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CENTRE COUNTY, PA

**IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW**

MICHAEL J. MCQUEARY,
Plaintiff

vs.

**THE PENNSYLVANIA STATE
UNIVERSITY,**
Defendant

: Docket No.: 2012-1804
:
: Type of Case: Whistleblower
:
:
:
: Type of Pleading: Objections,
: Answer and New Matter to
: Plaintiff's Petition for Costs of
: Litigation
:
: Filed on Behalf of: Defendant
:
: Counsel of Record for this Party:
: Nancy Conrad, Esquire
: White and Williams LLP
: 3701 Corporate Parkway
: Suite 300
: Center Valley, PA 18034
: Identification No.: 56157

IN THE COURT OF COMMON PLEAS
CENTRE COUNTY, PENNSYLVANIA

MICHAEL J. McQUEARY,

Plaintiff,

vs.

THE PENNSYLVANIA STATE
UNIVERSITY,

Defendant.

Docket No. 2012-1804

GAVIN, J.

2017 JUN 11 PM 2:55
CLERK OF COURT
CENTRE COUNTY, PA

**DEFENDANT'S OBJECTIONS, ANSWER, AND NEW MATTER TO PLAINTIFF'S
PETITION FOR COSTS OF LITIGATION**

AND NOW comes Defendant, The Pennsylvania State University, by and through its counsel of record, White and Williams LLP, and files these Objections, Answer and New Matter to Plaintiff's Petition for Costs of Litigation. In support thereof, the University asserts the following.

OBJECTIONS TO PLAINTIFF'S PETITION FOR COSTS OF LITIGATION

1. In the Court's November 30, 2016 Order, it instructed Plaintiff to submit "detailed statements of the counsel fees, witness fees and costs of litigation it incurred. . . ." The Court permitted the University to challenge "a fee, etc." as unreasonable by "identify[ing] the item and stat[ing] why the charge is inappropriate." The Court's request for "detailed statements" and its use of the indefinite article "a" when modifying "fee, etc." demonstrates that the Court expected Plaintiff to provide an itemized list of fees corresponding to each task completed and expense incurred. Further, the Court expected that Plaintiff would support its "detailed statements" with supporting evidence such as fee agreements, contemporaneous billing statements, expert agreements, and invoices. This would be the minimum necessary for the University to formulate

specific objections. Without such information from Plaintiff, Defendant is prevented from adequately reviewing and, in a line-item fashion, objecting to those fees (as ordered by the Court). For example, Defendant may have an argument that the time spent responding to discovery was excessive. Or, for further example, Defendant may have an argument that senior attorneys regularly performed junior attorney or paralegal level work. Plaintiff chose not to file a detailed statement, chose not to provide billing statements, chose not to itemize its expenses and time spent for each task, and chose not to provide supporting documentation. Defendant objects to Plaintiff's entire submission as it fails to provide basic information needed for the University to "identify the item and state why the charge is inappropriate."

2. Defendant objects to Plaintiff's submission's request for the award of attorney's fees and costs because Plaintiff has the burden of establishing the reasonableness of the hours and rates and Plaintiff failed to proffer sufficient evidence to meet this burden of proof.

3. Defendant objects to Plaintiff's submission's request for the award of attorney fees and costs because the failures set forth above mean that Plaintiff has not and cannot meet his burden of proving that its requested fees and costs are "reasonable", as required by 43 Pa.C.S. Section 1425. *See Rode v. Dellaciprete*, 892 F.2d 1177, 1183-1184 (3d. Cir. 1990)("To meet its burden, the fee petitioner must submit evidence supporting the hours worked and rates claimed."); *Signora v. Liberty Travel, Inc.*, 2005 PA Super 366, ¶ 13, 886 A.2d 284, 293 (2005) ("the method of determining a fee for legal services provided on an hourly basis is to multiply the total number of hours reasonably expended by the reasonable hourly rate. The resulting figure is known as the 'lodestar' fee"); *Zednak v. Police Ath. League of Phila.*, 132 A.3d 541 (Pa. Super. 2016)(In connection with a claim under 43 Pa.C.S. Section 1925, the verdict-winning plaintiff requested \$212,140 in legal fees, and \$36,197 in cost. The defendant argued that the

“hours and rates claimed, and the costs allegedly incurred” were not reasonable. The Court of common Pleas of Philadelphia County held a hearing on the plaintiff’s request “to determine the amount of fees and costs”, and, then, reduced the award to \$159,183 in legal fees, and \$36,000 in costs. The Superior Court sanctioned this method – which used the lodestar – to calculate a reasonable attorney fee under 43 Pa.C.S. Section 1425).

