judgment. The ruling of the trial court was affirmed by the Court of Appeals. The U.S. Supreme Court denied Appellant's appeal. Appellant has had his day in court. He has not been deprived of such in anyway.

Appellant and Appellee are the same parties in both this action and the Federal Court action. He had a full and fair opportunity to litigate the issues in the Federal Court action. Therefore, the only requirement remaining for determination if collateral estoppel also applies is whether the issues decided in the Federal Court action are the same as presented here.

Comparison of the claims asserted in Appellant's Amended Complaint and the claims asserted by Appellant in his Third Amended Complaint in the Federal Court action for which Summary Judgment was ordered in favor of defendants indicate that the issues which Appellant wishes to re-litigate were, in fact, raised, addressed and decided in the Federal Court action. As a result, Appellant's claims remaining in his Amended Complaint against Drexel are also barred by the doctrine of collateral estoppel.

It is clear from a reading of Appellant's numerous court filings that he simply cannot accept the fact that despite numerous opportunities to become a physician, he was unable to do so through the fault of no one but himself. No amount of litigation, reconsideration, or appeals will change the fact that he did not meet the educational requirements of Drexel, despite being given second and third chances by the Appellee. Appellant failed his initial courses, failed them or nearly failed them a second time, and failed his shelf exams, clearly revealing he does not possess the proficiency, ability or requisite knowledge to continue on towards obtaining a medical degree.

Given the amount, time and length of the various litigation, Appellant has had the full opportunity to establish that his dismissal from Drexel University College of Medicine violated his civil rights or any other legal rights under either Federal law or Pennsylvania law. Appellant

cannot do so. He could not establish a prima facie case on the claims he asserted in Federal Court resulting in its dismissal. He was not in any way limited as to the nature of the claims he presented in Federal Court. He was permitted to assert a Pennsylvania law claim and he chose to voluntarily discontinue it.

At no time was Appellant precluded from asserting any other state law claims in his Federal Court action. Appellant is now attempting to prosecute the same claims in this Court, despite the fact that the evidence presented to Judge Slomsky presented no issue of fact to prevent him from concluding that Drexel was within its contractual rights to dismiss Appellant and that there was a lack of conspiracy or concerted tortious action in which Drexel participated.

Drexel's actions in dismissing Appellant were justified and warranted and well within the bounds of the law and the terms of Appellant's agreed upon conditions for repeating courses, as evidenced by Judge Slomsky's Opinion on this identical issue. Simply because a federal court disagreed with Appellant's position, it does not mean he can simply seek the exact relief now at the state court level. Therefore, the grant of summary judgment in Drexel University's favor was proper and is to be upheld on appeal.

Further, failing to recognize the fact that his situation is though no one's fault but his own, Appellant has done nothing but file several lawsuits against those entities and individuals he believes treated him unfairly. These lawsuits and the actions contained within the lawsuits with the continued filings of Complaints, Amended Complaints, Motions for Relief, Motions for Reconsideration, Motions for Clarification and other miscellaneous motions reveal that Appellant also fails to recognize and understand the rules of court and the laws of our legal system.

A party … is entitled to no indulgence by the Court because he or she has decided to proceed *pro se*. *See* ***Abraham Zion Corp. v. After Six, Inc.***, 607 A.2d, 1105, 1109-10 (Pa. Super.

1992). "When a party decides to act on his own behalf, he assumes the risk of his own lack of professional legal training." ***Wiegand v. Wiegand***, 525 A.2d 772, 774 (1987). It is well established in Pennsylvania that *pro se* parties proceed at their own risk. ***O'Neill v. Checker Motors Corp.***, 389 Pa. Super. 430, 567 A.2d 680, 682 (Pa.Super. 1989).

This lack of legal training and knowledge is clearly apparent in the other filings to which Appellant appeals this Court's entry of Orders in motions that he filed and were denied.

Initially, Appellant filed a Motion to Strike certain exhibits Appellee relied upon in its Motion for Summary Judgment because they are not "evidence". Appellant conflates "evidence" that may be admitted at a trial versus the "evidentiary record" that may be considered by a court on a motion for summary judgment.

Appellant's Motion to Strike specifically sought this Court to completely disregard the opinions issued in the underlying federal and state court claims, the pleadings filed therein and other evidence that he has deemed "erroneous." Appellant's motion is without basis or legal support and he simply classified the opinions of Judge Slomsky and the Court of Appeals as "erroneous federal opinions that have little probative value on the instant case" and are intended to "trigger the doctrine of res judicata."

Initially, these opinions are not erroneous, as they go directly to the heart of this matter and support Appellee's claims as to the application of the doctrines preventing continued re-litigation of Appellant's claims. Appellant is under the mistaken belief that this Court is prohibited from considering these underlying opinions, however, he cites no caselaw to support this position. Appellant's position defies logic, as if his position were taken, then the doctrines of res judicata and collateral estoppel could never be successfully raised as a defense since, under his thinking, the reviewing court could not review the prior litigation history to determine the applicability of

these doctrines. This position is baseless, illogical and without merit and should be dismissed as such. This Court's denial of Appellant's Motion to Strike was proper and should be upheld on appeal.

Appellant also filed a Motion for Partial Summary Judgment on the claims of breach of contract and concerted tortious conduct against Appellee and certain individuals. As discussed above, Appellant's breach of contract claim is barred by the aforesaid doctrines precluding re-litigation of these matters and therefore, denial of this aspect of the claim was proper.

Further, Appellant sought the entry of summary judgment in his favor against certain individuals [Sahar, Dalton, Hamilton and Fuchs] who were precluded from being joined as parties by Judge Young. Since these individuals were never proper parties to this litigation, the entry of judgment against them and in Appellant's favor was a legal impossibility.

Even if these individuals were proper parties, Appellant's seeking the entry of judgment on his concerted tortious conduct claim under The Restatement (Second) Torts § 876 also fails, as Appellant misconstrues the law by failing to recognize that the individuals named by the Appellant were agents of Drexel and are to be deemed a single entity.

Generally, the acts of the agents of a corporation are the acts of the corporation. ***Nix v. Temple University of Corn. System of Higher Education***, 408 Pa. Super. 369, 378-79, 596 A.2d 1132, 1137 (1991). Since a corporation can only act through its agents, officers, and employees, it is legally impossible for a corporation to conspire with these persons, as long as they are acting exclusively within the scope of their employment. ***Thompson Coal Co. v. Pike Coal Co.***, 488 Pa. 198, 212-13, 412 A.2d 466, 473 (1979). Individual agents, officers, or employees of a corporation, acting in their representative capacities, cannot conspire among themselves. ***Rutherfoord v Presbyterian-University Hospital***, 417 Pa. Super. 316, 333-34, 612 A.2d 500, 508 (1992). A

conspiracy is possible, however, between a corporation and its agents, officers, or employees where they were acting as individuals, rather than representatives of the corporation. See ***Gordan v. Lancaster Osteopathic Hosp. Assoc.***, 340 Pa. Super. 253, 267-68, 489 A.2d 1364, 1372 (1985).

Appellant has offered no evidence that these individuals acted in an individual capacity, therefore, even if this claim would not be precluded under *res judicata*,[13] it would still be precluded for the reasons above. Therefore, the denial of Appellant's Motion for Partial Summary Judgment was proper and should be affirmed on appeal.

Lastly, Appellant appeals the Order denying his Motion for Clarification. On December 15, 2017, Appellant sought relief requesting that the 12 individuals named in his First Amended Complaint were deemed defendants as of January 26, 2014. Appellant fails to realize that the matter was initiated against Drexel University only by way of Writ of Summons and that he simply could not add new parties to the litigation on his own without following the rules of procedure by seeking joinder or filing a separate action and then consolidating the two. However, to date, only Drexel has been properly named as a defendant and is the only party Appellant has served to date. Appellant's reliance upon Pa.R.C.P. 1028(c) is misplaced, as said rule permits amendment of the pleading subject to preliminary objection. It does not permit adding new other parties to the litigation and not serving them with the action. Simply naming these individuals in an amended pleading without more, precludes the court from taking any action whatsoever against them.

"While this court is willing to liberally construe materials filed by a *pro se* litigant, we note that appellant is not entitled to any particular advantage because he lacks legal training. See, e.g., ***Mueller v. State Police Headquarters***, 110 Pa. Commw. 265, 268, 532 A.2d 900, 902 (1987). "As our supreme court has explained, 'any layperson choosing to represent himself in a legal

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[13] See Footnote 6.

proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing." ***Vann v. Commonwealth, Unemployment Compensation Board of Review***, 508 pa. 139, 148, 494 A.2d 1081, 1086 (1985).

Here, Appellant apparently labors under the false assumption that by proceeding *pro se* he has been absolved of all responsibility to comply with procedural rules or that he could simply ignore the procedural requirements in order to reach the merits of his claim. Such is not the case, as the United States Supreme Court has explained "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules or procedural and substantive law." ***Faretta v. California***, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 2540 n.46, 45 L.Ed.2d 562, 581 n. 46 (1975). Appellant cannot now be rewarded for his failure to properly follow the rules of court involving joinder or service of parties. He proceeded on his own and must now live with his errors.

All of Appellant's claims in this matter have been litigated and were subject to a final decision by the Honorable Joel Slomsky in the Eastern District of Pennsylvania. Appellant has had his day in court. Both the U.S. Court of Appeals and the U.S. Supreme Court have confirmed that he has had his day in court, yet Appellant simply refuses to recognize this or the legal principles involved.

Therefore, for all of the foregoing reasons, this Court's rulings were proper under the law and it is requested that this Court's determinations on each of the motions addressed herein be affirmed on appeal.

BY THE COURT:

Date: April 13, 2018

ANGELO J. FOGLIETTA J.

Certificate of Service

On this date, the **13th day of April, 2018**, a true and correct copy of the attached Supplemental 1925(b) Opinion was filed by this Court with the Civil Appeals Unit for service upon the counsel listed below via the Court's electronic filing system or First Class Mail:

Peter Samson, Esq.
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Lei Ke
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J.

ANGELO J. FOGLIETTA

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LEI KE,	:	No. 85 EAL 2019
Petitioner	:	
	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
DREXEL UNIVERSITY,	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 20th day of August, 2019, the Motion for Leave to File a Reply, Motion for Leave to Respond to Drexel's New Matter, Motion for Leave to Reply to Drexel's Answer to His Motion for Leave to Respond, and Petition for Allowance of Appeal are **DENIED**.

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95 EDA 2018

IN THE SUPERIOR COURT OF PENNSYLVANIA

Le Ke

Appellant

v.

Drexel University

Appellee

No. 95 EDA 2018

Brief of Appellee With Supplemental Reproduced Record

On Appeal From the Orders of December 18, 2017
in the Philadelphia Court of Common Pleas, Docket 13060350

Respectfully submitted,

CIPRIANI & WERNER, P.C.

By: _____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

BRIEF OF APPELLE

I. COUNTER STATEMENT OF JURISDICTION

The Rule that provides appellate jurisdiction in this matter is Pennsylvania Rule of Appellate Procedure 341(a).

II. COUNTER STATEMENT OF SCOPE AND STANDARD OF REVIEW

The standard of review of a grant of summary judgment is abuse of discretion. ***Robins v. Bock,*** 827 A.2d 1213, 1214 (Pa. Super. 2003). As summary judgment was entered in this matter on the grounds of *res judicata* and collateral estoppel, the standard which applied was whether there was "genuine issue of material fact and the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits disclose that appellees were entitled to judgment as a matter of law." ***Day v. Volkswagenwerk Aktiengesellschaft***, 318 Pa. Super. 225, 232, 464 A.2d 1313, 1316 (Pa. Super *1983*).

III. COUNTER STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Trial Court properly apply the doctrines of *res judicata* and collateral estoppel in entering summary judgment in favor of appellee?

Suggested answer: Yes.

2. Did appellant assert a cause of action of Concerted Tortious Conduct?

Suggested answer: No.

3. Did the Trial Court properly deny appellant's Motion for Partial Summary Judgment?

Suggested answer: Yes.

4. Should this Court consider appellant's argument concerning dismissal of Count IV of his Amended Complaint when it was not properly preserved for appellate review?

Suggested answer: No.

5. Did the Trial Court properly deny appellant's Motion to Amend the Complaint and Join Individual Defendants?

Suggested answer: Yes.

IV. COUNTER STATEMENT OF THE CASE

A. FACTUAL HISTORY[1]

Appellant Lei Ke entered Drexel University College of Medicine ["DUCOM"] in August 2007. After receiving a grade of "Marginal Unsatisfactory" in one course and "Unsatisfactory" in another course in the first year, Ke was allowed to continue after remediating these courses over the summer. In his second year, Ke received a grade of "Unsatisfactory" in all four major Year 2 courses, resulting in his dismissal by the Pre-Clinical Promotions Committee of DUCOM on May 11, 2009. Upon appeal to the Dean, Ke was reinstated under a number of

[1] More detailed factual histories are available to this Court in its Memorandum Opinion on June 15, 2017 in Lei Ke v. John Fry, et al. No 2587 EDA 2016, [R. 7389-7398] and the Trial Court's Opinion, Appendix C to Appellant's Brief.

conditions, two of which were that his receipt of a grade below "Satisfactory" in repeating his Second Academic Year or a grade below "Satisfactory" during his clinical training would be considered grounds for dismissal from DUCOM. In repeating the Second Academic Year, Ke received a "Marginal Unsatisfactory" grade in Microbiology, which violated the terms of his reinstatement; however, the Pre-clinical Promotions Committee granted leniency and did not dismiss Ke. He was granted permission to sit for the National Board of Medical Examiners ["NBME"] shelf exam which he passed, resulting in the change of his grade in Microbiology to "Satisfactory."

