

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JONATHAN N. WATERS
5299 Harbor Pointe Drive
Galena, Ohio 43021

Plaintiff,

v.

MICHAEL V. DRAKE, M.D.,
In his individual and official capacities,
President, The Ohio State University
1590 North High Street, Suite 500
Columbus, Ohio 43210

and

JOSEPH E. STEINMETZ, PH. D.,
In his individual and official capacities,
Executive Vice President and Provost,
The Ohio State University
1590 North High Street, Suite 500
Columbus, Ohio 43210

and

THE OHIO STATE UNIVERSITY
1590 North High Street, Suite 500
Columbus, Ohio 43210,

Defendants.

) Case No. 14 CV 1704
)
) Judge _____
)

COMPLAINT WITH JURY DEMAND

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“Jon is confronted with many years of ‘tradition’ and many well-meaning alumni whose proclivities and excesses need constant but gradual attitude adjustment. Jon has already begun to address these predispositions and is courageous in tackling some of the more extreme views head-on. Waters tries very hard to keep the SOM [The Ohio State University School of Music] informed of his world, an ever evolving, highly active, and interconnected sphere of decisions, protocols, and politics”

“Jon is a naturally gifted leader and he supervises a large and complex operation with grace and efficiency. This is no small task and we are fortunate to have him and his team leading this marching and athletic band program.”

Statements from **Richard Blatti**, Director of The Ohio State University School of Music, for Jonathan Waters’ 2013/14 Performance Review, signed by Dr. Blatti on June 2, 2014.

“I believe the report is largely historical... both largely historical first. And second, I appreciate the progress that’s been made, or given that things – I don’t believe things today are like they were in the past. Which I think is good. And I don’t think – I’ll try and say it again. If the band were behaving as it were reflected... in the report, then that group couldn’t march and represent the University... in this era. So I think – so no – I don’t believe that it reflects you accurately.”

“I believe that the report was overwhelmingly about people I’ve never met and that you’ve probably never met in times gone by. The overwhelming volume of this was historical information that was not relevant to you at all. Overwhelmingly.”¹

Recorded statements from **Dr. Michael V. Drake**, President of The Ohio State University on answering questions about the *Glaros Report* in a meeting with squad leaders of The Ohio State University Marching Band on August 21, 2014.

¹These quotations were taken from a recording of a meeting between squad leaders of The Ohio State University Marching Band and Dr. Drake on August 21, 2014. A certified copy of the transcript (“Drake Tr.”) has been attached as Exhibit A and is incorporated by reference into the Complaint. Drake Tr. p 28, ln. 16 – p. 29, ln. 6; p.20, ln. 13-19.

INTRODUCTION

A. *“I may run out of superlatives to describe the 2013-14 season”*

1. Jonathan Waters (“Waters”) became the full-time Director of The Ohio State Marching and Athletics Bands (the “OSU Band” or the “Band”) on February 1, 2013. That following year, Waters led the OSU Band to its most successful season ever, receiving national – and even international – acclaim. *The Wall Street Journal* in a November 1, 2013 article entitled “*Why Ohio State’s Band is Truly the Best in the Land*” wrote that “[h]ere in Ohio State country, it's hard to say who is having a better season – the school's undefeated football team or its marching band.” Laudatory headlines peppered news outlets worldwide – from Britain’s *Daily Mail* to Australia’s *Sydney Morning Herald*. The NBC *Today* show broadcast nationally a live performance of the OSU Band, and the OSU Band’s performances were YouTube sensations, with millions of viewers watching their performances each week. And indicative of just how much its popularity had grown, the OSU Band was featured in Apple’s “*Your Verse*” commercial for the iPad Air starting in January 2014. The Ohio State University (“OSU”) then leveraged the OSU Band’s popularity and had Waters travel the country raising tens of millions of dollars for OSU’s *But For Ohio State* campaign.

2. As the Director of The Ohio State University School of Music, Richard Blatti, summed up the 2013-14 season in his June 2, 2014 performance review of Waters: “I have never witnessed football crowd reactions like I did this season, nor have I felt this kind of buzz around one of our university ensembles, not in 25 years on this faculty. This is largely due to Jon’s creativity, his knowledge of the medium, and the rapport he has with these students. Truly inspirational. Based on that appraisal, I may run out of superlatives to describe the 2013-14

season.” Yet after extolling high praise on Waters on June 2nd, The Ohio State University and its employees would fire him and destroy his good name only six weeks later.

B. The Department of Education’s Investigation of OSU and the Glaros Report

3. Troubling issues were brewing for OSU having little to do directly with the OSU Band. On May 1, 2014, the United States Department of Education Office of Civil Rights (“Department of Education”) named OSU as one of 55 colleges and universities in the United States “under investigation for possible violations of federal law over the handling of sexual violence and harassment complaints.” Three weeks after the Department of Education’s public announcement (and ten days *before* Director Blatti signed his exceptional performance review of Waters), the mother of a former Band member approached The Ohio State University Office of Integrity and Compliance alleging that the Band’s culture was “sexualized,” and requested an investigation of her allegations.

4. A deeply flawed and incomplete report ensued, skewed and distorted more to appease the Department of Education than to afford due process to Waters. Chris Glaros, Assistant Vice President of Compliance Operation and Investigations for the Office of Compliance, apparently oversaw the investigation and preparation of the report (the “Glaros Report”), and signed the resulting findings. The Glaros Report was riddled with factual errors, material omissions, and result driven. The deeply flawed Glaros Report then formed the basis of OSU’s decision to terminate Waters as Director of the OSU Band, less than two months after he was praised by OSU for his “courageous” efforts “tackling some of the more extreme views [of the OSU Band] head-on.”

5. Problems riddled the Glaros Report, including that OSU’s methodology was destined to produce an invalid result. Only ten of the 240 current members of the OSU Band and

its 4,300 or so alumni were interviewed for the Glaros Report. This methodology resulted in a too small, unrepresentative sample size, which in turn led to a skewed picture of the culture of the OSU Band. And even in that too small, unrepresentative sample size, the Glaros Report distorted and miscast much of the significant testimony.

6. At least three of ten current members or alumni interviewed have objected to how their comments were misconstrued. One of the ten wrote in a letter to Dr. Drake and the OSU Board of Trustees that “[m]y comments were never identified or included in the report. A flagrant disregard for the anecdotes, opinions, and commentary that I provided on the band culture during my hour-long interview leads me to the conclusion that this investigation was not intended on finding the truth. This is truly unsettling.”

7. Another band member interviewed wrote in a letter to Dr. Drake and Steinmetz that she wanted to “express dissatisfaction regarding how my statements were presented in the report” and that “the investigators of the report choose to exclude vast amounts of testimony which contradict the conclusion presented.” She continued that the report’s “assertion that there is ‘no tangible evidence’ of efforts to change the band culture is without merit. This perception shows a complete willingness by the university to simply ignore the evidence contrary to the findings in the report.”

8. A third interviewee wrote in a letter to Dr. Drake that “at the center of this issue is an investigation that I feel was deeply flawed and executed with great carelessness and little concern with finding the truth. As someone with a deep understanding of the band, I would think that the hour I spent in the interview would have been used to gather the information I have about these issues and experiences. But as I recall, I was asked only a few general questions

about the majority of the content in the report.” Many others have also criticized the Glaros Report’s methodology.

C. Dr. Drake’s Two Versions of the Glaros Report

9. Yet, despite these problems, Dr. Drake publicly – and repeatedly – stood by the Glaros Report. In an August 13th press conference at the Columbus Metropolitan Club,² Dr. Drake publicly described the culture of the OSU Band as one including “[b]ehaviors that would not be tolerated in any class or in any unit on our campus - and I dare say – not in any of your companies.” Dr. Drake proclaimed that “[w]hat we felt was we had the facts that came to us from the investigation and those facts then describe a pattern that helped us make a decision that we needed based on what we thought was the best decision we could make moving forward to support our students.” Dr. Drake said, “[t]he facts showed us there was a culture not in line with our requirements of Title IX, not in line with our principles, not in line with our values and we needed to make a change and move forward.”

10. But privately, Dr. Drake told a different story. Dr. Drake acknowledged *only eight days later*, on August 21, 2014, in a meeting with squad leaders of the OSU Band that the Glaros Report contained “a whole sheath of historical material that was from 2006 or 2011, some 2006, and before that.”³ He conceded that “[i]t was clear to me that the vast majority of all that stuff, which actually I wish I didn’t know... was stuff from years gone by and wasn’t reflective of you in the modern era.”⁴ Continuing on the flawed nature of the Glaros Report, Dr. Drake admitted that “I believe that the report was overwhelmingly about people I’ve never met and that

² A video of Dr. Drake’s statements at the Columbus Metropolitan Club can be found at the website of Channel 10, WBNS-10TV, at <http://www.10tv.com/content/stories/2014/08/13/columbus-ohio-ohio-state-Dr.-drake-defends-jon-waters-firing.html>

³ Drake Tr. p. 16, ln. 1-3.