4. Defendant objects to Plaintiff’s submission because Plaintiff has failed to produce the best evidence of its fees and costs that he alleges that he incurred – i.e. (a) the “contemporaneous records of professional time spent on each particular matter for which [Plaintiff’s counsel was] engaged; (b) transcript and other document invoices, and proof of payment of same; and (c) expert witness fee invoices, and proof of payment of same -- and, as such, has failed to meet his burden of producing the evidence necessary to support his claim for reimbursement of deposition transcript fees. *See* Pennsylvania Rule of Evidence (“Pa.R.E.”) 1002 (“An original writing . . . is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise.”). No other rule of evidence, other rule, or statute provides otherwise in this case. The Pennsylvania Rules of Evidence “govern proceedings in all courts of the Commonwealth of Pennsylvania’s unified judicial system, except as otherwise provided by law.” *See* Pa.R.E. 101(a). No law provides otherwise in this case. As such, Plaintiff has not and cannot meet his burden of proving his claim for reimbursement of deposition transcript fees.

5. Defendant objects to Plaintiff’s submission because the rendering of any services by Plaintiff’s local counsel, Attorney Fleming, in this matter was duplicative and unnecessary – and, therefore, do not constitute a reasonable attorney fee. Accordingly, Plaintiff cannot recover the attorney’s fees of Attorney Fleming.

6. Defendant objects to Plaintiff's submission because Plaintiff's "estimate" of Attorney Fleming's time spent representing the Plaintiff, as set forth in Paragraph 31 of Plaintiff's Petition, is insufficient evidence to establish that Attorney Fleming's charges constitute a reasonable attorney fee. A retrospective attempt to "estimate" the time one has devoted to a legal matter over the course of the past 5 years (i.e., from "November 10, 2011 through November 30, 2016" – as set forth in Paragraph 31 of Plaintiff's Petition) is neither feasible, nor sufficient evidence to support a calculation of the lodestar. Accordingly, Plaintiff cannot recover the attorney's fees of Attorney Fleming.

7. Defendant objects to Plaintiff's submission because, pursuant to 42 Pa.C.S. Section 1425, a Court may only consider the award of fees and costs that were incurred because of an "action brought under this act". To the extent Plaintiff seeks fees for services rendered outside of his "action brought under [43 Pa.C.S. Section 1425]" – by way of example but not limitation, in connection with his negligent misrepresentation cause of action, or matters related to his dealing with the Pennsylvania Attorney General, or the representation of Plaintiff and/or John McQueary in connection with a lawsuit between PMA and Defendant -- that request must be denied.

8. Defendant objects to Plaintiff's submission because his request that this Honorable Court award to him a "contingency multiplier" / "risk multiplier" equal to 33.3% (the percentage of his contingency fee agreement with his attorneys) of the award as his "reasonable" attorney fee is improper. Plaintiff contends in its Petition that the lodestar should not be used to calculate his attorney's fees; instead, Plaintiff contends that this Honorable Court should award him attorneys' fees equivalent to a 1/3 contingency fee (a fee that further far exceeds the already wholly unsubstantiated and unreasonable \$497,881.00 in fees that Plaintiff's counsel claims to

