SET NO. 6

ARIZONA COURT OF APPEALS
DIVISION ONE

CARLETTA TILOUSI, et al. Plaintiffs-Appellants, v. ARIZONA BOARD OF REGENTS, et al. Defendants-Appellees.	No. 1 CA-CV07-0801 Maricopa County Superior Court No. CV2005-013190

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Plaintiffs-Appellants respectfully submit this Reply in opposition to Defendants-Appellees Joint Answering Brief filed on March 26, 2008. Plaintiffs-Appellants, Carletta Tilousi and 52 other Havasupai Tribe members ("Tilousi Appellants") seek review of the trial court's grant of summary judgment entered in favor of defendants. The Superior Court of Maricopa County based its summary judgment ruling on a misconstruction and misinterpretation of the requirements under Arizona's notice of claim statute, Arizona Revised Statute § 12-821.01(A). In interpreting the statute and applying *Deer Valley v. Houser*, 214 Ariz. 293, 152 P.3d 490 (2007), lower courts have been confounded by dicta contained in *Deer Valley* since its issuance by the Arizona Supreme Court in February 2007.

II. LEGAL ARGUMENT

A. TILOUSI APPELLANTS HAVE COMPLIED WITH THE NOTICE OF CLAIM STATUTE BY PROVIDING FACTS SUPPORTING THE SPECIFIC SETTLEMENT AMOUNT PROFFERED

Appellees erroneously assert and the trial court erroneously held that there is a sufficiency or adequacy test for the facts-supporting requirement of the notice of claim statute. (Joint Ans. Br. at 15-19). Appellees' itemized list of examples that would have helped them evaluate Appellants' notice of claim simply belies its

contention that *Deer Valley* did not establish a vague standard. (*Id.* at 22-23). Appellees' checklist demonstrates the problem with a vague sufficiency standard for facts-supporting requirement: cases are factually unique and issues will be presented differently in each case. There is no requirement for Appellants to seek medical treatment, counseling, or therapy within the 180 day period before filing the notice of claim. Each individual is entitled to pursue a different course of action instead of being bound by what satisfies this particular Appellees' checklist.

Appellants have provided factual support for the specific settlement amount proffered by describing, in detail, the ways in which Appellants have been harmed as a result of Appellees' unlawful conduct. In Appellants' notice of claim, ABOR and other Appellees were given the following facts:

- ASU fraudulently and intentionally misused Appellants blood samples for unauthorized purposes causing them severe harm, extreme distress, and emotional trauma
- Appellants worry about the possible uses and locations of their blood samples
- Appellants worry about the violation of their religious values and beliefs
- Appellants worry whether the blood samples have been lost
- Appellants worry whether the blood samples will continue to be used for additional unauthorized purposes
- Appellants fear going to the health clinic
- Appellants fear seeking medical attention
- Appellants fear providing blood samples for medical diagnosis or treatment

(Opening Br. Appendices, 1-4)

In this case, Appellees have been presented with facts that demonstrate that Appellants have been harmed by Appellees' illegal conduct. The facts show that many aspects of Appellants' lives have been violated: religious, medical, mental, and emotional. There is no requirement that Appellants paint an elaborate picture of the ways in which they have been harmed by Appellees' conduct. Appellees recommend a checklist of factual requirements, however, cases should not be subjected to such a formulaic mechanism. The notice of claim statute only requires facts supporting the specific settlement amount proffered. Neither the notice of claim statute nor *Deer Valley* requires a plaintiff to list all evidentiary facts that may be helpful in a Defendant's evaluation of the claim. There is no statutory requirement to list every single fact that supports the specific amount.

Appellees assertion that it had "no reasonable opportunity to determine whether settlement was preferable to being sued" is disingenuous. (Joint Ans. Br. at 21). Not only were Appellees provided with the notice of claim, Appellees conducted its own investigation into the claims asserted in the notice. Appellees' investigation resulted in a multi-volume factual report commissioned by the University. Appellees had several opportunities to evaluate the claims and make a settlement determination: when the notice of claim was filed in August 2003 and after the commissioned Hart Report was completed. Appellees elected to litigate and pursue mediation; therefore, any arguments concerning lack of factual support

should be considered waived given Appellees own factual investigation and conduct before and after the filing on the notice of claim in this case.

B. THIS COURT IS NOT REQUIRED TO FOLLOW MERE DICTA IN A JUDICIAL OPINION

Appellees concede that its contention that Appellants have not complied with the facts-supporting requirement is based on dicta found in a footnote in *Deer Valley*. (Joint Ans. Br. at 16) Nevertheless, Appellees insist that this Court defer to that dicta. Appellees further rely on inapposite legal authority that is distinguishable from this case. Appellees cite *Resolution Trust Corp. v. Segel*, 173 Ariz. 42, 839 P.2d 462 (App. 1992), for the proposition that this Court must follow dicta when it is intended to be a guide for future conduct. (Joint Ans. Br. at 16). The court in *Resolution Trust* was faced with the question of how much weight should be given to a *supplemental opinion* issued by a court when that opinion did not reverse the original opinion. The *Resolution Trust* court determined that the supplemental opinion was obviously intended to be a guide for future conduct and merely explained the scope of the original opinion. *Resolution Trust*, 839 P. 2d at 464. In this case, the *Deer Valley* court did not issue a supplemental opinion on the facts-supporting requirement and did not expressly declare that its footnote on the facts-supporting requirement was intended as a guide for future conduct. Appellees parenthetical cite to *State v. Fahringer*, 136Ariz. 414, 415, 666 P.2d 514, 515