⁴ Drake Tr. p. 33, ln. 20 – p. 34, ln. 1.

you've probably never met in times gone by. The overwhelming volume of this was historical information that was not relevant to you at all. Overwhelmingly.”⁵ And then, to reaffirm the problems with the Glaros Report, Dr. Drake conceded that “the report is largely historical... both largely historical first and second, I appreciate the progress that's been made or given that things – I don't believe things today are like they were in the past, which I think is good. And I don't think – I'll try and say it again – if the band were behaving as it were reflected in the report, then that group couldn't march and represent the University... in this era. So I think – so no – I don't believe that it reflects you accurately.”⁶

D. OSU Gives Waters the Ultimatum: Either Resign by 5 pm or Be Fired.

11. With the deeply flawed report in hand, Executive Vice President and Provost Joseph E. Steinmetz gave Waters an ultimatum on July 23, 2014 – either resign by 5:00 p.m. or be fired. Only after the ultimatum did Waters first receive a copy of the Glaros Report. Later that day, Waters' counsel asked OSU's attorneys for extra time to read, interpret, and respond to the Glaros Report that had only just been handed to Waters hours earlier. But the request fell on deaf ears. The next morning, OSU sent Waters a letter of termination ending his employment as Director of the OSU Band.

E. The Avalanche of Negative Publicity.

12. Then, OSU embarked on a calculated public relations campaign to disparage Waters and justify his termination. OSU widely publicized the Glaros Report through a dedicated website, and went so far as to have Dr. Drake issue a video statement that was disseminated and played throughout the United States. Waters' good name was dragged through the mud on national news channels, newspapers, and the internet, and Waters and the OSU Band became

⁵ Drake Tr. p. 20, ln. 13-19.

⁶ Drake Tr. p. 28, ln. 11 – p. 29, ln. 6.

fodder for unjust ridicule and embarrassment. Stories like “*Here Are The Dirty, Sexual Things Ohio State’s Band Did That Got The Director Fired*”⁷ appeared and were read widely. Current Band members report being harassed and victimized, criticized by employers, labeled as sexual deviants and to fear “retaliatory punishment for having an opinion different from the university.”⁸ Others report concern about negative effects on their career prospects, and to losing weight and sleep from stress caused by the report. To make matters worse, OSU escalated the negative publicity over the ensuing weeks with OSU spokesperson Chris Davey launching false and incendiary remarks about Waters through press releases.

F. The Scapegoat

13. Early suspicions were that OSU took these actions against Waters to stop the Department of Education’s ongoing investigation of OSU. That later proved true on September 11, 2014 when the Department of Education ended its investigation of OSU earlier than expected. A letter from the Department of Education noted that OSU had requested to resolve the Department of Education investigation “with a voluntary resolution agreement prior to the completion of [the Department of Education]’s investigation of all the issues in the review.” In that same letter, the Department of Education made explicit reference to Waters and his termination, citing it as one of the reasons why the Department of Education was ending its investigation prior to the completion of its review of all OSU’s issues. In other words, Waters was a scapegoat.

⁷ The *Huffington Post* published an article entitled, “*Here Are The Dirty, Sexual Things Ohio State’s Band Did That Got The Director Fired*” on August 5, 2014, available online at http://www.huffingtonpost.com/2014/08/05/ohio-state-sexual-director-fired_n_5649531.html

⁸ These examples are discussed in *Investigative Committee Report of TBDBITL, Inc.* that was prepared under the supervision of Gary Leppla, an attorney and former President of the Ohio State Bar Association. A copy of the Investigative Report has been attached as Exhibit B and is incorporated in its entirety by reference in this Complaint.

14. The actions of OSU and its employees are unconscionable. Dr. Michael Drake, Dr. Joseph Steinmetz, and OSU destroyed Waters' liberty and property interests protected by the United States Constitution without affording Waters an iota of due process. Waters was given no chance to effectively respond to the Glaros Report prior to his termination and the subsequent barrage of negative publicity that ensued. Doing so violated Waters' rights guaranteed to him under the United States Constitution and federal law. This action seeks to right these egregious wrongs.

PARTIES

15. Plaintiff Jonathan N. Waters is an Ohio resident living at 5299 Harbor Pointe Dr., Galena, Ohio 43021.

16. Waters served as the Director of Marching and Athletic Bands with the School of Music in the College of Arts and Sciences at OSU from February 1, 2013 through his termination on July 23, 2014. Prior to February of 2013, Waters had served as the Interim Director and an Assistant Director.

17. At all times material to this Complaint, Defendant Michael V. Drake, M.D., who is being sued in both his individual and official capacities, acted as President of The Ohio State University. OSU is a state actor and has empowered him to take administrative action against Waters under color of state law.

18. At all times material to this Complaint, Defendant Joseph E. Steinmetz, Ph. D., who is being sued in both his individual and official capacities, acted as Executive Vice President and Provost of The Ohio State University. OSU is a state actor and has empowered him to take administrative action against Waters under color of state law.

19. At all times material to this Complaint, Defendant OSU is a federal and state assisted institution of higher education and operates through its officers and employees.

JURISDICTION

20. This action arises under the Fourteenth Amendment to the United States Constitution, and under 42 U.S.C. §1983, and Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681, *et. seq.*

21. This Court has jurisdiction over this action by virtue of federal question jurisdiction pursuant to 28 U.S.C. §1331 and the protection of civil rights pursuant to 28 U.S.C. §1343.

22. Venue lies in this forum pursuant to 28 U.S.C. §1391(b) and Southern District Civil Rule 82.1 because the claims arose in Franklin County where at all times material to this Complaint the parties resided and committed the acts giving rise to this action.

FACTS COMMON TO ALL CLAIMS

A. Waters as the Full Time Director of the OSU Band

23. After serving as the Interim Director for the 2012 football season, Waters became the second former band member to be the full-time Director of the OSU Band on or about February 1, 2013. That following year, Waters led the Band to its most successful season in recent memory.

24. OSU recognized Waters' success with the Band. Waters' supervisor, Richard Blatti, wrote in a June 2, 2014 performance review that "I have never witnessed football crowd reactions like I did this season, nor have I felt this kind of buzz around one of our university ensembles, not in 25 years on this faculty. This is largely due to Jon's creativity, his knowledge of the medium, and the rapport he has with these students. Truly inspirational. Based on that

appraisal, I may run out of superlatives to describe the 2013-14 season.” In that same review, Waters was given an “*Exceptional*” rating, defined as “Performance consistently exceeded expectations. Demonstrated expertise. Modeled desired behavior for others. Trained and led others in this area. Employee was an exceptional contributor to the success of the department, college, and university.”

25. Waters’ success was not limited to the OSU Band’s performances. The OSU Band was also making great strides in improving its culture, an entrenched culture that dates back to at least the 1930’s. Activities which were demeaning and created a hierarchy among students had existed for many decades. Some were continuing when Waters assumed Band leadership. Upon becoming Band Director, Waters began in earnest to address and shape the culture to address these lingering issues.

26. Waters’ efforts to change the Band were praised by OSU, with Blatti writing that “Jon is confronted with many years of ‘tradition’ and many well-meaning alumni whose proclivities and excesses need constant but gradual attitude adjustment. Jon has already begun to address these predispositions and is courageous in tackling some of the more extreme views head-on. Waters tried very hard to keep the SOM [OSU School of Music] informed of his world, an ever evolving, highly active, and interconnected sphere of decisions, protocols, and politics.”

27. For many decades, the Band had operated on a quasi-military system based upon seniority, with all Band members initially having been drawn from the core of cadets in OSU’s Military Department. In an attempt to break down the barriers created by this system, Waters introduced an educational campaign, based on the tenets of servant leadership and other comparable methodologies. This campaign was designed in part to avoid damaging the students’

morale and feelings, especially newer Band members. Significant progress was made in this area during the 2012 and 2013 seasons, and was planned to continue in 2014.

28. Waters' efforts to change the Band's culture were extensive. For instance, the Investigative Committee of the TBDBITL Alumni Club, Inc. released its own 67 page report (the "TBDBITL Report")⁹ on September 12, 2014. The TBDBITL Report was prepared under the supervision of Gary Leppla, a former President of the Ohio State Bar Association. The TBDBITL Report specifically details Waters' efforts to improve Band culture starting at p. 60.

