

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CIVIL ACTION NO.: 1585-CV-0570 B

JANE DOE, MARY DOE, and JOHN DOE,)
Plaintiffs)
)
v.)
)
WORCESTER POLYTECHNIC)
INSTITUTE; AARTI MADAN; ANNE T.)
OGILVIE; RICHARD F. VAZ; SUSAN)
VERNON-GERSTENFELD; and)
CHERYL A. MARTUNAS,)
Defendants)

**DEFENDANTS WORCESTER POLYTECHNIC INSTITUTE, AARTI MADAN,
ANNE T. OGILVIE, RICHARD F. VAZ, SUSAN VERNON-GERSTENFELD AND
CHERYL A. MARTUNAS' MOTION FOR SUMMARY JUDGMENT**

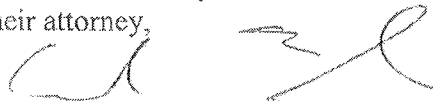
Now come the defendants, Worcester Polytechnic Institute, Aarti Madan, Anne T. Ogilvie, Richard F. Vaz, Susan Vernon-Gerstenfeld and Cheryl A. Martunas (hereinafter, "defendants") and move this Court pursuant to Mass .R. Civ. P. 56 for summary judgment as to the plaintiffs negligence, gross negligence, breach of contract and loss of consortium claims. As grounds for their motion, the defendants state that:

- a. The release signed by Jane Doe bars all of her claims against the defendants;
- b. The evidence, even when viewed in a light most favorable to the plaintiffs, is insufficient to establish a claim for gross negligence; and
- c. The generalized representations contained in the Going Global Handbook and any other WPI brochures relating to student safety are too vague and indefinite to form an enforceable contract or otherwise provide a basis for a cause of action against WPI for breach of contract.

Accordingly, summary judgment is appropriate. See, Lee v. Allied Sports Assocs., 349 Mass. 544, 550 (1965); Cornier v. Central Mass. Chapter of the Natl. Safety Council, 416 Mass. 286, 288-289 (1993). Altman v. Aronson, 231 Mass. 588, 591-592 (1919). Guckenberger v. Boston University, 974 F.Supp. 106, 150 (D.Mass 1997).

As further grounds for their Motion for Summary Judgment, the defendants refer the Court to their Memorandum in Support, attached hereto.

The defendants,
Worcester Polytechnic Institute, Aarti Madan,
Anne T. Ogilvie, Richard F. Vaz, Susan Vernon-
Gerstenfeld and Cheryl A. Martunas
By their attorney,



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CERTIFICATE OF SERVICE

I, David W. McGough, attorney for the defendants, Worcester Polytechnic Institute, Aarti Madan, Anne T. Ogilvie, Richard F. Vaz, Susan Vernon-Gerstenfeld, and Cheryl A. Martunas, hereby certify that on this 15th day of April, 2016 I have served a copy of the following document:

**DEFENDANTS WORCESTER POLYTECHNIC INSTITUTE, AARTI MADAN,
ANNE T. OGILVIE, RICHARD F. VAZ, SUSAN VERNON-GERSTENFELD AND
CHERYL A. MARTUNAS' MOTION FOR SUMMARY JUDGMENT**

by mailing a copy of the same first class mail, postage prepaid, to counsel of record:

Donna R. Corcoran, Esq.
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David W. McGough

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VERNON-GERSTENFELD; and)
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Defendants)

DEFENDANTS WORCESTER POLYTECHNIC INSTITUTE, AARTI MADAN, ANNE T. OGILVIE, RICHARD F. VAZ, SUSAN VERNON-GERSTENFELD AND CHERYL A. MARTUNAS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. SYNOPSIS OF ARGUMENT AND APPLICABLE LAW:

The defendants move for summary judgment on the grounds that there is no genuine issue of material fact with respect to plaintiffs' negligence, gross negligence and breach of contract claims, and summary judgment is warranted as a matter of law. Jane Doe signed a release of claims, which expressly released the defendants "from and against any present or future claim, loss or liability for injury to person or property which I may suffer ... during my participation in the Program." It is well settled that a defendant may exempt itself from liability which it might subsequently incur as a result of its own negligence. Lee v. Allied Sports Assocs., 349 Mass. 544, 550 (1965); Cormier v. Central Mass. Chapter of the Natl. Safety Council, 416 Mass. 286, 288-289 (1993). Furthermore, the alleged acts and/or failure to act by the defendants, even when viewed in a light most favorable to the plaintiffs, do not rise to the level of gross negligence. Altman v. Aronson, 231 Mass. 588, 591-592 (1919). Additionally, the generalized representations contained in the Going Global Handbook and any other

representations regarding student safety are too vague and indefinite to form an enforceable contract or otherwise provide a basis for a cause of action against WPI for breach of contract. Guckenberger v. Boston University, 974 F.Supp. 106, 150 (D.Mass 1997). Therefore, the plaintiffs cannot establish the essential elements of their claims and summary judgment is warranted. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991).

II. FACTS:

A. Background:

This case arises out of an incident that occurred on April 14, 2012 at the Ashford Imperial Condominiums (Ashford) in San Juan, Puerto Rico. Plaintiff, Jane Doe, alleges that she was sexually assaulted by William Rodriguez, who was employed as a security guards at the Ashford. At the time of the incident, Jane Doe was a student at Worcester Polytechnic Institute (WPI) and was participating in the Interactive Qualifying Project in Puerto Rico. In their Complaint, plaintiffs Jane Doe, her mother, Mary Doe, and her father, John Doe allege negligence, gross negligence and loss of consortium claims against the defendants WPI, Aarti Madan (WPI's on-site faculty advisor), Anne T. Ogilvie (WPI's Director of Global Operations), Richard F. Vaz (WPI's Dean of Interdisciplinary and Global Studies Division), Susan Vernon-Gerstenfeld (WPI's former Director of Academic Programs and Planning for Interdisciplinary and Global Studies) and Cheryl A. Martunas (WPI's Director of Public Safety and Chief of Police). Plaintiffs also assert a claim for breach of implied contract against WPI. (See Complaint, attached as Exhibit 1.)

B. Interdisciplinary and Global Studies Division Program:

WPI requires all junior year undergraduates to participate in the Interdisciplinary and Global Studies Division (IGSD) program. (Deposition of Aarti Smith Madan, hereinafter,

“Madan Dep.”, attached as Exhibit 2, p. 20.) While participating in the IGSD program, the students are required to complete a series of projects, including the Interactive Qualifying Project (IQP). (See Going Global @ WPI, attached as Exhibit 3, p. 3.) WPI offers its students the opportunity to complete this degree requirement at locations locally and around the world. (Exhibit 3, p. 3.) The IGSD program is not a traditional study abroad program, because the students work in a structured program doing research projects. (Deposition of Richard Vaz, hereinafter, “Vaz Dep.,” attached as Exhibit 4, p. 11.) During the 2011-2012 school year, WPI sent 625 students to various global project sites, more than any other U.S. college or university. (Exhibit 3, p. 3.) However, while the IQP is a graduation requirement, students are not required to travel overseas to complete the requirement. WPI offers project centers locally, including Worcester and Boston. (Madan Dep., Exhibit 2, p. 20.) Jane Doe knew about the local project centers and that she did not have to travel to Puerto Rico to fulfill her IQP requirement. (Deposition of Jane Doe, hereinafter, “Doe Dep.,” attached as Exhibit 5, p. 48.)

C. Student Housing in Puerto Rico/Security:

Housing for the students participating in the Puerto Rico program in 2012 was provided at the Ashford Imperial, which had been used by WPI for student housing since 1992 without incident. (Madan Dep., Exh. 2, pp. 40-42; Deposition of Susan Vernon-Gerstenfeld, hereinafter “Gerstenfeld Dep.,” attached as Exhibit 6, pp. 9, 35; Deposition of Anne Ogilvie, hereinafter, “Ogilvie Dep.,” attached as Exhibit 7, pp. 18, 41,47; Deposition of Yolanda Moral, hereinafter “Moral Dep.,” attached hereto as Exhibit 8, p. 124.) While the students were required to stay at the Ashford, they were not monitored or controlled by WPI, and could come and go as they wanted. (Madan Dep., Exh. 2, pp. 42-44, Gerstenfeld Dep., Exh. 6, p. 48.) The arrangement was similar to off-campus housing. (Deposition Cheryl Martunas, hereinafter, “Martunas Dep.”,

Exhibit 9, p. 28.) WPI procured housing for the students at the Ashford Imperial Condominiums through its vendor, Seabreeze Apartment Rentals, Inc. (Seabreeze). Gerstenfeld Dep., Exh. 6, p. 76.) In 2012, Seabreeze was operated by Yolanda Moral. (Gerstenfeld Dep., Exh. 6, p. 76, Moral Dep., Exh. 8, pp. 23-35; 48-50; 115-117.) As the Director of Academic Programs and Planning for Interdisciplinary and Global Studies, Ms. Vernon-Gerstenfeld would visit the Ashford twice annually to assess the housing conditions and risks; once in November and once in the spring for the students' final presentations. (Gerstenfeld Dep., Exh. 6, pp. 11, 33.) During her November visits, she would meet with Ms. Moral, the operator of Seabreeze, to discuss the housing needs for the following year. (Gerstenfeld Dep., Exh. 6, p. 11.) She would also have ongoing conversations about the student housing at the Ashford with each pair of faculty advisors (which changed each year), as well as the director of the IGSD program regarding all aspects of the center operations. (Defendant, Susan Vernon-Gerstenfeld's Answers to Interrogatories, Exhibit 10, No. 9.) Ms. Vernon-Gerstenfeld was familiar with the location, layout and security at the Ashford because in addition to her twice yearly visits she had also lived there when she had served as an on-site faculty advisor. (Gerstenfeld Dep., Exh. 6, p. 33.) The security at the Ashford Imperial included key card access, elevator key access, security cameras and a security guard stationed in the lobby. (Gerstenfeld Dep., Exh. 6, p. 32; Exh. 10, No. 7.) During her twice yearly assessment of the student housing in Puerto Rico, Ms. Vernon-Gerstenfeld directly observed the security, including the locks on the doors, security cameras and guards. (Gerstenfeld Dep., Exh. 6, pp. 32-33.) In the 20 years prior to the incident involving Jane Doe, there had never been any problems or issues with the security guards, and the safety of students at the housing was never in question. (Id.)¹

¹ On-site security guards are not ordinarily provided at IGSD project center housing and are not present at on-campus student housing. (Vaz Dep., Exh. 4, p. 20; Ogilvie Dep., Exh 7, p. 64; Martunas Dep., Exh. 9, p. 53.)

WPI and its staff relied on its vendor, Seabreeze, in their capacity as agent for the Ashford, for the retention of security. (Gerstenfeld Dep., Exh. 6, pp. 31-32.) The reliance on their vendor for this service was in accordance with the best practices of the National Association For Study Abroad (NAFSA). (Madan Dep., Exh. 2, p. 36.) This was both reasonable and beneficial, because the operator of Seabreeze, Yolanda Moral, also served as the Secretary of the Board of the Ashford condominium association, Consejo de Titulares Condominio Ashford Imperial ("Consejo"), and was directly involved in the vetting and hiring of the security company.² (Moral Dep., Exh. 8, pp. 117-118.) As WPI's Director of Academic Programs and Planning for Interdisciplinary and Global Studies, Ms. Vernon-Gerstenfeld knew that in addition to serving as WPI's housing vendor, Ms. Moral (Seabreeze) was also involved in the management of the Ashford and the retention of the Ashford's contractors, including the company that provided the security and security guards. (Gerstenfeld Dep., Exh.6, pp. 72, 77-78.) In fact, as a member and Secretary of Consejo, Ms. Moral participated in and voted on the retention of the security company, Winn Access (Winn), and the renewal of their contract with the Ashford. (Moral Dep., Exh. 8, pp. 107-108, 118-120.) The renewal of the security contract was done on a yearly basis, at which time Winn was required to present all required documents. (Moral Dep., Exh. 8, pp. 119-130; Deposition of Abraham Joaquin-Hidalgo, hereinafter, "Joaquin Dep.," attached at Exhibit 12, pp. 168-169.) When the security company changed its name from PDI to Winn Access in 2009, it made a presentation to the Board regarding the security services it would be providing. (Moral Dep., Exh. 8, pp. 119-121; Joaquin Dep., Exh. 12, p. 169-170.) Under the terms of the contract with Consejo/Ashford, Winn was required to

² In the years surrounding the incident, Seabreeze and its operator, Yolanda Moral, were one and the same. (See Seabreeze Answers to Plaintiff's First Set of Interrogatories, Nos. 1 and 15; Exhibit 11; Moral dep., Exh. 8, pp. 23-24; 33-35; 48-50; 115-117.)

be licensed and was also required to obtain Certificates of Good Standing issued by the Puerto Rico Police Department from each of the guards it employed. (Moral Dep., Exh. 8, pp. 125-126; Joaquin Dep., Exh. 12, p. 170-171.) The security guard involved in the incident, William Rodriquez, provided Winn Access with a Certificate of Good Standing prior to the arrival of the WPI students in March 2012. (Moral Dep., Exh. 8, p. 126; Joaquin Dep., Exh. 12, pp. 89-90, 170-171.) Through her direct involvement as a Board member, WPI's vendor, Ms. Moral/Seabreeze, knew the identity of the company that had been providing security services for many years and their obligations under the contract with the Consejo/Ashford, including what was required in terms of background checks/vetting of the security guards. (Moral Dep., Exh. 8, pp. 119-127.) Moreover, given her long history in serving on the Ashford Board and procuring WPI's housing, Ms. Moral/Seabreeze was a reputable vendor who certainly knew WPI expectations regarding student housing and security at the Ashford. (Exh. 3, p. 5; Moral Dep., Exh. 8, pp. 121-124.)³

D. Jane Doe's Release of Claims and Going Global Handbook:

Upon acceptance into the IGSD Puerto Rico program, Jane Doe signed the Acknowledgment and Release, which specifically provided that:

Assumption of Risk and Release of Claims. Knowing the risks described, and in consideration of being permitted to participate in the Program, I agree, on behalf of my family, heirs, and personal representative(s), to assume all the risks and responsibilities surrounding my participation in the Program. To the maximum extent permitted by law, I release and indemnify Worcester Polytechnic Institute, and its officers, employees and agents, from and against any present or future claim, loss or liability for injury to person or property which I may suffer, or for which I may be liable to any other person, during my participation in the Program (including periods in transit to or from any site in country where the Program is being conducted).

³ While Ms. Vernon-Gerstenfeld did not know the name of the security company prior to the happening of the incident, she knew that the same company had been providing security guards at the Ashford for over 20 years without issue. (Gerstenfeld Dep., Exh. 6, p. 79; Moral Dep., Exh. 8, p. 129.)

(Acknowledgment and Release, Exhibit 13.) Jane Doe carefully read and understood the Release of Claims against WPI and its staff, signed the Release. (Exh. 13; Doe Dep., Exh. 5, pp. 68-69.)

As a participant in the 2012 IGSD program, Jane Doe was also provided with written materials, including the Going Global @ WPI Puerto Rico D 2012 Student Handbook (Exh. 3; Doe Dep., Exh. 5, pp. 74-75.) The information in the Going Global Handbook was taken from the NAFSA website. (Exh. 3, p. 3; Vaz Dep., Exh. 4, pp. 21-25, 33-34.) The Going Global Handbook specifically advises students that the program sponsors cannot “guarantee or assure the safety and/or security of participants or eliminate all risks from the study abroad environments,” or “monitor or control all of the daily personal decisions, choices, and activities of participants.” (Exh. 3, p. 5.) The Handbook makes clear that the students should “read and carefully consider all materials issued by the sponsor...conduct their own research on the country(ies) they plan to visit with particular emphasis on health and safety concerns...promptly express any health and safety concerns to the program staff...[and] accept responsibility for their own decisions and actions.” (Exh. 3, p. 6.)

The Going Global Handbook reminds students that they “should recognize the fact that you have entered into a contractual agreement with WPI that states the obligations and responsibilities of both the university and yourself.” (Exh. 3, p. 3.) However, the Handbook does not represent or otherwise imply that it is to serve as a contract between WPI and the students. The text is taken from the NAFSA to provide information to students and their parents so they may better understand the IGSD program. (Madan Dep., Exh. 2, p. 62; Vaz Dep., Exh. 4, p. 25.) The statements in the Going Global Handbook are “intentionally general” and are intended to provide information and guidelines to develop and address good health and safety

practices. (Exh. 3, p. 4.) It is not intended to be comprehensive regarding the responsibilities of WPI. (Vaz Dep., Exh. 4, pp. 21-25.) Nor is it intended to serve as a contract. (Gerstenfeld Dep., Exh. 6, pp. 21, 74-75.) Indeed, the Going Global Handbook specifically states that “[t]he statements in the Handbook [are] intended to be aspirational in nature.” (Exhibit 3, p. 4.) The reference to “contractual agreement” refers to the agreements signed by the students relating to their participation in the IGSD program, including the Acknowledgment and Release (Exhibit 13), Conditions of Application (Exhibit 14), Participant Statement of Agreement (Exhibit 15), and the Off Campus Students’ Health Update and Records Release Form. (Exhibit 16.) (See also, Madan Dep., Exh. 2, pp. 57-58; Gerstenfeld Dep., Exh. 6, pp. 22, 75-76.)

E. Sexual Harassment Policy/Professor Madan’s Pre-Incident Interaction with William Rodriguez:

WPI has a sexual harassment policy that is consistent with the requirements of Title IX and includes a definition of sexual harassment. (Ogilvie Dep., Exh. 7, pp. 74-76; See, WPI Sexual Harassment Policy, Definition, Exhibit 17.) WPI also has procedures in place regarding the reporting of sexual harassment. (Ogilvie Dep., Exh. 7, pp. 74-75.) The Going Global Faculty Advisor Handbook provides that “all allegations [of sexual harassment] are to be taken seriously,” that the advisor “must follow a process of staying in touch with IGSD and WPI,” and that the advisor must “respond to the student’s concerns and seek the appropriate support and expertise both on campus and on-site.” (See Going Global @ WPI For On-Site Advisors, Exhibit 18, p. 29.) The Residential Services and Campus Police Community Response Checklist also advises the students and faculty to “report suspicious behavior to the appropriate campus officials, even if it is ‘just a hunch.’” (Exhibit 19; Madan Depo., Exh. 2, p. 113.)

