IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Commonwealth of Pennsylvania, Tom Wolf, Governor; and The City of Harrisburg and Capital Region Water f/k/a The Harrisburg Authority, by and through Marita Kelley, in her official capacity as Coordinator For The City of Harrisburg; and The Pennsylvania Department of Community and Economic Development, by and through Dennis Davin, in his official capacity as Secretary,	:	
Plaintiffs	:	
v.	:	No. 368 M.D. 2018
	:	Argued: September 9, 2019
RBC Capital Markets Corporation; Obermayer, Rebmann, Maxwell & Hippel, LLP; Buchanan Ingersoll & Rooney, P.C.; Eckert, Seamans, Cherin & Mellot, LLC; Public Financial Management, Inc.; Buchart Horn, Inc.; Foreman and Caraciolo, P.C. f/k/a Foreman & Foreman, P.C.,	:	
Defendants	:	

BEFORE: HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge[1]

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK FILED: September 9, 2021

[1] This case was argued before a panel of the Court that included former Judge Robert Simpson. Because Judge Simpson's service on this Court ended on December 31, 2019, this matter has been submitted on briefs to Judge Ceisler as a member of the panel.

The Commonwealth of Pennsylvania, acting by and through the Governor's Office of General Counsel, on behalf of Governor Tom Wolf, as *parens patriae* for the citizens of the Commonwealth (Commonwealth); the City of Harrisburg (City) and Capital Region Water formerly known as (f/k/a) The Harrisburg Authority (Authority), by and through Marita Kelley (Coordinator), in her official capacity as Coordinator For The City of Harrisburg; and The Pennsylvania Department of Community and Economic Development (DCED), by and through Dennis Davin, in his official capacity as Secretary (collectively, Plaintiffs), filed a First Amended Complaint (Complaint) in our original jurisdiction against financial advisers RBC Capital Markets Corporation (RBC) and Public Financial Management, Inc. (PFM); law firms Obermayer, Rebmann, Maxwell & Hippel, LLP (Obermayer), Buchanan Ingersoll & Rooney, P.C. (BIR); Eckert, Seamans, Cherin & Mellott, LLC (Eckert), and Foreman and Caraciolo, P.C. f/k/a Foreman & Foreman, P.C. (Foreman); and engineering firm Buchart Horn, Inc. (Buchart) (collectively, Defendants). Plaintiffs' 24-count Complaint sets forth claims for fraud, negligent misrepresentation, breach of fiduciary duty, and legal malpractice. Before the Court are preliminary objections (POs) filed by RBC, PFM, Obermayer, BIR, Eckert, and Foreman to Plaintiffs' Complaint, and Plaintiffs' POs in response thereto.[2]

[2] This Court is required to accept as true the well-pleaded averments set forth in the pleadings and all inferences reasonably deducible therefrom. *Pennsylvania State Lodge, Fraternal Order of Police v. Department of Conservation and Natural Resources*, 909 A.2d 413, 415-16 (Pa. Cmwlth. 2006), *aff'd*, 924 A.2d 1203 (Pa. 2007). However, we need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Id.* In order to sustain POs, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the POs should be sustained, the doubt must be resolved in favor of overruling the POs. *Id.*

I. Background

This action arose from the Authority's Resource Recovery Facility (Incinerator) retrofit project. Complaint ¶¶13-30. The Authority, which was organized in 1957 under the Municipality Authorities Act of 1945 (MAA),[3] owned the Incinerator and issued the debt instruments that financed construction of the new Incinerator. Complaint ¶31. For several decades, the City fulfilled a statutory obligation by sending the waste generated within its boundaries to the Incinerator. Complaint ¶32. During the 1990s, the Incinerator faced environmental and operational challenges and was unable to generate enough revenue to meet its expenses. Complaint ¶34. By the end of 2002, the Authority had issued approximately $100 million in taxpayer-backed debt. *Id.* At the same time, the Authority was facing a December 2002 deadline to meet federal emissions standards. Complaint ¶35. In 2003, the Authority entered into an agreement with Barlow Projects, Inc. (Barlow), an engineering and construction firm, to demolish the Incinerator and replace it with a much larger facility capable of generating sufficient revenue to pay its operating expenses and service both new and accumulated debt. Complaint ¶¶35-37.

To obtain the nearly $260 million in financing and refinancing needed for reconstruction, the Authority retained the finance professional and law firm Defendants, "which dubbed themselves the 'Working Group.'" Complaint ¶17. The Authority, which does not have taxing power, pledged the Incinerator's future revenues as security for the debt. Complaint ¶18. The City guaranteed the debt based upon the professional advice and representations of the Working Group

[3] Act of May 2, 1945, P.L. 382, *as amended, formerly* 53 P.S. §§301-322, repealed by the Act of June 19, 2001, P.L. 287. The Act of June 19, 2001, P.L. 287 also codified and amended the MAA, which now appears at 53 Pa. C.S. §§5601-5623.

concerning the project's risks, benefits, and alternatives. Complaint ¶¶19-21. The Working Group's compensation was largely contingent on the closing of the Incinerator debt transactions, which could not occur unless the City's elected officials authorized the City to guarantee repayment of the debt. Complaint ¶23.

The City's debt guarantees ultimately rendered it insolvent. Complaint ¶25. Then-Governor Corbett declared a state of fiscal emergency and placed the City into receivership. Complaint ¶26.

A. Plaintiffs allege that the Working Group convinced City Council to guarantee $130 million in debt that the City could not afford.

The Incinerator reconstruction project required the Authority to borrow more than $130 million in 2003. Complaint ¶39. Prior to borrowing the initial $130 million, the Authority, through the Working Group, asked the City to pledge its full faith, credit, and taxing power as security. Complaint ¶40. The City's guarantee required approval by City Council. Complaint ¶41. The magnitude of the debt service for both the existing $100 million and the additional $130 million Incinerator debt meant that the City would face insolvency if the Authority defaulted and caused the City to assume the debt. Complaint ¶43. City Council was aware that the Incinerator's ability to generate sufficient revenues to pay its operating debt and all of its debt service was critical to the City's economic survival. Complaint ¶44. Given the risks, and to adequately understand the nature of the proposed project and the details of the financing, City Council convened multiple public meetings at various locations throughout the City, during which City Council and citizens asked the Working Group to explain the details and provide professional advice regarding the reconstruction project and its financing. Complaint ¶¶45-46.

B. Plaintiffs allege that the Working Group's disclosures understated the financial burden of the reconstruction project and its financing.

Plaintiffs allege that the Working Group's public presentations omitted significant elements of the financial burdens the Incinerator project would impose. Complaint ¶47. First, the Working Group shared only 5 years of its own financial projections, despite having generated 30 years of financial projections showing that the Incinerator would not generate enough revenue to pay all expenses and debt service. Complaint ¶¶48-52. Additionally, the Working Group displayed projections, prepared by RBC, that significantly understated the Incinerator's net debt service in 2006. Complaint ¶¶53-58. Further, the Working Group understated the amount of money the Authority would borrow subject to the City's guarantee, increasing the total borrowing and the City's guarantee exposure by approximately $8 million. Complaint ¶¶59-62. Finally, the Working Group failed to disclose that its financial analysis relied on assumptions that left no room for any unforeseen circumstances during the entire 30-year life of the bonds. Complaint ¶¶64-74.

C. Plaintiffs allege that Buchart failed to identify design defects.

The City hired Buchart, an engineering consultant, to assess the viability of the Incinerator design. Complaint ¶75. Buchart issued a written report and presented the report at a public meeting convened by City Council, giving an unqualified endorsement of Barlow's design. Complaint ¶76. Plaintiffs allege that in doing so, Buchart ignored or failed to identify design defects that significantly increased the cost of the facility's construction and the amount of debt needed to finance it. Complaint ¶¶77-79.

D. Plaintiffs allege that the Working Group falsely represented to the City and DCED that the new Incinerator debt was consistent with statutory requirements.

The Working Group's responsibilities included determining whether the City's guarantees complied with the Local Government Unit Debt Act (LGUDA), 53 Pa. C.S. §§8001-8285, which prohibits municipalities from incurring or guaranteeing debt that exceeds statutory limits. Because the total of the new and preexisting Incinerator debt exceeded the City's debt limit, the City could not legally guarantee the additional Incinerator debt unless it classified nearly all of the debt as self-liquidating, meaning that the project would generate enough income to pay each year's operating expenses and debt service. Classifying the debt as self-liquidating would allow the City to exclude it for purposes of compliance with the LGUDA's limits. On two occasions in 2003, the Working Group, through attorneys from Obermayer and Eckert, and with support from RBC, falsely advised the City and falsely represented to DCED that nearly all Incinerator debt was self-liquidating. Complaint ¶¶80-85.

In early 2003, the Working Group advised the Authority to restructure the existing $100 million debt, almost all of which had previously been classified as self-liquidating. Complaint ¶86. The City guaranteed the restructuring. *Id.* At the time, the Incinerator had not generated sufficient revenue to pay its expenses and debt service for more than two years. Complaint ¶89. In June 2003, the Incinerator stopped burning trash, eliminating virtually all revenue that could service the Incinerator debt. Complaint ¶90. Nevertheless, relying on the Working Group's unsupported assumption[4] that the new Incinerator would generate

[4] According to the Complaint, reasons to doubt the project's feasibility included the following facts existing as of April 2003: the Authority was still negotiating its contract with Barlow; the total cost of the project was not finalized; the project's timeline was still in flux; **(Footnote continued on next page…)**

sufficient revenue, attorneys from Obermayer and Eckert advised the City that it could continue classifying nearly all of the Incinerator debt as self-liquidating. Complaint ¶¶91-92.

Subsequently, in November 2003, the Working Group again advised the City that it could classify all of the new $130 million in debt and all of the existing $100 million in debt as self-liquidating. Complaint ¶94. That advice was based on a financing plan that left no room for error; it assumed that for a period of more than 30 years, nothing would delay, shut down, increase the cost, decrease the revenue, or increase the debt service of the Incinerator. Complaint ¶96. This advice was given despite the fact that the Working Group had generated projections demonstrating that the Incinerator would not generate sufficient revenues each year to pay its operating expenses and service its total debt. Complaint ¶¶97-98. As noted, absent the self-liquidating exclusions, the City would have exceeded its statutory debt limit and would not have met the legal requirements permitting it to guarantee $230 million of Incinerator debt. Complaint ¶99.

Additionally, before the City could legally guarantee the 2003 debt restructuring and the 2003 reconstruction debt, the City had to obtain DCED's approval. Complaint ¶100. On behalf of the City, the Working Group submitted to DCED "self-liquidating debt reports" that set forth the basis of the Working

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(continued…)

Dauphin County had yet to pass a crucial ordinance that would direct all of the county's waste to the Incinerator; the Authority's Board had not yet approved the issuance of the new Incinerator bonds; City Council had not even considered an ordinance approving a guarantee of the new Incinerator debt; and the Working Group had not secured bond insurance, which eventually was predicated on a guarantee from Dauphin County. Complaint ¶93.

Group's claim that each 2003 transaction would be self-liquidating. Complaint ¶101. RBC, Obermayer, and Eckert provided substantial input as to the documentation filed with DCED. Complaint ¶102. In April 2003, Obermayer, on behalf of the City, filed proceedings seeking DCED's approval of the 2003 Series A, B, and C restructuring notes. Complaint ¶103. Plaintiffs allege that, given the tenuous nature of the reconstruction project, the Working Group misled DCED when it certified most of the existing Incinerator debt as self-liquidating based on assumptions concerning the construction of a new Incinerator. Complaint ¶104.

Further, in April and November 2003, Obermayer, on behalf of the City, gave DCED pro forma statements that projected revenues, expenses, and debt service from 2006 through 2010. Complaint ¶105. The financial projections Obermayer provided to DCED were truncated, and concealed years of projected shortfalls beginning in 2011. Complaint ¶106. DCED recognized the discrepancy between the length of the financial projections (5 years) and the length of the debt service schedules (30 years) and requested the missing information. Complaint ¶107. On November 19, 2003, attorneys from Obermayer and Eckert contacted DCED by telephone and represented that the Incinerator revenues "will be sufficient to pay the annual debt service on the retrofit bonds." Complaint ¶108.

No member of the Working Group ever disclosed to DCED that, in multiple years, under the best of circumstances, the Incinerator would be unable to cover all of its expenses and debt service. Consistent with the information presented at City Council meetings, the projections the Working Group provided to DCED understated the Authority's debt service obligations during the five years the projections covered. Complaint ¶¶109-110. Plaintiffs allege that accurate debt

service figures would have undermined the self-liquidating debt certifications. Complaint ¶111.

E. Plaintiffs allege that the Working Group subjected the Authority and the City to substantial losses by circumventing law requiring contractors to post financial security.

Pursuant to Section 3.1(a) of the Public Works Contractors' Bond Law of 1967,[5] before a "contracting body" awards "any prime contractor" a contract for the "construction, reconstruction, alteration or repair of any public building or other public work or public improvement," the contractor must obtain "financial security" equal to "one hundred percent of the contract amount," which is "solely for the protection of the contracting body." 8 P.S. §193.1(a). Such security "shall be executed by one or more surety companies or Federal or Commonwealth chartered lending institutions . . . authorized to do business in the Commonwealth . . . ." *Id.* §193.1(b); *see* Complaint ¶¶112-113. In projects involving the magnitude of the Incinerator reconstruction, it is customary for the contracting body to comply with this requirement by requiring the contractor to post a payment and performance bond. Complaint ¶114. In this instance, the Working Group initially drafted contracts that required Barlow to post a payment and performance bond, but Barlow could not meet the Authority's demand. Complaint ¶¶115-116.

The issue with Barlow's ability to post adequate security arose prior to the date that City Council authorized the City to guarantee the new Incinerator debt. Complaint ¶117. Nevertheless, no Working Group member made City Council or the public aware that Barlow would not be posting a payment and

[5] Act of December 20, 1967, P.L. 869, *as amended*, added by the Act of December 17, 1990, P.L. 694, 8 P.S. §193.1.

performance bond. Complaint ¶118. Instead, the Working Group changed the title, but not the nature of Barlow's contract. Complaint ¶¶121-122. The Working Group was aware that the above-quoted bond requirement applied to all contracts for "construction, reconstruction, alteration and repair." Complaint ¶119. The Working Group also knew that a separate statutory provision, which applied to contracts for "supplies and materials," did not require a contractor to post the same degree of financial security. Complaint ¶120. Even though Barlow was the prime contractor with complete control over the reconstruction project, the Working Group changed the title of Barlow's contract from "Facility Modification Agreement" to "Agreement for the Sale and Installation of Equipment." Complaint ¶121.

Additionally, the Working Group, acting primarily through Obermayer's Mr. Andrew Giorgione, helped Barlow assemble a patchwork of security that did not total 100% of the contract price and was not executed by a surety company or financial institution as required by law. Complaint ¶123. In fact, this "security" was primarily a "retainage" by which the Authority held back a portion of Barlow's compensation until the project was complete. Complaint ¶124. The retainage arrangement provided insufficient protection for the Authority. Complaint ¶125. Further, when Barlow began to claim financial distress, the Working Group released all of the retainage before Barlow had completed the project. Complaint ¶126. The balance of the security applied either only to the delivery of equipment or to ensure that subcontractors (but not Barlow, the prime contractor) performed under their contracts. Complaint ¶127. Plaintiffs allege that the security evaporated over time, as equipment was delivered, and subcontractors

walked off the job due to non-payment. Complaint ¶128. When Barlow could not complete the job, there was no "security" left to fill the void. Complaint ¶129.

F. Plaintiffs allege that the Working Group circumvented established approval processes to obtain additional Incinerator funding.

To obtain funding without publicly acknowledging that the Incinerator was incurring additional debt, RBC put together a number of "swap" transactions that brought in additional cash while significantly increasing the risk that debt service payments could increase by large amounts. Complaint ¶132. By the end of 2005, Barlow had depleted all available funds, including those generated by the swap transactions, and required approximately $25 million to continue building the new Incinerator. Complaint ¶133.

CIT, a lender that had previously provided construction financing to Barlow, agreed to provide the needed funds. Complaint ¶134. To ensure that CIT would be paid before all other Incinerator creditors, the loan was structured as a "license agreement." Complaint ¶135. As part of this transaction, Barlow assigned its rights in proprietary Incinerator technology to a Barlow subsidiary. Complaint ¶136. The Authority, which already had paid Barlow in full for use of the Incinerator technology, nevertheless agreed to "sub-license" the Incinerator technology from the Barlow subsidiary. Complaint ¶137. Under this agreement, the Authority was required to make additional "license" payments that totaled $25 million. *Id.* CIT then paid Barlow $25 million to acquire the Barlow subsidiary that held the "sub-license" of Barlow's patented technology. Complaint ¶138. As a result, the Authority began making its "sub-license" payments to CIT, instead of Barlow. *Id.* Barlow thus got its $25 million, and the Authority became obligated to pay CIT $3 million per year for technology it had already purchased from

Barlow. Complaint ¶139. In effect, the Authority borrowed $25 million from CIT so that Barlow could continue construction. Complaint ¶140.

Because the CIT payments were considered "license fees," they constituted operating expenses, which the Authority was required to pay before it made any debt service payments. Complaint ¶141. This structure ensured that CIT would be repaid before any of the Incinerator's other creditors. Complaint ¶142.

The manner in which the Working Group structured the CIT funding obscured the nature of the additional loan from City Council and circumvented City Council's authority. Complaint ¶143. The Working Group had not disclosed the consequences of a Barlow delay or cost overrun, and it had assured City Council that it would not seek the City's guarantee of any additional Incinerator debt. Complaint ¶144. Obermayer's Mr. Giorgione acknowledged that the Working Group would be "crucified" if City Council or the public learned about the $25 million loan. Complaint ¶145.

The agreements governing the City's 2003 Incinerator debt guarantee were drafted by Mr. Giorgione and required that City Council approve any new Incinerator-related indebtedness. Complaint ¶146. Although CIT requested a City Council resolution approving the "license" transaction, Mr. Giorgione advised all parties, including the Authority and the City, that such a resolution was not required. Complaint ¶147. This advice was contrary to the agreements he had drafted. *Id.* At the time, Mr. Giorgione represented both the Authority and the City. Complaint ¶149.

The "license" agreement "siphoned funds from Incinerator revenue that could have serviced the Incinerator debt, thereby increasing the City's exposure under its guarantee." Complaint ¶148. Plaintiffs allege that by denying

City Council its right to examine and reject the debt, Mr. Giorgione failed to protect the City's legal interests. Complaint ¶150.