Though he was granted five additional months to study for the United States Medical Licensing Step 1 exam, which DUCOM students are required to pass within 18 months of completing their Second Academic Year, Ke failed the Step 1 exam, which he took on September 27, 2010. He had started his Family Medicine clerkship on September 28, 2010. The clerkship ended on November 3, 2010 and the NBME Shelf exam for the Family Medicine clerkship was scheduled for November 5, 2010. After learning that he had failed the Step 1 exam during the last week of that clerkship, Ke decided to defer taking the Family Medicine Shelf exam until December 29, 2010 and scheduled his second attempt at the Step 1 exam for December 27, 2010. The December 27 Step 1 exam was cancelled by a snow storm and Ke had to reschedule again to February 2011, which he failed.

Ke received a grade of "Unsatisfactory" for the Family Medicine clerkship and failed the Shelf examination. Despite failing to comply with the conditions of his reinstatement, Ke was not dismissed by the Clinical Promotions Committee, but was allowed to continue at DUCOM under certain requirements which included that he would repeat the Family Medicine clerkship, that he would serve the remainder of his clerkships in Philadelphia under supervision of DUCOM active faculty members, and that the receipt of any grade below "Satisfactory" in the future would be grounds for dismissal from the program. Ke agreed to all of these as terms and conditions as part of his continued medical education. He then completed a clerkship in Obstetrics and Gynecology, but failed the NBME Shelf exam for that clerkship on March 25, 2011, receiving a score that placed him below the first percentile (bottom 1% nationally). The Clinical Promotions Committee met on April 8, 20111 and voted to dismiss Ke. He appealed unsuccessfully to the same committee and later to the Dean, who also denied his appeal.

B. PROCEDURAL HISTORY

Ke filed suit in the United States District Court for the Eastern District of Pennsylvania against defendants Drexel University ["Drexel"], John Fry, Richard Homan, Samuel Parrish, Amy Fuchs, Jennifer Hamilton, and Anthony Sahar. Ke's original Complaint was filed on November 18, 2011. Subsequently, Ke filed three

Amended Complaints. The Third Amended Complaint, filed on July 30, 2013, asserted claims of Intentional Discrimination in Violation of 42 U.S.C. §1981 against all defendants (though all claims against defendant John Fry had been dismissed), Willful Retaliation in Violation of 42 U.S.C. §1981, Hostile Educational Environment in Violation of 42 U.S.C. §1981, Intentional Discrimination in Violation of Title VI of the 1964 Civil Rights Act against Drexel University, Willful Retaliation in Violation of Title VI of the 1964 Civil Rights Act against Drexel University, Conspiracy in Violation of 42 U.S.C. §1985 against defendants Sahar, Parrish, Fuchs and Hamilton, and Racially Motivated Breach of Contract under 42 U.S.C. §1981(b). [R. 142-203][2] Both Ke and defendants filed Motions for Summary Judgment. The Honorable Joel H. Slomsky entered Summary Judgment for all defendants on all of Ke's claims on September 4, 2015. [R.4719, 4721-4802]

The United States Court of Appeals for the Third Circuit affirmed the District Court's grant of Summary Judgment on March 22, 2016. ***Ke v. Drexel University, et al*** 645 F. App'x. 161 (3d. Cir. 2016)[3] and on April 21, 2016, the United States Court of Appeals for the Third Circuit denied Ke's Petition for a Rehearing. [R.7316-7] On October 31, 2016, the United States Supreme Court

[2] As the pages of the Record transmitted by the Court of Common Pleas to the Superior Court are not individually numbered, citations are to the page on the Adobe page counter.
[3] This opinion is also contained within the record transmitted from the Court of Common Pleas at R. 6852-92.

denied Ke's Petition for a Writ of Certiorari, which sought review of the decisions of the Court of Appeals and the District Court. Ke's subsequent Petition for a Rehearing to the United States Supreme Court was denied on January 9, 2017. [R. 7319, 7321]

Ke initiated this action by the filing of a Summons naming only Drexel University on June 26, 2013. When Ke filed his Complaint on December 15, 2013, he added individual defendants John Fry, Jennifer Hamilton, Amy Fuchs, Anthony Sahar, John Dalton, Samuel Parrish, Richard Homan, Barbara Schindler, Eugene Hong, David Ruth, and Joseph Salomone. Preliminary Objections were filed by Drexel on January 6, 2014. Ke filed his Amended Complaint on January 26, 2014 and Drexel filed Preliminary Objections to the Amended Complaint on February 18, 2014. Ruling on Drexel's Preliminary Objections, the Honorable Marlene Lachman ruled that as none of the individual defendants had been served, they were not parties to the case. [R. 3240-3245] As to Counts I, III, IV, and V, Drexel's Preliminary Objections on the basis of prior actions or *lis pendens* were overruled on the basis that Drexel did not adequately point out where in the two Complaints (which were 61 pages and 86 pages long in the Federal Court and this

action respectfully) the same claims were asserted. [R.3241 at footnote 2][4] Count IV was dismissed against Drexel on other grounds. [R. 3242]

Ke's counts and claims that survived Judge Lachman's ruling on Preliminary Objections were: Count I – Breach of Contract, Count II – Violations of the Unfair Trade Practices Act, and Count V – Concerted Tortious Conduct.

On January 16, 2016, Ke initiated a third action (the second action in the Court of Common Pleas for Philadelphia County) relating to his dismissal from Drexel University College of Medicine by filing a Writ of Summons , docketed at January Term 2016, No. 2073 (hereinafter "January 2016 action"). [R.7392, 10264]

Ke filed a Complaint on March 9, 2016 in the January 2016 action asserting claims under the Unfair Trade Practices Act against numerous employees of Drexel University College of Medicine. [R.7326-7372]

On August 10, 2016, the Honorable Arnold L. New granted Preliminary Objections of defendants and dismissed Ke's Complaint in the January 2016 action. Judge New explained in his opinion that Ke's claims were barred by the doctrine of Collateral Estoppel. [R.7374-7387]

[4] By the time appellant filed his third action discussed below, Summary Judgment had been entered in the Federal Court action, making it much easier for Drexel to demonstrate that appellant was asserting the same claims in the Court of Common Pleas as he had unsuccessfully asserted in the Federal court.

On June 15, 2017, this Court affirmed Judge New's decision. [R. 7389-7398][5] On September 11, 2017, this Court denied plaintiff's application requesting reconsideration/reargument. [R. 7400] On March 27, 2018, the Supreme Court of Pennsylvania denied Ke's Petition for Allowance of Appeal. [S.R. 1b]

Ke's claims of violations of the Unfair Trade Practices and Consumer Protection law asserted in this matter are the same as alleged in the January 2016 action which this Court has already concluded were precluded by the application of the doctrine of collateral estoppel. [R.7389-7398].

V. SUMMARY OF THE ARGUMENT

Ke's Breach of Contract claim and Violation of the UTPCPL are both based on his contention that in dismissing him from DUCOM Drexel violated the terms of the Student Handbook, and that by denying his request for a formal hearing after his dismissal, Drexel violated its student policies. Ke contended that Drexel committed the same breaches of contract in his action in the Federal Court, contending that Drexel's breach of contract was the same, though it was allegedly racially motivated. The District Court entered summary judgment in favor of Drexel and specifically ruled as a matter of law that there had been no breach of contract with respect to Ke's dismissal or with respect to the denial of his request

[5] Under Superior Court I.O.P. 65.37 reliance on or citation to an unpublished memorandum pinion may be "relied upon or cited (i) when it is relevant under the doctrine of the law of the doctrines of *res judicata* or collateral estoppel ..." 210 Pa.Code §65.37

for a formal hearing. The District Court was affirmed by the United States Court of Appeals for the Third Circuit. The United States Supreme Court denied certiorari.

When Ke was not permitted to join individual defendants in this matter, he filed a third action, the January 2016 action. In that action, he asserted the same alleged breaches of contract as violations of the UTPCPL. Preliminary Objections to that Complaint were sustained and this Court affirmed the trial court. At the time this Court found that though Ke was presenting his claim as a violation of the UTPCPL, the underlying issue was the same as that litigated in the Federal Court. As Ke's claims of Breach of Contract in this action are the same, they are precluded by the application of the doctrines of collateral estoppel and *res judicata*.

In this appeal, and for the first time, Ke argues that the doctrines of collateral estoppel and *res judicata* should not be applied because Drexel's summary judgment in the Federal Court was obtained as a result of fraud. These claims were not asserted at the trial court; therefore, they should not be considered at this time. In addition, none of the behavior which Ke claims was fraudulent was actually fraudulent or played a part in the District Court's grant of summary judgment in favor of Drexel.

Summary judgment was properly entered on Ke's claim of Concerted Tortious Conduct for several reasons. The allegations in this count of Ke's complaint were precisely the same allegations he made in the Federal Court action

under the claim of Conspiracy in Violation of 42 U.S.C. §1985. Ke could not establish conspiracy when the individuals alleged to have conspired were all employees of Drexel University. In addition, the doctrine of *res judicata* not only precludes relitigation of the same claims resolved in the earlier litigation, but also precludes claims that could have ben litigated in the earlier action.

Lastly, Ke's claim that his Motion for Partial Summary Judgment and his Motion to Amend the Complaint, which would have enabled him to join several individual defendants, were improperly denied is meritless. Ke was not entitled to Summary Judgment on his Breach of Contract and Concerted Tortious Conduct claims due to his failure to establish *prima facie* cases on the same claims in the Federal Court.

Ke's Motion to Amend the Complaint to join individual defendants was properly denied as the Amendment to the Complaint would have been futile as Ke's claims against the individual defendants would have been barred by the applicable Statutes of Limitations and the doctrines of *res judicata* and collateral estoppel.

VI. LEGAL ARGUMENT

A. The Trial Court Properly Applied the Doctrines of *Res Judicata* and Collateral Estoppel Which Required That Summary Judgment be Entered in Favor of Drexel[6]

The doctrines of *res judicata* and collateral estoppel are well explained in ***Day v. Volkswagenwerk Aktiengesellschaft***, 318 Pa. Super. 225, 464 A.2d 1313 (Pa. Super 1983). The doctrine of *res judicata* holds "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of causes of action and of facts or issues thereby litigated, as to the parties, and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." ***Day***, *supra*, 318, Pa. Super. at 232, 464 A.2d at 1317 quoting ***In Re Estate of R.L.L.***, 487 Pa. 223, 228 n.7, 409 A.2d 321, 323 n.7 (1979) and additional authorities. For the doctrine of *res judicata* to apply there must be: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality or capacity of the parties suing or sued. ***Day***, *supra*, 318 Pa. Super. at 232-3, 464 A.2d at 1316-7 [other citations omitted].

Collateral estoppel is a broader concept. "It operates to prevent a question of law or an issue of fact which as once been litigated and adjudicated finally in a

[6] Appellant argues that the doctrine of *lis pendens* does not apply. When appellant initiated this action, the Federal Court action was pending; therefore the doctrine of *lis pendens* was one of the bases relied upon by Drexel in its Preliminary Objections. Appellant's Federal Court action is finally concluded; therefore, the doctrine of *lis pendens* is not being brief by appellee.

court of competent jurisdiction from being litigated in a subsequent suit." ***Day,*** *supra,* 318 Pa. Super. at 237, 464 A.2d at 1319. Collateral estoppel applies when

> 1) The issue decided in the prior adjudication was identical with the one presented in the later action, 2) there was a final judgement on the merits, 3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and 4) the party against whom it is asserted had a full and fair opportunity to litigate the issue in a prior action. ***Day,*** ***supra,*** 318 Pa. Super at 237, 464 A.2d at 1319.

Since Ke was the plaintiff in the Federal Court action and the actions started in the January 2016 action and this Court has already decided that he had a full and fair opportunity to litigate his claims in the Federal Court action, the third and fourth requirements for the application of both doctrines are satisfied.

With respect to identity of the issues and causes of action, Ke's claims under the Unfair Trade Practices and Consumer Protection Law asserted in his third cause of action, the dismissal of which was affirmed by this Court, were that the UTPCPL was violated by Drexel's alleged breach of contract "in fraudulently modifying the terms of the 2006 Student Handbook." *See* paragraphs 61-64 of the Complaint in the January, 2016 action at R. 7337-7338. This Court held that the doctrine of collateral estoppel properly applied to this claim and that Ke's assertion of a breach of contract by Drexel had been decided in the Federal Court action. As this Court noted, Ke asserted a Racially Motivated Breach of Contract count in his Federal Court action, the District Court held that there had been no breach of contract and that finding was specifically affirmed by the United States Court of

Appeals for the Third Circuit. As this Court stated, "[d]espite the fact that Ke is now presenting his claim as a violation of the UTPCPL, the underlying issue is the same. [R. 7395-6] Similarly, Ke's Breach of Contract claim asserts the same alleged violation of the Student Handbook.

