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December 6, 2016

Via E-Mail and Certified Return Receipt Mail

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Re: *New Mexico Tort Claims Act Notice – Claims of Dr. Robert Frank*

UNM Board of Regents and Counsel,

This law firm represents Dr. Robert G. Frank, President of the University of New Mexico. I am writing pursuant to the New Mexico Tort Claims Act, NMSA 1978 § 41-4-16(A) (the "Act") to provide notice of claims against University of New Mexico ("UNM") and UNM's Board of Regents ("BORUNM") arising from the unlawful disclosure and publication of confidential and defamatory records relating to Dr. Frank's employment.

I am also writing to demand that UNM take immediate steps to collect and preserve all communications, records, and other information which relate in any way to Dr. Frank's claims. I am also writing to make formal written request that UNM provide to Dr. Frank reports of all investigations initiated by the Board of Regents regarding his employment, including reports leaked to the media but withheld from Dr. Frank. I am further writing to demand that UNM immediately engage an independent outside investigator to determine who at UNM disclosed these reports in violation of UNM policy and New Mexico law. I am concerned that a member of the UNM Board of Regents leaked these reports, and thus the independent investigator must be completely outside the influence of the Board.

TORT CLAIMS ACT NOTICE

Dr. Frank anticipates filing a stigma-plus due process claim based on defamatory statements published by one or more members of the UNM Board of Regents, as well as claims for defamation, public disclosure of private facts, and tortious interference with contract, to the extent allowed by law. These tort claims are independent from breach of contract claims Dr. Frank may assert against UNM, and independent of claims Dr. Frank may assert against public officials acting outside of their authority in violation of New Mexico law. These tort claims are also independent of any claims Dr. Frank may bring under the New Mexico Whistleblower Protection Act, NMSA 1978, § 10-16C-1, *et seq.* or other applicable anti-corruption statutes. Because the actionable conduct against Dr. Frank is ongoing, he reserves the right to amend this notice to include additional claims.

Dr. Frank's claims arise from the intentional leak of false and defamatory reports to the media. One or more members of the Board of Regents initiated multiple investigations into Dr. Frank's conduct to create a pretext for the termination of his Employment Contract. Reports of these Regent-driven investigations were unlawfully leaked to at least two local media outlets simultaneous with the Board's announcement of a meeting to address Dr. Frank's employment. The Board of Regents failed and refused to provide Dr. Frank with reports leaked to media, thus depriving Dr. Frank any opportunity to fairly respond or protect his reputation. The disclosure and publication of these defamatory reports was intended to harm Dr. Frank's reputation, and in direct violation of UNM policy and New Mexico law.

The Kilborn Report

On November 30, 2016, the Albuquerque Journal reported it had "obtained" a report of an internal investigation conducted by attorney Alice Kilborn that was "ordered by the regents" "to review the conduct of Frank" (the "Kilborn Report"). Kilborn completed the report the day before (November 29, 2016), and it was leaked to the Albuquerque Journal within 24 hours. According to the Albuquerque Journal, Kilborn concluded that Dr. Frank's behavior did not constitute a hostile work environment, but apparently goes on to report that "Frank's treatment of faculty and staff is not appropriate and may rise to the level of bullying." The report goes on to refer to the interviews of eight unknown persons, including Governor Susana Martínez's Chief of Staff (not a UNM employee), and draws varying conclusions about Frank's "leadership communication style." Despite the fact that the investigator concluded Dr. Frank did not create a hostile work environment, the report was nonetheless promptly leaked to harm his reputation.

Concurrent with the leak of the Kilborn Report, Board President Robert Doughty provided a statement to the Albuquerque Journal disclosing that "[s]ome personnel-related concerns that came to light during an audit initiated by a whistleblower complaint prompted the regents to appoint an independent outside investigator to explore the matter." Despite the fact that the Kilborn Report concludes that Dr. Frank did not create a hostile work environment, the Board of Regents scheduled a meeting to discuss Dr. Frank's employment on the same day that the Kilborn Report was leaked to the media.

Dr. Frank requested that the Board of Regents provide him with the Kilborn Report, but those requests have been refused on grounds that the Kilborn Report is protected by the attorney client privilege. By this letter, Dr. Frank again requests that the Kilborn Report be provided to him so that he can fairly respond to it.

The Audit Report

On November 30, 2016, the Albuquerque Journal also reported that it obtained a copy of an internal audit of Dr. Frank's Travel, Entertainment and Other Expenses (the "Audit Report"), another investigation that also appears to have been initiated by the Board of Regents. The next day (December 1), KRQE also reported having received a copy of the Audit Report. In the Audit Report, the independent auditor (IA) concluded that:

[N]othing came to Internal Audit Department's attention to indicate that funds disbursed from discretionary funds (The President's Club) of the Foundation did not meet donor designation to support core priorities of the University. . . . The President and the President's staff provided full cooperation during the course of this audit.

The Audit Report notes that Dr. Frank was requested to, and did, reimburse certain amounts, but there are no findings of fraud, abuse or misconduct whatsoever. Despite the fact that the Audit Report found no misconduct, the Board of Regents scheduled a meeting to discuss Dr. Frank's employment on the same day that the Audit Report was leaked to the media.

The Leave Report

On December 1, 2016, KRQE reported that it had obtained a copy of an internal "Review of President Frank's Leave Accrual and Usage" (the "Leave Report"), another "investigation" that appears to have been recently initiated by the Board of Regents, and which primarily relies on information "confirmed" by Regent President Robert Doughty. Dr. Frank was never provided with the Leave Report, or given any opportunity to respond to it even though the report itself expressly recommends that "President Frank should be presented with the findings and allowed to respond regarding his leave usage and reporting." Instead, this report was leaked to the press at the same time that the Board of Regents scheduled a meeting to discuss Dr. Frank's employment. Dr. Frank only became aware of the report after it was posted and made available to the public on the KRQE website.

