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FILED
Superior Court of California
County of Los Angeles

JUL 28 2016

Sherri R. Carter, Executive Officer/Clerk
By Henry N. DiIambattista Deputy
N. DiIambattista

7 Attorneys for Respondent
University of Southern California
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES**

11
12 JOHN DOE, an individual,
Petitioner,
13
14 v.
15 AINSLEY CARRY, Ed.D., in his official
capacity as Vice Provost of Student Affairs;
16 GRETCHEN DAHLINGER MEANS, in her
official capacity as Title IX Coordinator;
17 PATRICK NOONAN, in his official capacity
as Senior Complaint Investigator;
18 UNIVERSITY OF SOUTHERN
CALIFORNIA, a California corporation, and
19 DOES 1 to 10 inclusive,
Respondent.

Case No.

BS163736

**DECLARATION OF GRETCHEN
DAHLINGER MEANS IN SUPPORT OF
UNIVERSITY OF SOUTHERN
CALIFORNIA'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
OPPOSITION TO PETITIONER'S EX
PARTE APPLICATION**

Hearing Date: July 28, 2016
Time: 8:30 a.m.
Dept: 86
Judge: Hon. Robert O'Brien

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21 **DECLARATION OF GRETCHEN DAHLINGER MEANS**

22 I, Gretchen Dahlinger Means, declare and state:

- 23 1. I am the Title IX Coordinator for Respondent University of Southern California
24 ("University" or "USC"). I submit this declaration in support of the University's Request for
25 Judicial Notice In Support of its Opposition to Petitioner's *Ex Parte* Application.
26 2. I have served as the Title IX Coordinator for the University since February 2016.
27 3. In my capacity as Title IX Coordinator, I oversee all phases of the University's
28 procedures to respond to allegations of discrimination, harassment, retaliation, sexual misconduct,

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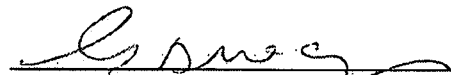
1 dating violence, domestic violence, intimate partner violence, stalking, and child abuse.

2 4. Consistent with my duties as Title IX Coordinator, I oversaw the investigation of
3 Petitioner's alleged violations of the University's policies as they related to a woman referred to
4 as "Jane Roe." As such, I can personally attest to the fact that the University provided Petitioner
5 with Exhibit 1, described further below, which represents a portion of the documents constituting
6 the record of the administrative proceeding. This document is kept and maintained by the
7 University in the normal course of business and in confidence. Attached as Exhibit 1 is a true and
8 correct copy of the Summary Administrative Review.

9 5. Attached as Exhibit 2 is true and correct copy of a letter dated July 8, 2016 from
10 Kelly J. Bendell to Mark Hathaway, which is also a portion of the documents constituting the
11 record of the administrative proceeding. I was copied on the letter as reflected in the cc line.

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct. Executed at Los Angeles, California on July 27, 2016.

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15 Dated: July 27, 2016

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18 Gretchen Dahlinger Means

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Summary Administrative Review

In the matter of John Doe

Case # 201502017

A Summary Administrative Review was concluded on May 20, 2016, in response to a January 28, 2016 report by Jane Roe (Complainant) to the Title IX Office. Charges were issued against John Doe (Respondent) in March when Complainant decided to proceed with an investigation. The review was conducted by Patrick Noonan, Senior Investigator, Office of Equity and Diversity, University of Southern California.

Respondent is charged with violating USC's Student Conduct Code, § 11.53C: Engaging in any actual or attempted non-consensual physical sexual act including, but not limited to vaginal, oral or anal penetration using a body part or object; to wit penetration of Complainant's vagina with his penis.

Summary of the Investigation

On January 28, 2016, Complainant met with Kegan Allee, Interim Title IX Coordinator, and reported that on October 14, 2015, she was sexually assaulted by Respondent. Complainant stated that on January 20, 2016, she was contacted via email by Mr. Mark Hathaway, Respondent's attorney, and a private investigator for his law firm, April Davis, requesting an interview. Complainant did not agree to an interview and expressed hesitation to move forward with an investigation because these communications had "intimidate[ed her]."

On February 25, 2016, Complainant met with Gretchen Dahlinger Means, Title IX Coordinator, to discuss the communications with Mr. Hathaway and April Davis. Complainant later contacted the Title IX Office and stated that she wanted to proceed with an investigation.

On March 3, 2016, Complainant met with the investigator and the Title IX Coordinator to discuss the investigative process. Between this meeting and her initial intake with Dr. Allee, Complainant identified nineteen (19) total witnesses. Complainant also provided the investigator with thirty-two (32) screen shots of text and Facebook messages she believed were relevant and indicated she would attempt to provide more communications.

Respondent was notified of the charges in an email dated March 22, 2016.

On April 7, 2016, the Investigator met with Respondent. Respondent elected not to make a statement, identify witnesses, or provide documentary evidence. Respondent indicated that he understood the specific nature of the allegations: that he penetrated Complainant's vagina with his penis, without her consent, in his bed at his fraternity house on October 14, 2015.

At the conclusion of the investigation, both parties participated in the review and response process. This process, which comes at the conclusion of the fact-finding stage, is an opportunity for both

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parties to view and respond to the totality of evidence gathered in the investigation. It is also an opportunity to provide information responsive to the evidence reviewed.

