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

13 **HALEY VIDECKIS and LAYANA**
WHITE, individuals,

14 Plaintiffs,

15 v.

16 **PEPPERDINE UNIVERSITY, a**
corporation doing business in
California,

17 Defendant.
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CASE NO. 2:15-CV-00298-DDP (JCx)

[Assigned to Hon. Dean D. Pregerson]

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO
STRIKE PORTIONS OF THE
THIRD AMENDED COMPLAINT**

Date: July 18, 2017
Time: 9:00 a.m.
Crtrm.: 9C

Expert Cut-Off: June 23, 2017
Pre-Trial Conf.: July 10, 2017
Trial Date: July 18, 2017

1 **I. INTRODUCTION**

2 Notwithstanding that fact that Defendant Pepperdine’s (“Pepperdine”) Motion
3 to Strike Portions of the Third Amended Complaint is untimely, it is also
4 substantively inaccurate. Plaintiffs are entitled to punitive damages under Title IX
5 and under the California Education Code and have adequately pled allegations to
6 support punitive damages under Plaintiffs’ Claims 2-5.

7 Pepperdine’s Motion is based on unsupported conclusions of law, requiring
8 this Court to make presumptions that are contrary to express language of the statutes
9 in question. Pepperdine’s Motion should be denied.¹

10 **II. ARGUMENT**

11 Motions to strike are generally viewed with disfavor and are not frequently
12 granted. *See Bassiri v. Xerox Corp.*, 292 F.Supp.2d 1212, 1220 (C.D.Cal.2003).
13 When considering a motion to strike, a court must view the pleadings in a light most
14 favorable to the non-moving party. *California ex rel. State Lands Comm'n. v.*
15 *United States*, 512 F.Supp. 36, 39 (N.D.Cal.1981). Such motions should not be
16 granted “unless it is clear that the matter to be stricken could have no possible
17 bearing on the subject matter of the litigation.” *Colaprico v. Sun Microsystems,*
18 *Inc.*, 758 F.Supp. 1335, 1339 (N.D.Cal.1991). Pepperdine makes no such showing,
19 here.

20 **A. The Issues In Pepperdine’s Motion Are Waived And Untimely**

21 Pepperdine has waived its right to bring the present motion to strike. Under
22 FRCP Rule 12(g), “[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a
23

24 ¹ While Pepperdine’s motion is substantively deficient on the question of punitive
25 damages under California Education Code sections 220, 66251 and 66270, Plaintiffs
26 have met and conferred with Pepperdine and have agreed to dismiss claims under
27 sections 66251 and 220 without prejudice, and will therefore only address
28 Pepperdine’s Motion with regarding to Title IX and section 66270 of the Education
Code.

1 motion under this rule must not make another motion under this rule raising a
 2 defense or objection that was available to the party but omitted from its earlier
 3 motion.” The right to file a motion to strike is waived if the party files a pre-answer
 4 Rule 12 motion on other grounds and does not include a motion to strike. FRCP
 5 12(h); *Culinary & Service Employees Union, AFL-CIO Local 555 v. Hawaii*
 6 *Employee Benefit Admin., Inc.* (9th Cir. 1982) 688 F2d 1228, 123. The issue of
 7 punitive damages raised in the present 12(f) motion to strike have been evident to
 8 Pepperdine since Plaintiffs requested punitive damages under California Education
 9 Code in their original complaint (filed Dec. 10, 2014), and punitive damages under
 10 Title IX requested in their third amended complaint (filed May 26, 2015). Despite
 11 knowing about these issues for years, Pepperdine did not raise any of the issues in
 12 its two 12(b)(6) motions to dismiss. Dkts. 13, 33. Therefore, Pepperdine has
 13 waived its right to its motion to strike.