29. For example, Waters hosted the College Band Directors National Association (the "CBDNA")¹⁰ symposium for its 10th Anniversary. This event focused specifically on hazing in collegiate bands, in the wake of the death of a band member at Florida A&M University due to hazing. With over 250 collegiate marching band directors in attendance, Waters invited leading national experts on preventing hazing to lead discussions and implement strategies that these band directors could use in each of their situations. Waters then implemented these strategies into the training of the OSU Band.

30. Waters implemented a policy where no form of hazing was tolerated in the OSU Band. Students in the OSU Band were educated about hazing often and the squad leaders and Band staff were vigilant about identifying it and dealing with issues swiftly.

31. Waters instructed students that their inappropriate behavior would not be tolerated on buses. All forms of inappropriate behavior, including singing songs with inappropriate lyrics, using vulgar language, watching inappropriate movies, and playing inappropriate games were forbidden. The Band staff was instructed not to allow such behaviors on buses. Before each trip,

⁹ A copy of the TBDBITL Report is attached as Appendix B and incorporated by reference in the Complaint.

¹⁰ Waters has been a member of the CBDNA since 2002.

bus rules were outlined with students, squad leaders, and staff, and after each trip, all students were invited to inform the staff of any inappropriate behavior while on a trip.

32. The “Trip-Tic” was an underground publication, which aimed to make fun of and insult some students and staff in the Band. In 2012, Waters intercepted a copy of the Trip-Tic and, with Band staff, took corrective action to see that this underground publication was never published again. One student was suspended for a portion of the season, and through a campaign of squad leaders and talks with the Band, the publication was banned immediately.

33. Certain prior members of the OSU Band published a “T Row Calendar” in 2007. The “T Row Calendar” showed male members of the T Row in various levels of undress and in seductive poses, as an apparent a parody of a swimsuit calendar. Regardless of the intentions, the “T Row Calendar” was offensive and inappropriate. The “T Row Calendar” was no longer published when Waters became the Director.

34. Waters banned alcohol consumption by any member of the Band during any Band related activity. Penalties included suspension or expulsion from the Band.

35. The Band continued to receive internal and external training on alcohol and substance abuse. Corrective actions – including, but not limited to, the removal of a squad leader from their position, the suspension of Band members from performing in a bowl game, and the expulsion of a student from the Band – occurred as a result of the Band staff’s firm adherence to the alcohol and substance abuse policy.

36. The Band had a long history of older members creating nicknames for younger band members. This practice dates to the 1930’s, and many of those nicknames are (and have long been) published alongside the member’s name in the Alumni Band directory. While many of these nicknames were not offensive, some were. Upon assuming Band leadership, Waters set

about to expel all inappropriate nicknames. Discussions with squad leaders yielded fewer inappropriate nicknames. Although virtually impossible to prevent the use of nicknames in private and outside the presence of Band staff, any member of the Band staff who heard an inappropriate nickname acted immediately to stop the behavior.

37. In years past, members of the certain members of the Band had an underground, offensive song book entitled the “*Unofficial OSU Marching Band School Songs*” (the “Song Book”). The last known version of the underground Song Book was published in 2006, although as an underground publication later editions may have been produced unbeknownst to Waters and the Band staff. The 2006 Songbook was attached as an appendix to the Glaros Report. The Song Book had been banned for years, and Waters continued the ban of the Song Book.

38. The Band had a tradition dating back to the 1960’s, where some Band members would march into the stadium in their undergarments at midnight (“Midnight Ramp”), although other members would wear other forms of attire. Participation was purely voluntary. Nonetheless, upon assuming Band leadership, in or about March 2012, Waters initiated conversations with squad leaders to stop Midnight Ramp. The first step in eliminating this tradition in 2012 was to deem that swim-wear, rather than undergarments, was the only appropriate attire. Later, Midnight Ramp was eliminated altogether during a squad leader retreat on May 9, 2014,

39. For many years, the Band made a rude gesture directed at a “Go Blue” sign while visiting the University of Michigan. Waters put a stop to that practice in 2013.

40. Waters fostered an “Open Door Policy” where any student at any time was encouraged to come speak to him or any other staff member about any issue they might have.

41. As a tool to shape the culture of the Band in a positive way, Waters created a

program of community involvement and volunteerism, called “*March to Pay Forward.*” Through this program, under Waters’ leadership, Band members logged over 5,000 collective hours of community service. Service projects included:

- a. Performing at Buckeyethon for cancer research;
- b. Working with the Ohio State School for the Blind Marching Band, rehearsals, performances, and developing a version of script Ohio in Braille for performance at Ohio Stadium;
- c. Forming the name of a terminally ill boy whose dying wish was to see the Band. He was not able to travel, so during a rehearsal the Band formed his name on the field and played for him. The video was uploaded to YouTube and he, as well as all of his family and friends, got to see it before he passed away. This was done for another boy as well;
- d. Giving terminal cancer patients the opportunity to dot the “i” at Band rehearsals;
- e. Volunteering at the Gladden Community House after school program;
- f. Volunteering at the Gladden Community House food pantry;
- g. Performing for the Gladden Community House fundraiser and subsequently raising over \$125,000 last year for Gladden;
- h. Going to Port Columbus airport and playing for WWII and Korean War veterans as they returned from seeing the memorial in D.C. These events were always on Saturday nights after games, making the day over 16 hours long for those who would volunteer;
- i. Participating in Nationwide Children’s hospital performances;
- j. Performing at the Wexner Medical Center;
- k. Doing community service events on Bowl trips;
- l. Holding dozens of instrument demonstrations and concerts at many elementary, middle, and high schools around the state and locally;
- m. Contributing to American Red Cross Blood Drives;
- n. Attending hospice fund raisers;

- o. Attending Recreation Unlimited fund raisers (for children with disabilities);
- p. Volunteering for the Salvation Army during the holidays;
- q. Volunteering with the Girl Scouts and Boy Scouts;
- r. Volunteering at Pelotonia; and,
- s. Holding Band Day with “Nellie’s Catwalk for Kids” where children with cancer march with the Band.

42. Waters also enhanced leadership training for the squad leaders. Waters developed a leadership manual for the squad leaders designed to train, teach, and shape the leadership culture. He overhauled the squad leader interview process, asking candidates for leadership positions to submit a leadership résumé and created interview questions about culture change, respect, student engagement, and servant leadership. Prior to Waters doing so, no such leadership résumé or questions were asked of squad leader candidates.

43. After the selection of the squad leaders, Waters required that the staff and student leadership of the Band undergo extensive training at a number of leadership retreats and events. These leadership training events could be classified as internal training, which was facilitated by the Band staff, and external training, which was facilitated by sources outside of the Band staff.

44. Waters instituted the following internal training for squad leaders and staff:
- a. Squad leader retreat at Cedar Point in May of 2013 and 2014, where the issues discussed included hazing, first-year member treatment, and gender equity, alcohol abuse, student conduct, in addition to on-field issues;
 - b. Squad leader tryouts that included sessions on leadership and on the Band’s policies and procedures, which includes information about hazing, sexual harassment, alcohol, and other substance abuse;
 - c. Squad leader meetings that occurred weekly during the football season. These meetings included constant monitoring, evaluation, and discussion to ensure that hazing, sexual harassment, alcohol, and other substance abuse were being addressed; and,

- d. Band members and staff education facilitated by the Director annually about the collective “duty to report” incidents to OSU and to support systems contained therein.

45. Waters instituted the following external training for squad leaders and staff:

- a. Information and training on hazing provided by the Office of Student Life in the Summer of 2012-2013;
- b. Information and training on the abuse of alcohol by the Office of Student Life in the Summer of 2012; and,
- c. Culture change training at Aileron in Dayton, OH, facilitated by TD Hughes, Chairman & CEO of LaRosa’s in the Summer 2013-2014.

46. In addition to the squad leaders and staff of the Band, Waters ensured that the entire student population the OSU Band underwent training and attended sessions on a number of topics to address the need to improve the Band’s entrenched culture.

47. Waters instituted the following for external training of all Band members:

- a. Training session for alcohol abuse by the Office of Student Conduct in the Autumn of 2013;
- b. Training session for gender equity by the Office of Student Conduct in the Autumn of 2013;
- c. Training session on sexual harassment and sexual assault by the OSU Athletic Department through an external presenter in the Winter of 2014;
- d. Training session for alcohol and substance abuse by the Office of Student Life, in the Summer of 2014;
- e. Training session for sexual harassment and abuse by the Office of Student Life in the Summer of 2014; and,
- f. Training session for time and stress management by the Office of Student Life in the Summer of 2014.

