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10 Attorneys for Defendant PEPPERDINE UNIVERSITY

11  
 12 UNITED STATES DISTRICT COURT  
 13 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

15 HALEY VIDECKIS and LAYANA  
16 WHITE, individuals,

17 Plaintiffs,

18 vs.

19 PEPPERDINE UNIVERSITY, a  
20 corporation doing business in  
21 California,

22 Defendant.

Case No. 2:15-cv-00298-DDP (JCx)

**DEFENDANT'S MEMORANDUM  
OF CONTENTIONS OF FACT AND  
LAW**

Trial Date: May 23, 2017

23 Pursuant to Local Rule 16-4, Defendant Pepperdine University submits the  
24 following Memorandum of Contentions of Fact and Law:

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1 **I. CLAIMS AND DEFENSES**

2 **A. Plaintiffs’ Claims Alleged Against Defendant**

3 1. Claim 1: Violation of Right of Privacy under California Constitution  
4 Article I, § 1:

5 Defendant Pepperdine violated the California Constitution, Article 1,  
6 § 1 by asking questions regarding, and seeking to determine, Plaintiffs’  
7 sexual orientation and personal relationship, seeking access to  
8 Plaintiffs’ gynecological records with no basis to believe that those  
9 records would provide any information regarding Plaintiffs’ ability or  
10 qualifications to play on the women’s varsity basketball team.

11 2. Claim 2: Violation of California Education Code §§ 220, 66251, and  
12 66270:

13 Defendant Pepperdine harmed Plaintiffs by subjecting them to  
14 disparate treatment that was so objectively severe, pervasive, and  
15 offensive that it effectively deprived them of their right of equal access  
16 to educational benefits and opportunities because of their sexual  
17 orientation in the following ways:

18 (a) Defendant Pepperdine discriminated against Plaintiffs by treating  
19 them differently from the other students in the University because of  
20 Pepperdine’s perception about the Plaintiffs’ sexual orientation.

21 (b) Defendant Pepperdine harassed Plaintiffs because of its  
22 perception of their sexual orientation.

23 (c) Defendant Pepperdine retaliated against Plaintiffs for their  
24 having complained to Coach Ryan Weisenberg about his assistant  
25 coaches, trainers and academic coordinator allegedly harassing them  
26 and retaliated against them for their Title IX complaint to Pepperdine  
27 administration.

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- 3. Claim 3: Violation of Title IX, 20 U.S.C. §§ 1681, et seq.:  
Defendant Pepperdine had actual notice of systemic, pervasive, harassment and discrimination against Plaintiffs and the violation of Plaintiffs’ rights based upon Plaintiffs’ sex and gender as a result of complaints concerning action by the faculty, administration and staff of Pepperdine and were deliberately indifferent to the violations of Plaintiffs’ rights.
- 4. Claim 4: Violation of Title IX, 20 U.S.C. §§ 1681, et seq.:  
Defendant Pepperdine intentionally discriminated against Plaintiffs based upon their sexual orientation or perceived sexual orientation, through express policy and practice.
- 5. Claim 5: Violation of Title IX, 20 U.S.C. §§ 1681, et seq.:  
Defendant Pepperdine retaliated against Plaintiffs because of their complaints against Defendant Pepperdine’s coaches and other staff regarding harassment of and discrimination against Plaintiffs based upon Plaintiffs’ sexual orientation, perceived sexual orientation.
- 6. Claim 6: Violation of the Unruh, California Civil Code §§51, et seq.:  
Defendant Pepperdine intentionally denied Plaintiffs full and equal accommodations, advantages, facilities, privileges, or services based upon their sexual orientation and perceived sexual orientation.
- 7. Claim 7: Intentional emotional distress:  
Defendant Pepperdine intentionally and maliciously sought to cause Plaintiffs severe emotional distress, humiliation, mental anguish, and emotional and physical distress.

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**B. Elements required to establish the Plaintiffs’ claims against Defendant**

1. Claim 1: Violation of Right of Privacy Under California Constitution, Article I, § 1:

Plaintiffs must prove:

- (a) That Plaintiffs had a reasonable expectation of privacy with regard to their sexual orientation and their personal relationship.
- (b) That Defendant Pepperdine intentionally intruded into Plaintiffs’ private affairs by asking questions about the Plaintiffs’ sexual orientation and their personal relationship.
- (c) That Defendant Pepperdine’s intrusion would be highly offensive to a reasonable person.
- (d) That Plaintiffs were harmed.
- (e) Defendant Pepperdine’s conduct was a substantial factor in causing such harm.

In deciding whether Plaintiffs had a reasonable expectation of privacy with regard to their sexual orientation and personal relationship, the following factors should be considered:

- (a) The identity of Defendant Pepperdine;
- (b) The extent to which other persons had access to information concerning Plaintiffs’ sexual orientation or their personal relationship; and
- (c) The means by which the intrusion occurred.

In deciding whether an intrusion is overly offensive to a reasonable person, the following factors should be considered:

- (a) The extent of the intrusion;
- (b) The Defendant Pepperdine’s motives and goals; and
- (c) The setting in which the intrusion occurred.

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(CACI 1800.)

2. Claim 2: Violation of California Education Code §§ 220, 66251, and 66270:

(A) **Harassment**

Plaintiffs must prove:

- (1) That Plaintiffs White and Videckis suffered harassment based on their sex/sexual orientation<sup>1</sup> that was so severe, pervasive, and offensive that it effectively deprived them of the right of equal access to educational benefits and opportunities;
- (2) That Defendant Pepperdine had actual knowledge of that harassment; and
- (3) That Defendant Pepperdine acted with deliberate indifference in the face of that knowledge.

