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MICHAEL J. MCQUEARY,	:	IN THE COURT OF COMMON
	:	PLEAS OF CENTRE COUNTY
Plaintiff,	:	
v.	:	
	:	CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE	:	
UNIVERSITY,	:	HON. THOMAS G. GAVIN
	:	
Defendant.	:	

PROPOSED POINTS FOR CHARGE ON BEHALF OF DEFENDANT,
THE PENNSYLVANIA STATE UNIVERSITY

Defendant the Pennsylvania State University ("the University"), by and through its counsel, White and Williams LLP, hereby submits its proposed jury instructions. Counsel has modified some of the suggested standard civil jury instructions below to reflect the proper identification of the parties by name, gender, and entity association, as well as the general nature of the claims asserted by Plaintiff Michael McQueary ("Plaintiff") in this action. The University reserves the right to amend, supplement, or withdraw any of these proposed instructions prior to and during trial.

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**COMPLETE PROPOSED JURY INSTRUCTIONS
(STANDARD, MODIFIED STANDARD, AND SUPPLEMENTAL)**

Defense Instruction No. 1. **Preliminary Instructions**

Jury service is an important responsibility of citizenship, fundamental to our entire system of justice. The courts cannot function unless citizens serve as jurors. Thanks to jurors, our society resolves its disputes in a civilized manner, in a courtroom where citizens decide upon a verdict.

By your verdict, you will decide disputed questions of fact from the evidence presented in the case. I will decide all questions of law that arise during the trial. Before you retire to deliberate at the close of the case, I will instruct you more fully on the law that you must follow and apply in deciding your verdict. It is your duty as jurors to follow the law as I shall state it to you and apply that law to the facts as you find them from the evidence presented in the case. You are not to be concerned with the wisdom or soundness of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty for you to base a verdict on any view of the law other than that given in my instructions, just as it would also be a violation of your sworn duty, as finders of the facts, to base a verdict on anything other than the evidence in this case.

Pennsylvania Standard Civil Jury Instructions 1.10; Adapted from O'Malley,
Grenig & Lee, Federal Jury Practice and Instructions - Civil §§ 101.01, 101.10,
101.31 (5th ed. 2000).

Defense Instruction No. 2. **Binding Instruction**

Under the facts presented to you, your verdict on Plaintiff's defamation claim must be in favor of the Defendant, the Pennsylvania State University.

Defense Instruction No. 3. **Binding Instruction**

Under the facts presented to you, your verdict on Plaintiff's misrepresentation claim must be in favor of the Defendant, the Pennsylvania State University.

Defense Instruction No. 4. **Sympathy**

In making your decision as to whether or not the University is liable to the Plaintiff, you may not permit sympathy for any parties in this case to influence your decision even in the slightest degree. It would be improper for you to allow any feelings you might have about the nature of the claims against the University to influence you in any way. Rather, there must be evidence upon which logically your conclusions are based.

Tauber v. Wilkinson, 309 Pa 331, 335 (Pa. 1932).

Defense Instruction No. 5. **Bias**

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, socioeconomic status, or *corporate status*.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 1.140 (4th Ed. with 2016 Supplements) (amendment italicized)

Defense Instruction No. 6. **Corporate Defendants**

It is the law of Pennsylvania that a non-profit corporation has the same rights and obligations as any individual, and in deciding this case, you must not allow the fact that the University is a non-profit corporation and that the Plaintiff is an individual to affect or influence your judgment in any way.

Gift v. Palmer, 392 Pa. 628, 632 (1958); Schofield v. King, 388 Pa. 132, 135 (1957).

Defense Instruction No. 7. **Evidence – Definition**

I have mentioned the word "evidence" and will use that term more during these instructions. "Evidence" includes the testimony of witnesses. Evidence also includes documents and other exhibits admitted during the trial. Certain things are not evidence and you cannot base your verdict upon them. I will now describe what is not evidence:

1. The lawyers are not witnesses and what they say is not evidence in the case. Their opening statements, arguments, questions, comments, and closing arguments are not evidence.

2. Anything you see or hear about this case outside the courtroom is not evidence and should never be considered by you in reaching your verdict.

3. I may strike from the record certain statements or exhibits. If that happens, I will tell you what you may not consider as evidence.

Any verdict which you return must be based solely and entirely upon the evidence presented and the law that is applicable. Filing of a lawsuit is not evidence of liability.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 1.190 (4th Ed. with 2016 Supplements)

Defense Instruction No. 8. **Ruling on Evidentiary Objections**

Judges and lawyers must follow Pennsylvania Rules of Evidence, which control what evidence lawyers may introduce during trial.

When a lawyer asks a question or offers an exhibit into evidence, and a lawyer on the other side thinks it is not proper under the Rules of Evidence, then the lawyer must "object" and I must rule on the objection.

If I overrule the objection, that means that the question can be answered or the exhibit received into evidence.

If I sustain [or uphold/approve] the objection, that means it was a proper objection under the law and, therefore, the witness cannot answer the question, or the exhibit cannot be put into evidence.

If I sustain [or uphold/approve] an objection to a question, you must not guess what the answer might have been.

If I sustain [or uphold/approve] an objection to an exhibit, you must not guess what the exhibit contains.

Please be assured that my ruling on what questions may be asked or what evidence may be presented is based upon the law and Rules of Evidence. As the judge of the law, I must apply the Rules of Evidence established over the past 200 or more years. My rulings have nothing whatsoever to do with whether or not I believe a witness or favor one party or parties over the other.

Sometimes a witness may answer a question before I have the opportunity to rule on an objection. I may order that the question and answer be removed and stricken from the record, and I may tell you that you must disregard or ignore the evidence I have stricken. If this should happen, you must not consider the evidence I told you to disregard. I understand this may be difficult, so we will do our best to see that this does not happen.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 1.200 (4th Ed. with 2016 Supplements)

Defense Instruction No. 9.