48. Waters instituted the following external training for all members of the OSU

Athletic Band:

- a. Training session on sexual harassment and sexual assault by the Athletic Department through an external presenter in the Winter of 2014;
- b. Training session for alcohol and substance abuse by the Office of Student Life in the Autumn of 2014;
- c. Training session for sexual harassment and abuse by the Office of Student Life, in the Autumn of 2014; and
- d. A talk given by Kathy Sankey, Principal at Dublin Jerome HS, about personal responsibility and accountability.

49. Waters instituted the following internal training for the OSU Marching Band:

- a. Training session for alcohol and drug abuse, hazing, social behavior, and attitude by the Marching Band Staff in the Autumn of 2012 and 2013;
- b. Review of policies & procedures document by the marching band staff and squad leaders with the band in the Autumn of 2012 and 2013;
- c. A talk given to Marching Band on personal responsibility by Director of Athletics, in the Autumn of 2013; and,
- d. A talk given by Tim Gerber, Secretary of OSU Faculty Senate, about accountability, personal responsibility, and attitude.

50. Waters instituted the following internal training for all Athletic Band Members:

- a. Training session for alcohol and drug abuse, hazing, social behavior, and attitude by the Band Staff in the Autumn of 2012 and 2013; and,
- b. A review of policies and procedures document with the Band, Autumn 2012 and 2013.

51. In addition to the internal and external training for the leadership and students, Waters also instituted constant monitoring and situational awareness. Waters adopted a policy to shape culture through student education and training, internal steering of policy and opinion by Band staff and student leadership, and the monitoring and mitigation of events as they occurred.

52. In the spring of 2013, Waters was made aware of a relationship between a Band instructor at the time and a student in the percussion section. Upon review of OSU's Sexual

Harassment Policy, Waters determined that the relationship was inappropriate. After consulting with the School of Music leadership, the College of Arts and Sciences human resources personnel, as well as OSU's Office of Human Resources, the Director of the School of Music and Waters decided that an alternate arrangement could not be made and the instructor was replaced.

53. Waters was complimented and commended on two occasions by the Vice President for Student Life for his leadership and handling of a reported sexual assault during October of 2013.

54. Waters also embraced a plan to have an outside firm perform a band culture survey in a November 21, 2013 email to Executive Vice President and Provost Steinmetz. Waters wrote that “[y]ou mentioned that we would have an outside firm conduct a band culture survey, a concept I wholeheartedly endorse. The end of the season is fast approaching and I wonder if you might be able to give me an estimate on when we can expect the culture survey to take place? I am willing to forego rehearsal time to do so, but just want to plan for it so that we can maintain performance standards while participating in the survey.” Yet despite “wholeheartedly endor[ing]” a band culture survey, Waters received nothing further from Steinmetz or any other OSU official to follow up on his request.

55. A month and half later, Waters wrote to Steinmetz on January 16, 2014, again mentioning the culture survey of the Band and wanting to see if it would be acceptable to Steinmetz to have OSU band members attend a sexual harassment/violence prevention seminar presented by the Athletic Department. Steinmetz wrote back to Waters on January 21, 2014 that “I think the training event is ok with me. However, I'm not in favor of it being mandatory, especially if there are students in class at that time.” As late as January of 2014, Steinmetz was

instructing Waters not to make certain Title IX related training “mandatory” for Band members.

B. The Deeply Flawed Glaros Report

56. On May 1, 2014, the United States Department of Education Office of Civil Rights (the “OCR”) named OSU as one of 55 colleges and universities in the United States “under investigation for possible violations of federal law over the handling of sexual violence and harassment complaints.” As Assistant Secretary for Civil Rights, Catherine Lhamon, said in a released statement, “[w]e are making this list available in an effort to bring more transparency to our enforcement work and to foster better public awareness of civil rights.”

57. Three weeks after the public announcement that OSU was under investigation, the mother of a former OSU Band member approached The Ohio State University Office of Integrity and Compliance alleging that the Band’s culture was “sexualized,” and requested an investigation of the allegations.

58. The complaint arose out of allegations that her daughter had been sexually assaulted by another member of the OSU Band at an off-campus party on October 11, 2013, roughly eight months earlier. A later police report indicated that the woman refused to press criminal charges against the alleged assailant.

59. The alleged victim reported the sexual assault to Waters, who then reported it to the proper persons at OSU. An investigation followed, and the alleged assailant was eventually expelled from school.

60. That complaint from a former Band member’s mother led to an investigation apparently overseen by Chris Glaros, Assistant Vice President of Compliance Operation and Investigations for the Office of Compliance.

61. The Glaros Report was incomplete, skewed, rife with material omissions, and distorted more likely to appease the Department of Education than to afford basic fairness to Waters.

62. For example, only ten of the more than 240 current members and student staff of the OSU Band and 4,300 living alumni were interviewed, including the child of the person whose complaint sparked the investigation. Despite its avowed goal of investigating Band culture, OSU made a conscious decision to limit this interview sample and not to randomly interview other Band members. The unrepresentative sample of interviews created a skewed and unrepresentative sample of those necessary to determine the “culture” of the Band.

63. Even more troubling, several of the interviews of those Band members were distorted and information supportive of Waters was ignored. In a letter dated August 3, 2014 addressed to Dr. Drake and others, one of the individuals interviewed for the Glaros Report wrote:

...at the center of this issue is an investigation that I feel was deeply flawed and executed with great carelessness and little concern with finding the truth. As someone with a deep understanding of the band, I would think that the hour I spent in the interview would have been used to gather the information I have about these issues and experiences. But as I recall, I was asked only a few general questions about the majority of the content in the report.

64. A current band member who was also interviewed for the Glaros Report described his issues with the Glaros Report in a letter addressed to Dr. Drake, in which he wrote:

The report, whose one job, it would seem, was to bypass objectivity and damn Mr. Waters for events predating his directorship and present only condemning opinions, is hardly a valid assessment of our culture. As one of the few individuals interviewed for this report, I have some merit in stating the above assertion.

My comments were never identified or included in the report. A flagrant disregard for the anecdotes, opinions, and commentary that I provided on

the band culture during my hour-long interview leads me to the conclusion that this investigation was not intended on finding the truth. This is truly unsettling.

If I had been asked, I would have told you that seven of the Rookie Tricks were given before Mr. Waters became Director. If I had been asked, I would have told you that sixteen of the Rookie Names were given before Mr. Waters became Director. If I had been asked, I would have provided you a copy of the "secret oath" we are sworn to follow as Rookies. If I had been asked, I would have said how I have seen the song book, but have never heard any of the songs sung.

I was never asked anything like the above questions. The questions were general, and, based upon what ended up in the final report, result-oriented. I was never asked to corroborate any of the acts mentioned in the report, indicating to me that a singular account or opinion was enough for inclusion, and further damning of Mr. Waters....

65. In a letter dated August 10, 2014 addressed to Dr. Drake and others, another Band member interviewed for the Glaros Report wrote:

I am writing to express my concern regarding the methodology of the investigation, the conclusions found in the report relating to a culture of sexual harassment, and the poor decision to terminate Jonathan Waters from his position as Marching and Athletic Bands Director....

As I understand, there are upwards of 4,000 OSU marching band alumni, and 240 members of the current OSU marching band. Sadly, the investigators choose to speak to a total of nine of those people and, from that, drew a conclusion regarding a sexualized culture that is vastly different from the actual nature of the band. Much of the backlash the university is receiving from band alumni is based on this sentiment, and I strongly urge you to not discredit the viewpoints of literally thousands of people who are speaking contrary to the report released. To do so shows an unwillingness to seek the truth....

My final point is to express my disappointment in how the university handled this. Any sort of complete investigation would have found the band to be a safe and caring environment. Instead the investigators of the report choose to exclude vast amounts of testimony which contradict the conclusion presented. As a former squad leader in the band, I can tell you that elimination of hazing, alcohol abuse, and overall cultural change were items that Mr. Waters worked very hard to achieve. The assertion by the administration that there is "no tangible evidence" of efforts to change band culture is without merit. This perception shows a complete

willingness by the university to simply ignore evidence contrary to the findings presented in the report. I am deeply concerned by the university's lack of management on this matter as well. There were many options the school could have pursued, but they choose the easy one. In the process, a man's name was destroyed, the outstanding reputation of the marching band battered, and the pride and honor of its current and former members pushed to the limit.

