No. 120951 (cons. with No. 120967 and No. 120986)

In the

Supreme Court of Illinois

GARY L. BOGENBERGER, as special administrator of the Estate of David Bogenberger, deceased,

Plaintiff-Appellant,

vs.

PI KAPPA ALPHA CORPORATION, INC., a corporation; PI KAPPA ALPHA INTERNATIONAL FRATERNITY, an unincorporated association; and ALYSSA ALLEGRETTI; JESSICA ANDERS; KELLY BURBACK; CHRISTINA CARRISA; RAQUEL CHAVEZ; LINDSEY FRANK; DANIELLE GLENNON; KRISTINA KUNZ; JANET LUNA; NICHOLE MINNICK; COURTNEY ODENTHAL; LOGAN REDFIELD; KATIE REPORTO; TIFFANY SCHEINFURTH; ADRIANNA SOTELO; PRUDENCE WILLRET; KARISSA AZARELA; MEGAN LEDONE; NICHOLE MANFREDINI; JILLIAN MERRIL; and MONICA SKOWRON,

Defendants-Appellees,

(CAPTION CONTINUED ON INSIDE COVER)

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-15-0128.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2013 L 1616.
The Honorable **Kathy M. Flanagan**, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT

(Reply to briefs of national fraternity and non-members)

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and

ETA NU CHAPTER OF PI KAPPA ALPHA INTERNATIONAL FRATERNITY AT NORTHERN ILLINOIS, an unincorporated association; ALEXANDER M. JANDICK, individually and as an officer of ETA NU CHAPTER OF PI KAPPA ALPHA INTERNATIONAL FRATERNITY AT NORTHERN ILLINOIS UNIVERSITY; JAMES P. HARVEY, individually and as officer of PI KAPPA ALPHA ETA NU CHAPTER; OMAR SALAMEH, individually and as an officer of PI KAPPA ALPHA ETA NU CHAPTER; PATRICK W. MERRILL, individually and as an officer of ETA NU CHAPTER OF PI KAPPA ALPHA FRATERNITY AT NORTHERN ILLINOIS UNIVERSITY; STEVEN A. LIBERT, individually and as an officer of PI KAPPA ALPHA ETA NU chapter; JOHN HUTCHINSON, individually and as an officer of PI KAPPA ALPHA ETA NU chapter; DANIEL BIAGINI, individually and as an officer of PI KAPPA ALPHA ETA NU chapter; MICHAEL J. PHILLIP, Jr.; THOMAS F. COSTELLO; DAVID R. SAILER; ALEXANDER D. RENN; MICHAEL A. MARROQUIN; ESTEFAN A. DIAZ; HAZEL A. VERGARALOPE; MICHAEL D. PFEST; ANDRES J. JIMENEZ, Jr.; ISAIAH LOTT; ANDREW W. BOULEANU; NICHOLAS A. SUTOR; NELSON A. IRIZARRY; JOHNNY P. WALLACE; DANIEL S. POST; NSENZI K. SALASINI; RUSSELL P. COYNER; GREGORY PETRYKA; KEVIN ROSSETTI; THOMAS BRALIS; and PIKE ALUM, L.L.C.,

Defendants.

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Defendants-Appellees,

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ETA NU CHAPTER OF PI KAPPA ALPHA INTERNATIONAL FRATERNITY AT NORTHERN ILLINOIS, an unincorporated association; *et al.*

Defendants.

REPLY BRIEF OF PLAINTIFF-APPELLANT GARY L. BOGENBERGER, special administrator of the Estate of David Bogenberger, deceased

(Joint Reply to briefs of national fraternity and non-members)

I. The national fraternity controlled pledging, knew the dangers of incorporating hazing into pledging, and specifically encouraged Mom and Dad's Night. Its control and its explicit and implicit encouragement of hazing supply the basis for recognizing a duty.

Information outside the complaint

Pi Kappa national fraternity's brief cites a deposition taken of a national officer, with argument that there was no *evidence* the national knew of or encouraged Mom and Dad's Night. National br. at 8-10. However, plaintiff appeals from a dismissal under Section 2-615. Consequently the complaint is the only proper source of facts. That part of their brief should therefore not be considered.

The national similarly emphasizes documents that plaintiff's counsel obtained. Nat. br. at 6-7, 35. It does not cite record pages because those documents are not part of the record. Given that this matter is at the pleading stage[1], those documents would not have been filed. Reference to documents not in the record cannot support Pi Kappa's arguments.

Although not explicitly saying so, the national implies that if those documents did not produce facts supporting the complaint, there could never be any additional information. However, there is no reason to conclude that the absence of supporting information in those documents means no such information will be unearthed when parties and witnesses, including those with knowledge of prior events, are deposed.

