

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION

ASHLEY DIAMOND,

Plaintiff,

v.

TIMOTHY WARD, *et al.*,

Defendants.

No. 5:20-cv-00453-MTT

**PLAINTIFF'S UPDATED REQUESTS TO CHARGE**

Pursuant to the Court's October 21, 2022 Order (ECF 169), rulings and instructions at the pretrial conference held January 6, 2023, and request for an updated submission on January 13, 2023, Plaintiff Ashley Diamond hereby submits the following updated requests to charge for the trial in this matter scheduled for January 17, 2023. Ms. Diamond reserves the right to withdraw, amend, modify, and/or add to these requested charges at any time before closing argument. Ms. Diamond further reserves the right to object to Defendants' requested charges.

This 13th day of January, 2023.

Respectfully submitted,

/s/ Scott D. McCoy

Scott D. McCoy\*  
Southern Poverty Law Center  
2 South Biscayne Blvd.  
Suite 3750  
Miami, FL 33131  
Phone: (786) 347-2056  
Email: scott.mccoy@splcenter.org

Elizabeth Littrell, Ga. Bar No. 454949  
Southern Poverty Law Center  
150 E. Ponc de Leon Ave.  
Suite 340  
Decatur, GA 30030  
Phone: (404) 221-5876  
Fax: (404) 221-5857

A. Chinyere Ezie\*  
Charles Coleman, Jr.\*  
Center for Constitutional Rights 666  
Broadway, 7th Floor New York, NY  
10012 Phone/Fax: (212) 614-6467  
Email: cezie@ccrjustice.org  
Charles@CFColemanJr.com

Caitlin J. Sandley, GA Bar No. 610130  
Center for Constitutional Rights  
P.O. Box 486  
Birmingham, AL 35201  
Phone/Fax: (212) 614-6443  
Email: csandley@ccrjustice.org

Email: beth.littrell@splcenter.org

Bruce Hamilton\*  
Emma Douglas\*  
Southern Poverty Law Center  
201 Saint Charles Avenue, Suite 2000  
New Orleans, Louisiana 70170  
Phone: (504) 352-4398  
Email: bruce.hamilton@splcenter.org  
emma.douglas@splcenter.org

*Counsel for Plaintiff Ashley Diamond*

\* Admitted *Pro Hac Vice*

**PLAINTIFF'S REQUESTED CHARGE NO. 1**

**General Preliminary Charge**

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case. When I have finished, following the arguments of counsel, you will go to the jury room and begin your discussions, also called your deliberations. I will provide you with a written copy of these instructions. Therefore, you may but need not take notes during my instructions. It is important instead that you listen closely to the instructions as I read them.

The Plaintiff in this case is Ashley Diamond. The Defendants are Sharon Lewis, Ahmed Holt, Robert Toole, Brooks Benton, Grace Atchison, and LaChesha Smith. In these instructions and on the verdict form, I will usually refer to Ashley Diamond as Plaintiff and to Sharon Lewis, Ahmed Holt, Robert Toole, Brooks Benton, Grace Atchison, and LaChesha Smith as Defendants.

[Eleventh Cir. Pattern Jury Instructions, 1.1 (Mar. 10, 2022); Jury Charges, *Rodriguez v. Bryson*, 5:17-cv-00010-MTT-CHW (M.D. Ala. Feb. 25, 2020), ECF No. 225; Jury Charges, *Owens v. Hart*, 1:14-cv-00001-WLS-TQL (Aug. 11, 2016), ECF No. 139.]

**PLAINTIFF'S REQUESTED CHARGE NO. 2**

**Duty to Follow Instructions – No Corporate Party Involved**

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A person convicted by the State is entitled to the same fair trial at your hands as is any individual. The law is no more respectful of one person than another, and all persons, including prisoners, stand equal before the law and are to be dealt with as equals in a court of justice.

[Eleventh Cir. Pattern Jury Instructions, 3.2 (Mar. 10, 2022); *see also* Jury Instructions, *Butterworth v. Wetherington*, No. 1:03-cv-146-WLS-CWH (M.D. Ga. Oct. 4, 2007), ECF No. 123 at 1.]

**PLAINTIFF'S REQUESTED CHARGE NO. 3**

**Consideration of Direct and Circumstantial Evidence; Argument of Counsel; Comments by the Court**

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses, the exhibits admitted, and the facts which may have been admitted or stipulated. But anything the lawyers say is not evidence and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

[Eleventh Cir. Pattern Jury Instructions, 3.3 (Mar. 10, 2022); *see also* Ninth Cir. Manual of Model Civil Jury Instructions, 1.16 (Sept. 2022).]

