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**Attorneys for Defendant,**
**PEPPERDINE UNIVERSITY**

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

| | |
|---|---|
| HALEY VIDECKIS and LAYANA WHITE, individuals,<br><br>Plaintiffs,<br><br>vs.<br><br>PEPPERDINE UNIVERSITY, a corporation doing business in California,<br><br>Defendant. | Case No. 2:15-CV-00298-DDP (JCx)<br><br>**NOTICE OF MOTION AND MOTION OF DEFENDANT PEPPERDINE UNIVERSITY TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**<br><br>*[Filed concurrently with Request for Judicial Notice and Proposed Order]*<br><br>**Date: March 30, 2015**<br>**Time: 10:00 a.m.**<br>**Ctrm: 3** |

**TO PLAINTIFFS HALEY VIDECKIS AND LAYANA WHITE, AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that on March 30, 2015 at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 3 of the above-captioned Court, located at 312 North Spring Street, Los Angeles, California, defendant Pepperdine University ("Pepperdine" or "the University") will and hereby does move this Court to dismiss the First Amended Complaint (the "FAC"), pursuant to Federal Rule of

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Civil Procedure ("FRCP") section 12(b)(6), on the grounds that it fails to state a claim upon which relief may be granted, including the allegations being impermissibly vague under FRCP 8(a). Pepperdine also moves to dismiss the request for punitive damages and prejudgment interest contained therein as the FAC lacks facts to support the recovery of these types of damages. Pepperdine makes this motion for the following reasons:

1. The Third Cause of Action for Violation of Title IX must be dismissed because Title IX does not apply to claims based on sexual orientation discrimination.

2. The First Cause of Action for Violation of the Right of Privacy under California Constitution, Article 1, Section 1 must be dismissed as the plaintiffs have failed to establish that they had a reasonable expectation of privacy.

3. All causes of action must be dismissed as they fail to allege the necessary elements of the causes of action and to present the requisite showing that the defendant's conduct was so severe as to deprive the plaintiffs of their privacy and educational rights.

4. The Second Cause of Action for Violation of the California Education Code must be dismissed because it is impermissibly vague.

5. The request for punitive damages must be dismissed as the plaintiffs have not alleged malicious or oppressive conduct sufficient to justify an award of punitive damages.

6. The prayer for prejudgment interest must be dismissed as the plaintiffs' nonpecuniary and unliquidated damage claims do not support an award of prejudgment interest.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on February 10, 2015.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Request for Judicial Notice filed concurrently herewith,

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all pleadings, files, and records in this proceeding, all other matters of which the Court may take judicial notice, and any argument or other matters that may be presented to or considered by the Court prior to its ruling.

DATED: February 18, 2015

ANDERSON, McPHARLIN & CONNERS LLP

*/s/ Paula Tripp Victor /s/*

By: _____
Paula Tripp Victor
Peter B. Rustin
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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION AND NATURE OF THE CASE

Despite several attempts to produce a cognizable pleading, the First Amended Complaint ("FAC") is substantively lacking and appears to be little more than a thinly guised press release. In it, plaintiffs Haley Videckis and Layana White, former participants on the Pepperdine women's basketball team, smear Pepperdine's Women's Basketball coach, Ryan Weisenberg ("Coach Ryan"), and other Athletics' staff members by portraying them as anti-gay. The truth, however, is that a student-athlete's sexual orientation is of no concern or consequence to Coach Ryan or the Athletics' staff. Rather, what matters to Coach Ryan is building a strong, cohesive and competitive basketball *team* while concurrently nurturing and developing student-athletes with high standards of academic scholarship, sportsmanship and leadership. Unfortunately, however, the plaintiffs did not embrace Coach Ryan's vision, but instead separated and segregated themselves from their teammates.

Videckis and White, who are in a dating relationship (FAC, ¶¶ 36, 39, 45, 64, 67, 73), recently voluntarily withdrew from Pepperdine and the basketball team (FAC, ¶ 17), alleging they did so as a result of discrimination, harassment and retaliation based upon their sexual orientation. More specifically, the plaintiffs' claims appear to be based on an unfounded belief that Coach Ryan and his staff targeted the plaintiffs in an attempt to remove them from the team. (FAC, ¶¶ 16, 46, 55, 74, 83.) Allegedly, their belief is supported by: (1) Inappropriate inquiries into their personal relationship (FAC, ¶ 32); (2) statements about "lesbianism" (FAC, ¶ 23); (3) improper requests for the plaintiffs' medical records (FAC, ¶ 28, 32, 41, 49, 69, 77); (4) unfair punishment for minor violations (FAC, ¶¶ 28, 41, 49, 69, 77); (5) refusal to permit the plaintiffs to attend basketball practice due to injury or insufficient medical clearance (FAC, ¶¶ 28, 27, 41, 49, 69, 77); and (6) refusal to process White's appeal to the NCAA (FAC, ¶ 41, 49, 69, 77). These assertions shed

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much heat – in the form of inflammatory comments and wild conjecture -- but little light to illuminate their claims.

**A. Inappropriate Inquiry into the Plaintiffs' Personal Relationship**

Despite their claims to the contrary, there was no inquest into the plaintiffs' relationship. The plaintiffs acknowledge that the inquiries into their relationship stemmed not from some prurient interest of Coach Ryan or other supporting Pepperdine staff members, but because of concerns that their relationship was adversely affecting team dynamics and performance. (FAC, ¶¶ 16, 23, 25.) The plaintiffs further admit that these allegations were thoroughly vetted in a Title IX investigation, which found that "there (was) insufficient evidence to conclude that harassment or sexual orientation discrimination occurred." (FAC, ¶ 28.) Further, the FAC states that Coach Ryan said that "[M]y staff doesn't gossip. And gossip is what gets people fired." (FAC, ¶ 27.) Pepperdine submits that not only are the allegations as to the alleged intrusion into the plaintiffs' personal lives untrue, any inquiries that were made were necessitated by complaints from members of the basketball team about Videckis and White. These complaints involved the plaintiffs' "drama," a tension between them and their teammates, and about them separating from the team. Coach Ryan's inquiries resulted from an effort to better understand the dynamics that were causing a perceived schism on this team, not to intrude upon the plaintiffs' privacy as to their sexual orientation or the nature of their relationship.