Defendant Pepperdine acted with deliberate indifference if its response to the harassment was clearly unreasonable in light of all the known circumstances.

(B) **Disparate Treatment, Discrimination**

Plaintiffs must prove:

- (1) That Plaintiffs White and Videckis suffered discrimination based upon their sex/sexual orientation that was so severe, pervasive, and offensive that it effectively deprived them of the right of equal access to educational benefits and opportunities;

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<sup>1</sup> Defendant Pepperdine continues to assert that discrimination or harassment based upon sexual orientation is not actionable under Title IX. Due to past rulings of this Court, however, and not to retract Defendant Pepperdine’s contention, where Title IX refers to discrimination on “sex” this pleading shall refer to “sex/sexual orientation.”

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(2) That Defendant Pepperdine had actual knowledge of that discrimination; and

(3) That Defendant Pepperdine acted with deliberate indifference in the face of that knowledge.

Defendant Pepperdine acted with deliberate indifference if its response to the discrimination was clearly unreasonable in light of all the known circumstances.

**(C) Retaliation**

(1) That Plaintiffs White and Videckis complained about unlawful sexual/sexual orientation harassment or discrimination;

(2) That Defendant Pepperdine took action against Plaintiffs that effectively deprived them of the right of equal access to educational benefits and opportunities;

(3) That Plaintiffs’ complaints to Pepperdine were a substantial motivating reason for Defendant Pepperdine to have taken such action;

(4) That Plaintiffs White and Videckis were harmed; and

(5) That Defendant Pepperdine’s conduct resulting from the complaints of Plaintiffs White and Videckis was a substantial factor in causing them harm.

(CACI 3069.)

3. Claim 3: Violation of Title IX, 20 U.S.C. §§ 1681, et seq. – Deliberate Indifference to Harassment:

Plaintiffs must prove:

(a) That agents or employees of Defendant Pepperdine engaged in sexual/sexual orientation harassment of Plaintiffs;

(b) That the harassment was so severe, pervasive and objectively offensive that it could be said to deprive the Plaintiffs access to the

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1 educational opportunities or benefits provided by the school;  
2 (c) That Defendant Pepperdine had actual knowledge of such  
3 harassment; and  
4 (d) That Defendant Pepperdine was deliberately indifferent to  
5 sexual/sexual orientation harassment.  
6 (CACI 3069.<sup>2</sup>)

7 4. Claim 4: Violation of Title IX, 20 U.S.C. §§ 1681, et seq. – Systematic  
8 Intentional Discrimination:

9 Plaintiffs must prove:

- 10 (a) That Defendant Pepperdine discriminated against Plaintiffs  
11 White and Videckis because of their sex/sexual orientation;  
12 (b) That the underlying discrimination was so severe, pervasive and  
13 objectively offensive that it could be said to deprive Plaintiffs access to  
14 the educational opportunities or benefits provided by the school;  
15 (c) That such discrimination caused Plaintiffs to suffer harm; and  
16 (d) That Plaintiffs’ sex/sexual orientation was a substantial  
17 motivating factor for Defendant Pepperdine’s conduct;  
18 (e) Plaintiffs White and Videckis were harmed; and  
19 (f) That Defendant Pepperdine’s discrimination against Plaintiffs  
20 was a substantial factor in causing them harm.  
21 (CACI 3069.)

22  
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24 \_\_\_\_\_  
25 <sup>2</sup> There are no 9th Circuit jury instructions for violations of Title IX. CACI 3069 is  
26 the California jury instruction for “Harassment in Education Institution (Education  
27 Code §220).” Education Code §220 has been held to be the equivalent of Title IX  
28 with the same elements and standards. (*Donovan v. Poway Unified School District*  
(2008) 167 Cal.App.4th 567.)

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5. Claim 5: Violation of Title IX, 20 U.S.C. §§ 1621, et seq. – Retaliation for Complaints About Discrimination:

Plaintiffs must prove:

- (a) That Defendant Pepperdine retaliated against Plaintiffs White and Videckis for having complained about Defendant Pepperdine’s harassment and discrimination as a result of their sex/sexual orientation;
- (b) That the retaliation was so severe, pervasive and objectively offensive that it could be said to deprive the Plaintiffs access to the educational opportunities or benefits provided by the school;
- (c) That such retaliation caused the Plaintiffs to suffer harm;
- (d) That Plaintiffs’ complaints about Defendant Pepperdine’s harassment and discrimination as a result of their sex/sexual orientation was a substantial motivating factor for Defendant Pepperdine’s conduct;
- (e) That Plaintiffs were harmed; and
- (f) That Defendant Pepperdine’s discrimination against the Plaintiffs was a substantial factor in causing them harm.

(CACI 3069.)

6. Claim 6: Violation of the Unruh Act:

Plaintiffs must prove:

- (a) That Defendant Pepperdine made a distinction based upon its perception of Plaintiffs’ sexual orientation that denied full and equal opportunities or benefits provided by the school to Plaintiffs;
- (b) That a substantial motivating factor for the conduct of Defendant Pepperdine was its perception of Plaintiffs’ sexual orientation;
- (c) That Plaintiffs were harmed; and
- (d) That Defendant Pepperdine’s conduct was a substantial factor in



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1 causing harm to Plaintiffs.