have billed in this case) -- as calculated by reference to the award in this case. What Plaintiff seeks as his attorney's fee is known as a "contingency multiplier" or "risk multiplier." Plaintiff contends in his Petition that a "contingency fee is the only way, for all practical intents and purposes, for a Whistleblower to obtain legal representation against a large defendant with enormous financial resources." However, this claim is belied by: (a) the fact that the 43 Pa.C.S. Section 1925's fee-shifting provision provides the very mechanism for a complainant to "obtain legal counsel" separate and apart from a "contingency fee" that Plaintiff claims does not exist; (b) the fact that Plaintiff's counsel claims (although they have not produced evidence to support same) that they continued to keep track of the number of hours spent devoted to the prosecution of Plaintiff's case throughout this litigation; (c) the contingency agreement between Plaintiff and his counsel implicitly recognized that the Court would not be required to award attorney's fees equal to one-third of any award. See Petition at ¶ 21. The Superior Court has "held that, as a general rule, the method of determining reasonable attorneys' fees under fee-shifting provisions in Pennsylvania is the lodestar approach." *Krebs v. United Ref. Co.*, 2006 PA Super 31, 893 A.2d 776 (Pa.Super. 2006). The *Krebs* Court noted that the "lodestar" is "essentially calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Id.*, at 790. This lodestar produces a figure which is "strongly presumed to yield a reasonable fee." *Id.* Section 1425 of the Whistleblower Law only allows for the granting of the "costs" of litigation -- with "reasonable" attorney's fees being one subset of those "costs." See 43 Pa.C.S. Section 1425. Even then, only "all or a portion" of the "cost" category of "reasonable" attorney's fee may be awarded to Plaintiff. In crafting Section 1425, the General Assembly saw fit to: (a) expressly define "reasonable" attorney fees as a "cost"; and (b) expressly authorize a departure **downward** from ("or a portion of") what was being sought as a

“reasonable” attorney’s fee -- without commensurately authorizing a departure *upward*. The choice of language used (and not used) by the General Assembly is clear evidence of its intent: (a) to peg attorney fees that are awarded under Section 1425 to those “costs” that can be actually itemized as having been incurred by plaintiff’s counsel in the representation of a plaintiff during litigation – not by reference to the “fee” that a plaintiff and his counsel agree to; and (b) not to allow the type of *upward* “enhancement” of attorney’s fees that Plaintiff seeks this Honorable Court to sanction. As Pennsylvania Courts have noted, the United States Supreme Court has: (y) determined that a the “quality of an attorney’s performance or the results obtained” may not “properly provide for a basis for an [risk multiplier] enhancement in a case involving a” federal “statutory fee-shifting provision” because “these [concepts are] already subsumed in the lodestar calculation” and (z) rejected the concept of a contingency multiplier in federal statutory fee-shifting cases because it “unduly rewards attorneys” -- given that fee-shifting “statutes were not designed as a form of economic relief to improve the financial lot of lawyers”. *See, e.g., Stair v. Trutzo, Spry, Sbrocchi, Faul & LaBarre*, 768 A.2d 299 (Pa. 2001)(applying Federal statutory law). As Pennsylvania Courts have further noted, the United States Supreme Court’s well-reasoned analysis, in *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), for why a “contingency multiplier” is not consistent with the calculation of a “reasonable” attorney’s fee in a statutory fee-shifting case was as follows:

[W]e see a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue. First, just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss. An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney’s time (or anticipated time) in cases where his client does not prevail.

Second, ...we have generally turned away from the contingent-fee model -- which would make the fee award a percentage of the value of the relief awarded in the primary action -- to the lodestar model. We have done so, it must be noted, even though the lodestar model often (perhaps, generally) results in a larger fee award than the contingent-fee model. See, e.g., Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may "give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation"). . . .

Contingency enhancement is a feature inherent in the contingent-fee model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it. Contingency enhancement is therefore not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee.

Id. at 565, 122 S. Ct. at 2643, 120 L. Ed. 2d at 458. See, e.g., *Samuel-Bassett v. Kia Motors Am., Inc.*, 613 Pa. 371, 34 A.3d 1(Pa., 2011)(applying Federal statutory law). For all of the above reasons, this Honorable Court must reject as unreasonable Plaintiff's request to be granted any "risk multiplier" or "contingency multiplier" above the lodestar.

9. Defendant incorporates as Objections to Plaintiff's Petition those averments set forth, *infra*, in its Answer to Plaintiff's Petition for Costs of Litigation, and New Matter to Plaintiff's Petition for Costs of Litigation, as if more full set forth herein at length.

WHEREFORE, The Pennsylvania State University, the Defendant, respectfully requests that this Honorable Court deny and dismiss Plaintiff's Petition for Costs of Litigation, with prejudice.

ANSWER TO PLAINTIFF'S PETITION FOR COSTS OF LITIGATION

1. Denied as stated. Plaintiff's Petition and the Court's Order are written documents which speak for themselves.

2. Admitted, to the extent that the docket is consistent with Plaintiff's corresponding averment.

3. Admitted, to the extent that the docket is consistent with Plaintiff's corresponding averment.

4. Denied. The text of 43 Pa.C.S. §1425 did and does speak for itself. Without waiving the foregoing, Plaintiff substituted the word "on" for the word "or" in the second line of his recitation of the text.