At the time of the incident, Prof. Aarti Madan was one of the on-site faculty advisors. (Madan Dep., Exh. 2, pp. 12, 21.) The faculty advisors were primarily responsible for

overseeing the academic program. (Defendant Aarti Madan's Answers to Interrogatories, Exhibit 20, No. 5; Madan Dep., Exh. 2, pp. 21, 42-43; Vaz Dep., Exh. 4, pp. 14-15; Gerstenfeld Dep., Exh. 6, p. 48; Ogilvie Dep., Exh. 7, p. 72.) While they also undertook certain responsibilities for health and safety, the students had primary responsibility for their health and welfare. (Exh. 3, p. 6; Madan Dep., Exh. 2, pp. 42-43, 47); Gerstenfeld Dep., Exh. 6, pp. 48-50; Ogilvie Dep., Exh. 7, pp. 72-73.) The on-site advisors are not tasked specifically with keeping an eye out for the students, who are free to come and go as they choose. (Vaz Dep., Exh. 4, pp. 14-15, 35-36.)

Prior to the incident, Prof. Madan had exchanges with security guard William Rodriguez, in which he acted in a flirtatious manner toward her. (Exh. 20, No. 17.) According to Prof. Madan, during their first or second exchange he referred to her in traditional Puerto Rican ways, as "guapa," "princesa" or "linda," all common terms used in Caribbean cultures. (Id; Madan Dep., Exh. 2, pp. 127-128.) Prof. Madan found Mr. Rodriguez's flirtatious behavior to be annoying. (Madan Dep., Exh. 2, pp. 125-140.) This included several occasions when he got on the elevator with her at night after she had been walking her dog. (Madan Dep., Exh. 2, pp. 130-131.) For this reason, Prof. Madan assumed a cooler and less friendly manner toward him, but he still continued to flirt with her. (Madan Dep., Exh. 2, pp. 127-128, 143.) Although Prof. Madan found Mr. Rodriguez's behavior to be annoying, she attributed it to nothing more than cultural difference. (Exh. 20, No. 17; Madan Dep., Exh. 2, pp. 127-128, 132; 150-151.) Despite his annoying behavior, Prof. Madan felt that she knew Mr. Rodriguez better than anyone else at WPI, felt very comfortable around him and considered his behavior to be nothing more than innocuous, benign flirtations. (Madan Dep., Exh. 2, pp. 128, 138.) At no time did she

find his behavior suspicious, threatening, predatory or sexually harassing. (Exh. 20, No. 17; Madan Dep., Exh. 2, pp. 130, 139, 150.)

Following the incident involving Jane Doe, Prof. Madan drafted an Incident Report in which she used the terms “strained,” “strange” and “uneasy” to describe her interactions with Mr. Rodriguez. Prof. Madan’s report provides:

I informed [the investigating police officer] that in fact my interaction with William was strained since he'd been a bit flirtatious since I'd arrived in Puerto Rico. After a few suggestive compliments, he realized I was the students' professor rather than a student; he seemed apologetic and a bit embarrassed. I felt strange with William because he entered the elevator with me to do his rounds on multiple occasions, always around midnight or 1:00 am after I'd given my dog her nighttime bathroom break. While the first 2 times didn't seem odd, the 3rd left me a bit uneasy because I felt a pattern. On one occasion I was speaking with Steve Partridge when William tapped one shoulder and then walked away, sort of teasing and trying to get me to look the wrong way. Steve immediately commented that I was being flirted with. After those instances, I cooled my interactions with William to the bare minimum.

(Incident Report, Exhibit 21, p. 2.)

Prof. Madan has made clear that she drafted the Incident Report at a time when she had been interacting with Mr. Rodriguez for over five weeks and her reflection upon their past interactions had been colored by the accusation. (Exh. 20, No. 17.) She has repeatedly stated, both in answers to interrogatories and at deposition, that her statement about feeling “uneasy,” “strained” and “strange” had to do with Mr. Rodriguez flirtatious and annoying manner, not with any suspicious or threatening behavior. (Exh. 20, No. 17; Madan Dep., Exh. 2, pp.125-152.) In fact, while she considered Mr. Rodriguez’ flirtation to be annoying, she also considered them to be compliments, which she did not want to entertain. (Madan Dep., Exh. 2, p. 137.) Prof. Madan did not feel the need to report this “innocuous, benign flirtation” to anyone. (Madan Dep., Exh. 2, p. 138.) Nor did she have any reason to believe that Mr. Rodriguez was flirting with any of the students, or to inquire if the students had any interactions with Mr.

Rodriguez. (Madan Dep., Exh. 2, pp 125-140.) Prior to the incident, Mr. Rodriguez had never acted in an inappropriate or threatening manner toward Jane Doe, and neither she, nor any of the other students, had ever made any complaints about him. (Doe Dep., Exh. 5, pp. 123-124.)

III. ARGUMENT:

A. The Release Signed by Jane Doe Bars Her Claims Against the Defendants

By signing the Acknowledgment and Release, Jane Doe released her claims against the defendants. It is well settled that releases of liability for ordinary negligence are valid. Gonsalves v. Commonwealth, 27 Mass. App. Ct. 606, 608 n.2 (1989); Cormier, 416 Mass. at 289. Massachusetts law favors the enforcement of releases. Lee, 349 Mass. at 550. A party may, by agreement, allocate risk and exempt itself from liability that it might subsequently incur as a result of its own negligence. See, e.g., Lee, 349 Mass. at 550 (release signed by plaintiff to gain admission to speedway valid); Cormier, 416 Mass. at 288 (motorcyclist's release of claims not against public policy); Coveney v. President & Trustees of College of Holy Cross, 388 Mass. 16, 21 (1983) (plaintiff waived claims against college by executing a valid release). In the absence of fraud, a person or entity may make a valid contract exempting themselves from liability to another resulting from their negligence. Schell v. Ford, 270 F.2d 384, 386 (1st Cir. 1959). Whether the contracts are called releases, covenants not to sue or indemnification agreements, they represent "a practice our courts have long found acceptable." Minassian v. Ogden Suffolk Downs, Inc., 400 Mass. 490, 493 (1987). See Shea v. Bay State Gas Co., 383 Mass. 218, 223-224 (1981); Clarke v. Ames, 267 Mass. 44, 47 (1929).

Here, Jane Doe agreed to and signed the Acknowledgment and Release (Release), which provides in relevant part that she "assumed all the risks" and "[t]o the maximum extent permitted by law, I release and indemnify Worcester Polytechnic Institute ... from and against

any present or future claim, loss or liability for injury ..." (Exhibit 13.) While any doubts about the interpretation of the release must be resolved in the plaintiff's favor, see, Lechmere Tire & Sales Co. v. Burwick, 360 Mass. 718, 721 (1972), the Release is unambiguous and comprehensive. Lee, 349 Mass. at 551. Jane Doe acknowledged that she was voluntarily participating in the IQP in Puerto Rico, knew the risks associated with participating in a study abroad program, read and understood the terms of the Release and signed it. (Doe Dep., Exh. 5, pp. 67-69.) Having read the Release, she is deemed to have understood it. Cormier, 416 Mass. at 289. There is no evidence to suggest that the Release was procured by deceit or fraud, or that Jane Doe was under duress at the time she signed.

Requiring the plaintiff to sign the Release before participating in the Puerto Rico IGSD program does not make it unconscionable. Jane Doe could have completed the IQP requirement at a local center, which would have allowed her to live either on campus or at home. (Madan Dep., Exh. 2, p. 20; Doe Dep., Exh. 5, p. 48.) Her decision to sign the Release and participate in the Puerto Rico program was voluntary. (Doe Dep., Exh. 5, pp. 68-69.) Nor does placing the risk of injury on a person as a condition of participation in a program contravene any public policy. In Lee, 349 Mass. 544, the Court upheld a release signed as a prerequisite to a spectator entering the pit area of an automobile race. In Sharon v. City of Newton, 437 Mass. 99, 109 (2002), the Court upheld a release required for participation by a minor in cheerleading. In Coveney, 388 Mass. 16, the Court held valid a release of the college from any past, present or future claims as a condition of being granted a de novo disciplinary hearing. In Cormier, 416 Mass. 286, the Court upheld a release signed by a beginner rider as a condition of her enrollment in a motorcycle safety class. The public policy of the Commonwealth is not offended by requiring a release as a prerequisite to that participation. Sharon, 437 Mass. at 109.

This policy is illustrated in the statutes that provide an exemption from liability for negligence: nonprofit organizations and volunteer coaches who run sports programs for children under eighteen years of age (G.L. c. 231, § 85V) and owners of land who permit the public to use their land for recreational purposes (G.L. c. 21, § 17C). See e.g., Anderson v. Springfield, 406 Mass. 632, 549 (1990) (city not liable for injuries resulting from negligently caused defect in city-owned baseball field). While these statutes are inapplicable to the present case, the principle remains the same: to hold a release of the type signed by Jane Doe unenforceable would expose colleges and universities who offer after school, extracurricular and/or study abroad programs to financial costs and risks that would lead to the reduction of those programs. This is unwarranted, inevitably destructive to school-sponsored programs and contrary to public interest. Sharon, 437 Mass. at 106, 110.

B. There is No Evidence of Gross Negligence or Violation of Statutory Duty

While an agreement placing the risk of negligently caused injury on a person as a condition of that person's voluntary choice to engage in a program ordinarily contravenes no public policy, the release may not exempt a defendant from liability for grossly negligent conduct. Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct, 17, 19 (1997). Similarly, Courts are cautious to enforce releases that attempt to shield a defendant from responsibility for violation of a statutory duty. Henry v. Mansfield Beauty Academy, Inc., 353 Mass. 507, 511 (1968). There is a clear distinction between ordinary negligence and gross negligence. As the Court explained in Altman v. Aronson:

Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to a present legal duty and to utter forgetfulness

of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence.

231 Mass. 588, 591-592 (1919).

In her Complaint, Jane Doe alleges that the defendants were grossly negligent with respect to three issues:

- failure to provide and/or secure safe and adequate student housing;
- failure to ensure and/or require proper background checks for security and oversee security operations; and
- failure to inform, warn, caution, and protect Jane against known risks to her health and safety.

Even when viewed in a light most favorable to the plaintiffs, the evidence does not meet the heightened burden of gross negligence. Zaras, 44 Mass. App. Ct. at 21. Where the evidence warrants no possible finding of gross negligence, the judge may rule on the issue as matter of law. Id. See also, Bodaracco v. Liner, 27 Mass. L. Rpt. 312 (Mass. Super. 2010) (summary judgment granted where no evidence on record from which jury could reasonably find that operator of car was grossly negligent). Here, the evidence does not meet the heightened burden imposed by the allegation of gross negligence. See, Brockman v. Sweetheart Cup Company, Inc., 2005 WL 1476872 (summary judgment granted where defendant's failure to warn of potential defects in platform and non-compliance with OSHA did not rise to the level of gross negligence).

First, the students had been safely housed at the Ashford Imperial since 1992 without incident. (Madan Dep., Exh. 2, p. 40-42; Gerstenfeld Dep., Exh. 6, pp. 9, 35; Ogilvie Dep., Exh. 7, pp. 18, 41,47; Moral Dep., Exh. 8, p. 124.) WPI arranged for the student housing at the

Ashford through its vendor, Seabreeze (Gerstenfeld Dep., Exh. 6, p. 76.) The housing was assessed twice annually by the site director, Susan Vernon-Gerstenfeld. (Gerstenfeld Dep., Exh. 6, pp. 11, 33.) During her November visits, she would meet with Yolanda Moral the operator of Seabreeze, to discuss the following years housing needs and to monitor the configuration of the rooms. (Gerstenfeld Dep., Exh. 6, p. 11.) Ms. Vernon-Gerstenfeld had personal knowledge of the housing and security conditions at the Ashford, having lived there for months at a time while serving as an on-site faculty advisor. (Gerstenfeld Dep., Exh. 6, p. 33.) The Ashford Imperial was equipped with exterior key access, elevator key access, security cameras and a security guard stationed in the lobby. (Vaz Dep., Exh. 4, p. 20; Gerstenfeld Dep., Exh. 6, p. 32; Ogilvie Dep., Exh. 7, p. 64.) During her bi-annual assessments of the student housing in Puerto Rico, Ms. Vernon-Gerstenfeld directly observed the security, including the locks on the doors, security cameras and guards. (Gerstenfeld Dep., Exh. 6, p. 33) She would also have ongoing conversations with each pair of faculty advisors, as well as the director, regarding all aspects of the center operations. (Exhibit 10, No. 9). Over the 20 years in which the Ashford had been used to house students, there was never any problem with the security guards, and the safety of students was never in question. (Id.)

Second, WPI and its staff reasonably relied on its vendor, Seabreeze, in their capacity as agent for the Ashford, to provide security. The reliance on their vendor for this service was in accordance with the best practices of the NAFSA. (Madan Dep., Exh. 2, p. 36.) The reasonableness of the defendants' reliance on their vendor is especially clear in this case, where the operator of Seabreeze, Yolanda Moral, served as the secretary of the Board of the Ashford Condominium Association (Consejo) and was directly involved in the vetting and hiring of the security company. WPI/Ms. Vernon-Gerstenfeld reasonably and accurately understood that Ms.

Moral was involved with and/or had knowledge of the retention of the Ashford's contractors, including the security company and guards. (Gerstenfeld Dep., Exh. 6, pp. 72, 77-78.) As a member and secretary of the Consejo Board, Ms. Moral/Seabreeze was directly involved in the renewal of the contract with Winn Access, and participated in and/or was present during their presentation describing the security services they would be providing. (Moral Dep., Exh. 8, pp. 107-108, 119-121; Joaquin Dep., Exh. 12, pp. 169 - 170.) Under the terms of the contract with the Ashford, Winn was required to be licensed and was also required to obtain Certificates of Good Standing issued by the Puerto Rico Police Department from each of the guards they employed. (Moral Dep., Exh. 8, pp. 125 - 126; Joaquin Dep. Exh. 12, p. 170.) William Rodriquez provided Winn Access with a Certificate of Good Standing prior to the arrival of the WPI students in March 2012. (Moral Dep., Exh. 8, p. 126.) Ms. Vernon-Gerstenfeld/WPI knew that the same company, under various names, had provided the security guards at the Ashford for over 20 years, over which time there were no issues. (Gerstenfeld Dep., Exh. 6, p. 79; Moral Dep., Exh. 8, pp. 107-108, 119-120.) Moreover, given her long history both as a Board member and WPI's housing vendor, Ms. Moral knew what WPI expected in terms of student housing and security at the Ashford. (Moral Dep., Exh. 8, pp. 121-124.)

Third, the defendants were unaware of any risks posed by Mr. Rodriquez prior to the incident. Although Prof. Madan found his flirtations annoying, she attributed his behavior to nothing more than cultural difference. (Madan Dep., Exh. 2, pp. 127-128, 132; 150-151; Exh. 20, No. 17.) At no time did she find his behavior suspicious, threatening predatory or sexually harassing. (Madan Dep. Exh. 2, pp. 130, 139, 150; Exh. 20, No. 17.) Furthermore, while she used the terms "uneasy," "strained" and "strange" in the Incident Report to describe her exchanges with Mr. Rodriquez, she related these terms to his "innocuous flirtations," not with

any suspicious or threatening behavior, either with her or with any student. (Madan Dep., Exh. 2, pp.125-152; Doe Dep., Exh. 5, pp. 123-124. Exhibit 20, No. 17.)

Nor did the defendants violate any law or regulation that caused or contributed to the happening of the incident. The interactions between Ms. Madan and Mr. Rodriguez did not amount to sexual harassment under either WPI's sexual harassment policy or Title IX, and therefore did not need to be reported or otherwise acted upon by the defendants. In order to succeed under a Title IX claim, a plaintiff must show that a school official authorized to take corrective action had "actual knowledge" of the sexual harassment and either failed to act or exhibited deliberate indifference to it. Bloomer v. Becker College, 2010 WL 3221969, citing Gebser v. Lago Vista Independent School Dist., 524 U.S. 274, 290 (1998); Frazier v. Fairhaven School Comm., 276 F.3d 52, 66 (1st Cir. 2002); Doe v. D'Agostino, 367 F.Supp.2d 157, 164-65 (D. Mass. 2005). Courts considering the scope of "actual knowledge" have concluded that it requires knowledge by an official of a substantial risk of abuse to students based on prior complaints or behavior that indicates some degree of risk that the harasser would subject the plaintiff to similar treatment. Brodeur v. Claremont School Dist., 626 F.Supp.2d 195, 208 (D. N.H. 2009); Doe v. Sch. Admin. Dist. No. 19, 66 F.Supp.2d 57, 63 (D.Me.1999). The evidence in this case does not come close to establishing such a fact.

Thus, even when viewed in a light most favorable to the plaintiffs, the evidence is insufficient to establish a claim that the defendants were grossly negligent. Indeed, the testimony of the defendants with respect to the safety of the Ashford, their reasonable reliance on Seabreeze for security, and the absence of any actual knowledge or foreseeable risk of sexual harassment or threatening behavior on the part of Mr. Rodriguez, and their compliance with the WPI sexual harassment policy and Title IX, demonstrate that the defendants acted

reasonably and fulfilled their duty to protect their students from foreseeable criminal acts of a third-party. Mullins v. Pine Manor College, 389 Mass. 47, 54 (1983.) The evidence is not sufficient for a jury to conclude that the defendants failed to exercise at least “slight diligence” or “scant care.” Altman, 231 Mass. at 591-592. The sexual assault of Jane Doe was an unforeseen and isolated incident.⁴

C. Breach of Contract:

In their Complaint, the plaintiffs allege that “an implied contract existed between Defendant WPI and ... Jane Doe, to provide safe and adequate student housing ... to protect its students against known risks to their health, safety and well-being on property selected and controlled by WPI.” (Exh. 1, Count I.) The plaintiffs claim that the information contained in the Going Global Handbook and other literature and/or brochures provided by WPI form the basis for this contract. However, the representations contained in the Going Global Handbook are too vague and indefinite to form an enforceable contract. Guckenberger v. Boston University, 974 F.Supp. 106, 150 (D. Mass. 1997).

