VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

LIBERTY UNIVERSITY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL21000354-00
	)	
JERRY L. FALWELL, JR.,	)	
	)	
Defendant.	)	

DEFENDANT'S DEMURRER TO COMPLAINT

Defendant, Jerry L. Falwell, Jr. ("**Falwell**" or "**Defendant**"), by counsel, pursuant to Virginia Code § 8.01-273, states the following as his Demurrer to the Complaint filed against him herein by Plaintiff, Liberty University, Inc. ("**Liberty**" or "**Plaintiff**").

LEGAL STANDARD

"The standard of review applicable to the circuit court's decision to sustain a demurrer is well established. 'A demurrer accepts as true all facts properly pled, as well as reasonable inferences from those facts.'" *Friends of the Rappahannock, et al. v. Caroline Co. Bd. of Supervisors, et al.*, 286 Va. 38, 44 (2013) (quoting *Steward v. Holland Family Props., LLC*, 284 Va. 282, 286 (2012)). "To survive a challenge by demurrer, a pleading must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Id.* (quoting *Eagle Harbor, L.L.C. v. Isle of Wight County*, 271 Va. 603, 611, (2006) (internal quotation marks omitted)). While a demurrer admits the truth of all properly pled facts, it "does not admit the correctness of the pleader's conclusions of law." *Ward's Equip., Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382 (1997). Therefore, "the purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which relief may be

granted." *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 557 (2011) (quoting *Abi–Najm v. Concord Condominium, LLC*, 280 Va. 350, 356–57, (2010) (citations and internal quotation marks omitted).

INTRODUCTION

Over the course of Liberty's Complaint, Liberty goes to great lengths to defame and diminish Falwell's reputation with allegations that have nothing whatsoever to do with its claims. It appears that Liberty's motivation in filing the Complaint was to air inflammatory and embarassing allegations about Falwell (or, more accurately, his wife) instead of actually trying to state a cause of action. While the narrative is repetitive, what is more concerning is, even treating all the allegations as true, as required by a demurrer, most of the averments are completely irrelevant to Liberty's attempted claims of breach of contract, breach of fiduciary duty, and statutory conspiracy.

Liberty states that, "[m]any of the facts supporting Liberty's latter two claims are helpfully spelled out in two writings." *Compl.* ¶ 4. Those documents are attached as exhibits. Those two writings only address the actions of Falwell's wife, and not the actions of Falwell in connection with his role as President of Liberty. As another example, in an effort to embarrass Falwell and his family, Liberty includes nine pictures in the Complaint's text, with inaccurate or misleading descriptions. The pictures and false descriptions have nothing whatsoever to do with the claims Liberty asserts.

Since Liberty's founding in 1971, Liberty and the Falwell name have been synonymous, and continue to be. Since May 15, 2007, upon the Rev. Jerry Falwell's ("**Rev. Falwell**") untimely passing, and until August 25, 2020, Falwell served as President and Chancellor of Liberty. During that 13-year period, Liberty experienced tremendous growth in both enrollment numbers and

financial independence through the growth in Liberty's endowment and assets. *See* Compl., Exhibit 2 (¶¶ 24-32 identifying a snippet of Falwell's contributions to Liberty). This growth began in 2007 and continued through Falwell's resignation in 2020.

In recognition of Falwell's impact on Liberty, Liberty attempts to assert three claims against Falwell: Breach of Contract, Breach of Fiduciary Duty, and Statutory Conspiracy. In support of its three claims, Liberty presents a novella complete with titles and pictures detailing the salacious personal details of an affair Rebecca Falwell ("**Becki**") had with Giancarlo Granda ("**Granda**") and the extortion attempts on Becki and Falwell. The rehashing of these events and protected defamation of Falwell through litigation serves one mission – ruining Falwell's reputation through mischaracterization of events and public shaming through out-of-context pictures filed in a public complaint.

The Complaint publicizes the personal story surrounding Granda, Becki, and Falwell. It also adds made up "facts" around pictures included in the Complaint, while detailing the "Liberty Way." Yet, through Liberty's alleged indignation that Falwell's averred actions are bad and Liberty is good, the Complaint does not address Falwell's actions as the leader of Liberty – instead, Liberty focuses on his wife's personal life, when the two are separate and distinct.