**B. Discriminatory Statements about "Lesbianism"**

Simply stated, this assertion is untrue. Coach Ryan did not make any discriminatory statements about lesbians, gays, bisexuals or transgenders.

This allegation appears to have stemmed from a meeting Coach Ryan had with several members of the team's leadership group, including the plaintiffs. In the Spring, 2014, Coach Ryan began a Leadership Council, on which he placed Videckis, White and four other players. The purpose of this Council was to foster a

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cohesive and supportive team and to develop and discuss the team's "Core Covenants." (FAC, ¶ 20.) The plaintiffs allege that Coach Ryan made the following statement in one of the Leadership Council meetings:

> "When I was coaching for the LA Sparks, two of our players were dating and they broke up in season. That was the reason our team fell apart and lost."

(FAC, ¶ 25, p. 9, lines 14-16.) This statement, however, does not support the plaintiffs' contention that he was against same-sex relationships. Rather, the statement furthered Coach Ryan's hope and vision for a unified team, where off-court issues like dating, *whether homosexual or heterosexual,* which could lead to distractions, would be left behind before entering the locker room, training facilities, or game. The concerns expressed by Coach Ryan and his staff derived not from any animus toward the plaintiffs or their sexual orientation but, rather, legitimate concerns relating to the plaintiffs' conduct and its negative impact on the team's dynamic as a whole.

### C. Improper Inquiries into the Plaintiffs' Medical Records

As part of their participation on the basketball team, Videckis and White were required to abide by all team rules, University policies, and conference and NCAA regulations. These requirements included maintaining academic eligibility, providing medical records for clearance to play (FAC, ¶ 28), attending practice and training sessions, and working with medical support staff to ensure that injuries were prevented or rehabilitated correctly. (FAC, ¶ 28.)

The plaintiffs allege that Pepperdine requested invasive and unlimited access to their medical records. (*See, e.g.,* FAC, ¶¶ 28, 41, 49, 69, 77.) Relatedly, the plaintiffs also assert that Coach Ryan and his staff refused to allow them to practice under the guise that they were injured or had failed to provide adequate medical clearances. *Id.* Videckis has alleged, however, that she, herself, informed Coach Ryan of her ailments and related medical visits, and told him on one occasion that she would not be at practice as a result of her being tested for cervical cancer.

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(FAC, ¶ 28.) Because Pepperdine is required to confirm that its student-athletes are physically able to participate in team activities (i.e., training and competition), each student-athlete must report, and provide relevant supporting medical documentation relating to, all health care concerns, including illnesses, injuries and visits to health care practitioners in order to obtain medical clearance. (*See, e.g.,* FAC, ¶ 28.) In the FAC, Videckis admits that Pepperdine required further information to clear her for play, which she did not provide, despite repeated requests beginning in August 2014, until December 1 – long after she and White had voluntarily withdrawn from the team. (FAC, ¶¶ 28, 29).

**D. Unfair Punishment for Minor Violations**

The plaintiffs further contend that they were treated disparately for minor violations of team rules and requirements (FAC, ¶¶ 28, 41, 49, 69, 77). These assertions are unfounded as Coach Ryan and other supporting staff members treated Videckis and White as they did all other members of the team – fairly, in accord with University policies and team rules, and indistinctly from other student-athletes.

The plaintiffs acknowledge that they violated team rules. Despite these transgressions, however, and because they continued to be valued members of the basketball team, Coach Ryan *refused* to kick Videckis off of the team. (FAC, ¶ 28.) Instead, after Videckis expressed uncertainty about her desire to remain on the team, Coach Ryan gave her the choice and then a deadline for her to make that choice so that the "drama" did not continue to affect the team. *Id.*

**E. Refusal to Process White's NCAA Appeal**

As a transfer Division I student-athlete who enrolled at Pepperdine in January 2014, White was required to sit out one year (called an "academic year-in-residence") before being allowed to compete for the University under NCAA rules. Under extraordinary circumstances (e.g., a family medical emergency or an assault on the student-athlete), however, the NCAA may waive this mandate.

After arriving at Pepperdine, White approached Coach Ryan asking whether a

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waiver to the year-in-residence rule could be obtained due to an incident she was involved with at her previous school (which the plaintiffs erroneously designate as an "appeal"). The matter was referred to the University's Athletics Compliance Department, who contacted White and sought substantiating documents necessary for a request for a waiver to the NCAA. White never responded to this request prior to her withdrawal from the University. In other words, White never provided the information necessary to support a waiver application, despite the University's willingness to do so. As such, there is no factual basis for these claims. (See, e.g., (FAC, ¶ 41, 49, 69, 77.)

**F. Pepperdine's Investigation of the Plaintiffs' Claims**

Upon receiving complaints from Videckis and White on September 22, 2014, investigations were immediately initiated by the University (FAC, ¶ 28). One investigation was undertaken by Tabatha Jones-Jolivet, Associate Dean of Student Affairs at Seaver College and a designated Deputy Title IX Coordinator for Pepperdine. (FAC, ¶ 28). After a lengthy investigation, during which Jones-Jolivet conducted an extensive and comprehensive examination of the plaintiffs' assertions, the University concluded that there was insufficient evidence to establish that harassment or sexual orientation discrimination occurred. The investigation also concluded that Dr. Green, the team doctor, had not received the requested documentation to medically assess Videckis' fitness to play. (FAC, ¶ 28).