The Working Group, including BIR and Foreman, explicitly acknowledged that this transaction was debt by another name. Complaint ¶151. The Working Group also acknowledged that this transaction circumvented the governmental approvals required for the City to guarantee new Incinerator debt. Complaint ¶152. The Working Group further acknowledged that the transaction most likely violated the Authority's agreements governing the Incinerator debt, which prohibited the Authority from issuing new debt at higher levels of seniority than the existing debt. Complaint ¶153. Despite Mr. Foreman's acknowledgment of the impropriety of this transaction, Foreman facilitated the deal by issuing an opinion letter stating that the transaction had received all necessary approvals. Complaint ¶154.

G. The Working Group subsequently added $60 million in additional debt to the Incinerator project.

By the end of 2006, the construction of the Incinerator was more than a year behind schedule. Complaint ¶155. The Authority terminated its contracts with Barlow on December 31, 2006. Complaint ¶156. On January 2, 2007, the Authority hired a new contractor to manage the Incinerator and design a plan for the completion of the reconstruction project. Complaint ¶157.

In May 2007, the Authority signed another agreement with the new contractor to complete construction. Complaint ¶158. However, there was no money to pay the new contractor. Complaint ¶159. In fact, the Incinerator was not generating enough revenue for the Authority to pay the Incinerator's utility bills or compensate its employees, much less pay the new contractor or make debt service payments. *Id.* Consequently, the Authority had to issue almost $60 million in

debt, in the form of a $25 million construction loan and a $30 million "working capital" loan. Complaint ¶160. The City pledged its full faith, credit, and taxing power as security for both loans. Complaint ¶161. After these transactions closed, the total Incinerator debt, including the CIT transaction and advances from Dauphin County (County) and the bond insurer, exceeded $360 million. Complaint ¶162.

In November 2007, the Working Group urged City Council to authorize the City's guarantee of a $30 million "working capital" loan. Complaint ¶163. During a November 8, 2007 meeting, PFM's Glen Williard and Eckert's Carol Cocheres indicated that the Authority sought to borrow $45 million in "working capital" that could go to a variety of uses, including capital investment needed to repair the Incinerator's steam line and expand its ash landfill. Complaint ¶164. Without the steam line repairs, the Authority could not generate any revenue from steam sales. Complaint ¶165. Without the landfill expansion, the Authority would have to keep paying fees to haul ash offsite. *Id.* Thus, the failure to fund these projects would limit the funds available to pay the Incinerator's debt service. *Id.*

Prior to the November 8, 2007 meeting, a consulting firm ran multiple projections showing that, even after the new Incinerator was fully functional, and even assuming steam line repair and landfill expansion, the Incinerator still would not generate enough revenue to service the existing debt, much less the new debt incurred in 2007. Complaint ¶166. Also prior to the November 8, 2007 meeting, PFM's Mr. Williard informed Eckert's Ms. Cocheres that he was "uneasy" about the "magnitude of this thing." Complaint ¶167. He asked Ms. Cocheres how to "protect [Eckert] and PFM here as this thing gets bigger and bigger." *Id.* Mr.

Williard stated, "I wouldn't want anybody to ever think that we thought there was a plan, and the revenues from the system would pay for this, because I just don't see that." *Id.*

Notwithstanding those concerns and beliefs, PFM and Eckert presented three options during the November 8, 2007 meeting that purportedly allowed revenues from the system to pay expenses and service both the existing debt and the new 2007 debt. Complaint ¶168. Notably, the options assumed that the Authority would begin collecting revenue from steam sales and that it would eliminate future expenses for ash disposal. Complaint ¶169. The options also would have required the City to raise waste collection rates to untenable levels and to execute future financings that would restructure the existing debt and fund debt payments. Complaint ¶170.

Neither PFM nor Eckert advised City Council of the potential difficulty the Authority would face if it attempted to execute Incinerator debt transactions after 2007. Complaint ¶171. In 2003 the market had refused to lend the Authority money for the Incinerator without both City and County guarantees. Complaint ¶172. In 2007, even with a County guarantee, the Authority could borrow only on unfavorable terms, indicating that it would be difficult to secure additional financing. Complaint ¶173. After 2007, however, the County was not willing to guarantee any additional Incinerator debt. Complaint ¶174. Nevertheless, neither PFM nor Eckert disclosed to the City the market risk inherent in the plans they presented at City Council meetings. Complaint ¶175.

PFM, through Mr. Williard, and Eckert, through Ms. Cocheres, returned to City Council on November 20, 2007. Since the November 8, 2007 meeting, the Working Group had reduced the size of the "working capital" loan

from $45 million to $30 million by eliminating, among other things, the money earmarked for steam line repair and landfill expansion. Without the repair and expansion, it would not be possible to service the debt under the projections that the Working Group had provided to City Council. Complaint ¶¶176-179. After eliminating those investments, PFM did not update its proposed options to account for the elimination of steam line revenue and the continuation of ash disposal costs. Complaint ¶180. Plaintiffs allege that had PFM done so, it would have been clear that the concerns privately expressed by Mr. Williard to Ms. Cocheres were well founded, and that even assuming the future rate increases and debt transactions occurred, Incinerator revenues still would not be sufficient to pay the existing debt, much less the $60 million new debt incurred in 2007. Complaint ¶181.

In addition to attending City Council presentations, Eckert advised the City regarding its compliance with LGUDA's debt limits following the guarantees of the $25 million construction loan and $30 million "working capital" loan. Complaint ¶182. The City classified nearly all of the preexisting $230 million Incinerator debt as self-liquidating. Complaint ¶183. Plaintiffs allege that Eckert knew and should have advised the City that those classifications were inaccurate and improper. *Id.* Because multiple sets of projections had demonstrated that, even after the Incinerator began full operations, the Incinerator would not generate sufficient revenues to service the existing Incinerator debt, each member of the Working Group, including PFM's Mr. Williard and Eckert's Ms. Cocheres, knew or should have known that the existing Incinerator debt was not self-liquidating. Complaint ¶¶185-186.

Ms. Cocheres admitted in sworn testimony before the Pennsylvania State Senate that the self-liquidating classifications were based on a version of

PFM's financing options. Complaint ¶187. Those options showed that the existing debt could be self-liquidating only if the City implemented substantial waste disposal rate increases, the Authority completed future debt transactions, and the Authority made capital investments that the Working Group had already decided to cut from the budget. *Id.*

During her testimony, Ms. Cocheres also admitted that, at the time, "most people thought that . . . at least . . . a portion of the debt . . . would probably not be self-liquidating" after the new Incinerator was finally operational. Complaint ¶188. Nevertheless, Eckert, through Ms. Cocheres and others, on behalf of the City, prepared submissions to DCED for approval of the City's guarantees of the $30 million "working capital" loan and for the $25 million construction loan, which included certifications that nearly all of the existing Incinerator debt continued to be self-liquidating. Complaint ¶189.

Because the filings did not specifically represent that the new debt was self-liquidating, the City was not required to submit any financial information supporting its certifications that the existing debt was self-liquidating. Complaint ¶190. Instead, Eckert drafted a one-paragraph certification that nearly $230 million of previous self-liquidating debt exclusions could remain in place. Complaint ¶191. Eckert did this despite the fact that the Incinerator had not generated positive cash flow for nearly 20 years, and the Authority was struggling to cover its most basic expenses. *Id.*

H. The Authority's default on the Incinerator debt caused a crisis requiring Commonwealth action.

Ultimately, the Authority defaulted on the Incinerator debt, which obligated the City to make debt service payments that rendered it insolvent. Complaint ¶193. To resolve this crisis, the Commonwealth, through DCED, acted

to fulfill its responsibilities and exercise its authority under the Municipalities Financial Recovery Act,[6] commonly known as Act 47. Complaint ¶¶193-194. On December 15, 2010, the Secretary of Community and Economic Development declared the City a distressed municipality pursuant to Section 203 of Act 47, 53 P.S. §11701.203. On October 24, 2011, the Governor of Pennsylvania declared a state of fiscal emergency in the City pursuant to Section 602 of Act 47, 53 P.S. §11701.602. On December 2, 2011, this Court placed the City under receivership pursuant to Section 703 of Act 47, 53 P.S. §11701.703, and appointed a Receiver, who headed the newly created Office of the Receiver, an agency of the Commonwealth. Complaint ¶¶195-197.

On March 9, 2012, this Court confirmed the Receiver's preliminary recovery plan, which included the Receiver's intent to examine civil claims against the professionals responsible for the Incinerator financings. Complaint ¶198. On September 23, 2013, this Court confirmed the Receiver's recovery plan, known as the Harrisburg Strong Plan (Strong Plan), which confirmed the Receiver's intent to pursue civil claims on behalf of the City and any of its authorities against the professionals responsible for the Incinerator financings. Complaint ¶199. The Strong Plan also contemplated that after the fiscal emergency subsided, a Coordinator would oversee implementation of the Strong Plan. *Id.*

On February 25, 2014, this Court terminated the City's receivership, effective March 1, 2014. The Secretary of Community and Economic Development appointed, and the Court confirmed, a Coordinator to oversee the implementation of the Strong Plan. The Court authorized and directed the

[6] Act of July 10, 1987, P.L. 246, No. 47, *as amended*, added by the Act of October 20, 2011, P.L. 318, 53 P.S. §§11701.101-11701.712.

Coordinator to assume all responsibilities previously designated to the Receiver, including, without limitation, the pursuit of civil claims against those professionals responsible for the Incinerator financings. Complaint ¶200.

The Court retained jurisdiction over the continued implementation of the Strong Plan and any modifications thereto. On August 1, 2017, following the first Coordinator's retirement, Plaintiff Marita Kelley became the Coordinator. Complaint ¶¶201-202.

I. Plaintiffs allege that the professionals whose actions allowed the City to sink into insurmountable debt derived substantial financial benefits through their work on the debt transactions as members of the Working Group.

Defendant RBC received millions of dollars in fees for its work on the 2003 bond issues and subsequent work within the City. Complaint ¶205. The law firms for which Mr. Giorgione worked, Obermayer and Klett Rooney (later BIR), received substantial compensation for their work on the 2003 Incinerator debt transactions and the CIT "licensing" transaction. Complaint ¶206. Eckert was compensated for its work on every financing transaction from at least 1993 through 2007. Complaint ¶207. PFM was paid for its work on the 2007 transactions and also for services provided in its role as financial advisor to the County for the 2003 Incinerator debt transactions. Complaint ¶208. Although it failed to identify significant defects in the project it was engaged to review, Buchart received tens of thousands of dollars in compensation. Complaint ¶209. Foreman, while receiving compensation as the Authority's Solicitor, played a pivotal role in the 2006 CIT transaction by issuing an opinion letter authorizing that transaction despite Foreman's prior admission that the CIT transaction was designed to circumvent legal process and multiple agreements with bondholders. Complaint ¶210.

In sum then, Plaintiffs allege in the Complaint that the Working Group's dual representation of the Authority and the City created conflicts of interest. Further, the Working Group's compensation was largely contingent on the closing of the Incinerator debt transactions, which could not occur unless the City's elected officials authorized the City to guarantee repayment of the debt. Plaintiffs allege that Defendants provided false and misleading information upon which the Authority, the City, and DCED relied, ultimately resulting in the City's insolvency. Defendants, *inter alia*, provided truncated debt service projections, concealed a $25 million loan, and misrepresented that the Incinerator debt would be and continued to be self-liquidating. After the Authority defaulted, the City's debt guarantees rendered it insolvent, leading then-Governor Corbett to declare a state of fiscal emergency and place the City into receivership. To repay the debt, the Strong Plan increased taxes, reduced pay and benefits to public employees, monetized public assets, and required significant expenditures of public funds.

Plaintiffs allege that the above actions resulted in harm to the City's residents, such as through substantial tax and waste disposal fee increases; harm to first responders, through wage and benefit adjustments; and harm to creditors, through concessions on amounts owed to them.

II. Plaintiffs' Complaint

The Complaint sets forth the following claims:

Commonwealth and Coordinator v. RBC: Count I, Fraud; Count II, Negligent Misrepresentation; Count III, Breach of Fiduciary Duty; Count IV, Aiding and Abetting Breach of Fiduciary Duty; and Count XXIV, Unjust Enrichment.

DCED v. RBC: Count V, Fraud; and Count VI, Negligent Misrepresentation.

Commonwealth and Coordinator v. Obermayer: Count VII, Breach of Fiduciary Duty; Count VIII, Legal Malpractice; and Count XXIV, Unjust Enrichment.

DCED v. Obermayer: Count IX, Fraud; and Count X, Negligent Misrepresentation.

Commonwealth and Coordinator v. BIR: Count XI, Breach of Fiduciary Duty; Count XII, Legal Malpractice; and Count XXIV, Unjust Enrichment.

Commonwealth and Coordinator v. Eckert: Count XIII, Breach of Fiduciary Duty; Count XIV, Aiding and Abetting Breach of Fiduciary Duty; Count XV, Legal Malpractice; and Count XXIV, Unjust Enrichment.

DCED v. Eckert: Count XVI, Fraud; and Count XVII, Negligent Misrepresentation.

Commonwealth and Coordinator v. PFM: Count XVIII, Breach of Fiduciary Duty; Count XIX, Negligent Misrepresentation; Count XX, Aiding and Abetting Breach of Fiduciary Duty; and Count XXIV, Unjust Enrichment.

DCED v. PFM: Count XXI, Aiding and Abetting Fraud.

Commonwealth and Coordinator v. Buchart: Count XXII, Professional Malpractice; and Count XXIV, Unjust Enrichment.

Commonwealth and Coordinator v. Foreman: Count XXIII, Aiding and Abetting Breach of Fiduciary Duty; and Count XXIV, Unjust Enrichment.

In addition to damages in an amount to be determined at trial, the Counts alleging intentional torts seek punitive damages, and each Count requests pre-judgment and post-judgment interest, and attorneys' fees, costs, and expenses.

III. Parties' POs

A. Defendants' POs

Before the Court are Defendants' POs to Plaintiffs' Complaint and Plaintiffs' POs in response thereto. Initially, we note that in relevant part, Pennsylvania Rule of Civil Procedure (Pa. R.C.P. No.) 1028(a) provides:

> (a) [POs] may be filed by any party to any pleading and are limited to the following grounds:
> (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
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> * * *
>
> (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
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> (3) insufficient specificity in a pleading;
>
> (4) legal insufficiency of a pleading (demurrer);
>
> > *Note:* The defense of the bar of a statute of frauds or statute of limitations can be asserted only in a responsive pleading as new matter under [Pa. R.C.P. No.] 1030.
>
> (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;
>
> (6) pendency of a prior action or agreement for alternative dispute resolution;
>
> * * *
>
> (7) failure to exercise or exhaust a statutory remedy; and
>
> (8) full, complete and adequate non-statutory remedy at law.

1. RBC's POs

RBC has filed POs to the Complaint asserting that: (1) the Commonwealth lacks capacity to sue; (2) the Coordinator lacks capacity to sue; (3) DCED lacks capacity to sue; (4) this Court lacks subject matter jurisdiction because the claims against RBC are time-barred; (5) the Complaint lacks

specificity; (6) the Complaint includes scandalous and impertinent matter; (7) the Commonwealth's and Coordinator's breach of fiduciary duty claims fail to conform to law or rule and fail to state a claim; (8) the Commonwealth and Coordinator have failed to state a claim for aiding and abetting a breach of fiduciary duty against RBC; (9) Plaintiffs have failed to state a claim for fraud; (10) Plaintiffs have failed to state a claim for negligent misrepresentation; (11) Plaintiffs have failed to state a claim against RBC for unjust enrichment; (12) DCED's negligent misrepresentation claim against RBC fails based on the LGUDA; (13) Plaintiffs have failed to plead allegations that are legally sufficient for punitive damages; (14) Plaintiffs have failed to plead allegations that are legally sufficient for attorneys' fees, costs, and expenses; and (15) Plaintiffs have failed to plead allegations that are legally sufficient for pre-judgment interest.

2. Obermayer's POs

Obermayer has filed POs to the Complaint asserting: (1) no Plaintiff has standing to bring claims on behalf of the Authority or the City against Obermayer; (2) the Commonwealth lacks standing to bring a claim as *parens patriae* because the Complaint does not sufficiently allege any injury to the Commonwealth itself or to the citizens of the Commonwealth as a whole; (3) Plaintiffs fail to state a claim for fraud or negligent misrepresentation against Obermayer because the Complaint fails to sufficiently allege the nature of DCED's alleged damages; (4) Plaintiffs fail to state a claim for unjust enrichment against Obermayer; (5) the Complaint violates applicable pleading rules by combining the purported claims of multiple plaintiffs into undifferentiated counts and by failing to attach critical documents upon which Plaintiffs rely; (6) the claims belonging to the Authority and the City are barred by the applicable statute of limitations; and

(7) Plaintiffs' request for punitive damages and attorneys' fees against Obermayer are legally insufficient.

3. BIR's POs[7]

BIR has filed POs to the Complaint alleging: (1) a misjoinder of the causes of action against BIR; (2) inclusions of scandalous or impertinent matter; (3) insufficient specificity of the pleadings; (4) the Coordinator lacks standing; (5) the Commonwealth does not have authority or standing to bring this lawsuit; (6) legal insufficiency/demurrer to Counts XI, XII, and XXIV; (7) demurrer to request for punitive damages; (8) demurrer to Plaintiffs' request for attorneys' fees, costs and expenses; (9) demurrer to Plaintiffs' request for pre-judgment interest; (10) failure to comply with Pa. R.C.P. No. 1019's requirement to identify or attach a copy of written agreements; and (11) Plaintiffs' claims in Counts XI, XII, and XXIV are barred by the statute of limitations.

4. Eckert's POs

Eckert submitted POs to the Complaint asserting: (1) the Commonwealth lacks standing; (2) the Coordinator lacks standing; (3) DCED lacks standing; (4) failure to identify or attach agreements relied upon; (5) the claims are barred by the statute of limitations; (6) the claims are barred by the LGUDA; (7) insufficient specificity; (8) failure to allege a fiduciary duty to the Commonwealth or the City; (9) failure to plead facts sufficient to support a claim for aiding and abetting a breach of fiduciary duty; (10) failure to state a claim of legal malpractice; (11) failure to state a claim of fraud; (12) failure to state a claim

[7] BIR filed POs identified by letters A through K. BIR's brief in support of its POs addresses each, but identifies arguments by letters A through H. To avoid confusion, we address these POs in the order in which they are presented.

of negligent misrepresentation; (13) demurrer failure to state a claim of unjust enrichment; and (14) failure to state a claim for punitive damages.