Ultimately, Liberty's Complaint fails to state a claim against Falwell for Breach of Contract, Breach of Fiduciary Duty, or Statutory Conspiracy. Instead of providing facts to support its claims, Liberty purposefully includes out-of-context pictures and irrelevant and salacious false allegations to disparage Falwell. Its claims that Falwell breached his fiduciary duty to Liberty and conspired to injure Liberty appear to be an afterthought or excuse to file the sensational allegations about Falwell. Liberty does not plead sufficient facts to support the claims it pretends to try to

allege. Because statements made in a complaint are privileged, Liberty appears to have filed this with the purpose of defaming Falwell rather than to truly state claims.

ARGUMENT

I. Liberty Fails to State a Claim in Count One.

The crux of Liberty's Count One is a breach of contract claim. In order to maintain a claim for breach of contract, a plaintiff must establish: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of the obligation." *Navar, Inc. v. Federal Business Council*, 291 Va. 338, 344 (2016). In this matter, Liberty goes to great length to detail the personal accounts of Becki and Falwell, but Liberty fails to include the 2019 Employment Agreement.[1] A breach of contract claim, however, requires more than identifying the obligation.

Liberty claims Falwell breached his duty under Section 3.8 of the 2019 Employment Agreement by failing to return Liberty's property. *See* Compl. ¶¶ 116, 123. Section 3.8 of the 2019 Employment Agreement provides "[a]ny Confidential Information *in tangible form* shall be immediately returned to LU upon request" (emphasis added). Here, Liberty avers that "Falwell, Jr. went to great lengths to avoid storing his communications and other business data on Liberty's system." Compl. ¶ 118. Liberty also alleges that Falwell has failed to return "many key documents relating [to] Liberty's business, including Confidential Information, is stored on devices provided by the University, or in third party systems." Compl. ¶ 119. "[C]omputer data . . . [is] not 'tangible' property in the common sense understanding of the word. The plain and ordinary meaning of the term 'tangible' is property that can be touched. Computer data . . . [is] incapable of perception by any of the senses and [is] therefore intangible." *America Online, Inc. v. St. Paul Mercury Ins. Co.*,

[1] A Motion Craving Oyer is being filed with this Demurrer, and Falwell asks that the Employment Agreement be considered as part of this Demurrer.

207 F. Supp. 2d 459, 462 (E.D.Va. 2002). Additionally, Liberty attempts to alternatively plead conversion within Count One. "In general, a cause of action for conversion applies only to tangible property." *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305 (1994). As stated herein, the property consisting of "computer data" is not tangible property. Therefore, Liberty fails to state a claim for breach of contract or conversion for any and all Confidential Data that "is stored on devices" because that data is not tangible.

For the entire claim, Liberty fails to state the injury or damage Falwell caused by the purported breach. Liberty simply sets forth the conclusory claim of $250,000.00 in purported damages.[2] Compl. ¶ 128. "[A]n *essential* element in a breach of contract action is that the defendant's breach of a contractual obligation caused injury or damage to the plaintiff." *Ramos v. Wells Fargo Bank, NA*, 289 Va. 321, 323 (2015) (emphasis added). "Accordingly, the plaintiff must allege facts setting forth injury or damage incurred as a result of defendant's breach." *Id*; citing *Squire v. Virginia Housing Development Authority*, 287 Va. 507, 518 (2014). Here, Liberty fails to set forth facts establishing that the alleged retention of Liberty's Confidential Information has damaged or injured Liberty. All the Complaint provides is that Falwell refused to use his assigned liberty.edu email address, avoided storing communications and data on Liberty's system, worked independently on Liberty deals, and had a duty to return Liberty's property. Compl. ¶¶ 117-124. These facts do not provide the requisite factual support to show Liberty's purported damage or injury.

Therefore, because Liberty fails to show a breach of returning intangible property and fails to show the injury or damage the purported breach caused, and because intangible property is not subject to a conversion claim, this Court must dismiss Count I of the Complaint with prejudice.

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[2] "As a general rule, damages for breach of contracts are limited to the pecuniary loss sustained." *Wright v. Everett*, 197 Va. 608, 615 (1956).