Ke also claims that Drexel violated its Academic Policies (also part of his alleged contract) by refusing his request for a formal hearing after his dismissal. *See* paragraphs 88 to 101 at R. 1250. The same allegations were made in Count X of Ke's Third Amended Complaint filed in the United States District Court for the Eastern District of Pennsylvania. *See* paragraph 205 at R. 201. While Ke voluntarily dismissed this claim in the Federal Court action, he did prosecute a Racially Motivated Breach of Contract claim in his Federal Court action in which he alleged the same contractual violations in that pleading. [R. 946-48][7]

In granting summary judgment in favor of the defendants, the Honorable Joel H. Slomsky found that Ke did not establish a *prima facie* case of a Racially Motivated Breach of Contract and found as a matter of law that Drexel's dismissal and the denial of his requested formal hearing to contest his Unsatisfactory grade in his Family Medicine clerkship were not in breach of contract. *See* R. 4778-81, where Judge Slomsky explains that the conditions placed on Drexel's

[7] In allowing appellant to amend his Compliant in the Federal Court Action, Judge Slomsky ordered that the proposed Count X of the Motion to Amend was incorporated in appellant's Third Amended Complaint. R.939-40.

reinstatement by the Dean in July 2009 were valid and enforceable, plaintiff violated such conditions, that plaintiff's dismissal was in compliance with the Student Handbook, and plaintiff was "not entitled to a FERPA hearing in the first place." *See* also footnote 33 of Judge Slomsky's Opinion, [R. 4796-97].

As recognized by the trial court, *"res judicata* bars not only those issues actually raised but also those issues which could have been litigated in the first action." ***Day***, *supra*, 318 Pa. Super. at 236, 464 A.2d at 1318 [citations omitted]. As a result, any claim raised in Ke's Amended Complaint that the Court considers outside or different from those asserted in plaintiff's Federal Court action is nevertheless barred because he could have brought them in that action. In fact, Ke alleged breach of contract in his Federal Court Amended Complaint and then withdrew the claim after filing this action. There is nothing that precluded plaintiff from asserting his Violation of the Unfair Practices and Consumer Protection Law or his Concerted Tortious Action claim in his Federal Court action. As a result, under the doctrine of *res judicata*, these remaining claims were properly dismissed.

Ke argues in Section B of his Argument (pages 21-30) that the doctrine of *res judicata* does not apply because Drexel's previous judgement was procured through fraud or collusion. While Ke has attacked Drexel's behavior, its counsel's actions, and the Honorable Joel I. Slomsky repeatedly during the prosecution of his three lawsuits, he did not oppose Drexel's' Motion for Summary Judgment on any

of the bases argued in this section of his brief; therefore, they cannot be raised for the first time on appeal and should not be considered. ***Kimmel v. Sommerset County Commissioners,*** 333 A.2d 777, 779 (1975). In the event this Court deems that Ke's repeated raising of these allegations, though not in response to Drexel's Motion for Summary Judgment, permits his raising them now, they will be addressed briefly. The first argument is that in responding to Ke's Motion for Summary Judgment, Drexel allegedly "faked mitigating circumstances for many students" whom Ke contended were treated more favorably than he. This is a collateral attack on Judge Slomsky's opinion in which he found that Ke's arguments with respect to his comparators were not convincing. The alleged "faked mitigating circumstances" were stated in the voluminous documentation concerning those students that was provided to both Ke and Judge Slomsky with the specific identity of each student redacted, but the student was identified by number. While claiming that the mitigating circumstances were "faked," Ke never explains how documents produced by Drexel that were created during the years 2007 to 2011 were "faked." He points to no substantive evidence that supports this allegation. Ke also argues that Drexel created "over a dozen sham affidavits" on the eve of the grant of summary judgment in the Federal Court. Ke does not identify the affidavits to which he refers or explain why they are "sham affidavits." Several affidavits were provided to the District Court in Drexel's response to Ke's

Motion for Summary Judgment to establish that the facts upon which Ke based his claim for summary judgment were disputed. This argument is just another collateral attack on Judge Slomsky's decision. Ke argues that the affidavit of Jennifer Hamilton, M.D. is inconsistent with the deposition testimony of Dr. Dalton, but inconsistency in testimony does not establish fraud.

Next, Ke asserts that Drexel committed fraud with respect to the content of its Response to Ke's Motion to Reinstate John Fry, President of Drexel University, as a defendant. Drexel's counsel dictated a portion of Judge Slomsky's opinion of October 4, 2013 which stated,

> "[i]n accordance with DCM's FERPA policy, only inaccurate or misleading records may be challenged through the FERPA process."

Failing to indicate to his assistant that he was now resuming the text of his argument, Drexel's counsel then dictated,

> "[s]ince no cause of action lies to the denial of plaintiff's request for a formal hearing, Mr. Fry should not be subjected to such a claim whether he had no role in the decision as suggested by the defendants, or somewhat of a role as suggested by plaintiff."

As a result, the second sentence appeared in Drexel's Response to be part of the quoted opinion. When this error was discovered by Drexel's counsel, he advised Judge Slomsky of the error, and provided an amended Response to Ke's Motion to Rejoin John Fry as a Defendant. [R. 2578]. Ke continued to seek sanctions as well as disqualification of Drexel's counsel in both the Federal Court

action and this matter, despite the fact that the error was brought to the attention of Judge Slomsky, the content of his Order that Drexel cited was clarified before Judge Slomsky ruled on the substantive issue and Drexel's counsel even produced the audio file of this dictation of the Response in question which established that what Ke contends was fraud was simply a dictation error.[S.R. at 2b-7b][8]

Next, Ke asserts collusion between Judge Slomsky and defense counsel apparently because the Federal Judge's wife practiced medicine at Friends' Hospital. This is another allegation Ke has raised on several occasions, but it is simply that, an allegation for which Ke has provided no evidence, and as a result, no Court has paid any attention to it. This contention was first made by Ke in footnote 3 of his Motion to Disqualify Judge Slomsky filed with the United States Court of Appeals for the Third Circuit on January 29, 2016. He then filed an addendum to that Motion on March 4, 2016 in which he stated incongruously that though Judge Slomsky's wife, Dr. Paula Slomsky, was a "sole proprietor," she had an economic interest in Drexel University through alleged ties to Friends Hospital, which he claims is a part of DUCOM's campus. Drexel responded to this addendum on March 7, 2016 and pointed out the total lack of evidence for Ke's claim that Judge Slomsky had a financial interest in Drexel University. Ke has never presented any evidence that Judge Slomsky had a financial interest in the

[8] In the interest of judicial economy, only the relevant pages have been included in the Supplemental Record.

outcome of his case or in the financial status of Drexel University or any collusion. Therefore, there is no basis to argue fraud precludes the application of the doctrine of *res judicata*.

Ke's next claim of fraud does raise an issue of fraud, but the fraud is his. As part of his Motion for Summary Judgment package in the Federal Court action, Ke filed a "Statement of Undisputed Material Facts" which included in paragraph 39:

> [p]laintiff is sure that defendants have no evidence that Caucasians are smarter than minority students. [R.5392]

Drexel responded to this paragraph as follows:

> [d]efendants lack sufficient knowledge to respond to plaintiff's statement about his certainty, but agree they do not contend that Caucasians are smarter than minority students. That does not mean, however, that there are not factors that make it more difficult for students whose first language is not English to perform as well as other students for whom English is their primary language. There may be other factors unrelated to intelligence that affect academic performance. S.R. at 9b

Ke has repeatedly asserted that appellee, Drexel University, issued a racist manifesto, stating that Drexel expressed that "Caucasian [students] are smarter than minority students." Fortunately, the Courts that have heard Ke's complaint in this regard have recognized that he misrepresented, as he has done in his brief in this matter, what Drexel stated. In footnote 6 in its opinion affirming Judge Slomsky's entry of summary judgment on behalf of defendants, the Third Circuit stated:

> Ke's statement that Defendants expressed in the District court that "Caucasian [students] are smarter than minority students" is

> frivolous and fallacious. What Defendants said was that they "**do not** contend that Caucasians are smarter than minority students. (Emphasis provided by the Third Circuit). (Citations omitted.) ***Ke***, *supra,* 645 F. App'x. 161, footnote 6. [R.6586-7]

Ke argues that Drexel's withdrawal of its Bill of Costs a collusive effort to obstruct justice. Again, Kc lacks any evidence of collusion. What even Ke's stilted recitation of Drexel's attempt to collect its Bill of Costs demonstrates is that following a simple attempt to recoup a miniscule amount of the thousands of dollars spent in defending Ke's frivolous claims, Drexel faced objections to the Bill of Costs requiring responses to be filed with the Clerk, then replies to an appeal to the Third Circuit, a Motion for Recusal, and a Petition for a Writ of Mandamus filed with the Third Circuit. A decision to cease efforts to collect on a legitimate Bill of Costs from an litigant who has chosen not to work in order to retain his *in forma pauperus* status over at least seven years, and has heretofore failed to pay a sanction imposed as a result of his continued abuse of discovery, is more than adequate evidence to establish that Drexel's decision to withdraw its Bill of Costs resulted from its recognition that it had already cost Drexel far more than the amount it sought to recover – an amount that Ke would never pay. That is not fraud or collusion.

Next Ke argues that Drexel has waived its contention that Ke could have asserted causes of action in the Federal Court; therefore, they are barred by *res judicata* because it "allowed dual proceedings in both Federal and State Courts for

a full thirty three (33) months." Again, this argument was not raised before the Trial Court and should not be considered here. ***Kimmel v. Sommerset County Commissioners,*** *supra.* It is also patently absurd. Drexel did object to the dual proceedings. It filed Preliminary Objections on the basis of *lis pendens*, collateral estoppel, and *res judicata.* In addition, after portions of its Preliminary Objections were overruled, it moved to stay this matter pending resolution of the Federal Court matter. There is nothing more it could have done to object to the existence of dual proceedings.

Ke continues to argue that Drexel's Motion for Summary Judgment was "non standard" and "should have been stricken" because it referred to Federal Court opinions. In addition to lacking any authority for this proposition, it is clear, as was recognized by Judge Foglietta, this

> position defies logic as if his position were taken, then the doctrine of res judicata and collateral estoppel could never be successfully raised as a defense since, under his thinking, the reviewing court could not review the prior litigation history to determine the applicability of these doctrines. This position is baseless, illogical and without merit and should be dismissed as such. Opinion of the Trial Court, Plaintiff's Appendix 22a-23a.

In fact, ***Day,*** *supra,* cited by both Ke and Drexel at the trial court level and in briefs to this Court, involved this Court affirming the trial court's grant of Summary Judgment on the basis of the application of the doctrines of *res judicata* and collateral estoppel after the defendants in the ***Day*** matter had obtained judgments in their favor in the United States District Court, affirmed by the United

States Court of Appeals for the Third Circuit. The Court of Common Pleas and subsequently this Court examined the decisions of the Federal Court and determined whether Day's claims were properly precluded by the application of these doctrines. The only way for the trial court and this Court to resolve the issue of whether or not Ke could have asserted claims he is pursuing now and whether his claims were already decided in favor of Drexel in the Federal Court is to review the opinions of the District Court and Court of Appeals.

B. Plaintiff Has Not Asserted a Cause of Action of Concerted Tortious Conduct[9]

Ke's allegations with respect to concerted tortious conduct are essentially the same as his allegations of conspiracy in his Federal Court action. In order to establish liability under the doctrine of Concerted Tortious Conduct, Ke must establish defendants "acted in concert with other defendants." ***Larson v. Philadelphia Newspapers***, 411 Pa. Super. 534, 542, 602 A.2d 324, 329 (Pa. Super. 1991). The analysis employed by the Court is the same under "Concerted Tortious Action" as employed in allegations of conspiracy. *See* ***Larson***, *supra*, 411 Pa. Super. at 546-7, 602 A.2d at 330-331. Ke alleges that all of the individual defendants who engaged in this concerted action, Jennifer Hamilton, M.D., Amy Fuchs, M.D., Anthony Sahar, M.D. and John Dalton, M.D., were employees or

[9] Ke did not brief this issue. Since he contends summary judgment was entered in error, he has appealed the dismissal of this claim, and Drexel is addressing it.

agents of Drexel University. Drexel has admitted this in its Answer and specifically pled in its New Matter that with respect to Ke's education at DUCOM, all of these individuals acted within the course and scope of employment or agency of Drexel.[10] As a result, Drexel cannot be deemed to have engaged in concerted action with itself. *See,* ***Rutherford v. Presbyterian Univ. Hosp.***, 417 Pa. Super 316, 334, 612 A.2d 500, 508 (1992) ["(a) single entity cannot conspire with itself and similarly **agents** of a single entity cannot conspire among themselves."] Judge Slomsky reached the same conclusion, a legal finding that is binding based on the application of the doctrine of collateral estoppel. *See* footnote 34 of Judge Slomsky's Opinion, R. 4802

Ke's claim of Concerted Tortious Conduct was also barred by the doctrine of *res judicata* even if it were different from plaintiff's claims in his Federal Court action, he nevertheless could have brought the claims in the Federal Court action.

