UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN DOE, Plaintiff	)	
v.	)	CIVIL ACTION NO.: 3:16cv-30184-MGM
WILLIAMS COLLEGE, Defendant.	)	

PLAINTIFF'S RESPONSES TO THE STATEMENT OF MATERIAL FACTS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND FURTHER STATEMENT OF MATERIAL FACTS

In support of its Opposition to Defendant Williams College's ("Defendant") Motion for Summary Judgment, Plaintiff John Doe ("Plaintiff") submits Responses to the Statement of Material Facts in Support of Defendant's Motion for Summary Judgment ("DFs") and Further Statement of Material Facts addressing and responding to DFs.

Plaintiff supports this counter-statement and material counter-facts set forth herein by providing affidavits, documents produced during discovery, and references to depositions, declarations, admissions, and other evidence in the record, all of which set forth such facts as would be admissible in evidence, and specific facts. Plaintiff's provision of a response to any material fact presented in DFs shall not constitute a waiver of any applicable objection, privilege, or other right. Where required, in order to response to the DFs, Plaintiff represents that it has undertaken good faith efforts to identify the information that would allow it to admit or deny such matters presented as material facts.

OBJECTION TO COMPREHENSIVE CHARACTERIZATION

Plaintiff will separately address each numbered "material fact" submitted with such statement below. As noted herein, the evidence cited in the record relative to many of the "material facts" presented in DFs does not support a conclusion that they are undisputed. Further, and as noted herein,

many of Defendant's statements presenting "material facts" are incomplete or lacking in context and/or mischaracterize the "material facts" they purport to state, thus rendering the statements presented meaningless and useless as "material facts." As such, Plaintiff objects to Defendant's characterization of the "material facts" presented in DFs as material facts sufficient for summary judgment.

GENERAL OBJECTIONS

The following general objections apply to each of DFs as presented by Defendant and are in addition to specific objections, if applicable.

1. Plaintiff objects to DFs to the extent that they call for the disclosure by Plaintiff of material protected by attorney-client privilege or work product doctrine.

2. To the extent that Plaintiff responds to specific statements of material fact to which it has objected, Plaintiff reserves the right to maintain such objections with respect to any additional information, and such objections are not waived by the furnishing of such information.

3. Plaintiff does not, by virtue of replying to any statement of material fact, admit to any legal or factual contention asserted in the text of any material fact, except as expressly stated.

4. Respondent objects to each statement of material fact to the extent that each calls for information that is not in the possession, custody, or control of Plaintiff.

5. To the extent that any statement of material fact quotes from a document or references a statement and solicits an admission that the quote or statement is evidence of the truth of the matter asserted, Respondent objects on the grounds of hearsay.

COUNTER-STATEMENT

Therefore, Plaintiff submits the following**,** demonstrating that there are many genuine issues in dispute in Defendant's Statement of Material Facts in Support of Defendant's Motion for Summary Judgment; that Defendant's Motion for Summary Judgment should be denied; and, that

Plaintiff's Motion for Partial Summary Judgment should be granted. The statements below are numbered to correspond to DFs.

THE PARTIES

1. Plaintiff John Doe[1] (a pseudonym) was a student at Williams College in the spring of 2016. It was his senior year. (Tab 1, Compl. ¶ 9)

Response: Plaintiff admits DF ¶ 1.

2. Defendant Williams College is a private, non-profit college in Williamstown, Massachusetts. (Tab 1, Compl. ¶ 2)

Response: Plaintiff admits DF ¶ 2.

3. The person known in this case as Susan Smith (also a pseudonym) was a Williams student. She graduated in the spring of 2015 and then worked for one year in the Williams Alumni Office, until June 30, 3016. (Tab 1, Compl. ¶ 13)

Response: Plaintiff disputes DF ¶ 3 as misleading. As of summer 2015, Smith was a Williams College employee and was an employee at the time of John's complaint.

4. Smith and Doe were in romantic, sexually active relationship from October 2013 to the winter of 2015-2016. (Tab 1, Compl. 14)

Response: Plaintiff admits DF ¶ 4.

5. Sarah Bolton was the Dean of the College at Williams from 2010 to June 30, 2016, when she left to accept a new position as President at the College of Wooster. (Tab 1, Compl. ¶ 10; Tab 61, Bolton Decl. ¶ 1)

Response: Plaintiff admits DF ¶ 5.

6. Marlene Sandstrom became Dean of the College as of July 1, 2016. (Tab 1, Compl. ¶12)

Response: Plaintiff admits DF ¶ 6.

[1] Plaintiff refers to himself as "John Doe" throughout the pleadings.

7. Meagan Bossong is the Director of Sexual Assault Prevention and Response at Williams. (Tab 10, Bossong Dep. I at 5:19-21)

Response: Plaintiff admits DF ¶ 7.

8. Toya Camacho is an Assistant Vice President and Title IX Coordinator at Williams. (Tab 12, Camacho Dep. at 7:3-4)

Response: Plaintiff admits DF ¶ 8.

WILLIAMS POLICIES AND PROCEDURES

The Code of Conduct

9. The Williams Code of Conduct applies to all members of the Williams community, including students and employees. (Tab 1, Compl. Ex. P-9 at 4-5)

Response: Plaintiff objects to DF ¶ 9 as an assertion that is incomplete, lacking in context, and may be misleading in the context of how - and even if - the Code of Conduct applies to "all members of the Williams community," "community" being a vague and ambiguous term in itself. Plaintiff incorporates by reference herein its proffer of Statement of Material Facts ("PFs" Dkt. 124) ¶ 21, 22, 23, 24, 25 and 142.

10. In September 2014, when the sexual encounter at issue in this case occurred, the Code of Conduct prohibited non-consensual sexual intercourse, which the Code defined as "any sexual intercourse … without effective consent." (Tab 1, Compl. Ex. P-13E at 4)

Response: Plaintiff does not dispute DF ¶ 10. However, this Statement is incomplete and limited as to the fact asserted. Plaintiff incorporates by reference herein its response to DF ¶ 11.

11. In September 2014, the Code described "effective consent" in relevant part as follows:

> Consent is a crucial part of both the Williams Code of Conduct and Massachusetts law. **Consent means that at the time of the sexual contact, words or conduct indicate freely given approval or agreement, without coercion, by both participants in the sexual contact.** Both parties have the obligation to communicate consent or the lack of consent. A verbal "no" (no matter how indecisive) or resistance (no matter how passive) constitutes the lack of consent. In addition, consent once given may be withdrawn at any time. If consent is withdrawn, the other party must immediately stop whatever sexual contact is occurring.

(Tab 17; Tab 1, Compl. Ex. P-13E at 4) (emphasis added)

Response: Plaintiff objects to DF ¶ 11 as an assertion that misstates the "material fact" it purports to state as the Code in September 2014 did not describe what was meant by "effective" or "effective consent" anywhere. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 1 and 2. *See* Dkt. 124-1 at 18.

12. In October 2014, Williams amended the Code to further clarify that "effective consent" also means "affirmative consent," a term that was becoming more common on college campuses. (Tab 11, Bossong Dep. II at 14:17-15:9, 18:18-23, 45:19-46:7)

Response: Plaintiff objects to DF ¶ 12 as an assertion that is incomplete, lacking in context, and is misleading in the context of the Code's use of the term "effective consent" before and after October 2014. As such, DF ¶ 12 warrants a number of counter-facts in response:

a. "Effective consent" could not have been "further" clarified as it was not clarified at all to begin with in the September 2014 Code.
b. The College admits that the term "affirmative consent" is industry jargon.
c. The College admits that "not everyone knows automatically what affirmative consent means."
d. The College admits that in the summer 2014 it was unclear and uncertain to the Williams community that there was an affirmative consent policy.
e. The College's affirmative consent sexual misconduct policy effective October 2014 was a "new policy" with "not trivial" changes that was "different" from the previous policy. The difference between the policies [i.e. the procedural problem on which the appeal was allowed] was considered substantive enough to have had significantly affected the outcome of the initial hearing.
f. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 1, 2, 123-134, 274 and its response to DFs ¶¶ 17 and 147 below.

13. The October 2014 version of the Code continued to prohibit non-consensual sexual intercourse – any form of sexual intercourse without "effective consent – and described "effective consent" as follows:

> Consent is a crucial part of both the Williams Code of Conduct and Massachusetts law. The Williams College Code of Conduct requires affirmative consent for all sexual activity. **Consent means that at the time of the sexual contact, words or conduct indicate freely given approval or agreement, without coercion, by both participants in the sexual contact.** Both parties have the obligation to communicate consent or the lack of consent. In the absence of affirmatively expressed consent, sexual activity is a violation of the code of conduct. In addition, a verbal "no" (no matter how indecisive) or resistance (no matter how passive) constitutes the lack of consent. In addition, consent once given may be withdrawn at any time. If consent is withdrawn, the other party must immediately stop whatever sexual contact is occurring.
> (Tab 17; Tab 1, Compl. Ex. P-13E at 2) (emphasis supplied).

Response: Plaintiff objects to DF ¶ 13 as an assertion that misstates the "material fact" it purports to state. The October 2014 Code actually described "Consent" with the paragraph provided in this statement. Plaintiff incorporates by reference herein its proffer of PF ¶ 6.

Disciplinary Procedures for Sexual Misconduct

14. At all relevant times, the College has had a policy on the Investigation and Adjudication Process for Sexual Assault, Sexual Exploitation, Stalking, Dating Violence and Domestic Violence. (Tab 1, Compl. Ex. P-9 at 12)

Response: Plaintiff objects to DF ¶ 14 as an assertion that is incomplete, lacking in context, misleading, and is a misrepresentation of the facts. First, the policy to which Defendant refers, Compl. Ex. P-9 at 12 located at page 76, is the policy governing sexual misconduct investigation and adjudication procedures "for student respondents." Dkt. 76-9. Second, Defendant's cited policy does not apply to employee respondents. The policy governing "concerns regarding actions of faculty or staff" is a separate and different procedure. PFs ¶¶ 22, 24, and 142. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 21, 23-25, and 142.

To further supplement its response, Plaintiff objects to Defendants use of "At all relevant times," as at the time of the alleged 2012 event, Williams did not have an Investigation and Adjudication

Process for Sexual Assault, Sexual Exploitation, Stalking, Dating Violence and Domestic Violence. All non-academic violations of Williams' Code of Conduct, including sexual misconduct, were investigated and adjudicated by the Office of the Dean of the College under the general misconduct process. Dkt. 134, Rossi Affidavit ¶¶ 7-8.

15. That policy provides that complaints of sexual misconduct will be investigated by a trained investigator who take [sic.] statements, obtain evidence, and produce a report describing the facts of the case. The complainant and respondent have an opportunity to submit written responses to the report. A hearing panel consisting of three members reviews the reports and responses and determines whether a preponderance of evidence shows a violation of the College's Code of Conduct. If the panel determines that a violation occurred, the panel then determines a sanction. (*Id.* at 12-15)

Response: Plaintiff admits DF ¶ 15 accurately describes the specific investigation and adjudication policy cited in DF ¶ 14 which was adopted subsequent to spring 2012.

16. The complainant and respondent have the right to an advisor of their choosing; the right to suggest other witnesses for the investigator speak with; the right to suggest questions the investigator should ask any witnesses including the other party; the right to review and comment on the investigation report before a finding is made; the right to object to potential panel members due to bias or other reasons; the right to address the panel when it is determining the sanction; and the right to appeal. (*Id.*)

Response: Plaintiff objects to DF ¶ 16 as it is unclear what Defendant means by "complainant and respondent." The specific policy cited in DF ¶ 14, i.e. the Investigation and Adjudication Process for Sexual Assault, Sexual Exploitation, Stalking, Dating Violence and Domestic Violence for student respondents, provides for the procedures cited in DF ¶ 16. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 21-24.

17. The right to appeal is limited to (a) significant procedural lapses or (b) the appearance of substantive new evidence not available at the time of the original decision. If the appeal is granted, its disposition is determined by the appellate officer, who may affirm the decision of the panel, return it to the original panel or summon a new panel, and who may task those panel members with reviewing the decision either in whole or in part. (*Id*. at 15)

Response: Plaintiff objects to DF ¶ 17 on the grounds that it is incomplete, lacking in context, and misleading. First, the right to appeal is also limited to "cases where the procedural problems or new evidence are considered substantive enough to have had significantly affected the outcome of the initial hearing." Plaintiff incorporates by reference herein its proffer of PF ¶ 28. Without waiving this objection, Plaintiff admits that this is an accurate depiction of a portion of the appeal policy for student respondents.

18. Williams also provided guidelines to students for the role of an advisor. The guidelines provided that consultation with the advisor "must take place in a manner that does not disrupt the proceedings. Appropriate consultation includes, but is not limited to: sharing notes, taking a brief break to consult, and consultation that takes place prior to or after any formal meetings with the investigator or hearing panel. The advisor may accompany the person they are advising to meetings with the investigator…However, the advisor may not speak for the person they are advising in meetings with the Investigator…The person being advised must speak for themselves in answering the questions of the investigator…" (*Id*. at 3)

Response: Plaintiff does not dispute DF ¶ 18.

DOE'S PRIOR DISCIPLINE AT WILLIAMS

19. During Doe's freshman year at Williams, in May 2012, he was found responsible for sexually assaulting a female student by having sexual intercourse with her without effective consent. (Tab 3, Doe Dep I at 17:7-20:12; Tab 22)

Response: Plaintiff does not dispute DF ¶ 19. However, this Statement warrants a number of counter-facts in response:

a. On February 22, 2018, at a hearing before Magistrate Judge Robertson of this Court, Defendant's counsel used the term "rape" to describe the allegation against John in the spring of his freshman year, 2012. Dkt. 134, Rossi Affidavit ¶ 4.

b. At said hearing, Defendant's counsel further claimed that John was found guilty again of "rape" in his senior year, 2016. *Id*.

c. John has never been charged with rape and no reports about John have ever been made to law enforcement. *Id.* and Dkt. 124-3 ¶ 13.

d. At 5:02 p.m. on May 1, 2012, David Boyer, Director of Campus Safety and Security ("CSS"), emailed John requesting that he call him "ASAP." One hour later, Boyer emailed John again stating, "Please plan to be at Hopkins Hall CSS for 7pm." Dkt. 135-1.

e. This sentence comprised the entirety of the information John received regarding the fact that he was needed at CSS. At no time was John provided any notice whatsoever by any school official as to why he was requested to go to CSS or that an allegation had been made about him to College officials. Dkt. 135, John Doe Affidavit ¶ 5.

f. When at CSS on May 1, 2012, John was simply asked to describe the events of April 14, 2012 into the next morning. He was not informed as to why he was there. *Id*. ¶¶ 4-5.