Under Massachusetts law, statements in handbooks, policy manuals, brochures, catalogs, advertisements and other promotional materials may form the basis of a valid contract. See, Russell v. Salve Regina College, 890 F.2d 484, 488 (1st Cir.1989) (reversed and remanded on other grounds). However, to create a contract, the promises made in student handbooks and other brochures must be “definite and certain so that the promisor should reasonably foresee that it will induce reliance.” Guckenberger, 974 F.Supp. at 150, 152 (court declined to decide whether there was an enforceable contract based on statements in BU brochures). See, Morris v. Brandeis University, 60, Mass. App. Ct. 1119, n.6 (2004) (unpublished opinion)(generalized

⁴ Under a Title IX analysis, the plaintiffs face the additional requirement of showing that the defendants’ actions amount to “deliberate indifference,” a more stringent standard requiring proof that the defendants “disregarded a known and obvious consequence of their action.” White v. Gurnon, 67 Mass. App. Ct. 622, 630 (2006).

representations to treat students with “fairness and beneficence” in Brandeis' promotional materials were too vague and indefinite to form an enforceable contract); cf., Sullivan v. Boston Architectural Center, 57 Mass. App. Ct. 771, 744 (2003) (enforceable contract where the defendant's policies and procedures contained well defined processes for addressing the plaintiff's grievance, applied them as articulated, and satisfied reasonable expectation that policies generated).

Here, the Going Global Handbook contains “intentionally general” statements and guidelines from the NAFSA, which are “aspirational in nature” and intended only to provide information to develop and address good health and safety practices. (Exh. 3, p. 4; Gerstenfeld Dep. Exh. 6, p. 21.) While it outlines the responsibilities of the students, it is not intended to be comprehensive regarding the responsibilities of WPI. (Madan Dep., Exh. 2, p. 62; Exh. 3, p. 4; Vaz Dep., Exh. 4, pp. 21-25; Gerstenfeld Dep., Exh. 6, pp. 74-75.) There is nothing which constitutes a “specific promise” made by WPI to Jane Doe regarding her health and safety. See, Shin v. Massachusetts Institute of Technology, 19 Mass.L.Rptr. 570 (2005)(representations made in MIT medical department brochure and by-laws are merely generalized representations of the purpose of medical services available).

Nor are the statements contained in the WPI Going Global Faculty Handbook advising that “all allegations [of sexual harassment] are to be taken seriously,” or a recommendation on the WPI Student Services web site that suspicious behavior should be reported even if it is “just a hunch,” sufficient to form the basis for a contract. (Exhibit 3, p. 2; Exhibit 19.) Like the Going Global Student Handbook, the Going Global Faculty Handbook provides general information that is intended to be aspirational. Similarly, recommendations regarding the

reporting of suspicious behavior are not “definite and certain so that the promisor should reasonably foresee that it will induce reliance.” Guckenberger, 974 F. Supp. at 150.

Even where a student handbook is found to create a contract, the plaintiff must prove “reasonable reliance on a promise, offer or commitment by the defendant.” Guckenberger, 974 F.Supp. at 150. Jane Doe read the Going Global Handbook, knew and understood that WPI was providing “good practices for health and safety,” and that it “cannot guarantee or assure the safety and/or security of participants or eliminate all risks from the study abroad environments.” (Doe Dep., Exh. 5, pp. 74-75, 77-78.) The only concerns or expectations Jane Doe ever expressed to WPI about her health and safety were those she allegedly made regarding her own behavior (eating disorder, drinking and cutting), not any expectation of safety gleaned from her reading of the Going Global Handbook. (Doe Dep., Exh. 5, pp. 82-83.)⁵

IV. CONCLUSION:

For the above stated reasons, the defendants move this Court for Summary Judgment as to all Counts and claims contained in the plaintiffs’ Complaint.

The defendants,
Worcester Polytechnic Institute, Aarti Madan,
Anne T. Ogilvie, Richard F. Vaz, Susan Vernon-
Gerstenfeld and Cheryl A. Martunas
By their attorney,



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⁵ Moreover, the plaintiffs’ breach of contract claim is nothing more than a negligence claim, which is precluded by the Release signed by Jane Doe. See Plaintiffs’ Motion to Strike the Errata Sheet of Anne Ogilvie, p. 7 (“the defendants breached the duty of care ... and acted negligently in failing to follow internal university policies.”)

COMMONWEALTH OF MASSACHUSETTS

Worcester, SS.

SUPERIOR COURT

JANE DOE, MARY DOE, and JOHN DOE,
Plaintiffs,

v.

WORCESTER POLYTECHNIC
INSTITUTE, AARTI MADAN, ANNE T.
OGILVIE, RICHARD F. VAZ, SUSAN
VERNON-GERSTENFELD, and CHERYL
A. MARTUNAS,
Defendants

CIVIL ACTION
NO.: 1585-CV-0570 B

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

The plaintiffs, Jane Doe, Mary Doe and John Doe, hereby **oppose** the Defendants' Motion for Summary Judgment. There exist many genuine disputed issues of material fact, which are supported by the record and by expert opinion, and which preclude this Honorable Court from granting summary judgment pursuant to Mass. R. Civ. P. Rule 56. These disputed issues include but are not limited to:

1. whether WPI's student handbook, Going Global @ WPI, created an enforceable contract between the university and Jane Doe, and whether the defendants materially breached it;
2. whether the "Acknowledgment and Release" signed by Jane Doe as a requirement of her participation in the Program was procured by fraud, or was materially breached by the defendants, or is invalid as against public policy; and

3. whether the defendants' conduct in failing to perform even minimal due diligence related to security at the student housing facility in Puerto Rico constituted gross negligence.

In further support of their Opposition, plaintiffs submit and incorporate herewith the Plaintiffs' Statement of Additional Material Facts pursuant to Rule 9A(b)(5), and Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, wherein plaintiffs' arguments are more fully set forth.

WHEREFORE, the plaintiffs' respectfully request that this Honorable Court **deny** the Defendants' Motion for Summary Judgment.

Respectfully submitted,

The Plaintiffs, Jane Doe, Mary Doe, and
John Doe,
By their attorneys,



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Dated: 4-25-16

COMMONWEALTH OF MASSACHUSETTS

Worcester, SS.

SUPERIOR COURT

JANE DOE, MARY DOE, and JOHN DOE,
Plaintiffs,

v.

WORCESTER POLYTECHNIC
INSTITUTE, AARTI MADAN, ANNE T.
OGILVIE, RICHARD F. VAZ, SUSAN
VERNON-GERSTENFELD, and CHERYL
A. MARTUNAS,
Defendants

CIVIL ACTION
NO.: 1585-CV-0570 B

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The plaintiffs, Jane Doe, Mary Doe and John Doe, hereby submit this Memorandum of Law in Support of their Opposition to Defendants' Motion for Summary Judgment. Numerous issues of material fact exist, supported by the record and expert opinion, which include but are not limited to: (1) whether a contract existed between Jane Doe and WPI, and whether it was materially breached; (2) whether the release at issue was procured by fraud and is therefore invalid against Jane Doe; and (3) whether the defendants' conduct constituted gross negligence. The defendants have failed to meet their burden to demonstrate the absence of a triable issue, and for the reasons set forth below, Defendants' Motion for Summary Judgment should be denied.

I. STATEMENT OF FACTS

In compliance with Superior Court Rule 9A, the plaintiffs have provided a Statement of Material Facts (hereinafter "SOF") in support of their Opposition. The facts set forth below are offered for the convenience and clarification of the Court:

A. The Rape of Jane Doe.

In the early morning hours of April 14, 2012, Jane Doe was raped by the security guard on duty at the Ashford Imperial (“Ashford”), which was selected, leased and controlled by the defendants for the purpose of student housing in San Juan, Puerto Rico. SOF, ¶ 33. WPI required students participating in the 2012 Puerto Rico Program (“Program”) to reside at the Ashford, and represented to the students, including Jane Doe, that the building was safe and was protected by a security officer on duty at all times. SOF, ¶34.

On December 11, 2012, Ashford security officer, William Rodriguez, was convicted of the aggravated rape of Jane Doe by a unanimous guilty jury verdict in the state court of Puerto Rico.¹ SOF, ¶35. Following an appeal, on October 29, 2015, Rodriguez’s conviction was affirmed in a unanimous decision by the Supreme Court of Puerto Rico. Id. He was sentenced and is currently serving twenty years in prison for this crime. Id.

Prior to working as a security officer, Rodriguez had served as a state police officer in Puerto Rico. SOF, ¶36. He was fired from the police force for corruption after he was arrested in August 2011 for selling police-issued ammunitions to an undercover agent. Id. The news of Rodriguez’s arrest was covered by the local newspapers and was easily discoverable by a simple internet search. Id. Rodriguez was convicted of this felony offense in February 2011. SOF, ¶37. Rodriguez had also been accused of domestic violence in 2010. Id. At the time of Jane Doe’s rape in April 2012, Rodriguez had a criminal background and was not licensed as a security guard in violation of Puerto Rico law. SOF, ¶¶36-38.

¹ As an aggravating factor the jury found that the rape was committed with the use of physical force, violence and intimidation. SOF, ¶35.

B. Statement by Aarti Madan to the Puerto Rico Police.

WPI on-site resident faculty advisors, Aarti Madan and Creighton Peet, resided with students at the Ashford, including Jane Doe, for the duration of the 2012 Program. SOF, ¶¶25, 39. The advisors were responsible for the safety of student participants and had a duty to report suspicious behavior and appropriately warn students of potential risks to their health and safety. SOF, ¶¶40-41. Following Jane Doe's rape, Aarti Madan reported to the Puerto Rico Police and then to WPI attorneys:

I informed [the police] that in fact my interaction with William was strained since he'd been a bit flirtatious since I'd arrived in Puerto Rico. After a few suggestive compliments, he realized I was the students' professor rather than a student; he seemed apologetic and a bit embarrassed. I felt strange with William because he entered the elevator with me to do his rounds on multiple occasions, always around midnight or 1:00 a.m . . . While the first 2 times didn't seem odd, the 3rd left me a bit uneasy because I felt a pattern. On one occasion I was speaking with Steve Partridge when William tapped one shoulder and then walked away, sort of teasing me and trying to get me to look the wrong way. Steve immediately commented that I was being flirted with. After those instances, I cooled my interactions with William to the bare minimum. In fact, he was gone for several weeks after Easter, and I commented that I was happy he was gone . . .²

SOF, ¶42. Although Ms. Madan cooled her own interactions with Rodriguez to "the bare minimum," she did not warn any of the female students participating in the Program that one of the security guards at the Ashford had a "pattern" of entering the elevator with her, always late at night when she was alone, and that it made her feel "strange" and "uneasy." SOF, ¶43. Similarly, she did not report his behavior to anyone at WPI, as she was required to do, or even inquire whether her female students were having similar experiences with Rodriguez. Id.

² Since the instant lawsuit was filed, Madan has attempted to qualify this statement by explaining that at the time it was written, her reflections upon her interactions with Rodriguez were "colored by the accusation" of rape. SOF, ¶44. Despite his subsequent conviction for the aggravated rape of Jane Doe, Madan now contends that she "felt very comfortable around him and considered his behavior to be nothing more than innocuous, benign flirting." Defendants' Motion for Summary Judgment, p. 9; SOF, ¶¶ 28, 44.

C. **The Going Global Handbook and the “Acknowledgement and Release.”**

WPI developed and distributed a handbook to its students entitled “Going Global @ WPI” (“the Handbook”). SOE, ¶¶21, 45. WPI intended the Handbook to serve as a contract between the university and the student participants. SOE, ¶46. “The Handbook was prepared to inform the student who has been accepted to participate in the Global Perspective Program at the Puerto Rico Project Center D 2012.” SOE, ¶45. Section 1 of the Handbook provided:

For the mutual protection of WPI, the students, and their families, the obligation assumed by each must be carefully defined and understood. You should recognize the fact that you have entered into a contractual agreement with WPI that states the obligations and responsibilities of both the university and yourself. This Handbook was created as the document that should be read carefully and thoroughly to avoid misunderstandings.

SOE, ¶46. The Handbook outlined the academic, behavioral and financial obligations of the students, and detailed specific industry standards WPI was obligated to follow to ensure that student housing in Puerto Rico was safe. SOE, ¶47. Examples of the relevant safety standards include the following:

- A. Conduct periodic assessments of health and safety conditions for their program . .
- B. Provide health and safety information for prospective participants so that they and their parents . . . can make informed decisions concerning preparation, participation and behavior while on the program.
- H. Conduct inquiries regarding the potential health, safety and security risks of the local environment of the program, including program-sponsored accommodation . . . prior to the program.
- I. Hire vendors and contractors . . . that have provided reputable services in the country in which the program takes place. Advise such vendors and contractors of the program sponsor’s expectations with respect to their role in the health and safety of participants.

SOE, ¶48. These standards were adopted from the NAFSA: Association of International Educators (NAFSA), “the predominant professional association in the world dealing with

international education,” and in the Handbook, WPI expressly promised the students that “the University is committed to uphold the standards of the profession.” SOE, ¶49.

As a condition of their participation in the Program, WPI required its students, including Jane Doe, to sign an “Acknowledgement and Release” form, also contained within the Handbook. SOE, ¶50. The terms of the Acknowledgement and Release expressly incorporated the information distributed to the students through written materials, and was contingent on the students’ acknowledgement that WPI had provided them “with adequate information about the Program, both verbally and through written materials” and that they knew and understood the risks described. SOE, ¶51. The Handbook was the document distributed to Jane Doe to provide her with “adequate information” about the Program and to fully inform her of its risks. SOE, ¶46, see also, Going Global Handbook, p. 3 (“This Handbook was created as the document that should be read carefully and thoroughly to avoid misunderstandings.”).

D. Student Housing and Security at the Ashford Imperial Condominium.

In 2012, WPI selected, leased and controlled the Ashford and required its students, including Jane Doe, to live there. SOE, ¶33-34. WPI assured its students that the health and safety of study abroad participants were “primary concerns.” SOE, ¶52. The defendants acknowledged and represented to students that a “safe and successful off-campus experience does not just occur – it requires careful planning and preparation” and that “careful risk management and diligent planning can result in a rewarding experience.” SOE, ¶¶53-54. The defendants had a duty to and expressly promised WPI students that the university would perform periodic safety and security assessments of the Ashford, and that WPI would adhere to the established safety standards of the industry, including the NAFSA standards detailed in the Going Global Handbook. SOE, ¶¶47-49

The students were wholly dependent on WPI for reasonably safe and secure housing in Puerto Rico. SOE, ¶55. They were not permitted to negotiate or choose their own housing, did not participate in contracts with local vendors, and were in no position to perform risk management assessments of WPI's student housing facility. Id. This notwithstanding, the defendants have admitted that they:

- did not discuss or ask their rental agent, Sea Breeze, or any other vendor *any* questions about security at the Ashford throughout the twenty years WPI required students to live there; SOE, ¶56
- did not conduct assessments regarding the quality of the security force on the premises throughout the twenty years they required students to live there; SOE, ¶ 58
- did not know the name of the person or entity responsible for providing security at the Ashford until after Jane Doe was raped; SOE, ¶59
- did not know what history the Ashford had with the security company; SOE, ¶60
- did not know what process the security company used to hire people;³ SOE, ¶61
- did not know whether any of the local vendors were properly insured; SOE, ¶62
- did not know whether the cameras at the Ashford properly functioned;⁴ SOE, ¶63
- did not know or ask Sea Breeze or any local vendor whether background or reference checks were performed for security officers responsible for WPI students; SOE, ¶64

³ After Jane Doe was raped, WPI asked their vendor, Sea Breeze, for the contact information of the security company, and “what process the security company uses to hire people and what security checks they do. Also, what history the condo association has with the security company. What questions does the board ask for the security company.” SOE, ¶71. The defendants admitted they could have easily asked these questions before Jane Doe was raped. Id.

⁴ At the time Jane Doe was raped, at least two cameras at the Ashford were not functioning, including the camera in the elevator that Rodriguez used to lure Jane Doe to the roof, where he raped her. SOE, ¶63.

- did not know or ask Sea Breeze or any local vendor whether security guards at the Ashford were licensed, had criminal records, or pending criminal charges; SOF, ¶65
- did not ask Sea Breeze or any local vendor to verify that background checks had been performed on the security guards responsible for WPI students; SOF, ¶66
- did not advise Sea Breeze or any local vendor that WPI was relying on them to provide adequate security to the WPI students at the Ashford;⁵ SOF, 67
- did not advise Sea Breeze or any local vendor of WPI's expectations with regard to security on the premises; Id.
- did not advise Sea Breeze or any local vendor that WPI expected the security officers at the Ashford to be "fully vetted and properly trained"; Id.
- did not know what authority and/or involvement, if any, their local vendor Sea Breeze/Yolanda Moral had in the securing and/or screening of the security company and guards; SOF, ¶69
- did not know anything about Rodriguez before Jane Doe was raped, including that he was a former police officer who had been fired, that he had been charged with, and convicted of a felony by April 2012, or that there were allegations of spousal abuse against him. SOF, ¶70.

The defendants admitted that information regarding security at the Ashford was accessible to WPI before Jane Doe was raped, and could have easily been requested from their local vendor, Sea Breeze. SOF, ¶72. The defendants further admitted that if they had

⁵ Yolanda Moral, who operated Sea Breeze in 2012, testified that nobody from WPI told her that WPI was relying on her to provide for the safety and security of WPI students at the Ashford, and that it was not her job. SOF, ¶68. She further testified that she and/or Sea Breeze had no authority over the hiring of security personnel at the Ashford, and had nothing to do with security provided to the lessees of the apartments she rented. Id. Abraham Hidalgo, president of the Ashford's Board of Directors, testified that at the time Jane Doe was raped he had never even heard of WPI. Id.

known about Rodriguez's background prior to Jane Doe's rape, they would have taken steps to have him investigated and removed because he would have posed a risk to the students. SOE, ¶73. A simple request by WPI to verify that the security company and guards at the Ashford were properly vetted would have revealed Rodriguez's criminal history, and that he was not licensed in violation of Puerto Rico law. SOE, ¶74. This notwithstanding, the defendants maintain that it was not their responsibility to know about the quality of security at the Ashford, where they required students to reside, and that "there didn't seem to be a reason to address security directly." SOE, ¶75. The defendants merely "assumed," to the detriment of Jane Doe, that security at the Ashford was adequate and that the security officers were vetted and complied with the law. SOE, ¶76.

The defendants failed to perform even minimal due diligence related to security at the Ashford. Such failure, especially in light of WPI's affirmative representations to its students that it would perform security assessments of the premises and adhere to the safety standards of the industry, constitutes a gross departure from the reasonable standard of care and was a material breach of the contract between Jane Doe and WPI.

II. ARGUMENT

Numerous issues of material fact exist, and the defendants have failed to and cannot meet their burden to demonstrate the absence of a triable issue as to the plaintiffs' causes of action. Accordingly, summary judgment should be denied.