[1] As noted in the main brief, the court barred all discovery but for one deposition, after defendants' strenuous opposition.

Factual misstatement

Pi Kappa says plaintiff alleged only that David Bogenberger and the other pledges "believed" participation in Mom and Dad's Night was required for membership. Nat. br. at 14. That is not correct. To the extent it matters, plaintiff alleged the fraternity told pledges that participation was a condition for membership. Pl. br. at 19; App. to main br. at A21 (¶5). Even the national acknowledges at page 20 that the fraternity told pledges the event was mandatory.

Argument

Introduction

Plaintiff reasoned that responsibility for the consequences of fraternity hazing should extend upstream to all in the organization who enabled, encouraged, and ultimately benefitted from hazing. The national fraternity says it did none of those things and even if it did, it should not ultimately be legally responsible because it did not control its pledging process. It instead points the finger of blame at its chapter and members.

Pi Kappa claims plaintiff's allegations that it is responsible for the conduct of its members are "logically-incredulous" because the member conduct at issue flies in the face of its internal rules. In its view, its rule puts an end to any need for further inquiry about its role in hazing. Nat. br. at 19. But even a cursory search of the literature or fraternity websites shows

almost every fraternity has such bans, yet hazing remains a problem.[2] That alone strongly suggests that a rule should not be sufficient to allow national organizations to wash their hands of what occurs at their chapters.

The national instigated this event.

A central allegation is that the national encouraged chapters to hold this pledge event, Mom and Dad's Night, because it believed such events resulted in increased member retention. App. to main br. at A14 (¶10 (f)). The complaint alleges national fraternity employees told members such nights were good for pledge and member retention and encouraged such events *as part of the pledging process.* App. at A4 (¶2). Finally, plaintiff charged that the national allowed pledge events which required consumption of dangerous levels of alcohol. App. at A14 (¶10) (a).

Pi Kappa says it does not have to address the allegation that such nights were used for member retention because the complaint does not offer "support". Nat. br. at 28. Defendants do not get to pick and choose which allegations they believe are valid and which are not. As to "support", that comes after the pleading stage. Pleading evidence is premature. *Handler v. Illinois Cent. R. Co.*, 207 Ill. 2d 331, 348, 798 N.E.2d 724, 733 (2003).

If a jury ultimately determines those allegations to be true[3], it cannot be correct to say that the choice to hold this pledge hazing event was solely a

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[2] For example, see *Lawsuit: Lake Zurich hazing*, Chicago Tribune, Sec. 1, p. 8 (2/2/17) (high school hazing story); *Northwestern's fraternity system faces crisis*, Chicago Tribune, http://www.chicagotribune.com/news/local/breaking/ct-northwestern-university-fraternity-suspend-met-20170217-story.html (2/21/17).

"local decision". Nat. br. at 20. As described in plaintiff's main brief, the national's "rule" against such hazing should not shield it from legal responsibility where the custom and practice of holding such pledge hazing events is not only known to the national but encouraged by it. Pl. main br. at 20-21, citing *Hamrock*. The national does not explain why that reasoning and that authority are not correct.

In the same vein, plaintiff also alleged that Mom and Dad's Night is a common pledging activity at this national's chapters. App. at A4 (¶1). That is relevant when weighing the extent of the national's involvement because plaintiff also alleged that the national sends chapter consultants to garner detailed knowledge about each chapter's conduct. App. at A11 (¶3). The consultants analyze all aspects of chapter performance. *Id.* From such visits and the fact that this event was common nationally, a jury could find that Pi Kappa knew or should have known their NIU chapter had no risk awareness program, the program addressing hazing. *Id.*

As plaintiff noted in his main brief, the consultants advised Pi Kappa that Eta Nu had a reputation as a fraternity of meatheads. *Id.* Because this was alleged to have been a national annual event and because consultants are almost always alumni, it is reasonable to presume the consultants were aware of the event's history. Given that history and the chapter's reputation, surely they should have known to ask if the chapter was planning to continue

[3] The bar on discovery prevented plaintiff's counsel from learning precisely what national representatives told local chapters.

the event. From that, a jury could conclude that despite Pi Kappa's protests, it knew or should have known of this event.

That is relevant because actual or implied knowledge of hazing is often a significant factor in determining whether to impose a duty on the national. *Krueger v. Fraternity of Phi Gamma Delta, Inc.*, 004292G, 2001 WL 1334996, at *2 (Mass. Super. May 18, 2001). For example, reasoning that a principal should have known of an event because it had been taking place over years was at the core of finding a duty in a Section 1983 case. *Hilton by Hilton v. Lincoln-Way High School*, 97 C 3872, 1998 WL 26174 at *5 (N.D. Ill. 1998).