Deposition Testimony

The sworn testimony of [name], taken by [deposition] [videotape] prior to this trial, is about to be presented to you. The testimony of a [witness] [party] who for some proper reason cannot be present to testify in person, may be presented in this form. Such testimony is given under oath and in the presence of lawyers for the parties, who question the witness. A court reporter takes down everything that is said and then transcribes the testimony. [The use of videotape permits you to see and hear the witness as [he] [she] appeared and testified under questioning by the lawyer.] This form of testimony is entitled to the same consideration as if the testimony of the [witness] [party] testified in court.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 2.10 (4th Ed. with 2016 Supplements)

Defense Instruction No. 10. **Stipulations of Fact**

[First Alternative]

The stipulation of fact[s] that has been offered and received in evidence constitutes an agreement by the opposing parties, through their lawyers, that [this] [these] fact[s] may be accepted as undisputed. [This fact] [These facts] require[s] no further proof, and no contradictory evidence will be permitted. [This fact is] [These facts are] to be accepted by you as binding and conclusive for the purposes of this trial.

[Second Alternative]

You have heard the stipulation, or agreement, by the parties through their lawyers, as to the testimony that would be given by [name] if [he] [she] testified as a witness in this case. This is simply evidence that you will consider with all the other evidence in the case and you may accept or reject all or any part of such evidence.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 2.50 (4th Ed. with 2016 Supplements)

Defense Instruction No. 11. **Exhibits**

The exhibits that have been identified and received in evidence are now being shown to you for your careful examination, without discussion at this time, to aid you in understanding the testimony.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 2.80 (4th Ed. with 2016 Supplements)

Defense Instruction No. 12. **Evidentiary Admissions – Answers to
Interrogatories**

Before the trial began, the lawyer for the University sent Plaintiff what we call “Interrogatories,” which are written questions.

Plaintiff provided written answers, under oath. You [will now hear] [heard] the sworn answers given by Michael McQueary in his answers to interrogatories. These answers are entitled to the same consideration as if the witness said them in court. You should consider [this] [these] answer[s] using the same factors to evaluate their believability as if the witness testified in person in the courtroom.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 3.10 (4th Ed. with 2016 Supplements)

Defense Instruction No. 13. **Evidence Admitted Only as to One Party or for
One Purpose**

You will now [hear] [see] evidence that:

a. applies only to [insert party], and/or

b. you may consider only for one purpose: [insert purpose].

You should not consider it for [any other party] [any other purpose].

Pennsylvania Suggested Standard Jury Instruction (Civ.) 3.40 (4th Ed. with 2016
Supplements)

Defense Instruction No. 14. **Direct and Circumstantial Evidence**

The evidence presented to you may be either direct or circumstantial evidence.

Direct evidence is testimony about what a witness personally saw, heard, or did.

Circumstantial evidence is testimony about one or more facts that logically lead you to believe the truth of another fact.

You should consider both direct and circumstantial evidence in reaching your verdict.

You may decide the facts in this case based upon circumstantial evidence alone.

I will give you an example of the difference between direct and circumstantial evidence. A person may testify that it was snowing at a particular time because he looked outside and saw the snow falling. If, however, he did not actually see the snow coming down, but when he first looked outside one morning he saw fresh snow where there had been none the night before, he can testify to these facts and the jury may conclude from those facts that it had snowed during the night.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.00 (4th Ed. with 2016 Supplements) (selecting first alternative example for circumstantial evidence)

g. Was a witness's testimony contradicted or supported by other witnesses' testimony or other evidence?

h. Does the testimony make sense?

i. If you believe some part of the testimony of a witness to be inaccurate, consider whether that inaccuracy casts doubt upon the rest of that same witness's testimony. You should consider whether the inaccuracy is in an important matter or a minor detail.

You should also consider any possible explanation for the inaccuracy. Did the witness make an honest mistake or simply forget, or was there a deliberate attempt to present false testimony?

j. If you decide that a witness intentionally lied about a significant fact that may affect the outcome of the case, you may, for that reason alone, choose to disbelieve the rest of that witness's testimony. But, you are not required to do so.

k. As you decide the believability of each witness's testimony, you will at the same time decide the believability of other witnesses and other evidence in the case.

l. If there is a conflict in the testimony, you must decide which, if any, testimony you believe is true.

As the only judges of believability and facts in this case, you, the jurors, are responsible to give the testimony of every witness, and all the other evidence, whatever weight you think it is entitled to receive.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.20 (4th Ed. with 2016 Supplements)

Defense Instruction No. 16. **Conflicting Testimony**

You may find inconsistencies within the testimony of a single witness, or conflicts between the testimony of several witnesses. Conflicts or inconsistencies do not necessarily mean that a witness intentionally lied. Sometimes two or more persons witnessing the same incident see, hear, or remember it differently. Sometimes a witness remembers incorrectly or forgets. If the testimony of a witness seems inconsistent within itself, or if the testimony given by several witnesses conflicts, you should try to *reconcile* the differences. If you cannot reconcile the differences, you must then decide which testimony, if any, you believe.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.30 (4th Ed. with 2016 Supplements)

Defense Instruction No. 17. **Intentionally False Testimony**

If you decide that a witness intentionally lied about a fact that may affect the outcome of the case, you may, for that reason alone, choose to disbelieve the rest of that witness's testimony. But, you are not required to do so. You should consider not only the lie, but also all the other factors I have given you, in deciding whether to believe other parts of the witness's testimony.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.40 (4th Ed. with 2016 Supplements)

Defense Instruction No. 18. **Impeachment or Corroboration of Witness by
Prior Inconsistent or Consistent Statements**

Inconsistent Statement

You may have heard evidence that a witness made [an earlier statement]
[earlier state-ments] inconsistent with [his] [her] testimony in court. You may
consider the earlier [statement] [statements] to evaluate the believability, in other
words, the truthfulness and accuracy of the witness's testimony in court.