A. Summary Judgment Standard

Summary judgment is generally disfavored, and rarely granted, in negligence actions. Kelly v. Brigham & Women's Hosp., 51 Mass.App.Ct. 297, 300 (2001); Inferrera v. Sudbury, 31 Mass. App. Ct. 96, 103 (1991). Moreover, the existence, terms, and performance or breach of a contract are questions of fact to be determined at trial, and are similarly not appropriate for

summary judgment. LeMaitre v. Mass. Turnpike Auth., 70 Mass. App. Ct. 634, 637 (2007); Hastings Assoc., Inc. v. Local 369 Bldg. Fund, Inc., 42 Mass. App. Ct. 162, 171 (1997).

The moving parties have the heavy burden of affirmatively demonstrating the complete absence of any genuine issue of material fact. Tate v. Department of Mental Health, 419 Mass. 356, 359 (1995). A genuine dispute means that a reasonable fact finder could resolve the point in favor of the nonmoving party. Dennis v. Kaskel, 79 Mass. App. Ct. 736, 740-741 (2011). When a moving party relies solely on its own self-serving deposition testimony or its particular view of the documentary evidence to establish an absence of issue of material fact, the court must recognize the possibility that a fact finder would be free to disregard such testimony, and thus such testimony cannot furnish the decisive evidence required to demonstrate the absence of a genuine dispute of material fact. Massachusetts Property Ins. Underwriting Ass'n v. Georgaklis, 77 Mass.App.Ct. 358, 361 (2010).

In determining the appropriateness of summary judgment, the court must construe the facts in the record and all inferences in the light most favorable to the plaintiff, bearing in mind that “a toehold” is enough to survive a motion for summary judgment. Marr Equipment Corp. v. I.T.O. Corp. of New England, 14 Mass. App. Ct. 231, 235 (1982).

B. The Going Global Handbook Created a Valid Contract Which the Defendants Materially Breached.

It is well-established under Massachusetts law that statements in university handbooks, policy manuals, brochures, and other promotional materials can form the basis of a valid contract. Shin v. Mass. Inst. Of Tech., No. 020403, 2005 WL 1869101, at *6 (Mass. Super, Jun. 27, 2005); e.g., Morris v. Brandeis Univ., 60 Mass. App. Ct. 1119, 2004 WL 369106, at *1 (2004) (unpublished opinion) (valid contract created by the detailed procedural

standards of the student judicial process contained in student handbook)⁶; Sullivan v. Boston Architectural Center, Inc., 57 Mass. App. Ct. 771, 773-774 (2003) (enforceable contract where defendant's policies and procedures in student handbook "contained well-defined processes for addressing the plaintiff's grievance," despite disclaimer in the handbook that the policies should not be construed as a contract). A valid contract exists when statements in a student handbook are definite and certain so that the university should reasonably foresee that they will induce reliance. Schaer v. Brandeis Univ., 432 Mass. 474, 478 (2000). It would be unfair to allow a university to distribute a handbook that makes students believe certain promises have been made, and then allow that university to renege on those promises. See, Ferguson v. Host Intern., Inc., 53 Mass. App. Ct. 96, 103 (2001) (holding that employee manual created a valid contract, and rejecting employer's argument that the procedures in the manual were binding only as to employees because the "employee's reliance on the manual would be reasonable, and [the employee] . . . is entitled to whatever rights that the manual sets forth."); LeMaitre v. Mass. Turnpike Auth, 70 Mass. App. Ct. 634, 640-641 (2007) (holding that personnel manual created legally binding contract because it created a reasonable expectation in the employees that the employer would adhere to its terms). In the parallel context of employee handbooks distributed by an employer, the Massachusetts Court of Appeals has commented:

Courts recently have been reluctant to permit management to reap the benefits of a personnel manual and at the same time avoid promises freely made in the manual that employees reasonably believed were part of their arrangement with their employer. Management voluntarily offers, and defines the terms of, any benefit set forth in its unbargained for personnel manual. The employees may have a reasonable expectancy that management will adhere to a manual's

⁶ Defendants, in their Motion, ignore this finding by the Court and rely on Morris only for the Court's comment that the generalized representations to treat students with "fairness and beneficence" in Brandeis' promotional materials were too vague and indefinite to form an enforceable contract. Morris, 2004 WL 369106, at n.6.

provisions . . . it would be almost inevitable for an employee to regard it as a binding commitment, legally enforceable, concerning the terms and conditions of his employment.

Ferguson, 53 Mass. App. Ct. at 102.

A material breach of contract excuses the other party from further performance and entitles them to sue for damages. Hastings Assoc., Inc. v. Local 369 Bldg. Fund, Inc., 42 Mass. App. Ct. 162, 171 (1997). Whether there has been such a breach is a question of fact for the jury. Id. A breach is material when it is “of an essential and inducing feature of the contract.” DiPietro v. Sipex Corp., 69 Mass. App. Ct. 29, 38 (2007).

The statements contained in the Going Global Handbook, including the safety standards and procedures described with particularity therein, form the basis of a valid contract between WPI and Jane Doe according to Massachusetts law and as evidenced by the language of the document and the intent of the parties. The Handbook itself states that it is a contractual agreement, and defendants admitted that it was intended to serve as a contract. Further, the document “was prepared to inform the student who has been accepted to participate in the . . . Puerto Rico Project Center D 2012,” and it outlined the “obligations and responsibilities of both the university and [the students].”

Jane Doe had a reasonable expectation that WPI would adhere to the health and safety standards it voluntarily offered and defined in its Handbook. Indeed, the defendants encouraged this reliance by communicating to the students that the Handbook should be “read carefully and thoroughly to avoid misunderstandings.” Defendants’ argument that the Handbook was binding to the students but that it was “not intended to be comprehensive regarding the responsibilities of WPI” is without merit. The Handbook promised the students that WPI was “committed to upholding the [safety] standards of the profession,” and

explained that the health and safety information provided would help students and their parents make “informed decisions” concerning their participation in the Program. Following the Massachusetts Court of Appeals in LeMaitre and Ferguson, the defendants cannot reap the benefits of the Handbook and at the same time avoid promises freely made, and that the students reasonably believed were part of their arrangement with the university.

Defendants’ failure to adhere to and/or perform the safety standards and procedures outlined by the Handbook, and failure to perform even minimal due diligence related to security at the Ashford, constitutes a material breach of contract for which Jane Doe is entitled to damages. The issue of student safety abroad, and WPI’s promise that it was “committed to uphold” detailed safety standards of the profession, was an essential and inducing feature of the contract between the university and Jane Doe created by the Handbook. This is supported by the language of the Handbook, wherein WPI expressly represented that the “health and safety of study abroad participants are primary concerns.” WPI’s promises regarding health and safety in Puerto Rico informed and induced Jane Doe’s decision to participate in the program, and the defendants’ failure to perform those promises was a material breach of contract which resulted in Jane Doe’s rape and subsequent damages.

C. The Release Signed by Jane Doe Does Not Bar Her Negligence Claims Against the Defendants and is Invalid.

The validity of the “Acknowledgement and Release” is a question of fact for the jury in this matter, and summary judgment as to plaintiffs’ negligence claims should be denied.

i. Jane Doe was fraudulently induced to sign the Acknowledgement and Release and it is invalid.

It is well settled that a release is voidable if obtained by a fraudulent misrepresentation. Bevilacqua v. Eisen, No. 06139, 2009 WL 2604694, at *4 (Mass. Super. 2009); see also, Sharon v. City of Newton, 437 Mass. 99, 103 (2002) (“... *in the absence of*

fraud a person may make a valid contract exempting himself from any liability to another...”). Whether there has been fraud in obtaining a release is generally a question of fact for the jury. Bevilacqua, 2009 WL 2604694 at *4 (citing Lee v. Allied Sports Assocs., Inc., 349 Mass. 544, 550-551 (1965)). To recover in an action for fraud, the plaintiffs must prove that the defendants (1) made false representations of material fact with knowledge of their falsity, (2) for the purpose of inducing the plaintiffs to act, and (3) which resulted in the plaintiffs’ reasonable reliance to their detriment. Int’l Totalizing Sys., Inc. v. PepsiCo., Inc., 29 Mass. App. Ct. 424, 431 (Mass. App. Ct. 1990) (citing Danca v. Taunton Sav. Bank, 385 Mass. 1, 8 (Mass. 1982)). False statements, including promises to perform an act, will sustain a claim for misrepresentation when “the promisor had no intention to perform the promise at the time it was made.” Cumis Ins. Soc’y, Inc. v. BJ’s Wholesale Club, Inc., 455 Mass. 458, 474, (2009).

The defendants made false statements of material fact regarding the quality of security at the Ashford, which were baseless and fraudulent, and which induced Jane Doe to sign the “Acknowledgement and Release” and to participate in the Puerto Rico Program. The defendants promised Jane Doe that student housing at the Ashford was reasonably safe. They also promised her that they would conduct inquiries regarding security risks of the program sponsored accommodation, hire reputable local vendors, and advise local vendors of the defendants’ expectations with respect to their role in health and safety of WPI students. The defendants failed to do any of the above.

The defendants admit in their Motion for Summary Judgment that they had no intention to perform these promises at the time they were made. According to the defendants, the obligations in the Going Global Handbook were binding to the students but optional or

mere “aspirations” when applied to the University.⁷ Additionally, it is clear that the defendants did not intend to perform these promises based on their twenty-year history of failing to perform even minimal due diligence related to security at the Ashford. See, Section I.D., supra. From 1992 to April 2012, the defendants admit they did not know and did not ask any questions regarding who or what entity was responsible for security in the building, whether the cameras functioned, or whether background checks were performed for security guards. They never advised the local vendors of defendants’ expectations with respect to their role in the health and safety of WPI students at the Ashford, or even informed these vendors that WPI was relying on them to provide adequate security to its students. The defendants also clearly did not hire reputable local vendors, as promised, which is evidenced by the fact that the Ashford allowed a man who had been fired from the police force, had a felony record, and was not a licensed security officer, to serve as a security guard in the building, where Jane Doe was required to live. The facts of Rodriguez’ criminal background and discharge from the police were discoverable as early as August 2011 by a simple internet search of his name.

The “Acknowledgement and Release” in this matter was clearly obtained by fraud. In reliance on the defendants’ fraudulent representations about security at the Ashford, Jane Doe was induced to and did chose to participate in the Program and thereby agreed to the terms of the “Acknowledgement and Release,” which she was required to sign as a condition of her participation. Had Jane Doe known the actual facts, that the defendants did not ask, and did not intent to ask anyone in Puerto Rico any questions about the safety and security of the Ashford, and ensure that it was reasonably safe for students, she would not have signed the Acknowledgement and Release and would not have chosen to go to Puerto Rico, as it was

⁷ See, Defendants’ Motion for Summary Judgment, p. 19.

optional. See, Affidavit of Jane Doe, Ex. 34. Jane Doe had a reasonable expectation that WPI would adhere to the health and safety standards it voluntarily offered and defined in its Handbook.⁸ Her reliance was also reasonable given that the Release required her to rely on the information provided to her by WPI in the Handbook. For example, Ms. Doe was made to acknowledge that “WPI has provided me with adequate information about the Program, both verbally and through written materials, and that I have read and understand such information.” The Release was also contingent on Jane Doe “knowing the risks described.” The Release cannot be valid where Jane Doe was clearly not provided with “adequate information about the Program,” and did not fully appreciate the “risks described,” given the defendants’ material misrepresentations regarding safety and security at their student housing facility. Construing the facts in the light most favorable to the plaintiffs, plaintiffs have demonstrated a genuine issue of material fact as to whether the Release was procured by fraud, and summary judgment should be denied.

ii. The defendants materially breached the terms of the release and Jane Doe is excused from performance.

In addition to fraudulently inducing Jane Doe to sign the Release, the defendants materially breached its terms, therefore, Jane Doe is excused from performance under the contract and plaintiffs’ negligence claims are not barred. “In interpreting a contract, the objective is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background and purpose.” Downer & Co., LLC v. STI Holding, Inc., 76 Mass. App. Ct. 786, 792 (2010). Any doubts about the interpretation of the release must be resolved in the plaintiffs’ favor. Cornier v. Central Mass. Chap. Of Nat. Safety Council., 416 Mass. 286, 288 (1993).

⁸ See also, Section II.B., supra (Jane Doe’s reliance on the statements in the Going Global Handbook was reasonable as supported by the facts of this case and Massachusetts law).

Jane Doe's release of liability was conditioned on her knowledge and understanding of "adequate information about the Program," including its risks. This interpretation is consistent with the language of the release, which specifically incorporated the verbal and written promises made by WPI concerning safety and security at the Program center. See, Acknowledgement and Release, Ex. 13 ("I further acknowledge that WPI had provided me with adequate information about the Program, both verbally and through written materials . . . Knowing the risks described . . . I agree . . . to assume all the risks and responsibilities surrounding my participation in the program . . .). The interpretation is also consistent with the background and purpose of the contract, which was to encourage and ensure that students made informed decisions concerning their participation in the program. See also, Going Global Handbook, Ex. 3, p. 5 (WPI is obligated to "[p]rovide health and safety information for prospective participants so that they and their parents . . . can make informed decisions concerning preparation, participation and behavior while on the program."). Any doubts about the interpretation of the release must be resolved in the plaintiffs' favor.

Defendants materially breached the terms of the Release by failing to provide Jane Doe with adequate and truthful information regarding safety and security at the Program center, which was an essential and inducing feature of the contract.⁹ Accordingly, the Release is not valid and summary judgment should be denied.

iii. The Release is invalid because it is against public policy.

Finally, the Acknowledgement and Release should not bar plaintiffs' negligence claims because the type of harm suffered by Jane Doe was not contemplated by the contract, and applying it to the facts of this case is against public policy. Defendants admitted that they

⁹ See Section II.B., supra (the issue of student safety in Puerto Rico was an essential an inducing feature of the contract and defendants' represented that it was a "primary concern" for WPI).

leased and controlled the Ashford, including the security guards on the premises¹⁰, and that they required students to live there. They admitted that students were not permitted to take part in choosing or negotiating student housing in Puerto Rico, and had no say as to what local vendors the university chose to contract with. The defendants made express promises to the students that they would perform security assessments of the Ashford, and admitted that the students were in no position to perform these assessments themselves.

The students, including Jane Doe, relied on WPI's representations and were entirely dependent on the university to provide them with reasonably safe student housing. Jane Doe cannot be said to have "assumed the risk" that WPI would fraudulently mislead her into believing the Ashford was reasonably safe, and that the university would perform security assessments of the building. She certainly did not assume the risk that the defendants would fail to perform even minimal due diligence related to security on the premises, and thereby allow a convicted felon, serving as a security officer, to rape her. The defendants should not be permitted to relieve themselves of liability for failing to do something that was wholly their responsibility, which they did not do, had no intention of doing, and which they intentionally removed from the control of the students and Jane Doe.

D. The Defendants' Conduct in Failing to Provide Safe Housing to Jane Doe was Grossly Negligent.

A release may not shield a defendant from liability for its grossly negligent conduct. Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 19 (1997). The question of gross negligence must be left to a jury where different conclusions might be reached from the evidence presented. First Am. Title Ins. Co v. Lippman, 67 Mass. App. Ct.

¹⁰ When deposed, the defendants admitted that they had control of the security officers responsible for WPI students at the Ashford Imperial, and had the power to remove a guard from service, if necessary. SOF, ¶79.

1102, 2006 WL 2138912 at *2 (2006) (unpublished opinion). Gross negligence is defined as “very great negligence, or the absence of even slight diligence, or the want of even scant care.” Zavras, 44 Mass. App. At 20, citing Altman v. Aronson, 231 Mass. 588, 591 (1919). It is materially more want of care than constitutes simple inadvertence. Altman, 231 Mass. at 591. Failure to conform to established industry standards may be evidence of gross negligence. Lautieri v. Bae, No. 01-4078, 2003 WL 22454645, at *4 (Mass. Super. Oct. 29, 2003) (denying summary judgment for defendant-race organizer on the issue of gross negligence because genuine issue of fact existed as to whether the organizer’s failure to heed any of the triathlon industry guidelines constituted gross negligence).

The record overwhelmingly supports the conclusion that the defendants’ conduct in this matter was grossly negligent. The defendants’ failure to ask *any* questions about security at the Ashford over the twenty-year period WPI required students to live there plainly reveals the absence of even slight diligence, or the want of scant care. This failure was a substantial deviation from the industry standards and from recommended good practices for health and safety promulgated by NAFSA, and was particularly egregious given that WPI adopted the NAFSA safety standards and made affirmative representations to students that the university would assess safety and security on the premises. This opinion is supported by the report of plaintiffs’ security expert, Norman Bates, whose opinion is attached to the parties’ Joint Appendix at Ex. 35.

The evidence in this case shows that: the defendants never knew or asked their local vendors what entity was responsible for security at the Ashford; what history the Ashford had with the security company; whether the vendors were properly insured; what process the security company used to hire guards; whether background checks were performed; whether the guards were licensed, had criminal records or pending criminal charges; or whether the

security cameras on the premises properly functioned. The defendants also did not inform their local vendors that they were relying on them for security, or communicate any of WPI's expectations, requirements or demands related to security on the premises. The defendants testified that there "didn't seem to be a reason to address security directly," and improperly "assumed," to the detriment of Jane Doe, that the guards at the Ashford were "fully vetted and properly trained."

It was not reasonable, and constituted a substantial deviation from the standard of care, for the defendants to simply "assume" that security at the Ashford was adequate, and to allow a security officer, whose background was not verified, to care for WPI students. At the very least, and with very little effort, the defendants could have required written verification that appropriate background checks of the guards had been performed, and that the guards were properly licensed with a clear criminal history. Such written verification would have placed minimal burden on the defendants, and would have revealed Rodriguez was not licensed and had a criminal history, and as such, should have been removed from duty at the Ashford.

Additionally, the burden on the on-site faculty advisor, Aarti Madan, to report Rodriguez's suspicious and harassing behavior was so slight, that it is unconscionable she did not make such a report and warn her students. Instead, Madan took care to protect herself by cooling her own actions with Rodriguez "to the bare minimum," and did not inform, warn or otherwise alert her students or WPI of his "pattern" of entering the elevator with her late at night, when she was alone, which made her feel "strange" and "uneasy." Had Jane Doe been warned of Rodriguez' behavior, she would have been aware of the potential risk to her safety when he approached her in the elevator on April 14, 2012, late at night, while she was alone.