Pledging and hazing are coexistent.

Pi Kappa says it could not benefit from hazing even if it benefits from pledging and membership. However, it reaches that conclusion only by separating hazing from pledging, after accusing plaintiff of conflating the two. Nat. br. at 19. But fraternity hazing does not exist separately from pledging – an event does not stop being part of pledging and instead become hazing only when physical or emotional harm emerges.

The national offers no legal support for its contention. Plaintiff, on the other hand, pointed to articles discussing pledging and hazing and the articles cited below show the same. The two do not independently exist; a literature search will show that any discussion of pledging inevitably includes hazing.

There is no consensus that national fraternity organizations owe no duty to pledges.

As to whether national fraternities should bear responsibility for the conduct of their members, there is no national consensus, contrary to the fraternity's claim. Nat. br. at 21. For example, a Louisiana court found a national owed a duty to its pledges in a factually similar scenario. *Morrison v. Kappa Alpha Psi Fraternity*, 31,805 (La. App. 2 Cir. 5/7/99), 738 So. 2d 1105, 1117–20.

The *Morrison* court first noted that the national fraternity was aware of prior hazing. Pi Kappa's encouragement of hazing here, where the hazing event was a recurring national event, is the equivalent of the national's knowledge in *Morrison*. That court then noted the same hierarchical system as in this case, with control vested at the top and regional officers charged with auditing chapters, much like chapter consultants here. The national there also had antihazing rules.

Finally, the *Morrison* court noted there was no alumni advisor, in violation of fraternity regulations. That is analogous to the allegation here that Pi Kappa failed to ensure that its NIU chapter had a functioning risk education program (the program used to address hazing) despite knowing through its consultants that this chapter had not had such a program for three years. App. at A15 (¶10 (h)).

The *Morrison* court found that the national fraternity owed a duty to the pledge, and that supports plaintiff's position here.

That court did go on to find that the national was not vicariously liable for the conduct of the fraternity president in battering a pledge at a secret unscheduled meeting. *Id.* at 1120. That part of the holding is inapposite because this event was historical rather than secret and, more importantly, Pi Kappa, whether explicitly or implicitly, endorsed and encouraged the event.

The national controlled its chapter's activities.

Pi Kappa refers to the scope of its control and authority in arguing against both vicarious and direct liability. The cases similarly often do not distinguish between the two grounds for liability. Plaintiff will therefore discuss control generally.

The question of how much and what kind of general control is sufficient to impose a duty on a national fraternity was analyzed at length in *Brown v. Delta Tau Delta*, 2015 ME 75, ¶¶ 12-14, 118 A.3d 789, 792–93. The incident at issue was a sexual assault related to intoxication, but its duty analysis is pertinent to every fraternity misconduct case. That court looked to the national's control as well as knowledge either that inappropriate behavior was occurring or that the chapter was not following its risk management policies. *Id.*

Brown first cited favorably to *Morrison*, noting such cases illustrate that the inquiry as to the existence of a duty is fact intensive. That is in accord with plaintiff's position here. This case is still at the pleading stage

and the dispositive facts are solely in defendants' hands, a factor that should be part of the equation used to evaluate the sufficiency of plaintiff's claim.

The *Brown* court pointed to its roots, having recognized long ago that sexual assaults were foreseeable in a dormitory. Nothing in the interim suggested such events had become less foreseeable. Allowing a group of young persons control over a residence where alcohol-related parties are held presents the potential for such misconduct. A national fraternity knows or should know that social events in a building housing a chapter present the potential for sexual assault, particularly where alcohol consumption is an integral part of the event. As in this case, the national's rules against such activities established its awareness of the dangers of alcohol, including assault. The court concluded such fraternity policies make little sense unless such activities were foreseeable to the national.[4] *Id.* at 794.

The national fraternity there required local chapters to address risk management plans and implement the national's alcohol education program. *Id.* Members had to sign a national code. Here, the fraternity's website says members must sign an agreement not to haze. Pikes.org/faq (last visited 12/6/16). Each chapter in *Brown* had an alumni adviser and a chapter consultant who visited once a semester and reported potential violations, mirroring the process here. *Id.* at 795.

[4] Its own history shows this fraternity had to have knowledge of systemic fraternity problems including hazing. Every incident noted is supported with a footnote. Wikipedia.org/wiki/Pi_Kappa_Alpha (last visited 2/15/17).

