

COUNTERCLAIM AND JURY DEMAND

The Corporation of Saint Mary's College, Notre Dame, for its Counter-Claim states as follows:

Facts

1. The Corporation of Saint Mary's College, Notre Dame ("Saint Mary's") is a small liberal arts college located in Notre Dame, Indiana. Janice Cervelli is an individual who is a citizen of the state of Indiana.

2. Ms. Cervelli was previously employed as president of Saint Mary's. While she served as president, her employment was governed by an Employment Agreement dated February

17, 2016 (“Employment Agreement”). A copy of the Employment Agreement was attached as Exhibit 1 to Ms. Cervelli’s Complaint for Damages (“Complaint”) publicly filed in this matter. The Employment Agreement includes the arbitration clause under which these proceedings have been commenced (Employment Agreement, ¶15). The Employment Agreement specifies that Indiana law governs this proceeding. The location of the arbitration proceedings is specified as South Bend, Indiana. Ms. Cervelli breached the Employment Agreement by, among other things, filing the present lawsuit in violation of the arbitration clause.

3. The Employment Agreement provided Saint Mary’s with the absolute and unconditional right to terminate Ms. Cervelli as president, subject to certain severance benefits and continuation of tenured status.

4. While she was president, Ms. Cervelli also held the status of tenure. She did not then have a teaching requirement and was not compensated as a tenured teaching member of the faculty. Although tenured, Ms. Cervelli received only a salary as president and she received no salary for her tenured position. Her status as a tenured member of the faculty is expressly governed by the policies and practices of Saint Mary’s.

5. Ms. Cervelli’s Employment Agreement provides:

The Board will use its best efforts to secure appointment of President as a tenured member of the faculty of Saint Mary’s or a full professor. Such tenure or professorship, if any, would be granted by the faculty of Saint Mary’s **in accordance with the customary policies and procedures** of the faculty in granting tenure to a faculty member or awarding a full professorship.

(Employment Agreement, ¶11) (emphasis added).

6. The Employment Agreement also includes a provision that Ms. Cervelli's tenured status would continue if she was terminated as president, again subject to the policies and practices of Saint Mary's:

Saint Mary's will recommend to the faculty that tenure or the full professorship be granted with retreat rights within President's area of teaching expertise (**to the extent permitted by the customary policies and procedures of the Saint Mary's faculty**), that is, if your employment as President is terminated President may retain a full-time teaching position in President's subject area to be paid in an amount equal to the highest paid professor at Saint Mary's.

Id. (emphasis added).

7. Ms. Cervelli's performance as president was substandard. She failed to improve her performance after having been advised in writing of the need to improve. Amongst other items, she was advised she was not living the values of the College. By email dated October 5, 2018, Ms. Cervelli, through legal counsel, informed Saint Mary's of her unequivocal agreement to resign from the position of president in lieu of termination. Saint Mary's relied on this email when considering its course of conduct. Ms. Cervelli subsequently failed to honor her agreement to resign. On November 5, 2018, the Saint Mary's Board of Trustees voted to authorize the termination of Ms. Cervelli as president.

8. In lieu of termination, Ms. Cervelli was permitted to resign from the position of president as a way to prevent damage to her reputation. After significant negotiation by her counsel, on November 15, 2018 the parties' executed a Resignation of Presidency and Release Agreement ("Settlement Agreement"). A copy of the Settlement Agreement was attached as Exhibit 2 to Ms. Cervelli's Complaint for Damages, which was publicly filed. The Settlement Agreement, among other things, specified that Ms. Cervelli would resign from the position as

president effective December 31, 2018, would continue as a tenured professor, and would release claims she may have then had.

9. Pursuant to the Settlement Agreement, Ms. Cervelli's position as a tenured faculty member would "continue" after resignation of the presidency. The Settlement Agreement at the specific request of counsel for Ms. Cervelli included the following language:

3. Tenured Faculty Position. The parties agree that as of January 1, 2019 Ms. Cervelli **shall continue her position as a tenured member of the faculty** and she shall be paid in accordance with Section 11 of the Employment Agreement. The parties have indicated a willingness to discuss a possible buyout of Ms. Cervelli's tenured faculty position. The parties have also indicated a willingness to participate in good faith in mediation as provided in Section 14 of the Employment Agreement to address any issues arising from the provisions of Section 11 of the Employment Agreement to address the issue of buying out Ms. Cervelli's tenured faculty position and sabbatical rights.