5. PFM's POs

PFM filed POs to the Complaint asserting: (1) the Commonwealth lacks standing to bring claims under a theory of *parens patriae*; (2) the Coordinator lacks standing to bring claims against PFM; (3) DCED lacks standing to bring claims against PFM; (4) Count XVIII should be dismissed for failure to identify and attach written agreements as required by Pa. R.C.P. No. 1019(h) and (i); (5) all claims against PFM are barred by applicable statutes of limitations; (6) the Complaint should be dismissed in its entirety due to insufficient specificity; (7) Count XVIII fails to state a claim for breach of fiduciary duty; (8) Count XIX fails to state a claim for negligent misrepresentation; (9) Count XX fails to state a claim for breach of fiduciary duty and negligent misrepresentation; (10) Count XX fails to state a claim for aiding and abetting a breach of fiduciary duty; (11) Count XXI fails to state a claim for aiding and abetting fraud; (12) the Complaint fails to state a claim for unjust enrichment; and (13) the Complaint fails to adequately plead entitlement to punitive damages.

6. Foreman's POs[8]

Foreman's POs to the Complaint assert: (1) the Commonwealth lacks standing; (2) the Coordinator lacks capacity to sue; (3) the Complaint fails to state

[8] Page 3 of Foreman's POs does not identify the POs by number or letter, but asserts those 11 reasons for dismissing the claims against Foreman. Pages 30 through 75 of the POs set forth supporting arguments in numbered paragraphs that generally correspond to paragraphs 8 through 18 on page 3. This argument section is separated into sections identified "A" through "E," with subsections. For the sake of clarity, we reference Foreman's POs by number in the order recited on page 3.

a claim of aiding and abetting a breach of fiduciary duty; (4) the Complaint fails to state a claim of unjust enrichment; (5) attorneys' fees are not recoverable; (6) there is no basis for punitive damages; (7) the demand for joint relief should be stricken; (8) Plaintiffs are not entitled to pre-judgment interest for the tort claim; (9) Counts XXII and XXIV should be dismissed for insufficient specificity; (10) Counts XXIII and XXIV should be stricken; and (11) the averment including Foreman as part of the Working Group should be stricken. Foreman's POs at 3.

B. Plaintiffs' Consolidated POs to Defendants' POs

Plaintiffs' POs 1 through 6 assert that the Court should strike all POs that improperly raise affirmative defenses. Plaintiffs' POs 8 through 13 assert that certain POs should be stricken as improper speaking demurrers.[9] Plaintiffs' POs 14 through 20 ask the Court to strike all POs that lack sufficient specificity. For those reasons, Plaintiffs request the Court to strike RBC's POs 4, 5, 6, 7, and 10; Eckert's POs 5 and 7; Obermayer's POs 5 and 6; BIR's POs 2 and 11; Foreman's POs 2 and 11; and PFM's POs 5, 6, 7, 8, 9, and 10.

IV. Analysis

POs are pleadings that must conform to Pennsylvania law and rules of court. Pa. R.C.P. Nos. 1017(a)(4), 1028(a)(2). POs also must be sufficiently specific for a responding party to prepare a defense. Pa. R.C.P. No. 1028(a)(3); *Paz v. Department of Corrections*, 580 A.2d 452, 456 (Pa. Cmwlth. 1990). The "proper method for challenging the propriety of a [PO] is by a [PO] to a [PO]." *Chester Upland School District v. Yesavage*, 653 A.2d 1319, 1325 n.8 (Pa. Cmwlth. 1994).

[9] Plaintiffs withdrew Consolidated PO 7.

To sustain POs, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved in favor of overruling the POs. *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Cmwlth. 2010). As previously noted, we accept as true all well-pleaded material allegations in the Complaint, as well as all inferences reasonably deducible therefrom. *Id.*

A. Standing[10]

In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). Consequently, we first address Defendants' POs asserting that Plaintiffs lack standing. Standing requires that a party have "a substantial, direct, and immediate interest in the matter." *Id.* To have a substantial interest, "the [party's] interest must have substance – there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282-83 (Pa. 1975).

1. Commonwealth's Standing

Plaintiffs assert that the Commonwealth, acting by and through the Governor's Office of General Counsel, on behalf of the Governor, is proceeding as *parens patriae* for the Commonwealth's citizens. *See, e.g.*, Complaint ¶3. The Commonwealth has *parens patriae* standing when it asserts a quasi-sovereign interest, an interest "that the Commonwealth has in the well-being of its populace." *Commonwealth ex rel. Corbett v. Citizens Alliance For Better Neighborhoods, Inc.*, 983 A.2d 1274, 1277 (Pa. Cmwlth. 2009). Assertion of a quasi-sovereign

[10] POs may be asserted pursuant to Pa. R.C.P. No. 1028(a)(5) for lack of capacity to sue when a plaintiff lacks standing.

interest is distinguished from simply representing the interests of parties that could have pursued their own claims. *Pennsylvania Department of Banking v. NCAS of Delaware, LLC*, 995 A.2d 422, 438 (Pa. Cmwlth. 2010) (*Department of Banking*).

Under Pennsylvania law, the Attorney General of the Commonwealth is authorized to bring actions on behalf of Pennsylvania and its agencies. Complaint ¶3. Additionally, Section 204(c) of the Commonwealth Attorneys Act[11] permits the Governor's Office of General Counsel to initiate such actions upon a delegation of that authority by the Attorney General. It states:

> The Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Department of Auditor General and State Treasury and the Public Utility Commission in any action brought by or against the Commonwealth or its agencies, and may intervene in any other action, including those involving charitable bequests and trusts or the constitutionality of any statute. The Attorney General shall represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth. . . . The Attorney General may, upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead.

71 P.S. §732-204(c). The Commonwealth alleges that, pursuant to the Commonwealth Attorneys Act, the Office of General Counsel received a delegation of authority from the Attorney General to initiate this action.

Defendants' POs assert that the Commonwealth lacks capacity to sue. Pa. R.C.P. No. 1028(a)(5). Defendants argue that the Commonwealth lacks

[11] Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §732-204(a).

standing to pursue its claims against them under the theory of *parens patriae.* More particularly, Defendants assert that the Complaint does not plead facts demonstrating a quasi-sovereign interest. Instead, the Complaint sets forth only vague and conclusory allegations that do not demonstrate how its claims relate to the well-being of the Commonwealth's citizens. Defendants assert that all of the Commonwealth's claims against them are predicated on Defendants' alleged relationships with the Authority and the City; the harm alleged in the Complaint is harm to the Authority and the City; and the Authority and the City could have asserted their own claims.

The parties cite *Commonwealth ex rel. Pappert v. TAP Pharmaceutical Products, Inc*, 885 A.2d 1127, 1143-44 (Pa. Cmwlth. 2005) (*TAP II*). That case involved a claim by the Commonwealth, as *parens patriae*, that pharmaceutical companies inflated the average wholesale price for drugs. We explained that to establish a quasi-sovereign interest, a state must allege "injury to a sufficiently substantial segment of its population." *Id.* We held in *TAP II* that the Commonwealth pleaded a quasi-sovereign interest where it alleged that the defendants' conduct "affected the economic health and well-being of its citizens by requiring those purchasers and reimbursors of the [d]efendants' drugs to pay inflated amounts for the [d]efendants drugs." *Id.* In determining that the Commonwealth had *parens patriae* standing, we noted that if the drug companies had not inflated the average wholesale prices, "the Commonwealth may have been better able to provide needed medications to more citizens than it has," and that the inflated average wholesale prices "affected the extent of benefits to which those covered under the Commonwealth's programs could claim entitlement." 885 A.2d at 1144 n.9. Our decision relied on the *parens patriae* analysis of *Alfred L. Snapp*

& Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) (*Snapp*).

Snapp was an action filed by the Commonwealth of Puerto Rico in the United States District Court for the Western District of Virginia, as *parens patriae* for Puerto Rican migrant farmworkers, and against Virginia apple growers, to enjoin discrimination against Puerto Rican farmworkers in favor of Jamaican farmworkers in violation of federal statutes and implementing regulations. The district court dismissed the action on the ground that Puerto Rico lacked standing to sue, but the Court of Appeals for the Fourth Circuit reversed.

On appeal, the United States Supreme Court held that generally, a state may not sue on behalf of its citizens without showing that a *separate sovereign interest* will also be served. *Id.* at 607. The Court explained:

> In order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development -- neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract -- certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general. . . .
>
> The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to

> give the State standing to sue as *parens patriae* is *whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers*.[]

Id. (emphasis added). The Supreme Court in *Snapp* held that the indirect effects on the interest of a substantial portion of Puerto Rico's citizenry were sufficient to support a *parens patriae* action. Specifically, despite the small number of individuals directly involved, the Supreme Court held that Puerto Rico had *parens patriae* standing to sue to secure its residents from the harmful effects of discrimination and to obtain full and equal participation in the federal employment service scheme.

In *Department of Banking*, this Court considered preliminary objections to a complaint filed by the Pennsylvania Department of Banking (Department) and the Attorney General alleging that the defendants violated the Consumer Discount Company Act (CDCA)[12] and what is known as the Loan Interest and Protection Law (LIPL).[13] In relevant part, the complaint alleged that by charging consumers certain fees and interest, the defendants "injured the economic health and well-being of the Commonwealth's citizens." *Id.* at 428.

We rejected the Department's claim to *parens patriae* standing to pursue an action for monetary relief on behalf of individual borrowers in Pennsylvania. In doing so, we explained:

> First, unlike *TAP II*, the Department fails to allege that the violations of the CDCA and the LIPL affected the efficacy or reach of a Commonwealth-sponsored benefits program or government entitlement. Also, the

[12] Act of April 8, 1937, P.L. 262, *as amended*, 7 P.S. §§6201-6219.

[13] Act of January 30, 1974, P.L. 13, *as amended*, 41 P.S. §§101-605.

> Department fails to allege any other legitimate quasi-sovereign governmental interest. Specifically, if the potential claims of [the defendants'] borrowers are set aside, as the *parens patriae* case law directs, the Department is left without a concrete, independent, and direct interest to protect.
>
> Second, the damages sought by the Department do not represent a quasi-sovereign interest but that of the individual borrower. The monetary relief the Department seeks in Count 2 of the Amended Complaint is premised on the numerous remedies available to individual borrowers under the LIPL. . . .
>
> Last, if this Court was to conclude that the Department has *parens patriae* standing, [the defendants] would be exposed to liability once from the Department, and second from individual borrowers that have either filed an action or plan to file an action.

995 A.2d at 439.

Plaintiffs argue that the Commonwealth's interests in this matter easily meet the standard set forth in *TAP II*. Plaintiffs assert that Defendants' actions created a fiscal emergency that threatened basic municipal functions such as police and fire, ambulance and rescue, and water supply and distribution, which are fundamental aspects of the Commonwealth's police power. Further, Plaintiffs argue that the City's residents alone constitute a substantial segment of the Commonwealth's population.

However, we agree with Defendants that *TAP II* is distinguishable. Rather than asserting claims arising out of commercial interactions with an identifiable group of Commonwealth citizens, Plaintiffs assert claims that allegedly arise from professional relationships between Defendants and a specific client, *i.e.*, the Authority or the City. As in *Department of Banking*, "if the potential claims of [the Authority and the City] are set aside, as the *parens patriae* case law directs,

[the Commonwealth] is left without a concrete, independent, and direct interest to protect." 995 A.2d 439.

Additionally, Defendants assert that pursuant to Section 204(c) of the Commonwealth Attorneys Act, a delegation of authority from the Attorney General is only effective if the Attorney General would have authority to initiate the action as *parens patriae,* and the Attorney General is not authorized to bring common law claims.

In relevant part, Article IV, Section 4.1 of the Pennsylvania Constitution provides that the Attorney General "shall exercise such powers and perform such duties as may be imposed by law." Pa. Const. art. IV, §4.1. Relying on this grant of constitutional power, the General Assembly enacted the Commonwealth Attorneys Act, which "made it clear that the powers of the state Attorney General are no longer an emanation from some bed of common law precepts, but are now strictly a matter of legislative designation and enumeration." *Commonwealth v. Carsia*, 517 A.2d 956, 958 (Pa. 1986). Under Section 204(c) of the Commonwealth Attorneys Act, the Attorney General is authorized to sue as *parens patriae* in only one type of action: a violation of federal or state antitrust laws. *See* 71 P.S. §732-204(c) (The Attorney General shall represent the Commonwealth "and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth.").[14]

In this matter, the Commonwealth, as *parens patriae*, purports to bring common law claims against Defendants that the legislature has not authorized the Attorney General to bring on behalf of the Commonwealth's citizens. Because the Attorney General would have no authority to bring such

[14] The Commonwealth has not enacted a state antitrust statute.

claims, the Commonwealth, acting by and through the Office of General Counsel, has no authority to bring them either.

Accordingly, we sustain the following POs: RBC's PO No. 1; Obermayer's PO No. 2; BIR's PO No. 5; Eckert's PO No. 1; PFM's PO No. 1; and Foreman's PO No. 1. We dismiss all claims asserted by the Commonwealth against those Defendants as set forth in Counts I, II, III, IV, VII, VIII, XI, XII, XIII, XIV, XV, XVIII, XIX, XX, XXII, XXIII, and XXIV of the Complaint.

2. DCED's Standing

DCED is "an executive agency of the Commonwealth under the Governor's jurisdiction created by [the Community and Economic Development Enhancement Act, Act of June 27, 1996, P.L. 403, *as amended*, 71 P.S. §§1709.101-1709.2106]." Complaint ¶5. DCED asserts claims of fraud and negligent misrepresentation against RBC (Counts V and VI of the Complaint), Obermayer (Counts IX and X), and Eckert (Counts XVI and XVII), and DCED asserts a claim of aiding and abetting fraud against PFM (Count XXI).

DCED's claims of fraud and negligent misrepresentation against RBC allege that RBC supplied the debt service figures on self-liquidating debt certifications the City submitted to DCED to obtain DCED's approval of the City's guarantee of the new Incinerator debt. RBC's PO No. 3 asserts that DCED lacks standing because: (1) DCED does not allege that it, the Authority, the City, or anyone else paid more to service the debt than what was projected in the debt service figures; (2) DCED has not pleaded any allegations that suggest it has "a substantial, direct and immediate interest in the matter" or that DCED suffered any injury as a result of the submission of the debt service figures, *Markham*, 136 A.3d

at 140; and (3) DCED alleges that the allegedly understated debt service figures were provided directly to the City, and DCED has failed to allege that it suffered any harm as a result of RBC's alleged conduct. Additionally, DCED has not alleged any basis for bringing claims on behalf of the City or the Authority.

In Counts IX and X, DCED asserts claims of fraud and negligent misrepresentation against Obermayer. Specifically, the Complaint alleges that in 2003, Mr. Giorgione, a former Obermayer attorney, submitted certifications to DCED to the effect that "all of the 2003 A, B, and C Series debt issues, as well as all debt previously classified as self-liquidating," were self-liquidating, and that Mr. Giorgione "prepared for the Mayor's and Controller's signatures a certification to DCED stating that all of the 2003 D, E, and F Series bonds, as well as all debt previously classified as self-liquidating, [were] self-liquidating." Complaint ¶¶337, 340. The crux of DCED's claims is that these representations were false.

In its third PO, Obermayer asserts that DCED fails to state a claim against Obermayer because DCED fails to sufficiently allege the nature of DCED's damages. Obermayer argues that in both Counts X and XI, the Complaint merely avers "an argumentative legal conclusion" that DCED "'in fact relied on Obermayer's statements when it approved the 2003 debt transactions, *which actually and proximately caused DCED actual damages*.'" Obermayer's POs ¶41 (quoting Complaint ¶¶352, 365 (emphasis added)). Obermayer further contends that, although the Complaint alleges that Obermayer collected substantial fees as a result of DCED's purported reliance on Obermayer's representation, the Complaint does not allege that DCED paid any such fees. Obermayer asserts that such an

inference would be unreasonable because there is no allegation that DCED was a client of Obermayer.[15]

DCED's fraud claim against Eckert alleges that Eckert, through Ms. Cocheres and other attorneys, had multiple conversations with DCED about the self-liquidating nature of the Incinerator debt. On April 8, 2003, Eckert attorneys informed DCED that the upcoming construction of a new Incinerator would render almost all of the existing debt self-liquidating. On November 19, 2003, after DCED requested complete projections supporting the self-liquidating status of the Incinerator debt, Eckert attorneys participated in a call with an Obermayer attorney in which they falsely represented that the estimated revenues of the Incinerator system for each year of the remaining life of the Retrofit Bonds would be sufficient to pay the annual debt service on the bonds. In 2007, Eckert's attorneys submitted to DCED certifications that almost all of the existing Incinerator debt continued to be self-liquidating, knowing that those representations were false. DCED relied on Eckert's misrepresentations when it approved the 2003 and 2007 debt transactions, which caused injury to DCED and its public resources through the massive resources it devoted to the City's recovery effort. Complaint ¶¶414-432. In its claim for negligent misrepresentation, DCED additionally asserts that Eckert had a pecuniary interest in the debt transactions, that Eckert failed to exercise reasonable care and competence in developing and presenting information to DCED, and that Eckert knew or should have known that by concealing the full 30-year projections,

[15] *See Bayada Nurses, Inc., v. Department of Labor and Industry*, 8 A.3d 866, 884 (Pa. 2010) (stating that on demurrer, the Court accepts as true all well-pleaded material allegations and any reasonable inferences drawn therefrom, but not any conclusions of law, unwarranted inferences, unsupported allegations, or expressions of opinion).

it prevented DCED from learning that the previously submitted self-liquidating debt certifications were false. Complaint ¶¶433-446.

In PO No. 3, Eckert asserts that DCED lacks standing to bring claims of fraud and negligent misrepresentation against Eckert on its own behalf. According to Eckert, DCED itself suffered no harm or injury due to the alleged misrepresentation or improper certification of the Incinerator debt as self-liquidating. To the contrary, DCED's claims are based entirely on alleged injury suffered by the City. DCED has not alleged any legal basis as authority for DCED to bring claims on the City's behalf.[16]

Count XXI of the Complaint asserts DCED's claim of aiding and abetting fraud against PFM. DCED alleges that PFM acted in concert with Eckert in certifying the City's existing debt as self-liquidating. Specifically, DCED alleges that Eckert relied on financial projections prepared by PFM; those projections were based on unrealistic and implausible assumptions that failed to account for revenue reductions and cost increases resulting from the elimination of significant capital investments for landfill expansion and steam-line repair; and PFM knew or should have known that Eckert's certifications were false. Eckert's conduct, with PFM's substantial assistance, caused actual damages to be incurred by DCED. Complaint ¶¶485-494.

In its third PO, PFM asserts that DCED lacks standing because it suffered no harm or injury as a result of PFM's role in the misrepresentation or improper certification of the Incinerator debt as self-liquidating. Rather, DCED's purported claim against PFM for aiding and abetting fraud is based entirely on

[16] Alternatively, Eckert asserts that DCED would only have standing as the City, and that the City's claims are time-barred.

alleged injury and harm suffered by the City. Consequently, PFM asserts that DCED lacks standing to bring these claims individually and on its own behalf.