Interviews

Potential witnesses¹ were provided by Complainant and identified during the course of the investigation. The following interviews were conducted by the Investigator:

- | | |
|------------------|--|
| 1. Jane Roe | March 3, 2016 (Gretchen Means present) |
| 2. John John Doe | April 7, 2016 (Mark Hathaway present) |
| 3. Wit 1 | April 12, 2016 |
| 4. Wit 2 | April 12, 2016 |
| 5. Wit 3 | April 18, 2016 |
| 6. Wit 4 | April 20, 2016 |
| 7. Wit 5 | April 21, 2016 |
| 8. Wit 6 | April 21, 2016 |
| 9. Wit 7 | April 22, 2016 |
| 10. Wit 8 | April 22, 2016 |
| 11. Wit 9 | April 22, 2016 |
| 12. Wit 10 | April 22, 2016 |
| 13. Wit 11 | April 25, 2016 |
| 14. Wit 12 | April 25, 2016 |
| 15. Wit 13 | April 26, 2016 |
| 16. Wit 14 | April 26, 2016 |
| 17. Wit 15 | April 26, 2016 |
| 18. Wit 1 | April 29, 2016 (by phone) |
| 19. Wit 16 | April 29, 2016 |
| 20. Wit 17 | May 4, 2016 |

Documentary Evidence

The Investigator reviewed and analyzed the following documents:

1. Intake notes from Dr. Allee's meeting with Complainant
2. Facebook messages between Complainant and Respondent (screen shots provided by Complainant; log, represented as complete set of communications, provided by Respondent)
3. Text messages between Complainant and Respondent (screen shots provided by Complainant; log, represented as complete set of communications, provided by Respondent)

¹ One witness was identified as being present outside Respondent's bedroom at the time of the incident but that individual was not interviewed due to his health status during the active period of the investigation.

4. Facebook messages between Respondent and Ms. Wit 9 (Screen shots provided by Ms. Wit 9)
5. Text messages between Complainant and Mr. Wit 7 : (Screen shots provided by Mr. Wit 7)
6. Emails between Respondent and Complainant (provided by Respondent)
7. Text messages between Respondent and [REDACTED] [REDACTED] (Screenshots provided by Respondent)

Summary of Evidence

Complainant

On January 28, 2016, Complainant reported that she was sexually assaulted by Respondent, John John Doe , in his room at the Sigma Alpha Mu fraternity house, on October 14, 2015. According to Complainant, Respondent penetrated her vagina with his penis without her consent.

At the time of the alleged assault, Complainant and Respondent had been in a non-exclusive dating relationship for several months—since the summer 2015. After the incident, the relationship continued for several weeks until Complainant ended the relationship on November 14, 2015. Complainant and Respondent attempted to have sex on two occasions prior to October 14, 2015, and had sex once after the alleged assault.

Complainant stated that, the evening of October 14, 2015, Respondent texted her, asking her to come over to his fraternity house to “cuddle”; Complainant agreed. Complainant indicated that she had not been drinking that night but believed that Respondent had been drinking because he texted: “I’m kinda drunk but super happy you’re coming.”

According to Complainant, after Respondent’s roommate left the room, they began making out and their clothes came off, which Complainant indicated was not her intent when she went to his room but she was “going along with it.” Complainant stated that she was “ok with everything until he started to insert his penis into my vagina.” According to Complainant, she told Respondent, “No,” ten to fifteen times and tried to push him off, but “he didn’t listen and just kept going.”

According to Complainant, “I was pushing against his chest. I was also using my knees to push his legs away from me. I was also trying to turn over and break free.” She continued, “He eventually got off of me a significant time later. He did pull out and push back in multiple times. That’s where all the bruising came from because he was so hard and he was trying to get me to hold still while he was jabbing his penis in or whatever.”

When asked by Dr. Allee whether Respondent used any force, Complainant stated, “He physically held me down[...] He was on top of me and kind of locked me in. The force of his weight kept me down, and his arms were to the sides of my arms which kept me from being able to get up. There was something with his legs too that kept me from being able to move.”

Complainant added, "What's also weird was his roommate had knocked a few times and [Respondent] had answered with something like 'give us a few minutes.' [Respondent] had been so focused on staying on top of me he didn't say or do anything in response."

Once Respondent stopped and got off of Complainant, she reported "he just turned around and told me to get out of his room. So out of emotion I wrote something on his whiteboard like 'You better have a great apology for this.' I walked out of his room crying just as his roommate was trying to open the door. So his roommate sees him naked in his bed and he's hard. He [his roommate] gives me this really confused face, and I just walk home. This was unusual because I'd always slept over when I'd gone over before. I'd never left in the middle of the night. So you could see the confused look on [his roommate's] face."

Complainant reported that she woke up the next day with bruising on her genital area, and on her inner, upper-thigh, which she described as, "tender when [she'd] walk[.]"

According to Complainant, Respondent texted her the next day, asking where she went, to which Complainant replied that she did not want to have sex the previous night, "but he did it anyway." Complainant stated that Respondent called her immediately and during their conversation, "He apologized and said, 'If we were going to have sex it should have been on your terms. I knew you were hesitant, and I shouldn't have taken over like that.' He told me he was starting to tear up and cry, so I don't know if there were witnesses who would have seen him there. So later that day he texts me and says he feels bad and maybe if he wasn't drunk he would have known better, and he said physically he'd crossed a line."