(Settlement Agreement, ¶3) (emphasis added).

10. The Settlement Agreement's use of the specific word "continue" is significant. While Ms. Cervelli was a tenured faculty member when she was president, she did not then receive a salary as a tenured faculty member, because she did not have a teaching load and teaching contract. Rather, she received only a salary as president. Her tenured status continues today. She holds the status of tenure, but does not presently have a teaching load or a teaching contract. She is thus not contractually entitled to a teaching salary until such time as she has secured a teaching contract at Saint Mary's.

11. The conclusion that Ms. Cervelli is not entitled to a salary based solely on her status of tenure is reached by applying the clear terms of the Settlement Agreement that specifies her tenured status would "continue," but it is also consistent with Saint Mary's policies and practices.

Saint Mary's policy and practice is not to pay a salary to those faculty members (tenured or otherwise) who do not have a teaching contract.

12. Saint Mary's obligation under the Settlement Agreement and Employment Agreement is to compensate Ms. Cervelli as a tenured faculty member, consistently with how it compensates its highest paid faculty member.

13. A teaching contract is awarded after a professor obtains approval of a full-time teaching load, essentially consisting of three classes, for each semester. Ms. Cervelli has simply not taken all of the steps to secure approval of these classes.

14. Ms. Cervelli has demanded rights and benefits to which other Saint Mary's professors are not entitled. She has not only demanded a salary for teaching when other similarly situated professors would not be entitled to a salary, but has also demanded sabbatical rights and various other rights and benefits. The highest paid faculty member receives no salary unless that member has a teaching contract (or unless they are on sabbatical, which is earned after seven years of teaching). This is consistent with how Ms. Cervelli was paid while president and how she is currently paid.

15. Ms. Cervelli was aware, based on her previous leadership position, as well as the information provided in numerous emails, of the steps necessary to obtain approval of classes so that she could secure a teaching contract and the salary that accompanied it. Regardless, Saint Mary's took the additional steps to inform Ms. Cervelli and her counsel separately of these steps on several previous occasions.

16. Although Ms. Cervelli has begun the process to secure approval of classes, through no fault of Saint Mary's, Ms. Cervelli has simply not taken all of the steps necessary to secure a fulltime teaching contract and is thus not entitled to a teaching salary. When Ms. Cervelli secures a teaching contract, Saint Mary's would pay her the salary to which she would then be entitled. Ms. Cervelli has not yet obtained the approval of an adequate number of classes necessary to earn a salary.

17. Ms. Cervelli has improperly claimed that Saint Mary's refuses to assist her with her efforts to secure approval of classes. She has also incorrectly alleged that Saint Mary's has not provided her with the benefits to which she claims she is entitled. Ms. Cervelli has had numerous in person meetings and emails with Department chairs of Saint Mary's as well as the Dean of the Faculty and the interim Provost providing her information, guidance and feedback on her proposals.

18. Ms. Cervelli threatened litigation if Saint Mary's refused to meet her demands. She subsequently filed the present lawsuit. Ms. Cervelli has repeatedly alleged a variety of claims that are not supportable or were addressed in and released by the Settlement Agreement. Most recently, she has claimed that the failure to pay her a teaching salary violates Indiana's Wage Payment Statute entitling her to enhanced damages. Ms. Cervelli has not -- and cannot -- offer any proof that she has been treated differently from other Saint Mary's professors.

19. The Employment Agreement and the Settlement Agreement include confidentiality provisions. The Settlement Agreement includes the following:

12. Confidentiality. The parties hereby acknowledge and agree that this Agreement is confidential. The parties agree not to disclose the existence of this

Agreement to any individual, entity or group of individuals, except for the following: Employee's legal counsel and tax advisors to the extent necessary for purposes of legal or tax advice; a governmental taxing authority if so required; a court of competent jurisdiction if required by subpoena; or as Saint Mary's may agree in writing. The parties agree to instruct any individuals whom are informed of the nature, terms and/or conditions of this Agreement of the confidential nature of the agreement and to obtain an agreement from such individuals to maintain their confidentiality.