66. So shoddy was the investigative work that the Glaros Report made assumptions about people without even speaking to them. One woman whose nickname was used as example of the “sexualized” culture in the OSU Band was never even interviewed. She wrote in a July 27, 2014 letter to Dr. Drake:

If the investigators felt that my rookie name was so offensive that it was the only one warranting an explanation, why was I never consulted about my opinion? If Ohio State has to investigate claims of sexual harassment, why was I never contacted for my side of the story? Where are the claims of sexual harassment aimed towards me coming from? If the people in charge of the investigation had reached out to me for my opinion, they would have learned that I did not feel I was being objectified or harassed by my peers....

[Waters] had zero tolerance for rookies names that he felt were purely degrading to students and during my last year he made it necessary for rows to document that they were providing their rookies with money to buy game days snacks for their rows so that the first year members could further enjoy their experience in the band instead of feeling as though they were being exploited by older members.

67. Even OSU's former Title IX and Clery Act Coordinator whose employment overlapped with Waters' tenure as Band Director, was reported in two articles appearing in the *The Lantern* on August 27th and 28th of 2014¹¹ as having stated that serious problems existed within the Office of Integrity and Compliance that lead her to file a complaint against her supervisor.

¹¹ “Former Title IX Coordinator: Ohio State Mishandled Band Probe,” dated August 27, 2014, available at <http://thelantern.com/2014/08/former-title-ix-coordinator-ohio-state-mishandled-band-probe/>, and “Meeting about Band Culture Draws Discord,” dated August 28, 2014 available at <http://thelantern.com/2014/08/meeting-about-band-culture-draws-discord/>

C. Dr. Drake's Two Versions of the Glaros Report

68. Despite all these problems, Dr. Drake continued to publicly – and repeatedly – stand by the Glaros Report and Waters' termination.

69. In an August 13th press conference at the Columbus Metropolitan Club, Dr. Drake publicly stated that the culture of the OSU Band was one including “[b]ehaviors that would not be tolerated in any class or in any unit on our campus - and I dare say – not in any of your companies.”

70. But privately, Dr. Drake told an entirely different story. Dr. Drake acknowledged *only eight days later* on August 21, 2014, in a meeting with squad leaders of the OSU Band that “[i]f the report had been true at all today, then we would have – it would have been the band who had a different action. So my view was that you were an entirely different group of people and able to represent the University proudly and... in a way that we all would be able to support.” (Drake Tr. p. 21, ln. 5 – 13).

71. In that same August 13th press conference, Dr. Drake said that “[r]eading the report, I was personally profoundly disappointed to see that there were reports that found that there were cultural problems in the band that needed to be addressed and we needed to move forward.”

72. But privately, Dr. Drake again told an entirely different story. Dr. Drake told squad leaders *only eight days later* that the Glaros Report contained “a whole sheath of historical material that was from 2006 or 2011, some 2006, and before that.” (Drake Tr. 16, ln. 1 -3) He conceded that “[i]t was clear to me that the vast majority of all that stuff, which actually I wish I didn't know... was stuff from years gone by and wasn't reflective of you in the modern era.” (Drake Tr. p. 33, ln. 20 – p. 34, ln. 1) Then continuing on the flawed nature of the Glaros Report,

Dr. Drake admitted that “I believe that the report was overwhelmingly about people I’ve never met and that you’ve probably never met in times gone by. The overwhelming volume of this was historical information that was not relevant to you at all. Overwhelmingly.” (Drake Tr. p. 20, ln. 13 – 19) And then to reaffirm the problems with the Glaros Report, Dr. Drake conceded that “...the report is largely historical... both largely historical first and second, I appreciate the progress that’s been made or given that things – I don’t believe things today are like they were in the past, which I think is good. And I don’t think – I’ll try and say it again – if the band were behaving as it were reflected in the report, then that group couldn’t march and represent the University... in this era. So I think – so no – I don’t believe that it reflects you accurately.” (Drake Tr. p. 28, ln. 16 – p. 29, ln. 6) Dr. Drake’s private comments recognized that Waters’ leadership of the OSU Band had, in fact, led to an improvement in its culture.

73. In the same August 13th press conference, Dr. Drake said that “[w]hat we felt was we had the facts that came to us from the investigation and those facts then describe a pattern that helped us make a decision that we needed based on what we thought was the best decision we could make moving forward to support our students.” Dr. Drake continued that “[t]he facts showed us there was a culture not in line with our requirements of Title IX, not in line with our principles, not in line with our values and we needed to make a change and move forward.”

74. But privately, Dr. Drake once again told an entirely different story. He told the squad leaders *only eight days later* that “[i]f the report had been true at all today, then we would have – it would have been the band who had a different action. So my view was that you were an entirely different group of people and able to represent the University proudly and... in a way that we all would be able to support.” (Drake Tr. p. 21, ln 5 – 13)

75. Dr. Drake even agreed with the squad leaders that parts of the Glaros Report were “biased,” “tainted,” and “sensationalized.” As Dr. Drake told them, “I want you to think that when I saw things that looked like they were biased or tainted or sensationalized that those were discounted because of that because that’s what I would do. Just to say that. So let me say the report had an awful lot of information in it and... speaking for myself but all but I did everything I felt that I was appropriate to filter out information that I thought was irrelevant or extraneous or inflammatory or historical.... So I guess I want to agree with you that I understand that lots of it was.” (Drake Tr. 67, ln. 17 – p. 68, ln. 8)

D. A Sample of the Falsities in the Glaros Report And Other OSU Statements

76. The Glaros Report contained a number of factual inaccuracies and falsities. Below is hardly a comprehensive list, but some examples are detailed in the following paragraphs.

77. The Glaros Report misstates on page 19 that “Waters failed to take action to eliminate the harassment, prevent its recurrence, and address its effects.” That statement is false. Waters did “take action” to eliminate harassment, prevent its occurrence, and address its effects. Those efforts are detailed in prior paragraphs in this Complaint in paragraphs 25 through 55, as well as in the TBDBITL Report that has been incorporated in this Complaint by reference.

78. The Glaros Report misstates on pages 4 through 5 that “[i]n recent years and under Waters’ direction, Midnight Ramp has been held immediately following Fesler Night, which is a semi-formal evening event where members learn about Marching Band traditions and, according to one witness, take oaths not to tell about the Fesler.” The phrase – “under Waters’ direction” – is false. Midnight Ramp did not occur “under Waters’ direction.” In addition, there

is no mention that Waters and squad leaders made the decision to eliminate Midnight Ramp on May 9, 2014, before the complaint was filed and before Waters learned of the investigation.

79. The Glaros Report misstates on page 5 that “[w]hen pressed specifically about the timing of this decision [to eliminate Midnight Ramp], Waters wavered on whether it occurred in May. Notably, Waters learned of this investigation on May 26, 2014, when he was told that it involved allegations of the Band’s culture.” This statement is misleading. Waters and squad leaders made the decision to eliminate Midnight Ramp on May 9, 2014, before the complaint was filed and before Waters learned of the investigation. The gratuitous clause in the Glaros Report that “Waters learned of this investigation on May 26, 2014” implies that the decision was made in response to learning of the investigation. That implication is false, because the decision was made seventeen days earlier. Yet, the Midnight Ramp was still mentioned to disparage Waters, but no mention made that Waters took action to eliminate it.

80. The Glaros Report also ignores the involvement of other university officials in Midnight Ramp. The TBDBITL Report points out at p. 22-23 that, “[a]s a further demonstration of the positive, non-sexual nature of the event, university staff outside of the OSUMB were specifically aware of the event, including interim OSUMB director, Dr. Russel Mikkelson, Director of University Bands, who attended the event in 2010, and university police department members, who regularly ‘secured’ the perimeter of Ohio Stadium (used with athletic department permission) for the event to facilitate positive tradition.”

81. The Glaros Report misstates on pages 8 that “[o]ne witness stated that upper classmen subject new Band members to ‘Rookie Midterms’ on long bus trips that would contain written questions and physical challenges. . . . The witness provided a copy of the ‘Rookie Midterm’ that was used in 2011 with students who are still currently in the Band.” This

statement is misleading. The language suggests that Waters permitted the Rookie Midterms. Quite the contrary, he banned them when he was Director. Moreover, the example of the “Rookie Midterm” was from 2011, and prior to Waters being named Director. The Glaros Report concedes as much by on page 9 acknowledging that Waters “told the Marching Band that this behavior needed to stop” and that “he believes the Rookie Midterms no longer occur.” Yet, the “Rookie Midterms” were still mentioned to disparage Waters, but no mention made that Waters did “take action” to eliminate it.