**PLAINTIFF'S REQUESTED CHARGE NO. 4**

**Stipulations**

The parties have agreed that certain facts are true. This agreement is called a stipulation. You must treat these facts as proved for this case.

[Eleventh Cir. Pattern Jury Instructions, 2.1 (Mar. 10, 2022).]

**PLAINTIFF'S REQUESTED CHARGE NO. 5**

**Use of Interrogatories and Requests for Admission**

During the trial, you may have heard answers that the Defendants gave in response to written questions the other side submitted. Before the trial, Defendants gave answers to these questions in writing while under oath. You must consider Defendants' answers to Plaintiff's questions as though they gave them under oath on the witness stand.

[Eleventh Cir. Pattern Jury Instructions, 2.6 (Mar. 10, 2022).]

**PLAINTIFF'S REQUESTED CHARGE NO. 6**

**Credibility of Witnesses**

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

1. Did the witness impress you as one who was telling the truth?
2. Did the witness have any particular reason not to tell the truth?
3. Did the witness have a personal interest in the outcome of the case?
4. Did the witness seem to have a good memory?
5. Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
6. Did the witness appear to understand the questions clearly and answer them directly?
7. Did the witness's testimony differ from other testimony or other evidence?

[Eleventh Cir. Pattern Jury Instructions, 3.4 (Mar. 10, 2022).]

**PLAINTIFF'S REQUESTED CHARGE NO. 7**

**Impeachment of Witnesses Because of Inconsistent Statements**

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

[Eleventh Cir. Pattern Jury Instructions, 3.5.1 (Mar. 10, 2022).]

**PLAINTIFF'S REQUESTED CHARGE NO. 8**

**Use of Depositions**

A deposition is a witness's sworn testimony that is taken before the trial. During a deposition, the witness is under oath and swears to tell the truth, and the lawyers for each party may ask questions. A court reporter is present and records the questions and answers. The depositions of some witnesses have been presented to you by video.

Deposition testimony is entitled to the same consideration as live testimony, and you must judge it in the same way as if the witness was testifying in court.

[Eleventh Cir. Pattern Jury Instructions, 2.2 (Mar. 10, 2022).]

**PLAINTIFF'S REQUESTED CHARGE NO. 9**

**Impeachment of Witnesses Because of Inconsistent Statements or Felony Conviction**

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

To decide whether you believe a witness, you may consider the fact that the witness has been convicted of a felony or a crime involving dishonesty or a false statement. Such a conviction does not necessarily mean that the plaintiff is not credible or that his testimony was not truthful. Evidence that a witness has been convicted of a crime is to be considered by you only insofar as you think it may affect the witness's credibility. You are to consider such evidence for no other reason.

[Eleventh Cir. Pattern Jury Instructions, 3.5.2 (Mar. 10, 2022); L. Sand, et al., 4 Modern Federal Jury Instructions 76.01, at 76-55 (2022); *id.* at 76-6 (citing *United States v. Corcione*, 592 F.2d 111 (2d Cir. 1979); Fifth Circuit Pattern Instruction No. 2.12)].

**PLAINTIFF'S REQUESTED CHARGE NO. 10**

**Testimony of a Correctional Officer**

The testimony of a correctional officer is entitled to no special or exclusive sanctity. A correctional official who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does and in the case of correctional officer you should not believe them merely because they are so employed. You should recall their demeanor on the stand, their manner of testifying, the substance of their testimony, and weigh and balance it just as carefully as you would the testimony of any other witness. People employed by the government, including correctional officers, do not stand in any higher station in the community than other persons, and their testimony is not entitled to any greater weight.

[*Darbin v. Nourse*, 664 F.2d 1109 (9th Cir. 1981), *see also United States v. Nash*, 910 F.2d 749, 754-755 (11th Cir. 1990); *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988).]

**PLAINTIFF'S REQUESTED CHARGE NO. 11**

**Expert Witness**

You have heard an expert witness give opinions about matters requiring special knowledge or skill. When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

[Eleventh Cir. Pattern Jury Instructions, 3.6.1 (Mar. 10, 2022); Seventh Cir. Pattern Jury Instructions, 1.21 (2017).]