Consistent Statement

You may have heard evidence that a witness made [an earlier statement]
[earlier statements] consistent with [his] [her] testimony in court. You may
consider the earlier [statement] [statements] only to evaluate the truthfulness and
accuracy of the witness's testimony in court.

Pennsylvania Standard Civil Jury Instructions 4.50.

Defense Instruction No. 19. **Expert Testimony**

During the trial you have heard testimony from both fact witnesses and expert witnesses.

To assist juries in deciding cases such as this one, involving scientific, technical, or other specialized knowledge beyond that possessed by a layperson, the law allows an expert witness with special education and experience to present opinion testimony.

An expert witness gives his or her opinion, to a reasonable degree of professional certainty, based upon the assumption of certain facts. You do not have to accept an expert's opinion just because he or she is considered an expert in his or her field.

In evaluating an expert witness's testimony, or in resolving any conflicting expert witness's testimony, you should consider the following:

- the witness's knowledge, skill, experience, training, and education;
- whether you find that the facts the witness relied upon in reaching his or her opinion are accurate; and
- all the believability factors I have given to you.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.80 (4th Ed. with 2016 Supplements)

Defense Instruction No. 20. **Expert Testimony: General**

Any evidence which is placed before you by an expert witness is opinion evidence. Opinion evidence is merely that - an opinion that you are free to accept or disregard. If you believe that either the opinion or the person who proposes the opinion lacks credibility, then you may disregard the evidence offered.

Rhoades, Inc. v. United Airlines, 340 F. 2d 481 (3d Cir. 1965).

Defense Instruction No. 21. **Expert Testimony; Hypothetical Question**

The expert witnesses were asked to assume that certain facts were true and to give an opinion based upon those assumptions. These are called hypothetical questions.

If you find that any important fact assumed in the hypothetical question has not been established by the evidence, you should disregard the expert's opinion given in response to that question.

Similarly, if the expert has made it clear that his or her opinion is based on the assumption that an important fact did not exist, and you find that it did exist, you should disregard that opinion.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.90 (4th Ed. with 2016 Supplements)

Defense Instruction No. 22. **Expert Testimony – Function of Expert**

If you disbelieve the facts upon which the opinion is based you may disregard that expert's opinion.

Kozak v. Struth, 515 Pa. 554, 558, 531 A.2d 420, 422 (1987).

Defense Instruction No. 23. **Weighing Conflicting Expert Testimony**

In resolving any conflict that may exist in the testimony of expert witnesses, you are entitled to weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and reliability of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.100 (4th Ed. with 2016 Supplements)

Defense Instruction No. 24. **Expert Testimony: Basis of Opinion**

An expert witness may use only factors supported by the evidence to reach his or her conclusion. An expert is not permitted to reach a conclusion and then supply through speculation or conjecture the facts necessary to support that conclusion. If you find that the facts necessary to support the opinion of any expert witness were supplied only by that expert, then the expert opinion is of no value and you should not consider it.

Collins v. Hand, 431 Pa. 378, 246 A.2d 398 (1968).

Defense Instruction No. 25. **Expert Opinion – Basis for Opinion Generally**

In general, the opinion of an expert has value only when you accept the facts upon which it is based. This is true whether the facts are assumed hypothetically by the expert, or they come from the expert's personal knowledge, from some other proper source, or from some combination of these.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.120 (4th Ed. with 2016 Supplements)

Defense Instruction No. 26. Expert Testimony – Cautionary Charge

The mere fact that this court has permitted a witness to testify as an expert witness should not be interpreted by you to mean that the court in any way sanctions the testimony given. In permitting a witness to testify as an expert, the court's only function is to determine whether or not the witness has any reasonable pretension to specialized knowledge on the subject matter in question "and the weight to be given to his evidence is for the jury."

Adapted from Pennsylvania Suggested Standard Jury Instruction (Civ.) 4.110 (4th Ed. with 2016 Supplements); Moodie v. Westinghouse Elec. Corp., 367 Pa. 493, 80 A.2d 734 (1951); Taylor v. Celotex, 393 Pa. Super. 566, 574 A.2d 1084, 1092 (1990).

Defense Instruction No. 27. **Burden of Proof and Preponderance of Evidence**

Under the law, the Plaintiff has the burden of proving his claims.

As I said before, this is a civil case, not a criminal case. The burden of proof in a civil case is different from the burden of proof in a criminal case. In a civil case, the Plaintiff must generally prove his claims by a legal standard called a "preponderance of the evidence." Preponderance of the evidence means that a fact is more likely true than not.

Think about an old-fashioned balance scale with a pan on each side to hold objects. Imagine using the scale as you deliberate in the jury room. Place all the believable evidence favorable to the Plaintiff in one pan. Place all the believable evidence favorable to the University in the other. If the scales tip, even slightly, to the Plaintiff's side, then the Plaintiff has met his burden of proving that fact. If, however, the scales tip even slightly on the University's side, or if the two sides of the scale balance equally, the Plaintiff has not met his burden of proof.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 5.00 (4th Ed. with 2016 Supplements) (amended to fit facts of this case); O'Rourke v. Department of Corrections, 778 A.2d 1194, 1200 (Pa. 2001) (whistleblower elements); BLACK'S LAW DICTIONARY 1206 (7th ed. 1999).

Defense Instruction No. 28. **Clear and Convincing Evidence**

Plaintiff must prove his fraudulent misrepresentation and defamation claims by a legal standard called “clear and convincing evidence.” The clear and convincing standard is the highest level of proof in civil actions. The clear and convincing standard imposes a heavier burden on the Plaintiff than the “preponderance of the evidence” standard I previously defined for you.