20. The May 2012 findings letter to Doe included relevant language from Williams' consent policy, reminding Doe that effective consent required words or conduct indicating freely given approval or agreement for the sex and in the matter [sic.] in which the sex would occur. (Tab 3, Doe Dep I at 20:22-22:4)

Response: Plaintiff objects to DF ¶ 20 on the grounds that the Statement is factually inaccurate and misleading. Neither the letter nor the policy in effect at the time stated that consent required words or conduct indicating freely given approval or agreement for the sex **and in the manner in which the**

sex would occur. [emphasis added.] In fact, none of the College's multiple permutations of sexual misconduct policy ever required approval or agreement for "the manner in which the sex would occur." Defendant misrepresents the policy in this Statement. Further, the policy was the "sexual misconduct" policy, not a "consent policy." DF ¶ 20 also warrants a number of additional counter-facts in response:

a. The record contains interview notes from May 1, 2012 interviews with John Doe, Francisca Moraga, Dayana De La Torre, Elisa Fernandez-Vasquez, and Hiroyuki Miyatake. Dkt. 134, Rossi Affidavit ¶ 5 and Dkt. 134-1 at 1-10.

b. None of the 11,825 pages of documents produced by Defendant contains documentation of interview notes from any interview with Jane Roe[2]. Dkt. 134, Rossi Affidavit ¶ 6.

c. Although in her May 5, 2012 sanction letter, Dean Bolton stated, "…we interviewed you and Jane Roe…," all the information in said letter was reflected in the interview notes of the above listed students. None of the allegations in the letter, except one alleged text by John, are quoted verbatim and all are paraphrased. As Williams did not produce evidence in the form of Jane Doe interview notes, the record indicates that the College investigated John without the participation of the complainant. Dkt. 134-2.

d. As the evidence shows, John was substantially intoxicated on April 14, 2012, the night in question. Dkt. 134-1.

e. Jane Roe's good friend Elisa Fernandez-Vasquez noted that Jane was only moderately drunk, a "6" on a scale of "0 – 10." *Id.* at 7.

f. Elisa described the allegations made to her by Jane: "I went to John's room in Mission. We were hooking-up (making out). Never had sex (intercourse) before but had hooked-up several times. We took all of our clothes off. We were kissing, then he stuck it in. I was shocked, I

[2] Jane Roe is a pseudonym for the student referenced in the 2012 documents.

pushed him off/out. Then he stuck it in again. **I told him, if you are going to do that, I don't want to get pregnant.** He got off the bed and put a condom on. I just laid there while John finished intercourse. Then he fell asleep. I left his room and went back to my room." *Id*.

g. Another witness, a male, reported that John was substantially impaired, "falling down" drunk that night. *Id*. at 9-10.

h. On May 5, 2012, Bolton met with John and hand delivered a determination and sanction ("findings") letter that informed him that he had been alleged of committing and found responsible for sexual assault. Dkt. 135, John Doe Affidavit ¶ 6 and Dkt. 134-2.

i. The letter completely ignored the witness's statement that Roe had told John, "If you are going to do that, I don't want to get pregnant" at which point John got up to get a condom and they resumed intercourse. The letter adopted the statements of the female students and disregarded statements from John and the male witness. *Id.* and Dkt. 134-1.

j. Williams did not provide John with any notice as to what he allegedly had done when he was questioned at CSS or any time thereafter, flagrantly violating the College's policy that stated, "A student charged with such a breach will be informed by a dean of the alleged violation." Dkt. 134, Rossi Affidavit ¶ 8.

k. In spring 2012, John was an eighteen year old boy without any understanding of his rights and the grave ramifications this disciplinary case would have on the rest of his academic and professional life. Dkt. 135, John Doe Affidavit ¶ 7.

l. Both John's parents are immigrants from Ecuador. His mother works as a home attendant and his father is a sculptor. Dkt. 124-159 at 12:13-21.

m. John's family has very modest financial means. *Id*., 13:10-17. He did not have the resources even if he wanted to challenge the finding and appeal.

n. John finished the spring 2012 semester at the College in June 2012. Dkt. 134-2.

21. Doe was suspended from Williams for two semesters, and allowed to return in the fall of 2013. (Tab 3, Doe Dep I at 27:19-29:5; Tab 22)

Response: Plaintiff admits DF ¶ 21. However, DF ¶ 21 warrants a number of counter-facts in response relative to events at Williams between fall 2012 and summer 2014 when the College developed its policy titled *Statement of Sexual Assault and Other Sexual Misconduct*, the new affirmative consent policy which went into effect in October 2014:

a. In early May 2014, a former Williams College student ("L.B.") started a change.org petition directed to Williams College Administration and to President Falk, Dean Bolton, and Bossong that was signed by 3,293 supporters. Dkt. 134-3.

b. #10 in L.B.'s change.org petition stated, in part, "Bossong should revise the college website so that policies, rules, and procedures are more accessible and clearly expressed." *Id*. at 3.

c. On May 13, 2014, L.B. and her parents accused leaders at the College of mishandling her fall 2012 sexual assault case on National Public Radio. The interview and other media coverage were broadcasted on WBUR, WAMC, WNYC, and NHPR. Dkts. 134-4 to 134-8.

d. One of L.B.'s accusations in the petition was that the College did not properly handle her complaint of retaliation. Bolton stated, "We have in place strong policies that forbid people to take revenge on folks who have reported. But you can have all of those things in place and still social backlash can happen." *Id*. (Dkt. 134-8) at 5.

e. Dean Bolton issued a statement to the Williams Community in response to the petition that stated, "…we notify the Williamstown Police Department as soon as a report comes to us, without sharing the survivor's name. This is our automatic practice: We immediately notify police of every report of sexual assault made to us." Dkt. 134-9 at 2.

f. President Falk also issued a statement to the Williams Community addressing the complaints of L.B. stating, "We're confident that throughout our handling of the case in question, we adhered to all of our policies and to all applicable laws." Dkt. 134-10 at 1.

g. Mid May 2014, two College fundraisers suspended activities to protest the handling of the alleged assault complained about by L.B. Dkt. 134-11.

h. Also in mid May 2014, the College's newspaper article on the story quoted L.B.'s father: "We were naïve," [father] said. "We thought that our interests and the schools' interests were aligned. I've come to see now that in fact, the school is focused on getting this out of the headlines as quickly as possible and diminishing what happened. That goes for any case, not just L.B.'s case." Dkt. 134-10 at 2.

i. On May 24, 2014, an article titled, "Williams College roiled by report of rape: Students, alumni outraged, say case was mishandled," appeared in the *Boston Globe*. Dkt. 134-12. Around the same time, a similar article appeared in the *The Atlantic* titled, "Williams Is the Latest College Accused of Mishandling Rape: Williams College is not one of the 55 colleges currently under federal investigation for mishandling sexual assault, but its administration is clearly worried it will be next." Dkt. 134-13.

j. On July 9, 2014, the College published a youtube video of Dean Bolton addressing the issue of what Williams does to prevent and respond to sexual assault on its campus. Dkt. 134-14.

k. Sometime in fall 2014, the College announced New and Expanded Campus Actions including, but not limited to, "The Women's Collective brought to campus Tatyana Fazlaizedeh and her public art project "Stop Telling Women to Smile" and "Students participated in a national day of action as part of the movement Carry That Weight." Dkt. 134-15.

l. On March 13 2015, Emma Sulkowicz spoke at the College about her performance art "Carry That Weight" "a visceral, public response to the pervasive mishandling of sexual assault cases on campuses, and the devastating effects on survivors who are expected, the piece suggests, to carry the weight of their assaults alone and in silence." Dkt. 134-16. Sulkowicz is the female accuser in the now-settled *Nungesser v. Columbia University* (1:15-cv-03216) case. The event was organized by Williams' Department of Women's, Gender, and Sexuality Studies. Dkt. 134-17.

m. In fall 2015, the organizer of the College's Uncomfortable Learning series, Zach Wood, cancelled a speaking event titled *One Step Forward, Ten Steps Back: Why Feminism Fails* due to "vehement reactions of students" opposed to bringing Suzanne Venker to the campus such as

> When you bring a misogynistic, white supremacist men's rights activist to campus in the name of 'dialogue' and 'the other side' you are not only causing actual mental, social, psychological, and physical harm to students, but you are also – paying – for the continued dispersal of violent ideologies that kill our black and brown (trans) femme sisters. You are giving those who spout violence the money that so desperately needs to be funneled to black and brown (trans) femme communities, to people who are leading the revolution, who are surviving in the streets, who are dying in the streets. Know, you are dipping your hands in their blood. Dkt. 134-18.

22. In November 2014, the Honor Committee found Doe responsible for an academic honor code violation. (Tab 23)

Response: Plaintiff admits DF ¶ 22.

23. Dean Bolton accepted the Honor Committee's recommended sanction of failure in the course and disciplinary probation for one year. (*Id.*)

Response: Plaintiff does not dispute DF ¶ 23.

24. Doe admits that Dean Bolton could have expelled him at that time in light of the prior finding and suspension for sexual assault. (Tab 3, Doe Dep. I at 30:16-31:6)

Response: Plaintiff does not dispute DF ¶ 24. However, Plaintiff incorporates by reference herein its response to DFs ¶¶ 19-20 above.

25. Dean Bolton warned Doe, "It is crucial that you understand that any future violation of the college's code of conduct, whether academic or nonacademic, and even if of relatively 'minor' significance, will certainly lead to your separation from the College." (Tab 23)

Response: Plaintiff admits DF ¶ 25.

SMITH SEEKS HELP FOR HER TROUBLED RELATIONSHIP WITH DOE

26. On October 5, 2014, Smith wrote an email to Dean Bolton asking for her help with her boyfriend (Doe) who was verbally abusive to her. (Tab 55; Tab 61, Bolton Decl. ¶ 1)

Response: Plaintiff objects to DF ¶ 26 on the grounds that the Statement is factually inaccurate and misleading. Bolton's declaration ¶ 1 states that she "was the Dean of the College at Williams College from July 1, 2010 to June 30, 2016…" *Id*. The October 5, 2014 email, which did not identify John, described what "seems from the outside like such a dumb problem" and that Smith didn't know "if how he treats [her] is right or if [she's] overly sensitive." Dkt. 127-57.

27. Dean Bolton responded and recommended that Smith talk with the Dean on call, who at the time was Dean Rosanna Reyes. (Tab 55)

Response: Plaintiff objects to DF ¶ 27 as an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence. In addition to recommending that Smith speak with Dean Reyes, Bolton told Smith that, among other things, "This isn't a dumb problem it's a scary and upsetting one. People who love you shouldn't treat you in ways like that." *Id*.

28. Dean Reyes later referred Smith to Ms. Bossong for additional support. (Tab 10, Bossong Dep. I at 14:19-23; Tab 56)

Response: Plaintiff does not dispute DF ¶ 28.

29. Ms. Bossong met with Smith in the spring of 2015. (Tab 10, Bossong Dep. I at 36:12-19)

Response: Plaintiff does not dispute DF ¶ 29 to the extent that it is an accurate depiction of Bossong's testimony at her deposition: "I believe I met her in the spring of 2015." However, documentary evidence demonstrates that this Statement misrepresents the facts. As such, DF ¶ 29 warrants a number of additional counter-facts in response:

a. In February 2015, Dean Reyes encouraged Smith to meet with Bossong: "I would like for you to come by to meet with me and with Meg Bassong [sic.]…I would like for this meeting to happen as soon as possible, please send me your availability. Dkt. 127-58.
b. There is no evidence that said meeting occurred as Smith's response was, "I would really just like to give this a rest. I've realized I should keep my relationship to myself and talk with John rather than other people." Dkt. 134-19 at 4.

c. Bossong stated, in regard to said email from Smith, "Even saying she shouldn't talk about it with you tells me the partner said something to her. That's isolating for her and totally an abuse tactic." *Id.* at 2.

d. According to the 11,825 pages of documents produced by Defendant, the first communication directly between Bossong and Smith was on December 2, 2015. Dkt. 134, Rossi Affidavit ¶ 29 and Dkt. 134-20.

e. In said communication, Smith asked to meet with Bossong which she did on December 7, 2015. *Id*. and Dkt. 134-22. *See also* Dkts. 124-125 and 124-31.

f. On February 2, 2016, Bossong emailed Smith to follow up on their meeting earlier that day. In this email, Bossong provided Smith her cell phone number. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 48-50; Dkt. 124-30.

g. According to the documents produced by Defendant, there were no communications between Bossong and Smith between December 7, 2015 and February 2, 2016. Dkt. 134, Rossi Affidavit ¶ 31. Therefore, the only documented interactions between Bossong and Smith up until February 2, 2016 were the emails scheduling the December 7, 2015 meeting and said meeting.

h. None of the documents produced by Defendant indicate that Bossong provided any "safety planning" to Smith any earlier than February 2, 2016. Dkt. 134, Rossi Affidavit ¶ 34.

