**IN THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY**

**32ND CIRCUIT**

**STATE OF MISSOURI**

J.P. HARING, )

 )

 Plaintiff, )

 )

vs. ) Case No.:20CG-CC00004

 )

SOUTHEAST MISSOURI STATE )

UNIVERSITY, ISAAC STROLE, ) **JURY TRIAL DEMANDED**

HOLLY RITTER, )

SIGMA CHI FRATERNITY, an )

Unincorporated Association, )

FRED LATHAN, )

 )

and SIGMA CHI, )

EPSILON PHI CHAPTER )

**PLAINTIFF’S RESPONSE TO DEFENDANT SIGMA CHI**

**FRATERNITY’S MOTION TO DISMISS**

Plaintiff, by and through his attorneys, Nicole Gorovsky and Sarah Schwartz of Gorovsky Law, LLC, for their Memorandum Response to Defendant Sigma Chi Fraternity’s Motion to dismiss Counts III, IV, VI and Punitive Damages Claim of Plaintiff’s Second Amended Complaint states as follows:

1. **INTRODUCTION**

Plaintiffs filed a Second Amended Petition in this matter on August 4, 2020. On September 1, 2020, Defendant Sigma Chi Fraternity filed a Motion to Dismiss. In that Motion, Defendant Sigma Chi argues that Counts III, IV, VI and the Punitive Damages Claims of Plaintiff’s Second Amended Complaint should be dismissed.

1. **STATEMENT OF RELEVANT FACTS PLED**

**IN THE SECOND AMENDED PETITION**

The Sigma Chi, Epsilon Phi Chapter is an unincorporated organization located at 1421 Show Me Dr, Cape Girardeau, Missouri 63701. (Plaintiff’s Second Amended Petition ¶ 26). The chapter is created only through authorization of Defendant Sigma Chi fraternity. (Plaintiff’s Second Amended Petition ¶ 27). Any person who becomes a member of a chapter, including the Defendant Sigma Chi, Epsilon Phi Chapter, automatically becomes a member of Defendant Sigma Chi. (Plaintiff’s Second Amended Petition ¶ 28).

Defendant Sigma Chi Fraternity is an unincorporated association – specifically an all men’s fraternity with a Chapter at SEMO. The Epsilon Phi Chapter has no independent corporate filings and no independent business structure. (Plaintiff’s Second Amended Petition ¶ 29). By all appearances, Defendant Sigma Chi Epsilon Phi Chapter at SEMO is synonymous with Sigma Chi Fraternity Id. The association currently has approximately 242 active chapters and 294,943 members. Id. Sigma Chi Fraternity clearly tells Chapters their policies, how to operate, what standards they have to follow, how to recruit members, how and when to discipline members, how to market themselves and provides structure, oversight, insurance, and longevity to its chapters. Id.

Upon information and belief, the Defendant Sigma Chi, Epsilon Phi Chapter does not exist as a separate corporate entity and is wholly subsidiary to or subsumed within Defendant Sigma Chi Fraternity. (Plaintiff’s Second Amended Petition ¶ 32).All chapter “governance positions” of the chapter are held by students and, therefore no personnel of any chapter remain longer than their time as a student at the relevant university. (Plaintiff’s Second Amended Petition ¶ 33). The chapter governmental system is entirely controlled by Defendant Sigma Chi. Id.

Defendant Sigma Chi Fraternity is an organization with a national headquarters in Evanston, Illinois to manage its chapters. (Plaintiff’s Second Amended Petition ¶ 34). Defendant Sigma Chi Fraternity is a hierarchical organization. Id. At the top of the hierarchy is the Executive Committee also known as the Board of Directors of the Fraternity. Id. The Executive Committee consists of 12 members and has the following functions:

* 1. “The Grand Consul serves as chairman and the Grand Pro Consul as vice chairman. Other members are the Grand Quaestor, the immediate Past Grand Consul, a Grand Trustee nominated by the Board of Grand Trustees, two Grand Praetors nominated by the Grand Praetors, one alumnus member-at-large and the two most recent International Balfour Award winners. These nine members serve for two years. Two undergraduate representatives also serve one-year terms on the committee. The committee directs the Fraternity budget and expenditures, acts upon recommendations and reports from the various boards and committees and, in coordination with the Executive Director, assigns duties to the International Headquarters staff. It administers the endowment and trust funds of the Fraternity and establishes Executive Committee Regulations, which are a part of the Governing Laws.” Id.
	2. “The committee makes recommendations concerning undergraduate chapter problems and may place on probation or suspend any undergraduate chapter charter. It investigates petitions for undergraduate chapter charters, and grants charters to alumni chapters and associations. It has appellate jurisdiction over the suspension or expulsion of members with authority to reinstate and the power to try any member for offenses specified in the Constitution and Statutes.” Id.
	3. “Additional duties of the committee include scheduling Grand Chapter and Grand Council meetings; determining province boundaries and their makeup; making contracts and regulations regarding the use, manufacture, sale and distribution of Fraternity insignia; and designing a uniform system of bookkeeping, records-keeping, minutes-recording, house rules and scholarship regulations. The members of the committee are also the directors of the Sigma Chi Corporation.”

<https://sigmachi.org/home/contact/directory/international-officers/> Id.

The Sigma Chi Fraternity website maintains a page specifically to “define the relationship” between the fraternity and its chapters. (Plaintiff’s Second Amended Petition ¶ 35). That page is located at <https://sigmachi.org/home/resources-3/policies/definition-of-the-relationship-between-the-fraternity-and-its-chapters/>, and states:

“When The Chapter receives its charter from The Fraternity, it is granted the right to use the exclusive name, nicknames, logos and insignia of The Fraternity on the chapter house, and in references to each member, and The Chapter. The Fraternity grants The Chapter the right to pledge and initiate members into The Fraternity, on the condition that they meet the requisite conditions of membership and that the prescribed Ritual and other provisions of the constitution and bylaws of The Fraternity are met, which include payment of the appropriate fees for pledging and initiation and thereafter semi-annual dues.” Id.