**PLAINTIFF’S REQUESTED CHARGE NO. 12**

**Responsibility for Proof – Plaintiff’s Claims – Preponderance of the Evidence**

In this case it is the responsibility of the Plaintiff to prove every essential part of her claims by a “preponderance of the evidence.” This is sometimes called the “burden of proof” or the “burden of persuasion.”

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this and you should put it out of your mind.

A “preponderance of the evidence” simply means an amount of evidence that is enough to persuade you that the Plaintiff’s claim is more likely true than not true.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the Plaintiff.

Here, where the Plaintiff has two different claims against multiple defendants, you should consider each claim against each defendant separately.

In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of the Plaintiff’s claims by a preponderance of the evidence, you should find for the Defendant as to that claim.

[Eleventh Cir. Pattern Jury Instructions, 3.7.1 (Mar. 10, 2022); Western District of Tennessee, Hon. James D. Todd Proposed Civil Jury Instructions 73-3, [https://www.tnwd.uscourts.gov/JudgeTodd/Instructions/Todd\\_Civil\\_Standard.html](https://www.tnwd.uscourts.gov/JudgeTodd/Instructions/Todd_Civil_Standard.html).]

**PLAINTIFF'S REQUESTED CHARGE NO. 13**

**Intent and Knowledge**

Intent and knowledge exist in a person's mind and cannot always be proved by exact and demonstrable evidence. Therefore, one's intent and knowledge has to be judged, to a certain extent at least, by his knowledge as shown by the evidence, and generally by judging him as reasonable, prudent persons, experienced in the everyday affairs of life, judge one another.

We cannot look into a person's mind and see what he intends or knows today, or what he intended or knew yesterday. But that does not mean that in a court of law his intent or knowledge cannot be ascertained and established. The law says that a jury is authorized to infer a person's intent and knowledge from his conduct, what he does, what he says, and how he acts (in accordance with the axiom that sometimes actions speak louder than words).

[Jury Charges, *Owens v. Hart*, 1:14-cv-00001-WLS-TQL (Aug. 11, 2016), ECF No. 139; *see also* Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 17:07 (6th ed.).]

**PLAINTIFF'S REQUESTED CHARGE NO. 14**

**Civil Rights – 42 U.S.C. § 1983 Claims – Eighth or Fourteenth Amendment Claim –  
Incarcerated Person Alleging Deliberate Indifference to Serious Medical or Mental Health  
Need**

In this case, Plaintiff Ashley Diamond claims that Defendant Sharon Lewis, while acting under color of law, was deliberately indifferent to her serious medical or mental health need and caused injury to her in violation of her Eighth Amendment rights.

The United States Constitution provides that anyone who is imprisoned is entitled to necessary medical and mental health care, and a prison healthcare provider violates that right by being deliberately indifferent to a prisoner's known serious medical or mental health need.

Defendant Lewis has already admitted that Plaintiff Diamond's gender dysphoria is a serious medical need, and that she was acting under color of state law for purposes of this action. So, to succeed on this claim, Plaintiff Diamond must prove each of the following facts by a preponderance of the evidence:

First: That Defendant Lewis knew that Plaintiff Diamond had a serious medical or mental health need that posed a risk of serious harm to Plaintiff Diamond;

Second: That Defendant Lewis failed to provide necessary medical or mental health care for Plaintiff Diamond's serious medical or mental health need in deliberate indifference to the risk of serious harm; and

Third: That Defendant Lewis's conduct caused some of Plaintiff Diamond's injuries.

In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.

For the first element, you must determine whether Defendant Lewis actually knew Plaintiff Diamond had a serious medical or mental health need that required attention. Put another way, it

is not enough to show that Defendant Lewis was careless or neglected her job duties and should have known about Plaintiff Diamond's need. And it is not enough to show that a reasonable person would have known of the serious medical need. However, you may find from circumstantial evidence that Defendant Lewis knew about the risk of serious harm. Further, if the risk of serious harm was obvious, you may, based on that, find that Defendant Lewis knew about that risk.

For the second element, to decide whether Defendant Lewis was deliberately indifferent to Plaintiff Diamond's serious medical or mental health need, you may consider all the relevant circumstances. This includes the seriousness of Plaintiff Diamond's condition, the injuries that resulted, and whether Defendant Lewis failed or refused to provide Plaintiff Diamond medical care, including additional treatment, evaluations, and referrals, and the length of any delay in providing Plaintiff Diamond medical care, and the reasons for any delay or denial of care. The law does not require that Plaintiff Diamond receive the most advanced medical response to her serious medical or mental health need, but if the medical or mental health care she received was a substantial deviation from accepted standards, this can be evidence of deliberate indifference. Also, if altogether refusing to provide a certain type of medical or mental health treatment is a substantial deviation from accepted standards, this can be deliberate indifference.