The national there had a process for disciplining members and broad authority to impose sanctions, including revoking a charter or suspending members. The court said the national did more than simply suggest conformity with its rules; it enforced its rules through constant monitoring, oversight, and intervention (presumably referring to the consultants because the record contained nothing else about that). *Id.* The court found that the fraternity's system meant the national reached into the day to day affairs of its chapter, creating a mutually beneficial relationship, the same kind of relationship plaintiff described here. Pi Kappa's national body possesses similar powers and has a similar structure. Pl. main br. at 9; R. C3829 (Risk Awareness Committee); C3858 (Risk Awareness Handbook); C3861 (Risk Committee); C3949 (Chapter Codes).[5]

Morrison was also a factor in a court's decision to place a duty on the national in *Alexander v. Kappa Alpha Psi Fraternity, Inc.*, 464 F. Supp. 2d 751, 755–56 (M.D. Tenn. 2006). *Alexander* first noted that other courts recognized a distinction between headquarters who knew hazing was taking place and those who did not. It then pointed to two cases where the fraternity knew about hazing. In each, those courts pointed to evidence that the fraternity failed to enforce its anti-hazing policy and that the national controlled the process by which new members joined chapters and as such possessed some control. *Id.* at 756.

[5] More legible copies can be found on the fraternity website – pikes.org.

Alexander also cited another case noting that a national is in a sense responsible for all that goes on in its chapters because it has the right to control intake and expel or suspend members. Despite the national's longstanding and explicit prohibitions against hazing, the *Alexander* court found that the national owed a duty. The fraternity knew of the existence of someone identified as an underground perpetrator and was on notice that hazing might have been occurring, and had a duty to prevent hazing injuries. *Id.* Even though the national there actually investigated, the court still found that it might have breached its duty by failing to adequately investigate.[6] The same logic should apply here where plaintiff alleged the national not only knew of hazing but encouraged it.

In a district court case on which *Alexander* relied, the court notably relied on the reasoning of *Quinn* and *Haben* in finding a duty on the part of the national under state law. *Edwards v. Kappa Alpha Psi Fraternity*, No. 98 C 1755, 1999 WL 1069100 (N.D. Ill. 1999). The *Edwards* court noted that a parent organization was subject to the Hazing Act. *Id.* at *7. As in this case, there was some evidence that the national knew or should have known about the hazing. The court ruled the case could proceed under a theory of direct liability.

Pi Kappa later repeats its claim that its only guidance was to preclude hazing, but that is contrary to the complaint's allegations. It continues in that vein, arguing that its rules left no room for the chapter to incorporate

[6] The investigator was not trained in investigating hazing.

hazing. Nat. br. at 31. Again, that is true only if the complaint did not allege the longstanding nature of the event and the national's endorsement.

Defendant's authorities are inapposite.

Pi Kappa relies on *Alumni Association v. Sullivan*, 524 Pa. 356, 572 A.2d 1209 (1990). Nat. br. at 23. The owner of a fraternity house sued an intoxicated partygoer from a neighboring fraternity for setting a fire that damaged the plaintiff's building, and the partygoer in turn claimed the national fraternity owning the fraternity house where he drank was responsible for his intoxication. The plaintiff's claim against the national was apparently based on its ownership of the building where the party took place. The court noted the plaintiff/owner did not allege that the neighboring national knew of the party or had any ability to control it (there was nothing about controlling the local chapter). *Id.* at 361; 572 A.2d at 1211. The court declined to remove its bar on social host liability, noting the defendant was not a social host.

That essentially ended the case and rendered any further discussion dicta. For reasons it did not explain, the court proceeded to comment on fraternity and chapter relationships. *Id.*, at 365, 572 A.2d 1213. The court described that as fraternal rather than paternal, and it is that language Pi Kappa cites. *Sullivan* called the relationship a fellowship of equals, where one group was not superior. That is incorrect. In this case, as in all fraternity scenarios, all the direction flows down and all the obligations flow

up. Nationals control and chapters respond. There is nothing fraternal about that.

Sullivan also called hazing a rare incident and concluded it did not require what it termed a dramatic corrective response. It cited no grounds for that conclusion and even a cursory review of the literature shows its view is now misguidedly naïve. The practitioners there must not have directed the court to sources like hazing.org which would have shown the contrary is true.

In addition, Pi Kappa's flagship Pennsylvania case must be viewed in light of what occurred when *Kenner*, a more typical hazing case with facts analogous to this case, came before the Pennsylvania courts. The *Kenner* court found the national had a duty. *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 2002 Pa. Super 269, 808 A.2d 178 (2002), appeal den. 575 Pa. 697 (2003). There, the plaintiff was injured during hazing. The national claimed it owed no duty because it had banned hazing, reasoning it could not be liable for that which it barred. That court first noted that *Sullivan* was limited to its factual matrix and that *Sullivan's* refusal to expand social host liability, the only issue there, did not bind it because the case before it did not involve the social host doctrine. *Id.* at 182.