82. The Glaros Report misstates on page 9 that Band members would prepare an underground newsletter named “Trip Tic” about anonymous members for away game trips. This statement is misleading by its implication that Waters permitted this activity. He did not. As pointed out in the TBDBITL Report (at p. 29), “[o]nce Mr. Waters became Director, he put a total stop to the practice.” In fact, only three paragraphs later the Glaros Report concedes that “most witnesses indicated that Waters’ banned Trip Tic in 2012 after a female student was severely berated in an article.” The Report further details that after Waters found the Trip Tic in October of 2012, he inquired into who published the newsletter, disciplined the student responsible, and required the offending student to publically apologize. In addition, Waters also spoke to the entire Band “and emphatically stated that this was not acceptable and would not continue.” The Glaros Report then concedes that Trip Tic has apparently stopped.” Yet, the Trip Tic was still mentioned to disparage Waters, but no mention made that Waters did “take action” to eliminate it.

83. The Glaros Report then dedicates page 10 to the *Unofficial Ohio State Marching Band Songbook*, an underground publication drafted long ago by former Band members and containing misogynistic and alternate sexual lyrics to OSU songs and those of other universities.

The entire discussion of the Song Book is misleading by its implication that Waters permitted this activity. In fact, as explained in TBDBITL Report, at p. 29, “[a]ll offensive songs were completely banned by 2013, but many students were reprimanded for singing them much earlier.”

84. The version of the underground Song Book included in the Glaros Report was published in 2006 – more than six years before Waters assumed duties as Band Director – and had been banned for years (although, as an underground publication, no one could be certain whether later editions were published). Waters continued the ban. The Glaros Report concedes as much, writing that “as Assistant Director, [Waters] addressed students singing inappropriate songs by speaking to the band and squad leaders and by directing staff to not allow this behavior to continue.” Yet, the Song Book was still mentioned to disparage Waters, even though he did “take action” to ban it. And even more egregious, the Song Book was then attached as an exhibit to the Glaros Report, creating the inference that it was still actively in use and permitted by Waters. The publication of the Song Book would later becoming the focus of some of the ridicule that Waters would receive in the ensuing weeks.

85. The Glaros Report misstates on page 11 that “one witness stated that Waters texted dirty limericks to students. Waters acknowledged having cell phone numbers for squad leaders but denied ever texting dirty limericks.” The gratuitous sentence – “Waters acknowledged having cell phone numbers for squad leaders but denied ever texting dirty limericks” – is misleading by its implication that Waters was lying about his denial. This incident is still mentioned solely to disparage Waters even though his denial is uncontroverted.

86. The Glaros Report misstates on page 20 an interaction involving a Band member who submitted a mid-term evaluation of Waters. But the Band member involved in the incident

wrote a letter to Dr. Drake emphasizing that key portions of her testimony were excluded. In her letter, the Band member detailed how Waters had taken extensive steps to protect her from harassment following a sexual assault. As she wrote to Dr. Drake:

Without any hesitation whatsoever Mr. Waters contacted stadium security on my behalf, had me print a picture of the involved individuals to distribute to security, and told me to come to him if I ever felt unsafe. It is worth noting that this incident occurred AFTER the meeting described in the report. In other words, the meeting with him was of such little consequence that I still saw Mr. Waters as someone I could go to for help. Mr. Waters cares deeply about the well-being of his students both mentally and physically, and the idea that he would be dismissive of sexual harassment is absurd. After confirming with the investigator that the reported meeting with Mr. Waters took place, I went to great lengths and detail about the many ways in which Mr. Waters personally helped me in tough situations. Yet, as far as I can see, the entirety of that was excluded from the report....

I know what sexual assault feels like. I know what sexual harassment feels like. I know what it is like to be troubled and have fear of speaking up. I know when something is wrong and when something needs to be said, and I have the courage to say it. I say in no uncertain terms that at no point in my five years in the OSU marching band did I ever feel sexually harassed. The claim that there is a culture of sexual harassment perplexes me. The reality is quite the opposite. In my discussion with the investigator I specifically noted that at no point did I feel unsafe or sexually harassed. I described how band members look out for each other's well-being. I believe my words were to the effect of "at the end of the day, if I truly needed help, I know I could go to anyone in band and they would be there for me.

But none of the Band member's additional testimony was included in the Glaros Report. This is just one example of how the Glaros Report intentionally manipulated its presentation of the "facts" to defame Waters.

87. The disparagement was not limited to Dr. Drake and the Glaros Report, but was also perpetuated by OSU Assistant Vice President, Media & Public Relations Chris Davey, who launched false and incendiary remarks about Waters through press releases. For example, Davey released an August 27, 2014 statement (the "Davey August 27th Press Release") refusing Waters'

request for a public name clearing hearing. In that release, Davey omitted key pieces of information in further attempt to defame Waters.

88. For instance, the Davey August 27th Press Release states that “the report’s basic conclusions about the specific complaints and the culture are not refuted by anyone,” and then reiterated several of the flawed examples mentioned in the Glaros Report, including the Trip Tic, Song Book, and Rookie Midterms.

89. Regarding the Trip Tic, the Davey August 27th Press Release states that “the ‘Trip Tic,’ a newsletter with sexual content has not been denied.” This statement is misleading by its implication that Waters permitted this activity. He did not. As discussed above – but intentionally omitted from the Davey August 27th Press Release – Waters banned the use of the Trip Tic.

90. Regarding the Song Book, the Davey August 27th Press Release states that “the Songbook, with 124 different songs full of grotesque lyrics, has not been denied...” This statement is also misleading by its implication that Waters permitted this activity. As discussed above – but intentionally omitted from the Davey August 27th Press Release – Waters banned the Song Book.

91. Regarding the Rookie Midterms, the Davey August 27th Press Release states that “Rookie Midterms and Physical Challenges with sexual content have not been denied.” This statement is also misleading by its implication that Waters permitted the Rookie Midterms and physical challenges. As discussed above – but intentionally omitted from the Davey August 27th Press Release – banned them as full-time Director. Yet, Davey intentionally excluded this information.

92. The Glaros Report contains many other inaccuracies, mischaracterizations, exclusions, and problems. For example, the TBDBITL Report provides an overview of former and current OSU Band members' and third parties' comments on additional flaws in the Glaros Report. The TBDITL Report also includes an overview of the impact the Glaros Report has had on the perception of Waters and other current and past members of the OSU Marching Band.

E. The Termination

93. Sometime during the week of May 26th of 2014, Glaros called the Band office and told Waters that a Title IX complaint had been filed against him and that he would need to come to Glaros' office and answer some questions.

94. On June 2, 2014, after not hearing from Glaros about the meeting, Waters emailed Glaros to ask when the meeting might occur. Glaros indicated Jessica Tobias ("Tobias") would be in touch. Tobias contacted Waters a few days later to schedule a meeting.

95. On June 12, 2014, Waters participated in an interview with Tobias and another woman who took notes. Contrary to OSU policy, Waters was not given a copy of OSU's "Guidelines for Investigating Complaints of Discrimination and Harassment" ("OSU's Investigation Guidelines"), which would have notified him of his right to have a "support person" present, which could have been an attorney. Waters answered questions about the timeline and reporting of a student issue and the meeting lasted about 2 and 1/2 hours, after which Tobias told Waters that nothing further would be needed from him.

96. Several weeks later, however, Waters was notified that he was to submit to another interview. On July 1, 2014, Waters attended a second meeting with Tobias and another woman who took notes. Contrary to OSU policy, Tobias failed to notify Waters that this interview was focused on a separate complaint, and she again failed to provide him with a copy

of OSU's Investigation Guidelines. The tone of this meeting was much more pointed and hostile and it was all about the culture of the Band. The meeting lasted 3 hours. Waters was asked to give a written report of the cultural shaping he had done with the Band during his leadership, but no deadline was given for its completion.

97. On July 14, 2014, Waters submitted a written report to Tobias of the cultural shaping and training he had done with the Band since taking over as Director.

98. Later that same day, Waters met with Steinmetz for the first time about the complaint. At the meeting, Steinmetz placed his hand on a stack of paper and stated that there was enough in the report to fire Waters. Steinmetz presented Waters with two options, either resign immediately, or adopt a zero tolerance policy and adhere to an assessment by an outside firm called Sports Conflict Institute ("SCI"), which would assess the culture of the Band. Stunned by the accusation, Waters indicated he would adopt a zero tolerance policy and open the Band to the assessment by SCI. No mention was made by Steinmetz of Waters' email six months earlier, already endorsing a cultural survey of the Band and asking Steinmetz when it would occur.