To establish his claims by “clear and convincing evidence,” Plaintiff must present evidence that is so clear, direct, and substantial that you are convinced, without hesitation, that a fact is true. Although this is a significant burden of proof, it does not mean the Plaintiff must prove the facts at issue beyond all doubt or beyond a reasonable doubt.

In order to succeed with his defamation claim, Plaintiff must prove with clear and convincing evidence that Spanier’s November 5, 2011 statement was materially false. In addition to proving falsity, Plaintiff must prove that the University acted with actual malice when it published Spanier’s November 5, 2011 statement. To establish actual malice, Plaintiff has the burden of proving by clear and convincing evidence that the University published Spanier’s November 5, 2011 statement:

1. knowing it was false;

- or -

2. after entertaining serious doubt as to the truth of the statement.

Falsity of a statement is insufficient to prove malice. Mere negligence or carelessness is not evidence of actual malice. Evidence of ill-will or the University's desire to harm the Plaintiff's reputation, although probative of the University's state of mind, without more, does not establish actual malice.

Plaintiff also has the burden of proving his fraudulent misrepresentation claim by clear and convincing evidence. To succeed with his fraudulent representation claim, Plaintiff has the burden of proving each of the following elements with clear and convincing evidence:

1. That Tim Curley and Gary Schultz made a material representation to Plaintiff;
2. That when Curley and Schultz made the representation to Plaintiff they knew the representation was false or entertained serious doubt as to the truth of the representation;
3. That Curley and Schultz made the representation with the intent of misleading Plaintiff into relying on it;
4. That Plaintiff's reliance on Curley and Schultz's misrepresentation was justifiable; and
5. The harm Plaintiff alleges he sustained was proximately caused by his reliance on Curley and Schultz's misrepresentation.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 5.10 (4th Ed. with 2016 Supplements) (with edits to account for defamation charge); *Pittsburgh Live*,

Inc. v. Sevov, 615 A.2d 438, 442 (Pa. Super. 1992) (elements of intentional misrepresentation); *Curran v. Philadelphia Newspapers, Inc.*, 546 A.2d 639, 642 (Pa. Super. 1988), *appeal denied*, 559 A.2d 37 (Pa. 1989); *Goldstein v. Phillip Morris, Inc.*, 854 A.2d 585, 591 (Pa. Super. 2004).

Defense Instruction No. 29. **Employer Liability for Employee Engaged in Intentional Conduct – Scope of Employment**

An employer is legally responsible for the wrongful acts of an employee committed during the course of and within the scope of employment. In certain circumstances, an employer's liability may extend to intentional acts committed by the employee.

In determining whether the acts of the employee were within the course and scope of the employment, you should consider the following factors:

First, whether the act was of a kind and nature the employee was employed to perform;

Second, whether the act occurred substantially within the authorized time and space limits; and

Third, whether the act was set in motion, at least in part, by a purpose to serve the employer.

Modified Pennsylvania Suggested Standard Jury Instruction (Civ.) 6.100 (4th Ed. with 2016 Supplements)

Defense Instruction No. 30. **Defamation – Defamatory Meaning**

A communication is defamatory if it tends to so harm the reputation of that person as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. A communication that states or implies that a person has acted in a way that would be inconsistent with the proper, honest, and lawful performance of his or her job, profession, or office, or has a character that would make him or her unfit to properly, honestly, and lawfully perform his or her job, profession, or office, is defamatory. Words are not defamatory merely because they are annoying or embarrassing to the person referred to in the communication.

In deciding whether the communication was defamatory, you should consider the message the communication would send to the average people who could have been expected to receive it. This means you should consider the innuendoes and implications of what was said, as well as inferences the recipients would have drawn from what may not have been said. You should also consider the context in which the allegedly defamatory statement was made.

Adapted from Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.100 (4th Ed. with 2016 Supplements)

Defense Instruction No. 31. **Defamation – Publication**

A defendant is responsible for communicating a defamatory statement if the defendant personally communicated it or directed or participated in another's publication of the defamatory statement. The burden is on the Plaintiff to show that the University either personally published the communication or directed or participated in another's publication of the defamatory statement.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.110 (4th Ed. with 2016 Supplements)

Defense Instruction No. 32. **Defamation – Identification of the Plaintiff**

It is not necessary for the Plaintiff to be specifically identified by name or official position for the communication to defame him. The Plaintiff may be defamed if the University intended the communication to refer to the Plaintiff, or if a description or reference tends to identify him. The Plaintiff also may be defamed where a recipient of the communication is familiar with the circumstances mentioned in the communication and recognizes that it concerns the Plaintiff. The burden is on the Plaintiff to show that a description or reference in the communication, or familiarity with the circumstances, would lead the recipients of the communication to reasonably understand it as referring to the Plaintiff.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.120 (4th Ed. with 2016 Supplements)

Defense Instruction No. 33. Defamation – Proof of Falsity Where the Plaintiff is a Public Figure or Public Official

A communication may be false either because it contains untrue or incomplete statements of fact or because its implication is untrue. The burden is on the Plaintiff to prove that the communication was defamatory and was false.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.140 (4th Ed. with 2016 Supplements)

Defense Instruction No. 34. **Defamation – Expression of Opinion**

The University asserts that the allegedly defamatory communication is purely an expression of opinion. The Plaintiff denies that this is so. A defendant is not liable for a communication that is pure opinion and does not state or imply any facts.

A fact is something that can be proven true or false. An opinion, on the other hand, cannot be proved true or false.

A communication is not protected merely because it is said to be an opinion. A communication is not protected if it states a defamatory fact or implies that undisclosed defamatory facts exist concerning the Plaintiff.