(App. 1983), further undercuts its erroneous claim that this Court is bound by *Deer Valley's* dicta. In *Fahringer*, the court made a distinction between judicial dicta and obiter dicta. *Id.* at 415. Judicial dicta is authoritative when the court *expressly declares* it to be a guide for future conduct and should be followed unless there is a cogent reason to depart from it. *Id.* Judicial dicta is defined as an opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision. In contrast, obiter dicta is defined as a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential. *Black's Law Dictionary, 2nd Ed.* Appellees concede that the court's comments in *Deer Valley* about the facts-supporting requirement is dicta. The dicta in Deer Valley is best characterized as obiter dicta because the court expressly declined to reach the facts-supporting requirement as it was not essential to its ruling in the case.

In *Deer Valley*, the claimant's notice of claim asked for approximately $35,000 per year or more..." and "similar appropriate pay increases" and damages for emotional distress and harm to her reputation of "no less than" $300,000 and $200,000 respectively. *Deer Valley*, 152 P.3d at 492. The only question before the court was whether those words satisfied the "specific amount" language of the notice of claim statute. The *Deer Valley* court squarely held that those qualifying

words did not. *Id.* at 493-494. The *Deer Valley* holding was quite limited: the court simply held that the statutory provision requiring that a notice of claim contain a specific amount means what it says – the notice must state a specific amount of money for which the claim could be settled, not an approximate amount. The court could not have been clearer that it did not decide whether the notice of claim in that case satisfied the "facts supporting" requirement of the statute:

> Because McDonald's letter does not include a specific sum, we need not reach the District's argument that McDonald's letter also fails to provide facts supporting the claimed amounts... *Id.* at 494.

Despite its clear acknowledgement that it "need not reach" the issue that the notice of claim letter did not provide "facts supporting" the settlement amount, the court nonetheless commented on the "facts supporting" requirement of the statute. In unmistakable dicta, the court noted:

> The attendant statutory obligation that claimants present facts supporting that amount requires that claimants explain the amounts identified in the claim by providing the government entity with a factual foundation to permit the entity to evaluate the amount claimed. *Deer Valley*, 152 P.3d at 493.

Because the court declined to decide the facts supporting issue, *Deer Valley* does not provide any binding precedent regarding the "facts supporting" the specific amount requirement of the notice of claim statute. Correctly interpreted, the court's comments did not establish a new legal principle for the facts supporting requirement. The court's observations were dicta because they were "unnecessary to sustain the judgment of the court." *Arizona Corp. Comm'n v.*

Mountain States Tel. & Tel. Co., 71 Ariz. 404, 412, 228 P.2d 749, 754 (1951). Importantly, the court did not expressly declare these comments to be a guide for future conduct and therefore, they are not precedential. *Phelps v. Dodge Corp. v. Arizona Dept. of Water Res.*, 211 Ariz. 146, 152, 118 P.3d 1110, 1116 (App. 2005).

Furthermore, contrary to Appellees' assertion, there is no case law or sound public policy reasons that require this Court to follow *Deer Valley's* dicta. In the case cited by Appellees, *Andrews v. Blake*, 205 Ariz. 236, 69 P.3d 7 (2003), the court decided to follow the relied upon dicta because there was *other* Arizona case law and sound public policy reasons that were consistent with Arizona jurisprudence and buttressed the dicta. Here, this Court would have no other case law or sound public policy reasons for adopting *Deer Valley's* dicta regarding the facts-supporting requirement. To do so would be inconsistent with Arizona jurisprudence that cautions against using procedural rules as technical weapons used to undermine the settlement and resolution of a case. *See Allstate v. O'Toole*, 182 Ariz. 284, 288, 896 P.2d 257, 258 (1995):

> Whenever possible, procedural rules should be interpreted to maximize the likelihood of a decision on the merits...[for example], the disclosure rules and sanctions were not meant to thwart that goal by encouraging litigants to lie in wait for their opponents to miss a deadline and then use that momentary transgression to get a case effectively dismissed.

This Court should not give undue weight to the dicta contained in the *Deer Valley* opinion because that dicta has the potential to transform the notice of claim filing requirements into a technical weapon, which could be used by Appellees and others to thwart meritorious claims. Moreover, the United States Supreme Court has stated that legislatively created rules (like the notice of claim statute in this case) can not be amended or changed by judicial interpretation. *Jones v. Bock*, 549 U.S. __, 127 S.Ct. 910, 919 (2007) (declining to impose a heightened pleading requirement because any heightened standard must be obtained by the process of amendment not by judicial interpretation)). Here, the Arizona legislature created a notice of claim filing requirement to advise public entities and employees of legal claims filed against them. The legislature determined that claimants must: (1) assert claims within 180 days of the cause of action accruing; (2) provide sufficient liability facts; and (3) provide facts supporting a specific settlement amount proffered. A.R.S. § 12-821.01. As such, courts can not impose heightened requirements upon claimants or change the notice of claim requirements by judicial interpretation.