2 (*CACI 3060.*)

3 7. Claim 7: Intentional Infliction of Emotional Distress:

4 Plaintiffs must prove:

5 (a) That Defendant Pepperdine’s conduct was outrageous;

6 (b) That Defendant Pepperdine intended to cause Plaintiff White and  
7 Plaintiff Videckis emotional distress;

8 (c) That Plaintiff White and Plaintiff Videckis suffered severe  
9 emotional distress; and

10 (d) That Defendant Pepperdine’s conduct was a substantial factor in  
11 causing Plaintiff White’s and Plaintiff Videckis’ severe emotional  
12 distress. “Outrageous conduct” is conduct so extreme that it goes  
13 beyond all possible bounds of decency. Conduct is outrageous if a  
14 reasonable person would regard the conduct as intolerable in a civilized  
15 community. Outrageous conduct does not include trivialities such as  
16 indignities, annoyances, or feelings, or bad manners that a reasonable  
17 person is expected to endure.

18 (*CACI 1600, 1602, and 1604.*)

19 C. Key Evidence in Opposition to Plaintiffs’ Claims

20 1. Claim 1: Violation of Right of Privacy Under California Constitution,  
21 Article I, § 1:

22 Defendant Pepperdine denies any intrusion into Plaintiffs’ private lives.  
23 The evidence will show:

24 (a) Plaintiffs had no reasonable expectation of privacy as to their  
25 medical condition or records in that they were NCAA athletes on  
26 athletic scholarships and as such they waived any right to preclude  
27 Pepperdine from inquiring into and obtaining records regarding their  
28 medical conditions. Pepperdine did not act beyond the scope of this

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justification in inquiring into and seeking records regarding Plaintiffs’ medical conditions.

(b) Pepperdine did not make intrusive or pervasive inquiries, either intentionally or otherwise, into Plaintiffs’ personal relationship and sexual activity. Whatever random and non-orchestrated discussions took place between teammates and/or non-managerial level Pepperdine employees on the topic were either social discussions among Plaintiffs and staff with whom Plaintiffs already had a personal relationship; were discussions with other women basketball players for the purpose of building team unity that were not offensive to other Pepperdine women’s basketball players; were not actually offensive to Plaintiffs when made; and were not highly offensive to a reasonable person in Plaintiffs’ position.

(c) The inquiries were not a substantial factor in any harm to Plaintiffs.

2. Claim 2: Violation of California Education Code §§ 220, 66251, and 66270:

Defendant Pepperdine denies any discrimination, harassment, or retaliation against Plaintiffs on the basis of gender, gender identity, gender expression or sexual orientation and asserts the evidence offered by Plaintiffs is insufficient as a matter of law on the topic. Should Plaintiffs’ evidence be considered sufficient to establish a *prima facie* case, Defendant Pepperdine’s evidence will show:

(a) There was no discrimination, harassment or retaliation against Plaintiffs based upon their gender, gender identity, gender expression or sexual orientation at all and certainly not in a severe, pervasive and offensive manner sufficient to deprive them of educational benefits. It was known by Coach Weisenberg that there were several members of

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1 the LGBT community on the women’s basketball team and on the  
2 coaching staff and there was no bias demonstrated by the coaching  
3 staff, by the Athletic Department, or by the Pepperdine administration  
4 in the handling of Plaintiffs’ situation, complaints and investigation.  
5 Any comments that were made by Coach Weisenberg regarding  
6 teammates dating were made solely for the purpose of making the  
7 leaders on his team aware of issues that could cause unity problems and  
8 all other players understood his comments in this way.

9 (b) Pepperdine did not have any knowledge of any alleged  
10 harassment and discrimination based upon sex/sexual orientation until  
11 Plaintiffs complained to the Pepperdine administration in late  
12 September 2014.

13 (c) Pepperdine was not indifferent to, and certainly not deliberately  
14 indifferent to, Plaintiffs’ complaints. Pepperdine took immediate and  
15 appropriate actions addressing all of Plaintiffs’ complaints and  
16 conducted a thorough and complete investigation of the allegations of  
17 discrimination and harassment.

18 (d) Plaintiffs were not retaliated against for raising their complaints  
19 and they were not forced off the basketball team, were not forced out of  
20 their scholarships, and were not forced to leave Pepperdine. Plaintiffs  
21 made those decisions themselves.

22 (e) Pepperdine was not hostile to its LGBT students. In fact, for  
23 years before and including the time when Plaintiffs were enrolled at  
24 Pepperdine substantive and deliberate efforts were being made by the  
25 Pepperdine administration to ensure that its LGBT students were  
26 supported, included, treated fairly and in a non-discriminatory manner.

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3. Claim 3: Violation of Title IX, 20 U.S.C. §§ 1681, et seq. – Deliberate Indifference to Harassment:

Defendant Pepperdine denies any discrimination, harassment, or retaliation against Plaintiffs on the basis of sex/sexual orientation and asserts the evidence offered by Plaintiffs is insufficient as a matter of law on the topic. Pepperdine further maintains, as it has throughout this case, that Plaintiffs’ allegations are insufficient to state a claim for violation of Title IX in that the allegations at most assert discrimination based upon sexual orientation which is not actionable under Title IX. Should Plaintiffs’ evidence be considered sufficient to establish a *prima facie* case for violation of Title IX, Defendant Pepperdine’s evidence will show all of the facts identified in 2 (a) – (e) at pages 10, line 18 through page 11, line 26 above.