5. Admitted, to the extent that the docket is consistent with Plaintiff's corresponding averment. By way of further answer, Plaintiff's counsel failed to produce any time entries related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this matter was duplicative and unnecessary.

6. Admitted, to the extent that the docket is consistent with Plaintiff's corresponding averment. By way of further answer, Plaintiff's counsel failed to produce any time entries related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this matter was duplicative and unnecessary.

7. Admitted, to the extent that the docket is consistent with Plaintiff's corresponding averment. By way of further answer, Plaintiff's counsel failed to produce any time entries related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this matter was duplicative and unnecessary.

8. Admitted, to the extent that the docket is consistent with Plaintiff's corresponding averment. By way of further answer, Plaintiff's counsel failed to produce any time entries related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this matter was duplicative and unnecessary.

9. Admitted, to the extent that the docket is consistent with Plaintiff's corresponding averment. By way of further answer, Plaintiff's counsel failed to produce any time entries

related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this matter was duplicative and unnecessary.

10. Denied. Plaintiff's discovery documents, which indicate when Plaintiff initiated discovery, are writing which speak for themselves. By way of further answer, Plaintiff's counsel failed to produce any time entries related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this matter was duplicative and unnecessary.

Costs

11. Admitted, to the extent that the docket is consistent with Plaintiff's corresponding averment.

12. Denied. Exhibit "A" to Plaintiff's Petition is a written document that speaks for itself. Without waiving the foregoing, Plaintiff has failed to produce the best evidence of the deposition transcript fees that he alleges that he incurred – *i.e.*, invoices from those transcripts, and proof of payment of same – and, as such, has failed to meet his burden of producing the evidence necessary to support his claim for reimbursement of deposition transcript fees. See Pennsylvania Rule of Evidence ("Pa.R.E.") 1002 ("An original writing . . . is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise."). No other rule of evidence, other rule, or statute provides otherwise in this case. The Pennsylvania Rules of Evidence "govern proceedings in all courts of the Commonwealth of Pennsylvania's unified judicial system, except as otherwise provided by law." See Pa.R.E. 101(a). No other law provides otherwise in this case. As such, Plaintiff has not and cannot meet his burden of proving his claim for reimbursement of deposition transcript fees.

13. Admitted, to the extent that the docket is consistent with Plaintiff's corresponding averment.

14. Denied. The corresponding paragraph of Plaintiff's Petition's averment of "necessity" and "reasonableness" constitute conclusions of law to which no response is required. Without waiving the foregoing, Plaintiff has failed to produce the best evidence of the expert witness fees that he alleges that he incurred – *i.e.*, invoices from those expert witnesses, and proof of payment of same – and, as such, has failed to meet his burden of producing the evidence necessary to support his claim for reimbursement of expert witness fees. See Pa.R.E. 1002; Pa.R.E. 101(a). As such, Plaintiff cannot meet his burden of proving his claim for reimbursement of expert witness fees.

15. Denied. Exhibit "B" to Plaintiff's Petition is a written document that speaks for itself. Without waiving the foregoing, Plaintiff has failed to produce the best evidence of the document and transcript fees that he alleges that he incurred – *i.e.*, invoices from those documents and transcripts, and proof of payment of same -- and, as such, has failed to meet his burden of producing the evidence necessary to support his claim for reimbursement of document and transcript fees. See Pa.R.E. 1002; Pa.R.E. 101(a). As such, Plaintiff cannot meet his burden of proving his claim for reimbursement of document and transcript fees.

16. Denied, for the reasons set forth in Paragraphs 11-15, *supra*.

Attorney's Fees

17. Defendant incorporates its responses to Paragraphs 1-16, *supra*, as if more fully set forth at length.

18. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in the corresponding paragraph of Plaintiff's Petition. By way of further answer, Plaintiff withdrew his demand for attorney's fees for services related to the Office of Attorney General. As such, no response is required. Further still and without waiver of any other objection, Plaintiff failed to

produce the best evidence of his fee arrangement (*i.e.*, the fee agreement itself) and, as such, has failed to meet his burden of producing the evidence necessary to support his claim for attorneys' fees. See Pa.R.E. 1002; Pa.R.E. 101(a). As such, Plaintiff has not and cannot meet his burden of proving his claim for reimbursement of attorney's fees.

19. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in the corresponding paragraph of Plaintiff's Petition. As such, no response is required. Further still and without waiver of any other objection, Plaintiff failed to produce the best evidence of his fee arrangement (*i.e.*, the fee agreement) and, as such, has failed to meet his burden of producing the evidence necessary to support his claim for attorneys' fees. See Pa.R.E. 1002; Pa.R.E. 101(a). As such, Plaintiff has not and cannot meet his burden of proving his claim for reimbursement of attorney's fees.

20. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in the corresponding paragraph of Plaintiff's Petition. As such, no response is required.

21. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in the corresponding paragraph of Plaintiff's Petition. As such, no response is required. Further still and without waiver of any other objection, Plaintiff failed to produce the best evidence of his fee arrangement (*i.e.*, the fee agreement) and, as such, has failed to meet his burden of producing the evidence necessary to support his claim for attorneys' fees. See Pa.R.E. 1002; Pa.R.E. 101(a). As such, Plaintiff has not and cannot meet his burden of proving his claim for reimbursement of attorney's fees.

22. Denied. Plaintiff's characterization of Defendant's defense is his own. No response to Plaintiff's characterization by Defendant is required.

23. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in the corresponding paragraph of Plaintiff's Petition. As such, no response is required. To the extent counsel seeks fees for services rendered outside of this litigation, the request fails and should be denied. Pursuant to 42 Pa.C.S. Section 1425, a Court may only consider the award of costs that were incurred because of an "action brought under this act". The costs that Plaintiff seeks reimbursement of in the corresponding paragraph of Plaintiff's Petition were not incurred because of an "action brought under this act".

24. Admitted; however, Plaintiff's counsel failed to produce any time entries related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this matter was duplicative and unnecessary.

25. Admitted; however, Plaintiff's counsel failed to produce any time entries related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this matter was duplicative and unnecessary.

26. Admitted; however, Plaintiff's counsel failed to produce any time entries related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this regard was duplicative and unnecessary.

27. Admitted; however, Plaintiff's counsel failed to produce any time entries related to these services. Furthermore, the rendering of any services by Plaintiff's local counsel in this matter was duplicative and unnecessary.

28. Denied. Plaintiff's characterizations of his attorney's efforts are his own. No response to Plaintiff's characterization by Defendant is required.

29. Denied. Exhibit "C" to Plaintiff's Petition is a written document that speaks for itself. Without waiving the foregoing, Plaintiff has failed to produce the best evidence of the attorney's fees that he alleges that he incurred – *i.e.*, the "contemporaneous records of professional time spent on each particular matter for which [Plaintiff's counsel was] engaged" – and, as such, has failed to meet his burden of producing the evidence necessary to support his claim for reimbursement of Strokoff & Cowden's attorney's fees. See Pa.R.E. 1002; Pa.R.E. 101(a). As such, Plaintiff has not and cannot meet his burden of proving his claim for reimbursement of Strokoff & Cowden's attorney's fees. Further still, the University is prevented from adequately reviewing and, in a line-item fashion, objecting to those fees. For example, the University may have an argument that the time spent responding to discovery was excessive. Or, the University may have an argument that senior attorneys regularly performed junior attorney or paralegal level work. However, the University is deprived of these potentially legitimate defenses because Plaintiff's counsel has refused to support its claim for fees with contemporaneously created billing sheets. Defendant incorporates its New Matter to Plaintiff's Petition, *infra*, herein as if more fully set forth at length.

30. Denied. Plaintiff's characterizations are his own. No response to Plaintiff's characterizations by Defendant is required. By way of further response, the services rendered by Plaintiff's local counsel in this matter were duplicative and unnecessary.

31. Denied. Plaintiff's "estimate" of Attorney Fleming's time spent representing the Plaintiff is insufficient evidence to establish same. Plaintiff has failed to produce the best evidence of the attorney's fees charged by Attorney Fleming that he alleges that he incurred –

i.e., “contemporaneous records of professional time spent on each particular matter for which [Plaintiff’s counsel was] engaged” – and, as such, has failed to meet his burden of producing the evidence necessary to support his claim for reimbursement of Attorney Fleming’s attorney’s fees. As such, Plaintiff cannot meet his burden of proving his claim for reimbursement of Attorney Fleming’s attorney’s fees. Defendant incorporates its New Matter to Plaintiff’s Petition, *infra*, herein as if more fully set forth at length.