The Plaintiff must prove that the communication stated a defamatory fact or implied the existence of undisclosed defamatory facts concerning the Plaintiff.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.150 (4th Ed. with 2016 Supplements)

Defense Instruction No. 35. **Defamation – Proof of Fault Where the Plaintiff is a Public Official or Public Figure**

The Plaintiff is required to prove, by clear and convincing evidence, that the University published the communication either with knowledge of its falsity or with a reckless disregard for whether it was true or false. A person recklessly publishes a defamatory communication when he or she does so despite serious doubts about the truth of the communication or when he or she possesses a high degree of awareness of its probable falsity. Serious doubt or the possession of a high degree of awareness of probable falsity may be inferred from relevant circumstantial evidence of the state of mind of the person who published the defamation.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.170 (4th Ed. with 2016 Supplements)

Defense Instruction No. 36. **Defamation – Actual Malice**

In order to succeed with his defamation claim, Plaintiff must prove that the University acted with actual malice when it published Spanier's November 5, 2011 statement. To establish actual malice, Plaintiff has the burden of proving by clear and convincing evidence that the University published Spanier's November 5, 2011 statement:

1. knowing it was false;

- or -

2. after entertaining serious doubt as to the truth of the statement.

Actual malice is not measured by whether a reasonably prudent person would have published, or would have investigated before publishing. Falsity of a statement is insufficient to prove malice. Mere negligence or carelessness is not evidence of actual malice. Evidence of ill-will or the University's desire to harm the Plaintiff's reputation, although probative of the University's state of mind, without more, does not establish actual malice.

Lewis v. Philadelphia Newspapers, Inc., 833 A.2d 185, 191-192 (Pa. Super. 2003);
Reiter v. Manna, 436 Pa. Super. 192, 647 A.2d 562, 565 (Pa. Super. 1994)

Defense Instruction No. 37. **Defamation – Truth as a Defense**

An essential element of defamation is that the statement published was false. Consequently, if the statement was in fact true, there can be no defamation regardless of the University's motivations. The University has the burden to prove that the statement was more likely true than not.

42 Pa. C.S. §8343(b)(1); American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania, 923 A.2d 389, 396 (Pa. 2007).

Defense Instruction No. 38. **Defamation - Public Concern**

The University is not liable if it has proven that Spanier's November 5, 2011 statement was a matter of public concern. Speech upon matters of public concern is entitled to special protection under the First Amendment. Even statements that are considered inappropriate or controversial are entitled to protection. Speech deals with matters of public concern when it relates to any matter of political, social, or other concern to the community or when it is a subject of legitimate news interest. Speech by public employees is also deemed to be speech about public concern when it relates to their employment. You, the Jury, must determine whether President Spanier's November 5, 2011 statement was a matter of public concern.

42 Pa.C.S. § 8343; *Snyder v. Phelps*, 562 U.S. 443, 451 (2011); *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 467 (3d Cir. 2015) (applying Pennsylvania law); *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

Defense Instruction No. 39. **Defamation – Failure to Verify**

A defendant's failure to verify his facts may constitute negligence, but does not rise to the level of actual malice. That is, while it arguably may be negligent not to check independently the veracity of information before publication, this fault does not rise to the level of actual malice.

Reiter v. Manna, 436 Pa. Super. 192, 647 A.2d 562, 565 (Pa. Super. 1994)

Defense Instruction No. 40. **Damages – Defamation**

The Plaintiff is entitled to be fairly and adequately compensated for all harm he suffered as a result of the false and defamatory communication published by the University.

A. The injuries for which you may compensate the Plaintiff by an award of damages against the University include:

First, the actual harm to the Plaintiff's reputation that you find resulted from the University's conduct;

Second, the emotional distress, mental anguish, and humiliation that you find the Plaintiff suffered as a result of the University's conduct.

Third, any other special injuries that you find the Plaintiff suffered as a result of the University's act.

B. If you find that the University acted either intentionally or recklessly in publishing the false and defamatory communication, you may presume that the Plaintiff suffered both injury to his reputation and the emotional distress, mental anguish, and humiliation that would result from such a communication. This means you need not have proof that the Plaintiff suffered emotional distress, mental anguish, and humiliation in order to award him damages for such harm because such harm is presumed by the law when a defendant publishes a false and

defamatory communication with the knowledge that it is false or in reckless disregard of whether it is true or false.

In determining the amount of an award for such presumed injury to the Plaintiff's reputation and suffering of emotional distress, mental anguish, and humiliation by the Plaintiff, you may consider the character and previous general standing and reputation of the Plaintiff in his community. You may also consider the character of the defamatory communication that the University published, its area of dissemination, and the extent and duration of the publication. If the University made a public retraction or apology to the person or persons to whom the publication was made, that fact, together with the timeliness and adequacy of the retraction or apology, is important in determining the probable harm to the Plaintiff's reputation.

The motive and purpose of the University, his belief or knowledge of the falsity of the publication, and the conduct of the Plaintiff are not to be considered by you in determining the amount of the damages to which the Plaintiff is entitled for the above-stated items. Such factors are only important to the question of whether you will award punitive damages against the University and if you choose to make such an award, the amount of the award.

Where the Plaintiff is a public official or a public figure, for purposes of awarding punitive damages, the Plaintiff must also prove that the University acted

with ill will or evil motive toward the Plaintiff in publishing the allegedly defamatory communication in order to recover punitive damages.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.180 (4th Ed. with 2016 Supplements)

Defense Instruction No. 41. **Fraudulent Misrepresentation or Nondisclosure**

A person must use reasonable care to disclose a material fact if:

First, the person knows he or she is making or later learns he or she has made a misrepresentation, or

Second, the person knows he or she is making or later learns he or she has made a misleading representation, or

Third, the person knows he or she is making a misrepresentation or misleading representation or later learns that another is about to act in reliance upon it. If that person fails to do so, he or she is responsible for all harm resulting from that other person's reliance on the misrepresentation or misleading representation.