14 In addition to having waived its claims, Pepperdine’s motion to strike also
 15 fails as untimely. The Federal Rules of Civil Procedure require that a motion to
 16 strike be made before responding to the pleading, or, if a response is not allowed,
 17 within 21 days after being served with the pleading. Fed. R. Civ. Pr. 12(f).
 18 Pepperdine has not requested a stipulation to extend its time to file. In cases such as
 19 this where there is no stipulation, courts hold that a motion to strike all or part of a
 20 complaint *must* be filed within the time required for serving a responsive pleading—
 21 usually 21 days. FRCP 12(f); *United States v. 729.773 Acres of Land* (D HI 1982)
 22 531 F.Supp. 967, 970.

23 **B. Punitive Damages are Available Under Title IX in the Ninth**
 24 **Circuit**

25 Pepperdine’s reliance on *Mercer v. Duke University*, 50 Fed. Appx. 643, 644-
 26 45 (4th Cir. N.C. Nov. 15, 2002), a Fourth Circuit case, is misplaced. *Mercer* is
 27 based on the Fourth Circuit’s extrapolation of the Supreme Court’s decision on *Title*
 28 *VI* issues in *Barnes v. Gorman*, 536 U.S. 181 (2002). *Barnes* did not make any

1 findings regarding Title IX. The court in *Mercer* reasoned that since Title IX is
2 based on Title VI, the same limitation on remedies should apply.

3 However, prior to *Barnes*, the Supreme Court in *Franklin v. Gwinnett County*
4 *Pub. Schs.*, 503 U.S. 60, 66, 76 (1992) (citing *Bell v. Hood*, 327 U.S. 678, 684
5 (1946)) where a former high school student sought damages ***under Title IX*** from her
6 high school for failing to stop a teacher from harassing her, in recognizing its
7 authority to fashion an appropriate remedy, made no distinction between
8 compensatory and punitive damages. *Id.* at 65-76. Some federal courts interpreted
9 *Franklin* as allowing both compensatory and punitive damages. Although since
10 *Mercer*, as pointed out by Pepperdine, some district courts within the Ninth Circuit
11 have cited *Mercer* in support of the proposition that punitives are not available
12 under Title IX (*See e.g. Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*,
13 2007 WL 3046034, at *13-*14 (E.D. Cal. Oct. 18, 2007)), none of those decisions
14 are binding on this Court. For example, the Eastern District of California later
15 disagreed with the determination in *Mansourian*, in *Doe v. Univ. of Pacific*, 2010
16 WL 5135360, at *18 n. 28 (E.D. Cal. Dec. 8, 2010), creating a contradiction within
17 that district.

18 In *Henkle v. Gregory*, 150 F.Supp.2d 1067, 1077 (D. Nev. 2001) the court
19 cited to the actual knowledge and deliberate indifference requirements to establish
20 liability under Title IX as set forth by the Ninth Circuit in *Reese v. Jefferson School*
21 *District No. 1J*, 208 F.3d 736, 739 (9th Cir. 2000)(quoting *Davis*, 119 S. Ct. at 1672,
22 1675). *Henkle* further noted that a punitive damages instruction may be warranted
23 for violation of Title IX (refused to dismiss plaintiff's claims for punitive damages)
24 because in the Ninth Circuit, deliberate indifference was defined as "the conscious
25 or reckless disregard of the consequences of ones acts or omissions," which is
26 sufficient to sustain an award of punitive damages. Although *Henkle* predates
27 *Barnes*, the logic applied by the court still applies here, and *Barnes* did not expressly
28 or impliedly overrule such reasoning for Title XI, when analyzing Title VI.

1 *Barnes* can also be readily distinguished from this case beyond merely the
 2 difference in statutory schemes. Pepperdine is a private university, not a public or
 3 governmental agency where administrative remedies may be available to a plaintiff
 4 under a Title VI scheme. Moreover, there are issues unique to Title IX claims
 5 where injunctions may not adequately address the harm, where compensatory and
 6 exemplary damages may apply to direct, individual claims.