Plaintiffs respond that DCED has standing to recover the money it spent to aid the City's recovery. DCED asserts that the false statements Defendants made or assisted others in making caused DCED to approve transactions that led to massive DCED expenditures on the City's recovery effort, the scope of which would have been unnecessary had Defendants provided accurate information to DCED. DCED argues that Defendants' false statements caused DCED to lose money, which is sufficient to establish DCED's "substantial, direct, and immediate interest" in the matter. *Markham*, 136 A.3d at 140.

A thorough review of the Complaint confirms that the claims alleged by DCED are based entirely on the alleged injury and harm suffered by the City. Despite DCED's assertions, DCED's statutory obligations to aid in the City's recovery are not dependent on the cause of the City's financial distress. **Having concluded that DCED lacks standing, we sustain RBC's PO No. 3, Eckert's PO No. 3, and PFM's PO No. 3, we dismiss RBC's twelfth PO and Obermayer's PO No. 3 as moot, and we dismiss all claims asserted by DCED against those Defendants as set forth in Counts V, VI, IX, X, XVI, XVII, and XXI of the Complaint.**

3. Coordinator's Standing

The Complaint asserts that the City's residents and its public fisc have suffered actual damages as a result of Defendants' conduct. The Coordinator has alleged that she "has the responsibility and authority to initiate and pursue Incinerator-related civil claims held by the City or any of its authorities" pursuant to: Part 9(A) and Part 3 of the Strong Plan; the Court's February 25, 2014 Order

terminating the City's receivership; and Section 221(d) of Act 47, 53 P.S. §11701.221(d). Complaint ¶4. Defendants assert that none of these sources confer the requisite standing on the Coordinator.

Defendants complain that the Strong Plan does not include language conferring standing on the Receiver or his successor. Defendants also argue that the Court's February 25, 2014 Order does not identify specific claims the Coordinator may pursue. Finally, Defendants assert that the Coordinator's authority is defined by statute and is limited to the extent of the Receiver's authority.

We first address Defendants' argument that the Coordinator's authority is derived from statute and is limited to the authority conferred on the Receiver. As observed in this Court's February 25, 2014 Order, the Coordinator is the successor to the Receiver for all purposes related to the Harrisburg Strong Plan and agreements attendant thereto. Section 706(a) sets forth the powers and duties of the Receiver.[17]

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[17] Section 706(a) of Act 47 states:

> **(a) Powers and duties.--**Notwithstanding any other provision of law, the receiver shall have the following powers and duties:
>
> (1) To require the distressed city or authority to take actions necessary to implement the recovery plan under section 703.
>
> (2) To modify the recovery plan as necessary to achieve financial stability of the distressed city and authorities in accordance with section 703.
>
> (3) To require the distressed city or authority to negotiate intergovernmental cooperation agreements between the distressed city and other political subdivisions in order to eliminate and avoid

(Footnote continued on next page…)

(continued…)

> deficits, maintain sound budgetary practices and avoid interruption of municipal services.
>
> (4) To submit quarterly reports to the governing body and the chief executive officer of the distressed city and to the department. The reports shall be posted on the Internet website for the distressed city.
>
> (5) To require the distressed city or authority to cause the sale, lease, conveyance, assignment or other use or disposition of the distressed city's or authority's assets in accordance with section 707.
>
> (6) To approve, disapprove, modify, reject, terminate or renegotiate contracts and agreements with the distressed city or authority, except to the extent prohibited by the Constitutions of the United States and Pennsylvania.
>
> (7) To direct the distressed city or authority to take any other action to implement the recovery plan.
>
> (8) To attend executive sessions of the governing body of the distressed city or authority and make reports to the public on implementation of the recovery plan.
>
> (9) After July 1, 2012, to file a municipal debt adjustment action under the Bankruptcy Code (11 U.S.C. §101[-1532]) and to act on the city's behalf in the proceeding. The power under this paragraph shall only be exercised upon the written authorization of the secretary. . . .
>
> (10) To meet and consult with the advisory committee under section 711.
>
> (11) To employ financial or legal experts deemed necessary to develop and implement the recovery plan. Notwithstanding any law to the contrary, the employment of such experts shall not be subject to contractual competitive bidding procedures.

53 P.S. §11701.706(a).

Defendants assert that whereas the statute authorizes the Receiver to file a municipal debt adjustment action under the Bankruptcy Code, there is no similar language authorizing the Receiver to commence an action in tort or contract on behalf of a distressed city, or a city authority. Defendants argue that "under the doctrine of *expressio unius est exclusion alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters." *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002). Defendants maintain that the absence of any statutory reference to the Receiver's authority to file an action in tort or contract on behalf of the City implies that such authority is excluded.

However, in making this argument, Defendants overlook the express language authorizing the Receiver to "require the distressed city or authority to cause the sale, lease, conveyance, *assignment or other use or disposition of the distressed city's or authority's assets* in accordance with section 707." 53 P.S. §11701.706(a)(5) (emphasis added). In the absence of an applicable statutory definition, we construe the term "asset" according to its "common and approved usage." Section 1903(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. §1903(a). Black's Law Dictionary 140 (10th ed. 2014) defines an "asset" as an "item that is owned or has value." Additionally, assets include all "the property of a person (esp. a bankrupt or deceased person) available for paying debts or for distribution." *Id.* A cause of action is a matter that has value which can be used for paying debts of the City and the Authority, and therefore falls within the common meaning of "asset."

Furthermore, the provisions of Section 706 reflect that the authority granted to the Receiver is consistent with the authority of a federal bankruptcy

trustee to liquidate a debtor's assets. In the context of bankruptcy proceedings, courts have consistently interpreted a debtor's equitable and legal interests in "property" as encompassing "causes of action existing at the time the bankruptcy action commences." *Anderson v. Acme Markets, Inc.*, 287 B.R. 624, 628 (E.D. Pa. 2002). Accordingly, we reject Defendants' contention that the Receiver lacks statutory authority to pursue these claims against Defendants.

The Receiver is responsible for submitting a recovery plan to Commonwealth Court. Section 703 of Act 47, 53 P.S. §11701.703. Section 703(a) through (d) of Act 47 addresses the issuance, content, and restrictions of a recovery plan. In pertinent part, it states:

> **(a) Issuance**.--Within 30 days of the appointment of the receiver, the recovery plan required under section 702(e)(4) shall be furnished to Commonwealth Court, the secretary and the governing body . . . .
>
> **(b) Contents.--**The receiver shall consider the plan prepared by the coordinator under section 241 and any other existing alternate plans in the development of the recovery plan. The following shall apply:
>
> **(1)** The recovery plan shall provide for all of the following:
>
> **(i)** Continued provision of vital and necessary services.
>
> **(ii)** Payment of the lawful financial obligations of the distressed municipality and authorities. This subparagraph includes debt obligations, municipal securities, lease rental obligations, legal obligations and consensual modifications of existing obligations.

(iii) Timely deposit of required payments to the pension fund in which the distressed municipality and each authority participates.

(2) The recovery plan may include:

(i) the sale, lease, conveyance, assignment *or other use or disposition of the assets of the distressed municipality or authority*;

(ii) the approval, modification, rejection, renegotiation or termination of contracts or agreements of the distressed municipality or authorities . . . .

(iii) the execution of new contracts or agreements; and

(iv) other information the receiver deems appropriate.

(c) Restrictions.--The recovery plan may not do any of the following:

(1) Unilaterally levy taxes.

(2) Unilaterally abrogate, alter or otherwise interfere with a lien, charge, covenant or relative priority that is:

(i) held by a holder of a debt obligation of a distressed municipality; and

(ii) granted by the contract, law, rule or regulation governing the debt obligation.

(3) Unilaterally impair or modify existing bonds, notes, municipal securities or other lawful contractual or legal obligations of the distressed municipality or authority.

(4) Authorize the use of the proceeds of the sale, lease, conveyance, assignment *or other use or disposition of the*

> *assets of the distressed municipality or authority in a manner contrary to section 707.*[18]
>
> **(d) Confirmation.--**Commonwealth Court shall conduct a hearing on the recovery plan within 30 days of the receipt of the plan from the receiver. The court shall confirm the plan within 60 days of the receipt of the plan unless it finds clear and convincing evidence that the plan is arbitrary, capricious or wholly inadequate to alleviate the fiscal emergency in the distressed municipality.

53 P.S. §11701.703(a)-(d) (emphasis added).

Part 9(A) of the Strong Plan, *Pursuit of Incinerator-Related Claims*, states in part:

> As is apparent to anyone reading the Forensic Report, the fundamental proposition that the Incinerator could realistically have "paid for itself" from its net operating revenues appears to have been ill-conceived from the outset. The public expects that there be a means to obtain redress for these ill-fated decisions if there is evidence supporting the allegation that highly imprudent actions were taken by those charged with protecting the City and its taxpayers against these very types of circumstances. The current Receiver agrees with the public that these matters merit full consideration. Indeed,

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[18] Section 707(b) provides:

> **(b) Prohibitions.--**Nothing under this section shall be construed to authorize the receiver to unilaterally abrogate, alter or otherwise interfere with a lien, charge, covenant or relative priority that is:
>
> (1) held by a holder of a debt obligation of a distressed municipality; and
>
> (2) granted by the contract, law, rule or regulation governing the debt obligation.

53 P.S. §11701.707(b).

> while the Preliminary Recovery Plan had indicated that the Receiver had retained legal counsel to review and evaluate the Forensic Report, the Receiver now reports to this Court that such analysis has been made, and that *the Receiver intends to consider using every measure available, including discussions seeking consensual resolutions or litigation if deemed warranted, to seek redress from those professionals and entities alleged to be responsible for the various decisions to proceed with the Incinerator retrofit project. . . .*
>
> [*T*]*he decision to pursue Incinerator Claims, including whether and on what terms to settle or institute suit, necessarily must be the Receiver's to determine in the fulfillment of his legislatively assigned duty to take actions that he deems appropriate to prudently and responsibly complete the implementation of the* [*City's*] *Strong Plan, of which the Incinerator Claims are a part.*
>
> As was made clear when the Preliminary Recovery Plan was submitted and confirmed, it is not possible at this time to begin to estimate what amount of proceeds could possibly be achieved either through settlement, litigation or some combination. Nor can the Receiver predict how long it might take to achieve settlements, or if matters were pursued in court, whether the claims would be successful after all appeals were completed . . . .

Complaint, Ex. 1, p. 61 (emphasis added). The Strong Plan makes clear that the Receiver intends to pursue civil claims related to the Incinerator project.

This Court's February 25, 2014 Order, entered in *Davin v. City of Harrisburg* (Pa. Cmwlth., No. 569 M.D. 2011), terminated the City's receivership and designated the Coordinator as the successor to the Receiver. Paragraph 5 of the Order states:

> The Coordinator is the successor to the Receiver for all purposes relating to the Harrisburg Strong Plan and agreements attendant thereto. As successor to the Receiver, the Coordinator is AUTHORIZED AND DIRECTED, as contemplated by the Plan's provisions, to

> perform all functions and responsibilities in the Harrisburg Strong Plan otherwise designated for performance by the Receiver, *including, without limitation, to pursue certain claims for the benefit of the City* and creditors and to carry out all obligations of the Receiver under the settlement agreements by and among the Assured Guaranty Municipal Corporation, the Receiver, and any other constituent parties to the Harrisburg Strong Plan, as well as all functions and responsibilities that are otherwise reposed in the Receiver under Parts Seven and Nine of the Plan.

Complaint, Ex. 2, 2/25/2014 Order ¶5 (emphasis added). Although the Order does not specifically identify the claims to be pursued, its broad language affirms that the Coordinator "is authorized and directed" to pursue claims for the benefit of the City.

Plaintiffs cite Section 221(d) of Act 47, which sets forth the Coordinator's duties, as a source of her authority "to initiate and pursue Incinerator-related civil claims held by the City or any of its authorities . . . ." Complaint ¶4. Defendants argue that this provision contains no language authorizing the Coordinator to pursue litigation on behalf of a municipality, its authorities, or their creditors. It states:

> **(d) Duties.--**The coordinator shall:
>
> (1) Present, at a public meeting within 45 days of the execution of the contract between the department and the coordinator, a list of the coordinator's preliminary findings, as to the financial condition of the municipality. The list of findings shall include, but is not limited to, a quantification of all operating deficits for the current fiscal year and a projection of revenues and operating expenses for the next three fiscal years, all outstanding debt obligations, the cost and term of all outstanding contracts and other relevant information.

(2) Solicit, not later than the date of the coordinator's presentation described in paragraph (1), comments in writing relating to the issues associated with the municipality's distress from such persons and entities who:

(i) have participated in the early intervention process;

(ii) have provided consultation on behalf of the municipality relating to the issues associated with its distress; or

(iii) are elected officials or employees of the municipality or labor organizations representing employees of the municipality.

(3) Consider all comments submitted within 30 days of the coordinator's presentation described in paragraph (1) before preparing and administering a plan designed to relieve the financial distress of the municipality which the coordinator has been appointed to serve.

53 P.S. §11701.221(d).[19]

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[19] Section 221(e), setting forth the Coordinator's powers, states:

(e) Powers.--The coordinator may:

(1) Apply for grants and loans pursuant to Chapter 3, as the coordinator deems necessary.

(2) Investigate the tax-exempt status of any property within a distressed municipality and advise the governing body of the municipality to appeal the assessment or exempt status of property within the distressed municipality.

(3) Solicit and negotiate payments in lieu of taxes from institutions of public charity and other tax-exempt property owners in the municipality and recommend action by the municipality.

53 P.S. §11701.221(e).

Citing *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017), Defendants maintain that even if Section 221(d)(3) could be interpreted to authorize any action, it is too vague to be understood as a delegation of authority by the General Assembly to the Coordinator to commence a lawsuit on behalf of the City or the Authority.[20] Further, Defendants argue that neither the Strong Plan nor the Court's February 2014 order can confer power or authority on the Coordinator that was not conferred by Act 47. Having already determined that Sections 703 and 706 of Act 47, as confirmed by the Strong Plan and this Court's February 25, 2014 Order, are indeed the source of the Coordinator's authority to pursue this action on behalf of the City and the Authority, we conclude that the absence of additional authorizing language in Section 221(d) is of no moment.[21] **Accordingly, we overrule RBC's PO No. 2; Obermayer's PO No. 1; BIR's PO No. 4; Eckert's PO No. 2; PFM's PO No. 2; and Foreman's PO No. 2, as they relate to claims asserted by the Coordinator against those Defendants set forth in Counts I, II, III, IV, VII, VIII, XI, XII, XIII, XIV, XV, XVIII, XIX, XX, XXII, XXIII, and XXIV of the Complaint.** Having determined the threshold issue that the Coordinator possesses standing, we address the parties' remaining POs.

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[20] In *Protz*, our Supreme Court explained: "[W]hen the General Assembly empowers some other branch or body to act, our jurisprudence requires 'that the basic policy choices involved in "legislative power" actually be made by the [I]egislature as constitutionally mandated.'" 161 A.3d at 833 (citing *Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 202 (Pa. 1975)).

[21] The Complaint also states that the Authority, now known as Capital Region Water, has executed a separate written assignment of all Incinerator claims to the Coordinator. Complaint ¶4 n.1; Complaint Ex. 3. However, Plaintiffs do not cite this agreement as authorizing the Coordinator to pursue this litigation on the Authority's behalf.

B. Remaining Defendants' POs

1. RBC's POs

The Coordinator's claims against RBC are set forth in Counts I, II, III, IV, and XXIV of the Complaint. In Count I, the Coordinator alleges fraud against RBC. To state a cause of action for fraud, a plaintiff must allege: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994).

In relevant part, Count I asserts as follows. In September and October 2003, during meetings with City Council, RBC's Mr. James Losty presented financial projections to show that the Authority would be able to service all of the Incinerator debt. Complaint ¶214. Mr. Losty falsely asserted that the projections showed that the Incinerator's revenue would cover all of the debt. Complaint ¶¶215-218. The financial projections covered only a handful of years and deliberately omitted data that contradicted Mr. Losty's representations. Complaint ¶¶217-220. Mr. Losty knew that his statements were false because he reviewed and helped prepare the Working Group's full 30-year projections, which showed that, in many years, expenses and debt service would exceed the Incinerator's revenues. Complaint ¶¶217-219.

Count I further alleges that Mr. Losty knew of the poor financial condition of the Authority and knew that the City would be unable to cover shortfalls. Complaint ¶¶232-233. RBC knew or had reason to know that the Authority would not be able to repay the existing or new Incinerator debt. Complaint ¶236. Additionally, RBC's compensation was in substantial respect

contingent on the closing of the Incinerator financing transactions. Complaint ¶238. RBC's false statements were material to the approval of the City's guarantee of the 2003 Incinerator debt. Complaint ¶239. RBC intended for public officials to rely on its statements to obtain support for the City's guarantee of the 2003 Incinerator debt, thereby allowing RBC to collect substantial fees. Complaint ¶241. Public officials did in fact rely on RBC's representations when approving the City's guarantee of the 2003 Incinerator debt transactions. Complaint ¶242. The Complaint alleges that as a direct and proximate result of RBC's conduct, the City's residents and public fisc have suffered, and continue to suffer damages. Complaint ¶244.

In PO No. 9, RBC asserts that the Complaint fails to state a claim for fraud. RBC asserts that Count I does not allege that RBC made any representations to the Coordinator and the Complaint fails to allege how the Coordinator was injured by RBC's alleged representations to the City. Having determined that the Coordinator is authorized to bring this action on the City's behalf, these assertions are irrelevant. RBC also asserts that the Complaint fails to allege that RBC intended to mislead or deceive the City. However, as briefly summarized above, the Complaint specifically alleges that Mr. Losty made a number of statements that he knew to be false, intending for the City to rely on them. *See, e.g.*, Complaint ¶¶215-220, 223-224. Finally, RBC argues that the Complaint fails to allege that Plaintiffs paid more in debt service costs than was estimated in the figures presented by RBC. However, the injury and damages alleged are not that the amounts paid exceeded estimates, but that the debt was incurred based on projections that were intentionally misleading. For these reasons **we overrule RBC's PO No. 9.**

Count II of the Complaint asserts negligent misrepresentation, relying on the above allegations of fact and asserting that RBC failed to exercise reasonable care and competence in developing and presenting information to the City. To state a claim for negligent misrepresentation, a plaintiff must plead "(1) a misrepresentation of material fact; (2) made under circumstances in which the [party making a misrepresentation] ought to have known its falsity; (3) with an intent it induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation." *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270, 277 (Pa. 2005). Additionally, negligent misrepresentation "requires the existence of a duty owed by one individual to another." *Richards v. Ameriprise Financial, Inc.*, 152 A.3d 1027, 1038 (Pa. Super. 2016).