A misrepresentation is any assertion by words or conduct that is not in accordance with the facts.

A misleading representation is an assertion by words or conduct that is likely to mislead another regarding the facts.

A fact is material if it is one that would be of importance to a reasonable person in determining a choice of action. A material fact, however, need not be the sole or even a substantial factor in inducing or influencing a reasonable person's decision. A fact is also material if the person who fails to disclose it knows that the

person to whom it is made is likely to regard it as important even though a reasonable person would not regard it as important.

"Reliance" means a person would not have acted as he or she did or would not have failed to act unless he or she considered the misrepresentation or misleading representation to be true.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 17.260 (4th Ed. with 2016 Supplements)

Defense Instruction No. 42. **Damages**

It is necessary that I charge you on damages so that you have all of the law before you; however, merely because I have charged you on damages should not be construed by you as an indication that there is liability in this case or that you should find liability in this case.

Further, the fact that I charge you on the measurement of damages does not indicate, nor should it be considered by you as an indication, that I think damages should be awarded. I give you instructions on damages solely because I am required to charge you on all phases of the case which you might have to consider. The court is instructing you on damages only so you may know the applicable law if you reach that question on the jury verdict form.

Only if you find liability should you then consider the issue of damages.

Dupont v. Gallagher, 62 A.2d 28 (Pa. 1948); Based on Pennsylvania Suggested Standard Civil Jury Instruction (Civ.) 7.00 (4th. Ed. with 2016 Supplements).

Defense Instruction No. 43. **Plaintiff's Burden to Prove Damages**

It is the Plaintiff's burden to prove each element of the damages they claim. If you find any element of the damages claimed has not been proved, then your verdict may not include compensation for that element of damages.

Gordon v. Trovato, 338 A.2d 653 (Pa. Super. 1975).

Defense Instruction No. 44. **Compensatory Damages**

A party may recover only those damages that will fairly compensate that party for the injuries legally caused by a defendant.

Incollingo v. Ewing, 282 A.2d 206 (Pa. 1971).

Defense Instruction No. 45. **Damages as Compensation**

The fundamental principle on which damages is based is that compensation should be just. Plaintiff should not profit from or be overcompensated for any alleged harm he sustained. The burden is on the Plaintiff to establish damages, not the University.

Incollingo v. Ewing, 282 A.2d 206 (Pa. 1971).

Defense Instruction No. 46. **Damages are not Punishment**

In determining the amount of damages, you should not attempt to punish the University. Just as your verdict should not be influenced by sympathy for the individual who suffered the injury, it should not be influenced by prejudice against any party who caused the injury.

Incollingo v. Ewing, 282 A.2d 206 (Pa. 1971).

Defense Instruction No. 47. **Damages May Not Be Speculative**

Proof in support of a claim for damages including future damages must permit more than a mere guess or speculation.

Fish v. Gosnell, 316 Pa. Super. 565, 4631 A.2d 1042 (1983); Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980).

Defense Instruction No. 48. **Mitigation of Damages**

Plaintiff had a duty to act to mitigate his damages. If substantially comparable work was available and the Plaintiff failed to exercise reasonable diligence in seeking that work, then the plaintiff has failed to properly mitigate his damages. The University must prove that substantially comparable employment was available and the Plaintiff failed to take reasonable steps to obtain a replacement position. You, the Jury, determine whether the Plaintiff has acted with reasonable diligence to mitigate his damages in this case.

See Merrell v. Chartiers Valley Sch. Dist., 51 A.3d 286, 298 (Pa. Commw. Ct. 2012).

Defense Instruction No. 49. **Punitive Damages – General Instructions**

If you find that the conduct of the University was outrageous, you may award punitive damages, as well as any compensatory damages, in order to punish the University for its conduct and to deter the University and others from committing similar acts.

Conduct is outrageous when it is malicious, wanton, willful, or oppressive, or shows reckless indifference to the interests of others.

Modified Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.00 (4th Ed. with 2016 Supplements)

Defense Instruction No. 50. **Punitive Damages against a Principal**

You may also award punitive damages against the Pennsylvania State University, if you find that the actions of Tim Curley or Gary Schultz or Graham Spanier:

First, were outrageous;

Second, occurred during and within the scope of Tim Curley or Gary Schultz or Graham Spanier's duties; and

Third, were not committed to satisfy Tim Curley or Gary Schultz or Graham Spanier's personal ill will or malice, but instead were committed with the intent to further the University's interests.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.10 (4th Ed. with 2016 Supplements)

Defense Instruction No. 51. **Outrageous Conduct Defined**

Conduct is outrageous when it is malicious, wanton, willful, or oppressive. Therefore, you may only find that the University's conduct was outrageous if you determine that the University acted maliciously, wantonly, willfully, or oppressively.

Adapted from Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.00 (4th Ed. with 2016 Supplements) ; e.g. Feld v. Merriam, 485 A.2d 742, 747 (Pa. 1984) (citing Restatement (Second) of Torts § 908(2)); Martin v. Johns-Manville Corp., 494 A.2d 1088, 1096 (Pa. 1985); Evans v. Philadelphia Transportation Co., 212 A.2d 440, 443 (Pa. 1965); see also Lewis v. Miller, 543 A.2d 590, 592 (Pa. Super. 1992).

Defense Instruction No. 52. **Reckless Indifference Defined**

Reckless indifference to the rights of others, sometimes referred to as "wanton misconduct," has been defined to mean that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. You may only find that the University's conduct was recklessly indifferent to the rights of Plaintiff if you determine that the University intentionally disregarded a known or obvious risk with an awareness that doing so made it highly probable that harm would result.