Even if this Court accepts the dicta in *Deer Valley*, it should not be given retroactive application because it would establish a new legal principle (a sufficiency test for the facts-supporting requirement) by deciding an issue whose resolution was not clearly foreshadowed; it would undermine the purpose of the

notice of claim statute; and it would produce substantial inequitable results since claimants were not permitted to cure any alleged defects in their notice of claim. *See Mark Lighting Fixture v. General Electric Supply Co.*, 155 Ariz. 27, 30 745 P.2d 85, 88 (1987); *see also Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 313 560 P.2d 1216, 1220 (1997)(internal citations omitted).

C. THERE IS NO NOTICE OF CLAIM STATUTORY REQUIREMENT TO APPORTION THE SETTLEMENT DEMAND AMONG PLAINTIFFS OR DEFENDANTS

Appellees cite neither statutory language nor case law to support its contention that Appellants are required to apportion the specific settlement amount proffered in a notice of claim among the multiple plaintiffs and defendants. The notice of claim statute states that "the claim shall also contain *a* specific amount for which the claim can be settled and the facts supporting that amount." A.R.S. §12-821.01 (emphasis added). The statutory language expressly states that a specific amount should be proposed – not multiple amounts for multiple plaintiffs and/or defendants. The only correct reading and construction of the statutory language is that only one single specific amount is required.

Here, the notice of claim unequivocally states the amount for which the Appellants would settle their claim against the Appellees, thereby fulfilling the statutory requirement under the notice of claim statute. Appellees rely on an offer of judgment rule that is inapplicable and irrelevant to this case. Appellees attempt

to impose yet another heightened standard into the notice of claim statute by proposing an apportionment requirement. An offer of judgment and the notice of claim specific amount requirement are wholly unrelated concepts and are not interchangeable. Typically, an offer of judgment is made prior to trial. Ariz. R. Civ. P. 68. A judge may impose sanctions against a party who does not accept an offer of judgment when the ultimate judgment obtained is equal to or more favorable to the offeror than the original offer. *Id.* The notice of claim at issue in this case was required before filing suit; offer of judgment principles applicable after filing suit and conducting discovery are wholly inapposite here. Further, Arizona courts recognize the concept of common fund cases with multiple plaintiffs. *See Burke v. Arizona State Retirement Sys.*, 206 Ariz. 269, 272 (App. 2003); *see also Kerr v. Killian*, 197 Ariz. 213, 3 P.3d 1133 (App. 2000).

D. APPELLANTS' INTEGRATED NOTICE OF CLAIM WAS PROPERLY FILED WITHIN 180 DAYS OF THE CAUSE OF ACTION ACCRUING AS REQUIRED BY THE STATUTE

On August 14, 2003, within 180 days from Carletta Tilousi becoming aware the Appellees' illegal conduct, Appellants filed the notice of claim. The subsequent notices of claim dated November 6, 2003, December 29, 2003, and March 4, 2004 supplemented the prior notice of claim by including additional Appellants. The four notices of claim constitute one fully integrated notice of

claim. As stated in each supplemental notice of claim, the additional Appellants were also harmed by the Appellees' conduct. The additional Appellants asserted the same claims based on the same factual foundations provided in the August 14, 2003 notice of claim and sought a specific settlement amount. There is no prohibition against supplementing a notice of claim as new information becomes available. In fact, supplementing a notice of claim permits Appellees to make a more thorough assessment and accurate plans for budgeting and settlement of the case, which fulfills the purpose of the notice of claim statute.

Alternatively, the relation back doctrine provides guidance on this issue. The relation back doctrine is liberally construed and applied in Arizona. *See Pargman v. Vickers*, 208 Ariz. 573, 579, 96 P.3d 571, 581 (App. 2005). Arizona courts have applied the relation back doctrine to include plaintiffs not originally in a lawsuit. *See Safeway Ins. Co. v. Collins*, 192 Ariz. 262, 268, 963 P.2d 1085, 1091 (App. 1998); *see also Toy v. Katz*, 192 Ariz. 73, 87 961 P.2d 1021, 1036 (App. 1997). In this case, the application of the relation back doctrine to the notices of claim is appropriate because: (1) the cause of action is the same and stems from the same facts (2) defendants are not prejudiced by the additional plaintiffs and (3) it lessens the likelihood of multiple lawsuits being handled in a piecemeal way. *Id.* Accordingly, the subsequent notices of claims should relate back to the original filing date of August 14, 2003.