30. Smith told Ms. Bossong that Doe verbally and physical [sic.] assaulted her. (*Id.* at 26:9- 19, 37:23-38:15)

Response: Plaintiff objects to DF ¶ 30 as an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence. DF ¶ 30 also misrepresents the deposition testimony cited in support of this Statement. Bossong, at 26:9-19 in her first deposition recited what Reyes conveyed to her (Bossong) about Smith. *Id*. The Panel determined that none of the specific complaints Susan made, including – but not limited to - the "lockout" scenarios described in said

deposition excerpt, "(even in combination) rose to the level of relationship abuse." Dkt. 124-136 at 2. Bossong, at 37:23-38:15 in her first deposition, claimed that up until December 2015, Smith's "conversations about John's conduct were about verbal and physical assaults of her but not sexual assault of her." Dkt. 124-63. However, none of the evidence supports Bossong's claim that she had ever had a conversation with Smith before December 2015. Plaintiff incorporates by reference herein its response to DF ¶ 29.

To further supplement its response to DF ¶ 30, Plaintiff offers its own statement of material facts relating to the misrepresentations Bossong made regarding "verbal and physical assaults" in her first deposition at 37:23-38:15:

a. Bossong claimed, "John would sometimes pinch [Smith] or if she had -- for example, she did dance and other kinds of performance. If she had bruises and they were arguing, John would press on those bruises. So that was the behavior she had described to me." Tab 10 at 38:10-15.

b. First, according to the investigative report, there was one single alleged incident where John's playful grab ended up with an inadvertent pinch and the Panel found said incident not to be "abuse." Dkt. 124-28 at 50-52.

c. Second, Bossong falsely claimed that John's pushing on Smith's bruises was "in the report." Tab 10 at 38:20-39:1.

d. However, the report does not contain any allegation that John ever pushed on Smith's bruises at any time. Dkt. 134, Rossi Affidavit ¶ 35. *See also* Dkt. 124-28.

31. Ms. Bossong began safety planning with Smith and repeatedly offered Smith the opportunity to file a no-contact order against Doe. (*Id.* at 39:11-40:22)

Response: Plaintiff objects to DF ¶ 31 as an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence. Plaintiff incorporates by reference herein its response to DF ¶ 29. Further, DF ¶ 31 is vague and ambiguous at to when this allegedly occurred.

THE HONOR CODE PROCEEDING

32. On December 6, 2015, Smith emailed Dean Bolton, stating that she had written essays for Doe in three different Spanish classes. (Tab 3, Doe Dep. I at 62:20-63:11)

Response: Plaintiff does not dispute DF ¶ 32.

33. The allegation was referred to the honor committee, which held a hearing in accordance with the College's honor code policies. (*Id.* at 64:19-65:21)

Response: Plaintiff objects to DF ¶ 33 as an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 47 and 51-59.

34. The honor code policies provide that the Dean's office will be available to assist witnesses, that the accuser has a role in presenting evidence to the honor committee, and that the accuser is informed of the outcome of the proceedings. (Tab 1, Compl. Ex. P-5, Honor Hearing Procedures)

Response: Plaintiff does not dispute DF ¶ 34.

35. On March 2, 2016, Dean Bolton, acting as recording secretary to the honor committee, wrote to Doe informing him of the committee's decision. The committee found that there was not sufficient evidence to find him responsible for a violation of the honor code for two of his classes, but that they did find sufficient evidence that he violated the honor code in one class. (Tab 24)

Response: Plaintiff does not dispute DF ¶ 35.

36. The committee voted to recommend Doe's permanent separation from the college. Dean Bolton accepted the recommendation, which the President of the College approved. (Tab 24)

Response: Plaintiff does not dispute DF ¶ 36.

THE MARCH 13, 2016 CEASE AND DESIST LETTER TO SMITH

37. On March 13, 2016, Doe's attorney, Stacey Elin Rossi, sent a cease and desist letter to Smith via email, with a blind copy to Dean Bolton. (Tab 25; Tab 3, Doe Dep. I at 82:14-84:13)

Response: Plaintiff admits DF ¶ 37.

38. The letter demanded that Smith cease engaging in "harassing actions" toward Doe and indicated that Doe was considering legal action against Smith in connection with her "battery upon [Doe] on the night of December 5, 2016..." (Tab 25)

Response: Plaintiff admits DF ¶ 38.

39. Doe did not expect Dean Bolton to take any action as a result of receiving a blind copy of the letter. (Tab 3, Doe Dep. I at 87:4-18)

Response: Plaintiff objects to DF ¶ 39 as an assertion that misrepresents the deposition testimony cited in support of this Statement. In Defendant's cited deposition testimony, Defendant's counsel first asked John [who was looking at said letter], "The letter makes no mention of filing any complaint against her with the College, does it?" John answered, "No, it does not." Next, Defendant's counsel asked John if he knew that said letter was being sent to Bolton at the same time it was being sent to Smith. John answered, "I don't recall." Lastly, Defendant's counsel asked, "It's fair to say that you don't recall expecting that Dean Bolton was going to take any action as a result of receiving this letter; is that fair?" to which John replied, "yes, that's fair." Not recalling an expectation is not the same as expressing an affirmative expectation as Defendant's DF ¶ 39 asserts. Dkt. 124-159 at 87:4-18.

THE MARCH 14, 2016 MEETING WITH DEAN BOLTON AND COLLEGE COUNSEL

40. The next day, on March 14, 2016, Doe and his attorney, Ms. Rossi, met with Dean Bolton and Jeffrey Jones, then College Counsel at Williams. (Tab 3, Doe Dep. I at 87:19-88:4)

Response: Plaintiff admits DF ¶ 40.

41. At the meeting Doe's attorney expressed deep concern that Williams was protecting an employee who allegedly had assaulted and harassed him. (*Id.* at 88:6-12)

Response: Plaintiff admits DF ¶ 41.

42. Doe did not indicate that he intended to file a complaint against Smith, nor did he ask the College to conduct an investigation or take any other action against Smith. (*Id.* at 89:23-90:8)

Response: Plaintiff objects to DF ¶ 42 as an assertion that misrepresents the deposition testimony cited in support of this Statement. In Defendant's cited deposition testimony, Defendant's counsel asked, "You did not in this meeting ask either the College counsel, Jeff Jones, or Dean Bolton to initiate any kind of college process against Ms. Smith, right?" John acknowledged that this was correct. *Id*.

43. When Doe left the meeting, he did not expect that the College was going to do anything other than be aware of and be alert to the allegations that Smith allegedly had assaulted and harassed him. (*Id.* at 89:17-21)

Response: Plaintiff does not dispute DF ¶ 43 as an accurate depiction of the deposition excerpt but would like to point out that expecting and wanting are not coterminous.

APRIL 2016 NO-CONTACT ORDERS

44. After Smith reported Doe for plagiarism and he was found responsible, Smith expressed concern that Doe might retaliate against her physically, as a result of which she sought a no-contact order. (Tab 1, Compl. ¶ 63; Tab 61, Bolton Decl. ¶ 5)

Response: Plaintiff objects to DF ¶ 44 as an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence. As such, DF ¶ 44 warrants a number of counter-facts in response:

a. Compl. ¶ 63 states, "On information and belief, Bolton had informed employee Smith that John's appeal hearing had been granted and it was on this basis and upon Bolton's recommendation that employee Smith request that the College put in place a no-contact order. Dkt. 76.

b. Through discovery, documents revealed that sometime on or around April 5, 2016, which was around the time that the honor code committee agreed to hear John's appeal, Smith had complained to her supervisors in the Alumni Department and to Bolton that she would be in

John's presence at an upcoming College dance performance in which John was to participate. PF ¶ 68.

c. As a result of Smith's request, the Alumni Department wanted to bar him from performing in the dance and to bar him from attending the events that weekend. PF ¶ 69.

d. Responding that she "may be able to make some arrangements," Bolton set up a mutual no-contact order between Smith and John for the purposes of excluding John from the dance performance and accommodating Smith. PFs ¶¶ 70-1.

e. The time cited in DF ¶ 44, "After Smith reported Doe for plagiarism and he was found responsible," as testified to by Bolton in her sworn statement, February 23, 2016, was actually six weeks before the Alumni Department personnel reached out to Bolton. Tab 61, Bolton Decl. ¶ 5; PF ¶ 59.

f. The time when Bolton initiated the no-contact order (early April 2016) was one month after John's final communication with Smith (March 4, 2016) and nearly one month after she had received the cease and desist letter from John's counsel (March 13, 2016). Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 61-63.

45. On April 7, 2016, mutual no-contact orders were entered between Doe and Smith, which applied equally to both of them. (Tab 29; Tab 3, Doe Dep. I at 106:18-107:15)

Response: Plaintiff admits DF ¶ 45.

46. Doe was in favor of the no-contact orders. (Tab 3, Doe Dep. I at 107:16-18)

Response: Plaintiff admits DF ¶ 46.

47. Dean Bolton asked Doe to refrain from attending a dance event at which Smith would be working because Smith is the one who sought the no-contact orders and Dean Bolton understood that Doe only recently had volunteered to dance in the event, whereas Smith had been planning and working on the event for some time. The director of the event also requested that Doe be the one not to attend the event. (Tab 61, Bolton Decl. ¶ 9)

Response: Plaintiff objects to DF ¶ 47 as an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence. Documentary evidence shows that it was Bolton herself who contrived by "ma[king] some arrangements" and initiated the no-contact orders to accommodate the Alumni Department's wish to bar John from the dance performance. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 68-71.

DOE'S APRIL 2016 COMPLAINT AGAINST SMITH

48. The first time Doe or his counsel indicated to the College that Doe wanted to bring a complaint against Smith was on April 13, 2016, in a letter he sent to Ms. Camacho. (Tab 3, Doe Dep. I at 90:16-91:8; Tab 26)

Response: Plaintiff objects to DF ¶ 48 as an assertion that is incomplete, lacking in context, and is misleading. The blind-copied email to Bolton on March 13, 2016 and the meeting on March 14, 2016 were complaints in and of themselves. In fact, Bolton's email to a College Associate Vice President of Finance and Administration for insurance purposes acknowledges that the College was on actual notice of the "charges on March 13th." Plaintiff incorporates by reference herein its proffer of PF ¶ 76. Dkt. 124-51.

DOE'S HONOR CODE APPEAL

49. On March 16, 2016, after his meeting with Bolton, but before his Title IX complaint, Doe appealed the honor committee finding. (Tab 3, Doe Dep. I at 92:1-8)

Response: Plaintiff admits DF ¶ 49.

50. Doe's appeal succeeded and the finding against him was vacated. (*Id.* at 96:19-97:3; Tab 27)

Response: Plaintiff admits DF ¶ 50.

51. Doe has not had any contact with Smith since the outcome of the honor code appeal. (Tab 3, Doe Dep. II at 76:20-77:1)

Response: Plaintiff objects to DF ¶ 51 as factually inaccurate and misrepresents the deposition testimony cited in support of this Statement. At John's second deposition, Defendant's counsel

asked, "is it still the case that you've had no contact with [Smith] since you found out the outcome of the – the initial outcome of the Honor Code proceeding?" John answered, "I have not had any contact with her." Dkt. 124-160 at 76:20-77:1. The initial outcome of the Honor Code proceeding was conveyed by Bolton to John on March 2, 2016. The final communication John had with Smith was March 4, 2016. The outcome of the appeal of said proceeding was not until April 26, 2016. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 61 and 73-75, and its response to DF ¶ 163.

MEETINGS TO DISCUSS DOE'S AND SMITH'S COMPLAINTS

52. On May 2 or May 3, 2016, Doe met with Ms. Camacho to discuss his complaint against Smith. (Tab 1, Compl. ¶ 75)

Response: Plaintiff does not dispute DF ¶ 52.

53. On May 5, 2016 Smith sent an email to Camacho in which she agreed to meet to discuss Doe's complaint, but also said she wanted to file a complaint against Doe "regarding relationship abuse and retaliation." (Tab 49)

Response: Plaintiff does not dispute DF ¶ 53.

54. Ms. Bossong did not advise Smith to file the counter complaint against Doe. (Tab 10, Bossong Dep. I at 54:10-13)

Response: Plaintiff objects to DF ¶54 on the grounds that the assertion is solely based upon one deponent's testimony. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 87-89.

55. On May 9, 2016, Camacho met with Smith to discuss Doe's complaint against her and her complaint against Doe. (Tab 21; Tab 19)

Response: Plaintiff does not dispute DF ¶ 55.

56. On May 10, 2016, Camacho also sent Doe a letter informing him of Smith's complaint that he had displayed abusive behavior toward her during the past two years and explaining the investigation process. The letter included a copy of the approximate timelines, guidelines for advisors, a copy of the code of conduct, and the procedures for the investigation and adjudication

process for sexual assault, sexual exploitation, stalking, dating violence and domestic violence applicable to students. (Tab 28; Tab 3, Doe Dep. I at 104:13-18; Tab 1, Compl. ¶¶ 77-78)

Response: Plaintiff does not dispute DF ¶ 56.

57. On May 10, 2016, Ms. Camacho also met with Doe to discuss Smith's complaint against him for relationship abuse and to discuss the investigation process. (Tab 3, Doe Dep. I at 99:1-6, 103; Tab 1, Compl. ¶ 77; Tab 20)

Response: Plaintiff does not dispute DF ¶ 57.

58. Ms. Camacho initiated the investigation into Smith's complaint because anytime someone comes forward with a complaint she looks in to it; she does not turn anyone down. (Tab 12, Camacho Dep. at 41:23-42:4)

Response: Plaintiff objects to DF ¶ 58 on the grounds that the assertion is solely based upon one deponent's testimony. DF ¶ 58 also warrants a number of counter-facts in response.

a. Defendant has made a number of conflicting statements on the issue of whether or not it conducts threshold evaluations or investigates all complaints. The College claims that it has "no 'threshold' determination for initiating a disciplinary process"; that **every** complaint is investigated and adjudicated; and that no complaints are "screened out" or otherwise resolved in any manner other than through the investigation/process. *See* PF ¶ 12 and 13.
b. According to Sandstrom, "Williams gives individuals who have been harmed the choice of whether to pursue an investigation." Dkt. 134-23.
c. In her April 21, 2016 email to John, Bolton stated the college "…**may** need to proceed with an investigation…[emphasis added]". Dkt. 134-24.
d. According to the College's Annual Security and Fire Safety Report 2017-2018 section titled *Response to a Report*, "all CSS incident reports are forwarded to the Dean of the College's Office **for review for potential action, as appropriate**. [emphasis added.]" Dkt. 134-25 at 8.

e. Said report also states that the College issues "timely warnings to the campus community" for Sexual Assault. *Id*. at 10.

f. Said report misstates the sexual misconduct policy's definition of consent as "…words **and** conduct…[emphasis added.]" *Id.* at 24.