The plaintiff in *Kenner* paid an application fee to seek membership and the court said that established a relationship between the student and the fraternity. The social utility factor weighed heavily in favor of duty because "the social utility of a national fraternity's efforts to stop hazing is

not in dispute". *Id.* at 183. The nature of the harm was deemed clear and foreseeable. The burden was deemed minimal because the national had already taken steps to stop hazing, and the court found a substantial public interest in assuring that individuals were not injured in efforts to join. The *Kenner* court concluded that the factors "weighed heavily" toward imposing a duty. The fraternity escaped liability only because the plaintiff at the summary judgment stage could not produce evidence that the national breached its duty.

Pi Kappa also relies on an Indiana case for its argument that it was not a principal with respect to its Eta Nu chapter because it did not control day to day activities. *Smith v. Delta Tau Delta, Inc.*, 9 N.E.3d 154 (Ind. 2014). That court looked at connections between the national and the chapter in the context of addressing a charge of *assumed duty*. *Id.* at 161-62. It concluded the national had only remedial powers and said the chapter's everyday management was not undertaken at the direction of the national. That was deemed not to be sufficient control.

That case was decided on summary judgment, not on the pleadings. The further distinguishing aspect is that, unlike this case, the national played no role in the hazing and apparently had no reason to suspect it. If the *Smith* court had been given evidence that the national encouraged or turned a blind eye to hazing, as alleged here, the outcome would have been different.

Plaintiff cited *Ballou* because it found a duty on the part of a national in analogous circumstances. *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 146, 352 S.E.2d 488, 491-93 (Ct.App.1986); Pl. main br. at 29. Pi Kappa distinguishes it on the ground that the national there did not bar the chapter from supplementing a "quasi-religious initiation ceremony". First, the court's description of the event shows there was nothing quasi-religious about it. Second, that court significantly did not say the national had not barred hazing, as Pi Kappa implies. In fact, given that its website says it was founded in rebellion against hazing and that it still bars hazing, it seems highly likely that its bar against hazing was always in place, just as in this case. Sigmanu.org/about-us/history; sigmanu.org/prospective-members/why-sigma-nu/no-hazing.

Pi Kappa says numerous courts cite lack of control but then names just three. Nat. br. at 31. One was *Sullivan*. Another was *Foster v. Purdue University Chapter*, 567 N.E.2d 865, 872 (Ind. Ct. App. 1991). That case is *sui generis* because the plaintiff charged only that the national assumed a duty to control an alcohol problem at the house (plaintiff was injured on a waterslide). The opinion contains few facts and simply affirmed summary judgment after noting the national had done nothing more than inspect and advise against alcohol. The third was *Walker v. Phi Beta Sigma Fraternity*, 706 So.2d 525,529 (La.App. 1 Cir. 12/29/97), two years before *Morrison* and yet another summary judgment. The only evidence was that the national

warned against hazing and had no knowledge of hazing. Even worse, members in depositions said they purposely hid any hazing. The facts and law of both cases are critically different.

The chapter and members acted within the scope of their agency.

The national argues that its members acted beyond the scope of their authority as agents. Nat. br. at 25. Again, this argument rests on its premise that plaintiff conflated hazing and pledging. It says hazing is separate and beyond the members' authority.

As discussed above, Mom and Dad's Night was a pledging event that incorporated hazing. That was the whole point of the evening, a reality known to the national. The national acknowledges that its members (and presumably chapters as well) are its agents for purposes of rush and initiation. Nat. br. at 27. And it says, accurately, that its rules prohibit hazing. From that, it reasons that when members incorporated hazing into pledging, they must as a matter of law have acted outside the scope of their agency. That is incorrect for two reasons.

Scope of agency was defined in *Adames v. Sheahan*, 233 Ill. 2d 276, 298, 909 N.E.2d 742, 754–55 (2009), addressed in plaintiff's main brief at 17. Conduct is within the scope if it is of a kind the agent was to perform, it occurs substantially within the authorized time and space, and it is actuated at least in part by a purpose to serve the principal. Here, the national gave the chapter the task of operating pledging, the event occurred in the

fraternity house, and the event was designed to induce pledges to become fee paying members. The latter was the entire purpose of the event. It was not a random activity. Rather, it was the *sine qua non* for Pi Kappa's existence. How could the requirements of *Adames* have been better fulfilled?

In addition, if plaintiff also proves the national knew of and encouraged this event, a jury could readily find that all those factors were present for that reason. The national, repeating its primary contention, says it is unreasonable to even argue that hazing was part of what members were expected to do for the national. Nat. br. at 28. Once again, that point is premised on the false premise that pledging and hazing are mutually exclusive. However, the Hazing Act criminalizes hazing in the context of pledging. If the court agrees the two are in fact one and that Pi Kappa knew about it, the fraternity's conclusion fails because its premise fails.