The “define the relationship” page is mostly dedicated to conclusory statements that Defendant Sigma Chi is not responsible for its chapters or members. (Plaintiff’s Second Amended Petition ¶ 36). However, the following facts belie that conclusion:

1. All membership eligibility rules are set by Defendant Sigma Chi. <https://sigmachi.org/home/resources-3/policies/governinglaws/> Id.
2. Defendant Sigma Chi dictates the responsibilities of the chapter members including the responsibility to follow the governing laws of Defendant Sigma Chi, to honor decisions made by the General Consul of Defendant Sigma Chi, and to follow a “personal code of ethics which shall preclude any conduct prejudicial to good order and discipline or unbecoming a member of the [Defendant Sigma Chi] Fraternity within the meaning of its laws.” Id.
3. Defendant Sigma Chi governing laws dictate that Defendant Sigma Chi “shall establish and maintain active and alumni chapters.” In other words, Defendant Sigma Chi dictates the existence of a chapter, including Defendant Sigma Chi, Epsilon Phi, and provides the necessities to maintain the existence of that chapter. Id.
4. The highest-level member of the chapter, including Defendant Sigma Ci, Epsilon Phi, must report to Defendant Sigma Chi regularly. Id.
5. Defendant Sigma Chi, and not Defendant Sigma Chi, Epsilon Phi has the authority to make contracts and agreements on behalf of the fraternity. In other words, only Defendant Sigma Chi can make contracts and agreements regarding member housing such as the housing at issue in this case. Id.
6. Members pay dues to Defendant Sigma Chi. Id.
7. Defendant Sigma Chi sets rules for events that the Chapter can hold, rules for meetings to be held by the chapter, rules for all activities, rules for maintaining records, and rules for issuing discipline for fraternity members. Id.
8. Defendant Sigma Chi provide all materials to each chapter regarding rituals, training, governance, initiation, insignia, the logo, and a pledge. Id.
9. Defendant Sigma Chi dictates appropriate behavior and prohibited conduct for all the members despite the existence of chapters. Id.
10. Defendant Sigma Chi mandates that all members have a responsibility toward Defendant Sigma Chi and its future. Id.
11. Defendant Sigma Chi mandates all issues related to risk management and provides insurance for its chapters. Id.
12. Defendant Sigma Chi provides a model risk management plan to its chapters. It is a mandatory plan is an editable template only in the sense that each chapter is obligated to add sections related to state law and University policy in its area. <http://www.rmfeducation.org/model-risk-management-plan-template> Id.

Based on all of the above, at all times relevant, Defendant Sigma Chi Fraternity managed, operated, administered, and maintained the Defendant Sigma Chi, Epsilon Phi Chapter and, in conjunction with Defendant SEMO, theSigma Chi Housing Dormitory located at the “H Building” at 1000 Towers Circle, Cape Girardeau, MO 63701. (Plaintiff’s Second Amended Petition ¶ 37). Accordingly, it strains credulity to suggest that Defendant Sigma Chi, having assumed the obligation of repeated management and maintenance contacts to hold its Chapter accountable, to now say they are not responsible. (Plaintiff’s Second Amended Petition ¶ 38).

Defendant Sigma Chi voluntarily undertook a duty to Defendant Sigma Chi, Epsilon Phi members by having the “risk management” requirements for its chapters, dictated and mandatory policies for addressing risk violations, and risk monitoring. (Plaintiff’s Second Amended Petition ¶ 39). Defendant Sigma Chi assumed a duty to control Defendant Sigma Chi, Epsilon Phi members, particularly in the context of risk management by persistently involving itself in chapter operations and requiring frequent reporting on the state of the chapter. (Plaintiff’s Second Amended Petition ¶ 40).

The law imposes an obligation upon everyone who attempts to do anything, even if gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. (Plaintiff’s Second Amended Petition ¶ 41). The local chapter of Defendant Sigma Chi, Epsilon Phi has no independent governing body. (Plaintiff’s Second Amended Petition ¶ 42). It has college student members burdened with silly titles, but those Titles exist in name only. Id. The requirements for the positions, and the day to day activities of the persons put into those positions are dictated by Defendant Sigma Chi and subject to monitoring and punishment by Defendant Sigma Chi. Id. In addition, those positions change hands very frequently as they must be earned by time in the fraternity (meaning first and second year students are unlikely to hold the positions) and kids graduate out of the positions frequently. Id. Accordingly, the constant force behind the operations of the fraternity is Defendant Sigma Chi, has the power to dictate operations, and retains the power to close any chapter. Id.

Defendants’ website further states “**More than 255,000 living members** are the product of a story that has been building on itself since 1855 when seven college students found in themselves, and each other, an uncommon strength of character to pursue a dream — to enhance the leadership abilities of men by refining their character through the framework of Friendship, Justice and Learning — and pass that dream on to other young men who would carry it forward. (Plaintiff’s Second Amended Petition ¶ 43). **During our 164 years, Sigma Chi has initiated more than 350,000 men, and “**Sigma Chi stands committed to the education of our members — a commitment that does not end at graduation. By providing our members with world class educational opportunities, Sigma Chi is making a positive impact on campuses, communities and ultimately on the world. **“These statements tell Sigma Chi members that they are members of a national organization, not a local one.** Id.

A group of people could not claim they are a Defendant Sigma Chi fraternity without explicit approval. (Plaintiff’s Second Amended Petition ¶ 44). At all times relevant, Plaintiff J.P. Haring and Defendant Fred Lathan were members of the Defendant Sigma Chi Fraternity, Defendant Sigma Chi, Epsilon Phi chapter, and were also SEMO students. (Plaintiff’s Second Amended Petition ¶ 45).