RBC's PO No. 10 asserts that Count II fails to state a claim for negligent misrepresentation because Plaintiffs have not pleaded any duty owed by RBC. RBC contends that while the Coordinator alleges RBC supplied information to the City, "with respect to the City's consideration of whether to guarantee the 2003 Incinerator debt transaction" (Complaint ¶247), she fails to allege why RBC was supplying information to the City or how this resulted in RBC owing the City a duty. In particular, RBC cites the Bond Purchase Agreement, which expressly states that RBC (the Underwriter) is not acting as a fiduciary of the Authority (the Issuer). RBC's POs Ex. A. p. 2. As before, RBC asserts that the Coordinator failed to allege justifiable reliance on any misrepresentations made by RBC or any injury, such as paying more than RBC estimated for debt service, resulting therefrom.

To the extent that RBC relies on the Bond Purchase Agreement, we note that the negligent misrepresentation claim is a tort claim, not a breach of contract claim. Contrary to RBC's assertions, Count II of the Complaint clearly alleges that RBC supplied information to the City knowing and intending that the City would rely on its debt service figures in determining whether it could legally classify the Incinerator debt as self-liquidating. Complaint ¶¶247-260. Also contrary to RBC's contentions, the Complaint expressly alleges that the City justifiably relied on the debt figures that RBC provided for its use in determining that the Incinerator debt was self-liquidating, and, because of RBC's failure to exercise reasonable care in supplying debt service figures to the City, the City's residents and public fisc suffered, and continue to suffer actual damages. Complaint ¶¶261-267. Based on the foregoing, **RBC's PO No. 10 is overruled**.

In Count III of the Complaint, the Coordinator asserts a claim for breach of fiduciary duty against RBC. A fiduciary relationship exists when one party "has the power to take advantage of or exercise undue influence over the other." *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 22-23 (Pa. 2002). In *Yenchi v. Ameriprise Financial, Inc.*, 161 A.3d 811 (Pa. 2017), the Court explained:

> A fiduciary duty is the highest duty implied by law. *Miller v. Keystone Ins. Co.*, [636 A.2d 1109, 1116 (Pa. 1994)] (Cappy, J., dissenting). A fiduciary duty requires a party to act with the utmost good faith in furthering and advancing the other person's interests, including a duty to disclose all relevant information. *See Basile v. H & R Block, Inc.*, [761 A.2d 1115, 1120 (Pa. 2000)]; *Young v. Kaye*, [279 A.2d 759, 763 (Pa. 1971)] ("When the relationship between persons is one of trust and confidence, the party in whom the trust and confidence are reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using

his position to the other's detriment and his own advantage."); *Sylvester v. Beck*, [178 A.2d 755, 757 (Pa. 1962)]; *McCown v. Fraser*, [192 A. 674, 676-77 (Pa. 1937)]; *Null's Estate*, [153 A. 137 (Pa. 1930)], *see also* Black's Law Dictionary (10th ed. 2014) (defining a fiduciary duty as "a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person"). This highest duty will be imposed only where the attendant conditions make it certain[ ] that a fiduciary relationship exists. *Leedom v. Palmer*, [117 A. 410, 412 (Pa. 1922)] ("[T]he evidence to sustain a confidential relation must be certain; it cannot arise from suspicion or from infrequent or unrelated acts[.]"); *In re Erdeljac's Estate*, [131 A.2d 97, 100 (Pa. 1957)]; *In re King's Estate*, [87 A.2d 469, 472 (Pa. 1952)].

In some types of relationships, a fiduciary duty exists as a matter of law. Principal and agent, trustee and cestui que trust, attorney and client, guardian and ward, and partners are recognized examples. *See, e.g.*, *McCown*[, 192 A. at 676-77]; *Young*, 279 A.2d at 763. The unique degree of trust and confidence involved in these relationships typically allows for one party to gain easy access to the property or other valuable resources of the other, thus necessitating appropriate legal protections.

Where no fiduciary duty exists as a matter of law, Pennsylvania courts have nevertheless long recognized the existence of confidential relationships in circumstances where equity compels that we do so. *See Darlington's Appeal*, 5 W.N.C. 529 (Pa. 1878). Our courts have found fiduciary duties in circumstances where the relative position of the parties is such that the one has the power and means to take advantage of, or exercise undue influence over, the other. The circumstances in which confidential relationships have been recognized are fact specific and cannot be reduced to a particular set of facts or circumstances. [*In re Scott's Estate*, 316 A.2d 883, 885 (Pa. 1974)]. We have explained that a confidential relationship "appears *when the circumstances make it certain* the parties do not deal on equal terms, but, on the one side there is an

> overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed[.]"

Yenchi, 161 A.3d at 814-20 (emphasis added and footnote omitted). The Court explained that the requirement that the evidence be "certain" is the evidentiary standard now referred to as "clear and convincing." *Id.* at 820 n.10. The Court further explained that the relevant determination was necessarily fact specific. *Id.* at 821.

RBC's PO No. 7 argues that the facts alleged do not show a fiduciary duty. RBC also contends that the Bond Purchase Agreement was not attached and clearly disclaims a fiduciary duty assumed by RBC.

In response, Plaintiffs note that the Bond Purchase Agreement is not mentioned in the Complaint. Rather, Plaintiffs allege in the Complaint that the Authority and the City, including the Mayor and City Council, based on a long-running relationship over the course of several years, placed special trust in RBC to act in good faith and in the Authority's and the City's best interests. Complaint ¶270. Plaintiffs further allege that RBC provided substantial and ongoing advice to the City and the Authority, including, but not limited to: advising on how to structure multiple financial transactions; preparing and giving presentations regarding the viability and financial wisdom of various financial transactions; interpreting legal requirements applicable to various Authority and City financial transactions; and providing material assistance in drafting the City's and Authority's interest rate management plans that LGUDA requires before a municipality can enter into swap transactions. Complaint ¶271. Plaintiffs allege that RBC's Mr. Losty held himself out as an adviser to the City and the Authority and, as a key member of the Working Group's finance team, made crucial financial decisions on behalf of the City and the Authority. Complaint ¶272. In relevant

part, Plaintiffs also allege that RBC had the power to take advantage of, and to exercise undue influence over, the Authority's and the City's financial decision-making. Complaint ¶273.

Plaintiffs also cite *EBC I, Inc. v. Goldman, Sachs & Co.*, 832 N.E.2d 26, 31 (N.Y. 2005), which held that "a cause of action for breach of fiduciary duty may survive . . . where the complaining party sets forth allegations that, apart from the terms of the contract, the underwriter and issuer created a relationship of higher trust than would arise from the underwriting agreement alone." *Id.* Plaintiffs assert that the allegations here are similar to those before the court in *EBC I* and the claim should be allowed to proceed.

Based on the analysis set forth in *Yenchi*, neither the existence of the Bond Purchase Agreement nor its terms are dispositive of this issue. Moreover, because the determination of whether a fiduciary duty existed is necessarily fact specific, we conclude that a decision at this stage of the proceedings is premature. **Consequently, we overrule RBC's PO No. 7**.

In Count IV of the Complaint, Plaintiffs allege that RBC aided and abetted a breach of fiduciary duty by Obermayer. In *Koken v. Steinberg*, 825 A.2d 723, 731 (Pa. Cmwlth. 2003), this Court recognized aiding and abetting a breach of fiduciary duty as a cause of action pursuant to Section 876 of the Restatement (Second) of Torts, §876 (Am. Law Inst. 1977). The elements for a claim of aiding and abetting a breach of fiduciary duty are: "(1) a breach of fiduciary duty owed to another; (2) knowledge of the breach by the aider and abettor; and (3) substantial assistance or encouragement by the aider and abettor in effecting that breach." 825 A.2d at 732.

Plaintiffs allege that Obermayer breached its fiduciary duty to the City when it improperly advised that the 2003 Incinerator reconstruction transactions complied with the LGUDA, and that RBC acted in concert with Obermayer in the preparation of the self-liquidating debt reports that supported Obermayer's advice. Complaint ¶¶282-283. Plaintiffs also allege that RBC knew that Obermayer's conduct constituted a breach of fiduciary duty and that RBC substantially assisted Obermayer's breach by supplying inaccurate debt service figures, *i.e.*, the truncated five-year financial projections that supported the decision to classify almost all of the Incinerator debt as self-liquidating. Complaint ¶¶285-286.

In PO No. 8, RBC contends that the allegations fail to state facts showing that RBC aided and abetted a breach of fiduciary duty committed by Obermayer. RBC first asserts that the Complaint alleges a duty to the City but not to the Coordinator. We have previously determined that the Coordinator has standing to assert claims on the City's behalf. RBC additionally contends that Plaintiffs do not show how RBC rendered substantial assistance, *but see* Complaint ¶286. Finally, RBC asserts that the Complaint fails to allege that any Plaintiff paid more in debt service costs than what was listed on the figures provided. However, the gravamen of the Complaint is that the additional debt would not have been *incurred* had accurate figures been supplied.

Plaintiffs respond that Count IV of the Complaint sufficiently states a claim for aiding and abetting a breach of fiduciary duty against RBC. In accord with the foregoing, we agree. **Accordingly, RBC's PO No. 8 is overruled.**

RBC's PO No. 4 asserts that the Complaint should be stricken in its entirety because all of the claims against RBC are time-barred. Initially, this Court has explained that, "where an affirmative defense is clear on the fact of the

pleadings, it may be addressed by the court at the preliminary objection stage." *Scavo v. Old Forge Borough*, 978 A.2d 1076, 1078 (Pa. Cmwlth. 2009). RBC notes that the common law claims of fraud, negligent misrepresentation, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty have a two-year statute of limitations, and that the unjust enrichment claim against RBC has a four-year statute of limitations. *See* Sections 5524 and 5525 of the Judicial Code, 42 Pa. C.S. §§5524, 5525.

RBC asserts that the Complaint does not allege any involvement on its part after 2005. Additionally, RBC contends that Plaintiffs had notice of potential claims at least by September 23, 2013, the date that this Court confirmed the Receiver's recovery plan, and that Plaintiffs waited over four and a half years to file the Complaint. Anticipating Plaintiffs' response, RBC argues that the doctrine of *nullum tempus occurrit regi* (*nullum tempus*) does not apply to Plaintiffs' claims.

This Court has observed:

> The purpose of the *nullum tempus* doctrine is to further the goal of protecting "public rights, revenues and property from injury and loss." *Mt. Lebanon School District v. W.R. Grace & Co.*, [607 A.2d 756, 759 (Pa. Super. 1992)]. "The doctrine of *nullum tempus occurrit regi* generally provides that statutes of limitations do not bar actions brought by a state or its agencies. 'Under the doctrine of *nullum tempus*, statutes of limitations are not applicable to actions brought by the Commonwealth or its agencies unless a statute expressly so provides.' (Citations omitted.) Local governments are political subdivisions of a state and are entitled to assert the *nullum tempus* privilege under only limited circumstances. In order for *nullum tempus* to apply, a municipality's claims must (1) accrue to the municipality in its governmental capacity and (2) seek to enforce an obligation imposed by law as distinguished from one

> arising out of an agreement voluntarily entered into by the defendant." *City of Philadelphia v. Lead Industries Association, Inc.*, 994 F.2d 112, 118-119 (3d Cir. 1993).

Delaware County v. First Union Corp., 929 A.2d 1258, 1261 (Pa. Cmwlth. 2007), *aff'd & remanded*, 992 A.2d 112 (Pa. 2010).

RBC asserts that a local government can invoke *nullum tempus* only to enforce strictly public rights, when the cause of action accrues to the entity in its governmental capacity, and the suit is brought to enforce an obligation imposed by law as distinguished from one arising out of a voluntary agreement. RBC maintains that *nullum tempus* cannot be applied to the Coordinator's claims on behalf of the City or the Authority because she has not identified any state law or statute that mandated the conduct that allegedly gave rise to the claims against RBC.

Plaintiffs respond that the City's claim accrued in its governmental capacity because each claim arises from the City's statutory obligation to provide waste-disposal capacity and the City's obligations under the LGUDA. The City has "the power and its duty shall be . . . to assure adequate capacity for the disposal of municipal waste generated within its boundaries." Complaint ¶32 (quoting Section 304(a) of the Municipal Waste Planning, Recycling and Waste Reduction Act).[22] Plaintiffs assert that the City's Incinerator debt guarantees, and related actions, ensured that the City fulfilled its statutory obligation regarding waste disposal. Further, Plaintiffs assert that the City's claims also arise from its efforts to comply with the LGUDA, which controlled the parties' obligations each time the City considered a guarantee of the Incinerator debt. In support, Plaintiffs rely on *Montgomery County v. Microvote Corp.*, 320 F.3d 440, 446 (3d Cir. 2003)

[22] Act of July 28, 1988, P.L. 556, *as amended,* 53 P.S. §4000.304(a).

(holding that *nullum tempus* applied because the performance bond ensured that the county could perform its statutorily mandated duty to obtain electronic voting machines), and *Township of Indiana v. Acquisitions & Mergers, Inc.*, 770 A.2d 364, 373 n.10 (Pa. Cmwlth. 2001) (stating that had *nullum tempus* been timely raised, it likely would have applied, because the township was seeking to enforce rights under an agreement that was entered into as a means of ensuring compliance with the township's land development ordinance). Plaintiffs also argue that Defendants breached duties imposed by tort law, not duties imposed by voluntary agreement.

As to the Authority, Plaintiffs assert the law is well settled that a municipal authority is an independent agency of the Commonwealth. *Dauphin County General Authority v. Dauphin County Board of Assessments*, 768 A.2d 895, 897 (Pa. Cmwlth. 2000) ("There is no question in this case that the [a]uthority is a properly incorporated municipal authority . . . which is permitted to acquire and hold property. As such, the [a]uthority is an independent agency of the Commonwealth.") (citing *Delaware County Solid Waste Authority v. Berks County Board of Assessment Appeals*, 626 A.2d 528 (Pa. 1993)). As a Commonwealth agency, the Authority is unquestionably entitled to invoke *nullum tempus*. *See Smith v. Mognet*, 618 A.2d 1215, 1217-18 (Pa. Cmwlth. 1992) (holding that, as a Commonwealth party, the Pennsylvania Turnpike Commission may assert the doctrine of *nullum tempus*). Because the City's claims arose from the City's statutory obligations and the Authority is an independent Commonwealth agency, **we overrule RBC's PO No. 4.**

RBC's PO No. 5 asserts that the Complaint should be dismissed in its entirety for lack of specificity. Under Pennsylvania law, a complaint "must do

more than simply give the defendants fair notice of what the claims are and the grounds upon which they rest. It should formulate the issues by fully summarizing the material facts." *Jackson v. Southeastern Pennsylvania Transportation Authority*, 566 A.2d 638, 642 (Pa. Cmwlth. 1989). Courts find insufficient specificity where a pleading asserts broad, general, or conclusory allegations, without specific facts to support the claim. *Office of Attorney General ex rel. Corbett v. Richmond Township*, 917 A.2d 397, 404-05 (Pa. Cmwlth. 2007). RBC argues that the allegations in the Complaint do not specify what role RBC played in the Working Group or provide details as to how the allegedly tortious conduct of the Working Group is attributable to RBC. Contrary to RBC's assertions, the Complaint sets forth specific statements and actions attributed to RBC's Mr. Losty. Complaint ¶¶215-223. **RBC's PO No. 5 is overruled.**

RBC's PO No. 6 asserts that Plaintiffs' repeated use of the term "Working Group" is immaterial and inappropriate and should be stricken as scandalous and impertinent under Pa. R.C.P. No. 1028(a)(2). "To be scandalous and impertinent, allegations must be immaterial and inappropriate to the proof of the cause of action." *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 115 (Pa. Cmwlth. 1998), *aff'd*, 757 A.2d 367 (Pa. 2000). We have previously observed that "the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice." *Department of Environmental Resources v. Hartford Accident & Indemnity Co.*, 396 A.2d 885, 888 (Pa. Cmwlth. 1979). RBC asserts that Plaintiffs do not define RBC's role in the Working Group. Although some of the references to the Working Group appear unrelated to RBC's conduct, the Complaint nevertheless alleges specific actions on the part of each Defendant, including RBC, which collectively resulted

in the alleged harms. We cannot conclude that the use of the term Working Group is disconnected from the proof of the claims against RBC, nor has RBC shown any prejudice as a result. **Accordingly, we overrule RBC's PO No. 6.**

The POs relating to Plaintiffs' standing are addressed above. Having determined that DCED lacks standing, **RBC's PO No. 12 is dismissed as moot.**

RBC's PO No. 13 asserts that Plaintiffs have failed to state a claim for punitive damages sought in Count I, III, and IV of the Complaint. Punitive damages should be awarded "only where the plaintiff has established that the defendant has acted in an outrageous fashion due to either the defendant's evil motive or his reckless indifference to the rights of others." *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005). Plaintiffs allege that RBC's conduct was malicious, wanton, willful, oppressive, and/or committed with reckless indifference.

RBC's PO No. 14 asserts that Plaintiffs have failed to state a claim for attorneys' fees, costs, and expenses against RBC in Counts I, II, III, IV, and XXIV. "Under the American Rule, applicable in Pennsylvania, a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception." *Trizechahn Gateway LLC v. Titus*, 976 A.2d 474, 482-83 (Pa. 2009.) Plaintiffs respond that under the Strong Plan, any recovery will create a fund that benefits the entities identified by the plan, and this "common fund" will pay fees and costs. Plaintiffs contend that Pennsylvania has recognized the common fund doctrine as an exception to the American rule. *Jones v. Muir*, 515 A.2d 855 (Pa. 1986). This unrebutted assertion is sufficient to overcome RBC's PO No. 14.

RBC's PO No. 15 is a demurrer to Plaintiffs' claim for pre-judgment interest asserted against RBC in Counts I, II, III, IV, and XXIV. RBC acknowledges that pre-judgment interest may be awarded by the court to prevent unjust enrichment or avoid injustice. *Kaiser v. Old Republic Insurance Co.*, 741 A.2d 748, 755 (Pa. Super. 1999).