Following the confrontation, Complainant said that she told multiple people about the incident, specifically, that Respondent had sex with her when she did not want to have sex. According to Complainant, "I didn't use the word 'rape' because at the time I was trying not to make it a big deal and I hadn't yet realized myself that it was a rape. To him I'd said 'You had sex with me, and I didn't want to.' So I knew what had happened. I just wasn't using the word 'rape.'"

Complainant stated that she tried to forget about the incident and "push all these emotions out of [her] mind" as she went through internship recruitment interviews. Complainant explained that she experienced ongoing health issues during the Fall 2015 semester, and "felt like [she] needed support from him. So [she] continued to see him after the sexual assault." According to Complainant, "[Respondent had] never been physically abusive, other than that one night, but he'd been emotionally manipulative before and after that[...] It's funny that I thought I was getting emotional support from him when he kind of didn't care about what was going on in my life."

Complainant indicated that she realized over Winter Break that, because it had been non-consensual sex, what happened was "by definition 'rape.'" At that time, Complainant again confronted Respondent, this time via Facebook messaging. She stated that Respondent admitted via Facebook message that Complainant did not say 'yes' to having sex but Respondent insisted that he was not a rapist, "like Bill Cosby."

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Complainant stated that she was “emotionally torn up” by the “back and forth” with Respondent during their Winter Break and described herself as feeling “ashamed” about what happened.

Wit 4

Wit 4, a friend of Complainant, indicated that she spoke with Complainant over text message and in person in the days immediately following October 14, 2015. Wit 4 stated that Complainant told her that she and Respondent had sex but that she did not want to have sex, and that “Everything hurt, and that she had lots of bruising.” According to Wit 4, Complainant did not “give any details about what they did during the sex, just that he forced her into it[...].” She said that she firmly said ‘no’ while they were in bed, but then he just went ahead and did it anyway.”

Wit 6

Mr. Wit 6, the president of Sigma Alpha Mu, Respondent’s fraternity, first learned of the incident in January 2016. He was told by Wit 17, a friend whom he trusts “with [his] life,” that Complainant had reported the incident to her. According to Mr. Wit 6, he asked Respondent about the incident and “he said they had a complicated relationship and that there was one night in particular that could be seen as an issue.” Nonetheless, Mr. Wit 6 stated that Respondent told him that he did not feel that he violated any laws, or policies, or had done anything wrong, and that Respondent never denied the allegation but indicated that, “It’s complicated.”

Mr. Wit 6 also spoke to Complainant about the incident and, “Her version was that that night she was sexually assaulted. She said she assumed from her texts and their relationship that she would go over and they would cuddle and have a nice night, but instead he really wanted to have sex. Then she left, really upset, crying—she said that was the first time she left in the middle of the night, if that says anything.”

Mr. Wit 6 stated that, “Both [Complainant and Respondent] agreed that, at a minimum, there was an argument or a miscommunication.”

Wit 7

Mr. Wit 7, a friend of Complainant since freshman year, indicated that he received text messages from Complainant the morning after the incident. Mr. Wit 7 stated that, in the text messages sent on October 15, 2015, “[Complainant] told me that ‘unwanted sex occurred last night,’ that’s how she put it. I didn’t know right away that it was [Respondent], but she told me in that conversation that it was. She said she went over and he really wanted to have sex but she didn’t, she said ‘no,’ but he physically forced himself onto her. She said she didn’t want it, that she was saying ‘no,’ trying to push him off, that kind of thing.”

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According to Mr. Wit 7 ; he accompanied Complainant to the Engemann Student Health Center after Winter Break, and waited for her while she went in to speak to a counselor. He stated that Complainant told him some of what happened in the meeting and, in the process, discussed again the details of the incident. Mr. Wit 7 : indicated that the version of events that she provided him in January did not differ from what she had texted him the morning after the incident.

Mr. Wit 7 : also reported that he believes Complainant reported the October 2015 incident to the Title IX Office because she wanted to “keep it from happening to someone else.”

In her texts to Mr. Wit 7 : on October 15, 2015, Complainant shared details of the incident as well as her physical state following the incident. The texts, which were provided by Mr. Wit 7 ;, are attached as Appendix A.

In her texts to Mr. Wit 7 ;, Complainant states, “Unwanted sex occurred last night and I feel so shifty and I have bruises all over my private parts and I can’t even walk or sit everything hurts.” Complainant continued, “There’s this guy I’ve been having a thing with and he really wanted to have sex yesterday and I didn’t and he was persistent and aggressive for like two hours and I just kept pushing him off of me and telling him to stop.”

Complainant continued, “He originally asked me to come over just to hang out and cuddle and sleep over which we’ve done a few times before and I was cool with that. But that’s not what actually happened[...] At the time I really just needed some affection[]And emotional support.”

Complainant later states, “I didn’t know my genitals could hurt this much[...] I keep thinking this is my fault and I’m the one to blame for it[.] Like if I hadn’t have led him on this wouldn’t have happened. Or if I had been more firm in saying no[.] But like I wasn’t super clear that I was opposed to it. Like we were hooking up and I was fine with that but then I didn’t want to have sex but idk[.] Like I guess I could have spoken up louder.”

Mr. Wit 7 : stated to Complainant, “If I tell you I’ll give you a cookie it doesn’t mean you can steal my fridge.” Complainant then responded, “You’re right, that makes no sense[.] Also why do I have bruises.....this was so aggressive[.] I’m so sore[.]”