13. Non-Disparagement. Saint Mary's, the Released Parties, and Ms. Cervelli mutually promise and agree that neither will make false, disparaging or uncomplimentary remarks about each other including any of Saint Mary's officers, administrators, trustees, managers, employees or other affiliated persons. The parties further agree that in the event inquiries are made about Ms. Cervelli's resignation both parties agree to say that Ms. Cervelli made the decision to resign her employment as President at Saint Mary's and continue her role as a tenured member of the faculty.

(Settlement Agreement, ¶¶ 12, 13).

20. Ms. Cervelli has breached the confidentiality and non-disparagement provisions of the Settlement Agreement and the Employment Agreement with the intent to cause Saint Mary's substantial economic harm. Ms. Cervelli has made false statements to members of the South Bend Community about her relationship with Saint Mary's and Saint Mary's obligations and actions. Ms. Cervelli has breached the confidentiality and non-disparagement provisions by filing, or causing to be filed, the Complaint, Settlement Agreement and the Employment Agreement in the public record. The intent of Ms. Cervelli to disclose confidential information for the purpose of causing financial harm is highlighted by her counsel's public statements reported in a national periodical after filing the Complaint: "It's very regrettable that the situation has gotten to a point where all of this misbehavior has had to be divulged in legal documents. I would have strongly preferred that the parties had worked out their differences behind the scenes and not let it get to the point that it has gotten to."

21. Prior to filing the present lawsuit, Ms. Cervelli sent several proposed press releases that incompletely and inaccurately described her termination and she has threatened significant financial harm to Saint Mary's should Saint Mary's fail to meet her demands.

22. Saint Mary's has ensured that Ms. Cervelli has been treated similarly to other faculty professors with no teaching load. Saint Mary's College has and will continue to steadfastly honor its obligations under the Settlement Agreement and Employment Agreement and will consistently and fairly follow its practices and policies.

First Claim

Declaratory Judgment

23. Given the repeated and improper threats of litigation by Ms. Cervelli, a declaratory determination of the parties' rights and obligations under the agreements is appropriate. The Indiana Declaratory Judgment Act, I.C. 34-14-1-1, *et. seq.*, permits this court to determine the rights and obligations of the parties under the agreements at issue.

24. Saint Mary's seeks a declaratory judgment concerning the rights and obligations of each of the parties stemming from the Settlement Agreement and the Employment Agreements. Saint Mary's seeks declaratory judgment that it did not breach the provisions of the Employment Agreement and the Settlement Agreement.

Second Claim

Breach and Repudiation of Contract

25. Ms. Cervelli has demonstrated an unwillingness and refusal to be bound by the terms of the agreements. Her conduct constitutes a repudiation of her contractual obligations under

the Settlement Agreement and the Employment Agreement, causing financial damage, injury and reputational harm to Saint Mary's.

26. Ms. Cervelli's conduct constitutes a material breach of her contractual obligations under the Settlement Agreement and the Employment Agreement, causing financial damage, injury and reputational harm to Saint Mary's.

27. Saint Mary's seeks damages for Ms. Cervelli's breach and repudiation of the Settlement Agreement and the Employment Agreement.

28. Ms. Cervelli's breach of the Settlement and Employment Agreements was the first breach relieving Saint Mary's of the obligation to perform under the agreements.

Wherefore, Counter-Plaintiff, The Corporation of Saint Mary's College, Notre Dame, requests that the Court enter a declaratory judgment in favor of Saint Mary's and against Ms. Cervelli and declare that Saint Mary's did not breach any provisions of the Employment Agreement and the Settlement Agreement, for compensatory damages, attorney's fees, costs of this action and all other relief appropriate in the premises.

Respectfully submitted by:

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JURY DEMAND

The Corporation of Saint Mary's College, Notre Dame, demands a trial by jury of all claims and issues so triable.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2019, the foregoing was served through the Indiana's IEFS e-filing system in accordance with Ind. App. R. 68(F)(I) on the following attorneys of record:

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