4. Claim 4: Violation of Title IX, 20 U.S.C. §§ 1621, et seq. – Systematic Intentional Discrimination:

As with Claim 3, Defendant Pepperdine denies any discrimination, harassment, or retaliation against Plaintiffs on the basis of sex/sexual orientation and asserts the evidence offered by Plaintiffs is insufficient as a matter of law on the topic. Moreover, Defendant Pepperdine’s evidence will show all of the facts identified in 2 (a) – (e) at page 10, line 24, through page 11, line 26 above.

5. Claim 5: Violation of Title IX, 20 U.S.C. §§ 1621, et seq. – Retaliation for Complaints About Discrimination:

As with Claims 3 and 4, Defendant Pepperdine denies any discrimination, harassment, or retaliation against Plaintiffs on the basis of sex/sexual orientation and asserts the evidence offered by Plaintiffs is insufficient as a matter of law on the topic. Moreover, Defendant Pepperdine’s evidence will show all of the facts identified in 2 (a) – (e)

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at page 10, line 24, through page 11, line 26 above.

6. Claim 6: Violation of the Unruh Act:

Defendant Pepperdine denies withholding or denying Plaintiffs full and equal accommodations, advantages, facilities, privileges, or services as a result of their sex or sexual orientation or at all and Defendant Pepperdine asserts the evidence offered by Plaintiffs is insufficient as a matter of law on the topic. Should Plaintiffs’ evidence be considered sufficient to establish a *prima facie* case for violation of the Unruh Act, Defendant Pepperdine’s evidence will show all of the facts identified in 2 (a) – (e) at page 10, line 11, through page 11, line 13 above.

As addressed under issues of law, Defendant also objects to a late insertion of Civil Code Section 51.9 by Plaintiffs in that it was not alleged in their TAC and it does not apply since there are no allegations of any “sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender.

7. Claim 7: Intentional Infliction of Emotional Distress:

Defendant Pepperdine denies any misconduct toward Plaintiffs including the intentional infliction of emotional distress. Should Plaintiffs’ evidence be considered sufficient to establish a *prima facie* case for intentional infliction of emotional distress, Defendant Pepperdine’s evidence will show:

(a) Pepperdine and its employees acted reasonably within the scope of their responsibilities within the Athletic Department and the University as a whole. The athletic trainers are required to monitor player physical condition in order to protect the players and meet the requirements of the NCAA and as such must inquire as to player

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1 physical condition and obtain medical records. The Academic  
2 Coordinator was responsible for maintaining study hall hours and team  
3 members' meeting their requirements for attending study hall and team  
4 member academic status. The coaching staff was required to oversee  
5 this work and to maintain a good team dynamic in order to promote  
6 team unity. Pepperdine administration, both of the Athletic Department  
7 and the University as a whole, was to oversee the activities of the  
8 athletic staff including assuring that they complied with all applicable  
9 laws, including laws against harassment, discrimination, and retaliation.  
10 Pepperdine's evidence will demonstrate that all Pepperdine employees  
11 acted reasonably in carrying out their duties and no Pepperdine  
12 employee, much less administrative staff, acted inappropriately, much  
13 less, outrageously toward Plaintiffs. (See, Pepperdine's evidence  
14 identified in 2 (a) – (e) at page 10, line 24, through page 11, line 26  
15 above.)

16 (b) All actions taken by Pepperdine Athletics coaches and staff were  
17 the proper exercise of permissible, privileged conduct. Plaintiffs knew  
18 that as women basketball players, Pepperdine coaches and staff were  
19 charged with meeting the requirements of the NCAA regarding the  
20 health and fitness of players and thus had to inquire into their physical  
21 condition and substantiating medical records. Plaintiffs knew, that as  
22 women basketball players, they had to maintain academic standards to  
23 be eligible to play and keep their scholarships and knew the coaches  
24 and staff of the Athletic Department were charged with assisting them  
25 to meet this goal. Team unity and chemistry are also an appropriate  
26 characteristic for coaches to foster and develop. Pepperdine's evidence  
27 will demonstrate that each of its coaches and staff had a good faith  
28 belief that they had a legal right and obligation to carry out the conduct

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1 of which Plaintiffs now complain.

2 **D. Summary Statement of Defendants of Defenses and Their**  
3 **Elements.**

4 Defendant Pepperdine asserts is affirmative defenses 1, 3, 5, 6, 10, 13, 16, 18,  
5 19, and 21 and withdraws all other affirmative defenses. The affirmative defenses  
6 Pepperdine Asserts are as follows:

7 1. First Affirmative Defense – Plaintiffs’ Failure to State a Claim

8 Defendant Pepperdine asserts that Plaintiffs’ evidence is insufficient to  
9 establish liability on any theory set out in Plaintiffs’ Third Amended Complaint and  
10 will move to have judgment entered as a matter of law at the close of Plaintiffs’  
11 evidence. Defendant Pepperdine also asserts that Plaintiffs’ Third, Fourth and Fifth  
12 Causes of Action must be dismissed because Title IX does not apply to claims based  
13 on sexual orientation discrimination, harassment, or retaliation.