Wit 9

Ms. Wit 9 ;, a friend of Complainant and roommate of Respondent’s current girlfriend, Wit : Wit 15 ;, indicated that she spoke with Complainant on October 15, 2015: “Yeah, so the morning after—sorry it’s been a long time and we haven’t really talked about it much in a while—I think she was there overnight, and she just seemed confused about what had happened. I think they may have both been drinking. She said, though, that they had sex, and that he forced himself on her.”

When asked if Complainant shared any specific details about the encounter, Ms. Wit 9 : stated that, “She told me that she said ‘no’ and that he forced himself on—in, on? I’m not sure—on her.” Later in her interview, Ms. Wit 9 stated that, “Well, I think they may have both been intoxicated and

that may have contributed to what he did because he was sloppy—a sloppy drunk, I guess. Oh, she also shared at the time that she tried to push him away, like with force, but he still just did what he did.”

In December 2015 and January 2016, Respondent and Ms. Wit 9 exchanged approximately five Facebook messages, which were provided by Ms. Wit 9. In these messages, Respondent tells Ms. Wit 9 that Complainant was very upset with him and that “[Complainant] could probably use some friends.” The general tone of the messages from Respondent was one of concern for Complainant and indicated a desire to repair the relationship between him and Complainant.

Ms. Wit 9 told the investigator that Complainant had a hard time deciding whether to file a report but as she saw him dating other people, she chose to file because she did not want the same thing to happen to others that happened to her.

Wit 10

Ms. Wit 1, a friend and sorority sister of Complainant, indicated that she spoke with Complainant the day after the incident as they were getting ready for an event that evening. According to Ms. Wit 1, “[W]e were at my apartment getting ready for an event, and she said that she was with [Respondent] last night and that she was feeling kind of weird, and that she didn’t have a good time with him. She usually had a good time, so I asked what was wrong or what happened and she basically said she just wasn’t happy with things and the way things were going. She was just very somber about it.”

When asked if Complainant discussed any details about her encounter with Respondent the night before, Ms. Wit 1 stated, “[S]he was really somber, but she said she had bruises down there—I just, thinking back on it, I just didn’t connect the dots. She told me all of this like it was a normal thing[...] [S]he said she was feeling weird, but not really why. She said she felt pressure.”

Upon their return to USC after Winter Break, Complainant told Ms. Wit 1 that, “she was saying ‘no,’ but he was like, ‘no, it’s fine, it’s fine.’ Like he was taking her ‘no’s as ‘maybe’s.”

Additionally, according to Ms. Wit 1, Complainant struggled making a decision about what to do after the incident.

Wit 15

Ms. Wit 15 is the current girlfriend of Respondent. When asked if she knew anything about the incident on October 14, 2015, Ms. Wit 15 stated, “[Respondent] shared some details about the incident. He said, like... I don’t really remember... Well, he said he was dating her and there was this incident, and there might have been a miscommunication. He didn’t share any other details, though.”

Wit 16

Ms. Wit 16 , a friend and sorority sister of Complainant, stated that she first learned of the incident in December and, “The most she said to me about specifics was that she vocalized that she didn’t want to have sex that night and that he was aware that she wasn’t into it. I don’t know if he knew that she wasn’t into it at the time, or if that was after.”

Ms. Wit 16 , who is Ms. Wit 15 ’s roommate, stated that in their conversations, Ms. Wit 15 has indicated that Respondent “knows that something was wrong about that night and he knows where Jane is coming from.”

Additional Interviews

In addition to the interviews listed above, the Investigator met with multiple witnesses identified by Complainant who all indicated that they heard Complainant’s version of the incident on October 14, 2015. All witnesses described consistent versions of the encounter, which were given by Complainant between October 2015 and January 2016.

Additionally, numerous witnesses interviewed by the Investigator indicated that Complainant was scared and intimidated by Respondent’s attorney and private investigator and that the attorney’s involvement discouraged Complainant from filing a complaint with the Title IX Office. Further, multiple witnesses described Complainant as having a difficult time making the decision to file a complaint with the Title IX Office due to concerns of personal ramifications, fear of Respondent’s attorney, as well as Complainant’s conservative, religious upbringing and concern for how her family would react if they learned of the situation.

Documentary Evidence

Text messages between Complainant and Respondent

On March 3, 2016, Complainant provided screen shots of text messages between her and Respondent. On May 10, 2016, Respondent provided a log, which he stated includes all text messages sent between him and Complainant from September 16, 2015 to the present. As explained under “Evidentiary Anomalies” infra, specific text messages were not included in the version initially presented to the investigator. Text messages between Complainant and Respondent from October 14, 2016 to the present are attached as Appendices B1 and B2, respectively.

Text messages before the incident on October 14, 2015 indicate that Respondent asked Complainant to come to his apartment to sleep over and “cuddle.”

The following day, text messages were exchanged between Complainant and Respondent regarding the incident.

In the October 15, 2015 text messages, Complainant confronted Respondent about his behavior, saying, “It was clear all you wanted was to have sex and you wouldn’t stop until you did, which

was really uncomfortable for me and also unwanted. And even though I audibly said things like stop and no, you kept persisting. I had to physically push you off of me multiple times because you wouldn't stop on your own. In addition to being forceful, you also tried to guilt trip me into feeling bad and having sex." Complainant also stated, "I just found bruises between my legs[...] I think it's just from general aggressiveness."

Respondent replied to Complainant with various forms of apology, as well as the missing texts described below.