The event benefitted the national fraternity.

Pi Kappa says plaintiff does not provide support for his allegation that members believed this event would improve the retention rate for pledges, in turn benefitting the national because it would increase dues income. Def. br. at 28. It argues that without such support, the event would fall beyond the scope of their members' authority. Plaintiff offered no evidentiary "support" because the case is still in the pleading stage, without discovery. As to the complaint's allegations, the national contends the complaint does not suggest that hazing benefits the fraternity and says such a fact could never be

alleged.[7] However, it then argues that the court should ignore the very allegations in the complaint that connect hazing to Pi Kappa's economic welfare, allegations that meet its objection.

The allegations connecting hazing to the entire organization are set out in plaintiff's main brief. In summary, they are as follows. This was a common event.[8] App. at A4 (¶1). Pi Kappa employees told members that Mom and Dad's Nights were good for pledge and member retention and encouraged such events. App. at A4 (¶2). Members believed the event would improve pledge retention which in turn would benefit the organization by increasing dues income. App. at A6 (¶14). That answers the national's argument here and at 33.

As part of its control/benefit argument, Pi Kappa says the complaint does not allege that hazing or alcohol were required. Nat. br. at 30. But Mom and Dad's Night was only about hazing. That was its sole purpose, based on a belief that hazing led to a good result – bonding among members. Hazing is reported to perform a social utility by promoting bonding and solidarity among members of a group. *In re Khalil H.*, 80 A.D.3d 83, 93–94, 910 N.Y.S.2d 553, 561 (2010), relying on Lewis, The Criminalization of Fraternity, Non–Fraternity and Non–Collegiate Hazing, 61 Miss. L.J. at 147–

[7] The deposition and its exhibits, especially the Pi Kappa periodical, exhibit an obsessive concern with recruiting, suggesting discovery on this point will be fruitful. R. C3586 (v15), esp. C3924, C3926 and C3933.

[8] This allegation was added based on the member's statement (appendix to pl. answer to br. of Eta Nu chapter, at A51), illustrating the likelihood that discovery will lead to further relevant information.

148 [1991]; Junger, First, The Ordeal, New York Times, Mar. 11, 2000, section A, col. 6, at 15.

The role of hazing as a perceived benefit to fraternities is uniformly accepted. As the author of a study of the Greek system at one college described it, such time honored rituals "bond one generation to the next". *Inside Greek U*, Alan D. DeSantis, Univ. Press of Ky. (2007), Kindle at 2514-28. DeSantis concluded that Americans identify the hazing process as the key to brotherhood. *Id.* at 2815-22. His final conclusion was that "pledging, with all its flaws, still provides an inexplicable connection between both the abusees and the abusers". *Id.* at 3105-11. That same finding is found in *Hazing in View: College Students at Risk*, Allan and Madden, at 27 (3/11/08); stophazing.org/wpcontent/uploads/2014/06/hazing_in_view_web1.pdf (last viewed 1/4/18) (hazing rationalized as promoting bonding). That perceived bonding was also reported in acui.org/Publications/The_Bulletin/2010/2010-05/12585/ (*Presence, Tolerance, and Significance of Hazing*, at 2/3).

The national's scope case support is inapposite.

Pi Kappa claims *Anderson* supports its "no agency" contention. *Anderson v. Boy Scouts of America, Inc.*, 226 Ill.App.3d 440, 589 N.E.2d 892 (1992) (affirming summary judgment). There, a scout pack leader dropping off craft materials at a home struck a pedestrian. The court noted the victim was not a scout and the injury did not occur during a scouting event. *Id.* at 444, 589 N.E.2d at 894. Unlike the extensive authority possessed by Pi

Kappa over its chapters, there were no internal documents giving the national group any supervisory power over the manner in which local leaders accomplished their tasks.

Furthermore, and again unlike this case, there was no evidence the driver was acting within the scope of his authority as a leader or that anyone affiliated with the scouts asked him to make the delivery. The court found that even the allegation that the driver's gratuitous delivery of craft materials constituted a scouting activity was tenuous. The court deemed it a common auto liability case and said it would not find liability against anyone other than the driver unless the other person owned the car or had the right to control the car.

Because the facts and issues differ, *Anderson* is not apposite.

Finding vicarious liability is appropriate and it is covered by the Hazing Act.