In their failure to ensure that the Ashford was reasonably safe for Jane Doe, the defendants ignored established industry standards, breached express promises to their students

regarding safety at the Program site, and failed to perform even *minimal* due diligence with regards to security on the premises for a period lasting *twenty* years. A reasonable juror could certainly find that this conduct constituted “materially more want of care than . . . simple inadvertence,” and the issue of the defendants’ gross negligence should be submitted to the jury.

III. CONCLUSION

Summary judgment is inappropriate due to the numerous issues of disputed material fact raised by plaintiffs’ Opposition. For this and for all of the reasons stated above, plaintiffs respectfully request this Honorable Court deny the defendants’ Motion for Summary Judgment.

**PLAINTIFFS REQUEST A HEARING ON THIS MOTION IF THE COURT
DEEMS IT APPROPRIATE.**

Respectfully submitted,

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By their attorneys,



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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CIVIL ACTION NO.: 1585-CV-0570 B

JANE DOE, MARY DOE, and JOHN DOE,)
Plaintiffs)
)
v.)
)
WORCESTER POLYTECHNIC)
INSTITUTE; AARTI MADAN; ANNE T.)
OGILVIE; RICHARD F. VAZ; SUSAN)
VERNON-GERSTENFELD; and)
CHERYL A. MARTUNAS,)
Defendants)

**SUPERIOR COURT RULE 9A(B)(5) JOINT STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED**

1. WPI requires all junior year undergraduates to participate in the Interdisciplinary and Global Studies Division (IGSD) program and complete the Interactive Qualifying Project (IQP). (See Going Global @ WPI, attached as Exhibit 3, p. 3; Deposition of Aarti Smith Madan, hereinafter, "Madan Dep.", attached as Exhibit 2, p. 20.)

Response No. 1: Admitted.

2. WPI students are not required to travel to Puerto Rico or other overseas locations to complete the IQP graduation requirement, but may do so at project centers located in Worcester and Boston. (Madan Dep., Exhibit 2, p. 20.)

Response No. 2: Admitted.

3. Housing for the students participating in the Puerto Rico program in 2012 was provided at the Ashford Imperial, which had been used by WPI for student housing since 1992. (Madan Dep., Exh. 2, p. 40-42; Deposition of Susan Vernon-Gerstenfeld, hereinafter "Gerstenfeld Dep.," attached as Exhibit 6, pp. 9, 35; Deposition of Anne Ogilvie,

hereinafter, "Ogilvie Dep.," attached as Exhibit 7, pp. 18, 41,47; Deposition of Yolanda Moral, hereinafter "Moral Dep.," attached as Exhibit 8, p. 124.)

Response No. 3: Admitted.

4. While the students were required to stay at the Ashford, they could come and go as they wanted. (Madan Dep., Exh. 2, pp. 42-44, Gerstenfeld Dep., Exh. 6, p. 48.)

Response No. 4: Denied in part.

Admit that students were required to stay at the Ashford Imperial. Denied that they could "come and go as they wanted." WPI students participating in the program were required to keep their faculty advisors informed of their whereabouts at all times. If they planned to travel they were required to give their advisors an itinerary in writing. The Going Global Handbook told students that, "You must be accounted for every weekend whether you are traveling or not." Aarti Madan testified that she was required to keep track of the students "for safety sake," and keep a log that detailed where the students would be on the weekends, who with, and when they were expected to return. Furthermore, students were not permitted to take vacation days off from project work, even with permission from their project mentor. If students had an urgent family or job-related need to travel on a project work day, they were required to consult with the on-site advisor before making any travel plans. (Going Global Handbook, Ex. 3, pp. 9, 14, 18; Madan/30(b)(6) of WPI dep., Ex. 2, p. 110).

5. WPI procured housing for the students at the Ashford Imperial condominiums through its vendor, Seabreeze. (Gerstenfeld Dep., Exh. 6, p. 76.)

Response No. 5: Admitted.

6. In 2012, Seabreeze was operated by Yolanda Moral. (Gerstenfeld Dep., Exh. 6, p. 76, Moral Dep., Exh. 8, pp. 23-35; 48-50; 115-117.)

Response No. 6: Admitted.

7. As the Director of Academic Programs and Planning for Interdisciplinary and Global Studies, Ms. Vernon-Gerstenfeld visited the Ashford twice annually; once in November and once in the spring for the students' final presentations. (Gerstenfeld Dep., Exh. 6, p. 11, 33.)

Response No. 7: Denied in part.

The statement is overly broad. Admitted that Gerstenfeld visited Puerto Rico and stayed at the Ashford twice during the 2011/2012 academic year. Agree that Gerstenfeld testified that she typically visited the Ashford twice annually, but there is no documentary evidence of said visits and the jury is free to disbelieve her.

8. During her November visits, Ms. Vernon-Gerstenfeld would meet with Ms. Moral, the operator of Seabreeze, to discuss the housing needs for the following year. (Gerstenfeld Dep., Exh. 6, p. 11.)

Response No. 8: Denied in part.

The statement is overly broad. Admitted that Gerstenfeld testified that she met with Moral to choose available apartment units for student housing. Denied that they discussed any further "housing needs." Gerstenfeld never asked Moral anything about security on the premises, and never told Moral that WPI was relying on Sea Breeze to provide adequate security for WPI students required to stay at the Ashford. (Moral dep., Ex. 8, pp. 52-53, 70.)

9. Ms. Vernon-Gerstenfeld also had on-going conversations about the student housing at the Ashford with each pair of faculty advisors and the director of the IGSD program regarding all aspects of the center operations. (Defendant, Susan Vernon-Gerstenfeld's Answers to Interrogatories, Exhibit 10, No. 9.)

Response No. 9: Denied.

There no evidence, beyond Gerstenfeld's self-serving statement in her interrogatories, that she engaged in "on-going conversations" about "all aspects of the center operations" with any WPI employees, and a jury is free to disbelieve this assertion. To the contrary, Gerstenfeld testified that she merely "assumed" security at the Ashford was safe and adequate, and that she never saw any reason to address it or ask questions about it. (Gerstenfeld dep., Ex. 6, pp. 35-36, 42).

10. The security at the Ashford Imperial included key card access, elevator key access, security cameras and a security guard stationed in the lobby. (Gerstenfeld Dep., Exh. 6, pp. 32; Exh. 10, No. 7.)

Response No. 10: Denied in part.

Admitted that these security features were present at the Ashford, but denied to the extent that the statement suggests security was adequate and functioning in April 2012. At the time Jane Doe was raped, at least two of the security cameras were not functioning, including the camera in the elevator that Rodriguez used to lure Jane Doe to the roof, where he raped her. (Joaquin-Hidalgo dep., Ex. 12, pp. 56, 118; Melendez dep., Ex. 32, p. 36-38). Additionally, the guards were not properly licensed and vetted, as evidenced by the fact that Ashford Security Officer, William Rodriguez, had been fired from the Puerto Rico police department for corruption,

had a felony record, and was not licensed in violation of Puerto Rico law. See, Plaintiffs' Statement of Material Facts, ¶¶36-38.

11. Ms. Vernon-Gerstenfeld was familiar with the location, layout and security at the Ashford, because in addition to her twice yearly assessments of the student housing, she had also lived at the Ashford while serving as an on-site faculty advisor. (Gerstenfeld Dep., Exh. 6, p. 32-33.)

Response No. 11: Denied.

Gerstenfeld was not familiar with security at the Ashford Imperial. She testified that she never asked Sea Breeze or any local vendor in Puerto Rico any questions about security from 1992 to 2012, she did not know whether the cameras functioned, she never assessed the quality of the security force, she did not know who was responsible for providing security, she did not know whether background checks were performed on the security officers responsible for WPI students required to live at the Ashford, and she did not know whether the security guards were licensed, had criminal records or pending criminal charges. (Gerstenfeld dep., Ex. 6, pp. 34-38, 40-41).

12. In the 20 years prior to the incident involving Jane Doe, there had never been any problems or issues with the security guards at the Ashford. (Id.)

Response No. 12: Denied.

The statement is overly broad. Gerstenfeld testified that in 20 years there had never been an incident with the guards that had "alarmed" WPI, but there is no evidence of this beyond her self-serving testimony and the jury is free to disbelieve this. (Gerstenfeld Dep., Exh. 6, p. 35.).

13. WPI and its staff relied on its vendor, Seabreeze, for the retention of security. (Gerstenfeld Dep., Exh. 6, pp. 31-32.)

Response No. 13: Denied.

The defendants did not rely on Sea Breeze or any local vendor for security at the Ashford. WPI was obligated to conduct assessments of potential security risks of the Ashford. To the extent WPI contracted services to local vendors, they were required to advise such vendors of WPI's expectations with respect to their role in the health and safety of participants. The defendants did not inform any local vendor that they were relying on them to provide adequate security to the WPI students required to live at the Ashford. The defendants did not communicate any expectations or demands to any local vendor regarding security on the premises, including their expectation that guards were "fully vetted and properly trained." The leasing agreement between WPI and Sea Breeze not include any provisions regarding security. The defendants merely "assumed," to the detriment of Jane Doe, that security was adequate. (Going Global, Ex. 3, pp. 4-5; Madan/30(b)(6) of WPI dep., Ex. 2, pp. 75, 79, 81-84; Ogilvie dep., Ex. 7, pp. 18-19, 29-31, 69-70; Gerstenfeld, Ex. 6, p. 35, 40-41; Vaz dep., Ex. 4, p. 30; WPI/Sea Breeze 2012 Short Term Lease Agreements, Ex. 23).

14. In addition to operating SeaBreeze, Yolanda Moral served as the Secretary of the Board of the Ashford Condominium Association, Consejo de Titulares Condominio Ashford Imperial ("Consejo") (Morel Dep., Exh. 8, pp. 117-118.)

Response No. 14: Admitted.

15. As a member and Secretary of Consejo, Ms. Moral participated in and voted on the selection and yearly renewal of the contract with the security company, Winn Access. (Moral Dep., Exh. 8, pp. 107-108, 118-120.)

Response No. 15: Denied.

The Win Access security contract was not reviewed yearly, and was renewed automatically on a yearly basis. (Joaquin-Hidalgo dep., Ex. 12, p. 168-169).

16. When the security company changed its name from PDI to Winn Access in 2009, it made a presentation to the Board regarding the security services it would be providing. (Moral Dep., Exh. 8, pp. 119-121; Deposition of Abraham Joaquin-Hidalgo, hereinafter, "Joaquin Dep.," attached at Exhibit 12, pp. 84, 169-170.)

Response No. 16: Denied.

In 2009, the Ashford Imperial security company changed its name from PDI to Win Access, after PDI filed for bankruptcy. Abraham Joaquin-Hidalgo, President of the Ashford Imperial Board of Directors, testified that the Win Access contract was discussed at a board meeting in October 2008, and specifically that the board discussed the company's name change and pricing. He testified that the Win Access security contract was a continuance of the PDI contract, that they were "already qualified," and that the board did not discuss the qualifications of the security officers. (Joaquin-Hidalgo dep., Ex. 12, pp. 66, 168-169).

17. Under the terms of the agreement with Consejo/Ashford, Winn Access was required to be licensed and was also required to obtain Certificates of Good Standing issued by the Puerto Rico Police Department from each of the guards it employed. (Moral Dep., Exh. 8, pp. 125-126; Joaquin Dep., Exh. 12, p. 170-171.)

Response No. 17: Denied.

The terms of the Win Access security agreement stated that it had “ideal human resources and the necessary equipment to provide the protection and security services stipulated in this contract.” The contract said that Win Access “knows and complies with state and federal laws that regulate companies providing security services.” Nothing in the agreement spoke about licensure of the company or individual guards, or Certificates of Good Standing. (2009 Win Access Security Contract, Ex. 33).

18. William Rodriguez provided Winn Access with a Certificate of Good Standing issue by the Puerto Rico Police Department prior to the arrival of the WPI students in March 2012. (Moral Dep., Exh. 8, p. 126; Joaquin Dep., Exh. 12, pp. 89-90, 170-171.)

Response No. 18: Denied.

There is no evidence as to what, if anything, Rodriguez provided to Win Access. Joaquin-Hidalgo testified that Win Access provided the Board of Directors of the Ashford with a Certificate of No Penal Record for Rodriguez after Jane Doe was raped. As of August 2011, Rodriguez’s discharge from the Puerto Rico police department on charges of corruption, his arrest, and later his felony conviction were easily discoverable by a simple internet search. In addition, Rodriguez was not licensed as a security officer in violation of Puerto Rico law. (Joaquin-Hidalgo, Ex. 12, pp. 90; Adendi.com article, Exhibit 11 to Joaquin-Hidalgo Dep., Ex. 26; Elnuevodia.com article, MAPFRE’s Responses to Plaintiffs’ Request for Production of Documents, Ex. 27; 25 L.P.R.A. §258; Ex. 29).

19. Ms. Vernon-Gerstenfeld knew that the same company had been providing security guards at the Ashford for over 20 years without issue. (Gerstenfeld Dep., Exh. 6, p. 79; Moral Dep., Exh. 8, p. 129.)

Response No. 19: Denied.

Gerstenfeld never knew who or what entity was responsible for providing security to the Ashford Imperial. She knew there was a guard on duty on the premises only because she physically observed them during her brief trips to Puerto Rico between 1992 and 2012. She admitted that she never asked any questions or discussed security in the building with Sea Breeze or any local vendors, and did not know about the quality of the security force, and “assumed” that the guards were adequate. (Gerstenfeld dep., Ex. 6, pp. 34-39, 79).

20. Upon acceptance into the IGSD Puerto Rico program, Jane Doe signed the Acknowledgment and Release, which she read and understood. (Acknowledgment and Release, Exhibit 13; Doe Dep., Exh. 5, pp. 68-69.)

Response No. 20: Admitted.

21. As a participant in the 2012 IGSD program, Jane Doe was provided the Going Global @ WPI Puerto Rico D 2012 Student Handbook (Exh. 3; Doe Dep., Exh. 5, pp. 74-75.)

Response No. 21: Admitted.

22. The Going Global Handbook states that the program sponsors cannot “guarantee or assure the safety and/or security of participants or eliminate all risks from the study abroad environments,” or “monitor or control all of the daily personal decisions, choices, and activities of participants.” (Exh. 3, p. 5.)

Response No. 22: Denied.

The defendants' statement misrepresents the document as a whole. The Going Global Handbook told students that their safety was WPI's "primary concern" and that WPI was "committed to uphold the [safety] standards of the profession" to ensure that program-sponsored accommodation was reasonably safe, including:

- A. Conduct periodic assessments of health and safety conditions for their programs . . .
- B. Provide health and safety information for prospective participants so that they and their parents . . . can make informed decisions concerning preparation, participation and behavior while on the program.
- H. Conduct inquiries regarding the potential health, safety and security risks of the local environment of the program, including program-sponsored accommodation . . . prior to the program.
- I. Hire vendors and contractors . . . that have provided reputable services in the country in which the program takes place. Advise such vendors and contractors of the program sponsor's expectations with respect to their role in the health and safety of participants.

(Going Global Handbook, Ex. 3, p. 4-5).

23. The Going Global Handbook provides that the statements in the Handbook are intended to be "aspirational in nature" and "intentionally general." (Exhibit 3, p. 4.)

Response No. 23: Denied.

The defendants statement misrepresents the document as a whole. Section 1 of the Handbook states that it is a contract which states the obligations and responsibilities of the university and the students. WPI intended it to be a contract. In the Handbook, WPI included "Good Practices for Health and Safety" adopted from NAFSA: Association of International Educators, the "predominant professional association in the world dealing with international education." NAFSA explained

that the safety standards were “aspirational in nature” and “intentionally general” because they could not account for all the many variations in study abroad programs, but WPI expressly promised students in the Handbook that it was “committed to uphold the standards of the profession.” (Going Global Handbook, Ex. 3, p. 3-4; Ogilvie dep., Ex. 7, p. 23).

24. In addition to the Acknowledgment and Release (Exhibit 13), Jane Doe signed and agreed to the Conditions of Application (Exhibit 14), Participant Statement of Agreement (Exhibit 15), and the Off Campus Students’ Health Update and Records Release Form. (Exhibit 16.)

Response No. 24: Admitted.

25. At the time of the incident, Prof. Aarti Madan was one of the on-site faculty advisors. (Madan Dep., Exh. 2, pp. 12, 21.)

Response No. 25: Admitted.

26. The faculty advisors were primarily responsible for overseeing the academic program. (Defendant Aarti Madan’s Answers to Interrogatories, Exhibit 20, No. 5; Madan Dep., Exh. 2, p. 21, 42-43; Vaz Dep., Exh. 4, pp. 14-15; Gerstenfeld Dep., Exh. 6, p. 48; Ogilvie Dep., Exh. 7, p. 72;.)

Response No. 26: Denied.

Admitted that faculty advisors were responsible for overseeing academic programming, but they were also responsible for the safety of the students participating in the Program, and were expected to use their eyes and ears to make sure the environment in Puerto Rico was safe for students. They were expected to be aware of and appropriately warn students of risks to their health and safety.

Faculty advisors were required to keep track of their students for safety purposes, and students were required to keep their faculty advisors informed of their whereabouts at all times. (Madan/30(b)(6) of WPI dep., Ex. 2, p. 47, 110; Ogilvie dep., Ex. 7, p. 20-22, 73; Vaz dep., Ex. 4, p. 37-38; Going Global Handbook, Ex. 3, pp. 9, 14, 18).

27. Prior to the incident, Prof. Madan found Mr. Rodriguez flirtatious behavior to be annoying, but she attributed it to nothing more than cultural difference. (Exh. 20, No. 17; Madan Dep., Exh. 2, pp. 127-128, 132; 150-151.)

Response No. 27: Denied.