For the third element, you must determine whether Defendant Lewis's conduct, or failure to act, caused some of Plaintiff Diamond's physical or emotional injuries. Defendant Lewis's conduct, or failure to act, caused Plaintiff Diamond's injuries if Plaintiff Diamond would not have been injured or continued to suffer an injury without Defendant Lewis's conduct or failure to act, or if Plaintiff Diamond's injuries were worsened by Defendant Lewis's conduct, or failure to act, and the injuries were a reasonably foreseeable consequence of Defendant Lewis's conduct or failure to act.

If you find Plaintiff Diamond has proved each of the facts she must prove, you must then decide the issue of Plaintiff Diamond's damages. If you find that Plaintiff Diamond has not proved each of these facts for a given Defendant, then you must find for that Defendant.

[Eleventh Cir. Pattern Jury Instructions, 5.8 (Mar. 10, 2022); *Steele v. Shah*, 87 F.3d 1266, 1269 (11th Cir. 1996) (citing *Greason v. Kemp*, 891 F.2d 829, 835 (11th Cir. 1990)); *Braggs v. Dunn* 257 F.Supp.3d 1171, 1191 (M.D. Ala. 2017) (recognizing "serious medical need" includes serious mental health needs).]

**PLAINTIFF'S REQUESTED CHARGE NO. 15**

**Civil Rights – 42 U.S.C. § 1983 Claims – Eighth  
Amendment Claim – Failure to Protect**

In this case, Plaintiff Diamond claims that Defendants Benton, Atchison, Holt, Toole, and Smith, while acting under color of law, unlawfully failed to protect Plaintiff Diamond from harm in violation of the United States Constitution.

An officer who fails to protect a prisoner from a known threat of harm posed by another prisoner may be held liable for this failure to protect.

Defendants Benton, Atchison, Holt, Toole, and Smith have already admitted that they were acting under color of state law. So, to succeed on this claim, Plaintiff Diamond must prove each of the following by a preponderance of the evidence:

First: That there was a substantial risk to Plaintiff Diamond that she could be harmed by another prisoner;

Second: That the Defendant actually knew of that risk;

Third: That the Defendant disregarded that risk or failed to take reasonable measures to protect Plaintiff Diamond in response to that risk;

Fourth: That Plaintiff Diamond was injured; and

Fifth: That the Defendant's failure to protect caused one or more of Plaintiff Diamond's injuries and the injury or injuries were a reasonably foreseeable consequence of the Defendant's failure to protect.

In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.

For the second element, it is not necessary that Defendants Benton, Atchison, Holt, Toole

and Smith knew precisely who would attack Plaintiff Diamond so long as the Defendant knew there was a substantial risk to Plaintiff Diamond's safety. Also, if Plaintiff Diamond shows that Defendants Benton, Atchison, Holt, Toole and Smith had information she suspected (or believed) to be true, and if you find that such information indicated a substantial risk of serious harm to Plaintiff Diamond, Defendants Benton, Atchison, Holt, Toole and Smith cannot escape liability for failing to confirm those facts. But it is not enough for Plaintiff Diamond to show that her risk of substantial harm was obvious and that Defendants Benton, Atchison, Holt, Toole, and Smith should have known of the risk. Plaintiff Diamond must show that the Defendant actually knew of the risk.

For the fourth and fifth elements, you can consider whether Ms. Diamond experienced any physical injuries, emotional injuries, or sexual acts while in prison as a result of a Defendant's conduct or failure to act. A sexual act is not only incidents of rape or sexual assault. Sexual acts also include contact between the penis and the anus; contact involving the penis occurs upon penetration, however slight; contact between the mouth and the penis, or the mouth and the anus; or the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

If you find Plaintiff Diamond has proved each of the facts she must prove, you must then decide the issue of Plaintiff Diamond's damages. If you find that Plaintiff Diamond has not proved each of these facts for a given Defendant, then you must find for that Defendant.