32. Denied that the amount that constitutes “one-third of” the award entered by this Honorable Court has any relevance to any issue in question in Plaintiff’s Petition. Defendant incorporates its New Matter to Plaintiff’s Petition, *infra*, herein as if more fully set forth at length.

33. Denied. The corresponding paragraph of Plaintiff’s Petition constitutes a conclusion of law to which no response is required. Without waiving the foregoing, Defendant incorporates its New Matter to Plaintiff’s Petition, *infra*, herein as if more fully set forth at length.

34. Denied. The corresponding paragraph of Plaintiff’s Petition constitutes a conclusion of law to which no response is required. Without waiving the foregoing, Defendant incorporates its New Matter to Plaintiff’s Petition, *infra*, herein as if more fully set forth at length.

WHEREFORE, Defendant The Pennsylvania State University respectfully requests that this Honorable Court deny and dismiss Plaintiff’s Petition for Costs of Litigation, with prejudice.

NEW MATTER TO PLAINTIFF’S PETITION FOR COSTS OF LITIGATION

35. Defendant incorporates as New Matter the factual averments set forth in its responses to Paragraphs 1-34, *supra*, as if more fully set forth at length.

I. The Text of the Current, and Prior, Versions of 43 Pa.C.S. Section 1425.

36. Section 1425 of the Pennsylvania Whistleblower Law (43 Pa.C.S. Section 1425) provides:

Enforcement. A court, in rendering a judgment in an action brought under this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies. A court *shall* also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, *if the complainant prevails in the civil action*.

(emphasis added).

37. Prior to the enactment of Act 2014-87, amending 43 Pa.C.S. Section 1425 effective on or about September 2, 2014, the text of 43 Pa.C.S. Section 1425 provided:

Enforcement. A court, in rendering a judgment in an action brought under this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies. A court *may* also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, *if the court determines that the award is appropriate*.

(emphasis added).

38. Under either version of the text of 43 Pa.C.S. Section 1425, the General Assembly proscribed that only “all of a portion of” a plaintiff’s “costs of litigation,” including his or her “reasonable attorney fees” can be awarded.

II. The “lodestar”.

39. The Superior Court has “held that, as a general rule, the method of determining reasonable attorneys’ fees under fee-shifting provisions in Pennsylvania is the lodestar approach.” *Krebs v. United Ref. Co.*, 2006 PA Super 31, 893 A.2d 776 (Pa.Super. 2006).

40. The *Krebs* Court noted that the “lodestar” is “essentially calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” *Id.*, at 790.

41. This lodestar produces a figure which is “strongly presumed to yield a reasonable fee.” *Id.*

III. Plaintiff’s attempt to recover attorney’s fees above the lodestar.

42. Plaintiff contends in its Petition that the lodestar should not be used to calculate his attorney’s fees; instead, Plaintiff contends that this Honorable Court should award him attorneys’ fees equivalent to a 1/3 contingency fee -- as calculated by reference to the award in this case. This amount would be nearly 4 times the amount of the fees Plaintiff contends in his Petition that his attorneys incurred based upon the time-entries that were apparently contemporaneously maintained.

43. What Plaintiff seeks as his attorney’s fee is known as a “contingency multiplier” or “risk multiplier.”

44. Plaintiff contends in his Petition that a “contingency fee is the only way, for all practical intents and purposes, for a Whistleblower to obtain legal representation against a large defendant with enormous financial resources.” However, this claim is belied by: (a) the fact that the 43 Pa.C.S. Section 1925’s fee-shifting provision provides a mechanism for a complainant to “obtain legal counsel” separate and apart from a “contingency fee”; (b) the fact that Plaintiff’s counsel claims (although they have not produced evidence to support same) that they continued to keep track of the number of hours spent devoted to the prosecution of Plaintiff’s case throughout this litigation; (c) the contingency agreement between Plaintiff and his counsel

implicitly recognized that the Court would not be required to award attorney's fees equal to one-third of any award. See Petition at ¶ 21.