C. The Trial Court Properly Denied Appellant's Motion for Partial Summary Judgment

Other than to state that "Judge Foglietta abused his discretion by dismissing it [Ke's Motion for Partial Summary Judgment] without even looking at it," Ke

[10] In arguing that since Drs. Sahar and Dalton could not be served at Drexel's Office of General Counsel, they are not employees or agents of Drexel, plaintiff confuses service, personal jurisdiction, and agency. All of the actions of Drs. Sahar and Dalton on behalf of Drexel took place in New Jersey and they both resided and worked in New Jersey; therefore, they could not be properly served in Philadelphia. Pa.R.Civ.P. 402 Nevertheless, they were agents of appellee because their supervision of appellant during his Family Medicine clerkship was exclusively on behalf of DUCOM.

offers no argument or basis for his conclusion. Ke sought partial summary judgment on his Breach of Contract and Concerted Tortious Conduct claims not only against Drexel University, but all of the individuals he was seeking to join to the case, none of whom had been a party to the case, and none of whom had been served as of the filing of his Motion for Partial Summary Judgment. Obviously, he had no authority to support his contention that the Court should have granted summary judgment against individuals who were not even parties to the case. It was determined in Ke's Federal Court action that his dismissal did not violate the Student Handbook and he was not entitled to a formal hearing under the Student Policies; therefore, Ke's Motion for Partial Summary Judgment was meritless.

D. Ke's Argument That His "Civil Conspiracy For Retaliation Purposes Against Sahar, Dalton, Hamilton, Fuchs, And Drexel University" Should Not Have Been Dismissed Was Not Raised Properly On Appeal And Should Not Be Considered.

As indicated in the Procedural History above, in ruling on Preliminary Objections, Judge Lachman dismissed this count against Drexel only, but had pointed out that the individual defendants named in this count had not been served and therefore were not parties to the case. Ke's Notice of Appeal asserted an appeal from four orders entered in December, 2017 and Ke did not include in his Notice of Appeal Judge Lachman's Order of March 3, 2014. Ke's description of appeal stated in his docketing statement filed with this Court does not mention an appeal on the basis of the dismissal of this count of his Amended Complaint, and

Ke's generalized statement pursuant to Pa. R.A.P. 1925(b)(4) which incorporates by reference his Notice of appeal also does not mention this alleged basis for appeal. This failure is not excused because the trial court's opinion had not been issue because the dismissal of this count of the Amended Complaint was not an issue addressed by Judge Foglietta when he granted summary judgment to Drexel. As a result, under Pa. R.A.P. 1925(b)(4)(vii) the issue is waived and Ke's argument should be disregarded. ***Lineberger v. Wyeth,*** 2006 Pa. Super, 894 A.2d 141, 148 (Pa. Super. Ct. 2006)

In the event this Court entertains Ke's argument concerning dismissal of this count, Judge Lachman's ruling was entirely appropriate for the reasons stated above with respect to Ke's concerted tortious conduct claim. Ke cannot establish a conspiracy when the alleged actors were Drexel University and Drexel University's employees.

E. Appellant's Attempts to Join Defendants and Amend his Complaint Were Properly Denied.

Ke first attempted to join additional individual defendants by naming them in his Complaint without having named them in the Summons which initiated this action. After Judge Lachman ruled on Preliminary Objections that none of the individual defendants were parties to the case because they had not been served, Ke then attempted to join individual defendants by filing a Motion on November 9, 2015 [R. 15] which was denied by the Honorable Jacqueline F. Allen on December

16, 2015. [R. 16] Ke's Motions to Reconsider, to Certify the issue for appeal, and for the Determination of Finality in order to file an interlocutory appeal were denied on January 8, 2016. [R. 18] This led Ke to file his second action in the Court of Common Pleas (the January 2016 action), which has been discussed above and resulted in Preliminary Objections being sustained and the dismissal of that lawsuit which was affirmed by this Court.

Since the trial court had denied Ke's attempt to join additional defendants on two prior occasions, his motion which was denied by the Honorable Angelo Foglietta should have been presented as a Motion for Reconsideration. Plaintiff did not argue that the Court should reconsider prior rulings because he could not establish any base for such reconsideration.

Motions for Reconsideration are directed to the discretion of the trial court and should only be granted when "1) there is an intervening change in the controlling law, 2) thc availability of new evidence that was not previously available, or 3) the need to correct a clear error of law to prevent manifest injustice." ***W.C. v. Janssen Pharms., Inc.***, 2015 Phila Ct. Com. Pl. LEXIS 324 *citing* ***Pennsylvania R.R. Co. v. Public Serv. Comm'n,*** 179 A. 850 (Pa. Super. 1935). Ke has not established that any of these circumstances existed.

While Pennsylvania Rule of Civil Procedure 1033 indicates that requests for amendment should be freely granted, when the amendment would be futile and the

claims that the plaintiff seeks to add would otherwise be barred, the motion to amend should be denied. ***Brickman Group Ltd. v. CGU Ins. Co.***, 865 A.2d 918, 927 (Pa. Super. 2004). Ke's Motion for the Joinder of Individual Defendants, which is essentially a Motion to Amend the Amended Complaint to add individual defendants John Fry, Jennifer Hamilton, Amy Fuchs, Samuel Parrish, Richard Homan, Anthony Sahar (deceased), John Dalton, Joseph Salomone, Barbara Schindler, Eugene Hong, and John Gyllenhammer, was properly denied because all of the claims against these individual defendants would be barred by the applicable Statute of Limitations.

Ke's cause of action arises out of his dismissal from Drexel University College of Medicine which was finalized on June 27, 2011 when Richard Homan, M.D. denied Ke's appeal of his dismissal by the Clinical Promotions Committee. Ke did not name any individual defendants in the Writ of Summons that he filed on June 26, 2013. As indicated by Judge Lachman in her Order of April 3, 2014, [R. 3240-45] none of the individual defendants that plaintiff seeks to join were served; therefore, the Statute of Limitations against them has not been tolled. It has run from June 27, 2011 to the present; therefore, it has run on all of the claims plaintiff attempts to assert against individual defendants.. Specifically, the statute of Limitations for breach of contract is four years 42 Pa. C.S. §5525; therefore that expired on June 29, 2015. The Statute of Limitations for Common Law Retaliation

(Count III), Conspiracy for Retaliation Purpose (Count IV), Concerted Tortious Conduct (Count V), Violation of Pennsylvania Constitutional Rights (Count VI), and Negligent Infliction of Emotional Distress (Count VII) are all two years. 42 Pa. C.S. §5525. The Statute of Limitations for a claim under the Unfair Trade Practices and Consumer Protection Law is six years; therefore, it expired on June 27, 2017. *See* ***Gabriel v. O'Hara***, 368 Pa. Super 383, 396 534 A.2d 488, 495 (Pa. Super, 1987)

The claims asserted in the existing Amended Complaint are also barred by the doctrines of *res judicata* and collateral estoppel. In ruling on Preliminary Objections, Judge Lachman dismissed Counts I (Breach of Contract), III (Common Law Retaliation, IV (Civil Conspiracy), VI (Violation of Pennsylvania Constitutional Rights, and VII (Negligent Infliction of Emotional Distress) as against Drexel only as the individual defendants were not parties to the action at the time of Judge Lachman's ruling as they had not been served. However, the same bases that required the dismissal of these counts against Drexel apply to these counts if the individual defendants were joined.

Without question, Ke's requested claims against Jennifer Hamilton, M.D., Amy Fuchs, M.D., Samuel Parrish, M.D., Richard Homan, M.D. and Anthony Sahar, M.D., or the representative of Dr. Sahar's estate are explicitly barred by the doctrine of *res judicata*. As discussed above, John Dalton, Joseph Salomone, and

John Gyllenhammer are in privity with Drexel University, *res judicata* also bars plaintiff's claims against them. All these defendants acted as agents and employees of Drexel University within the course and scope of their employment, therefore they are in privity. ***Day***, *supra*, 318 Pa. Super. at 233-4, 464 A.2d at 1316.

To the extent Ke contends his retaliation claim in this action is different from his retaliation claim in his Federal Court case, Ke could have brought the instant claim in the Federal Court matter; therefore, Ke's claim is barred on the doctrine of *res judicata*.

VII. CONCLUSION

The doctrines of *res judicata,* and collateral estoppel exist to prevent exactly what Ke is attempting to do in this cause of action. Having had a full opportunity to establish that his dismissal from Drexel University College of Medicine violated his civil rights or any other legal rights under Federal law and Pennsylvania State law, plaintiff could not do so. He either could not establish the same factual allegations that he has made in this action in the Federal Court or the same facts upon which he bases his claims in this action were insufficient to establish a *prima facie* case on the claims he asserted in Federal Court. He was not limited as to the nature of the claims he presented in Federal Court. He was permitted to assert a Pennsylvania law claim and voluntarily discontinued it. At no time was he precluded from asserting any other state law claims in his Federal Court action.

After failing to establish a *prima facie* case on any of his claims, plaintiff is attempting to prosecute the same claims under different titles in this Court, despite the fact that the evidence presented to Judge Slomsky presented no issue of fact to prevent him from concluding that Drexel was within its contractual rights to dismiss Ke and that there was a lack of conspiracy or concerted tortious action in which Drexel participated. As a result, Drexel University respectfully requests that this Court affirm the summary judgment entered on its behalf and against Ke.

Respectfully submitted,

CIPRIANI & WERNER, P.C.

By: 

Peter Samson, Esquire
I.D. No. 23130
Attorneys for Appellee
450 Sentry Parkway
Suite 200
Blue Bell, PA 19422
610-567-0700

CERTIFICATE OF SERVICE

I, Peter Samson, Esquire, counsel for Appellee hereby certify that a true and correct copy of the attached Brief of Appellee has been served on this 23 day of July, 2018 to the party named below by first class mail, postage pre-paid:

Lei Ke
4025 Roosevelt Blvd
Philadelphia, PA 19124

Respectfully submitted,

CIPRIANI & WERNER, P.C.

By: Peter Samson

Peter Samson, Esquire
I.D. No. 23130
Attorneys for Appellee
450 Sentry Parkway; Suite 200
Blue Bell, PA 19422
610-567-0700

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

CIPRIANI & WERNER, P.C.

By: 

Peter Samson, Esquire
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SUPPLEMENTAL REPRODUCED RECORD

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LEI KE, Petitioner v. JOHN FRY, JENNIFER HAMILTON, AMY FUCHS, SAMUEL PARRISH, RICHARD HOMAN, MARIANNE SAHAR (ON BEHALF OF ANTHONY SAHAR, DECEASED), JOHN DALTON, JOSEPH SALOMONE, BARBARA SCHINDLER, EUGENE HONG AND JOHN GYLLENHAMMER, Respondents	:	No. 454 EAL 2017 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 27th day of March, 2018, the Application to File an Addendum, which was docketed on October 9, 2017, be GRANTED, and the Applications to File an Addendum, Motions for Leave to File a Response, and the Petition for Allowance of Appeal be DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEI KE,	**CIVIL ACTION NO. 11-CV-6708**
Plaintiff,	**HONORABLE JOEL H. SLOMSKY**
v.	
DREXEL UNIVERSITY, et al.	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDNATS' RESPONSE TO PLAINTIFF'S MOTION TO REINSTATE JOHN FRY AS A DEFENDANT AND COUNTER MOTION FOR SANCTIONS

This Motion presents at least the fourth attempt by plaintiff to drag John Fry, President of Drexel University, into this lawsuit. Nothing has changed since the last time the Court decided this issue and denied plaintiff's Motion for Reconsideration (Doc. No. 127) and wrote the opinion of October 4, 2013 (Doc. No. 222). The Court's discussion of plaintiff's attempt to add John Fry as a defendant on October 4, 2013 accurately reviews the facts established by plaintiff and explains why Mr. Fry should not be added as a defendant in this action.

In their response to plaintiff's Motion for Leave to Add Defendants (Doc. No. 363), defendants request the Court declare "once and for all" that plaintiff has no viable Breach of Contract claim as a result of Drexel's denial of his request for a "formal [FERPA] hearing." That part of plaintiff's Motion to Add John Gyllenhammer, Chief Counsel of Drexel University College of Medicine as a defendant was based on his alleged participation in the decision to deny the formal hearing. Defendants argued that no breach of contract resulted from the denial of the formal hearing request because plaintiff's purpose was to challenge the grade he received for the

clinical portion of the Family Medicine Clerkship and not to correct an inaccurate or mis-recorded record. In fact, the Court had already reached this conclusion in its opinion of October 4, 2013 in which it stated:

> [i]n accordance with DCM's FERPA policy, only inaccurate or misleading records may be challenged through the FERPA process. Since no cause of action lies for the denial of plaintiff's request for a formal hearing, Mr. Fry should not be subject to such a claim whether he had no role in the decision as suggested by defendants, or somewhat of a role as suggested by plaintiff.

Plaintiff's claims that Mr. Fry should be added as a defendant under the doctrine of *respondeat superior* due to plaintiff's alleged wrongful dismissal from DUCOM is asserted without any valid citation to any authority which suggests that a President of a University is responsible for all decisions made by faculty members or administrators of different portions of the University. Moreover, plaintiff's claim is based upon an absolute misstatement of fact. Plaintiff alleges that Mr. Fry "had the authority to institute corrective measures on defendants' behalf but chose not to." Defendants presume that plaintiff meant to state that Mr. Fry had the authority to institute corrective measures on his [plaintiff's] behalf. This is in fact incorrect. The appeal process for a Drexel College of Medicine student who believes that he has been given an incorrect grade does not extend to an appeal to the President of Drexel University, and Mr. Fry would has no authority to change a grade of a student in the Medical School. Similarly, the process for a medical student to appeal his dismissal by the Promotions Committee permits an appeal to the Promotions Committee and an appeal to the Dean. There is no right of appeal to the President of Drexel University, and no authority for the President of the University to reverse such a dismissal.