[Eleventh Cir. Pattern Jury Instructions, 5.9 (Mar. 10, 2022); Third Cir. Pattern Jury Instructions 4.11.3 (2018); *see also* L. Sand, et al., 5 Modern Federal Jury Instructions 87.03, at 87-69 – 87-

70, 87-74D, 87-75 (2022) (citing *Parratt v. Taylor*, 451 U.S. 527 (1981)); *Farmer v. Brennan*, 511 U.S. 825, 845 (1994); *Purcell ex rel. Estate of Morgan v. Toombs Cnty, Ga.*, 400 F.3d 1313, (11th Cir. 2005), 28 U.S.C. § 1346(b); 18 U.S.C. § 2246.]

**PLAINTIFF’S REQUESTED CHARGE NO. 16**

**Civil Rights – 42 U.S.C. § 1983 Claims – Damages**

Plaintiff Diamond can recover compensatory and punitive damages only if you find that Plaintiff Diamond has suffered more than a minimal physical injury. Thus, you must first determine whether Plaintiff Diamond suffered more than a minimal physical injury. Minor cuts and bruises are examples of minimal physical injuries. If you find that Plaintiff Diamond has proved more than a minimal physical injury, then you must consider Plaintiff Diamond’s claims for compensatory and punitive damages.

**Compensatory Damages:** If you find a Defendant liable and that Plaintiff Diamond suffered more than a minimal physical injury, then you must consider the issue of compensatory damages. You must award Ms. Diamond an amount that will fairly compensate her for any injury she actually sustained as a result of the Defendant’s conduct.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of Plaintiff Diamond’s damages—no more, no less. You must not impose or increase these compensatory damages to punish or penalize the Defendants. And you must not base these compensatory damages on speculation or guesswork. But compensatory damages are not restricted to actual loss of money—they also cover the physical or emotional aspects of the injury. Plaintiff Diamond does not have to introduce evidence of a monetary value for intangible things like physical pain. You must determine what amount will fairly compensate Plaintiff Diamond for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You should consider the following elements of damage, to the extent you find that Plaintiff Diamond has proved them by a preponderance of the evidence, and no others:

(a) Plaintiff Diamond's physical injuries, including ill health, physical pain and suffering, disability, disfigurement, and discomfort, including such physical harm that Plaintiff Diamond is reasonably certain to experience in the future;

(b) Plaintiff Diamond's mental and emotional distress, impairment of reputation, and personal humiliation, including such mental or emotional harm that Plaintiff Diamond is reasonably certain to experience in the future.

(c) The reasonable value of medical care and supplies that Plaintiff Diamond reasonably needed and actually obtained, and the present value of medical care and supplies that Plaintiff Diamond is reasonably certain to need in the future;

**Punitive Damages:** If you find for Plaintiff Diamond and find that a Defendant acted with malice or reckless indifference to Plaintiff Diamond's federally protected rights, the law allows you, in your discretion, to award Plaintiff Diamond punitive damages as a punishment for the Defendant and as a deterrent to others.

Plaintiff Diamond must prove by a preponderance of the evidence that she is entitled to punitive damages.

A defendant acts with malice if his or her conduct is motivated by evil intent or motive. A defendant acts with reckless indifference to the protected federal rights of Plaintiff Diamond when a defendant engages in conduct with a callous disregard for whether the conduct violates Plaintiff Diamond's protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding each defendant's financial resources in fixing the amount of punitive damages to be awarded. You may also assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different

amounts.

**Nominal Damages:** If Plaintiff Diamond has failed to prove that she suffered more than a minimal physical injury, then you must award nominal damages of \$1.00. This is because a person whose constitutional rights were violated is entitled to a recognition of that violation, even if she suffered no actual injury. You may not award both nominal and compensatory damages to the Plaintiff.

[Eleventh Cir. Pattern Jury Instructions, 5.13 (Mar. 10, 2022); Third Cir. Pattern Jury Instructions, 4.8.1, 4.8.2, 4.8.3 (Apr. 2022).]

**PLAINTIFF'S REQUESTED CHARGE NO. 17**

**Duty to Deliberate When Only the Plaintiff Claims Damages**

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that the Plaintiff should, or should not, prevail in this case.

Your verdict must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with. Remember that, in a very real way, you're judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

[Eleventh Cir. Pattern Jury Instructions, 3.8.1 (Mar. 10, 2022).]

**PLAINTIFF'S REQUESTED CHARGE NO. 18**

**Election of Foreperson, Explanation of Verdict Form**

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and speak for you in court.

A verdict form has been prepared for your convenience. You should be careful to follow all directions set out in the verdict form and enter your findings and verdict accordingly.