IV. The Commonwealth's acknowledgement of the Federal approach.

45. As Pennsylvania Courts have noted, the United States Supreme Court has: (a) determined that a the "quality of an attorney's performance or the results obtained" may not "properly provide for a basis for an [risk multiplier] enhancement in a case involving a" federal "statutory fee-shifting provision" because "these [concepts are] already subsumed in the lodestar calculation" and (b) rejected the concept of a contingency multiplier in federal statutory fee-shifting cases because it "unduly rewards attorneys" -- given that fee-shifting "statutes were not designed as a form of economic relief to improve the financial lot of lawyers". *See, e.g., Stair v. Trutzo, Spry, Sbrocchi, Faul & LaBarre*, 768 A.2d 299 (Pa. 2001)(applying Federal statutory law).

47. As Pennsylvania Courts have further noted, the United States Supreme Court's analysis, in *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), for why a "contingency multiplier" is not consistent with the calculation of a "reasonable" attorney's fee in a statutory fee-shifting case was as follows:

[W]e see a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue. First, just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss. An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail.

Second, ...we have generally turned away from the contingent-fee model -- which would make the fee award a percentage of the value of the relief awarded in the primary action -- to the lodestar model. We have done so, it must be noted, even though the lodestar model often (perhaps, generally) results in a larger fee award

than the contingent-fee model. See, e.g., Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may "give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation"). . . . Contingency enhancement is a feature inherent in the contingent-fee model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it. Contingency enhancement is therefore not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee.

Id. at 565, 122 S. Ct. at 2643, 120 L. Ed. 2d at 458. See, e.g., *Samuel-Bassett v. Kia Motors Am., Inc.*, 613 Pa. 371, 34 A.3d 1(Pa., 2011)(applying Federal statutory law).

V. Counsel is not entitled to recover fees because they failed to produce evidence to support the lodestar.

48. First, this Honorable Court should not award to Plaintiff any attorney's fees, because he has failed to produce the appropriate quality or quantity of evidence necessary to establish the lodestar. See *Signora v. Liberty Travel, Inc.*, 2005 PA Super 366, ¶ 13, 886 A.2d 284, 293 (2005) ("the method of determining a fee for legal services provided on an hourly basis is to multiply the total number of hours reasonably expended by the reasonable hourly rate. The resulting figure is known as the 'lodestar' fee, and a court has the discretion to adjust the lodestar fee in light of the degree of success, the potential public benefit achieved, and the potential inadequacy of the private fee arrangement."); *Rode v. Dellaciprete*, 892 F.2d 1177, 1183-1184 (3d. Cir. 1990). Without production of the best evidence (required by Pa.R.E. 1002) of the hourly time entries of the attorney's fees, and other costs of litigation, that he claims that he has incurred, Plaintiff has not and cannot meet his burden of production and proof of evidence to support the lodestar. See *Rode*, 802 F.2d at 1183 ("To meet its burden, the fee petitioner must submit evidence supporting the hours worked and rates claimed.").

49. In the alternative, and only to the extent that Plaintiff were able to meet his burden of production and proof to support the lodestar (and, then, only after Defendant would be given

the opportunity to inspect and respond to same), this Honorable Court should award to Plaintiff no more than the fees deemed to be reasonable (in terms of both the necessity in their being incurred, and the hourly rate, of same) as itemized in “contemporaneous records of professional time spent on each particular matter for which it was engaged”.

50. This Honorable Court should award no attorney’s fees to Plaintiff in connection with the “estimate” of the number of hours spent by Attorney Fleming representing Plaintiff (as set forth in Paragraph 31 of Plaintiff’s Petition). A retrospective attempt to “estimate” the time one has devoted to a legal matter over the course of the past 5 years (i.e., from “November 10, 2011 through November 30, 2016” – as set forth in Paragraph 31 of Plaintiff’s Petition) is neither feasible, nor sufficient evidence to support a calculation of the lodestar.

51. Further, this Honorable Court should reject Plaintiff’s request to be granted any “risk multiplier” or “contingency multiplier” above the lodestar.

52. Section 1425 of the Whistleblower Law only allows for the granting of the “costs” of litigation –with “reasonable” attorney’s fees being one subset of those “costs.” 43 Pa.C.S. Section 1425

53. Even then, only “all or a portion” of the “cost” category of “reasonable” attorney’s fee may be awarded to Plaintiff.

54. In crafting Section 1425, the General Assembly saw fit to: (a) expressly define “reasonable” attorney fees as a “cost”; and (b) expressly authorize a departure *downward* from (“or a portion of”) what was being sought as a “reasonable” attorney’s fee -- without commensurately authorizing a departure *upward*.