Plaintiff's attempt at the conclusion of his Memorandum of Law to rejoin Mr. Fry as a defendant subject to liability for his alleged Section 1981 (b) claims, alleged breach of contract

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEI KE,	**CIVIL ACTION NO. 11-CV-6708**
Plaintiff,	**HONORABLE JOEL H. SLOMSKY**
v.	
DREXEL UNIVERSITY, et al.	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDNATS' AMENDED RESPONSE TO PLAINTIFF'S MOTION TO REINSTATE JOHN FRY AS A DEFENDANT AND COUNTER MOTION FOR SANCTIONS

This Motion presents at least the fourth attempt by plaintiff to drag John Fry, President of Drexel University, into this lawsuit. Nothing has changed since the last time the Court decided this issue and denied plaintiff's Motion for Reconsideration (Doc. No. 127) and wrote the opinion of October 4, 2013 (Doc. No. 222). The Court's discussion of plaintiff's attempt to add John Fry as a defendant on October 4, 2013 accurately reviews the facts established by plaintiff and explains why Mr. Fry should not be added as a defendant in this action.

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clinical portion of the Family Medicine Clerkship and not to correct an inaccurate or mis-recorded record. In fact, the Court had already reached this conclusion in its opinion of October 4, 2013 in which it stated:

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Plaintiff's claims that Mr. Fry should be added as a defendant under the doctrine of *respondeat superior* due to plaintiff's alleged wrongful dismissal from DUCOM is asserted without any valid citation to any authority which suggests that a President of a University is responsible for all decisions made by faculty members or administrators of different portions of the University. Moreover, plaintiff's claim is based upon an absolute misstatement of fact. Plaintiff alleges that Mr. Fry "had the authority to institute corrective measures on defendants' behalf but chose not to." Defendants presume that plaintiff meant to state that Mr. Fry had the authority to institute corrective measures on his [plaintiff's] behalf. This is in fact incorrect. The appeal process for a Drexel College of Medicine student who believes that he has been given an incorrect grade does not extend to an appeal to the President of Drexel University, and Mr. Fry would has no authority to change a grade of a student in the Medical School. Similarly, the process for a medical student to appeal his dismissal by the Promotions Committee permits an appeal to the Promotions Committee and an appeal to the Dean. There is no right of appeal to the President of Drexel University, and no authority for the President of the University to reverse such a dismissal.

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February 24, 2014

The Honorable Joel H. Slomsky
United States District Court - Eastern District of PA
5614 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

RE: Lei Ke v. Drexel University, et al.
U.S. District Court, E.D.PA 11-cv-6708

Dear Your Honor:

In both his Reply to Defendants' Response to Plaintiff's Motion to Reinstate John Fry as a Defendant [Document No. 401], and his Motion to Severely Sanction Defense Counsel for their Egregious Misconduct [Document No. 402], defendant accurately pointed out that in the Memorandum of Law in Support of defendants' Response [Document No. 396], the quote taken from Your Honor's opinion of October 4, 2013 [Document No. 222] contained language that was added by defense counsel. The text which was added to the quote from the opinion should have been presented as argument, not as quote from your opinion. This is an inexcusable error on my part. No one else is responsible for it.

While I will respond to plaintiff's Motion to Severely Sanction Defense Counsel for their Egregious Misconduct, I wanted Your Honor to know of the error and also to be aware that I have filed an Amended Response to Plaintiff's Motion to Reinstate John Fry as a Defendant which corrected the misquotation [Document No. 403].

Very truly yours,

Peter Samson

PS/kf

cc: Lei Ke

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March 4, 2014

The Honorable Joel H. Slomsky
United States District Court
Eastern District of Pennsylvania
5614 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

RE: Lei Ke v. Drexel University, et al.
U.S. District Court, Eastern District of PA 11-cv-6708

Dear Your Honor:

On March 3, 2014 defendants' Response to Plaintiff's Motion to Disqualify Peter Samson and Stefanie Anderson was filed via the electronic filing system. The Memorandum of Law in that Response refers to providing Your Honor and plaintiff with a digital file of the dictation in question. Enclosed is a CD containing a .wav file of that dictation. It should play in any computer equipped with a media player.

Very truly yours,

Peter Samson

PS/kf
(enclosure)

cc: Lei Ke (with enclosure)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEI KE,	**CIVIL ACTION NO. 11-CV-6708**
Plaintiff,	**HONORABLE JOEL H. SLOMSKY**
v.	
DREXEL UNIVERSITY, et al.	
Defendants.	

DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS (DOCUMENT 632-2)

1. Admitted.

2. Admitted in part, denied in part. It is admitted that defendant Drexel University informed plaintiff that he had failed four major courses of the Second Academic Year. Answering defendants are unable to respond to plaintiff's statement that "defendants informed him that he had failed four courses without verifying the 'fails' with him" because they do not know what that means. By way of further answer, plaintiff essentially admitted at his deposition that his transcript was accurate and the failure of the four courses in the Second Year appears on the transcript. *See* plaintiff's deposition, p. 291, Exhibit "A." It is denied that plaintiff was "ordered to remediate the courses." To the contrary, after being dismissed by the Promotions Committee, plaintiff appealed and his appeal was granted by defendant Richard Homan, M.D., Dean of DUCOM, who placed several conditions on plaintiff's reinstatement, one of which was that he re-take the courses that he had failed.

3. This is not a statement or a fact.

4-5. It is admitted that plaintiff has quoted portions of the Student Handbook.

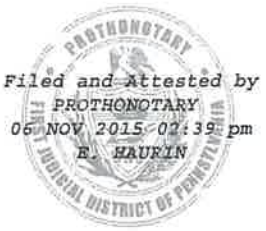
for failures in the First Year. Two students, identified as numbers 30 and 405, whose academic performances were comparable to plaintiff's were dismissed after multiple failures in the second year, unlike plaintiff. Further, this chart does not establish that any unlawful discrimination occurred as plaintiff cannot demonstrate that any students of Chinese ethnicity with comparable academic performance were dismissed.

38. It is admitted that plaintiff was expelled. The remaining alleged facts of his paragraph are denied. Plaintiff's allegations with respect to what the chart that was provided by Drexel with respect to students who were expelled between 2007 and 2011 does not establish anything. First of all, plaintiff has added two students to the chart. The student plaintiff identified with the initials "LZ" **withdrew** after failing the Step exam for the third time. He was not dismissed and the reason for his withdrawal had nothing to do with Drexel as the USMLE grades the Step exams. The second student, whom plaintiff has identified with the initials JY was not dismissed until 2013; yet plaintiff does not have data and therefore has not added data concerning dismissals after June 2011 which obviously skews the data.

39. Denied. The dismissal data applies to the years 2007 to 2011 and plaintiff is making conclusions based upon demographic information for the year 2011-2012. Further, since the basis of the dismissals of the students listed on plaintiff's chart has not been established, no significant data can be derived from such a chart. Defendants lack sufficient knowledge to respond to plaintiff's statement about his certainty, but agree that they do not contend that Caucasians are smarter than minority students. That does not mean, however, that there are not factors that make it more difficult for students whose first language is not English to perform as well as other students for whom English is their primary language. There may be other factors unrelated to intelligence that affect academic performance.

TO: PLAINTIFF

You are hereby notified to file a written response to the enclosed New Matter within twenty (20) days from service hereof or a judgment may be entered against you.



Peter Samson

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Attorneys for Defendant

Lei Ke	:	IN THE COURT OF
	:	COMMON PLEAS OF PHILADELPHIA
Plaintiff,	:	COUNTY, PENNSYLVANIA
	:	
v.	:	JUNE TERM 2013 NO. 03506
	:	
Drexel University,	:	
	:	
Defendant	:	

ANSWER WITH NEW MATTER OF DEFENDANT, DREXEL UNIVERSITY, TO PLAINTIFF'S FIRST AMENDED COMPLAINT

1. Admitted in part, denied in part. It is admitted that plaintiff alleges such claims. It is denied that he has properly stated causes of actions against Drexel University. It is further denied that plaintiff is entitled to injunctive, equitable and compensatory relief. Further, as plaintiff has not served any individual defendants, he has no causes of action against them.

2. Denied.

3. Admitted in part, denied in part. It is admitted that plaintiff alleges such claims. It is denied that he has properly stated causes of action against Drexel University. It is further

denied that plaintiff is entitled to injunctive, equitable and compensatory relief, and punitive damages.

4. Denied.

5. Denied that venue is proper as a nearly identical case is pending in the United States District Court for the Eastern District of Pennsylvania, *Lei Ke v. Drexel University, et al.*, Civil Action No. 11-CV-6708.

6. Denied. It is further denied that Dr. Anthony Sahar is a "key defendant" in the pending matter in the United States District Court for the Eastern District of Pennsylvania, *Lei Ke v. Drexel University, et al.*, Civil Action No. 11-CV-6708.

7. Admitted in part; denied in part. It is admitted that plaintiff was a medical student at Drexel University College of Medicine ("DUCOM") during the academic years 2007-2008 and 2008-2009, then dismissed and readmitted for the academic years 2009-2010 and 2010-2011. Plaintiff was then dismissed from DUCOM on April 8, 2011. It is denied that defendant violated any contract with Plaintiff. It is further denied that any contract between student and answering defendant was violated. Defendant admits plaintiff's allegation of residency.

8. Denied as stated. It is admitted only that Drexel University is a Pennsylvania corporation with its official address as stated by plaintiff.

9. Admitted in part; denied in part. It is admitted that John Fry was and is President of Drexel University. It is denied that plaintiff has properly stated causes of action against John Fry. It is denied that he performed his duties solely at the address stated. It is denied that plaintiff was denied due process, equal protection or denied any rights. While plaintiff's request for a formal hearing was properly denied it is denied that Mr. Fry was directly involved in the denial. Plaintiff's claims of violation of the Pennsylvania Constitution have been dismissed.

10. Denied as stated. Barbara Schindler, M.D. is a Professor and Vice Dean for Educational and Academic Affairs at DUCOM. It is denied that she performed her duties solely at the address stated.

11. Admitted in part; denied in part. It is admitted that Amy Fuchs, M.D. was the Associate Dean for Student Affairs at DUCOM. It is denied that she performed her duties solely at the address stated.

12. Admitted in part; denied in part. It is admitted that Jennifer Hamilton, M.D. is the Director of the Family Medicine Clerkship at DUCOM. It is denied that she performed her duties solely at the address stated.

13. Admitted in part; denied in part. It is admitted that Samuel Parrish, M.D. was the Senior Associate Dean for Student Affairs and Admissions at DUCOM. It is denied that he performed his duties solely at the address stated.

14. Admitted in part; denied in part. It is admitted that Richard Homan was the Dean of DUCOM. It is denied that he performed his duties solely at the address stated.

15. Admitted in part; denied in part. It is admitted that Eugene Hong is the Associate Dean for Primary Care and Community Health and Chair of Family, Community and Preventative Medicine at DUCOM. It is denied that he performed his duties solely at the address stated.

16. It is admitted only that Anthony, Sahar, M.D. was a member of the clinical faculty of DUCOM. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

17. Admitted in part; denied in part. It is admitted only that John Dalton, M.D. is a physician at AM Sahar Family Practice located in Monmouth New Jersey. The remaining

allegations in this paragraph of plaintiff's Amended Complaint are denied.

18. Admitted in part; denied in part. It is admitted that David Ruth, Ph.D. is the Dean of Students at Drexel University. It is denied that he performed his duties solely at the address stated.

19. Admitted in part; denied in part. It is admitted that Joseph Salomone manages the Registrar offices for Drexel University. It is denied that he performed his duties solely at the address stated.

20. Admitted in part; denied in part. It is admitted only that John Gyllenhammer is the Associate Vice President and Chief Counsel for DUCOM. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

21. Admitted in part; denied in part. It is admitted only that plaintiff was admitted to DUCOM in August 2007. Answering defendant denies the remaining allegations in Paragraph 21 for lack of knowledge after a reasonable investigation.

22. Answering defendant denies said allegations for lack of knowledge as to plaintiff's medical diagnoses after reasonable investigation. It is denied that plaintiff requested accommodation from Dr. Parrish.

23. Admitted in part; denied in part. It is admitted that in May 2009 plaintiff failed all major courses of the Second Academic Year at DUCOM and was dismissed. It is denied that any one other than plaintiff was responsible for such failures. It is admitted that plaintiff appealed to the Dean, Richard Homan, who granted his appeal in July 2009 and reinstated plaintiff under several conditions, one of which being that the receipt of any grade lower than Satisfactory would be considered grounds for dismissal. It is denied that any contract between plaintiff and answering defendant was violated. It is denied that plaintiff ever requested or was

denied accommodation. The remaining allegations in Paragraph 23 of plaintiff's Amended Complaint are denied.

24. Denied. It is admitted that pursuant to his request to be reinstated, plaintiff repeated all the courses he failed and then he chose when he would start his third year clinical rotations to have additional time to study for the United States Medical Licensing Examination Step 1 which he nevertheless failed. It is denied that any contract between plaintiff and answering defendant was violated. Defendants deny the remaining allegations in Paragraph 24 of plaintiff's Amended Complaint for lack of knowledge after reasonable investigation. It is denied that DUCOM was "anxious to grab his tuition and fees."

25. Admitted in part; denied in part. It is admitted that plaintiff chose to start his Third Year clerkship on September 28, 2010 at AM Sahar Family Practice located in Monmouth New Jersey. It is denied that DUCOM "assigned" plaintiff. The remaining allegations in Paragraph 25 are denied.