THE FORMAL INVESTIGATION

59. In the beginning of May 2016, Williams retained an outside attorney, Allyson Kurker, to conduct the formal investigation into Doe's and Smith's complaints. (Tab 58)

Response: Plaintiff does not dispute DF ¶ 59. However, DF ¶ 59 warrants further response. Kurker was hired to be a "fact-finder" whose responsibilities do not include providing opinions or assessing the respondent's credibility. PF ¶ 143.

60. Kurker had been practicing law for over ten years and had been conducting Title IX investigations for about four years. (Tab 13, Kurker Dep. at 7:4-9)

Response: Plaintiff does not dispute DF ¶ 60.

61. Kurker had attended numerous trainings on Title IX and has conducted somewhere between 25 and 75 Title IX investigations for colleges. (*Id.* at 7:10-8:15, 88:13-16)

Response: Plaintiff does not dispute DF ¶ 61.

62. The investigator first interviewed Smith on May 10, 2016. (*Id.* at 10:21-11:1)

Response: Plaintiff disputes DF ¶ 62 as factually inaccurate. Kurker first interviewed Smith on May 20, 2016. Plaintiff incorporates by reference herein its proffer of PF ¶ 144.

63. Smith mentioned that there was an incident of sex with Doe that she believed was not consensual. (*Id.* at 11:16-12:2)

Response: Plaintiff disputes DF ¶ 63 on the grounds that the assertion is solely based upon one deponent's testimony. DF ¶ 63 also warrants a number of additional counter-facts in response. In the last five minutes of Kurker's first interview with Smith, which took two and one half hours, Smith raised the allegation that there had been an incident of nonconsensual sex. PF ¶ 145. This was after

she had made numerous other allegations of John's force and coercion upon her. Plaintiff incorporates by reference herein its proffer of PF ¶ 244. It did not concern the Panel that Smith made all these other claims before getting to the claim that there was alleged nonconsensual sex. Dkt. 124-68 at 66:10-67:6.

64. At the time Smith revealed this information to the investigator, the investigator had another individual coming in for an interview right after Smith, so Smith did not have time to share any of the details during that interview. (*Id.*)

Response: Plaintiff does not dispute DF ¶ 64.

65. During a second interview on June 15, 2014, Smith provided more details about the sexual encounter (*Id.* at 17:17-18:2). Smith reported to the investigator that the incident occurred on Labor Day, September 2014, when she "didn't want to have sex, but [Doe] still did it anyway." She explained that she was crying while they were having sex; he "kind of just forced himself in, and it hurt"; she was lying face down in bed; Doe was on top of her; and she felt confused about why they were having sex. Smith explained that she had been intoxicated and Doe had penetrated her from behind, a position they never started in (a fact Doe later confirmed to the investigator). Smith said that she tried to pull away from Doe when he was on top of her but his hands were on her shoulders, and she could not move from under him because he was restraining her and holding her down. She reported that she did not participate in the sex that night, meaning that she did not kiss him or touch him intimately. Smith also stated that she gave no indication that she wanted to have sex, whereas she and Doe always talked about having sex before beginning any sexual activity. (Doe agreed that Smith "almost always initiated sexual activity.") Smith also explained that it felt uncomfortable, that she was not lubricated and it hurt. She also told the investigator that after the encounter, when she went to the bathroom to clean herself she noticed she was bleeding. (Tab 50 at 9-12)

Response: Plaintiff objects to DF ¶ 65 on the grounds that it contains multiple statements. Further, DF ¶ 65 lacks context and may be misleading in the context of all the representations made by Smith

and her "witnesses." Dkt. 124-28 at 38-45. Plaintiff incorporates by reference herein its proffer of PF ¶ 208 and its response to DFs ¶¶ 66-67.

66. Another student told the investigator that Smith told him in the Spring of 2015 that Doe had forced himself on her when she did not want to engage in sexual activity one evening after they had been drinking. (*Id.* at 13).

Response: Plaintiff objects to DF ¶ 66 on the grounds that it is inaccurate, incomplete, misleading, and lacking in context. First, Eman Al-Ali, the alleged "witness" from spring 2015, was not a student but a friend of Smith's in Houston. Dkt. 124-28 at 44. Second, the Panel understood and agreed that there was no evidence that John forced himself on Smith to have intercourse on the night in question. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 208(e) and 257-258. *See also* Dkt. 124-68 at 44:2-8.

67. Two other students told the investigator that Smith told them about the incident, one in May 2016, and one in June and July 2016. (*Id.*)

Response: Plaintiff objects to DF ¶ 67 on the grounds that it is incomplete, misleading, and lacking in context. DF ¶ 67 warrants a number of counter-facts in response:

a. Smith had been given notice of the College investigation of her on the first or second day of May 2016.

b. Ava Atri, the student who "told the investigator that Smith told [her] about the incident" in May 2016 also told the investigator that Smith had said earlier, "No, he's never done that. He doesn't do that" when asked if John have ever abused her physically or engaged in nonconsensual sex with her. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 208(c). *See also* Dkt. 124-28 at 43.

c. Elanie Wilson, the student who "told the investigator that Smith told [her] about the incident" in "June and July 2016" actually approached Smith on June 18, 2016 to talk about the alleged incident but it was not discussed at that time. *Id*. at 44.

d. Elanie told the investigator that, in July 2016, Smith told her that "on one occasion when she had been intoxicated and asleep, she awoke to John having sex with her." *Id*. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 208(a) and 208(f).

e. Elanie was not named as a "witness" by Smith until her third/final interview on July 26, 2016. PFs ¶¶ 154-158.

f. According to Pretto, it didn't occur to the Panel that Smith was grooming witnesses to support her story Dkt. 124-68 at 79:17-19.

g. According to Gordon, the Panel did not discuss the possibility that Smith groomed these witnesses to support her stories. Dkt. 124-69 at 111:2-5.

h. Said statements evidence that the Panel did not read John's Response as he wrote about Smith's "grooming" of witnesses. Dkt. 124-28 at 11 and 39.

i. Smith claimed to have told a third student, Andrea Estrada with whom she was close friends, about the alleged incident in October 2014, approximately one month later, which would have been the closest in time to the index event.

j. Andrea told the investigator that she did not recall Smith confiding in her about any episode of sexual contact that Smith described as nonconsensual or upsetting. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 208(d). Dkt. 124-28 at 38-39.

k. What Smith alleged to have said to Andrea was that she had felt uncomfortable when she and John had sex during the alleged incident "because it was a really different position and that [she] was crying." *Id*.

l. Absent from this earliest version of Smith's story are any claim of intoxication, waking up to having intercourse, trying to shift away, never just starting out from behind, not kissing, insufficient lubrication, alleged lack of consent, etc. *Id*.

m. Smith "doubted that John noticed the crying" she alleged occurred. *Id*.

Doe Had Multiple Opportunities to Respond to Allegations,

Submit Additional Evidence, and Identify Witnesses

68. On May 20, 2016, Doe met with Ms. Kurker for his first interview, accompanied by his attorney, Ms. Rossi. (Tab 3, Doe Dep. I at 119:1-7)

Response: Plaintiff admits DF ¶ 68.

69. During the interview, Doe had the opportunity to tell the investigator his story about his relationship with Smith, the night Smith slapped him, and Smith's plagiarism allegations. (Tab 3, Doe Dep. I at 119:9-120:4; Tab 31at 4-46)

Response: Plaintiff does not dispute DF ¶ 69.

70. On May 20, 2016, in an email, Doe sent the investigator documents and identified three witnesses. (Tab 3, Doe Dep. I at 120:5-122:1)

Response: Plaintiff admits DF ¶ 70.

71. On June 1, 2016, Doe met with the investigator for his second interview, accompanied by Attorney Rossi. (*Id.* at 122:18-123:11; Tab 32)

Response: Plaintiff admits DF ¶ 71.

72. The investigator shared the information she had received to date from Smith and gave Doe the opportunity to respond. (Tab 3, Doe Dep. I at 123:18-124:4)

Response: Plaintiff disputes DF ¶ 72 on the basis that this Statement is factually inaccurate. Investigator Kurker did not share any information she had received to date from Smith regarding the allegation of nonconsensual sex and, therefore, did not give Doe the opportunity to respond or to prepare a response to said allegation. Kurker had received information from Smith on May 20, 2016 at her first interview regarding the allegedly nonconsensual sex incident. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 151-153.

73. The investigator asked Doe if he wanted to identify any additional witnesses to interview or provide additional documents. (*Id.* at 124:5-125:17)

Response: Plaintiff disputes DF ¶ 73 on the grounds that this Statement is incomplete and lacks context. Plaintiff's testimony at 124:5-125:17 of his first deposition relates to investigator Kurker's question to him at his second interview on June 1, 2016 – before July 13, 2016 when she informed him that Smith had made a claim that they had engaged once in nonconsensual sex. *Id*.

74. On June 1, 2016, June 3, 2016, and June 13, 2016, Doe sent the investigator additional documents that he thought the investigator should consider. (*Id.* at 125:20-127:1)

Response: Plaintiff admits DF ¶ 74.

75. On June 13, 2016, Doe had a third interview with the investigator, accompanied by Attorney Rossi. (*Id.* at 127:2-17)

Response: Plaintiff disputes DF ¶ 128 on the basis that this Statement is factually inaccurate and misrepresents the deponent's testimony. John correctly testified that the date of said interview was July 13, 2016. *Id*.

76. The investigator told Doe that Smith alleged that Doe engaged in nonconsensual sex with her in September 2014. (*Id.* at 128:1-16)

Response: At this third and final interview, investigator Kurker told Doe that Smith alleged that Doe engaged in nonconsensual sex with her in September 2014 at the very end of his interview. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 151-153.

77. The investigator read Doe a summary of Doe's complaint and recounted the details of Smith's allegations. (Tab 33 at 17-24)

Response: Plaintiff disputes DF ¶ 77 as an assertion that is inaccurate, incomplete, and is misleading in the context of the documentary evidence. DF ¶ 77 warrants a number of counter-facts in response. First, Defendant likely meant to say that the investigator read Doe a summary of Smith's complaint. Second, investigator Kurker provided John with a summary of Smith's complaint but did not provide details including those that would reveal Smith's inconsistent statements or statements made to or by Smith's "witnesses." *Id*. For example, Kurker made no mention that Smith had claimed to have been

crying (although she doubted he had heard), that she allegedly went to the bathroom afterwards, or that she told Elanie that she awoke to John having sex with her. Dkt. 124-26 at 111-115.

78. During the interview Doe had an opportunity to respond to Smith's account of the events of the September 2014 encounter, which he denied. (Tab 3, Doe Dep. I at 128:10-16; Tab 33 at 19, 22)

Response: Plaintiff disputes DF ¶ 78 as an assertion that is incomplete, lacking in context, and is misleading. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 151-153 and its response to DF ¶ 77.

79. At the end of the interview, the investigator asked if Doe had anything else he wanted to say or if there was anything else she should know, and Doe stated he did not have further information to provide. (Tab 33 at 22)

Response: Plaintiff objects to DF ¶ 79 for the same reasons it disputes DF ¶ 78.

80. On July 14, 2016, the day after Doe and his attorney were informed of Smith's allegation of nonconsensual sexual intercourse, Doe's attorney sent the investigator an email attaching copies of the Code of Conduct, stating, "I wanted to ensure that you had copies of the college's Code of conduct that apply to the times discussed in the interviews. I am attaching the previous versions I have been able to access from the College's website's archives." (Tab 34; Tab 3, Doe Dep. I at 129:19-131:3)

Response: Plaintiff objects to DF ¶ 80 as lacking in context. The majority of the incidents complained about by Smith spanned from academic year 2014-2015 and into fall 2015. Dkt. 124-28. College policy prior to the 2015-2016 Code of Conduct made no reference to an "ongoing pattern of behavior" constituting relationship abuse. Throughout his Response to the Report, John correctly cited that only the Dating or Domestic Policy and Stalking Policies were in effect during applicable times and that the Relationship Abuse policy did not take effect until October 2015. *Id*. at 15 and throughout.

81. The policies that Doe's attorney identified to Kurker were ***not*** the policies that applied in September 2014. The definition of consent in the policies she sent included the language concerning "affirmative consent." (Tab 34 at WMS10098, WMS10121)

Response: Plaintiff objects to DF ¶ 81. Plaintiff incorporates by reference herein its response to DF ¶ 80. Further, John's counsel did not assert that the policies applied in September 2014. The only policies available directly from the College were those that she forwarded which were titled October 2014. Besides, the onus to provide the correct policies should not be on the accused student's attorney.

82. On July 23, 2016, Doe notified Ms. Camacho and on and July 24, 2016 Doe notified the investigator that he wanted to add three people to his witness list for interviews because he believed they had information relevant to Smith's claim that she was intoxicated the night of the alleged nonconsensual intercourse. (Tab 35)

Response: Plaintiff disputes DF ¶ 82 on the basis that this Statement is factually inaccurate. John notified the investigator that he wanted to add three people to his witness list for interviews because he believed they had information that they had information that Smith's was "untruthful about said incident and that she was not overly intoxicated the night in question." *Id*.

83. On July 26, 2016, the investigator notified Doe that Smith had identified the date of the alleged nonconsensual sex as Labor Day 2014, and the investigator told Doe that if he wanted to provide any new information now that the exact date was identified he could schedule a time to do so. Doe declined the invitation. (*Id.*)

Response: Plaintiff does not dispute DF ¶ 83.