During the pendency of Jones-Jolivet's Title IX investigation, Pepperdine was simultaneously conducting a Human Resources inquiry to assess whether any employee had violated any University policy, protocol or norm in his/her interactions with the plaintiffs. This independent review of the plaintiffs' complaints found no evidence that any University employee had engaged in sexual orientation discrimination or harassment of Videckis or White.

Unsatisfied with the results of these investigations, the plaintiffs chose to withdraw from the University and give up their scholarships. (FAC, ¶¶ 17, 33).

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## II. SUMMARY OF ARGUMENT

The FAC is bereft of operative allegations that could support the three causes of action brought by the plaintiffs. The gravamen of the plaintiffs' claims **is not that they were discriminated against individually because they were lesbians**, but that they were repeatedly asked about the nature of their relationship. The plaintiffs admit that Pepperdine's attitude towards same-sex relationships is "ambivalent," and that it "admits lesbians as students."[1] These concessions, along with the plaintiffs' acknowledgment that the alleged inquiries into their relationship was out of concern for team dynamics and performance and not due to some prurient or other inappropriate interest (FAC, ¶¶ 16, 23, 25), coupled with a review of the plaintiffs' allegations, establish that the FAC's three causes of action cannot be maintained as a matter of law, for the following reasons:

- The third cause of action, for violation of Title IX, must be dismissed because Title IX does not cover claims based simply upon sexual orientation.
- The first cause of action, for violation of the right of the right of privacy under California Constitution, Article 1, Section 1, is untenable because the plaintiffs fail to establish that they had a reasonable expectation of privacy in light of their status as athletes on a collegiate basketball team.
- All causes of action must fail because all require a showing that the defendant's conduct was so severe as to deprive the plaintiffs of their privacy and educational rights. When ambivalence is the attitude ascribed to the defendant, and the well-being of the team is the admitted motive of Coach Ryan, the requisite severity is necessarily lacking.
- Both the Education Code and Title IX causes of action (second and third)

[1] See Pepperdine's Request for Judicial Notice ("RJN") and original Complaint, Para. 6, attached as Exhibit A to Notice of Removal filed herein as Document No. 1 on January 14, 2015, and incorporated herein by reference.

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must be dismissed because the FAC lacks the requisite facts to support the elements of the alleged violations.

- The second cause of action also fails because the plaintiffs do not differentiate between the various statutes they contend have been violated, but instead group them together with no specificity or particularity.
- The punitive damage claim must be dismissed because the plaintiffs fail to allege facts to support a finding of malice or oppression.
- The claim for prejudgment interest has no legal basis.

Accordingly, and for the reasons explained in detail below, this Motion to Dismiss the FAC should be granted.

## III. LEGAL ARGUMENT AND AUTHORITY

### A. Standard for Granting Motions Under Rule 12(b)(6)

Where it appears from its face that a complaint fails to state a claim upon which relief may be granted, a motion to dismiss under Rule 12(b)(6) must be granted. Fed.R.Civ.P. 12(b)(6); *Cahill v. Liberty Mutual Insurance Company*, 80 F.3d. 336, 338 (9th Cir. 1996); *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482, 1483 (9th Cir. 1991).

In deciding a Rule 12(b)(6) motion, the Court need not accept conclusory allegations, legal characterizations, unreasonable inferences, or unwarranted deductions of fact as true. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). As stated in SCHWARZER, TASHIMA & WAGSTAFFE *California Practice Guide – Federal Civil Procedure Before Trial* §8:27a, "bare assertions of legal conclusions may not satisfy plaintiff's obligations to provide fair notice of the claim alleged. In fact, [c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." (Citing *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).) As the Ninth Circuit has held,

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dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Department*, 901 F.2d. 696, 699 (9th Cir. 1990).

**B. The Third Cause of Action for Violation of Title IX Must Be Dismissed In Its Entirety Because Title IX Does Not Apply to Claims Based on Sexual Orientation Discrimination**

Title IX, at 20 U.S.C. § 1681(a) provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The purpose of Title IX, as originally conceived, was "banning discrimination against women in the field of education." *New Haven Bd. of Educ. v. Bell,* 456 US 512, 523 (1982).

The plaintiffs' claim for violation of Title IX is based upon alleged disparate treatment, harassment, and retaliation due merely to the plaintiffs' sexual orientation. (FAC, ¶¶ 68, 69, 74, 77, and 86). Many courts have squarely held, however, that **discrimination on the basis of sex** is a *sine qua non* of a Title IX sexual harassment case, and a failure to plead that element is fatal. *Frasier v. Fairhaven School Comm.,* 27 F.3d 52, 66 (1st Cir. 2002).

The FAC does not allege discrimination on the basis of sex. Rather, it only alleges discrimination on the basis of sexual orientation, and the "law is settled that a Title IX claim is only cognizable if there is evidence that the offender acted because of the victim's sex." *Hoffman v. Saginaw Public Schools,* 2012 WL 2450805 (E.D. Mich. June 27, 2012). In *Hoffman,* the court squarely recognized that "while discrimination based on non-compliance with sexual stereotypes may be actionable under Federal law, **discrimination based on sexual orientation is not**." *Id.* at 8. (Emphasis added.) Accordingly, the court dismissed a Title IX complaint based upon sexual orientation. *Id.* at 13.