Facebook messages between Complainant and Respondent

On March 3, 2016, Complainant submitted screen shots of Facebook messages she was able to capture and that she felt relevant to the incident. On May 10, 2016, during his Review and Response meeting, Respondent provided 252 pages of Facebook messages between him and Complainant from June 3, 2015, through the present, which he represented as a complete set of the communications between the parties during that time period. All messages provided by Complainant and Respondent from October 14, 2015, through the present are attached as Appendices C1 and C2, respectively.

Over their Winter Break (after the incident), Complainant and Respondent exchanged a series of Facebook messages discussing what occurred, as well as the ramifications of the incident to their relationship. The earliest message in this exchange was sent on December 29, 2015.

In their initial messages, Complainant again confronts Respondent about "the time [Respondent] pinned [her] down and had partial sex with [her] when [she] didn't want to." In his response, Respondent states, "I have a huge mixture of guilt, nostalgia, and confusion about everything that happened." He also states, "I understand your perspective on the situation and I feel terribly about it. There was clearly a huge miscommunication between us and I feel horrible about that. We both definitely made mistakes that night and we weren't on the same page, I only wish that it hadn't led to there being so much shit between us."

Respondent goes on to say, "A huge mistake of mine which I recognize now is that you should have been in control the whole time. It was a bigger event for you then[sic] for me, I should have let you control the speed of our relationship. For me, sex isn't a big deal because I'm used to it, so I just wanted to jump into it as though you were in the same place that I was."

Respondent states in another message to Complainant, "Can't you see that I'm a regular person? I'm not some knight in shining armor that knows the right thing to do in every situation. I know that I'm flawed but I don't think you're at all looking at things from my perspective."

He continues, "I understand why you are hurt. Can't you understand why I didn't know this would happen? If there was one thing I wish I could make you understand it's that I never meant you any

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harm and I had no idea that you would get this torn up. Now that it's happened I'm willing to do literally anything that will make it up to you. I don't know what else you can ask of me."

He states further, "I didn't realize how much you cared about me. I didn't realize how big a deal sex was for you, which I should have but I had never been with a virgin before and I felt like I just had to show you the way."

Respondent states that he was not "that drunk" and had "full recollection" of having sex with Complainant. He tells her, "It seems to me like you were using physical gestures that seemed obvious to you but seemed subtle to me to tell me you didn't want to be having sex." He then states, "If I could go back in time and make sure that we talked everything through before we started I would. I wish that there was better communication at the time between us. But there's no going back now[...]"

Respondent states, "We both made mistakes and I'm completely willing to admit to mine." He goes on to say, "[F]rom my perspective I view everything that happened between us as a bad miscommunication[.]"

In part of their Facebook conversation, Respondent states that when he thinks of rapists, he thinks of people like Bill Cosby and, in comparison, what happened between him and Complainant, "didn't feel like rape, it felt like we had a failure to communicate effectively."

At one point, Respondent states that, "Maybe I thought that I had convinced you, and I shouldn't have done that, everything that happened that night was a mistake, but I didn't realize the damage I was doing."

Respondent goes on to say, "I shouldn't have pushed you at all to have sex without your full and complete consent. It's the biggest mistake I've made in my life and the most hurt I've ever done to someone."

Complainant states to Respondent, "your actions are equivalent to bill cosby's," to which Respondent replies, "I think that's unfair, Jane. Bill Cosby was knowingly drugging and raping numerous women. I really didn't know that I was scarring you at the time that we were having sex. I was trying to be as gentle as possible and when you told me to stop I did. I'm not saying that justifies my actions, I'm just saying that I wasn't trying to cross your boundaries or force you to have sex with me. I really just wanted to improve our intimate relationship and work towards what I thought was generally a mutual goal of ours. Again, I went about that in a terribly wrong way but can't you cut me some slack and not compare me to Bill Cosby? Even with how bad that night was there was still some romantic intimacy, at least from my end, in the sense that I thought we were growing our relationship, not destroying it. I take responsibility for the mistakes made that night. I want to make things better moving forward."

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Complainant then responds, “John l, you didn’t stop when I told you to. This is so frustrating that you keep saying you did. Eventually when I said no the 20th time you stopped, but it took a damn long time before I was able to get the point through your head. Okay no, you didn’t maliciously drug and rape me. I know that. But I do want you to understand how serious this is.”

Respondent also stated to Complainant, “Please try to think about your life today and not what happened between us a few months ago. In the grand scheme of your life, it’s a minor event that doesn’t reflect who you are or who you will be in your life. Just because I did something shitty doesn’t mean that you have to spend the rest of your life worrying about it. Both of us know that you’re a talented person, and I mean that, and that you have so much more to enjoy in your life.”

Evidentiary Anomalies

During her March meeting with the investigator, Complainant provided screen shots of text and Facebook messages from her phone, which she acknowledged were not all of the text messages sent between the parties but, rather, were those she felt were most relevant. (Attached as Appendix B1 and C1, respectively)

In May, during evidence review and response, Respondent provided text and Facebook messages, through his attorney, Mr. Hathaway, which both Respondent and Mr. Hathaway represented as complete records of the communications between Respondent and Complainant. The messages were provided to the investigator as paper files, with the Facebook messages bound, in reverse chronological order, with page numbers ‘1’ through ‘252’ in the center bottom footer.

The text message spreadsheet was stapled, on legal-size paper, with a Bates stamp on the bottom right corner of each page, numbered ‘0001’ through ‘0017.’ The Investigator requested, via email, that Respondent provide a “full text” version of the text spreadsheet, as the paper document showed only one line of each text message, the majority of which contained additional content beyond the confines of the cell.