14 2. Third Affirmative Defense – Consent

15 Defendant Pepperdine asserts that Plaintiffs consented to the inquiries into  
16 their physical condition and all medical records supporting the same as scholarship  
17 athletes and under NCAA rules and regulations and thus its actions were privileged  
18 and justified. Defendant Pepperdine will show:

- 19 (a) Pepperdine’s coaches and staff had a good faith belief that the  
20 inquiries were consented to and justified and privileged; and
- 21 (b) Pepperdine’s coaches and staff had the right and obligation to  
22 inquire about Plaintiffs’ physical condition as scholarship athletes and  
23 under NCAA rules and regulations.

24 (CACI 1807.)

25 3. Fifth Affirmative Defense - Estoppel

26 Defendant Pepperdine will establish that Plaintiffs are estopped from  
27 asserting that its staff harassed, discriminated against and/or retaliated against  
28 Plaintiffs by inquiring into Plaintiffs’ medical condition and medical records.

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1 Plaintiffs represented to Defendant Pepperdine what their complaints against the  
2 coaches and staff were at the outset of the Title IX investigation. Plaintiffs did not  
3 represent that they believed they were harassed, discriminated against or retaliated  
4 against by the inquiries into their medical condition and records. Defendant  
5 Pepperdine changed its position to its detriment based upon the representations of  
6 Plaintiffs by relying upon Plaintiffs’ representations in structuring and proceeding  
7 with its Title IX investigation.

8 4. Sixth Affirmative Defense – Failure to Mitigate

9 Defendant Pepperdine asserts Plaintiffs have a duty to use reasonable efforts  
10 to mitigate their damages. Defendant Pepperdine will show:

11 (a) Plaintiffs failed to use reasonable efforts to mitigate their  
12 damages; and

13 (b) The amount of damages that would have been mitigated.  
14 (*9<sup>th</sup> Circuit Manual of Model Jury Instructions, Civil No. 5.3*)

15 5. Tenth Affirmative Defense – Justification/Excuse

16 Defendant Pepperdine asserts that its inquiry into Plaintiffs’ physical  
17 condition and all medical records supporting the same as scholarship athletes and  
18 under NCAA rules and regulations was justified. Defendant Pepperdine will show  
19 Pepperdine’s coaches and staff had the right and obligation to inquire about  
20 Plaintiffs’ physical condition as scholarship athletes and under NCAA rules and  
21 regulations in order to protect scholarship athletes’ health and comply with NCAA  
22 regulations.

23 (*CACI 1807.*)

24 6. Thirteenth Affirmative Defense – Privilege – Good Faith Assertion of  
25 Legal Rights and Privileges

26 Defendant Pepperdine asserts that each statement or inquiry made by the  
27 coaches and staff of Defendant Pepperdine to the Plaintiffs was made in good faith  
28 and was a lawful assertion of the Defendant’s legal rights and obligations and thus



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1 was privileged. Defendant Pepperdine will show:

2 (a) Pepperdine’s coaches and staff had a good faith belief that the  
3 inquiries were justified and privileged; and

4 (b) Pepperdine’s coaches and staff had the right and obligation to  
5 inquire about Plaintiffs’ physical condition as scholarship athletes and  
6 under NCAA rules and regulations.

7 (CACI 1605.)

8 7. Sixteenth Affirmative Defense – Punitive Damages Limited

9 Defendant Pepperdine asserts that if Plaintiffs produce clear and convincing  
10 evidence against Defendant Pepperdine sufficient to satisfy the requirements for  
11 punitive damages under California Civil Code, Section 3294, any punitive damages  
12 awarded must be reasonable in terms of the following guideposts set forth by the  
13 United States Supreme Court in *BMW of North America, Inc. v. Ira Gore, Jr.*, 517  
14 U.S. 559 (1996): (1) the degree of reprehensibility of the Defendant’s conduct; (2)  
15 the actual harm inflicted on Plaintiff; and (3) the civil or criminal penalties that  
16 could be imposed for comparable misconduct. Defendant Pepperdine recognizes  
17 this is a legal issue for determination by the Court. It is, however, pled as an  
18 affirmative defense and as such Defendant Pepperdine addresses it here to be in full  
19 compliance with the Court’s rules.

20 8. Eighteenth Affirmative Defense – Unclean Hands

21 Defendant Pepperdine asserts that Plaintiffs’ action is barred by the doctrine  
22 of unclean hands in that Plaintiffs were acting illegally by intentionally recording  
23 conversations with Athletic Department coaches and staff without notice or consent  
24 in violation of California Penal Code Section 632 in an effort to set up this litigation.

25 9. Nineteenth Affirmative Defense - Waiver

26 Defendant Pepperdine asserts that Plaintiffs waived any claims that inquiries  
27 by its Athletics Department coaches and/or staff into their medical conditions and  
28 into the records supporting their medical conditions by failing to complain of those

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1 actions at the outset of, or during the course of, the Title IX investigation conducted  
2 by Defendant Pepperdine.

3 10. Twenty-First Affirmative Defense – Justification

4 Any alleged invasion of privacy was justified because it substantively  
5 furthered one or more countervailing interests. Defendant Pepperdine shall  
6 establish:

7 (a) The inquiries into the Plaintiffs’ physical condition and medical  
8 records were justified under NCAA regulations and requirements and  
9 the appropriate standard of care in managing scholarship athletes’  
10 needs and safety; and

11 (b) The inquiries substantially furthered the interests of keeping  
12 players healthy and safe.