Many other courts have reached this same conclusion in holding that alleged harassment based on sexual preference or orientation is not actionable under Title

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IX or Title VII[2] of the Civil Rights Act of 1964, 42 U.S. Code § 2000e *et seq*. For example, in *Howell v. North Central College,* 320 F. Supp. 2d 717 (N.D. Ill. 2004), the district court dismissed a claim that is, in many respects, much like the instant case. In *Howell*, a female athlete was alleged to have been targeted for harassment because she was a heterosexual who played on a women's college basketball team. *Id.* at 718. The district court granted the defendant College's motion to dismiss: "**Regarded in the best of lights, [the claims] are about harassment based on sexual preference, which is not actionable under Title VII or Title IX**. In fact …the harassment that plaintiff proposed did not violate Title IX." *Id.* at 724 (citing *Hamm v. Weyauwega Mild Products, Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003); *Hamner v. Saint Vincent Hosp. and Healthcare Center,* 224 F3d 701, 707 (7th Cir. 2000)). (Emphasis added.) *See also, Ulane v. Eastern Airlines, Inc.*, 742 F. 2d 1081, 1085 (7th Cir. 1984) (Title VII does not cover claims based upon sexual orientation). Other identical results have been reached in:, *Montgomery v. Independent School Dist. No. 709,* 109 F. Supp. 2d 1081, 1089-90 (D. Minn. 2000) (Title IX claims based on discrimination due to sexual orientation or perceived sexual orientation not actionable and must be dismissed); *Tyrrell v. Seaford Union Free School Dist.,* 792 F. Supp. 2d 601, 622-23 (E.D.N.Y. 2011) (sexual orientation not a protected class under Title VII or Title IX; harassment or discrimination based upon sexual orientation not prohibited under either statute); *Swift v. Countrywide Home Loans, Inc.* 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011); *Dawson v. Bumble & Bumble,* 398 F.3d 211, 217 (2d Cir. 2005); and *Simonton v. Runyan,* 232 F.3d 33, 36 (2d Cir. 2000).

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[2] The courts look to Title VII precedent to inform their analysis of sexual discrimination claims under Title IX. Title VII does not prohibit discrimination based upon sexual orientation. *See, e.g., Spearman v. Ford Motor Co,.* 231 F.3d 1080 (7th Cir. 2000); *Williamson v. A.G. Edwards & Sons, Inc.* 876 F.2d 69, 70 (8th Cir. 1989) (citing *DeSantis v. Pacific Talcott & Talcott Co.,* 608 F.2d 327 (9th Cir. 1979)).

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These authorities are clear — Title IX does not apply to claims based upon alleged sexual orientation discrimination. Accordingly, the plaintiffs' Title IX claim must be dismissed.

**C. The First Cause of Action for Violation of Right of Privacy Fails to State a Claim Upon Which Relief Can Be Granted**

In *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, the California Supreme Court held that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in the circumstances, and (3) conduct by defendant constituting a serious invasion of privacy. *Id.* at 39-40. Since the last two of these elements are not present in the FAC, this cause of action should be dismissed.

**1. The Plaintiffs Had No Reasonable Expectation of Privacy as to Their Medical Records**

The plaintiffs summarily allege "a reasonable expectation of privacy as to their sexual orientation" (FAC, ¶ 31) and that the plaintiffs' right of privacy was intruded upon by the asking of questions relating to or to determine the plaintiffs' sexual orientation and demanding access to medical records." (FAC, ¶ 32.) In *Hill*, however, the California Supreme Court held that the NCAA's drug testing policy for college athletes (involving both monitoring of urination and testing of urine samples, as well as inquiries concerning medications), did not violate the student athletes' right to privacy, because the athletes had a greatly reduced expectation of privacy.

Several factors led to this conclusion. First, the athletes in *Hill*, as in the instant case, had the ability to consent or not consent to the activity at issue, i.e., participation in collegiate sports. The "presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant." *Id.* at 37. The California Supreme Court emphasized that "the reasonable expectations of privacy of plaintiffs (and other

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student athletes) … must be viewed within the context of intercollegiate athletic activity and the normal conditions under which it is undertaken." *Id.* at 41. The Supreme Court held that intercollegiate athletes, who have no legal right to participate in intercollegiate athletic competition, are by necessity subject to a diminished expectation of privacy:

> By its nature, participation in intercollegiate athletics, . . . involves close regulation and scrutiny of the physical fitness and bodily condition of student athletes. Required physical examinations (including urinalysis), and special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests are routine aspects of a college athlete's life not shared by other students or the population at large. … [Athletes] exchange information about their physical condition and medical treatment with coaches, trainers, and others who have a "need to know."

*Id.* at 41-42.

Because of "its unique set of demands, athletic participation carries with it social norms that effectively diminish the athlete's reasonable expectation of personal privacy in his or her body condition, both internal and external." *Id.* at 42.

The plaintiffs here, then, had no reasonable expectation of privacy as to their medical records. The University required the plaintiffs' medical records to determine whether the plaintiffs were physically able to participate in athletic activities. A review of Paragraph 28 of the FAC reveals that the inquiries as to the plaintiffs' medical records derived from concerns as to whether the plaintiffs were physically able to participate in athletic activities.[3] Under these circumstances, the plaintiffs had no expectation of privacy as to their medical records given their voluntary participation in a collegiate athletic program. If the involuntary

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[3] *See, e.g.,* FAC, ¶ 18 (page 13, lines 7-8) (Haley received emails stating that she would not be cleared for participation until documentation from the spine specialist had been brought to the athletic medical center); page 13, lines 14-16 (Dr. Green could not clear Haley until she brought documentation as to spinal condition).

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monitoring of urination permitted by *Hill* did not violate a student athlete's expectation of privacy, it begs the question as to how requests for medical records from Pepperdine in this case, compromised any diminished expectation of privacy that the plaintiffs might have had. It bears emphasis that the plaintiffs have not alleged any improper motive for the request for medical records. This Court, then, can decide as a matter of law, that the University's information gathering procedure concerning the plaintiffs' medical information is reasonably calculated to further its interests in the health and safety of student-athletes participating in its programs. *See Hill*, 7 Cal. 4th at 54.