E. APPELLANTS HAVE PRESENTED ONE QUESTION FOR REVIEW AND THE COURT SHOULD CONSIDER THE ISSUE AS PRESENTED BY APPELLANTS

In the notice of appeal, Appellants have limited the issue for review to the lower court's ruling regarding the facts-supporting requirement of the notice of claim statute. The lower court issued a limited judgment — ruling that notice of claim did not provide "facts sufficient to allow ABOR to evaluate the reasonableness of [Tilousi's] settlement demands." (I.R. 153 at 4). As such, Appellants have limited the issue presented for review solely to the facts-supporting requirement of the notice of claim statute. It is well-established that appellate courts have jurisdiction only over those matters designated in the notice of appeal or cross-appeal. *Flory v. Silvercrest Indus., Inc.*, 129 Ariz. 574,581 633 P.2d 383, 931 (1981); *see also Baker v. Emmerson*, 153 Ariz. 4, 9 734 P.2d 101, 106 (App. 1986). While this court may have discretion to reach the Appellees' arguments regarding timeliness and service, Appellants respectfully submit that those issues should await resolution by the trial court on remand.

III. Conclusion

For the foregoing reasons, the Superior Court's decision must be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify the attached brief uses proportionally spaced type of 14 points or more, is double spaced using a roman font, and contains 2,891 words.

Dated this 21 day of April, 2008.

Albert M. Flores

CERTIFICATE OF SERVICE

Original and two copies hand delivered this 21 day of April, 2008, to:

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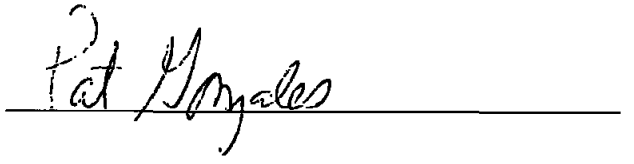

APPENDIX

1

8/18/03 KH AZ

AUG 2 1 2003

AG/ADM RECEIVED Claim #1

AUG 1 8 2003

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August 14, 2003

VIA U.S. MAIL, CERTIFIED MAIL, AND PERSONAL SERVICE

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Re: Notice of Claim - ASU Misuse of Havasupai Blood

To Whom It May Concern:

We represent twenty-nine (29) members of the Havasupai Tribe (hereinafter "Clients") located on the Havasupai Indian Reservation in the Grand Canyon. The names of our Clients are:

1. Rena Uqualla
2. Leota Watahomigie
3. Claudia Watahomigie
4. Arlene Wescogame
5. Orlando Manakaja
6. Patricia A. Watahomigie
7. Carol Ann Rogers
8. Kathleen Siyuja
9. Ingrid Putesoy
10. Sherry Putesoy
11. Lenora Jones
12. Caroline Putesoy
13. Aral Putesoy Kaska
14. Violet Watahomigie
15. Fydel A. Jones
16. Bernice Watahomigie
17. Gloria Siyuja
18. Ruth Havatone
19. Sheila Manakaja
20. Hansen Manakaja
21. Desiree Putesoy
22. Gifford Angel Smith
23. Rosemarie Manakaja
24. Muriel Uqualla
25. Nettie Tilousi
26. Rosella Tilousi
27. Rex Tilousi
28. Carletta Tilousi
29. Mark Putesoy

This letter constitutes our Clients' Notice of Claim against Arizona State University ("ASU"), Professor John Martin, Professor Therese Markow, and Professor Daniel Benyshek. Pursuant to Rule 408 of the Arizona Rules of Evidence, this letter is not admissible in any proceeding since it constitutes evidence of compromise. This letter contains only known facts to date.

Our Clients have reported to us that they participated in an ASU-sponsored diabetes study conducted by Professor John Martin of the ASU Anthropology Department in the early 1990's in Supai Village in which hundreds of blood samples were obtained from individual members of the Havasupai Tribe without any formal written consent. As part of the Professor Martin's study, our Clients provided blood samples to ASU officials to be used exclusively for the diabetes study as promised by ASU's representatives. Based on information and belief, ASU has misused these blood samples for additional studies unrelated to the diabetes study without our Clients' consent causing our Clients severe harm and extreme distress.

ASU has refused to provide our Clients with any information regarding the use, handling, or transfer of the Havasupai blood samples. Despite our written requests on May 14, 2003 and June 20, 2003, ASU officials have been unable or unwilling to disclose the current whereabouts, or current or past uses, of these blood samples. ASU cannot or will not provide us with a full accounting of the handling, transfer, or use of the Havasupai blood samples since obtaining such samples in the early 1990's. ASU has simply left our Clients to worry about the possible uses and locations of their blood samples, the violation of their religious values and beliefs, whether these samples have been lost, and whether they will continue to be used for additional unauthorized purposes. Many of our Clients now fear going to the health clinic, seeking medical attention, or providing blood samples for medical diagnosis or treatment.

ASU has only indicated to us that ASU has initiated a so-called "independent" investigation into the circumstances surrounding the use of the Havasupai blood samples "to discover the facts surrounding what has been done with the Havasupai blood samples after the samples were transferred out of Supai Village." Our Clients have objected to ASU's unilateral selection of Stephen Hart, the former Director of the Arizona Department of Gaming, as the so-called "independent" investigator. Our Clients assert that ASU cannot conduct a legitimate investigation on itself. Our Clients have had no discussions or input with ASU regarding the development or initiation of this investigation. Our Clients have requested in writing from ASU more information regarding the investigation including the scope of the investigation, who will be conducting the investigation, the background of the persons conducting the investigation including any former or current relationships with ASU or its officials, how the investigation will be conducted, the reporting and handling of the results of the investigation, and the funding and payment for such investigation; however, ASU has only responded by stating that "the ASU Office of General Counsel has no prior relationship with Mr. Hart." Because ASU has not made any of its findings public, additional facts may come to light.