Defendant Southeast Missouri State University (SEMO) is a public university located in Cape Girardeau, Missouri, in Cape Girardeau County (Plaintiff’s Second Amended Petition ¶ 17). SEMO advertises that it “offers [prospective freshmen] a challenging, future-focused college experience in a friendly, supportive environment.” (Plaintiff’s Second Amended Petition ¶ 18).

At all times relevant, Defendant SEMO managed, operated, and maintained the entire SEMO campus facility (Plaintiff’s Second Amended Petition ¶ 20). The “H Building” at 1000 Towers Circle, Cape Girardeau, MO 63701where the incident at issue in this matter occurred, is located on the Defendant SEMO campus and upon information and belief, is jointly managed, operated and maintained by Defendant SEMO and Defendant Sigma Chi, Epsilon Phi (Plaintiff’s Second Amended Petition ¶ 21). The location is called the Sigma Chi Housing Dormitory and is housed inside a Defendant SEMO residence hall. Id. At all times relevant, SEMO’s Office of Residential Life was an agency of or department within SEMO, and all its officers and employees, including but not limited to Residential Advisors (“RAs”), were working as employees and/or agents of Defendant SEMO (Plaintiff’s Second Amended Petition ¶ 22).

Regarding the “H” building, also known as “Sigma Chi,” housing, Defendant’s Office of Residential Life worked in conjunction with Greek Life personnel provided also by Defendant SEMO to manage, operate, and maintain the living space (Plaintiff’s Second Amended Petition ¶ 23). In turn, Greek Area Hall Director liaised with the fraternity, Defendant Sigma Chi, Epsilon Phi Chapter to further manage, operate and maintain the living space for the fraternity members (Plaintiff’s Second Amended Petition ¶ 24). Defendants Residential Advisors Isaac Strole and Greek Area Hall Director Holly Ritter were at all times herein employees of Defendant SEMO and reside in Missouri (Plaintiff’s Second Amended Petition ¶ 25).

Based on documents and evidence relating to Sigma Chi and it’s governance of its chapters, and relating to SEMO and its residence halls at all times relevant, Defendant Sigma Chi Fraternity managed, operated, administered, and maintained the Defendant Sigma Chi, Epsilon Phi Chapter and, in conjunction with Defendant SEMO, theSigma Chi Housing Dormitory located at the “H Building” at 1000 Towers Circle, Cape Girardeau, MO 63701 (Plaintiff’s Second Amended Petition ¶ 36-37).

Defendant Fred Lathan is an adult male who, at all times relevant herein, lived in Cape Girardeau, Missouri (Plaintiff’s Second Amended Petition ¶ 46-47). At all times relevant, Plaintiff and Defendant Lathan were roommates who resided together at Sigma Chi Housing Dormitory located at the “H Building” at 1000 Towers Circle, Cape Girardeau, Missouri 63701 (Plaintiff’s Second Amended Petition ¶ 48). Defendant Lathan was a student at SEMO and was a member of the Sigma Chi Fraternity (Plaintiff’s Second Amended Petition ¶ 49).

Plaintiff and Defendant Lathan joined Defendant Sigma Chi fraternity via Defendant Sigma Chi, Epsilon Phi Chapter and maintained their memberships through February 15, 2019 (Plaintiff’s Second Amended Petition ¶ 51). Plaintiff and Defendant Lathan both moved into H Building, located at 1000 Towers Circle, Cape Girardeau, Missouri 63701 (“Towers North”) (Plaintiff’s Second Amended Petition ¶ 52). H Building is a residence hall controlled by SEMO and supervised by agents of SEMO, including Residential Advisors, who are identified as Student Staff on page 11 in SEMO’s 2018-2019 Residence Life Handbook (“The Handbook”), and the Greek Hall Area Director (<https://semo.edu/pdf/ResLifeHandbook.pdf>) in conjunction with Defendant Sigma Chi and Defendant Sigma Chi, Epsilon Phi Chapter (Plaintiff’s Second Amended Petition ¶ 53).

The Residential Life Contract is a document given to students who live in the Defendant SEMO residence halls, including the one where Plaintiff and Defendant lived. Embedded in the Residential Life Handbook is the “Contract for University Housing, ” (“The Contract) (Plaintiff’s Second Amended Petition ¶ 54). It is, quite literally, a contract between Defendant SEMO and the students who live in residence halls, like Plaintiff and Defendant. This section of the handbook states “The housing contract is for one full academic year and is a legally binding document.” Id.

The contract enumerates the rights of students who live in the residence halls including, “The right to have guests,” “The right to rectify grievances,” “The right to be free of the fear of intimidation, physical and/or emotional harm, and “The right to sleep without undue noise interruptions from a roommate’s guests, etc.” (Plaintiff’s Second Amended Petition ¶ 55).

The contract further tells students that if they have a conflict, they should communicate about it (Plaintiff’s Second Amended Petition ¶ 56).The contract further states, “Residence Life staff will confront oppressive behavior in an appropriate manner, recognizing that education is our most powerful tool” and “Disruptive, dangerous, or violent behavior can result in permanent removal from the residence halls (Plaintiff’s Second Amended Petition ¶ 57). Examples of such behavior include, but are not limited to physical altercations, possession of a weapon, repeated policy violations and possession or sale of drugs… The possession or use of illegal drugs or drug paraphernalia may result in suspension from the University, removal from the residence halls, and suspension of other rights and privileges. Since the possession or use of illegal drugs is a violation of criminal law, it is possible for a violator to be subject to criminal action.” Id.

The Greek sections of the residence halls were a part of the residence halls and subject to the same contract: “Residents who chose to live in their organization’s on-campus space are living in a residence hall… While living in organizational housing, residents are expected to follow all organization housing policies, Residence Life policies, and the Student Code of Conduct.” (Plaintiff’s Second Amended Petition ¶ 58).“Assignment to Group/Greek Housing is for students affiliated with groups residing in the housing area. Students must be approved by the Greek chapter’s House Manager or the Greek Hall Director before they can move into a fraternity or sorority house. Space allocations vary and are based on the size and needs of each individual group/chapter. Students living in a theme community are assigned by the Office of Residence Life.  Housing contracts for members living in this area are completed with the Office of Residence Life and are legally binding agreements for the academic year.” (Plaintiff’s Second Amended Petition ¶ 59).