13 (*CACI 1807*)

14 **E. Statements of Anticipated Evidentiary Issues**

15 The evidentiary issues for this case are reflected in the extensive motions in  
16 limine filed by both sides. The Court ruled on those motions on Monday, June 19,  
17 2017. Defendant Pepperdine is not aware of any other evidentiary issues except  
18 those that might be raised during the course of trial and those rulings on motions in  
19 limine in which the Court reserved for further foundation or later ruling. Defendant  
20 Pepperdine refers the court to its minute order and will submit the transcript of that  
21 hearing for the Court’s file as soon as it is received.

22 **F. Statement of Issues of Law**

23 Defendant Pepperdine contends that (1) Plaintiffs’ evidence when interpreted  
24 most favorably to Plaintiffs’ claims is not sufficient to establish liability for  
25 harassment, discrimination, and retaliation or on any other theory set out in  
26 Plaintiffs’ TAC, (2) that punitive damages are not recoverable under Plaintiffs’  
27 Claim 2 (California Education Code), Claims 3 – 5 (Violation of Title IX) and  
28 Claim 6 (Violation of Unruh Act); (3) Plaintiffs are not entitled to instructions on

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1 Education Code §§ 66251 and 66270 in that there is no private right to a cause of  
2 action under those provisions of law and instructing would confuse the jury; and (4)  
3 Plaintiffs are not entitled to instructions on Civil Code § 51.9 in that it was not  
4 pleaded and it does not apply. Defendant Pepperdine has met and conferred with  
5 Plaintiffs’ counsel on all these issues.

6 1. Sufficiency – Anticipated Motion for Entry of Judgment (FRCP 50)

7 Pepperdine further asserts that Plaintiffs have failed to allege facts sufficient  
8 to support a claim under Title IX in that the facts in the TAC allege discrimination  
9 based upon sexual orientation and not on the basis of sex. While Plaintiffs pepper  
10 the TAC here and there with allegations of gender stereotyping, there are no facts  
11 alleged to support that conclusory allegation. It is, therefore, Defendant  
12 Pepperdine’s position that the TAC fails to state facts sufficient to support a Title IX  
13 claim. Now that we are at trial, Defendant Pepperdine expects that Plaintiffs will  
14 fail to offer evidence to support a finding that they were harassed, discriminated  
15 against, or retaliated against based upon sex or gender stereotyping.

16 Defendant Pepperdine further asserts that Plaintiffs’ evidence will be  
17 insufficient as a matter of law to establish a *prima facie* case of invasion of privacy,  
18 or intentional infliction of emotional distress.

19 Defendant Pepperdine, therefore, anticipates moving for Judgment as a Matter  
20 of Law under F.R.C.P. Rule 50 of those claims at the conclusion of Plaintiffs’  
21 evidence.

22 2. Punitive Damages

23 Defendant Pepperdine asserts Plaintiffs cannot recover punitive damages  
24 under Claim 2 (California Education Code), Claims 3 – 5 (Violation of Title IX) and  
25 Claim 6 (Violation of Unruh Act) and as such, Plaintiffs are not entitled to  
26 instructions related to such a recovery and thus are not entitled to instructions or a  
27 verdict form with questions on these issues.

28 ///

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1 (a) Title IX (Claims 3 – 5)

2 Punitive damages are not available under Title IX. (Mercer v. Duke Univ.,  
3 401 F.3d 199, 202 (2005, 4<sup>th</sup> Cir.); *Mercer v. Duke Univ.*, 2002 U.S. App. LEXIS  
4 23610, \*1 \*\*, 50 Fed. Appx. 643, 643 (4th Cir. N.C. Nov. 15, 2002)<sup>3</sup>; *Benacquista*  
5 *v. Spratt*, 217 F. Supp. 3d 588, 606-607 (2016, USDC Northern Dist. NY) [citing  
6 *Mercer* for holding that punitive damages not available under Title IX]; *Minnis v.*  
7 *Bd. of Supervisors of La. State Univ. & Agric. & Mech. College*, 972 F. Supp. 2d  
8 878 (M.D. La. Sept. 17, 2013) [citing *Mercer* as basis for grant of motion to dismiss  
9 allegations of punitive damages under Title IX]; *Elizabeth S. v. Okla. City Pub.*  
10 *Schs.*, 2008 U.S. Dist. LEXIS 67099 \*16-18, 2008 WL 4147572 (2008, USDC  
11 Western Dist. Oklahoma); *Mansourian v. Bd. of Regents*, 2007 U.S. Dist. LEXIS  
12 77534 \*42-44; 2007 WL 3046034 (2007, USDC Eastern Dist. California)[motion  
13 for judgment on the pleadings granted dismissing claim for punitive damages under  
14 Title IX; subsequent grant of summary judgment overturned on other grounds by 9<sup>th</sup>  
15 Circuit in *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957 (2010) ]; *James*  
16 *v. Independent School Dist. No. 1-007*, 2007 U.S. Dist. LEXIS 79119 \*. 9-10; 2007  
17 WL 3171213 (2007, USDC, Western Dist. Oklahoma.) Defendant Pepperdine  
18 asserts punitive damages are not available under the Title IX provisions and thus  
19 asserts there should be no instruction to the jury or questions on the verdict form  
20 regarding this issue as to these claims for relief.

21 \_\_\_\_\_  
22 <sup>3</sup> **4<sup>th</sup> Circuit Local Rule 32.1. Citation of Unpublished Dispositions.** “Citation of  
23 this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and  
24 oral arguments in this Court and in the district courts within this Circuit is  
25 disfavored, except for the purpose of establishing res judicata, estoppel, or the law  
26 of the case. If a party believes, nevertheless, that an unpublished disposition of this  
27 Court issued prior to January 1, 2007, has precedential value in relation to a material  
28 issue in a case and that there is no published opinion that would serve as well, such  
disposition may be cited if the requirements of FRAP 32.1(b) are met [*copies*  
*provided if not otherwise available*].”