84. Throughout the investigation process, if at any point Doe thought there was material the investigator should consider, he had the opportunity to share it with her. (Tab 3, Doe. Dep. I at 121:12-17)

Response: Plaintiff objects to DF ¶ 84 on the grounds that it is misleading. Kurker stated to John at his third interview when asked about providing further information, "…we could do this back and forth for a year. At a certain point, I need to feel confident that I've provided the hearing panel with enough information for them to make a decision. So there is information that the two of you presented that is just inconsistent with each other, and I feel like I have captured both of your perspectives." PF ¶ 153. This indicated that Kurker was finished with interviewing John and that she did not want to hear any more from him.

85. The investigator interviewed every witness Doe identified who was willing to speak to her. (*Id.* at 142:1-4)

Response: Plaintiff objects to DF ¶ 85 as factually inaccurate. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 158-164.

86. The investigation lasted longer than usual because both parties identified a number of witnesses and some witnesses had to be contacted multiple times. (Tab 13, Kurker Dep. at 36:8-18)

Response: Plaintiff objects to DF ¶ 86 as incomplete and misleading. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 151, 158, 181, 189, 194, and 195.

The Applicable Policy Was Inadvertently Omitted From the Report

87. On August 15, 2016, the investigator asked Ms. Camacho for the applicable policies, including the policies in effect during the summer of 2014 and September 2014. (Tab 51)

Response: Plaintiff does not dispute DF ¶ 87.

88. Because Ms. Camacho was not at Williams during those times, she consulted Ms. Bossong, who referred her to College Counsel, Mr. Jones. (Tab 12, Camacho Dep. at 42:18-43:3)

Response: Plaintiff does not dispute DF ¶ 88. However, this Statement begs the question why Bossong did not refer Camacho to Cynthia Haley who was the custodian of the policies Sandstrom consulted to compile her "policies over time" document. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 270 and 293.

89. Mr. Jones responded that there was no separate sexual misconduct policy in effect until October 2014, but that the Code of Conduct (which contained the applicable policy against nonconsensual sexual intercourse) would have applied prior to October 2014, which Ms. Camacho relayed to the investigator on September 12, 2016. (Tab 14)

Response: Plaintiff objects to DF ¶ 89 as factually inaccurate and misleading. College Counsel Jones is reported to have stated that "the College's code of conduct for student would apply for the policy section of the investigative report since the college did not have a Sexual Misconduct policy until October 2014." *Id*. "Separate" was nowhere in his response.

90. The investigator's report referred to the 2013-2014 Code of Conduct, but did not copy the text of the consent policy into the report, inserting instead the consent policy from October 2014. (Tab 50 at WMS 01843)

Response: Plaintiff does not dispute DF ¶ 90. However, this Statement is misleading in its use of the term "consent policy." The policy in the 2013-2014 Code of Conduct, effective up until October 2014, was a "sexual misconduct" policy, not only a "consent policy." After October 2014, the College implemented a separate "consent policy." Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 1, 6, 7, 124, 125, 127, and 205.

91. When they reviewed the report, neither Ms. Camacho nor Dean Sandstrom noticed that the consent policy from September 2014 was not included; that was because the language of the two policies was so similar. (Tab 12, Camacho Dep. at 44:12-22; Tab 9, Sandstrom Dep. at 20:13-22)

Response: Plaintiff does not dispute DF ¶ 91 to the extent that it is an accurate depiction of what Camacho and Sandstrom stated at their depositions. However, DF ¶ 91 warrants a number of counter-facts in response. First, the two policies were not similar. Second, none of the documentary evidence demonstrates that either Camacho or Sandstrom had identified the correct September 2014 Code of Conduct sexual misconduct policy around the time they received the August 2016 draft from Kurker. Dkt. 134, Rossi Affidavit ¶ 36.

Doe Had the Opportunity to Review and Respond to the Report and to Supply Additional Information

92. On September 13, 2016, Dean Sandstrom provided Doe with the investigator's report, and on September 14, 2016, she sent Doe all the exhibits to the report. (Tab 3, Doe Dep. I at 143:1-144:1; Tab 36; Tab 37)

Response: Plaintiff admits DF ¶ 92.

93. The investigator did not make any findings of responsibility. (Tab 36)

Response: Plaintiff does not dispute DF ¶ 93. However, DF ¶ 93 warrants a counter-fact in response. The investigator also did not assess John's credibility although she was the only official to meet with John face-to-face as part of the investigation and adjudication. Plaintiff incorporates by reference its response to DF ¶ 59.

94. On September 14, 2016, Dean Sandstrom emailed Doe informing him that he had the right to provide a written response to the investigation report. She also told him that he could identify additional witnesses to be interviewed or additional questions that should be asked of those who had been interviewed already, in which case the investigator may conduct additional interviews and produce an updated report. (Tab 54)

Response: Plaintiff does not dispute DF ¶ 94. However, at the third and final interview, Kurker indicated that she did not want or need to hear from John again. Plaintiff incorporates by reference its response to DF ¶ 84.

95. With the assistance of his attorney, Doe submitted a 24-page written response to the investigation report on September 24, 2016, with over 100 pages of exhibits. (Tab 38; Tab 3, Doe Dep. I at 144:11-145:2)

Response: Plaintiff does not dispute DF ¶ 95.

96. Doe's response included his account of the events at issue and detailed arguments as to why he should not be found responsible. (*Id.*)

Response: Plaintiff does not dispute DF ¶ 96.

97. Because Smith's response to the investigation report contained new information, Doe was also given an opportunity to review Smith's response and provide an additional response to her response. (Tab 39; Tab 3, Doe Dep. I at 145:11-146:12)

Response: Plaintiff admits DF ¶ 97.

98. On October 7, 2016, Doe submitted his response to Smith's response, which also was prepared with the assistance of his attorney. (Tab 1, Compl. ¶ 117; Tab 41)

Response: Plaintiff admits DF ¶ 98.

99. On October 3, 2016, Doe's attorney also submitted comments to the investigator and Dean Sandstrom concerning the report. (Tab 40; Tab 3, Doe Dep. I at 146:17-147:4)

Response: Plaintiff does not dispute DF ¶ 99. However, said "comments" were limited to notification of a transcription error and incorrect interview dates. John's attorney alerted the investigator and Sandstrom to the fact that incorrect interview dates were listed in the report: May 10, May 20, and July 13. The correct interview dates for John were May 20, June 1, and July 13. Tab 40.

100. On October 11, 2016, the investigator sent Dean Sandstrom the revised investigation report, which reflected changes that Doe's attorney suggested. (Tab 50)

Response: Plaintiff disputes DF ¶ 100 on the basis that this Statement is factually inaccurate. The revised report contained the correction of the transcription error but Kurker did not correct all the interview dates. Tab 50 at 3.

101. Doe had an opportunity to provide the investigator with all the information he thought was relevant to the matter and to review all the material that was going to be presented to the panel. (Tab 3, Doe Dep. I at 148:3-14)

Response: Plaintiff disputes DF ¶ 101 as inaccurate on the grounds that at the third and final interview, Kurker indicated that she did not want or need to hear from John again. Plaintiff incorporates by reference its response to DF ¶ 84.

Doe's Response Did Not Clearly Identify the Issue with the Policies

102. In his lengthy response to the investigation report, Doe touched on the fact that the consent policy from September 2014 was not included in the report. (Tab 38 at WMS07618)

Response: Plaintiff objects to DF ¶ 102 as an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence. John did not merely "touch[] on the fact that the consent policy from September 2014 was not included in the report." John repeatedly demonstrated that the September 2014 policy was not in the report. Dkt. 124-28 at 5, 8, 11, 24, 28, 29, 33, 39, 40, 45, and 82. He also provided an entire section in his Response to the Report titled, "FAILURE TO INCLUDE APPLICABLE POLICIES" that contained the relevant Code of Conduct policy on sexual misconduct. Dkt. 124-28 at 5 and Dkt. 124-113.

103. Dean Sandstrom read Doe's response and found it confusing. (Tab 9, Sandstrom Dep. at 20:23-21:8) At least in part, that was because when Doe pointed out the policy error, he was referring to the relationship abuse allegation, not the allegation of nonconsensual sex. (*Id.* at 45:3-11)

Response: Plaintiff does not dispute DF ¶ 103 to the extent that it accurately depicts Sandstrom's statements at her deposition. However, DF ¶ 103 is an assertion that is incomplete, lacking in context, and is misleading. In John's Response, he pointed out the sexual misconduct policy error, i.e. the fact that the report used the October 2014 "affirmative consent" policy instead of sexual misconduct policy that was effective in September 2014. Plaintiff incorporates by reference herein its response to DF ¶ 102. Also in John's Response, he pointed out he pointed out another of the report's errors, i.e. the fact that the relationship abuse policy error was applied at times during which said policy was not in effect. The College's relationship abuse policy did not go into effect until October 2015. However, the investigator repeatedly applied said policy to events that occurred prior to October 2015. Dkt. 124-28 at 6, 9, 13-20, 23, 33, 36-37, 48-49, 52, 56, 58, 60, 62, and 82.

104. It was not clear to Sandstrom that there was an error in the investigation report. (*Id.* at 21:12-21; 43:8-44:6)

Response: Plaintiff does not dispute DF ¶ 104 to the extent that it accurately depicts Sandstrom's statements at her deposition. However, DF ¶ 104 is an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence and what Sandstrom actually testified. As such, DF ¶ 104 warrants a number of counter-facts in response:

a. The subject matter of Sandstrom's testimony at 43:8-44:6 was the email she had sent to President Falk explaining, "There are a couple of interwoven factors that contributed to this error" referring to how the panel "was using the Oct 2014 definition of consent, rather than the September 2014 definition" in the report. Dkt. 124-65 at 42:22-46:21 and Dkt. 124-142.

b. John's Response to the first investigative report, dated September 13, 2016, was sent to the College on September 24, 2016. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 203-214.

c. Sandstrom testified that, "in John's response when he raised the issue of whether the correct policy was used, he was citing a policy that he had found in another case, which was confusing because it didn't come from our own policy." Dkt. 124-65 at 43:8-13.

d. Sandstrom also testified that, "it didn't match our policy what he was reporting…" Dkt. 124-65 at 43:15-16.

e. On September 26, 2016, Bossong and Sandstrom independently exchanged emails with College Counsel for legal advice concerning issues raised by John in response to the investigative report and disciplinary procedures. PF ¶ 215.

105. On September 28, 2016, Dean Sandstrom emailed Doe to address the policy concerns he had raised. (Tab 39). She wrote, in relevant part, "The investigative report carefully lays out the relevant college policies that were in effect in 2013-2014, 2014-2015, and currently (see pages 4-8). While there were some shifts in specific language over time, there was always a code of conduct which prohibited sexual misconduct of any kind." (*Id.*)

Response: Plaintiff does not dispute DF ¶ 105 to the extent that it is an accurate depiction of relevant parts of said email. However, said email contains information that is factually inaccurate. The investigative report did not "carefully lay[] out the relevant college policies that were in effect in 2013-2014" as Sandstrom asserted. The report did not contain the relevant college policy in effect prior to October 2014. Plaintiff incorporates by reference herein its proffer of PFs ¶¶s 203-205.

106. Doe never responded to Dean Sandstrom's email to clarify that the section of the Code of Conduct relevant to the definition of consent at the time of the alleged sexual misconduct was missing from the report.

Response: Plaintiff objects to DF ¶ 106 on the grounds that Defendant offers no evidentiary support for this Statement.

THE ADJUDICATION

Doe Had an Opportunity to Object to the Adjudication Procedures

107. On September 13, 2016, Dean Sandstrom sent an email to Doe, which noted that the allegations spanned a period of time when both Doe and Smith were students and another period of time when Doe was a student and Smith was an employee, and suggested that the issues both complainants had raised should be considered together and adjudicated by a single panel acting under the student misconduct procedures, which she would oversee. (Tab 30 at 2-3)

Response: Plaintiff does not dispute DF ¶ 107 as an accurate depiction of Sandstrom's email.

108. On September 14, 2016, after consultation with his counsel, Doe agreed to the proposal. (*Id.* at 1; Tab 3, Doe Dep. I at 117:11-118:12)

Response: Plaintiff does not dispute DF ¶ 108. However, it bears noting specifically to what John agreed. Plaintiff incorporates by reference herein its proffer of PFs ¶¶s 21-25, 99, and 223-225. Further, it was not until discovery that it was learned that the Panelists had not been trained in employee policy. Plaintiff incorporates by reference herein its proffer of PFs ¶¶s 139-142.

Doe Had Opportunity to Review Panel Members

109. In advance of the adjudication, Doe was informed who the eligible hearing panelists were and was given an opportunity to identify anyone he thought was biased or unfit. He made no objection to any of the three panelists who ultimately heard his case. (Tab 3, Doe Dep. I at 112:23-113:12)

Response: Plaintiff objects DF ¶ 109 on the grounds that it contains an assertion that is incomplete and misleading. Relative to the potential panelist information, Sandstrom emailed John that objections to any specific individual on the list needed "to be based on specific interactions." Dkt. 124-121. John had not had nor was aware of any interactions with the three panelists who ultimately heard his case.

The Panel Was Trained and Experienced

110. The hearing panel consisted of two men and one woman: Aaron Gordon, the Administrative Director of Divisional Affairs; Stephen Klass, Vice President for Campus Life; and Ninah Pretto, the Assistant Dean of International Student Services. (Tab 5, Gordon Dep. at 7:17-22; Tab 6, Klass Dep. at 6:8-9; Tab 7, Pretto Dep. I at 5:17-20)

Response: Plaintiff admits DF ¶ 110.

111. Prior to hearing Doe's case, all of the panel members had attended training on cases involving sexual misconduct. (Tab 5, Gordon Dep. at 10:2-5; Tab 6, Klass Dep. at 7:5-16; Tab 7, Pretto Dep. I at 9:15-21)

Response: Plaintiff does not dispute DF ¶ 111.

112. The training was conducted by Ms. Bossong and lasted several hours. (Tab 5, Gordon Dep. at 11:4-7, 17:19-23; Tab 6, Klass Dep. at 7:11-16; Tab7, Pretto Dep. I at 10:8-11:2)

Response: Plaintiff does not dispute DF ¶ 112.