Respondent electronically provided what appeared to be an extracted text log of all messages exchanged between him and Complainant. The primary body of text messages and correlated data ranged from cell A1 (first column, first row) to R1001 (18th column, row 1001) and is attached as Appendix B2.

Two text messages, which had been provided by Complainant as screen shots, were omitted from the Bates stamped paper text log provided by Respondent. Those messages did appear in the electronic spreadsheet file but in a non-sequential location.² Their chronological placement on the spreadsheet should have placed these text messages in column Q (the 17th column) and rows 514 and 541. However, in the electronic version, they were placed in column BY (the 77th column)

² Attached as Appendix B3.

and rows 1016 and 1020, respectively. Hundreds of cells (approximately 7 pages worth) separate the two missing texts from the body of the document. No other text messages appear missing or misplaced.

The text of the first message, sent by Respondent at 4:48:01PM on October 15, 2015, is as follows:

I'm sorry that I was so persistent. But to be fair when you told me to stop and that we should try again some other time, I did. Like I said last night it is your body and you decide what to do with it. If I had any idea that last night would hurt you so much I would have never in a million years tried to touch you. I really wasn't trying to be malicious, I wasn't trying to use you, and I definitely didn't know that I was hurting you so much. Maybe if I wasn't drunk I would have known better but all I really wanted was for us to have fun together and I feel so badly that instead I've made you so upset. And I was [sic] also feel bad that I feel like a terrible person when I would never want to hurt you. I don't know why drunk/asleep me was so rude to you afterwards but I'm so sorry about it all and I wish that you could see that and realize that nothing really has changed between us other than I clearly made [sic] a mistake and should known [sic] better but I'm not just thinking about sex all the time and I really do enjoy and miss all the other parts of our relationship. I wish I could explain things better but I've just never felt so guilty about hurting someone in my life and I don't know how to handle it.

The text of the second message, sent by Respondent at 12:04:01AM on October 16, 2015, is as follows:

Okay. I've been thinking about you all day and I know that it was a hard one for you. I'm gonna go to bed but i [sic] hope you'll feel at least a little better tomorrow. Hopefully knowing that I [sic] really care about you makes you feel at little bit better. I really think this will be for the best for us in the long run, but maybe that's hard to feel right now. Please understand how incredibly bad I feel about distressing you. Physically I may have crossed [sic] a line but I think emotionally I've never realized how much you matter to me right now and I won't be able to live with myself unless I know that things are good between us. I really hope this pain leaves you and you can look at the good things we have. I'll stop talking now but have [sic] a good night Jane [sic]. I'm sorry again and I hope sooner or later you [sic] can forgive me.

Complaint filed by Respondent against Complainant with Title IX Office

Respondent filed a complaint with the Title IX Office on March 4, 2016, in which he alleged that Complainant has been "harassing [him] for over two months by threatening to report [him] to the Title IX office, telling people that [he] assaulted her while [they] were together, and also asking to continue our relationship." According to Respondent, Complainant filed this complaint with the Title IX Office because Respondent posted a picture on Facebook with his current girlfriend. Respondent suggested that Complainant threatened him with filing a Title IX complaint between the time of their breakup in November 2015 and January 2016, at which time she told Respondent that she intended to file a Title IX complaint to "make [him] understand that [he] raped her."

In the complaint, Respondent also indicates that, when he sent an investigator through his lawyer, Mr. Hathaway, to contact Complainant, Complainant stated, "I won't report anything, please keep your lawyers out of my life."

Complainant's Review and Response to Evidence

Complainant met with the Investigator to review and respond to the evidence gathered throughout the investigation on May 3, 2016, and then again on May 5, 2016, to review the transcript from the interview with Ms. Wit 17, which took place on May 4, 2016. Complainant then reviewed the information provided by Respondent during his review and response meeting via the online server, Onehub, from May 16, 2016 through May 19, 2016.

Respondent's Complaint of Harassment

In response to a complaint filed by Respondent against Complainant with the Title IX Office, in which Respondent indicates that this claim by Complainant was motivated by a Facebook picture of Respondent with his current girlfriend, Complainant stated that she was unaware of the Facebook post because, as Respondent indicates in his complaint, Complainant does not have access to his Facebook account.

Complainant stated that she took time to decide and wavered regarding whether or not to file because different factors were weighing on her at different times, and she indicated that it was a "very emotional decision." Complainant also stated that her suggesting to Respondent that they maintain a relationship or friendship was not "forcing" him to accept a relationship or friendship.

Consent Video from Sorority Sexual Harassment Training

Ms. Wit 11, a friend of Complainant, sent a YouTube video to the investigator, which she identified as causing significant distress for Complainant during their sorority's sexual harassment training in January 2016. The video portrays a woman acting out a sexual encounter as a person on top of another, saying things like, "come on, I thought you liked me," and "I promise you'll like it," and "just do it for me." Complainant confirmed, after watching less than five seconds of the video with the investigator, that the video provided by Ms. Wit 11 was the video that disturbed her because, "The position was the same, he was over me like that, and he was saying literally these exact same things, word for word, like, 'Come on, I promise you'll like it... Normal people want to have sex.' It was like reliving the situation."

The video may be found at: <https://www.youtube.com/watch?v=TD2EooMhqRI>

Respondent's Review and Response to Evidence

Respondent met with the Investigator on May 10, 2016, to review and respond to the evidence gathered over the course of the investigation. Present at this interview was Respondent's advisor and attorney, Mark Hathaway.