26. Admitted in part; denied in part. It is denied that Dr. Sahar "insisted" on knowing where plaintiff came from or that any point of origin for plaintiff was "not good enough" for Dr. Sahar. Dr. Sahar and plaintiff had a discussion at the start of plaintiff's clerkship during which Dr. Sahar inquired about plaintiff's background. However, it is denied that Dr. Sahar's questions had anything to do with carrying a bias or engaging in discriminatory conduct. As Dr. Sahar is not from the United States and came from a multi-cultural background, he is curious as to the background of people who also are not "originally from the United States." It is denied that Dr. Sahar ever talked to plaintiff in an "arrogant, condescending demeanor" or established a "master-and-slave relationship."

27. Admitted in part; denied in part. It is admitted that Dr. Sahar traveled to Portugal

but it is denied that the trip took four weeks. Rather, Dr. Sahar was out of his office for only ten working days. It is admitted that while Dr. Sahar was away, both plaintiff and another student were supervised by Dr. John Dalton. It is denied that any contract between plaintiff and answering defendant was violated. It is denied that Dr. Dalton's supervision of plaintiff and another student was a violation of any contract. It is further denied that Dr. Dalton "harmed" plaintiff in any way.

28. Denied as stated as Dr. Dalton's mid-block evaluation speaks for itself. By way of further answer, answering defendant points out that though the evaluation was completed in the fifth week, it applied only to the first half of clerkship.

29.-31. The allegations in these paragraphs of plaintiff's Amended Complaint are admitted in part and denied in part. With respect to the incident involving a patient of Dr. Sahar who had metastatic prostate cancer, it is admitted that plaintiff saw him first. It is denied that he "was a prostate cancer survivor" as he was being treated for metastatic disease. Plaintiff's recitation of his conversation with this patient is denied for lack of knowledge without reasonable investigation. While answering defendant does not know the exact words used by plaintiff, it is denied that he asked the question as instructed at the orientation. It is admitted that plaintiff asked a question of Dr. Sahar challenging and questioning his treatment of his patient in the presence of the patient. In addition, plaintiff's representation as to the effect of Leuprolide is incorrect. While it is admitted that plaintiff's unprofessional and inappropriate question angered Dr. Sahar, it is denied that he reacted as plaintiff states or spoke as plaintiff has misquoted him. Further, it is denied that Dr. Sahar's patient reacted as stated. To the contrary, plaintiff's actions so upset the patient that he never again allowed a medical student to participate in his care.

32. Denied for lack of knowledge after reasonable investigation plaintiff's allegations

concerning his realization that he had offended Dr. Sahar. It is denied, however, that plaintiff's actions were inadvertent as he exhibited this type of behavior during the second half of his clerkship on several occasions. Further, it is denied that Drexel's Code of Conduct protected such unprofessional behavior. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

33. Admitted in part; denied in part. It is denied that the conversation that Dr. Sahar had with plaintiff with respect to a patient who suffered from a kidney disorder involved the next patient to be seen. It is admitted that Dr. Sahar asked plaintiff for the basic test for renal insufficiency. It is denied that Dr. Sahar pointed to any laboratory test. It is admitted that plaintiff gave three separate incorrect answers. It is denied that Dr. Sahar broadcast plaintiff's wrong answers loudly or embellished it. It is admitted that plaintiff's inability to identify the laboratory tests to determine renal insufficiency reflected plaintiff's lack of medical knowledge. It is further denied that Dr. Sahar racially profiled plaintiff or "accused" plaintiff of suffering from Asperger's Syndrome.

34. Answering defendant denies the allegations in this paragraph of plaintiff's Amended Complaint for lack of knowledge after reasonable investigation although it is entirely possible that such an interchange did occur.

35.-36. Answering defendant denies for lack of knowledge plaintiff's allegation that the incidents involving the patient with metastatic prostate cancer and the patient with kidney disorder occurred on the day before plaintiff's last day of rotation; therefore, such allegation is denied. It is denied that Dr. Sahar went to New York to consult his "financial advisor" as he does not have a financial advisor. It is further denied that Dr. Sahar owns a motel. It is admitted that Dr. Dalton discussed plaintiff's performance with him on his last day and advised him that the

formal evaluation would follow in writing. It is admitted that he told plaintiff that he had improved with respect to some aspects of his performance during that evaluation. Dr. Dalton probably discussed plaintiff's penchant for questioning physicians in the presence of patients as he observed this on a few occasions during the second half of plaintiff's clerkship. It is denied that he had told plaintiff that Dr. Sahar would write plaintiff's final evaluation as the final evaluation is a joint evaluation prepared by both Drs. Sahar and Dalton.

37. Admitted in part; denied in part. It is admitted that Jennifer Hamilton, M.D. telephoned plaintiff around January 3, 2011 to inform him that he had failed the Family Medicine shelf exam; therefore, with that failure, he also failed the Family Medicine Clerkship. It is denied that plaintiff then contended that Dr. Sahar exhibited racial animus or retaliated against him. Plaintiff later fabricated these claims later. It is denied that Dr. Sahar was motivated to retaliate or had or exhibited any racial animus. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

38. Plaintiff's allegations with respect to the evaluations by Drs. Sahar and Dalton are denied as the evaluations speak for themselves and the evaluation was performed by both Drs. Sahar and Dalton. It is denied that either Dr. Sahar or Dr. Dalton falsified any evaluation. It is admitted the evaluation was a joint evaluation.

39. It is admitted that plaintiff did not miss a day of rotation. It is denied that he was the first person to arrive and that he stayed up late to finish up charts. It is denied that he worked particularly hard or received praised from nurses or staff members. It is admitted that while plaintiff was praised for his interactions in the first half of his clerkship, by the end of the clerkship, plaintiff's behavior had changed significantly. He had acted inappropriately to staff and in the presence of other patients, and had improperly questioned treatment provided by Dr.

Sahar and Dr. Dalton. Plaintiff's allegations with respect to playing with fussy babies are denied as Dr. Sahar's practice did not include pediatric patients. Plaintiff's allegations with respect to "counseling patients on STDs" are denied for lack of knowledge after reasonable investigation. It is denied that plaintiff interacted with the staff as related in this paragraph.

40. Denied. Dr. Hamilton's email speaks for itself and has been misinterpreted by plaintiff. It is denied that Dr. Hamilton "officially failed" plaintiff's Family Medicine Clerkship. Rather, Dr. Hamilton notified plaintiff that he failed the family medical clinical rotation at Dr. Sahar's office; therefore, based on plaintiff's poor exam and poor rotation performance, plaintiff received a final Family Medicine grade of Unsatisfactory. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

41. It is admitted that in the second email of January 6, 2011, Dr. Hamilton advised plaintiff as to how he should appeal the grade that he received in the Family Medicine Clerkship. Answering defendant denies plaintiff's allegation that he "found out the failing grade online" on January 5, 2011 and "protested again" for lack of knowledge after reasonable investigation.

42. It is admitted that plaintiff did appeal the grade he received for the Family Medicine clinical. It is admitted that, upon review, Dr. Hamilton determined that plaintiff's final Family Medicine grade of Unsatisfactory should stand. It is further admitted that Dr. Hamilton informed plaintiff that if he wished to appeal this finding, his next step would be to contact Dr. Eugene Hong, Chairman of the Family Medicine department, within 5 business days. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied as the email from Dr. Hamilton to Dr. Hong concerning plaintiff's appeal of his Family Medicine grade speaks for itself.

43. Plaintiff's allegations concerning his appeal to Dr. Hong are denied as the email

from Dr. Hong dated February 2, 2011 denying plaintiff's appeal speaks for itself. It is denied that Dr. Hong "flatly denied" plaintiff's appeal.

44. It is admitted that Dr. Schindler met with plaintiff on February 11, 2011. It is denied that Dr. Schindler "refused" to look at plaintiff's appeal letter. It is denied that Dr. Schindler "flatly denied" plaintiff's appeal of his Family Medicine Clerkship grade. It is admitted that Dr. Schindler advised plaintiff that he would benefit from repeating the Family Medicine Clerkship. It is admitted that Dr. Schindler attended the Promotions Committee meeting and that subsequent to that meeting Dr. Fuchs wrote a letter to plaintiff regarding the decision of the Promotions Committee. It is denied that the Promotions Committee worked on a letter against plaintiff. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

45. Denied.

46. It is denied that Dr. Hamilton was "shocked" by Dr. Sahar and Dr. Dalton's joint evaluation. Plaintiff's allegations regarding Dr. Hamilton's email to Dr. Fuchs are denied as the email speaks for itself. The remaining sentence in this paragraph constitutes argument and is not a recitation of facts.

47. Plaintiff's allegations regarding his final evaluation are denied as the evaluation speaks for itself. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

48. This paragraph constitutes argument and is not a recitation of facts; however, plaintiff exhibited egregiously unprofessional behavior after his mid-rotation evaluation had been submitted.

49. It is denied that Dr. Sahar retaliated against plaintiff. The remaining sentences in

this paragraph constitute argument and are not a recitation of facts.

50. Denied. In fact, plaintiff's initial version of his unprofessional interaction with Dr. Sahar in the presence of his patient who had metastatic prostate cancer was consistent with Dr. Sahar's. It is only as plaintiff's subsequent failure of the Obstetrics and Gynecology Shelf Exam resulted in his dismissal that plaintiff's version of the discussion became less obviously unprofessional, stating that he "had accidentally asked him [Dr. Sahar] a question before the patient."

51. It is denied that Drs. Hamilton, Sahar or Fuchs conspired against plaintiff. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied as the emails written by Drs. Hamilton, Sahar and Fuchs speak for themselves.

52. It is denied that there was any conspiracy against plaintiff or that any individual or answering defendant conspired against plaintiff. It is denied that Dr. Fuchs and Hamilton "kept plaintiff in the dark" because they were engaged in a conspiracy. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied as the testimony of Joseph Salomone speaks for itself and has been taken out of context.

53. It is denied that there was any conspiracy against plaintiff or that any individual or answering defendant conspired against plaintiff. It is denied that Dr. Hamilton failed plaintiff's family medicine rotation. Rather, upon review, Dr. Hamilton determined that plaintiff's final Family Medicine grade of Unsatisfactory should stand.

54. It is denied that Dr. Fuchs wrote plaintiff's Family Medicine Clerkship evaluation. It is denied that any of Dr. Fuchs actions were in order to "harm" plaintiff. The remaining sentences in this paragraph constitute argument and are not a recitation of facts.

55. It is denied that both Dr. Hamilton and Dr. Fuchs were on the Clinical Promotions

Committee because while Dr. Fuchs attended the Clinical Promotions Committee meetings, she did not have a vote in its decision making. It is admitted that Dr. Fuchs wrote the February 14, 2011 letter to plaintiff on behalf of the Clinical Promotions Committee. It is denied that plaintiff's transfer "back to Philadelphia" was retaliatory. Rather, it was to provide him with additional faculty guidance and assistance. It is denied that that any contract between plaintiff and answering defendant was violated. All other allegations in this paragraph of plaintiff's Amended Complaint are denied.

56. Denied.

57. It is admitted that Dr. Sahar asked plaintiff for the basic test for renal insufficiency. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied. Dr. Sahar did not point to liver tests on a laboratory order sheet and plaintiff answered this basic question incorrectly three times.

58.-59. Denied. It is admitted that the significance of a patient's laboratory value of blood urea nitrogen and creatinine are a means to renal function, every second year medical student should know it, and plaintiff did not, underscoring his lack of medical knowledge. It is further denied that this was an "ex parte communication and conspiracy" as plaintiff's version of the event at the time was essentially the same as Dr. Sahar's version. All other allegations in these paragraphs of plaintiff's Amended Complaint are denied.

60. It is denied that Dr. Sahar ever "used a racial slur" on plaintiff. It is denied that Dr. Sahar profiled plaintiff as autistic. The remaining allegations in this paragraph of plaintiff's Amended Complaint are not proper averments.

61. Denied.

62. The allegations in this paragraph of plaintiff's Amended Complaint are denied as

any "writing," although not specifically identified by plaintiff, by answering defendant or any individual speaks for itself. Plaintiff's allegations of retaliation are denied.

63.-64. Denied. The allegations in this paragraph of plaintiff's Amended Complaint are not proper averments. By way of further response, it is admitted that plaintiff "had no clue" or insight into his indefensible, unprofessional behavior, and it is denied that any of plaintiff's rights were violated.

65. Plaintiff's representations concerning the advice given to him and praise from Dr. Farabaugh concerning his asking questions are denied.

66.-67. Plaintiff's allegations concerning Dr. Fuch's February 14, 2011 letter to plaintiff are denied as the letter speaks for itself. It is denied that the student handbook was violated or that the Student Handbook was the only document which set forth the terms of plaintiff's tenure at DUCOM as plaintiff was also required to meet the conditions of Dr. Homan's letter of July 21, 2009, attached hereto as Exhibit "A." All other allegations in this paragraph of plaintiff's Amended Complaint are denied.

68. Admitted in part; denied in part. It is admitted that Dr. Fuchs spoke to plaintiff on February 11, 2011 to advice him of the Promotions Committee's decision which included that his clerkships were to be in Philadelphia in order to provide him with guidance from the directors of the clerkship programs and she wanted him to hear this from her before he received the letter advising him. It is admitted that she gave him a note with the address for his OB/GYN clerkship. The remaining allegations in this paragraph are denied.