II. Liberty Fails to State a Claim Against Falwell for Breach of Fiduciary Duty.

In order to state a claim for breach of fiduciary duty under Virginia law, Liberty must allege "(1) a fiduciary duty, (2) breach, and (3) damages resulting from the breach." *Informatics Applications Grp., Inc. v. Shkolnikov*, 836 F.Supp.2d 400, 424 (E.D. Va. 2011). Here, Liberty alleges Falwell "had a fiduciary duty to provide material information to the Board, refrain from acts harmful to the interests of Liberty, avoid conflicts of interest, and reject opportunities to benefit his personal interests to the detriment of Liberty." Compl. ¶ 130. Yet, regardless of the allegations, Liberty remains unable to show how Falwell himself, under the facts alleged, breached any of his alleged fiduciary duties to Liberty and, moreover, how Liberty was damaged beyond the conclusory allegations of Liberty's reputation being damaged, among others. Compl. ¶ 136.

Here, the best Liberty can allege is that Becki engaged in an affair with Granda that Falwell learned about. Compl. ¶ 8. The remaining allegations state embarrassing allegations that have no bearing on Liberty or its claims in this lawsuit. At most, the affair is ultimately a personal issue between Granda and Becki, to which Falwell, as Becki's husband, learned about. To the extent Liberty seeks to utilize this "Granda Plan" into a breach of fiduciary duty, it is unable.

In Virginia, while the Code does not abrogate the common law duties of loyalty and care of a director, the Code does set the standard by which a director is to discharge those duties. *Williard ex rel. Moneta Bldg. Supply, Inc. v. Moneta Bldg. Supply, Inc.*, 258 Va. 140, 151 (1999); *see also* Va. Code § 13.1-870 (General standards of conduct for directors). Here, Liberty claims Falwell had a fiduciary duty to provide material information to the Board, refrain from acts harmful to the interests of Liberty, avoid conflicts of interest, and reject opportunities to benefit his personal interests to the detriment of Liberty. Compl. ¶ 130.

The duties Liberty claims are similar to a lawsuit involving comedian Kevin Hart ("**Hart**"). There, Hart posted a video on social media apologizing to his wife and kids for an affair that was the subject of a private extortion attempt at the same time he, and more specifically, a company of which he was a director, was promoting a mobile video game. *See Stand Up Digital, Inc. v. Hart*, No. 1:18-cv-919, 2019 WL 6257734, *3 (E.D.Va. Nov. 22, 2019).

In *Hart*, the plaintiff makes "the general proposition that a director has a duty to 'tell his principal about anything which might affect the principal's decision whether or how to act.'" *Stand Up Digital, Inc. v. Hart*, 2019 WL 6257734, *3 (E.D.Va. Nov. 22, 2019) (quoting *Allen Realty Corp v. Holbert*, 227 Va. 441, 446 (1984)); *Cf.* Compl. ¶ 130. The plaintiff in *Hart* also argues "these duties forbid the director from 'placing himself in a position where his individual interest clashes with his duty to his corporation.'" *Id.* (quoting *Rowland v. Kable*, 174 Va. 343, 366 (1940)). The Court in *Hart*, however, ruled that the plaintiff's argument over-extends the *Holbert* and *Rowland* cases cited. "*Rowland* and *Holbert* involved classic cases of self-dealing, where a director stood to gain personally or financially in direct conflict with the interests of the corporation." *Id.* As the Court states, "[v]ery significantly, these cases [*Rowland* and *Holbert*] involved decisions made by a director or fiduciary that involved the corporation's business interests on the one hand, and the director's interests on the other." *Id.* Here, the factual scenario is similar to Hart with one distinct difference; Hart committed the affair and Falwell did not. Regardless, just as Hart went public, Becki and Falwell's "decision to go public regarding the extortion attempt was [] not one where [they] stood to gain personally or financially to the direct detriment of [Liberty]. *Id.* Consequently, just as the Court ruled in favor of Hart's motion, the Court should grant the Demurrer and dismiss Liberty's Complaint.