113. The training included a review of the policies, the definitions in the policies, the adjudication process, a review of case studies and scenarios, and breakout group discussions. (Tab 5, Gordon Dep. at 11:6-11; Tab 7, Pretto Dep. I at 10:18-20)

Response: Plaintiff does not dispute DF ¶ 113.

114. The panelists were trained to consider all the evidence and make findings based on a preponderance of the evidence. (Tab 5, Gordon Dep. at 86:16-18)

Response: Plaintiff objects to DF ¶ 114 on the grounds that the assertion is solely based upon one deponent's testimony.

115. The training also included being equitable in decision-making. (Tab 7, Pretto Dep. I at 78:10-12; Tab 10, Bossong Dep. I at 85:8-15)

Response: Plaintiff does not dispute DF ¶ 115.

116. The panel received a refresher training prior to hearing Doe's case. (Tab 5, Gordon Dep. at 11:6-14; Tab 7, Pretto Dep. I at 14:5-11; Tab 9, Sandstrom Dep. at 29:2-10)

Response: Plaintiff does not dispute DF ¶ 116 to the extent that it is an accurate depiction of what Gordon, Klass, and Pretto stated at their depositions. Plaintiff incorporates by reference herein its proffer of PFs ¶¶s 231-233.

117. Consideration of the College's reputation was not part of the panel's training. (Tab 5, Gordon Dep. at 18:7-11; Tab 6, Klass Dep. at 7:17-21; Tab 7, Pretto Dep. I at 11:9-13)

Response: Plaintiff does not dispute DF ¶ 117 to the extent that it is an accurate depiction of what Gordon, Klass, and Pretto stated at their depositions. To further supplement its response, Plaintiff incorporates by reference herein its response to DF ¶ 179(c)

118. Prior to serving on Doe's panel, Gordon had served on seven or eight other panels involving sexual misconduct complaints and Klass had served on one or two other panels involving sexual misconduct complaints. (Tab 5, Gordon Dep. at 9:21-10:1; Tab 6, Klass Dep. at 7:5-10)

Response: Plaintiff does not dispute DF ¶ 118.

The Panel Carefully Deliberated

119. The panel met on October 21, 2016 for the refresher training with Dean Sandstrom, and then began to review the case materials. (Tab 5, Gordon Dep. at 21:10-22:22, 25:1-10; Tab 15 at 1)

Response: Plaintiff does not dispute DF ¶ 119.

120. The materials included the investigator's report and the students' responses, each with their exhibits. (Tab 5, Gordon Dep. at 21:10-22:22, 25:1-10; Tab 7, Pretto Dep. I at 62:18-64:15; Tab 42 at 7)

Response: Plaintiff does not dispute DF ¶ 120.

121. The panel members continued to review the materials after the first meeting (Tab 5, Gordon Dep. at 31:4-10; Tab 7, Pretto Dep. I at 22:17-22)

Response: Plaintiff does not dispute DF ¶ 121.

122. The panel met for a second time on November 2, 2016 to discuss the case (Tab 5, Gordon Dep. at 30:14-31:3)

Response: Plaintiff does not dispute DF ¶ 122. However, DF ¶ 122 warrants a number of counter-facts in response. The ninety (90) minute meeting on November 2, 2016 was the one and only time the Panel discussed the case at the primary adjudication (pre-appeal) stage. Dkt. 124-124. The Panel had twenty-four (24) allegations to deliberate. Dkt. 124-130. The Panel deliberated at said meeting which provided less than four (4) minutes per allegation.

123. The panel discussed every aspect of the case over many hours and considered all the evidence. (Tab 5, Gordon Dep. at 33:15-18; Tab 6, Klass Dep. at 12:18-21; Tab 7, Pretto Dep. I at 24:20-23)

Response: Plaintiff does not dispute DF ¶ 123 to the extent that it is an accurate depiction of what Gordon, Klass, and Pretto stated at their depositions. However, DF ¶ 123 is misleading and misrepresents facts. Plaintiff incorporates by reference herein its responses to DFs ¶¶ 122 and 126.

124. During their deliberations, the panel used a spreadsheet that they made to keep track of and organize the information they were discussing and to parse out what took place. (Tab 5, Gordon Dep. at 40: 7-19; Tab 7, Pretto Dep. I at 41:1-3; Tab 6, Klass Dep. at 13:10-13; Tab 16)

Response: Plaintiff does not dispute DF ¶ 124.

125. The panel assessed the credibility of Smith's account of the relevant events, and found her account of nonconsensual sex to be credible. (Tab 7, Pretto Dep. I at 87:4-88:5; Tab 5, Gordon Dep. at 87:5-12)

Response: Plaintiff objects to DF ¶ 125 as an assertion that is incomplete, lacking in context, and is misleading in the context of the College's procedures. Plaintiff incorporates by reference herein its proffer of PF ¶ 18, which states, "The College's adjudication of sexual misconduct complaints involving students does not include any 'in person' credibility assessment. The Panel bases its decision on the 'report' rather than 'live' testimony by students." To further supplement its response, Plaintiff incorporates by reference herein its response to DF ¶ 126 and its proffer of PF ¶ 112-113, 143, 297, and 298.

126. The panel applied the preponderance of the evidence standard. (Tab 3, Doe Dep I, I 176:1-177:20; Tab 4, Doe Dep. II, 59:6-63:10; Tab 5, Gordon Dep. at 35:11-19; Tab 7, Pretto Dep. I at 73:14-19)

Response: Plaintiff objects to DF ¶ 126 as an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence and what the deponents actually said. DF ¶ 126 misrepresents the deposition testimony cited in support of this Statement. As such, DF ¶ 126 warrants a number of counter-facts in response:

a. At his first deposition, John merely acknowledged recitations Defendant's counsel read from the Panel's findings letter relative to "preponderance of the evidence." John's acknowledgments agreed that counsel read correctly from said letter. Dkt. 124-159 at 176:1-177:20.

b. At his second deposition, John again merely acknowledged recitations Defendant's counsel read from the Panel's findings letter relative to "preponderance of the evidence." John's acknowledgments agreed that counsel read correctly from said letter and that the letter purported that the Panel applied said standard. Dkt. 124-160 at 59:6-63:10.

c. Gordon, when asked if the panel is supposed to find the truth of what happened, said, "I think the standard we're given is – is reasonable doubt the term that – the 51 percent?...I think when we make the finding, we believe that what we feel is the truth, but it is the preponderance of evidence standard." Dkt. 124-69 at 35:11-19. This generalization was not a statement about what the Panel did in this particular case.

d. Pretto acknowledged by saying "Yes" to the question, "So all these other claims that [Smith] made…were found to be unsubstantiated or at least there was not a preponderance of the evidence for, correct?" Said fact addresses John's claims against Smith and does not evidence the use of the preponderance of the evidence standard for Smith's claims against John. Dkt. 124-68 at 73:14-19.

DF ¶ 126 also warrants a number of additional counter-facts in response:

aa. Pretto acknowledged a credibility problem in Smith. Dkt. 124-68 at 77:11-13.

bb. The spreadsheet kept by the Panel contained notes from Pretto about Smith's contradictory statements and changing and inconsistent stories relative to claims other than the one alleged nonconsensual sex incident. PF ¶ 244; Dkt. 124-130 at 2.

cc. However, at the section on said incident, no information was entered regarding the multiple inconsistent statements by Smith. *Id*.

dd. At his deposition, in response to a question regarding Smith's inconsistent statements, Gordon explained that from the trainings the Panel has had, "when there is trauma it can affect an individual's ability to recall information and to sequence narratives in a linear way." Dkt. 124-69 at 99:7-15.

ee. Gordon also stated that nonconsensual sex "is a form of trauma" and that all "recollections would have been post trauma." *Id*. at 99:16-21. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 246-248.

ff. Evidence indicates that the Panel disregarded John's Responses as the College admitted that the Panel "bases its decision on the investigator's report…" without mention of the Responses. Dkt. 124-8 Admission ¶ 5. Camacho also stated, "The panel makes its findings on whether or not there was a violation of the code of conduct based on the report." Dkt. 124-16. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 295-303 and PC-Fs ¶¶ 126 (gg-pp) below.

gg. Pretto stated that in coming to the determination that the alleged incident was nonconsensual, "[the Panel] reviewed what was written in the report and from that [it] made the decision." Pretto's answer made no mention of the Responses. Dkt. 124-68 at 42:18-43:1.

hh. Gordon stated that in coming to the determination that the alleged incident was nonconsensual, "I think that if you read the parts of the report that we read as we understood consent at the time, and understanding the way she described it, which we felt was credible, we didn't feel there was consent…" Dkt. 124-69 at 114:18-23.

ii. John's first Response pointed out the numerous inconsistent and discredited statements by Smith. PF ¶ 208.

jj. Said response also emphasized how Smith did not express that she did not want to be having sex despite the policy requirement for both parties to communicate consent or the lack of consent. PF ¶ 210.

kk. The Panel disregarded the fact that Smith did not express to John that she did not want to be having sex at any time during the alleged incident. PF ¶ 259-260.

ll. Nothing in the record indicates Smith was forced into having sexual intercourse and the Panel understood this. PF ¶ 257-258. *See also* Dkt. 124-68 at 44:2-8.

mm. The Panel was cognizant that Smith had a pattern of escalating the severity of her descriptions of events. "As Smith's claims escalate in number they escalate in severity of descriptions," wrote Klass on the spreadsheet regarding how Smith's "story changes pretty

dramatically over time – from 'playing around' after 'he got over it' to his nail pinching her during an argument." Dkt. 124-130 at 2.

nn. The Panel was also cognizant of Smith's pattern of putting John's interests first without communicating her own needs or desires; that she would wish that John would read her mind; and that when this would happen, she would end up regretting the outcome. Dkt. 124-68 at 80:17-83:9.

oo. The Panel disregarded said tendency of Smith's when it came to the account of nonconsensual sex. Dkt. 124-68 at 83:10-14.

pp. The Panel disregarded the information John provided in his Response that Smith had retaliated against him by filing her counter-complaint which Kurker did not even investigate. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 165-166, 207, and 237-239.

qq. Defendant's counsel stated to the First Circuit that, "…if the panel **refuses to hear** or is denied the hearing of exculpatory evidence that would implicate the fairness analysis," when asked whether it would be unfair to exclude exculpatory evidence. Dkt. 134, Rossi Affidavit ¶ 37.

127. The panel never was given any instruction, express or implied, to find Doe responsible. (Tab 5, Gordon Dep. at 109:4-8; Tab 7, Pretto Dep. I at 78:16-21)

Response: Plaintiff does not dispute DF ¶ 127 to the extent that it is an accurate depiction of what Gordon and Pretto stated at their depositions.

The Panel Delivers its Findings

128. On November 21, 2016, the panel delivered its findings in a letter addressed to Doe. (Tab 42 at 7)

Response: Plaintiff disputes DF ¶ 128 on the basis that this Statement is factually inaccurate. On November 22, 2016, Sandstrom forwarded a letter to John. *Id*. Said letter, written by Sandstrom, did

not reflect the Panel's findings. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 234-243 and 264-266.

129. The panel found that Doe's claims of relationship abuse against Smith – for looking at his social media page, exhibiting jealousy, and repeatedly texting him on one occasion – did not meet the College's definition of relationship abuse. (*Id.*)

Response: Plaintiff does not dispute DF ¶ 129.

130. The panel found that Smith did not falsely report Doe for the honor code violation and did not retaliate against him for making a Title IX claim against her, noting that her participation in the honor code appeal process started well before Doe asserted his claim. (*Id.*)

Response: Plaintiff objects to DF ¶ 130 as factually inaccurate, incomplete, and misleading. As such, DF ¶ 130 warrants a number of counter-facts in response:

a. The Panel found that Smith did falsely report John for the honor code violation. PFs ¶¶ 236, 241, and 242.

b. Said finding was in the Panel's findings letter of November 7, 2016. *Id*.

c. Sandstrom rewrote the Panel's November 7, 2016 letter. PF ¶ 240.

d. Said letter no longer included the "guilty" finding for Smith's honor code reporting. *Id*.

e. The Panel did not correct the letter. PF ¶ 243.

f. Sandstrom influenced the Panel to disregard to John's claim that Smith retaliated against him for making the Title IX complaint against her. PFs ¶¶ 234, 235, 237-239, and 266; Dkt. 124-68 at 101:10-108:2.

g. Plaintiff incorporates by reference herein its response to DF ¶ 126(pp).

131. The panel found that Smith did violate the Code of Conduct's relationship abuse policy by slapping Doe in December 2015. (*Id.* at 8)

Response: Plaintiff does not dispute DF ¶ 131.

132. The panel found that Smith's allegations of relationship abuse against Doe evidenced deeply problematic behavior by him, but it did not rise to the level of relationship abuse under the Code of Conduct. (*Id.*)

Response: Plaintiff does not dispute DF ¶ 132.

133. The panel found that Doe violated the Code of Conduct by engaging in non-consensual sexual intercourse with Smith in September 2014. (*Id.*) The panel's its [sic.] rationale was as follows:

> Based on the preponderance of the evidence we find it more likely than not that you did *not* have affirmative consent to have sexual intercourse with Smith during the incident in question. Smith indicated that the unusual sexual position and roughness were indicators that you did not have consent. In additional [sic], several witnesses recalled that Smith had described this incident of nonconsensual sex to them. Taken together, the Hearing Panel found this evidence to be credible, and therefore find you responsible for violation of the code of conduct in regard to sexual misconduct. (*Id.*)

Response: Plaintiff does not dispute DF ¶ 133 to the extent that this Statement accurately depicts the Panel's letter.