99. Steinmetz also indicated that Waters could see the report "at some point," but would not allow Waters to see it then. Steinmetz said that the SCI cultural assessment would start soon and end by August 25th. SCI would then issue a report on the status of the culture and make recommendations from there. Steinmetz also indicated that Waters should do nothing until hearing from him or SCI and that by the end of the week, Steinmetz would have a plan in place. Steinmetz also wanted to know all of all media and public appearances for Waters and the OSU Band for the upcoming weeks. Waters provided him with a list through September.

100. On July 23, 2014, Waters was again called to a meeting with Steinmetz. At that meeting, Steinmetz gave Waters an ultimatum to resign or be terminated by 5:00 pm that day. Upon leaving the office, Waters was handed copies of the Glaros Report. That was the first time Waters had seen the report. Later that day, Waters' counsel asked OSU's attorneys for extra time to read, interpret, and digest the Glaros Report that Waters had just been handed, as well as additional time to formulate a response. The university declined that request, but extended the deadline by one hour, to 6:00 pm, to account for time spent negotiating with Waters' counsel. Waters did not resign by 6:00 pm.

101. On Thursday, July 24, 2014, Waters received a letter of termination through his counsel. The letter gave no cause for his termination. When his counsel questioned OSU about the reasons, OSU's counsel sent an email at 7:12 pm on July 24th that "[y]ou have been provided the reasons for termination. They were set forth in the meeting between the Provost and Mr. Waters, which we attended. You also have a copy of the investigation report."

102. At no time prior to his termination or the publication of that fact to the media was Waters provided notice and a meaningful opportunity to be heard on the contents of the Glaros Report and, in addition, none of OSU's employees, including Glaros, communicated with Waters about the specific findings of the Glaros Report prior to his July 23, 2014 termination and the later publication of the Glaros Report.

103. Dr. Drake and Steinmetz have not since provided Waters any meaningful opportunity to be effectively heard on the contents of the Glaros Report.

104. On August 27, 2014, Waters' counsel sent OSU's counsel a letter requesting that OSU provide Waters with a public name-clearing hearing.

105. OSU denied Waters the opportunity for a name-clearing hearing that same day, on August 27, 2014. Specifically, OSU stated, “In response to the letter that Jon Waters’ lawyer David Axelrod sent today demanding a ‘Public Name-Clearing Hearing,’ here is a statement from Chris Davey, OSU Assistant Vice President, Media & Public Relations...We will not be revisiting this decision. It is closed, and it is time to move on.”

106. Later communications from OSU have backtracked from the refusal for a name clearing hearing, but OSU has still has not offered Waters a constitutionally sufficient name clearing hearing.

F. The Avalanche of Negative Publicity

107. OSU released the Glaros Report on or around July 24, 2014 and widely published it through a website, <http://www.osu.edu/bandculture>, which included a video statement from Dr. Drake. In addition, OSU released a portion of a surreptitious recording of Waters’ interactions with a Band member that was unknown to Waters. The partial recording provided no context of the circumstances behind the interaction, but even its contents had nothing to do with the alleged sexualized culture at the Band. This skewed presentation was again made solely to disparage Waters.

108. Since then, countless newspapers and news outlets have reported on the false contents of the Glaros Report, Dr. Drake’s statements, and Davey’s press releases.

109. For instance, on July 24, 2014, the *Dayton Daily News* published an article entitled “*OSU fires marching band director over harassment culture.*” The article begins, in large letters, “Director Jonathan Waters failed to address wrongdoing, new President says.” It continues, “[t]he 92-page investigation concluded that Waters, who was a sousaphone player in the band in the late 1990s, was aware or should have known about this culture but failed to

eliminate or address it, the university said.” The article is available online at <http://www.daytondailynews.com/news/news/osu-fires-marching-band-director-over-harassment-c/ngm3M/>.

110. *The Washington Post* also reported on the story on July 24, 2014 in an article entitled, “*‘Sexualized culture’ cited in firing of Ohio State marching band director.*” The article reports that “Ohio State determined that Waters ‘failed to eliminate the sexual harassment, prevent its recurrence, and address its effects.’” The article is available online and can be found at <http://www.washingtonpost.com/blogs/early-lead/wp/2014/07/24/sexualized-culture-cited-in-firing-of-ohio-state-marching-band-director/>.

111. On July 25, 2014, *USA Today* published an article entitled “*Ohio State fires band director over ‘sexual culture.’*” The article, which also provides a video of Dr. Drake’s statement on the Band’s culture, states that, “[t]he investigation was triggered by the complaint of a parent and revealed that students often sexually harassed one another and that Waters knew about it or should have known about it. The details of the investigation are laid out in an extensive 23-page report, which describes an ‘annual tradition of members marching across the field in their underwear under the supervision of the Marching Band directors and staff, including Jonathan Waters.’” The article is available online at <http://www.usatoday.com/story/sports/ncaaf/2014/07/24/ohio-state-fires-band-director-over-sexual-harassment/13104017/>.

112. The *Los Angeles Times* also covered the story in a July 25, 2014 article entitled “*Ohio State band director fired after report finds sexualized culture.*” Underneath a large photo of Waters directing the Band, the article described the contents of the Glaros Report, stating, “In the report, investigators said they learned of the tradition known as the Midnight Ramp, during

which band members strip down to their underwear and march in formation on the field of Ohio Stadium.” The article is available online and can be found at <http://www.latimes.com/nation/nationnow/la-na-ohio-state-band-director-fired-sexualized-culture-20140725-story.html>

113. On July 28, 2014, CNN published an article entitled, “*Ohio State band director fired for ‘sexualized’ culture.*” The article reported that, “Waters had known for years about the ‘sexualized’ environment surrounding the band, in which members had to swear an oath of secrecy to protect its ‘objectionable traditions and customs,’ according to an investigation report released by the Office of University Compliance and Integrity. He failed to eliminate and prevent the recurrence of this climate, the report said.” The article and a corresponding video are available online at <http://www.cnn.com/2014/07/25/us/ohio-state-marching-band/>.

114. On August 5, 2014, the *Huffington Post* published an article entitled, “*Here Are The Dirty, Sexual Things Ohio State’s Band Did That Got The Director Fired.*” The article, which is available online at http://www.huffingtonpost.com/2014/08/05/ohio-state-sexual-director-fired_n_5649531.html, states that “[t]he investigation found a multitude of alleged sexualized hazing and harassment for new members, which the school concluded Waters ‘knew or reasonably should have known’ about, though he ‘failed to take action to eliminate the harassment, prevent its recurrence, and address its effects.’”

115. The *Columbus Dispatch* and OSU’s on-campus publication, *The Lantern*, have also reported consistently on the story since it broke on July 24, 2014.

116. On August 27, 2014, *The Lantern* published an article entitled, “*Ohio State to Jonathan Waters: ‘It is time to move on.’*” The article, which is available online at <http://thelantern.com/2014/08/ohio-state-to-jonathan-waters-it-is-time-to-move-on/>, reported on

the Davey August 27th Press Release and provided a link directly to the press release discussed above in paragraphs 72 to 76.

117. On August 27, 2014, WCMH-TV, NBC 4 published a similar story, entitled “*Former TBDBITL Director Requests ‘Name-Clearing Hearing’ With OSU*” and provided a link to the Davey August 27th Press Release, which is available online at <http://www.nbc4i.com/story/26385676/former-tbdbitl-director-requests-name-clearing-hearing-with-osu>.

G. Waters Used as a Scapegoat

118. On May 1, 2014, the United States Department of Education Office of Civil Rights (“Department of Education”) named OSU as one of 55 colleges and universities in the United States “under investigation for possible violations of federal law over the handling of sexual violence and harassment complaints.”

119. Early suspicions were that OSU took these actions against Waters to stop the Department of Education’s ongoing investigation of OSU.

120. That later proved true on September 11, 2014 when the Department of Education ended its investigation of OSU earlier than expected by entering into a resolution agreement.

121. As the Department of Education wrote in its September 11, 2014 letter addressed to Dr. Drake:

During the course of this compliance review, the University conducted an investigation of alleged sexual harassment within its Marching Band and found that there was a sexually hostile environment for students in the Marching Band of which the University had notice and failed to adequately address. The University requested to resolve the review with a resolution agreement prior to the completion of OCR’s investigation of all the issues in the review. As such, OCR is not making any further compliance determinations under Title IX, including whether the University has complied with the Title IX requirements for the prompt and equitable resolution of sexual harassment and sexual violence complaints

in the implementation of its sexual harassment policies and procedures. On September 8, 2014, the University signed the enclosed resolution agreement (the Agreement), which when fully implemented, will address all of the issues in this compliance review. OCR incorporates in the Resolution Agreement the University's own corrective action steps for the Marching Band as requirements.