The national argues that imposing vicarious liability would "leave unanswered other questions" like where to draw the line between chapter and non-chapter conduct. Def. br. at 37. But once a policy is recognized, that is what courts do: they draw the line between conduct that creates liability and conduct that does not. *Moss v. Dep't of Employment Sec.*, 357 Ill. App. 3d 980, 987, 830 N.E.2d 663, 670 (2005). Courts recognize that can be a difficult task (*People v. Oduwole*, 2013 IL App (5th) 120039, ¶ 50, 985 N.E.2d 316, 327), but that is not a reason for surrendering the field. Other courts, described above, have already gone down this road and none, even those who

ultimately found no duty on the part of the national, raised any question about their inability to draw a line.

Pi Kappa additionally reasons that because the Hazing Act uses the term person, the legislature did not mean to address organizations. From that, it concludes no national fraternity group, and by extension no fraternity organization, should be liable for hazing. Nat. br. at 37. However, "person" does not exclude various forms of organization, contrary to the national's assumption. *Schwartz v. Dep't of Employment Sec.*, 285 Ill. App. 3d 319, 321, 674 N.E.2d 146, 147–48 (1996) ("person" does not exclude corporation). In any event, the criminal code defines person to include all forms of organizations, and that would include fraternities. 720 ILCS 5/2-15.

The *Edwards* court also addressed vicarious liability, holding that members had implied actual authority to conduct the pledge process and engage in hazing. *Edwards v. Kappa Alpha, supra,* at *5. It pointed to the use by members of paraphernalia bearing the fraternity name. Here, the event was conducted in a house bearing the fraternity name. Discovery will likely reveal further physical manifestations to support the complaint's allegations. In finding a duty, *Edwards* also took into account that it was disputed whether the national enforced its ban on hazing, also an issue here.

The national has a direct duty.

The national argues against recognizing a direct duty, saying there can be no direct duty if there is no vicarious duty. Def. br. at 38. It cites no

authority for that proposition and none exists. Indeed, it is common to potentially have liability under one of those theories but not the other because the requirements are different for vicarious and direct liability. Cases brought under Section 414 of the Restatement of Torts make that clear.

The national then says, again, that plaintiff conflates hazing and pledging, arguing that while the national may control pledging it does not control hazing. *Id.* Plaintiff rebutted that above. Further, for direct liability, it is not a question of whether Pi Kappa controlled day to day chapter operations (def. br. at 39), but rather whether it directly caused, encouraged or by its inaction ratified this well known and long standing hazing event. Pi Kappa says plaintiff did not allege national involvement. Def. br. at 40. As plaintiff showed above, that is not correct. App. to main br. at A(4) (¶2).

The national contends plaintiff did not plead encouragement or ratification. Def. br. at 41. However, as noted above, the complaint actually used the word "encouraged". App. at A4 (¶2). As to ratification, the national ratified the event by allowing its chapter to run this event annually despite knowing about it. The words ratify, approve and confirm are synonymous. *Hammer v. Jefferson Oil & Gas Corp.*, 38 Ill. App. 2d 136, 138–39, 186 N.E.2d 667, 669 (1962). Ratification may be express or implied and occurs when the principal, with knowledge of the material facts, takes a position inconsistent with nonaffirmation of the action. *Athanas v. City of Lake*

Forest, 276 Ill. App. 3d 48, 56, 657 N.E.2d 1031, 1037 (1995). That is what occurred here when the national did not stop the chapter from continuing the event, as plaintiff alleged.

Public policy favors a duty.

Pi Kappa contends public policy is on its side. Nat. br. at 36. In support, it first repeats the myth of *Smith*, debunked earlier, that the relationship between national and chapter is fraternal, not paternal. And even if that were true, why would that weigh against holding a national liable for its chapter's misconduct?

It next reasons it would be illogical to hold it liable for chapter decisions (like hazing) which primarily impact the chapter, if an unaffiliated "house" would be solely liable for hazing. The two concepts – a national fraternity composed of chapters as opposed to a single unaffiliated "house" – are not equivalent. The latter is known as an apartment building. As to why a national should be made responsible for chapter conduct, that would be socially desirable because the duty would presumably cause the national to exercise its power and authority to change chapter culture, a culture alleged here to be the result of national influence.

Finally, it would not make sense to say the legislature would approve a civil action against chapters for hazing-related injuries but would not approve the same remedy against the institution under whose auspices the hazing was committed. Logic calls for the opposite result.

The system will not splinter.

Pi Kappa closes with the argument that placing a duty on it would give it an impossible task, causing it to abandon its chapter and "splintering the fraternity system". Nat. br. at 42. It scoffs at plaintiff's contention that the proper inquiry is whether making an institution obey the law is a burden, saying every human act would then carry a duty of care. That hyperbole does not require a response. The question as to burden is, how could obeying the law ever be deemed an undue burden? Pi Kappa blusters but does not answer that question. The national then repeats its "daily control" argument, rebutted above.

As to splintering the system, if national organizations do not control their chapters on this critical point, they will cease to exist because as occurred here, their chapters will be suspended.