Adapted from Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.00 (4th Ed. with 2016 Supplements); e.g. Feld v. Merriam, 485 A.2d 742, 747 (Pa. 1984) (citing Restatement (Second) of Torts § 908(2)); Martin v. Johns-Manville Corp., 494 A.2d 1088, 1096 (Pa. 1985); Evans v. Philadelphia Transportation Co., 212 A.2d 440, 443 (Pa. 1965); see also Lewis v. Miller, 543 A.2d 590, 592 (Pa. Super. 1992).

Defense Instruction No. 53. More than an Intentional Tort is Required to Award Punitive Damages

The commission of an intentional tort such as defamation and fraudulent misrepresentation alleged here is not sufficient to award punitive damages. Punitive damages may only be awarded if the Plaintiff showed additional evidence of willful, malicious, wanton, reckless or oppressive conduct beyond the underlying tort of defamation or fraudulent misrepresentation.

Chambers v. Montgomery, 192 A.2d 355, 358 (Pa. 1962); Rizzo v. Haines, 555 A.2d 58, 69 (Pa. 1989); Long v. McAllister, 118 A. 506 (Pa. 1922), Erie City Iron Works v. Barber, 102 Pa. 156, 164 (1883); Smith v. Renault, 564 A.2d 188 (Pa. Super. 1989); Pittsburgh Live, Inc. v. Sevov, 615 A.2d 438, 442 (Pa. Super. 1992); Delahanty v. First Pennsylvania Bank, 464 A.2d 1243 (Pa. Super. 1983). Accord Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 741 (3d Cir. 1992) (applying Pennsylvania law); In re Lemington Home for the Aged, 777 F.3d 629, 631 (3d Cir. 2015) (same); Contractor Utility Sales Co., Inc. v. Certain-Teed Corp., 748 F.2d 1151, 1156 (7th Cir. 1984) (same).

Defense Instruction No. 54. **Punitive Damages – Defamation**

A public figure Plaintiff such as Michael McQueary may not recover punitive damages in a defamation action unless he proves actual malice. Actual malice means that the statements were made with knowledge that it was false or with reckless disregard of whether it was false or not.

New York Times Co. v. Sullivan, 376 U.S. 254, 280 (U.S. 1964);
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755 (1985);
Sprague v. Porter, 2014 Pa. Super. Unpub. LEXIS 1659, *66 (Pa. Super. Ct. 2014).

Defense Instruction No. 55. **Punitive Damages – Amount of Award**

If you decide that the Plaintiff is entitled to an award of punitive damages, it is your job to fix the amount of such damages. In doing so, you may consider any or all of the following factors:

1. the character of the University's act,
2. the nature and extent of the harm to the Plaintiff that the University caused or intended to cause,
3. the wealth of the University insofar as it is relevant in fixing an amount that will punish it and deter it and others from like conduct in the future.

It is not necessary that you award compensatory damages to the Plaintiff in order to assess punitive damages against the University, as long as you find in favor of the Plaintiff and against the University on the question of liability.

The amount of punitive damages awarded must not be the result of passion or prejudice against the University on the part of the jury. The sole purpose of punitive damages is to punish the University's outrageous conduct and to deter the University and others from similar acts.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 8.20 (4th Ed. with 2016 Supplements)

Defense Instruction No. 56. **Concluding Instructions Generally**

1. You now have all the rules of law to properly reach a verdict in this case. In a few minutes, you will begin your deliberations. Before you do so, I would like to give you a few final guidelines on conducting your deliberations and properly arriving at a verdict.

2. My responsibility, as judge, is to decide all questions of law; therefore, you must accept and follow my rulings and these instructions as to matters of law. But I am not the judge of the facts. You, the jurors, are the only judges of the facts. So your responsibility is to consider the evidence and decide what are the true facts. By applying the rules of law as given to you, to the facts as you find them, you must decide whether the Plaintiff has proven his claims.

3. The decision in this case, as I am sure you understand, is a matter of considerable importance. Your responsibility, as jurors, is to reach a verdict based on the evidence presented during the trial, and upon your evaluation of that evidence. You must consider all of the testimony you have heard, and all of the other evidence presented during this trial, in order to decide the facts.

4. In deciding the facts, you may properly apply common sense and draw upon your own everyday practical knowledge of life. You should keep your deliberations free of any bias or prejudice. All parties have the right to expect you

to consider the evidence conscientiously, and to apply the law as I have outlined it to you.

5. Before you begin to deliberate, you should select one of your group to be the foreperson. The foreperson will announce the verdict in this courtroom after you have finished deliberating. If, during deliberations, you have a serious doubt about some portion of these instructions, write your question in a note, signed by the foreperson. Give the note to the bailiff. The bailiff will give it to me for response. You should not, however, reveal to anyone how the jury stands numerically.

6. Some of you have taken notes during the trial. You will be permitted to take your notes with you to the deliberation room. In addition, you are permitted to share your notes with other jurors during your deliberations. Your notes may help you refresh your recollection of the testimony and should be treated as a supplement to, rather than a substitute for, your memory. Your notes are merely memory aids; they are not evidence or the official record. Those of you who have not taken notes are reminded to not be overly influenced by the notes taken by other jurors. Give no more or no less weight to the view of a fellow juror just because he or she did or did not take notes. Following your deliberations and after your verdict has been accepted by the court, your notes will be collected by the court and destroyed, without inspection.

7. The verdict should be rendered only after careful and thoughtful deliberations. In the course of your deliberations, you should consult with each other and discuss the evidence freely and fairly, in a sincere effort to arrive at a just verdict. It is your obligation to consider the evidence and the issues presented with a view toward reaching agreement, if you can do so without violating your own individual judgment. Each juror must decide this case for himself or herself, after examining the issues and the evidence with proper regard to the opinions of other jurors. Proper consideration of the issues before you means that you should be willing to reexamine your views and change your opinion, if convinced that it is erroneous; but you are not required to surrender an honest conviction as to the weight or effect of the evidence only because of another juror's opinion, or solely for the purpose of returning a verdict.