134. The "roughness" referred to by the panel, was indicated in the way the sexual encounter was described, including that it was unusual for Doe to start from behind; Smith tried to pull away but Doe was on top of her; Doe seemed to be preventing Smith from leaving; Smith felt discomfort, was not lubricated and did not intend to have sex; Doe's hands were on her shoulders so she could not move from under him; and she did not participate in the sex, meaning she did not kiss or touch him. (Tab 5, Gordon Dep. 66:9-70:2)

Response: Plaintiff objects to DF ¶ 134 on the grounds that the assertion is solely based upon one deponent's testimony. Plaintiff further objects on the grounds that DF ¶ 134 is incomplete, lacking in context, and is misleading in the context of the documentary evidence and what Panelist Gordon actually said. As such, DF ¶ 134 warrants a number of counter-facts in response:

a. The Panel's letter cites solely two *separate* factors: "unusual sexual position and roughness."

b. Gordon, at 66:15-17, stated, "I think that the roughness also indicated that the way the sexual encounter was initiated was unusual…" Dkt. 124-69.

c. Smith did not provide any description of "the way the sexual encounter was initiated." Plaintiff incorporates by reference its proffer of PFs ¶¶ 249-250 and 257-258.

d. Gordon continued his sentence at 66:17-19, "…in addition to the fact that she was uncomfortable and not lubricated." Dkt. 124-69.

e. In fact, Smith had stated that she "just felt really uncomfortable" because she was not lubricated and not because of anything else. Plaintiff incorporates by reference its proffer of PFs ¶¶ 254-255.

f. Next, Gordon added, "I also feel that her inability to extricate herself per her narrative was also a piece that we felt made it a rough encounter." Dkt. 124-69 at 66:20-22.

g. The College has stated that shifting around during intercourse "would not be enough in and of itself to communicate nonconsent" and that "a reason that someone might move their position during sexual intercourse might be to move in such a way that it would make it more pleasurable for them." Dkt. 124-6 at 60:12-61:14.

h. Pretto acknowledged that there was nothing else but the virtue of the physical position that Smith and John were in that indicated an exertion of force. Dkt. 124-68 at 59:21-60:5.

The Panel Believed It Had the Correct Policy Information

135. The panel believed that the version of the consent policy contained in the investigator's report was the applicable policy. (Tab 5, Gordon Dep. at 47:8-14; 105:15-106:5)

Response: Plaintiff objects to DF ¶ 135 as an assertion that is incomplete, lacking in context, and is misleading in the context of the documentary evidence and what Panelist Gordon actually said. DF ¶ 135 misrepresents the deposition testimony cited in support of this Statement. First off, the policy was not a "consent policy" but was the "sexual misconduct" policy. DF ¶ 135 warrants a number of counter-facts in response:

a. Gordon stated that, "when panels are formed and given the packet of information, I think there's an inherent assumption that the conversation has already taken place and we're being

given the relevant policy at…the outset and so we didn't necessarily question that…" and "it was our assumption that all the relevant policy information had been provided…" Dkt. 124-69 at 47:8-14; 105:15-106:5.

b. The report did not contain any version of the sexual misconduct policy that was applicable to the incident in question. The report only referred to the applicable policy: "A. The 2013-2014 Student Code of Conduct. The College's 2013-2014 Student Code of Conduct applies to the allegations that precede the College's adoption of its Statement of Sexual Assault and Other Sexual Misconduct, which went into effect in October 2014." Dkt. 124-20 at 4.

c. John emphasized the fact that the report failed to include the applicable policies provided an entire section in his first Response to the Report titled, "FAILURE TO INCLUDE APPLICABLE POLICIES" that contained the relevant Code of Conduct policy on sexual misconduct. Dkt. 124-28 at 5 and Dkt. 124-113.

d. The Response also explained that the Panel must adjudicate the allegations under the policy that was in effect at the time of each of the alleged incidents. Dkt. 124-28 at 6.

Doe Elects Not to Attend the Sanction Hearing

136. On November 22, 2016, Dean Sandstrom sent Doe a copy of the panel's findings. (Tab 42)

Response: Plaintiff disputes DF ¶ 136 on the basis that it is factually inaccurate. The letter Sandstrom sent Doe, written by Sandstrom, did not reflect the Panel's findings. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 234-243 and 264-266.

137. Doe was informed that he had the right to address the panel before the sanction was determined and to provide additional information pertinent to determine the sanction. (*Id.*)

Response: Plaintiff objects to DF ¶ 137 as an assertion that is incomplete, lacking in context, and is misleading in the context of the College's policy on the sanctioning stage. First, the policy does not allow the respondent to discuss the facts of the case during this opportunity to address the Panel. *Id*. Second, when John tried to address the unfairness of the 2012 case to protest its handling during the

spring 2016 honor code process, the committee student chair and Bolton denied him that opportunity. Plaintiff incorporates by reference herein its proffer of PF ¶ 67.

138. Doe elected not to attend the hearing or address the panel in connection with the panel's sanctioning decision. (Tab 3, Doe Dep. I at 165:6-9)

Response: Plaintiff does not dispute DF ¶ 138. To supplement its response, Plaintiff incorporates by reference herein its response to DF ¶ 137.

139. The panel convened to deliberate on sanctions, at which point they were informed for the first time about Doe's history of prior discipline at the College. (Tab 7, Pretto Dep. I at 108:18-22; Tab 5, Gordon Dep. at 138:2-6; Tab 15)

Response: Plaintiff does not dispute DF ¶ 139.

140. On December 7, 2016, Dean Sandstrom informed Doe of the panel's sanction decision. (Tab 43)

Response: Plaintiff admits DF ¶ 140.

141. The panel decided that in light of the seriousness of the offense and Doe's disciplinary record, including having been found responsible in May 2012 for violating the Code of Conduct with regard to nonconsensual sex and in November 2014 for violating the academic honor code, the panel determined that the appropriate sanction was permanent separation from the College. (*Id.*)

Response: Plaintiff does not dispute DF ¶ 141. To supplement its response, Plaintiff incorporates by reference herein its response to DF ¶ 137.

DOE FILES THIS LAWSUIT

142. Doe filed his original complaint in this case on November 23, 2016. Dkt. No. 1.

Response: Plaintiff admits DF ¶ 142.

THE COLLEGE GRANTS DOE'S APPEAL

143. On December 11, 2016, Doe emailed Leticia Haynes, the College's Vice President of Institutional Diversity & Equity, to appeal the panel's decisions. He asserted that the College failed

to apply the Code of Conduct from the 2014-2015 academic year and referred Haynes to his complaint in this case, in which he asserted additional "procedural lapses." (Tab 44)

Response: Plaintiff admits DF ¶ 143.

144. Haynes responded on December 14, 2016, asking Doe to clarify the procedural lapses he believed affected the panel's decision concerning the sexual misconduct incident for which he was found responsible, rather than referring her to his lengthy federal court complaint. (Tab 45)

Response: Plaintiff admits DF ¶ 144.

145. Doe responded on December 19, 2016, clarifying that he was appealing the panel's application of the incorrect consent policy and an incorrect burden of proof. Doe also asserted that the panel ignored certain evidence. (*Id.*)

Response: Plaintiff objects to DF ¶ 145 as an assertion that is incomplete, lacking in context, and is misleading in the context of John's statements to Haynes on said date. Without waiving this objection, Plaintiff admits that John cited "the application of an incorrect burden of proof and incorrect college policy [and/or disregard for the correct policy]…" and that "[t]he Hearing Panel did not appear to have read [his] Responses to the report…" as grounds for his appeal. The procedural lapses included, but were not limited to, said three bases. Plaintiff incorporates by reference herein its proffer of PF ¶ 276. *See* Dkt. 124-143 (WMS10428). To further supplement its response, Plaintiff incorporates by reference herein its proffer of PF ¶ 281 which states, "On January 3, 2017, John emailed Haynes a summary of the procedural lapses that were in addition to the incorrect policy issue: 1) The Panel did not apply the correct standards in determining whether John engaged in non-consensual sexual intercourse; 2) The proceedings were not conducted with basic fairness; 3) The Panel's decision was arbitrary and capricious." *See* Dkt. 124-145 (WMS10371); and Dkt. 124-146, (WMS10372).

146. Ms. Haynes allowed Doe's appeal in part, granting a limited rehearing of his case as to the finding of responsibility for non-consensual sex and related sanction. (Tab 46)

Response: Plaintiff admits DF ¶ 146. To supplement its response, Plaintiff incorporates by reference herein its proffer of PF ¶ 288.

147. Haynes noted that the policy contained in the investigation report included language about "affirmative consent" which was added in October 2014, and was not in the policy that was in effect in September 2014. (*Id.*)

Response: Plaintiff objects to DF ¶ 147 as an assertion that is incomplete, lacking in context, and is misleading in the context of what Haynes actually wrote in her letter granting John an appeal. First, Haynes stated that in support of the appeal, John "highlight[ed] a procedural concern, namely that the hearing panel did not consider the college policy in place at the time of the alleged misconduct…" *Id.* Haynes recited the policy in effect at the time of the alleged incident and stated, "The college's policy changed in October 2014, the month following the alleged sexual misconduct. Under the revised policy, affirmative consent is required for all sexual activity, "[t]he Williams College Code of Conduct requires affirmative consent for all sexual activity…in the absence of affirmatively expressed consent, sexual activity is a violation of the code of conduct…" *Id.* Haynes concluded, "The two policies are different, including with respect to the requirement for affirmative consent" and stated, "[i]n light of the fact that the hearing panel applied a policy not in effect at the time of the alleged misconduct, your appeal of the finding of responsibility and related sanction is granted." *Id.*

148. Haynes decided that the original hearing panel would reconvene and consider the claim of non-consensual intercourse in light of the policy in effect in September 2014, that the panel would consider and weigh all the evidence, and that the panel would reach a conclusion based on a preponderance of the evidence. (*Id.*)

Response: Plaintiff admits DF ¶ 148 to the extent that it is an accurate depiction of what Haynes stated the Panel would do in her January 31, 2017 letter to John. *See* Dkt. 124-153 (WMS11124 also Dkt. 76-16).

THE BOARD APPLIES THE CORRECT CONSENT POLICY ON APPEAL

Plaintiff objects to this conclusory and incorrect header as factually inaccurate. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 1, 2, 28, 120-137, 274, 284, 285, and 295-303.

149. The panel reconvened and reconsidered the sexual misconduct charge against Doe. (Tab 8, Pretto Dep. II at 12:1-17; Tab 5, Gordon Dep. at 105:22-106:5)

Response: Plaintiff disputes DF ¶ 149 which misrepresents the deposition testimony cited in support of this Statement. Pretto and Gordon acknowledge that the Panel reconvened but there is no deposition testimony, any evidentiary matters produced in discovery, or other evidence to support the assertion that the Panel actually reconsidered "sexual misconduct charge against Doe." *Id*. Instead, the evidence supports the assertion that the Panel reviewed the "policy revision" to "reaffirm [its] original findings" so "[it] could be consistent between the two and have the same outcome." Dkt. 124-69 at 105:22-106:5. To further supplement its response, Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 295-303.

150. The panel discussed the case in detail. (Tab 6, Klass Dep. at 19:1-2)

Response: Plaintiff objects to DF ¶ 150 on the grounds that the assertion is solely based upon one deponent's testimony. Further, Klass stated in his deposition at 19:5-6 that he might not have been at the appeal. *Id.*

151. The panel did not discuss Doe's lawsuit, nor did it consider his prior disciplinary sanction in making its determination. (Tab 8, Pretto Dep. II at 15:2-16:6)

Response: Plaintiff objects to DF ¶ 151 on the grounds that the assertion is solely based upon one deponent's testimony.

152. The panel was given the applicable policy and compared it to the policy they previously had applied. (Tab 5, Gordon Dep. at 139:9-10; 143:8-18; Tab 6, Klass Dep. at 16:6-9)

Response: Plaintiff disputes DF ¶ 152 as misrepresentative of the deposition testimony cited in support of this Statement. Plaintiff further objects to DF ¶ 152 as an assertion that is incomplete, lacking in context, and may be misleading in the context of other deposition testimony and

documentary evidence. According to Klass, the Panel looked closely at the key term of consent in the two policies. *Id*. **The single key term of consent does not comprise the policies.** Plaintiff incorporates by reference herein its proffer of PF ¶ 125. In Gordon's deposition at 139:9-10, he stated that he knew he had been given additional information but could not say what it was. At 143:8-18, Gordon stated that the Panel was asked to revisit its "conclusions based on the new information" and that "[u]pon revisiting it [the conclusion] and reviewing both policies side by side, [the Panel] felt that it didn't substantively change the outcome that we came to and so we reaffirmed our initial decision." Dkt. 124-69. To supplement its response, Plaintiff incorporates by reference herein its response to DF ¶ 149 and its proffer of PFs ¶¶ 120, 121, 123, 127-137, and 302.

153. The panel concluded that the change in policy language did not substantively change the outcome because the newer policy was merely a different articulation of the same policy; it only added clarity and did not change the fundamentals of the policy itself, which required "effective consent" – words or conduct that communicate consent to the activity. (Tab 5 Gordon Dep. at 143:15-148:23; Tab 6, Klass Dep. at 14:17-15:8)

Response: Plaintiff objects to DF ¶ 153 as an assertion that is incomplete, lacking in context, and may be misleading in the context of other deposition testimony and documentary evidence. Plaintiff incorporates by reference herein its response to DFs ¶¶ 149 and 152. DF ¶ 153 also warrants further response. At his deposition, Klass twice defined the term consent as "…words **and** actions…" and "…words or actions..." Dkt. 124-135 at 10:1-5 and 14:22-14. Klass "clarified" these responses in his errata sheet to "…words and/or actions…" Dkt. 134-26.

154. The panel viewed the facts under the correct "effective consent" policy and concluded that Doe violated that policy. (Tab 5, Gordon Dep. at 145:11-17; Tab 47)

Response: Plaintiff objects to DF ¶ 154 as an assertion that is incomplete, lacking in context, and may be misleading in the context of the College's sexual misconduct policy in effect at the time. The correct policy, i.e. the sexual misconduct policy in the Code of Conduct during September 2014, did

not have an "effective consent policy." Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 1, 2, 28, 120-134, 274, 284, and 285 and its response to DFs ¶¶ 11-13, 147, 149, 152, and 153.

155. On February 13, 2017, Dean Sandstrom informed Doe of the panel's decision. (Tab 47)

Response: Plaintiff admits DF ¶ 155.