**2. The Plaintiffs Had No Reasonable Expectation of Privacy as to Their Sexual Orientation**

Equally spurious is the notion that the plaintiffs had any reasonable expectation of privacy as to their sexual orientation under the specific facts of this case. The plaintiffs would have this Court believe that their privacy was "invaded" by questions relating to their sexual orientation. (FAC, ¶ 32.) This Court should see through these inflammatory allegations and recognize instead that any questions asked by Coach Ryan were asked not out of any improper motive or by a prurient interest in the plaintiffs' sexual orientation, but, rather, as the plaintiffs themselves have admitted, out of a concern for a cohesive, supportive team dynamic. (FAC, ¶ 25, p. 9: 14-16.) As participants in a collegiate athletic program, the plaintiffs did not have an expectation of privacy about a critical fact that could lead to the deterioration of team morale and dynamics, i.e., their interpersonal dating relationship.

In *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, the Court of Appeal recognized that there is no protectable privacy interest in pursuing an intimate relationship under the state constitutional right to privacy. *Id.* at 531. The Court of Appeal also recognized that the plaintiff, a sales manager, had no reasonable expectation of privacy with respect to his relationship with a

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subordinate. *Id*. at 532-33. The basis for this holding is especially pertinent to the concerns at issue in this case. Noting that the plaintiff had been expressly warned that inter-company dating was a bad idea, the Court of Appeal expressed concern that dating a subordinate would present a potential conflict of interest, which could be inimical to legitimate concerns relating to the proper and effective functioning of any organization or entity. *Id.* at 533.

Such is the case here. Any questions to the plaintiffs about their relationship were motivated not by animus or prurience but, instead, by a desire to understand the basis for a rift on the team. The plaintiffs have admitted as much in the allegations of their FAC. Accordingly, this Court should find that the plaintiffs had no reasonable expectation of privacy about their dating status given their voluntary participation in a women's collegiate basketball team, a status which could, and did, cause harm to the team.

### 3. The Plaintiffs Have Failed to Allege that the Invasion of Privacy Was Sufficiently Severe

The third element for a cause of action for invasion of privacy is that the invasion constitutes a "serious invasion of privacy." *Hill,* at 37. *Accord, Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal 4th 30, 43. As the *Hill* court emphasized:

> "No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. 'Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part.' Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute **an egregious breach of the social norms underlying the privacy right.**" *Hill,* at 37 (quoting Rest. 2d of Torts Section 652D.) (Emphasis added.)

Pepperdine submits that under the circumstances of this case, the inquiries into the plaintiffs' interpersonal relationships and medical records fail to rise to the level of an "egregious breach of social norms" applying to a collegiate sports team,

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especially in view of the diminished expectation of privacy of athletes (*Id.* at 53.) The competing interests of Pepperdine (a consideration recognized in *Hill)* in maintaining the integrity of the team, erodes any claim that the inquiries into the plaintiffs' personal relationship and medical records constituted a sufficiently serious invasion into the plaintiffs' privacy.

In sum, the first cause of action of the plaintiffs' FAC contains many adjectives, but is devoid of an actual allegation that the purported invasion of the plaintiffs' privacy was "serious." Because the plaintiffs have failed to allege or demonstrate a serious invasion of privacy, the entire cause of action must fail. *Hill* at 40 (defendant may prevail in state constitutional privacy case by negating any element).

**D. The Second and Third Causes of Action Must Be Dismissed Because the Plaintiffs Have Not and Cannot Allege the Necessary Elements to Support these Causes of Action**

As set forth more fully below, the plaintiffs' second cause of action is impermissibly vague because it is based on the violation of multiple, undifferentiated statutes. California Education Code Section 220, enacted to protect against hate crimes,[4] appears inapplicable to the facts of this case. Nonetheless, to the extent the second cause of action does allege a violation of specific sections of the Education Code, i.e., California Education Code sections 220, 66251 and 66270, those sections are subject to the same pleading and proof requirements as claims

[4] Section 220 of the California Education Code seeks by its language to protect against discrimination based upon "any characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the [California] Penal Code." Penal Code Section 422.55, in turn, is concerned with actual "criminal acts." The plaintiffs have not alleged any criminal activity by the University or its employees. Moreover, the "Assembly Bill Advisory Task Force Report, California Student Safety and Violence Protection Act of 2000 (2001) demonstrates that the Assembly was concerned with eliminating discrimination arising out of "hate-motivated behavior" or "hate motivated violence" *Id.* at xii; 2.

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based on Title IX.

In *Donovan v. Poway Unified School Dist.* (2008) 167 Cal. App. 4th 567, the Court of Appeal recognized that a cause of action under Section 220 was co-extensive with a claim under Title IX. *Id*. at 579, 603-04. Accordingly, as with Title IX, a plaintiff under Section 220 must allege, *inter alia*, that the school acted with "deliberate indifference in the face of knowledge of the alleged harassment." *Id*. at 579. A plaintiff must also allege that she suffered severe, pervasive and offensive harassment that "effectively deprived plaintiff of the right of equal access to educational benefits and opportunities." *Id*. Moreover, because California Education Code Section 66252(g) provides that Chapter 4.5 of the Education Code (which includes Sections 66251 and 66270) is to be interpreted as consistent with Title IX, there must, as to the claims under these sections, be an allegation of "deliberate indifference" and that the defendant "effectively deprived plaintiff of the right of equal access to educational benefits and opportunities," as required by *Donovan* and *Davis v. Monroe County Board of Education* 526 U.S. 629 (1999). As established below, the plaintiffs have not successfully pled a violation of either Title IX or the specified sections of the California Education Code and, therefore, those causes of action must fail.