At this stage of the proceedings, we cannot say with certainty that the law will not allow recovery of punitive damages, attorneys' fees, or pre-judgment interest as damages against RBC. Where any doubt exists as to whether the POs should be sustained, the doubt must be resolved in favor of overruling the preliminary objections. *Pennsylvania State Lodge, Fraternal Order of Police v. Department of Conservation & Natural Resources*, 909 A.2d 413, 416 (Pa. Cmwlth. 2006), *aff'd*, 924 A.2d 1203 (Pa. 2007). **Accordingly, RBC's POs Nos. 13, 14, and 15 are overruled.**

Count XXIV of the Complaint sets forth Plaintiffs' claim of unjust enrichment against RBC, Obermayer, BIR, Eckert, PFM, Foreman, and Buchart.[23]

[23] Buchart has not filed POs to Counts XXII and XXIV of the Complaint asserting claims of professional malpractice and unjust enrichment against it. Rather, Buchart filed an Answer and New Matter to the Complaint, seeking judgment in its favor and against Plaintiffs on all claims based on its denials, and a Professional Services Agreement with the City. Plaintiffs filed POs to the Answer and New Matter asserting, *inter alia*, that the Answer and New Matter improperly seek dismissal of the Complaint. As the Superior Court has explained:

> The term "New Matter" (under which heading [Pa. R.C.P. No.] 1030 requires affirmative defenses to be pleaded) "embraces matters of confession and avoidance as understood at common law, and has been defined as matter which, taking all the allegations of the complaint to be true, is nevertheless a defense to the action." "New matter ignores what the adverse party has averred and adds new facts to the legal dispute on the theory that such new facts dispose of any claim or claims which the adverse party had asserted in his pleading." An affirmative defense is distinguished

(Footnote continued on next page…)

In RBC's PO No. 11, Obermayer's PO No. 4, BIR's PO No. 6, Eckert's PO No. 13, PFM's PO No. 12, and Foreman's PO No. 4, these Defendants assert that Plaintiffs failed to state a claim for unjust enrichment.

To state a claim for unjust enrichment, a plaintiff must plead: (1) benefits conferred on the defendant by the plaintiff; (2) the appreciation of such benefits by the defendant; and (3) the payment of value. *Williams Township Board of Supervisors v. Williams Township Emergency Co., Inc.*, 986 A.2d 914, 923 (Pa. Cmwlth. 2009). "The most significant element of the doctrine is whether the enrichment of the defendant is *unjust*. The doctrine does not apply simply because the defendant may have benefitted as a result of the actions of the plaintiff." *Styer v. Hugo*, 619 A.2d 347, 350 (Pa. Super. 1993), *aff'd*, 637 A.2d 276 (Pa. 1994) (emphasis in original). "Whether the doctrine applies depends on the unique factual circumstances of each case." *Id.*

RBC contends that Plaintiffs have failed to allege how or why it would be inequitable for RBC to retain the professional fees, salaries, and other sums received in exchange for the financial services rendered. Because the determination of whether the doctrine applies requires resolution of disputed facts,

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(continued…)

> from a denial of facts which make up the plaintiff's cause of action in that a defense will require the averment of facts extrinsic to the plaintiff's claim for relief.

Coldren v. Peterman, 763 A.2d 905, 908 (Pa. Super. 2000) (citations omitted). Moreover, "there is a generally accepted position that affirmative defenses are those as to which the defendant has the burden of proof," and "[a]ffirmative defenses are compulsory and therefore must be timely pleaded or they are forever lost." *Id.* at 909 (citations omitted). Thus, although the Answer and New Matter is not a dispositive pleading such as the POs, it does ultimately seek dismissal of the Complaint based on facts extrinsic to it as properly pleaded therein.

we overrule RBC's PO No. 11, Obermayer's PO No. 4, BIR's PO No. 6, Eckert's PO No. 13, PFM's PO No. 12, and Foreman's PO No. 4.[24]

2. Obermayer's POs

We next address Obermayer's POs to the Coordinator's claims in Counts VII, VIII, and XXIV. Count VII of the Complaint asserts a breach of fiduciary duty. In relevant part, Count VII alleges that throughout 2003 and 2004, Obermayer, through Mr. Giorgione and other attorneys, represented both the Authority and the City with respect to multiple Incinerator transactions. Complaint ¶316. As a law firm, Obermayer owed fiduciary duties to its clients by operation of law. Complaint ¶317.[25] Obermayer breached its fiduciary duty when it elevated its own interest in securing funding over the City's interest in determining the legality of its debt guarantees. Complaint ¶318. Specifically, Obermayer breached its fiduciary duty on April 2003 when it advised that the City could classify nearly all of the existing debt as self-liquidating, when, at that time, the Incinerator was not generating sufficient revenue to pay its debt service and was on the verge of ceasing operations completely, and the reconstruction project faced obstacles to its implementation. Complaint ¶319. Obermayer breached its fiduciary duty again in November 2003, when it advised that the City could classify all of the new and nearly all of the existing Incinerator debt as self-liquidating, despite the unreasonableness of assumptions supporting that conclusion and despite

[24] Plaintiffs respond that they may properly assert unjust enrichment as a mechanism to elect remedies at trial, citing Restatement (Third) of Restitution and Unjust Enrichment Part II, Ch. 5, Topic I, Intro. Note (Am. Law Inst. 2011).

[25] *See Yenchi*, 161 A.3d at 820 (noting that in some relationships, including attorney and client, a fiduciary duty exists as a matter of law).

Obermayer's awareness of projections that contradicted its advice. Complaint ¶320.

Thereafter, in 2004, through Mr. Giorgione and other attorneys, Obermayer constructed the "security package" that in theory would protect the Authority and the City against Barlow's failure to perform under its contract. Complaint ¶321. The "security package" was insufficient, and it violated Pennsylvania law, because it did not amount to the full value of Barlow's contract, it was not for the sole benefit of the Authority or the City, and it was not executed by a surety or other financial institution. Complaint ¶322. The "security package" evaporated over time and it provided no protection when Barlow failed to perform under the contract. Complaint ¶323. By assembling the deficient security package and by failing to notify the City of Barlow's difficulty in posting proper security, Obermayer breached its fiduciary duties to the Authority and the City. Complaint ¶324.

In Count VIII, the Coordinator asserts a claim of legal malpractice. Obermayer represented the Authority and the City with respect to multiple aspects of the Incinerator transactions. Complaint ¶329. Obermayer owed the Authority and the City a duty to exercise the degree of knowledge, skill, and care that would normally be exercised by attorneys under similar circumstances. Complaint ¶330. In April and November 2003, Obermayer failed to exercise the requisite degree of knowledge, skill, and care when it wrongly advised the City that it should certify the City's existing Incinerator guarantees as self-liquidating. Complaint ¶331. In 2004, Obermayer again failed to exercise the requisite degree of knowledge, skill, and care when it assembled a deficient security package that did not adequately protect the Authority against Barlow's failure to perform and when it failed to

notify the City of Barlow's difficulty obtaining a proper security package. Complaint ¶332.

Obermayer's first and second POs challenged Plaintiffs' standing and were addressed above. Having determined that DCED lacks standing, **Obermayer's PO No. 3 is dismissed as moot.**

Obermayer's fifth PO asserts that the Complaint violates applicable pleading rules by (1) combining the purported claims of multiple plaintiffs into undifferentiated counts, making it difficult to tell which plaintiff is seeking to enforce what rights; and (2) failing to attach critical documents upon which Plaintiffs rely. Pa. R.C.P. No. 1028(a)(5).

"A plaintiff may join as defendants persons against whom the plaintiff asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, if any common question of law or fact affecting the liabilities of all such persons will arise in the action." Pa. R.C.P. No. 2229(b). We conclude that the allegations in Counts VII and VIII, as summarized above, clearly identify the claims against Obermayer. Moreover, we agree with Plaintiffs that the documents Obermayer cites, including a complete copy of the Strong Plan and financial projections, are not required at this stage of the litigation, but may be requested during discovery. **Accordingly, we overrule Obermayer's PO No. 5.**

Obermayer's sixth PO asserts that the Coordinator's claims are time-barred, a claim we have rejected. Obermayer's seventh PO asserts that Plaintiffs' requests for punitive damages and attorneys' fees should be stricken as insufficiently supported by the Complaint's factual allegations. As we previously observed, at this stage of the proceedings, we cannot say with certainty that the law

will not allow recovery of punitive damages and attorneys' fees. Accordingly, **Obermayer's POs Nos. 6 and 7 are overruled**. **Additionally, as noted above, Obermayer's PO No. 4, which asserts that Count XXIV fails to state a claim for unjust enrichment, is overruled.**

3. BIR's POs

In Count XI, the Coordinator asserts a breach of fiduciary duty claim against BIR. Count XI alleges that BIR, through Mr. Giorgione, represented both the City and the Authority with respect to multiple aspects of the Incinerator transactions. Mr. Giorgione identified himself as a representative of both the City and the Authority, referred to the City and the Authority as his clients, and provided legal advice to the City and the Authority. As a law firm, BIR owed a fiduciary duty to its client, the City. BIR, through Mr. Giorgione, negotiated the licensing agreement between the Authority and CIT. That transaction caused the Authority to borrow $25 million at higher levels of seniority than the existing Incinerator debt. Under the agreements governing the City's guarantee of the Incinerator debt, which Mr. Giorgione had drafted, approval of City Council was required before the Authority incurred new Incinerator-related indebtedness. Complaint ¶¶367-372.

According to the Complaint, CIT sought a resolution by City Council approving the licensing agreement, but Mr. Giorgione advised that City Council approval was not required. Mr. Giorgione gave that advice because he knew City Council would not approve the transaction. By providing that advice, BIR, through Mr. Giorgione, denied the City its right to have its duly elected representative body protect citizens from the harms that ultimately flowed from the excessive Incinerator debts. By prioritizing the Authority's interest in obtaining

additional debt funding over the City's interests, BIR, through Mr. Giorgione, breached its fiduciary duties to the City. Complaint ¶¶373-377.

Count XII asserts a claim of legal malpractice against BIR. "A cause of action for legal malpractice contains three elements: the plaintiff's employment of the attorney or other grounds for imposition of a duty; the attorney's neglect to exercise ordinary skill and knowledge; and the occurrence of damage to the plaintiff proximately caused by the attorney's misfeasance." *Epstein v. Saul Ewing LLP*, 7 A.3d 303, 313 (Pa. Super. 2010). Count XII asserts that, throughout 2005 and 2006, BIR, through Mr. Giorgione, represented both the Authority and the City with respect to multiple aspects of the Incinerator transactions, as described above. BIR, as a law firm, owed the City a duty to exercise the degree of knowledge, skill, and care that would normally be exercised by attorneys under the same or similar circumstances. BIR failed to exercise the requisite degree of knowledge, skill, and care when, as discussed above, through Mr. Giorgione, it denied the City its contractual right to submit the CIT "licensing" transaction to City Council for approval, which allowed CIT to receive more than $20 million of incinerator revenue, thereby significantly increasing the City's guarantee exposure. At all relevant times, Mr. Giorgione was acting within the scope and course of his relationship with BIR. Complaint ¶¶380-385.

BIR's sixth PO asserts a demurrer to the claims in Counts XI, XII, and, to Count XXIV, previously addressed. Preliminary objections in the nature of a demurrer "require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer." *Kirschner v. K&L Gates LLP*, 46 A.3d 737, 748 (Pa. Super. 2012). All material facts set forth

in the pleadings and all inferences reasonably deducible therefrom must be admitted as true *Id.*

BIR argues that Plaintiffs have not adequately pleaded an attorney-client relationship between BIR and the City on the CIT transaction. Relying on the decision in *The Harrisburg Authority v. CIT Capital USA, Inc.*, 869 F. Supp. 2d 578 (M.D. Pa. 2012), BIR asserts that Mr. Giorgione was identified only as "special counsel" to the Authority for the CIT transaction at issue.

Plaintiffs reject BIR's reliance on the CIT litigation as it did not address BIR's duty to the City. Plaintiffs assert that whether BIR represented the Authority in the CIT transaction is irrelevant to BIR's relationship to the City.[26]

As noted above, Pennsylvania courts have found a fiduciary duty to exist in circumstances where the relative position of the parties is such that one party has the power to take advantage of or exercise undue influence over the other. *Yenchi.* Further, in the absence of an express contract, an implied attorney-client relationship may be found if: (1) the purported client sought advice or assistance from the attorney; (2) the advice sought was within the attorney's professional competence; (3) the attorney expressly or impliedly agreed to render such assistance; and (4) it was reasonable for the putative client to believe the

[26] BIR also argues that City Council had no contractual right to approve or disapprove the CIT transaction. In making this argument, BIR asserts that its agreement relating to reimbursement only requires the City's approval for an increase of debt service requirements. Plaintiffs respond that BIR's position ignores pertinent language of the agreement. These arguments reflect a contractual ambiguity that cannot be resolved on a demurrer. *See Insurance Adjustment Bureau, Inc. v. Allstate Insurance Co.*, 905 A.2d 462, 468-69 (Pa. 2006) ("A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. While unambiguous contracts are interpreted by the court as a matter of law, ambiguous writings are interpreted by the finder of fact.") (citation omitted).

attorney was representing him. *Cost v. Cost*, 677 A.2d 1250, 1254 (Pa. Super. 1996).

The Complaint alleges that Mr. Giorgione identified himself as a representative of both the City and the Authority, referred to both as his clients, provided legal advice to the City and the Authority, and rendered false legal advice to the City concerning the City's ability to review and reject the CIT transaction. Complaint ¶¶147, 149, 150, 368-369, 373-376, 383. We conclude these allegations are sufficient to overcome BIR's demurrers to Counts XI and XII. **BIR's PO No. 6 is overruled.**

BIR's first PO asserts misjoinder of parties under Pa. R.C.P. No. 1028(a)(5). BIR argues that the claims against it arise solely out of its alleged attorney-client relationship with the Authority, not the City. However, this is contrary to Plaintiffs' factual allegations. BIR also contends that there is no common question of law or fact that will affect the liabilities of all Defendants in this action. BIR maintains that the claims against it and the claims against the other Defendants involve different theories of liability, such that resolution of the former would have no bearing on the resolution of the latter. Plaintiffs respond that common legal and factual issues abound. In particular, Plaintiffs cite Mr. Giorgione's involvement in the 2003 transactions, including the 2003 Reimbursement Agreement, and the CIT transaction. Finally, BIR asserts that the joinder of these unrelated claims creates a significant risk of prejudice. We conclude that this argument is unavailing, as the individual counts of the Complaint clearly identify the alleged conduct of each individual defendant.

"The rule permitting the joinder of additional defendants is to be broadly construed to effectuate its purpose of avoiding multiple lawsuits by settling

in one action all claims arising out of the transaction[s] or occurrence[s] which gave rise to the plaintiff's complaint." *Svetz for Svetz v. Land Tool Co.*, 513 A.2d 403, 405 (Pa. Super. 1986). **Accordingly, BIR's PO No. 1 is overruled.**

BIR's second PO, under Pa. R.C.P. No. 1028(a)(2), objects to allegations in the Complaint that BIR was part of the "Working Group" as being scandalous and impertinent. "To be scandalous and impertinent the allegations must be immaterial and inappropriate to the proof of the cause of action." *Common Cause/Pennsylvania*, 710 A.2d at 115. Again, "the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice." *Department of Environmental Resources*, 396 A.2d at 888. Although some of the references to the Working Group are unrelated to BIR's conduct, the Complaint nevertheless alleges specific actions on the part of each Defendant, including BIR. Indeed, in making this argument, BIR asserts that, on its face, the Complaint makes BIR's role clear, and we agree. **Accordingly, we overrule BIR's PO No. 2.**

BIR's third PO asserts that the Complaint is insufficiently specific under Pa. R.C.P. No. 1028(a)(2), (3). BIR argues that because the Coordinator alleges she is pursuing claims on behalf of the Authority and the City, it is not clear on whose behalf the Coordinator is asserting claims against BIR. BIR asserts that this lack of specificity precludes it from preparing an adequate defense. However, contrary to these allegations, Counts XI and XII unambiguously assert claims and seek damages on behalf of the City. Complaint ¶¶375-379, 382-386. **BIR's PO No. 3 is overruled.**

BIR's fourth and fifth POs relate to standing and were addressed above. BIR's seventh, eighth, and ninth POs assert demurrers to Plaintiffs' request for

punitive damages; attorneys' fees, costs, and expenses; and pre-judgment interest under Pa. R.C.P. No. 1028(a)(4). "Punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton, or reckless conduct." *Hutchison ex rel. Hutchison v. Luddy*, 870 A.2d 766, 770 (Pa. 2005). Here, Plaintiffs have alleged that BIR acted in a manner that was malicious, wanton, willful, and recklessly indifferent. BIR complains that Plaintiffs seek an award of "all" attorneys' fees, without citing an agreement or statute as authority, and where at best an award of legal fees, costs and expenses would be limited. Plaintiffs argue, *inter alia*, that a determination regarding legal fees is premature, and we agree. Finally, BIR acknowledges that pre-judgment interest may be awarded in the court's discretion to prevent unjust enrichment or avoid injustice. *Kaiser*, 741 A.2d at 755.

Again, at this stage of the proceedings, we cannot say with certainty that the law will not allow recovery of punitive damages, attorneys' fees, or pre-judgment interest as damages against BIR. **Accordingly, BIR's POs Nos. 7, 8, and 9 are overruled.**

BIR's tenth PO asserts that Plaintiffs' Complaint relies on certain agreements, including a "licensing" agreement, but fails to identify whether such agreements are oral or written, and, if written, fails to attach the relevant agreements to the Complaint as required by Pa. R.C.P. No. 1019(h). Citing *Brimmeier v. Pennsylvania Turnpike Commission*, 147 A.3d 954, 967-68 (Pa. Cmwlth. 2016), *aff'd*, 161 A.3d 253 (Pa. 2017), and *Adamo v. Cini*, 656 A.2d 576, 579 (Pa. Cmwlth. 1995), BIR argues the Complaint should be stricken for failure to comply with this rule. However, in contrast to *Brimmeier*, involving a claim for breach of contract, and *Adamo*, requiring interpretation of a collective bargaining

agreement, Plaintiffs do not assert any breach of contract claim. Moreover, as previously discussed, a written agreement is not necessary to establish an attorney-client relationship relevant to Plaintiffs' claims against BIR. **Accordingly, BIR's PO No. 10 is overruled**.

BIR's eleventh PO asserts that Plaintiffs' claims are barred by the statute of limitations. Consistent with our prior discussion, **BIR's PO No. 11 is overruled.** *Montgomery County*; *Township of Indiana*.