ASU has apparently met with the Tribal Council of the Havasupai Tribe on at least two occasions; however, our Clients have been denied access to these closed meetings and have been

provided with no information about these meetings from either ASU or the Tribal Council. The Havasupai Tribe and Tribal Council do not have the right to negotiate with ASU officials to address or settle the individual injuries suffered by our Clients, and any agreement reached between ASU and the Havasupai Tribe does not resolve the claims of our Clients. The blood samples in question came from our Clients, not the Havasupai Tribe.

On or about February 27, 2003, one of our Clients, Carletta Tilousi, the only member of the Havasupai Tribe to have graduated from ASU, attended an oral presentation of a PhD dissertation by ASU student Daniel W. Garrigan. At this presentation, Ms. Tilousi first learned that the blood samples taken from Havasupai people by ASU in the 1990's were likely used not only by the ASU Anthropology Department but also by the ASU Biology Department in multiple additional studies and/or publications unrelated to diabetes including Mr. Garrigan's dissertation as well as research and articles written and/or published by current and former ASU professors such as Therese Markow and others. Unknown to Professor Martin, the ASU Biology Department apparently authorized the use of the Havasupai blood samples for examination, study, and use as part of the PhD dissertation written by Mr. Garrigan as well as other studies. At the presentation, Mr. Garrigan publically admitted that he did not receive the permission of the Havasupai people to use the blood samples as part of his dissertation.

The same day as Mr. Garrigan's presentation, Ms. Tilousi attended a closed meeting of numerous officials from the ASU Biology Department including Professor Martin and officials from the ASU Anthropology Department, as well as Daniel Benyshek from the University of Nevada Las Vegas, and Therese Markow from the University of Arizona (formerly with ASU). At the meeting, Professor Martin and Professor Benyshek both insisted that no written consent forms were ever obtained, and that the verbal consent from each individual was based on Professor Martin's and Professor Benyshek's promise that the blood samples would only be used for Professor Martin's diabetes study. Professor Martin clearly and emphatically stated that ASU Biology Department officials including Therese Markow had no authorization to use the Havasupai blood samples for any other study than Professor Martin's specific diabetes study, that the ASU Biology Department had misused the blood samples without his knowledge, and that such use amounted to a betrayal of trust with the Havasupai people and a violation of the original agreement.

On May 8, 2003, the Tribal Council of the Havasupai Tribe unanimously approved an Order Banishing Arizona State University from the Havasupai Reservation. On June 3, 2003, ASU Office of General Counsel wrote to us indicating that Stephen Hart was selected as the investigator working for and paid by ASU to "discover the facts" surrounding this matter. ASU officials will have a difficult time conducting an investigation when they have been excluded from the Havasupai Reservation.

State law provides a limited period of time in which to file a Notice of Claim. This Notice of Claim is based on the facts which have been made public thus far. ASU has refused to provide us with any substantive information regarding this matter nor has ASU released the findings of its so called "independent" investigation to the public or others. In the event that additional facts

come to light, we reserve the right to bring additional claims based upon those facts.

Our Clients believe that ASU has misused their blood samples for unauthorized purposes causing them severe harm, extreme distress, and emotional trauma. The conversion and improper use of these blood samples by ASU officials constitutes a breach of ASU's fiduciary duty owed to our Clients, violates our Clients' privacy rights as well as their cultural, religious, and legal rights. ASU may also have violated State and Federal laws including HIPPA administered by the U.S. Department of Health and Human Services regarding the sharing of medical information and records as well as the storage, handling, use, and transfer of blood samples.

Our Clients intend to pursue any relevant State law and/or Federal claims in this matter. These claims include, but are not limited to, violation of civil rights, 42 U.S.C. § 1981, 1982, 1983, 1985, negligence, gross negligence, intentional torts, intentional and negligent infliction of emotional distress, and violations of state and Federal constitutional rights. Our Clients will also seek compensatory, general, specific, punitive and other relevant damages as well as attorney's fees under the applicable causes of action.

We demand that ASU immediately cease all use and/or transfer of our Clients' blood samples including the publication or acceptance by ASU of Mr. Garrigan's dissertation as well as the use of the blood samples or related information for any other purpose. In addition, our Clients hereby exercise their right revoke any and all use, study, or transfer of these blood samples for any purpose. We further demand that ASU conduct a full and truly *independent* investigation into this matter with our Clients' input and participation, and that the blood samples be identified, located, secured, and returned to our Clients. Finally, we demand that ASU locate, secure, and provide us with all information regarding ASU's possession, use, and transfer of the Havasupai blood samples including all documents, studies, grant proposals, reports, writings, and all other related documents or evidence, and that ASU pay for all damages and costs caused by ASU's conduct.