At all times relevant in this matter, Defendant Lathan and Plaintiff were assigned by Defendant Sigma Chi, Epsilon Phi Chapter to live in Greek housing within a Defendant SEMO’s residence hall (Plaintiff’s Second Amended Petition ¶ 60). Both Defendant Lathan and Plaintiff were subject to the legally binding housing contract (Plaintiff’s Second Amended Petition ¶ 61).

Defendant Lathan was known around campus to be extremely aggressive and confrontational (Plaintiff’s Second Amended Petition ¶ 62). Upon information and belief, Defendant Lathan had shown aggressive to other students and personnel in the residence hall (Plaintiff’s Second Amended Petition ¶ 63). Plaintiff and Defendant Lathan had an acrimonious relationship during their tenure as roommates in the Greek Life section of the residence hall prior to the February 15, 2019 assault (Plaintiff’s Second Amended Petition ¶ 67).

Both Plaintiff and Defendant Lathan notified agents of SEMO and agents of Defendant Sigma Chi, Epsilon Phi Chapter that they had a tense relationship and were not getting along as roommates prior to the assault (Plaintiff’s Second Amended Petition ¶ 68).Both Plaintiff and Defendant Lathan informed Defendant personnel that they were having problems getting along and **requested roommate changes** before the assault occurred and Defendant SEMO, and Defendant Sigma Chi, Epsilon Phi Chapter and its officials were unresponsive to their requests (Plaintiff’s Second Amended Petition ¶ 69). Prior to the assault, Defendant Lathan contacted SEMO’s Greek Area Hall Director, Holly Ritter, to notify her that he was angry with Plaintiff (Plaintiff’s Second Amended Petition ¶ 70).Ten days prior to the assault and pursuant with the policies articulated in SEMO’s Residence Life Contract, Plaintiff contacted SEMO’s Residential Advisor, Isaac Strole (Also Defendant Sigma Chi, Epsilon Phi Chapter personnel member), to inform him that Defendant Lathan used drugs in their room in violation of federal and state law, as well as in violation of the SEMO housing contract and Sigma Chi policy, and that Defendant Lathan was aggressive (Plaintiff’s Second Amended Petition ¶ 71). Plaintiff told Defendant Strole that he was so uncomfortable with Defendant Lathan’s behavior that **he wanted to be moved to a different room. According to the housing contract, Plaintiff had the right to have his request granted.** Id.

On February 3, 2019, at 10:54 AM, Plaintiff texted Defendant Strole asking if there was any way he could move rooms (Plaintiff’s Second Amended Petition ¶ 72). Defendant Strole responded saying, “Sorry bro there’s no other spots.” Id. He then offered to talk to Defendant Lathan about Plaintiff’s concerns. Id. Plaintiff responded, thanking Defendant Strole for his reply and saying, “I just work at 7 AM and have a 9 AM [class] and it’s almost like he tries to wake me up at 3 AM.” Strole replied, “Thanks for letting me know.” (Plaintiff’s Second Amended Petition ¶ 73).

Sometime prior to the assault described herein, Defendant Lathan posted a video to his Snapchat stating that anyone who accused him of misconduct was going to “get it.” Accordingly, Plaintiff felt unsafe in his dorm room (Plaintiff’s Second Amended Petition ¶ 74). Ten days after the text conversation between Defendant Strole and Plaintiff, at approximately 4:00 AM on February 15, 2019, Plaintiff and his girlfriend Casey Brogdon, who were asleep in the dorm, were awoken by Defendant Lathan and Defendant Lathan’s girlfriend, Haley Winston, when they were speaking loudly (Plaintiff’s Second Amended Petition ¶ 75). Plaintiff addressed the immediate situation as the housing contract told him to – by talking to Lathan. Plaintiff requested that Defendant Lathan keep the noise down because he had early morning classes, but Defendant Lathan refused (Plaintiff’s Second Amended Petition ¶ 76). To block out the loud noise of Defendant Lathan, Plaintiff turned on the television, but Defendant Lathan got up and turned the television off. Plaintiff then attempted to turn the television back on. (Plaintiff’s Second Amended Petition ¶ 77). The situation escalated. Id.

Defendant Lathan then aggressively approached Plaintiff, pushing up against him. Plaintiff, looking to de-escalate the situation, told Defendant Lathan to back off (Plaintiff’s Second Amended Petition ¶ 78). Defendant Lathan then struck Plaintiff in the face with his fist repeatedly (Plaintiff’s Second Amended Petition ¶ 79). Defendant Lathan’s physical contact was so hard that Plaintiff fell back on Brogdon. Id.

Plaintiff had contusions, blood on his face, and a head injury directly resulting from the assault. (Plaintiff’s Second Amended Petition ¶ 80). Plaintiff contacted police and SEMO’s Department of Public Safety arrived on the scene shortly after the assault (Plaintiff’s Second Amended Petition ¶ 81). Police gave Defendant Lathan a summons and notice to appear in Court for attempting to cause or recklessly cause physical injury, physical pain, or illness to Plaintiff (Plaintiff’s Second Amended Petition ¶ 82).

After reporting the assault to police and Defendants, Plaintiff faced retaliation in the form of name-calling and taunting from Defendant Sigma Chi, Epsilon Phi fraternity members and officers, calling him a “pussy” in group chats for reporting the assault. (Plaintiff’s Second Amended Petition ¶ 82).