69. Answering defendant denies for lack of knowledge after reasonable investigation plaintiff's allegations concerning the reputation of Hahnemann University. Plaintiff's allegation that his rotation at Hahnemann Hospital left him little time to study for both the shelf and Step 1

exams is denied, particularly as according to plaintiff he started the OB/GYN clerkship on February 14, 2011 or promptly thereafter, plaintiff had taken the Family Medicine shelf exam five weeks previously and had taken the Step 1 exam for the second time on February 10, 2011. Defendant denies that plaintiff had or ever informed defendant or any individual at DUCOM that he had a "serious vision disability." Defendant denies for lack of knowledge plaintiff's allegations as to the reason why he scheduled his third and fourth year clinical rotations at Monmouth Medical Center and his lack of readiness to spend time commuting. Defendant denies for lack of knowledge after reasonable investigation plaintiff's allegations concerning the reasons he failed the shelf exam for OB/GYN. By way of further response, defendant points out that this allegation makes no sense as plaintiff was not at the time studying for a Step 1 exam and plaintiff's circumstances with respect to studying for the OB/GYN shelf exam were no different than other medical students whose OB/GYN clerkships were at Hahnemann Hospital.

70. It is denied that plaintiff was under circumstances that were "a recipe for failure." Defendant denies for lack of knowledge plaintiff's allegations concerning the time required for him to commute to and from the hospital. Defendant denies for lack of knowledge plaintiff's allegations with respect to why he registered to take the Step 1 exam again in six weeks. By way of further answer, defendant points out that as most DUCOM students take the Step 1 exam within weeks after completing their second year of medical school, plaintiff had more than the average time to prepare for his third attempt at the Step 1 exam. It is denied that Dr. Fuchs relayed any "order to command" plaintiff to take the Step 1 in six weeks in violation of the student handbook. Rather, Dr. Fuch's appropriately informed plaintiff that he could not resume his Clerkships without sitting for the Step 1 exam. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

71. Plaintiff's allegations concerning his time arising and transportation are denied for lack of knowledge after reasonable investigation. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

72. It is admitted that plaintiff passed the clinical portion of the OB/GYN clerkship. Defendant denies for lack of knowledge after reasonable investigation plaintiff's allegations as to the reason he failed the OB/GYN shelf exam. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied. In fact, Dr. Fuchs urged plaintiff to defer taking the Obstetrics & Gynecology Shelf exam in order to have more time to study for it, but plaintiff disregarded Dr. Fuchs' advice.

73. It is denied that Dr. Fuchs retaliated or discriminated against plaintiff. Plaintiff's allegation that Dr. Fuchs "lost no time in emailing Ke [plaintiff] the dismissal letter dated April 11, 2011" is denied as Dr. Fuchs appropriately emailed plaintiff her letter of April 11, 2011 after the Clinical Promotions Committee met to discuss plaintiff's continued failures to meet the conditions of his continuing at DUCOM. The remaining allegations regarding Dr. Fuchs' April 11, 2011 letter are denied as the letter speaks for itself.

74. It is admitted that plaintiff met with Drs. Fuchs and Parrish on April 26, 2011 in order to prepare for his meeting with the Promotions Committee. The remaining allegations in this paragraph are denied as Drs. Fuchs and Parrish advised plaintiff that he should accept responsibility for his failures, explain why he should be given another opportunity to succeed, and explain his plan that would enable him to succeed if permitted to continue at DUCOM.

75. Plaintiff's allegations in this paragraph of plaintiff's Amended Complaint are denied and defendant incorporates by reference its response to paragraph 74. By way of further answer, defendant denies plaintiff's assertion that he failed the OB/GYN shelf exam due to

insurmountable pressure because plaintiff completed the OB/GYN shelf exam on March 25, 2011 and was not engaged in any other DUCOM activity when he took the OB/GYN shelf exam. Further, it is denied that Dr. Parrish ever threatened plaintiff. Additionally, Dr. Fuchs urged plaintiff on at least two occasions to defer the shelf exam and plaintiff chose not to follow that advice.

76. While it is admitted that Dr. Parrish may have stated that the subject letter was well written, it is denied that he stated it was "excellent" or that Dr. Parrish was not worried about plaintiff's academic success. It is admitted that plaintiff met with the Promotions Committee on May 13, 2011 and that Dr. Parrish was present. It is denied that plaintiff was precluded from presenting his case or speaking in his own defense. It is admitted that the Promotions Committee decided to dismiss plaintiff. It is denied it stated its decision to plaintiff at that time.

77.-78. Denied.

79. It is admitted that Dr. Homan met with plaintiff on June 21, 2011. It is denied that the email from plaintiff's father was a request for accommodation in accordance with DUCOM procedure or that plaintiff's father had a right to request accommodation. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

80. Denied.

81. It is admitted that plaintiff's father sent a letter of June 30, 2011 to john Fry. Defendant denies for lack of knowledge plaintiff's allegations concerning plaintiff's parent having sent letters to Dean Homan without receiving a reply. It is admitted that plaintiff emailed President Fry on July 3, 2011 and that President Fry responded by email on July 5, 2011. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

82. It is admitted that Dr. Ruth emailed plaintiff on July 7, 2011. It is denied that Dr. Ruth asked Dean Homan to respond. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied as Dr. Ruth's July 7, 2011 and Dr. Homan's July 7, 2011 email speak for themselves.

83. It is denied that "all the emails exchanged" between Drs. Ruth and Homan were forwarded to John Fry. No response to the remaining allegations is required as plaintiff's claims for violation of the Pennsylvania Constitution have been dismissed by this Court.

84. It is denied that a hearing was cancelled. Once it was determined why plaintiff wanted the hearing, the request was denied as inappropriate as the purpose of a FERPA hearing is only to challenge inaccurate or misleading records. It is denied that plaintiff had a due process right to a formal hearing. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

85. Defendant incorporates its response to all preceding paragraphs of plaintiff's Amended Complaint.

86.-88. The allegations in these paragraphs of plaintiff's Amended Complaint constitute conclusions of law to which no response is required.

89. Denied. By way of further answer, Drexel points out that plaintiff's status during his Third Year of medical school was not controlled only by the Student Handbook. Rather, he was subject to the conditions stated in the letter from Richard Homan, M.D. of July 21, 2009 and the February 14, 2011 letter from Amy Fuchs, M.D., attached hereto as Exhibit "A" and "B."

90. The allegations in this paragraph of plaintiff's Amended Complaint constitute conclusions of law to which no response is required.

91. Admitted in part; denied in part. It is admitted that plaintiff has accurately quoted

portions of the Student Handbook, but it is denied that plaintiff's status during his Third Year of medical school was controlled by the Student Handbook. Rather, he was subject to the conditions stated in the letter from Richard Homan, M.D. of July 21, 2009 and the February 14, 2011 letter from Amy Fuchs, M.D.

92. Denied. Plaintiff was properly dismissed for failing to comply with the conditions of his reinstatement. In comparison with other students, he had more than enough time to pass his Shelf examinations, and chose to take the OB/GYN Shelf Exam after being advised by Dr. Fuchs to defer taking it to have more time to prepare for it.

93. Denied as stated. It is admitted only that dismissals are not final until the student's appeals are exhausted, but dismissals are not "tentative" and there is nothing prejudicial about this practice.

94. Admitted in part; denied in part. It is admitted that plaintiff's reinstatement appeal was denied by Richard Homan on June 27, 2011. Plaintiff's allegation concerning Dr. Homan's letter are denied as the letter speaks for itself. While it is admitted that plaintiff denied that he had failed the Family Medicine rotation, it is denied that there is any evidence that he passed the rotation, or that there was a conspiracy. Plaintiff failed the Family Medicine rotation both by failing the clinical portion of the course and by failing the Shelf exam.

95.-97. Denied. Plaintiff's status was not solely determined by the Student Handbook as he was subject to the conditions stated in Richard Homan's reinstatement letter of July 21, 2009 and Amy Fuchs' letter of February 14, 2011, with which he failed to comply. It is denied that plaintiff is entitled to relief.

98.-99. The allegations in these paragraphs of plaintiff's Amended Complaint constitute conclusions of law to which no response is required.

100. It is denied that there was any retaliation by Dr. Sahar or any violation of plaintiff's rights. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

101.-108. It is denied that DUCOM's Academic Policies were violated. It is admitted that plaintiff has quoted portions of the deposition of Joseph Salomone, Ph.D. and David Ruth, Ph.D. out of context. It is denied that a hearing was cancelled. Once it was determined why plaintiff wanted the hearing, the request was denied as inappropriate as the purpose of a FERPA hearing is only to challenge inaccurate or misleading records. It is denied that plaintiff had a due process right to a formal hearing. It is denied that John Fry ever "promised" plaintiff a hearing. The remaining allegations in these paragraphs of plaintiff's Amended Complaint are denied. It is denied that "all the emails exchanged" between Drs. Ruth and Homan were forwarded to John Fry. The remaining allegations in these paragraphs of plaintiff's Amended Complaint are denied. No response to the allegations regarding plaintiff's claims for violation of the Pennsylvania Constitution is required as plaintiff's claims for violation of the Pennsylvania Constitution have been dismissed by this Court.

109. No response to the allegations regarding plaintiff's claims for violation of the Pennsylvania Constitution is required as plaintiff's claims for violation of the Pennsylvania Constitution have been dismissed by this Court.

110. Denied. It is denied that plaintiff has established a cause of action for breach of contract or retaliation. It is denied that plaintiff is entitled to relief.

111. Defendant incorporates its response to all preceding paragraphs of plaintiff's Amended Complaint.

112.-114. The allegations in these paragraphs of plaintiff's Amended Complaint

constitute conclusions of law to which no response is required.

115. It is admitted that plaintiff failed four courses in his Second Year. It is denied that his failure was "largely due to his vision disability" or that "many other students also failed four courses ... without being issued a dismissal letter." It is denied that plaintiff's status during his Third Year of medical school was controlled by the Student Handbook. Rather, he was subject to the conditions stated in the letter from Richard Homan, M.D. of July 21, 2009 and the February 14, 2011 letter from Amy Fuchs, M.D. Plaintiff was properly dismissed for failing to comply with the conditions of his reinstatement. The remaining allegations in these paragraphs of plaintiff's Amended Complaint are denied.

116. Plaintiff's allegations in this paragraph of his Amended Complaint are denied for reasons stated above. Plaintiff was properly dismissed for failing to comply with the conditions of his reinstatement. It is denied that there was any retaliation by Dr. Sahar or Dr. Fuchs or any conspiracy to dismiss plaintiff from DUCOM. The remaining allegations in these paragraphs of plaintiff's Amended Complaint are denied.

117.-118. The allegations in these paragraphs of plaintiff's Amended Complaint constitute conclusions of law to which no response is required.

119. Plaintiff was subject to the conditions stated in the letter from Richard Homan, M.D. of July 21, 2009 and the February 14, 2011 letter from Amy Fuchs, M.D. Plaintiff was properly dismissed for failing to comply with the conditions of his reinstatement. Defendant did not breach the Student Handbook with respect to plaintiff.

120. The allegation in this paragraph of plaintiff's Amended Complaint constitutes conclusions of law to which no response is required.

121.-122. Plaintiff's allegation concerning the Student Handbook and contractual terms

constitute conclusions of law to which no answer is required. It is denied that plaintiff was the victim of retaliation or discrimination. It is denied that any contract with plaintiff was breached. Plaintiff was subject to the conditions stated in the letter from Richard Homan, M.D. of July 21, 2009 and the February 14, 2011 letter from Amy Fuchs, M.D. Plaintiff was properly dismissed for failing to comply with the conditions of his reinstatement. The remaining allegations in these paragraphs of plaintiff's Amended Complaint are denied.

123. The allegation in this paragraph of plaintiff's Amended Complaint constitutes conclusions of law to which no response is required.

124. It is denied that defendant willfully caused plaintiff any confusion or misunderstanding of conditions required of him in order to remain enrolled in DUCOM pursuant to the letter from Richard Homan, M.D. of July 21, 2009 and the February 14, 2011 letter from Amy Fuchs, M.D. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

125. It is denied that a hearing was cancelled. Once it was determined why plaintiff wanted the hearing, the request was denied as inappropriate as the purpose of a FERPA hearing is only to challenge inaccurate or misleading records. It is denied that plaintiff had a due process right to a formal hearing. It is denied that John Fry ever "promised" plaintiff a hearing. The remaining allegations in these paragraphs of plaintiff's Amended Complaint are denied. It is denied that anyone confirmed that plaintiff was entitled to a hearing. The remaining allegations in this paragraph of plaintiff's Amended Complaint is denied.

126. Denied.

127. Denied as to plaintiff's allegations concerning Joseph Salomone's testimony as the testimony speaks for itself. The remaining statements in this paragraph of Plaintiff's

Amended Complaint are argumentative and not proper averments to which no response is required.

128. The allegation in this paragraph of plaintiff's Amended Complaint constitutes conclusions of law to which no response is required. It is denied that plaintiff is entitled to treble damages.

129. Denied for lack of knowledge as to plaintiff's thoughts regarding attending DUCOM. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

130. Defendant incorporates its response to all preceding paragraphs of plaintiff's Amended Complaint.

131.-182. As the Court has dismissed Counts III and IV of plaintiff's First Amended Complaint, no response is required.

183. Defendant incorporates its response to all preceding paragraphs of plaintiff's Amended Complaint.

184. The allegation in this paragraph of plaintiff's Amended Complaint constitutes conclusions of law to which no response is required.