122. In that same letter, the Department of Education made explicit reference to Waters and his termination, citing it as one of the reasons why the Department of Education was ending its investigation prior to the completion of its review of all OSU's issues.

**COUNT ONE: DUE PROCESS CLAIMS
UNDER FEDERAL CONSTITUTION
(Against Individual Defendants Drake and Steinmetz
In Their Individual and Official Capacities)**

123. Waters incorporates by reference the allegations contained in paragraphs 1 through 122 of this Complaint as if fully restated herein.

124. The Fifth Amendment to the United States Constitution, made applicable to the State of Ohio by the Fourteenth Amendment, provides that no person shall "be deprived of life, liberty, or property, without due process of law."

125. The Fourteenth Amendment to the United States Constitution provides that no state shall deprive "any person of life, liberty, or property, without due process of law."

126. The Due Process Clauses of the United States Constitutions apply to higher education investigation procedures and disciplinary decisions, including sexual harassment investigations that have the potential to result in loss of reputation, employment or status.

127. The individual Defendants Drake and Steinmetz (the "Individual Defendants"), through their exercise of state action, had an obligation to provide a fundamentally fair and reliable investigation process when affecting Waters' liberty and property interests, and that

fundamentally fair and reliable investigation process must meet constitutional due process requirements.

128. As the subject of a sexual harassment investigation process, Waters was entitled under the Constitution of the United States to have adequate notice of the charges affecting his reputation and livelihood, and to be heard in a meaningful manner in the course of the investigation, before the results of the investigation were determined and published.

129. Due process requirements also entitled Waters to a meaningful opportunity to respond to the conclusions reached in any such investigation, particularly as the Individual Defendants were aware that the investigation results were going to be made available to the public and would have a harmful effect on Water's reputation, employment, and other fundamental privileges. Waters has a constitutionally protected liberty interest in his good name and reputation.

130. Through policies, practices, and procedures of OSU, Waters has a constitutionally protected property interest in his employment by OSU.

131. The Individual Defendants failed to provide any of these procedural and substantive due process requirements to Waters in the course of the investigation or before subsequent publication of the results of the investigation.

132. The Individual Defendants engaged in the repeated subsequent publication of stigmatizing information as detailed in this Complaint. By doing so, the Individual Defendants, individually, and through their authorized agents, including Chris Davey, publicized additional unfounded and stigmatizing statements impugning Waters' honesty and morality. These statements included, but are not limited to, those identified earlier in this Complaint.

133. The Individual Defendants did not provide Waters a meaningful opportunity to clear his name or rebut the statements.

134. The Individual Defendants acted under color of law in violating Waters' rights under the Fifth and Fourteenth Amendments to the United States Constitution. The Individual Defendants acted intentionally and with callous disregard for Plaintiff's clearly established constitutional rights.

135. The Individual Defendants' actions as detailed above are so unjust that it shocks the conscience

136. As a direct and proximate result of the Individual Defendants' violations of Waters' constitutional rights, Waters has suffered severe and substantial damages, including lost earnings, diminished earnings capacity, lost career and educational opportunities, litigation expenses including attorneys' fees, loss of reputation, humiliation, embarrassment, mental and emotional anguish and distress and other compensatory and punitive damages, in an amount to be determined by a jury and a court.

137. Pursuant to 42 U.S.C. §1983, the Individual Defendants are liable to Waters for his damages.

138. Pursuant to 42 U.S.C. §1988, Waters is entitled to his attorneys' fees incurred in bringing this action.

**COUNT TWO: TITLE IX CLAIM
(Against OSU for Disparate Treatment and Retaliation)**

139. Waters incorporates by reference the allegations set forth in paragraphs 1 through 137 of this Complaint as if fully restated herein.

140. Defendant OSU is a public university created by the Ohio legislature. OSU is an educational institution as that term is defined in 20 U.S.C. §1681. OSU is a recipient of federal financial assistance for its educational programs and activities.

141. Waters is a former employee of OSU, and participated in educational programs or activities that were direct or indirect beneficiaries of federal financial assistance. Waters is protected from discrimination on the basis of his gender under 20 U.S.C. §1681 and implementing regulations, 34 C.F.R. Part 106.

142. Title IX of the Educational Amendments of 1972 (“Title IX”), 20 U.S.C. §1681 *et seq.* and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of gender in education programs or activities operated by recipients of federal financial assistance. Title IX provides, in pertinent part: “No person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

143. The implementing regulations and guidance under Title IX require fair and impartial investigation of complaints of sexual harassment or related misconduct, and require basic due process protections for all employees that are the subject of an investigation.

144. In its investigation and determination of the allegations of the complaint that resulted in the Glaros Report, and in the preparation of that report, OSU subjected Waters to discrimination on the basis of his gender. Specifically, Waters was not provided due process and fairness protections required under OSU policy, and Title IX regulations and guidance. OSU routinely extends these protections to female participants in Title IX sexual harassment investigations.

145. OSU also subjected Waters to unlawful discrimination on the basis of his gender in terminating his employment after receiving the results of the Glaros Report. Waters' gender was a determining factor in OSU's decision to terminate his employment. But for his gender, he would have been permitted to continue working under the terms of a performance improvement program, in accordance with existing OSU policy.

146. As part of OSU's effort to show the federal government and others that it is vigilant in enforcing perceived Title IX objectives, OSU's current practice is to use a harsher and more punitive standard in considering, investigating and punishing allegations of harassment, discrimination and "promoting a sexualized culture" when the subject is male. Similar allegations, when made against female students or employees, are more likely to be treated leniently or even disregarded.

147. Similarly situated female employees have been treated more favorably under similar circumstances, including a female cheerleading coach who was the subject of an investigation in 2013 involving sexualized behavior in the cheerleading crew. On that occasion, the female coach was determined to be responsible for alleged wrongdoing similar to that identified in the Glaros Report. OSU did not terminate the employment of the cheerleading coach after issuance of the report. Instead it provided her with an opportunity to correct the concerns identified in the investigation and resulting report. But for his gender, Waters would have been provided the same opportunity after similar concerns were identified in the Glaros Report.

148. Defendant OSU's discrimination against Waters in violation of Title IX, and entitles Waters to damages. Waters has suffered severe and substantial damages, including lost earnings, diminished earning capacity, lost career opportunities, litigation expenses (including

attorneys' fees), loss of reputation, humiliation, embarrassment, mental and emotional anguish, and other compensatory damages.

149. Defendant OSU is liable to Waters for damages under Title IX. Additionally, Waters is entitled to equitable relief requiring reinstatement to his former position of employment with the University, and reimbursement of attorneys' fees under 42 U.S.C. §1988.

150. OSU's conduct in treating Waters in disparate fashion is intentional, willful and malicious, and entitles Waters to an award of punitive damages.

WHEREFORE, Waters prays that this Court:

- a. Declare that Defendants have violated the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §1983;
- b. Order a meaningful name-clearing opportunity, which shall require that OSU (i) fully comply with all public records requests prior to the date of the hearing; (ii) provide Waters with two full eight-hour days at which he can present evidence and testimony; (iii) make OSU officials, including Dr. Drake, available for testimony and subject to cross-examination; (iv) limit any statements made by OSU during to the duration of the name-clearing hearing strictly to the confines of the hearing; (v) provide notice of the hearing to all local and national media; and (vi) make available such resources necessary for the live broadcasting and recording of the hearing;
- c. Order that Waters be reinstated as Director of the OSU Marching and Athletics Band;
- d. Award Waters compensatory damages in an amount in excess of \$1 million, punitive damages in an amount to be determined at trial, prejudgment and post-judgment interest, reasonable attorneys' fees and costs; and
- e. Grant such other relief as the Court may deem appropriate.

Respectfully submitted,

s/ David F. Axelrod

David F. Axelrod (0024023), Trial Counsel

Dated: September 26, 2014

Mark D. Wagoner, Jr. (0068577)
James M. Petro (0022096)
Katherine S. Decker (0085600)
SHUMAKER, LOOP & KENDRICK, LLP

JURY DEMAND

Plaintiff Jonathan N. Waters demands a jury trial.

David F. Axelrod (0024023), Trial Counsel
Mark D. Wagoner, Jr. (0068577)
James M. Petro (0022096)
Katherine S. Decker (0085600)