In a text message between Plaintiff and Defendant Strole, Plaintiff notified Strole that he “wrote a police report because he [Defendant Lathan] assaulted me and Casey.” Defendant Strole attempted to stop him from filing a police report, responding, “Dude you don’t need to do that.” (Plaintiff’s Second Amended Petition ¶ 86).

1. **STANDARD OF REVIEW**

In Missouri, "[A] motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." City of Lake St. Louis v. City of O'Fallon, 324 S.W.3d 756, 759 (Mo. Banc 2010) (quoting Reynolds v. Diamond Foods & Poultry, Inc., 79 S.W.3d 907, 909 (Mo. banc 2002).) A court reviews the petition "in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." Id. *(*quoting Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 306 (Mo. banc 1993)). In so doing, a court takes a plaintiff's averments as true and liberally grants plaintiff all reasonable inferences. Id. at 909. It will not weigh the credibility or persuasiveness of facts alleged. Id.

1. **ANALYSIS**

Defendant Sigma Chi Fraternity moves to Dismiss Counts III, IV, VI, and Plaintiff’s Punitive damages claims in this case.

1. Count III

Defendant alleges that Count III of Plaintiff’s Second Amended Petition claiming negligence fails to state a claim for relief because Plaintiff has not properly pled that the Sigma Chi Fraternity is responsible for its local chapters. Defendant’s motion in this regard reads much more like an argument for summary judgment or a factual defense at trial than it does an argument on the pleadings in a motion to dismiss. Accordingly, Defendant’s argument is not proper at this point in the case. However, Plaintiff will gratuitously address the merits (or lack thereof) of Defendant’s allegation.

Defendant specifically argues that Plaintiff cannot prove the legal concept of “piercing the corporate veil,” but Defendant fails to acknowledge that the corporate veil theory is, but one legal theory supported in the pleading to show Defendant’s liability. Plaintiff plead several theories of liability against the Defendant in this case.

 Plaintiff specifically mentioned a piercing the corporate veil theory in Count III, with regard to liability for the national fraternity but it was not to be locked into that specific theory. Missouri is and has been for some time, a fact pleading state. Accordingly, Plaintiff need only plead facts to support legal theories and is not in any way obligated to name every legal concept in the pleading. As Plaintiff incorporated every line pled into every Count charged in this case, all the facts and statements in the pleading must be considered in their totality regarding which legal theories they support.

Accordingly, Plaintiff pled several ways that Sigma Chi Fraternity had a duty to Plaintiff in this case. One way, as Defendant states, was that Defendant is liable under the piercing the corporate veil theory. But that is not the only theory of liability that Plaintiff pled for Defendant Sigma Chi Fraternity. Plaintiff also pled facts to support a theory of vicarious liability, voluntary undertaking, and apparent authority. In fact, Plaintiff pled copious facts to support Sigma Chi’s duty and responsibility in this case by alleging that Sigma Chi:

* Provided memberships in the international fraternity to both Plaintiff and Defendant Lathan (Plaintiff’s Second Amended Petition ¶ 28, 45)
* Authorized the creation of the local fraternity chapter. (Plaintiff’s Second Amended Petition ¶ 27).
* Through all appearances there is no difference between the National and local fraternity. (Plaintiff’s Second Amended Petition ¶ 29).
* The National Fraternity has complete control of the local fraternity including control over:
	+ How to operate
	+ The policies that must be utilized
	+ The standards that must be followed
	+ How to get new members
	+ How and when to discipline members
	+ How to market themselves
	+ How to structure their organization
	+ Makes, enters into and holds contracts for the chapter – including housing contracts such as the one at issue in this case.
	+ How to keep operating for longevity
	+ Collects payments from members
	+ Sets all rules for the Chapter
	+ Provides all training and governing materials to Chapters
	+ Dictates appropriate behavior to the members
	+ Controls all risk management for the chapters(Plaintiff’s Second Amended Petition ¶ 29, 36, 41)
* The local fraternity does not exist as any separate corporate entity and is wholly subsumed by the national fraternity. (Plaintiff’s Second Amended Petition ¶ 32)
* There is no real governance at a local level because the “governors are students and therefore only available for short periods of time. Therefore, all actual and complete governance comes from the National Fraternity. (Plaintiff’s Second Amended Petition ¶ 33, 34, 36)
* Based on all of the above, at all times relevant, Defendant Sigma Chi Fraternity managed, operated, administered, and maintained the Defendant Sigma Chi, Epsilon Phi Chapter and, in conjunction with Defendant SEMO, theSigma Chi Housing Dormitory located at the “H Building” at 1000 Towers Circle, Cape Girardeau, MO 63701. (Plaintiff’s Second Amended Petition ¶ 37)
* Accordingly, it strains credulity to suggest that Defendant Sigma Chi, having assumed the obligation of repeated management and maintenance contacts to hold its Chapter accountable, to now say they are not responsible. (Plaintiff’s Second Amended Petition ¶ 38)
* Defendant Sigma Chi voluntarily undertook a duty to Defendant Sigma Chi, Epsilon Phi members by having the “risk management” requirements for its chapters, dictated and mandatory policies for addressing risk violations, and risk monitoring. (Plaintiff’s Second Amended Petition ¶ 39)
* Defendant Sigma Chi assumed a duty to control Defendant Sigma Chi, Epsilon Phi members, particularly in the context of risk management by persistently involving itself in chapter operations and requiring frequent reporting on the state of the chapter. (Plaintiff’s Second Amended Petition ¶ 40)
* The law imposes an obligation upon everyone who attempts to do anything, even if gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. (Plaintiff’s Second Amended Petition ¶ 41).
* The local chapter of Defendant Sigma Chi, Epsilon Phi has no independent governing body. It has college student members burdened with silly titles, but those titles exist in name only. The requirements for the positions, and the day to day activities of the persons put into those positions are dictated by Defendant Sigma Chi and subject to monitoring and punishment by Defendant Sigma Chi. In addition, those positions change hands very frequently as they must be earned by time in the fraternity (meaning first and second year students are unlikely to hold the positions) and kids graduate out of the positions frequently. Accordingly, the constant force behind the operations of the fraternity is Defendant Sigma Chi, has the power to dictate operations, and retains the power to close any chapter. (Plaintiff’s Second Amended Petition ¶ 42)
* Defendants’ website further states “**More than 255,000 living members** are the product of a story that has been building on itself since 1855 when seven college students found in themselves, and each other, an uncommon strength of character to pursue a dream — to enhance the leadership abilities of men by refining their character through the framework of Friendship, Justice and Learning — and pass that dream on to other young men who would carry it forward. (Plaintiff’s Second Amended Petition ¶ 43)