For the purposes of this letter, the account above only constitutes a summary of the events that transpired. In the event of future litigation, it is not a substitute for the sworn testimony of our Clients or any other witnesses. If this letter is used in any way in subsequent litigation, the fact finder should be advised that this letter contains only enough facts to permit the public entity to ascertain the basis upon which liability is claimed under A.R.S. § 12-821.01. Our Clients are expected to give a more detailed and specific version than this cursory letter. In the event that you force litigation, we will show the ASU engaged in illegal and unethical conduct that culminated in the egregious violation of the rights of our Clients causing our Clients severe harm and extreme distress.

Our Clients would prefer to allow a jury to determine how much ASU and others defendants should pay to compensate our Clients for their injuries. However, in conformance with the State statute, our Clients are required to state a settlement amount. Consequently, please be advised that our Clients would settle their claims at this early juncture for $45,000. per Client.

Sincerely,

Christopher A. Flores, Attorney

c: Havasupai Clients
File

APPENDIX

2

Claim # 1
Lawsuit #1

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Robert J. Lyttle (Licensed in OK & DC)
Christopher A. Flores (Licensed in AZ)
Of Counsel: Cesar Luna (Licensed in CA)

Christopher A. Flores
(602) 271-0070
Reply to Arizona Office

November 6, 2003

Paul Ward, Vice President and General Counsel
Office of General Counsel
Arizona State University
Administration Building B-Wing, Room B256
Tempe, Arizona 85287-2003
SENT VIA FAX AND REGISTERED MAIL

Re: 15 Additional Clients - Havasupai Blood Samples

Dear Mr. Ward:

As a result of recently released information regarding the Havasupai blood samples used by ASU since 1990 including new information provided by Arizona State University ("ASU") officials to the Havasupai Tribal Council on October 24, 2003, we have been retained by fifteen (15) additional members of the Havasupai Tribe who believe their blood samples were misused by ASU. (*See*, attached list). We now represent a total of forty-four (44) members of the Havasupai Tribe.

Our clients, including the 15 new clients, have reported to us that they participated in an ASU-sponsored diabetes study in the 1990's in which hundreds of blood samples were obtained from individual members of the Havasupai Tribe without full or proper written consent. As part of the study, our clients provided blood samples to ASU officials to be used exclusively for the diabetes study as promised by ASU's representatives.

As you know, on October 24, 2003, ASU confirmed to the Havasupai Tribal Council that the Havasupai blood samples were improperly collected and mishandled by ASU officials, and used for unauthorized purposes including various studies to determine if ancestors of modern-day Havasupai people traveled across the Bearing Strait land bridge from Asia eons ago. Clearly, these unauthorized uses of the blood samples are totally unrelated to the diabetes study originally

promised by ASU officials. Many of our clients have documentation showing that the blood samples were obtained by ASU officials in the 1990's for the "Diabetes Study - Markow".

Our clients believe that ASU has misused their blood samples for unauthorized purposes causing them harm, extreme distress, and emotional trauma. The conversion and improper use of these blood samples by ASU officials violates our client's privacy as well as their cultural, religious, and legal rights. ASU may have also violated State and Federal laws and regulations regarding the sharing of medical information and records as well as the storage, handling, and transfer of blood samples. Our clients demand that ASU immediately cease all use and/or transfer of the Havasupai blood samples including the 15 new clients indicated in this letter. In addition, our clients hereby exercise and reiterate their right revoke any and all use, study, or transfer of these blood samples for any purpose. We further demand that the blood samples be identified, located, secured, and returned to our clients. Finally, we demand that ASU locate, secure, and provide us with all information regarding ASU's possession, use, and transfer of the Havasupai blood samples including all documents, studies, reports, writings, and all other related evidence, and that ASU pay for all damages and costs caused to our clients.

Thank you for your prompt attention to this matter. Please feel free to call me at (602) 271-0070 so that we may discuss this matter.

Sincerely,

Christopher A. Flores, Attorney

c: Robert J. Lyttle, Attorney
Havasupai Clients
File

15 New Clients

Floranda Uqualla
Bemus Uqualla
Gretchen Putesoy
Ziggy Jones
Daisy Jones
Dennie Wescogame
Jeffery Manakaja
Germaine Paya Watabomigie
Debbie D. Uqualla
Roland Manakaja
Haven J.H. Manakaja
Sage Qwapta Manakaja
Hope Cedar Manakaja
Raven Juniper Manakaja
Vivian Wescogame

APPENDIX

3

Law Offices

Robert J. Lyttle, P.C.
Attorneys at Law

Arizona: P.O. Box 1189, Carefree, Arizona 85377
Oklahoma: 3334 West Main Street, #148, Norman, Oklahoma 85377

Tel: (480) 488-5027
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Robert J. Lyttle (Licensed in OK & DC)
Christopher A. Flores (Licensed in AZ)
Of Counsel: Cesar Luna (Licensed in CA)

Christopher A. Flores
(602) 271-0070
Reply to Arizona Office

December 29, 2003

Paul Ward, Vice President and General Counsel
Office of General Counsel
Arizona State University
Administration Building B-Wing, Room B256
Tempe, Arizona 85287-2003

Richard Albrecht
Office of the Attorney General
State of Arizona
Administration Division
1275 West Washington
Phoenix, Arizona 85007

Re: **New Clients, and Attachments to Draft Report**

Dear Mr. Ward and Mr. Albrecht:

Please be informed that we have been retained by two additional members of the Havasupai Tribe who recently learned that their blood samples were likely misused by ASU. One of the new clients who lives in Nevada first learned about this matter this month. (*See*, attached names). The new clients have the same or similar claims as our other clients as outlined in our earlier correspondence, and they hereby assert such claims.