On April 14, 2012, the day Jane Doe was raped, Madan reported to the Puerto Rico police, and later to WPI's attorney, that she had a "strained" relationship with Rodriguez and felt "strange" around him because he entered the elevator with her to do his rounds on multiple occasions, always around midnight or 1:00 a.m. . . . She felt a pattern after the third occasion of Rodriguez entering the elevator with her late at night, always when she was alone, and she told the police that it had made her feel "uneasy." After that, she reported that she cooled her interactions with him "to the bare minimum." When Rodriguez was gone for several weeks after Easter she commented to someone that she was happy he was gone. (Madan/30(b)(6) of WPI dep., Ex. 2, p. 118; Statement of Aarti Madan, Ex. 21, p. 2). Since the instant lawsuit was filed, Ms. Madan has attempted to qualify this statement by explaining that at the time it was written, her reflections upon her interactions with Rodriguez were "colored by the accusation" of rape. Despite his subsequent conviction for the aggravated rape of Jane Doe, she now contends that she "felt

really comfortable with him” and considered his behavior to be nothing more than innocuous, benign flirting. A jury is free to, and will likely, disbelieve her. (Statement of Aarti Madan, Ex. 21, p. 2; Madan Dep., Ex. 2, pp. 118-119, 128, 138; Madan’s Answers to Interrogatories Propounded by Plaintiff, Jane Doe, Ex. 20, p. 10; Defendants’ Motion for Summary Judgment, p. 9)

28. Prof. Madan considered Mr. Rodriguez’ behavior nothing more than innocuous, benign flirtations. (Madan Dep., Exh. 2, pp. 128, 138.)

Response No. 28: Denied.

See, Plaintiffs’ Response No. 27, which is incorporated by reference herein.

29. At no time prior to the incident did Prof. Madan find Mr. Rodriguez behavior to be suspicious, threatening, predatory or sexually harassing. (Exh. 20, No. 17; Madan Dep., Exh. 2, pp. 130, 139,150.)

Response No. 29: Denied.

See, Plaintiffs’ Response No. 27, which is incorporated by reference herein.

30. Prof. Madan’s use of the terms “uneasy,” “strained” and “strange” in the Incident Report related to her feelings regarding Mr. Rodriguez’ flirtatious and annoying manner. (Exh. 20, No. 17; Madan Dep., Exh. 2, pp.125-152.)

Response No. 30: Denied.

See, Plaintiffs’ Response No. 27, which is incorporated by reference herein.

31. Prof Madan did not feel it necessary to report Mr. Rodriguez innocuous, benign flirtations to anyone. (Madan Dep., Exh. 2, p. 138.)

Response No. 31: Denied.

Madan reported Rodriguez's behavior to the police as stated above, and not as "innocuous" or "benign" flirtation. Admitted that Madan did not report Rodriguez's behavior to anyone at WPI, or inform, warn or otherwise alert her students of his "pattern" of entering the elevator late at night, always when she was alone, which made her feel "strange" and "uneasy." (Madan/30(b)(6) of WPI dep., Ex. 2, pp. 100, 130, 137-138, 171).

32. Prior to the incident, Mr. Rodriguez never acted in an inappropriate or threatening manner toward Jane Doe and neither she nor any of the other students had ever made any complaints about him. (Doe Dep., Exh. 5, pp. 123-124.)

Response No. 32: Denied.

Jane Doe testified that she did not make any complaints about Rodriguez prior to her rape, and she never heard any other students make complaints about him. (Doe dep., Ex. 5, pp. 123-124).

PLAINTIFFS' STATEMENT OF ADDITIONAL MATERIAL FACTS

33. In the early morning hours of April 14, 2012, Jane Doe was raped by the security guard on duty at the Ashford Imperial, which was selected, leased and controlled by the defendants for the purpose of student housing in San Juan, Puerto Rico. Defendants admitted they controlled the Ashford when they reported Jane Doe's rape under the Clery Act as a crime having occurred non-campus abroad, which is defined by the Act as a building owned or controlled by an institution that is used in direct support of educational purposes. (People v. Rodriguez, 2015 TSPR 139 (P.R. 2015) (Certified English Translation), Ex. 22; WPI/Sea Breeze 2012 Short Term Lease Agreements, Ex. 23; WPI Annual Security & Fire Safety Report, Ex. 24, page 21; U.S. Dept. of Education,

Handbook for Campus Safety and Security Reporting, Ex. 25, p. 25-26; Madan/30(b)(6) of WPI dep., Ex.2, p. 27, 56-57, 166; Ogilvie dep., Ex. 7, pp. 65-66; Gerstenfeld dep., Ex. 6, pp. 8-9; Vaz dep., Ex. 4, pp. 46-47).

Response No. 34:

Denied that WPI controlled the Ashford or a portion of those premises. (Madan Dep., Exhibit 2, pp. 42-44, Gerstenfeld Dep., Exh. 6, pp. 47-49; Martunas Dep., Exhibit 9, p. 28.) The term “control” under the Clery Act is used for purposes of reporting. WPI was not required to report the incident, but did so based on transparency and the feeling that it was the right thing to do. (Martunas Dep., Exh. 9, pp. 30-31.) Even assuming, as plaintiffs contend, that WPI controlled the apartments in which students were housed and the common areas used to access those apartments, the area purported to be under its “control” did not extend to the roof. Access to the roof was limited and was not an area that was readily accessible to the students, and required the unlocking of a steel bar door and climbing a ladder. (See Deposition of Jane Doe from Puerto Rico action (“Doe Puerto Rico Dep.”, Exh. 36, pp. 106-111; Doe Dep., Exh. 5, pp. 144-146; Joaquin Dep., Exh. 12, pp. 77-79. See also, “Limits of control” and “Space versus program agreements” and examples cited therein, Exh. 25, pp. 27-28.)

34. WPI required students participating in the 2012 Puerto Rico Program (“Program”) to reside at the Ashford Imperial, and represented to the students, including Jane Doe, that the building was safe and was protected by a security officer on duty at all times. (Madan/30(b)(6) of WPI dep., Ex. 2, pp. 27-28; Ogilvie dep., Ex. 7, p. 15; Gerstenfeld dep., Ex. 6, pp.10-11; Vaz dep., Ex. 4, p. 13-14; Going Global @ WPI, Ex. 3, p. 19).

Response No. 34:

Admitted that the students were required to reside at the Ashford Imperial, which had a security guard on duty at all times. Denied that WPI represented to the students that the building was safe at all times and protected by the security guard at all times. The students were free to come and go as they chose to do and had primary responsibility for their health and welfare. (Vaz Dep., Exh. 4, pp. 14-15, 35-36; Going Global Handbook, Exhibit 3, p. 6; Madan Dep., Exh. 2, pp. 42-43, 47, 111; Gerstenfeld Dep., Exh. 6, pp. 48-50; Ogilvie Dep., Exh. 7, pp. 72-73.)

35. On December 11, 2012, Security Officer William Rodriguez was convicted of the aggravated rape of Jane Doe by a unanimous guilty jury verdict in the state court of Puerto Rico. As an aggravating factor the jury found that the rape was committed with the use of physical force, violence and intimidation. Following an appeal, Rodriguez's conviction was affirmed in a unanimous decision by the Supreme Court of Puerto Rico on October 29, 2015. (People v. Rodriguez, 2015 TSPR 139 (P.R. 2015) (Certified English Translation), Ex. 22, p. 2). He was sentenced and is currently serving twenty years in prison for this crime. Id. (Affidavit of Counsel, Ex. A, para. 19).

Response 35:

Admitted.

36. Prior to working as a security officer, Rodriguez had served as a state police officer in Puerto Rico. He was fired from the police force for corruption after he was arrested in August 2011 for selling police-issued ammunitions to an undercover agent. The news of Rodriguez's arrest was covered by the local newspapers and was easily discoverable as of

August 2011 by a simple internet search. (Adendi.com article, Exhibit 11 to Joaquin-Hidalgo Dep., Ex. 26).

Response No. 36:

Denied. The citation to the record does not support the fact presented. Mr. Joaquin testified that prior to the incident he did not know that Mr. Rodriguez had been convicted of a felony for selling ammunition and that only after did he learn that Mr. Rodriguez had "had been accused." (Joaquin Dep., Exh. 12, pp. 125-128.) Furthermore, prior to the incident, Mr. Rodriguez had obtained and provided to Winn Access and the Ashford a Certificate of Good Standing from the Puerto Rico Police indicating that he did not have a criminal record. (See Certificate of No Penal Record, Exhibit 37.) Admitted that Mr. Rodriguez was dishonorably discharged from the police force for selling ammunitions to an undercover agent and that an account of his arrest is contained in an article obtained from Adendi.com, which was marked as Exhibit 11 to Abraham Joaquin-Hidalgo's deposition, but which Mr. Joaquin did not see until after the incident. (Joaquin Dep., Exh. 12, pp. 124 -128; Adendi.com print out, Exh. 26.)

37. Rodriguez was convicted of the felony offense of violating Puerto Rico's Law on Firearms in February 2011. He had also been accused of domestic violence in 2010. (Elnuevodia.com article, MAPFRE's Responses to Plaintiffs' Request for Production of Documents, Ex. 27, Statement of Creighton Peet, Ex. 28, p. 4).

Response No. 37:

Admitted that Rodriguez was convicted of the felony offense of violating Puerto Rico's Law on Firearms. Otherwise, the facts alleged are not established by the reference cited.

38. At the time of Jane Doe's rape, Rodriguez was not licensed, in violation of Puerto Rico law. Under the Private Detectives Act of Puerto Rico, it is illegal for an individual to engage in the private detective business without first having obtained a license. (25 L.P.R.A. §§285b, 285c(b), Ex. 29). William Rodriguez was a "private detective" as defined by the Act: "Private detective is a person who, for private purposes . . . protects persons or real or personal property." (25 L.P.R.A. §258a(a)(1)(3), Ex. 29). Rodriguez was required to be licensed as a security officer, notwithstanding that he was employed by a security agency. (25 L.P.R.A. §285j, Ex. 29, "Employment in the agency does not entitle [an employee] to act as a private detective unless he obtains a license as such.").

Response No. 38:

Denied. Mr. Rodriguez did not operate a private detective business or serve as a private detective under Puerto Rico Law. Mr. Rodriguez was an employee of Winn Access and as such was not required to be a licensed private detective. See, Private Detectives Act of Puerto Rico, 25 L.P.R.A. 285j (Agency Employees)

39. In 2012, WPI on-site resident faculty advisors, Aarti Madan and Creighton Peet, resided with students at the Ashford Imperial for the duration of the Program. (Vaz dep., Ex. 4, p. 14).

Response No. 39:

Admitted.

40. WPI's on-site resident faculty advisors, including Aarti Madan, were responsible for the safety of the students participating in the Program, and were expected to use their eyes and ears to make sure the environment in Puerto Rico was safe for students. They were expected to be aware of and appropriately warn students of risks to their health and safety. (Madan/30(b)(6) of WPI dep., Ex. 2, p. 47; Ogilvie dep., Ex. 7, p. 20-22, 73; Vaz dep., Ex. 4, p. 37-38).

Response No. 40:

- Denied. At the time of the incident, Prof. Aarti Madan was one of the on-site faculty advisors. (Madan Dep., Exh. 2, pp. 12, 21.) The faculty advisors were primarily responsible for overseeing the academic program. (Defendant Aarti Madan's Answers to Interrogatories, Exhibit 20, No. 5; Madan Dep., Exh. 2, pp. 21, 42-43; Vaz Dep., Exh. 4, pp. 14-15; Gerstenfeld Dep., Exh. 6, p. 48; Ogilvie Dep., Exh. 7, p. 72.) While they also undertook certain responsibilities for health and safety, the students had primary responsibility for their health and welfare. (Exh. 3, p. 6; Madan Dep., Exh. 2, pp. 42-43, 47; Gerstenfeld Dep., Exh. 6, pp. 48-50; Ogilvie Dep., Exh. 7, pp. 72-73.) The on-site advisors were not tasked specifically with keeping an eye out for the students, who were free to come and go as they chose. (Vaz Dep., Exh. 4, pp. 14-15, 35-36.)**
41. The advisors, including Aarti Madan, had a duty to "report suspicious behavior to the appropriate campus officials, even if it was 'just a hunch.'" (Residential Services and Campus Police Community Response Checklist, Ex. 19; Madan/30(b)(6) of WPI dep., Ex. 2, p. 113).

Response No. 41:

Admitted. However, the defendants deny any implication that Prof. Madan failed to report any behavior that should have been reported. Prof. Madan testified that at no time prior to the incident did she find Mr. Rodriguez' behavior to be suspicious, threatening, predatory or sexually harassing or that it needed to be reported. (Exh. 20, No. 17; Madan Dep., Exh. 2, pp. 130, 139, 150.)

42. On April 24, 2012, Aarti Madan submitted an incident report to WPI regarding the rape of Jane Doe, which she had carefully prepared for the university and its attorney. In the report she detailed an interview that she gave to the Puerto Rico police on 4/14/12 as part of their investigation of Jane Doe's rape. She wrote:

I informed [the police] that in fact my interaction with William was strained since he'd been a bit flirtatious since I'd arrived in Puerto Rico. After a few suggestive compliments, he realized I was the students' professor rather than a student; he seemed apologetic and a bit embarrassed. I felt strange with William because he entered the elevator with me to do his rounds on multiple occasions, always around midnight or 1:00 a.m . . . While the first 2 times didn't seem odd, the 3rd left me a bit uneasy because I felt a pattern. On one occasion I was speaking with Steve Partridge when William tapped one shoulder and then walked away, sort of teasing me and trying to get me to look the wrong way. Steve immediately commented that I was being flirted with. After those instances, I cooled my interactions with William to the bare minimum. In fact, he was gone for several weeks after Easter, and I commented that I was happy he was gone . . .

(Madan/30(b)(6) of WPI dep., Ex. 2, p. 118; Statement of Aarti Madan, Ex. 21, p. 2).

Response No. 42:

Admitted that Prof. Madan prepared an Incident Report, that is attached as Exhibit 21, in which she described her pre-incident interaction with Mr. Rodriguez. However, the defendants deny that Prof. Madan was obligated or otherwise should have reported Mr. Rodriguez behavior. Prof. Madan has made

clear that she drafted the Incident Report at a time when she had been interacting with Mr. Rodriguez for over five weeks and her reflection upon their past interactions had been colored by the accusation. (Exh. 20, No. 17.) She has repeatedly stated, both in answers to interrogatories and at deposition, that her statement about feeling “uneasy,” “strained” and “strange” had to do with Mr. Rodriguez flirtatious and annoying manner, not with any suspicious or threatening behavior. (Exh. 20, No. 17; Madan Dep., Exh. 2, pp.125-152.) In fact, while she considered Mr. Rodriguez’ flirtation to be annoying, she also considered them to be compliments, which she did not want to entertain. (Madan Dep., Exh. 2, p. 137.) Prof. Madan did not feel the need to report this “innocuous, benign flirtation” to anyone. (Madan Dep., Exh. 2, p. 138.) Nor did she have any reason to believe that Mr. Rodriguez was flirting with any of the students, or to inquire if the students had any interactions with Mr. Rodriguez. (Madan Dep., Exh. 2, pp 125-140.) Prior to the incident, Mr. Rodriguez had never acted in an inappropriate or threatening manner toward Jane Doe, and neither she, nor any of the other students, had ever made any complaints about him. (Doe Dep., Exh. 5, pp. 123-124.)

43. Before Jane Doe was raped, Madan did not report Rodriguez’s behavior to WPI, or inform, warn or otherwise alert her students of his “pattern” of entering the elevator late at night which made her feel “strange” and “uneasy.” She also did not inquire whether any of her female students were having similar experiences with Rodriguez. (Madan/30(b)(6) of WPI dep., Ex. 2, pp. 100, 130, 137-138, 171).

Response No. 43:

Admitted. However, the defendants deny that Prof. Madan was obligated or otherwise should have reported Mr. Rodriguez behavior. See Response No. 42, above.

44. Since the instant lawsuit was filed, Madan has attempted to qualify this statement by explaining that at the time it was written, her reflections upon her interactions with Rodriguez were “colored by the accusation” of rape. Despite his subsequent conviction for the aggravated rape of Jane Doe, Madan now contends that she “felt really comfortable with him” and considered his behavior to be nothing more than innocuous, benign flirting. (Madan’s Answers to Interrogatories Propounded by Plaintiff, Jane Doe, Ex. 20, p. 10; Madan Dep., Ex. 2, pp. 128, 138; Defendants’ Motion for Summary Judgment, p. 9)

Response No. 44:

Denied. This is not a statement of a material fact, but merely plaintiffs’ opinion regarding Prof. Madan’s sworn deposition testimony. See Response No. 42, above.

45. WPI developed and distributed a handbook to its students entitled “Going Global @ WPI” (“the Handbook”). “The Handbook was prepared to inform the student who has been accepted to participate in the Global Perspective Program at the Puerto Rico Project Center D 2012.” (Ogilvie dep., Ex. 7, pp. 22-23; Going Global Handbook, Ex. 3, p. 3).

Response No. 45:

Admitted that “[t]he Handbook was prepared to inform the student who has been accepted to participate in the Global Perspective Program at the Puerto Rico Project Center D 2012,” and that it was “compiled from a number of sources to

provide as much practical information as possible that may be applicable to all project sites.” (Exh.3, p. 3.)

46. The Handbook was a contract. WPI intended the Handbook to serve as a contract between the university and the student participants. The language of the Handbook stated that it was a contract. Section 1 of the handbook provided:

For the mutual protection of WPI, the students, and their families, the obligation assumed by each must be carefully defined and understood. You should recognize the fact that you have entered into a contractual agreement with WPI that states the obligations and responsibilities of both the university and yourself. This Handbook was created as the document that should be read carefully and thoroughly to avoid misunderstandings.

(Ogilvie dep., Ex. 7, p. 23; Going Global Handbook., Ex. 3, p. 3).

Response No. 46:

Denied that the Handbook was a contract. The Going Global Handbook contains “intentionally general” statements and guidelines from the NAFSA, which are “aspirational in nature” and intended only to provide information to develop and address good health and safety practices. (Exh. 3, p. 4; Gerstenfeld Dep. Exh. 6, p. 21.) While it outlines the responsibilities of the students, it is not intended to be comprehensive regarding the responsibilities of WPI. (Madan Dep., Exh. 2, p. 62; Exh. 3, p. 4; Vaz Dep., Exh. 4, pp. 21-25; Gerstenfeld Dep., Exh. 6, pp. 74-75.) There is nothing which constitutes a “specific promise” made by WPI to Jane Doe regarding her health and safety. (Exhibit 3.)

47. The Handbook outlined the academic, behavioral and financial obligations of the students, and detailed specific policies and standards WPI was obligated to follow to ensure that student housing in Puerto Rico was safe. (Going Global Handbook, Ex. 3; Ogilvie dep., Ex. 7, pp. 23, 25-26, 32-34; Gerstenfeld dep., Ex. 6, pp. 22-27).

Response No. 47:

Denied that the Handbook sets out any policies and standards that WPI was “obligated” to follow or is a contract. The Handbook makes reference to certain health and safety practices to the sponsors and the students “should” aspire to achieve. (Exh. 3, pp. 4-5.) See also, Response No. 46, above.