4. Eckert's POs

Count XIII asserts a claim of breach of fiduciary duty against Eckert. A fiduciary duty requires a party to act with the utmost good faith in furthering and advancing the other party's interests, including a duty to disclose all relevant information. *Basile*, 761 A.2d at 1120. Plaintiffs assert that from at least 1993 through 2007, Eckert, through Ms. Cocheres and other attorneys, represented the City in numerous Incinerator-related debt transactions. In 2007, when the City guaranteed repayment of the $25 million construction and $30 million Working Capital Loans, Ms. Cocheres and other Eckert attorneys advised the City that it could classify almost all existing Incinerator debt as self-liquidating. By operation of law, Eckert owed fiduciary duties to its client, the City. At the time, Incinerator revenue fell far short of operating expenses and debt service payments, and multiple projections showed that even after the Incinerator project was complete, it would not generate sufficient revenues to pay operating expenses and the existing debt service. Eckert's attorneys knew or should have known that the City could not classify the existing debt as self-liquidating. Indeed, Eckert's attorneys should have known that, in order to justify the self-liquidating classifications, the City would have to make unreasonable assumptions, including assumptions that the

City would adopt extraordinary increases in waste disposal rates and engage in subsequent debt transactions that were unlikely to occur. By wrongly advising the City that it could classify the existing debt as self-liquidating, Eckert, through its attorneys, prioritized Eckert's interest in securing Incinerator debt funds over the City's interest in an accurate determination of the legality of its debt guarantees. Thus, Eckert breached its fiduciary duty to the City. Count XIII further asserts that Eckert's breaches of fiduciary duty were malicious, wanton, willful, and/or committed with a reckless indifference so great as to make it highly probable that the City's residents and the public fisc would be harmed.

Count XIV asserts that Eckert aided and abetted a breach of fiduciary duty by Obermayer. The elements of a claim of aiding and abetting a breach of fiduciary duty are "(1) a breach of fiduciary duty owed to another; (2) knowledge of the breach by the aider and abettor; and (3) substantial assistance or encouragement by the aider and abettor in effecting that breach." *Koken*, 825 A.2d at 732. As noted, Plaintiffs allege that Obermayer breached its fiduciary duty to the City in April 2003 and November 2003, when it advised the City that it could certify its existing debt as self-liquidating. Plaintiffs allege that Eckert acted in concert with Obermayer in justifying the decision to classify the City's existing debt as self-liquidating, as both parties intended to establish the legality of the City's guarantee of the Incinerator debt. Further, Plaintiffs assert that Eckert knew that Obermayer's conduct constituted a breach of fiduciary duty, and that Eckert provided Obermayer substantial assistance in its breach of fiduciary duty. Prior to the April 2003 self-liquidating debt certifications, Eckert, through Ms. Cocheres and other attorneys, provided substantial input into using the yet-to-be-planned Incinerator reconstruction project as a basis for certifying the existing debt as self-

liquidating. In November 2003, Eckert, through Ms. Cocheres, acted in concert with Obermayer in classifying almost all of the Incinerator debt as self-liquidating, even though the financing plan was based on unreasonable assumptions, and even though the full 30-year projections undermined the classification of nearly all incinerator debt as self-liquidating. Complaint ¶¶398-403.

Count XV asserts a claim of legal malpractice against Eckert. Plaintiffs assert that in 2007, when the City guaranteed repayment of the $25 million construction loan and the $30 million Working Capital Loan, Eckert, through Ms. Cocheres and other attorneys, advised the City that it could classify nearly all preexisting Incinerator debt as self-liquidating. Eckert owed the City a duty to exercise the degree of knowledge, skill, and care that would normally be exercised by attorneys under the same or similar circumstances. Eckert, through Ms. Cocheres and other attorneys, failed to exercise the requisite degree of knowledge, skill, and care when it wrongly advised the City that it could certify the existing debt as self-liquidating.

In Counts XVI and XVII, DCED asserts claims of fraud and negligent misrepresentation against Eckert. Eckert's POs No. 11 and 12 assert demurrers to Counts XVI and XVII. Having determined that DCED lacks standing in this matter, **we dismiss Eckert's POs Nos. 11 and 12 as moot.**

As to the malpractice claim, Eckert's fourth PO under Pa. R.C.P. No. 1028(a)(2) asserts that a tort claim for legal malpractice requires the plaintiff to show "the employment of the attorney or other basis for a duty[.]" *Kituskie v. Corbman*, 714 A.2d 1027, 1029 (Pa. 1998). Eckert contends that the Complaint fails to conform to Pa. R.C.P. No. 1019's requirement to identify whether the necessary employment agreement is oral or written and, if the latter, to attach a

copy of the agreement to the pleading. As noted above, an implied attorney-client relationship may be found in the absence of an express contract if: (1) the purported client sought advice or assistance from the attorney; (2) the advice sought was within the attorney's professional competence; (3) the attorney expressly or impliedly agreed to render such assistance; and (4) it was reasonable for the putative client to believe the attorney was representing him. *Cost*, 677 A.2d at 1254. Consequently, an express agreement is not a prerequisite to a legal malpractice claim. **Eckert's PO No. 4 is overruled.**

Eckert's fifth PO asserts that all claims against it are time-barred. Consistent with our prior discussion, **Eckert's PO No. 5 is overruled.** *Montgomery County*; *Township of Indiana*.

Eckert's sixth PO asserts a demurrer to all claims against it under Pa. R.C.P. No. 1028(a)(4). Specifically, Eckert argues that, under Section 8209(a) of the LGUDA, DCED's issuance of a certificate of approval effectively ratifies "the lawful nature of the project." 53 Pa. C.S. §8209(a).[27]

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[27] In relevant part, Section 8209(a) and (b) of the LGUDA states:

> **(a) General rule.--**Where a certificate of approval has been issued by the department . . . the validity of the proceedings, the right of the local government unit lawfully to issue its bonds or notes or to enter into a lease, guaranty, subsidy contract or other agreement evidencing lease rental debt pursuant to those proceedings, and the validity and due enforceability of the bonds, notes or other instruments in accordance with their terms shall not thereafter be inquired into judicially, in equity, at law or by civil or criminal proceedings, or otherwise, either directly or collaterally. The effect of the approval by the department or by the court on appeal or, in the case of tax anticipation notes, the effect of filing in compliance with section 8128 shall be to ratify, validate and confirm the proceedings absolutely, including the lawful nature of

(Footnote continued on next page…)

Plaintiffs respond that DCED's review was limited to three issues: (1) whether the City conformed with its debt limit; (2) whether the City's submission comported with the LGUDA; and (3) whether the transaction was compliant with the Pennsylvania Constitution. Plaintiffs explain that once DCED approved, no party could assert the LGUDA violations as a reason to invalidate the City's guarantee. Here, Plaintiffs are not seeking to invalidate the City's obligations, nor do they claim the Incinerator project was an improper use of municipal debt. Rather than challenging the lawful nature of the Incinerator project, Plaintiffs allege that Eckert made misrepresentations that resulted in damages to them. We conclude that Eckert's reliance on the LGUDA is misplaced, **and we overrule Eckert's PO No. 6.**

Eckert's seventh PO asserts that the Complaint fails to state the material facts with sufficient specificity under Pa. R.C.P. No. 1019(a). Insofar as this PO

(continued…)

> the project . . . and any debt limit imposed by this subpart shall be deemed increased to the extent necessary to validate the debt or obligation. This section does not relieve an initial purchaser of bonds or notes from liability to a local government unit for the payment of the consideration agreed in the contract of sale or make the bonds or notes valid and enforceable in the hands of an initial purchaser unless the issuer has received a substantial consideration for the series as a whole.
>
> **(b) Liability for willful violations or fraud.--**This section does not relieve any person participating in the proceedings from liability for knowingly participating in an ultra vires act of a local government unit or from any civil or criminal liability for false statements in any certificates filed or delivered in the proceedings.

53 Pa. C.S. §8209(a), (b).

relates to claims brought by the Commonwealth, it is moot. Insofar as Eckert complains it had no relationship with the Coordinator, we have determined that the Coordinator has standing to assert claims on the City's behalf. **Accordingly, Eckert's PO No. 7 is overruled.** Eckert's eighth PO is a demurrer to Count XIII (breach of fiduciary duty). Eckert again argues the Complaint does not allege a relationship with the Commonwealth or the Coordinator. For the reasons just stated, **Eckert's PO No. 8 is overruled.** Eckert's ninth PO asserts a demurrer to Count XIV (aiding and abetting a breach of fiduciary duty). It similarly argues that the Complaint fails to allege a relationship between Eckert and the Commonwealth or the Coordinator.[28] **Eckert's PO No. 9 is overruled.**

Eckert's tenth PO asserts a demurrer to Count XV (legal malpractice). Eckert contends that the Complaint fails to plead facts demonstrating that Eckert owed a duty to the City. In relevant part, Count XV alleges that Eckert, through Ms. Cocheres and other attorneys, failed to exercise the requisite knowledge, skill, and care when it wrongly advised the City that it could classify nearly all preexisting Incinerator debt as self-liquidating. Complaint ¶¶408-411. We conclude that the Complaint's allegations, although minimal, and the inferences reasonably drawn therefrom, are sufficient to allege a relationship and legal duty owed by Eckert to the City. **Eckert's PO No. 10 is overruled.**

Count XVI and XVII assert claims by DCED and have been stricken. **Accordingly, Eckert's POs Nos. 11 and 12, demurrers to those Counts, are dismissed as moot. Eckert's PO No. 13 is a demurrer to Count XXIV (unjust**

[28] Alternatively, to preserve the issue on appeal, Eckert also argues that aiding and abetting a breach of fiduciary duty is not a cause of action recognized by the Pennsylvania Supreme Court.

enrichment) and is overruled. Eckert's PO No. 14 is a demurrer to Plaintiffs' request for punitive damages. As before, we cannot say with certainty that the law will not allow for recovery of punitive damages, and **Eckert's PO No. 14 is overruled.**

5. PFM's POs

In Count XVIII of the Complaint, the Coordinator asserts a breach of fiduciary duty claim against PFM. The Complaint alleges that PFM owed fiduciary duties to the City and the Authority, both of which placed special trust in PFM, as a financial advisor, to act in their best interests. PFM provided substantial and ongoing advice with respect to the Authority's decision to continue the Incinerator project and the City's decision to continue providing its full faith, credit, and taxing power as security for the failed reconstruction project in 2007 and beyond, including, but not limited to, by developing and presenting claims that the Incinerator could finally become self-sustaining. As a well-known financial advisory firm in Pennsylvania, PFM had the power to take advantage of and to exercise undue influence over the Authority's and City's affairs with respect to financial decisions, including, but not limited to, the Authority's decision to issue and the City's decision to guarantee the 2007 working capital notes. PFM breached its fiduciary duties to the City and the Authority by elevating the issuance of the Incinerator debt over providing full and accurate advice to the City and the Authority. Because PFM was involved in the 2003 Incinerator debt transactions, it knew or should have known that the Authority could secure Incinerator debt only with the City and County guarantees, and that, in 2007, the City could not obtain those guarantees without conceding to unfavorable terms. Complaint ¶¶447-453.

Moreover, because the County was unwilling to guarantee any additional Incinerator debt issuances, PFM knew or should have known that it would be virtually impossible for the Authority to restructure its debt in the future. PFM also knew or should have known that by eliminating capital investment for steam-line repair and landfill expansion, the Authority's finances would fall even farther into the red. Indeed, Mr. Williard himself believed that Incinerator revenues ultimately would not be sufficient to pay the Incinerator debt. By advising the Authority and the City to proceed with the Working Capital Loan, despite knowledge of the above, PFM failed to act in the best interests of the Authority and the City. At all relevant times, Mr. Williard was acting within the scope and course of his employment with PFM. Complaint ¶¶454-458.

In Count XIX, the Coordinator asserts a claim of negligent misrepresentation as follows. On or about November 8, 2007, and November 20, 2007, PFM's Mr. Williard informed City Council and the City's citizens that the Authority could pay its existing Incinerator debt by restructuring the debt in 2009 and 2010. Mr. Williard did so to convince the City to guarantee the $30 million Working Capital Loan. At all relevant times, Mr. Williard was acting within the scope and course of his employment with PFM. Complaint ¶¶461-464.

PFM had a pecuniary interest in this transaction. PFM's compensation was contingent on the closing of the Working Capital Loan, and the Authority had to obtain the City's guarantee so that the Working Capital Loan could close. PFM intended for the City to rely on the information that it provided with respect to the City's decision to guarantee the Working Capital Loan. The City's elected representatives and citizens justifiably relied on the information that PFM provided. Complaint ¶¶465-467.

PFM failed to exercise reasonable care and competence in developing and presenting the information to the City. PFM, which was involved in the 2003 Incinerator debt transactions, knew or should have known that the Authority could secure Incinerator debt only with City and County guarantees, and knew that in 2007, the Authority could not obtain those guarantees without conceding to unfavorable terms. Because the County was unwilling to guarantee any additional Incinerator debt issuances, PFM knew or should have known that it would be virtually impossible for the Authority to restructure debt in the future. PFM also knew or should have known that by eliminating capital investment for steam-line repair and landfill expansion, the Authority's finances would fall even farther into the red. Indeed, Mr. Williard himself believed that Incinerator revenues ultimately would not be sufficient to pay the Incinerator debt. PFM's misrepresentations were material to the City's decisions to guarantee the $30 million Working Capital Loan. Complaint ¶¶468-473.

In Count XX, the Coordinator asserts against PFM a claim of aiding and abetting a breach of fiduciary duty. As set forth above, Eckert breached its fiduciary duty to the City in 2007 when it advised the City that it could classify the existing Incinerator debt as self-liquidating. PFM acted in concert with Eckert in justifying the decision to classify the City's existing debt as self-liquidating. Both parties intended to secure the City's guarantee of the Working Capital Loan. PFM knew or should have known that Eckert's conduct constituted a breach of fiduciary duty. PFM provided Eckert substantial assistance in its breach of fiduciary duty. In assessing the self-liquidating status of the existing Incinerator debt in 2007, Eckert and Ms. Cocheres relied on financial projections prepared by PFM. PFM knew or should have known its projections would be used in support of the City's

self-liquidating debt classification. As previously stated, the projections were based on unrealistic and implausible assumptions and failed to account for revenue reductions and cost increases that would result from the elimination of significant capital investments for landfill expansion and steam-line repair. Complaint ¶¶475-482.

PFM's first three POs challenge capacity to sue/standing and were addressed above. In its fourth PO, PFM asserts that Count XVIII fails to conform to law or rule of court, under Pa. R.C.P. No. 1028(a)(2), which requires any claim based on an agreement to specify whether the agreement is oral or written and, if the latter, to attach the agreement to the pleading. According to PFM, the Complaint fails to allege a fiduciary relationship between PFM and the Authority or the City. In support, PFM argues that to the extent that PFM owed fiduciary duties to the City or the Authority, the same would arise from agreements between PFM and the City or the Authority, and the Complaint fails to identify any oral or written agreement or attach a written agreement to the pleading.

In its seventh PO, PFM asserts that Plaintiffs failed to state a claim for breach of fiduciary duty. PFM first argues that it had no legal relationship with the City. Further, PFM contends that equity would not compel a finding of a fiduciary duty where the Complaint references the "Authority's decision to continue and the City's decision to continue providing its full faith, credit, and taxing power as security." Complaint ¶450. PFM maintains that, as recited in the Complaint, the City retained decision-making power, thereby precluding a determination that a fiduciary duty existed under *Yenchi*.

PFM correctly asserts that, under *Yenchi*, fiduciary duties do not arise merely because one party relies on and pays for the specialized skill of the other

party. The superior knowledge or expertise of a party does not impose a fiduciary duty on that party or otherwise convert an arm's-length transaction into a confidential relationship. Rather, the critical question is whether the relationship goes beyond mere reliance on superior skill, and into a relationship characterized by overmastering influence on one side or weakness, dependence, or trust, justifiably reposed on the other side, which results in the effective ceding of control over decision making by the party whose trust or dependence is justifiably reposed in the other. *Id.* at 822-23.

However, PFM disregards the fact-intensive nature of the inquiry, which was emphasized in *Yenchi*, in an appeal from the grant of summary judgment based on an evidentiary record. 161 A.3d at 817. Here, the extent of the influence alleged is a factual determination that cannot be decided on POs. **Accordingly, PFM's POs Nos. 4 and 7 are overruled.**

PFM's fifth PO asserts that all claims against it are barred by the applicable statute of limitations. Having previously rejected that contention, **PFM's PO No. 5 is overruled.**

PFM's sixth PO asserts the Complaint should be dismissed for insufficient specificity under Pa. R.C.P. No. 1028(a)(2) and (3). PFM asserts that the Complaint's statement of relevant facts generally refers to an amorphous "Working Group" that allegedly engaged in tortious conduct related to the financing of the Incinerator project. PFM argues that the Complaint provides no detail as to what role PFM played in that "Working Group" or any details concerning the who, what, when, where, or how of any of the allegedly tortious conduct being attributed to PFM or its employees. We are mindful that Pennsylvania law requires a complaint to "fully summariz[e] the material facts."

Jackson, 566 A.2d at 642. Contrary to PFM's assertions, the Complaint identifies conduct attributable to PFM and to Mr. Williard in particular. We conclude that the averments in the Complaint meet this standard. **PFM's PO No. 6 is overruled**.

In its eighth PO, PFM asserts a demurrer to Count XIX (negligent misrepresentation) under Pa. R.C.P. No. 1028(a)(4). As previously noted, to state a claim for negligent misrepresentation, a plaintiff must plead: "(1) a misrepresentation of material fact; (2) made under circumstances in which the party who misrepresents ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to another party acting in justifiable reliance on the misrepresentation." *Bilt-Rite*, 866 A.2d at 277.

PFM argues that the alleged misrepresentation also must relate to a past or existing fact and cannot be based on projections or an expression of the speaker's opinion. *Rogers v. Gentex Corporation* (M.D. Pa., No. 3:16-CV-00137, filed March 16, 2018). PFM asserts that it is not liable to the City for a claim of negligent misrepresentation based on assumptions and projections that did not pan out, as opposed to representations concerning past or existing facts. Additionally, PFM contends that Plaintiffs were aware that revenue-generating line items were removed debt service projections in November 2007.

However, although the allegations of negligent misrepresentation relate to financial projections, Count XIX does not assert that PFM negligently offered opinions concerning a future event. Rather, Count XIX asserts that PFM made material representations regarding the Authority's finances that were contrary to facts within PFM's knowledge at the time the representations were made. The allegations in Count XIX that PFM misrepresented material facts in favor of

PFM's pecuniary interest are sufficient to overcome a demurrer. **PFM's PO No. 8 is overruled.**

PFM's ninth PO alleges that Counts XVIII (breach of fiduciary duty) and XIX (negligent misrepresentation) fail to state a claim. PFM asserts that the City and County entered into a "Tri-Party Interim Funding Agreement" to guarantee a Working Capital Loan on October 5, 2007, prior to the meetings between PFM and City Council, and, therefore PFM did not induce the City's guarantee of the Working Capital Loan as a matter of law. In making this argument, PFM impermissibly relies on facts not included in the Complaint. It is well settled that "a demurrer cannot aver the existence of facts not apparent from the face of the challenged pleading." *Martin v. Department of Transportation*, 556 A.2d 969, 971 (Pa. Cmwlth. 1989) (citation omitted). **PFM's PO No. 9 is overruled.**

PFM's tenth PO is a demurrer to Count XX (aiding and abetting a breach of fiduciary duty by Eckert). PFM asserts that it is not liable for aiding and abetting a breach of fiduciary duty by Eckert because Eckert owed no fiduciary duty to Plaintiffs. Alternatively, PFM argues that the Complaint does not allege any facts to support a conclusion that PFM "substantially assisted" Eckert in its alleged breach of fiduciary duty to Plaintiffs. PFM contends that even if PFM knew that Eckert was using its projections to breach fiduciary duties it owed to the City, "[m]ere knowledge of a violation alone, without assistance . . . is not an actionable wrong." *Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 800 (3d Cir. 1978).