We have also received from your office a copy of the report entitled, "Preliminary Investigative Findings Concerning the Medical Genetics Project at Havasupai". The Report includes a number of appendices, as well as "Document Binders" numbers 1 through 8. While we received the appendices, we did not receive a copy of the Document Binders, therefore, please send a copy of the Document Binders as your earliest convenience.

Please feel free to call me if have any questions or need any additional information. Thank you.

Sincerely,

Christopher Flores by PJR.

Christopher A. Flores, Attorney

c: 2 New Clients
File

2 New Clients:

Lucinda Watahomigie

Genevieve Jackson

APPENDIX

4

3-5-04
11:35 P.M.
Claim # 3

LAW OFFICES OF
ALBERT M. FLORES
A PROFESSIONAL CORPORATION
337 NORTH FOURTH AVENUE
PHOENIX, ARIZONA 85003-1871

(602) 871-0070 FAX (602) 258-1928

March 4, 2004

VIA PERSONAL SERVICE

Terry Goddard
State of Arizona Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Chris Herstam, President
University of Arizona Board of Regents
2020 North Central Avenue, Suite 230
Phoenix, Arizona 85004

Dr. David Ortiz, Chair
University of Arizona Committee on Ethics & Commitment
University of Arizona - Social Sciences
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Judith Leonard, Vice President and General Counsel
Office of General Counsel
University of Arizona
Administration Building, Room 103
1401 E. University Blvd.
Tucson, Arizona 85721-0066

Professor Therese Ann Markow, Individually and in her Official Capacity
Center for Insect Science - Biological Sciences West
University of Arizona
1041 E. Lowell Street
Tucson, Arizona 85721

Professor Michael Hammer, Individually and in his Official Capacity
University of Arizona - Life Sciences South
1007 E. Lowell Street
Tucson, Arizona 85721

Professor Tatiana Karafet, Individually and in her Official Capacity
University of Arizona - Biological Sciences West 239
1041 E. Lowell Street
Tucson, Arizona 85721

Professor Stephen Zegura, Individually and in his Official Capacity
University of Arizona - Anthropology Department
1009 E. South Campus Drive
Tucson, Arizona 85721

Re: Notice of Claim - UA Misuse of Havasupai Blood

To Whom It May Concern:

My co-counsel, Robert Lyttle, and I represent fifty-two (52) members of the Havasupai Tribe (hereinafter "clients") located on the Havasupai Indian Reservation in the Grand Canyon. The names of our clients are: (1) Carletta Tilousi, (2) Daisy Jones, (3) Fydel Jones, on behalf of himself and (4) Alyssa L. Jones (a minor child), and (5) Paulina K. Jones (a minor child), (6) Lenora Jones, (7) Haven J.H. Manakaja, (8) Jeffery Manakaja, (9) Orlando Manakaja (10) Roland Manakaja, on behalf of himself and (11) Hope Cedar Manakaja (a minor child), (12) Raven Juniper Manakaja (a minor child), and (13) Sago Qwapta Manakaja (a minor child), (14) Rosemarie Manakaja, (15) Sheila Manakaja, on behalf of herself and (16) Hansen Manakaja, JR., (a minor child), (17) Aral Kaska Putesoy, (18) Caroline Putesoy, (19) Desiree Putesoy, Fannie Putesoy on behalf of (20) Genevieve Jackson (a minor child), (21) Gretchen Putesoy, on behalf of herself and (22) Ziggy Jones (a minor child), (23) Ingrid Putesoy, (24) Mark Putesoy, (25) Sherry Dee Putesoy, (26) Carol Ann Rogers, (27) Gloria Siyuja, (28) Kathleen Siyuja (29) Gifford Angel Smith, (30) Ruth Havatone, (31) Edmond Tilousi (32) Rex Tilousi, on behalf of himself and (33) Nettie Tilousi (a minor child) (34) Rosella Tilousi, (35) Bernus Uqualla, (36) Debbie D. Uqualla, (37) Floranda Uqualla, (38) Muriel Uqualla, (39) Rena Uqualla, (40) Bernice Watahomigie, (41) Claudia Watahomigie, (42) Germaine Paya Watahomigie, (43) Leota Watahomigie, (44) Lucinda Watahomigie, (45) Patricia Watahomigie, (46) Violet Watahomigie,

(47) Arlene Wescogame,(48) Dennie Wescogame, (49) Vivian Wescogame, (50) Dianna Uqualla, (51) Carrie Goldbaum, (52) Eljean Hanna, (53) Grace Hanna, (54) Flora Wright, (55) Natalie Wright and (56) Matthew Putesoy.