During this meeting, Respondent provided a statement in response to the complaint, 252 pages of Facebook messages between him and Complainant, as well as a forensic log of text messages between him and Complainant between September 16, 2015 and January 4, 2016. Respondent indicated that the text messages and Facebook messages were complete representations of all communications between him and Complainant but, as described above in the "Evidentiary Anomalies" section, certain texts were found to be missing from the evidence provided by Respondent. Respondent did not provide any witnesses but did indicate that he believes people saw him crying in his fraternity house on October 15, 2015.

Respondent indicated that, in their encounter on October 14, 2015, he and Complainant had two "unsuccessful" attempts to have sexual intercourse. According to Respondent, Complainant told him to stop once, they cuddled, and then they tried a second time, were again unsuccessful, and then fell asleep.

When asked what happened to indicate affirmative consent, Respondent stated, "Well, we had a conversation about how we were going to have sex. I went to the other side of the room, to get lubricant, and I said 'this should make things feel better' and she said 'I hope so.'" Respondent indicated that he then placed lubricant on his penis and Complainant's genitals, and attempted to penetrate her vagina with his penis, and indicated that his penis was "less than a centimeter" inside Complainant's vagina.

When asked for more details about the encounter, Respondent indicated, "Well, our clothes came off, we took each other's clothes off. We were touching each other in the genital areas, and it led towards sex." He added, "By the time we were in bed, applying lubricant, she seemed down, like she had on the prior occasions[...] I didn't do anything against her will."

Respondent stated that "I'm not sure how she could have been bruised, I thought I was being very gentle. I never forced her[...] She says I was aggressive but it was probably the least aggressive sexual encounter I've ever had. It was just the two of us barely moving. Me watching for her reactions."

In response to Complainant's statement that she was struggling to keep Respondent off of her on October 14, 2015, Respondent indicated that the encounter was not a struggle and was an "intimate encounter." According to Respondent, "I was applying a slight pressure, but she was resistant, so I never really entered her, I was kept at the entrance. But we had more success on our fourth attempt[...] With our first two attempts, there was no issue, with the fourth there was no issue, so I don't know why this time was different. It didn't seem different." He then added, "I didn't force her into it. If I wanted to I could have, but I didn't. She was discomforting, and I could tell she was less than happy [but then she told me to stop and I did]." Respondent indicated that Complainant never told him to stop until she said 'no,' which he described as "a clear moment" when she told him to stop, and he did.

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According to Respondent, Complainant gave him an ultimatum over Winter Break in which she told him that he would either have to date her to that she would file a Title IX complaint.³ He also stated that Complainant filed this complaint in response to an Instagram picture of Respondent with his current girlfriend.

Respondent stated that he took a lot of responsibility in his Facebook and text messages with Complainant but not because he felt he was at fault. Respondent indicated that he took responsibility in his messages in order to deescalate the argument between him and Complainant. According to Respondent, "I don't believe it was a rape, or a sexual assault, but she was upset. And I probably went too far trying to apologize."

Findings

Analysis

The University is primarily an academic community. As such, the University seeks to maintain an optimal educational environment. To achieve this objective, the University exercises certain disciplinary and discretionary powers designed to protect its community. In furtherance of this objective, the University has established and maintains standards of conduct that reflect the very nature of our academic community and the need to preserve an environment conducive to academic excellence. The University's code of conduct establishes standards that exceed those reflected in the general laws of society and its students are expected to meet this higher standard of conduct.

The University actively endeavors to ensure that all members of its community (students, faculty, staff and friends) pursue their work and education in a safe environment, free from sexual coercion, violence and intimidation of any kind. The university community is committed to fostering a safe campus environment where sexual misconduct and harassment are unacceptable. All members of the university community are expected to conduct themselves in a manner that does not infringe upon the rights of others.

The standard of proof in adjudicating allegations against an accused student shall be such evidence that, when weighed against that opposed to it, has the more convincing force and the greater probability of truth.

Under USC's Student Code of Conduct, Section E.5.IV.a., "Sexual assault occurs where [there] is no affirmative, conscious and voluntary consent, or consent is not freely given," or where, "Physical force, threats, coercion or intimidation are used to overpower or control another, or the

³ Respondent did not identify a specific message or conversation in which Complainant presented him with an ultimatum and none of the text or Facebook messages provided to the investigator indicated an ultimatum that offered Respondent the choice between a romantic relationship and a Title IX Complaint. The only choice presented to Respondent by Complainant was whether to remain friends or completely cut off communications.

person assaulted fears that he or she, or another person, will be injured or otherwise harmed if he or she does not submit[.]”

According to Student Code Section E.5.IV.d:

An affirmative consent standard applies in the determination of whether consent was given by both parties to sexual activity. “Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that they have the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent. It shall not be a valid excuse that Respondent believed that Complainant affirmatively consented to the sexual activity under either of the following circumstances:

- i. Respondent’s belief in affirmative consent arose from the intoxication or recklessness of Respondent.
- ii. Respondent did not take reasonable steps, in the circumstances known to Respondent at the time, to ascertain whether Complainant affirmatively consented.

It should be noted that the University does not consider prior sexual acts between parties as an invitation or consent to sexual intercourse. Our affirmative consent policy expressly requires that consent must be given to the immediate sexual act.

Here, the weight of the evidence indicates that “affirmative consent” was not acquired prior to or during the sexual penetration. In making this determination, the Investigator finds the testimony of Complainant more credible than the testimony of Respondent.