7 Courts, including courts within the Ninth Circuit, have held that the issue of
 8 punitive damages under Title IX is not entirely foreclosed. *See Hurd v. Delaware*
 9 *State Univ.*, No. 07-11-MPT, 2008 WL 4369983 (D Del. Sept. 25, 2008) (whether
 10 punitive damages are recoverable under Title IX depends on whether the institution
 11 acted with malice or reckless indifference to the federally protected rights of
 12 plaintiff); *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996) (holding
 13 that Title IX provides for punitive damages). In *Doe v. Univ. of Pacific*, 2010 WL
 14 5135360, at *18 n. 28 (E.D. Cal. Dec. 8, 2010) the court noted that the issue of
 15 whether punitive damages are available under Title IX is unsettled within the Ninth
 16 Circuit and that *Barnes* does not definitely answer the question.

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 18 **C. The California Education Code Provides for Punitive Damages**

19 Plaintiff cites to no law for the proposition that, for punitive damages
 20 purposes, the California Education Code provisions should be interpreted
 21 consistently with Title IX, other than its suggestion of how *Donovan v. Poway*
 22 *Unified School District*, 167 Cal.App.4th (2008) should be applied. The express
 23 language of the California Education Code refutes Pepperdine’s argument. Section
 24 66292(b) states:

25 *Persons who have filed a complaint pursuant to this chapter² with an*
 26 *educational institution shall be advised by the educational institution that **civil***
 27 *law remedies, including, but not limited to, injunctions, restraining orders,*

28 ² “Chapter” refers to Chapter 4.5 of the Education Code entitled Equity in Higher Education Act [Sections 66250-66292.4].

1 *or other remedies or orders. may also be available to complainants.* The
2 educational institution shall make this information available by publication in
appropriate informational materials. (emphasis added).

3 Section 66252(g) of the CA Education Code states:

4 (g) It is the intent of the Legislature that this chapter shall be interpreted
5 as consistent with Article 9.5 (commencing with Section 11135) of Chapter 1
6 of Part 1 of Division 3 of Title 2 of the Government Code, Title VI of the
7 federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, et seq.), Title IX of the
8 Education Amendments of 1972 (20 U.S.C. Sec. 1681, et seq.), Section 504
9 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)), the federal
10 Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.),
11 the federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, et
12 seq.), the Unruh Civil Rights Act (Secs. 51 to 53, incl. Civ. C.), and the Fair
13 Employment and Housing Act (Pt. 2.8 (commencing with Sec. 12900) Div
14 3 Gov. C.) ***except where this chapter may grant more protections or impose***
15 ***additional obligations, and that the remedies provided herein shall not be***
16 ***the exclusive remedies, but may be combined with remedies that may be***
17 ***provided by the above statutes.*** (emphasis added).

18 Thus, although the California Legislature intended the Equity in Higher
19 Education Act (Chapter 4.5 of the Education Code) to be interpreted as consistent
20 with Title IX and other federal regulations, it also intended for California residents
21 to have broader protections than those afforded by federal law.

22 District courts in the 9th Circuit have found that a school district could be
23 sued for punitive damages for alleged violation of the California Education Code.
24 *See Gay-Straight Alliance Network v. Visalia Unified School District*, 262 F. Supp.
25 2d 1088 (E.D. Cal. 2001) (finding that since Section 262.3 of the Education Code
26 (which applies to Section 220 and tracks the language of 66292) “does not limit the
27 type of remedies allowed,” a plaintiff asserting a claim under the section can seek
28 punitive damages); *see also Massey v. Banning Unified School Dist.*, 256 F. Supp.
2d 1090, 1098 (C.D. Cal. 2003) (the court "has already determined that the
Individual Defendants in their personal capacities may be sued for money damages,
including punitive damages for violation of the Education Code sections.”)

1 **III. CONCLUSION**

2 Based on the foregoing, Plaintiffs respectfully request that the Court deny
3 Pepperdine’s untimely Motion to Strike.

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5 Dated: July 12, 2017

Respectfully submitted,

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