8. Your verdict must represent the jury's considered, final judgment. While the view of every juror must be considered, your verdict need not be unanimous. A verdict rendered by five-sixths of the jury shall constitute the verdict of the entire jury. Five-sixths of eight is seven. So when seven of you have agreed that you have reached a verdict, indeed, you have. You should tell the bailiff, and we will reconvene court to accept your verdict.

9. Please keep in mind that this dispute between the parties is, for them, a most serious matter. They and the court rely upon you to give full and

conscientious consideration to the issues and the evidence before you. Neither sympathy nor prejudice may influence your deliberations. You should not be influenced by anything other than the law and the evidence in this case, together with your own judgment and evaluation of that evidence. All parties stand equally before the court, and each is entitled to the same fair and impartial treatment in your hands.

10. I am well aware that in daily life, you may regularly communicate with friends and family through text messaging, e-mail, Twitter, social networking sites, chat rooms, Facebook, MySpace, *Instagram*, *Snapchat*, LinkedIn, YouTube, blogs, or other websites. Remember--you must not communicate about this case in any way, even electronically.

I also am well aware that in daily life, many of you regularly use the Internet to obtain all types of information. As I told you at the beginning of the trial, anyone can put anything on the Internet and that information may or may not be accurate or reliable, and probably would not have been admissible as evidence during this trial. During this trial, I had to decide that the information you heard was sufficiently reliable to be admissible under the Rules of Evidence and the law. Relying on any information you obtain outside the courtroom is not only a violation of these rules, it is unfair because the parties would not have the opportunity to refute it, explain it, or correct it.

You may begin your deliberations.

Combined Pennsylvania Suggested Standard Jury Instructions (Civ.) 12.00 and
12.10 (4th Ed. with 2016 Supplements) (amendments in italics)

Defense Instruction No. 57. **Copy of the Written Jury Instructions Provided to the Jury**

You will receive copies of some of my concluding instructions.

You should give equal weight to the written instructions and the instructions

I am now verbally giving you.

Do not place greater emphasis on the instructions I provide you in writing.

Consider all the instructions as a whole and each in light of the others.

During your deliberations, if you have a question and need further instruction, write your question on a sheet of paper and give it to a [court officer] [jury tipstaff] who will give it to me.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 12.11 (4th Ed. with 2016 Supplements)

Defense Instruction No. 58. **Post-Deliberation Communications**

After you leave today, the lawyers, the media, or others may contact you to discuss this case.

Lawyers may want to talk to you to understand why you reached the verdict, get suggestions on how they could do better in their next trial, or various other reasons. Your friends might communicate with you personally or on your own social media sites.

As private citizens, you were called on by this court to perform one of the great duties of citizenship--to serve as a juror. It is NOT part of your responsibility to be a spokesperson for the justice system or to explain to anyone why you or your fellow jurors reached your verdict.

You have performed your duty as jurors in this case.

You have no obligation to answer anyone's questions, whether from the lawyers, the media, or anyone else. You certainly may communicate with them.

If you do discuss the case, please remember how important it is not to say anything that would be hurtful to another person and be considerate of your fellow jurors and respect their right to privacy.

Pennsylvania Suggested Standard Jury Instruction (Civ.) 12.11 (4th Ed. with 2016
Supplements)

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: _____

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Dated: September 29, 2016

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Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	:	IN THE COURT OF COMMON
	:	PLEAS OF CENTRE COUNTY
Plaintiff,	:	
v.	:	
	:	CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE	:	
UNIVERSITY,	:	HON. THOMAS G. GAVIN
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 29nd day of September, 2016, a true and correct copy of the Proposed Points of Charge on behalf of The Pennsylvania State University was served upon the following persons via electronic and regular mail:

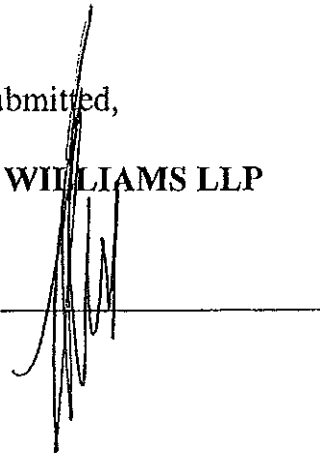
Elliot A. Strokoff, Esquire
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132 State Street
Harrisburg, PA 17101
Counsel for Plaintiff

William T. Fleming, Esquire
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111 Sowers Street, Suite 330
State College, PA 16801
Local Counsel for Plaintiff

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: _____

A handwritten signature in black ink, appearing to be "J. Williams", is written over a horizontal line. The signature is stylized with a large, sweeping initial "J" and a vertical line for the last name.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

CIVIL ACTION- AT LAW

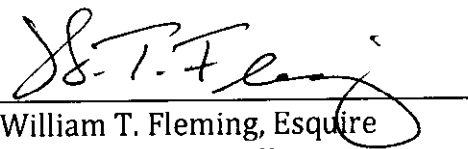
MICHAEL J. MCQUEARY,	:	
Plaintiff,	:	
	:	No. 2012-1804
v.	:	
	:	Hon. Thomas G. Gavin
THE PENNSYLVANIA STATE	:	
UNIVERSITY,	:	
Defendant	:	

CERTIFICATE OF SERVICE

William T. Fleming, Esquire, counsel for the above Plaintiff, hereby certifies that a true and correct copy of Proposed Points for Charge on Behalf of Defendant, The Pennsylvania State University, filed of record in the aforementioned Court on July 14, 2017, was served upon Defendants, through their counsel of record, by United States Mail, sent on July 14, 2017 to the following address:

Nancy Conrad, Esquire
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FLEMING LAW OFFICES

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Date: July 14, 2017