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it and date it. Then you'll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the court security officer. The court security officer will bring it to me and I'll respond as promptly as possible – either in writing or by talking to you in the courtroom. Please understand that I may have to talk to the lawyers and the parties before I respond to your question or message, so you should be patient as you await my response. But I caution you not to tell me how many jurors have voted one way or the other at that time. That type of information should remain in the jury room and not be shared with anyone, including me, in your note or question.

[Eleventh Cir. Pattern Jury Instructions, 3.9 (Mar. 10, 2022); Jury Charges, *Owens v. Hart*, 1:14-cv-00001-WLS-TQL (Aug. 11, 2016), ECF No. 139 at 15.]

**PLAINTIFF'S REQUESTED CHARGE NO. 19**

**Spoliation of Evidence**

The parties each have introduced evidence that evidence was lost because the other party failed to take reasonable steps to preserve it or because the other party destroyed it or allowed its destruction.

Each party making this contention has the burden of proving it. The party must prove that (1) the missing evidence existed at one time; (2) that the other party had control over the evidence when it was destroyed or lost; (3) that the other party had a duty to preserve the evidence; (4) that the other party failed to take reasonable steps to preserve the evidence; and (5) that the evidence could not be restored or replaced through additional discovery.

The duty to preserve arises when litigation is pending or reasonably foreseeable at the time the evidence is lost or destroyed. A demand letter triggers a duty to preserve by putting a party on notice of potential litigation, but such a letter is not necessary to trigger the duty. When litigation is reasonably anticipated, a party must preserve what it knows, or reasonably should know, is relevant in the action, or is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. Relevant evidence includes evidence that has any tendency to make a fact more or less probable than it would be without the evidence.

In addition, the party must also prove that the other party acted with the intent to deprive the party of the information's use in the litigation, also sometimes called bad faith. Bad faith can include failing to suspend automated deletion systems or failing to intervene in routine document retention policies and procedures once litigation is reasonably foreseeable so that evidence is preserved.

If all of this is proved, then you may conclude from the absence of the evidence that the

evidence was unfavorable to the party that caused its loss or destruction.

[*Ala. Aircraft Indus., Inc. v. Boeing Co.*, No. 20-11141, 2022 WL 433457, at \*13–15 (11th Cir. Feb. 14, 2022); *O’Berry v. Turner*, No. 7:15-cv-64, 2016 WL 1700403, at \*2–3 (M.D. Ga. Apr. 27, 2016); *Wilder v. Rockdale Cnty.*, No. 1:13-cv-2715-RWS, 2015 WL 1724596, at \*3 (N.D. Ga. Apr. 15, 2015); *Watson v. Edelen*, 76 F. Supp. 3d 1332, 1343 (N.D. Fla. 2015); *Stanfill v. Talton*, 851 F. Supp. 2d 1346, 1361–62 (M.D. Ga. 2012) (Treadwell, J.); *Bland v. Sam’s E., Inc.*, No. 4:17-cv-190 (CDL), 2019 WL 407406, at \*2–3 (M.D. Ga. Jan. 31, 2019); *Connor v. Sun Trust Bank*, 546 F. Supp. 2d 1360, 1376–77 (N.D. Ga. 2008) (finding bad faith when email not preserved before automatic deletion); *Blazer v. Gall*, No. 1:16-cv-1046, 2019 WL 3494785, at \*4–5 (D.S.D. Aug. 1, 2019) (finding bad faith when defendants took no steps to preserve jail’s video recordings before being overwritten after preservation request); *Storey v. Effingham Cnty.*, No. CV415-149, 2017 WL 2623775, at \*4 (S.D. Ga. June 16, 2017) (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)) (cleaned up.)]

**PLAINTIFF’S REQUESTED CHARGE NO. 20**

**Invocation of Fifth Amendment Privilege Against Self-incrimination**

You have heard a witness invoke his/her Fifth Amendment right against self-incrimination. A witness has a constitutional right to decline to answer on the ground that it may tend to incriminate him/her. You may, but need not, infer from such refusal that the answers would have been adverse to the witness’s interest.

[*Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (“[T]he Fifth Amendment does not forbid adverse inferences against parties . . . when they refuse to testify in response to probative evidence offered against them” in the civil context); *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1304 (11th Cir. 2009); *Floyd ex rel. Ray v. United States*, No. 3:08-cv-122-CDL, 2010 WL 4905010, at \*18 (M.D. Ga. Nov. 26, 2010); see also *Brink’s Inc. v. City of New York*, 717 F.2d 700, 707 (2d Cir. 1983)]