Complainant’s account of the night of October 14, 2015, has been consistent since she confronted Respondent on October 15, the following day. In her numerous texts and verbal statements to multiple parties, including Respondent, Complainant has indicated that she did not want to have sex with Respondent on October 14, 2015. Additionally, Complainant has consistently indicated that she communicated this to Respondent by saying stop, no multiple times and trying to push him off of her using physical force; nonetheless, he persisted until he penetrated her vagina with his penis.

Complainant also immediately reported bruising to multiple sources, again including Respondent, and stated that she attempted to push him away while he was on top of her, and while asking him to stop and saying ‘no.’ Complainant’s bruising indicates that the encounter between her and

Respondent was prolonged and physically significant. This corroborates Complainant's description of a "struggle" that occurred over a period of time, not Respondent's description of an encounter that was "very gentle," brief, and involved very little physical activity.

Although Complainant did not report the incident immediately, her attempts to repair or maintain a relationship with Respondent do not undermine the veracity of her report. Complainant's reported internal debate, corroborated by multiple witnesses, is consistent with her description of her struggle to understand the nature of what happened between her and Respondent, a person with whom she believed she had an emotionally supportive, romantic relationship. Moreover, Complainant's statements to Respondent the morning after the incident indicate credibility in her report of sexual misconduct in October, months before her ultimate report. Likewise, the subsequent consensual sexual encounter between Complainant and Respondent does not equate to consent on the date in question, nor is it inconsistent with an attempt to normalize an intimate relationship or rationalize a traumatic experience.

Respondent made numerous admissions to Complainant about his actions on October 14, 2015:

"I'm sorry that I was so persistent" (October 15)

"I clearly made [sic] a mistake and should know [sic] better" (October 15)

"Physically I may have crossed crossed [sic] a line" (October 15)

"A huge mistake of mine which I recognize now is that you should have been in control the whole time." (Winter Break)

These admissions and this description of the incident stand in contrast to his description of the incident during this investigation. To the investigator, Respondent described a gentle, mutual sexual encounter, indeed the "least aggressive" sexual encounter he has ever had, NOT one in which he crossed the line physically, was persistent, and in which he was in control.

Respondent's investigative narrative also stands in contrast to his statements to his current girlfriend, Ms. Wit 15, and his fraternity brother, Mr. Wit 6. Both indicate that Respondent admitted a "miscommunication" occurred on October 14, 2015. Mr. Wit 6 further indicated that Respondent never outright denied the incident, though Respondent told Mr. Wit 6 that he did not feel he did anything wrong.

Respondent's misrepresentation and deliberate manipulation of the information provided to the Investigator severely diminishes his credibility. The two text messages not provided, then obscured, were not random or inconsequential. They contained the most significant and immediate admissions to his conduct, made before months of emotional conversation and debate, at a time when the events were fresh at hand. These admissions were made when the parties were still coupled and before litigation or the idea of report to Title IX was introduced. The content and context of these texts make the admissions contained powerful evidence of Respondent's

knowledge and actions; and his misrepresentation and manipulation of these texts erodes the credibility of his investigative narrative of the event.

Under the USC Student Code of Conduct, failure to take reasonable steps to adequately understand the circumstances surrounding a sexual encounter is not an excuse for failing to receive affirmative consent. Intoxication is also not an excuse for an individual's failure to recognize or understand affirmative consent. Given these norms, Respondent's suggestion that the incident was the result of a "miscommunication" is not a defense to Complainant's allegation, neither is his state of intoxication.

In sum, there is *sufficient evidence* that Respondent knew or reasonably should have known that Complainant did not consent to the sexual penetration on October 14, 2015.

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July 8, 2016

VIA U.S. MAIL

Mark Hathaway, Esq.
Werksman Jackson Hathaway & Quinn
888 West Sixth Street, Fourth Floor
Los Angeles, CA 90017

Re: Allegation of Gender Bias

Dear Mr. Hathaway:

I am writing in response to your letter dated June 30, 2016 to Ms. Gretchen Means. As indicated in Ms. Means' letter dated June 21, 2016, my office has referred your complaint of gender bias for review by an impartial investigator. I have ensured your letter of June 30 is included as part of that review.

Sincerely,

Kelly J. Bendell
Associate General Counsel, Litigation

cc: Dr. Ainsley Carry
Carol Mauch Amir
Gretchen Means

07/29/2016

EXH-2

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
PROOF OF PERSONAL SERVICE

I am a citizen of the United States and employed in the County of Los Angeles, State of California, at the law firm of O'Melveny & Myers, located at 400 South Hope Street, Los Angeles, CA 90071-2899. I am not a party to this action.

On July 28, 2016, I caused the personal service of the following documents:

**DECLARATION OF GRETCHEN DAHLINGER MEANS IN SUPPORT OF
UNIVERSITY OF SOUTHERN CALIFORNIA'S REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF ITS OPPOSITION TO PETITIONER'S *EX PARTE*
APPLICATION**

by handing the above document to:

Mark M. Hathaway
WERKSMAN JACKSON HATHAWAY & QUINN LLP
888 West Sixth Street, Fourth Floor
Los Angeles, California 90017

at Los Angeles Superior Court, Stanley Mosk Courthouse, 111 North Hill Street, Los Angeles, CA 90012.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 28, 2016 at Los Angeles, California.



Rachel S. Cronin

07/29/2016