The elements for a private right of action under Title IX were established by the *Davis* court (526 U.S. 629 (1999)). The Supreme Court held that federal funding recipients are properly held liable in damages under Title IX where they are: (1) deliberately indifferent, (2) to sexual harassment, (3) of which they have actual knowledge, (4) that is so severe, pervasive and objectively offensive, (5) that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. *Id.* at 650. *Accord*, *Donovan v. Poway United School Dist., supra,* 167 Cal. App. 4th at 579; *Walsh v. Tehachapi School Dist.*, 827 F. Supp. 2d 1107, 1114 (E.D. Cal. 2011); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F. 3d 253, 258-59 (6th Cir. 2003). Even a cursory review of the second and

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third causes of action reveals that the plaintiffs have not alleged the necessary elements of a cause of action for damages as established by *Davis* and its progeny.

**1. Pepperdine Took the Plaintiffs' Concerns Serious and Acted Immediately**

Although the FAC contains conclusory allegations that Pepperdine acted in a "deliberately indifferent" fashion to the discrimination alleged by the plaintiffs, there are no facts to support such a conclusion. Rather, the FAC is replete with examples of University staff acting on their concerns, e.g., Coach Ryan called meetings to address their complaints (FAC ¶25, 8:19-24; ¶27, 11:19-23; ¶28, 12:9-12); Coach Ryan told White that he would have a coach monitor meetings with Adi (FAC ¶23, 7:6-7); Dr. Potts told White he would take care of the appeal to the NCAA and that she should send him her appeal letter (FAC, ¶25, 9:6-7); and Title IX and Human Resources investigations were conducted (FAC ¶28, 15:16-21) Simply stated, an uncaring, deliberately indifferent defendant does not call meetings to get to the bottom of concerns, the Athletic Director does not take up time to meet with the student-athletes, and the University does not conduct lengthy investigations into the plaintiffs' claims as did Pepperdine.

**2. The Conduct Alleged by the Defendants Does Not Satisfy the Second and Fourth Prongs of *Davis/Donovan***

The second and third causes of action must also be dismissed because the FAC fails to allege facts that establish that the plaintiffs were subject to sexual harassment or discrimination.[5] The conduct alleged did not involve unwanted sexual acts or words which must be present to establish sexual harassment or discrimination based on sex. *Herberg v. California Institute of the Arts* (2002) 101

[5] In the context of educational institutions, sexual harassment is a form of discrimination. *Davis, supra, 526 U.S. at 650.*

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Cal.App.4th 142, 150. Questions about whether the plaintiffs were dating do not constitute unwelcome sexual advances or words. One comment allegedly made by Adi Conlogue, about whether the plaintiffs pushed their beds together, *may* border on "sexual words," but an isolated comment, and without an allegation of context,[6] cannot support a claim of sexual harassment. *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App. 3d 590, 610 (1989).

Moreover, none of the questions directed toward the plaintiffs, or requests for medical information, were based upon any animus, prurient interest or improper motive. Rather, as the plaintiffs admit in their FAC, Coach Ryan (and, by extension, his staff and associated personnel) were doing their best to maintain a harmonious team and to ensure that the plaintiffs were medically fit to play basketball. The alleged inquiries stemmed from concerns about a rift in the team, and not from the plaintiffs' sexual orientation. The plaintiffs specifically allege that Coach Ryan spoke to them about two L.A. Sparks players who "were dating and they broke up in season. **That was the reason our team fell apart and lost."** (FAC, ¶ 25.) (Emphasis added.)

Despite the dozens of irrelevant conversations that litter the FAC, Coach Ryan's motivation, as alleged in the FAC, was consistent. Clearly, concerns about a player's conduct having a negative impact upon that player's performance and the team as a whole are well within the acceptable ambit of a coach's relationship with the team members. Indeed, these concerns exist irrespective of gender. Put another way, if a woman student-athlete was permitting a relationship with a man to interfere with her performance and the dynamics of a team, nobody would question

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[6] Pepperdine contends any statement made regarding pushing beds together was made in the context of athletic recruits visiting campus needing rooms to stay in and that members of the team could accommodate them by pushing beds together and using sleeping bags.

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the coach's raising that as an issue with that athlete by asking something like, "are you dating John Doe? I've seen you together and he seems to be causing you to lose focus."

Coach Ryan's alleged comments, made to avoid the internal destruction of the team and the isolation of two of its players due to their interpersonal relationship, is clearly not sexual harassment or discrimination based on sex, nor, in the context in which the conduct allegedly occurred, can it be said that the conduct was severe, pervasive and objectively offensive. Similar to a workplace harassment case, "ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" is not actionable harassment. *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788. In this case, there was no abusive language, gender-related jokes or even teasing. Simply stated, the few inquiries allegedly made were done for the good of the basketball team, something that a player might expect if her relationship is interfering with team chemistry.

**3. The Plaintiffs Were Not Deprived Access to Educational Opportunities**

The plaintiffs have not, and cannot, allege the fifth element of a cause of action for damages under Title IX or Section 220, i.e., the alleged sexual harassment "can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. Rather, the plaintiffs have simply alleged that they were "harmed" or suffered "harm" (FAC, ¶¶ 33, 47, 65, 75, 84, 93.) A mere allegation of undifferentiated harm, however, is not a specific allegation of this essential element.