55. The choice of language used (and not used) by the General Assembly is clear evidence of its intent: (a) to peg attorney fees that are awarded under Section 1425 to those

“costs” that can be actually itemized as having been incurred by plaintiff’s counsel in the representation of a plaintiff during litigation – not by reference to the “fee” that a plaintiff and his counsel agree to; and (b) not to allow the type of *upward* “enhancement” of attorney’s fees that Plaintiff seeks this Honorable Court to sanction.

56. Section 1425 of the Whistleblower Law does not expressly authorize a “risk multiplier” or “contingency multiplier” – nor, in any manner or respect, does it even impliedly sanction the awarding of “more than” a “reasonable” attorney’s fee as calculated by reference to the lodestar. 43 Pa.C.S. § 1425.

54. While Pa.R.C.P. 1716 concerns class action cases and authorizes a Court in those cases to factor into its analysis of the amount of any award of attorney’s fees that it is authorized to grant the question of “whether the receipt of a fee was contingent on success”, this Rule is inapplicable to Plaintiff’s suit under 43 Pa.C.S. § 1425. As noted in *Samuel-Bassett, supra*, “Rule 1716 is a rule of procedure prescribed by this Court that does not purport to create any substantive right to a contingency multiplier in all cases.” *Samuel-Bassett*, 34 A.3d at 56.

55. Even in the case of class action suits involving fee-shifting statute, the state of the law in the Commonwealth regarding whether a contingency multiplier is permitted, at all, is uncertain. For instance, the Superior Court has declined an out-right ban on the concept in Class Action suits “absent clear direction from the Pennsylvania Supreme Court that it would be inclined to follow the United States Supreme Court’s lead in its interpretation of federal law”. *See Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 293 (Pa.Super. 2005).

56. As the Superior Court further noted in *Samuel-Bassett*, “[t]here is nothing inherently unjust about limiting [attorney’s fees recovered under a fee-shifting statute] to actual costs”. *Samuel-Bassett*, 34 A.3d at 42.

VI. The Standard of Review on Appeal of an Award of Attorney's Fees under a Fee-Shifting Statute.

57. Generally, where the award of attorneys' fees is authorized by statute, an appellate court reviews the propriety of the amount awarded by the trial court under an abuse of discretion standard. *Solebury Twp. v. DEP*, 928 A.2d 990, 997, n. 8 (Pa. 2007).

58. An abuse of discretion occurs if there is a showing of "manifest unreasonableness, partiality, prejudice, bias, ill-will, or such lack of support in the law or record." *Id.*

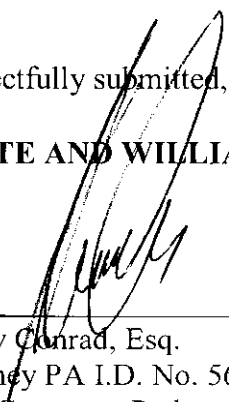
59. Because it involves a question of statutory interpretation, an appellate Court's scope of review of a statutorily awarded attorney's fee is plenary, and the standard of review is *de novo*. *Id.*

WHEREFORE, The Pennsylvania State University, the Defendant, respectfully requests that this Honorable Court deny and dismiss Plaintiff's Petition for Costs of Litigation, with prejudice.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: _____


Nancy Conrad, Esq.
Attorney PA I.D. No. 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com
Attorneys for Defendant,
The Pennsylvania State University

Dated: January 11, 2017

Attorneys for Defendant
The Pennsylvania State University

IN THE COURT OF COMMON
PLEAS OF CENTRE COUNTY

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CIVIL ACTION NO. 2012-1804

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I, Nancy Conrad, Esquire, hereby certify that on this 11th day of January, 2017, a true and correct copy of the foregoing DEFENDANT'S OBJECTIONS, ANSWER AND NEW MATTER TO PLAINTIFF'S PETITION FOR COSTS OF LITIGATION was served upon the following persons via first class, United States mail, postage prepaid:

Elliot A. Strokoff, Esquire
Strokoff & Cowden, P.C.
132 State Street
Harrisburg, PA 17101

Attorney for Plaintiff

and

William T. Fleming, Esquire
Fleming Law Offices
204 East Calder Way, Suite 304
State College, PA 16801

Local Counsel for Plaintiff

WHITE AND WILLIAMS LLP

By: _____

Nancy Conrad, Esq.
Attorney PA I.D. No. 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com
Attorneys for Defendant,
The Pennsylvania State University