**During our 164 years, Sigma Chi has initiated more than 350,000 men, and “**Sigma Chi stands committed to the education of our members — a commitment that does not end at graduation. By providing our members with world class educational opportunities, Sigma Chi is making a positive impact on campuses, communities and ultimately on the world.”

**These statements tell Sigma Chi members that they are members of a national organization, not a local one.**

* A group of people could not claim they are a Defendant Sigma Chi fraternity without explicit approval. (Plaintiff’s Second Amended Petition ¶ 45)

All the above, is pleading *in excess* to show how the National fraternity is responsible for the local chapter.

Liability can arise under several different theories for companies that have a parent-subsidiary relationship as Sigma Chi does. Missouri does not have a special theory of franchisor liability or any law specific to fraternities. J.M. v. Shell Oil Co*.,* 922 S.W.2d 759, 765 (Mo. banc 1996). "[T]he general rules of agency and tort provide adequate guidance for vicarious liability." Id*.* Accordingly, to analyze Sigma Chi’s responsibility for anything that its chapter may have responsibility for, one must only look at the general rules of agency and tort.

Here, national Sigma Chi, as shown above, is vicariously liable for its Chapters: “The supreme test in determining whether vicarious liability applies to a tort is whether the person [in this case, National Sigma Chi] sought to be charged as master had the right or power to control and direct the physical conduct of the other [in this case, the Chapter] in the performance of the act. Balderas v. Howe, 891 S.W.2d 871, 873-874 (Mo.App.W.D.1995).

Here, as pled in the petition *ad nauseum*, National Sigma Chi maintains complete control over every aspect of the Chapter from governance to day-today operations policies to risk management to contracts. Agreements between the national fraternity and the Chapter visible on the internet reveal an extreme level of control that the national fraternity exerts over the Chapter.

In addition, because National Sigma Chi directly holds memberships, takes dues, and holds contracts for the chapters, such as the housing contract at issue in this case, there is a strong argument here that they are directly liable even without vicarious liability. Nevertheless, the are also liable through vicarious liability. Accordingly, if the Chapter is liable in this case, Sigma Chi National is also liable.

In Count III Plaintiff pled negligence. To prove negligence in Missouri, a Plaintiff must plead and prove the following:

1. legal duty on the part of the defendant to conform to a certain standard of  conduct to protect others against unreasonable risks; (2) a breach of that duty; (3) a proximate cause between the conduct and the resulting injury; and (4) actual damages to the claimant's person or property.

Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc., 700 S.W.2d 426, 431 (Mo.banc 1985).

Generally, businesses do not owe a duty to prevent harm due to the criminal acts of third parties on their property. Wieland v. Owner-Operator Servs., 540 S.W.3d 845, 848 (Mo.banc 2018). However, the Missouri Supreme Court has carved out two exceptions to the rule. The first, and relevant one here, is if that business (such as a fraternity) knows or has reason to know that the third party has harmed or is about to harm. Here, both Plaintiff and Defendant Lathan complained to the fraternity that tensions were escalating between them. In addition, Plaintiff told Isaac Strole, an Officer of the Sigma Chi Fraternity that Defendant Lathan was using drugs and acting aggressively toward him and he wanted to move away from him. So, Defendant fraternity had actual notice that Lathan was aggressive, using drugs, and was likely to harm Plaintiff. This fits squarely into the exception that creates a duty for the chapter and the national fraternity. Defendant challenges only the duty owed and not any of the other prongs of the test, but those are met in this case as well.

The facts pled in the Second Amended Petition also support that Defendant Sigma Chi was responsible through a veil piercing theory which, like vicarious liability requires a fact-specific showing that the parent company has control over the subsidiary. Plaintiff has shown that above.

The facts also support that Defendant Sigma Chi is responsible through a Voluntary Undertaking theory. Missouri recognizes that even if a company would not otherwise have a duty, that duty may be assumed or undertaken and once that happens, the company must exercise reasonable care in exercising that duty. Doe v. Ozark Christian Coll., 579 S.W.3d 220 (Mo. App. S.D. 2019).

Here, National Sigma Chi has taken on the duty of training, risk management, advertising, policy making, discipline, membership rules and contracts for its Chapters. Accordingly, it has a duty to exercise reasonable care in performing those duties. As shown above, despite National Sigma Chi’s attempts to train, set policies and then advertise to the world that its fraternities are safe and Christian and form young men, it has been negligent in that training, prevention in misrepresenting those claims. This is because the evidence really shows that the fraternity promotes a culture of drug use, aggressiveness and retaliatory conduct. Facts in this case reveal that even the adult advisors assigned to chapters criminally provide alcohol to minors. Accordingly, National Sigma Chi is directly responsible for negligence in this case.

Lastly, the facts pled in Plaintiff’s petition support that Defendant Sigma Chi is responsible through an apparent authority theory. "When a principal cloaks his agent with apparent authority, the principal can be vicariously liable to wronged third parties even when the agent acts wholly out of personal motive or with the purpose of defrauding his principal and even when the principal is innocent and deprived of any benefit." Pitman Place Dev., LLC v. Howard Invs., LLC, 330 S.W.3d 519, 528 (Mo. App. E.D 2010).