The Leave Report falsely claims that "[s]ince his hire in 2012 President Frank has failed to report any annual leave," which is defamatory on its face. After reviewing the report, Dr. Frank immediately provided extensive records documenting compliance with UNM leave practices.

The Leave Report – which has no date or identifiable author – goes well beyond objective evaluation of his use of leave, and includes gratuitous statements about Dr. Frank's ethics, behavior, and character. For example, the Leave Report gratuitously declares that

“President Frank’s behavior demonstrates poor administrative operations of his office and possibly unethical behavior” and that “failing to comply with UNM Policy sets a poor example for the campus community.” The report goes on to “recommend[] that the outcome of this item be considered as part of any other reviews currently underway evaluating the President’s performance.” These investigations, the leaks of these reports, and the Board of Regents’ meeting were coordinated.

The factual statements made in the Leave Report are demonstrably false. Dr. Frank has never been provided with the Leave Report or given any opportunity to respond to it. The Board of Regents scheduled a meeting to discuss Dr. Frank’s employment on the same day that the Leave Report was leaked to the media.

INDEPENDENT INVESTIGATION

By this letter, Dr. Frank formally requests that the University of New Mexico engage an outside independent investigator to determine the source of the above referenced media leaks and to identify any related violations of UNM Policy and New Mexico Law. Because of concerns that one or more Regents leaked these reports, the independent investigator should be completely free of any influence by the Board.

PRESERVATION DEMAND

By this letter, I make demand that UNM immediately take all steps to collect and preserve any and all documentation, including, but not limited to, electronically stored data (emails, texts, and information stored on laptops, flash drives and in internet accounts), audio data (voicemail, tape recordings, and other information contained in cell phones) and all other communications from any Regent or UNM employee regarding the above referenced investigations and reports. The following types of electronic data should be preserved:

a. All electronic mail and information about electronic mail (including message contents, header information, and logs of electronic mail system usage) sent to or received by (1) each individual member of the Board of Regents; (2) all members of the Board of Regents’ staff; (3) Alice Kilborn; (4) the Albuquerque Journal; (5) KRQE; (6) UNM’s Human Resources Department; and (7) UNM’s Internal Audit Department;

b. All other electronic mail and information about electronic mail (including message contents, header information, and logs of electronic mail system usage) containing information about Dr. Frank’s employment, the Kilborn Report, the Audit Report, or the Leave Report. This includes any private, business, or other non-UNM email accounts used by the Board of Regents to conduct UNM business;

c. All databases (including all records and fields and structural information in such databases), containing any reference to and/or information about Dr. Frank’s employment, Dr. Frank’s expenses; Dr. Frank’s use of leave; the Kilborn Report, the Audit Report, or the Leave Report;

d. All PDF and word-processing files containing information about Dr. Frank's employment, the Kilborn Report, the Audit Report, or the Leave Report; and

e. All files containing information from electronic calendars and scheduling programs used by the Board of Regents.

Replacement of Data Storage Devices: Do not dispose of any electronic data storage devices and/or media which may be replaced due to failure and/or upgrade and/or other reasons that may contain electronic data meeting the criteria listed above.

Fixed Drives on Stand-Alone Personal Computers and Network Workstations: With regard to electronic data meeting the criteria listed above, which existed on fixed drives attached to stand alone desktop computers or laptops and/or network workstations at the time of this letter's delivery: do not alter or erase such electronic data, and do not perform other procedures (such as data compression and disk de-fragmentation or optimization routines) which may impact such data, unless a bit-stream copy has been made of such hard drive.

Programs and Utilities: Preserve copies of all programs and utilities which may be necessary to view or extract potentially responsive electronic data.

Log of System Modifications: Maintain an activity log to document modifications made to any electronic data processing system that may affect the system's capability to process any electronic data meeting the criteria listed in paragraph 1 above, regardless of whether such modifications were made by employees, contractors, vendors and/or any other third-parties.

Personal Computers and Other Electronic Devices Used by the Board of Regents and/or their Assistants: All potentially relevant data on any personal computer, laptop, handheld devices (e.g., cell phones, tablets, etc.), or other electronic device used by the Board of Regents or their staff should be preserved.

Evidence Created Subsequent to this Letter: With regard to electronic data created subsequent to the date of delivery of this letter, relevant evidence should not be destroyed and UNM should take whatever steps are appropriate to avoid destruction of evidence.

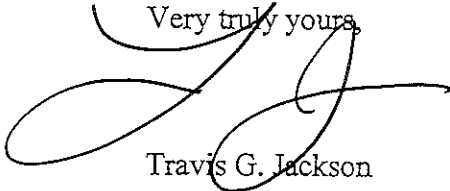
Litigation Hold: Please provide a copy of this letter to all persons whose job responsibilities cover the matters addressed herein, including the Board of Regents and their staff, and issue a litigation hold letter to all employees and officials who may possess the materials and information addressed herein directing that they immediately take steps to collect and preserve such information.

MEDIATION DEMAND

There exist multiple disputes concerning Dr. Frank's Employment Agreement and/or the performance thereof. Paragraph 17 of the Employment Agreement requires that the parties engage in mediation prior to commencing litigation. By this letter, Dr. Frank invokes Paragraph 17, and makes demand that the parties promptly engage in mediation before a mutually acceptable mediator.

This firm will act as co-counsel for Dr. Frank with the law firm of Pegue and Thompson. Please direct all communications regarding this matter to both firms.

Very truly yours,

A handwritten signature in black ink, appearing to read "Travis G. Jackson", is written over the typed name. The signature is fluid and cursive, with a large initial "T" and "J".

Travis G. Jackson

TGJ/nb