In addition to Liberty's failure to state of claim for breach of fiduciary duty, Falwell is protected from liability when "business decisions [are] made 'in accordance with his good faith judgment of the best interests of the corporation.'" *Lake Monticello Owners' Ass'n v. Lake*, 250 Va. 565, 571 (1995) (quoting Virginia Code § 13.1-870(A)). "Courts are reticent to review directors' decisions made in accordance with the law and its corporate powers." *Bennett v. Loudoun Valley Home Owners Ass'n*, 73 Va. Cir. 466, 2007 WL 6013706, *3 (July 30, 2007 Loudoun Co. Cir. Ct.). Here, the crux of Liberty's claim involves Falwell's treatment of a private matter and publicizing the details of Becki's affair and the subsequent extortive attempts. Falwell's duties to Liberty do not prohibit Falwell from derailing, in any legal manner, Granda's plan.

Overall, Falwell breached no fiduciary duty to Liberty, as a matter of law, by handling Falwell's private matters that only indirectly clashed with Liberty's interest, including negotiating the 2019 Employment Agreement. Notably, in every negotiation of an employment agreement, the interests of the employee (even a President/CEO), are inherently adverse to the interests of the employer. *See Official Committee of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins*, No. Civ.A. 20228-NC, 2004 WL 1949290, *16 (Del. Ct. of Chancery Aug. 24, 2004) ("Employees negotiating employment agreements with their employers have the right to seek an agreement containing the best terms possible for themselves"). In fact, the 2019 Employment Agreement was not an employment agreement sought because of Falwell's private matters, but was an employment agreement in the due course, as the 2012 Employment Agreement "provided for a seven-year compensation schedule with annual raises." Compl. ¶ 67.

As described above, Falwell owed no duty to tell Liberty of private matters involving Becki. Furthermore, the actions and duties Liberty claims are unsupported and do not rise to a cognizable claim. In sum, Liberty can point to no breach that implicates a duty Falwell owed to

Liberty. Falwell, as President, Chancellor, and member of the Board of Trustees, acted in furtherance of Liberty's mission to become the pre-eminent evangelical college in the world and fulfilled his duties of care and loyalty to Liberty, its faculty and staff, and its students. Consequently, Count II must be dismissed with prejudice.

III. Liberty Fails to State a Claim Against Falwell for Statutory Conspiracy.

Liberty fails to state a plausible claim for statutory business conspiracy under Virginia Code § 18.2-499. Virginia Code § 18.2-499 provides: "[a]ny two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act." More succinctly, in order to state a claim, "a plaintiff must establish: '(1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business; and (2) resulting damage to plaintiff.'" *Dunlap v. Cottman Transmissions*, 287 Va. 207, 214 (2014) (citing *Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, (1984)).

More importantly, however, is that for a plaintiff to survive a demurrer, the conduct must be directly aimed toward damaging Liberty and "an allegation of conspiracy, whether criminal or civil, must at least allege an unlawful act or an unlawful purpose." *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402 (1985). This is because "there can be no civil conspiracy to do an act that the law allows . . . an allegation of conspiracy . . . must at least allege an unlawful act or an unlawful purpose [to survive dismissal] . . . . In other words, actions for common law civil conspiracy and statutory business conspiracy lie only if a plaintiff sustains damages as a result of an act that is itself wrongful or tortious." *Dunlap*, 287 Va. at 215 (internal citations omitted).

The alleged "conspiracy" alone is not enough to state a cause of action. *Id.* Instead, conspiracy claims serve to impose vicarious liability on the conspirators for the underlying tort. *Id.*

When pleading business conspiracy, a plaintiff must allege "concerted action, legal malice, and causally related injury . . . set[ting] forth core facts to support the claim." *Kayes v. Keyser*, 72 Va. Cir. 549, 552 (Charlottesville Cir. Ct., 2007) (quoting *Atlantic Fulton v. Tempur-Pedic, Inc.*, 67 Va. Cir. 269, 271 (Charlottesville Cir. Ct., 2005). Moreover, "it is not enough for [a] plaintiff merely to track the language of the conspiracy statute without alleging the fact that the alleged co-conspirators did, in fact, agree to do something the statute forbids." *Id.*