Coach Ryan did not threaten to kick the plaintiffs off of the team or out of Pepperdine if their relationship was discovered. Indeed, the plaintiffs concede that, at worst, Pepperdine was "ambivalent" to the relationship. (RJN No. 1). Further, even if the plaintiffs left the team – which they voluntarily did in Fall 2014 – their

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athletic scholarships would have been honored throughout the remaining academic year. While the plaintiffs may not have liked the alleged inquiries and comments made about their relationship, they cannot factually establish that they were denied academic and athletic opportunities. As a result, the second and third causes of action must fail.

**E. The Second Cause of Action Fails to State a Claim Upon Which Relief Can Be Granted Because it is Impossibly Vague**

The second cause of action brought by the plaintiffs against Pepperdine vaguely alleges "violation of California Educational Code §§ 220, 66251, 66270." (FAC, p. 17, lns. 9-11.) For several reasons, the second cause of action fails to state a sufficiently specific claim upon which relief can be granted.

First, the plaintiffs have indiscriminately bundled their claims under "California Educational Code §§ 220, 66251, 66270," and have failed to specify the terms of the various statutes or how they were allegedly violated. FRCP 8(a)(2) requires a pleading stating a claim for relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "Under Rule 8(a), the plaintiff must 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Mendiondo v. Centinela Hosp. Medical Center,* 521 F.3d 1097, 1104 (9th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)) .

A plaintiff's failure to identify with specificity what statute it contends has been violated is fatal. In *Lee v. Plummer,* 2005 WL 91380 (N.D. Cal. Jan. 17, 2005), the district court granted a motion to dismiss a claim based upon an unspecified "breach of statute," where the plaintiff failed to identify what statute she claimed to have been breached. The court emphasized that "[n]either defendants nor the Court should be required to guess which statue plaintiff invokes." *Id*. at 4. A similar result should be reached in the case at bar, as citation of three separate statutes fails to apprise Pepperdine of exactly what behavior allegedly contravened what statute. Thus, the allegations are impermissibly vague and fail to comport with the pleading

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requirements of FRCP 8(a)(2).

**F. The Plaintiffs' Claim for Punitive Damages Fails to State a Claim Upon Which Relief Can Be Granted**

The proper medium for challenging the sufficiency of factual allegations of punitive damages is a motion to dismiss under FRCP 12(b)(6). *Kelley v. Corrections Corp. of America,* 730 F. Supp. 2d 1132, 1146 (E.D. Cal. 2010). In each of their three causes of actions, the plaintiffs seek punitive damages. The operative allegation demanding punitive damages is identical in each cause of action, i.e., a conclusory allegation that the conduct was "malicious and oppressive," purportedly allowing the plaintiffs to recover punitive damages. (*See, e.g.,* FAC, ¶¶ 38, 48, 57, 66, 76, 85 and 94.) These bare allegations are insufficient.

California Civil Code section 3294(a) only authorizes the imposition of punitive damages where a "defendant has been guilty of oppression, fraud, or malice." Specific conduct which amounts to malice, fraud or oppression must be alleged. In *Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894, the Court emphasized that "the cases interpreting section 3294 make it clear that in order to warrant the allowance of punitive damages, the act complained of must not only be willful in the sense of intentional, but it must also be accompanied by aggravating circumstances, amounting to malice. The malice required implies an act conceived in a spirit of mischief or with criminal indifference toward the obligation owed to others. *There must be an intention to vex, annoy or injure*. Mere spite or ill will is not sufficient…." [Citations] (Italics in original.)

The plaintiffs herein request punitive damages for each cause of action despite there being no factual basis for doing so. In order to properly plead a claim for punitive damages, the ultimate facts of the defendant's wrongful motive, intent, or purpose must be alleged. *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 632; *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1036, 1042; *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1; *Cyrus v. Haveson* (1976) 65 Cal.App.3d

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306. The plaintiffs have failed to allege any such facts against Pepperdine. There are no proper *factual* allegations to show that the University engaged in "despicable conduct", nor conduct in "conscious disregard" of the plaintiffs' rights, nor conduct intended to oppress or injure the plaintiffs, as those necessary terms are defined in California Civil Code §3294(c).

Nor have the plaintiffs alleged facts to show by *clear and convincing evidence* that these necessary facts exist, as required in Civil Code §3294(a). "Clear and convincing evidence" is a high standard, requiring "a "high probability" that the charge is true. *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (2013) 221 Cal.App.4th 102, 112. Merely stating that Pepperdine acted in a "malicious and oppressive" fashion, as the plaintiffs allege throughout the FAC, fails to meet the pleading requirements for the recovery of punitive damages. (*Cohen v. Groman Mortuary, Inc.* (1964) 231 Cal.App.2d 1, 8-9 (disapproved of on other grounds in *Christensen v. Superior Court* (1991) 54 Cal. 3d 868, 888-89).

In *Coppola v. Smith,* 982 F. Supp. 2d 1133 (E.D. Cal. 2013), the district court held that Civil Code section 3294 "sets the substantive requirements that must be met in order to obtain punitive damages, but Federal Rules of Civil Procedure 8 and 9 set the pleading standards that must be met in federal court." *Id*. at 1144. The district court recognized that the underlying tort (release of hazardous substances into subsurface of real property) "does not mean that the release was done with an evil motive. What is alleged is merely a claim for trespass and nuisance, and such claims in and of themselves do not automatically entail a right to punitive damages. Something more is necessary to plausibly support an evil motive …." *Id*. at 1145.

The complaint at issue in *Kelley v. Corrections Corp. of America,* 730 F. Supp. 2d 1132, 1146 (E.D. Cal. 2010) contained the requisite "buzz words," yet the claim for punitive damages was still dismissed. The district court noted that the allegations claiming punitive damages were "nothing more than conclusory allegations of conscious disregard of [plaintiff's] rights and with the intent to vex,

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injure and annoy [plaintiff] such as to constitute oppression, fraud or malice." *Id*. at 1147.