185. The allegation in this paragraph of plaintiff's Amended Complaint constitutes conclusions of law to which no response is required It is denied that plaintiff has properly asserted a cause of action for concerted tortious conduct. It is denied that plaintiff is entitled to any relief.

186. It is denied that any "false facts" related to plaintiff were brought to any Promotions Committee Meeting. It is denied that plaintiff was racially profiled. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

187. Denied. Plaintiff's allegations with respect to the evaluations by Drs. Sahar and Dalton are denied as the evaluations speak for themselves and the evaluation was performed by both Drs. Sahar and Dalton. It is denied that there was any conspiracy with Dr. Sahar regarding plaintiff's evaluation.

188. Denied. It is admitted that Dr. Fuchs and Dr. Hamilton contacted Dr. Sahar by email with their documentation of the details Dr. Sahar gave to them that warranted plaintiff's grade of Unsatisfactory and asked Dr. Sahar to check their documentation for accuracy. Plaintiff's allegations as to Dr. Hamilton's statements regarding plaintiff's Family Medicine clerkship evaluations are denied. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

189. Denied.

190. Admitted in part; denied in part. It is admitted that Dr. Hamilton advised plaintiff how to properly appeal his Family Medicine Clerkship grade. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

191.-192. Denied.

193. Plaintiff's allegations concerning the Promotions Committee notes are denied as the notes speak for themselves. The remaining allegations in this paragraph of plaintiff's Amended Complaint are denied.

194. It is admitted that the Promotions Committee reviewed plaintiff's Unsatisfactory grade in Family Medicine on February 11, 2011 and decided to allow plaintiff to remain enrolled in DUCOM despite previous communications providing clear warning that an additional grade of less than Satisfactory was grounds for dismissal. Plaintiff was subject to the conditions stated in the letter from Richard Homan, M.D. of July 21, 2009 and the February 14, 2011 letter from

Amy Fuchs, M.D. The remaining allegations in this paragraph of plaintiff's Amended Complaint are not proper averments and are denied.

195. It is denied that plaintiff has properly stated a claim for concerted tortious conduct or aiding and abetting each other in retaliation.

196. Denied.

197.-198. Plaintiff was subject to the conditions stated in the letter from Richard Homan, M.D. of July 21, 2009 and the February 14, 2011 letter from Amy Fuchs, M.D. Plaintiff was properly dismissed for failing to comply with the conditions of his reinstatement. Defendant did not breach the Student Handbook with respect to plaintiff. It is denied that there was any conspiracy, conduct or desire to make plaintiff fail.

199.-200. The allegations in these paragraphs of plaintiff's Amended Complaint constitute conclusions of law to which no response is required.

201.-228. As the Court has dismissed Counts VI and VII of plaintiff's First Amended Complaint, no response is required.

NEW MATTER

229. Plaintiff's First Amended Complaint fails to state a cause of action upon which relief can be granted.

230. At all material times, any actions taken by defendant or defendant's agents were for legitimate and non-discriminatory reasons.

231. At all times relevant to plaintiff's causes of action, defendant and defendant's agents complied with Drexel University College of Medicine's policies and procedures.

232. If plaintiff suffered any damages or losses, such damages or losses were caused in whole or in part by plaintiff's own acts, omissions or conduct.

233. Plaintiff is not entitled to injunctive relief.

234. No action or inaction of defendant or defendant's agents caused plaintiff harm at any time.

235. Defendant and defendant's agents acted reasonably and in good faith with respect to plaintiff at all times.

236. If a contract existed between plaintiff and Drexel University, it included the terms of the letters to plaintiff of January 25 and 30, 2007 attached as Exhibit "C."

237. Plaintiff never requested accommodation for any condition pursuant to the procedure set forth in the letters of Exhibit "C."

238. Plaintiff entered Drexel University College of Medicine ["DUCOM"] in the fall of 2007.

239. In his first year plaintiff received a grade of Unsatisfactory in Medical Immunology. *See* Plaintiff's transcript attached as Exhibit "D."

240. Plaintiff received grades of Unsatisfactory in four major courses of the Second Academic Year, specifically, Introduction to Clinical Medicine, Medical Microbiology, Pathology and Laboratory Medicine, and Medical Pharmacology. *See* Exhibit "D."

241. The Student Handbooks in effect for the Academic Years 2006-2007 and 2007-2008 state, "[s]tudents who achieve three or more grades of U or MU in an academic year, may be dropped from the rolls of the College of Medicine." *See* Student Handbooks filed as Plaintiff's contracts, the applicable pages of which are attached as Exhibit "E" at contracts 11 and 23.

242. As a result of plaintiff's receipt of four grades of Unsatisfactory, the Preclinical Promotions Committee of DUCOM dismissed plaintiff from the Medical School.

243. Subsequently, plaintiff appealed his dismissal to the Dean of DUCOM, Richard V. Homan, M.D.

244. Dr. Homan reversed the decision of the Preclinical Promotions Committee and reinstated plaintiff to the College of Medicine under specific conditions stated in his letter of July 21, 2009, a copy of which attached as Exhibit "A."

245. To the extent that plaintiff had a contractual relationship with defendant Drexel University, Dr. Homan's letter of July 21, 2009 stated terms of plaintiff's contractual relationship with Drexel University starting on plaintiff's decision to return to DUCOM.

246. Those terms as stated in the letter of July 21, 2009 included, but were not limited to:

> Any grade below Satisfactory will be considered grounds for dismissal from the College of Medicine. ...
>
> The receipt of any grade lower than Satisfactory during your clinical training will be considered as grounds for dismissal from the College of Medicine.

247. Plaintiff repeated the second year of DUCOM during the Academic Year of 2009-2010.

248. Plaintiff received the grade of Marginal Unsatisfactory in Microbiology. *See* Academic Summary attached as Exhibit "F."

249. Rather than dismiss plaintiff, the Preclinical Promotions Committee allowed plaintiff to remediate his grade in Microbiology by taking the National Board of Medical Examiners ["NBME"] subject exam. *See* Exhibit "F."

250. Plaintiff passed the NBME subject exam in Microbiology and his course grade in Microbiology was changed to Satisfactory.

251. Plaintiff started the Family Medicine Clerkship in Monmouth, New Jersey in the practice of Anthony Sahar, M.D. on September 28, 2010. *See* Exhibit "F."

252. Each DUCOM Third Year Clerkship includes a requirement for students to take and pass the respective NBME subject exam, also referred to as a "Shelf" exam. *See*, Exhibit "E" at "contracts 11 and 23."

253. Plaintiff received a grade of Unsatisfactory for the clinical portion of the Family Medicine Clerkship *See* Student Clinical Rotation Final Evaluation Report, attached as Exhibit "G."

254. Plaintiff took the NBME Shelf exam for Family Medicine on December 29, 2010 and failed the exam, receiving a score which placed him in the lowest one percentile nationally. *See* report of Family Medicine Shelf Exam on December 29, 2010 attached as Exhibit "H."

255. Plaintiff subsequently unsuccessfully appealed his clinical failure of the Family Medicine clerkship to the Family Medicine Clerkship Director, Jennifer Hamilton, M.D., then to the Chair of the Department of Family Medicine, Eugene Hong, M.D., and to Barbara Schindler, M.D., the Vice Dean for Education and Academic Affairs.

256. Despite the terms of Dean Homan's letter of July 21, 2009, the Clinical Promotions Committee decided not to dismiss plaintiff from DUCOM for his failure of the Family Medicine Clerkship because he was potentially misled by a favorable mid-rotation evaluation in Family Medicine, and issued a letter again stating that plaintiff's continuation at DUCOM was subject to several conditions, one of which was that "[t]he receipt of any additional grade of less than Satisfactory (including Unsatisfactory or Marginal Unsatisfactory) will be considered grounds for dismissal from the College of Medicine." This letter is attached as Exhibit "B."

257. Plaintiff then started the Obstetrics and Gynecology clerkship on February 14, 2011.

258. Amy Fuchs, M.D. advised plaintiff to defer taking the Obstetrics and Gynecology Shelf exam in order to have more time to study for it. Plaintiff disregarded that advice.

259. Though plaintiff passed the clinical portion of the Obstetrics and Gynecology clerkship, he failed the NBME Shelf exam in Obstetrics and Gynecology, which he took on March 25, 2011, receiving a score of 54, which was the lowest score for all DUCOM students taking that Shelf exam that block. His score placed him below the first percentile (bottom 1%) when compared to all students taking the exam nationally. *See* report of Obstetrics and Gynecology Shelf exam of March 25, 2011, attached as Exhibit "I."

260. Failure of the Obstetrics and Gynecology Shelf exam led to a grade of Marginal Unsatisfactory for the clerkship.

261. On April 11, 2011 the Clinical Promotions Committee of DUCOM decided to dismiss plaintiff.

262. Plaintiff's subsequent appeals to the Clinical Promotions Committee and Dean Homan were denied.

263. Plaintiff initiated an action in the United States District Court for the Eastern District of Pennsylvania. After amending his Complaint on three occasions, the parties filed Motions for Summary Judgment on the claims asserted on plaintiff's Third Amended Complaint, a copy of which is attached as Exhibit "J."

264. On September 4, 2015 the Honorable Joel H. Slomsky granted Summary Judgment to defendants on all claims asserted by plaintiff in his action pending in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 11-6708). A copy

of Judge Slomsky's Order and Memorandum Opinion are attached as Exhibit s "K" and "L" respectively.

265. In deciding the issues presented in the Motion for Summary Judgment, Judge Slomsky addressed plaintiff's claim that his dismissal from DUCOM in 2011 for violating the terms of Dean Homan's letter of July 2009 [Exhibit "A"] and the subsequent letter of the Clinical Promotions Committee of February 2011 [Exhibit "B"] violated DUCOM's Student Handbook. Judge Slomsky found as a matter of law that the letter of Dean Homan and the letter of the Promotions Committee were enforceable "re-enrollment conditions" and that "DUCOM's student handbook …

> mandates that the Promotions Committee review the academic record of any student with more than one grade below Satisfactory in a given year to determine whether the student should be dismissed. Accordingly, even without the conditions imposed on Plaintiff for his continued enrollment at DUCOM, his poor academic performance could have been considered grounds for dismissal.

See Exhibit "M" at page 58.

266. As a result, plaintiff's claims that his dismissal in 2011 constituted a violation of the Student Handbook and his breach of contract claim against Drexel University should be dismissed under the doctrines of *res judicata* and collateral estoppel.

267. Plaintiff's Second Count is also based upon his contention that his dismissal violated the terms of the Student Handbook and his contract with defendant Drexel University.

268. The conclusions by Judge Slomsky that the conditions stated in the letters of July 2009 of Dean Homan and February 2011 of the Clinical Promotions Committee did not violate the Student Handbook and that plaintiff's dismissal did not constitute a violation of the terms of the Student Handbook preclude further litigation of the claims raised in the Second Count of plaintiff's Complaint under the doctrines of *res judicata* and collateral estoppel.

269. Plaintiff's remaining claim is asserted in Count Five, entitled Concerted Tortious Conduct Against Hamilton, Fuchs, Sahar, Dalton, and Drexel University.[1]

270. With respect to their involvement with plaintiff, Jennifer Hamilton, M.D., Amy Fuchs, M.D., Anthony Sahar, M.D. and John Dalton, M.D. were acting in their capacity as members of the faculty of DUCOM and as agents or employees of defendant, Drexel University.

271. Defendant, Drexel University cannot be held to conspire or act in concert with its agents and employees.

272. Plaintiff's causes of action are barred by the applicable Statute of Limitations

273. Plaintiff's claims for damages are barred, in whole or in part, by his failure to mitigate damages.

274. Plaintiff has failed to establish any basis for asserting a claim for compensatory damages.

WHEREFORE, defendant, Drexel University requests that judgment be entered in its favor, together with costs and any other relief deemed appropriate.

Respectfully submitted,

CIPRIANI & WERNER, P.C.

By: Peter Samson

Peter Samson, Esquire
Julia Jacobelli, Esquire
Attorneys for the Defendant

[1] As stated by the Honorable Marlene Lachman, the individual defendants, having not been properly served, have not been made parties to this action.

VERIFICATION

I, John R. Gyllenhammer, Esquire, Deputy General Counsel and Chief Counsel for Health Sciences of Drexel University, hereby certify that the statements in the foregoing Answer with New Matter to Plaintiff's Amended Complaint are true and correct to the best of my knowledge, information and belief. This statement and verification is made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities, which provides that if I knowingly make false statements, I may be subject to criminal penalties.

October 1, 2015
Date

Signature

John R. Gyllenhammer
Print

Deputy General Counsel and Chief Counsel for Health Sciences
Title

Ke v. Drexel University

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Attorneys for Defendant

Lei Ke	:	IN THE COURT OF
	:	COMMON PLEAS OF PHILADELPHIA
Plaintiff,	:	COUNTY, PENNSYLVANIA
	:	
v.	:	JUNE TERM 2013 NO. 03506
	:	
Drexel University,	:	
	:	
Defendant	:	
	:	
	:	
	:	
	:	

CERTIFICATE OF SERVICE

I, Peter Samson, Esquire, counsel for defendants, Drexel University hereby certify that a true and correct copy of the attached Answer with New Matter to the Amended Complaint has been electronically filed and served on this 6 day of November, 2015 as follows:

Lei Ke
4025 Roosevelt Blvd
Philadelphia, PA 19124

CIPRIANI & WERNER, P.C.

By: Peter Samson
Peter Samson, Esquire
Attorneys for the Defendant