This letter constitutes our clients' Notice of Claim against the University of Arizona ("UA"), Professor Therese Markow ("MARKOW"), and Professor Michael Hammer ("HAMMER"), Professor Tatiana Karafet ("KARAFET"), and Professor Stephen Zegura ("ZEGURA"). Pursuant to Rule 408 of the Arizona Rules of Evidence, this letter is not admissible in any proceeding since it constitutes evidence of compromise. This letter contains only known facts to date.

In January 2004, Attorney Stephen Hart of the law firm of Burch & Cracchiolo, P.A. issued a Final Report ("Final Report") on the acquisition, use, transfer, loss, and destruction of hundreds of blood samples, data, and related information including hand prints and genealogy research obtained from Members of the Havasupai Tribe. In 2003, Arizona State University ("ASU") hired Mr. Hart to conduct a thorough investigation into the events surrounding the Diabetes Project initiated in Havasupai in the 1990's. We have now reviewed the Final Report and attached documents which we received in late January 2004. We believe the Final Report clearly shows that not only did ASU commit numerous violations of law, but also UA and its professors engaged in extensive misconduct which has caused serious harm to our clients.

In 1989, ASU Professors John Martin ("MARTIN") and Markow, helped design a project to study diabetes ("Project" or "Diabetes Project") among the Members of the Havasupai Indian Tribe ("Tribe"). These professors presented the Project to the Havasupai people and the Havasupai Tribal Council strictly as a diabetes project designed to assist the Tribe with addressing a pressing medical issue in the Tribe – diabetes. These professors presented the Project as a diabetes study only, when in truth and in fact they knew or should have known that such representation was false and with the intent to obtain the Havasupai blood samples for non-diabetes purposes.

From 1990 through 1994, MARTIN and MARKOW obtained and collected, or caused to be obtained and collected, nearly four hundred (400) blood samples from individual Members of the Havasupai Tribe including our clients without obtaining informed consent, without ASU Institutional Review Board ("IRB") approval, and in violation of Federal and State laws and regulations. On information and belief, in 1995, MARKOW transferred from ASU to the UA and took the Havasupai blood samples with her to UA.

Once having obtained the Blood Samples from our clients and others, MARKOW

admittedly mishandled the blood samples including the destruction, loss, and improper use and transfer of the blood samples and related information to the extent that many blood samples are unaccounted for at this time. For example, MARKOW provided the blood samples and related data and information, both directly and indirectly, to other UA professors including HAMMER, KARAFET, and ZEGURA, as well as out-of-state professors and laboratories. These UA professors including MARKOW used the Havasupai blood samples in multiple research projects and publications without the UA Committee on Ethics and Commitment's approval or oversight and without informed consent of our clients or others similarly situated. At least fifteen (15) of these publications deal with non-diabetes subjects including schizophrenia, inbreeding, and theories about ancient human population migrations from Asia to North America, all to the harm and detriment of our clients and others similarly situated.

The uncontrolled use and transfers of our clients' blood samples and data has resulted in a breach of duties imposed by Federal and State laws applicable to UA and its professors as well as rules and protocol principals in the area of human subject research. As a result, UA and its professors have benefitted financially and otherwise.

The acts, omissions, and conduct of UA and its professors constitute negligent, grossly negligent, reckless, intentional, knowing, extreme, and outrageous conduct against our clients and others similarly situated. UA and its professors have breached the fiduciary duty owed to our clients, have failed to obtain informed consent from our clients, have committed fraud and misrepresentation, have inflicted intentional and negligent infliction of emotional distress on our clients, have violated the civil rights of our clients, have converted our clients blood samples for their own unauthorized use, and have engaged in negligence, as well as other serious violations of law. These actions have violated our clients' cultural, religious, and legal rights and have caused them severe emotional distress.

Our clients intend to pursue all relevant State and/or Federal claims in this matter. Our clients will seek compensatory, general, specific, punitive and other relevant damages as well as attorney's fees under the applicable causes of action.

Our clients demand that UA immediately cease all use and/or transfer of our clients' blood samples, data, and related information. Our clients further demand that UA locate, secure, and provide us with all information regarding UA's possession, use, and transfer of the Havasupai blood samples including all documents, studies, grant proposals, reports, writings, and all other related documents or evidence, and that UA pay for all damages and costs caused by its conduct.

For the purposes of this letter, the account above only constitutes a summary of the events that transpired and that are known to date. In the event of future litigation, it is not a substitute for the sworn testimony of our clients or any other witnesses. If this letter is used in any way in subsequent litigation, the fact finder should be advised that this letter contains only enough facts to permit the public entity to ascertain the basis upon which liability is claimed under A.R.S. § 12-821.01.

We are prepared to let a jury determine how much UA and other defendants should pay to compensate our clients for their injuries. However, in conformance with the State statute, our clients are required to state a settlement amount. Consequently, please be advised that our clients would settle their claims at this early juncture for ten million dollars, $10,000,000.

Sincerely,

Albert M. Flores

c: Havasupai Clients
File