48. Examples of the relevant safety standards detailed in the Going Global Handbook include the following:

- C. Conduct periodic assessments of health and safety conditions for their programs . . .
- D. Provide health and safety information for prospective participants so that they and their parents . . . can make informed decisions concerning preparation, participation and behavior while on the program.
- J. Conduct inquiries regarding the potential health, safety and security risks of the local environment of the program, including program-sponsored accommodation . . . prior to the program.
- K. Hire vendors and contractors . . . that have provided reputable services in the country in which the program takes place. Advise such vendors and contractors of the program sponsor’s expectations with respect to their role in the health and safety of participants.

(Going Global Handbook, Ex. 3, pp. 4-5).

Response No. 48:

Admitted that the above text is a sample of the materials contained within pages 4 and 5 of the Going Global Handbook. However, the items listed are statements of good practice as to what the Program Sponsors “should” aspire to achieve. (Exh. 3, pp. 4 - 5.) The Handbook also contains a list of good practices that the students “should” aspire to achieve, and advises students that the program

sponsors cannot guarantee or assure the safety and/or security of participants, eliminate all risks from the study abroad environments, or monitor or control all of their daily personal decisions, choices, and activities. Moreover, the Handbook advised the students that they “can have a major impact on their own health and safety through the decisions they make before and during the program and by their day to day choices and behaviors.” (Exh. 3, p. 5-6.)

49. These standards were adopted from NAFSA: Association of International Educators (“NAFSA”), “the predominant professional association in the world dealing with international education.” In the Handbook, WPI expressly promised the students that “the University is committed to uphold the standards of the profession.” (Going Global Handbook, Ex. 3, p. 4).

Response No. 49:

Admitted that certain text, including the statements of good practice, contained in the Going Global Handbook was “taken from the NAFSA: Association of International Educators’ website, and that the handbook provides that “while WPI’s off campus program is unique in its structure, the University is committed to uphold the standards of the profession.” Otherwise, denied. (Exhibit 3, p. 4.)

50. As a condition of their participation in the Program, WPI required its students, including Jane Doe, to sign an “Acknowledgement and Release.” (Going Global Handbook, Ex. 3, p. 10).

Response No. 50:

Admitted.

51. The terms of the Acknowledgement and Release expressly incorporated information distributed to the students through written materials, and was contingent on the students' acknowledgement that WPI had provided them "with adequate information about the Program, both verbally and through written materials" and that they knew and understood the risks described. (Acknowledgement and Release, Ex. 13).

Response No. 51:

Admitted that the Acknowledgment and Release provides that Jane Doe had been provided with adequate information about the program "both verbally and through written materials," and that these materials included but were not limited to the Application, Conditions of Application, Going Global Handbook, Participant Statement of Agreement, Off-Campus Student Healthy Update and Records Release Form, and site specific, alcohol awareness and Sexual Harassment orientation materials. Admitted that in the Acknowledgment and Release, Jane Doe acknowledged that WPI had provided her with adequate information about the Program and that she had read and understood such information. Denied that any such materials were expressly incorporated into the Acknowledgement and Release. (Exh. 13.)

52. The defendants acknowledged and represented to students that, "The health and safety of study abroad participants are primary concerns." (Going Global @ WPI, Ex. 3, p. 4; Madan/30(b)(6) of WPI dep., Ex. 2, p. 61; Ogilvie dep., Ex. 7, p. 12; Gerstenfeld dep., Ex. 6, p. 12; Vaz dep., Ex. 4, p. 13).

Response 52:

Admitted.

53. The defendants acknowledged and represented to students that, “A safe and successful off-campus experience does not just occur – it requires careful planning and preparation.” (WPI Website for the Interdisciplinary and Global Studies Division, Ex. 30; Madan/30(b)(6) of WPI dep., Ex. 2, p. 22; Ogilvie dep., Ex. 7, p. 13, Gerstenfeld dep., Ex. 6, p. 12; Vaz dep., Ex. 4, p. 16).

Response 53:

Admitted.

54. The defendants acknowledged and represented to students that, “While off-campus study can present unique challenges, careful risk management and diligent planning can result in a rewarding project experience.” (WPI Website for the Interdisciplinary and Global Studies Division, Ex. 30; Madan/30(b)(6) of WPI dep., Ex. 2, p. 23).

Response 54:

Admitted that the WPI Website for the Interdisciplinary and Global Studies Division provides common sense health and safety information, including the statement of good practice that “[w]hile off-campus study can present unique challenges, careful risk management and diligent planning can result in a rewarding project experience.” (Exh. 30.) Similarly, the Going Global Handbook advised the students that they “can have a major impact on their own health and safety through the decisions they make before and during the program and by their day to day choices and behaviors.” (Exh. 3, p. 5-6.)

55. The students were wholly dependent on WPI for reasonably safe and secure housing in Puerto Rico. They were not permitted to negotiate or choose their own housing, did not

participate in contracts with local vendors, and were in no position to perform risk management assessments of WPI's student housing facility. (Vaz dep., Ex. 4, pp. 26-27).

Response 55:

Admitted that WPI selected and leased apartments at the Ashford Imperial Condominium in San Juan for the housing of students participating in the IGSD program. Denied that the students were wholly dependent on WPI for reasonably safe and secure housing in Puerto Rico or that WPI controlled the Ashford. The students were free to come and go as they chose to do and had primary responsibility for their health and welfare. (Vaz Dep., Exh. 4, pp. 14-15, 35-36; Going Global Handbook, Exhibit 3, p. 6; Madan Dep., Exh. 2, pp. 42-43, 47, 111; Gerstenfeld Dep., Exh. 6, pp. 47-50; Ogilvie Dep., Exh. 7, pp. 72-73.) Additionally, Jane Doe attended orientation seminars specifically dealing with sexual assault and alcohol use and abuse, which included information and instruction that the students should look out for each other, learn about the place they were going, travel in groups, avoid excessive or irresponsible consumption of alcohol, never leave anyone at a bar, and always come home in a group. (Madan Dep., Exh. 2, pp. 113-118; Doe Dep., Exh. 5, pp. 70, 84, 94-99; Gerstenfeld Dep., Exh. 6, p. 48.) The Going Global Handbook also advised students that the program sponsors cannot guarantee the safety of the participants, eliminate all risks, or monitor and control all of their daily personal decisions and activities, including preventing the students from engaging in dangerous, risky or unwise activities. (Exh. 3, p. 5.) Jane Doe disregarded the training, and her own better judgment, by excessively and irresponsibly drinking to excess and agreeing to go to the secluded roof with a man with whom she had never

previously spoken, whose name she did not know, and whose behavior had not only surprised her, but which she felt was "weird." (Doe Dep., Exh. 10, pp. 147-148.)

56. Defendants admitted that they never discussed or asked any questions regarding security at the Ashford Imperial with Sea Breeze or any local vendors in Puerto Rico, throughout the twenty years they required students to live there. (Gerstenfeld dep., Ex. 6, p. 34; Ogilvie dep., Ex. 7, p. 18).

Response No. 56:

Admitted. However, as the Director of Academic Programs and Planning for Interdisciplinary and Global Studies, Ms. Vernon-Gerstenfeld visited the Ashford twice annually; once in November and once in the spring for the students' final presentations. (Gerstenfeld Dep., Exh. 6, p. 11, 33.) During her November visits, Ms. Vernon-Gerstenfeld would meet with Ms. Moral, the operator of Seabreeze, to discuss the housing needs for the following year. (Gerstenfeld Dep., Exh. 6, p. 11.) Ms. Vernon-Gerstenfeld also had on-going conversations about the student housing at the Ashford with each pair of faculty advisors and the director of the IGSD program regarding all aspects of the center operations. (Defendant, Susan Vernon-Gerstenfeld's Answers to Interrogatories, Exhibit 10, No. 9.) The security at the Ashford Imperial included key card access, elevator key access, security cameras and a security guard stationed in the lobby. (Gerstenfeld Dep., Exh. 6, pp. 32; Exh. 10, No. 7.) Ms. Vernon-Gerstenfeld was familiar with the location, layout and security at the Ashford, because in addition to her twice yearly assessments of the student housing, she had also lived at the Ashford while serving as an on-site faculty advisor. (Gerstenfeld Dep., Exh. 6, p. 32-33.) In the 20 years prior to the incident

involving Jane Doe, there had never been any problems or issues with the security guards at the Ashford. (Id.) WPI and its staff relied on its vendor, Seabreeze, for the retention of security. (Gerstenfeld Dep., Exh. 6, pp. 31-32.) Ms. Vernon-Gerstenfeld knew that the same company had been providing security guards at the Ashford for over 20 years without issue. (Gerstenfeld Dep., Exh. 6, p. 79; Moral Dep., Exh. 8, p. 129.)

57. Susan Vernon Gerstenfeld was the Director of WPI's Puerto Rico Project Center from 1992 to 2013. As Director, she was one of the people responsible for making sure the Going Global Handbook safety procedures were carried out, and that students in Puerto Rico were reasonably safe. Gerstenfeld testified that she knew there was security at the Ashford only because she had observed cameras, locks and security guards during her visits to Puerto Rico, and because Ashford Imperial's rental agent had said to her in 1992, "And we have security in the building." Gerstenfeld admitted that she knew nothing about security at the Ashford Imperial other than what she had observed. (Gerstenfeld dep., Ex. 6, pp. 7, 12, 25-26, 32-34).

Response 57:

Denied that the Going Global Handbook contains any "safety procedures" with which WPI was obligated to perform. (Exh. 3, p. 4.) See also, Response No. 56.

58. During the twenty years students were required to live at the Ashford Imperial, WPI never conducted assessments regarding the quality of the security force on the premises. (Ogilvie dep., Ex. 7, p. 32; Gerstenfeld dep., Ex. 6, pp. 35-37, 39).

Response No. 58:

Denied. See Response to No. 56, above.

59. The defendants did not know the name of the person or entity responsible for providing security at the Ashford Imperial until after Jane Doe was raped. (Madan/30(b)(6) of WPI dep., Ex. 2, pp. 50, 77-78; Ogilvie dep., Ex. 7, p. 26; Gerstenfeld dep., Ex. 6, p. 36).

Response No. 59:

Admitted that WPI did not know that the name of the security company was Winn Access. However, Ms. Vernon-Gerstenfeld knew that the same company had been providing security guards at the Ashford for over 20 years without issue. (Gerstenfeld Dep., Exh. 6, p. 79; Moral Dep., Exh. 8, p. 129.)

60. Before Jane Doe was raped in April 2012, the defendants did not know or ask what history the Ashford had with its security company. (Gerstenfeld dep., Ex. 6, pp. 36, 38; 4/15/12 E-mail from Gerstenfeld to Sea Breeze, Ex. 31).

Response No. 60:

Denied. See Response No. 56, above.

61. Before Jane Doe was raped in April 2012, the defendants did not know or ask what process the security company used to hire its security officers. (Gerstenfeld dep., Ex. 6, p. 38; 4/15/12 E-mail from Gerstenfeld to Sea Breeze, Ex. 31).

Response No. 61:

Denied. WPI and its staff relied on its vendor, Seabreeze, for the retention of security. (Gerstenfeld Dep., Exh. 6, pp. 31-32.) In addition to operating SeaBreeze, Yolanda Moral served as the Secretary of the Board of the Ashford Condominium Association, Consejo de Titulares Condominio Ashford Imperial ("Consejo") (Morel Dep., Exh. 8, pp. 117-118.) As a member and Secretary of Consejo, Ms.

Moral participated in and voted on the selection and yearly renewal of the contract with the security company, Winn Access. (Moral Dep., Exh. 8, pp. 107-108, 118-120.) As WPI's Director of Academic Programs and Planning for Interdisciplinary and Global Studies, Ms. Vernon-Gerstenfeld knew that in addition to serving as WPI's housing vendor, Ms. Moral (Seabreeze) was also involved in the management of the Ashford and the retention of the Ashford's contractors, including the company that provided the security and security guards. (Gerstenfeld Dep., Exh.6, pp. 72, 77-78.) When the security company changed its name from PDI to Winn Access in 2009, it made a presentation to the Board regarding the security services it would be providing. (Moral Dep., Exh. 8, pp. 119-121; Joaquin Dep., Exh. 12, pp. 84, 169-170.) Under the terms of the agreement with Consejo/Ashford, Winn Access was required to be licensed and was also required to obtain Certificates of No Penal Record issued by the Puerto Rico Police Department from each of the guards it employed. (Moral Dep., Exh. 8, pp. 125-126; Joaquin Dep., Exh. 12, p. 170-171.) William Rodriguez provided Winn Access with a Certificate of Good Standing issue by the Puerto Rico Police Department prior to the arrival of the WPI students in March 2012. (Exh. 37; Moral Dep., Exh. 8, p. 126; Joaquin Dep., Exh. 12, pp. 89-90, 170-171.) Ms. Vernon-Gerstenfeld knew that the same company had been providing security guards at the Ashford for over 20 years without issue. (Gerstenfeld Dep., Exh. 6, p. 79; Moral Dep., Exh. 8, p. 129.)

62. Before Jane Doe was raped in April 2012, the defendants did not know or ask whether the local vendors in Puerto Rico were properly insured. (Madan/30(b)(6) of WPI dep., Ex.2, p. 84; Gerstenfeld dep., Ex. 6, pp. 30, 38; Ogilvie dep., Ex. 7, p. 45).

Response No. 62:

Admitted. However, this is not a material fact with respect to the defendants' Motion for Summary Judgment or the plaintiffs' Opposition, and is irrelevant.

63. Before Jane Doe was raped in April 2012, the defendants did not know whether the cameras at the Ashford Imperial properly functioned. (Gerstenfeld dep., Ex. 6, p. 40). At the time Jane Doe was raped, at least two cameras were not functioning, including the camera in the elevator that Rodriguez used to lure Jane Doe to the roof, where he raped her. (Joaquin-Hidalgo dep., Ex. 12, pp. 56, 118; Melendez dep., Ex. 32, p. 36-38).

Response No. 63:

Admitted that prior to the incident, no one reported to Susan Vernon-Gerstenfeld or WPI that the cameras were not working. (Gerstenfeld Dep., Exh. 6, p. 40.) Otherwise, denied. (Doe Dep., Exh. 5, pp. 147-148.) Admitted that on April 14, 2012, the cameras in one of the elevators were not working, and that the Ashford knew they were not working and was struggling to get them repaired. (Joaquin Dep., Exh. 12, p. 56-59.)

64. Before Jane Doe was raped in April 2012, the defendants did not know or ask any of the local vendors whether background or reference checks were performed on the security officers employed at the Ashford Imperial. (Ogilvie dep., Ex. 7, pp. 30, 54-55; Gerstenfeld dep., Ex. 6, p. 35-37).

Response No. 64:

Admitted. See Response No. 61, Above.

65. Before Jane Doe was raped in April 2012, the defendants did not know or ask whether security guards at the Ashford Imperial were licensed, had criminal records, or pending criminal charges. (Madan/30(b)(6) of WPI dep., Ex. 2, pp. 81-83; Ogilvie dep., Ex. 7, pp. 54-55; Gerstenfeld dep., Ex. 6, pp. 36-37).

Response No. 65:

Admitted. See Response No. 61, Above.

66. Before Jane Doe was raped in April 2012, the defendants did not ask Sea Breeze or any local vendor to verify that background checks had been performed for the security officers responsible for WPI students. (Ogilvie dep., Ex. 7, p. 71).

Response No. 66:

Admitted. See Response No. 61, above.

67. Before Jane Doe was raped in April 2012, the defendants did not advise their local vendors that WPI was relying on them to provide adequate security to WPI students required to reside at the Ashford. The defendants did not advise Sea Breeze or any local vendor of WPI's expectations with respect to security at the Ashford, including WPI's expectation that the security officers on the premises be "fully vetted and properly trained." (Madan/30(b)(6) of WPI dep., Ex. 2, pp. 75, 79, 81-83; Ogilvie dep., Ex. 7, pp. 18-19, 29-31, 69-70; Vaz dep., Ex. 4, p. 30).

Response No. 67:

Denied. Through her direct involvement as a Board member, WPI's vendor, Ms. Moral/Seabreeze, knew the identity of the company that had been providing security services for many years and their obligations under the contract with the Consejo/Ashford, including what was required in terms of background

checks/vetting of the security guards. (Moral Dep., Exh. 8, pp. 119-127.) Moreover, given her long history in serving on the Ashford Board and procuring WPI's housing for 20 years, Ms. Moral/Seabreeze was a reputable vendor who certainly knew WPI expectations regarding student housing and security at the Ashford. (Exh. 3, p. 5; Moral Dep., Exh. 8, pp. 121-124.)

68. Yolanda Moral, who operated Sea Breeze in 2012, testified that nobody from WPI told her they were relying on her to provide for the safety and security of WPI students at the Ashford Imperial, and that it was not her job. She further testified that she and/or Sea Breeze had no authority over the hiring of security personnel at the Ashford Imperial, and had nothing to do with security provided to the lessees of the apartments she rented. Abraham Joaquin-Hidalgo, president of the Ashford's Board of Directors, testified that at the time Jane Doe was raped he had never even heard of WPI. *Id.* (Moral dep., Ex. 8, pp. 52-53, 70; Joaquin-Hidalgo dep., Ex. 12, p. 124).

Response No. 68:

Denied. While Ms. Moral initially testified that she and/or Sea Breeze had no authority over the hiring of security personnel at the Ashford Imperial, her later testimony proved otherwise. According to Ms. Moral, she served as the Secretary of the Board of the Ashford condominium association, ("Consejo"), and was directly involved in the vetting and hiring of the security company. (Moral Dep., Exh. 8, pp. 117-118.) In the years surrounding the incident, Seabreeze and its operator, Yolanda Moral, were one and the same. (Exh. 11, Nos. 1 and 15; Moral dep., Exh. 8, pp. 23-24; 33-35; 48-50; 115-117.) As a member and Secretary of Consejo, Ms. Moral participated in and voted on the retention of the security company, Winn

Access (Winn), and the renewal of their contract with the Ashford. (Moral Dep., Exh. 8, pp. 107-108, 118-120.) The renewal of the security contract was done on a yearly basis, at which time Winn was required to present all required documents. (Moral Dep., Exh. 8, pp. 119-130; Joaquin Dep., Exh. 12, pp. 168-169.) When the security company changed its name from PDI to Winn Access in 2009, it made a presentation to the Board regarding the security services it would be providing. (Moral Dep., Exh. 8, pp. 119-121; Joaquin Dep., Exh. 12, p. 169-170.) Under the terms of the contract with Consejo/Ashford, Winn was required to be licensed and was also required to obtain Certificates of No Penal Record issued by the Puerto Rico Police Department from each of the guards it employed. (Moral Dep., Exh. 8, pp. 125-126; Joaquin Dep., Exh. 12, p. 170-171.) Through her direct involvement as a Board member, WPI's vendor, Ms. Moral/Seabreeze, knew the identity of the company that had been providing security services for many years and their obligations under the contract with the Consejo/Ashford, including what was required in terms of background checks/vetting of the security guards. (Moral Dep., Exh. 8, pp. 119-127.) Furthermore, while Mr. Abraham came to find out after the incident who WPI was, he knew that students had been staying at the Ashford for several years. (Joaquin Dep., Exh. 12, p. 124.)