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1 (b) California Education Code (Claim 2)

2 Likewise, since the California Education Code provisions making  
3 discrimination in education illegal are to be interpreted consistently with Title IX  
4 (see, *Donovan v. Poway Unified School District* (2008) 167 Cal.App.4th 567),  
5 Defendant Pepperdine asserts punitive damages are not available under the  
6 Education Code provisions and thus asserts there should be no instruction to the jury  
7 or questions on the verdict form regarding this issue as to these claims for relief.

8 (c) Unruh Civil Rights Act (Claim 6)

9 Unruh Act allegations cannot support a claim for punitive damages since the  
10 Unruh Civil Rights Act provides for statutory penalties that are punitive in nature  
11 and thus punitive damages would be duplicative relief. (*Harris v. Capital Growth*  
12 *Investors XIV* (1991) 52 Cal. 3d 1142 [superseded by statute as to disability  
13 discrimination, but otherwise good law]; *Doran v. Embassy Suites Hotel*, 2002 US  
14 Dist LEXIS 16116 (2002, ND Cal) [motion to strike punitive damage allegations  
15 and prayer in disability discrimination case under Unruh Civil Rights Act granted];  
16 *Loskot v. Lulu's Rest.*, 2000 U.S. Dist. LEXIS 22252 \* (E.D. Cal. Nov. 14, 2000)  
17 [allegations for punitive damages under California Civil Code §3294 and prayer  
18 stricken]; *see also, Peters v. CJK Assocs., LLC* (2003, ED Cal) 2003 US Dist.  
19 LEXIS 26988 [finding authority on both sides of the issue when dealing with  
20 discrimination based upon disability and choosing not to exercise supplemental  
21 jurisdiction].) Moreover, since penalties under the Unruh Civil Rights Act are in  
22 effect punitive damages (*id.*), an award of punitive damages under any theory of  
23 liability would be duplicative of an award of penalties under the Act and the  
24 punitive damage award would need to be reduced by the amount of any penalties  
25 awarded.

26 (d) Procedure

27 The issue of punitive damage allegations and prayers asserted contrary to the  
28 law can be addressed in three ways, motions for judgment on the pleadings

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1 (*Mansourian v. Bd. of Regents*, 2007 U.S. Dist. LEXIS 77534 \*; 2007 WL 3046034  
2 (2007, USDC Eastern Dist. California)), motions to strike (see e.g., *M'Baye v. World*  
3 *Boxing Ass'n*, 2007 U.S. Dist. LEXIS 23173 (2007, USDC Southern Dist. NY)), and  
4 motions in limine (*County of Suffolk v. Amerada Hess Corp. (In re Methyl Tertiary*  
5 *Butyl Ether Prods. Liab. Litig.)*), 517 F. Supp. 2d 662, 666-667 (2007, USDC  
6 Southern Dist. NY). The Court may strike portions of a pleading on its own motion  
7 or on the motion of a party.<sup>4</sup> Defendant Pepperdine has met and conferred with  
8 Plaintiffs' counsel on this issue. Defendant Pepperdine intends to prepare and serve  
9 a motion addressing this issue on Plaintiffs' counsel on Friday, July 7, 2017, and  
10 will ask the Court for direction on how to proceed with hearing the issue.

11 3. Education Code §§ 220, 66251 and 66270

12 Plaintiffs' have offered jury instructions as if Claim 2 under the California  
13 Education Code is two separate claims, one under California Education Code  
14 Section 220, and a separate one under California Education Code Section 66251 and  
15 66270. Research regarding the jury instruction issue revealed that Plaintiffs are not  
16 entitled to bring a claim under any of these theories. Thus, Defendant Pepperdine  
17 requests that the Court deny Plaintiffs' instructions and verdict questions on any  
18 theory under Claim 2 of their TAC.

19 (a) Education Code Section 220

20 Pursuant to a December 11, 2015<sup>5</sup> case, *Karasek v. Regents of the Univ. of*  
21

22 \_\_\_\_\_  
23 <sup>4</sup> FRCP 12(f) states, "The court may strike from a pleading an insufficient defense  
24 or any redundant, immaterial, impertinent, or scandalous matter. The court may act:  
25 (1) on its own; or (2) on motion made by a party either before responding to the  
26 pleading or, if a response is not allowed, within 21 days after being served with the  
27 pleading."

28 <sup>5</sup> The *Karasek v. Regents of the Univ. of Cal.*, 2015 U.S. Dist. LEXIS 166524 \*;  
2015 WL 8527338 (2015, USDC No. Dist. California) was issued on Friday,  
December 11, 2015, well after briefing and argument had closed on Defendant  
(footnote continued)

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1 *Cal.*, 2015 U.S. Dist. LEXIS 166524 \*; 2015 WL 8527338 (2015, USDC No. Dist.  
2 California), California Education Code Section 220 does not support a private right  
3 of action against a university since it is a “post-secondary” institution not covered  
4 by the statutory scheme supporting the Section 220 prohibition. (*Karasek v. Regents*  
5 *of the Univ. of Cal.*, 2015 U.S. Dist. LEXIS 166524 \*54-56; 2015 WL 8527338  
6 (2015, USDC No. Dist. California). Therefore, Plaintiffs are not entitled to  
7 instructions or verdict questions under this theory of recovery.