Sigma Chi forces every Chapter to use its branding, logo, materials, advertising, training and more. Members who travel to visit other Universities know they can stop in at other Sigma Chi Fraternities and be welcomed as brothers. Sigma Chi goes to great lengths to make it look like every Chapter is the same in policies, pledges, membership, rules, discipline, creed, and governance. When a student signs up to be a Sigma Chi member, that student has no idea that Sigma Chi considers it to be separate from the national fraternity and that the national fraternity would disown it at the first sign of trouble. In fact, Sigma Chi purposely bolsters the legitimacy of the chapters by hiding any separation from them. To students and their parents, it is Sigma Chi, a national adult run legitimate organization and that is by design. It is not presented to students and parents who often pay for those students as a fly by night local group of kids led by a guy who goes by the nickname “Rage.” Accordingly, Sigma Chi has created an apparent authority situation for itself. Accordingly, it is liable for activities in the Chapters. Any other finding would be unjust.

Defendant argues non-precedential out-of-state law that is inapplicable to this case but fails to address or even mention any of the above law in its motion. Moreover, as Defendant is quick to point out that in another of Plaintiff’s Counsel’s cases in Adair County Missouri, Plaintiff lost some claims at the Circuit Court level (as if that is somehow precedential here), Defendant fails to mention that Counsel won readily on this issue against another fraternity because the law is clear in Missouri. (It also appears that Defendant copied from the fraternity’s pleading in that case as they cited the same case in the exact same improper way in their motion. Defendant, like the fraternity in the Adair County case Bottorff-Arey et al v. Truman State University and AKL, et al, (Adair County Case No.: 19AR-CV00792), cited Lipp v. Ginger C, LLC which was a Federal Court case from the Western District of Missouri which does not appear to make any statement of law remotely close to Defendant’s statement that it stands for the proposition that a national fraternity owes no duty to its local chapters. *See* Lipp v. Ginger C, LLC, 229 F.supp 3d 1018 (WDMO 2017)(regarding a motion in limine discussing the introduction of intoxication evidence at trial). A PACER search of Lipp v. Ginger C LLC, shows an order by the District Court dismissing a National Fraternity because “Plaintiffs have not alleged a claim against [the National Fraternity] in any complaint. They have further not alleged a negligence claim against PKP Chapter stemming from PKP Chapter’s failure to train, failure to follow fraternity policy, or provision of alcohol at the rush party.” Lest there be any confusion, the Federal Court in Lipp was not stating that the Plaintiff mis pled, but that they did not make a pleading in this regard at all. This is not applicable to the present case. It is false to claim that this order of the cited case stands for the proposition that “Missouri law does not recognize a duty by a national fraternity to supervise the activities of its local chapters.” **Defendants here, like Defendants in the Adair County case, should be cautioned in making a material misrepresentation of law to the Court).**

As Defendant’s Motion to dismiss in this regard has no merit it should be denied.

1. Count IV

In Defendant’s next portion of its Motion to Dismiss, Defendant Sigma Chi argues that Count IV, assault and battery under a vicarious liability theory should be dismissed because Plaintiff cannot show vicarious liability for the fraternity. Plaintiff explained above in significant detail the facts pled to show that National Sigma Chi is vicariously liable for its Chapters. Accordingly, here, Plaintiff must only show that the chapter is liable for its members.

Defendant cites State ex rel Ford Motor Company v. Bacon, 63 S.W.s3 641, 642 (Mo banc 2002) for the agency principles. This case states the following elements for an agency relationship: “[1)]that an agent holds a power to alter legal relations between the principal and a third party; Restatement (Second) of Agency sec. 12; [2)]that an agent is a fiduciary with respect to matters within the scope of the agency; Restatement (Second) of Agency sec. 13; [and] 3) that a principal has the right to control the conduct of the agent with respect to matters entrusted to the agent; Restatement. Id.

Here, the fraternity held the power to alter all legal relations regarding membership in the fraternity and its member’s relationships with third parties. Defendant Lathan would not have been allowed to go around making legal relationships on behalf of the fraternity. For example, the residence hall contract between that allowed Sigma Chi and SEMO to jointly run the Tower H residence hall was made by Sigma Chi and SEMO and as a fraternity member and student, Lathan was required to abide by it, Lathan did not have the power to alter it. He did not have the power to go make a separate contract with SEMO alone to live in that Greek residence hall and he could not refuse the agreement and still live there. Accordingly, this element is met.

Next, the agent, in this case, Defendant Lathan is a fiduciary with respect to all maters within the scope of the agency. Here, the scope of the agency is membership in and residence in the fraternity and fraternity housing. In other words, Lathan, by virtue of agreeing to be a member in the fraternity and follow the fraternity pledge, policies and rules and be subject to the fraternity’s discipline, is a fiduciary with regard to being a member of the fraternity and living in the fraternity’s residence hall.

Lastly, a principal has the right to control the conduct of the agent with respect to matters entrusted to the agent. Here, the principal, Sigma Chi maintained the ability to control the members of the fraternity living in the fraternity residence hall. They did this by having and enforcing rules and regulations for being a member in the fraternity and living in the fraternity housing.

Defendant argues that there can be no agency relationship between Lathan and the fraternity because there was no mutual consent to the agency, but this is factually inaccurate. Lathan consented to be a member of the fraternity and the fraternity consented to accept him as a member. That came with all the baggage of the law – rules, policies, supervision, and liability. Defendant writes as if to have agency liability one must directly consent to be liable. That is not how the law works. Nothing in Missouri law requires us to make interpretations of law that are non-sensical. The consent element merely means the parties consented to be in an agency relationship – which they did here through membership and all the responsibilities, explained above, that Sigma Chi took on when providing that membership for a fee, of course.

Defendant Lathan committed the assault in question here within the course and scope of his fraternity membership. Defendant Lathan was living in Sigma Chi Housing with another fraternity member and interacting with another Sigma Chi fraternity member. That is the entire course and scope of fraternity membership– to live and interact with other members.