Here, Liberty is unable to show how Falwell combined with any other person or persons to ***willfully*** injure Liberty (emphasis added). Instead, the Complaint shows how Granda's actions were done to harm Falwell. Compl. ¶ 32, 34-38. Granda's plan was to damage Falwell and Liberty. Compl. ¶ 37. Falwell was leading Liberty through meteoric growth, not acting with Granda to willfully injure Liberty. *See* Compl., Exhibit 2 (¶¶ 24-32). Additionally, the harmful act, as Liberty describes, is an affair Becki had with Granda and the attempt to conceal the allegations and extortive acts from Liberty. Compl. ¶ 142. The problem with the facts alleged is the purported acts are apparently alleged to be for Granda's, Becki's, or Falwell's personal benefit, not to harm Liberty. When evaluating the injury to one's business, "[t]he injury must ***not*** be a result or secondary effect of an action taken for mere personal gain." *Nationwide Mut. Fire Ins. Co. v. Jones*, 577 F.Supp. 968, 970 (W.D.Va. 1984) (emphasis added).[3] The statutory conspiracy statutes "are inapplicable to one isolated incident in which a combination of persons defraud a company for their own personal enrichment." *Id.* at 970-71.

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[3] The Court in *Nationwide* illustrated direct injury to business interests as: "(1) interfering in business activity such as boycotts and pickets; (2) injuring a company's tradename and good will; (3) stealing customer lists and trade secrets."

Again, Liberty fails to even try to allege how the alleged conspiracy among Falwell, Granda, and Becki was entered into for the purposes of harming Liberty's business interest. Any damage to personal reputation or interest in employment is excluded from the statute's purview. *See Andrews v. Ring*, 266 Va. 311, 319 (2003); *see also Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d. 246, 267 (W.D.Va. 2001) (stating the Fourth Circuit and the district courts employ broad language with regard to the exclusion of employment interests from the scope of Section 18.2-499). In attempting to establish harm to Liberty's business interests, Liberty simply, and in a conclusory manner, says: "[t]he actions of Falwell Jr. and Granda have injured Liberty's enrollment, impacted its donor base, disrupted its faculty, enabled the 2019 Employment Agreement that proved detrimental to Liberty's interests, and damaged Liberty's reputation." Compl. ¶ 147. Nowhere in Liberty's Complaint does Liberty allege the critical element that Falwell, Granda, and Becki were purposefully combining to willfully and maliciously injure Liberty and its business interest. Instead, Liberty utilizes Falwell's October 28, 2020 complaint against Liberty, which describes the contributions Falwell made to Liberty in solidifying Liberty as one of not only the top Christian colleges and universities, but one of the country's top colleges and universities.

Liberty tries to utilize Falwell's 2019 Employment Agreement as a fact establishing Falwell furthered the conspiracy by negotiating the 2019 Employment Agreement, and had Liberty known about the extortion attempt, they would have refrained from entering the 2019 Employment Agreement. Compl. ¶¶ 145-46. "Va. Code § 18.2-499 does not mention employment as a protected activity. The section is aimed at conduct which injures a 'business.'" *Campbell v. Board of Sup'rs of Charlotte County*, 553 F.Supp. 644, 645 (E.D.Va. 1982); *see also Ward v. Connor*, 495 F. Supp. 434, 439 (E.D.Va. 1980), rev'd on other grounds, (describing lost profits as an explanation of what

business-related damages may be recovered). Falwell's negotiation of an employment agreement and the compensation associated therewith is an employment interest and not a business interest. Beyond pontificating the impact of Falwell's 2019 Employment Agreement, Liberty alleges, in a conclusory fashion, their business interests were harmed through enrollment, its donor base impacted, the faculty disrupted, and Liberty's reputation was damaged. Yet, there are no actual allegations to show the extent of the injury, such as a decrease in enrollment, decrease and correlation in donations, or how Liberty's reputation was damaged.

Therefore, instead of setting forth facts showing two or more people combined, with legal malice, to directly harm Liberty's business interests, it ultimately appears Liberty's "Granda Plan" is solely to continue its efforts of discrediting and publicly humiliating Falwell because of his wife's affair. As a result, this Court must dismiss Count III with prejudice.

CONCLUSION

WHEREFORE, Defendant, Jerry L. Falwell, Jr., by counsel respectfully requests that this Court sustain its Demurrer to the Complaint; dismiss Counts I, II and III of the Complaint with prejudice; and order such other relief as the Court deems necessary and appropriate.

Dated: June 1, 2021

JERRY L. FALWELL, JR.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2021, a true and correct copy of the foregoing ***Defendant's Demurrer to Complaint*** was served *via* e-mail transmission and first-class, postage-prepaid, U.S. Mail upon the following:

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