II. The court erred when it ruled that nonmembers did not owe a duty because they were not part of the process of determining whether pledges would be invited to be members.

The question whether nonmembers owe a duty not to participate in hazing pledges is apparently one of first impression nationally. At this stage, there is no issue as to the extent of their participation. They knew this was a pledge event intended to make the pledges intoxicated, they actively participated, and they knew participation was a prerequisite to membership.

App. at A32 (¶3). The only distinction from the other participants was that they were not members.[9]

The nonmembers, like the appellate court, point to the language of the Hazing Act and argue that it addresses only persons who *require* hazing. They quibble with the meaning of the word "require", pointing to definitions other than the one to which plaintiff cited. Nonmem. br. at 13. They claim they cannot be liable because they had no *right or authority* to require hazing, calling that a layman's understanding of the word require. But the third of the three definitions they cite defines require as imposing a compulsion or command on another, and plaintiff noted a further similar definition, to simply ask or request. The nonmembers cannot explain why the first of the three definitions is the only layman's understanding of the word, rather than looking to the other and broader definitions.

If we step back and look at the big picture, we see a group, all members of the Greek fraternity/sorority system, hazing a separate group whose goal is to join that system. Members and nonmembers acted as a unit. From the pledges' viewpoint, they faced a unified social coercion compelling them to the same object: intoxication. That the nonmembers could not vote misses the point of the Act. The object of the legislature's ire was hazing, not fraternity

[9] These defendants at 2 point out that defendant Nicole Manfredi was not specifically named in the body of plaintiff's brief or the body of the petition for leave to appeal. She was, however, named in the caption of the petition and in the caption of plaintiff's main brief, and the prayer for relief in each was generic as to all nonmembers. The same thing occurred in plaintiff's appellate court brief. The absence of any objection below illustrates that this defendant understood she was a party. The appellate court similarly named her only in the caption and then treated nonmembers generically.

membership. From a policy perspective, does it make sense to treat some actors differently from others simply because some came with a badge of authority and others did not? If a person is running a gauntlet, he is not concerned with who is authorized to strike him and who is not – the effect is the same either way.

A further consideration is that nonmembers are not being prosecuted for a criminal offense. Rather, the statute is a source of a standard of care for civil actions based on hazing. Viewed from that perspective, the statute reflects the legislature's intent to sanction hazing and the civil action serves the same deterrent purpose.

The nonmembers participation in hazing established a relationship with those whom they hazed. Injury is readily foreseeable and likely, that being the reason for the Act. The burden put on them would only be to not participate in hazing, and that cannot be deemed a burden either in terms of magnitude or consequences. That meets all the criteria for recognizing a duty. *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 155 Ill.App.3d 231, 235, 507 N.E.2d 1193, 1196 (1987) (cited by the nonmembers for that reason at 3).

The nonmembers assert that recognizing a common law duty would open up a limitless group of people to liability. Nonmem. br. at 10. That is premised on their characterization of themselves and the pledges as similarly situated friends, as at a cocktail party. Plaintiff debunked the "hazing as a

social event" myth in his main appellee's brief in the consolidated case at 20-21. These nonmember participants stood with the other actors, not with the subservient pledge group. As with the members, the nonmembers had and employed socially coercive power in a way they could not have done in a normal social context. The two sides were not similarly situated.

The bottom line is that any duty would extend only to those in this specific scenario, persons who actively participate in hazing through social coercion in a context of unequal status. That is not a limitless group. This would not be like the situation in *Rabel*, cited at page 41 of Pi Kappa's brief, where the plaintiff argued that a university handbook supported a broad-ranging duty to create a safe environment.

The nonmembers' motivation might not be the same as the members (nonmem. br. at 15), but their hazing conduct was identical to that of the members and they intended the same result. It is one's conduct that creates liability, not one's motivation. As the allegations make clear, that conduct encompassed much more than encouraging someone to drink excessively. Nonmem. br. at 16, 18. The nonmembers were not part of the planning and decision making functions (nonmem. br. at 18), but they are not sued for planning. They are sued for participating in and carrying out the event, a more critical role.

As to Point V of their brief, plaintiff did not allege that nonmembers were involved in the concluding part of the event where members cared for the intoxicated pledges. That is not at issue.

CONCLUSION

For the reasons stated, plaintiff Gary Bogenberger, as special administrator of the estate of David Bogenberger, deceased, requests the relief set out in his main brief.

Respectfully submitted,

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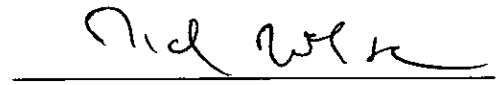
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 6,667 words.



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