Additionally, facts pled in the petition show that the fraternity encouraged and supported drug and aggressive culture during fraternity membership. (Plaintiff’s Second Amended Petition ¶ 66). Lathan’s behavior was merely an extension of that as well. In addition, the support of aggressive and deviant culture at the fraternity, coupled with the fraternity officers’ behavior in criticizing and retaliating against Plaintiff (by terminating his membership from the fraternity) for reporting the incident to the police shows clearly that the fraternity supported and ratified the conduct. There is no “furtherance of the business” for fraternities other than contributing to the culture that the fraternity creates. This fraternity created a culture of drug use, physical aggressiveness, and calling people highly gendered names questioning their sexuality when they refused to project those traits. Accordingly, Lathan’s behavior was squarely in the scope of the fraternity’s business.

1. Count VI

In Count VI Plaintiff pled that Defendant violated the Missouri Merchandising Practices Act. “We acknowledge that  a claim alleging violations of the MMPA need not be stated with the same particularity as a claim of common law fraud or mistake.” Gardner v. Bank of Am., N.A., 466 S.W.3d 642, 648(Mo.App.E.D.2015). To plead a violation of the MMPA, a Plaintiff must plead that:

(1) the defendant used or employed a deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or a concealment, suppression, or omission of a material fact; (2) the fraudulent act occurred in connection with the sale or advertisement of merchandise in trade or commerce; (3) the fraudulent act resulted in an ascertainable loss of money or property; and (4) the loss occurred to a person who purchased or leased [\*\*10]  merchandise primarily for personal, family, or household purposes. Sections 407.020-.025; Edmonds v. Hough, 344 S.W.3d 219, 223 (Mo. App. E.D. 2011).

Id. Here, Plaintiff pled that the Defendant used or employed deception, fraud or false pretenses false promise, misrepresentation, unfair practice, or a concealment, suppression, or omission of a material fact; in paragraphs 142, 143, 152, and 153. Plaintiff pled that Defendant Sigma Chi promised that members would “assume leadership roles and responsibilities,” be in an environment where members are taught positive social skills and self-restraint, be “safe from the moment they are recruited,” be supported in a safe environment, the would be provided with a course of action, resources and/or intervention in the event of roommate disputes or unsafe situations.

Plaintiff further pled that these promises were made in conjunction with the sale of merchandise – namely a fraternity membership. Plaintiff pled that the fraudulent act led to a loss of money – namely that Plaintiff was injured and suffered economic losses. Lastly, Plaintiff pled that the loss occurred to Plaintiff who purchased his fraternity membership for his own personal use. Accordingly, Plaintiff successful pled all the elements of an MMPA claim in Count VI.

Defendant’s main argument against this claim is that “Plaintiff’s MMPA allegations against International Fraternity in this case are exactly the same allegations which were attempted by Plaintiff’s counsel in *Melissa Bottorff-Arey (sic)* and which the Court rejected as insufficient to state a claim under Missouri law. Apparently, Defendant feels so strongly about this argument that counsel put it in all bold. Unfortunately, Counsel for Defendant should again be cautioned about making misrepresentation to this Court. Plaintiff’s claim the Bottorff-Arey et al v. Truman State University and AKL, et al, (Adair County Case No.: 19AR-CV00792) case was different factually than the allegations here. The biggest difference is that in this case, there was an actual contract that contained some of the promises pled. Accordingly, whereas the Defendant fraternity in the Adair County case could simply argue that the statements made on websites were merely aspirational, here some of these promises were made in a legally binding contract.

Moreover, in much of Sigma Chi’s marketing materials they literally use language such as “we promise,” and “This is our commitment” and “We pledge.” Accordingly, the language is very different than the aspirational language in the Adair Count case. Sigma Chi’s very motto is “Expect more” implying that its statements are commitments rather than puffery.

Certainly the promise in the residential housing agreement for a trident to live in the Sigma Chi Dorm that students would be provided with a course of action, resources and/or intervention in the event of roommate disputes or unsafe situations is actionable under the MMPA and did not exist in the Adair County case. It is a specific and measurable claim made in a legally binding contract. Accordingly, Defendant’s Motion to Dismiss Count VI should be denied.

1. Punitive Damages

It is interesting that Defendant Sigma Chi chooses to challenge punitive damages in this case with an argument that Plaintiff failed to plead facts showing that Defendant willfully, wantonly, intentionally, or recklessly injured the plaintiff. Despite facts pled showing the drug and abuse culture in the fraternity, the punishment meted out to Plaintiff for reporting the assault, the glorifying of toxic masculinity in officer nicknames like “rage,” and in cutting Plaintiff down by calling him a “p—sy” for being punched, Defendant seeks to challenge this issue in particular.

The Pleading speaks for itself in this regard. Even at the most basic level, Plaintiff pled that he gave actual notice to Defendant that an assault was likely to occur, he asked Defendant to fulfil its contractual obligation to work to assist him with this issue, and Defendant failed to act. This is at least reckless and likely meets the threshold of an intentional failure. Then, adding in the aiding and encouraging of aggressive behavior from fraternity members and officers and it certainly meets the threshold of willful, wanton, intentional and reckless. Then, on top of that, add in the layer of the officers of the fraternity retaliating against Plaintiff for reporting the injury and the behavior is beyond warranting punishment via punitive damages, it is quickly approaching criminal – i.e. victim tampering, and obstruction of justice.

1. **CONCLUSION**

As none of Defendant’s arguments have merit, Defendant’s Motion to Dismiss should be denied.

Dated: September 3, 2020

 Respectfully submitted,

 */s/ Nicole E. Gorovsky*

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 3rd day of September 2020, the foregoing was filed electronically with the Clerk of Court, therefore, to be served electronically by operation of the Court’s electronic filing system to the following attorneys for Defendants:

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