WILLIAMS AFFORDS DOE ACCESS TO INTERVIEW TRANSCRIPTS

156. Nothing in the disciplinary procedures provides that respondents in sexual misconduct cases are entitled to receive transcripts of witness interviews. (Tab 1, Comp. Ex. P-9 at 12-16)

Response: Plaintiff objects to DF ¶ 156 as an assertion that is incomplete, lacking in context, and may be misleading in the context of the College's policy on educational records and Family Educational Rights and Privacy Act ("FERPA"). The College's procedures state that students have "the right to inspect and review the student's education records within 45 days after the institution receives a request for access" without reference to FERPA. Plaintiff incorporates by reference herein its proffer of PF ¶ 9a.

157. During the investigation, Doe asked Dean Bolton for copies of the transcripts. (Tab 52)

Response: Plaintiff admits DF ¶ 157. However, this Statement warrants a number of counter-facts in response. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 167-174.

158. On September 2, 2016, Dean Sandstrom informed Doe that it was not the College's practice to provide transcripts for interviews of other witnesses as part of the investigation and adjudication process. (*Id.*)

Response: Plaintiff objects to DF ¶ 158 as an assertion that is incomplete, lacking in context, and may be misleading in the context of the College's policy on educational records. Plaintiff incorporates by reference herein its response to DFs ¶¶ 156-157.

159. As of September 19, 2016, Doe was provided with copies of the transcripts from all three of his own interviews. (Tab 1, Compl. ¶101; Tab 53)

Response: Plaintiff admits DF ¶ 159.

160. On December 4, 2016, Doe's counsel sent a letter to Williams citing the Family Educational Rights and Privacy Act (FERPA) and seeking copies of Doe's disciplinary records, including transcripts of all witness interviews. (Tab 57)

Response: Plaintiff objects to DF ¶ 160 as an assertion that is incomplete, lacking in context, and may be misleading in the context of the College's policy on educational records and FEPRA. Plaintiff incorporates by reference herein its response to DFs ¶¶ 158-159.

161. On January 16, 2017, the College made Doe's disciplinary records, including the interview transcripts, available for inspection by Doe and his counsel. (Tab 48)

Response: Plaintiff admits DF ¶ 161.

162. Doe's counsel did not follow up to review the documents until February 16, 2017. (Tab 59)

Response: Plaintiff admits DF ¶ 162.

DOE HAD THE ASSISTANCE OF COUNSEL THROUGHOUT THE PROCESS

163. Doe retained Ms. Rossi as his attorney around the time he received the honor code decision on March 2, 2016. (Tab 3, Doe Dep. I at 80-81)

Response: Plaintiff admits DF ¶ 163.

164. Ms. Rossi accompanied Doe and assisted him in all three of his interviews with the investigator. (*Id.* at 108:18-109:4)

Response: Plaintiff admits DF ¶ 164.

165. During the first interview, Attorney Rossi attempted to speak for Doe and spoke directly to the investigator about substantive issues. (Tab 31 at 17, 18, 24, 28, 34, 38-42)

Response: Plaintiff objects to DF ¶ 165 as factually inaccurate and misleading. On page 17, Plaintiff's counsel said to John, "I could pull it up [referring to messages]. I'll pull it up while you talk." This was no attempt to "speak for John" or speaking to the investigator about substantive issues. On page 18, Plaintiff's counsel said, "No." This was no attempt to "speak for John" or speaking to the investigator about substantive issues. On page 24, there are no references to

Plaintiff's counsel. On page 25 (marked 24), Plaintiff's counsel interacted with John to make sure he stayed in chronological order, but made no substantive comments. This was no attempt to "speak for John" or speaking to the investigator about substantive issues. On page 28, there are no references to Plaintiff's counsel. On page 29 (marked as 28), Plaintiff's counsel spoke with John to remind him of an event with the transcriber picking up Plaintiff's counsel's question to John, "Did you hear me?" This was no attempt to "speak for John" or speaking to the investigator about substantive issues. On page 34, Plaintiff's counsel said to John, "I thought the hearing was the 26th, I thought," to correct a date John stated and asked Kurker if she "would like him to do it in this order here?" This was no attempt to "speak for John" or speaking to the investigator about substantive issues. On page 35 (marked 34), Plaintiff's counsel asked Kurker, "Would it be inappropriate for him to read this to me?" On page 37 (marked 36), Plaintiff's counsel asked Kurker, "Do you mind if I write on this copy? I'm just gonna underline" in reference to an intention to make a record of the policy sections Plaintiff indicated Smith had violated. Dkt. 134, Rossi Affidavit ¶ 11. On page 38 (marked 37), Plaintiff's counsel stated, "Yeah" and "Sorry" in reference to Kurker's refusal to allow her to make said record. On page 39 (marked 38), Plaintiff's counsel admittedly interrupted the interview to inform Kurker that she did not have a thorough copy of the actual policy. On page 40 (marked 39) to page 42 (marked 41), Plaintiff's counsel and Kurker continued to discuss the discrepancies and incompleteness of the policy Kurker brought with her to the interview. On page 43 (marked 42), Plaintiff's counsel spoke **to** John, reminding him about his final communication with Smith. This was no attempt to "speak for John" or speaking to the investigator about substantive issues.

166. After the first interview, the investigator may have told Ms. Rossi that she was not to participate directly in the interviews, but also would have said that she could request breaks during which she could advise her client. (Tab 13, Kurker Dep. 91:14-21)

Response: Plaintiff objects to DF ¶ 166 as an assertion that is incomplete, lacking in context, and may be misleading in the context of what actually happened at the first interview and what Kurker

actually stated at said interview and at her deposition. First, Kurker repeatedly stopped John's counsel from communicating to him through notes. Dkt. 124-7 ¶ 11. Second, after the interview, Kurker indicated that it was her belief that the attorney was not allowed to communicate with the interviewee and could only "sit there like a potted plant." *Id*. Third, as Kurker was incorrect and the Policy instead provided that "[a] complainant or respondent may consult with their advisor at any time during the process…Appropriate consultation includes, but is not limited to: sharing notes…," Plaintiff sent the policy to Kurker following the interview. Dkt. 124-7 ¶ 12-13. Fourth, in her deposition, Kurker could not "recall any specific interaction with [John's counsel] or John…" (Tab 13, Kurker Dep. 91:1-3 which omitted page 90.)

167. Ms. Rossi helped Doe prepare his responses to the investigation report and to Smith's response. (Tab 3, Doe Dep. I at 111:19-21; 144:18-145:2)

Response: Plaintiff admits DF ¶ 167.

THERE IS NO EVIDENCE OF BIAS

168. Doe admitted during his first deposition that he did not believe Williams discriminated against him based on his gender. (Tab 3, Doe Dep. I at 188:7-14)

Response: Plaintiff objects to DF ¶ 168 on the grounds that it is vague and ambiguous and contains a presupposition not subject to separate factual basis. "Discriminated" and "gender" are undefined and ambiguous terms and the Statement presupposes that John understood their meanings as intended by Defendant's counsel.

169. Doe later "corrected" his deposition with an errata sheet, changing his answer from "no" to "yes." (Tab 3, Doe Errata Sheet)

Response: Plaintiff admits DF ¶ 169.

170. During his second deposition Doe claimed that Dean Bolton and Ms. Bossong discriminated against him based on his gender. (Tab 4, Doe Dep. II at 63:18-66:12)

Response: Plaintiff admits DF ¶ 170.

171. Doe believes Dean Bolton was biased because she had a relationship with Smith, as a result of Smith seeking help from the Dean. (*Id.* at 30:9-31:10).

Response: Plaintiff admits DF ¶ 171.

172. Dean Bolton had left Williams before the panel was convened in Doe's case and Doe admitted that he has no evidence Dean Bolton ever communicated with the panel members or had any communications with Ms. Kurker which reflected any bias. (*Id.* at 26:16-27:5; 33:9-34:4)

Response: Plaintiff admits DF ¶ 172.

173. Doe believes that Ms. Bossong was biased because of her contact with Smith and Dean Bolton. (*Id.* at 55:15-56:8)

Response: Plaintiff admits DF ¶ 173.

174. Ms. Bossong was Smith's support person during the disciplinary proceeding. (Tab 60)

Response: Plaintiff objects to DF ¶ 174 as an assertion that is incomplete, lacking in context, and may be misleading based on Bossong's other roles and involvement in this case. Bossong, in addition to being Smith's support person during the disciplinary proceeding and for months after Smith's employment and the disciplinary proceeding ended, was also the College's Director of Sexual Assault Prevention and Response. PFs ¶¶ 31 and 98. Bossong said that she does not advise student or employee respondents. PF ¶ 97 However, Smith was an employee respondent. DF ¶ 3. College policy designates faculty/staff as respondents to student complaints and does not provide for students to be respondents to faculty/staff complaints. PF ¶ 99 and 142. At her deposition, Bossong falsely stated that she had begun advising Smith when she was still a student. Plaintiff incorporates by reference herein its response to DF ¶ 29. Dkt. 124-63 at 14:19-21.

Bossong trained and guided Sandstrom on this case. PF ¶ 103 and 117. Bossong trained the Panelists in this case. PF ¶ 116. She advised Pretto on the "Title IX" retaliation issue. PF ¶ 234. Bossong, along with Bolton, College Counsel, and Defendant's counsel, worked on the policy changes in summer 2014. PFs ¶¶ 124 and 126.

175. Doe also had a support person during the disciplinary proceeding, Associate Dean David Johnson. (*Id.*)

Response: Plaintiff admits DF ¶ 175. However, this Statement warrants a number of counter-facts in response. Johnson's role differs greatly from that of Bossong. Plaintiff incorporates by reference herein its response to DF ¶ 174. Johnson does not have pro bono legal resources equivalent to that which Bossong has to provide her advisees. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 94-95.

176. Doe has no evidence that Ms. Bossong sought to influence the hearing panel. (Tab 4, Doe Dep. II at 56:5-8, 64:18-65:1)

Response: Plaintiff admits DF ¶ 176. However, this Statement warrants a counter-fact in response. Plaintiff has more than sufficient evidence that Sandstrom sought to and actually did influence the hearing panel. Plaintiff incorporates by reference herein its proffer of PFs ¶¶ 234-243 and 264-266. The College itself has stated, "The determination whether conduct violates the Code of Conduct is made by a hearing panel, not the Dean of the College Office, the Title IX Coordinator, or the Direction of Sexual Assault Prevention and Response" and its counsel has stated, "If there were actual evidence of actual tampering and had an actual impact on the panel that would implicate the fairness analysis." PF ¶ 20 and Dkt. 134, Rossi Affidavit ¶ 10.

177. Doe denies having knowledge that anyone else at Williams was biased against him. (*Id.* at 66:1-12)

Response: Plaintiff admits DF ¶ 177. However, this Statement warrants a counter-fact in response. At the time of John's second deposition, he stated that he "[doesn't] know if anyone else was or was not biased against [him.]" *Id*.

178. Doe does not believe the panel members had an agenda against him or were biased against him. (*Id.* at 54:1-19; 42:16-43:5)

Response: Plaintiff objects to DF ¶ 178 as an assertion that is incomplete, lacking in context, and may be misleading in the context of John's actual deposition testimony. At 54:2-3, John stated that it was correct that, at his previous deposition, he had stated, "Responding would have been futile [in reference to appearing before the Panel at the sanctioning phase]. The College had an agenda against me." At 54:18-19, John explained, "when I say 'the College' I'm not necessarily referring to the panel." Dkt. 124-160.

179. From 2011 to 2016, about 20% of male students at Williams who were accused of sexual assault were found not responsible. (Tab 2, Supp. Answer to Int. No. 4)

Response: Plaintiff does not dispute DF ¶ 179. However, this Statement warrants a number of counter-facts in response:

a. Security Officer Joshua Costa provided a sworn statement that the College has no uniformity to its application of its policies and procedures. He also described an incident in which was "a first responder to a call involving a student who had sexually assaulted another student and during the incident had smashed the student's head enough to cause it to bleed. The parents of the assaultive student are well connected to the Goodrich family which has such a prominent role at Williams College that Goodrich Hall is named after it. The assaultive student experienced no disciplinary consequences for his actions." Dkt. 59 ¶ 4.

b. Costa also described how at least one, if not more employee(s) [sic.] at the Office of Campus Safety and Security is known to date and have sex with female students and even brag about the exploits. Because this employee is part of the 'old boy network,' the behavior is accepted." Id. at ¶ 6.

c. Another College employee, Brian Marquis, also provided a sworn statement. Marquis described a sexual misconduct panelist training Bossong provided on January 30, 2015: the most important factor in decision-making is the College's reputation and those from

prominent families receive the utmost attention and protect[ion] from the College's administration and faculty. Dkt. 58 ¶¶ 8-10.

d. At the time of his affidavit, Marquis was an independent contractor for the College. Dkt. 58 ¶¶ 1-3.

e. Bossong stated in her affidavit that Marquis attended one of her trainings on January 30, 2015. Dkt. 54 ¶ 7.

f. Contrary to Defendant's statements in its Memorandum in Support of Defendant's Motion for Summary Judgment, Dkt. 126 at 21, the statements of Marquis are based on personal knowledge and are admissible as his statements reflect the training he received by Bossong on January 30, 2015. Dkt. 58 ¶ 5.

180. Doe admitted that he and Smith have similar socioeconomic backgrounds. (Tab 3, Doe Dep. I at 16:2-12)

Response: Plaintiff objects to DF ¶ 180 on the grounds that it is vague and ambiguous and contains a presupposition not subject to separate factual basis. "Socioeconomic backgrounds" are undefined and ambiguous terms and this Statement presupposes that John understood their meanings as intended by Defendant's counsel.

JOHN DOE, PLAINTIFF

Date: October 28, 2018

By: _____/s/ Stacey Elin Rossi_____
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CERTIFICATE OF SERVICE

This document was served electronically upon all counsel of record by filing through the ECF system on October 28, 2018.

_/s/ Stacey Elin Rossi_____
STACEY ELIN ROSSI