69. Ms. Gerstenfeld admitted at her deposition that before Jane Doe was raped, she did not know whether Ms. Moral (Sea Breeze) was involved in the management of the condominium, and never asked and did not know whether Ms. Moral was involved in securing and/or screening the security contracts for the building. (Gerstenfeld dep., Ex. 6, pp. 83-85).

Response No. 69:

Denied. Ms. Vernon-Gerstenfeld knew that in addition to serving as WPI's housing vendor, Ms. Moral (Seabreeze) was also involved in the management of the Ashford and the retention of the Ashford's contractors, including the company that provided the security and security guards. (Gerstenfeld Dep., Exh.6, pp. 72, 77-78.)

70. Before Jane Doe was raped in April 2012, the defendants did not know that Rodriguez was a former police officer who had been fired, that he had been charged with, and convicted of, a felony by April 2012, or that there were allegations of spousal abuse against him. (Ogilvie dep., Ex. 7, p. 65; Gerstenfeld dep., Ex. 6, pp. 43-44).

Response No. 70:

Admitted.

71. After Jane Doe was raped, the defendants asked Sea Breeze, WPI's rental agent for the Ashford, for the contact information of the security company and "what process the security company uses to hire people and what security checks they do. Also, what history the condo association has with the security company. What questions does the board ask for the security company." Defendants admitted that they could have easily asked these questions before Jane Doe was raped. (4/15/12 E-Mail from Gerstenfeld to Sea Breeze, Ex. 31; Gerstenfeld dep., Ex. 6, p. 38-39; Vaz dep., Ex. 4, p. 33).

Response No. 71:

Admitted. Furthermore, in the 20 years prior to the incident involving Jane Doe, there had never been any problems or issues with the security guards at the Ashford. (Gerstenfeld Dep., Exh. 6, pp. 34-38, 40-41).

72. Before Jane Doe was raped in April 2012, the defendants could have easily requested information regarding the background checks performed (if any) on security officers at the Ashford Imperial, but determined there was “no reason” to request such information. (Gerstenfeld dep., Ex. 6, pp. 38-39; Vaz dep., Ex. 4, pp. 32-33).

Response No. 72:

Admitted. See Response No. 71, above.

73. If the defendants had known about Rodriguez’s background prior to Jane Doe’s rape, they would have taken steps to have him investigated and removed, because having a convicted felon serve as a security guard at a student housing facility would pose a risk to WPI students. (Martunas dep., Ex. 9, pp. 47-48, 80-83; Ogilvie dep., Ex. 7, pp. 14-15, 65-66; Gerstenfeld dep., Ex. 6, pp. 16, 44-45).

Response No. 73:

Admitted. However, under the terms of the contract with Consejo/Ashford, Winn was required to be licensed and was also required to obtain Certificates of Good Standing issued by the Puerto Rico Police Department from each of the guards it employed. (Moral Dep., Exh. 8, pp. 125–126; Joaquin Dep., Exh. 12, p. 170-171.) William Rodriguez provided Winn Access with a Certificate of No Penal Record issue by the Puerto Rico Police Department prior to the arrival of the WPI students in March 2012, which indicated that he did not have a criminal record. (Certificate of Good Standing, Exh. 37; Moral Dep., Exh. 8, p. 126; Joaquin Dep., Exh. 12, pp. 89-90, 170-171.)

74. A simple request by WPI to verify the security company and guards at the Ashford Imperial were properly vetted would have revealed William Rodriguez’s criminal history,

and that he was not licensed in violation of Puerto Rico law. See, ¶¶37-38 (Rodriguez was not licensed and information regarding his criminal background was reported by local newspapers and easily discoverable by a simple internet search).

Response No. 74:

Denied. Prior to the incident, Mr. Rodriguez had obtained and provided to Winn Access and the Ashford a Certificate of Good Standing from the Puerto Rico Police indicating that he did not have a criminal record. (See Certificate of No Penal Record, Exh. 37. See also, Private Detectives Act of Puerto Rico, 25 L.P.R.A. 285j (Agency Employees)

75. According to the defendants, it was “nobody’s responsibility at WPI” to know about the quality of guards at the Ashford Imperial, and “there didn’t seem to be a reason to address security directly.” (Madan/30(b)(6) of WPI dep., Ex. 2, pp. 35-36, Gerstenfeld dep., Ex. 6, p. 42; Martunas dep., Ex. 9, pp. 33-34).

Response No. 75:

Admitted in part, denied in part. WPI and its staff relied on its vendor, Seabreeze, for the retention of security. (Gerstenfeld Dep., Exh. 6, pp. 31-32.) In addition to operating SeaBreeze, Yolanda Moral served as the Secretary of the Board of the Ashford Condominium Association. Morel Dep., Exh. 8, pp. 117-118.) As a member and Secretary of the Board, Ms. Moral was involved in the selection, review and yearly renewal of the contract with the security company, Winn Access. (Moral Dep., Exh. 8, pp. 107-108, 118-120.) Ms. Vernon-Gerstenfeld knew that in addition to serving as WPI’s housing vendor, Ms. Moral (Seabreeze) was also involved in the management of the Ashford and the retention of the Ashford’s contractors,

including the company that provided the security and security guards. (Gerstenfeld Dep., Exh.6, pp. 72, 77-78.) When the security company changed its name from PDI to Winn Access in 2009, it made a presentation to the Board regarding the security services it would be providing. (Moral Dep., Exh. 8, pp. 119-121; Deposition of Abraham Joaquin-Hidalgo, hereinafter, "Joaquin Dep.," attached at Exhibit 12, pp. 84, 169-170.) Under the terms of the agreement with Consejo/Ashford, Winn Access was required to be licensed and was also required to obtain Certificates of Good Standing issued by the Puerto Rico Police Department from each of the guards it employed. (Moral Dep., Exh. 8, pp. 125-126; Joaquin Dep., Exh. 12, p. 170-171.) William Rodriguez provided Winn Access with a Certificate of No Penal Record issue by the Puerto Rico Police Department prior to the arrival of the WPI students in March 2012. (Moral Dep., Exh. 8, p. 126; Joaquin Dep., Exh. 12, pp. 89-90, 170-171.) Ms. Vernon-Gerstenfeld knew that the same company had been providing security guards at the Ashford for over 20 years without issue. (Gerstenfeld Dep., Exh. 6, p. 79; Moral Dep., Exh. 8, p. 129.)

76. The defendants, without doing anything or asking anyone, assumed that the guards were vetted and complied with the law. (Gerstenfeld dep., Ex. 6, p. 35; Madan/30(b)(6) of WPI dep., Ex. 2, pp. 82-84).

Response No. 76:

Denied. See Response No. 75, above.

77. The leasing agreement between WPI and Sea Breeze, for student housing at the Ashford, did not include any provisions regarding security. (Gerstenfeld dep., Ex. 6, pp. 40-41; WPI/Sea Breeze 2012 Short Term Lease Agreements, Ex. 23)

Response No. 77:

Admitted.

78. The defendants could have requested a security provision in the Sea Breeze housing contract. (Ogilvie dep., Ex. 7, p. 56; Gerstenfeld dep., Ex. 6, p. 41).

Response No. 78:

Denied. While one could place a provision in a lease regarding security (See, Ogilvie Dep., Exh. 7, p. 56), WPI did not know how Seabreeze would have responded to a request that such a provision be included in the Short Term Lease Agreements. (Gerstenfeld Dep., Exh. 6, pp. 41-42.)

79. The defendants had control of the security officers responsible for WPI students at the Ashford Imperial, and had the power to remove a guard from service, if necessary. (Madan/30(b)(6) of WPI dep., Ex. 2, pp. 57, 166; Ogilvie dep., Ex. 7, pp. 65-66; Gerstenfeld dep., Ex. 6, pp.44-45; Vaz dep., Ex. 4, pp.46-47).

Response No.: 79:

Admitted that if WPI felt that a security guard posed a threat to students, they could have reported, taken steps and/or requested that a security guard be removed. Otherwise, denied. (Madan Dep., Exhibit 2, p. 57; Gerstenfeld Dep., Exh. 6, pp. 44-45; Vaz Dep., Exh. 4, p. 46.)

80. There is no documentary evidence that anyone from WPI assessed safety or security at the Ashford at any time from 1992 through 2012. (Madan/30(b)(6) of WPI dep., Ex. 2, p. 64; Gerstenfeld dep., Ex. 6, p. 43).

Response No. 80:

Admitted that no documents have been located regarding WPI's assessment of safety and security at the Ashford at any time from 1992 through 2012. However, Ms. Vernon-Gerstenfeld visited the Ashford twice annually; once in November and once in the spring for the students' final presentations. (Gerstenfeld Dep., Exh. 6, p. 11, 33.) During her November visits, Ms. Vernon-Gerstenfeld would meet with Ms. Moral, the operator of Seabreeze, to discuss the housing needs for the following year. (Gerstenfeld Dep., Exh. 6, p. 11.) Ms. Vernon-Gerstenfeld also had on-going conversations about the student housing at the Ashford with each pair of faculty advisors and the director of the IGSD program regarding all aspects of the center operations. (Exh. 10, No. 9.) The security at the Ashford Imperial included key card access, elevator key access, security cameras and a security guard stationed in the lobby. (Gerstenfeld Dep., Exh. 6, pp. 32; Exh. 10, No. 7.) Ms. Vernon-Gerstenfeld was familiar with the location, layout and security at the Ashford, because in addition to her twice yearly assessments of the student housing, she had also lived at the Ashford while serving as an on-site faculty advisor. (Gerstenfeld Dep., Exh. 6, p. 32-33.) In the 20 years prior to the incident involving Jane Doe, there had never been any problems or issues with the security guards at the Ashford. (Id.) WPI and its staff relied on its vendor, Seabreeze, for the retention of security. (Gerstenfeld Dep., Exh. 6, pp. 31-32.) Ms. Vernon-Gerstenfeld knew that the same company had been providing security guards at the Ashford for over 20 years without issue. (Gerstenfeld Dep., Exh. 6, p. 79; Moral Dep., Exh. 8, p. 129.)

81. When Jane Doe signed WPI's "Release and Acknowledgement" she trusted and relied upon the defendants' representations that student safety was their top priority, and that

they conducted inquiries regarding potential safety and security risks of the Ashford Imperial, that they performed periodic assessments of health and safety conditions of the premises, that they were going to comply with their responsibilities outlined in the Going Global Handbook, and that they advised local vendors in Puerto Rico that WPI expected reasonably safe and secure housing for their students who were required to live at the Ashford. (Affidavit of Jane Doe, Ex. 34).

Response No. 81:

Denied. In her IGSD Application, prior to receipt of any information from the defendants, Jane Doe selected the Puerto Rico Project Center as her first choice, because she liked the projects, and the weather in Puerto Rico. (Doe Dep., Exh. 5, pp. 58-60.) Furthermore, the Affidavit of Jane Doe is improper and should be struck, because it contradicts her earlier sworn testimony regarding the factors influencing her choice to participate in the Puerto Rico Project. A party opposing summary judgment may not create disputed issue of fact by submitting affidavit that contradicts their earlier sworn testimony. Vinci v. Byers, 65 Mass.App.Ct. 135, 138 n. 10, 837 N.E.2d 1140 (2005). Where there is no explanation of the conflict, self-serving, contradictory affidavits such as the one submitted by Jane Doe cannot create genuine issues of material fact. See, Ng. Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 648 (2002) (It is established that a “nonmoving party cannot create a material issue of fact and defeat summary judgment simply by submitting affidavits that contradict its previously sworn statement.”)

82. Had Jane Doe known that WPI did not ask, and did not intend to ask, anyone in Puerto Rico any questions about security at the Ashford, or perform even minimal due diligence

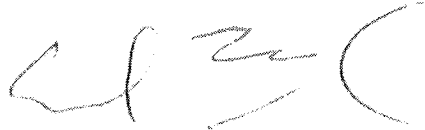
regarding security at the Ashford, she would not have signed the Acknowledgement and Release and would not have chosen to go to Puerto Rico, as it was optional. (Affidavit of Jane Doe, Ex. 34).

Response 82:

Denied. See Response No. 81, above.

The Plaintiffs,
By their attorneys,

The defendants,
By their attorney,



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reasonably safe and secure housing for their students who were required to live at the Ashford. (Affidavit of Jane Doe, Ex. 34).

82. Had Jane Doe known that WPI did not ask, and did not intend to ask, anyone in Puerto Rico any questions about security at the Ashford, or perform even minimal due diligence regarding security at the Ashford, she would not have signed the Acknowledgement and Release and would not have chosen to go to Puerto Rico, as it was optional. (Affidavit of Jane Doe, Ex. 34).

The Plaintiffs,
By their attorneys,

The defendants,
By their attorney,


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CERTIFICATE OF SERVICE

I, David W. McGough, attorney for the defendants, Worcester Polytechnic Institute, Aarti Madan, Anne T. Ogilvie, Richard F. Vaz, Susan Vernon-Gerstenfeld, and Cheryl A. Martunas, hereby certify that on this 3rd day of May, 2016 I have served a copy of the following document:

SUPERIOR COURT RULE 9A(B)(5) JOINT STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

by mailing a copy of the same first class mail, postage prepaid, to counsel of record:

Donna R. Corcoran, Esq.
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Audrey R. Poore, Esq.
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David W. McGough

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CIVIL ACTION NO.: 1585-CV-0570 B

JANE DOE, MARY DOE, and JOHN DOE,)
Plaintiffs)
)
v.)
)
WORCESTER POLYTECHNIC)
INSTITUTE; AARTI MADAN; ANNE T.)
OGILVIE; RICHARD F. VAZ; SUSAN)
VERNON-GERSTENFELD; and)
CHERYL A. MARTUNAS,)
Defendants)

**JOINT APPENDIX OF EXHIBITS TO DEFENDANTS WORCESTER
POLYTECHNIC INSTITUTE, AARTI MADAN, ANNE T. OGILVIE, RICHARD
F. VAZ, SUSAN VERNON-GERSTENFELD AND CHERYL A. MARTUNAS'
MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY
JUDGMENT**

1. Plaintiffs' Complaint;
2. Deposition of Aarti Smith Madan, Ph.D./30(b)(6) Deposition of WPI;
3. Going Global @ WPI Puerto Rico D 2012;
4. Deposition of Richard F. Vaz;
5. Deposition of Jane Doe;
6. Deposition of Susan Vernon-Gerstenfeld;
7. Deposition of Anne T. Ogilvie;
8. Deposition of Yolanda Justa Moral-Arias;
9. Deposition of Cheryl Martunas;
10. Defendant, Susan Vernon-Gerstenfeld's, Answers to Interrogatories Propounded by the Plaintiff, Jane Doe;
11. Co-Defendant's [Seabreeze Apartment Rentals, Inc.] Answers to the Plaintiff's First Set of Interrogatories and Requests for Production of Documents;

12. Deposition of Abraham Joaquin-Hidalgo;
13. Acknowledgment and Release;
14. Conditions of Application;
15. Participant Statement of Agreement;
16. Off-Campus Students' Health Update and Records Release Form;
17. WPI Sexual Harassment Policy;
18. Going Global @ WPI For On-Site Advisors;
19. Residential Services and Campus Police Community Response Checklist;
20. Defendant, Aarti Madan's, Answers to Interrogatories Propounded by Plaintiff, Jane Doe;
21. Incident Report by Aarti Madan (with redactions);
22. People v. Rodriguez, 2015 TSPR 139 (P.R. 2015) (certified translation);
23. WPI/Sea Breeze 2012 Short Term Lease Agreements;
24. WPI 2015 Annual Security & Fire Safety Report;
25. Handbook for Campus Safety and Security Reporting, U.S. Dept. of Education;
26. Adendi.com article, Ex. 11 to the deposition of Abraham Joaquin-Hidalgo;
27. Elnuevodia.com article, produced by MAPFRE PRAICO Insurance Company;
28. Incident Report by Creighton Peet (with redactions);
29. Private Detectives Act of Puerto Rico, 25 L.P.R.A. §285;
30. WPI Website for the Interdisciplinary and Global Studies Division;
31. 4/15/12 E-mails between Susan Vernon Gerstenfeld and Johanna Rios/Sea Breeze;
32. Deposition of Yvonne Melendez-Rivera;
33. Win Access/Ashford Imperial Security Services Contract;

34. Affidavit of Jane Doe;
35. Expert Report of Norman D. Bates;
36. Deposition of Jane Doe from Puerto Rico Case; and
37. Certificate of No Penal Record.

The Plaintiffs,
By their attorneys,

The defendants,
By their attorney,



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- 34. Affidavit of Jane Doe; and
- 35. Expert Report of Norman D. Bates.

The Plaintiffs,
By their attorneys,

The defendants,
By their attorney,


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CERTIFICATE OF SERVICE

I, David W. McGough, attorney for the defendants, Worcester Polytechnic Institute, Aarti Madan, Anne T. Ogilvie, Richard F. Vaz, Susan Vernon-Gerstenfeld, and Cheryl A. Martunas, hereby certify that on this ^{2nd} ___ day of May, 2016 I have served a copy of the following document:

**JOINT APPENDIX OF EXHIBITS TO DEFENDANTS WORCESTER
POLYTECHNIC INSTITUTE, AARTI MADAN, ANNE T. OGILVIE, RICHARD
F. VAZ, SUSAN VERNON-GERSTENFELD AND CHERYL A. MARTUNAS'
MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY
JUDGMENT**

by mailing a copy of the same first class mail, postage prepaid, to counsel of record:

Donna R. Corcoran, Esq.
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Audrey R. Poore, Esq.
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