In making this argument, PFM mischaracterizes the allegations in Count XX. In Count XX, Plaintiffs assert that PFM supplied Eckert with

projections that failed to account for revenue reductions and cost increases that would result from the elimination of significant capital investment for landfill expansion and steam-line repair. PFM knew or should have known that Eckert would rely on its projections to support the City's self-liquidating debt classification. Eckert breached its fiduciary duty to the City, and PFM acted in concert with Eckert in order to secure the City's guarantee of the Working Capital Loan. Complaint ¶¶476-482. These allegations are sufficient to overcome a demurrer. **PFM's PO No. 10 is overruled.**

PFM's eleventh PO is a demurrer to Count XXI, in which DCED asserts a claim of aiding and abetting fraud against PFM. Having determined that DCED lacks standing to pursue claims in this matter, **we dismiss PFM's PO No. 11 as moot**. **Additionally, as noted above, PFM's PO No. 12, which asserts that Count XXIV fails to state a claim for unjust enrichment, is overruled.**

In relevant part, PFM's thirteenth PO alleges that Counts XVIII (breach of fiduciary duty) and XX (aiding and abetting a breach of fiduciary duty) fail to adequately plead entitlement to punitive damages. "Punitive damages are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others." *Johnson v. Pilgrim Mutual Insurance Co.*, 425 A.2d 1119, 1125 (Pa. Super. 1981) (quotation and citation omitted). Count XVIII alleges that PFM's breaches of fiduciary duty were malicious, wanton, willful, oppressive, and committed with a reckless indifference so great as to make it highly probable that the City's residents and public fisc would be harmed. Count XX alleges that PFM's substantial assistance in aiding and abetting Eckert's breach of fiduciary duty was provided in the same manner. As previously explained, at this stage of the proceedings we cannot say with

certainty that the law will not allow recovery of punitive damages. **Consequently, PFM's PO No. 13 is overruled.**

6. Foreman's POs

In Count XXIII of the Complaint,[29] the Coordinator claims that Foreman aided and abetted a breach of fiduciary duty by BIR, alleging as follows. BIR breached its fiduciary duty to the City when it denied City Council its contractual right to review and reject excessive new Incinerator debts. The Foreman firm acted in concert with BIR in allowing the CIT "licensing" transaction to proceed without City Council approval. The Foreman firm knew that BIR's conduct constituted a breach of fiduciary duty. Complaint ¶¶505-506. In an email, Mr. Foreman directly acknowledged the impropriety of the CIT "licensing" transaction, stating that "whatever we call it . . . I cannot find this License Agreement anything but a guarantee on Barlow's debt." Complaint ¶507.

Foreman provided BIR substantial assistance in its breach of fiduciary duty. Specifically, the Foreman firm issued an opinion letter in which it opined that the transaction was legal and did not require any additional approvals. However, the Foreman opinion letter was false and inaccurate, as Foreman had recognized in its prior acknowledgement of the transaction's impropriety. Complaint ¶¶508-510. As a direct and proximate result of these failures, accomplished with Foreman's substantial assistance, the City's residents and public fisc have suffered and will continue to suffer damages. Further, Foreman's conduct was malicious, wanton, willful, oppressive, and/or committed with a reckless indifference so great as to make it highly probable that the City's residents

[29] Count XXII of the Complaint asserts a claim of professional malpractice against Buchart. As noted above, Buchart has not filed POs.

and the public fisc would be harmed. Complaint ¶¶511-512. Count XXIII requests damages, pre-judgment and post-judgment interest, punitive damages, and attorneys' fees. Consistent with our analysis above, **Foreman's PO No. 1, challenging the Commonwealth's capacity/standing to sue, is sustained. Foreman's PO No. 2, asserting that the Coordinator lacks capacity to sue, is overruled.**

Foreman's third PO asserts that the aiding and abetting a breach of fiduciary duty claim in Count XXIII is legally insufficient. As previously recited, the elements for a claim of aiding and abetting a breach of fiduciary duty are: (1) a breach of fiduciary duty owed to another; (2) knowledge of the breach by the aider and abettor; and (3) substantial encouragement by the aider and abettor in effecting that breach. *Koken*, 825 A.2d at 731. The Complaint, including Count XXIII, vaguely alleges that Foreman aided and abetted BIR's alleged breach of fiduciary duty to its client, the City, by "[issuing] an opinion letter in which it opined that the [CIT transaction] was legal and that it did not require any additional approvals." Complaint ¶¶154, 509. Foreman elaborates, noting that the claim is based on allegations concerning the solicitor's letter *Foreman issued to CIT on behalf of its client, the Authority*, in connection with the 2006 license agreement.

Foreman argues that it cannot be liable to non-clients for legal services that it provided to its client. Citing *Austin J. Richards, Inc. v. McClafferty*, 538 A.2d 11, 15 (Pa. Super. 1988), Foreman asserts that a third party "can have no cause of action against the attorneys because of advice which the attorneys gave their client." In *Aetna Electroplating Co. v. Jenkins*, 484 A.2d 134, 136-37 (Pa. Super. 1984), the court upheld the dismissal of a trespass claim against the appellee attorney. The attorney had promised in open court to guarantee any indebtedness

found to be owing by his client in order to open a default judgment without the posting of a bond. The Superior Court held that the statute of frauds could not be used by the attorney to avoid an agreement he entered into in open court. However, the court held that the attorney could not be held liable in trespass for unintentional harm to the appellant, so long as the attorney was serving his client's interests. The court explained:

> The complaint does not contain averments that counsel committed an intentional tort designed maliciously to cause harm to Aetna. The complaint is, rather, that the manner in which counsel represented his client in defense of Aetna's claim caused delay in the recovery of a judgment therefor. Defending Aetna's claim, however, was a justifiable and proper interest, for which Jenkins could properly exert maximum effort on behalf of his client. He cannot be held liable to Aetna so long as he was serving that interest. In *Smith v. Griffiths*, [476 A.2d 22 (Pa. Super. 1984)], we held that an attorney who acts in good faith for the purpose of serving a justifiable and proper interest of the client will not be held liable for unintentional harm caused to third persons, particularly where the third person is an adverse party to litigation. We said:
>
> > To impose upon an attorney a duty of care to the adverse party would place the attorney in a position where his own interest would conflict with the interests of his client and prevent him from exerting a maximum effort on behalf of the client. It would place an undue burden on the profession and would diminish the quality of the legal services rendered to and received by the client. *Where an attorney represents a client in litigation . . . the public interest demands that attorneys in the proper exercise of their functions as such, not be liable to adverse parties for acts performed in good faith and for the honest purpose of protecting the interests of their clients*.

> [*Smith*, 476 A.2d at 26] (emphasis added) (citations omitted). . . .

Aetna Electroplating Co., 484 A.2d at 136-37.

Foreman argues that the aiding and abetting a breach of fiduciary duty claim against it is a collateral attack by non-clients on Foreman's legal advice and advocacy for its client. Although not specified in the Complaint, Plaintiffs do not dispute that the solicitor's letter was prepared by Foreman for the Authority, in its capacity as the Authority's Solicitor and during the course and scope of providing legal services for the Authority.[30] The opinion letter was directed to CIT, the other party to the transaction with the Authority, not the City.

Additionally, Foreman notes that the basis for the claim that BIR breached its fiduciary duty to the City was that BIR prioritized the Authority's interest in obtaining additional debt funding above protecting the City's interests. Complaint ¶376. Foreman argues that the opinion letter was required to complete the licensing transaction that the Authority wanted and needed. Foreman maintains that it cannot be held liable to the City for acting solely to advance the legitimate business interests of its own client, the Authority. We agree. Indeed, to hold otherwise would lead to an absurd result, finding Foreman liable for a failure to prioritize the interests of the City, a non-client over the interest of its own client, the Authority. Under these circumstances, Foreman cannot be liable to the City for its representation of its client, the Authority.[31] Having so concluded, we necessarily conclude that Foreman cannot be liable for the related claim of unjust enrichment. **Accordingly, we sustain Foreman's PO No. 3 and dismiss the**

[30] Plaintiffs do not argue that Foreman's third PO is an impermissible speaking demurrer.

[31] The Complaint does not allege that Foreman had a fiduciary duty to the City based on a special relationship with the City.

claims in Counts XXIII and XXIV against it. Foreman's remaining POs are dismissed as moot.

C. Plaintiffs' POs

Plaintiffs' POs Nos. 1 through 5 allege that Defendants improperly raised the affirmative defense of statute of limitations in preliminary objections. Pa. R.C.P. No. 1030(a) requires affirmative defenses to be pleaded in a responsive pleading as new matter. Plaintiffs' first PO alleges that BIR improperly raised the statute of limitations defense in its eleventh PO. Plaintiffs' second PO asserts that Eckert improperly raised the affirmative defense in its fifth PO. Plaintiffs' third PO asserts that Obermayer improperly raised the statute of limitations defense in its sixth PO. Plaintiffs' fourth PO argues that PFM improperly asserts the statute of limitations defense in its fifth PO. Plaintiffs' fifth PO asserts that RBC improperly raised the statute of limitations defense in its fourth PO. Finally, Plaintiffs' sixth PO alleges that Foreman improperly raised the affirmative defense of collateral estoppel in support of its second PO.

Generally, the Pennsylvania Rules of Civil Procedure prohibit preliminary objections that raise affirmative defenses. Pa. R.C.P. No. 1030(a) states that all affirmative defenses, including the statute of limitations, estoppel, and res judicata, "shall be pleaded in a responsive pleading under the heading 'New Matter.'" The Official Note to Pa. R.C.P. No. 1028(a)(4) states that "the statute of limitations can be asserted only in a responsive pleading as new matter under [Pa. R.C.P. No.] 1030." Nevertheless, a court may address the merits of affirmative defenses at the preliminary objection stage under limited circumstances, when (1) the plaintiff fails to object or otherwise waives its right to object to the improper preliminary objections, and (2) where the affirmative

defense was clearly applicable on the face of the complaint. *Jacobs v. Merrymead Farm, Inc.*, 799 A.2d 980, 983 (Pa. Cmwlth. 2002). In this matter, Plaintiffs filed POs objecting to Defendants' assertions of affirmative defenses and have not waived the procedural defect. *Id.*

In *Jacobs*, we acknowledged that "[p]ermitting affirmative defenses to be raised by preliminary objections occasionally permits expeditious resolution of a dispositive issue; however, it carries broad unsettling potential." 799 A.2d at 983-84. We observed that a "lack of predictability arising from sporadic affirmative defense demurrers falls primarily on plaintiffs," who would be increasingly "uncertain whether they must anticipate affirmative defenses in the complaint or whether they may rely on existing procedural rules in crafting their pleadings." We concluded that it "is prudent to respect plaintiffs' objections to a departure from existing rules for raising affirmative defenses." *Id.* **Accordingly, in this instance, we conclude that Plaintiffs' POs Nos. 1 through 6 provide an additional basis for overruling the six POs that they challenge.**

Plaintiffs' POs Nos. 8 through 13 assert that six of Defendants' demurrers introduce facts that do not appear in the Complaint and should be stricken as improper speaking demurrers. It is well-settled law in Pennsylvania that POs in the nature of a demurrer require the Court to resolve the issues solely on the basis of the pleadings. *Smith v. Pennsylvania Employees Benefit Trust Fund*, 894 A.2d 874, 879 (Pa. Cmwlth. 2006). No evidence outside the Complaint may be considered. *Id.* Rather, this Court has repeatedly held that a demurrer cannot aver the existence of facts not apparent from the face of the challenged pleading. *Martin*, 556 A.2d at 971. *See also Beaver v. Coatesville Area School District*, 845 A.2d 955, 958 (Pa. Cmwlth. 2004) ("For many years, Pennsylvania

Courts have not countenanced 'speaking demurrers.'") (quoting *Wells v. Southeastern Pennsylvania Transportation Authority*, 523 A.2d 424, 426 (Pa. Cmwlth. 1987)).

Plaintiffs argue that in PFM's seventh PO, which asserts that PFM did not owe a fiduciary duty to the City or the Authority, PFM cites and attaches a contract, handouts, and a forensic audit report, and also cites draft legislative documents and video recordings, where none of these were part of the Complaint.

Plaintiffs argue that in PFM's eighth PO, which asserts that PFM fully disclosed all material facts to City Council, PFM includes cites to video recordings of City Council meetings, attaches handouts from those meetings, and cites and attaches a forensic audit report, thereby attempting to introduce facts and exhibits that do not appear in the Complaint.

In support of PFM's ninth PO, which asserts that the Authority contractually agreed to incur and the City contractually agreed to guarantee the Working Capital Loan, PFM cites and attaches an agreement that is not part of the Complaint. Plaintiffs argue that this PO also should be stricken as an improper speaking demurrer. Likewise, Plaintiffs assert that in PFM's tenth PO, denying liability for aiding and abetting Eckert's breach of fiduciary duty, PFM pleads that "PFM merely provided routine professional services to the Authority, without any knowledge that Eckert would later allegedly use PFM's debt service projections in connection with the self-liquidating debt classification." PFM's POs ¶154. This fact does not appear in the Complaint, and Plaintiffs argue that PFM's tenth PO should be stricken as an improper speaking demurrer.

RBC's seventh PO asserts that the Authority "disclaimed any fiduciary duties potentially owed by RBC." RBC's POs ¶87. In support, RBC

cites and attaches a contract that was not part of the Complaint. Plaintiffs did not allege that any written agreement defined RBC's obligations to the City and Authority, but instead asserted RBC's actions went beyond anything described in the attached contract. Plaintiffs assert that RBC's seventh PO is an improper speaking demurrer because it attempts to introduce facts and exhibits that do not appear in the Complaint.

Finally, Plaintiffs allege that RBC's tenth PO is an improper speaking demurrer. RBC's tenth PO asserts that "Plaintiffs have not pleaded any duty owed by RBC to Plaintiffs." RBC's POs ¶123. In support, RBC cites and attaches a contract that was not part of the Complaint. Plaintiffs did not allege that a written agreement governed RBC's duties to the City and the Authority, and Plaintiffs argue that RBC's tenth PO should also be stricken as a speaking demurrer.

Because the law requires this Court to resolve the issues raised in a demurrer solely on the basis of the pleadings, *Smith*, 894 A.2d at 879, and it is well settled that "a demurrer cannot aver the existence of facts not apparent from the face of the challenged pleading," *Martin*, 556 A.2d at 969, **Plaintiffs' POs Nos. 8 through 13 provide additional basis for overruling PFM's POs Nos. 7, 8, 9, and 10, and RBC's POs Nos. 7 and 10.**

Finally, Plaintiffs' POs Nos. 14 through 20 assert that the allegations in RBC's fifth and sixth POs, Eckert's PO No. 7, Obermayer's fifth PO, PFM's sixth PO, BIR's second PO, and Foreman's fifth PO, in which each Defendant challenges its inclusion in the "Working Group," are insufficiently specific. Having overruled the Defendants' POs on the merits, and discerning no value in addressing them further, **we overrule Plaintiffs' POs Nos. 14 through 20.**

V. Conclusion

Accordingly, the Plaintiffs' and Defendants' POs are sustained in part, overruled in part, and dismissed as moot in part as outlined above. The Commonwealth and DCED are dismissed as parties to the action, and all of their claims asserted in the Complaint are dismissed. All claims in the Complaint against Foreman are dismissed, and Foreman is dismissed as a party to the action. All of the Defendants, with the exception of Buchart,[32] are directed to file an Answer to the Plaintiff Coordinator's remaining claims asserted in the Complaint.

MICHAEL H. WOJCIK, Judge

President Judge Brobson did not participate in the decision of this case.
Judge Cohn Jubelirer did not participate in the decision of this case.
Judge Fizzano Cannon did not participate in the decision of this case.
Judge Crompton did not participate in the decision of this case.

[32] *But see Kenney v. Southeastern Pennsylvania Transportation Authority*, 551 A.2d 614, 615 (Pa. Cmwlth. 1988) (holding that Pa. R.C.P. No. 1033 permits a party to amend his pleading by consent of the other party or leave of court, and Pa. R.C.P. No. 126 provides for liberal construction of the Rules of Civil Procedure).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Commonwealth of Pennsylvania, Tom Wolf, Governor; and The City of Harrisburg and Capital Region Water f/k/a The Harrisburg Authority, by and through Marita Kelley, in her official capacity as Coordinator For The City of Harrisburg; and The Pennsylvania Department of Community and Economic Development, by and through Dennis Davin, in his official capacity as Secretary,	:	
Plaintiffs	:	
v.	:	No. 368 M.D. 2018
RBC Capital Markets Corporation; Obermayer, Rebmann, Maxwell & Hippel, LLP; Buchanan Ingersoll & Rooney, P.C.; Eckert, Seamans, Cherin & Mellot, LLC; Public Financial Management, Inc.; Buchart Horn, Inc.; Foreman and Caraciolo, P.C. f/k/a Foreman & Foreman, P.C.,	:	
Defendants	:	

O R D E R

AND NOW, this 9th day of September, 2021, the preliminary objections of the above-named Plaintiffs and Defendants are SUSTAINED in part, OVERRULED in part, and DISMISSED as moot in part, in accordance with the foregoing memorandum opinion. The Commonwealth of Pennsylvania, Tom Wolf, Governor, and the Pennsylvania Department of Community and Economic Development, by and through Dennis Davin, in his official capacity as Secretary,

are DISMISSED as parties to the above-captioned action, and all claims asserted by them in the First Amended Complaint filed in our original jurisdiction are DISMISSED. All claims asserted against Foreman and Caraciolo, P.C. f/k/a Foreman & Foreman, P.C. (Foreman), in the First Amended Complaint are DISMISSED, and Foreman is DISMISSED as a party to the above-captioned action. The remaining above-named Defendants, with the exception of Buchart Horn, Inc., are directed to file an Answer to the remaining claims raised in the First Amended Complaint filed in our original jurisdiction by the City of Harrisburg and Capital Region Water f/k/a The Harrisburg Authority, by and through Marita Kelley, in her official capacity as Coordinator for the City of Harrisburg, within 60 (sixty) days of the date of this order.

_____

MICHAEL H. WOJCIK, Judge