Similarly, in a subsequent decision, the *Kelley* court recognized that the allegations that purported to justify an award of punitive damages "are really nothing more than allegations that Defendant failed to abide by FEHA's requirements coupled with the conclusory allegation that Defendant did so 'with conscious disregard for [Plaintiff's] rights and with the intent to vex, injure and annoy [Plaintiff]." *Kelley v. Corrections Corp. of America,* 2011 WL 121582 (E.D. Cal. January 13, 2011) at 6. The court cautioned that "it is the express policy of courts deciding discrimination cases that punitive damages are never awarded as a matter of right, are disfavored by the law, and should be granted with the greatest of caution and only in the clearest of cases." *Id. (*quoting *Henderson v. Security Pacific Nat'l Bank* (1977) 72 Cal. App. 3d 764,771).

A similar result should be reached in this case, especially in view of the plaintiffs' own admission that Pepperdine's attitude towards lesbian relationships was at worst "ambivalent." (RJN No. 1). The "magic words" of "malicious and oppressive" conduct have been folded into the FAC in a desultory effort to clear the bar, but a review of the actual allegations reveals that there was no malice or oppression under the factual circumstances of this case. Accordingly, the claims for punitive damages must be dismissed.

### G. Prejudgment Interest Is Not Recoverable Herein

#### 1. The Plaintiffs' Claim for Prejudgment Interest Relating to the Alleged Invasion of Privacy and Education Code Violations Is Not Proper

State law claims brought in federal court are governed by state law. *Rodriguez v. County of Stanislaus*, 799 F. Supp. 2d 1131, 1137 (E.D. Cal. 2011). California Civil Code § 3287 governs prejudgment interest in cases where damages are certain, or capable of being made certain by calculation. California Civil Code § 3288 provides that in actions other than contract, and in every case of oppression,

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fraud or malice, interest may be awarded. It has been squarely held, however, that "[u]nder Civil Code Section 3287, prejudgment interest is not available in non-contractual tort cases when the determination of damages involves factors of mental injury requiring the fact finder's resolution. *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.*, 60 Cal.App.4th 13, 21 (1997).

The *Steinfeld* court recognized that "absent oppression, malice, or fraud, prejudgment interest is not available under section 3288 on 'damages for the intangible, non-economic aspects of mental and emotional injury' in non-contractual tort actions because such damages are inherently non-pecuniary, unliquidated and not readily subject to precise calculation …." *Id.* at 21. Accordingly, "prejudgment interest under sections 3287 and 3288 in non-contractual tort actions is limited to ascertainable damages because the interest compensates the plaintiff for the loss of calculable funds that belonged to the plaintiff, or should have been paid to the plaintiff." *Id.*

Similarly, in *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, the California Supreme Court recognized that "damages for the intangible, non-economic aspects of mental and emotional injury … are inherently non-pecuniary, unliquidated and not readily subject to precise calculation. *Id.* at 103. The Court concluded that allowance of interest on such claims would in essence create a double recovery. *Id.* In *Gourley v. State Farm Mutual Auto. Ins. Co.* (1991) 53 Cal.3d 121, the California Supreme Court recognized that "the courts have traditionally refused to apply sections 3287 and 3288 in situations where the defendant could not know the amount owed. … as in claims for damages for the non-economic aspects of physical, mental and emotional injury." *Id.* at 134 (citations omitted).

These authorities are fatal to the plaintiffs' claim for prejudgment interest under their first two causes of action. The gravamen of the FAC is the unliquidated emotional and mental injury allegedly suffered by the plaintiffs. *See, e.g.,* FAC,

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¶¶ 17, 33, 47, 56, 65, 75, 84 and 93. Moreover, insofar as the plaintiffs' claims for punitive damages must be dismissed, as discussed above, there is no basis for prejudgment interest pursuant to California Civil Code § 3288.

**2. Prejudgment Interest Under Title IX Is Not Proper**

The plaintiffs' claim for prejudgment interest under their third cause of action for violation of Title IX is without merit. For federal causes of action, "the Ninth Circuit has generally held that prejudgment interest is a matter committed to the sound discretion of the trial court." *In re Acequia, Inc.*, 34 F.3d 800, 818 (9th Cir. 1994); *Murphy v. City of Elko*, 976 F.Supp.1359, 1361 (D. Nev. 1997).

The case at bar is not an appropriate one for an award of prejudgment interest. Title IX is silent as to whether prejudgment interest should be awarded, and for that reason alone, the claim should be dismissed. If Congress intended Title IX litigants to recover prejudgment interest, it could have so provided; it did not.

Further, as discussed above, because the plaintiffs are claiming non-economic damages arising from their alleged harassment and emotional injury, claims which are claims are inherently unliquidated and unascertainable, this court should hold that prejudgment interest is inappropriate. For these reasons, the prayer for prejudgment interest should be dismissed.

## IV. CONCLUSION

For all of the foregoing reasons, Pepperdine respectfully requests that this Court grant its Motion to Dismiss the FAC without leave to amend.

DATED: February 18, 2015 ANDERSON, McPHARLIN & CONNERS LLP

*/s/ Paula Tripp Victor /s/*

By: _____

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 707 Wilshire Boulevard, Suite 4000, Los Angeles, California 90017-3623.

On **February 18, 2015**, I served the document described as **NOTICE OF MOTION AND MOTION OF DEFENDANT PEPPERDINE UNIVERSITY TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED.R.CIV.P. 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties as follows:

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**BY MAIL:** I am "readily familiar" with Anderson, McPharlin & Conners' practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at Los Angeles, California, on that same day following ordinary business practices.

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**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made. Executed on **February 18, 2015**, at Los Angeles, California.

LISA GREENE

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