8 (b) *Education Code Sections 66251 and 66270*

9 Moreover, no private right of action has been recognized under California  
10 Education Code Sections 66251 or 66270. No case law, much less California case  
11 law, recognizes a private right of action under California Education Code §§ 66251  
12 and 66270 and as such Plaintiffs are not entitled to independent instructions on  
13 theories of liability under those sections. (See, *Aguilar v. Corral*, 2007 US Dist  
14 LEXIS 77359, \*7 (2007, ED Cal) [while the Education Code Section 66251 [*“may*  
15 *support a cause of action for sexual harassment, there is no reason that violation of*  
16 *those statutes would give rise to a derivative cause of action in tort.” (Emphasis*  
17 *Added.)*]) Frankly, to instruct on these code sections as if they were a distinct theory  
18 of liability from California Education Code Section 220, assuming the jury receives  
19 such instructions, would confuse the jury. A private right of action is recognized  
20 under Section 220 as against elementary and secondary schools under *Donovan v.*  
21 *Poway Unified School District*, (2008) 167 Cal.App.4th 567, which adopts Title IX  
22

23 \_\_\_\_\_  
24 Pepperdine’s Motion to Dismiss claims within the TAC. Pepperdine’s Reply Brief  
25 in support of its Motion to Dismiss as to claims of the Third Amended Complaint  
26 (Dkt No. 33) was filed July 6, 2015, the matter was argued on August 24, 2015 and  
27 taken under submission on that date (Dkt. No. 39), and the matter was decided by  
28 the Court on Monday, December 14, 2015 (Dkt. No. 40), the Monday following the  
issuance of the *Karasek* decision.

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1 requirements as evidenced by a CACI jury instruction to that effect.<sup>6</sup> There is no  
2 reason to duplicate it with confusing instructions. Defendant Pepperdine suggests  
3 that this Court in the exercise of its supplemental jurisdiction is not in a position to  
4 decide a new and novel issue of California law and as such should decline any  
5 request to do so. (*See e.g. Peters v. CJK Assocs., LLC* (2003, ED Cal) 2003 US  
6 Dist. LEXIS 26988 [choosing not to exercise supplemental jurisdiction to address an  
7 uncertain issue of California law].) If the Court chooses to instruct under California  
8 Education Code Sections 66251 and 66270, the instruction should be based upon  
9 Title IX law as is the instruction under Section 220 and the *Donovan* case, i.e. CACI  
10 3069 and not some cobbled together formulation offered by Plaintiffs’ counsel.

11 (c) Procedure

12 Plaintiffs are not entitled to instructions or verdict questions on these  
13 Education Code liability theories and Defendant Pepperdine submits these issues for  
14 those reasons. Defendant Pepperdine, however, intends to prepare and serve a  
15 proposed motion to address this issue and to serve it on Plaintiffs tomorrow with a  
16 hearing date to be determined by the Court. Defendant Pepperdine requests the  
17 Court’s direction on this issue.

18 4. Civil Code § 51.9

19 Defendant Pepperdine asserts that Plaintiffs are not entitled to instructions  
20 under Civil Code Section 51.9 because it has not been pled and the allegations of the  
21 complaint do not factually raise issues under the section. Plaintiffs’ TAC does not  
22 mention California Civil Code Section 51.9 at all. Yes, it does mention California  
23 Civil Code Section 51, “*et seq.*”, but that does not mean it properly pleaded every  
24 theory of liability set out in the Unruh Civil Rights Act. The TAC does not make  
25 any allegations specific to Civil Code Section 51.9. Civil Code Section 51.9

26 \_\_\_\_\_  
27 <sup>6</sup> CACI 3069.  
28



1 addresses quid pro quo and requests for sexual favors in professional relationships  
2 independent of an employment relationship. Section 51.9(a)(2) specifically  
3 addresses such conduct.<sup>7</sup> Since no such allegations are pled, the jury should not be  
4 instructed under the section.

5 Defendant Pepperdine has met and conferred with Plaintiffs’ counsel on all of  
6 these issues and requests that the Court address them at the Pre-Trial Conference or  
7 at another hearing scheduled at the Court’s convenience.

8 **G. Bifurcation of Issues – Amount of Punitive Damages**

9 The parties have agreed to bifurcate the issue of the amount of punitive  
10 damages to be tried to the jury after the jury makes a decision as to whether  
11 Defendant Pepperdine’s conduct was sufficient to award punitive damages.

12 **H. Attorneys’ Fees Claim**

13 Plaintiffs have made a claim for the award of attorneys’ fees under 42 U.S.C.  
14 §1988 and a claim under the Unruh Act (California Civil Code §52).

15  
16 DATED: July 6, 2017

ANDERSON, McPHARLIN & CONNERS LLP

17  
18  
19 By: /s/ Paula Tripp Victor  
20 Paula Tripp Victor  
21 David R. Hunt  
22 Peter B. Rustin  
23 Attorneys for Defendant PEPPERDINE  
UNIVERSITY

24 <sup>7</sup> California Civil Code §51.9(a) states as a mandatory element of a violation, “The  
25 defendant has made sexual advances, solicitations, sexual requests, demands for  
26 sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical  
27 conduct of a sexual nature or of a hostile nature based on gender, that were  
28 unwelcome and pervasive or severe.”

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